

# Approval to directly award a contract under Regulation 32(2)(c) of the Public Contracts Regulations 2015 for the Management of Ash Dieback across the City

Date: 11/10/2024

Report of: Natural Environment Manager

Report to: Chief Officer, Climate, Energy and Green Spaces

Will the decision be open for call in?  Yes  No

Does the report contain confidential or exempt information?  Yes  No

## Brief summary

This report is for the Chief Officer Climate, Energy and Green Space to approve directly awarding a new contract for the management of ash dieback across the City to Tilhill Forestry Limited (Tilhill). The contract will be awarded on a two-year term, commencing on the 1<sup>st</sup> November 2024 until 31<sup>st</sup> March 2026.

## Recommendations

It is recommended that:

- a) The Chief Officer, Climate Energy and Green Spaces approves the direct award of a new contract under Regulation 32(2) (c) of the Public Contracts Regulations 2015 (PCR) for the management of ash die back to Tilhill Forestry Limited (Tilhill).
- b) The contract commences on 1<sup>st</sup> November 2024 and shall expire on 31<sup>st</sup> March 2026.
- c) The total initial contract value is £400,000.00, with an additional 10% allowance of this initial contractual value to be approved as an additional sum. For the avoidance of doubt the total contract value of the direct award to Tilhill will be up to £440,000.00, to deliver the management of ash dieback including the ground proofing surveys to confirm accuracy of current data, bat roosting surveys, technical advice about the length of highway to be sectioned for traffic management and the type of traffic management required for each section, the felling of 539 trees with most advanced ash dieback symptoms, plus re-planting and establishment management of the trees to comply with Felling Licence Agreement, but also to contribute to the delivery of city targets for climate change and zero carbon.

## What is this report about?

- 1 Ash dieback (*Hymenoscyphus fraxineus*) is a highly destructive, exotic fungal disease that presents a significant threat to native ash trees, ultimately, resulting in their decline and in most cases death. In turn this will lead to failure of branches and whole trees. As such it poses a significant risk to infrastructure and public safety, particularly in high usage areas (e.g. highway infrastructure).
- 2 Nationally, 4 stages of Ash Dieback infection have been identified, based on the percentage of live tree canopy:
  - Class 1 – 0-25% of the canopy dead.
  - Class 2 – 25-50% of the canopy dead
  - Class 3 – 50-75% of the canopy dead
  - Class 4 – 75-100% of the canopy dead

Class 3 and 4 pose highest risk and mitigation of the risk posed by these trees needs to be prioritised. Actual failure tends to be caused by secondary infection, such as 'Honey fungus' and boring insects such as the Ash Bark Beetle, which take advantage of the moribund ash trees.

- 3 It should be noted that the disease is progressive and, whilst a small percentage (approximately <3%) of trees will show a high degree of tolerance, the vast majority are expected to succumb and die. The need to monitor and mitigate accordingly over the next few years, is, therefore, extremely important.
- 4 Leeds City Council has a statutory duty to ensure that all trees under its control are maintained in such a way that they do not pose unreasonable risks to people or property. Ash trees affected by ash dieback can succumb extremely quickly and when vitality is reduced or lost, they are vulnerable to other secondary infections, which can further hasten their decline, resulting in tree failure. All of the Ash trees included in this contract have the potential to fall onto the highway, risking harm to people or property. The increase in the number and strength of autumn and winter storms exacerbates this risk.
- 5 To support with that statutory duty of care Leeds city council commission a survey of 520 Km of Leeds' A and B roads in summer 2023. This data was used by LCC to create an Ash Dieback Analysis Dashboard. The analysis of this data facilitated understanding of the prioritisation of risks of tree failure to highway users and allowed initial estimated costs of appropriate risk mitigation to be calculated. This survey identified the following data linked specifically to Ash trees;
  - i. 14,584 Ash trees identified in the 2023 survey as being within the Adopted Highway and under Council Control.
  - ii. Of those, 539 Ash trees identified as posing the highest risk to highway users because they are already considered class 4 trees and are capable of falling into either an A or B.
- 6 In order to comply with felling licence regulations and to ensure that we suffer no long-term reduction in tree canopy cover. Trees removed will be replanted at a 5:1 ratio (2,695 trees in total) and receive full establishment management to ensure independence in the landscape at year 5.
- 7 The purpose of this report is, therefore, to approve the direct award to a single contractor for Phase 1 who has the proven experience to undertake each requirement of the contract to the specification and has the capacity to meet the time limits of each requirement of the contract.
- 8 Phase 1 will focus on the removal of 539 Council owned trees that are most seriously affected by the disease (Class 4 trees) and that are within falling distance of Leeds' A and B Roads. Sampling survey undertaken in June 2024 (see paragraph 10 above) allowed the LCC team to estimate

that 90% of the ash trees we had a diameter at breast height (dbh – measured at 1.3 m above ground) of less than 45 cms and the remaining 10% had a dbh of greater than 45 cms. This allowed the team to estimate removal costs based on Tilhill's schedule of rates.

- 9 Phase 1 covers 520 km of strategic highway (A and B Roads). Phase 2, to be presented to the open market in the near future is a larger framework and will include the rest of Leeds highway network (approximately 2,600 km in length), plus high usage areas in parks and green spaces. Surveys for Phase 2 are currently taking place. It is envisaged that Phase 2 surveys will identify a significantly higher number of Class 3 and 4 diseased ash trees than identified in Phase 1.
- 10 The aim of this Pilot Phase is to ensure that our approach is correct and that any difficulties encountered by LCC and the contractors are identified and solutions put in place before work on a Phase 2 framework begins. The focus of the Pilot Phase is to complete the following prior to March 2025:
  - i. Undertake Ground-Truthing, legally required ecological surveys and traffic management specification of 14,584 ash trees identified in the 2023 survey of the A and B Roads – to start in November and complete in January 2024 ahead of any tree removal. This will require controlled access to ArcGIS ash dieback data and the ability to edit and add required data remotely.
  - ii. Fell and remove the identified high-risk trees. No tree climbing due to risk of failure. All trees under a diameter of 45 cm (measured at 1.3 m above ground level) to be removed mechanically. To take place in January 2025 to end of March 2025.
- 11 For completeness the intention will be to undertake re-planting (5:1 replace ratio) to comply with Felling Licence requirements November 2025 to end of February 2026 and establishment management of newly planted trees over a 5-year period to ensure independence in the landscape – beginning in April 2025 and ending in summer 2030 which will be inclusive within this contract.
- 12 The Council's Climate Energy and Green Space service is leading on the delivery of the Council's ash dieback programme and this winter intends to appoint Tilhill in order to deliver these works because they have a proven track record. They set up a specialist ash dieback contractor team in the south-East of England and are just completing a similar project to our Phase 1 where they removed high risk ash trees within falling distance of the M25 under contract to National Highways. This required the remote access to National Highways ArcGIS data and the live inputting and editing of data at all stages of the project.
- 13 Tilhill have undertaken previous projects for the Council and their rates have been benchmarked to demonstrate value for money. The market is limited and Tilhill have secured their South-East team on the project due to their expertise in this field. Ash dieback is a national issue and there are limited contractors set up and ready to do the work as specified in this contract.
- 14 The commencement of the full scope of works is urgent due to the short timeframe. There is the requirement to undertake the Ground-Truthing work prior to any tree felling. This includes the Potential Roost Feature (Bats) assessments, which need to be done when the trees lose their leaves, therefore November and December, prior to tree felling in late December through to late March (subject to nesting bird surveys).
- 15 Should the award be delayed, there is a risk that the Council would miss the window for mitigating the identified Class 4 trees that require action now and this will pose a health and safety risk to members of the public, property and highways.
- 16 Due to the aforementioned timescales there is insufficient time to carry out a further competitive tender exercise and no alternative third-party frameworks for the Council to directly call-off from

have been identified. Therefore, the recommendation is to seek approval under Regulation 32(2)(c) of the PCR to directly enter into a contract with Tilhill to deliver the full revised scope of work.

### What impact will this proposal have?

- 17 The appointment of Tilhill to deliver the Pilot Phase of the project, will relieve internal resource pressures to and enable the service to deliver this phase of the ash dieback programme and improve the approach in advance of procuring future contracts to the open market.
- 18 The successful delivery of the project will ensure that the safety of the public, property and highways is maintained and that we learn from the pilot phase of the project gaining experience and allowing the council to implement identified required changes for future Ash Dieback Mitigation contracts.
- 19 At the outset of this decision an Equality Diversity and Cohesion and Integration screening exercise was carried out (attached in appendix).

### How does this proposal impact the three pillars of the Best City Ambition?

Health and Wellbeing       Inclusive Growth       Zero Carbon

- 20 This scheme will support the Council's ambition to health and wellbeing by ensuring that any trees that pose a danger to citizens of Leeds are removed before they become a safety risk.
- 21 Each tree that is felled will be replaced by 5 new trees (NB this is a condition of the required Felling Licence Agreement). This will support zero carbon by ensuring continued absorption of CO2. The contractor will also be required to carry out their works in a way that has the least impact on the environment and where possible reduced their emissions from carrying out or excessive travelling for the survey works.

### What consultation and engagement has taken place?

Wards affected: ALL

Have ward members been consulted?       Yes       No

- 22 During the contract and works period, communication and engagement will take place with members of the public and other council departments to ensure all are aware of the works taking place and the reasons behind the removal of certain trees.
- 23 A dedicated Ash Dieback Project Board and an Ash Dieback Project team will be formed to manage the whole process.

### What are the resource implications?

- 24 An injection of funds into the capital programme has been agreed and a new capital scheme has been set up to the value of £1.08m (all profiled to spend in 24/25).
- 25 The total initial contract value is £440,000.00, inclusive of 10% contingency for any additional sums.

### What are the key risks and how are they being managed?

- 26 The risk of procurement challenge is being mitigated by publishing a Voluntary Transparency Notice (VTN).

27 There is reputational risk to the Council, that not meeting the identified timeframes may result in delaying the required mitigation of identified, diseased trees which, as result, may fail and cause damage/injury to people, property or highways assets.

### **What are the legal implications?**

28 The decision to directly award a new contract for the Outsourcing a Phase 1 'Pilot Project' Ash Dieback Mitigation to Tilhill for the period 1<sup>st</sup> November 2024 to 31<sup>st</sup> March 2026 at a cost of up to £440,000.00 (including a 10% contingency) is a Publishable Admin Decision and is not subject to call in. There are no grounds for keeping the contents of this report confidential under the Council's Access to Information Rules.

29 The Council believes that the decision to award new contracts for the Phase 1 'Pilot Project' of the City's Ash Dieback Programme is permitted pursuant Regulation 32(2)(c) of the PCR which states:

*"32(1) In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated procedure without prior publication.*

*(2) The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:*

*(c) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with."*

30 The late start to beginning the procurement process was dependent on having the funds in place and the evidence to support release of funds needed to be accurate. The time taken to provide this evidence was unforeseeable and the requirement to mitigate the risks to people and property within a short time frame is extremely urgent. The increase in the number and severity of autumn/winter 'Named Storms' adds to this urgency.

31 It is further important to note that the extreme urgency brought on to make this direct award to Tilhill pursuant to Regulation 32(2)(c) PCR 2015 is also compounded by the increasing public health and safety issue due to the proximity of the trees requiring felling and management to the roadways. If this direct award is not made there is a danger that the trees will fall onto the roadways.

32 Notwithstanding the above, there is the potential risk of challenge because the Council has used Regulation 32(2)(c) PCR 2015.

33 This risk can be mitigated by the publication of a voluntary transparency notice on Find a Tender Service immediately after the decision to award the contract has been taken and then waiting 10 days to see if any challenges are made. If no challenges are made, the chances of a claim for ineffectiveness being brought are significantly reduced and would only be successful if the Council had used the negotiated procedure without publication of a notice incorrectly. Furthermore, publishing such a notice will also start time running for any other potential claim for breach of the PCR, which must be brought within 30 days of the date that an aggrieved party knew or ought to have known that a breach had occurred.

34 However, it should be noted that voluntary transparency notices themselves can be challenged. Although the UK has now left the European Union, the case of *Italian Interior Ministry v Fastweb SpA (Case C-19/13)* is still persuasive and highlights the limited protection that the voluntary transparency notice route can offer to contracting authorities wishing to make direct awards without following a fully transparent process for above threshold public procurements in accordance with the PCR. A grey area remains around whether the protection of a voluntary

transparency notice will be available where the contracting authority genuinely, but mistakenly, considers it was entitled to award the contract without notice. It shows that the safe harbour will only be 'safe' to the extent that the justification for the direct award is sound and ready to stand up to the increased scrutiny that the publication of the voluntary transparency notice may well invite.

35 These comments should be noted by the Chief Officer, Climate Energy & Green Space in making the final decision and should be satisfied that doing so represents best value for the Council and is in the Council's best interests.

## **Options, timescales and measuring success.**

### **What other options were considered?**

36 Use of an existing framework was considered but there were none available that would meet the time scales for this type of work.

37 Carrying out a new above threshold competitive procurement exercise was considered but unfortunately due to the timescales required to do so within the constraints of the current growing season this was discounted as an option.

### **How will success be measured?**

38 Success will be measured by all identified Class 4 trees being felled and subsequently replanted. Should there be any remaining budget then identified Class 3 trees will also form part of the programme.

39 The contractor will be measured by the quality and consistency of the works.

### **What is the timetable and who will be responsible for implementation?**

40 The contract will commence on 1<sup>st</sup> November 2024 and shall expire on 31<sup>st</sup> March 2026

41 The two elements of the contract will include ground truthing surveys, bat roosting surveys, technical advice about the length of the highway to be sectioned, the felling and the re-planting of the trees across the city.

- 1) November 2024 – early January 2025 – ground truthing and bat roosting surveys.
- 2) Mid-January 2025– March 2025 – felling and removing identified trees.
- 3) November 2025 – March 2026 – re-planting of trees.
- 4) 5 years establishment management of newly planted trees to ensure independence in the landscape – April 2025 to summer 2030.

42 Senior Project Manager (Acting) will manage the contract and be responsible for its implementation.

## **Appendices**

- Equality, Diversity, Cohesion, and Integration Screening document

## **Background Papers**

N/A