

Report Title:	Highways Services Contracts
Contains Confidential or Exempt Information	Yes Part I: Main Report Part II: Appendix B – Legal and financial implications of report's recommendation. Not for publication by virtue of paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972
Cabinet Member:	Cllr Hill, Cabinet Member for Highways and Transport, Customer Service Centre and Employment
Meeting and Date:	Cabinet – 27 March 2024
Responsible Officer(s):	Andrew Durrant – Executive Director of Place Services Alysse Strachan – Assistant Director Neighbourhood Services
Wards affected:	All



## **REPORT SUMMARY**

The Council's current contract for Highway Maintenance & Management reached the end of its initial term in March 2022. Approval was obtained to extend the contract until March 2024 to enable a procurement process to take place.

On 1st December 2022 Cabinet received a report and approved recommendations relating to the procurement of contracts to deliver Highway Services as part of a new service model. The recommendations in the report proposed grouping services into lots as part of the procurement exercise and to bring certain functions, including highway inspections, back in-house to provide better quality and cost control.

On 29<sup>th</sup> November 2023 Cabinet received a report and approved the award of four contract lots:

- Lot 1 - Highway Maintenance and Capital Works
- Lot 2 - Street Cleansing
- Lot 3 - Highway Transport and Bridge Professional Services
- Lot 4 - Traffic Signal and ITS (Integrated Traffic System) Maintenance

The preferred bidders and the financial implications were included in the Part II appendices to that report.

Lots 2, 3 and 4 have been awarded and the suppliers are now mobilising to commence services on 1st April 2024.

The Lot 1 preferred bidder was provisionally awarded the contract on 8<sup>th</sup> December 2023. During the 10-day Alcatel (standstill) period required by the Public Contracts Regulations 2015 (PCRs) the three unsuccessful bidders contacted the Council questioning how the commercial scoring methodology had been applied for one specific aspect. The Alcatel (standstill) period was extended to allow the Council to investigate.

Following investigation, it is recognised that there was a lack of clarity between the tendering instructions, a clarification response posted in July 2023 and how the scoring was applied. Officers took specialist external legal advice and have considered how to resolve this issue in a fair, open, compliant and efficient manner that will comply with the PCRs, whilst minimising additional costs and protecting the Council from the risk of legal challenge.

Having investigated all options thoroughly, the Council concluded – supported by external legal advice received - that it was not possible to continue with the procurement fairly and lawfully, and that it would not be expedient and in the public interest to proceed.

On this basis the procurement was terminated, and the Council will now run a new procurement process for the Lot 1 services. Lots 2 – 4 remain unaffected and the new contracts will come into effect as planned from 1 April.

To allow for a new procurement process to be undertaken and to allow for approval and mobilisation of a new contract, an extension of the existing contract with VolkerHighways Ltd will be required.

## 1. DETAILS OF RECOMMENDATIONS

**RECOMMENDATION:** That Cabinet notes the report and:

- i) **Delegates authority to the Executive Director of Place Services in consultation with the Cabinet Member for Highways and Transport, Customer Service Centre and Employment, and the Deputy Leader and Cabinet Member for Finance to agree terms for the extension of required Highway services with the current supplier, VolkerHighways Ltd.**

## 2. REASON(S) FOR RECOMMENDATION(S) AND OPTIONS CONSIDERED

### Options

**Table 1: Options arising from this report**

<b>Option</b>	<b>Comments</b>
Extend the existing contract for required Highway services with the current supplier, VolkerHighways Ltd.  <b>This is the recommended option</b>	This would ensure that the Council can continue to deliver Highway services and fulfil statutory duties whilst the council conducts a new compliant tender process.
Do Nothing	This is not possible as services could not be delivered so the Council would not be able to fulfil its statutory and regulatory duties.

### **The discrepancy**

- 2.1 In July 2023, before bids were received, a clarification question response was issued erroneously on the Procurement Portal. This response suggested that a specific scoring approach would be applied to individual sub-components of the price element of the bid evaluation, which was at odds with the original and intended scoring approach. The evaluation was carried out on the basis of the original intended scoring approach (i.e. the specific scoring approach was applied to the price score as a whole).
- 2.2 Upon receipt of the scores and feedback following the award of the contract, all three unsuccessful bidders have complained and queried why this approach was taken by the evaluators.
- 2.3 The Council has investigated those complaints and has sought external specialist legal advice, which has led to the conclusion that it would be unlawful to proceed to enter into the Contract with the preferred bidder, particularly in light of likely legal challenge. It is likely that some bidders may have been unintentionally misled by the clarification response before preparing their bids.

### **Options considered**

- 2.4 The Council has investigated whether it would be possible to proceed with the current procurement by partially rewinding the process, by clarifying how the price element of the bid evaluation would be carried out and allowing all bidders to re-submit the price element of their bids.
- 2.5 Since the preferred bidder's scores and technical feedback had been disclosed to the unsuccessful bidders in their unsuccessful award letters (as per the PCRs) and to ensure equal treatment, a rewind could only take place by disclosing all of the scores and the narrative feedback of each of the unsuccessful bidders to all bidders.
- 2.6 Not all bidders agreed to the proposed rewind and the Council has concluded, based on legal advice, that it is not possible to proceed with the rewind in a way which is lawful and consistent with its duties under the PCRs.

### **Termination of procurement – Lot 1**

- 2.7 The Council is entitled to terminate this procurement process as set out in the Invitation to Tender, and not enter into the contract in question so long as any decision is reached in accordance with the Council's duties under the PCRs which include the duties of equal treatment, transparency and proportionality.
- 2.8 It is the view of officers, supported by external legal advice, that the Council had no option other than to terminate the procurement of Lot 1. Letters have been sent to the four bidders terminating the procurement. The Council has therefore revoked the award to the preferred bidder and will not be proceeding to award the Contract to any bidder.

### **New procurement – Lot 1**

- 2.9 The Council will now commence a new procurement exercise for Lot 1 and ensure the completion of a rigorous and compliant competitive procurement (Open Procedure) process following the PCRs. Upon completion of the

procurement exercise a report will be presented to Cabinet recommending an award to the preferred bidder, once established.

- 2.10 As part of this, a lessons learned review is being taken forward – led by members of the Council’s Executive Leadership Team – which will lead to additional safeguards being put in place and processes amended where necessary in order to reduce to risk of further issues in relation to this or other procurement processes. A number of changes have been implemented immediately, including limited access to documents relating to clarification responses and a review of all posted clarification responses prior to the submission of bids.

**Extension of existing service provision**

- 2.11 There is insufficient time to conduct a procurement to secure an interim contract for the services in Lot 1 which are required for the council to fulfil statutory duties. To enable the new procurement process and ensure a compliant procurement to be concluded, the existing contract with Volker Highways Ltd will need to be extended (excluding services to be delivered through Lots 2 and 3). There is no alternative viable option to continue to deliver core Highway services during this period, a number of which are required to meet statutory duties.
- 2.12 All of the stages set out in this report were jointly developed between RBWM Highway, procurement and legal teams in conjunction with external specialist legal advice.

**3. KEY IMPLICATIONS**

- 3.1 The approval of the recommendation in this report will ensure that statutory and legal obligations can be met as the Highway Authority.
- 3.2 Alongside the mobilisation of Lots 2, 3 & 4, and the new procurement for Lot 1 services, a parallel piece of work is ongoing to review and restructure the Highways service which will support the new operating model required for all contracted services. This includes functions, including highway inspections, being brought back in-house to provide better quality and cost control.

**Table 2: Key Implications**

<b>Outcome</b>	<b>Unmet</b>	<b>Met</b>	<b>Exceeded</b>	<b>Significantly Exceeded</b>	<b>Date of delivery</b>
Enter into a contract extension with VolkerHighways Ltd to deliver Highway services from the end of the existing contract (31 <sup>st</sup> March 2024) until the new contract commences	Extension not agreed	Agreed extension	N/A	N/A	1 <sup>st</sup> April 2024 – extension in place

#### **4. FINANCIAL DETAILS / VALUE FOR MONEY**

- 4.1 No financial implications from this report at this stage. The financial implications from Lots 2, 3 and 4 remain unchanged from those set out in the Cabinet report of 29th November 2023. There may be financial implications relating to the extension for existing services, but they are not known at this stage. Every attempt will be made to keep any additional costs to a minimum. Any financial implications relating to the extension for existing services will be considered under the recommended delegated authority. The financial implications relating to the award of the Lot 1 contract will be presented to Cabinet as part of the award decision.

#### **5. LEGAL IMPLICATIONS**

- 5.1 The discussions of the legal implications in this report's recommendations are contractually sensitive and therefore additional information is included in Appendix B which is Part II by virtue of paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972.
- 5.2 The termination of the existing procurement process and commencing a new procurement process will ensure the contract has been procured in line with the Council's constitution and the Public Contracts Regulations 2015. The Council's Legal Services Team have been involved throughout the procurement and will support contract mobilisation activities and contract sealing.
- 5.3 The Council undertakes the role of Highway Authority, which provides statutory powers to operate and maintain a safe highway asset for all road users. Highway Authorities often work with suppliers to discharge these statutory duties, through service contracts, whereby the supplier delivers services which discharge the Authorities duties under the Highways Act 1980.
- 5.4 Transfer of Undertakings (Protection of Employment) regulations (TUPE) may apply to some roles transferring back to the Council from existing suppliers. The Council would work closely with suppliers to ensure any required consultation and transfers are undertaken in accordance with the Regulations and are seamless.
- 5.5 All contractual matters and certification required will be put in place to enable the extension in relation to the terms agreed with VolkerHighways Ltd.

#### **6. RISK MANAGEMENT**

- 6.1 The termination of the existing procurement and commencing a new procurement for Lot 1 will ensure the Council has conducted a compliant tender process following the PCRs. This provides assurance that the procurement process has been undertaken in an open, fair, transparent manner, giving all bidders equal treatment. Whilst there is always a risk of a challenge to the outcome and selection of a Preferred Bidder, which could result in delay to the contract award, the Council believes this approach to be suitably robust and compliant.

- 6.2 If the Council chooses not to enter an extension with VolkerHighways Ltd, it would be at significant risk of not being able to deliver its statutory and regulatory duties as Highway Authority. The extension of the existing contract recommended in this report is essential to maintain the continuity of services whilst a compliant tender process is concluded.

**Table 3: Impact of risk and mitigation**

Threat or risk	Impact with no mitigations in place or if all mitigations fail	Likelihood of risk occurring with no mitigations in place.	Mitigations currently in place	Mitigations proposed	Impact of risk once all mitigations in place and working	Likelihood of risk occurring with all mitigations in place.
There is a risk that a supplier may challenge the extension	Medium	Medium	External expert Legal advice on the approach taken		Medium	Medium

## 7. POTENTIAL IMPACTS

- 7.1 Equalities. An Equality Impact Assessment has been produced and is available as Appendix A to this PART 1 Report.
- 7.2 Climate change/sustainability. There are no specific climate change/sustainability implications in this report.
- 7.3 Data Protection/GDPR. There are no specific data protection/GDPR implications in this report.
- 7.4 Staff and HR Matters. Transfer of Undertakings (Protection of Employment) regulations (TUPE) may apply to some roles transferring back to the Council from existing suppliers. The Council would work closely with suppliers to ensure any required consultation and transfers are undertaken in accordance with the Regulations and are seamless.

## 8. CONSULTATION

- 8.1 Cabinet Paper on proposed options was considered and approved at Cabinet on 1st December 2022, developed further to consultation with officers and Members.
- 8.2 Cabinet Members and Senior Officers have been regularly updated through the procurement process, including the proposal to rewind the commercial evaluation element of the Lot 1 procurement, and the decision to terminate the procurement and the requirement to extend the existing contract.

- 8.3 The Assistant Director Neighbourhood Services, the Strategic Lead – Contracts & Service Improvement and the Procurement Manager have briefed the Executive Leadership Team (ELT) including the Section 151 Officer. ELT approved the termination of the Lot 1 procurement on 21st February 2024.
- 8.4 The Procurement Manager has been involved throughout the procurement, evaluation and in developing recommendations.

## 9. TIMETABLE FOR IMPLEMENTATION

- 9.1 Implementation date: 28th March 2024. The full implementation stages are set out in table 4.

**Table 4: Implementation timetable**

Date	Details
27 March 2024	Cabinet Approval
28 March 2024	Enter extension with Volker Highways

## 10. APPENDICES

- 10.1 This report is supported by the following appendices:

Appendix A - Equality Impact Assessment

Appendix B - Legal and financial implications of report's recommendation. (Part II)

## 11. BACKGROUND DOCUMENTS

- 11.1 This report is supported by two background documents:

- Cabinet Report 29<sup>th</sup> November 2023.
- Cabinet Report 01st December 2022.

## 12. CONSULTATION

Name of consultee	Post held	Date sent	Date returned
<i>Mandatory: Statutory Officer (or deputy)</i>			
Elizabeth Griffiths	Executive Director of Resources & S151 Officer	23/02/24	
Elaine Browne	Deputy Director of Law & Governance & Monitoring Officer	23/02/24	27/02/24
<i>Deputies:</i>			
Andrew Vallance	Deputy Director of Finance & Deputy S151 Officer	23/02/24	28/02/24
Jane Cryer	Principal Lawyer & Deputy Monitoring Officer	23/02/24	

Helena Stevenson	Principal Lawyer & Deputy Monitoring Officer	23/02/24	
<i>Mandatory:</i>		<i>Procurement Manager (or deputy) - if report requests approval to go to tender or award a contract</i>	
Lyn Hitchinson	Procurement Manager	23/02/24	27/02/24
<i>Mandatory:</i>		<i>Data Protection Officer (or deputy) - if decision will result in processing of personal data; to advise on DPIA</i>	
Samantha Wootton	Data Protection Officer	23/02/24	
<i>Mandatory:</i>		<i>Equalities Officer – to advise on EQiA, or agree an EQiA is not required</i>	
Ellen McManus-Fry	Equalities & Engagement Officer	23/02/24	26/02/24
<i>Mandatory:</i>		<i>Assistant Director HR – to advise if report has potential staffing or workforce implications</i>	
Nikki Craig	Assistant Director of HR, Corporate Projects and IT	23/02/24	25/02/24
<i>Other consultees:</i>			
Steve Mapple	Insurance & Risk Manager	23/02/24	29/02/24
<i>Directors (where relevant)</i>			
Stephen Evans	Chief Executive	23/02/24	27/02/24
Andrew Durrant	Executive Director of Place	23/02/24	26/02/24
<i>Assistant Directors (where relevant)</i>			
Andrew Vallance	Deputy Director of Finance & Deputy S151 Officer	23/02/24	
Becky Hatch	Assistant Director, Strategy & Communications	23/02/24	29/02/24
Alysse Strachan	Assistant Director Neighbourhood Services	23/02/24	23/02/24
<i>External (where relevant)</i>			
N/A			

Confirmation relevant Cabinet Member(s) consulted	Cllr Hill, Cabinet Member for Cabinet Member for Highways and Transport, Customer Service Centre and Employment	Yes
---	---	-----

## REPORT HISTORY

Decision type:	Urgency item?	To follow item?
Key Decision. First entered onto the Forward Plan 26th February 2024	Yes	No - Main report and Appendix A Yes – Appendix B

Report Author: Chris Wheeler, Strategic Lead – Contracts & Service Improvement, Neighbourhood Services
--



# Appendix A - Equality Impact Assessment

For support in completing this EQIA, please consult the EQIA Guidance Document or contact [equality@rbwm.gov.uk](mailto:equality@rbwm.gov.uk)

www.rbwm.gov.uk



## 1. Background Information

Title of policy/strategy/plan:	<b>Highway Services – Lot 1 contract</b>
Service area:	<b>Neighbourhood Services</b>
Directorate:	<b>Place</b>

### **Provide a brief explanation of the proposal:**

- What are its intended outcomes?
- Who will deliver it?
- Is it a new proposal or a change to an existing one?

**This contract extension is required to maintain and improve the borough's Highway network and fulfil RBWM duties as Highway Authority.**

**These services are already delivered through contracts for RBWM. The new contracts/ extension cover the same services in different groupings (lots).**

## 2. Relevance Check

### **Is this proposal likely to directly impact people, communities or RBWM employees?**

- If No, please explain why not, including how you've considered equality issues.
- Will this proposal need a EQIA at a later stage? (for example, for a forthcoming action plan)

**No - as no change to existing service provision. All people will benefit from a well-maintained Highway network.**

If 'No', proceed to 'Sign off'. If unsure, please contact [equality@rbwm.gov.uk](mailto:equality@rbwm.gov.uk)

### 3. Evidence Gathering and Stakeholder Engagement

**Who will be affected by this proposal?**

For example, users of a particular service, residents of a geographical area, staff

**Among those affected by the proposal, are protected characteristics (age, sex, disability, race, religion, sexual orientation, gender reassignment, pregnancy/maternity, marriage/civil partnership) disproportionately represented?**

For example, compared to the general population do a higher proportion have disabilities?

**What engagement/consultation has been undertaken or planned?**

- How has/will equality considerations be taken into account?
- Where known, what were the outcomes of this engagement?

**What sources of data and evidence have been used in this assessment?**

Please consult the Equalities Evidence Grid for relevant data. Examples of other possible sources of information are in the Guidance document.

## 4. Equality Analysis

Please detail, **using supporting evidence**:

- How the protected characteristics below might influence the needs and experiences of individuals, in relation to this proposal.
- How these characteristics might affect the impact of this proposal.

Tick positive/negative impact as appropriate. If there is no impact, or a neutral impact, state 'Not Applicable'

More information on each protected characteristic is provided in the Guidance document.

	Details and supporting evidence	Potential positive impact	Potential negative impact
Age			
Disability			
Sex			
Race, ethnicity and religion			
Sexual orientation and gender reassignment			
Pregnancy and maternity			
Marriage and civil partnership			
Armed forces community			
Socio-economic considerations e.g. low income, poverty			
Children in care/Care leavers			

## 5. Impact Assessment and Monitoring

*If you have not identified any disproportionate impacts and the questions below are not applicable, leave them blank and proceed to Sign Off.*

<b>What measures have been taken to ensure that groups with protected characteristics are able to benefit from this change, or are not disadvantaged by it?</b> For example, adjustments needed to accommodate the needs of a particular group
<b>Where a potential negative impact cannot be avoided, what measures have been put in place to mitigate or minimise this?</b> <ul style="list-style-type: none"><li>For planned future actions, provide the name of the responsible individual and the target date for implementation.</li></ul>
<b>How will the equality impacts identified here be monitored and reviewed in the future?</b> See guidance document for examples of appropriate stages to review an EQIA.

## 6. Sign Off

<b>Completed by: Chris Wheeler</b>	<b>Date: 22/02/24</b>
<b>Approved by: Alysse Strachan</b>	<b>Date: 22/02/24</b>

If this version of the EQIA has been reviewed and/or updated:

<b>Reviewed by: Ellen McManus-Fry</b>	<b>Date: 26/02/24</b>
---------------------------------------	-----------------------