FAITHFUL+GOULD

Member of the SNC-Lavalin Group

A350 Melksham Bypass

Procurement Strategy

Wiltshire Council

09 November 2021

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Project	A350 Melksham Bypass
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Introduction

This report analyses the various delivery and contractual models that are available to deliver the Melksham Bypass project.

1. Introduction

1.1. Overview

This Outline Procurement Strategy ("OPS") sets out F+G's current view as to the correct Delivery and Contracting Model for delivering the A350 Melksham Bypass project (the "Project").

The typical progression of an investment through a decision making/ business case process sees the procurement of a project or programme develop in a relatively linear fashion – procurement aspects being defined at the Strategic Outline Case (SOC) stage, refined and delivered at or immediately post Outline Business Case (OBC) and in the stages between OBC and Full Business Case (FBC); before essentially being complete and fully assessed at FBC.

The Project, its potential procurement, as well as commercial matters generally are at OBC stage, naturally therefore there will be a degree of development and refinement of these matters over the coming months.

1.2. Scheme background

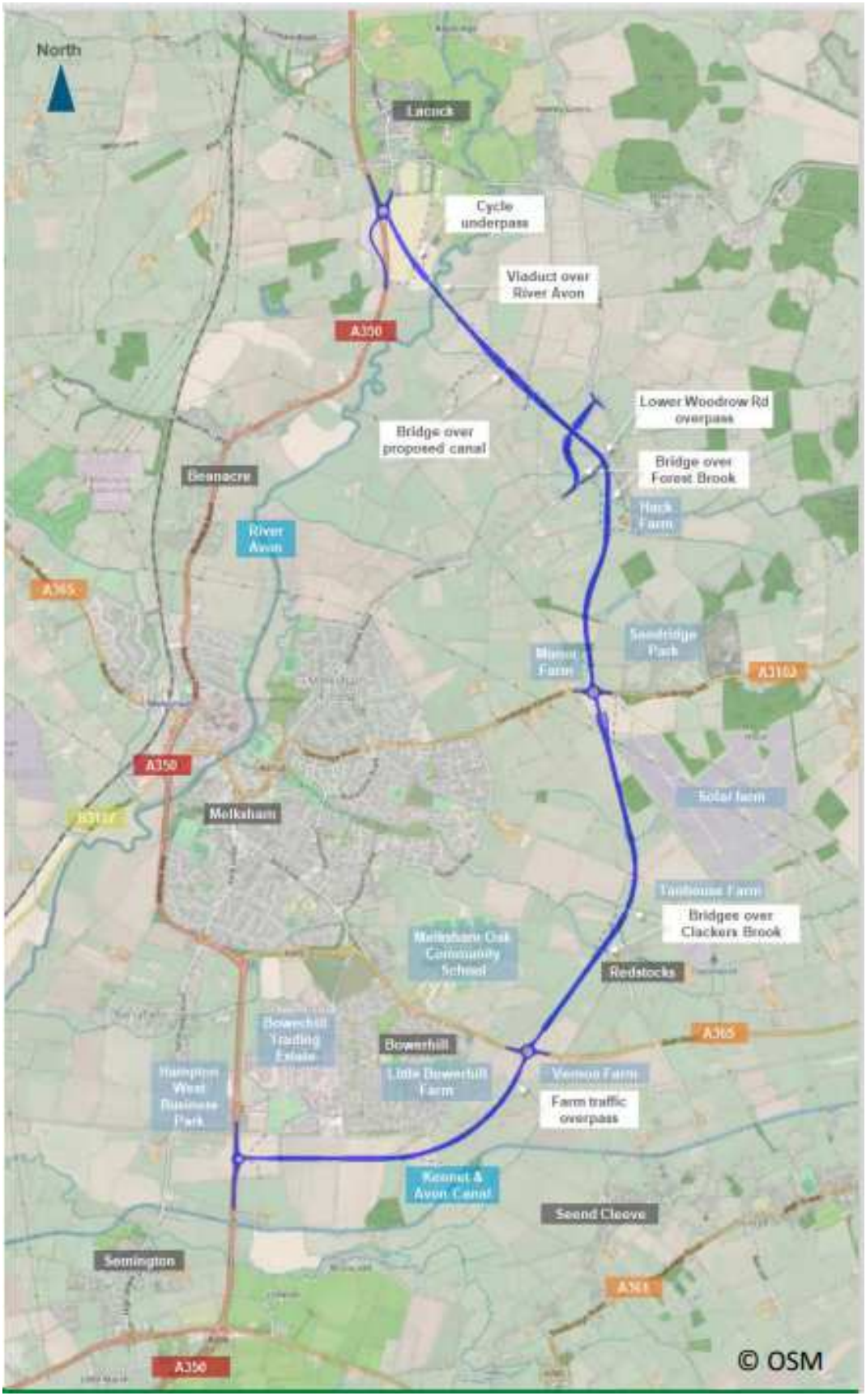
The A350 is one of the most important routes within Wiltshire. It connects several of Wiltshire's principal communities and as such Wiltshire Council (WC) recognise its importance to the local economy. The section of the A350 through Melksham is one of the busiest major roads in the county. Every day it sees up to 35,000 vehicles travel along it, with around 3,000 being heavy goods vehicles (HGVs). Given the high volume of traffic, the A350 through Melksham and Beanacre is of concern as it passes through residential areas, severs access to retail and the rail station, and crosses several busy junctions. It can also suffer from slow moving traffic as a result of various speed limits, capacity constraints, road conditions and layout, and access requirements for adjacent commercial and retail uses. Therefore, the local road network is susceptible to disruption. It's long been a priority for WC to improve connectivity from the north to the south via the A350 corridor, which includes road, rail, cycleway and footpath, and now funding has been received from the Department for Transport (DfT) to develop an Outline Business Case to improve the A350 corridor at Melksham. These improvements represent the scheme. (source: A350 Melksham Bypass – Second Public Consultation brochure). The emerging option is shown in **Figure 1-1 - Emerging option** below.

The key features of the emerging option we are consulting on include:

- The route is approximately nine kilometres long and has a total footprint of around 50 hectares.
- There are four new roundabouts – from south to north, these are: at the A350 just south of Hampton Park roundabout; at the A365; at the A3102; and at the A350 between Halfway Farm and Lacock village (this would upgrade the existing junction with Melksham Road).
- A viaduct is provided over the River Avon and its flood zone, approximately 410 metres in length.
- A bridge carries the bypass over the Wilts and Berks canal (currently not in use), which requires four culverts.
- Four bridges are proposed over the Clackers and Forest brooks
- Drainage attenuation ponds and other measures are provided to reduce flood risk and avoid pollution.
- Environmental mitigations are included in the scheme, such as vegetation planting along sections of the bypass.
- Existing Public Rights of Way routes for walking, cycling and horse-riding will be adjusted, or new routes provided to ensure connectivity.

The construction cost estimate for the emerging option is in the region of £145m (in 2019 prices) and there will be contingency costs and inflation to be further considered. We'll have a clearer idea of final costs as the design develops.

Figure 1-1 - Emerging option



2. Methodology

2.1. General

The Procurement Strategy for the Scheme has and will continue to be developed using best practice - making use of such tools and guidance as the Cabinet Office's Construction Playbook[1], HM Treasury Business Case guidance, internal WC guidance and so on.

All such tools and guidance however must be utilised within the context of the Scheme; the utmost regard must be given to the outcomes and objectives of the Scheme.

Of key consideration has and will continue to be the development of the right Delivery Model, and in turn the commercialisation of that Delivery Model into the right Contracting Model.

2.2. Key information

Prior to any consideration of the Delivery Model and Contracting Model there needs to be a succinct understanding of the Project's characteristics in key areas:

- The Project's Objectives
- The Project's Construction (and other) Constraints (noted in Scheme Background)
- The Project's Risks
- The Project's likely position and attractiveness in the market; and
- The capacity and capability of the procuring organisation to deliver the Project.

The following section of this OPS considers the above items and sets out the understanding as matters stand in October 2021. Naturally matters will evolve over the future months. It should be noted that the final bullet point is not considered at this juncture – rather the same will be progressed as the management case is developed through the business case process.

2.2.1. The Project's Objectives

Five transport objectives have been set for the final scheme, reflecting the current and future problems and issues identified, supported by evidence, in relation to the A350 route at Melksham. The scheme will need to contribute positively towards each of the following objectives;

Table 2-1 - Scheme objectives

1	2	3	4	5
Reduce journey times and delays and improve journey reliability on the A350 through Melksham and Beanacre, improving local and regional north-south connectivity, and supporting future housing and employment growth in the A350 corridor.	Reduce journey times and delays and improve journey reliability on the following routes through Melksham: • A350 South – A3102 • A365 West – A365 East • A350 South – A365 West	Provide enhanced opportunities for walking and cycling between Melksham town centre and the rail station / Bath Road, and along the existing A350 corridor within Melksham and Beanacre, which will help reduce the impact of transport on the environment and support local economic activity.	Reduce personal injury accident rates and severity for the A350 and Melksham as a whole, to make the corridor safer and more resilient.	Reduce the volume of traffic, including HGVs, passing along the current A350 route in northern Melksham and Beanacre to reduce severance, whilst avoiding negative impacts on other existing or potential residential areas.

[1] The Construction Playbook – December 2020 (publishing.service.gov.uk)

2.2.2. The Project's Risks

At this stage of developing the OSP for the Scheme, the risks from a procurement perspective will largely reflect those of the Project generally – these being augmented by specific procurement risks.

The Scheme's key risks at this stage include:

- Flood zone activity – programme, construction and facilities
- Planning of construction activities so as to ensure minimal environmental and AONB impact
- Environmental constraints and site issues impacting delivery
- Land access for residents and landowners
- Land acquisition
- Communication with the residents and landowners
- Utilities - asset owner engagement
- Protection of the Roman road
- Potential delays in the supply of materials and/ or plant
- Contractor and Site agility in the face of Covid-19/ Brexit
- Client agility in the face of Covid-19/ Brexit
- Client Capacity and capability
- Interface between design, construction, and financial/ cost activity
- Market appetite and capacity

2.2.3. The Project's likely position and attractiveness to the market

Purchasing within the construction/ infrastructure sector, be that for services, consultancy or works, is expanding. Despite the impact of the COVID-19 crisis and Brexit the infrastructure sector has seen significant commitment by government through 2020: £25bn plus for the roads sector, £50bn plus for the water and sewerage, and a similar amount for the rail sector.

Such increased activity introduces both challenges and opportunities. A particular challenge in the context of the Project (and any major civils/ infrastructure project at present) is the need for clients to make their projects attractive to the market. The availability of work can drive selective tendering by both consultants and contractors, something we are seeing evidence of developing across the UK.

There can be a myriad of reasons behind an organisation's decision to become selective as to their bidding activity (locality, locked up resource, commercial pressures, all play a role). A key theme beginning to emerge however is that the market is becoming uncomfortable with extensive transfers of risk, particularly when coupled with a lack of information, lack of design development and so on.

As the Project's procurement strategy develops it is therefore key to ensure engagement with the market, in terms of the delivery and contractual models to be deployed and the technical aspects of the Scheme. A dialogue with the market pre-procurement is crucial.

2.2.4. Capacity and capability to deliver the scheme

Success on any major infrastructure project will not be forthcoming without the alignment and matching of capacity and capability to the project and delivery environment. Ultimately the Delivery Model and Contractual Model deployed must be deliverable in the face of the capacity and capability available.

During the next stage, it will be important to ensure that this necessary alignment and matching is in place – as mentioned above this will be progressed as the management case is developed through the full business case process.

3. The Delivery Model

As set out in the Cabinet Office's Construction Playbook[2] the correct delivery model for a project or scheme enables clients and industry to "work together to deliver the best possible outcomes by determining the optimal split of roles and responsibilities". The procurement strategy for the Project will develop so as to identify, utilising evidence and analysis, how Wiltshire should structure the delivery of the Project[3]. As also set out in the Construction Playbook, the importance of this strategic decision cannot be underestimated.

3.1. The methodology to be used

The Methodology used (and which will continue to be used) to identify the appropriate Delivery Model for the Scheme can be found here. Put succinctly a 3 Step process is followed, albeit it is not fully sequential, focusing on the elements of Definition, Appraisal and Engagement.

The Definition step sees the emergence of Wiltshire's actual requirements and outcomes, through focusing on the organisation's 'needs' and 'wants'. Faithful and Gould (F+G) through its discussions with Atkins have established these 'needs' and 'wants', and in turn F+G has also screened and appraised the models capable of delivering on these 'needs' and 'wants. This detailed analysis can be seen in Appendix A.

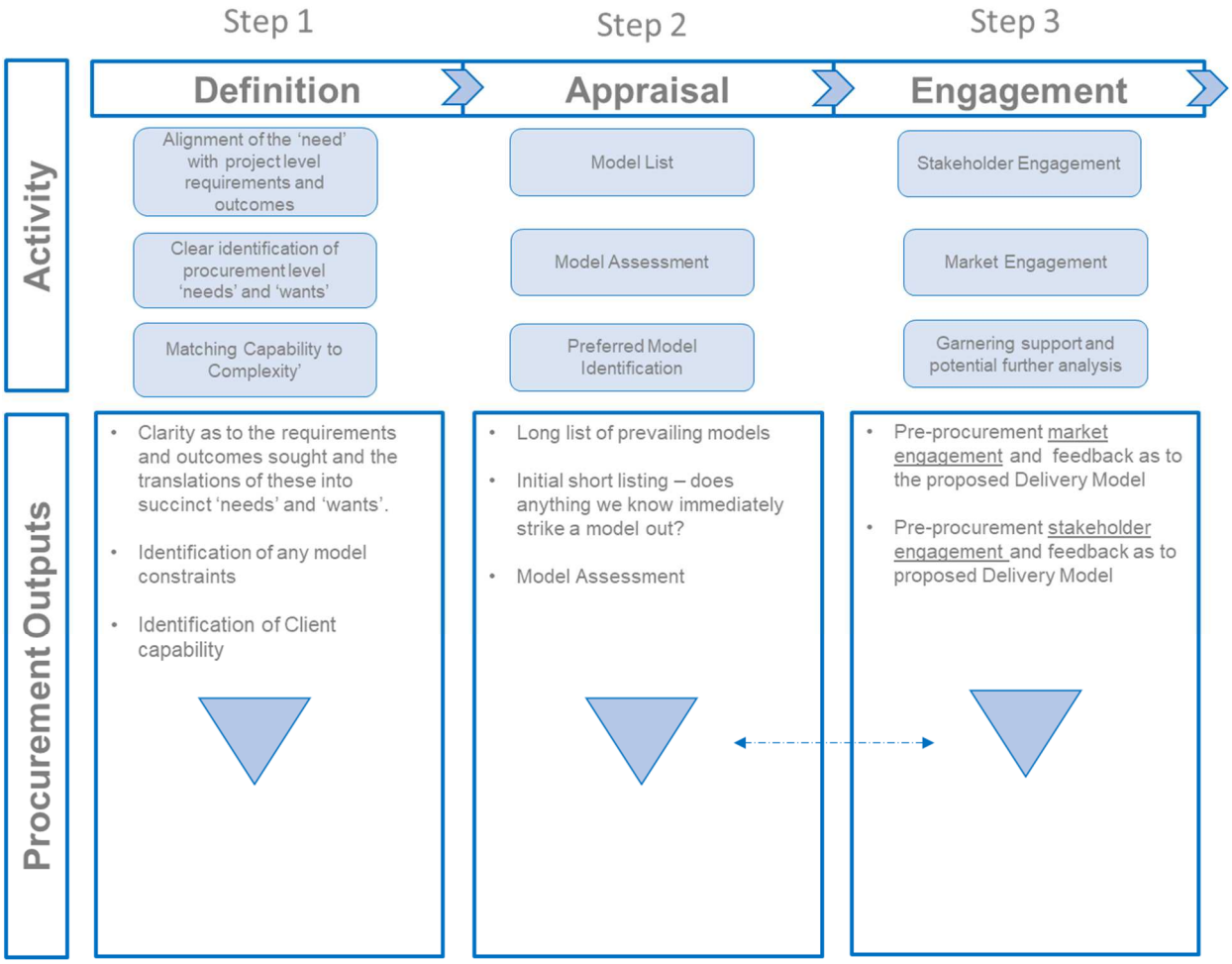
Having defined the requirements and outcomes, consideration was given to the models that may be used to bring about those requirements and outcomes.

Finally, Engagement as to the Preferred Model is to take place with the market and wider stakeholders. It is expected that this Engagement phase will be undertaken shortly.

[2] Ibid 1

[3] It is important to note that not only is the outward facing structure for the Scheme important, but so to the internal structure. Although outside the scope of this report it is recommended that Wiltshire consider this aspect as soon as possible.

Figure 3-1 - Delivery Model Methodology

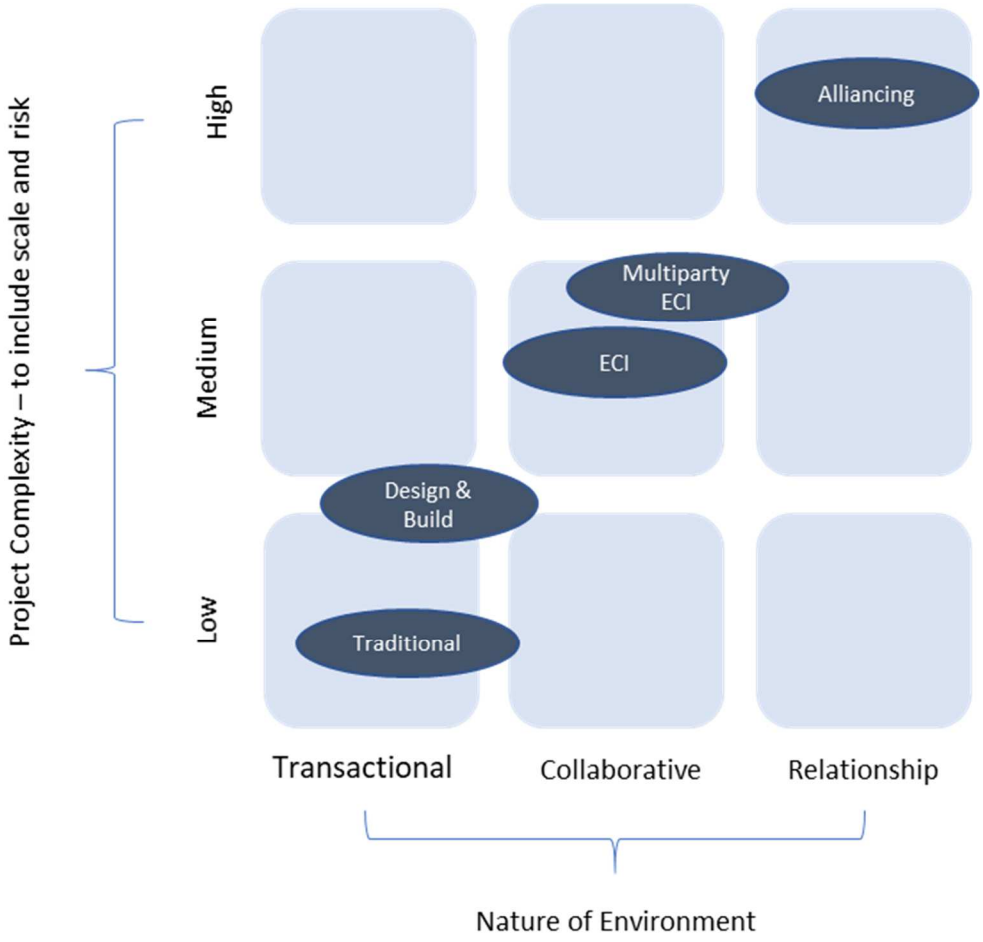


The outcomes and requirements (in the form of the Project objectives set out in Section 2) have largely been framed, though it will of course be necessary as the Project evolves to continually revisit the same.

3.2. Delivery Model Typology

Viewing matters through the lens of complexity and environment set out in Figure 3-2 - Delivery Model Typology are the delivery models assessed. The nature of the environment to be established is a key strategic decision - a more collaborative/ relationship-based environment, as opposed to a transactional based relationship may be preferred; similarly, Wiltshire may want to retain large elements of risk and opt for a more transactional, traditional approach.

Figure 3-2 - Delivery Model Typology



Key information as regards each delivery model considered is set out in **Table 3-1 - Delivery model** below.

Table 3-1 - Delivery model

Model Type	Key Characteristics (Summary)
Traditional	• Design – preliminary and detailed – is a separate function to the construction and sits on the client side (WC in this context) either being delivered in-house or through a separate consultancy • The Contractor would be appointed to construct only – taking risk only on workmanship and materials, not design. • Risk around the design (and other matters such as Statutory Undertakes, engagement with complex stakeholders etc.) would typically sit client side, i.e. WC in this context. • Typically, an Employer's Agent ("EA") would be appointed to help assist and likely administer the contract on the client side. The EA has no contractual link with the contractor.
Design and Build	

	• Preliminary design is again a separate function to the contractor and will be carried out by the client, either in house or via a consultancy. • The Contractor in turn is responsible for detailed design and construction. However, it is also typical for the contractor to take on responsibility for the preliminary design work upon appointment[4] . • Prelim design will be carried out by the client (WC in this context) • Risk other matters such as Statutory Undertakes, engagement with complex stakeholders etc. would typically sit client side, i.e. WC in this context – but not always • The model can be used with differing pricing mechanisms however – lump sum, target, cost reimbursable are all use in combination with this model. • Again, typically an Employer's Agent ("EA") would be appointed to help assist and likely administer the contract on the client side. The EA has no contractual link with the contractor.
ECI	• An Early Contractor Involvement ("ECI") appointment is ultimately a variant of the D&B route. It sees a more integrated team of contractor and designer being appointed to help develop a scheme from concept, through preliminary and on to detailed design and construction. • This would typically see a management type contractor being appointed, who would ultimately be responsible for all design and construction, as well as other areas such as stakeholder engagement with the likes of the Environment Agency, Statutory Undertakers etc. Owing to their early involvement there can be a reasonable appetite to take on such risks within this type of environment. • More often than not bespoke created SPVs will be brought forward by the private sector to deliver. • Again, typically an Employer's Agent ("EA") would be appointed to help assist and likely administer the contract on the client side. The EA has no contractual link with the contractor.
Multiparty ECI Environment (akin to an NEC3/4 X12)	• A series of providers – designer, contractor, consultants, ECI/ constructability consultant etc. would be brought together to help deliver the Scheme. • A Multiparty ECI Environment would take advantage of a partnering or bespoke relationship clause (e.g. X12 in the NEC4) setting out that everyone involved in a project is to work together towards a common goal or outcome. • Key within the environment will be the early contractor/ constructability involvement element which would likely be

[4] The importance of this point on a major infrastructure scheme cannot be underestimated, since failure to bottom out design liability can see disputes rapidly developing. Put succinctly having sperate liability between preliminary design and detailed design could always see a contractor moving to extinguish their liability for design through tying issues at detailed stage, back to the earlier preliminary phase for design

	achieved through consultancy from a contractor or specialist individual. • The client – WC in this context - would have a number of contractual relationships to bring about delivery – everyone would have their own contractual relationship with WC. In turn all those appointed would have an arrangement between them – potentially a memorandum of understanding round a series of programme objectives or a more complex performance arrangement where they would look to share any pain or gain when it comes to delivery. • Dispute resolution and escalation plans will feature, but organisations will retain independence and there will be contractual remedies between the client (WC in this context) and its providers (note the difference in this context with Alliancing below) • Programme level performance will need to be driven via appropriate pain gain mechanisms. • An EA may well form part of the multiparty arrangement.
Alliancing	• A series of providers – designer, contractor, consultants, ECI/ constructability consultant etc. would be brought together to help deliver the Scheme. • It should be noted that there is no agreed definition of 'alliancing'. Broadly however they amount to an agreement that parties will act in a certain way to achieve a common goal or outcome. "All Alliance Participants" work together to bring about delivery • No/ very limited claims possible between the parties, i.e. they can't sue each other only in very limited circumstances, which is the key difference to the multiparty arrangement mentioned above. • Alliancing does not rest solely on the content of a contract – trust, good faith, collaborative mentality and organisation maturity all have a key role to play. • Everyone, including the client/ ultimate owner (WC in this context) shares in success and failure. Typically, everyone would be under one contract (but not always) with a variety of pain gain mechanisms linked to performance being in play • Such models tend to be well suited when projects (or risks on a project are particularly complex). For example, when new/ never before seen risks are in play or when the finished "product" cannot be defined

The above models that have been assumed to be in play to bring about delivery of the Project. Variants to the above however are possible (and are visible in the marketplace). It should be noted that there will be an opportunity to discuss variants to the above during further refinement of both the Delivery and Contracting Models over the coming weeks and months – particularly post market engagement.

3.3. Delivery Model Recommendation

Based on Atkins and F+G's knowledge and analysis to date, on balance it is felt that Wiltshire should progress with a **'Multiparty ECI Environment'** delivery model for the delivery of the Project - on the basis that the Project is medium/high on the scale of complexity, scale and risk and the more detailed analysis set out in Appendix A:

Figure 3-3 - Multiparty ECI Environment

Figure 3-3 depicts the Multiparty ECI Environment – it sees Wiltshire entering into a series of contractual relationships (denoted by 🤝) – each supplier having an important/ key role to play. It is a delivery model of this nature that is to be progressed. What is key is ensuring that all parties operate in a collaborative environment, focused on Wiltshire's objectives.

3.4. ECI Requirements

There are several scenarios for when an ECI contractor may be appointed to support project development.

It is important that the requirements and needs for ECI involvement are agreed in order to identify the most appropriate ECI options which are available. We would recommend that further engagement between Atkins and key Wiltshire Council representatives is continued to identify and agree requirements to inform the most appropriate route.

Examples of ECI advisory functions are as follows:

- Buildability, including input into the phasing and sequencing of projects.
- Optimising the use of enabling works.
- Potential use of Modern Methods of Construction (MMC) and potential off-site fabrication.
- Input into Sustainability and Social Value Strategy using experience of local supply chain.
- The identification of options for value engineering and review of Consultant Team costings.
- Advise on programme durations for activities in detailed design and construction stages.
- Identification of constraints, risks and opportunities using experience from previous similar projects.
- Integration of digital technologies and innovation.
- Planning advice.
- Input into Environmental Statement to support planning.
- Input on land requirements to support land acquisition and any CPO process.

The following point set out the typical benefits that engaging with a contractor early can bring to a project. Whether all potential benefits would be achievable on the Project would be dependent upon the outcome of Atkins and Wiltshire Council engagement leading to agree requirements of an ECI route. Potential benefits of ECI are:

- Allows early value adding input to the scheme from the contractor and the supply chain. This provides more thorough and well thought through collaborative solution development, review, and challenge with anticipated benefits to buildability and value engineered solutions.
- Enables early development of detailed scheme requirements, constraints, and client, contractor, and designer relationships.
- Allows early development of a detailed integrated programme improving certainty of timely delivery.
- Allows early development of detailed quantities, specifications. This allows time for detailed subcontract and supplier, T&C's and price negotiation improving value for money and reducing subcontract and supplier disputes.
- Early engagement of key specialist suppliers to add value giving improved price, programme and methodology certainty in key areas such as structural steel, archaeology, environmental, flood mitigation.
- Allows contractor and designer early access and liaison with key stakeholders such as the Environment Agency, National Trust and SU's. This facilitates early liaison with significant risk reduction opportunities, timely detailed resource and programme development, methodology optimisation and working relationship development in advance of construction.
- Allows detailed input into specific preconstruction requirements tailored to the contractor's specific design and construction methodology such as ground investigation, ecology and archaeology programme management strategy and temporary land requirements.
- Allows time for project risks and mitigation strategies to be fully explored and incorporated into the construction plan and programme. Overall ECI should reduce the overall risk profile of the scheme.
- Allows the client flexibility to efficiently adapt to changing requirements during the preconstruction phase.
- Allow the option to commence high impact detailed design early (at risk) substantially reducing the late design delivery risk.
- Enables early agreement and preparation of approvals systems and processes.
- Allows seamless team continuity through early-stage scheme development though to construction completion.
- ECI provides early access to contractor's scheme pricing improving budget management.
- Encouragement of innovation, agreement and ownership of solutions.
- Potential to commence targeted enabling works or full construction to reduce programme risk.

4. The Contracting Model

As set out in Section 3 Wiltshire should progress with a **'Multiparty ECI Environment'** type model. Having determined the proposed Delivery Model, this Section 3 focuses on establishing the correct Contractual Model to commercialise and make that Delivery Model a reality.

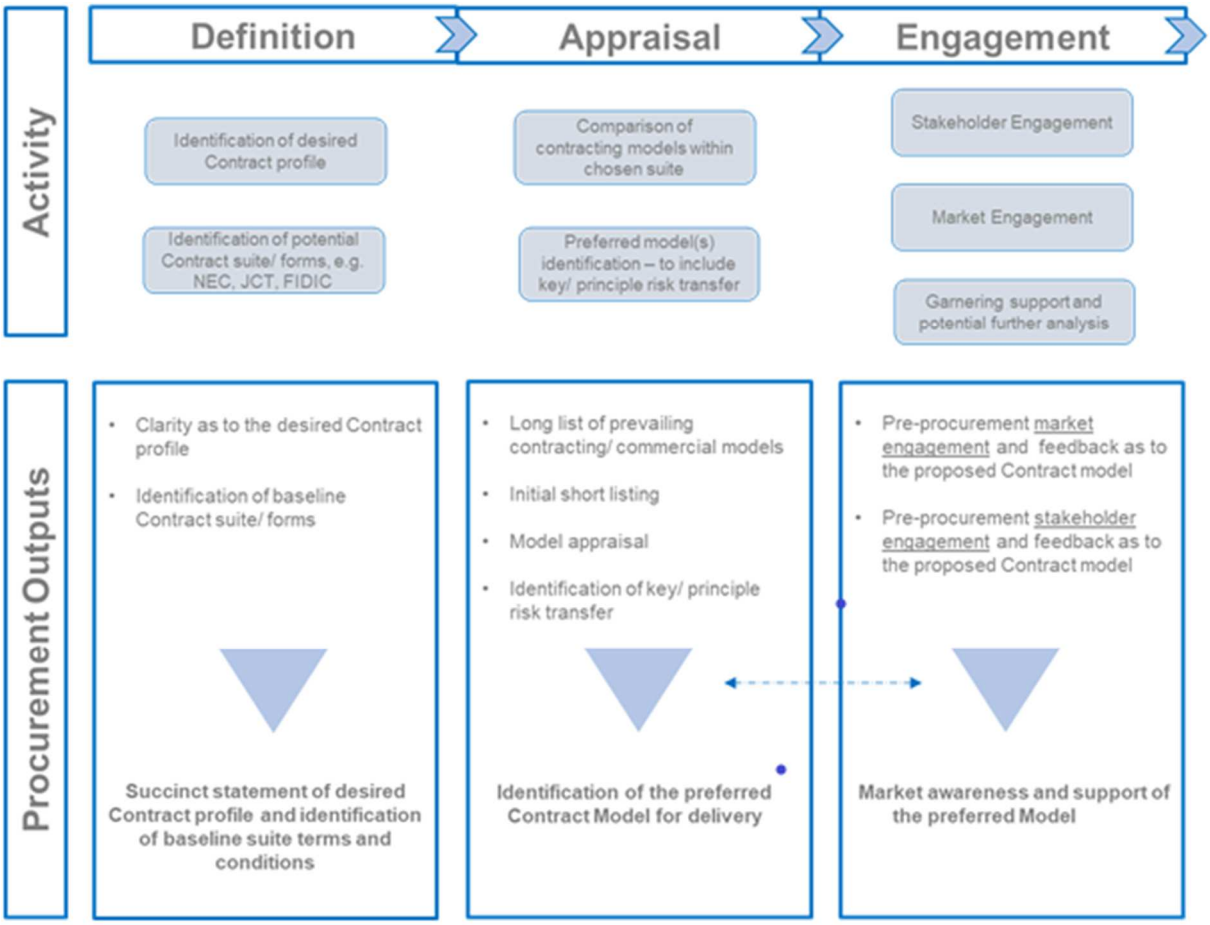
4.1. The methodology to be used

The methodology used (and which will continue to be used) is similar to that used to derive the Delivery Model in that again a 3 Step process focusing on the elements of Definition, Appraisal and Engagement is to be used/ followed.

The Definition step sees the emergence of WC's desired contract profile, as well as the identification of potential suites that may be utilised. Thereafter Appraisal of the potential models within the identified suite, as well as an agreement around the apportionment of key risks, e.g. design liability, physical conditions etc. within the conditions of contract are to be determined.

Finally, Engagement as to the Preferred Model should take place with the market and wider stakeholders.

Figure 3 – Contractual Model Methodology



4.2. Contracting for the Project Delivery Model identified

Having established the Project Delivery Model, there is now a need to identify how the Project will be contracted for (and how it will be procured)[5].

4.2.1. The contract suite to be used

The NEC suite of contracts tends to be the predominant form of contract used to deliver infrastructure across the UK (National Highways, Homes England, HS2, Heathrow etc. all advocate its use). There is no authoritative reason to deviate away from this approach, as such it is recommended that the NEC4 suite of contracts is used to deliver the Project for all suppliers. Its use will allow flexibility and agility and will stimulate good management across the Project.

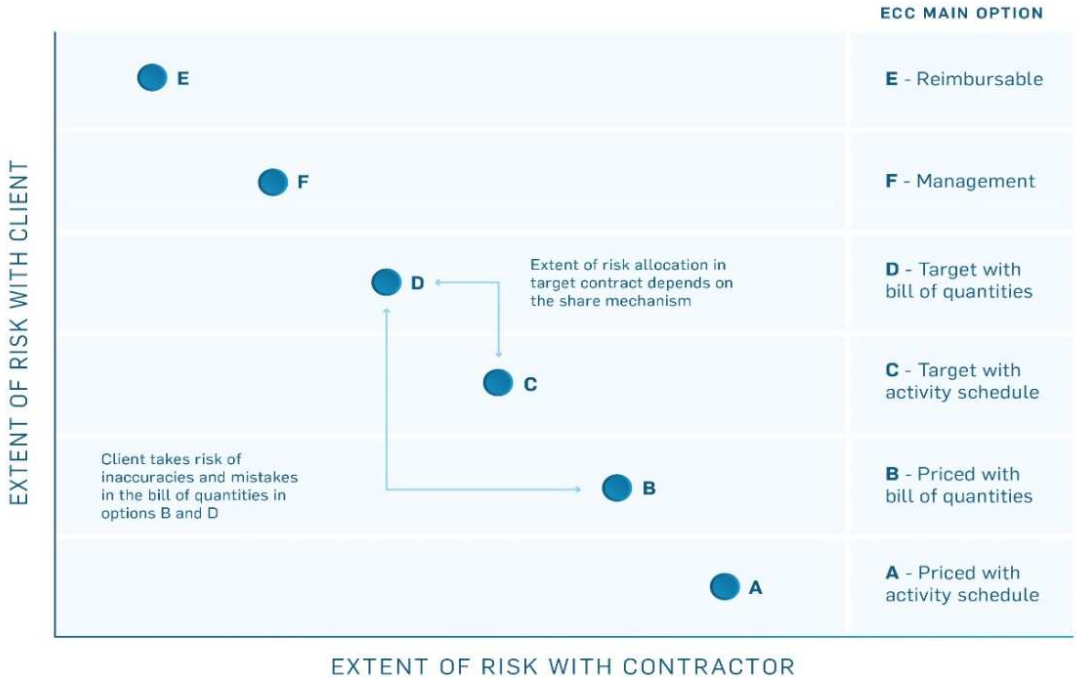
4.2.2. The contractual forms to be used

A list of the available NEC4 contracts together with brief guidance on when each is typically used can be found in the guidance to the NEC suite (note it is not reproduced in this report). There is a need to establish an appropriate risk profile that is acceptable to all parties, and it should not be underestimated that this is critical to the success of the Project. Neither success in procuring or delivering will be forthcoming if the balance of risk is incorrect. Risk, however, is only one dimension where procurement (and subsequently delivery) is concerned,

[5] It should be noted that it is critical at this early stage to also set out how the Project is to be managed and this should be the subject of a further stand-alone report or plan.

the balance also has to be struck across time, cost and quality. The Price (P): Quality (Q) ratio for any future procurement will be subject to future confirmation following final approval of the Delivery Model and Contractual structure, and subsequent engagement with the market as regards the same.

Figure 4-1 - Extent of risk with Contractor



4.2.3. Contract for ECI

In terms of the appropriate contract form for use when 'services' of any scale are to be provided, it is generally well understood that the NEC Professional Services Contract (PSC4) should be used, and this is what is recommended, that PSC4 is to be used for the provision of the ECI services being sought.

4.2.4. Contract for the construction

The NEC4 Engineering and Construction Contract (ECC4) is to be used for the construction aspect of the Project.

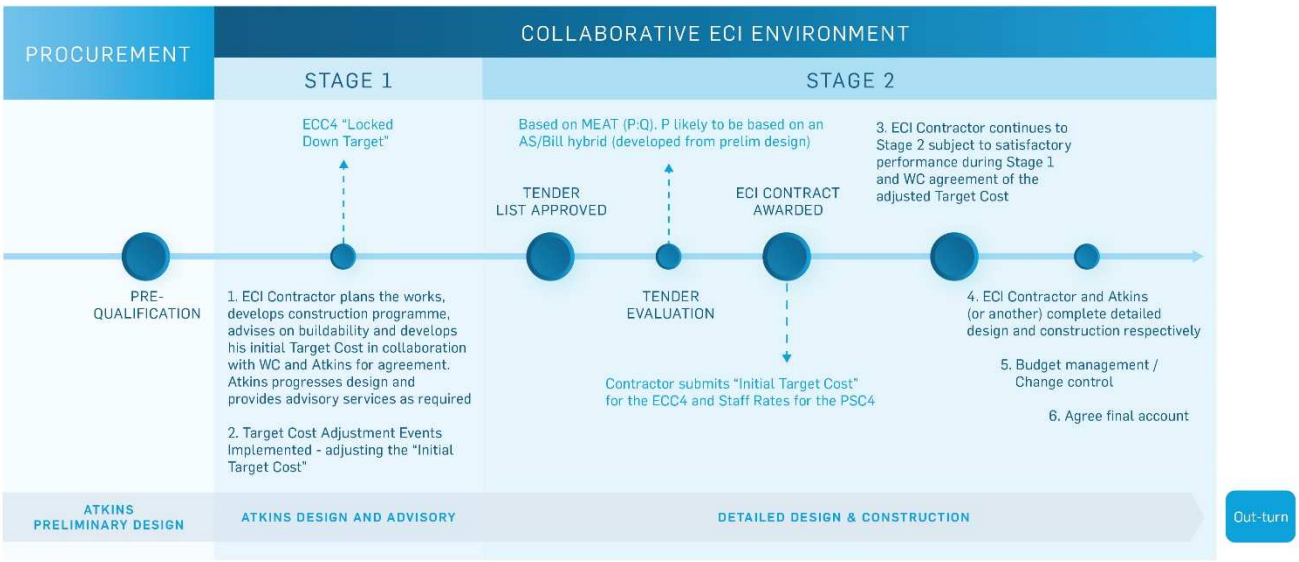
Having determined the contractual forms to be used, it is now necessary to identify the appropriate main payment option for these contracts, the correct selection is critical as it is this main provision that largely dictates the extent of risk that sits with the contractor and the extent of the risk that sits with the client. As can be seen in Figure 4 'Option A' sees the majority of risk being sat with the contractor, 'Option E' the majority of the risk with the client. Put succinctly the former being appropriate for use when there is limited clarity and certainty as to the exact requirements and the former being when the extent of the work is not fully defined – risk being shared between the contractor and client.

The Project is currently finalising options appraisal and preparing for necessary surveys and preliminary design. As such a combination of PSC4 Main Option E and ECC4 Main Option C is recommended for ECI and construction respectively.

4.2.5. The contractual model – what it looks like in practical terms

Building on the analysis set out above, Figure [x] below sets out how the contractual relationship will work between Wiltshire, its Designer(s) and the appointed ECI Contractor.

Figure 4-2 - Contractual relationship for the scheme



The successful ECI contractor will be asked to enter two (2) separate, but linked agreements for delivery of the Project:

- a PSC4 main Option E for the carrying out of ECI services; and
- a ECC4 main Option C for construction.

At tender ECI contractors will be asked to submit two (2) sums, a set of Prices for the Stage 1 PSC4, and a set of Prices for the Stage 2 ECC4. The Prices submitted for the Stage 2 ECC4 at tender represent an initial target cost for the construction stage of the Project based on the preliminary design produced by Wiltshire Council/ Atkins (the "Initial Target Cost"). The Initial Target Cost submitted is to be varied as the design of the Project develops – "Target Adjustment Events" will be set out (likely at the collaborative environment level[6]). The ECC4 Initial Target Cost may only be varied under and in accordance with the terms of the contractual arrangement set out, i.e. on the occurrence of one of these Target Adjustment Events[7].

The overall purpose of the Target Adjustment Event is to provide a framework within which the appointed contractor is to develop its Initial Target Cost. Despite commentary received from a prospective contractor during a market engagement exercise on separate Wiltshire Council project, that such a mechanism may be viewed negatively, it is our recommendation that such a framework is used subject to Wiltshire obtaining legal advice. It is a method that's used across the UK in both central and local government.

Simply appointing a contractor with no framework within which to develop their Stage 2 price would run the risk of the Council being in a weakened commercial position during and particularly towards the end of Stage 1. Additionally, it is considered that a less strict approach to pricing, i.e. a pure negotiation approach without Target Adjustment Events may be non-compliant with the procurement regime in England and Wales[8].

Contractors will also need to submit a series of percentages at tender to cover items such as overhead, margin, insurance premium costs etc, and these percentages will not be adjusted as the design develops, they will remain consistent throughout the life of the Project.

[6] The exact position of the mechanism within the contractual structure of the Project will need to be determined with the benefit of specialist legal advice.

[7] Again, it is important to note that specialist legal advisers will need to be appointed to carry out the required legal drafting.

[8] In the event that Wiltshire are of the view that a less strict approach around pricing remains preferable then we recommend that expert legal advice is sought as to the appropriateness of the same.

The appointed ECI contractor will only be appointed to undertake the Stage 2 construction phase of the Project if instructed to do so by Wiltshire. If Wiltshire wishes the ECI contractor to undertake these Stage 2 activities, then it will issue a “Stage 2 Notice to Proceed” signed on behalf of the client. It is important to note that progression beyond Stage 1 is not guaranteed.

It is also important to note that should a decision be made not to proceed, then it is likely that further procurement exercises (the number being dependent on how works are packaged) will be required. Programme impact would be inevitable in such a situation (possibly 4 to 6 months). Naturally, everything would be done to mitigate such an event. Example mitigation activity could be continuation of detailed design, re-packaging of works, and the use of different routes to markets (such as national frameworks).

5. Public Procurement and Route to Market

5.1. Public Procurement post 31st December 2020

Since leaving the EU at 11pm on the 31st of December 2020 the UK is no longer subject to EU procurement law. The UK is however still subject to the World Trade Organization's Government Procurement Agreement (GPA). The GPA requires the majority of contracts to be open to the EU and other trading partners, with transparent award procedures and remedies being available.

In order to ensure compliance with the GPA, and to safeguard against disruption, the 2015 Public Contracts Regulations continue to apply – this will be the case until they are formally repealed and replaced with longer term, UK specific arrangements.

Whilst not much may have changed, practical amendments to the PCR 2015 have been made, and it is important that such changes are noted:

- There is now and obligation to publish in "Find a Tender" rather than the EU's Official Journal (i.e. the advert is not to be published in the OJEU). Find a Tender is the UK's new e-notification system.
- Where there were instances or reasons to report matters to the European Commission, such matters should now be reported to other UK Government departments, e.g. Cabinet Office.

The historic regime as set out in the PCR 2015 should (for now) be those that are considered from a procurement perspective. These regulations implement EU Directive 2014/25/EU in England and Wales.

It is certain that irrespective of the Delivery and Contractual Model to be used, the above procurement regime will be engaged.

Set out below in Table 5-1 is an example analysis of the procedures to be followed in the event that the PCR 2015 are engaged[9]. A detailed analysis along such lines will need to be undertaken over the coming weeks and months to determine the appropriate route to market – once the Delivery Model and Contracting Model is agreed.

5.2. A note on framework agreements

The term 'framework agreement' is regularly used within the context of developing projects the size of the Scheme. It is a term however that can also cause confusion, and as such it is felt prudent to touch on 'frameworks' at this early stage – albeit briefly.

As set out in UK Government guidance "a framework agreement is a general phrase for agreements with providers that set out terms and conditions under which agreements for specific purchases (known as call-off contracts) can be made throughout the term of the agreement. In most cases a framework agreement will not itself commit either party to purchase or supply, but the procurement to establish a framework agreement is subject to the EU procurement rules"

It is important to note that a framework agreement can feature:

- as a legitimate delivery and contracting model (e.g. analysis could show that an arm's length, non-committal. transactional framework arrangement should be utilised, enabled via a bespoke drafted framework agreement) **and/ or**
- feature as a route to market (e.g. analysis could show that an alliance model and contract should be used, but ultimately there would be no need to procure the same in open competition via advertisement; reliance being able to be put on an already established framework).

Table 5-1 PCR 2015 Procedures

Procedure	Specific requirements for using the procedure	Stages	Level of Competition likely to be generated	Likely level of workload for AUTHORITY	Potential for procurement challenge	Opportunity for innovation	Opportunity for negotiation/dialogue during the tender process	Likely minimum timeframe from OJEU Publication to contract award (excluding reductions for E-submissions)
Open	None	1. Selection and evaluation	High	HIGH All compliant tenders must be examined by AUTHORITY and this can delay the award. Resource intensive for both AUTHORITY and the tenderers	LOW Decision made with a straightforward focus on the award. Limited transparency risks as an open, transparent, competitive procedure	Low	None	4 to 5 months
Restricted	None	1. Prequalification 2. Selection and evaluation	Medium - Limited to shortlisted tenderers	MEDIUM Limited number of tenders to evaluate and therefore less resource intensive for AUTHORITY Two-stage procedures might be longer in order to respect the required time limits	MEDIUM Greater potential for challenge due to the increased exercise of discretion by AUTHORITY	Low	None	6 to 8 months

Competitive Dialogue	Fulfil one or more of the following criteria: (1) An open or restricted procedure has attracted only irregular or unacceptable tenders. (2) The needs of the AUTHORITY cannot be met without the adaptation of available solutions. (3) The subject matter includes design or innovative solutions. (4) The technical specifications cannot be established with sufficient precision by the AUTHORITY with reference to defined standards or technical requirements. (5)The contract cannot be awarded	1. Prequalification 2. Negotiation and evaluation	Medium - Limited to shortlisted tenderers	HIGH The burden of proof for the circumstances allowing for the use of the procedure rests with AUTHORITY. AUTHORITY is highly involved in the negotiation/dialogue with tenderers. Limited number of tenders to evaluate and therefore less resource intensive for AUTHORITY. Two-stage or three stage procedures might be longer in order to respect the required time limits.	MEDIUM Greater potential for non-compliance with PCR2105 rules due to the increased exercise of discretion by AUTHORITY	Medium	High	10 - 18 months
Competitive procedure with negotiation		1.Prequalification 2. Dialogue 3. Selection and evaluation	Medium - Limited to shortlisted tenderers		HIGH Greater potential for non-compliance with PCR2105 rules due to the increased exercise of discretion by AUTHORITY. Transparency requirements are particularly challenging during the dialogue.	High	High	6 to 10 months

	without prior negotiations due to specific risks or circumstances related to the nature, complexity, or legal and financial matters.							

5.2.1. Advantages and Disadvantages

The market engagement exercise and definition of the ECI requirements will inform the final decision on selection of procurement procedure, but prior to the completion of these exercises it is anticipated that the Project is likely to be procured using the Restricted Procedure. Table 5-1 below sets out the high-level structure of a Restricted procurement, and also sets out the list of documents necessary to be drafted at advert publication. It should be noted that if the Open Procedure is to be used, the same documentation needs to be drafted, it is simply the case that there will not be a pre-selection stage prior to tender.

Table 5-1 - Restricted Procedure Highlights

Procedure	Any limitation/ constraint to using the procedure	Stages	Minimum number of candidates	Likely level of competition	Key documentation for drafting
Restricted	None. Procedure can be used for all purchasing activity including works of the nature of the Project.	Prequalification Selection and evaluation	All interested parties can submit expressions of interest (i.e. submit a PQQ). At least 5 pre-selected candidates to submit a tender	Prequalification likely to be high	Project Advert PQQ Project Background (or use MEE slide deck) PSC4 ECC4 PSC4 Scope ECC4 Scope PSC4 Activity Schedule ECC4 Activity Schedule

5.3. Tender process timescale

- Tender doc prep to include notice, SQ, draft ITT, draft contract and draft pricing documents
- Opportunity Publication
- SQ receipts and selection of tenderers
- Publication of final ITT, final contract and final pricing documents
- Tender period
- Contract Award

5.4. Market Engagement

It is understood that Wiltshire Council in the future will hold a market engagement event. The format of this is not currently known and will take account of market engagement event for other schemes, but it is anticipated that it will consist of a webinar and a formalised feedback form which the supply chain will be asked to complete by return. The feedback form will capture benefits, advantages and disadvantages associated with the proposed

procurement strategy and delivery model as well as providing the opportunity to provide comment on emerging constraints, risks and opportunities relating to constructability.

It has been discussed with Wiltshire Council that the level of technical detail for the market engagement event for the route will be as follows:

- General Arrangements for route
- Constraints
- Typical cross sections
- Structure locations & lengths
- Typical structures cross section

The market engagement exercise and definition of the ECI requirements will inform the final decision on selection of procurement procedure.

6. The potential impact of Covid-19 and Brexit

The point has already been made that purchasing/ government investment within the construction/ infrastructure sector – be that for services, consultancy or works – is expanding. However, both Covid-19 and Brexit have the potential to impact on procurement activities (and the Scheme in general) during the coming months. As such, it is felt prudent even at this early stage to at least provide some high-level insight to what recent events may mean from a procurement/ supply chain perspective, and also to set out some headline thoughts for the project team to consider as the procurement strategy begins to develop and evolve.

6.1. Covid-19 – what could it mean from a procurement perspective in the coming months

Despite the fact that we are seeing investment from government, it is well documented that the infrastructure sector has been hit hard by the pandemic. At times over the past 12 months, research conducted by Atkins saw a drop in confidence within the transport sector of circa 30%; revenue dropping in excess of 15%, as well as high levels of postponement/ delays across projects, across the UK and the globe. In reality, however, especially given the current position with vaccine roll outs across the globe (and the inevitable link with geopolitics) it is impossible to say what the coming months may bring from a procurement perspective. What can only be said with certainty is that it is very unlikely that previous states of normality will return, certainly in the short term.

The only modern comparable situation to the position we now face economically is that of procurement/ supply chain activity in the immediate aftermath of the 2008 financial crash.

Similar to recent months the entwined nature of global supply chains, together with the risks pertaining to the same were vividly in evidence for all to see back in 2008. The stark reality of the months and years immediately post the 2008 saw organisations hoard capital, slash inventories and reduce their costs at an unprecedented rate[10]. A story starting to replay itself today.

Certain sectors however chose to innovatively respond to the 2008 crash. For example, there was a material move away in certain organisations away from 1990s efficiency dominant (and arguably lauded) models such as “Just in Time” (largely prevalent in the automotive industry) “Efficient Consumer Response” (largely prevalent in retail) “Quick Fashion” (largely prevalent in textiles) etc. Flexibility and agility (the ability to respond quickly to sudden changes- on the demand or supply side) adaptability (ability to evolve as a project itself evolves) and securing alignment (alignment across the objectives of multiple parties) became the modus operandi of those businesses that became successful post 2008.

Indeed, it felt prudent even at this early stage to state that these tenets of agility and adaptability should be embedded in the procurement solution for the Scheme – since it is inevitable that the scheme will be delivered during a time of turbulence.

6.2. Brexit - what could it mean from a procurement perspective in the coming months

As previously mentioned, the historic regime as set out in the PCR 2015 should (for now) be followed from a procedural perspective. The same however is likely to change in the coming months. As such it is key that the project team keeps abreast of the changes that are being introduced (and considered).

Similarly, it’s important that the project team also keeps abreast of matters such the introduction of new rules and regulations around skills and migration, tariffs, as well as currency fluctuations. Such matters can dramatically impact on procurement (and delivery) and changes in these areas can dramatically impact on the delivery of a project. As such, it is also felt prudent to say that an agile and adaptable procurement solution will also be of benefit in a Brexit context – put succinctly it is another reason why an agile and adaptable solution should be devised.

7. Recommendation

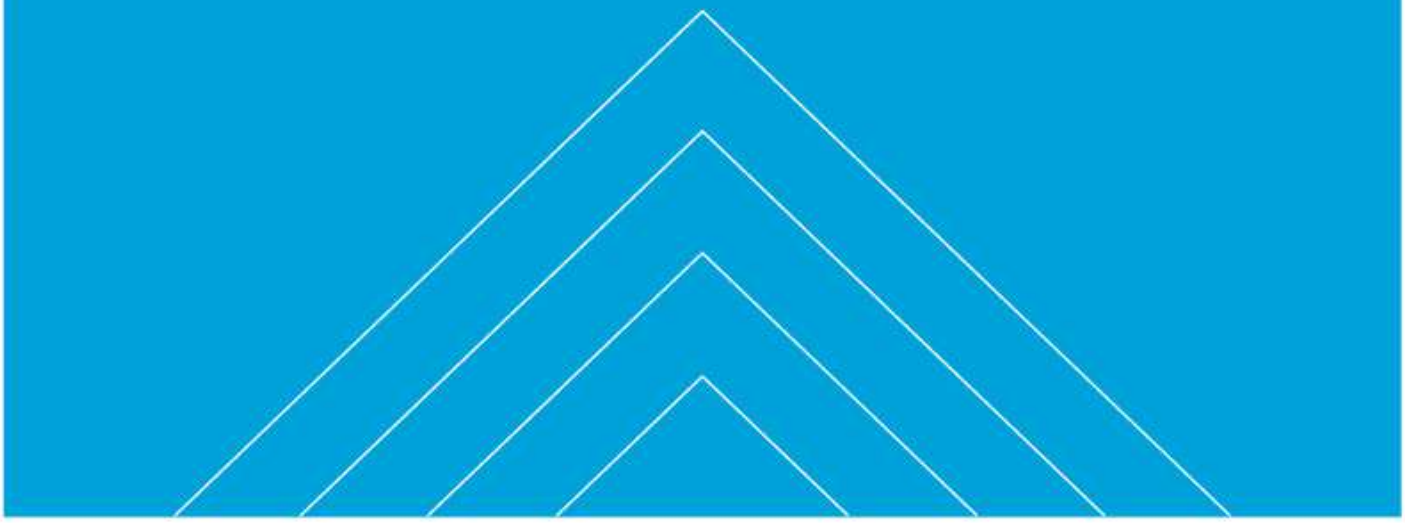
As set out in Section 3 it is recommended that during detailed design (after Design Fix 3 stage)[11] , Wiltshire progress with a **'Multiparty ECI Environment'** (see Figure 3). This will see an environment being created where multiple suppliers can all focus on Wiltshire's objectives – designers designing, contractors constructing, environmental advisers advising on environment matters and so on. How key risks are to be dealt with in that environment will evolve over as the project progresses through the preliminary design stage.

- Surveys and Investigations phase is programmed for first year or so of FBC stage. The collected data will inform the preliminary design and planning application development. These surveys and investigations would reduce the risks of programme delay and cost escalation.
- Non-statutory public consultation is expected to be undertaken in the first 6 - 9 months of the prelim design period. This is required to address all the comments from, and changes requested by landowners and key stakeholders.
- The tender would be based on completed preliminary design, which will provide better cost certainty for the FBC.

The market engagement exercise and definition of the ECI requirements will inform the final decision on selection of procurement procedure, but prior to the completion of these exercises it is anticipated that the Project is best suited to being procured via the Restricted Procedure. The scale and complexity of the Project suggests that Wiltshire should ensure that only those truly able to deliver are able to bid.

11 ECI appointment anticipated after completion of DF3 non-statutory public consultation and following completion of site survey and investigation works.

Appendices



Appendix A.

Outline Analysis of Procurement Options

Procurement Route	Traditional (Target Cost)	Design and Build (Target Cost)	Multiparty ECI Environment (akin to an NEC3/4 X12)[12]	Alliance
Cost accuracy	Medium. Costs will be accurate as based on actuals, however, cost over-run or savings against target costs will be shared between the parties	Medium. Costs will be accurate as based on actuals, however, cost over-run or savings against target costs will be shared between the parties	Medium. Costs will be accurate based on actuals, however, cost over-run or savings against target costs will be shared between the parties	Reimbursement of direct costs + fixed price fee +gainshare/painshare payment linked to KPIs
Cost certainty	Low certainty as the costs will be based on actual costs spent on the project however this is offset as cost over-run or savings against target costs will be shared between the parties	Low certainty as the costs will be based on actual costs spent on the project however this is offset as cost over-run or savings against target costs will be shared between the parties	Low certainty as the costs will be based on actual costs spent on the project however this is offset as cost over-run or savings against target costs will be shared between the parties	Reimbursement of direct costs + fixed price fee +gainshare/painshare payment linked to KPIs
Design and Construction Cost	Design costs would be borne by the client and the construction costs by the contractor.	Design and construction costs would be borne by contractor. Design costs could be higher as the contractor would include a mark-up/ overhead, there would be a single point of liability	Design and construction costs would be borne by contractor. Design costs could be higher as the contractor would include a mark-up/ overhead	Reimbursement of direct costs + fixed price fee +gainshare/painshare payment linked to KPIs
Management Cost	Management costs required by PM, QS and Supervision. Additional management costs for auditing of actual costs	Management costs required by PM, QS and Supervision. Additional management costs for auditing of actual costs	Management costs required by PM, QS and Supervision. Additional management costs for auditing of actual costs	Reimbursement of direct costs + fixed price fee +gainshare/painshare payment linked to KPIs
Change control	Cost of changes (as valid under the contract) borne by the client, however, budget over-run or deficit shared between the parties	Cost of changes (provided they do not fall outside of the scope of the contract)) borne by the contractor, however, budget over-run or deficit shared between the parties. Assumption is that key risks: weather, ground and utilities sit with the contractor.	Cost of changes (provided they do not fall outside the scope of the contract) borne by the contractor, however, budget over-run or deficit shared between the parties	Reimbursement of direct costs + fixed price fee +gainshare/painshare payment linked to KPIs
Incentives for time and cost performance	Pain:gain mechanism for time and cost performance	Pain:gain mechanism for time and cost performance	Pain:gain mechanism for time and cost performance	Reimbursement of direct costs + fixed price fee +gainshare/painshare payment linked to KPIs

[12] Expected in the current market, a lump sum approach will not work in a scheme of this scale. This will require multi contracts and the assumption is that the contractors will expect target mechanism

Design Risk/ Benefit	Design risk remains with the client	Design risk is borne by the contractor*. Allocation of key risks dependant on share mechanism otherwise the design risk may sit with the client	Design risk is borne by the contractor*. Allocation of key risks dependant on share mechanism	Risks are usually shared 50/50 or completely unallocated
Liability	Construction sits with the contractor. Design with the client	Sits with contractor - Single point of liability	Pain:gain is usually capped at loss of fee.	No blame no disputes. Painshare is usually capped at loss of fee. No claims possible between the parties
Accelerated Delivery	Opportunity to accelerate delivery, any additional costs will be borne by the client	Opportunity to accelerate delivery, additional costs will be borne by the client	Can accelerate pre-delivery phases and reduce procurement durations	Use of overlapping phases allows acceleration, further acceleration available through progressive alliances.
Time	Contractor obligations to complete on time Additional costs resulting from delays will be shared between the parties	Contractor obligations to complete on time. Additional costs resulting from delays will be shared between the parties	Obligations to complete on time supported by pain:gain - payment linked to KPI.	Target date for completion is supported by gainshare/painshare payment linked to time KPI.

* Whilst the design risk is borne by the contractor, the client maintains the risk for the accuracy and clarity of the scope of works. It is strongly recommended that the contract is drafted to cover both the requirements of the client and the highways authority/TAA and the risk of the obtaining highways authority approval during design development is a liability of the contractor.

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