

[Commercial In Confidence]

Office of the Minister of Transport

Cabinet

Auckland Light Rail - next steps

Purpose

- 1 This paper seeks confirmation of Cabinet's preferred way forward for the City Centre to Māngere project (CC2M) light rail project. A decision is required to provide certainty to the two Respondents and to manage possible risk to the Crown. This paper recommends that the parallel process for the consideration of the two proposals is terminated.

Context/Background

- 2 CC2M is a priority in the Auckland Transport Alignment Project (ATAP) and aims to connect the two major employment hubs of the city centre and the airport precinct, support urban redevelopment, and improve environmental outcomes. The optimal way to deliver these outcomes has been tested through a parallel process (Proposal Process) conducted by the Ministry of Transport to compare a proposal from NZ Infra with a proposal from the New Zealand Transport Agency Waka Kotahi (Waka Kotahi).
- 3 In June 2019 Cabinet agreed to progress with the Proposal Process to allow it to determine the Crown's Preferred Delivery Partner for CC2M [DEV-19-MIN-0141 refers].
- 4 This was in the context of an unsolicited bid from NZ Infra (a consortia of the New Zealand Super Fund and the Canadian pension fund CDPQ Infra) to finance, design, deliver, own and operate light rail in Auckland. This proposal represented a fundamentally different model to a Crown delivery model, led by Waka Kotahi. The merits of the two delivery models were not well understood at that time, and Cabinet agreed that both should be further explored, with a view to making an informed decision on its Preferred Delivery Partner for CC2M.
- 5 This process allowed the public policy and system implications of these different delivery models offered to be fully considered and for Cabinet to select a Preferred Delivery Partner, or take an alternative course of action. The two Respondents were aware of this from the beginning and made an informed decision to participate at their own cost and risk, with no guarantee of a favourable decision.
- 6 Since that time, the Ministry of Transport has run a robust process for the development of the two proposals. This was based on a clear set of outcomes that were considered by the Ministerial Oversight Group¹, and the two Respondents put forward two credible proposals. These proposals were received in late November 2019, and were evaluated by the Ministry and a group of expert partners (including central and local government and the private sector). The Ministry has provided advice on its findings from the process, including the Secretary of Transport's recommendation to select NZ Infra as the Preferred Delivery Partner for CC2M. This

¹ Members of this group are: the Minister of Transport, the Minister of Finance, the Minister for the Environment, the Minister of Infrastructure and the Associate Minister of Transport (Hon Genter).

advice was shared with the Ministerial Oversight Group that was set up to support and guide the process.

- 7 A draft 'options' paper has been prepared that outlines the advantages and disadvantages of the two proposals to assist Cabinet's decision. This draft Cabinet paper has been subject to cross-party consultation and discussions; however, it has been unable to progress to Cabinet.
- 8 The Proposal Process provides for Cabinet to decide to not select a Preferred Delivery Partner and instead take an alternative course of action. It separately reserves the right for the Crown to suspend or terminate the process, along with other reserved rights.
- 9 When considering these alternative courses of action, it is important that we consider the following:
 - 9.1 Maintaining the integrity of the Proposal Process run to date
 - 9.2 The obligations on the Crown to treat both Respondents fairly and equally and act in good faith
 - 9.3 Harnessing the benefits of the Proposal Process to the extent possible and acknowledging that Auckland transport issues remain.

Legal arrangements that currently apply

- 10 The Crown, NZ Infra and Waka Kotahi are currently bound by the Response Requirements Document (RRD) and individual probity agreements.
- 11 The RRD sets out the process for submitting and evaluating proposals. It provides that this evaluation will inform the Secretary for Transport's recommendation to the Minister of Transport and that this recommendation will then assist Cabinet in its task of selecting a Preferred Delivery Partner to deliver CC2M.
- 12 The RRD also expressly provides the right for Cabinet to require further information to be provided or decide an alternative course of action. Section 19 of the RRD sets out the Ministry's reserved rights (on behalf of the Crown), including the following:
 - 12.1 Suspend, terminate or modify the Proposal Process.
 - 12.2 Revert to public sector delivery of CC2M.
 - 12.3 Take such other action as the Ministry considers appropriate in relation to the Proposal Process.
- 13 It is important to note that the rights above must be exercised having regard to the probity arrangements, in particular that both Respondents be treated fairly and equally.
- 14 The RRD and probity arrangements remain in force until the Crown signs a Memorandum of Understanding (MoU) with a Preferred Delivery Partner, a Respondent withdraws from the process or the Ministry (on behalf of the Crown) exercises its rights to terminate the Proposal Process under section 19 of the RRD. In these scenarios, elements of the probity arrangements remain in place in perpetuity (e.g. the Crown and its associates must continue to protect the Respondents' information disclosed as part of the Proposal Process).

The next steps for the project – terminate the process

15 I recommend that we agree to terminate the Proposal Process. There are a number of considerations that I have taken into account in arriving at this recommendation, and these include:

15.1 The two proposals received from Waka Kotahi and NZ Infra are credible, and they could be delivered by leveraging the seed funding envelope that was outlined in ATAP. Both proposals would involve ongoing payments by the Crown.

15.2 [REDACTED]

15.3 [REDACTED]

15.4 [REDACTED]

15.5 I am also mindful that as we focus on economic recovery from COVID-19, the Crown's view of funding and financing options needs to be considered.

15.6 The recommendation of the Secretary for Transport and the Ministry's analysis of this recommendation. This material has already been provided in draft to Ministers (for the purposes of consultation) and the analysis that sits behind that through the process that has been followed as referred to in paragraphs 6 and 7 above. This paper provides that material again given the decisions now sought. In particular, attached is a summary of the Ministry's assessment of the two proposals (Appendix A).

16 I consider it appropriate to terminate further consideration of the two proposals and consequently terminate the Proposal Process. This means that the two proposals will no longer be able to be further progressed.

17 In arriving at this recommendation, I have also considered advice from Crown Law.

[REDACTED]

17.1 [REDACTED]

17.2 [REDACTED]

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- 18 I have considered other options to manage Crown risk and to provide the Respondents with clarity and certainty in respect of the future of the Proposal Process. In brief these are:

18.1 [REDACTED]

18.2 [REDACTED]

- 19 The implications of terminating the process are:

- 19.1 The Crown and the two Respondents will no longer be bound by the terms of the RRD. The Respondents will continue to own their intellectual property (IP).
- 19.2 Elements of the probity arrangements remain binding in perpetuity (this is the case under any option) and therefore the Crown has obligations to protect the confidentiality of the information provided by Respondents, including their proposals, and not use such information outside the confines of the process.
- 19.3 The Crown still has the opportunity to purchase the elements of the IP contained within the proposals.
- 19.4 The Crown has the flexibility to develop its optimal delivery model and commercial solution for light rail in Auckland.

Further work

- 20 While I recommend that the process is terminated, I am mindful that mass transit remains a priority under ATAP, that we endorsed as a Cabinet in April 2018 [CAB-18-MIN-0169 refers]. Officials advise that the process has revealed policy and legislative issues that will need to be addressed for future mass transit projects regardless of where they occur. Officials have started work on these policy and framework issues. Light rail remains an ATAP priority, and officials will report to the next government with recommendations on how this and other ATAP projects can be delivered.

- 21 In doing so, it is important that the comprehensive work that has been done to date is not lost, [REDACTED]

[REDACTED]

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[REDACTED]

22

[REDACTED]

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23

[REDACTED]

- 24 NZ Infra is responsible for meeting its own costs involved in submitting a proposal and participating in the Proposal Process.

Obligations to the Respondents

- 25 Under any scenario, I am advised that the Crown has obligations in perpetuity with respect of the project. If the Crown were to breach its obligations, this may give rise to grounds for a Respondent to bring a claim in relation to the Proposal Process. To manage the Crown's risk, the Ministry will prepare a letter for all Ministers, officials and evaluation personnel who have received the draft Cabinet paper or evaluation material, reminding them of their detailed obligations to treat the Respondents fairly and to maintain confidentiality of proposals and disclosed information.

Communications and next steps

- 26 Should Cabinet agree to terminate the process, there will need to be a careful process of notifications and announcements. I envisage the following key next steps:
- 26.1 Formal notification to the two Respondents, and allow them time to confirm key messages.
 - 26.2 Notify the Mayor of Auckland.
 - 26.3 Notify the Chief Executives of Auckland Council and Auckland Transport.
 - 26.4 Public announcement.

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[REDACTED]

Proactive Release

- 28 As part of the development of the Government's communication plan, I will give further consideration to whether this Cabinet paper can be proactively released. I would expect it to be significantly redacted, given the legal advice and commercially sensitive matters outlined in this paper.

Recommendations

- 1 **Note** that in June 2019 Cabinet endorsed my proposal to undertake the Proposal Process to allow us to determine our preferred delivery model and partner for Auckland light rapid transit [DEV-19-MIN-0141 refers].
- 2 **Note** that rapid transit is a key part of ATAP, which has been previously endorsed by Cabinet [CAB-MIN-0169 refers].
- 3 **Note** that a structured process has been undertaken, and that both proposals received are credible and appear to be able to be delivered within the ATAP funding assumptions.
- 4 **Note** that the Appendix to this paper provides a summary of the proposals including the recommendation from the Secretary for Transport.
- 5 **Note** that the structured process provides for Cabinet to make the decision on the way forward for CC2M, including either selecting one of the Respondents as the Preferred Delivery Partner or deciding on an alternative course of action.
- 6 **Note** that both Respondents have been aware from the beginning of the process that Cabinet can decide to take an alternative course of action.

Process for considering the proposals received from the two Respondents

- 7 [REDACTED]
- 8 **Agree** to formally terminate the Proposal Process and revert to public service delivery, and note that as a consequence, neither proposal will be progressed.
- 9 **Note** that the CC2M project remains a commitment in ATAP, and the Ministry of Transport and Treasury will report back after the General Election on optimal arrangements for public service delivery, with this work to be carried out in close consultation with ATAP agencies and MHUD.

- 10 [REDACTED]

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Other matters

- 14 **Note** that the Crown has ongoing obligations to the two Respondents and in the case of NZ Infra this includes obligations relating to confidentiality, use of disclosed information and use of proprietary information [REDACTED].
- 15 **Note** that a communications plan will be developed to communicate Cabinet's decision. This will provide clear messaging that takes account of the Crown's and other parties obligations for confidentiality and fair treatment.

Authorised for lodgement

Hon Phil Twyford

Minister of Transport

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