

Birmingham City Council

Report to Cabinet

25 June 2024



Subject: Procurement Strategy for Highways Maintenance & Management

Report of: Craig Cooper, Strategic Director, City Operations

Relevant Cabinet Member: Cllr Majid Mahmood, Environment and Transport

Relevant O&S Chair: Cllr Lee Marsham, Sustainability and Transport

Report author: Mark Shelswell, Assistant Director, Highways and Infrastructure (mark.shelswell@birmingham.gov.uk)

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: 012968/2024		
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 checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Exempt Information - Appendix A		
Exempt information paragraph 3. Information relating to the financial or business affairs of any particular person (including the Council).		
Paragraph 5. Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.		

1 Executive Summary

- 1.1 Under Section 41 of the Highways Act 1980, Birmingham City Council as the 'Highway Authority' for the city, has a legal duty to maintain all adopted highways within Birmingham.
- 1.2 The maintenance of the highway network is undertaken by Birmingham Highways Ltd (BHL) under the Interim Services Contract (ISC) that commenced in April 2020 approved by Cabinet in the Highway Maintenance and Management PFI Contract report dated 25th June 2019. The Council has instigated a Judicial Review against the government's decision to withdraw PFI credits. This hearing was held on the 21-22 March 2024.
- 1.3 The outcome of the Judicial Review (whether or not appealed by either party) may require further engagement with DfT to confirm future funding arrangements and to clarify the long-term future of the Highways PFI contract. To ensure that the Council can continue to fulfil its statutory duties as the Highway Authority for the city, this report requests Cabinet's approval to further extend the Council's existing Interim Service Contract with Birmingham Highways Limited for a period of up to 24 months.
- 1.4 There is insufficient time to undertake a full procurement to appoint a replacement long-term service provider prior to 31 July 2024. As part of extensive contingency planning, the proposal set out in this Cabinet Report allows the Council sufficient time (up to 24 months) to develop and implement a robust procurement strategy for the long-term provision of services, if required.
- 1.5 Regardless of the outcome of the JR, due to the length of time being taken for this matter to be appropriately considered, an extension of the ISC beyond 31 July 2024 will be needed.
- 1.6 The proposed contractual arrangements will be delivered within the financial envelope set out in the Council budget approved by Full Council on 5 March 2024, including the planned savings for future years.
- 1.7 Throughout this process the Council has received external legal advice from DLA Piper UK LLP (DLA Piper) and financial, commercial, and technical support from Arup Group Limited (Arup) (DLA Piper's subcontractor) to support internal knowledge and expertise.
- 1.8 Under the existing Highways PFI arrangements, BHL have a contract with Kier for the delivery of services that is due to expire on 31 July 2024. Depending on the outcome of the JR and subsequent operational decisions, this sub-contract will either be extended by BHL with the current contractual arrangements between BCC and BHL remaining in place, or the contract with BHL will fall away with the sub-contract novated to the Council.

- 1.9 At the time of writing the Report, the Council awaits the court's decision. Please note by the time of the Cabinet meeting a judgement may have been handed down.

2 Recommendations

That Cabinet:

- 2.1 Approves the extension of the Interim Services Contract for the maintenance and management of the Council's public highways network for a period of up to 24 months commencing 1st August 2024 for the value of £75.3m with Birmingham Highways Ltd (BHL) in accordance with the approach in paragraph 7.4.1.
- 2.2 Notes in the event that the current Project Agreement between BCC and BHL terminates, the road maintenance term service contract held by Birmingham Highways Ltd (BHL) with Kier Transportation Ltd (KTL) will novate to the Council. This will be for a period of up to 24 months commencing 1 August 2024.
- 2.3 In the event the Project Agreement terminates and the contract novates to the Council, under the Council's Procurement and Contract Governance Rules (PCGR) paragraph 4.59 vi, approves applying a Negotiated Contract without competition for the following ancillary services in accordance with the approach in paragraph 7.4.3 & 7.4.4 and delegates the award of any subsequent contracts to the Strategic Director, City Operations in consultation with the Interim Director, Commercial and Procurement, the Interim Director of Finance (Section 151 Officer) and the Interim City Solicitor and Monitoring Officer (or their delegates):
- Highways Insurance and Associated Cover with Howden Insurance Brokers Ltd.
 - Third party claims handling service with Gallagher Bassetts

For a sufficient period of time to allow for contingency arrangements and to allow for a full procurement to take place.

- 2.4 Notes the feedback from the Sustainability and Transport Overview and Scrutiny Committee, and the response, as set out in paragraph 5.2 and Appendix A (Exempt Information).
- 2.5 Authorises the Interim City Solicitor and Monitoring Officer (or their delegate) to execute and complete all necessary documentation to give effect to the above recommendations.

3 Background

- 3.1 The 2019 settlement was entered into with the support of Department for Transport (DfT) subject to the Council submitting a revised business case for continuing to receive £50.311m per annum PFI grant funding including the procurement of the long-term replacement of Amey as operating sub-contractor (the "OSC/PFI Procurement").

- 3.2 In 2019 BHL entered an Interim Services Contract (ISC) with Kier Transportation Limited (Kier) in-order to continue the highway maintenance and management services while a restructuring of the PFI was undertaken and the OSC Procurement completed.
- 3.3 Cabinet has received regular updates on progress since 2019 and has approved decisions to enable officers to develop the way forward within specified financial and operational parameters.
- 3.4 Since 2021 the project has procured expert external legal, commercial, and technical and professional support services, through our partner DLA Piper, assisted by Arup. This has led to a revised governance approach and structure, strengthening internal consultation and engagement on the delivery of the PFI contract restructuring. This includes:
- 3.4.1 A Sponsoring Board, chaired by the Cabinet Member for Transport and including the Cabinet Member for Finance, Strategic Director of City Operations together with the Interim Director, Commercial and Procurement, Interim Director of Finance (Section 151 Officer) and the Interim Monitoring Officer and City Solicitor.
- 3.4.2 A Programme Board, chaired by the Assistant Director for Highways and Infrastructure as Senior Responsible Officer, and including senior officers from Highways, Finance and Legal Services.
- 3.5 On 30 November 2023 DfT informed the Council that it would not support the Outline Business Case. The Government proposed to maintain the provision of Highways Maintenance funding for the Council at the current level (£50m p.a.) until the end of the current Spending Review Period (the end of 2024/25 fiscal year).
- 3.6 Following the Decision Letter, the Council issued a letter to DfT setting out the basis of its proposed Judicial Review challenge pursuant to the Pre-Action Protocol Letter for Judicial Review (dated 11 December 2023) (the "PAP Letter").
- 3.7 The commissioners wrote to the Rt. Honourable Mark Harper MP, Secretary of State for Transport on the 14 December 2023, to highlight and set out the implications of the DfT's decision to withdraw Highways Maintenance PFI credits from the Council, referencing the following:
- Financial sustainability – in the short term, it is estimated the decision could cost the Council an additional c.£144.8m;
 - Timing – the decision does not allow BCC to negotiate a long-term arrangement;
 - Regional impact – the impact of a significant reduction in spending would be severe, including the preservation of the number of local jobs and skill sets to the city and wider region;

- Scale of service – Birmingham has an extensive network; it is a major operation and is a significantly larger service than in many councils;
- Focus on senior officers – the associated changes for BCC to deliver on its Best Value duty will stretch even the best political and officer teams.

The Commissioners requested that the Department reconsiders its position on the PFI in Birmingham so as not to add to its challenges during a very difficult period.

- 3.8 As no substantive response was received to the PAP Letter within the time permitted, the City Solicitor instructed the Council's external legal advisers to file and serve a Judicial Review challenge at court on 2 January 2024. On 3 January 2024, the court sealed those documents and the Council's external legal advisers sent the documents to the Government Legal Department (acting on behalf of DfT), albeit, in accordance with the Civil Procedure Rules, the documents were not deemed served until the second business day after despatch, being Friday 5 January 2024. On 8 January 2024 the court made an order requiring DfT to file its Acknowledgment of Service and Summary Grounds of Defence by 19 January 2024.
- 3.9 On 19 January 2024 DfT filed and served an Acknowledgment of Service and Summary Grounds of Defence, to which BCC responded in brief on 22 January 2024. Evidence was served at intervals thereafter.
- 3.10 A two-day hearing took place from 21 to 22 March 2024 at Birmingham Civil and Family Justice Centre. No judgement was given by the court at this time.
- 3.11 The priority remains the continued delivery of statutory highway functions and services across the city, ensuring the safety of citizens across the network. The Council ensures delivery through its contract with BHL, who discharge some of their duties through their subcontract with Kier (ISC). This currently expires on 31 July 2024.

4 Options Considered and Recommended Proposal

- 4.1 To do nothing is not an option as the Council has a statutory duty to provide continuity of services for the continued delivery of highway functions and services across the city.
- 4.2 To bring the services in-house is not considered to be a feasible option at this time. There is insufficient time to allow for and manage any significant organisational and operational change required (including transfer of staff to the Council) if the Council were to bring services back in-house. To do so now would leave the Council in a high-risk position, both financially and operationally.
- 4.3 To undertake a full procurement to award a contract prior to the 31 July 2024 is not possible as there is insufficient time. The recommendations made in this Report allow the Council time to develop and implement a robust strategy for the

long-term provision of services whether the JR is successful (and the PFI Procurement can ultimately be completed) or if the JR is unsuccessful.

- 4.4 To extend the ISC and continue operating with an external service provider under the current ISC arrangements represents the most feasible option to undertake to ensure continuity of services.
- 4.5 The recommended proposal is that Cabinet approves the extension of the ISC for a period of up to 24 months to allow time for officers to develop and implement a robust strategy for the long-term provision of services (either through completion of the PFI Procurement or an alternative long-term solution via a competitive procurement process).

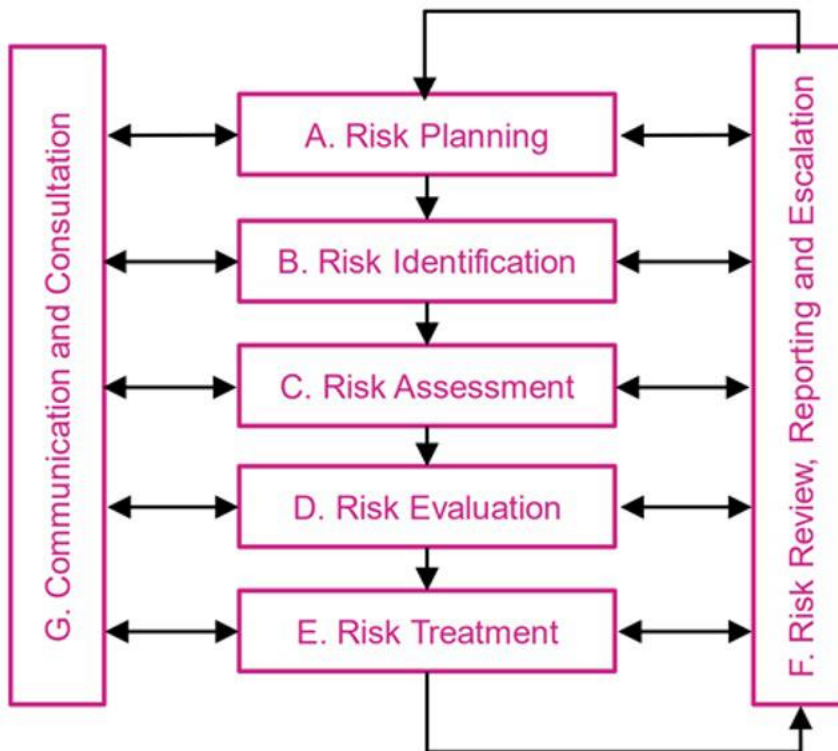
5 Consultation

- 5.1 Members and Commissioners have been briefed and consulted with, including the Sustainability and Transport Overview and Scrutiny Committee and will continue to be consulted with on the Council's position as appropriate and as the position with government develops.
- 5.2 The Sustainability and Transport Overview and Scrutiny Committee undertook pre-decision scrutiny on 16 May 2024. Appendix A (Exempt Information) sets out their recommendations, the key points arising from their discussions and the response in more detail. The outcome of the Judicial Review (whether or not appealed by either party) may require further engagement with DfT to confirm future funding arrangements and to clarify the long-term future of the Highways PFI contract and, in the meantime, the Committee highlighted the need to have a Highways Maintenance and Management contract in place which both delivers services and achieves best value. The Committee also acknowledged that there were specific challenges for the Council in doing this within the current context. Finally, the Committee wanted assurances that the future contract arrangements will be flexible to manage risks moving forward. In response to this, we have taken onboard these observations and can confirm and provide assurance that the proposed contractual arrangements will be drafted with the necessary flexibility to provide sufficient protection to the Council to deliver Best Value and can demonstrate robust management of risk as set out in section 6.
- 5.3 In 2019 the then Cabinet Member for Transport and Environment formed an all-party member working group. This group was setup to act as a 'sounding board' and provide member feedback to the Cabinet Member on the acceptability of potential proposals. The feedback from the group enabled officers to develop appropriate commercial proposals in the procurement and validate priorities for service delivery.

6 Risk Management

- 6.1 The full risk register is provided in Appendix D.

- 6.2 We have developed a risk management process that reviews the way the project manages risks and issues that arise as part of our contingency planning. The management of risks is embedded in the lifecycle of the Council's internal governance that supports the process and structures in place to ensure that the appropriate levels of rigour are being applied, with evidence of interventions and changes being made to manage risks.
- 6.3 The risk management process aims to identify and manage all foreseeable risks and opportunities in a manner which is proactive, effective, and appropriate, in order to maximise the likelihood of the project achieving its objectives, while maintaining risk exposure at an acceptable level. The risk management process aims to engage all project participants appropriately, creating ownership and buy-in to the project and to risk management actions.
- 6.4 The risk management process enables project participants to focus attention on those areas of the project most at risk, by identifying the major risks and opportunities and strategies for managing them. The process covers all activities undertaken by the project team during the lifetime of the project.
- 6.5 Risk-based information is communicated to project stakeholders in a timely manner at an appropriate level of detail, to enable the project strategy to be modified in the light of current risk exposure.
- 6.6 The project has applied a structured, systematic, and ongoing process, in accordance with the best practice, for identifying, assessing, and managing risk at project level to reduce the likelihood that risks will occur, and where risk is unavoidable, to reduce or mitigate its impact.
- 6.7 The risk management process adopted for the project is set out in the Project Risk Management Plan and is summarised in the diagram below. The Risk Management Plan is a live document and will be updated throughout the lifecycle of the project.



6.8 In revising arrangement such as this it is appropriate that Cabinet has assurance regarding the changes proposed.

6.8.1 Are considered appropriate to mitigate risks in the future contract to within acceptable levels.

6.8.2 Are affordable within the project's assumed affordability; and

6.8.3 May be revised in the future, but to do so will require full consideration of the risk to the Council.

7 Compliance Issues:

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

7.1.1 The Council has adopted the Corporate Plan 2022 to 2026 on 11 October 2022. This identifies five strategic outcomes for the city, as follows:

- i. A Bold Prosperous Birmingham;
- ii. A Bold Inclusive Birmingham;
- iii. A Bold Safe Birmingham;
- iv. A Bold Healthy Birmingham; and
- v. A Bold Green Birmingham.

- 7.1.2 This decision directly affects the priorities that relate to the strategic outcomes as follows:
- i. **A Bold Prosperous Birmingham, Priority 3: Attract inward investment in infrastructure:** This decision directly affects investment in and maintenance of the Council's 2,500km highway network and Council-owned infrastructure on it. Such investment will directly reduce the percentage of carriageways that should be considered for structural maintenance.
 - ii. **A Bold Safe Birmingham, Priority 9: Make the city safer:** The future investment in street lighting that this decision supports contributes to citizens feeling safer.
 - iii. **A Bold Healthy Birmingham, Priority:** Encourage and enable physical activity and healthy living: The future investment in maintenance of footways and cycleways supports Active Travel choices which contributes to the health and wellbeing of citizens.
 - iv. **A Bold Green Birmingham, Priority 19: Continue on the Route to Zero:** Investment in street lighting technologies and future investment in street lighting enables the city to manage and reduce its highway infrastructure energy use.
- 7.1.3 Citizens' priorities also reflect that road and pavement repairs are the fourth highest priority in the city for citizens.
- 7.1.4 Birmingham Business Charter for Social Responsibility (BBC4SR)
- i. Kier is a certified signatory to the BBC4SR and will be required to produce an action plan with commitments as part of the extension to the ISC.
- 7.1.5 Improvement and Recovery Plan (IRP). This decision directly supports the IRP Theme – Delivering Good Services
- i. Efficient and effective citizen services which consistently provide safe, compliant, fair, and lawful services.
 - ii. Conforming with Best Value duty to deliver services in line with expected standards and statutory requirements.
 - iii. Improved citizen experience with clear, consistent, and well-defined services.

7.2 Legal Implications

- 7.2.1 The Council has a statutory duty to maintain highway infrastructure, primarily under Section 41 of the Highways Act 1980 and the New Roads and Street Works Act 1991.

- 7.2.2 Under Section 111 of the Local Government Act 1972 the Council has power to do anything that is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions.

7.3 Financial Implications

- 7.3.1 The Council's budget for 2024/25, approved at a Full Council meeting on 5 March 2024, included a revenue provision for the services to be delivered under this proposed contract extension of a maximum of £75.3m over the 2-year period.
- 7.3.2 Whilst the proposed ISC does not set out a fixed contract sum, the extent of works undertaken will be required to be managed to ensure that services are delivered within the approved available budget as set out above.

7.4 Procurement Implications

- 7.4.1 The extension of the ISC contract is compliant with the Public Contracts Regulations 2015 Reg 72.1.e and 72(8).
- 7.4.2 The justification for entering an extension of the current ISC contract is for immediacy, practical and logistical considerations for up to a period of 24 months (or shorter period or increments as required), as there is insufficient time to undertake a full and competitive tender process. There is also insufficient time to allow for the significant organisational and operational change required (including transfer of staff to the Council) if the Council were to bring services back in-house. The proposed extension of contract will include robust contract management and assurance arrangements, providing opportunity for the City Council to work with BHL and Kier to drive forward efficiencies and drive down costs, and prepare for the completion of the PFI Procurement or competitive award of a long-term procurement contract (as applicable).
- 7.4.3 In the event of the novation of the road maintenance term service contract being carried out, there will be requirements for Highways Insurance and Associated Cover and Third-Party Claims Handling Service contracts to be in place. These contracts are sub-contracted to third parties, and as such, it is not possible to novate these to the Council.
- 7.4.4 To be compliant with the City Council's Constitution (Procurement and Contract Governance Rules – PCGR) and Public Contract Regulations 2015, the proposed procurement route is to apply a Negotiated Contract without competition with the Howden Insurance Brokers Ltd for the Highways Insurance and Associated Cover contract and Gallagher Bassetts Service Inc for the Third Party Claims Handling Service under PCGR clause 4.59(vi) and PCR15 Clause 32(2)(c) *“insofar as is strictly necessary where, for reasons of extreme urgency brought about by*

events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with". This is to maintain continuity of service, which protects the Council, through this interim period.

7.5 Human Resources Implications

7.5.1 Depending on the negotiated scope of the various contracts set out above a review and restructure of Highways and Infrastructure may be required. In this event any proposals will be fully consulted on with relevant stakeholders prior to implementation.

7.6 Public Sector Equality Duty

7.6.1 An Equality Impact Assessment has been undertaken and is shown in Appendix B. There are no issues arising as a result of this assessment.

8 Appendices

- 8.1 Appendix A: Exempt Information
- 8.2 Appendix B: Equality Impact Assessment
- 8.3 Appendix C: Environment and Sustainability Assessment
- 8.4 Appendix D: Risk Register

9 Background Documents

- 9.1 Report of the Director, Inclusive Growth and Chief Finance Officer to Cabinet, 25 June 2019 (“Highway Maintenance and Management PFI Contract”).
- 9.2 Report of the Acting Director, Inclusive Growth, and Interim Chief Finance Officer to Cabinet, 16 March 2021 (“Highway Maintenance and Management PFI Contract”).
- 9.3 Report of the Acting Director, Inclusive Growth and Interim Director of Council Management to Cabinet, 8 June 2021 (“Highway Maintenance and Management PFI Contract”).
- 9.4 Report of the Managing Director, City Operations to Cabinet, 14 December 2021 (“Highway Maintenance and Management PFI Contract”).
- 9.5 Report of the Strategic Director, City Operations to Cabinet, 8 November 2022 (“Highway Maintenance and Management PFI Contract”).
- 9.6 Report of the Director, City Operations to Cabinet, 5 September 2023 (“Highway Maintenance and Management PFI Contract”). FBC