

London Borough of Enfield

Operational Report

Report of Penny Halliday – Commercial Director Meridian Water

Subject: MW HIF - Contract Variation for PM / QS services

Executive Director: Peter George – Director of development

Ward Upper Edmonton

Key Decision: KD5569

Purpose of Report

1. The purpose of this report is to obtain approval to vary the existing call-off contract with Turner & Townsend to account for additional services that have been provided during the PCSA and prolongation of the programme period. T&T were appointed in August 2020 as Project Management Consultant to support the delivery of Strategic Infrastructure Works in Meridian Water.
2. Since entry into contract, T&T have submitted several (retrospective) fee requests (as detailed in Confidential Appendix A), which have been disputed due to the quantum of and the lack of substantiation. A Dispute Resolution Procedure was started in summer 2022 in accordance with the contract to negotiate an amicable solution.
3. After various negotiation meetings under this procedure, T&T have submitted a revised and final offer for fees up to the end of December 2022 and provided substantiation of their claim including timesheets detailing the extra senior resources required over above their original PCSA period. It is considered that T&T is entitled to additional fees and LBE has already incurred cost liability under the contract and/or common law.
4. The settlement agreement is reasonable and representative of the amount of additional work provided, and prolongation incurred on the programme. The settlement fee is considered to represent value for money and is in line with the average contractual day rate. Refusal to pay reasonable and additional fees may be a breach of contract by LBE and T&T would be entitled to suspend services under the contract, which would result in significant disruption to the project delivery of SIW works.
5. Furthermore, this report recommends approval of a further allowance for 6 months prolongation of PCSA service from T&T until June 2023 (as detailed in confidential appendix). This extension is required to cover the management of the contractors extended design activities under the PCSA and prepare for main contract award, which is dependent on funding decision from DLUHC.
6. The recommendations for latest audit report related to contract management on Meridian 1 are being reviewed and are taken on board in contract management of T&T going forward. The team has now implemented an improved change control

process to ensure changes are agreed prior to additional scope of services being undertaken and close monitoring of suppliers' performance and progress is in place.

Proposal(s)

7. Approve the settlement agreement and associated expenditure (as detailed in Confidential Appendix A) for additional services and prolongation provided by Turner & Townsend up the end of December 2022.
8. Approve a further allowance for 6 months prolongation of PCSA service from T&T until June 2023 (as detailed in confidential appendix) to cover the management of the contractors extended design activities under the PCSA and prepare for main contract award.
9. Authorise the variation of the Call-off Agreement to reflect the changes detailed in this report and authorise the delegated legal officer to complete settlement agreement / deed of variation if required.
10. Note that the expenditure related to proposals 7 and 8 above can be covered from the Meridian Water Capital Programme and claimed in arrears from DLUHC (former MHCLG) on a quarterly basis in accordance with the terms in the HIF Grant Determination Agreement.

Reason for Proposal(s)

11. T&T submitted a final claim for all work up to the end of December 2022 and provided substantiation of their claim including timesheets detailing the extra senior resources required over above their original PCSA period.
12. The final claim is reasonable and representative of the amount of additional work provided, and prolongation incurred on the programme. The settlement fee is considered to represent value for money and is in line with the average contractual day rate.
13. It is considered that T&T is entitled to additional fees and LBE has already incurred cost liability under the contract and/or common law. Refusal to pay reasonable and additional fees may be a breach of contract by LBE and T&T would be entitled to suspend services under the contract, which would result in significant disruption to the project delivery of SIW works.
14. A further allowance for 6 months prolongation of PCSA service from T&T until June 2023 is required to cover the management of the contractors extended design activities under the PCSA and prepare for main contract award. The allowance is based on framework rates and reduced resources levels reflecting lower intensity of work over the next couple of months until entry into main contract, which is dependent on funding decision from DLUHC

Relevance to the Council's Plan

15. The Strategic Infrastructure Works delivered through the HIF funding serve future development which is key to unlocking the development of Meridian Water and contributes to the priorities of the Council's Corporate Plan:
 - a. *Good homes in well-connected neighbourhoods*
The Strategic infrastructure at Meridian Water is key to building more and better homes in Enfield. It is also key to delivering and driving investment to

deliver growth in Enfield. Further to this, a key aim in the Council Plan is to Complete Government-funded strategic infrastructure works for Meridian Water, which include a major new road and public park, due for completion in 2023.

b. Safe, healthy and confident

The Strategic Infrastructure works underpin placemaking capability at Meridian water that will contribute to reducing reliance on cars and increasing walking, cycling and public transport at Meridian Water and it will also contribute to opportunities to visit and enjoy parks and open spaces.

c. An Economy that works for everyone

The Strategic Infrastructure Works at Meridian water are key to shaping the economy of Meridian Water and allowing the economic growth of Meridian Water to be filtered out to connecting areas throughout Enfield, attracting jobs, business growth and supporting Enfield residents and the local economy.

Background

Previous Decisions

16. In December 2018 the Council submitted a bid to the Department for Levelling Up, Housing and Communities (DLUHC, formerly MHCLG) for the Housing Infrastructure Fund (HIF) to deliver the first phase of strategic infrastructure works in Meridian Water. The Strategic Infrastructure Works comprise of rail enhancement works amounting to a value of circa £54m (HIF Rail Works) and strategic road and flood alleviation works for a value amounting to circa £116m (HIF Street Works).
17. On 12th February 2020 Cabinet approved (KD 5085) the entry by Council into the Grant Determination Agreement (GDA) and in October 2020 the Council entered the GDA with DLUHC for a total amount of £170m.
18. Following the announcement that the Council had successfully secured the HIF funding, a Project Management Consultant was procured through the Homes England Framework for Multidisciplinary Technical Services. In July 2020 the Director of Place approved (KD5170) the appointment of Turner & Townsend (T&T) as Project Management Consultant to support the delivery of the Strategic Infrastructure Works (SIW). The total authorised expenditure related to the appointment of T&T is detailed in Confidential Appendix A.
19. The T&T tendered contract sum (as detailed in Confidential Appendix A) was based on a defined scope and programme to manage Pre-Construction Service Agreement (PCSA) between the VINCI Construction UK Limited (VTW) and LBE, and the Main Work NEC4 contract.
20. The Project Management Consultancy Services provided by T&T are eligible for HIF funding under the GDA and could be claimed in arrears on a quarterly basis.

Key Project Challenges

21. The budget pressure on the Street Works has increased incrementally since the start of the project. The latest interim cost estimate prepared by the Council's Cost Consultant showed a significant budget pressure on Street Works, mainly due to

exceptional inflation cost. Value Engineering and de-scoping items identified can only partially ease the budget pressure.

22. Conversations have started with DLUHC to obtain additional HIF funding for the cost overruns. LBE have provided information to support this and DLUHC is carrying out a national HIF funding review, which will inform their decision to allocate any further funding. The outcome of the funding review was expected in November this year, but latest information from DLUHC identified that a funding decision will not be taken before June 2023.
23. As result of budget pressures and delays to the DLUHC funding decision uncertainty remains on the surety of the total price of the Street Works being contractable in the HIF funding envelope. This in turn prevents the Council from entry into the main works contract and start the works on site and has caused significant delays.
24. It should be noted that the delayed start on site for the Street Works will impact the completion date, which will exceed the HIF funding deadline of March 2024. An extension of the HIF funding deadline to December 2025 is being considered by DLUHC as part of the overall funding review.
25. The strategy is therefore to continue discussions with DLCUH around securing the full funding ask and delivering all the housing objectives, whilst also presenting alternative options considering prevailing uncertainties. A funding ask and updated business case has been submitted to DLUHC, along with lobby letters from senior officers and stakeholders to key stakeholders in central government.

Main Considerations for the Council

Fee Claims and Negotiation

26. The PCSA service provide by T&T was scheduled to be completed in July 2022. However, it is in delay due to various challenges:
 - Extended negotiation on PCSA agreement between LBE and VTW prior to entry into the PCSA;
 - Extensive PCSA design development including value engineering to mitigate the project risks and support the wider development programme;
 - Project affordability issue and budget pressure due to extraordinary inflation based on the supply chain feedbacks during PCSA procurement phase;
 - Delayed HIF funding review by central government.
27. As a result, T&T have retrospectively submitted several fee requests (as detailed in Confidential Appendix A). The additional services cover the extended PCSA period up to December 2022, which is an extension of 19-month in comparison to the original PCSA period (PCSA prolongation). The fee requests have been disputed by LBE due to the quantum of and the lack of substantiation.
28. Following these disputes, T&T and LBE entered into a Dispute Resolution Procedure in June 2022 in accordance with the contract to negotiate an amicable solution. After various negotiation meetings under this procedure, T&T have submitted a revised and final and provided substantiation of their claim including timesheets detailing the extra senior resources required over above their original PCSA period.

29. The average day rate for T&T revised fee claims is in line with the average of T&T contractual day rate and it is considered that the revised T&T fee claims are acceptable and reasonable for settlement agreement.
30. Furthermore, extended contractors design activities and delayed funding decision from DLUHC, result in further prolongation on the PCSA period and delay to start on site of the main works. As a result, there is a need of further 6-month allowance for prolongation of PCSA service required from T&T until June 2023 (as detailed in confidential appendix).
31. The allowance is based on framework rates and reduced resources levels reflecting lower intensity of work over the next couple of months until close out of the PCSA period and entry into main contract, which is dependent on funding decision from DLUHC.
32. Usage of the prolongation allowance is dependent on the timing of the DLUHC funding decision, and the amount of additional funding confirmed, if any. The sooner the decision comes through the quicker the Council can enter into the main works contract and complete the PCSA. However, it should be noted that if no or limited additional funding comes through a de-scoping / value engineering exercise will need to be undertaken to ensure project is deliverable within funding envelope.

Framework and Call-Off Contract

33. T&T is appointed on a call-off contract under the Homes England Framework for multidisciplinary services. The call-off contract binds the parties to (also) act in accordance with the framework terms.
34. The framework terms require the contractor to agree any anticipated costs incurred in excess of agreed tender rates, with the Council's nominated/instructing officer before commencing the additional services. Although, as a result of the prolonged PCSA period these extra services may have been deemed to constitute 'additional' services (as the contractual scope of works for the PCSA is 11 months only) the contractor submitted a fee claim to the Council, post-provision of such extra services. However, the contractual documentation does not bar the consultant from claiming for additional services retrospectively, as has happened with claims submitted by T&T.
35. At the end of 2022 an audit was carried out to provide assurance that supplier management risks within the Meridian One project were identified, reviewed and mitigated. The recommendations set out in this report are being reviewed and are taken on board in contract management of suppliers going forward, including T&T.
36. In addition, the team has now implemented an improved change control process to ensure changes are agreed prior to additional scope of services being undertaken and close monitoring of suppliers' performance and progress is in place.

Cost and Budget

37. It is recommended that the total expenditure on PM/QS consultancy service for T&T is increased as detailed in confidential appendix A.

38. The cost can be covered from the budget allowance for HIF Street Works for FY 2022/23 / 2023/24 and the additional expenditure for T&T set out in this report is included in the overall project CAPEX.
39. Conversations have started with DLUHC to obtain additional HIF funding for the exceptional inflation cost. LBE has been providing information to support this and DLUHC is carrying out a national HIF funding review, which will inform their decision to allocate any further funding. The outcome of the funding review is not expected until February 2023.
40. The costs for T&T's services are eligible for HIF funding and expenditure to date has been successfully claimed back from DLUHC in the form of preliminary funding. Subject to approval of the recommendations set out in this report, any expenditure related to T&T's appointment will continue to be claimed back from DLUHC.

Risk of additional fee claims

41. Based on an increasing construction value T&T have indicated that additional fees of circa £345k on their Construction Period Fee may be required. This potential claim cannot be settled at this stage and has been excluded from the Fee Settlement Agreement.
42. It should be noted that an additional Claim Settlement could be considered a substantial variation to T&T contract and may constitute a new contract for the purposes of the procurement rules, requiring LBE to launch a new tender in respect of PM/QS service under the Public Contract Regulation 2015.
43. Advice has been sought from legal and procurement and exemptions to the rules are available and it is considered that the risk on the need to re-tendering remains low.
44. The team is reviewing T&T's performance and exploring alternative options, including reprocurement of the services should it become necessary to replace T&T with an alternative consultant either under an existing framework or through another relevant frameworks. A separate procurement strategy would be submitted for approval should this be required.

Safeguarding Implications

45. The recommendations in this report do not have any safeguarding implications.

Public Health Implications

46. There are no public health implications arising directly from this decision.

Equalities Impact of the Proposal

47. There are no equalities impact arising from the decision in this report.
48. Impact on parties currently operating on the land where the SIW will take place was analysed through Equalities Impact Assessment (EQIA) in relation to the CPO. The initial EQIA was conducted in December 2019 internally by the Council, with a subsequent extensive review by external consultant Ottaway Strategic Management in March 2020. Both assessments identified no direct negative

impact of the CPO. Please see KD 4832 (January 2020) Cabinet and (July 2020) Operational reports for details.

49. A predictive EqIA was completed on the Meridian Water Masterplan in 2018 and found that the scheme will have a positive impact on groups sharing protected characteristics, creating a sustainable community in Meridian Water that is connected to the surrounding communities in Edmonton and promoting social equity and reduce inequalities. The EqIA demonstrated that the scheme will deliver social, economic, health, educational, physical, and environmental infrastructure that meets the needs of different groups and reduces inequality across a number of domains, including housing, health, and employment.

Environmental and Climate Change Considerations

50. There are no environmental implications arising directly from this decision.

Risks that may arise if the proposed decision and related work is not taken

51. Not approving the recommendations set out in this report will result in having to pause Street Works, until the budget pressures on the Street Works have been resolved and additional HIF funding by DLUHC is confirmed. This will have direct and indirect impacts on the delivery of strategic aims at Meridian Water. Impacts of having to stop / pause the Street Works are set out below:
52. **Programme Impact:** The team will need de-mobilised, being unable manage and close out the PCSA, resulting in a significant delay to the programme and risk of DLUHC withdrawing the funding.
53. **Budget Impact:** Pausing Street Works is expected to result in additional cost related to inflation, as well as de-mobilisation and re-mobilisation cost of project teams.

Risks that may arise if the proposed decision is taken and actions that will be taken to manage these risks

54. **Risk:** T&T are not providing required services up to expected standard and are underperforming.
Mitigation: Contract and change management procedures are under review as well as the possibility to introduce Key Performance Indicators. In addition, options are being explored to reprocure the services should it become necessary to replace T&T with an alternative consultant.
55. **Risk:** Further fee claims could be considered a substantial variation to T&T contract and may constitute a new contract for the purposes of the procurement rules, requiring LBE to launch a new tender.
Mitigation: In addition, options are being explored to reprocure the services should it become necessary to replace T&T with an alternative consultant.
56. **Risk:** Delay or other breach of GDA - non-compliance with the Council's obligation under the GDA, such as delay to the Infrastructure Milestones could result in breach of contract and in the worst-case scenario termination of the agreement and further funding being withheld or all/ some funding being claimed back, including the funding to cover the expenditure set out in this report.
Mitigation: Existing project management arrangements are in place to manage the project and ensure timely delivery of Infrastructure Milestones. Close

engagement with DLUHC is ongoing through monthly progress meetings and if required agreement will be sought from the DLUHC for a waiver or extension.

Financial Implications

Legal Implications

Legal Services has been consulted in the process of preparing this report and make the following observations (provided by MP 24/10/22 based on version of report circulated on 17/10/22, timed at 13:52hrs). Report updated by OD on 05/01/23 based on version of the report circulated on 21/12/22.

57. S.111 Local Government Act (1972) gives a local authority power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions, including its housing functions.
58. Furthermore, the general power of competence under s.1(1) Localism Act (2011) states that a local authority has the power to do anything that individuals generally may do provided it is not prohibited by legislation and subject to Public Law principles. The proposal to enter into settlement agreement with Turner & Townsend for additional services as mentioned within this report are therefore in accordance with the Council's powers.
59. The parties entered into a call-off contract, let under the 'Homes England Multi-Disciplinary Technical Services Framework'. In addition to the terms stipulated therein, the call-off contract by reference, binds the parties to act in accordance with the framework terms. The framework terms (*Part 5 – Invoicing Procedure; clause 1.4*) require the contractor to agree "*any anticipated costs incurred **in excess of** agreed tender rates*", with the Council's Nominated/Instructing Officer **before** commencing such additional services.
60. Whilst as a result of the prolonged PCSA period, the extra services may have been deemed to constitute 'additional' services (owing to the contractual scope for the PCSA being for 11 months only) this would not excuse the contractor from following due process. The contractor submitted various fee claims to the Council, **post-provision** of such extra services.
61. Although the contractual documentation does not explicitly prohibit the contractor from claiming for additional services retrospectively, again, this does not excuse it from following due process. The framework terms (*Part 5 – Invoicing Procedure; clause 1.3*) implies that any additional services (falling outside of the agreed scope and fee) provided to the Council, are done so at the contractor's own risk. The framework terms further state that:

"no payments shall be made for any Services supplied by the Consultant [contractor] for which no Instruction or no approval to the Consultant's [contractor's] Fees has been given by [the Council] in accordance with this Contract."

The Council, upon receipt of such retrospective fee claims from the contractor, engaged in negotiations, hence (i) implying acceptance of the steering away from

the actual 'fee claim / invoice submission' process and (ii) accepting/showing willing that the Council is agreeable to negotiate and settle at a fee for the services rendered.

62. Upon discussion with the Council, the contractor has acknowledged that there had been a 'steering away' on its part, from the actual 'fee claim/invoice submission process' and this acknowledgement is reflected in the reduction in the settled fee claim figure. It is confirmed that Legal Services have been consulted on the settlement.
63. The Council has been advised to agree and document a process with the Contractor, to avoid this situation from arising again (for the remainder of the contract term including any extension to the contractual arrangement). The Council is also advised, considering what has occurred, to ensure that management of this contract is tightened.
64. All formal variations to the original call-off contract currently in place between the parties and/or settlement agreements, should be drafted by and in a form approved by the Director – Law & Governance.

Workforce Implications

65. Not applicable

Property Implications

66. Not applicable

Other Implications

67. The original contract with Turner & Townsend for Project Management and Quantity Surveying Services for the Delivery of Strategic Infrastructure at Meridian Water was let under the Homes England Multi-Disciplinary Technical Services Framework.
68. Procurement services note the request for additional expenditure under this contract. Any additional expenditure must be in accordance with the original contract and demonstrates best value. The additional services must be substantially the same as those provided for in the original contract. Any additional expenditure must also comply with the 2015 Public Contract Regulations.
69. Any extensions or variations to the original contract must be recorded on the London Tenders Portal.

Options Considered

70. **“Do Nothing”** – it is considered that T&T is entitled to additional fees and LBE has already incurred cost liability under the contract and/or common law. Refusal to pay reasonable additional fees may be a breach of contract by LBE and T&T would be entitled to suspend services under the contract, which would result in significant disruption to the project delivery of SIW works. This option is therefore not recommended.
71. **“Continue to dispute the fee under dispute resolution”** - it is considered that the proposed settlement is within the acceptable range of LBE assessment. Further

dispute resolution procedure would likely lead to expert determination and/or adjudication. While it may be possible to achieve some betterment under these proceedings, the LBE costs to run these proceeding would be significant and in general not recoverable. This would offset any potential further betterment on the fee negotiation and result in significant disruption to the project delivery of SIW works. This option is therefore not recommended.

Conclusions

72. This report recommends varying the call-off contract with T&T to account for additional services that have been provided during the PCSA period and prolongation of the programme period
73. It is considered that T&T is entitled to additional fees and LBE has already incurred cost liability under the contract and/or common law. Refusal to pay reasonable additional fees may be a breach of contract by LBE and T&T would be entitled to suspend services under the contract, which would result in significant disruption to the project delivery of SIW works.
74. It is considered that this offer represents value for money for acceptance by the Council because
 - a. The settlement offer represents a significant reduction against their initial claim;
 - b. The prolongation costs are below the PCSA contract rate, as the T&T revised fee claim is in line with the average of T&T contractual day rate and is considered acceptable and reasonable for settlement agreement.
 - c. The further prolongation allowance is deemed to be required to close out prolonged PCSA activities and ensure a minimum level of resources whilst DLUHC funding decision is awaited, without having to fully demobilise the team.
75. In addition, this report recommends the approval of further expenditure for additional scope items to allow (critical) enabling works to be carried out under the PCSA and mitigate any delays to entry into the main works contract while central government is carrying out their ongoing review on HIF funding.

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Appendices

- Confidential Appendix A

Background Papers

The following documents have been relied on in the preparation of this report: