

BIRMINGHAM CITY COUNCIL

PUBLIC REPORT

Report to:	CABINET
Report of:	CORPORATE DIRECTOR, ECONOMY
Date of Decision:	25 JULY 2017
SUBJECT:	HIGHWAY MAINTENANCE AND MANAGEMENT PFI CONTRACT
Key Decision: Yes	Relevant Forward Plan Ref: 003854/2017
If not in the Forward Plan: (please "X" box)	Chief Executive approved <input type="checkbox"/> Overview and Scrutiny Chairman approved <input type="checkbox"/>
Relevant Cabinet Member(s):	Councillor Stewart Stacey, Cabinet Member for Transport and Roads Councillor Majid Mahmood, Cabinet Member for Value for Money and Efficiency
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 a proposal to reach a commercial settlement with Amey Birmingham Highways Limited (ABHL) in relation to a number of matters within the Highway Maintenance and Management Private Finance Initiative (HMMPFI) contract.
1.2	A separate private report addresses the relevant private financial and commercial matters.

2.	Decision recommended:
2.1	That Cabinet notes the content of this report.

Lead Contact Officer(s):	Kevin Hicks
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3.	Consultation:
3.1	<u>Internal</u>
3.1.1	<p>Officers from Legal and Democratic Services, City Finance and Procurement have been involved in the preparation of this report.</p> <p>No significant issues have been identified as a result of this consultation.</p>
3.2	<u>External</u>
3.2.1	<p>External specialist legal advice has been provided by DLA Piper. The Department for Transport has also been kept fully informed of progress with discussions, is supportive of the Council's approach and has advised on the position in respect of the Council's PFI grant.</p>
4.	Compliance Issues:
4.1	<u>Are the recommended decision(s) consistent with the Council's Policies, Plans and Strategies?</u>
4.1.1	<p>The Council has adopted a <i>Vision and Forward Plan, 2017-2020</i>, which identifies four key drivers of change in Birmingham (Children, Housing, Jobs and Skills and Health). This decision supports the vision as follows:</p> <ul style="list-style-type: none"> • <i>Jobs and Skills: Investment in infrastructure and improved connectivity.</i> This decision directly affects investment in and maintenance of the Council's 2,500km highway network and Council-owned infrastructure on it.
4.2	<u>Financial implications - will decisions be carried out within existing finances and resources?</u>
4.2.1	<p>The City Council will agree a commercial settlement in respect of the issues subject to this decision. Legal costs to finalise and progress such matters have been approved under a separate delegated procurement authorisation.</p>
4.2.2	<p>The financial implications of the commercial settlement (including all costs) will be maintained within existing HMMPFI resources.</p>
4.3	<u>Legal implications</u>
4.3.1	<p>The 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.</p>
4.3.2	<p>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.</p>
4.4	<u>Public Sector Equality Duty</u>
4.4.1	<p>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).</p>
5.	Relevant background / chronology of key events:
5.1	<p>The HMMPFI contract commenced in June 2010. The Council has been in dispute with ABHL regarding a number of matters under the contract for some time, with the earliest dispute arising in April 2014. A number of Birmingham Councillors, stakeholders and members of the public have advised their dissatisfaction over</p>

this period in various forums with a range of issues including investment decisions, quality of workmanship and performance.

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

5.3 The Council has sought to manage the performance and delivery of ABHL by engaging at the most senior level. Despite extensive dialogue on these matters, the Council has not been able to find an acceptable position with ABHL. We consider that to accept ABHL's position on these matters would:

- i. Reduce contract performance standards; and
- ii. Also apply interpretations of the contract that would weaken the Council's legal and commercial position.

This position would then apply for the remainder of the contract term (i.e. to June 2035).

5.4 The Council agreed a settlement (the "2015 Settlement" - see report to Cabinet, 16 March 2015, referenced below) on a number of performance, contract and commercial issues on 18 December 2015. The requirements of the 2015 Settlement have yet to be fully completed by ABHL and will require completion to a satisfactory level prior to entering into any full agreement.

5.5 Therefore the alternative options available to the Council are to either dispute matters formally (through the contract dispute resolution process, ultimately including the courts) or engage in dialogue with ABHL to reach an appropriate commercial settlement. For reference, a 'commercial settlement' is common practice in resolving contractual disputes through a legally binding agreement on terms agreed by the parties, taking holistic account of both financial and non-financial issues.

5.6 Without prejudice to either party's position in disputes, discussion has taken place with senior representatives of ABHL and its subcontractor Amey LG since January 2017 to seek to reach a settlement across all the disputed issues. From the Council's perspective the focus of that settlement has been to ensure delivery of the contract outcomes (i.e. improve roads and footways) and to secure best value for money for the City Council. The terms of this settlement will therefore be required to reflect an acceptable position for the Council on the disputed matters.

5.7 Details of the proposed settlement are contained within the accompanying Private Report.

5.8 It is essential that the settlement results in the necessary service improvement. To support this, the Council will seek appropriate assurance that the requirements of any new settlement will be delivered. Further detail on this is provided in the Private Report.

6.	Evaluation of alternative options:											
6.1		<p>The alternative for the Council is to proceed with its appeal on the Project Network Model dispute, scheduled at the Court of Appeal in January 2018 and seek resolution of each individual matter in dispute through the formal contractual dispute resolution procedure.</p> <p>Whilst this could enable the Council to obtain legal determination of the matters under dispute it would take considerable time to resolve and incur significant additional cost, which may not be fully recoverable. To date, progress under this option has been slow and has not resolved the disputed issues.</p>										
7.	Reasons for Decision:											
7.1		<p>This decision provides the best option for the City Council to resolve a number of contractual matters in the most expeditious and cost effective way, enabling the contract to continue and deliver the required outputs as set out in the project's business case.</p>										
<table style="width: 100%; border: none;"> <tr> <td style="width: 75%;">Signatures:</td> <td style="width: 25%; text-align: right;">Date:</td> </tr> <tr> <td colspan="2">Signatures:</td> </tr> <tr> <td style="padding-top: 20px;">Cabinet Member:</td> <td style="border-top: 1px dotted black; padding-top: 20px;"> <div style="text-align: center;">Councillor Stewart Stacey, Cabinet Member for Transport and Roads</div> </td> </tr> <tr> <td style="padding-top: 20px;">Cabinet Member:</td> <td style="border-top: 1px dotted black; padding-top: 20px;"> <div style="text-align: center;">Councillor Majid Mahmood, Cabinet Member for Value for Money and Efficiency</div> </td> </tr> <tr> <td style="padding-top: 20px;">Chief Officer:</td> <td style="border-top: 1px dotted black; padding-top: 20px;"> <div style="text-align: center;">Waheed Nazir, Corporate Director, Economy</div> </td> </tr> </table>			Signatures:	Date:	Signatures:		Cabinet Member:	<div style="text-align: center;">Councillor Stewart Stacey, Cabinet Member for Transport and Roads</div>	Cabinet Member:	<div style="text-align: center;">Councillor Majid Mahmood, Cabinet Member for Value for Money and Efficiency</div>	Chief Officer:	<div style="text-align: center;">Waheed Nazir, Corporate Director, Economy</div>
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List of Background Documents used to compile this Report:												
<ul style="list-style-type: none"> Report of the Director of Highways and Resilience to Cabinet, 16 March 2015 (Public) 												
List of Appendices accompanying this Report:												
<ol style="list-style-type: none"> 1. Equality Act 2010 Statement 2. Equality Impact Assessment 												

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) age
 - (b) disability
 - (c) gender reassignment
 - (d) pregnancy and maternity
 - (e) race
 - (f) religion or belief
 - (g) sex
 - (h) sexual orientation

APPENDIX 2: EQUALITY IMPACT ASSESSMENT