

<b>Meeting:</b>	Executive
<b>Meeting date:</b>	9 <sup>th</sup> May 2024
<b>Report of:</b>	Claire Foale Assistant Director Policy and Strategy
<b>Portfolio of:</b>	Cllr Katie Lomas Executive Member for Finance, Performance, Major Projects, Human Rights, Equality, and Inclusion

## Decision Report: Advertising Contract

### Subject of Report

1. The Council has had a concession contract in place for a Concessionaire to provide and maintain bus shelters with either no advertising, paper adverts or digital adverts, and digital Free-Standing Units (**FSUs**) since 15<sup>th</sup> July 1999, which is due to come to an end on 31<sup>st</sup> December 2024.
2. During April 2023, the Council conducted an independent market appraisal to understand the value of place-based advertising across the city.
3. The market appraisal provided sufficient information for the Council to conduct a competitive tendering exercise to enter into a contract with a supplier to provide and maintain bus shelters with either no advertising, paper adverts or digital adverts, and digital FSUs, subject to the necessary planning consents.

**The market appraisal is commercial in confidence and is to be treated as exempt under Section 100I and paragraph 3 of Schedule 12A of the Local Government Act 1972.**

4. To successfully conduct a competitive tendering exercise, the Council also seeks an extension to the current concession contract with the incumbent supplier for a further 12-months expiring on

31<sup>st</sup> December 2025. This is to allow a compliant procurement process to be undertaken and for current negotiations to come to a natural end, as well as (where applicable) to allow for the smooth transition from the incumbent supplier to any new supplier. With the appropriate time, a sound procurement strategy will be developed in line with the market appraisal to ensure the procurement is an attractive opportunity for the market.

5. In tandem, the Council has developed an advertising policy and supporting guidance which aims to restrict high fat, salt, or sugar (HFSS) adverts being displayed across the city which will be incorporated into the specification of the new concession contract.

## **Benefits and Challenges**

6. Outdoor advertising in York currently raises around £179k for the Council through a combination of bus shelter adverts, carparks and park and ride, roundabout and boundary signs. The independent Market Appraisal demonstrated there is the potential to increase advertising revenue across a range of formats across the city, with a potential value of “anywhere from £456,000 to £479,000 per annum, an uplift of circa £290k per annum.” This estimate is subject to caveats including planning consent for the installation FSUs, market demand, capacity to grow the offer and appetite in the market.
7. The end of the current bus shelter contract provides an opportunity for York to reshape the specification to maximise the Council’s expectations and requirements. There will be a number of benefits in the range of value-added advertising installations which could include air quality monitors, UK GDPR compliant device counters via publicly available Wi-Fi and dedicated digital advertising space for council events, civic promotion, and messaging (subject to planning consents). In addition, the new concession contract following the competitive tendering exercise will set out clear sustainability expectations and social value additional benefits to the city, such as participating in community projects through the York Community Fund together with restricting the display of HFSS adverts across the advertising on renewal and retenders.
8. There is a challenge resulting in the move from paper advertising to digital advertising. This is demanded by the market and is prevalent in other heritage and conservation areas, however for York this

represents a unique challenge to continue to ensure the character of the city remains intact.

9. Each installation with digital advertising (whether bus shelter or free-standing units) will require planning permission. Furthermore, the digital advertising screens will include auto dim technology, and turned off between 12pm-5am whilst being compliant to the luminance levels stipulated by the planning authority.
10. Exploration of whether it is possible to waive the requirement for a competitive process under the Council's Contract Procedure Rules under Appendix 11 of the Council's Constitution (the "**Council's CPRs**") for a new concession contract, and instead renegotiate with the current provider was presented to Executive on 18<sup>th</sup> April 2024.

This previous position was based on the information provided by officers to Legal Services and Commercial Procurement, who as result advised that as the estimated turnover for the incumbent supplier under the new concession contract appeared to have been below the relevant procurement threshold under the Concession Contract Regulations 2016 (the "**Concession Regs**"), and/or the Procurement Act 2023 which comes into force from 28<sup>th</sup> October 2024 (the "**Procurement Act**"), a full competitive tender would not be required under law, and Executive could waive the requirement for such an exercise under the Council's CPRs.

One of the benefits of this approach would have been to meet the budget savings set out in the financial strategy.

However, since Executive met on 18<sup>th</sup> April 2024, officers have obtained further clarification which has led them to revise their previous assessments/estimates on what the likely turnover for a concessionaire under the new concession contract would be. As a result, Legal Services and Commercial Procurement have now reached the conclusion that the revised estimated turnover for a concessionaire under any new concession contract is likely to exceed the relevant public procurement threshold, and so an open and transparent competitive tender process is now required.

This means the budget savings anticipated in 2023-25 will not be met, introducing additional pressures to existing budgets.

## Policy Basis for Decision

11. **Equalities:** The design specification of the bus shelters and free-standing units includes features to better support different communities, including seating across all bus shelters, avoiding blocking visibility, wider walk around widths and energy efficient lighting. The design of replacement bus shelters and free-standing units will be shared with disabled community groups for comment.
12. **Affordability:** The new advertising contract supports the Council's Mid Term Financial Strategy and savings plan.
13. **Climate:** The new contract responds to the Council's ambition to be net zero by 2030. Air quality measures can be added to bus shelters in key locations together with sustainable measures incorporated within the design and maintenance of the refurbished bus shelters and proposed digital FSUs (subject to planning). Conducting a competitive tendering exercise, the Council will be seeking a supplier to minimise emissions associated with demolition, disposal and replacement of the existing shelters and advertising infrastructure. Opportunities for bus shelters and advertising infrastructure to support the ambition for York to be Climate Ready by 2030 should be considered in the design of the units.
14. **Health:** There is a strong body of evidence that suggests restricting advertising to avoid high fat, sugar and salt products better supports resident's healthy weight. The Council has refreshed the advertising policy to incorporate HFSS policy developed by Public Health and partners. Incorporating the Council's advertising policy into any new advertising concession contract, and all place-based advertising contracts going forward, is aligned to both the Council Plan's commitment to reduce health inequalities and provide the best start for children and young people, and the Joint Health and Wellbeing Strategy 2022-2032.

## Financial Strategy Implications

15. The current financial strategy already assumes a total of £500k additional income for the Council from advertising, of which £125k was expected in 2023/24, with the balance of £375k expected in 2024/25.

16. Delaying the competitive tender process whilst exploration of the potential for a single tender waiver to deliver budget savings within the time period has now introduced a pressure on the financial strategy that will be carried forward into 2025/26, with the balance now anticipated in 2026/27.
17. Following the Market Appraisal and additional discussions with the incumbent, it is clear York represents a lucrative market for media owners who can meet the requirements of the proposed tender. The gross revenue of media owners from York advertising has meant there is no longer a legal basis for a single tender waiver.

## Recommendation and Reasons

18. Executive are invited to:
  - a. Note the independent market appraisal and the potential revenue opportunities from place-based advertising.
    - Understanding the potential value of advertising opportunities across the Council's estate and assets to realise maximum revenues, recognising that by doing so there will be a necessary change from analogue to digital advertising, to keep up with market demand and recognise increased revenue opportunities.
  - b. Approve the additional extension of 12-months to the current concession contract for the supply and maintenance of street furniture with or without advertising with the incumbent supplier commencing on 1<sup>st</sup> January 2025 and expiring at 23:59:59 GMT on 31<sup>st</sup> December 2025, to allow a formal competitive exercise to be undertaken and delegate authority to negotiate and conclude the extension in accordance with the terms and conditions of the current concession contract with the incumbent supplier and the Council's Contract Procedure Rules under Appendix 11 of the Council's Constitution (the "**Council's CPRs**") to the Director of Governance in consultation with the Head of Procurement.
    - The current bus shelter and digital information board contract was originally meant to expire on 31<sup>st</sup> December 2023 and is currently now on a 12-month extension as per the current contract mechanism. The contract allows for further extensions to be undertaken and has the provision within the

contract to do so (please refer to the **Legal Implications** and **Procurement and Social Value Implications** below).

- c. Approve a formal competitive procurement exercise to be undertaken for a new 15-year (plus 1-year optional extension) concession contract for the provision and maintenance bus shelters with either no advertising, paper adverts or digital adverts, and digital Free-Standing Units on Council land, and delegate authority to the Director of Governance in consultation with the Head of Procurement to commence the procurement exercise via an open, fair and transparent competitive process and evaluation criteria in compliance with the Council's CPRs and (where applicable) the Concession Contract Regulations 2016 (the "**Concession Regs**"), and/or the Procurement Act 2023 which comes into force from 28<sup>th</sup> October 2024 (the "**Procurement Act**").
  - Delays to initiating the competitive procurement exercise has led to financial pressures on the current financial strategy, these will aim to be alleviated through a competitive process, although until that has concluded it is not possible to confirm to Executive whether these financial pressures remain.
- d. Delegate authority to the Director of Governance in consultation with the Head of Procurement to negotiate and conclude the new 15-year (plus 1-year optional extension) concession contract for the provision and maintenance bus shelters with either no advertising, paper adverts or digital adverts, and digital Free-Standing Units on Council land, along with authority to negotiate and conclude the provisions of any subsequent modifications and/or extensions thereto post award.

## **Background**

19. The Financial Strategy 2023/24 - 2027/28 approved by Council in February 2023 notes additional income from advertising contracts of £125k in 2023/24 and £375k in 2024/25.
20. The Council currently generates revenue from advertising from bus-shelters and other formats (boundary signs, roundabouts, car parks), totalling around £179k per year.
21. The current bus shelter contract is with JC Decaux UK and has been in place since 15<sup>th</sup> July 1999 and is currently due to expire on 31<sup>st</sup>

December 2024 This report only considers the bus shelter contract, noting not all bus shelters are managed through this contract.

22. To understand the potential value of advertising contracts, the council commissioned an independent market appraisal to better understand income generation opportunities from small and large format out of home media, with options that are deliverable and with 'the estimated value of their recommendations.'
23. *The Advertising and sponsorship income generation feasibility study and audit report* (the market appraisal) was produced independently and identifies several possible new and or enhanced revenue streams for the Council from commercial advertising and sponsorship. Council income from place-based advertising could be increased to around £456k-£478k per annum (subject to planning consents) through a combination of:
  - a. Re-tendering the bus-shelter concession contract to include free-standing digital advertising and information units (**FSUs**).
  - b. Tendering new large format out of home advertising displays (billboards), primarily digital, with both rental and percentage share income.
  - c. Add to the commercial value of sponsored roundabouts and boundary signs along with advertising displays in carparks and park & rides, either through engagement with the current supplier or through a tender exercise.
24. In addition, an independent report issued in March 2024 by <sup>1</sup>KPMG and Outsmart explored sustainability comparisons between advertising channels and noted:
  - a. Per impression out of home emits less carbon than all other media measured.
  - b. Out of home is 3.3% of advertising power consumption and less than 3.5% of advertising carbon footprint.

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[OOH is just 3.3% of UK Advertising's Power Consumption & under 3.5% of its Carbon Footprint - New Report \(outsmart.org.uk\)](https://www.outsmart.org.uk)

- c. Control over the supply chain and end to end operations means out of home advertising media owners directly improve sustainability more easily than other advertising channels.
- d. Out of home is a more sustainable advertising platform for brands than other media types.

### **Bus shelter and FSU concession contract**

- 25. The Financial Strategy 2023/24 - 2027/28 approved by Council in February 2024 notes additional income from advertising contracts of £125k in 2023/24 and £375k in 2024/25.
- 26. JC Decaux UK Limited (**JC Decaux**) currently holds the concession contract for providing and maintaining bus shelters across the Council's geography. Although they are not the only provider of bus shelters, they own 142 bus shelters (of which 80 include paper advertising). The concession contract with JC Decaux was extended for 12-months on 20<sup>th</sup> December 2023 from 1<sup>st</sup> January 2024 and up to and including 31<sup>st</sup> December 2024. There are other bus shelters managed outside of this concession contract, which do not feature advertising.
- 27. A new concession contract for the provision and maintenance of bus shelters with either no advertising, paper adverts or digital adverts, and digital FSUs therefore needs to be commissioned and in place for when the current concession contract with JC Decaux expires.

An initial exploration as to whether it would be possible under the Council's CPRs to waive the requirement for a competitive tender and instead directly negotiate a new contract with the incumbent supplier, JCDecaux, was presented to Executive on 18<sup>th</sup> April 2024. This previous position was based on the information provided by officers to Legal Services and Commercial Procurement, who as result advised that as the estimated turnover for the incumbent supplier under the new concession contract appeared to have been below the relevant procurement threshold under Concession Regs, and/or the Procurement Act, a full competitive tender would not be required under law, and Executive could waive the requirement for such an exercise under the Council's CPRs.

Since then, however, officers have obtained further clarification which has led them to revise their previous assessments/estimates on what the likely turnover for a concessionaire under the new

concession contract would be. As a result, Legal Services and Commercial Procurement have now reached the conclusion that the revised estimated turnover for a concessionaire under any new concession contract is likely to exceed the relevant public procurement threshold, and so an open and transparent competitive tender process is now required.

Therefore, the Council can no longer proceed at this time with the previously proposed waiver of the Council's CPRs or direct negotiations with the incumbent.

28. Subject to planning consents, the new concession contract will need to make provision for internally illuminated and digital advertising and non-advertising bus shelters, together with FSUs.
29. If digital advertising is not supported, the independent market appraisal has made clear the market will not be interested in entering into a new concession contract as it will no longer be commercially viable and will likely produce a failed procurement.
30. As a result, this could expose the Council to having to develop and maintain its own Bus Shelter estate at an initial fee of around £1.4m in Capex (asset, foundations, installation, power connection) as well as an ongoing annual operational costs of around £200k considering electricity costs, business rates and associated cleaning and maintenance costs.
31. On expiry of the current contract in December 2025, should the incumbent, JC Decaux UK, be unsuccessful in the competitive tender process, all street furniture, including bus shelters, belonging to the incumbent will be removed with potential disruption to the service whilst new shelters with a new provider are installed. An extension to the current contract has been arranged to allow for a smooth transition, although the risk of service disruption remains.
32. The new concession contract will provide the Council with an annual revenue comprised of a minimum guarantee and profit share. Subject to contract and planning for digital advertising, the Council anticipates that it will see an increase in income from the previous concession contract, partially as a result of a move to digital which is more lucrative for the market (subject to planning) and partially because the current contract was negotiated nearly 20-years ago.

33. The value of the proposed concession, which is subject to contract and planning approval for digital advertising, is based on both the resident population and the high number and high value of the visitor economy which is extremely attractive to advertisers, benefiting the council indirectly through increased revenue. The value of York place-based advertising to the market as result of the visitor economy is lucrative with York seen as an essential part of the advertising landscape, with the Council potentially being in a strong position to negotiate through the competitive tender process.
34. The addition of digital adverts is a market requirement. Digital advertising both increases revenue to the Council and provides the Council with the opportunity of advertising its own information, with complete autonomy to promote Council messaging and events, at the time the Council wants, and to the audience that is most appropriate.
35. The construction and maintenance of bus shelters has changed since the existing contract was first negotiated and entered into in 1999. Sustainability measures will be included within the new specification and concession contract. These will include (but may not be limited to):
  - a. Lighting should be LED.
  - b. Energy from 100% renewable sources certified via private meter connection (solar on-site has been discounted due to the variable conditions, with only 18% energy at most which cannot power the full unit, leading to reliance on grid provision).
  - c. 100% electric fleet for maintenance crews.
  - d. Rainwater collated for cleaning where feasible.
  - e. Recycled or upcycled production and maintenance.
  - f. Community biodiversity initiatives.
  - g. Monitor and minimise embedded carbon, contributing to the Council's annual emission reporting.
36. In addition, following discussion with the Local Planning Authority, illuminated panels will have restricted luminance levels as set by the

Local Planning Authority, to reduce both visual impact and keep emissions low. This is similar to the current illuminated advertising panels that are set by the Local Planning Authority.

37. Maintenance of the bus shelters will be included in the new concession contract. Response times are to remain the same, with a slight enhancement. The specification for the competitive tender will invite potential suppliers to offer residents and officers the ability to report issues easily and directly to the supplier to arrange timely responses to faults reported. Response times of maintenance issues are listed below, through the competitive tender these will be set as the minimum expectation:
  - a. all items shall be cleaned at least once a fortnight throughout the year - including sides and clear roofs;
  - b. graffiti and fly posters shall be removed within one working day of the supplier becoming aware or being notified;
  - c. offensive graffiti shall be removed within four (4) Normal Working Hours of the supplier becoming aware or being notified;
  - d. routine repairs shall be carried out within 2-working days of the supplier becoming aware or being notified of the fault;
  - e. Brandsabotage/Brandalism - on notification the supplier shall replace within a day.
38. The design of the bus shelters will include provision to include air quality sensors for the council's Air Quality Team to consider, free public Wi-Fi, together with sustainability measures above. The Yorkshire Rose will be added to the design of bus shelters and FSUs to be consistent with street furniture installed across the city, which is currently included on the wayfinding signage across the city centre. Any new design will be subject to internal approval.
39. The design includes requirements such as ensuring advertising improves visibility for approaching buses.
40. Executive are therefore invited to endorse the procurement of a new 15-year (plus 1-year optional extension) concession contract, and endorse a 12-month extension of the incumbent concession contract to allow time for a compliant tender exercise to take place,

and delegate authority to conduct a procurement exercise and to negotiate and conclude the terms and conditions of a new concession contract (as well negotiate and conclude the provisions of any subsequent modifications and/or extensions thereto post award) to the Director of Governance and the Head of Procurement.

41. The Council will develop the other place-based advertising opportunities identified in the independent market appraisal when appropriate, with Executive subsequently invited to endorse any future contracts.

## **Consultation Analysis**

42. An internal group including Communications, Planning, Regeneration and Highways was convened to inform the development of the market appraisal and the specification and requirements for the new concession contract.
43. An independent consultation with key stakeholders was conducted by Fortuna who produced the market appraisal. Responses from key stakeholders covering conservation and the city are included against the advertising 'opportunities' in the *Advertising and sponsorship income generation feasibility study and audit report*.
44. The budget consultation focus groups conducted throughout December 2023 and January 2024 highlighted that residents are comfortable raising additional income from tourists. Although indirectly, because the revenue share of the new concession contract is predicated on York's high value, high volume visitor economy, the Council can attract a higher income than other places.
45. Following Executive on 18<sup>th</sup> April 2024, discussions with the incumbent supplier, JC Decaux, brought further information to light about the value of the place-based advertising contract to the market which has led to the revised recommendations set out in this paper for Executive consideration.

## **Options Analysis and Evidential Basis**

46. There are only two options presented today:
  1. Accept the recommendations above and:

- a. progress with the extension to the incumbent supplier for a maximum of 12-months to allow a procurement exercise to be undertaken; and
  - b. approve officers to undertake a competitive tendering exercise and award of a new 15-year (plus 1-year optional extension) concession contract for the provision and maintenance bus shelters with either no advertising, paper adverts or digital adverts, and digital FSUs on Council land and delegate authority to negotiate and conclude the new concession contract to the Director of Governance in consultation with the Head of Procurement (as well as authority to negotiate and conclude the terms and conditions of any modifications and/or extensions to the new concession contract post award).
2. Reject the recommendations and invite officers to explore a business case for the Council to instead own and maintain bus shelters, running the advertising sales and securing additional Council income.
47. Proceeding with Option 2 above would introduce an additional pressure to cover both the capital expenditure for the new bus shelters, together with a maintenance contract of around £200k per year, and additional capacity to run bus shelter installation, maintenance, and movements into the Council. Such assets would have to be managed by the Council, which would also mean that the Council would be wholly responsible for all advertising sales. Advertising revenue from media sales could be lucrative, however media buyers typically buy space across the country, rather than in individual towns or cities, with two media owners having 98% of the national market. Further, this approach relies upon the Council being able to sell enough advertising space to cover cleaning, maintenance, and upgrade costs. The Council would have 100% responsibility to sell advertising space to generate revenue, therefore the risk would be greater. The Council will also be responsible for all damages and repairs required within the network. If revenue falls, the Council could be vulnerable.
48. It is the recommendation of this paper that the Executive approve Option 1 above.

## Organisational Impact and Implications

### 49. Financial

The current level of income generated by place-based advertising is c£179k and, as outlined elsewhere in the report, total savings of £500k was approved for 2023/24 and 2024/25.

This new concession contract will provide the council with an annual revenue comprised of a minimum guarantee and profit share. However, by moving from direct negotiations with the incumbent supplier to an open tender exercise, a budget pressure has been introduced to the current financial strategy, with savings from the bus shelter contract not now expected until 2025/26, meaning that additional mitigating savings will need to be identified. Future finance and performance monitoring reports will consider this pressure, alongside the other Council wide budget pressures.

The new bus shelter concession contract would mitigate additional Council expenditure by providing the bus shelters and bus shelter maintenance (see **Financial Risks**).

### 50. Human Resources

Should there be additional resources required to undertake aspects of these projects, consideration should be taken to assess and possibly re-prioritise existing resources or seek short term additional capacity. All options will be considered in line with the current financial climate and HR processes.

### 51. Legal

**Powers:** The Council has power under the general power of competence under section 1(1) of Localism Act 2011 to raise income through outdoor advertising.

By virtue of section 9D of the Local Government Act 2000 any function of the Council is the responsibility of the Executive unless there is a contrary intention expressed in legislation. There is nothing in the Concession Regs referred to below (see **Procurement and Contract Law Implications** below) or the Local Authorities (Functions and Responsibilities) (England) Regulations

2000 that indicate that proposed concession contract is not to be a matter for Executive.

Further to Rules 8.10 and 11.7 of the Council's CPRs, where the aggregate contract value (including any extension) of any concession contract exceeds £500,000, the decision will be regarded as a Key Decision reserved to Executive, unless the Chief Finance Officer acting in consultation with the Monitoring Officer has approved the procurement as Routine.

Given the subject matter of the proposed concession contract referred to in this paper, it is the view of Legal Services that the procurement of the proposed concession contract for the provision and maintenance of bus shelters with either no advertising, paper adverts or digital adverts, and digital FSUs referred to in this paper would not be considered to be a routine procurement under Rules 8.11 and 8.12 of the Council's CPRs, as it does not relate to any core administrative, infrastructure or business functions of the Council.

Any Key Decision (and any decision as to whether a matter should be considered a Key Decision) is subject to Call-In.

**Specific Legislation:** Further to section 4 of Local Government (Miscellaneous Provisions) Act 1953, the Council can provide and maintain bus shelters on highways it is the highway authority for, and on land it owns abutting such highways, and may also enter into and carry into effect any agreement with any other party with respect to the provision and maintenance of shelters.

The Council is also able to allow a bus shelter provider to advertise on the highway, pursuant to the New Roads and Street Works Act 1991.

Outdoor advertising is also subject to a legal control system predominantly contained in the Town and Country Planning (Control of Advertisements) (England) Regulations 2007. Consents would need to be in place before any advertising commences. Where a local authority seeks planning consent from itself, there is a mechanism in place to maintain probity.

**Guidance:** Following an Office of Fair-Trading investigation, non-statutory guidance was issued in 2012 entitled "*Street furniture advertising: Recommendations to Local Authorities*". This focuses

on ways Local Authorities might procure street furniture advertising in future to encourage greater competition. It highlights the risks of long duration contracts and recommends Local Authorities separate out contracts for installing and maintaining street furniture from contracts to advertise on that street furniture. It also recommends that Local Authorities tender out contracts which come to the end of their current term, rather than simply renegotiating an extension with the incumbent provider for reasons of transparency and encouraging new entrants.

***Procurement and Contract Law Implications:***

***a) Extending the current concession contract***

The current concession contract with JC Decaux allows for the parties to extend the term of the contract by successive periods of 1-year each, subject to the mutual written agreement of the parties.

Legal Services must be consulted with regards to the drafting on any such extension to ensure that the correct procedure under the contract is followed.

Failure to extend the contract in this way will result in the expiry of the contract and disruption to local services (see ***Implications of not proceeding with extension and reprocurement*** below).

***b) Procurement of a new concession contract***

Based upon previous information provided to both Legal Services and Commercial Procurement, it had been advised that the Council could enter into direct negotiations with the incumbent supplier for a new concession contract without engaging with the market. This was why a previous waiver of the Council's CPRs further to Rule 26.1 of the CPRs was sought from Executive.

However, based upon new recent information provided to Council by the incumbent supplier, it is now understood by both Legal Services and Commercial Procurement that the likely turnover (net of VAT) of any new supplier for the entire duration of any new concession contract (including any extensions thereto) will exceed the current procurement threshold for

public concession contracts as calculated under Regulation 9(3) of the Concession Regs (i.e., £5,372,609 including VAT). As such, any new concession contract must be commissioned via an open and compliant procurement route under (where applicable) the Council's CPRs and the Concession Regs (and from 28<sup>th</sup> October 2024 the Procurement Act – but only if the procurement had not started by that time), with advice from the Commercial Procurement team (see **Procurement and Social Value Implications** below).

The successful bidder will be expected to (*inter-alia*) to provide, install, and take on maintenance responsibilities of the advertising bus shelters and digital FSUs, and to offer a concession fee, in return for the advertising/sponsorship income that it can generate. The commercial risk will rest with the supplier, so this is why any new contract would be treated as a concession contract (rather than a services contract) for public procurement purposes.

An appropriate form of concession contract will therefore need to be drafted and completed with support from Legal Services. One should note that under the Concession Regs, a duration of 5-years should only be exceeded in a concession contract should a longer period be necessary in order to allow the concessionaire to recoup its investment, together with a return-on-investment capital. This will need to be factored into the drafting of both the new concession contract and the Council's service specification/requirements.

Advice should also be sought from Legal Services with regards to any exit and/or handover provisions in the current contract with JC Decaux. In particular, as all the bus shelters, street furniture and equipment under the current concession contract belong to JC Decaux, any change in supplier would also necessitate the additional costs of procuring and installing temporary bus shelters and equipment while the current provider removes all of their assets and any new provider installs theirs, as well as address potential TUPE and pension implications in relation to the relevant transfer of any JC Decaux UK staff to the Council or any replacement supplier, all of which would require further advice from Legal Services.

### ***c) Implications of not proceeding with extension and reprocurement***

If the Executive decide not to proceed with the extension of the current contract with JC Decaux and/or the procurement of a new concession contract, this will mean the current concession contract will expire on 31<sup>st</sup> December 2024.

As all the bus shelters, street furniture and equipment under the current concession contract belong to JC Decaux, expiry of the current concession contract would also necessitate the removal of all relevant bus shelters and street furniture from Council land and the additional costs of procuring and installing new bus shelters and relevant street furniture in line with the Council's CPRs and (where applicable) the Public Contract Regulations 2015, the Concession Regs and/or Procurement Act. It is highly likely that such assets would have to be managed by the Council itself, which would also mean that the Council would be wholly responsible for all advertising sales and all cleaning and maintenance of any bus shelters and other relevant street furniture. This approach relies on the Council being able to sell enough advertising space to cover cleaning, maintenance, and upgrade costs. The Council would also have 100% responsibility to sell advertising space to generate revenue, therefore the risk would be greater. The Council will be responsible for all damages and repairs required within the network. If revenue falls, the Council could be vulnerable.

In addition, expiry of the current contract without a replacement concession contract may result in potential TUPE and pension implications in relation to the relevant transfer of any JC Decaux UK staff to the Council, all of which would require further advice from Legal Services.

## **52. Procurement and Social Value**

Any proposed extension will need to be carried out as per the provision within the current contract. Both Commercial Procurement and Legal Services must be consulted prior to the extension being entered into.

As this report is covering the advertising requirement, this is a concession contract and subsequently, any new concession

contract must be commissioned via a compliant procurement route under the Council's Contract Procedure Rules and where applicable, the Concession Regs, and from 28<sup>th</sup> October 2024 the Procurement Act 2023 and any successor, amending or enabling legislation implemented to govern the award of public contracts.

All tenders will need to be conducted in an open, fair, and transparent way to capture the key principles of procurement. Further advice regarding the procurement routes, strategies and markets must be sought from the Commercial Procurement team.

The Social Value Act came into force January 2013 which requires all public sector bodies to adhere to. In June 2018, Central Government announced Social Value would then be an element within the procurement and contract that would be evaluated when awarding major projects. This is now the protocol the Council takes on spend and projects with a value of £100k +.

Social Value will be a requirement within this procurement and as such, the requests made by officers in the tender documentation must meet the council's priorities and commitments made in the Council Plan.

### **53. Health and Wellbeing**

The inclusion of the HFSS policy drawn up by CYC in any new concession contract for the bus shelter and FSU advertising will improve the long-term health impacts and nutritional benefits of food advertised to York residents and will therefore be a net health gain for the city.

### **54. Environment and Climate action**

Through the competitive tender process, bidders should be assessed on their understanding of the main sources of emissions associated with the contract and their plans to minimise these emissions, along with the potential climate adaptation measures and associated benefits.

Potential climate change implications associated with this contract include:

- i. embodied emissions associated with the materials, construction, and installation of new infrastructure;
- ii. operational emissions from energy consumption associated with digital advertising;
- iii. emissions associated with the disposal of old and new infrastructure; and
- iv. risks and opportunities for climate adaptation (e.g., resilience to higher temperatures and extreme weather events).

The sustainability requirements incorporated within the specification will address the majority of these implications (see paragraph 35 of this paper above), and it is recommended that consideration is also given to:

- a. Assessment of embodied carbon associated with installed infrastructure and construction work;
- b. materials are future-proofed for climate adaptation; and
- c. following the waste hierarchy for removal/disposal.

## **55. Affordability**

The council will have 10% of all advertising time, allowing it to provide messages direct to specific groups, including carers, or low-income groups, to promote council services that could better support.

## **56. Equalities and Human Rights**

The Council recognises, and needs to take into account its Public Sector Equality Duty under Section 149 of the Equality Act 2010 (to have due regard to the need to eliminate discrimination, harassment, victimisation and any other prohibited conduct; advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and foster good relations between persons who share a relevant protected characteristic and persons who do not share it in the exercise of a public authority's functions).

The Equality Impact Assessment (**EIA**) **Annex A** notes the impact the advertising and street furniture could have on protected characteristics, see below summary.

- Age – Children are particularly vulnerable to advertising content, with the HFSS policy aimed at mitigating the risk of choosing unhealthy food or drink
- Disability – disabled residents have shared concerns about the current bus shelters in the Local Transport Strategy and these concerns form part of the specification for new designs, with testing to be offered to disabled community groups
- Gender – All advertising must comply to ASA guidelines.
- Gender reassignment – All advertising must comply to ASA guidelines.
- Marriage and civil partnership – no impact
- Pregnancy and maternity – no impact
- Race - – All advertising must comply to ASA guidelines.
- Religion and belief – All advertising must comply to ASA guidelines.
- Sexual orientation - All advertising must comply to ASA guidelines.
- Other socio-economic groups including:
  - Carer – no impact, the council will have advertising space on digital advertising units and can promote messages direct to the carer community (see Disability);
  - Low-income groups – no impact, the council will have advertising space on digital advertising units and can promote messages direct to low-income groups;
  - Veterans, Armed Forces Community – no impact, the council will have advertising space on digital advertising units and can promote messages direct to the community.

## 57. **Data Protection and Privacy**

Data protection impact assessments (**DPIAs**) are an essential part of our accountability obligations and is a legal requirement for any type of processing under UK data protection and privacy legislation. Failure to carry out a DPIA when required may leave the council open to enforcement action, including monetary penalties or fines.

DPIAs helps us to assess and demonstrate how we comply with all of our data protection obligations. It does not have to eradicate all risks but should help to minimise and determine whether the level of risk is acceptable in the circumstances, considering the benefits of what the council wants to achieve.

The DPIA screening questions were completed for this report and as there is no personal data being processed for the options set out in this report, there is no requirement to complete a DPIA. This will be reviewed where required following the decision on this report.

## 58. **Communications**

There are unlikely to be any implications of this report for the Communications Service, except to deal reactively with any media enquiries which may result.

## 59. **Economy**

No impact.

## **Risks and Mitigations**

60. The opportunities for income uplift through advertising revenue, are not insignificant, which go some way towards mitigating the risks outlined below:

a. **Market acceptance risk** The Out of Home Advertising market is no longer developing 100% paper advertising given the increasing move to Digital which now represents 75% of revenue. As such, there is a risk that if digital advertising is not supported, the market will not be interested in entering into a new 15yr term for the development of paper display shelters as the contract will no longer be commercially viable.

b. **Financial risks** relate to:

i. additional financial pressure on current year's budget as a consequence of delaying the competitive tender (outlined above);

ii. retention of the current level of income; and

- iii. failure to realise the opportunities for increased income as described.

If the contract does not go forward, this could expose the Council to having to develop and maintain its own Bus Shelter estate at an initial fee of around £1.4m in Capex (asset, foundations, installation, power connection) as well as an ongoing annual operational costs of around £250k-£300k considering electricity costs, business rates and associated cleaning and maintenance costs.

- c. **Installation risks** relate to whether as a Local Planning Authority, and constraints imposed by conservation areas, the ability to switch from paper to digital is possible, with the risk that revenue is compromised.
- d. **Reputationally** although the digital advertising units have been tested and are designed to be no more obtrusive than existing bus shelter advertising units, residents might not support them and will make representations through Planning. Resident engagement will take place once the installation plan has been completed.

## Wards Impacted

All.

## Contact details

For further information please contact the authors of this Decision Report.

## Author

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<b>Date:</b>	13 March 2024

## **Specialist officers**

Head of Procurement

Head of Legal

Monitoring Officer

## **Background papers**

Executive February 2024 Financial Strategy 23/24-27/28 Savings

[Agenda for Council on Thursday, 22 February 2024, 6.30 pm \(york.gov.uk\)](https://york.gov.uk/agenda/council/2024-02-22)

Executive April 2024 considers initial recommendations for a single tender

waiver [Agenda for Executive on Thursday, 18 April 2024, 5.30 pm \(york.gov.uk\)](https://york.gov.uk/agenda/committee/2024-04-18) item 115

## **Annexes**

**Annex A** Equalities Impact Assessment

**Annex B** Annex B Advertising and sponsorship income generation feasibility study report