
Meeting: Executive
Date: 13 July 2010
Subject: Novation of the Term Contract for Highways Services
Report of: Cllr David McVicar, Portfolio Holder for Safer Communities & Healthier Lifestyles
Summary: The report proposes that a deed of novation and section 16 agreement be entered into which will have the effect of transferring the Bedfordshire Highways Term Contract for Highways Services from Bedford Borough Council (as caretaker) to Central Bedfordshire Council.

Advising Officer: Gary Alderson, Director of Sustainable Communities
Contact Officer: Basil Jackson, Assistant Director for Highways & Transport
Public/Exempt: Public
Wards Affected: All
Function of: Executive
Key Decision Yes
**Reason for urgency/
exemption from call-in
(if appropriate)** N/A

CORPORATE IMPLICATIONS

Council Priorities:

The Council priorities affected by this paper are:

- creating safer communities;
- managing growth effectively; and
- promoting healthier lifestyles.

Financial:

The paper details a proposed maximum extension of the highways contract up to 31st March 2016 in exchange for the removal of contract thresholds and protection from any financial liability for future changes to the scope of works by Bedford Borough Council.

Legal:

In April 2009, Central Bedfordshire Council (CBC) succeeded Bedfordshire County Council (BCC) as highway authority for the road network in Central Bedfordshire (excluding Trunk Roads). An important function of the highway authority is to maintain the highways for which it is responsible in a good state of repair. From April 2005, BCC delivered this aspect of its legal responsibilities through a contract with Amey LG.

On 1 April 2009 responsibility for the contract with Amey LG passed to Bedford Borough Council (BBC) as the nominated caretaker authority, and BBC hold the contract as trustee on behalf of CBC.

Since April 2009, a letter of agreement between CBC and BBC has been in place, enabling Central Bedfordshire Council to access highways services. Continuing with this arrangement puts CBC in an uncertain legal position in the event that there is a third party claim against the Council or if there is a contractual dispute; particularly if arbitration or legal resolution becomes necessary.

It is proposed that BBC and CBC should now enter into an agreement under section 16 of the Local Government and Public Involvement in Health Act 2007 which will transfer the contract with Amey LG to CBC. CBC will then become the employer under the contract and will assume all rights and liabilities in relation to the contract.

BBC wishes to have access to services provided by Amey LG under the contract on the same terms, but also wishes to withdraw from certain services. The Deed of Novation provides that these changes will have no cost implications for CBC.

Risk Management:

The main risks associated with this contract are as follows:

- how a third party claim against the Council, or a contractual dispute, would be dealt with based on the existing letter of agreement;
- the contractual requirement for a minimum annual expenditure through the highways contract, and
- the financial liability for potential changes to the scope of works provided to Bedford BC.

Proposals to mitigate the above risks have been put forward in the main body of this report.

Staffing (including Trades Unions):

None.

Equalities/Human Rights:

Creating an attractive and accessible public realm has a part to play in getting people out and about, especially the more vulnerable members of the community who might experience isolation. The Contract is specifically set up to utilise customer feedback as an essential part of developing an accessible public realm.

Community Safety:

The Highways Act 1980 requires highway authorities to keep roads and footways open and remove obstructions which may affect the safety of the travelling public. The Contract dictates how such highway works are delivered in Central Bedfordshire to meet our obligations. The contract also delivers safety improvement schemes to assist in reaching our casualty reduction targets.

Sustainability:

The effective maintenance of our highway network is a key part of accommodating Central Bedfordshire's growth agenda and ensuring that we are "open for business".

Summary of Overview and Scrutiny Comments:

- The report has not been considered by the Overview and Scrutiny Committee.

RECOMMENDATION(S):

- 1. That Executive agrees to enter into an agreement under section 16 of the Local Government and Public Involvement in Health Act 2007 under which the contract with Amey LG for highway works will be transferred from BBC to CBC together with a Deed of Novation which will give effect to the transfer.**
- 2. Delegates to Director of Sustainable Communities in consultation with Portfolio Holder for Safer Communities and Healthier Lifestyles, authority to approve the terms of the documents referred to in recommendation 1 above.**
- 3. That, if CBC and BBC are unable to proceed with deed of novation Executive endorses BBC continuing to manage the contract and CBC enters into a separate agreement with BBC for the remaining duration of the contract until March 2013.**

Reason for Recommendation(s): To allow Central Bedfordshire Council to take the place of BBC as employer under the Term Contract for Highway Services with Amey LG, thus allowing CBC to assume full responsibility for this contract and for the delivery of services under the contract in its area.

Executive Summary

This item follows a paper brought to Executive on 14th April 2009 entitled “Highways Contract Options”. At this meeting, Members considered a number of alternatives for the future of its term contract for highways services. Based on the steer given to officers at that meeting, an agreement has now been reached to transfer the Bedfordshire-wide highways term contract to Central Bedfordshire (Minute E/08/125 refers). Members are now asked to consider and endorse this agreement.

Background

1. In 2005 the former Bedfordshire County Council entered into an agreement with Amey LG for the provision of highway services using a **Managing Agent Contract (MAC)**. This means that the Authority is responsible for setting budgets and policy while Amey is responsible for everything related to service delivery (including staffing, scheme development, scheme implementation etc). Under the MAC, the Authority retains a small number of staff to monitor Amey’s performance. The contract was let for a minimum period of 5½ years, with five possible one-year extensions based on the achievement of agreed performance levels. Two of these extensions had been agreed, and a decision on the third was pending at the time the County Council was abolished.
2. Under the Local Government (Structural Changes) (Transfer of Functions, Property, Rights and Liabilities) Regulations 2008 (The Regulations), CBC and BBC were required to use their best endeavours to reach agreement before 1st April 2009 as to the transfer of the rights and liabilities of the former County Council under the Contract. No such agreement was reached by 1st April 2009 and, as a result, the Secretary of State nominated BBC as “caretaker” for the contract. BBC thus holds the contract in trust until such time as other arrangements can be agreed between both authorities.
3. In April 2009, Central Bedfordshire Council’s Executive received a report entitled “Highways Contract Options”, which considered a number of alternatives for the future of its highways term contract. Members favoured the option that would result in a Central Bedfordshire led contract. On this basis, officers have been working with Bedford Borough Council and Amey to produce a deed of novation for a Central Bedfordshire led contract.

Contractual Arrangements since April 2009

4. In the absence of a formal agreement between CBC and BBC, a letter was sent to Amey LG which informed Amey that CBC officers would manage highways services in Central Bedfordshire directly and gave an undertaking that CBC would pay Amey LG directly, on the terms set out in the original contract with the former County Council. However, during the “caretaker” period, the ability of CBC to develop the contract (i.e. in terms of managing costs, quality,

programmes and innovation) is limited. This is not ideal as it leaves CBC at risk and relies on commitment from both authorities to deal with issues amicably. (It is worth noting that a recent contract review carried out by CBC's Head of Procurement rated the contract as good).

Negotiations with Bedford BC and Amey LG

5. The report to Executive on 14th April 2009 noted that both Central Bedfordshire and Bedford Borough Councils had agreed that the contract would transfer to CBC, and that a draft novation agreement setting out the terms under which this could occur was being prepared. Over the last twelve months there have been extensive discussions between the three organisations. Whilst these have been open and amicable in nature, two sticking points have caused difficulty in coming to an agreement. They are:
 1. the contractual requirement for a minimum annual expenditure through the contract; and
 2. the question of financial liability for potential future changes to the scope of works provided to Bedford BC.

Risk - Annual Expenditure

6. Clause 59a of the highways contract stipulates that, should expenditure fall below a minimum value, Amey would be entitled to an uplift in rates to reduce the impact on the fixed overhead costs they have resourced-up to in the expectation of a certain value of work. The minimum expenditure figure is currently just over £21M p.a. (for the whole of Bedfordshire) and the uplift would be 2% on all expenditure in the year (i.e. a maximum of £420,000). The difficulty faced by both BBC and CBC is that if the expenditure by the other Council fell short of its share of the joint £21M, both Councils would be liable for a share of the additional payment. Clearly, CBC would not wish to underwrite BBC in this way (and vice versa).
7. A range of possible solutions has been explored between the Councils in terms of isolating the risk to each, but without success. However, discussions with Amey have proved to be more fruitful, and the company has offered to delete this clause from the contract. This would be in exchange for a positive decision on the year's extension that was outstanding at the time of Local Government Reorganisation (LGR), and on the extension available for performance in 2009/10. (Note that due to the "caretaker" arrangements, formal contractual targets were not set for 09/10. However, a suite of targets were set for the CBC area). By agreeing to this proposal and removing clause 59a, Central Bedfordshire Council would not be required to meet any future minimum funding level, thereby removing a significant area of risk.

Risk - Future Liability

8. Another potential area of risk to Central Bedfordshire Council relates to the MAC's lump sum costs (i.e. overhead costs on the contract including winter maintenance, the watchman role etc) in those areas where Bedford Borough Council has indicated their future intention to deliver services in-house through their Direct Services Department (DSD). Throughout the discussions, the

position of Central Bedfordshire has been that, were Bedford Borough Council to remove work from the contract, any residual costs associated with that action should be borne by BBC, and not CBC. e.g. if BBC removed the requirement for Amey to maintain the road condition database, the database would still need to be maintained and the full cost should not fall to CBC.

9. At the request of both Councils, Amey LG has agreed to take all future liability for such changes to the scope of the contract onto itself, in exchange for award of the third and final outstanding contract extension. This extension would take the contract end date to 31st March 2016. The benefit to CBC of this arrangement is that there would be no risk of any claims for costs resulting from actions taken by BBC or CBC in removing work from the contract. It is felt that this proposal gives CBC the optimum value for money option and removes another area of financial risk from the operation of the contract.

Form of Agreement

10. The deed of novation is a tri-party document between CBC, BBC and Amey LG. It removes clause 59 of the contract relating to value of works committed under the contract, whilst including the section 16 agreement between CBC and BBC. The deed defines the relationship between CBC, as owner of the contract, Amey LG and BBC. This is important as BBC wish to continue using parts of the contract going forward, including functions such as winter maintenance and gully cleansing.

Conclusions and next steps

11. The draft deed of novation and section 16 agreement now need to be formally agreed by all parties. Both CBC and BBC officers have indicated that these proposals are acceptable, as has Amey LG's senior management. The proposals offer benefit to all three parties and are in accordance with the resolution of CBC's Executive at its meeting on 14th April 2009. If Members endorse the proposed novation then, subject to the approvals by Amey LG and BBC, the novation will occur by 1 September 2010 or as soon thereafter as practical.
12. Should the agreement not be endorsed, CBC would need to enter into an alternative section 16 agreement with BBC, confirming the current interim arrangements for the remainder of the contract. This would leave CBC still subject to all of the financial and managerial risks outlined above.

Appendices:

None

Background Papers: (open to public inspection)

None