

BIRMINGHAM CITY COUNCIL

PUBLIC REPORT

Report to:	CABINET
Report of:	CORPORATE DIRECTOR, ECONOMY
Date of Decision:	12 DECEMBER 2017
SUBJECT:	HIGHWAY MAINTENANCE AND MANAGEMENT PFI CONTRACT
Key Decision:	Yes
If not in the Forward Plan: (please "X" box)	Chief Executive approved <input type="checkbox"/> N/A O&S Chair approved <input type="checkbox"/> N/A
Relevant Cabinet Members:	Councillor Stewart Stacey, Cabinet Member for Transport and Roads Councillor Majid Mahmood, Cabinet Member for Commercialism, Commissioning and Contract Management
Relevant O&S Chair:	Councillor Zafar Iqbal, Chair, Economy, Skills and Transportation Overview and Scrutiny Committee Councillor Mohammed Aikhlaq, Chair, Corporate Resources and Governance Overview and Scrutiny Committee
Wards affected:	All

1. Purpose of report:

- 1.1 This report informs Members of progress in agreeing a commercial settlement with Amey Birmingham Highways Limited (ABHL) in relation to a number of matters within the Highway Maintenance and Management PFI (HMMPFI) contract.
- 1.2 A separate Private Report addresses the relevant private financial and commercial matters and sets out the terms that would enable a commercial settlement to be reached.

2. Decision recommended:

- 2.1 That Cabinet notes the content of this report.

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3. Consultation:

- 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 decision(s) consistent with the Council's Policies, Plans and Strategies?

4.1.1 The Council has adopted a *Vision and Forward Plan, 2017-2020*, 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 - will decisions be carried out within existing finances and resources?

4.2.1 The financial implications of the proposed commercial settlement (including all costs) will be maintained within existing HMMPFI resources. Further details are provided in the Private Report.

4.2.2 The City Council will seek to agree a commercial settlement in accordance with the terms set out in the Private Report. Legal costs to finalise and progress such matters have been approved under a separate delegated procurement authorisation.

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.

4.3.2 Any commercial settlement would only be agreed if it complied with the Council's statutory duty to make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness in accordance with Section 3 Local Government Act 1999.

4.4 Public Sector Equality Duty

4.4.1 A copy of the Equality Act 2010 – Public Sector Duty statement is set out in Appendix 1, together with the initial equality assessment screening (Appendix 2).

5. Relevant background / chronology of key events:

5.1 The HMMPFI contract commenced on 7 June 2010, including an initial five year investment period to improve the city's highway infrastructure and provide operational services on the highway network over the contract term. After an initial period of delivery the Council began to identify concerns regarding a range of issues with ABHL, including questionable investment decisions, quality of workmanship and performance. A number of Members, stakeholders and members of the public have also advised their dissatisfaction regarding the performance of ABHL over this period in various forums.

5.2 A dispute commenced between the Council and ABHL in April 2014. This dispute was significant as it concerned the extent of infrastructure investment works to be carried out as part of the services procured under the contract by ABHL on roads and footpaths across the city.

5.3 The Council has actively managed the performance of ABHL on both investment works and operational services from service commencement on 7 June 2010 and in accordance with the terms of the contract. Unfortunately, a number of further disputes have arisen in relation to the services over this period of time. These are more fully described in the Private Report.

5.4 On 18 December 2015 the Council agreed a settlement in relation to some (but not all) of the performance and quality disputes, including measures to rectify the disputed

matters (the “2015 Settlement”). These rectifications were to be completed by ABHL by 18 December 2016.

- 5.5 Despite the 2015 Settlement, since November 2015 a number of significant performance disputes have arisen. A further dispute in relation to the investment works on roads and footpaths also commenced in early 2016. The extent of this dispute again was significant and fundamental to how those investment works were to be delivered.
- 5.6 Since January 2017, without prejudice to either party’s position in disputes, discussions have taken place between the Council, senior representatives of ABHL and its subcontractor Amey LG. These discussions have sought to reach a commercial settlement acceptable to the parties (for reference, a ‘commercial settlement’ is a legally binding agreement on terms between the parties to end a dispute, taking holistic account of financial and non-financial issues).
- 5.7 By mid-2017 it became evident that it would not be possible to resolve all the disputes but that some elements could be agreed. To enable progress to be made on the agreed elements in 2017, an agreement was reached for an interim period on 15 September 2017 (the “Interim Agreement” - approved by Cabinet, 25 July 2017). The Interim Agreement expires on 31 December 2017. Details of the settlement in the Interim Agreement are contained within the accompanying Private Report.
- 5.8 Discussions between the parties have continued subsequently towards reaching a full agreement on all of the disputed issues. However, it has not yet been possible to do so and discussions will continue. Details of the position are contained within the accompanying Private Report.

6. Evaluation of alternative options:

- 6.1 This Public Report updates Cabinet on the progress regarding a commercial settlement. The following are alternatives to pursuing a course of reaching a settlement.
- 6.2 *Accept ABHL’s position on the disputed matters.* This is not acceptable as it will reduce the performance standards required under the contract and undermine the Council’s commercial and legal position. Fundamentally, it would fail to secure the value for money position expected from the contract.
- 6.3 *Continue to dispute matters.* The Council could continue to dispute matters and pursue resolution through the contractual dispute resolution procedure. Whilst this would ultimately enable each disputed matter to be determined, it will take considerable time to resolve and would incur additional cost, some or all of which may not be recoverable by the Council.
- 6.4 *Agree a settlement on some matters and continue to dispute others.* Whilst this may be possible in theory, in practice this will not provide a long-term basis for improvement as some disputes would continue.

7. Reasons for Decision:

- 7.1 To update Cabinet on progress made in agreeing a commercial settlement with ABHL.

Signatures:**Date:**

Councillor Stewart Stacey
Cabinet Member for Transport and
Roads

Councillor Majid Mahmood
Cabinet Member for Commercialism,
Commissioning and Contract
Management

Waheed Nazir,
Corporate Director, Economy

List of Background Documents used to compile this Report:

- Report of the Corporate Director, Economy to Cabinet, 25 July 2017 – Highway Maintenance and Management PFI Contract (Public).

List of Appendices accompanying this Report:

1. Equality Act 2010 – Public Sector Duty statement
2. Initial equality assessment screening

APPENDIX 1: 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