

## CABINET

27 NOVEMBER 2012

### **GATEWAY 5 PROCUREMENT CONTRACT MANAGEMENT REPORT: DCLG WEEKLY COLLECTIONS SUPPORT FUND (MEDWAY WEEKLY BID)**

Portfolio Holder: Councillor Phil Filmer, Frontline Services

Report from: Robin Cooper, Director of Regeneration, Community and Culture

Author: Sarah Dagwell, Head of Waste Services

#### **Summary**

This report seeks permission from the Cabinet to amend the Collection Services and Street Cleansing Service contract currently being delivered and awarded to the supplier as highlighted within 2.1.2 of this report. Further information relating to permissions is detailed within 2.0 'Permissions'.

*This report is seeking permission in advance for confirmation of funding from the Department of Communities & Local Government's 'Weekly Collection Support Fund'. The outcome of this bid was expected at the end of October, but this has now been delayed to a date yet to be confirmed, but is expected by the end of November. This report is seeking permissions in advance of the outcome to enable a swift progress in procurement if the funding is awarded. If the funding is not awarded to Medway, there will be no changes in services from current service delivery.*

The contract commenced on 1 October 2010. This report is based on service and price variations agreed between the Council and contractor in order to facilitate an enhanced service. The additional cost burden of this enhancement will be met through external capital and revenue funding provided by the Department of Communities and Local Government. At time of writing, awards for this funding had not yet been announced. However, it is essential that, once awarded, Waste Services can immediately commence the procurement of critical equipment.

Approved Procurement Gateway 1, 3 and 4 Reports relating to this Gateway 5 report are available upon request.

This Procurement Gateway 5 report has been approved for submission to Cabinet after review and discussion at Regeneration, Community and Culture Directorate Management Team meeting on 25 October and the Strategic Procurement Board on 31 October 2012. These reviews have approved the concept proposed by this report and agree that, once approved by Cabinet, any subsequent adjustments that may be required as a result of changes to the terms of the funding can be approved through the delegation to officers in consultation with the Portfolio Holders for Frontline Service and Finance.

## 1. Budget and Policy Framework

### 1.1 Procurement Contract Management

This procurement contract management report and its subsequent review is within the Council's policy and budget framework and ties in with all the identified Core Values, Strategic Priorities, Strategic Council Obligations and Departmental/Directorate service plans as highlighted within the Procurement Gateway 1 Report.

### 1.2 Statutory Requirements

Environmental Protection Act (1990): local authorities have a statutory duty to collect controlled waste from households.

The Controlled Waste (England and Wales) Regulations 2012: defines household controlled waste and what materials should be collected from the kerbside.

Waste (England and Wales) Regulations 2011: transposes the EU revised Waste Framework Directive in to English and Welsh law on matters such as how recycling should be collected.

Household Waste Recycling Act (2003): For every household that domestic waste is collected, so should at least two materials be collected for recycling separately from that waste.

### 1.3 Funding/Engagement From External Sources

In February 2012, the Secretary of State, Eric Pickles, launched a challenge fund of £250m aimed at encouraging local authorities to retain or reinstate weekly rubbish collections – a service Medway residents continue to receive. Having already satisfied the main criteria, Waste Services have investigated other ways in which a valid claim can be made to fund improvements to its services. As a result and with approval from the Chief Finance Officer, Portfolio Holder for Front Line Services and our contractor, a bid for both capital and revenue funding of £14,029,901 has been submitted, proposing that we increase both recycling and organics collections to weekly in line with black sack refuse collections. A decision is expected in November 2012.

## 2. Background

### 2.1 Contract Details

2.1.1 This contract is a Services contract.

#### 2.1.2 Supplier Details

This Gateway 5 Report relates to the **Collection Services & Street Cleansing Services** contract currently delivered through Veolia Environmental Services.

#### 2.1.3 Contract Description

This contract is a services contract for the Waste Collection and Street Cleansing services (residual waste collection, recycling collection from kerbside and bring sites, food and garden waste collection and street

cleansing). It commenced on 1 October 2010 and is for 9 years including the agreed two-year extension (Cabinet decision number 8/2012).

## **2.2 DCLG Weekly Collection Fund**

As detailed in 1.3 above, Medway has submitted a bid to enhance the kerbside recycling and organic waste collections from fortnightly to weekly, along with associated promotions campaign.

The funding period is over 2.5 years ending April 2015. There will be a commitment to provide Medway residents with the proposed enhanced service for 5 years. The proposal has been structured so that the enhanced service can be maintained for the full duration of the Waste Collection contract, which expires on 30 September 2019.

The capital fund will enable the upfront purchase of all collection vehicles for all three kerbside services, therefore extracting their cost from the existing payment mechanism. The revenue fund in 2013/14 and 14/15 will subsidise the running of all three services in those years, thus accumulating adequate banked savings to offset the cost of the enhanced service in the remaining years of the contract.

The bid totals £14,029,901 and full details of the funding provision can be seen in the exempt financial appendices.

## **2.3 Permissions Required**

2.3.1 This report requests permission from Cabinet for a contract variation, on the basis that the current contract terms and conditions permit a contract variation and there is a justified business case to invoke such a variation as opposed to exploring alternative procurement mechanisms.

- The bidding and funding timetable presented by the DCLG does not allow for any large-scale procurement exercise (funding is limited to 2 ½ years commencing this financial year). A decision is expected in November 2012 and Medway will need to launch its enhanced service in Spring 2013.
- Contractually and operationally it will be extremely difficult for the enhanced service to be let as a separate contract as this would mean two contractors operating in Medway to cover the same services, in the same areas on the same days.
- The total revenue cost of maintaining the enhanced service for the duration of the existing contract is £6.5 million. The projected current contract value is £85 million over the total 9 years. The revenue variation only equates to 7.65% of the total contract cost.
- The total capital cost requested is £7.5million; representing 8.82% of the total contract costs.
- The enhanced service will only be possible through the successful submission to a bidding competition that did not exist - nor could its launch and criteria be foreseen - at the time the current contract was signed.
- The terms of the contract are largely unaffected. However, the following clauses have been identified as requiring amendment:
  - Schedule 2, General requirements: Section 4, relating to 'Vehicles, Plant and Equipment'

- Schedule 2, Specification: Frequency specifications contained in 1.5.2, 3.1.2, 5.2.6, 7.1, 7.3, 8.3, 10.1.6, 10.2.4
- All details of collection round schedules relating to recycling and garden/kitchen waste
- Bill of Quantities appendices, efficiency savings being reflected by varying or eliminating the following items:
  - Appendix D: items 1, 2, 5, 6 (all to be incorporated within revised unit price per collection)
  - Appendix E: items 1 to 5 (all to be incorporated within revised unit price per collection)
- Schedule of Rates appendices, efficiency savings being reflected by varying or eliminating the following items:
  - Appendix I: items 1 and 4
  - Appendix J: items 1 and 4
- Payment mechanisms for refuse, recycling and organics collections

2.3.2 For reasons of best value and the limitations placed on a full procurement process by the funding timetable, the 48 collection vehicles must be purchased by our contractor, Veolia, on our behalf. The vehicles will be owned by Medway but run and maintained by Veolia within the agreed contract cost. Upon contract expiry, these vehicles will be either:

- Returned to Medway for resale
- Purchased by Veolia
- Utilize their remaining value by passing on to the successive contractor.

2.3.3 Detailed cost implications as a result of the proposed contract variation are provided within Section 2.1 Finance and Whole Life Costing of the Exempt Appendix.

### **3. Options**

In arriving at the preferred option as identified within Section 4.1 'Preferred Option', the following options have been considered with their respective advantages and disadvantages.

#### **3.1 Retender the Whole of the Current Contract**

##### Advantages

- Negates any chance of a challenge from the unsuccessful bidders for the current Waste Collection & Street Cleansing Contract.

##### Disadvantages

- The cost of retendering the whole contract and paying early termination fees to the incumbent would be significant and be direct cost burden on the Council, therefore render the enhancement too expensive.

#### **3.2 Invoke Contract Variation Into Current Contract**

The option of invoking a contract variation within the current contract has been considered and below are the advantages and disadvantages of this option:

#### Advantages

- A contract variation can be achieved within the extremely tight timetable of the project.
- The incumbent contractor, a partner in the bid, has made price concessions to reflect and pass-on efficiencies and economies of scale savings they will realise from operating the enhanced service.
- The total forecasted variation would be within 16.5% of the original contract spend.

#### Disadvantages

- Tenderers who were unsuccessful in their bid to be awarded the current Medway Waste Collection & Street Cleansing Service contract may challenge this variation. (Legal advice has been sought and the likelihood is of a successful challenge is low, given the facts set out in paragraph 8.2).
- The price variations, even though they represent a lower unit price, will not be tested in a competitive market place. However, Waste Services have conducted some benchmarking with two London boroughs and found the unit price to be within the market rate for similar weekly collection services.

### **3.3 Let the Enhanced Service as a New and Separate Contract**

#### Advantages

- Reduces the chance of a challenge from any unsuccessful bidders for the current Waste Collection & Street Cleansing Contract
- May return a more competitive unit price

#### Disadvantages

- The funding timetable will not accommodate a large-scale procurement process.
- The cost of the procurement exercise would be a direct cost burden on the Council and would therefore render the enhancement too expensive.
- If two different contractors were to fulfill the same service, this could be both confusing to residents and extremely problematic for the client team to manage
- Unless agreed otherwise, all collected kerbside dry recycling will have to be transferred to the current collection contractor as, under the current contract, they retain ownership once collected.

### **3.4 Capital purchase of vehicles through Veolia Environmental Services**

The funding timetable requires year 1 expenditure to be committed by April 2013. Whilst Medway has access to the ESPO (European Plant Science Organisation) and YPO (Yorkshire Purchasing Organisation) procurement frameworks for vehicle purchases, these require a mini competition to be held for all bidders named in the lot. This would take a minimum of 3 months before a successful bidder could be awarded the contract. Only then could the 'build slot' for the vehicles be reserved with delivery typically being 6 months later. This 9-month delay would render the rest of the funding timetable unachievable, pushing the launch date for the enhanced service back to around September 2013.

### Advantages

- Through our background research, capital purchase via Veolia is the only viable way Medway can meet the financial constraints imposed by DCLG's funding timetable.
- Veolia, being one of the world's largest waste management companies are more likely to secure best value vehicle purchasing through their procurement contracts.
- By purchasing via Veolia, Medway negates the additional staff costs associated with procurement support from Category Management.

### Disadvantages

- The contract will have to be very specific with regards to ownership, insurance, condition and maintenance.

## **4. Advice and analysis**

### **4.1 Preferred Option**

Further to an extensive review of procurement options as highlighted within Section 3 'Options' above, the following preferred option is recommended to the Cabinet:

3.2 Invoke Contract Variation Into Current Contract

3.4 Capital purchase of vehicles through Veolia Environmental Services

As described above, option 3.2 & 3.4 are the only practicable options available. Besides the operational and contractual complications described in options 3.1 and 3.3, the cost and execution time necessary for the alternative options make them unworkable for this project.

#### **4.1.1 Procurement Project Outputs / Outcomes**

The following procurement outcomes/outputs have been appraised in the table below to demonstrate how the procurement contract and corresponding supplier have continued to deliver aid outcomes/outputs as part of ongoing contract management.

Outputs / Outcomes	Detail	Budget holder	When?	Impact
1. Successful bidders notified by DCLG			Oct 2012	N/A
2. Final negotiation of contract terms, Bill of Quantities & Schedule of Rates.	The contractor is undergoing their own similar internal process to this Gateway 5 in order to secure corporate approval for the variation	Waste Services' existing SLA/budget & Veolia	Nov 2012	Efficiencies secured for enhanced service
3. Draft legal agreement and sign	Variations agreed by both parties	Waste Services' existing SLA/budget + Veolia	Dec 2012	Necessary step before funding can be accepted
4. Communications campaign	Full plan drafted, commence with press releases and appointment of project officer	DCLG/Waste Services' existing budget	To be commenced as soon as funding announced then phased throughout years 1 to 3; after step 3 complete	Residents informed of forthcoming changes, then encouraged to make full use of them to return best financial and environmental value
5. Receive Year One funding from DCLG and make capital/revenue purchases	Capital: a) Order vehicles b) Kitchen caddies & liners Revenue: a) Project officer b) Comms equipment	DCLG	Dec 2012	Start date of weekly collections can be accurately estimated. Dedicated officer can drive communications campaign forward
6. Roll out of kitchen caddies/liners	84,000 units to be distributed along with instruction leaflet	DCLG	Feb/Mar 2013	Residents receive everything they need to participate in weekly food/garden/dry recycling
7. Take delivery of vehicles	May/June 2012	N/A		Weekly services can be launched immediately
8. Roll out of weekly collections		DCLG/Waste Services' existing budget	May/June 2013	Contract performance continues to be monitored/evaluated as now.

- 4.1.2 Procurement Project Management  
This procurement project will be taken through the remainder of the Gateway Procurement Process through the utilisation of the following project resources and skills.
- 4.1.2.1 Variation Agreement  
Legal Services will need to be commissioned for completion of the variation agreement. Assistance from the Category Management (Places) team will also be required to review the final agreement with Veolia.
- 4.1.2.2 Communications Planning  
The Communications team will need to be commissioned to assist with the finalising and delivering the communications plan for the new services.
- 4.1.2.3 Contract Management Resources and Skills  
The contract management will continue to be resourced for the remainder of the contract via:  
Head of Waste Services, supported by:  
Contracts Manager; with 1 senior contract monitoring officer and 4FTE contract monitoring officers and one contract support officer.  
Waste Development Officer  
Recycling Officer  
Recycling Assistant (EU funded)  
Waste Disposal Officer
- Waste Services will have support in monitoring the services by Communities' Officers and the Environmental Enforcement Team.
- The bid also includes a request for funds to employ a project officer for two years who will be responsible for the implementation and monitoring for the first two years of the enhanced service.
- 4.1.3 TUPE Issues  
There will be no TUPE issues with a contract variation; however, the contractor will have to employ 40 new staff to run the enhanced service. Depending on the collection frequency requested in the next contract, these additional staff may need to be considered under TUPE regulations.

## **5. Risk Management**

### **5.1 Risk Categorisation**

The following risk categories have been identified as having a linkage to this procurement contract at this Gateway 5 Stage:

Contractual delivery, Service delivery, Legal, Reputation / political and Financial



<b>Risk Categories</b>	<b>Outline Description</b>	<b>Risk Likelihood</b> A=Very High B=High C=Significant D=Low E=Very Low F=Almost Impossible	<b>Risk Impact</b> I=Catastrophic II=Critical III=Marginal IV=negligible Impact	<b>Plans To Mitigate Risk</b>
Contractual delivery	Contractor's new price proves unsustainable	E	I	Benchmarking has been conducted and price is within current market rates; contracted rates have been negotiated and will be fixed (subject to RPIX annually)
Service delivery	Contractor cannot maintain enhanced service and Council defaults on funding agreement with DCLG	D	II	Variation price is cheaper than original fortnightly BoQ. Clause to be included that holds this price if contractor defaults on weekly collections. Council repays unspent funding from banked savings held to offset additional cost of weekly collections not introduced.
Reputation / political	Weekly collections are not maintained a) before, or b) after contract expiry	a) D b) C	II III	a) Clauses in variation make this an undesirable situation for contractor. b) Decision on future contract makeup will be subject to review within 2-3 years of contract expiry.
Legal	Variation is challenged by other contractors	D	II	The variation could not have been predicted at time that current contract was let. It is the result of a new external funding opportunity. The variation represents 16.4% of the original total contract spend
Financial	Financial forecasts for enhanced service prove underestimated, ie housing growth steeper than forecasted and RPIX uplift greater than 2.5% year-on-year.	C	II	Safety margins have been inbuilt within the financial modelling of the enhanced service. Tonnage modelling suggests a £1.2m direct saving to the Council over the duration of the service. Housing growth has been modelled according to planning dept forecast and are an accepted risk within the current contract.

There are not additional requirements or pressures on existing council assets or ICT.

## **6. Consultation**

### **6.1 Internal (Medway) Stakeholder Consultation**

As part of this proposal to enhance the collection services, the following internal stakeholder consultation has been conducted to establish agreement in principal:

- Regeneration, Community and Culture Directorate Management Team, 24 May 2012
- Cabinet members were briefed week early June 2012
- Regeneration, Community and Culture Overview and Scrutiny Committee, 28 June 2012
- Approval from Chief Finance Officer, August 2012

As part of the legal approval for the current contract to be enhanced, the following consultation has been conducted:

- Regeneration, Community and Culture Directorate Management Team, 25 October 2012
- Strategic Procurement Board, 31 October 2012

### **6.2 External Stakeholder Consultation**

As part of the funding bid for an enhanced recycling and organics collection service, the external stakeholder consultation has been carried out:

- Questionnaire distributed to the Council's 'Citizen Panel' achieving 62 responses, of which 53 stating they would recycle more if collections were more frequent.
- Letter of support received from established residents' pressure group/think tank, The Medway Waste Forum.

## **7. Procurement Board**

7.1 The Procurement Board considered this report on 31 October 2012 and recommended approval to Cabinet.

## **8. Financial and legal implications**

### **8.1 Financial Implications**

8.1.1 The procurement contract and its associated delivery as per the preferred option highlighted at Section 4.1 'Preferred Option' and the recommendations at Section 9, has the following financial implications which the Cabinet must consider:

- Low risk of a financial pressure to the council through agreeing an enhanced service. All unbudgeted costs will be covered by external funding
- Low risk of fines due to a successful challenge to the contract variation
- Significant chance of saving in excess of £1m over the duration of the service enhancement due to a natural decrease in disposal tonnages whilst residents increase their uptake of an enhanced weekly recycling and organics collection service.

- Potential savings into next contract period by utilizing fleet purchased through this funding scheme

8.1.2 Detailed finance and whole-life costing information is contained within **Section 2.1 Finance and Whole-Life Costing of the Exempt Appendix** at the end of this report.

## 8.2 Legal Implications

This procurement contract and its associated delivery as per the preferred option highlighted at Section 4.1 'Preferred Option' and the recommendations at Section 9, has the following legal implications which the Cabinet must consider:

There is a risk of a challenge being launched by the two unsuccessful bidders for the current contract or indeed by a provider who did not originally bid for the contract, on the basis that the variation in the contract in fact amounts to an illegal direct award of a contract above the EU threshold.

The existing contract was awarded after an OJEU tender exercise. In these circumstances a contract can only be varied where the variation would not result in a contract which is materially different from the existing contract. This is to ensure compliance with the principles of transparency and equal treatment.

In accordance with the case of *Presstext*, a variation to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted. Likewise an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered. An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in the manner which was not provided for in the terms of the original contract.

Having regard to the above factors and the particular variation suggested it is not considered that the proposed variation would result in a contract which is materially different because (i) the type of services to be provided are the same, the proposed variation merely increases the frequency of the collections, (ii) it is unlikely that the nature of the change would have allowed for the admission of tenderers other than those originally admitted or would have allowed for the acceptance of a tender other than the one originally accepted, (iii) while the value of the variation is significant in absolute terms, the revenue variation only equates to 7.7% of the contract value and the capital element to 8.8% of the contract value, (iv) the nature of the proposed variation does not change the economic balance in the contract between the Council and the contractor.

In addition, even if the variation were considered to be material, the Public Contracts Regulations 2006 allow a local authority to use the negotiated

procedure without prior publication of a contract notice (i.e. a direct award) where:

the local authority wants an existing contractor to carry out additional work or works or provide additional services which were not included in the original contract but which through unforeseen circumstances have become necessary and such work or services cannot for technical or economic reasons be carried out or provided separately from those under the original contract without major inconvenience to the local authority. This exemption applies where the aggregate value of the consideration to be given under contracts for the additional work, works or services does not exceed 20% of the value of the consideration payable under the original contract. Here the valuation of the variation is 16.5% of the value of the original contract.

### **8.3.1 Procurement Implications**

- 8.3.1 This procurement contract and its associated delivery as per the preferred option highlighted at Section 4.1 'Preferred Option' and the recommendations at Section 9, has the following procurement implications which the Cabinet must consider:
- 8.3.2 The existing contract was awarded after an OJEU tender exercise. In these circumstances a contract can only be varied where the variation would not result in a contract which is materially different from the existing contract. This is to ensure compliance with the principles of transparency and equal treatment
- 8.3.3 This contract terms and condition contains provisions for a variation and on this basis Strategic Procurement supports the recommendation to vary this contract as it will enable and facilitate an enhanced service.
- 8.3.4 The additional cost burden of this enhancement will be met through external capital and revenue funding provided by the Department of Communities and Local Government. The variation to this contract is according to the Medway Contract Exception Procedure Rules Clause 1.8.2.1. (Where the Council has entered into a contract and additional works or services not exceeding 20% of the value of the original contract are needed through unforeseen circumstances).

### **8.3 ICT Implications**

This procurement requirement does not have any ICT implications.

## **9. Recommendations**

- 9.1 Cabinet is requested to approve a contract variation that will facilitate an increase in the frequency of recycling and organics kerbside collections from fortnightly to weekly. The variation will involve a number of existing BoQ unit prices being incorporated within one encompassing unit price that reflects efficiency savings. This variation must also adequately cover the capital purchase of vehicles through Veolia Environmental Services, which will extract their cost from the existing revenue budget and contract payment mechanism.

9.2 That the Assistant Director Legal and Corporate Services, in consultation with the Portfolio Holders for Frontline Services and Finance, be delegated authority to make any subsequent adjustments that may be required as a result of changes to the terms of the funding.

## 10. Suggested reasons for decision(s)

- 10.1 The recommendations contained within Section 9 'Recommendations' above are provided on the basis that this enhanced service will,
- put the customer at the centre of everything we do by satisfying past and current research indicating that residents would welcome increased recycling collections;
  - giving value for money by using external capital and revenue funding to create a scheme likely to save in excess of £1million in disposal costs over the lifetime of the current contract;
  - help create a cleaner, greener environment by diverting more resources to recycling and composting while giving Medway a very real chance of hitting its 2015 recycling rate target of 45% .

### Lead officer contact

Name  Title   
Department  Directorate   
Extension  Email

The following documents have been relied upon in the preparation of this report:

Description of document	Location	Date
DCLG weekly collection support fund – Medway's bid	<a href="http://democracy.medway.gov.uk/mgconvert2pdf.aspx?id=16104">http://democracy.medway.gov.uk/mgconvert2pdf.aspx?id=16104</a>	28 June 2012