

## **Divisions Affected – ALL**

**CABINET  
18 October 2022**

## **Zero Emission Bus Regional Areas (ZEBRA) – Funding Agreements**

**Report by Corporate Director for Environment and Place**

### **RECOMMENDATION**

**Cabinet is RECOMMENDED to delegate authority to the Corporate Director for Environment and Place, in consultation with the Director for Law and Governance and the Cabinet Member for Highway Management to negotiate, finalise and enter into funding agreements with Oxford Bus Company (Go-Ahead) and Stagecoach to provide electric buses and charging infrastructure based on the funding milestones set out in this paper.**

### **Executive Summary**

1. The Department for Transport (DfT) has agreed to Oxfordshire County Council's funding 'ask' for the delivery of its Zero Emission Bus Regional Areas programme (ZEBRA). ZEBRA services will be procured and operated by the two main bus operators serving Oxfordshire – Oxford Bus Company and Stagecoach.
2. Funding from DfT is to be paid directly to Oxfordshire County Council who will need to oversee the delivery of ZEBRA and manage grant payments to the bus operators for the procurement of buses and related infrastructure. It is a requirement that the bus operators place orders for buses by December 2022 as orders made after this date will mean a significant increase in costs.
3. Oxfordshire County Council therefore needs to agree payment terms and key milestones with bus operators to ensure the project's timely delivery and the release of funds at appropriate points and ensure the funding conditions set out by the DfT are met. These provisions will be covered through legally binding funding agreements with the operators. The value of the grants being offered to operators means Cabinet approval is sought to enter into these funding agreements. Under the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 and the council's Constitution, the Cabinet is the appropriate decision-making body.
4. Bus operators' participation in the ZEBRA project is conditional on the county council committing to measures to increase bus productivity in the city by at least 10%. The proposed trial traffic filters in Oxford will account for over half of this productivity improvement, so operators' participation in ZEBRA – at the current time and its current form – is in effect conditional on the trial traffic filters proceeding. If a decision is made not to proceed with the trial traffic filters, the ZEBRA project will not progress in its present form and the current funding

agreement will have to be terminated. It may be possible for other measures to achieve the 10% improvements to be agreed between Oxfordshire County Council and the operators, but there is no guarantee of this. Owing to the time required to develop any such alternative, the county council would need to ask the Department for Transport to defer Oxfordshire's ZEBRA award until a future year – again with no guarantee of success.

## Background

5. In January 2022 Oxfordshire County Council applied to the DfT for grant funding to enable the procurement of electric buses for use within the Oxford SmartZone area. In March 2022 the funding bid was approved, and Oxfordshire County Council was awarded £32.8 million by the DfT. This has been supplemented by £6 million of capital funding by Oxfordshire County Council and £43.7 million from the Oxford Bus Company (Go-Ahead) and Stagecoach.
6. It is anticipated the project will deliver 159 electric buses for use on routes operating wholly within the Oxford SmartZone, along with associated infrastructure. The bus operators are responsible for the delivery of these elements.
7. A project delivery group between Oxfordshire County Council, the Oxford Bus Company and Stagecoach is being established and will be administered by Oxfordshire County Council.
8. The scale and ambition of the Oxfordshire ZEBRA scheme will materially contribute towards the Government's and Oxfordshire's shared policy objectives towards the decarbonisation of transport and the enhancement of bus quality and provision. The ZEBRA proposals support wider policy proposals for Oxford – including the zero-emission zone, Oxford traffic filters, Oxford workplace parking levy and other elements of the Central Oxfordshire Travel Plan. The project will also support patronage growth and the broader objectives of the council's Bus Service Improvement Plan.
9. As the administrator of the grant, Oxfordshire County Council is responsible for the release of funds at agreed milestones whilst ensuring the programme adheres to the conditions set out by the DfT. Please see Annex 1 for further details. Proposed project milestones have been developed alongside the bus operators.

## Proposed milestones and payments schedule

10. Details of the proposed payment milestones developed by the bus operators can be found in Annex 2 and have been provisionally accepted by Oxfordshire County Council. Payments will be made in stages, with first payment in December 2022 and the last payment in August 2024, when the last bus is expected to be delivered. Payments made under the funding agreements will be based on actual expenditure (up to the maximums shown) to ensure that the bus operators are not overcompensated, and that the total percentage subsidy contributions are managed.

11. Detailed project plans to ensure the projects adherence to these milestones are currently being developed by bus operators in partnership with Oxfordshire County Council and will be monitored through the project delivery group.

## Financial Implications

12. The total value of the ZEBRA project, including vehicles and infrastructure is £82,495,975. Funding will come from:

- Department for Transport ZEBRA grant (£32,815,452)
- Oxfordshire County Council contribution (£6,000,000)
- Investment from the bus operators' own funds (£43,680,523).

13. Funding agreements with bus operators will cover the payment, use and monitoring of the ZEBRA grant and additional council funding, totalling £38,815,452 (see table at paragraph 15).

14. This project is capital funding with some minor revenue costs relating to staffing support that will be managed through the existing staffing budget. Staffing costs cannot be charged to the capital grant funding.

15. The anticipated payment and funding profile for the DfT ZEBRA grant and additional council funding is as follows:

	2022/23	2023/24	2024/25	Total
Expected grant payments from OCC to bus operators	-£3,028,514	-£28,423,464	-£7,363,473	-£38,815,452
DfT ZEBRA funding payment to OCC	£32,815,452	£0	£0	£32,815,452
Additional council contribution (allocated in capital programme)	£0	£6,000,000	£0	£6,000,000

16. The funding agreements will ensure Oxfordshire County Council is not in a position where any payments made to operators are not covered by DfT's ZEBRA funds or the additional council contribution in the agreed capital programme. Clawback provisions for the DfT funding are limited and any such provisions will be mirrored in the funding agreements with operators, including in relation to a subsidy control challenge. The funding agreements will also confirm that all risk of cost over-runs rests with the bus operators.

## Revenue

17. The project will be delivered and maintained by the bus operators, so there are no ongoing revenue implications for the county council. Monitoring and evaluation activities will be covered within existing budgets.
18. The 10% improvement in journey times will be monitored independently by a third party, using a mutually agreed definition and methodology. There is a risk that the operators could seek to recover from the county council some or all of the investment they are making themselves to deliver ZEBRA if the 10% is not achieved. If the proposed measures do not deliver a minimum 10% productivity improvement, the county council will commit to working with bus operators to identify and implement additional measures to achieve the 10% improvement.

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## Legal Implications

19. When public bodies provide financial assistance (including grants), they need to have regard to subsidy control laws.
20. In April 2022, the Subsidy Control Act 2022 (the “Act”) was enacted, but this is yet to be fully implemented. It is expected that the Act will come fully into force during late 2022 or early 2023 following the implementation of secondary legislation. In the interim, public funding is still subject to the rules contained in the UK-EU Trade and Cooperation Agreement (TCA), which require public authorities to consider on a case-by-case basis whether financial support could fall within the definition of “subsidy” and if so whether it would comply with six key principles. However, the government has issued draft statutory guidance in readiness for the Act being implemented and therefore it is sensible to also have regard to this. If the Act is implemented prior to the council entering into the funding agreements with the bus operators, this could result in delay because referral to the Competition and Markets Authority may be required
21. The council will not itself receive unlawful subsidy as it will pass the ZEBRA Grant in full to the Operators and as a result the subsidy control rules will not be engaged.
22. The payment of the ZEBRA grant and the additional council grant to bus operators will fall within the definition of “subsidy” which means the council must satisfy itself that the grant is consistent with the six key TCA principles. The principles focus on identifying the public policy objective to be achieved by the grant and ensuring proportionality, necessity and that the positive benefits outweigh the negative effects.
23. Government guidance recommends that public authorities carry out an assessment against the six principles. The council’s current draft subsidy control assessment included in Annex 3 to this report. Independent expert legal advice

has been obtained to support the preparation of the assessment and further advice will be obtained prior to it being finalised.

24. The DfT Zebra scheme was established on the basis that the DfT will contribute up to 75% of the cost difference between a zero-emission bus and a standard conventional diesel bus equivalent with the same total passenger capacity. For infrastructure, DfT will contribute up to 75% of the capital expenditure incurred as a result of its purchase and installation. The proportion of grant funding towards eligible costs is the same as under earlier government schemes such as the Ultra-Low Emission Bus Scheme which were approved under the former state aid regime. Since the council is offering an additional grant, the level of intensity for buses is expected to be 92% which exceeds the DfT intensity levels and therefore any "protection" that would be available from the grant being on the same terms as a lawful scheme under the EU state aid regime is lost. However, under the current rules, there are no set intensity levels and the focus is on proportionality and necessity. Officers have collected evidence from the bus operators which demonstrates that, without the level of funding being offered they could not proceed. Several other local authority ZEBRA recipients are also offering additional funding which gives support that higher intensity levels are necessary to make the schemes viable and for the public policy objectives to be met.
25. Taking the total proposed public subsidy, there are reasonable grounds to conclude that the combined grant would comply with TCA Principles.
26. Risks relating to any indirect subsidy can be mitigated by compelling operators to tender the contracts for the buses and related infrastructure using a transparent competitive procedure.
27. Risks relating to public procurement rules are considered low. If the Council directly subsidises, by more than 50%, certain types of above-threshold works contracts or above-threshold services contracts which are connected to subsidised above-threshold works contracts, it must ensure they are let under Part 2 of the Public Contract Regulations 2015 (PCR) or let the contracts itself under the PCR. These provisions are unlikely to be engaged for the reasons set out below:
  - First, the majority of the public subsidy (i.e. the ZEBRA grant and Additional Council Grant combined) will be spent on supplies, i.e. electric vehicles, which are neither works nor services and so cannot fall within the rules around subsidised contracts. The Council is directing all of the Additional Council Grant to vehicles, as this reduces financing costs and provides the best value for money overall.
  - Second, to the extent the use of the ZEBRA Grant could fall within the categories of subsidised works, the total amount to be spent by each bus operator on infrastructure will be below the current works threshold.
28. The requirement for the bus operators to obtain value for money and to comply with both procurement and subsidy control roles will be included in the funding agreements. The grant agreements will also contain clawback provisions in the event of non-compliance.

29. Under the interim subsidy control regime, challenge is by way of Judicial Review. There is a new right under the TCA which allows an “interested party” considering a court challenge to seek further information from an entity which has granted a subsidy. This is to enable the interested party to assess the application of the TCA Principles. The granting authority must provide the information within 28 days of such a request, subject to any proportionate restrictions around confidentiality, commercial sensitivity, or legal privilege.
30. If a challenge is brought which seeks an order for recovery (i.e. repayment of the subsidy), proceedings must be brought within one month of the publication of the information on the national database unless an interested party has requested the information referred to above within that month, in which case the limitation period is extended to one month from the authority certifying that it has supplied the further information. From a risk perspective, the council can take a risk assessed approach, for example, by publishing the fact it will be providing a grant on the national subsidy database but then waiting for the limitation period to expire before making any payment.

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## **Staff Implications**

31. This project will be delivered by the bus operators with Oxfordshire County Council acting to ensure funding is released in accordance with the agreed milestones, the DfT conditions are adhered to and providing wider project oversight and administration. The county council will also have a significant role to play in the monitoring and evaluation of the project. It is believed this work can be managed within existing staffing levels meaning there is no requirement for additional staffing resource to support the project.

## **Equality & Inclusion Implications**

32. As part of the grant funding bid to the DfT a full Equalities and Climate Impact Assessment was completed. A full copy can be found in Annex 4.
33. It is anticipated the ZEBRA programme will have a positive impact on all groups with ‘protected characteristics’. In summary these positive impacts are related to the reduction in emissions, improved safety features on new buses (e.g. CCTV, accessibility improvements).
34. The report identifies either neutral or positive impacts for other communities due to enhanced air quality due to the introduction of the all-electric fleet and the subsequent redistribution of the existing ultra-low emission fleet to serve rural areas.

## **Sustainability Implications**

35. The ZEBRA project will lead to electrification of 69% of total daily bus mileage within Oxford. In the locations with the highest bus flows, this is expected to reduce NOx emissions from road transport by approximately 50%, and particulate matter emissions by up to 4-5%. Electrification of the 159 buses included in the proposal could save around 6,000 tonnes of CO2 each year compared to diesel buses.
36. The electricity to power Oxford Bus Company's electric fleet is to be generated from renewable sources. It is expected the use of solar energy will result in a carbon reduction of 1,000 tonnes per annum. Stagecoach purchase 100% of their electricity from certified renewal sources.
37. Indirectly, it is anticipated there will be increased bus demand and mode share from car, through the increased attractiveness of bus that will result from the delivery of zero emission buses and the estimated 10% reduction in bus journey times (allied to restriction on car trips impacts for movements to and across the city centre) that will increase the relative attractiveness of bus versus car.

## Risk Management

38. The project risks and mitigations in place are outlined in Annex 5.
39. Operators will have full responsibility for the procurement and ownership of all vehicles and infrastructure with all risk of unaccounted price increases or unforeseen costs sitting with the operators. There will be only limited operator expenditure incurred prior to the procurement of vehicles and infrastructure. This relates mainly to the development of tender documentation, and the sunk costs if the project is cancelled prior to final procurement of vehicles and infrastructure.
40. As procurement and project delivery is being undertaken by operators, they will own all risks related to project programme and ensuring it is delivered to the proposed timeline.
41. However, OCC (not the bus operators) is accountable to DfT for the delivery of the project and the spending and monitoring of the ZEBRA grant. Failure to deliver could result in DfT seeking to reclaim funding, and/or damaging OCC's chances of success when applying for DfT funds in future.
42. Planning permissions are required for some of the charging infrastructure and depot works. As operators are responsible for the delivery of all infrastructure and depot works, they own all planning risk related to the project including any planning costs that may be incurred.
43. The legal risks of this project relate to subsidy control and are summarised in the legal implications section above. These risks will be shared by OCC and the operators. Operators, through the proposed funding agreement, will be obliged to undertake appropriate tendering processes. Responsibility will sit with Oxfordshire County Council to ensure that operators adhere to the agreement.

44. As set out in Oxfordshire County Council's application to the DfT the bus operators' commitment to this project is dependent upon the approval of additional traffic filters (set to go to Cabinet on 29<sup>th</sup> November 2022) and approval of measures described in the Enhanced Partnership to ensure a minimum of 10% improvement in bus productivity.

**BILL COTTON**

Corporate Director of Environment and Place

Annex 1: Oxfordshire Memorandum of Understanding

Annex 2: Payment Milestones

Annex 3: Subsidy control assessment

Annex 4: ZEBRA ECIA

Annex 5: Risks

Background papers: None

Other Documents: None

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