

Executive Decision Report

From: **Rebecca Spore – Director of Infrastructure and David Adams, Interim Director of Education**

To: **Peter Oakford** Deputy Leader and Cabinet Member for Finance, Corporate and Traded Services

Subject: **Decision 20/00056 - Capital Construction Programme Delays to projects as a result of COVID 19**

Key decision – ***Expenditure or savings of > £1m – including if over several phases***

Classification: **Appendix A&B Exempt**

Electoral Division: County Wide

Summary:

KCC has a significant capital construction programme that has and will be, adversely impacted by COVID-19 pandemic. A review has identified over 30 capital projects, which are at risk due to contractors having stopped work or reported delays due reduced labour and material supply issues. This paper sets out proposals to mitigate delays and provide contractual relief measures, together with the associated costs. An urgent decision is required to implement these measures in the time available to avoid disruption to front line services, in particular the need to secure the contractual arrangements for the provision of school places by September 2020 to meet KCC's statutory duties.

Recommendation(s):

The Deputy Leader and Cabinet Member for Finance, Corporate and Traded Services is asked to agree to:

- a) approve up to £7.89m of additional funds to cover the cost of temporary accommodation solutions, contractor relief payments and contractual claims across the capital construction programme where already approved via key decision or covered by appropriate delegated authority.
- b) delegate authority to the Director of Infrastructure, in consultation with the Cabinet Member for Finance, Corporate and Traded Services and the Cabinet Member for Education and Skills to finalise the contractual terms and enter into any associated documentation.

1. Introduction

- 1.1 The outbreak of the Novel Coronavirus (COVID-19), declared by the World Health Organization as a “Global Pandemic” on 11 March 2020, has impacted global financial markets. Restrictions have been implemented by many countries including the UK.
- 1.2 Following the necessary response to limiting the spread of Covid19 by the British Government, the construction industry has been heavily impacted with some sites unable to operate safely and therefore closing or operating with a reduced labour force. The supply of materials has also been significantly impacted following the restriction of movements and the closures of key suppliers.
- 1.3 KCC has a significant capital construction programme that has and will be, adversely impacted by COVID-19 pandemic. A review has identified over 30 capital projects, which are at risk due to contractors having stopped work or reported delays due to reduced labour and material supply issues. This paper sets out proposals to mitigate delays and provide contractual relief measures recommended by central government, together with the associated costs.

2. Current position

- 2.1 From the beginning of the crisis the Capital Projects Team has been monitoring the performance of the construction supply chain supporting the programme, reporting to Corporate Management Team and Corporate Members Meetings on 28th April and 14th May 2020.
- 2.2 Our supply chain, much of which is locally based has generally adopted a proactive approach, working with the Capital Projects Team attempting to maintain progress, despite encountering restrictions required as a result of implementing social distancing procedures on site. In addition, there have been materials shortages across supply chains, with working restrictions affecting suppliers. Some sites have closed temporarily and reopened, as and when materials and labour are available. Several contractors have continued to work together to share supply chains.
- 2.3 The Government is encouraging the construction industry to resume output and contractors have responded by resequencing works and reprogramming activities to observe social distancing.

3. Impact assessment

- 3.1 The inevitable result of the above is that virtually all projects on site have been delayed, with the further risk of construction programmes lengthening. This occurs particularly in the latter phases, where works would normally assume multiple trades working inside. Certain projects have also experienced delay due to the uncertainty around arrangements for the planning committee sitting in March, April, May and June. The impact of this mainly falls on projects completing in 2021 and 2022 and is currently being assessed.

- 3.2 Under the terms of existing contractual arrangements, contractors are able to claim for additional costs. There are also additional costs to KCC, associated with the implementation of the government's Procurement Policy Note 02/20-guidance for construction contracts. Additionally, there is a risk that KCC will be unable to meet its statutory responsibility to deliver sufficient school places in 2020, 21 and 22 without mitigation measures being put in place.
- 3.3 The table in Appendix A identifies the 2020 capital projects currently under contract in the capital construction programme that have been impacted by the COVID 19 emergency.

4. Mitigation

- 4.1 The majority of our supply chain has and continues to keep in regular contact and has worked hard to mitigate the impact of delays on the capital programme, with project reviews being undertaken on a twice weekly and in some instances, daily basis. This is recorded in a live mitigation plan document, which is updated on a weekly basis
- 4.2 *Education Projects* – There are 366 places in the primary sector, 450 in the secondary sector and 232 specialist provision places that are required for September 2020. Area Education Officers and the Capital Projects Team have continued to work closely with Schools and Academy Trusts to identify measures to ensure that sufficient accommodation is ready to provide additional school places from September 2020 onwards. Schools and Trusts have generally adopted a realistic approach and have been pragmatic about their accommodation needs. The solutions that are being proposed represent the minimum required and are set out in Appendix A.
- 4.3 The Capital projects team are in continuing contact with the DfE over DfE schemes being locally delivered by KCC and CYPE have completed a return to the DfE confirming the arrangements that will be in place to meet the school place requirements.
- 4.4 *Non Education Projects*: As previously noted delays in these programmes will have an impact for service delivery, with services continuing to operate in accommodation which is not fit for purpose and consequential impact on the ability in some instances to meet the savings identified in the MTFP, release assets for disposal or increased operational costs. The Capital Projects Team is working with the finance business partners to determine these.

5. Contractual Position, KCC and Central Government Guidance

- 5.1 The Cabinet Office has issued guidance notes that set out the various forms of relief an authority may agree with a supplier in order to deal with business disruption caused by COVID-19. These are designed to protect local suppliers and supply chains and to avoid double counting of relief offered by the Treasury through the Employee Furlough scheme.

5.2 The Capital Projects Team has reviewing each construction project and is preparing where appropriate Deeds of Variation as recommended by the PPN 02/20 – Guidance Notes for Construction Contracts issued by the Cabinet Office. This states that contracting authorities should continue to pay suppliers at risk due to COVID-19 on a continuity and retention basis until at least the end of June 2020, to:

- ensure supplier cash flow
- maintain cash flow into the supply chain
- protect jobs
- ensure suppliers are better able to cope with the current crisis and to fulfil
- contractual obligations once the COVID-19 crisis over
- ensure continuity of suppliers' businesses during and after the crisis; and
- ensure suppliers are able to resume delivery of public services once the outbreak is over.

5.3 These set out the terms on which payment relief will be granted and include: the modifying payment terms, increasing frequency of payments, additional relief payments.

5.3KCC has contracted with its supply chain mostly using JCT or NEC contracts. Both allow for extensions of time due to Force Majeure provisions, however only the NEC contract allows contractors to request recompense. Notwithstanding this, the JCT contract allows either party to determine the contract if the period of delay exceeds a predetermined period, usually 4 to 6 weeks.

5.4 The capital projects team has discussed with each building contractor mitigation measures to ensure school places are available for the September 2020 term. This will require instructions to be issued irrespective of the contract form. This additional work may increase contract programme time, which will together with resequencing or phasing works which will be reclaimable under the terms of both the NEC and JCT contract. These have been factored in Appendix A below.

5.5 Each contract will therefore be reviewed to determine a relief package to ensure the best outcome is achieved.

6. Financial Implications

6.1 The table in appendix A reflects the current assessment of the impact on the 2020 programme per project, including:

- Potential contractual claims for extension of times depending on the form of contract used and applying the PPN2 cabinet office guidance,
- Internal staff and consultancy costs as projects require more time input, due to delays,
- The cost of mitigation measures required in order to meet operational requirements. The majority of these claims arise from the need to provide temporary measures in order to meet basic need requirements for school spaces at the start of the 2020 academic year, in line with the Kent Education Plan (KEP).

- It should be noted that there will also be an impact on the 2021 and 2022 projects which is yet to be assessed.

6.2 The total capital/revenue allocation against the programme is insufficient to absorb the additional pressures identified above. Additional funds will need to be allocated to meet the costs identified. These have been separated between capital and revenue in Appendix A to show the impact on each project and is summarised in Appendix B.

6.3 The Capital Projects Team will continue to work with contractors, schools AEO's and other service directorates to minimise costs where possible. For the purposes of the Key Decision it is recommended that budget is set at £7.89 million which includes a contingency figure to avoid a further urgent decisions requirement for the September 2020 programme, should further mitigations be required beyond those that have been identified and to enable the project team to act swiftly should there be a supplier failure in this period. Any expenditure over the estimate and up to the £7.89 million will be authorised with relevant sign off from Finance, Education and Infrastructure. The proposed expenditure has been acknowledged by Finance as a COVID related expenditure and will be incorporated as part of the COVID 19 returns. There is a risk that KCC is not able to reclaim all of its COVID 19 expenditure. It should also be noted that the expenditure is a mix of capital and revenue.

6.4 As the impact on budgets exceeds £1m and will take the project costs over the allocated budgets, an urgent decision is required to authorise use of funds to meet contract relief costs and mitigation measures to counter programme delays. In particular our supply chain advises that there is an urgent need to place orders for temporary accommodation and organise works in time for September 2020.

7. Requirement for a Decision under the Urgency Procedure

7.1 The assessment of the impact on the capital programme has been undertaken as quickly as possible working with Schools, Stakeholders and Contractors. KCC are contractually obligated to agree the relief claims where these are provided for under the contracts and there are increasing requests from contractors for KCC to apply the Cabinet Office PPN guidance to assist with financial pressures that are being experienced by the contractors. These measures now need to be urgently applied so to support the supply chain.

7.2 The most significant initial impact for KCC of any delays are the delivery of the basic need programme and ensuring that KCC is able to meet its statutory duties to provide school places for September 2020. In order to achieve this and secure the temporary accommodation and any temporary works, orders are required to be placed on the 1st June 2020.

7.3 An urgent decision is required to increase the financial provision in the Capital Programme and the individual ROD for the capital projects to meet these timelines, following the normal FED publication and decision making process would mean that order could not be placed until after the deadlines required to place the orders to meet the school place provision in September 2020 with an increased risk of contractor distress with the resulting delays and the ability of KCC to meet its contractual requirements.

8. Legal implications

- 8.1 Where the contracts already provide for relief, KCC is already contractually obligated to meet financial claims. The application of the Government Procurement Policy Note 02/20 - Guidance Notes for Construction Contracts, will be used to support any variations required to the contracts. In the absence of mitigation action in relation to the school projects due to complete for September 2020 that KCC will not be able to meet its statutory duties to provide school places.

9. Equalities implications

- 9.1 An impact assessment has not been carried out, but it should be noted that failure to implement measures to offset delays to building contracts will in turn delay the delivery of special needs school places which are particularly in demand.

10. Governance

- 10.1 The funding, mitigation activity and delegated authority provided by this decision applies only to capital programme projects approved via the necessary formal governance arrangements (Executive Decision or appropriate delegated authority).
- 10.2 It is proposed that under the scheme of delegation the Director of Infrastructure, in consultation with the Cabinet Member for Finance, Corporate and Traded Services and the Cabinet Member for Education and Skills to finalise the contractual terms and enter into any associated documentation.

11. Conclusions

- 11.1 KCC has a significant capital construction programme that has and will be, adversely impacted by COVID-19 pandemic. A review has identified over 30 capital projects, which are at risk due to contractors having stopped work or reported delays due reduced labour and material supply issues. This paper sets out proposals to mitigate delays and provide contractual relief measures, together with the associated costs. An urgent decision is required to implement these measures in the time available to avoid disruption to front line services, in particular the provision of school places by September 2020.

12. Recommendation(s):

Cabinet Member Decision –

The Deputy Leader and Cabinet Member for Finance, Corporate and Traded Services is asked to agree to:

- a) approve up to £7.89m of additional funds to cover the cost of temporary accommodation solutions, contractor relief payments and contractual claims across the capital construction programme where already approved via key decision or covered by appropriate delegated authority.
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13. Background Documents

Appendix A – **EXEMPT** Summary of delay assessment and costs per project

Appendix B – **EXEMPT** Summary table of impact costs

14. Contact details

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