

Forward Plan reference number: FP/685/04/20

Report title: Coronavirus Outbreak – payments to operators for local bus and home to school contracted services (including ticketing agreements) and Park and Ride services

Report to: Councillor Ray Gooding – Cabinet Member for Education and Skills and Councillor Kevin Bentley – Deputy leader and Cabinet Member for Infrastructure

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Date: 18 April 2020

For: Decision

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County Divisions affected: All Essex

Confidential Appendix

This report has a confidential appendix which is not for publication as it includes exempt information falling within paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972, as amended.

1. Purpose of Report

- 1.1. The Coronavirus outbreak is a major public health emergency. The Government's current advice is for the population of the United Kingdom to travel only when it is essential to do so. This has meant significant changes to home to school transport services, local bus services and Park and Ride services, including a significant drop in passenger numbers. ECC needs to determine how to support the maintenance of a network to enable key worker travel and essential journeys during the period of travel restrictions. These changes have been made on the decisions by ECC and by the operators.
- 1.2. This report asks the cabinet members to decide on the level of payment to make to operators who are at risk of financial distress (due to COVID-19 related service disruptions) to secure continuity and retention of services over the medium to long term if services are disrupted and/or not running. This is to support operators where service issues are specifically related to COVID-19 and not due to a general or long-standing lack of commercial sustainability.

2. Recommendations

Cabinet Member for Education and Skills:

- 2.1 That the following payment approaches are adopted:

2.1.1 For Home to school transport hired by the Council, ECC pays with respect to the summer 2020 term:

- a. Where a school is open and services are being provided 100% of pre-COVID19 contractual payments less any deductions as recommended in Public Procurement Note 02/20 (PPN 02/20), and
- b. 80% of contractual payments less any deductions as recommended in PPN 02/20 where a school is closed.

2.1.2 On bus services where the council normally purchases season tickets for pupils to use on public bus services the Council will commit to purchase, for the summer term 2020 the same number of tickets as it did in the spring term, subject to a commitment from the operator to accept a reduced level to take account of;

- a. A legally binding commitment to abide by the principles in PPN02.
- b. A maximum payment of 80% where the school is closed.

2.1.3 For public bus services which are subsidised by ECC, we will pay the full contractual amounts up to a maximum of £2.125m for the period up to 30 June 2020 and agree that the Director, Highways and Transportation may extend these arrangements to extend for a further month at an additional maximum cost of £708,000.

2.1.4 That no payments be made with respect to any services which are not being provided unless there is a legally binding commitment in place to ensure that the principles set out in this report and PPN 02/20 are being adhered to.

2.1.5 That arrangements referenced in 2.1.4 are in a form agreed by the Director, Highways and Transportation in consultation with the Director, Legal and Assurance.

2.1.6 That contractual payments are subject to approval by the S151 Officer to confirm legality of payment in terms of responsiveness to COVID-19 as well as State Aid compliance, via an agreed open book approach.

Deputy Leader and Cabinet Member for Infrastructure:

2.2 Agree that the approach for the park and rides services is to be as set out in the Confidential Appendix.

3. Summary of Issue

3.1 The Council is responsible for making a number of payments to bus and taxi operators with respect to their operations in Essex. Those relevant to this report are:

- a. Local Buses that run locally. This includes bus services supported by taxpayers and the wider commercial bus network. ECC only pays for services supported by taxpayers.

- b. Home to School Hired Transport. Where children have a statutory (legal) entitlement to taxpayer funded transport to school ECC commissions that transport. Hired transport is where ECC directly procures transport services which is used purely to provide home to school transport.
 - c. Home to School Ticketed Arrangements. Where children have a statutory (legal) entitlement to taxpayer funded transport to school ECC commissions this transport. Ticketing arrangements are where ECC purchases tickets for children to travel on existing bus services – whether provided commercially or not.
- 3.2 The decision to move to ‘lockdown’ and Central Government guidance advising against all but essential travel on public transport travel have had an immediate and significant adverse impact on bus, taxi and coach businesses. Bus operators have seen a drop in patronage on individual routes and journeys of over 85% of normal passenger usage and a significant drop in revenue. This essentially means the entire bus network in Essex is facing a very difficult situation. At the same time, operators are also dealing with staffing problems due to COVID-19 illness or self-isolation.
- 3.3 As a result, operators have decided to alter or stop some routes and ECC has closed the park and ride services. As a result of school closures very few pupils are travelling by public transport. The normal general principle is that when ECC has commissioned a service which the provider is unable to deliver then ECC should not have to pay for that service. The position may be different when the provider is unable to deliver the service through no fault of its own (eg when schools are closed by snow) or when ECC has asked the service not to be provided, but even so in these cases the provider normally saves money and the saving should normally be passed onto the Council.
- 3.4 These are not normal times. The Government has put forward a huge amount of support to businesses and employees to help them get through the current situation. Central Government and the European Commission have issued various communications and guidance documents in response to the COVID-19 impact on the wider commercial market. While these guidance documents do not have the force of law, are not statutory guidance, and ECC is not required to follow or implement the recommended measures, the guidance documents are relevant considerations in decision-making. Relevant guidance in this context includes:
 - i. PPN 02/20 issued by Cabinet Office sets out “information and guidance for public bodies on payment of their suppliers to ensure service continuity during and after the current coronavirus, COVID-19, outbreak.” The guidance also encourages us to act to ensure at-risk suppliers are “in a position to resume normal contract delivery once the outbreak is over.” PPN 02/20 sets out a range of measures and includes a set of terms and conditions to use as a basis for varying contracts in response to COVID19. The proposals set out in this report would be implemented in line with the guidance and in line with relevant legislation. PPN 02/20 is attached at Appendix A.

- ii. On 25 March 2020, the DfT issued a letter encouraging transport authorities “to continue to pay bus and coach operators for tendered services and home to school transport at the levels before any downturn in service provision or patronage, for at least the period of the outbreak. This will help ensure that bus operators continue to be able to provide socially necessary services once the outbreak is over.” This guidance document was intended to be consistent with PPN 02/20 and is at Appendix D to this report.
 - iii. The European Commission has also issued guidance regarding State Aid generally, revised permissible thresholds, and has also reviewed interim umbrella measures proposed by Government. Generally, State Aid is any advantage that is granted by public bodies, using state resources, on a selective basis to any organisation where there is the potential to distort competition in the European Union (which, for these purposes, includes the United Kingdom).
- 3.5 The proposals set out in this report take account of this guidance, existing contractual measures that can be used as a basis for calculating appropriate continued payments, and local knowledge of the Essex-wide market and network needs.
- 3.6 Bus operators do not operate at a large profit margin. As well as employee costs they have very significant costs invested in buses as well as plant and machinery to maintain them. As a result, school bus contracts include a provision that ECC will pay them 80% of the daily charge if schools are closed due to snow. It is important that we maintain the viability of bus operators since if they fail:
- a. ECC will come under pressure to replace commercial services lost.
 - b. If there are fewer operators then prices are likely to rise.
 - c. There will be disruption to travel.
- 3.7 The DfT communication recommended continued support for the bus industry for the next 3 months at pre-COVID19 outbreak levels. The recommendations in the guidance are in addition to other support announced subsequently by DfT. The DfT is clear that this is operator support and value for money requirements at this time include securing continuity, redeployment and retention in the medium- to long-term. As stated above, while the guidance is not legally binding, nor is it statutory guidance, it is a relevant consideration in decision-making.
- 3.8 The DfT has also announced a package of measures on 3 April 2020 to address the impact on commercial bus services which follows the approach recommended in PPN 02/20. This is additional to the recommendation made to local authorities.
- 3.9 This report proposes that ECC should take a number of steps to implement the DfT guidance in a way which protects vital services and, as far as possible, the public purse.

3.10 We will not make payments to operators unless there is a legally binding commitment to amend them.

3.11 It is proposed that any operator wishing to be paid for services they are not providing will be required to enter into a legally binding commitment to comply with a number of key principles:

- a. Allowing ECC to direct which route to prioritise
- b. Allowing ECC to direct mutual aid whereby it makes resources available at cost to another operator
- c. Continuing to pay employees and subcontractors that are solely dedicated to the relevant contract with ECC and not furloughing staff and claiming from the government scheme.
- d. No profits on elements of a contract that are undelivered during this period
- e. Operate with integrity
- f. Where services are not being provided agreeing to redeploy staff or assets to other areas of need wherever possible.
- g. Operators must use all reasonable endeavours to operate contracted services unless ECC agrees otherwise.
- h. All service changes must be approved by ECC in writing in advance
- i. Operators must maintain a reliable service across the network and meet agreed performance standards
- j. Deductions will be made where recommended by PPN02/20
- k. An open book approach to cost and funding verification to provide comfort to taxpayers that value for money has been secured for the public purse.

3.12 ECC now needs to make a decision on how it will treat payments to operators for these contracted services if they are not delivered.

3.13 It is proposed that these measures for school related payments apply for summer term 2020 and that the other measures apply until 30 June 2020, with the Director being authorised to extend for a further month if necessary.

Home to School Transport Hired transport

3.14 In normally times ECC pays for commissioned services, except where a school is closed (this is normally for snow days) where ECC pays 80% to recognise unavoidable costs where neither party is at fault. The proposal is that ECC maintains that position for the current period. Where schools are open and a service is being provided, ECC would continue to pay, where the contractual payment is based on the actual invoice per route for January 2020:

- a. 100% of pre-COVID19 contractual payment less any deductions as recommended in PPN 02/20 or in the relevant contract where a school is open, and
- b. 80% of contractual payments less any deductions as recommended in PPN 02/20 where a school is closed.

Home to school transport ticketing agreements

- 3.15 Where a commercial service is running ECC purchases individual tickets at a discounted rate for children entitled to home to school transport rather than procuring a separate service. Ticketing agreements do not contain the same contractual terms as home to school hired services, however they are fundamentally of a similar nature as they are securing seats for entitled children.
- 3.16 ECC mainly purchases tickets on a 'per term' basis. If schools remain closed throughout the summer term, there would be no need for ECC to purchase any tickets. Unlike in other cases, ECC will be entering into a commitment to pay in full knowledge that no service may be delivered and there may be no need for the bus service to operate at all.
- 3.17 It is proposed that ECC purchases tickets on terms where 1) ECC will pay, where the number of tickets purchased is based on the number purchased for the Spring term, 100% of pre-COVID19 ticketing agreement price per ticket less any deductions as recommended in PPN 02/20 where a school is open, and 2) 80% of ticketing agreement price per ticket less any deductions as recommended PPN 02/20 where a school is closed.
- 3.18 In essence, the proposal is that ticketing arrangements are treated in the same way as hired transport in these circumstances.

Local Bus

- 3.19 For local bus it is proposed that we would maintain all payments made in January 2020 subject to any previously agreed non COVID 19 service changes and subject to deductions recommended in PPN 02/20, but subject to reliability across the agreed network is good and meets pre-agreed performance measures

Park and Ride

- 3.20 The park and ride services have already stopped operating following a previous decision and the Council needs to negotiate with the operators. Please refer to the attached Confidential Appendix for the proposed approach.

Concessionary fares

- 3.21 ECC remain committed to the existing fixed pot arrangements for concessionary fares (£17.7m) as set out in the decision KD14 FP/637/02/20 Agreement of Concessionary Fare Scheme for 2020/21 published on 9 April 2020). Given the falling passengers volumes this continued payment represents significant financial support to the market.
- 3.22 In implementing these measures we will continue to review State Aid and procurement guidance to ensure that we are following all applicable legal requirements.

4. Options

- 4.1 **Option 1:** Make payments to operators in line with contractual commitments based on pre-COVID service levels and government guidance (recommended), varying agreed service levels to take account of the current crisis.
- 4.2 If the ECC decides to make payments in this way, ECC can expect a significantly larger bus network to remain in place enabling key workers and those making essential journeys to travel. ECC could also expect a significant number of operators to remain solvent throughout this period whereas they otherwise would not. Payments by ECC are often only a part of the operators' income streams but they represent a crucial part of the overall support package put in place by central Government.
- 4.3 The financial impact is shown in the financial implications section.
- 4.4 **Option 2:** Make reduced payments to reflect services actually delivered.
- 4.5 If ECC decided to reduce payments to operators it is likely that there will be significantly more service withdrawals and operator failures than under option 1.

5. Financial implications

5.1 For Option 1:

- 5.1.1 The existing budgetary allocation in the 2020/21 budget for local bus and home to school transport contractual payments totals £37.74m as shown below (Park and Ride is in the confidential appendix below):

	Annual Net Contracted Expenditure 2020/21 £m	Annual Non Contracted expenditure 2020/21 £m	Annual Non Contracted income 2020/21 £m
Local Bus	8.46	0.08	-0.71
Home to School Hired Transport	26.27		
Home to School Public Tickets/Mileage Allowance	3.01	0.59	
Total	37.74	0.67	-0.71

- 5.1.2 The financial impact of the recommended payment option for each transport provision is as follows:

Home to school Transport

- 5.1.3 Hired Transport: The worst-case financial impact before any deductions lies within the range £6.931m (all schools closed) - £8.664m (all schools open) for the period up to the end of the summer term.

5.1.4 Ticketing agreements: The worst-case financial impact before any deductions lies within the range £792,000 (all schools closed) - £990,000 (all schools open) for the period up to the end of the summer term.

Transport Provision	Worst Case -100%	Best Case - 80%
	April to July contractual payments £m	April to July contractual payments £m
Home to School Hired Transport	8.664	6.931
Home to School transport public tickets	0.990	0.792

Local Bus

5.1.5 The financial impact associated with ECC agreeing to meet up to 100% of pre-COVID19 contractual obligations until the end of June would be £2.125m with delegated approval to extend for a further month with an additional maximum cost of £708,000.

Transport Provision	April to June contractual payments £m	July contractual payments £m
Local Bus	2.125	0.708

Park and Ride

5.1.6 See Confidential Appendix.

5.2 Financial Assumptions:

5.2.1 the contractual payment for home to school hired transport is based on the actual invoice per route for January 2020

5.2.2 the home to school transport public ticket payment is based on the pre-COVID19 ticketing agreement price per ticket. The number of tickets purchased is based on the number purchased for the Spring term

5.2.3 All payments will be made less any deductions required to comply with PPN 02/20

5.2.4 the value for money criteria that councils must consider include securing continuity, redeployment and retention in the medium to long term.

5.3 Financial Mitigations

5.3.1 All financial impact set out in this paper is expected to be contained within the existing budgetary allocation in the 2020/21 budget. Should any

pressures arise, for example on the support being given to local bus operators, there is an opportunity to mitigate from:

- a. personal mileage allowances that are not being paid for the summer term (£200,000)
- b. the £964,000 supported bus services grant funding previously announced by DfT as part of their better deal for bus users announced on 6 February 2020
- c. the £692,000 Covid-19 Bus Services support grant (CBSSG) announced by DfT on 9th April 2020 which is to be used for the purposes of supporting local bus services during the COVID-19 outbreak for up to 3 months (from the period of 17th March 2020)
- d. any discount to budgeted costs secured from negotiations set out above.

6. Legal implications.

- 6.1 The Government guidance referenced in this report does not have the effect of law or of statutory guidance. While the guidance does set out Government's preference for how ECC will approach the current COVID-19 situation when working with its suppliers and contractors, the guidance is a relevant consideration rather than a direction or law that must be followed. In implementing these recommendations, ECC must do so lawfully in accordance with the existing legal frameworks.
- 6.2 PPN 02/20 links much of its guidance to the Public Contracts Regulations 2015 (PCR2015). In accordance with PPN 02/20 and PCR2015, any necessary contractual variations initially will be reviewed in line with existing contractual provisions. Where possible, variations will be implemented in accordance with existing contract mechanisms. Where this is not suitable or possible, any variation will be made with due regard to the variation provisions set out in PCR2015, specifically in regulations 32 and 72.
- 6.3 Any relief granted in these circumstances must also be implemented in line with State Aid rules. On 20 March 2020, the European Commission (EC) announced a temporary State Aid framework for measures to support economies during the COVID-19 public health emergency (EC 2020/C 91 I/01) In that Communication, the EC recognised liquidity concerns arising from the containment measures and also recognised the particular impact on the transport sector. All relief will be reviewed in line with existing State Aid principles as well as any temporary framework or umbrella provisions that have been implemented by the European Commission and central Government.
- 6.4 ECC, in coming to this decision, has considered the current health emergency as well as the financial impacts in line with the guidance, PCR2015, and State Aid frameworks and considers that the proposed response is proportionate to the situation and will be limited to those measures strictly necessary to respond to this emergency.

6.5 It is important that officers effectively manage payments to minimise the risk of unlawful state aid arising. If there is unlawful state aid then ECC would be required by law to reclaim it, potentially putting an operator in financial difficulties.

7. Equality and Diversity implications

7.1 In making this decision ECC must have regard to the public sector equality duty (PSED) under s.149 of the Equalities Act 2010, i.e. have due regard to the need to: A. Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act. B. Advance equality of opportunity between people who share a protected characteristic and those who do not. C. Foster good relations between people who share a protected characteristic and those who do not including tackling prejudice and promoting understanding.

7.2 The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

7.3 The PSED is a relevant factor in making this decision but does not impose a duty to achieve the outcomes in s.149, is only one factor that needs to be considered, and may be balanced against other relevant factors.

7.4 An equality impact assessment has been undertaken. The protected groups impacted by this decision are older people, younger people and people with disabilities as they are disproportionately users of these services. The impact of the decision is positive for these groups as it will support the continuation of bus services both over this period and in the future.

8. List of Appendices

Appendix A - PPN 02/20

Appendix B - Equality Impact Assessment

Appendix C - Confidential Appendix

Appendix D - DFT letter 25 March 2020

9. List of background papers

None

I approve the above recommendations set out above relating to my portfolio for the reasons set out in the report.	Date 20/4/20
Councillor Ray Gooding, Cabinet Member for Education and Skills	

I approve the above recommendations set out above relating to my portfolio for the reasons set out in the report.	20/4/20
Councillor Kevin Bentley, Cabinet Member for Infrastructure	

In consultation with:

Role	Date
Andrew Cook, Director, Highways and Transportation	18/4/20
Nicole Wood, Executive Director for Finance and Technology (S151 Officer)	18/4/20
Director, Legal and Assurance (Monitoring Officer)	18 April 2020
Paul Turner	

<p>Exemption from call in and being included on the forward plan</p> <p>I agree that this key decision is urgent and cannot reasonably be deferred and therefore that it may be taken without it being on the forward plan.</p> <p>I also agree that it is in the best interests of the Council for this decision to be implemented urgently and therefore this decision is not subject to call in (paragraph 20.15(xix) of the constitution applies).</p> <p>Councillor Mike Mackrory – Chairman of the Corporate Policy and Scrutiny Committee</p> <p>Date: 20 April 2020</p>
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