

# Birmingham City Council

## Report to Cabinet

18 May 2021



**Subject:** Contract Extension - Arboriculture Services (non-highways) (Ref: P0560)

**Report of:** Acting Director, Neighbourhoods

**Relevant Cabinet Member:** **Councillor John O'Shea Cabinet Member for Street Scene and Parks**  
**Councillor Tristan Chatfield, Cabinet Member for Finance and Resources**

**Relevant O &S Chair(s):** **Councillor Sir Albert Bore, Chair of Resources Overview and Scrutiny Committee**

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Are specific wards affected?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No – All wards affected
If yes, name(s) of ward(s):		
Is this a key decision?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If relevant, add Forward Plan Reference: 008682/2021		
Is the decision eligible for call-in?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Does the report contain confidential or exempt information?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If relevant, provide exempt information paragraph number or reason if confidential :		

### 1 Executive Summary

- 1.1 This report seeks approval to extend the current framework agreements with Gristwood & Toms Ltd (North Framework Contract) and Acorn Environmental Management Group (South Framework Contract) for Arboriculture Services for the period 28<sup>th</sup> June 2021 to 31<sup>st</sup> March 2022 as an amendment to contract within the scope of regulation 72 (1) (c) of the Public Contracts Regulations 2015.

- 1.2 The Council has approximately 736,000 trees within its tree stock on land which it is responsible for. Works under the extended framework agreements will maintain these trees, as determined by the Council and will ensure that any emergency works are carried out to ensure that the Council adheres to its legal obligations. Both frameworks are due to expire on 28<sup>th</sup> June 2021. The proposed extension will allow enough time for replacement frameworks to be procured. The procurement has been delayed due to critical Council projects taking priority such as security services where existing contracts are not in place and the impact of the COVID restrictions on the Parks service. The introduction of these restrictions and the measures that have had to be taken has increased the time it takes the Council Tree Officers to complete day to day activities meaning less time to focus on procurement planning.

## **2 Recommendations**

That Cabinet

- 2.1 Approves the extension of the framework agreements for arboriculture services with Gristwood & Toms Ltd (North Framework Contract) and Acorn Environmental Management Group (South Framework Contract) for a period of 10 months, commencing 28<sup>th</sup> June 2021 to 31<sup>st</sup> March 2022 for the estimated total value of £0.917m.
- 2.2 That Cabinet notes the risks and mitigations set out in 6 below; and
- 2.3 Authorises the City Solicitor (or their delegate) to execute and complete all necessary legal documents to give effect to 2.1.

## **3 Background**

- 3.1 The contract award was approved by Acting Director, Neighbourhoods in a report dated 4<sup>th</sup> June 2019.
- 3.2 Two framework agreements were subsequently awarded to Gristwood & Toms Ltd for the North of the City and Acorn Environmental Management Group for the South of the City.
- 3.3 Both frameworks commenced on 28<sup>th</sup> June 2019 and had a two year contract term.
- 3.4 Since the award of the frameworks both Gristwood & Toms Ltd and Acorn Environmental Management Group have provided a satisfactory service in accordance with contractual requirements. The procurement for replacement contracts has been delayed for the reasons set out above. Based on this position it is recommended that both frameworks are extended.
- 3.5 The contract renewal process commenced in Feb-21, However there is insufficient time for this to be concluded before the existing contracts expire. A tender timetable is included in section 7.4 below. The reason for the delay and why the procurement process did not commence earlier are set in 1.2 above.

## **4 Options considered and Recommended Proposal**

- 4.1 The option of 'do nothing' was considered & discounted on the following grounds
  - 4.1.1 Do not formally extend the contracts and ask the contractors to carry on providing the service informally. This was rejected as it is not in full compliance with the Council's governance arrangements; and
  - 4.1.2 Do not maintain the tree stock and let the contracts expire. This was rejected as the Council must maintain the trees on its land in order to avoid harm being caused to people and property which could result in claims for damages under the laws of negligence. More detail is provided in 7.2.1
- 4.2 Given that the procurement activity leading to the renewal of these frameworks will not have concluded in time for the expiry of the current frameworks no alternative options exist. It is therefore proposed that the framework agreements be extended for the reasons set out above.

## **5 Consultation**

- 5.1 Both Gristwood & Toms Ltd and Acorn Environmental Management Group are agreeable to this extension.

## **6 Risk Management**

- 6.1 There is a risk of a procurement challenge from a non-contracted supplier as a result of not re-tendering this service.
- 6.2 Based on an assessment of the market the likelihood of this risk occurring is low for the reasons set out below. It is therefore a measured and acceptable risk to take in the circumstances
  - 6.2.1 Although there are numerous contractors in the market, there are few with the capacity & capability to undertake the Council's tree works to the required standards. Those capable will in the main be local SMEs. During the proposed 10 month extension, interested suppliers will in focusing on the re-procurement of a new contract as opposed to commencing a legal challenge
  - 6.2.2 Market intelligence suggests that this is not a litigious market.
  - 6.2.3 The time and cost to both parties of mobilising the framework were significant. Suppliers are unlikely to want to invest in this for a 10 month return. The first 6-9 months of a contract of this size is typically non-profit making for the successful provider.
- 6.3 The mitigations for the above risk are as follows
  - 6.3.1 The services provided during the extended term will be according to the terms and conditions laid out in the contract.
  - 6.3.2 As the Council is seeking to modify a contract within the scope of regulation 72 (1) (c) of the Public Contracts Regulations 2015 a transparency requirement applies. The contract modification notice in the Official Journal of the European Union (OJEU) & Find a Tender Service setting out the

nature and extent of the modifications will mitigate the risk of any future legal challenge being successful on the grounds that a contractor was unaware of the contract modification at the time of change. OJEU is free to access and is available online.

6.3.3 We will include a termination clause exercisable by the Council where it is determined by a court to effectively be a contract modification outside of Regulation 72.

6.3.4 A further mitigation is that under the Public Procurement Regulations (PCR) 2015, Contracts may be modified without a new procurement procedure where all of the following conditions are fulfilled

- i. the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;
- ii. the modification does not alter the overall nature of the contract;
- iii. any increase in price does not exceed 50% of the value of the original contract.

6.3.5 These conditions can be fulfilled as follows

- i. The need to prioritise critical Council projects could not have been foreseen by the Council and the impacts this has had on its own procurement and delivery timescales. The introduction of Public health and social measures has increased the time it takes the Council Tree Officers to complete day to activities meaning less time to focus on procurement planning;
- ii. the proposed extension does not alter the nature of the contract; and
- iii. the value of the proposed extension at 41% of the original contract value does not exceed the 50% threshold.

6.3.6 The re-procurement is running in parallel with the extension period and evidences that the Council is following due process to award a new contract.

## **7 Compliance Issues:**

### **7.1 How are the recommended decisions consistent with the City Council's priorities, plans and strategies?**

7.1.1 This contract will support the following objectives of the Council:

**Birmingham is a great city to live in:** through the provision of, and improved access to, outdoor recreational facilities and the creation of clean, green and safe open spaces. Public spaces will be physically improved for use by all. The timber is recycled so contributes to the Council's

sustainability agenda whilst the trees contribute to the green Infrastructure of the city and to reduce the impact of climate change

#### **7.1.2 Birmingham Business Charter for Social Responsibility (BBC4SR)**

Both Gristwood & Toms Ltd and Acorn Environmental Management Group has signed up to and has adopted the principles of the Birmingham Business Charter for Social Responsibility. Delivery of this will continue during this extension term.

### **7.2 Legal Implications**

7.2.1 Section 164 of the Public Health Act 1875 gives the Council power to plant and maintain trees on land it is responsible for. The Council must maintain the trees on its land in order to avoid harm being caused to people and property which could result in claims for damages under the laws of negligence or an offence being committed under the Corporate Manslaughter and Corporate Homicide Act 2007. Section 23 of the Local Government (Miscellaneous Provisions) Act 1976 also gives the Council powers to make safe dangerous trees on privately-owned land.

7.2.2 As the contract does not make provision for the further extension of the term there could be a risk of a challenge to the Council for not re-procuring the services. This risk of challenge is considered to be low. The key risks and mitigations are included in para 6 above.

### **7.3 Financial Implications**

7.3.1 The frameworks do not commit the Council to a particular level of spend. Based on the historical expenditure and projected future usage the total spend is estimated at £0.917m across the two framework agreements for the extension period with work split roughly 50 / 50 between the two contractors. Price will be fixed for the duration of the framework agreement.

7.3.2 The expenditure that is incurred will be funded from within the annual approved budgets of the Council Directorates that utilise these Framework Agreements equating to £1.1m for the full year

7.3.3 Any work undertaken to make safe dangerous trees on privately-owned land is recharged to the landowner.

### **7.4 Procurement Implications**

#### **7.4.1 Contract renewal**

The In-house preferred test has been undertaken and demonstrates that this service is not suitable for delivery In-house due to the lack of in-house resource or expertise to deliver this with an additional cost of approximately £370k per annum over and above the current costs. The basis of this was calculated using the numbers of employees, vehicles, equipment and premises required to deliver the service. In the circumstances the tender process commenced on 11<sup>th</sup> Feb with the issue of a call for competition notice in the

Find a Tender service. The indicative timetable for the remaining stages of the procurement process is included in the table below. An extended mobilisation period is proposed to include the significant resource implication for Parks to load new contract pricing on to the POPI system (Parks Operations Performance Information). This system is integral to the management of this contract as it is where work orders are raised by the Council and where contractors confirm completion of the work which then drives payment only for work completed. The system also provides disaster recovery arrangements and performance information for reporting to client groups, for example Housing and Education.

Find a Tender Notice Issued	11 Feb-21
SQ response period	11 Feb – 16 Mar
SQ evaluation period	17-31 <sup>st</sup> March
On site H&S assessments	5 <sup>th</sup> – 30 <sup>th</sup> April
Agree short list of contractors	3 <sup>rd</sup> - 14 <sup>th</sup> May
Finalise tender documents	17 <sup>th</sup> – 21 <sup>st</sup> May
Tender issued to short listed contractors	24 <sup>th</sup> May
Tender response period	25 <sup>th</sup> May – 7 <sup>th</sup> July
Tender Evaluation Period	July-August
Approval (Award)	September
Contract(s) Award	1 <sup>st</sup> Oct
Mobilisation Period (6 mths)	Oct – March 2022
Service Commencement	1 <sup>st</sup> April 2022

#### **7.4.2 Service Delivery & Performance Management**

This contract will continue to be managed operationally and commercially by Tree & Green Waste Recycling Manager, Parks and Nature Conservation

### **7.5 Human Resources Implications (if required)**

7.5.1 None

### **7.6 Public Sector Equality Duty**

7.6.1 The requirements of Standing Order No. 9 in respect of the Council's Equal Opportunities Policy have been incorporated into the contract.

7.6.2 The requirements of the Equality Act 2010 have been specifically included in the contract to comply with the Act.

## **8 Background Documents**

8.1 Nil

## **9 Appendices**

None