

# **BIRMINGHAM CITY COUNCIL**

## **PUBLIC REPORT**

**Report to:** **CABINET MEMBERS FOR TRANSPORT AND ENVIRONMENT AND FOR FINANCE AND RESOURCES JOINTLY WITH CORPORATE DIRECTORS, ECONOMY AND FINANCE AND GOVERNANCE**

**Report of:** **ASSISTANT DIRECTOR HIGHWAYS AND INFRASTRUCTURE**

**Date of Decision:** **07 SEPTEMBER 2018**

**SUBJECT:** **HIGHWAY MAINTENANCE AND MANAGEMENT PFI CONTRACT**

**Key Decision:** No

**If not in the Forward Plan:** **Relevant Forward Plan Ref:**

**(please "X" box)** **Chief Executive approved** ☐

**Relevant Cabinet Member(s) or** **O&S Chair approved** ☐

**Relevant Executive Member:** **Cllr Waseem Zaffar, Transport and Environment**

**Relevant O&S Chair:** **Cllr Brett O'Reilly, Finance and Resources**

**Cllr Sir Albert Bore, Resources**

**Cllr Tahir Ali, Sustainability and Transport**

**Wards affected:** **All**

### **1. Purpose of report:**

1.1 To update Cabinet Members on the current position regarding the Highway Maintenance and Management PFI (HMMPFI) contract disputes and performance management to:

- i) obtain approvals to support delivery of the Council's objectives regarding its future management and
- ii) provide assurance for the Council.

### **2. Decision(s) recommended:**

That the Cabinet Members for Transport and Environment and for Finance and Resources jointly with the Corporate Directors, Economy and Finance and Governance :-

2.1 Notes the current position set out in this report;

2.2 Notes that the recommended required actions to be implemented by the Assistant Director, Highways and Infrastructure in relation to the Highways Maintenance and Management PFI Contract dispute as detailed in the Private report.

**Lead Contact Officer(s):** Kevin Hicks, Assistant Director, Highways and Infrastructure

**Telephone No:** 0121 675 3748

**E-mail address:** [kevin.hicks@birmingham.gov.uk](mailto:kevin.hicks@birmingham.gov.uk)

### 3. Consultation

Consultation should include those that have an interest in the decisions recommended

#### 3.1 Internal

3.1.1 Officers from Legal and Governance Services, City Finance and Procurement have been involved in the preparation of this report.

#### 3.2 External

3.2.1 External specialist legal advice has been provided by DLA Piper.

### 4. Compliance Issues:

#### 4.1 Are the recommended decisions consistent with the Council's policies, plans and strategies?

4.1.1 The Council has adopted the Council Plan, 2018+, which identifies four key drivers of change in Birmingham (Children, Housing, Jobs and Skills and Health). This decision supports the vision as follows:

- *Jobs and Skills: Investment in infrastructure and improved connectivity.*  
This decision directly affects investment in and maintenance of the Council's 2,500km highway network and Council-owned infrastructure on it.

#### 4.2 Financial Implications (How will decisions be carried out within existing finances and Resources?)

4.2.1 The Council presently receives a PFI grant from government of £51.9m per annum in relation to this contract and funding mechanism. In addition, as part of its Full Business Case, it has agreed to ring fence and index its revenue budget prior to the contract for the provision of these services.

4.2.2 The City Council may seek to agree a commercial settlement in accordance with the terms set out in the Private Report and within existing portfolio resources. Legal costs to finalise and progress such matters have been approved under the Council's Procurement Governance Arrangements process (2 February 2017).

4.2.3 Any financial implications will be maintained within existing HMMPFI resources. Further details are provided in the Private Report.

#### 4.3 Legal Implications

4.3.1 The HMMPFI contract was procured to enable the Council to meet its statutory duties relating to maintenance of highway infrastructure, primarily under the Highways Act 1980 and the New Roads and Street Works Act 1991 as covered in Section 4.3.1 of the Public Report to Cabinet of 31 July 2018.

#### 4.4 Public Sector Equality Duty (see separate guidance note)

4.4.1 Not applicable. Public Sector Equality Duty is covered in Appendix 1 to the Public Report to Cabinet of 31 July 2018.

## 5. Relevant background/chronology of key events:

- 5.1 The HMMPFI contract commenced on 7 June 2010 and included an initial five year 'core investment period' (CIP) to improve the city's highway infrastructure and provide operational services on the highway network over the full 25-year contract term. It provides the Council with a £51.9m per annum PFI grant from government to supplement the Council's own revenue budget for highway maintenance and management, which has been ring fenced for the 25 years duration of the contract. The Council's contract is with Amey Birmingham Highways Ltd (ABHL), a 'special purpose vehicle' company that employs Amey LG (ALG – a subsidiary of Amey plc providing highway maintenance and management services) as its main subcontractor to provide the services.
- 5.2 After an initial period of delivery, the Council began to identify concerns regarding a range of issues with ABHL. These issues included questionable investment decisions, quality of workmanship and performance. The Council has many disputes with ABHL and ALG, ranging from relatively small amounts to tens of £millions.
- 5.3 The Court of Appeal unanimously determined one of two significant investment disputes (the Project Network Model) conclusively in the Council's favour in February 2018. It described ABHL / ALG's actions as an "ingenious interpretation of the contract" and went on to state that parties in a long term contract such as this should not be seeking to "disrupt to the project to maximise [their] own gain".
- 5.4 The effect of the Court of Appeal's judgment and subsequent Order dated 22 February 2018 was that:
  - i) ABHL is now required to re-calculate the condition of roads and footways and to provide programmes of investment work to rehabilitate it correctly; and
  - ii) The Court of Appeal judgment overturns the previous High Court judgment, meaning that the Council (i) is no longer obliged to pay ABHL as though investment work was completed after May 2013 and (ii) is entitled to recover the overpayments that result (£54.95m) together with accrued interest. This has also reduced future monthly payments to ABHL by ~£1.3m each month.
- 5.5 The current position on implementing the judgment is that ABHL / ALG (despite additional pressure, including litigation):
  - i) have not completed the investment required under the contract, and in fact have neither provided details of the condition of roads and footways, nor provided programmes to do this;
  - ii) have not repaid the significant sums of money (in excess of £55m) owed to the Council; and
  - iii) have continued not performing the contract requirements (in addition to providing the investment required by the court decision), which has resulted in the Council withholding ~£42m from payments in relation to non-performance (up to and including the June 2018 Monthly Payment).
- 5.6 ALG has failed to perform the contract services over a sustained period of time and importantly failed to provide the appropriate reassurance that they can and will carry out

the required investment to meet their contractual obligations and comply with the court order.

- 5.7 The Council therefore has no alternative but to review how this matter can be taken forward with all parties to the contract. Further work is now required to implement the decisions agreed by Cabinet on the 31 July 2018, details of which are listed in this report and the accompanying Private Report.

## **6. Evaluation of alternative option(s):**

- 6.1 These actions are fully in accordance with the 31 July 2018 Cabinet Decision. Further work is now required to implement the decisions agreed by Cabinet on the 31 July 2018, details of which are listed in this report and the accompanying Private Report.

## **7. Reasons for Decision(s):**

- 7.1 These decisions will support the Council's ongoing and future management of the HMMPFI contract in delivering its objectives and obtaining the necessary levels of assurance.

### **Signatures**

### **Date**

**Councillor Waseem Zaffar**  
**Cabinet Member for Transport and Environment**

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**Councillor Brett O'Reilly**  
**Cabinet Member for Finance and Resources**

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**Clive Heaphy**  
**Corporate Director, Finance and Governance**

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**Waheed Nazir**  
**Corporate Director, Economy**

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### **List of Background Documents used to compile this Report:**

31 July 2018 Report to Cabinet, Highways Maintenance and Management PFI Contract

### **List of Appendices accompanying this Report (if any):**

**NIL**

## **PROTOCOL PUBLIC SECTOR EQUALITY DUTY**

- 1 The public sector equality duty drives the need for equality assessments (Initial and Full). An initial assessment should, be prepared from the outset based upon available knowledge and information.
- 2 If there is no adverse impact then that fact should be stated within the Report section 4.4 and the initial assessment document appended to the Report duly signed and dated. A summary of the statutory duty is annexed to this Protocol and should be referred to in section 4.4 of executive reports for decision and then attached in an appendix; the term 'adverse impact' refers to any decision-making by the Council which can be judged as likely to be contrary in whole or in part to the equality duty.
- 3 A full assessment should be prepared where necessary and consultation should then take place.
- 4 Consultation should address any possible adverse impact upon service users, providers and those within the scope of the report; questions need to assist to identify adverse impact which might be contrary to the equality duty and engage all such persons in a dialogue which might identify ways in which any adverse impact might be avoided or, if avoidance is not possible, reduced.
- 5 Responses to the consultation should be analysed in order to identify:
  - (a) whether there is adverse impact upon persons within the protected categories
  - (b) what is the nature of this adverse impact
  - (c) whether the adverse impact can be avoided and at what cost – and if not –
  - (d) what mitigating actions can be taken and at what cost
- 6 The impact assessment carried out at the outset will need to be amended to have due regard to the matters in (4) above.
- 7 Where there is adverse impact the final Report should contain:
  - a summary of the adverse impact and any possible mitigating actions (in section 4.4 or an appendix if necessary)
  - the full equality impact assessment (as an appendix)
  - the equality duty (as an appendix).

## Equality Act 2010

The Executive must have due regard to the public sector equality duty when considering Council reports for decision.

The public sector equality duty is as follows:

- 1 The Council must, in the exercise of its functions, have due regard to the need to:
  - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by the Equality Act;
  - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- 2 Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:
  - (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
  - (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
  - (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
- 3 The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
- 4 Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:
  - (a) tackle prejudice, and
  - (b) promote understanding.
- 5 The relevant protected characteristics are:
  - (a) marriage & civil partnership
  - (b) age
  - (c) disability
  - (d) gender reassignment
  - (e) pregnancy and maternity
  - (f) race
  - (g) religion or belief
  - (h) sex
  - (i) sexual orientation