

## **Highways Term Maintenance Contract 2017 - 2027**

Report of the Head of Highways, Capital Development, and Waste

***Please note that the following recommendations are subject to consideration and determination by the Cabinet (and confirmation under the provisions of the Council's Constitution) before taking effect.***

### **Recommendations:**

- (a) that approval be given to the contract award for the Council's new Highways Term Maintenance Contract in accordance with the recommendations set out in the accompanying Part II report;**
- (b) that collaborative work continues with Plymouth City Council and Somerset Council and the relevant contractor(s).**

### **1. Summary**

The current Highways Term Maintenance Contract (TMC) expires at the end of March 2017.

Cabinet decided to procure a new TMC to ensure that Devon County Council can continue to discharge its statutory responsibilities as Local Highway Authority.

The new contract has been designed to capture research on industry best practice, experience and learning over recent years to ensure that the new contract provides value for money and provides a good service to Devon's communities and users of the local highway network.

Care has been taken to strictly follow current procurement regulations in selecting suitable tenderers, compiling the contract documents, negotiating with tenderers and tender evaluation. Independent assurance has been received to confirm that the procurement process is robust.

This report sets out the decisions made relating to continued delivery of the service. It sets out the procurement process leading to the identification of the best overall tender. The report seeks Cabinet approval to the award of the next Highways TMC for the period 1 April 2017 to 31 March 2024, with extension options to 2027.

### **2. Introduction**

The existing Highway TMC, through which the Council commissions routine, reactive, emergency and planned highway maintenance work, expires on 31<sup>st</sup> March, 2017.

Cabinet decided on 13<sup>th</sup> May 2015, that the future delivery model should be a TMC. Further, to benefit from collaborative working, that the TMC should be jointly procured with Plymouth City Council (PCC) and Somerset County Council (SCC).

DCC has considered feedback from the regular attendance of Devon Highways officers at HATOC meetings, from individual elected Members, Place Scrutiny Committee, local

councils, individual customers and the networks of highway industry professionals in developing its strategy for the new TMC. This is to ensure that the Contract builds on industry best practice in its technical requirements and in contract performance management. Also, that it enables the adoption of a collaborative culture linking the authority as client, the contractor and Devon's highway users and their representatives.

Joint authority working has been progressed in the development of the new contract. However, to enable the partner authorities to work together whilst avoiding the loss of their autonomy, it was decided that the procurement should be for three separate lots resulting in three separate but aligned contracts, one for the administrative area of each authority, rather than a single combined authority contract. Tenderers were permitted to submit bids for one or more than one lot, resulting in one or more possible multi-lot bids. The multi-lot bids could comprise bids for all three Authorities, or any combination of two of the Authorities. In any event, DCC will have its own specific contract, as will SCC and PCC.

A Cabinet Member Decision was taken in January 2016, regarding the selection of tenderers following the Pre-Qualification Questionnaire (PQQ). Members will recall that the four Contractors who submitted PQQs for the DCC Lot satisfied the qualification criteria and were all invited to participate in the tender process.

In producing the contract documents, use has been made wherever possible of the suite of documents from the Highways Maintenance Efficiency Programme (HMEP), which is a Department for Transport funded and sector led transformation programme.

Place Scrutiny Committee has been heavily involved during the period of the procurement project, with two specific members' briefings. In March, 2016, there was a briefing which included:

- Timescales for the procurement
- Procurement procedure
- Evaluation methodology
- Governance of the overall arrangements.

A supplementary briefing for Place Scrutiny Committee Members was also held on 14<sup>th</sup> June which focussed on Performance Management arrangements for the new contract. Following an update at Place Scrutiny Committee on the same date, a briefing note was distributed to all County Members updating on progress with the procurement and circulating the two sets of slides which were used for the Place Scrutiny briefings.

### **3. Contract and evaluation Process**

The Authorities chose to follow the procurement procedure referred to as Competitive Procedure with Negotiation. This procurement procedure enables Initial Tenders to be received, at which point each Authority has the option to either award their Contract or continue with the procurement by entering into a process of negotiation intended to improve the content of tenders prior to then inviting submission of Final Tenders and then awarding following the evaluation of the Final Tenders. This process was chosen as it is well suited to meeting the needs of highway authorities in procuring complex, long term maintenance contracts. The process enables optimisation of tenders as ideas and initiatives can to be explored in negotiations involving the client and tenderers, before making changes to the contract documents that will be used for the final bids. The negotiation process has enabled the Council to talk directly to each tenderer, which has proven beneficial in refining the contract.

In accordance with procurement regulations, the contract award criteria were advised to tenderers at the outset of the competitive process and were composed of three parts:

- 40% Price
- 25% Technical Quality
- 35% Additionality

More details of the process and the evaluation methodology are contained at Appendix 1, including what is meant by “Additionality”.

The process was co-designed with partner Authorities and with the partnerships’ external legal advisors, Foot Anstey. Devon Audit Partnership has also been overseeing the evaluation process to add independent assurance.

#### **4. Final Award process**

Full details of the outcome of tender evaluation using the pre-defined contract award criteria are contained in the Part II report.

The tender evaluation process that has been followed was published in the tender documents. On completion of the Technical Quality including Additionality and Finance evaluations, the resulting scores were added together to give a total score for each tender submission. As there is both a Quality and Price component (worth 60% and 40% respectively), the recommended tenderer will give the optimum Price / Quality balance. As such the winning tender may not necessarily be the lowest priced submission, when price is viewed in isolation. However, the combination of price and quality ensures that the tender with the best overall score represents best overall value.

In considering multi-lot tenders, which is where tenderers bid for more than one Authority contract, (as this provides the opportunity for increased value through an integrated contract delivery approach), the Authorities agreed that no Authority could be compelled to accept a multi-lot tender if that multi-lot tender would put the Authority in a less favourable position than a higher scoring single-lot tender for that Authority. In other words, this means that for a multi-lot tender to succeed, it must represent better value than all of the corresponding single lot tenders.

SCC decided to exercise its right to award at Initial Tender stage. This meant that SCC did not proceed to the negotiation and Final Tender stage. Therefore, the only multi-lot bids that could be submitted at Final Tender were for the two lots comprising the administrative areas of PCC and DCC.

Multi-lot submission for PCC and DCC can only be awarded if both Authorities independently agree this Award. PCC will make its contract award decision on 13<sup>th</sup> September, so a verbal update of the PCC decision will be given to Devon Members at the Cabinet meeting on 14<sup>th</sup> September.

#### **5. Assurance process**

Utilising the extensive professional knowledge of the County Council, many different service areas have been involved with the TMC procurement project, as indicated below:-

- Business Strategy and Support
  - ICT
  - Procurement
  - Estates
- Finance

- Highways
- HR
- Legal Services

The documents for the TMC procurement have been co-designed with PCC and SCC so the documents have been subject to a high degree of peer scrutiny and challenge. As previously mentioned, Place Scrutiny Members have also been briefed in detail on the procurement.

Additionally, an external legal advisor, Foot Anstey has been jointly appointed by DCC, SCC and PCC to assist and advise on the contract. Foot Anstey has provided assurance of the procurement process and documents at key project milestones, such as at Invitation to Submit Final Tenders Stage, and now, at Contract Award.

Devon Audit Partnership has been involved in the design of the evaluation process, and has monitored performance during evaluation and moderation. It has also assisted in checking and assuring key documents and has been involved in assuring the final outcome has been reached correctly following the processes published in the tender documentation.

In June, 2016 DCC commissioned separate external legal advisors, Bevan Brittan, to consider DCC's position. They carried out a high level legal audit of procedural compliance with procurement law and checked that DCC's decision making processes are in accordance with relevant legislation and the Council's constitution. They reported that the procurement process and decision-making to date appears robust.

A Project Board comprising Cabinet Members and senior officers from the three Councils has provided executive decision making and oversight on the delivery of the procurement project. For DCC, these representatives are the Cabinet Member for Highway Management and Flood Prevention (Councillor Stuart Hughes), the Chief Executive (Phil Norrey), and the Head of Highways, Capital Development and Waste (David Whitton).

## **6. Continual evolution including future collaborative working with PCC and SCC**

Collaborative work to date has primarily concentrated on the procurement of this contract, which has been done with future alignment possibilities in mind. It is acknowledged that there are likely to be advantages of continuing the collaborative working with SCC and PCC. Collaborative work on the procurement of this contract has generated national interest within the highways sector.

Collaborative working is the core of what HMEP and the industry are seeking to achieve in looking for overall synergies and efficiencies. Collaborative working is one of the factors required to demonstrate that DCC is a high performing Highway Authority, which will enable it to maximise capital funding provided by the Department for Transport, through its Incentive Fund. For DCC, qualifying as a high performing authority secures additional capital funding of £7M per year by 2021.

One of the recommendations in this report is therefore to continue collaborating with SCC and PCC in the evolution of the highway service being commissioned through the contract and also through exploiting wider joint working opportunities. The extent of the collaboration will be based on a business-like approach including an analysis of the benefits that have been derived to date from joint authority collaboration on the TMC procurement. This analysis is yet to be carried out however a post procurement project review will be undertaken.

Collaborative work with the other Authorities in the south-west will also continue through the South West Highways Alliance, and this potentially will include procurement of some framework contracts that will enable the delivery of works not commissioned through the TMC, as well as benchmarking of services and co-design of policies.

## **7. Financial Considerations**

The detailed financial considerations are covered in Part II of this report.

## **8. Equality Considerations**

The Council is subject to the Public Sector Equality Duty ("PSED") under s.149 of the Equality Act 2010.

The Equality Act 2010 Public Sector Equality Duty requires decision makers to give due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other prohibited conduct;
- advance equality by encouraging participation, removing disadvantage, taking account of disabilities and meeting people's needs; and
- foster good relations between people by tackling prejudice and promoting understanding,

taking account of age, disability, race/ethnicity (includes Gypsies and Travellers), gender and gender identity, religion and belief, sexual orientation, pregnant women/new and breastfeeding mothers, marriage/civil partnership status in coming to a decision, a decision maker may also consider other relevant factors such as caring responsibilities, rural isolation or socio-economic disadvantage.

In progressing this proposal, an Impact Assessment has been prepared which has been circulated separately to Cabinet Members and also is available on the Council's website at: <https://new.devon.gov.uk/impact/highways-maintenance-contract-2016/>, which Members will need to consider for the purposes of this decision by Cabinet.

Potential equality issues have been addressed through mitigation measures within the contract. As a consequence there are no particular equality issues arising from the impact assessment. Cabinet's decision is about which tenderer is selected to provide the service. The decision on TMC contract award does not alter service levels or policies, which require separate decisions. However if any changes to service level or policy are proposed then a separate Impact Assessment will be produced at the time that decision is considered.

The new contractor will be bound by standard equality clauses in the contract to ensure the Contractor does not discriminate against staff or service users unlawfully.

## **9. Legal Considerations**

The requirement to ensure compliance with the Public Contracts Regulations 2015 and associated legislation and case law has been taken into account in the preparation of this report and the recommendations contained in Part II of the report. Foot Anstey has provided procurement support and assurance throughout this procurement and the procurement process up to June 2016 has been audited for compliance with procurement law and DCC's decision making process by Bevan Brittan.

## **10. Risk Management Considerations**

A contract of this scale with DCC is very attractive. Unsuccessful tenderers will have made a significant investment in the procurement exercise in terms of time and resource and may scrutinise the entire procurement process including compliance with procurement regulations, the published process and other legal requirements. As with any public procurement there is a risk of procurement challenge.

This risk has been mitigated by:

- Appointing specialist external legal advisors to support, advise and provide assurance in relation to the procurement process.
- Appointing a separate legal advisor to audit DCC's compliance with legislation and its Constitution.
- Ensuring that any minor changes to the evaluation process since the first stage of the competitive process, which began in November 2015, have been agreed with all tenderers.
- Ensuring that all those involved in the evaluation and moderation stage have received appropriate training on the evaluation process.
- Engaging Devon Audit Partnership to oversee the development and operation of the evaluation process.
- Adopting sound project Governance, including the Joint Highway Board, and Devon TMC Project Board.

The final stage of contract award decision making must comply with the published procurement process. Further information is provided in the associated Part II Report.

## **11. Options/Alternatives**

Please refer to the Part II report.

## **12. Reason for Recommendations**

The Highways Term Maintenance Contract is a very significant contract for Devon and a decision on contract award is required now to enable it to continue to meet its statutory duty as a Local Highway Authority.

The performance of the contract significantly influences key service outcomes for highway network performance in the immediate and long term.

The form of contract has been derived from HMEP advice and reflects national industry good practice.

The process that has been followed has been independently assured by various parties described in the body of this report and the recommendations provide Devon with the best value outcome.

David Whitton  
Head of Highways, Capital Development and Waste

**Electoral Divisions: All**

Cabinet Member for Highway Management and Flood Prevention: Councillor Stuart Hughes  
*Strategic Director, Place: Heather Barnes*

Local Government Act 1972: List of Background Papers

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Background Paper	Date	File Reference
1. Members Briefing Paper	June 2016	
2. Impact Assessment	August 2016	<a href="https://new.devon.gov.uk/impact/highways-maintenance-contract-2016/">https://new.devon.gov.uk/impact/highways-maintenance-contract-2016/</a>

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## **Tender Process**

### **1. Procurement Route choice**

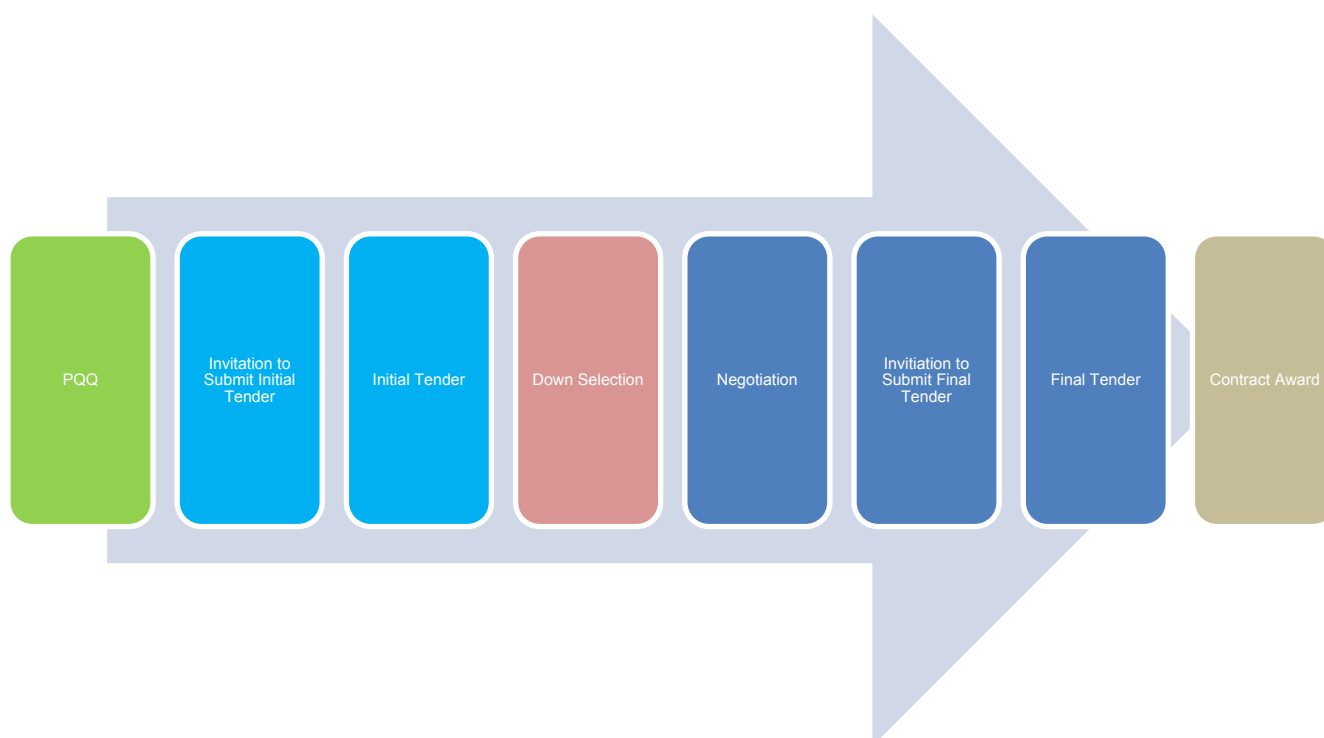
A new procedure was introduced in the 2015 Public Procurement Regulations called Competitive Procedure with Negotiation. A decision was taken that this route should be followed as:-

- 1 we are getting the market to move away from the traditional approach of bidding for one authority/contract to three, so there needs to be some tailoring of their normally readily available solution to do this.
- 2 we are asking the market to bring innovation to the procurement through looking at how they can best support the strategic aims and expected benefits of working within collaboration.
- 3 to bring together the knowledge of the industry to help co-design the contract is beneficial.

The advantage of following this procedure is that it offers all the benefits of a restricted procedure with additional flexibilities if required, including development of the documents through the process. The latter may also remove risk from the proposals as uncertainty can be reduced and suppliers are not put off by the rigidity of alternative processes. Additionally suppliers can be “down-selected” or direct award can be made at Initial tender stage.

### **2. Procurement Process**

This is summarised in the diagram below.



As can be seen above there are 8 main stages to the process, of which the last is Contract Award.

- PQQ was issued on 13<sup>th</sup> November 2015
- Invitation to Submit Initial Tender was issued on 25<sup>th</sup> January 2016

- Initial Tenders were received on 11<sup>th</sup> April 2016
- Down selection took place following evaluation of Initial tenders although no bidders were down selected.
- Negotiation and rewriting of the documents took place between 17<sup>th</sup> May and 15<sup>th</sup> July 2016
- Invitation to submit Final Tenders were issued on 18<sup>th</sup> July 2016
- Final Tenders were submitted on 12<sup>th</sup> August 2016.

### 3. Evaluation process – Technical Quality 25%

Part of the evaluation of the tenders was on the basis of the tenderers submissions on 11 technical questions. The questions covered the following subjects

- Overall Service Delivery
- Mobilisation
- Operational Structure
- Sustainable Service
- Structural Maintenance, 2 questions
- Environment & sustainability
- Reactive Maintenance
  - Safety defects
  - Emergencies
  - Winter Service
- Cyclical Maintenance

An evaluation matrix was included in the tender documents so that the tenderers could understand how their responses would be evaluated. This matrix has been used consistently and has not been altered.

The tenderers' responses were evaluated by 7 panels constituting 3 people in each. The staff involved were chosen for their professional and technical knowledge. All staff involved had to undergo training on how to evaluate the responses. All staff involved had to also sign confidentiality agreements. Only DCC staff evaluated the DCC submissions.

Each person had to evaluate their questions independently before the panels were formed and the scores moderated to come up with a consensus, not an average score for every question for each bidder. Some of the moderation sessions were attended by Devon Audit Partnership to ensure the correct process was being followed.

### 4. Evaluation Process - Additionality 35%

Additionality was defined by the Authorities as

*“The ongoing realisation of genuine benefits for the Authorities, beyond competent delivery of the Services (and which, as such, may also be fairly characterised as “value-added” components of the Tenderer’s offering).”*

Additionality was measured through 8 Quality Performance Objectives (QPO's), based on three themes.

#### **Cultural Alignment**

- Partnership Principles
- Digital by Design
- Community Engagement and Social Value

#### **Efficient Delivery**

- Delivering integration and service deliveries
- Demand Management
- Supply Chain Management

#### **Innovation and Agility**

- Innovation
- Agility

The tenderers were asked to submit up to 5 Quality Undertakings for each of the 8 QPO's, as well as identifying how the undertakings were to be measured. These undertakings will form part of the contract and are also Key Performance Indicators. The QPOs were evaluated by staff as described above, although using a separate evaluation matrix, which had also been communicated to all tenderers at the start of the process, and has not been altered.

To ensure that there was a golden threading on additionality, part of the technical questions were scored on the basis of the inclusion of additionality into the answers.

#### **5. Evaluation process – Financial 40%**

The overall evaluation process awards a larger proportion of the marks to the quality and additionality areas than it does to the financial submissions. In order to minimise the financial risk to DCC a sophisticated financial model was developed and used in the financial evaluation. The model capped the financial risk to DCC to ensure the solution was affordable whilst still seeking to obtain high quality.

The model awards financial scores that adequately separate high and low priced tenders. So, for example for a lowest tender price of £30m a year, the score would be 100 marks (i.e. the top price evaluation percentage score of 40%). A tender that is 20% higher at £36m a year would attract a price evaluation score of about 5 marks (i.e. a price evaluation percentage score of about 2%).

This score separation is more than for a conventional scoring model, but avoids the risk of a high cost outcome, where the gap in the price score could easily be closed by associated high quality and additionality scores.

This price evaluation process was set and communicated to all tenderers at PQQ stage and has not been altered throughout the procurement process.

The price lists that have been submitted by tenderers are based on our best estimate of the volume of quantities going through the contract in the first year. For DCC alone this means over 5000 rates<sup>1</sup> have been submitted by the tenderers for all types of highway maintenance activity. The rates submitted have been checked to ensure that there are no obvious anomalies, that the tenders do not appear abnormally low (i.e. that the contract is not unsustainable), and individual orders have been considered to highlight any further anomalies. The formulas within the Price List have been assured by the Devon Audit Partnership. This work has been carried out in conjunction with PCC to identify any similar issues between the Authorities.

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<sup>1</sup> A rate is a price for a particular item of expenditure listed in the price list.