

<b>Decision Maker:</b>	<b>Cabinet member: economy and corporate services</b>
<b>Decision Date:</b>	<b>24 May 2017</b>
<b>Title of Report:</b>	<b>Terms of the BT delivery close down (phase one of the Borders Broadband project)</b>
<b>Report by:</b>	<b>Assistant director - communities</b>

## Classification

Open

## Key decision

This is a key decision because it is likely to result in the council incurring expenditure which is, or the making of savings which are, significant having regard to the council's budget for the service or function to which the decision relates. Notice has been served in accordance with Part 3, Section 9 (Publicity in Connection with Key Decisions) of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012

## Wards affected

County-wide.

## Purpose

To agree terms of close down of the fibre broadband delivery with BT (as part of phase one of Borders Broadband project - referred to as Fastershire).

## Recommendations

**THAT:**

- (a) **the delivery element of the Borders Broadband contract with BT be closed subject to a deed of variation being agreed with the following terms:**
- **Achievement of contracted delivery for phase one is based on required premises being fully evidenced as Passed Premise with the ability to access a 30Mbps service based on the output of the wholesale line checker as of 31 May 2017;**
  - **That a compensation sum is calculated on the basis of £2,400 for each premise not achieving Passed Premise status as part of the target delivery;**
  - **That any compensation sum is retained from any future eligible claim and if required charged to BT where the residual contract payments are less than the compensation sum due;**
  - **That BT's obligation to deliver universal service commitment (USC) under the contract is removed and 50% of Herefordshire's M1b budget is**

reallocated to Herefordshire's M1a budgets subject to evidence of under 30Mbps premises being reached and costs incurred;

- (b) subject to recommendation (a) being implemented, a reinvestment fund be established under the control of the partner councils (for which Herefordshire Council will act as accountable body) to hold any excess profits generated by BT to be used to fund additional network deployment during a period of 7 years after final payment for phase 1;
- (c) in the event that the deed of variation referenced in recommendation (a) is not accepted by BT, BT be issued with a termination notice based on the contracted delivery as of 31 December 2016 based on evidence provided; and
- (d) the assistant director communities be authorised to take all operational decisions necessary to effect the above recommendations.

## Alternative options

- 1 That BT is given an additional 12 months to deliver any outstanding deployment. This is not recommended as BT have already been issued with contract extensions. Also, closing delivery at this point will mean options for premises that fall out of the BT delivery can be explored in a timely manner to meet the intentions of the revised broadband strategy.
- 2 That BT are immediately issued with termination notice based on contractual default due to missed coverage as of December 2016 without the terms identified above being offered. This option is recommended if BT do not agree the proposed terms of a negotiated close down. It is likely that this would be a longer process and may involve resources being required to support litigation that are better used to support the Fastershire project going forward with an uncertain outcome for the partner councils. It is deemed prudent to offer reasonable terms before taking this step.

## Reasons for recommendations

- 3 The terms outlined in the recommendations are considered the best outcome for due diligence in the use of public funds whilst meeting the ambitions of the revised broadband strategy agreed by cabinet in December 2015. In presenting these terms the partner councils are offering reasonable conditions to bring to a close overdue delivery, with compensation for reinvestment in a future solution for those premises not reached as part of the planned delivery for phase one.
- 4 The recommendation concerning USC (universal service commitment) is based on recognising that premises of less than 2Mbps have been serviced by either the fibre network or the availability of the Better Broadband (national government subsidised satellite scheme).

## Key considerations

- 5 Herefordshire Council is working in partnership with Gloucestershire County Council to improve the broadband network across the two counties to enable businesses, communities and individual households to benefit from faster broadband. The public sector funding is via local and national government, with Broadband Delivery UK (a government department) supporting the project. The emphasis of the programme has always been on extending the reach of high speed broadband as deeply into rural areas as possible, as more populated areas have or are more likely to benefit from commercial delivery.
- 6 The intervention area was created through an open market review in 2011 to establish areas not planned for commercial investment – therefore eligible for public subsidy. This intervention area needed to be agreed by the National Competency

Centre to qualify for state aid under EU regulations.

- 7 BT was contracted to delivery phase one in December 2012 based on their best and final offer (BAFO) of 77.8% of premises in the intervention area for Herefordshire, providing download speeds of 30Mbps and above – this represented 35,424 out of 45,532 premises within the eligible area of Herefordshire. The target figure was latterly increased to 36,174 through a formal variation that encompassed the authorities’ acceptance of an increased and agreed baseline figure. In addition, every premise in the intervention area was to have, as a minimum, access to the government’s universal service commitment (USC) of >2Mbps. This was due to be delivered via fibre coverage, existing asymmetric digital subscriber line (ADSL), broadband extending technology (BET) or a satellite offer where the project covers the networking charge.
- 8 Within the overall delivery the contract with BT includes distinct targets as geographic milestones to ensure rural and more urban areas are reached simultaneously and that the contract could be monitored for delivery. However, BT have failed to meet a number of milestones and the partner councils have agreed to a contract extensions on three occasions (in March, May and September 2015). In April 2016 the authorities agreed an upwardly revised baseline and for all milestones to be concluded in December 2016 in return for additional premises to be delivered through a “recovery plan”.
- 9 Based on the information provided by BT in April 2017 the table below shows status of milestone achievement:

<b>Milestones areas</b>	<b>Target coverage</b>	<b>% CRFS*</b>
1 Ross on Wye	10,335	94.2
6 West Hfds	594	97.1
9 North Glos & Ledbury	2,231	62.2
11 Central Hfds	14,391	98.5
12 North Hfds	4,390	61.1
13 Kington	3,131	92.1
14 East Hfds	352	77.3
15 additional coverage	750	43.7

\*customer ready for service

- 10 The above table does not take account of original milestone dates which will need to be considered in the event of termination.
- 11 Negotiations have taken place with BT to consider contract extension to March 2017, however terms were not concluded and it became apparent that although BT was making progress on delivery it would not be concluded by March 2017.
- 12 The alternative options above outline the different courses of action to close down the delivery with BT – the timing is particularly relevant as a new provider (Gigaclear) will be starting delivery in the county from June 2017. However, there are a number of issues that need to be resolved as outlined below.
- 13 Premises not delivered – As outlined above BT have fallen short of target coverage. The recommendation is for BT to complete as much delivery as possible by 31 May 2017, any premises not eligible nor evidenced as Passed Premise will not be considered as achieved.
- 14 Premises claimed – through contract assurance and queries raised by customers it has been established that BT have claimed for premises that are not a Passed

Premise under the contracted terms – i.e. ability to purchase a service. This also relates to claimed speeds – the NGA (next generation access) element of the contract is for 30Mbps and above – however it has been found that when placing an order the speeds delivered can be lower than the 30Mbps threshold. It is BT's responsibility to provide accurate claims as evidence of delivery.

- 15 Universal Service Commitment (USC) – this is a government commitment that all premises should be able to access at least a 2Mbps service, and was built into the contract with BT. The USC has been delivered through the fibre deployment and the Better Broadband Scheme. Costs have been incurred through the fibre deployment to reach the USC commitment (that cannot be counted as NGA as below 30Mbps). Therefore, BT are requesting a relocation of payment codes of £550k from M1b (USC coverage) to M1a (NGA payments). This is only relevant to Herefordshire and covers 50% of allocated expenditure on USC - the remaining 50% funds would be retained for further network delivery in Herefordshire. Payments will be made on unclaimed expenditure to ensure there is no double funding.
- 16 Reinvestment fund - The contract provides for mutual agreement in establishing a reinvestment fund to meet state aid regulation to “claw-back” excess profits made by BT as part of the project. This is based on over achievement of BT's estimates of take up of the fibre service in the cost model submitted (stated as 20% take up, though the two counties are averaging 30% take up already). How the reinvestment fund operates was not set out in the original contract, therefore this report recommends that the reinvestment fund be held in an account by the partner councils to fund further network deployment for the term of the agreement (7 years after final payment). After 7 years if funds are still in the reinvestment fund they are distributed to the partner councils on a geographic basis for any form of investment. The partner councils will identify need for network investment which BT, along with other suppliers, could bid for – this provides a reasonable, fair and transparent process. As accountable bodies and commissioners of public services it is appropriate for the partner councils hold and allocate these funds.
- 17 Employment sites - the contract provides for BT to specifically deliver to a list of significant employment sites. Once evidence is provided by BT this element of the contract can be fully assessed – if needed any compensation will be applied to under-delivery based on £2,400 per premise.
- 18 Evidence – reflecting on the issues outlined above evidence of Passed Premise will be based on BT proving that customers can order and purchase a service – this is referred to as the “wholesale” view. This is publically available for individual premises and produced by BT through the ADSL checker on-line. It will be BT's responsibility to produce an output of that data for each premise in the eligible area identifying available services and associated speeds as of 31 May 2017. BT have been made aware that the project requires this evidence base to demonstrate the customer can purchase a service.

## **Community impact**

- 19 The purpose of investment in the broadband network by local and national government was to reach premises that were not being covered by commercial providers. This is predominately in the rural areas of the counties, and the contract with BT has seen thousands of homes and businesses benefiting from some of the best broadband connection in the country. Based on BT's modelled output, between 85-90% of premises in Herefordshire should have had access to fibre broadband by the end of 2016. This figure comprises BT's own commercial deployment and the Fastershire intervention area.

- 20 The Fastershire project aims to improve the opportunities for citizens across the two counties to make use of digital connectivity where supporting education and learning, accessing services, enhancing employment opportunities, supporting preventative health or addressing well-being by tackling isolation. Connectivity also has a key role in the sustainability of rural communities by helping rurally based businesses to be viable and competitive as well as ensuring people living in rural communities have access to the same broadband services as those in more populated areas.
- 21 Herefordshire Council's corporate plan includes the priority of supporting the growth of the county's economy. In addition to increasing the number of premises with the potential to access superfast broadband services, improved connectivity will assist with delivery of other corporate plan activity including:
- Growing businesses, jobs and wage levels
  - Improved provision of information and signposting
  - Increase in self-serve web transactions.
- 22 Improvement to broadband was identified as a key element of the Marches local enterprise partnership strategic economic plan. An economic impact assessment has been developed to estimate the significant impact on the local economy which may result from the project. It estimates a gross value added (GVA) uplift for Herefordshire of £13m per annum and a cumulative GVA uplift of £120m over ten years.

## Equality duty

- 23 The equality duty is in section 149 of the Equality Act 2010. It ensures that public bodies consider the needs of all individuals in shaping policy, in delivering services, and in relation to employees. The duty requires that when exercising public functions, public service providers must have due regard to the need to:
- Eliminate unlawful discrimination, harassment and victimisation and any other conduct prohibited by the Act
  - Advance equality of opportunity between people who share a protected characteristic and people who do not share it
  - Foster good relations between people who share a protected characteristic and people who do not share it.
- 24 The duty relates to different groups who share any of the "protected characteristics" of age, sex, pregnancy and maternity, disability, race, marriage and civil partnership, religion or belief, sexual orientation. A needs and impact assessment is one tool that may assist decision makers to comply with the public sector equality duty.
- 25 When the original 'Borders Broadband Contract Award and Partnership Agreement' (September 2012) was agreed an equality impact and needs assessment was completed and though significant deployment of fibre broadband has taken place key aspect of the assessment still apply. That assessment demonstrates a range of positive impacts in tackling the inequality of broadband coverage. Primarily, by improving the broadband network, people will have better access to services and greater equality of opportunity.
- 26 In meeting the equality duty for this decision the focus is on eliminating the barriers to internet access based on the following:
- Infrastructure: continue with the roll out of fast broadband to everyone's household that needs it to ensure equal access of availability.
  - Age: encourage take up by older people through course and classes based on the fact that as people get older they are less likely to take advantage of broadband.

- Cost: that free wifi continues to be available including in the network of libraries where the public access PCs.
- Services: that services provided by the council are easy to access and navigate on the local authority webpages.
- Communities: self-run community schemes operate with support (financial and advice) from the local authority.

## Financial implications

- 27 The first contract to extend superfast broadband beyond the commercially viable areas was awarded to BT in 2012 and was worth up to £35.42m. BT have met their targets for Gloucestershire so outstanding delivery is based on Herefordshire. Funds unclaimed to date are c£10m – depending on BT’s delivery up until 31 May 2017 and any penalties applied, some or all of that fund can be used for reinvestment in the broadband network under other contracts in meeting the requirements of the revised broadband strategy. Until BT submits claims with required evidence that amount is not predictable but cannot exceed the contracted sum. BDUK as part funder of phase one have agreed that any underspend in phase one can be reinvested into the network.
- 28 In addition funds acquired from the reinvestment fund (see paragraph 16) can be reinvested in broadband delivery to cover shortfall in any phase one delivery and future delivery – this will be through new procurements or contract extensions. All new contracts have the details of the investment fund outlined as excess profits returning to the councils for investment at their own discretion.
- 29 As part of this decision no further milestone achievement certificates, that trigger payment, are issued until evidence of delivery to the partner councils’ satisfaction is received and related issues are resolved.
- 30 If the partner councils decided to pursue the alternative option of termination a compensation sum would be calculated based on in the contract definition. This will be further verified through evidence and data provided by BT and assessed by the authorities.

## Legal implications

- 31 Broadband delivery is not a statutory function of the council, but the general power of competence is available under the Localism Act 2011 to enable the council to conduct the project as set out in this report.
- 32 The procurement process and contracts were established in line with OJEU procurement requirements, BDUK requirements and the council’s contractual procurement rules.
- 33 The definition of Passed Premise requires that the premise must be able to “purchase the wholesale access products” and “services over the network”. On that basis, if no ISPs can access the wholesale services to be able to offer the retail services to the premise then it is not a Passed Premise.
- 34 If there are any changes to a procured contract the council would need to ensure that the changes are not so material that they require a further procurement. The changes in this context falls under Regulation 72 (5) which states that a contract can be modified without a new procurement procedure where the value of the change is below both of the following values:
- a. The relevant threshold; and

- b. 10% of the initial contract value for service contracts provided that the modification does not alter the overall nature of the contract.

- 35 Until recently, the legal advice on this point was that, as the change in value is a minus value, the partner councils only need to consider whether the modification alters the overall nature of the contract – in this case the nature of the contract is the provision of broadband to the area and this has not changed. However, a recent case has undermined this advice by deciding that removing a substantial obligation from a contract may require a new procurement to be carried out even though the change has a negative value. This must therefore be considered in light of the removal of the USC obligations. Given that the USC obligation is being removed from BT contracts across the UK and that this is fully supported by BDUK then it is comfortable to proceed.
- 36 State aid is a key consideration in this project as public subsidy is being given to the telecommunications industry. The European Union state aid rules are designed to ensure that any use of public funding is targeted at areas of market failure and ensuring positive market outcomes while minimising any distortion to competition. In the context of broadband, the state aid rules require using public funding only to extend broadband coverage in geographic areas where there is no current or planned (next three years) provision of superfast broadband. This is a gap funding model providing the supplier with additional funds to complete the works. The state aid rules require that if BT make excess profits over the BAFO, BT need to return that to the project. This is likely to be the case as BT estimated a take up of 20%, though for the counties this has reached 30% take up and the project would aim for 50% take up to maximise the investment made. The greater take up means BT will generate income from their line use even if an order is not placed with BT as the internet service provider.

## Risk management

- 37 That BT do not provide the data and evidence to assess final coverage as of 31 May 2017.  
Mitigation: The partner councils have the right to audit to access information it requires to validate claims if the information is not provided and can require data as part of legal proceedings.
- |                   |   |                   |   |
|-------------------|---|-------------------|---|
| Likely (out of 5) | 4 | Impact (out of 5) | 4 |
|-------------------|---|-------------------|---|
- 38 That communities supposed to be covered by the phase 1 BT contract will miss out on coverage.  
Mitigation: that further procurement / change requests take place with the aim of reaching premises that have not been reached. The reinvestment fund will support this approach. Timing is important in order to work on a solution for those premises.
- |                   |   |                   |   |
|-------------------|---|-------------------|---|
| Likely (out of 5) | 2 | Impact (out of 5) | 3 |
|-------------------|---|-------------------|---|
- 39 That BT do not agree to the terms.  
Mitigation: The partner councils have acted reasonably and the terms are reasonable as a way of avoiding litigation. If BT do not agree to the terms the company will be subject to contractual default as of delivery from December 2016.
- |                   |   |                   |   |
|-------------------|---|-------------------|---|
| Likely (out of 5) | 4 | Impact (out of 5) | 4 |
|-------------------|---|-------------------|---|

## Consultees

Gloucestershire County Council as a formal partner are in agreement with this approach.  
BDUK as funder and partner have agreed that funds reclaimed or not spent as part of

phase 1 delivery by BT can be allocated for future deployment.

## **Appendices**

None.

## **Background papers**

None.