

From: Simon Jones, Director of Highways, Transportation and Waste

To: Michael Payne, Cabinet Member for Highways and Transport

Subject: **Highway Maintenance Contract Extension**

Decision No: 20/00092

Past Pathway of Paper: N/A

Future Pathway of Paper: For Cabinet Member decision

Electoral Division: All

**Summary:**

Kent County Council is the statutory Authority responsible for the delivery of highways services to Kent residents. Many of these services are delivered through a Highways Term Maintenance Contract (HTMC) with AMEY. The current contract expires in August 2021. Due to the COVID-19 pandemic, an extension until April 2023 is required.

**Recommendation(s):**

The Cabinet Member for Highways and Transport is asked to approve the award of a 20-month extension with Amey until 30<sup>th</sup> April 2023.

## 1. Introduction

1.1 Kent County Council is the statutory Authority responsible for the delivery of highway services for the residents of Kent (excluding Medway). The Highway Term Maintenance Contract (HTMC) is currently provided by Amey and the contract is managed by Highways, Transportation and Waste (HTW). This is detailed within OJEU Notice 2011/S 122-201805 (formerly 2010/S 100-152522) and the contract signed by both parties. This will expire in August 2021.

1.2 The current arrangement commenced on 1 September 2011, is due to terminate on the 31 August 2021 (following a expiry of the full contract period) and has been worth approximately £40m per annum. Several key services are delivered through this contract including:

- **Winter Service Provision** – i.e. gritting of our major routes during freezing conditions
- **Drainage Maintenance and Capital Projects** – i.e. gully cleansing and drainage repairs
- **Structures Maintenance** – i.e. bridge repairs and construction
- **Patching and Small Resurfacing Services** – i.e. potholing and patching of the highway
- **Surface Treatments** – i.e. small highway and footway resurfacing
- **Emergency Response** – i.e. response to emergencies across the network due to weather, crashes or structure failure

- **Highway Schemes Delivery** – i.e. construction of highway improvement schemes, including those for crash remedial measures and s106 requirements.

1.3 KCC implemented a commissioning programme in 2019 which focused on reviewing the current contractual arrangements as set out above and determining how these should be delivered post 2021. Good progress was made, but due to the COVID-19 pandemic and the associated measures taken by government, the re-procurement of a strategic contract of this kind at this time would represent a high risk for the Council as explained in this report (and would not elicit or enable a good market response).

1.4 This paper outlines the rationale and justification for this proposal to extend the contract for 20 months beyond the expiry date and considers the following:

- Timeline to procure a replacement contract
- Operation risk with winter service
- Market availability and stability

## 2. Timeline

2.1 To procure a replacement contract is complex and time consuming. The original programme was extremely tight with minimal float to deal with unforeseen circumstances. The COVID-19 pandemic scuppered the ability to deliver that programme.

2.2 To deliver the programme, a longer lead time would be needed to finalise the strategy and outline the contract requirements. The procurement and mobilisation process should in best practice require 20 months to deliver. This allows for float for any unexpected issues and mobilisation to protect KCC's statutory obligation. It is anticipated that the following stages represent a realistic outline programme. There will be a need to align the democratic decision process which could prolong these estimates:

- Selection Qualification (SQ) Process – 1 Month
- SQ Evaluation and Approval – 2 Months
- Initial Tender Period – 3 Months
- Initial Tender Evaluation and Shortlist – 3 Months
- Negotiation Period – 2 Months
- Final Tender Period – 1 Month
- Award Process – 2 Months
- Mobilisation Period – 6 Months

2.3 To work towards a May 2023 date, the procurement would be required to commence in September 2021.

2.4 If a replacement contract was required for September 2022, the procurement would need to commence by January 2021, with specification and options to be developed Summer 2020 (now past). The potential risk of a further pandemic wave imports additional risk to this programme.

### **3. Operational Risk**

- 3.1 Due to Winter Service requirements, the recommended period for any new contracts to commence is late spring/early summer. This allow preparation for Winter Service (which formally starts in October) and includes securing/maintaining vehicles, route optimisation and driver recruitment and training.
- 3.2 The normal industry practice is to commence a new contract during April/May. The proposal to move the contract start date to May 2023 will protect Winter Service and provide assurance that our statutory obligations in this regard are met.
- 3.3 The pandemic continues to strain resources and has caused market volatility. A delay to defer the programme is sound and in accordance with Central Governments PPN 01/20 publication.

### **4. Market Availability and Stability**

- 4.1 The effect of the current or future waves of COVID-19 have not been evaluated at this stage, but are likely to reflect the factors identified in this section of the report. Any delay would place at risk any procurement commencing prior to July 2021.
- 4.2 It is expected that as organisations move out of emergency measures, the market will stabilise. We are seeing a reduction and adjustment in the supply chain and this must be considered prior to the commencement of the formal procurement.
- 4.3 Initial market testing has identified that the market is incorporating significant additional (financial) “provisions” in attempts to weather the current situation. Such provisions could make a contract unaffordable and not best value to the public purse.
- 4.4 Furthermore, the new contract is expected to cover a long term (circa 10/12 years) and therefore the aggregate effect of procuring in an unstable market would place significant strain upon the council’s budget.
- 4.5 Market intelligence suggests that deferring procurement would be sensible and would allow the market to normalise. This is in line with decisions other authorities have also made.
- 4.6 The currently identified procurement risks included (but are just not limited to):
  - Market Uncertainty – the industry landscape is undergoing change and it will be difficult for contractors to price elements of risk with their tender submission. This could fluctuate further if restrictions increase, but is likely to moderate in the medium term.

- Supply Chain Risk – there is a risk that some organisations may not survive the downturn. This may pave way for new market entrants but could restrict the competitive nature of any procurement.
- Mobilisation Period – It is now not possible to carry out a re-procurement which will enable the Council to meet its statutory responsibilities securely or enable a fair and competitive process in time for either a 1st September 2021, a May 22, or a September 22 start date.
- Manufacturing risks - secure restrictions exist in securing appropriate plant (including winter service fleet) due to prevailing market conditions and significant manufacturing lead times.

## **5. Financial Implications**

5.1 Financial Pressure – As part of a Medium-Term Financial Plan (MTFP) pressure, £2.4m was estimated to cover the increased inflationary cost of service delivery.

5.2 There is high risk that due to the market uncertainty and instability that this will fall short of the actual costs tendered with submissions being unaffordable and the operational service being materially affected.

5.2 The financial impact of the Amey extension is favourable, as it has been agreed that the prices within the contract will remain the same and only rise in line with inflation indices in accordance with the contract. This defers the MTFP pressure by two years and will be revaluated when the commission recommences.

## **6. Policy Framework**

6.1 This commission is detailed within the following plans:

- Growth Environment and Transport Directorate Business Plan 20/21
- Highways, Transport and Waste Service Level Business Plan 20/21

## **7. Legal Implications**

7.1 In March 2020, the Cabinet Office published information and associated guidance on the public procurement regulations in the context of responding to the current coronavirus, COVID-19, outbreak. This Procurement Policy Note (PPN 01/20) applies to central and local government authorities and covers options that may be considered in relation to procurements under the Public Contract Regulations (PCR) 2015:

- “Direct award” due to extreme urgency (regulation 32(2)(c) (namely treating the extension as though it is a new contract altogether);
- direct award due to absence of competition or protection of exclusive rights;
- call off from an existing framework agreement or dynamic purchasing system;
- call for competition using a standard procedure with accelerated timescales;

- extending or modifying a contract during its term (regulation 72).

7.2 In this instance the Council has available the possible ability to seek to rely on regulation 32 (extreme urgency) or may seek to extend the current contract under regulation 72. Regulation 32 imposes a strict test of extreme urgency and is not easily applicable. Under the PCR 2015, extending or modifying an existing contract during its term is permitted by Regulation 72(1) where certain conditions are met. These include where the following applies:

*Contracts [...] may be modified without a new procurement procedure [...] in any of the following cases:*

*(c) where all of the following conditions are fulfilled:*

- (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;*
- (ii) the modification does not alter the overall nature of the contract;*
- (iii) any increase in price does not exceed 50% of the value of the original contract or framework agreement.*

7.3 The Council may take the reasonable view that limb (i) of the conditions has been met due to the pandemic, on the basis that no diligent authority could have predicted the pandemic or its effects. It may also conclude (and is the case) that the recommended extension scope meets the other two conditions. The recommended modification will not alter the overall nature of the contract (limb (ii)) as it is not proposed to include services not listed within the original OJEU notice (and contract) or otherwise to change the terms and conditions (including as to pricing). In respect of limb (iii), the value of the extension will not exceed 50% of the value of the original contract.

## **8. Equality Implications**

8.1 An Equalities Impact Assessment has been carried out and no implications for extending the HTMC have been identified.

## **9. Next Steps**

- 9.1 We will be required to submit a modification notice to inform the market of the decision. Following this, we will finalise and sign the extension with Amey until 30 April 2023.
- 9.2 A commissioning programme will be drafted and scheduled. This will be shared with appropriate members and show the intention of when KCC will return to market.

## **10. Conclusions**

10.1 This paper considered the following:

- 1. Timeline to procure a replacement contract ✓
- 2. Operation risk with winter service ✓
- 3. Market availability and stability ✓

10.2 The rationale to extend the contract for 20 months beyond the expiry date protects KCC statutory obligations and reduces the risk of carrying out a procurement during any further instability within the market. This will allow KCC to fully assess the market and affordability before it commences a procurement process under stable market conditions (enabling a competitive process which will maximise competition).

## 11. Recommendations

### **Recommendation(s):**

The Cabinet Member for Highways and Transport is asked to approve the award of a 20 month extension with Amey until 30th April 2023.

## 12. Report Author

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