

Birmingham City Council

Report to Cabinet

19 March 2024



Subject: ACIVICO FURTHER CONTRACT EXTENSION –
UPDATED DEFERRED REPORT

Report of: Paul Kitson - Strategic Director of Place, Prosperity and
Sustainability

**Relevant Cabinet
Member:** Deputy Leader, Cllr Thompson

Relevant O&S Chair(s): Cllr Deakin

Report author: Philip Nell – Director (Property and investment)

| | | |
|---|---|---|
| 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: 011347/2023 | | |
| 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, state which appendix is exempt, and provide exempt information paragraph number or reason if confidential: | | |

1 Executive Summary

- 1.1 This report seeks to further extend the contractual relationship between the Council and Acivico (DCFM) Ltd/Acivico Ltd regarding the delivery of design, construction, and facilities management services and Acivico Ltd regarding the delivery of building consultancy services for a further period to 31 March 2026. Both contracting parties with the Council are referred to as Acivico.
- 1.2 During the extension period the Council will work with Acivico to review future delivery options and, subject to the outcomes, review and amend the contract terms to ensure the contract delivers value for money. This review work forms part of the council-wide review of the group of companies.

2 Recommendations

2.1 That Cabinet:

- i. Approves a further extension, from 1 April 2024 to 31 March 2026, to the contracts between the Council and Acivico (DCFM) Ltd/Acivico Ltd regarding the design, construction and facilities management services and Acivico Ltd regarding the building consultancy services.
- ii. Approves the contract extension with options for the Council to exercise the right to terminate with three months' notice.
- iii. Authorises the Interim City Solicitor and Monitoring Officer (or their delegate) to negotiate, execute and complete all necessary legal documents to give effect to the above recommendation.
- iv. Notes that the full review of the contract and performance framework with Acivico is to take place during this period and company/group position review is part of the council's improvement recovery plan stream, Companies and Traded Services.
- v. Request a further progress report to be provided to Cabinet be provided by September 2024 providing a comprehensive plan (including milestones) on when and how this will be progressed.

3 Background

- 3.1 Members are reminded that in May 2023 a report was tabled titled "Acivico Further Contract Extension", with the subsequent report being deferred from that meeting to enable the Deputy Leader to understand and identify reasons as to the circumstances surrounding why the previous actions had not been implemented.
- 3.2 In addition, a whole Member briefing was offered to elected Members in advance of this paper returning to Cabinet. This was carried out on 22 August 2023.
- 3.3 A subsequent report was tabled for consideration for Cabinet agenda in October 2023, but Commissioners sought that report to be further deferred pending a greater understanding of the future strategic direction required of the Council along with greater clarity on performance and value for money.
- 3.4 This report sets out an update on that position and picks up direct discussions with relevant officers involved and includes a follow up with relevant Cabinet members.
- 3.5 As noted in the original report Acivico was set up in 2012 to provide the following services to the Council: Professional Services for design and construction services and hard facilities management (mechanical, electrical engineering and building maintenance) relating to the Council's corporate estate along with the separate arrangement for Building Consultancy Services.
- 3.6 As a Teckal company, i.e., a wholly owned company by the Council to provide services back to the Council via a contract for services, the Council is within its

rights to award work direct to Acivico without the need to tender those defined activities for which Acivico was established to provide.

3.7 It is recognised that at various times and for a variety reasons the relationship between the Council and Acivico has been challenging around how the contract has performed.

3.8 In December 2018 Cabinet approved a number of recommendations, including:

- i. the Council remains a shareholder of the Acivico Ltd company for the foreseeable future
- ii. support the establishment of a new brand entity and company structure, that will take the place of the current Acivico company, enabling a fresh infrastructure upon which a new Business Plan, within new governance arrangements and contractual frameworks;
- iii. the Council provides a new three-year contract, (under the Teckal rules), for the core services outlined in the business plan, with the intention that the Teckal rules will no longer apply at the end of the three-year term, as the company will be sufficiently established to compete for business in the open market;
- iv. the service areas not included within the core services outlined in the business plan (cleaning and Birmingham City Laboratories) are returned to the Council as soon is practicably possible, where further commissioning work will need to be undertaken to determine the future for these services,
- v. the Council establishes evidence-based commissioning strategies for the services delivered by the company.
- vi. the Council enhances effective governance controls for the oversight of the company and the services in the future (Shareholder/Contract/Commissioner) that have clear roles and responsibilities defined and processes in place for day to day operation of the various roles the Council holds. This includes aligning the Company's Board to the Council's Group Company Governance Committee (the Shareholder governing body) and clearly distinguishing the contract management and commissioning functions within the Council;
- vii. Cabinet reverses its decision taken in June 2017 to outsource DCFM work for the reasons given above and;
- viii. delegated authority is provided to the Deputy Leader and Corporate Director for Finance and Governance, in consultation with the Cabinet Member for Finance and Governance, to agree any relevant procurement strategies and contract variations and new terms, associated with the implementation of the recommended approach in this report.

3.9 With the original contract due to expire in October 2019 a Delegated Award Report was approved to extend the DCFM Agreement existing agreement up 31 March 2020 in order to enable the contractual matters for the new Contract to be resolved and formalise the new contractual arrangements (see Appendix B).

3.10 The new contract therefore was to run from 1 April 2020 to 31 March 2023.

3.11 From the additional discussions held specific outcomes from the original recommendations are as follows:

- i. *Council remains a shareholder of the Acivico Ltd company for the foreseeable future - This is still the position.*
- ii. *Support the establishment of a new brand entity and company structure, that will take the place of the current Acivico company, enabling a fresh infrastructure upon which a new Business Plan, within new governance arrangements and contractual frameworks;*

Acivico have established a new contract which forms part of the trading arm for external parties to contract with and bid for work with other organisations.

- iii. *The Council provides a new three-year contract, (under the Teckal rules), for the core services outlined in the business plan, with the intention that the Teckal rules will no longer apply at the end of the three-year term, as the company will be sufficiently established to compete for business in the open market;*

Matters related to the contractual position are further noted in this report.

- iv. *the service areas not included within the core services outlined in the business plan (cleaning and Birmingham City Laboratories) are returned to the Council as soon is practicably possible, where further commissioning work will need to be undertaken to determine the future for these services,*

In a Deed of Variation dated 6 June 2019 the following services were returned to the Council - Civic Catering Service, the Birmingham City Laboratory Service and the Building Cleaning Service.

- v. *The Council establishes evidence-based commissioning strategies for the services delivered by the company.*

Done by way of benchmarking and/or soft market testing and to be established once a complete needs assessment has been undertaken. This will be based on gap analysis between the Council's required services and the final agreed Acivico Arrangement and the final Corporate Landlord Model to be established to fully consider/determine levels of future resourcing capacity and capabilities.

- vi. *The Council enhances effective governance controls for the oversight of the company and the services in the future Shareholder / Contract / Commissioner) that have clear roles and responsibilities defined and processes in place for the day –to-day operation of the various roles the Council holds. This includes aligning the Company's Board to the Council's Group Company Governance Committee (the Shareholder governing body) and clearly distinguishing the contract management and commissioning functions within the Council;*
- vii. Current arrangements with Acivico see both monthly operation meetings and strategic client management for the DCFM contract. In addition, regular and structured shareholder meetings are also carried out. Acivico also present to

the Group Company Governance Committee bi-annually. *Cabinet reverses its decision taken in June 2017 to outsource DCFM work for the reasons given above;*

DCFM work still remains with Acivico.

- 3.12 The key challenges that remain present around the fact that both the formal contract has never been executed and prolonged delays in providing assurance and confidence that the arrangement for Acivico does and will continue to provide value for money for the Council, both now and ongoing.
- 3.13 As noted in the previous report and demonstrated above there has been work in place prior to and post March 2020 to formalise the contract but was impacted by delays regarding ongoing contractual discussions on design of the new contract coupled with organisational changes both within Acivico and the Council.
- 3.14 A key factor is that the then new 3-year contract was due to commence on 1 April 2020, but was never finally agreed and executed.
- 3.15 In the circumstances the DCFM Agreement dated 2 May 2017, as amended, between the Council and Acivico, forms the basis of the ongoing contractual relationship between the parties who have accepted that there is a contract by conduct by virtue of Acivico continuing to provide the services and the Council continuing to make payment for such services.
- 3.16 Whilst it is acknowledged and recognized that this position is unsatisfactory, there has been through actions and payments a contract by conduct in existence. There is active cross Directorate work and strategic engagement with Acivico to correct the current failure to have an up-to-date signed contract in place.
- 3.17 The above reasons have also impacted on not yet establishing a clear strategic outcome for future needs been established.
- 3.18 There have also been other interdependences which have further restricted the ability to advance some of the more strategic elements around what the Council needs in operational practice for future needs, including the Corporate Landlord programme to move towards corporate model for its built assets. The Council's Corporate Landlord Programme remains a key interdependence around the ongoing services delivered under the contract.
- 3.19 As highlighted in the original report both the Council and its company are committed to working through a programme of improvements aiming to optimise the relationship and maximise the benefits to the Council as a shareholder as well as the positive impact of the arrangement to the communities of Birmingham and note that there is further work to do, which includes:
 - i. Reviewing future delivery options for current services provided by Acivico through the contract.
 - ii. Reviewing and any necessary update of the governing documents (including the Articles of Association).

- iii. Reviewing and update of contract and associated performance metrics.
- iv. Conducting an up-to-date Value for Money test on current arrangements and any necessary performance action plan. This would likely include looking to benchmark and review Acivico fee structure to ensure it is updated, it includes an agreed methodology for an annualised increase, and works well for both.
- v. Setting out any necessary growth / business plans and ensure that these are in line with the governing documents.
- vi. Providing a further update report to Cabinet on above and any longer-term considerations.

3.20 Since the start of 2022 focus has been on re-establishing the strategic relationship between Acivico and the Council, and activity has included:

- i. Benchmarking prices around rates
- ii. Review of working practices with Acivico and works contractors appointed on the supporting framework
- iii. Ongoing work to gain a clearer understanding on specific performance matters with an aim to improve operational efficiency across the arrangement, including new joint governance arrangements with the Council and Acivico to govern the performance of the contract from an operational level through to enhanced strategic client management.
- iv. The performance of the Acivico Contract is reported at a monthly Performance Monitoring and Management Board (PMMB) using a series of Key Performance Indicators (KPI's). These currently show that Acivico's performance is circa 96% A recommendation is to review the KPI's as part of the contract extension to make more reflective of the performance and availability of the Council's assets.

3.21 It is however noted that with the existing arrangement now expired on the 31 March 2023.

3.22 Acivico have highlighted as part of recent discussions that not having a formally constituted contract in place does raise issues in relation to workforce and auditor confidence, particularly given the context of the council's s114 notice and the need for auditors to be comfortable that going concern is secure at the point of signing off company accounts.

3.23 As with the earlier Delegated Award Report there are no additional cost implications in respect of this report as spend would be in line with budget to allocate the necessary activities direct to Acivico.

3.24 Following deferral of the original report and as part of assurance discussions with the Deputy Leader specific actions have included:

- a. Raising with Acivico for discussion at Shareholder Board around inclusion of a client Advisory group to include representatives of schools forum.

- b. Reaching out to all elected Members to seek and respond to any specific areas of interest or concern around the Acivico services.
- c. Presentation by Acivico to the Group Company Governance Committee providing an introductory meeting of the senior management team within Acivico and high-level outline of the business.
- d. Subject to approval of the recommendations in this report ongoing preparatory work around the contract(s) and schedules has continued in order to position them ready for signing.
- e. Scheduling of Strategic workshop with Acivico in October 2023 to assist around the wider future direction.
- f. Redefining the Governance for the Contract including membership and responsibility (see Appendix D).

3.25 The Deputy Leader has also sought quarterly updates on progress in order to strengthen the overall governance on this contract and will be seeking assurance on a number of key features, including but not limited to:

- i. Assurance of value for money
- ii. Ensuring future delivery of the arrangement is fit for purpose for the wider needs of the Council
- iii. Maintaining ongoing strategic focus around management of the contract
- iv. Ensuring that the numerous directorates who use / benefit from the contract are actively engaged in the overall governance, both from an operational sign off perspective to the strategic oversight
- v. The overall scale and complexity of the arrangement are appropriately managed
- vi. Competing priorities meaning overall resources to manage and support the arrangement from a client-side perspective are not reduced.
- vii. The risk that Acivico's objective of returning a profit to the Council does not negatively impact the price paid by the Council for works required or undertaken (noting that the Council operates on a commercial footing with its group of companies and the favourable pricing is not always allowable for tax purposes).

4 Options considered and Recommended Proposal

- 4.1 Further to the additional insight it remains the case that there are no practical alternative short-term options given that these services are delivered across the council and group services, most is currently work in progress and that it is a Teckal company.
- 4.2 In line with original report of December 2018 and taking into account the progress and development since then, longer term strategic options could include, but not be limited to:

- a. Continue to reshape the existing arrangements to meet new and emerging needs, included scaling up or down overall services delivered.
 - b. Test the wider market through competitive tender for some or all service provision.
 - c. Support the company in expansion plans, consider corporate structure to widen shareholding or sale of Acivico as a company.
 - d. Insource and return some or all services to the Council.
- 4.3 Each option will have different risk which will need to be considered including the need to understand the cost implications, timescales, people and legal implications. One common theme is that any change will have a significant resource impact to transition from current status quo. It should be noted that the Council have a statutory duty to ensure that its operational buildings are managed and maintained in a compliant fashion.
- 4.4 Should the Council wish to seek an alternate procurement, this can only be achieved following the benchmarking and soft market testing, preparing a scope for any alternate service delivery model and eventual procurement following government approved procurement mechanisms or framework. As a result, any alternate provider for some or all of these services may not be commissioned until early 2025, which would need to coincide with the end of this proposed contract extension.
- 4.5 In the interim, the Council need to continue with the current contract arrangement and service provider, Acivico to provide and improve the ongoing level of statutory compliance. This is the recommended option.

5 Consultation

- 5.1 Officers from Corporate Procurement Service, Legal Services, Capital Finance / Finance Service and Place, Prosperity and Sustainability Directorate have been engaged in development of this report along with consultation with Acivico and the Cabinet Member for Finance and Resources.
- 5.2 The Group Managing Director of Acivico Ltd, has been engaged in the development of this proposal, along with members of the Senior Leadership Team of the company.

6 Risk Management

- 6.1 At this stage the main risks associated is the administrative aspects of resolving the formal contract, which this report seeks to do.
- 6.2 Changes to personnel, demands and capacity will remain a risk but will look to be mitigated as part of formalising the programme to manage this change.
- 6.3 Until a signed contract in place, there remains a contract by conduct, but the company auditors may require a letter of comfort (or going concern) from the Council at the point that it approves the 2023/24 accounts.

6.4 Further risks beyond this will be the necessary strategic review work to ensure that the continued operation of Acivico as a Teckal company is the correct value for money outcome for the future.

7 Compliance Issues:

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

7.2 The recommended decision is consistent with the Council's policies, plans and strategies. This delegated award report seeks to build on the earlier Cabinet approvals of the recommendations contained within the December 2018 report, updated to take in account activity in the intervening period.

8 Legal Implications

8.1 There are no legal implications arising from this decision. As a wholly owned company, the Council is permitted, under regulation 12 of the Public Contracts Regulations 2015, to directly place work with Acivico. The current Acivico contract does not restrict the number or term of the extensions that may be applied to it.

9 Financial Implications

9.1 Acivico is a Council owned company and as such BCC shares any risk and rewards resulting from its financial performance.

9.2 The Council's expenditure through Acivico varies from year to year depending on the Council's need and demand for services provided by Acivico. In 2022/23, BCC spend through Acivico was approximately £21.5m. It is likely that this number would reduce in future years due to a reduction in the number of assets held and maintained by the Council as well financial constraints within the Council.

9.3 The contract extension is required to ensure the Council can continue to use the services of Acivico under an approved legal framework. It does not commit the Council to any additional or specific amounts of expenditure.

9.4 Any expenditure via this contract with Acivico will be funded through existing budgets within relevant directorate budgets.

9.5 The report identifies the need for a wider review of Acivico through a review. It was originally anticipated that this would be through an external review, however in light of spending controls this activity will be carried out within existing resource constraints.

10 Procurement Implications (if required)

10.1 There are no procurement implications arising from this decision for the reasons stated under paragraph 7.2.1 above.

11 Human Resources Implications (if required)

11.1 None

12 Public Sector Equality Duty

12.1 There are no PSED considerations to undertake at this time

13 Appendices

APPENDIX A - Public Cabinet report Dec 18

APPENDIX B - Delegated Award Report Oct 19

APPENDIX C – Redefined Governance for the Contract

14 Background Documents

None