

<b>Decision maker:</b>	<b>Cabinet member economy and communication</b>
<b>Decision date:</b>	<b>Thursday, 7 March 2019</b>
<b>Title of report:</b>	<b>Fastershire Broadband Contract Change 2019</b>
<b>Report by:</b>	<b>Assistant Director Corporate Support</b>

## **Classification**

Open

## **Decision type**

Key

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 concerned. A threshold of £500,000 is regarded as significant.

This is a key decision because it is likely to be significant having regard to: the strategic nature of the decision; and / or whether the outcome will have an impact, for better or worse, on the amenity of the community or quality of service provided by the authority to a significant number of people living or working in the locality (two or more wards) affected.

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**

(All Wards);

## **Purpose and summary**

To review and agree recommended changes to the broadband delivery contracts with Gigaclear taking note of change of deployment, premises details, time line and costs.

The decision is to alter the council's existing contracts with Gigaclear to expand their scope both in terms of the level of public subsidy (£1.975m) and the number of eligible premises that would be reached with full fibre broadband. Agreeing this change would leverage no less than £1.85m private sector investment, see an extra c.700 premises becoming capable of accessing superfast

broadband for the first time and c. 3,500 premises upgraded to full fibre across Herefordshire and Gloucestershire.

The decision will also mean altering the delivery plan to accommodate slippage on the current programme and the new delivery, extending the ultimate completion date from March 2020 to March 2022. In order to mitigate the impact of any future changes to the timelines, a series of communications process improvements are also recommended.

In relation to recommendation (b) any approved schedule must ensure that the network/s that have been introduced or expanded to include the area around Newland must be complete by June 2020. This is in order to utilise the European Agricultural Fund for Rural Development (EAFRD) funding made available for what had been designated as Cluster G8.

The change will also alter the Fastershire vision recognising the extended contract time scale and on-going deployment of superfast and full fibre broadband.

## **Recommendation(s)**

**That:**

- (a) Agree the Gigaclear contract change request subject to state aid approval, based on:**
- **Making an additional public subsidy of up to 10% of the original contract value (£1.86m) available from the existing capital allocation to leverage a minimum £1.85m extra private sector investment in order to extend the full fibre broadband network to no less than 4,663 extra premises of which at least 679 premises do not currently receive superfast broadband**
  - **Extending the contract with Gigaclear from March 2020 to March 2022**
  - **Embedding a new communication protocol outlined in paragraph 18 into the contract change**
  - **Ensuring that ‘community 215’ covering premises in Newland (Gloucestershire) is delivered by the end of June 2020;**
- (b) The contract changes are only agreed based on the 25% milestone for Lot 3d being claimed before April 2019;**
- (c) Approve revised Fastershire Vision as set out in para 19; and**
- (d) The Assistant Director Corporate Support be authorised to take all operational decisions necessary to implement the above recommendations including, following consultation with the chief finance officer, agreement of a revised project finance model.**

## **Alternative options**

1. The council could opt to reject the change request, including the extended timescale proposed by Gigaclear. However, as a number of milestones have already been missed, without approving a change in the timescales as a minimum, the council would need to notify Gigaclear of contractual default. With no remedy available for the loss of time to date<sup>1</sup>, this could only result in placing Gigaclear in breach of the contract. The council could seek to use its rights under the step in clause of the contract to procure an alternate

---

<sup>1</sup> Without the ability to prove a financial impact of the delays on the Council, imposing penalties for late delivery would be legally unenforceable.

contractor to complete the contract and charge Gigaclear the cost. Alternatively, the council could decide to cancel the contract. However, while the Council wouldn't have to pay any funding to Gigaclear as a result (regardless of the extensive delivery that has been achieved so far) it is unlikely that a similar quality of service could then be procured from any other supplier. These courses of action would clearly restrict the Council's ability to achieve its vision for superfast broadband access, therefore both options were rejected.

2. The Council could also opt to alter the milestone dates and end date but not to expand the scope in terms of additional coverage and subsidy. This would marginally improve the delivery timescales of the original areas. The Council could instead seek to use the residual funding a different way for instance via an expanded grant scheme or new procurement. However, while useful for resolving bespoke issues, grant schemes are not the most efficient tool through which to achieve extensive broadband coverage due to the excessive cost of bespoke solutions. Moreover, the nature of telecommunication contract including following OJEU procurement requirements are technically difficult and lengthy and therefore should not be entered into lightly. Also, the latest OJEU process for the clusters demonstrated that there is a limit to the appetite of suppliers to enter into contracts to tackle an ever decreasing and dispersed set of properties. Therefore, extending the contract is deemed to be an efficient way to secure additional coverage and as such this option was rejected.

## Key considerations

3. Herefordshire Council has worked in partnership with Gloucestershire County Council for seven years to improve broadband availability across the two counties in order to enable businesses, communities and individual households to become more connected – with business more productive, competitive and sustainable in supporting the wider economy.
4. Known as the Fastershire project, the emphasis of the programme has been to extend the reach of high speed broadband deep into rural areas. Fastershire acts as a conduit for public subsidy to provide gap funding to private sector suppliers to deliver broadband infrastructure to areas that have proved to be commercially unviable.
5. The current Fastershire Broadband Strategy includes 4 stages which can be described as follows;
  - Stage 1 commercial coverage without public sector funding where considered by the private sector worthy of return on investment
  - Stage 2 initial major contract with BT
  - Stage 3 significant lot based contracts with Gigaclear and BT
  - Stage 4 granular approaches including cluster contracts (Airband), plus direct grants to businesses.
6. Stage one is an ongoing process, stage two is complete and stages three and four are being delivered concurrently.
7. Stages two and three are funded by a combination of Herefordshire Council, Gloucestershire County Council, national government and private sector match. Stage 4 is primarily EU funded.
8. To date the coverage of superfast broadband (30Mbps and above) in the county has reached 87% of premises but upon the conclusion of the contracts that are currently being deployed, the coverage is expected to top out at 97% of premises. For Herefordshire this is from a base of 0.6% superfast coverage in 2012; with 13% full fibre coverage compared

to the national average of 5%. This is set to continue with the Gigaclear contract (which is full fibre) making Herefordshire one of the fastest connected counties in the country.

9. Gigaclear are running 4 separate contracts for the project. These are as follows;
  - 3c – south Herefordshire and Gloucestershire (west of the River Seven)
  - 3d – north Gloucestershire
  - 3e – south Gloucestershire
  - 4 – north Herefordshire
10. Gigaclear are delivering the lion's share of the Stage 3 delivery (previous cabinet member report:[link](#)). They have been operating on behalf of Fastershire in Gloucestershire since 2015 and in Herefordshire since 2017. To date they have excavated 1,277km of fibre trench in Gloucestershire and 186km in Herefordshire building 18,700 fibre pots (connection points) in Gloucestershire and 2,000 in Herefordshire so far. Their progress has however been slow to reach peak deployment and there has been a divergence from the original profile. After several months of assurances followed by several more months of work to generate a new deployment plan underpinned by more realistic assumptions Gigaclear have sought an extension of the contract timescales based on this plan via a formal change request.
11. Gigaclear have been hampered by a number of issues in delivery emanating in part from their dependency on backhaul provision and wayleave grantors. These are third parties over which they have had limited influence. In addition Gigaclear have needed to develop and grow as an organisation which has had an impact on delivery.
12. Though the delays are nowhere near as severe as in other areas of the country where Gigaclear are operating, the position presented in the change request will see a delay from some of the start dates associated with each community as initially outlined by Gigaclear which had been published on [www.fastershire.com](http://www.fastershire.com) (these were ultimately withdrawn from the website and replaced by a holding statement in lieu of a decision regarding the change request).
13. Despite this, the approach is to maximise the existing contracts given the product offered by Gigaclear, the limited number of providers of a full fibre network, and the complexity / length of time to conduct a new procurement. This will be combined with utilising the underspend that remains in the programme to seek to increase the coverage of the contracts alongside a timescale change request.
14. By adding a further 10% subsidy (allowed under state aid rules) coverage can be extended to c.700 more properties that would otherwise not have access. In doing so, a further 3,500 premises would benefit from an upgrade to full fibre.
15. The table below identifies the proposed milestone changes accounting for the new premises that could be delivered for 10% extra subsidy. They are presented alongside the existing milestone dates to demonstrate the extended timescale.

Contract	Proportion of build	Original Milestone Date	Requested Milestone Date Change
Lot 2/3c Gloucestershire	25%	30/09/2018	31/03/2020
	50%	31/03/2019	30/09/2020
	75%	30/09/2019	31/03/2021
	100%	31/03/2020	30/06/2021
Lot 2/3c Herefordshire	25%	30/09/2018	31/03/2020

	50%	31/03/2019	31/03/2021
	75%	30/09/2019	30/06/2021
	100%	31/03/2020	31/03/2022
Lot 3d Gloucestershire	25%	31/12/2017	25/04/2019
	50%	30/06/2018	22/07/2019
	75%	30/09/2018	31/12/2019
	100%	31/12/2018	30/06/2021
Lot 3e Gloucestershire	25%	31/03/2018	31/12/2019
	50%	30/09/2018	30/09/2020
	75%	30/06/2019	31/03/2021
	100%	31/12/2019	31/12/2021
Lot 4 Herefordshire	25%	31/03/2018	30/09/2019
	50%	30/06/2018	31/12/2019
	75%	30/09/2018	30/09/2020
	100%	31/03/2019	30/06/2021

16. Despite the slow progress to date, there is little risk that Gigaclear as an organisation lack the capacity to deliver a larger contract. Alongside the change request is a demonstrable increase in their own financial and staff resource to make the new plan achievable.
17. Any approved schedule must ensure that the network/s that have been introduced or expanded to include the area around Newland must be complete by June 2020. This is in order to utilise the EAFRD funding made available for what had been designated as Cluster G8.
18. As well as change deployment changes, a number of other obligations to improve the way Gigaclear operate and communicate are included in a revised contract and thus to enable the project to improve communication. These are as follows:
  - a. Gigaclear will provide updated C2 reports (showing community level status) for Lots 2/3c, 3d, 3e and Lot 4 as well as the C3 report (showing premise level status) no later than the 25<sup>th</sup> day of each month.
  - b. Fastershire.com will serve as the single point of contact for public enquiries regarding deployment timescales. Both Fastershire and Gigaclear staff will point enquirers to the premise checker on Fastershire.com in response to such requests.
  - c. The underpinning data for Fastershire.com will be revised upon the approval of the Change Request in order to present the new accepted dates.
  - d. Going forward, Fastershire.com will be revised to improve the way in which timescales are presented. When selected, each premise aligned to Gigaclear's deployment will return the quarter in which the build start is planned for the relevant network rather than the month.
  - e. Gigaclear's monthly C2 report will be used by Fastershire to monitor progress with the C2's provided in March, June, September and December used to update Fastershire.com.
  - f. If the quarter highlighted for build start changes thereafter, Gigaclear will provide the content for a rationale message to explain the change to the public.
  - g. Within 2 weeks following the design validation of any given community and in consultation with Fastershire, Gigaclear will arrange the date and location of a community meeting. It is acknowledged that meetings may be arranged to cover more than one community area (subject to acceptable proximity) and as such that the actual meeting dates may vary from the point of design validation.

- h. No less than six weeks prior to build start, a letter with branding determined to be acceptable by Fastershire will be issued to all public funded premises notifying them of the relevant public meeting.
  - i. No less than two weeks prior to build start, a second letter with branding determined to be acceptable by Fastershire will be issued to all public funded premises to explain the build programme and information about any planned road closures.
  - j. Stakeholder packs will be issued to each parish to be affected by Gigaclear's build no less than 8 weeks prior to the build start of the first community to affect the parish. Fastershire will be notified when each pack has been issued.
  - k. Failure to meet these timeframes will also be considered as a new trigger for breach of contract.
19. As a consequence of the proposed changes and recognising local need alongside the shift nature of the national broadband programme, the vision for the project to be updated to:

"Upon the completion of the Fastershire project, all residents and businesses in Herefordshire and Gloucestershire will be able to order the broadband service they need and a high percentage will be using faster broadband to do more online, boost business growth and achieve their potential".

This is from a vision published in 2017 of: by the end of 2019/20 all residents and businesses in Herefordshire and Gloucestershire will be able to order a broadband service they need and a high percentage will be using faster broadband to do more online, boost business growth and achieve their potential".

## Community impact

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. Digital access has a role to play in addressing issues of isolation and access to services for citizens, specifically in rural areas, and is increasingly being used as a tool to address health issues. Without further superfast deployment, there will be a digital divide between those with access to superfast broadband and those with USC (Universal Service Commitment as set by the Government at 2Mbps) specifically as USC over time will not be enough to satisfy future demands.
22. The further delivery will support the following objectives and actions in the corporate plan:
- a. Priority: Support the growth of our economy.
  - b. Measure: Support economic growth and connectivity (including broadband, local infrastructure, transport and economic development).

## Equality duty

23. Under section 149 of the Equality Act 2010, the 'general duty' on public authorities is set out as follows:

A public authority must, in the exercise of its functions, have due regard to the need to -

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
  - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
24. The Equality Act 2010 established a positive obligation on local authorities to promote equality and to reduce discrimination in relation to any of the nine 'protected characteristics' (age; disability; gender reassignment; pregnancy and maternity; marriage and civil partnership; race; religion or belief; sex; and sexual orientation). In particular, the council must have 'due regard' to the public sector equality duty when taking any decisions on service changes.
25. In terms of the protected characteristics the most significant impact is on "age" where older residents are less likely to be internet users which could cause digital exclusion. In terms of actions to support the equality duty:
- a. Infrastructure: continue with the roll out of fast broadband to everyone's household that needs it to ensure equal access of availability.
  - b. Age: encourage take up by older people through courses and classes based on the fact that as people get older they are less likely to take advantage of broadband.
  - c. Cost: that free Wi-Fi continues to be available including in the network of libraries where the public access PCs.
  - d. Services: that services provided by the Council are easy to access and navigate on the local authority webpages.
  - e. Communities: self-run community schemes operate with support (financial and advice) from the local authority.

## Resource implications

26. Herefordshire's capital programme element covered by Herefordshire Council, and Gloucestershire by Gloucestershire County Council with match funding by national government via branch of DCMS called BDUK (Broadband Delivery UK).
27. Revenue costs are split between Herefordshire Council and Gloucestershire County Council.
28. The additional funding required to subsidise the extra coverage has already been approved for the Fastershire budget via the capital programmes of both councils as identified with the table below.

Project Name	Budget £	Stages 2 & 3 Spent £	Stages 3 & 4 Committed £	Stage 4 Uncommitted Funding £
BDUK	31,090,660	19,514,825	11,420,658	155,175

Herefordshire Council	12,549,049	5,211,635	4,541,599	2,795,816
Marches LEP	1,674,000	1,674,000	-	-
Gloucestershire Council	13,699,929	4,970,129	5,445,122	3,284,679
EAFRD "Clusters" (European Agricultural Fund for Rural Development)	6,919,962	-	6,919,962	-
ERDF "Business Grant" (European Regional Development Fund)	749,685	26,362	723,323	- 0

29. State Aid requirements mean that there is a 10% cap on contract extension.
30. The extension of the contracts will also impact the profiled draw down of the funding allocated to Herefordshire. A revised project finance model will be requested to generate a new draw down profile following any approved change. Further work will then be required to ensure the BDUK funding aligned to the contracts can be spent by their deadline of March 2020.
31. There is a short fall of funding in the change request coverage extension. However, the project team do not agree with some of the assumptions that have been made to arrive at the costs. The team will seek to negotiate on the costs that have been presented, that is why the recommendation presents the maximum threshold.

## Legal implications

32. 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 councils to conduct the project as set out in this report.
33. State aid is any advantage granted by public authorities through state resources on a selective basis in any organisations that could potentially distort competition and trade in the European Union. The council must take account of the European Commission's State Aid and competition regulations. Funding for broadband projects would give rise to state aid as the funding is from or through State resources therefore it will confer a selective advantage on the supplier appointed to deliver the broadband project. State aid requirements allow for 10% extension in expenditure of public sector funds.
34. The Public Contracts Regulations 2015 provide clarity about the extent to which a contract can be amended after award without the need to re-advertise in the OJEU.
35. Regulation 72 of the 2015 Regulations states that a contract may change without re-advertisement in OJEU where it is a minor change that does not affect the nature of the contract and does not exceed the relevant threshold and does not exceed 10% (services or supplies) of the initial value. The 10% extension is also compliant with procurement requirements related to contracted terms.
36. The contract will be sealed by legal services under delegated powers.

## Risk management

37. Risks as outlined below:

Risk / opportunity	Mitigation
The later milestones could mean the Council is unable to defray the BDUK funds that have been aligned to the contracts by the BDUK spend deadline.	Seek to modulate the BDUK / Local Authority to ensure the maximum BDUK spend can be drawn down as early as possible.
The delays adversely impact the local economy and the communities' ability to take advantage of high speed connectivity.	Gigaclear's full fibre remains world leading and despite the delays, much of rural Herefordshire and Gloucestershire will get provision well before the government's target of 2033.
Continued delays impact Fastershire's ability to communicate the current position to the community. This presents a reputational risk for the project as well as the Council as its sponsor.	The new communications obligations will increase the ability of Fastershire to communicate progress to communities in a timely and efficient manner. It will also reduce the scope for mis-information to be communicated between the partners.

## Consultees

38. Gloucestershire County Council are in agreement with this approach.
39. BDUK will need to consider the state aid and value for money requirement.
40. Political groups have been consulted based on a key decision with information distributed on 7 March 2019 for comments back on the 25 March. No concerns or comments raised through the consultation process. A briefing was also held on 25<sup>th</sup> February 2019 open to all members.

## Appendices

None

## Background papers

None