

OFFICER DECISION FORM

DECISION TO BE TAKEN BY: DIRECTOR OF FINANCE

KEY DECISION YES

DIRECTORATE: FINANCE

WARDS AFFECTED: West Kirby and Thurstaston; Hoylake and Meols

SUBJECT: WEST KIRBY FLOOD ALLEVIATION SCHEME – ADDITIONAL GRANT FUNDING AND CONSTRUCTION CONTRACT VARIATION

1.0 DECISION:

- 1.1 The Director of Finance (Section 151 Officer), has accepted additional grant in aid (GiA) of £3m from the Environment Agency (EA) and authorised with immediate effect that this be included in the council's Capital Programme for defrayment solely upon the West Kirby Flood Alleviation Project. The Section 151 Officer also decided to approve the necessary purchase orders to vary the council's construction contract with Volkerstevin Ltd with immediate effect, up to a maximum contract sum of £17,273,533, subject to certificates issued by the independent contract Project Manager.

2.0 REASONS FOR THE DECISION

- 2.1 The decision has been taken after the Chief Executive, the Monitoring Officer and the Section 151 Officer have consulted with the Mayor, who has agreed, in accordance with Part 4, Section 3, Paragraph 5, of the Constitution, that this is an urgent decision outside of the council's budget policy framework. The reasons for urgency are that there is an urgent need to make immediate contractual payments and avoid potential significant costs for interest on late payment or litigation for breach of contract.

3.0 STATEMENT OF COMPLIANCE

- 3.1 The recommendations are made further to legal advice from the Monitoring Officer and the Section 151 Officer has confirmed that they do not incur unlawful expenditure. They are also compliant with equality legislation and an equality analysis and impact assessment has been completed. The recommendations reflect the core principles of good governance set out in the council's Code of Corporate Governance.

4.0 DECLARATION OF INTEREST

- 4.1 None.

Signed:



Officer: Matthew Bennett

Title: Director of Finance

Date: 17 July 2023

A list of background papers on this issue is held with:

Contact Officer: Neil Thomas, Senior Manager Flood and Coastal Risk Management

Date: 17 July 2023

Date of Publication: 19 July 2023

17 July 2023

Report Title:	WEST KIRBY FLOOD ALLEVIATION SCHEME – ADDITIONAL GRANT FUNDING AND CONSTRUCTION CONTRACT VARIATION
Report of:	ASSISTANT DIRECTOR, HIGHWAYS AND INFRASTRUCTURE, NEIGHBOURHOOD SERVICES

REPORT SUMMARY

This report seeks the approval of the Director of Finance and Section 151 Officer to disburse grant in aid (GiA) of £3m from the Environment Agency (EA) towards the West Kirby Flood Alleviation Project and to approve the necessary purchase orders to vary the council's construction contract with Volkerstevin Ltd up to a maximum value of £17,273,533. The recommendations require an urgent decision under Section 4 of the Constitution as a matter outside of the council's budget policy framework, because there is an urgent need to make immediate contractual payments.

The West Kirby Flood Alleviation scheme strategically aligns with both the Sustainable Environment and Safe and Pleasant Communities themes of the Wirral Plan 2021-26.

The scheme is located within Hoylake & Meols and West Kirby & Thurstaston wards.

The recommendation of this report represents a key decision because of financial value.

RECOMMENDATIONS

The Section 151 Officer is recommended to:

- 1) Consult with the Mayor, together with the Chief Executive and the Monitoring Officer, to seek the Mayor's agreement that this is an urgent decision outside of the council's budget policy framework in accordance with Part 4, Section 3, Paragraph 5, of the Constitution;
- 2) To authorise, with immediate effect, that this grant be included in the Council's Capital Programme for defrayment solely upon the West Kirby Flood Alleviation Project, and
- 3) Approve the necessary purchase orders to vary the council's construction contract with Volkerstevin Ltd, with immediate effect, up to a maximum contract sum of £17,273,533, subject to certificates issued by the independent contract Project Manager.

SUPPORTING INFORMATION

1.0 REASONS FOR RECOMMENDATIONS

- 1.1 There is an urgent need to make immediate contractual payments and avoid potential significant costs for interest on late payment or litigation for breach of contract.

2.0 OTHER OPTIONS CONSIDERED

- 2.1 Either waiting until the next meeting of the Council or convening an Extraordinary Meeting of the Council are not practical in the circumstances. Any delay in disbursing the grant in aid (GiA) funding and making it available for immediate defrayment towards contractual payments may render the council in breach of contract, liable for significant interest on late payments, and exposed to the risk of adjudication or litigation proceedings.

3.0 BACKGROUND INFORMATION

- 3.1 The West Kirby Flood Alleviation Scheme project received planning consent in November 2021 and works commenced on site in May 2022. An Engineering and Construction Contract (ECC) contract for the construction works, under the New Engineering Contract 4th Edition (NEC4), had been awarded to Volkerstevin Ltd under an Environment Agency (EA) Framework procurement route in April 2022. The contract is based upon a cost-plus with target model. The target cost at contract award was £9,640,000. The contractor is paid costs incurred in carrying out the construction and is incentivised, under a pain/gain share mechanism, to achieve the agreed target cost. The target cost varies, based upon contact compensation events, the values of which are determined by an independent Project Manager appointed by the council to oversee the contract. The Project Manager issues interim payment certificates on a monthly basis indicating the amount the council must pay to the contractor.
- 3.2 The Environment, Climate Emergency and Transport Committee resolved on 14 March 2023 to accept additional GiA from the EA amounting to £4,400,000 and to vary the construction contract up to a revised sum of £14,282,000, as a result of a number of compensation events that had occurred, which were set out in detail in the report of the Director of Neighbourhood Services to that Committee.
- 3.3 Whilst at the time of drafting the report to the March 2023 Committee and securing additional grant from the EA, in February 2023, the main compensation events were known and had been assessed, the final values for changes to the type of flood gate was based on cost estimates and predicted completion dates at that time. Unfortunately, since publication of the report, it has become clear that a number of very complex modifications were required to the design of the flood wall and the surrounding surfaces where moving gates need to be positioned. This process has taken longer than originally predicted and has been further complicated by recently discovered unforeseen underground obstructions, such as pre-existing structural foundations, requiring further modifications and design changes. The costs of the delays associated with these design modifications, as well as the additional construction works required as a result is considerable in circumstances where construction and materials prices have continued to increase as a result of global inflationary pressures. A bid to the EA for additional GiA of £3m was made by the council in May 2023 and awarded by the EA on 30 June 2023.

- 3.4 The council has been able to meet all contractual payments certified by the Project Manager, by their due date for payment, up until June 2023. However, since the last interim payment was made in May 2023, there is no remaining budget in the Capital Programme allocated specifically to this scheme with which to make any payments to contracted suppliers. The ECC Project Manager's certificate issued for works completed in May 2023, requiring payment by the council before 27 June 2023, in the sum of £845,000, remains overdue for payment. There is another certificate pending for works completed in June 2023, likely to be in the sum of at least £1,500,000, which will become due for payment on 25 July 2023. A further interim payment will become due in August for works completed in July. Works are expected to complete on site in early August and it is anticipated that a final account will be agreed by September 2023.
- 3.5 Following the report to the Environment Climate Emergency and Transport Committee on 14 March 2023 a substantive motion was resolved resulting in an amendment to the recommendations of the report to include the following additions:
- officers be thanked for the considerable amount of work put into the project, and
 - the report be referred to the Audit & Risk Management Committee so that consideration can be given to reviewing concerns relating to the procurement of the construction contract and the increase in cost of the project.

As a result of this resolution a full detailed report will be presented to Audit and Risk Management Committee on 24 October 2023 setting out the procurement process utilised for the main construction contract and detailing all of the final contract costs and reasons for increases, together with the efficiencies and benefits realised.

4.0 FINANCIAL IMPLICATIONS

- 4.1 The current overall project budget is £16,351,296. However, this budget has been fully committed against contractual payments and other project costs incurred up to June 2023 and no funds remain available. Accepting the additional £3m GiA and immediately including this in the council's Capital Programme will result in the total project budget increasing to £19,351,296, enabling the council to meet its current urgent current contractual obligations.
- 4.2 No further council capital borrowing or budgetary implications are anticipated, provided that the GiA is immediately accepted and defrayed for the sole purposes of the West Kirby Flood Alleviation Scheme project budget.
- 4.3 Since the Committee resolution on 14 March 2023, the contract sum has been further increased by £404,173 to £14,686,173 under delegated officer variation.
- 4.4 The current maximum estimated contract sum payable by the council is predicted to be £17,273,533, if all of the compensation events currently under consideration are accepted or assessed at the values the contractor has quoted and if the contractor's final costs remain at the current estimated figure. There is no guarantee the Project Manager will agree with the contractor's compensation event values, so this contract sum remains a prediction at this stage. However, in order that the potential remaining contractual payments can be made, a further contract variation and purchase order will be required so that invoices matching the Project Manager's

certificates can be processed, drawn-down against this amount, in the sum of £2,587,368, being the difference between the likely maximum final contract sum of £17,273,533 and the currently approved contract sum value of £14,686,173, which will require the approval of the Section 151 Officer.

5.0 LEGAL IMPLICATIONS

5.1 The council has duty under its contract with Volkerstevin Ltd to make payments to them in the sums certified by, and by the due dates certified by, the Project Manager. Failure to do so may result in the council being in breach of contract. The contractor is entitled to register a dispute under the contract and thereafter to commence adjudication or litigation proceedings depending upon the nature of the breach and the council's actions following any dispute notification.

6.0 RESOURCE IMPLICATIONS: STAFFING, ICT AND ASSETS

6.1 There are no resource, staffing, ICT or assets implications arising from this report.

7.0 RELEVANT RISKS

7.1 If the Section 151 Officer fails to immediately accept the additional £3m GiA provided by the EA and include this in the Capital Programme and approve the contract variation and Purchase Order required to make up the anticipated maximum final contract amount, the council will be in breach of its contract with Volkerstevin Ltd and may incur significant costs for interest on late payment and risk litigation for breach of contract.

7.2 If the council were to fail to make the remaining contract payments before the next meeting of the Council in October 2023, it is estimated that interest on late payments to the value of £32,000 will have accrued.

7.3 The EA has made clear that the GiA funding may not be utilised for interest payments nor adjudication litigation costs by the council, so these risks would present significant pressures upon the council's revenue budget resources if realised.

8.0 ENGAGEMENT/CONSULTATION

8.1 There are no direct engagement or consultation implications arising from this report which is concerned only with grant funding and contractual payment obligations.

9.0 EQUALITY IMPLICATIONS

9.1 There are no direct equality implications arising from this report which is concerned only with grant funding and contractual payment obligations.

10.0 ENVIRONMENT AND CLIMATE IMPLICATIONS

10.1 There are no direct environment or climate emergency implications arising from this report which is concerned only with grant funding and contractual payment obligations.

11.0 COMMUNITY WEALTH IMPLICATIONS

11.1 There are no direct community wealth implications arising from this report which is concerned only with grant funding and contractual payment obligations.

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APPENDICES

None

BACKGROUND PAPERS

Various background papers held by: Neil Thomas, Senior Manager Flood and Coastal Risk Management, including:

- Confidential commercially sensitive contractual papers (exempt from publication)
- Environment Agency Variation to Funding Approval letter 30 June 2023

SUBJECT HISTORY (last 3 years)

Council Meeting	Date
Strategic Applications Sub Committee	02 November 2021
Environment, Climate Emergency and Transport Committee - West Kirby Flood Alleviation - Award of Contract for Construction Phase	15 November 2021
Decision – West Kirby Flood Alleviation – Advanced Engineering Construction Contract	21 February 2022
Decision – West Kirby Flood alleviation – Award of Main Engineering Construction Contract	11 April 2022
Environment, Climate Emergency and Transport Committee - West Kirby Flood Alleviation – Variation of Construction Phase Contract and Acceptance of Flood Defence Grant Funding	14 March 2023