

NORTH SOMERSET COUNCIL DECISION

DECISION OF: ASSISTANT DIRECTOR PLACE MAKING & GROWTH. IN ACCORDANCE WITH DELEGATED AUTHORITY 22/23 DP 53



IN CONSULTATION WITH: SECTION 151 OFFICER AND HEAD OF STRATEGIC PROCUREMENT

DECISION NO: 22/23 DP 428

SUBJECT: APPROVE THE INCREASE OF LEGAL FEES FOR EXTERNAL LEGAL SUPPORT BASED ON THE WORK SCOPE AND THE ESTIMATED NUMBER OF HOURS TO SCHEME COMPLETION IN CONNECTION WITH THE DELIVERY OF BANWELL BYPASS AND ASSOCIATED HIF INFRASTRUCTURE

KEY DECISION: YES

REASON: The total sum for the estimated legal fees exceeds £500,000.

BACKGROUND:

Following a comprehensive procurement and evaluation exercise Burges Salmon LLP was selected to provide legal support to deliver the Banwell bypass scheme (decision 20/21 DP216).

The original tendered costs for legal support of £642,950 was based on the work scope set out in the work streams listed in the legal specification and the estimated number of hours for each work stream, based on hourly rates within Burges Salmon's tender submission.

For the reasons set out in this report, as the scheme has developed time spent against the work streams has increased. Burges Salmon was invited to provide an updated pricing scheme for delivery to the scheme to completion and based on the hourly rates set out in their tender submission fees will increase by £898,610. This will bring the total estimated fees for external legal services to £1,541,560. Whilst this is a significant increase, the original estimate for legal fees and advertised in the Official Journal of the European Union was £1.7m.

DECISION:

To approve an increase for external legal support by £893,610 to enable Burges Salmon to continue to deliver critical legal services to the delivery of Banwell Bypass and associated works.

REASONS:

The pricing schedule provided with the tender had a set number of hours and workstreams which the project team estimated based on information available at the time of tender in 2020. As the project has progressed the scheme design and understanding has developed, which has required further legal advice and support. Regulation 72 of the Public Contract Regulations 2015 states that a contract/framework may change without re-advertisement in OJEU where:

“The change, irrespective of the monetary value, is provided for in the initial procurement documents in a clear, precise and unequivocal review or option clause, which specifies the conditions of use and the scope and nature of the change; and the overall nature of the contract/framework is not altered.”

Section 2.1 of the specification made provision for this by setting out that the scheme limits and plots were based on a concept as such the hours were an estimate. “The indicative concept and location are not fixed and will be subject to further optioneering, assessment and public engagement through the design process before a final design solution is proposed.” Overall, the workstreams set out in the specification have not altered just the amount of time to undertake them.

As well as the scheme design developing, which has required further advice from Burges Salmon on planning, land acquisition and further engagement with the scheme designers and land agents, there have also been unforeseen issues such as advising on replacement land for Banwell Football Club and the requirement for a supplementary CPO. This does not extend the scope of the contract considerably.

The cost increase of £893,610 has been scrutinised by the Banwell Bypass project team who are satisfied the hours are justified and that the additional contract value remains good value for money. The total contract costs still fall within the £1.7 million OJEU notice advertised at tender stage.

OPTIONS CONSIDERED:

1. Undertake a new open tender procurement exercise:

This option has been discounted as it would take several months before a contractor is appointed and given the stage of the project, this would be detrimental to programme and project delivery. In addition to this, Burges Salmon have acquired significant knowledge of the project through their delivery to date, which would take time and incur cost for new advisors to develop.

2. Do nothing:

There is limited resource within the council to advise on legal services, which would leave the project team without valuable legal expertise at a critical stage of the project when the project is going through determination of the planning application and the Compulsory Purchase and Side Road Order process for land acquisition.

3. Seek approval to vary and increase the value of the existing contract with Burges Salmon:

This is deemed to be the most suitable approach and is the recommended decision in this report.

FINANCIAL IMPLICATIONS:

The legal contract would be funded by cost code KDT701 (Bypass design and planning). At present, the scheme is projecting an underspend of the preliminary budget of approximately £5,000,000 (total prelim budget £17,363,518). As the contract was awarded at a lower value than anticipated, there are sufficient funds to cover the additional spend of this contract.

Costs

Burges Salmon has submitted a revised pricing schedule based on the number of hours they anticipate each workstream will take to complete totalling an additional spend of £893,610.

Funding

The legal contract would be funded by cost code KDT701 (Bypass design and planning). At present, the scheme is projecting to have committed £9,206,822 of the £17,363,518 preliminary budget, there are sufficient funds to cover the additional spend of this contract.

LEGAL POWERS AND IMPLICATIONS

Regulation 72 of the Public Contract Regulations 2015 states that:

- (1) Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Part in any of the following cases:
 - (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options, provided that such clauses:
 - (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and
 - (ii) do not provide for modifications or options that would alter the overall nature of the contract or the framework agreement.

As we are requesting a variation to the hours charged against each workstream and not seeking to increase the services within the scope of the original contract the variation falls within regulation 72(a).

It was made clear in the specification that scheme limits and land plots were indicative and for tendering purposes only, ie modifications were expected throughout the life of the contract.

Contract Standing Orders 27 provides that:

- (a) where a contract with a whole-life contract value of £50,000 and above is proposed to be increased by a value of 25% and above, a report shall be made to the Section 151 Officer who shall decide what further action is necessary; and
- (b) where any claim for payment exceeds the original contract sum by £50,000 or more, the matter must be referred to the Head of Strategic Procurement before any settlement is made.

As the increase of professional legal fees is greater than £50,000 this report sets out the reasoning for such increase and this decision shall be made in consultation with the Section 151 officer and the Head of Strategic Procurement. The reasons for the increase are as follows:

1. The Planning Application for the Scheme has been more complicated than anticipated, so Burges Salmon has spent additional time on advising and reviewing the planning application documentation pre submission. There have also been some complex issues to address post determination to resolve comments from consultee's requiring further input from Burges Salmon.
2. The requirement for a Supplementary CPO has arisen to address additional land required to deliver mitigation for bats that was identified during the planning determination.

3. Unforeseen issues have arisen such as advising on replacement land for Banwell Football Club.
4. Further hours have been added for work still to be undertaken to reflect the complexity of the project that was identified when undertaking the planning application.
5. None of the above extends the scope of the contract considerably.

CLIMATE CHANGE AND ENVIRONMENTAL IMPLICATIONS

There are no climate change or environmental implications as a result of this decision.

CONSULTATION

The options listed have been presented to the HIF steering board that agreed (in principle) with the approach.

RISK MANAGEMENT

RISK	IMPACT	MITIGATION
Further legal services may be required	Cost increase	Burges Salmon has a better understanding of the scheme, the updated pricing schedule will take into account more accurate hours for each workstream. The risk budget can accommodate any unforeseen costs.

EQUALITY IMPLICATIONS

Have you undertaken an Equality Impact Assessment? Yes

A full EQIA has been undertaken as part of the Banwell Bypass planning application. The protected characteristics most pertinent to the highways scheme are age, disability, gender and deprivation. These protected groups were consulted and will continue to be consulted on the scheme design to ensure they are not disadvantaged.

CORPORATE IMPLICATIONS

APPENDICES


None

BACKGROUND PAPERS

- **20/21 DE110** procurement plan: legal services for the housing infrastructure fund programme of works
- **20/21 DP216** contract award: legal services for the housing infrastructure fund programme of works
- 25 June 2019 Commissioning Plan approved by Full Council
- Banwell Bypass Legal Specification

SIGNATORIES:

DECISION MAKER(S):

Signed:  Assistant Director Placemaking and Growth

Date: 2 March 2023

In consultation with:

Signed:  S151 Officer

Date: 2 March 2023

Signed:  Head of Strategic Procurement

Date: 2 March 2023