

## ABERDEEN CITY COUNCIL

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COMMITTEE	Full Council
DATE	21 August 2013
DIRECTOR	Gordon McIntosh
TITLE OF REPORT	Aberdeen Western Peripheral Route
REPORT NUMBER:	EPI/13/136

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### 1. PURPOSE OF REPORT

Full Council of 6<sup>th</sup> March 2013 (Article 28 refers) authorised officers to continue discussions with Aberdeenshire Council and Transport Scotland with regards to a revised payment mechanism towards the Council's 9.5% contribution towards the Aberdeen Western Peripheral Route (Northern and Southern Legs), and for the Head of Legal and Democratic Services to negotiate a legal agreement governing the payment mechanism, subject to the approval of the Director of Corporate Governance, the Head of Finance and the Director of Enterprise, Planning and Infrastructure.

This report outlines the result of those discussions and details the proposed Third Variation to the existing Memorandum of Understanding to govern the revised payment mechanism. It also seeks approval for an amended process to be used for receipt and opening of tenders in the course of the competitive dialogue process to appoint a Special Purpose Vehicle ("SPV") to enter into a Project Agreement to design, build, finance and operate the Aberdeen Western Peripheral Route/Balmedie-Tipperty (AWPR/B-T) project. It also seeks approval for the Head of Legal and Democratic Services to agree the terms of the AWPR/B-T Project Agreement and other associated contractual documentation with the SPV, and to sign it on behalf of Aberdeen City Council, subject to approval of the documentation by the Director of Corporate Governance, the Head of Finance and the Director of Enterprise, Planning and Infrastructure.

### 2. RECOMMENDATION(S)

It is recommended that Elected Members: -

- (a) Note the Council decision of 6<sup>th</sup> March 2013 where it was agreed that the Council would meet its share of the costs of the AWPR northern and southern legs via an up-front capital contribution up to a maximum of £75m or 9.5%, whichever is the lower ;

- (b) Note that officers and officials are progressing the terms of a Third Variation to the October 2003 MoU to govern the revised payment mechanism, which is proposed to be entered into between the Council, Aberdeenshire Council and the Scottish Ministers;
- (c) Apply Standing Order 1(6)(a) (Special Circumstances) in order to exempt the process for entering into a contract with the SPV to design, build, finance and operate the AWPR/B–T project from certain of the requirements of the Council’s Standing Orders Relating to Contracts and Procurement, namely Standing Orders 7(1)(b) (Tenders to remain in the custody of the Head of Procurement) and 7(2) (Tender Opening); and
- (d) Delegate to the unanimous approval of the Director of Corporate Governance, the Head of Finance, the Head of Legal and Democratic Services and the Director of Enterprise, Planning and Infrastructure the negotiation, approval and execution of the contract documents noted below and any other contract letters or documents required to be signed in connection with the implementation of the construction of the AWPR/B-T project on such terms and conditions as they think fit. The contract documents referred to above are:-
  - 1. Third Variation of Memorandum of Understanding
  - 2. Funding Agreement
  - 3. Project Agreement

### 3. FINANCIAL IMPLICATIONS

- 3.1 Funding for the Aberdeen Western Peripheral Route (“AWPR”) has been the subject of a tripartite Memorandum of Understanding (“MoU”) between the Scottish Ministers, Aberdeen City Council and Aberdeenshire Council signed on 30<sup>th</sup> October 2003 (and subsequently varied in April 2007 and April 2013 to reflect changes to the project).
- 3.2 The MoU established the level of funding contributions from the two partner local authorities of Aberdeen City and Aberdeenshire Councils in recognition of the costs of providing ‘additional’ junctions with local roads and the significant local economic benefits accruing as a result.
- 3.3 The MoU commits both Aberdeen City and Aberdeenshire Councils to contribute 9.5% each of the overall cost of the scheme development and capital construction of the Northern and Southern Legs of the AWPR (coloured orange and green respectively at Appendix 1). The scheme development and construction costs of the Fastlink (coloured purple) and the A90 Balmedie-Tipperty Dualling (coloured red) will be met in their entirety by the Scottish Ministers. A 30-year operation and maintenance cost for the project, post complete scheme construction and when it is opened fully for public use will also be met by The Scottish Ministers. From 1 January 2013, both Councils’ contribution,

shared equally between them, will be £141m with a cap of £150m. Further detail on this is provided below.

#### 4. OTHER IMPLICATIONS

- 4.1 The successful delivery of the AWPR will significantly contribute towards the achievement of the Aberdeen City Council's vision of "A Smarter City". This includes, for example, the "Smarter Mobility" policy objective through the delivery of a modern, effective transport network within and around Aberdeen and the "Smarter Economy" by providing the infrastructure to enable the City of Aberdeen to be a place to invest, live, work and export from.
- 4.2 Environmental and sustainability issues associated with the Scheme were considered during the Environmental Impact Assessment of the AWPR as outlined in the 2007 Environmental Statement, and examined during the subsequent 9 month Public Local Inquiry with appropriate mitigation measures being confirmed within the Ministerial Decision Letter of 21<sup>st</sup> December 2009.

#### 5. BACKGROUND/MAIN ISSUES

##### **AWPR Payment Mechanism**

- 5.1 Report CG/12/08 to Elected Members of Aberdeen City Council of 10<sup>th</sup> October 2012 (Article 24 refers) by the Head of Finance gave details of discussions between officers of both Aberdeen City and Aberdeenshire Councils and officials of Transport Scotland on the future operation of the local authorities' payment mechanism towards the AWPR.
- 5.2 Elected Members agreed, in principle, to bring forward the Council's contribution to the AWPR project costs, subject to clarification of the Council's legal powers to undertake such a course of action and it being in the best interest of the Council to do so; and instructed officers to continue to negotiate with Transport Scotland officials on the future funding mechanism and report back in due course on this funding package.
- 5.3 The Minister for Transport & Veterans, Keith Brown MSP, subsequently wrote to both Aberdeen City and Aberdeenshire Councils in November 2012 indicating the Scottish Government's willingness to consider how both Councils wished to fund their respective 9.5% contributions to the AWPR (Northern & Southern Legs only) Scheme, in recognition of the cost estimate increase and the Scheme's progress towards procurement in the Official Journal of the European Union.

- 5.4 Elected Members at Full Council of 6<sup>th</sup> March 2013 (Article 28 refers) subsequently further agreed to note the updated overall cost estimate for the AWPR project and to authorise the Council to enter into a variation to the Memorandum of Understanding with the Scottish Ministers and Aberdeenshire Council; secondly, to approve the proposal for Aberdeen City Council and Aberdeenshire Council to meet their share of the costs of the AWPR project via a combined (equally shared) up-front capital contribution; and; thirdly, to authorise officers to enter into further discussions with Transport Scotland and Aberdeenshire Council regarding the up-front capital contribution and to authorise the Head of Legal and Democratic Services to negotiate the terms of a legal agreement to govern the payment mechanism, subject to the approval of the Director of Corporate Governance, the Head of Finance and the Director of Enterprise, Planning and Infrastructure and to report back to the next appropriate Council meeting on the outcome.

Following this decision by both local authorities, the Minister for Transport & Veterans, Keith Brown MSP, visited Aberdeen on 7<sup>th</sup> May 2013 and announced that the Scottish Government had agreed to cap both local authorities' outstanding 9.5% share of the AWPR scheme at £75M each. The Council is still awaiting formal confirmation of that position.

- 5.5 This is to be formally agreed by way of a Third Variation to the MoU in the following terms:
- 5.5.1 The effective start date of this revised payment mechanism is 1<sup>st</sup> January 2013;
  - 5.5.2 Each Council's capital cost contribution equates to £70.5M (at outturn prices);
  - 5.5.3 In recognition, however, of the level of risk associated in determining costs based upon estimates, a "cap" on liabilities has been set at £150M (£75M per local authority). Both Aberdeen City and Aberdeenshire Councils will have no further exposure to the overall cost once the cap has been reached;
  - 5.5.4 Conversely, should the actual new works costs incurred (for both the Northern Leg and Southern Leg only) be lower than the current estimates, both Councils will receive a proportionate reduction in their upfront capital contribution, as outlined in 5.5.3 above, in line with the funding allocation within the MoU Agreement (81% the Scottish Ministers; 9.5% and 9.5% to each Council);
  - 5.5.5 De-trunking costs will be funded, in their entirety, by the Scottish Ministers;

- 5.5.6 Insurance, liability and responsibility risk(s) for working in and around the BP/Shell pipelines which are traversed by the AWPR and Balmedie-Tipperty routes and how these relate to the Main Works shall be met either by the SPV formed to deliver the construction contract and/or the Scottish Ministers as appropriate;
- 5.5.7 Property acquisition receipts which may arise following a future re-sale will be distributed on a 81%/9.5%/9.5% basis for those properties acquired which fall within the boundaries of the AWPR Southern and Northern Legs (where costs are shared between the three funding partners per the MoU Agreement), otherwise receipts shall revert 100% to the Scottish Ministers for those properties within the AWPR Fastlink and A90 Balmedie-Tipperty Legs of the AWPR/B-T Scheme; and,
- 5.5.8 Operation and Maintenance insurance costs will be met, in their entirety, by the Scottish Ministers.

The Third Variation to the MoU is currently being prepared and agreed by the three parties.

## **VAT**

- 5.6 As previously advised to Elected Members on 6<sup>th</sup> March 2013, the Council was seeking specialist VAT advice. Such specialist advice has subsequently been received and in a letter dated 11<sup>th</sup> June 2013, HMRC have re-confirmed Aberdeen City Council's understanding that, as the Council has been delegated the functions of the Scottish Ministers as Trunk Roads Authority in relation to the AWPR/B-T project under section 4 of the Roads (Scotland) Act 1984, then re-charges made by Aberdeen City Council to Aberdeenshire Council and the Scottish Ministers in relation of the AWPR/B-T project remain outside the scope of VAT.

## **Council's Standing Orders Relating to Contracts & Procurement**

- 5.7 Pursuant to the MoU, an Agency Agreement was entered into between Aberdeen City Council and the Scottish Ministers on 4<sup>th</sup> and 6<sup>th</sup> November 2003 (and subsequently varied in 2008, 2012 and 2013) whereby Aberdeen City Council became the Appointed Agent of the Scottish Ministers under section 4 of the Roads (Scotland) Act 1984 for the carrying out of the Scottish Ministers' functions as Trunk Roads Authority in relation to the AWPR/B-T project.
- 5.8 Under the terms of the Agency Agreement, Aberdeen City Council is responsible for the provision of all services in connection with the procurement, preparation and construction of the AWPR/B-T project on behalf of the Scottish Ministers and acting as their Agent.

- 5.9 Accordingly, Aberdeen City Council is the Contracting Authority and has undertaken a significant number of procurements in relation to advance works and services required for a civil engineering project of this magnitude (for example, archaeological investigations, demolition works and ecological mitigation measures as further detailed in Report EPI/12/242 to Elected Members of the Council's Enterprise, Planning and Infrastructure Committee of 6th November 2012). Aberdeen City Council shall be the Contracting Authority for the Main Works contract for the construction and subsequent 30 year operation and maintenance of the Scheme post full completion.
- 5.10 As outlined in Report EPI/12/056 to Elected Members of Aberdeen City Council's Enterprise, Planning and Infrastructure Committee of 31st January 2012, the "competitive dialogue" procedure is being used to procure a Contractor to design, build, finance and operate the AWPR/B-T project. The procurement process is now well underway.
- 5.11 Competitive Dialogue is a procedure whereby a public authority is able to conduct dialogue with bidders directly with the aim of developing one or more suitable alternative solutions to meet its requirements. Individual bidders may develop more than one solution. The dialogue may be conducted in successive stages, with the option of reducing the number of solutions (and therefore bidders) at each stage. Solutions must be eliminated on the basis of applying the stated award criteria.
- 5.12 As the Council's Standing Orders in Relation to Contracts and Procurement make clear, the competitive dialogue can only be used in exceptional circumstances for "particularly complex" supplies, services and works contracts where it would not be possible to award a contract using the open or restricted procedures and where the circumstances do not permit use of the negotiated procedure.
- 5.13 It should be noted that for both public authorities and bidders this procedure requires a greater investment of inputs in terms of resources, planning and time than other standard procedures and cannot be viewed as a short-cut in any way. The process always involves competitive tendering and award can only be made on the basis of the Most Economically Advantageous Tender award criterion.
- 5.14 The complexity and scale of the procurement exercise for the AWPR/B-T project can be illustrated by the fact that the electronic "data room" which provides a secure environment for the transmission of documents and drawings contains in excess of 3,800 documents and drawings in one section alone. The amount and volume of documentation will only increase as the procurement competition proceeds and dialogue period submissions (leading to Final Submissions) are generated.

- 5.15 Accordingly, Elected Member approval to apply Standing Order 1(6)(a) (Special Circumstances) is sought in order to exempt the AWPR/B-T competitive dialogue Final Tender Submissions from certain requirements of the Council's Standing Orders Relating to Contracts and Procurement, namely Standing Orders 7(1)(b) (Tenders to remain in the custody of the Head of Procurement) and 7(2) (Tender Opening to be undertaken by the Head of Procurement in the presence of two Members of the Council).
- 5.16 This would enable Final Tender Submissions to be delivered to a secure area of Transport Scotland's Buchanan House offices in Glasgow where they would be opened in the presence, and kept in the custody of, the AWPR/B-T Managing Agent, Mr John Wilson. The Head of Legal and Democratic Services and the Head of Procurement have both been specifically consulted on this proposition and are in agreement.
- 5.17 Such a procedure would be justifiable in the special circumstances surrounding the AWPR/Balmedie-Tipperty scheme as it would considerably facilitate the efficient and effective evaluation of Final Tender Submissions with all material and documentation securely held in one central location for ease of access by technical, legal, insurance and financial advisors in addition to evaluation by officers of the AWPR/B-T Managing Agent plus officials of Transport Scotland.
- 5.18 This recommendation also reflects the reality that the storage capacity of the Managing Agent's offices at the Aberdeen Business Centre (Willowbank House, Aberdeen) is limited and has been robustly tested with the receipt and storage of the information submitted in March 2013 by bidders' Pre-Qualification Questionnaires and accompanying documentation. Additionally, savings both in financial and carbon terms will be achieved by not having to courier or otherwise transport voluminous amounts of documentation from Aberdeen to elsewhere in Scotland.

### **Project Agreement and Associated Documents**

- 5.19 Approval is sought for the Head of Legal and Democratic Services to agree the terms of the Project Agreement and all other associated contractual documentation with the SPV, and to sign it on behalf of Aberdeen City Council, subject to the approval of the documentation by the Director of Corporate Governance, the Head of Finance and the Director of Enterprise, Planning and Infrastructure.
- 5.20 Implementation of this recommendation will allow for the speedy conclusion of the Project Agreement in what is envisaged shall be a fast moving and time sensitive commercial environment. It is important for Elected Members to note that, in this respect, the Council's financial interests in the Project Agreement will already have been safeguarded and secured by the Third Variation to the MoU whereby the Councils

will jointly fund their outstanding capital share of the Scheme on a fixed cap basis and the Scottish Ministers shall be required to pay the entire Unitary Charge.

## 6. IMPACT

Corporate - The delivery of the AWPR\B-T will achieve a number of the objectives and policies listed in Aberdeen City Council's "The Smarter City" policy statement and also the Single Outcome Agreement. This includes, for example, the provision of a sustainable transport system and promotion of Aberdeen as a city to invest, live, work and export from.

Public – Upon completion, the AWPR\B-T will remove traffic from unsuitable rural and urban roads in and around Aberdeen and will improve road safety. By cutting congestion, it will reduce journey times and improve journey time reliability in addition to providing access to Park & Choose sites around the periphery of the City and improving access to national Trunk Road and Trans-European transport networks.

EHRIA - An Equality and Human Rights Impact Assessment has not been completed as this report relates to administrative arrangements only.

## 7. MANAGEMENT OF RISK

The management of risk, both threats and opportunities, is an integral part of successfully delivering the AWPR/B-T project. A series of risk registers have been developed to capture the risk relating to different aspects of work involved in project delivery and reviewed regularly. This risk management process is adopted throughout scheme delivery and enables key risks to be identified and actively managed to reduce the impact that they may have on project delivery.

## 8. BACKGROUND PAPERS

Transport Scotland News Release, 7<sup>th</sup> May 2013 – "[Funding Agreement reached for the AWPR/Balmedie-Tipperty, capping council payments](#)"

## 9. REPORT AUTHOR DETAILS

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# Appendix 1: AWPR & A90 Balmedie to Tipperty Scheme

