

Committee: Cabinet

Date: 15 July 2019

Agenda Item:

Wards: All

Subject: Variation to the existing Highway Works and Service Contract of up to 6 months extension for mobilisation after award of replacement contract presently being procured.

Lead Officer: Chris Lee – Director of Environment and Regeneration

Lead Member: Councillor Martin Whelton – Cabinet Member for Regeneration, Environment and Housing

Contact Officer: Gary Marshall – futureMerton Infrastructure Manager

Recommendations:

1. That Cabinet agree a variation to the current Highway Works and Services Term Contract with F M Conway for an extension of up to 6 months from 31 August 2019, as provided for in CSO 27 of the Contract Standing Orders (CSO) and in particular S.27.12.2 in line with the procurement activities currently on going for a new contract to be in place. This is to allow enough time for mobilisation after contract award.
2. Approval of the specific terms of the variation be delegated to the Lead Officer.

1. PURPOSE OF REPORT AND EXECUTIVE SUMMARY

- 1.1. This report recommends that Cabinet approve an extension and variation to the current Highways Works and Services Term Contract and that the Lead Officer be delegated authority to approve the form of the relevant extension documents. The duration of the extension so delegated should be for a duration of up to 6 months. The current Highways Works and Services Term Contract is between the London Borough of Merton and F M Conway Limited (the Contract).
- 1.2. It is proposed to extend the agreement from the end date (30 August 2019) otherwise with no further change to the terms and conditions of the Contract including price.
- 1.3. This extension will only be taken up should it be required as it is intended to facilitate a seamless transition from the current supplier to the new contract following the current procurement process for replacement services and mobilisation period. The proposed extension of the Contract, is intended to

reduce the risk of potential disruption to service for the start of the replacement services while ensuring continuity of service as the council delivers on-going public realm regeneration work.

- 1.4. The variation to the contract to allow for extension of up to six months will help to deliver value for money in accordance with S.27.8 of the CSOs, as contract price for the last 7 years will be applicable. The current contractor has confirmed there won't be any changes to the current terms including price.

2 DETAILS

- 2.1. The Contract was awarded to F M Conway Ltd for a five-year term from 1 September 2012 to 31 August 2017. The Contract allowed for its term to be extended for up to a further two years and on 19 September 2016, Cabinet approved the 2 years extension which ends on 30 August 2019.

3 OPTIONS CONSIDERED

- 3.1. Two options were available to the council to consider:
 - Agree a variation to the current contract to allow for an extension of up to 6 months for mobilisation after award of a contract for the replacement services.
 - Do nothing and allow no mobilisation time or award the contract based on tight mobilisation timescales following award of the contract currently being procured.
- 3.2. The recommended option is to agree a variation to extend the existing contract to allow adequate time for mobilisation for the new contract following the current procurement process.
- 3.3. Varying the Contract to allow for an extension of up to 6 months, with no changes to the terms and conditions, is considered the most expedient and risk free approach to allow a seamless transition and continue to deliver planned and reactive highway works during the mobilisation period.
- 3.4. The variation to the contract will allow enough time for TUPE requirement to be implemented as required by statute.

4 CONSULTATION UNDERTAKEN OR PROPOSED

- 4.1. A verbal update of the timeline and key milestones for the current ongoing procurement activities for a new highways works and service contract, was presented to the council's internal Procurement Board on the 11th June 2019. Procurement Board officers recommended that a contract variation for an extension of up to 6 months should be considered in light of ongoing obligations to undertake planned and reactive works on the public highway

and also allow for mobilisation of the new contract as well as facilitating the operation of TUPE obligations in relation to staff transfers between the existing and new contractor as applicable.

- 4.2. On 12 June 2019 FM Conway agreed to the council's request to extend the existing contract for up to 6 under the existing terms, conditions and prices.

5 TIMETABLE

- 5.1. The timetable is as follows:

- Cabinet – 15 July 2019: decision on this report and decision on new Highways Works and Services Term Contract Award, followed by call in process.
- 30th August 2019 – existing Contract term due to end.
- 31st August 2019 commencement of further extension for a period of up to six months
 - Start of mobilisation with new Highways Contractor, including TUPE of staff as statutorily required.
 - Existing Highways Terms and Services Contract with FM Conway due to for up to six months continue under the existing terms conditions and price while mobilisation with the new contractor takes effect.

- 5.2. If Cabinet agreed to the recommendations, once the call-in procedure has been followed, the council could formalise FM Conway's acceptance of the proposed extension period.

- 5.3. If Cabinet decide not to agree a variation to extend the existing contract, depending upon its recommended course of action, the Council will be at risk of awarding the new contract potentially without sufficient time for mobilisation of the new contract which may cause disruptions to service delivery.

6 FINANCIAL, RESOURCE AND PROPERTY IMPLICATIONS

- 6.1. The cost of carrying out a variation to the existing contract will be met from within existing budgets. F M Conway Ltd, the current highways term contractor, has agreed to the variation for up to six months from the end of the existing contract term with no change to the Terms and Conditions of the Contract including price.

7 LEGAL AND STATUTORY IMPLICATIONS

- 7.1. The variation or modification of public contracts by local authorities should be compliant with the Public Contracts Regulations 2015 and in particular with regulation 72 which allows modification of contracts within pre-defined 'safe-harbours'.
- 7.2. Should the variation be required such variation must be compliant with one of these safe-harbours the risk of procurement challenge in relation to the proposed variation appears relatively low given that the Council is presently undertaking a procurement for replacement services.
- 7.3. There are several options under regulation 72 that allow modification of public contracts. In particular regulation 72 allows for modifications, irrespective of their value, that are determined not to be substantial (regardless of cost) and as such a lawful contract modification where such modifications do not:
 - 7.3.1 render the relevant contract materially different in character from the one initially concluded; alter the terms of the original procurement such that another bidder could have been awarded the contract or allow others to bid; change the economic balance of the contract in favour of the contractor in a manner which was not provided for in the initial contract; modify the scope of the contract considerably. Considering that the contract is to be extended for a relatively short period, it is to be on the same terms and prices as originally awarded, risk of challenge therefore appears to be low.
- 7.5. Additionally contract variations which are valued in the case of works contracts below 15% of the original total contract value and also the applicable procurement threshold, is £4,551,413 are allowed.
- 7.6. The report notes the relevant Contract Standing Order being number 27 which allows for contract variations and sets out the requirements officers must demonstrate in the approval of a variation.

8 HUMAN RIGHTS, EQUALITIES AND COMMUNITY COHESION IMPLICATIONS

- 8.1. The effective maintenance and improvement of the adopted highway network in the borough is essential to meet our statutory duty to maintain a safe environment for residents, businesses and users of the network. This is especially important for disadvantaged groups such as those with mobility difficulties and the elderly. The extension of the existing Highways Contract for up to six months while mobilisation of the new contractor takes place is the most expedient and risk averse approach to allow a seamless transition and continue to deliver planned and reactive highway works during the mobilisation period.

9 CRIME AND DISORDER IMPLICATIONS

- 9.1. Section 17 of the Crime and Disorder Act 1998 requires all Local Authorities to consider crime and disorder while exercising their duties. The design of

highway improvements and maintenance on existing roads complies with nationally agreed Codes of Practice and Design Guides and assists with delivering the Council's ambitions of "A Safe and Secure place to Live" and contributes to the objectives of the Thematic Partnerships contained in the Community Plan 2009-19 namely the Sustainable Communities and the Stronger Communities strategic themes.

10 RISK MANAGEMENT AND HEALTH AND SAFETY IMPLICATIONS

- 10.1. Effective maintenance and improvement of the Highway Network will minimise insurance or injury risks to the Council by ensuring that the public highway is safe and serviceable.
- 10.1. Insurance levels set out in the existing contract requirements have been assessed by the Council's Risk and Insurance team and have been deemed to be of an acceptable level.
- 10.2. The recommendations in this report to extend the contract from 31st August 2019 for up to six months is to mitigate the risks set out in this report of not having enough time to allow a seamless transition and to continue to deliver planned and reactive highways works during the mobilisation period.
- 10.3. The original timetable was for mobilisation to take place from April / May 2019 onwards. The provision for the contract extension was not considered necessary until recently as the dates between new contract award and the end of the old contract were reduced and did not allow for adequate mobilisation to take place.

11 APPENDICES – NONE

12 BACKGROUND PAPERS

- 12.1. Merton's Highways Works and Services Contract September 2012
- 12.2. Merton's Highways Works and Services tender 2019

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