

ABERDEEN CITY COUNCIL

COMMITTEE	Council
DATE	25 th June 2014
DIRECTOR	Gordon McIntosh
TITLE OF REPORT	AWPR/B-T Governance & Approvals Process
REPORT NUMBER:	EPI/14/037
CHECKLIST RECEIVED:	YES

1. PURPOSE OF REPORT

This report sets out the governance approvals process which Aberdeen City Council ("the Council"), in its capacity as the Appointed Agent of The Scottish Ministers, will be required to follow in order enter into the Non Profit Distributing ("NPD") Contract for the Design Build Finance and Operation ("DBFO") of the Aberdeen Western Peripheral Route/Balmedie-Tipperty ("AWPR/B-T") Project.

2. RECOMMENDATION(S)

- (a) To note the governance and approvals processes outlined herein;
- (b) To delegate to the Chief Executive, or her nominated representative, the approval of Independent Project Assurance Model (IPAM 4) Key Stage Review; and,
- (c) To note the revised process for execution of the NPD Contract Documents (namely, the NPD Contract, the various direct agreements with sub-contractors and the Lender's Direct Agreement) by the Council in its capacity as Agent of the Scottish Ministers for the AWPR/B-T Project in accordance with Article 1(8) of the revised Standing Orders relating to Contracts and Procurement.

3. FINANCIAL IMPLICATIONS

- 3.1 There are no specific financial implications arising as a result of these recommendations.
- 3.2 Nevertheless, funding for the AWPR/B-T Project is detailed in an agreement between Aberdeen City Council, Aberdeenshire Council and the Scottish Government by way of a signed Memorandum of Understanding and subsequent Variations. Full Council on 21st August

2013 approved an upfront capital contribution by both local authorities with a cap on each Council's contribution at £75m each.

4. OTHER IMPLICATIONS

- 4.1 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, the NESTRANS 2013 Regional Transport Strategy Refresh 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.
- 4.2 Environmental and sustainability issues associated with the AWPR/B-T Project were considered during the Environmental Impact Assessment of the proposed scheme as published in the 2007 Environmental Statement, and examined during the subsequent Public Local Inquiry ("PLI") and with appropriate mitigation measures being confirmed within the Ministerial Decision Letter of 21st December 2009 in respect of the AWPR. A separate, but similar, process was undertaken for the A90 Balmedie-Tipperty Dualling Improvement scheme.

5. BACKGROUND

- 5.1 The Scottish Ministers (acting through the Executive Agency of Transport Scotland), Aberdeen City Council and Aberdeenshire Council entered into a Memorandum of Understanding ("MoU Agreement") setting out their respective roles and responsibilities concerning the funding of the AWPR and associated governance matters in 2003 and varied as the, subsequently combined, AWPR/B-T Project has developed.
- 5.2 As jointly reported by the Directors of Corporate Governance and Enterprise, Planning & Infrastructure to Council on 6th March 2013 (Article 28 refers) and, subsequently, in report EPI/13/136 to Council on 21st August 2013 in relation to the necessary enabling variation to the MoU Agreement (Article 14 refers), Elected Members agreed that the Council and Aberdeenshire Council will each fund a proportion of upfront capital costs with an agreed respective cap of £75M (£150M split equally between both Authorities).
- 5.3 In return, the Scottish Ministers agreed that they, through Transport Scotland, would be responsible for reimbursing the Council the full costs of the NPD Unitary Charge ("UC") payable by the Council under the NPD Contract to the Special Purpose Vehicle ("SPV") contracted to design build finance and operate the AWPR/B-T Project.
- 5.4 In addition to the MoU Agreement, an Agency Agreement was entered into between the Council and the Scottish Ministers on 4th and 6th November 2003 (and subsequently varied in 2008, 2012 and 2013) whereby the Council was appointed as agent, in terms of section 4 of the Roads (Scotland) Act 1984, to exercise the Scottish Ministers'

functions as Trunk Roads Authority in relation to the AWPR/B-T Project.

- 5.5 Under the terms of the Agency Agreement, the Council is responsible for the provision of all services in connection with the procurement, preparation and construction of the AWPR/B-T Project as agent for the Scottish Ministers.
- 5.6 It is important for Elected Members to note that the party carrying the responsibility for the rights and obligations under the NPD Contract is the Scottish Ministers as principal rather than the Council as agent.
- 5.7 As part of the normal process in the run up to Financial Close, the prospective financial lenders to the SPV will undertake due diligence to satisfy themselves that all relevant statutory and other approvals to enter into the NPD Contract have been secured and that the proper authority to sign the NPD Contract has been obtained and appropriately delegated.
- 5.8 Where either the Scottish Ministers or the Council were contracting in their own right as the principal under the NPD Contract, well tested procedures for giving lenders the satisfaction they need already exist (for example, as utilised by the Council in entering into the NPD National Housing Trust Project amongst others) in terms of executing contractual documentation of this kind.
- 5.9 The complication that arises in relation to AWPR/B-T Project is that the NPD Contract is being signed by an agent (the Council) on behalf of a principal (the Scottish Ministers) and therefore the approvals process for both organisations will be relevant.

6. MAIN ISSUES

- 6.1 The main purpose of this report is to outline the governance approvals process which the Council, in its capacity as the Appointed Agent of the Scottish Ministers, will be required to follow in order to enter into the NPD Contract for the design build finance and operation of the AWPR/B-T Project.
- 6.2 In particular, this report is seeking to introduce certain revisions to existing approval mechanisms endorsed by Elected Members in light of both the Principal/Agent nature of the relationship between the Scottish Ministers and the Council in respect of the AWPR/B-T Project and the due diligence requirements of the Consortia's financial lenders currently engaged in the competitive dialogue procurement process.
- 6.3 In light of these circumstances, a carefully programmed sequence of decisions and approvals within a demanding timeframe will require to be taken by both the Council and the Scottish Ministers in order to ensure that construction can begin without delay. It is worth, therefore, examining the separate approvals processes required by both the Scottish Ministers and the Council in order to execute the NPD

Contract and achieve Financial Close thereby permitting works to commence.

The Scottish Ministers

- 6.4 Through the recently awarded M8 M73 M74 Motorway Improvements Project (“M8 DBFO”), a clear approvals process was developed to satisfy prospective lenders' requirements for approval to enter into the NPD Contract for the AWPR/B-T Project. In summary, this comprised:
- 6.4.1 A letter from the Director General of the Scottish Government’s Enterprise Environment and Digital Directorate concerning the status of Transport Scotland’s Framework Document (which in turn sets out the extent of the powers delegated to Transport Scotland to enter into contracts of this nature);
 - 6.4.2 A letter from the Chief Executive of Transport Scotland setting out certain matters in relation to the procurement process, ownership of land and internal approvals, (for the AWPR/B-T Project this will be extended to confirm the Principal/Agency relationship between Scottish Ministers and the Council); and,
 - 6.4.3 A copy minute of the Investment Decision Maker (IDM) Board of Transport Scotland approving the project documents (NPD Contract Documents and NPD Articles of Association) (this will still be required under the AWPR/B-T Project but will have to address directing the Council as Agent to enter into the project documents).

Aberdeen City Council

- 6.5 The Council’s role as Agent of the Scottish Ministers for the AWPR/B-T Project does not preclude the requirement to satisfy prospective lenders that it has the necessary approvals to enter into the NPD Contract Documents. These approvals will comprise the following:
- 6.5.1 As the NPD Contract is being signed by an Officer authorised under the Council’s Standing Orders in relation to Contracts and Procurement, a copy of the same will be required. Note that the individuals authorised by Standing Order 44 to bind the Council into contract will require to be available at short notice. Based on Transport Scotland’s experience on the M8 DBFO Project, signing is likely to take place in London with approximately 1 weeks' notice and the formalities associated with financial close will extend to at least 2 days.
 - 6.5.2 A certificate of the relevant officer of the Council setting out the names and specimen signatures of the persons authorised to sign the NPD Contract.

6.5.3 A certificate of the Council issued pursuant to the Local Government (Contracts) Act 1997; and,

6.5.4 Certified copies of the Council's Standing Orders, Scheme of Delegation, Orders of Reference and Financial Regulations.

Aberdeenshire Council

6.6 Aberdeenshire Council, whilst a Funding Partner to the AWPR/B-T Project, will not be required by financial lenders to approve or authorise the signing of the NPD Contract as this role falls to the Council in its capacity as Agent of the Scottish Ministers.

6.7 This notwithstanding, both Aberdeenshire Council and Transport Scotland have been consulted on this report and are in agreement with its conclusions and recommendations.

Agency Agreement

6.8 Clause 2.8 of the Agency Agreement provides that "*the Appointed Agent shall not conclude any contracts or agreements with third parties as agent of the Scottish Ministers in terms of the [Agency] Agreement, or incur any legal obligations as agent of the Scottish Ministers, without the written consent of the Project Director*". Evidence of the written consent of the Scottish Ministers to the Council authorising it to enter into the NPD Contract will also need to be exhibited.

Project Management and Governance

IPAM Key Stage Reviews

6.9 Elected Members of the former Enterprise, Planning & Infrastructure Committee at their meeting of 31st January 2012 (Article 46 refers) endorsed the project governance and management arrangements that would apply to the AWPR/B-T Project going forward.

6.10 In particular, Elected Members agreed to delegate approval of the Integrated Project Assurance Model ("IPAM") Key Stage Reviews 1 to 3 inclusive to the Chief Executive, or her nominated representative, on the AWPR/B-T Project Board.

6.11 Elected Members will be aware that all NPD projects are required to go through IPAM Key Stage Reviews at certain pre-defined points during the procurement (based on the competitive dialogue process), namely:

- IPAM 1 – Pre Official Journal European Union (OJEU)
- IPAM 2 – Pre Invitation to Participation in Dialogue (ITPD)
- IPAM 3 – Pre Close of Dialogue
- IPAM 4 – Pre Award

- 6.12 IPAM reviews are short, focused reviews of a programme or project that occur at key decision points in a project's lifecycle. They are conducted by a team of experienced practitioners, independent of the AWPR Managing Agent and Transport Scotland, and drawn from, or on behalf of, the Scottish Futures Trust ("SFT") who play a key role in advising Scottish Ministers on major investment decisions.
- 6.13 As outlined within report EPI/12/056 in January 2012, the outcome and approval of the IPAM 4 (Pre Award) Key Stage Review was reserved to Elected Members of both Aberdeen City and Aberdeenshire Councils. This procedure was put in place to reflect the previous funding arrangements whereby both the Council and Aberdeenshire Council would have on-going responsibility to pay a proportion of the NPD Unitary Charge for the AWPR Northern and Southern Legs for 30 years post-construction of the scheme.
- 6.14 As jointly reported by the Directors of Corporate Governance and Enterprise, Planning & Infrastructure to Council on 6th March 2013 (Article 28 refers) and, subsequently, in report EPI/13/136 to Council on 21st August 2013 the obligation upon the Council and Aberdeenshire Council to pay a proportion of the NPD Unitary Charge has now been completely removed.
- 6.15 It is recommended that Elected Members agree to delegate approval of the IPAM 4 Key Stage Review to the Chief Executive of Aberdeen City Council or her nominated representatives on the AWPR/B-T Project Board, thereby recognising that the financial risk in relation to the quantum of the Unitary Charge has been transferred, in its entirety, from both Councils to the Scottish Government.
- 6.16 Approval of the recommendations within this report will allow for the efficient delivery of the Project Board governance responsibilities and a continuity of scrutiny by the Chief Executive on the outcome of the IPAM 4 Key Stage Review in her role as the representative of the Council on the AWPR/B-T Project Board.
- 6.17 Of particular relevance in this regard will be the key role of the Project Board (i.e. representatives from each of Transport Scotland, Aberdeenshire Council and Aberdeen City Council) who will take reports from the AWPR/B-T Project management team as well as the professional legal, financial and technical advisers to the AWPR/B-T Project.

Execution of Project Documentation

- 6.18 The AWPR/B-T Project Board will scrutinise the relevant reports, IPAM 4 Key Stage Review and associated recommendations, and will then confirm the necessary approvals and make the appropriate formal recommendations to Transport Scotland's IDM Board.

- 6.19 In the event that Transport Scotland's IDM Board endorses the AWPR/B-T's Project Board's recommendation, the Council will be directed as Agent of the Scottish Ministers to enter into the NPD Contract and to execute the relevant contractual documentation all in accordance with Article 1(8) of the revised Standing Orders relating to Contracts and Procurement. This provides that where the Council enters into a contract as the agent of another party, the provisions of Part A of the Standing Orders shall apply, unless the Party for whom the Council is acting specifies otherwise. In this case, the Scottish Ministers have specified that a different procedure shall apply.
- 6.20 For the avoidance of doubt, this revised procedure (constructed following feedback from prospective lenders to the SPV) would supersede the decision of Elected Members in Council of 21st August 2013 (Article 14 refers) where Members resolved to delegate to the unanimous approval of certain named Chief Officers, in consultation with the Council Leader, the Convenor of Finance, Policy and Resources and the Convenor of Audit and Risk, the negotiation, approval and execution of the AWPR/B-T NPD Contract Documents.
- 6.21 As a period of more than 6 months has passed since the decision of Elected Members on 21st August 2013 in respect of delegation to Chief Officers of certain powers in relation to contractual documentation, Standing Order 22 (Alteration or Revocation of a Previous Decision) does not require to become formally engaged in respect of this decision. Nevertheless, it is the intention of this report to give practical effect as if Standing Order 22 had been applied by resolution of Elected Members. This is the intention behind recommendation (c) which requests Elected Member's approval for a revised governance and approvals process in respect of executing the NPD Contract Documents.

Sequencing

- 6.22 Accordingly, the following table sets out the sequencing of the various approvals in relation to the Financial Close process.

Approval Stage	Approximate period prior to Financial Close (FC) (number refers to calendar days)
Project Board approval (including approval of IPAM 4)	FC minus 14
IDM approval and direction to the Council pursuant to Article 1(8)	FC minus 12
Standstill (Alcatel) period	10
Financial close	0

7. IMPACT

Corporate - The delivery of the AWPR\B-T Project 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 Project 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

Report No. EPI/12/056 ("AWPR Progress & Governance") by the Director of Enterprise, Planning & Infrastructure to Enterprise, Planning & Infrastructure Committee, 31st January 2012.

Report no. CG/12/108 ("Aberdeen Western Peripheral Route") by Head of Finance to Council, 12th October 2012.

Report no. EPI/13/136 ("Aberdeen Western Peripheral Route") by the Director of Enterprise, Planning & Infrastructure and Acting Director of Corporate Governance to Council, 21st August 2013.

9. REPORT AUTHOR DETAILS

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