

# **Congleton Link Road**

## **Procurement Summary Report**

**Oct 2016**

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## 1 Procurement – Contract Approach

The following procurement options were considered:

- Design and Build during statutory process.
- Design and Build after Secretary of State Decision.
- Early Contractor Involvement (ECI).
- Construction only contract – e.g. NEC3 ECC Option A or C.

It was concluded that Design and Build options with invitation to tender for a NEC Option A Lump Sum Contract during the Statutory Process would be the preferred procurement Option for the tender process. The reasons for this are described below.

### 1.1.1 Design and Build during statutory process

This Option (with invitation to tender shortly after Public Inquiry) would allow a competitive tender price to be included in the funding application submitted to the DfT, and enable the start of the construction phase at the earliest opportunity. The Design and Build Lump Sum tender would also provide some cost certainty and is considered to provide CEC with best value for money. Design and Build contracts offer early Price Certainty and optimum risk transfer to the contractor.

Concern was expressed that undertaking this before the Secretary of State (SoS) Decision could be seen as prejudging the outcome of the Public Inquiry. Feedback from experience within the industry has confirmed that that inviting tenders before the Secretary of State's decision was not unprecedented with award of contract being after SoS Decision. Additionally, the Inspector is independent and will need to conclude that there is a compelling case for the scheme and that the public benefit outweighs the private loss. The Inspector's recommendation will be made independently of the procurement process. However the following risks were identified.

- The statutory process delays or significantly amends the scheme thus requiring negotiation and/or significant change to the contract (or delay to the originally foreseen programme)
- Potential lack of interest/commercially acceptable price due to contractors not being confident in the scheme going ahead.
- Provides any objectors with ammunition to claim that the outcome of the statutory process was being prejudged, and increases the risk of procedural challenge/judicial review.

Following this review it was recommended that:

- Cheshire East Council would need to obtain Cabinet and Legal approval regarding invitation to Tender during the Statutory Process and SQ in advance of Public Inquiry.
- The Tender invitation documents should clearly state that the award of a contract will be subject to a successful Secretary of State Decision, and approval of funding.

### 1.1.2 Design and Build after Secretary of State Decision

Procurement using Design and Build with the tender process starting after the Secretary of State's decision is not preferred due to a delay of at least 9 months in starting work on site and the increase in construction costs that would result due to inflation. See Annex B..

### 1.1.3 Early Contractor Involvement (ECI)

The use of an ECI procurement route using an NEC3 Option A Lump Sum or Option C Target Cost Contract negotiated after the Public Inquiry was also rejected. ECI would provide some price and programme certainty, as the design and construction programme is better developed and there is opportunity to reduce risk prior to starting on site. However, experience suggests the following.

- Scheme development costs (phase 1 of ECI) are higher when procured through ECI than when procured directly from the designers. This is primarily due to Contractors adding their overhead and profit onto the designers costs which they procure through a subcontract.
- In construction (phase 2 of ECI) the Target Cost is derived through negotiation and Contractors predominantly seeking to include a high level of risk within the target which in a competitive D&B they would have to include within the tender price.

The price of the ECI option, being a negotiated price, is likely to be higher than the Design and Build option.

### 1.1.4 Construction only contract

With this route, all tender documentation is required to be ready and published at the same time as the OJEU contract notice. The restricted procedure requires tenderers to prequalify by submitting a Pre-Qualification Questionnaire (SQ) which limits the number of tenderers submitting a final price.

This process is more favourable with bidders as they only have to complete the tender documentation in stages and are not required to complete the tender documentation if they are not short-listed and therefore less resource hungry for them.

A construction contract (NEC3 ECC Type A) was rejected because of the increased programme. Although Tenderers would be pricing a fully developed design, providing certainty of price, the design of the scheme would not be complete until after the statutory process resulting in a delay to the project construction start date as the tender process could not begin until after the Secretary of State's decision. Additionally, with the detailed design work being carried out in advance of the SoS

decision, there is the risk of this work being abortive with costs being borne by the Council. Additionally, the opportunity for the Tenderers to offer alternatives and reduce overall cost/programme is minimal.

## 2 Procurement – Options to Secure the Services of a Contractor

The following three options were identified for procuring the services of a contractor.

- OJEU Notice - Restricted Procedure.
- OJEU Notice – Open Procedure, open to all contractors.
- Use of a Framework to which CEC has access i.e. Highway England's Collaborative Delivery Framework (CDF) the Midlands Framework and the SCAPE Framework.

It was concluded that the OJEU Notice - Restricted Procedure and the CDF would both be suitable and that a detailed comparison of both routes should be undertaken.

### 2.1.1 OJEU Notice - Restricted Procedure

The restricted procedure requires tenderers to prequalify by submitting a Pre-Qualification Questionnaire (SQ) which limits the number of tenders submitting a price. It was concluded that this was the most appropriate method. The SQ would enable an appropriate tender list to be drawn up, of tenderers interested in the work, and who Cheshire East were likely to want to appoint.

### 2.1.2 OJEU Notice – Open Procedure

An open OJEU procedure is open to all contractors and this option was dismissed because of the potentially large number of tenderers to be assessed and the time to do so.

### 2.1.3 Use of a Framework to which CEC has access

The CDF is Highway England's framework for procuring works on the Strategic Road Network. It is open to all English Local Highway Authorities.

Congleton Link Road, with a construction estimate of £50m would fall into the CDF Lot 3a high value construction work category ("schemes between £25m and £40m, may be extended to £300m"). The following contractors are on the framework.

- Amey
- Galliford Try Infrastructure Ltd
- HOCHTIEF (UK) Construction Ltd
- John Sisk & Son Ltd/Lagan Construction Group Ltd JV
- Kier Infrastructure & Overseas Ltd
- VINCI Construction UK Ltd (trading as Taylor Woodrow) / Vinci Construction Grands Projects JV

The Midlands Alliance framework is run by Leicestershire CC and only applies to schemes up to a construction value of £25m. The expected value of the contract means that the Midlands Framework is not applicable on the Congleton Link Road scheme.

### SCAPE Framework

A presentation was given to Cheshire East Council on 16 May 2016 by Scape Procure and Balfour Beatty on the use of the Scape Framework.

Scape Group is a public sector owned built environment specialist. The Scape Civil Engineering & Infrastructure Framework is a national framework delivered by Balfour Beatty. It has a four-year duration and an overall value of £1.5 Billion and is available to all public bodies in the UK. The nominal project value for contracts is between £1M and £40M; however Scape is not capped at that value and has been used on contracts up to £79m. The framework uses NEC options A or C and is OJEU compliant.

The framework allows a project to be developed from inception to post completion with Balfour Beatty being involved in the early stages of projects. It offers a quick way to market with individual packages of work being market tested and managed using an open book approach. The framework also includes cost planning and risk management. Scape is a collaborative arrangement and the core management team is selected from all parties in the contract. The success of the contract would depend on CEC putting in place the right controls at the outset of the contract, including influencing the quality of the management team, and then exercising these controls.

There is a management fee for using the framework.

The Scape Framework would be similar to ECI in that it would offer early collaboration with CEC. It undoubtedly has advantages and disadvantages, however, it is not being recommended for the Congleton Link Road for the following reasons.

- In Section 1 of this report it was recommended to pursue a Design and Build Contract in favour of ECI because provided better cost certainty.
- The framework is restricted to one contactor, Balfour Beatty and although each individual package is tendered, this precludes the use of other major contractors with the expertise to construct Congleton Link Road.
- Increased onus on CEC to effectively control the contract.
- There are fewer examples of a scheme of this value being procured through SCAPE. CEC has not used this framework before and, it is considered preferable to test it on a smaller value contract.



## 3 CDF route compared to OJEU route

### 3.1 Use of Collaborative Delivery Framework

This section of the report compares the advantages and disadvantages of using the CDF compared with following the OJEU process with a particular emphasis on the programme implications of both routes.

A meeting was held with Highways England on 8 December 2015. The key points from this meeting were

- CDF was appropriate for D&B and ECI contracts using NEC Options A or C.
- CEC should complete a commissioning form to reserve a place on the framework.
- Congleton Link Road suitable for Lot 3A contractors (6No.) but HE looking at extending this to Lot 2 (5No) Contractors.
- Some form of pre-market engagement held including a Contractor awareness day.
- CEC can use its own tendering system.
- Price/Quality ratings can be altered. The Highways England range is 70:30 to 30:70 which is consistent with CEC.
- 4-year framework with final date to place a contract of November 2018.
- Procurement period is up to 3 months shorter and reduces tendering costs in that CEC has access to nationally known and accomplished contractors that have already been through a vetting procedure for contacts of the size (£25M - £100M) of CLR (circa £50M).

As a result of this meeting it was concluded that

- CDF Lot 3a would provide a suitable means of procuring the contractor for Congleton Link Road.
- Obtaining a place on the framework would not commit CEC to using the framework but that some lots on the framework were getting close to their ceiling which could preclude its use in the future.

CEC has since applied for and obtained a place on the CDF Framework. This would be on the basis of procuring the works through an Option A Design and Build Contract.

## 3.2 Comparison of CDF and Traditional OJEU Options

### 3.2.1 Collaborative Design Framework

<b>Positives</b>	<b>Negatives</b>
<p>Shorter procurement period than OJEU of between 3-5 months. Saving time and money.</p> <p>Some form of pre-market engagement held including a Contractor awareness day, shorter than SQ.</p> <p>Access to nationally well-known contractors that have already been through a vetting procedure for contacts of the size of CLR.</p> <p>Contractor interest gained through contractor awareness day.</p> <p>Appropriate for D&amp;B and ECI contracts using NEC Options A or C.</p> <p>Congleton Link Road contract value around £50million. This is ideal for Lot 3A which is for contracts in the range £25-100million.</p> <p>CEC can use its own tendering system.</p> <p>Price/Quality ratings can be altered. The Highways England range is 70:30 to 30:70 which is consistent with CEC.</p> <p>Tender documentation needs to be prepared at ITT.</p> <p>The CDF framework can be used with minimal Highways England input (other than adherence with and reporting on Key Performance Indicators (KPI's)).</p>	<p>Restricted to 6 previously identified tenderers.</p> <p>No real feel for their 'appetite' at time of making bid (9-12 months' time) even if they say they are keen now and risk that insufficient number of tenderers will bid.</p> <p>4-year framework with final date to place a contract of 4 November 2018. If programme slips e.g. due to High Court challenge, this option may not be available and tender approach / documentation would have to be revisited.</p> <p>If OJEU process is commenced prior to the inquiry (as recommended), there is no time saving in the CDF approach.</p>

### 3.2.2 OJEU Notice

<b>Positives</b>	<b>Negatives</b>
<p>Appropriate for D&amp;B and ECI contracts using NEC Options A or C.</p> <p>Not limited to number of contractors and may attract high profile UK and EU contractors who would be expressing a definite interest in the scheme and result in a potentially a more competitive price due to larger market.</p> <p>CEC can use its own tendering system</p> <p>Open OJEU procedure available</p> <p>Price/Quality ratings to suit with no restrictions.</p>	<p>Potentially 3-5 months longer tendering procedure, if SQ cannot commence until after Public Inquiry resulting in a start on site 3 months later.</p> <p>Open OJEU procedure onerous because of the potentially large number of tenderers to be assessed.</p> <p>Tender documentation needs to be ready when the contract OJEU notice is published.</p> <p>If SQ cannot commence until after PI, there is greater likelihood that early ecological work would start later and miss ecological windows that would be achieved with CDF.</p>

### 3.2.3 Programme

Annex B includes a programme comparing the CDF and OJEU options. These are:

- Option 1A – SQ before PI hearing, ITT after hearing.
- Option 1B – SQ after PI hearing.
- Option 1C – Collaborative Design Framework (ITT after PI hearing).
- Option 1D – SQ after SoS Decision.

This confirms that If the OJEU process is commenced prior to the inquiry (as recommended), there is no time saving in the CDF approach.

## 4 Conclusions

This report has reviewed the options for procuring a contractor on Congleton Link Road which is being promoted by Cheshire East Council. In summary the findings are:

- A construction only contract need not be explored further.
- A restricted OJEU notice approach provided the best way to achieve an appropriate / competitive tender list
- Cheshire East Council would need to obtain Cabinet and Legal approval regarding invitation to Tender during the Statutory Process and SQ in advance of Public Inquiry.
- The Tender invitation documents should clearly state that the award of a contract will be subject to a successful Secretary of State Decision, and approval of funding.
- Both D&B and ECI provide acceptable methods for procuring the work, however, it is considered that overall, the D&B option would give Cheshire East Council best value for money, and earliest completion. The ECI option provides better programme certainty, and more flexibility in dealing with any programme slippage, but is likely to result in a greater cost. The Design and Build Lump sum tender would provide early cost certainty.
- Tendering immediately after PI hearing is preferred to tendering after Secretary of State's decision due to the significant programme advantages provided. This Option would allow a competitive tender price to be included in the funding application submitted to the DfT, and enable the start of the construction phase at the earliest opportunity.
- Both tendering using the CDF and following the OJEU procedure offer acceptable means of procuring Congleton Link Road. Using the CDF has the advantages of using nationally well-known contractors that have already been through a vetting system and provides a much shorter procurement period and tender documents do not need to be available until Instructions to Tender. There is a small risk that not all contractors would wish to tender. The OJEU route would open up the contract to other high profile UK and EU contractors who would be expressing a definite interest in the scheme.
- The tender process is longer with the OJEU route and there is a requirement for the tender documents to be available at publication of the OJEU Notice.
  - If SQ can start in advance of Public Inquiry, then tenders for both the OJEU and CDF routes would be the same and achieve the same programme.
  - If SQ starts after Public Inquiry, contract award would be three months' later.
  - If SQ were to start after Secretary of State Decision, there would be a further delay of around 6 months to award of contract; compared with tendering after Public Inquiry.

- CDF is 4-year framework with final date to place a contract of 4 November 2018. If programme slips e.g. due to High Court challenge or other factors outside of the Council's control, this option may no longer be available. (Earliest contract award currently January 2018)
- Overall, the OJEU route is preferred to CDF because it offers a wider range of contractors and avoids the risk of missing the cut-off date of 4 November 2018 that applies to CDF.
- The Scape framework offers an alternative to both CDF and the traditional OJEU route that offers a fast route to market with cost planning and risk management at an early stage, although not cost certainty. Although the framework has a notional value of between £1m and £40m, it has been used on contracts greater in value than anticipated for the current estimated construction cost for Congleton Link Road. However, it is limited to delivery by a single supplier. CEC would need to confirm that they retain sufficient control in the procurement and implementation process, including the selection of the management team.

## 5 Recommendations

The following recommendations are made:

1. Procure the construction works for Congleton Link Road on a Design and Build contract utilising a NEC3 Option A Priced Contract with Activity Schedule with Contractor Design.
2. Obtain Cabinet and legal approval to commence the SQ process in advance of Public Inquiry with invitation to tender immediately after completion of Public Inquiry and contract award after Secretary of State Approval.
3. Subject to it being acceptable to commence the SQ process in advance of Public Inquiry which would allow Invitation to Tender just after the closure of the Public Inquiry, it is recommended that the contract is procured using the OJEU route. This is because:
  - It gives access to a wider range of contractors.
  - It avoids the risk of missing the cut-off date of 4 November 2018 that applies to CDF.
4. In the event that it is not acceptable to invite tenders at the same time as the Public Inquiry, CEC should retain the option to use the Collaborative Delivery Framework, provided it was confident of achieving award of contract in advance of 4 November 2018.
5. Commence preparation of tender documents as soon as practicable in order to maximise procurement activities.