

Title of report: Public realm contract extension 2023**Meeting: Cabinet****Meeting date: 26 October 2023****Cabinet Member: Barry Durkin, Roads and Regulatory Services****Report by: Corporate Director, Economy and Environment****Report by: Service Director Environment and Highways****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 approve an extension of the public realm service contract with Balfour Beatty Living Places in line with contract terms and conditions and provide an update on contract management arrangements.

Recommendation(s)**That:**

- (a) Balfour Beatty Living Places be awarded two extensions in accordance with the Public Realm Contract of one year for each relevant period (to 31 August 2026);**
- (b) That the progress in closing out the improvement plan actions is noted and agreed;**
- (c) That the progress made in implementing the commissioning and contract management functions and the findings of the SWAP audit are noted.**

Alternative options

1. Not to award an extension to the contract at this time. This is not recommended as the contract follows a model that is designed to incentivise the provider to achieve successful performance delivery throughout the potential contract term. Successful performance is gauged against strategic indicators which are monitored and considered at relevant set periods through the term of the contract. As Balfour Beatty Living Places (BBLP) has achieved acceptable strategic performance, as defined by the contract they are entitled to a contract extension in any event unless the performance reduces and then the council reduces the extension period.
2. To award an extension of the contract period to BBLP that is greater than two years for the relevant period. Under the contract the council has discretion to award extensions of greater than one year following the attainment of acceptable strategic performance by BBLP. This is not recommended at this time as the council considers the future operating model.

Key considerations

3. The public realm services contract between the council and BBLP commenced on 1 September 2013. This is one of the council's strategic and most significant contracts in terms of range of services and value. To ensure the services provided through the contract meet the council's requirements, the performance is closely monitored and performance is incentivised throughout the term of the contract. This helps enable a positive and mutually supportive strategic partnership.
4. The contract period is September 2013 to August 2023, with up to a ten year extension. A decision was made on the 9 July 2018 by the Cabinet Member Transport and Regulatory Services that BBLP be awarded a one year extension (to 31 August 2024) to the public realm service contract in line with the contract terms set out in paragraphs 8 and 9.
5. The contract has now reached the second and third relevant periods for review of strategic performance and the award of a contract extension. The overall performance delivery meets the required thresholds for a contract extensions over the relevant periods achieving acceptable or above performance.
6. The council and BBLP jointly set and review the strategic performance indicators (SPI), of which there are 16, which measure the contract's contribution to the council's strategic objectives. Each SPI has a specific definition which includes how each will be measured and performance calculated within set thresholds.
7. The contract sets out relevant periods for the review of strategic performance as:
 - i. the 3 financial years from and including 2014/15 to 2016/17;
 - ii. the 3 financial years from and including 2017/18 to 2019/20;

- iii. the 2 financial years from and including 2020/21 to 2021/22;
 - iv. the 2 financial years from and including 2022/23 to 2023/24; and
 - v. Subject to extensions to the Contract Period having been granted in accordance with clause 31.3) the 2 financial years from and including 2024/5 to 2025/26.
8. The contract states that BBLP are awarded one year's extension to the contract period, for each relevant period in which they achieve either acceptable strategic performance in each of the financial years comprising the relevant period, or where the total performance score achieved is greater than the total score for acceptable strategic performance for those financial years comprising the relevant period. The aggregated score against the strategic performance indicators must not be less than 9 for BBLP to have achieved acceptable performance.
9. In accordance with the contract, extensions are now due for 2 relevant periods, as detailed in paragraphs 7. (ii).for the period earned 3 years from 2017/18 to 2019/20 and 7. (iii) the period earned for 2 years from 2020/21 to 2021/22 up to August 2026 subject to the satisfactory performance of the SPIs.
10. BBLP have submitted a SPI report, which demonstrates the performance position, scoring mechanism, trends and outcome. The overall performance delivery is positive when assessing the performance levels achieved, the total aggregated score, against the minimum required of 9 as detailed in paragraph 8 for the relevant periods is detailed below.

2017/18	15.40
2018/19	17.46
2019/20	16.99
2020/21	18.88
2021/22	14.40

11. The council's contract management team (CMT) have reviewed the SPI report, to test:
- i. If the SPI definitions have been correctly applied;
 - ii. The source and accuracy of the data;
 - iii. If the calculation is correctly applied and is correctly calculated;
 - iv. If the SPI outcome is correctly reported in the monitoring report.
12. The review concluded that the overall quality and accuracy of the SPI report is fit for purpose. The correct definitions, calculations and data sources have been applied for each of the indicators and the correct scores has been awarded. From the above review it is evident that the contract is currently performing in accordance with the agreed performance indicators and that the relevant extensions are due. As such the contract will be extended until August 2026 (unless there is reduction in performance for 2022/23 onwards to reduce the contractual term).
13. The council has received external legal advice on the conditions of contract which has confirmed that extensions are required as below:

- i. 3 years from 2014/15 to 2016/17 – if SPIs are achieved in each of the years 2014/15, 2015/16 and 2016/17, the Provider is entitled to a one-year extension, from the end of the current term, being until August 2024. (Awarded 9 July 2018)
 - ii. 3 years from 2017/18 to 2019/20 – if SPIs are achieved in each of the years 2017/18, 2018/19 and 2019/20, the Provider is entitled to a one-year extension, from the end of the extended term, until August 2025. (now due)
 - iii. 2 years from 2020/21 to 2021/22 – if SPIs are achieved in each of the years 2020/21 and 2021/22, the Provider is entitled to a one-year extension, from the end of the current term, being until August 2026. (Now due)
 - iv. 2 years from 2022/23 to 2023/24 – if SPIs are achieved in each of the years 2022/23 and 2023/24, the Provider is entitled to a one-year extension, from the end of the current term, being until August 2027.
 - v. 2 years from 2024/25 to 2025/26 – if SPIs are achieved in each of the years 2024/25 and 2025/26, the Provider is entitled to a one-year extension, from the end of the current term, being until August 2028.
 - vi. The council has discretion to award more than a one-year extension if required. The above extensions are only for a one-year period. The council has discretion to award a further 5-year extension to take the term to the full 10 years (maximum to August 2033) although they are not under any obligation to do so. If performance doesn't meet contractual requirements over any period then the term can be reduced by 1 year and if is lower under two consecutive contractual periods then the extension is reduced to zero.
14. Following the concerns raised by the external auditors on the contract, detailed in paragraphs 17 and 18, external legal advice has been taken to ascertain if the matters raised by the auditors would be deemed as “reasonable discretion” as set out in the contract for the council not to award a contract extension. The advice received was that “on the assumption that this contract was tendered by the council on this basis and has been ongoing since the Commencement Date, as well as the fact that one extension has been agreed, this would not be considered “reasonable” in the circumstances” and on that the council are required under the contract to award the extension if BBLP have met the SPI performance criteria.
15. In accordance with the contract, the CMT has been in negotiation with BBLP over the setting of the Strategic Performance Indicators and Operational Performance Indicators as the current ones were last agreed in July 2016. Following a failure to agree any changes for 2022/23, the Strategic Performance Indicators and Operational Performance Indicators were held at 2021/22 performance levels in accordance with the contract conditions. A revised set of Operational Performance Indicators were agreed and introduced for 2023/24.
16. The council has notified BBLP of its intention to reject the indicators for 2024/25. These will need to be reviewed and agreed for inclusion within the 2024/25 Annual Plan. The council's commissioners and BBLP's management team have begun to review the indicators and the outcome of these negotiations will be presented to the contract Strategic Partnering Board (SPB) for approval. In the event that there is a further failure to agree the SPIs will remain as those agreed for 2021/22.
17. A major contract performance review was undertaken on behalf of the council and the findings from this were taken to Cabinet on 24 September 2020. The review specifically

focused on the public realm services and property and facilities management service contracts provided by the council's contractor, BBLP. The review highlighted that there were concerns over performance monitoring, financial monitoring and contract compliance monitoring. Concerns were also listed under:

- i. Risk management – as the risk register does not sufficiently log actions related to risks;
- ii. Relationship management – as there was “little constructive tension” between the two parties leading to a lack of competitive dialogue and the contractor not always providing ‘proactive support or the collaborative behaviour that would be expected from a strategic partner’ and a lack of clear demarcation between the council and its contractor, as both sides were co-located in the same office; and
- iii. Change management – as the framework agreements were not included in the contracts register.

18. Concerns were also highlighted around the council's internal governance, whereby auditors commented that the council did not appear to be adhering to the contract procedure rules, when commissioning works outside the core programme. There were further concerns about the council's ‘lack of clarity’ around managing the contract and commissioning further work. Key recommendations arising from the report were:

- i. Build technical knowledge within the council – the council relies on its contractor for technical assistance which limits the council's ability to scrutinise or monitor effectively;
- ii. Improve internal communication and education – the council needed to better understand the contract in order to achieve value for money;
- iii. Increase the involvement of the council's procurement team – to assist with governance and provide expertise;
- iv. Set up a contract management framework; and
- v. Consider an appropriate contract management system.

19. To respond to the auditors concerns a Major Contracts Improvement Board (MCIB) was set up to oversee the development and implementation of an improvement plan for the public realm contract. The improvement plan was presented to the inaugural meeting of the board in February 2022. Following a series of meetings and progress made in the delivery of the improvement plan at its meeting in October 2022 the MCIB approved the close out of the improvement plan. The Board noted the successful close out of actions and that a phase 2 plan had been developed with responsibility for the close out managed by the Corporate Director Economy and Environment.

20. The council has issued a number of Early Warnings to BBLP regarding contract compliance to ensure that the CMT can continue its work in evidencing the close out of the improvement plan. BBLP have acknowledged that these matters need to be closed down but as yet have not provided a suitable evidence to enable the council to close out the matters. The outstanding Early Warnings are detailed in Table 2 below:

Table 2 – Outstanding Early Warnings

	EW No	Title	Date Raised
1	PR21-00-01-14	Annual plan and forward plan development	04/04/2022
2	PR22-00-01-12	SPI16 Continuous Improvement Efficiency clarification.	08/08/2022
3	PR22-00-01-08	Contract Quality Plan	15/07/2022
4	PR21-00-01-16	Social Value Plan	04/04/2022

5	PR22-00-03-02	Develop carbon footprint report and carbon Reduction Plan	06/10/2022
6	PR22-00-03-01	Contract Management and Record Keeping (Confirm)	23/09/2022
7	PR22-00-01-15	Out of Scope	17/08/2022
8	PR21-00-01-17	Implementation of phase 2 of OCH	04/04/2022
9	PR21-00-01-18	BBLP audit programme 2022/23 (to be closed out as part of EW PR22-00-01-08)	04/04/2022

21. In April 2022 the auditors made a further key recommendation that the council “should progress the actions within its major contracts improvement plan and that performance against the plan should be reported to Cabinet. The phase 2 improvement plan has been progressed with updates provided to the contract Strategic Partnering Board for information and comment. The current status and progress on the close out of the phase 2 improvement plan is attached as Appendix A.
22. The auditors also identified a significant risk identified related to the council’s capital programme whereby a number of issues had been identified in recent years. The auditors acknowledged that the council was responding to the issues but considered that it still represents a significant on-going risk to its VFM conclusion and concluded that “in light of the concerns raised over the contractual arrangements and the findings identified from the internal investigations, we have concluded that the council does not have appropriate arrangements in place over its capital programme”.
23. The auditors also referred to the council’s ongoing investigation into the City Link Road, the findings of which will be reported to a future cabinet meeting.
24. The council’s CMT has been developing and implementing revised procedures and processes to improve governance and compliance within the council’s contract management arrangements and address the concerns of the external auditors. These new procedures and processes have been assessed by SWAP Internal Audit as part of its follow up review of the Whitbourne section 106 project and SWAP issued its final findings Whitbourne Section 106 Follow Up Final Report – June 2023 with the following comments:
- i. The processes in operation when the Whitbourne Section 106 final report was published, in June 2020 have been superseded. This has resulted in a change in the roles and responsibilities of the Contract Management Team (CMT). The Highway and Public Realm Contract Manager advised that the governance process has been developed further since the last audit update in September 2020. All S106 works are now commissioned and project managed by the Council’s Programme Management Office (PMO).
 - ii. The role of Commissioner and Contract Management is now clearly defined. The Highway and Public Realm Contract Manager provided the organogram of the Transport and Highways Structure. The organogram shows the functional responsibilities for the CMT to manage the Balfour Beatty Living Places (BBLP) contract. Commissioners, including the PMO, are now required to provide a completed Service Order Form (SO), including budget information for each individual scheme presented to the Contract Management Team (CMT).
 - iii. The Contract Officer undertakes due diligence of the SO, to verify that it clearly states the requirements and that the document is fully complete. If satisfactorily, the SO information is input into Business World as a Purchase Order (PO). If clarification is required, only once a satisfactory response is received will the CMT populate Business World. The workflow mapping within the Business World system provides an audit trail of events, so record management is improved.

- iv. The Commissioner approves the expenditure through the standard approval process within Business World. In addition, an approved Record of Officers Decision is required for an SO of £50,000 or more. Once the approved PO is on Business World the SO is submitted by CMT to BBLP.
 - v. The follow-up audit has identified the process changes are now aligned to the Council's governance framework. This provides greater oversight and mitigates the control weaknesses previously identified.
25. To ensure that value for money (VFM) is delivered within the contract the council's CMT have implemented the identified actions within the improvement plan agreed by the MCIB which have seen the following new controls introduced to ensure that VFM is delivered:
- i. A robust approach to contract management by CMT on compliance to the contract to ensure that BBLP deliver the council's requirements to the required cost and quality. This has resulted in increased commercial tension within the contract and a number of commercial early warning notices issued by the council to BBLP.
 - ii. A review of the performance management arrangements with higher performance thresholds introduced for the operational performance indicators together with a review of the performance monitoring management arrangements. Performance is reported monthly to the Operational Board and quarterly to the Strategic Partnering Board.
 - iii. A commercial approach to the annual plan development process. This has included introducing a significant number of new acceptance criteria bring issued to BBLP setting out the councils requirements on cost, commercial and financial aspects of the annual plan.
 - iv. The introduction of a cost and commercial evaluation, in liaison with the council's accountants, of the budget costs for the contract in 2023/24. This resulted in the council reducing the service order values by 20% pending BBLP demonstrating its costs and VFM.
 - v. A commercial approach to the evaluation of the monthly Cost of Services Paid to Date (COSPTD) which has introduced further rigour into the evaluation of the invoices supplied by BBLP. This has resulted in costs being disallowed by the council where these are not deemed applicable within the contract.
 - vi. The introduction of Aecom as the council's cost consultants to assist the council's commissioners and CMT in verifying costs provided as part of any project within the contract.
 - vii. The council's commissioners will undertake an assessment of the procurement options (having due regard to the councils CPRs and relevant legislation), to determine the best route to market and ensure governance is in place prior to any works being placed with BBLP
 - viii. A review of BBLPs procurement process by the council's CMT and procurement teams to ensure that BBLP are evaluating and delivering VFM within its procurement and supply chain arrangements.
 - ix. The introduction of a mini competition process within BBLPs supply chain to assess the market rates and optimum VFM for the delivery of the pot hole fund programme for 2023/24. This has been managed jointly by the council with the outcome to be used to benchmark other rates.
 - x. A review of the gainshare process to ensure that transparency in the method of calculation and share due to the council is in place.
 - xi. A review of the management of risk within the contract and the introduction of a Risk Management Board. Risks are now reviewed monthly and escalated to the Strategic Partnership Board and added to the council's corporate and divisional risk registers as required.
 - xii. The completion of the contract management framework in compliance to council

policy.

Community impact

26. There is clear evidence that the effective management of the public realm, which includes highways, parks and public rights of way, is an important contributor to the county's health, wellbeing and economy.
27. A clear measurable annual plan provides a mechanism for monitoring performance and supports the council to achieve its corporate plan priority to secure better services, quality of life and value for money for the people of Herefordshire

Equality duty

28. 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.

29. The public sector equality duty (specific duty) requires us to consider how we can positively contribute to the advancement of equality and good relations, and demonstrate that we are paying 'due regard' in our decision making in the design of policies and in the delivery of services.
30. BBLP is fully aware of its contractual requirements in regards to equality legislation BBLP has a Fair & Inclusive Workplace Policy which sets out its commitment to creating an inclusive workplace, free from discrimination, harassment and other unacceptable behaviour. As part of this all employees are required to complete Value Everyone Diversity & Inclusion training.
31. The council manage this through its CMT with BBLP required to provide a full set of its policies and procedures each year and advise the council if there are any revisions or amendments. Any recorded incidents/complaints that relate to a protected characteristic would be reported through the contract governance. This decision will have no negative impact on the council or BBLP's compliance with this duty.

Resource implications

32. The annual contract value in 2023/24 is £12,867,000 capital and £5,832,587 revenue. An annual plan is developed in advance each year, which set out the proposed service and budget. Other capital programme budgets may be delivered by BBLP but are subject to separate decisions when approving the delivery method.
33. A Cabinet Member decision is taken each March for the financial year ahead, following the

council's approval in February of the annual capital and revenue budgets which in turn align to the council's medium term financial strategy.

Legal implications

34. The council has statutory duties to provide a number of the services which are contracted to BBLP under this arrangement. A list of the relevant legislation and policy context, together with the approved policies and procedures to be used by BBLP in the delivery of the annual plan are retained by the council's CMT. In addition the council has a general duty to secure best value in the exercise of all of its functions. The development and review of the annual plan, as part of the council's long term contractual relationship with BBLP, is a key mechanism for the discharge of these legal duties.
35. The council must ensure that the contract is robustly managed and appropriately scrutinised and reviewed to ensure that its specific statutory duties are met and also that the council's wider duty to obtain best value in the provision of all of its services is satisfied.
36. In procuring this long term contractual arrangement in 2013 the council contemplated a series of commercial incentives for the appointed contractor, of which this contract extension mechanism is part. To depart from this agreed mechanism in the contract without compelling financial or quality related reasons could give rise to difficulties with the contractual relationship with BBLP.
37. Robust contract management is any event essential for a long term contract which is of high financial value and of significant strategic importance. Price and quality must be regularly benchmarked to ensure that the contract continues to deliver best value for the council and its communities.

Risk management

38. Associated risks with contract extension are detailed below:

Risk / opportunity	Mitigation
Ensuring value for money is achieved in future years	Value for money is tested at various stages of the annual commissioning process and the council's acceptance of the annual plan.
Good quality effective service is continuously delivered	Performance is closely monitored through the Operational Performance Indicators and Strategic Performance Indicators, to ensure services are delivering to target and continuously improved, where possible. The contract model incentivises good quality performance. The Operational Performance Indicators for 2023/24 have been reset with higher thresholds to drive service improvements. The council has notified BBLP of its intention to reject the SPIs and OPIs for 2024/25 and these to be reviewed prior to the contract extension commencing.

Consultees

39. The contract SPB have been consulted on this decision report, as part of due contract process as detailed in paragraph 17. No issues were raised at this board and the decision to award the extensions was supported. As a key decision political groups have been consulted as part of the governance process.

Appendices

Appendix 1 - Public realm contract extension 2023

Background papers

None