

Birmingham City Council

Report to Cabinet

25th June 2024



Subject: Negotiated Contract for specialist external advocacy, legal advice and support relating to the Highway Maintenance and Management contract (P0989_2024-1)

Report of: Interim City Solicitor & Monitoring Officer

Relevant Cabinet Member: Cllr Majid Mahmood, Environment and Transport

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

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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: 012933/2024		
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
If relevant, state which appendix is exempt, and provide exempt information paragraph number or reason if confidential :		
Paragraph 3 Information relating to the financial or business affairs of any particular person (including the authority holding that information).		

1 Executive Summary

- 1.1 This report seeks approval to commence a negotiated procedure and award a contract under the Council's Procurement and Contract Governance Rules for specialist external advocacy, legal advice and support relating to the Highway Maintenance and Management PFI contract (HMMPFI) and the contractual arrangements with the PFI company set up to deliver the contract ; Birmingham Highways Limited (BHL) .
- 1.2 The necessity for a negotiated procedure has arisen because of the DfT's late decision to withdraw PFI credits for the HMMPFI contract and the Council's decision to issue Judicial Review (JR) proceedings on 2 January 2024 to challenge that decision. The Council is awaiting the decision of the Court and once delivered, it may be the subject to further litigation by way of appeal by DfT.
- 1.3 The legal services required under this report are far reaching and relate not only to ongoing work in the current JR proceedings but once a decision is given the Council requires DLA's advice and assistance either with the continuation of the HMMPFI Contract or termination of the HMMPFI Contract and ancillary contracts and the procurement of a new service provider to ensure the Council continues to meet its statutory duty.on the appointment of a long term service provider. Further details about the Council's options once the decision from the High Court is received is detailed in the private Appendix 3.
- 1.4 The criteria for applying a Negotiated Contract without competition is "*the activities are of a specialised nature which, are carried out by only one supplier, and it can be evidenced that not can be demonstrated and evidenced that no genuine competition can be obtained*". As DLA Piper UK LLP (DLA) are the solicitors who advised the Council on the original PFI arrangements and prepared the extensive documentation for the JR, it is highly unlikely that a new legal provider would be able to bid for the work on more favourable terms. It is, therefore proposed that their services be retained until the litigation comes to an end and the necessary contractual arrangements are put into place so that the Council continues to meet its statutory obligations. Furthermore it would not be advisable to change legal representation when litigation is ongoing as to do so

would invariably lead to a substantial duplication of costs and deliver no tangible benefit.

- 1.5 The proposed negotiated contract is with DLA for the period of up to 24 months, for the estimated total value of up to £4.5m. Thereafter the services will be competitively re-procured.
- 1.6 Continuing to employ DLA Piper will deliver best value compared to the start-up and familiarisation costs that would be incurred on the appointment a new legal advisor.
- 1.7 In the context of litigation, it is extremely risky to change legal advisors since should a dispute arise, there would be contention regarding which advisor was responsible. This would not be an issue with a consistency of the same advisor as there is a clear line of liability.
- 1.8 DLA already provide a satisfactory and significantly discounted service to the Council against Crown Commercial Services Framework rates, particularly for partner level support. On the basis that the favourable commercial arrangement is at least maintained, this will enable the Council to continue to benefit from these favourable discounted rates.

2 Recommendations

That Cabinet

- 2.1 Approves under the Council's Procurement and Contract Governance Rules the commencement of a negotiated procedure by Head of Highways PFI with DLA Piper LLP for the provision of specialist external advocacy, legal advice and support relating to the Highway Maintenance and Management contract for the maximum total sum of up to £4.5m over a period of up to 24 months, commencing 1 July 2024.
- 2.2 Delegates approval to award a contract for the provision of specialist external advocacy, legal advice and support relating to the Interim Monitoring Officer & City Solicitor or their delegate, in consultation with Interim Commercial & Procurement Director (or their delegate) and Interim Director of Finance and Section 151 Officer (or their delegate)

3 Background

- 3.1 DLA were awarded their current commission under a Delegated Award Report dated 17 November 2022 for a period of 20 months commencing December 2022 following the Council's procurement exercise through an open tender process. The main purpose of that arrangement was for the provision of legal advice and assistance to the Council in managing the relationship between the Council and PFI SPV company Birmingham Highways Limited (BHL), assisting with the production of an Outline Business Case (OBC) that was required by the DfT to demonstrate continuing VFM in the HMMPFI contract and assisting with the Council's oversight obligations in the procurement by BHL of a long-term term service provider following the exit of Amey LG in 2019 PLC .
- 3.2 Under this award DLA were also required to procure third party specialist legal, financial, commercial, and technical advice. This was a was a requirement of DfT to assure itself that any OBC presented by the Council was based on professional advice provided by suitably qualified external and impartial professional advisers on which all parties can rely. .
- 3.3 The Delegated Award Report financial limit was reached early in February 2024. This was due to: changes requested by DfT that necessitated additional work to complete the Business Case. There was also an extension to the procurement programme timetable to appoint a long-term subcontractor to enable bidders further dialogue meetings, respond to subsequent queries and additional time to ensure final bids remained competitive and therefore delivered best value to the Council. Finally, substantial costs were subsumed in obtaining Counsel's opinion and preparing the necessary and extensive supporting documents prior to issuing JR proceedings on 2 January 2024.
- 3.4 A further call off contract #2, in line with the Ordering & Award procedure in the Council's own Framework agreement was approved for the period March to June 2024. This allowed the work already in progress by the advisors to continue. This was included in the [Planned Procurement Activities report on 13th February 2024](#) with the delegated award approved by approved by Strategic Director, City Operations 28 February 2024.
- 3.5 Under the framework agreement non-legal advice is subcontracted by DLA to the following organisations
- a) OVE ARUP & Partners Limited (ARUP) for technical & commercial advice

- b) Willis Towers Watson for legal advice connected to the insurance element of the PFI contract; and
- c) Kroll Corporation as independent advisor connected to the June 2019 multi-party settlement described above and representation at board level with BHL.

3.6 This report seeks approval to commence a negotiated procedure under the Council's Procurement and Contract Governance Rules with DLA for services supplied directly by DLA and the subcontract arrangements with Willis Towers Watson and Kroll Corporation (3.5 b-c). The necessity for a negotiated procedure has arisen due to unforeseen JR litigation and the activities are of a specialised nature which, due to the time and costs involved can only, reasonably, be carried out by only one supplier, and it can be evidenced that there is no reasonably satisfactory alternative available. The advice provided by ARUP (3.5 a above) is subject to separate executive approval and to be provided under a separate contract directly with ARUP. Details will be included in the Planned Procurement Activities Report for 25th June 2024 Cabinet. [CMIS > Meetings](#).

3.7 The Council has an established relationship with DLA Piper. DLA was the Council's external advisor for the initial procurement and has successfully supported the Council through the lengthy disputes with Amey.

3.8 The basis of the negotiations will be to confirm the scope, terms and conditions the services will be delivered under. The financial negotiations will be undertaken within the following specific commercial and financial parameters.

- a. Fee proposals will be modelled against the work pattern for support in the Council's experience of previous disputes.
- b. Discount rates against card rates will be compared to previously obtained discounted levels.

3.9 A further award report will be presented in line with the delegation in 2.2 above setting out the outcome of the negotiations with DLA and requesting approval to award a contract for up to 24 months commencing 8th July 2024 for the maximum total value of up to £4.5m.

3.10 Relevant procurement implications are set out in para. 7.4 below

4 Options considered and Recommended Proposal

Alternative Options

4.1 Option 1 - *To provide the services in-house*. This option has been discounted as, given the specialist nature of the work, there is not the capacity or experience

within the council to undertake this. . Going forward once the judicial review has been concluded and a court decision received, legal support will focus on the Highway Maintenance and Management contract including any interim arrangement and dealing with any claims that may arise the as part of contract management activities. Subject to capacity, further work around reviewing and evaluating options for delivering additional legal support in-house will be explored.

- 4.2 *Option 2 – To tender for these services.* This option has been discounted on the basis that given the unforeseen litigation and timescales attached to this there is insufficient time and staff resources for procurement via the open or restricted procedures or competitive procedures with negotiation cannot be complied with.
- 4.3 *Option 3 - use a vendor neutral solution like [Constellia](#) and [BLOOM](#)* - these solutions do not directly deliver legal services to Local Authorities (i.e. they do not employ Solicitors that give advice the Local Authorities) but instead manage a supply chain of law firms that do deliver legal services to Local Authorities along with numerous other professional services via subcontractor arrangements. This option has been discounted on the basis that there is an inherent risk in contracting legal services via vendor neutral solutions who just use a light touch to “manage” the contract and take an admin fee as a % of total spend with the supply chain partner..
- 4.4 *Option 4 – to commence a negotiated procedure under the Council's Procurement and Contract Governance Rules for a contract for up to 24 months.* This is the recommended proposal. As described above the Council has an established relationship with DLA Piper. DLA was the Council's external advisor for the initial procurement and has successfully supported the Council through the lengthy disputes with Amey. The timescales attached to the ongoing litigation with DfT means that there is insufficient the time to procurement under the open or restricted procedures or competitive procedures with negotiation cannot be complied with.

Future Options

- 4.5 There should be no continuing requirement for these advisory services once a long-term arrangement for highway maintenance and management services is in

place and if further services are required these would be subject to a separate procurement exercise.

5 Consultation

- 5.1 Councillor Karen McCarthy Cabinet Member for Finance has been consulted and has approved this report.
- 5.2 Officers from Finance, Procurement and Legal and Governance have been involved in the preparation of this report.

6 Risk Management

- 6.1 At this stage it would be difficult to appoint a new legal firm and onboard them in the time required to meet the timetable the project is currently on. At the point of writing this report the authority is still awaiting the outcome of the JR and is being supported by DLA to explore and develop alternative strategies for the various scenarios that could emerge from the JR decision.
- 6.2 The Council's Legal Services will closely manage the contract to ensure VFM is delivered and where appropriate ensure added value is provided by DLA under their appointment. Further the Council's Legal Services will itself undertake aspects of the work deemed appropriate from the perspective of time, expertise and efficiency.

7 Compliance Issues:

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

- 7.1.1 The proposals contribute to the delivery of the Corporate Plan 2022 to 2026 of
 - **A Bold Prosperous Birmingham** "*we are a city with a modern green, accessible, transport system*"
 - **A Bold Green Birmingham** "*Improved transport infrastructure*"
- 7.1.2 The Highway Maintenance and Management contract will directly affect investment in and maintenance of the council's 2,500km highway network and council-owned infrastructure on it. This decision therefore contributes to achieving these priorities.
- 7.1.3 DLA Piper UK LLP is a certified signatory to the BBC4SR. Compliance with the BBC4SR is a mandatory requirement that will form part of the conditions of this contract. The negotiations will seek to agree social value commitments in an action plan to the value of the new contract. The delivery of the actions will be monitored and managed during the period of the contract agreed.

7.2 Legal Implications

7.2.1 This contract supports the re-procurement of the Council's contract to provide highway maintenance and management services, which delivers statutory obligations under the Highways Act (1980) and New Roads and Streetworks Act (1992).

7.2.2 The procurement of this contract is required due to the circumstances in paragraph b(ii) of Regulation 32(2)(c) of the Public Contract Regulations (2015) in that in the circumstances for reasons of extreme urgency brought about by events unforeseeable by the Council (the unforeseen litigation), the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.

7.3 Financial Implications

7.3.1 The estimated maximum cost of the services is £4.5m over a 2-year period commencing on 1 July 2024. This has been estimated from the anticipated resourcing requirements and the indicative day rates from DLA to provide these services for the duration of the contract. The actual costs following completion of the negotiations will be reported in the contract award report.

7.3.2 The cost of these services can be met from the council's approved budget for the provision of highway maintenance and management services, which comprise ringfenced and unringfenced resources, comprising:

7.3.2.1. PFI grant from government (subject to the outcome of the JR).

7.3.2.2. Revenue budget for services in scope of the PFI contract or its replacement; and

7.3.2.3. PFI reserves.

7.3.3 The services required are part of the cost of restructuring the PFI contract (or, should it be required, putting in place alternate arrangements) is funded from these sources. There is no requirement for further funding commitment.

7.3.4 Authorisation has been received from the Section 151 Board on 21st December 2024 ID3907 and 14th May 2024 ID: 7565.

7.4 Procurement Implications (if required)

Benefits appraisal

7.4.1 The following are the key benefits that result from the negotiated procedure:

- a. Ensure a legally compliant contract to protect the Council.
- b. Continuity of advisory support and knowledge;
- c. Organisational familiarity with the highway maintenance and management services contract and corporate memory and no lost time in maintaining continuity.
- d. The ability to access specific, expert advice as required to support the project (the subcontract arrangements with Willis Towers Watson and Kroll Corporation described in 3.6 b-c); and
- e. Provision of specialist infrastructure projects advisors with experience of acting for both public and private sector (including lenders).

7.4.2 Using DLA Piper for these services would achieve these benefits.

7.4.3 Proposed rates will be compared with current market rates , to ensure they deliver Value for Money.

Justification for Negotiated Procedure

7.4.4 For reasons given in 1.4 above the justification for the negotiated procedures is that DLA Piper LLP is the sole supplier that could provide the services in the timeframe, as the activities are of a specialised nature given the corporate memory that DLA Piper LLP have built over the last 10+ years, and at a reasonable cost taking account of the unforeseen litigation and realising the benefits described in 7.4.1 above. As previously stated it would not be advisable to change legal representation when litigation is ongoing as to do so would invariably lead to a substantial duplication of cost and time and deliver no tangible benefit.

Contract & Performance Management

7.4.5 The contract and performance will be managed by Legal Services in conjunction with the Head of Highways PFI. At an operational level contract management process will focus on

- i. regular structured and informal communication with DLA forecasting and prioritising work.
- ii. agreeing who will be deployed to undertake that work e.g. looking at grades of staff.
- iii. assessing supplier performance; and

- iv. Processes to evaluate and review options around delivering some services in-house within legal services to reduce the degree of reliance on DLA.

7.5 Human Resources Implications (if required)

None

7.6 Public Sector Equality Duty

Entering into a negotiated procedure and concluding the award of this contract does not revise, amend or review Council policies of functions and therefore an Equality Impact Needs Assessment is not required.

1.9 Appendices

- Appendix 1 – Environment & Sustainability Assessment
- Appendix 2 - Equality Impact Assessment
- Appendix 3 – Private Appendix

1.10 Background Documents

- i. Report to Strategic Director, City Operations – Tender Strategy for Highway Maintenance and Management PFI Contract Restructuring support dated 9 September 2022
- ii. Report to Strategic Director, City Operations – Contract Award - Framework Agreement for Highway Maintenance and Management PFI Contract Restructuring Support– P0989 dated 17 November 2022.
- iii. [Planned Procurement Activities report on 13th February 2024](#)
- iv. Report to Strategic Director, City Operations – Call Off Contract Award for Highway Maintenance and Management PFI Contract dated 28 February 2024