

CHESHIRE EAST COUNCIL

Cabinet

Date of Meeting: 4 February 2013
Report of: Streetscape Task and Finish Group
Subject/Title: Call in of Key Decision CE12/13-18, Delivery of Streetscape and Parking Maintenance Activities Within the Highway Services Contract
Portfolio Holder: Councillor David Topping
Portfolio Holder for Environment

1.0 Report Summary

- 1.1 This report sets out the findings of the Streetscape Task and Finish Group, which was established to give consideration to the Call In of Key Decision CE12/13-18, Delivery of Streetscape and Parking Maintenance Activities Within the Highway services Contract.

2.0 Decision Requested

- 2.1 To approve the extension of the scope of the Highways Services Contract to include Mechanical Street Cleansing activities (subject to no challenge being received during the Voluntary Ex-ante Transparency Notice period commonly referred to as the VEAT notice)
- 2.2 To approve the publication of a procurement VEAT Notice
- 2.3 To approve the development of a detailed activity programme that will engage with elected Members, existing employees and their Trade Union representatives with a view to achieving the earliest possible commencement date after 1st April 2013 for the new service delivery arrangements.
- 2.4 That the remaining Streetscape Services be reviewed and investigated by the Environment and Prosperity Policy Development Group and reported back to Cabinet in September 2013.

3.0 Reasons for Recommendations

- 3.1 Due to the ever increasing financial pressures that the Council is facing, new and innovative ways of service delivery are required that will allow the Council to achieve 'more for less', ensuring that existing service provision continues to the same high standards as delivered previously whilst being sustainable in future years. By adopting the above approach it will allow the Council to maximise the efficiency opportunities associated with Highways activities without adversely affecting delivery arrangements for the maintenance of parks & open spaces and cemeteries. In addition, the Council's approach to local

service delivery transfer and devolution can be developed directly in consultation with Town & Parish Councils.

4.0 Wards Affected

4.1 All wards are affected by the proposal

5.0 Local Ward Members

5.1 All wards are affected by the proposal

6.0 Policy Implications including – Carbon Reduction - Health

6.1 The existing Highways Services Contract requires Ringway Jacobs to carry out the services in a manner that achieves greater value for money for the Council, year on year, by reducing costs and delivering the Services more efficiently whilst seeking to maximise the achievement of the Council's Strategic Objectives throughout the contract period. Our Strategic Objectives include 'limiting carbon emissions', which ensures that Ringway Jacobs are required to demonstrate that they are achieving this. Additionally, in support of this, Ringway Jacobs must also maximise the 'achievement of the objectives set out in the Local Transport Plan'. The Local Transport Plan includes Priority Policies that work towards carbon reduction, through for example, minimising the future need to travel and through encouraging technological development in transport services in partnership with operators.

6.2 Ringway Jacobs have already embraced the Council's objectives associated with well being and carbon reduction and in the short time they have been in operation, have become an integrated member of the Carbon Reduction Group. The same approach will apply to all services included within the increased scope of contract.

6.3 An existing performance framework exists which requires Ringway Jacobs to measure performance in this area with challenging targets established for energy reduction.

7.0 Financial Implications (Authorised by the Director of Finance and Business Services)

7.1 The services which are included within the scope of works for the Highways Services Contract and undertaken by Ringway Jacobs as core services have an annual value of around £14 million (capital and revenue).

7.2 The current 2012-13 annual combined value of the Streetscape services associated with Grounds Maintenance and Street Cleansing activities is around £5.5 million. The mechanical sweeping activities cost approximately £1million p.a. and savings are proposed against this element of work in the 2013/14 budget.

- 7.3 The new arrangement will deliver savings after the first full year of operation when compared to existing Service costs. This will be achieved by the integration of services across the Highway Service combined with operational efficiencies secured during the first full year of operation, generating savings of around 7.5% as per the contractual commitment contained within the Highways Services Contract. In addition to these initial savings, future year-on-year savings of 3% per annum will be secured from innovation and efficiency gains.

8.0 Legal Implications (Authorised by the Borough Solicitor)

- 8.1 The Council has entered into the Highways Services Contract (the Contract) with Ringway Jacobs. The term of the Contract is five years with the opportunity to extend for a further two years (depending on performance and at the Council's ultimate discretion). The Contract commenced early October 2011.
- 8.2 The Council, as Highway Authority for the Cheshire East area, has numerous powers and duties under the Highways Act 1980 to carry out highway associated activities including maintenance, improvement and repair work on the highway network all of which were included within the original contract scope as set out in the OJEU Procurement Notice (the Notice) for the Contract. None of the duties discharged by Ringway Jacobs on behalf of the Council relieve the Council of those powers and duties and the Contract contains contractual remedies that can be exercised in the event that Cheshire East Highway's fails to discharge the functions.
- 8.3 The Highways Services Contract sets out very clearly the statutory obligations of the Council the performance of which, are delegated to Ringway Jacobs along with the protocol for the discharge of other statutory obligations of the Council.

Substantially amending the scope of a contract post award of tender can lead to a breach of the procurement rules. A substantial change in scope could amount to an award of a new contract which could then be challenged as an unlawful award of contract. Although the wording within the Contract was widely drafted with a catch all phrase of 'any additional services as may be requested by the Employer from time to time' this would be legally construed in the light of the overall content of the Notice and the categories of services included within that Notice. Although adding the services to the Contract would not result in the value of the Contract exceeding the estimated financial contract value given in the Notice this is not the only issue to consider when interpreting if a change in scope amounts to an award of a new contract that could be challenged as an unlawful award of contract.

- 8.4 Advice was sought from Bevan Brittan, the external solicitors involved in the procurement of the Highway's Contract, as to the potential risk of a challenge that could result from any perceived change in the scope and value of the contract. Bevan Brittan has provided clear advice as to what is unequivocally within scope and what is in strict legal terms was outside scope. A commercial view was proffered as to the risk of challenge by the unsuccessful tenderers;

this was considered to be low. However, a challenge can be brought by anyone, in practical terms only parties that might stand to benefit bring claims, however in the given situation the Council needs to consider the Unions and Members and would be unwise to proceed in the event that there was not universal support for the action. Although it is envisaged that the risk of challenge from both internal and external sources is minimal, the proposed increased scope of activities will result in a variation to the existing arrangement that is sufficiently material to fall beyond the scope of works originally advertised and with hindsight should have been included on the original published OJEU Notice. It is not only original tenderers that could challenge the award organisations that are able to provide mechanical street cleansing activities might also wish to challenge, any one could raise a complaint with the EU Commission which would pursue the Council of its own volition.

8.5 It has been suggested that prior to the Council extending the scope of the Contract it could protect its position by issuing a VEAT Notice. Provision is made for the VEAT Notice in the Public Procurement Regulations to be used to advertise to the market an intention to award a contract directly without making a call for competition. However these direct awards can only be made where explicit justification is given. The permissible justifications are set out in regulation 14 as follows:

(1) A contracting authority may use the negotiated procedure without the prior publication of a contract notice in accordance with regulation 17(3) in the following circumstances-

(a) in the case of a public contract-

(i) when a contracting authority is using the negotiated procedure in accordance with regulation 13(a) and invites to negotiate the contract every economic operator which submitted a tender following an invitation made during the course of the discontinued open procedure or restricted procedure or competitive dialogue (not being a tender which was excluded in accordance with regulation 15(11), 16(7) or 18(10)); and

(ii) subject to paragraph (2), in the absence of tenders, suitable tenders or applications in response to an invitation to tender by the contracting authority using the open procedure or the restricted procedure but only if the original terms of the proposed contract offered in the discontinued procedure have not been substantially altered in the negotiated procedure;

(iii) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the public contract may be awarded only to a particular economic operator;

(iv) when (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by, and not attributable to, the contracting authority, the time limits specified in-

(aa) regulation 15 for the open procedure;

(bb) regulation 16 for the restricted procedure; or

(cc) regulation 17 for the negotiated procedure;

The Council does not fit comfortably within these justifications, however as Bevan Brittan has advised issuing the VEAT is a way of flushing out potential challenges and would protect the Council's position.

Although the publication of the VEAT notice in itself can encourage a challenge, in practice since the introduction of the New Directive Remedies these notices are being used across the EU to resolve the changing needs of long-term arrangements.

A challenge can be received anytime during the first six months of a Contract but by following the VEAT Notice approach identified above, will reduce the risk of any challenge being made.

8.6 It must also be noted that extending the scope of the Contract will trigger the automatic application of the TUPE Regulations which will affect a transfer of a number of existing Council employees within the Streetscape, Parking and Fleet Services to Ringway Jacobs.

9.0 Risk Management

9.1 The potential risks to the Council of a procurement challenge are dealt with in paragraph 8.5 above.

9.2 The Council is at the forefront of pursuing devolution of services and the objectives of the Localism Act 2011 with its Town and Parish Councils. Currently a 'Pathfinder' is underway with Congleton Town Council. The Pathfinder has been conducting trials on local delivery of services and is currently considering the benefits of devolving services from Cheshire East Council to the Town Council of Congleton. Other Town and Parish Councils are also considering similar service delivery models. The scope of the proposed extended Contract with Ringway Jacobs will not prevent or delay such initiatives and remains flexible enough to accommodate future delivery needs.

9.3 Achieving the target date of 1st April 2013 for the commencement of service delivery under the revised scope of contract is dependent upon the successful completion of 2 key activities, namely, concluding the terms of the extension with Ringway Jacobs and liaising with staff and trade unions in relation to TUPE transfer.

9.4 The Council has recently introduced a requirement for all major projects and programmes to be reviewed by a new corporate quality assurance group called the Executive Monitoring Board (EMB) before they can proceed. Major projects and programmes are defined where there is a total cost in excess of £250k and/or where there is significant risk. The project arising from this report will therefore need to be reviewed by the EMB prior to any approval to proceed being given.

10.0 Background and Options

- 10.1 Following the Call In of Key Decision CE12/13-18, Delivery of Streetscape and Parking Maintenance Activities Within the Highway Services Contract, at its meeting held on 12 November 2012, Cabinet resolved that the decision would be deferred in order to allow time for the matter to be considered by the relevant Policy Development Group, but that the part of decision relating to Parking Maintenance be proceeded with.
- 10.2 The Environment and Prosperity Policy Development Group set up a Task and Finish Group comprising of Councillors D Brickhill, H Davenport, W Fitzgerald, S Hogben and B Livesley to review that decision.
- 10.3 The Task and Finish Group met several times during its investigations and considered evidence relating to:
- Questions submitted by Members and the Reasons for Call In
 - Details of the Grounds Maintenance and Street Cleansing Service, including service overview, statutory responsibilities, key service responsibilities, financial and staffing resources, performance measures, contribution to the Corporate Plan and Service Context and service structure.
 - Details on how works would be monitored.
 - Results of the Ringway Jacobs Satisfaction Survey.
 - The proposed system for contact arrangements by Members.
 - Summary of the business options appraisal.
 - Further evidence that the quality of the service would not be sacrificed.
 - Details of the split between grounds maintenance and street cleansing
 - The possibility of phasing the contract
 - The model to be used to achieve localism
- 10.4 Following detailed consideration of the above evidence, it became apparent that further time was required to review the decision and gain assurance that the quality of service would not be compromised. It was therefore agreed that the issue should be further investigated and reported back to Cabinet in September 2013. However as the Mechanical Cleansing activity has clear operational synergies with Highways Maintenance it was agreed this part of the decision should be proceeded with.

11.0 Access to Information

The background papers relating to this report can be inspected by contacting the report writer:

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