

Please contact: **Wayne Hemingway**

Your ref:

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Date: **18 September 2009**

To all Members of the Council

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Dear Councillor,

Cabinet Meeting – Tuesday 22 September 2009

Supplementary Agenda

Please find attached the following report for Cabinet on 22 September 2009:

**Agenda item 11 Contracts for the Collection and Disposal of Waste
Update**

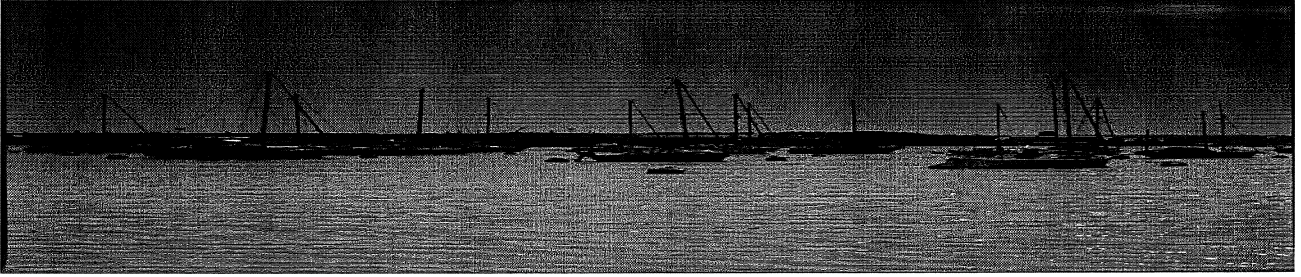
Please note that there is an exempt appendix to this report. If Members wish to discuss this appendix, the Cabinet is recommended to exclude the press and public as it contains commercially sensitive information not for publication under paragraph 3 of part 1 of Schedule 12A of the Local Government Act 1972. It is considered the need to keep information exempt outweighs the public interest in disclosing the information.

Please contact me if you have any queries.

Yours sincerely



**Wayne Hemingway
Cabinet Coordinator**



Cabinet report

Front Line Services

22 September 2009

**Contracts for the Collection and Disposal of Waste
Update**

ITEM: 11

CABINET

22 SEPTEMBER 2009

CONTRACTS FOR THE COLLECTION AND DISPOSAL OF WASTE UPDATE

Portfolio Holder: Councillor Phil Filmer, Front Line Services

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

Author: Andy McGrath, Assistant Director Frontline Services

Summary

To seek recommendations for the next steps for the procurement of residual waste disposal, refuse and recycling collection and street cleaning and the processing of garden & kitchen waste.

1. Budget and Policy Framework

- 1.1 The Council's Waste Strategy 2005 to 2020 is due to be updated in 2011. The current strategy does not specify a preferred method of waste disposal or processing but states that the procurement exercise would have to establish what the industry is able to offer in terms of a deliverable solution and at a viably economic price.
- 1.2 Although the options selected will affect the Council's Waste Strategy, the purpose of this report is to seek decisions that are related to the procedural elements of the procurement of new contracts rather than to ask for decisions that would affect the policy framework. The steps that are recommended fall within the current budget allocation for Waste Services and this is therefore a matter for Cabinet.
- 1.3 The decisions are urgent by nature in order to allow the procurement of long term contracts to continue.

2. Background

- 2.1 The Council currently has a waste contract with Veolia for the collection and disposal of residual household waste, garden waste, kerbside recycling, local recycling points, Household Waste and Recycling Centres and street cleaning. This contract expires on 28 September 2009, although the contract contained a provision for a two-year extension.

- 2.2 The Council agreed on 20 February 2007 to tender the waste services, and to split the tenders into the following areas:
- Collection of residual waste, kerbside recycling and street cleaning
 - Disposal of residual waste
 - Collection & disposal of green waste
 - Separate arrangements for the management of Household Waste and Recycling Centres, school waste and clinical waste.
- 2.3 Tenders were invited for the disposal of residual waste with a return date of 13 May 2009; the processing of garden and kitchen waste with a return date of 8 June 2009; and the collection of waste and recycling with street cleaning with a return date of 1 May 2009. The tenders were then evaluated by the waste procurement team, and their recommendations were taken to the Procurement Board on 24 June 2009.
- 2.4 Detailed consideration of each waste service is set out below.

3. Residual waste disposal

- 3.1 The procurement procedure followed for inviting tenders for the residual waste was known as “competitive dialogue”. This meant that the Council could follow a process of discussion or dialogue with bidders to try and achieve an acceptable solution, and this would allow the use of different technologies to be explored. Effectively this allowed bidders the opportunity of offering a wide range of technologies for residual waste processing to meet the Council’s needs.
- 3.2 During the course of the dialogue stage of the competitive dialogue procedure, one company (Contractor B) asked if they could submit a bid based on a capped liability i.e. that if they were in default under the contract, which resulted in termination, their liability, in terms of the damages which they might have to pay the Council, would be subject to a financial limit. Contractor B was informed that they could submit a bid based on a 2-year cap (which Contractor B felt offered a sufficient level of protection to meet any likely financial compensation). Officers advised that the Council might be unable to accept the risk arising from a cap, which, if applied in the early years of the contract, would have a significant effect. As a result, Contractor B was invited to submit a bid based on uncapped liability as well as the capped bid. In the event they submitted capped liability bids as described above based on the value of 2, 3 and 4 years of the unitary charge and did not submit a bid based on uncapped liability.
- 3.3 In the event of the termination of the contract the level of damages that the Council would seek to recover would include the costs of emergency arrangements for residual waste transfer and disposal whilst a new procurement exercise was undertaken; the costs of that new procurement exercise; and the potential for higher costs from using an alternative contractor for the remaining lifetime of the contract including the additional costs of haulage to the new disposal facilities. Any limit, or cap, to a contractor’s liability would need to be sufficient to cover these costs if the Council were not to be financially disadvantaged by the contract failure.

- 3.4 The procurement process produced final tenders from 2 bidders. Contractor A provided a final tender without any limit on their liability in the event of the Council terminating the contract due to a contractor default. Contractor B provided three bids, based on a cap to their liability equivalent to the average of 2, 3 or 4 years of the unitary charge for the contract (effectively the annual cost of the contract).
- 3.5 When the bids were evaluated, Contractor B's 2 year capped bid was the Most Economically Advantageous Tender (MEAT) based on the technical, professional and financial evaluation of the bids, applying the criteria identified by the Council in the tendering documentation. It is a requirement of EU procurement law that contracts are awarded upon such basis (unless lowest price is chosen, which was not the case in this instance). Officers considered the effect of the 2 year capped bid and felt that it did not provide an adequate level of protection to the Council in the event of termination due to contractor default, and represented an unacceptable financial risk. The Procurement Board were advised of this at their meeting on 24 June 2009, and as a result the recommendation was that the second highest scoring bid be accepted, which was that of Contractor A.
- 3.6 A report was considered by the Regeneration, Community and Culture Overview and Scrutiny Committee on 7 July 2009 setting out the recommendations of the Procurement Board. Prior to the meeting, legal advisors for Contractor B contacted the Council to express their concern that the report contained a recommendation to award the residual waste disposal contract to Contractor A although the 2 year capped bid from Contractor B was the MEAT bid. As a result, the Council withdrew the recommendation to award the contract and sought further advice on the issue.
- 3.7 Officers had advised Contractor B that the Council might not be able to accept a capped bid if it did not provide sufficient protection for the Council. However, the evaluation criteria which was set at the start of the procurement process did not allow the Council to adequately weight and evaluate the risk offered by the capped bids, as these were not envisaged when the criteria was set. Accordingly, any bid scored using the evaluation matrix would select the lowest financial cost as the highest scoring bid, regardless of the level of effectiveness of the protection offered.
- 3.8 Legal advice was received from Eversheds, the Council's solicitors, which stated that because the Council had allowed bids from Contractor B to be submitted on the basis that they were, and because those bids had then been evaluated, then it was a requirement of the procurement rules that such bids be considered by applying the published evaluation criteria and that the contract be awarded in accordance with such criteria.
- 3.9 As a consequence of this advice, the Council's financial advisors, Ernst and Young, were asked to evaluate the protection offered by capped bids in the event of a contract failure. This inevitably varies according to the life remaining for the contract at the point of failure but it is clear from their work that a capped liability for two years of the unitary

charge would not be adequate protection for a significant number of years from the start of the contract. The schedule they have provided, and the assumptions that they have used, is reproduced for Cabinet in the exempt report as appendix 1. This does however suggest that a liability cap at three years would provide a level of compensation sufficient to meet a reasonable expectation of potential cost for a replacement provider.

4. Collection Services

- 4.1 The Collection Services were tendered in March 2008, with a tender return date of 1 May 2009. Unlike the procedure for the waste disposal contract, the services were tendered under the restricted procedure, which does not allow for any negotiation. This route was chosen because the Council was able to specify the service it required.
- 4.2 Tenders for the collection service were evaluated in May and June by the waste procurement team, and a report was submitted to the Procurement Board on 24 June 2009. The Council had received four bids for this service from three contractors. Contractor A had submitted two bids, as one of their bids was a "variant bid". This means that the Contractor had proposed a number of changes to the service, and this bid was acceptable under the tender conditions.
- 4.3 Tenderers were invited to submit bids for the collection service that could be evaluated against the disposal site being either within a five mile radius, or a fifteen mile radius. This meant that tenderers had to submit two prices to cover both of these scenarios.
- 4.4 The Procurement Board recommended acceptance of the tender of Contractor A for its variant bid on the basis that Contractor A's variant bid was the MEAT bid for both the five and fifteen mile radius scenarios.
- 4.5 This contract award was also considered by the Regeneration, Community and Culture Overview and Scrutiny Committee on 7 July 2009 with a recommendation to Cabinet on 14 July 2009, that it award the contract for collection services to Contractor A for its variant bid (Cabinet Decision 127/2009).
- 4.6 Following the Cabinet decision, concerns were raised by another tenderer that the evaluation matrix used was incorrect. Officers have had this matrix re-checked by Ernst and Young, and it has been confirmed that an incorrect weighting had been applied to the tenders. A copy of the revised scoring matrices is submitted as Appendix 3 in the exempt report. Use of the correct weighting means that Contractor A's variant bid is only the MEAT bid on a five mile radius. As a consequence the contract for collection services cannot be awarded until the outcome of the disposal services tender is known as the award will depend on the location for disposal services. Therefore the decision made to accept the variant bid of Contractor A needs to be rescinded, since it will not be known which is the most economically advantageous until the result of the waste disposal contract has been determined.

- 4.7 In any event, further concerns have been raised that, the extent of the clarification of the substance and contents of the variant bid submitted by Contractor A, may have given rise to an inadvertent breach of the procurement rules. Legal advice received supports this conclusion, and a copy of Counsel's Opinion is attached as Appendix 2 in the exempt report.

5. Green Waste Processing

- 5.1 Cabinet awarded the green waste processing contract to Contractor C at its meeting on 14 July 2009. The start date for the contract was for 1 November 2009.
- 5.2 The unsuccessful bidder, Contractor D, questioned the evaluation of the bids and the use of the evaluation matrix as set out in 4.5 above. The correct weighting has now been applied by Ernst and Young and this does not alter the award of the contract to Contractor C, as they remain the MEAT bid. A copy of the revised scoring is attached as Appendix 3 in the exempt report.

6. Current Position

- 6.1 In order to ensure that there is continuity of service whilst the outstanding issues are being resolved, Cabinet made the decision on 25 August 2009 to delegate authority to extend the current waste contract to the Director of Regeneration, Community and Culture. This was to be on the basis of an extension to the contracts for up to two years from 28 September 2009. This has now been agreed with the Council's current service provider and the Council has extended its contract for up to 2 years. This extension is within the budget set for the service. There is a potential liability upon the Council should the contract extension not last the two years. This is in respect of the termination costs to be borne by the current provider on the transfer and bulking capacity they have had to lease from a third party. The Council will work to mitigate this liability in the event that it seems a likely scenario.

7. The Way Forward

A. Residual waste disposal

- 7.1 Contractor B has raised concerns about the Council's decision not to accept its capped bid. Additionally, and by contrast, Contractor A was not offered an opportunity to submit a capped bid, which itself might have been a source of challenge had the decision been made to award the contract to Contractor B. Therefore it would seem appropriate to stop the procurement as an error has been made that the Council needs to correct.
- 7.2 There are therefore two options to stopping the procurement process: move the process back a stage to re-open dialogue with both Contractors under the Competitive Dialogue process, or to cancel the procurement entirely and start again.

- 7.3 Officers consider that, following external legal advice, the Council should reopen the Competitive Dialogue to ensure that the evaluation criteria are wholly transparent and then request fresh final bids. In essence, the procedure needs to be taken back to the Invitation to Submit Final Tenders stage, but it will also be necessary to engage with bidders on the substance of final tenders and particularly the terms of any cap on liability.
- 7.4 Advice received is that it would be unreasonable for the Council to say that they will never accept any capped bid. Even if a contractor unlawfully terminated the contract, the Council would be obliged to mitigate its losses and re-tender. At what level a cap moves from being reasonable to unacceptable is a matter for the Cabinet to consider, having regard to the specialist advice provided by Ernst and Young. However, the Council will need to communicate this as part of the final tender stage of the competitive dialogue. It cannot allow such to act independently of the tender evaluation process.

B. Residual Waste/Recycling Collection and Street Cleansing

- 7.5 It is not permitted to negotiate a contract procured under the restricted procedure. However, limited and proportionate clarifications are permitted. Contractor B has raised concerns that the extent of the clarifications to the variant bid of Contractor A may have amounted to negotiation. Because the legal advice supports the conclusion that this may have occurred, the decision to award the contract on the basis of the variant bid would be a significant risk.
- 7.6 Therefore it is recommended that the Council go back one stage in the process and ask for all bidders to submit fresh tenders. This will allow all tenderers the opportunity of submitting a variant bid and ensure that the Council is open and transparent.
- 7.7 The Council will have the opportunity to be clearer about the terms upon which a variant or any bid should be submitted so as to remove the risk of extensive clarifications, which might amount to negotiations.

C. Green waste disposal

- 7.8 The current contract extension with Veolia means that they are carrying out the green waste disposal under the extension. Therefore the Council is not in a position to start the new green waste/kitchen waste disposal contract until the other contracts are awarded and its extension with Veolia terminates. A delay to the commencement date to match the award and commencement of the other waste management contracts will therefore be required.
- 7.9 To commence the contract in November 2009 would leave the Council in a position where it was paying for in-vessel composting as a disposal mechanism whilst it was not possible to collect the kitchen waste that necessitated the more expensive process. Effectively, the Council would pay a premium without seeing benefits in residual waste reduction and increasing composting.

8. Legal & Financial Advice

8.1 Legal and financial advice is set out both in this report and in the exempt appendices.

9. Risk Management

9.1 Risk management is an integral part of good governance. The Council has a responsibility to identify and manage threats and risks to achieve its strategic objectives and enhance the value of services it provides to the community. The risks are therefore identified below:

Risk	Description	Action to avoid or mitigate risk
That the necessary waste contracts are delayed and service continuity is disrupted	The need to obtain further advice has meant that the timetable for commencement of the new waste contracts will not take place on 1 st November 2009 (Risk rating A3)	The Council has taken the option in the current contracts to extend for up to 2 years and guarantee service continuity
The Council faces a legal challenge relating to its procurement processes	There is a risk that the decisions taken are seen as a distortion of the EU procurement rules. However, advice received is that the proposed actions provide the most fair and transparent way to resolve the issues. (D2)	External legal advice has been obtained together with external financial advice and this is attached in the exempt report.
In deciding to delay the award of contracts, the validity of the 90 day tender period has expired meaning that Council can no longer hold bidders to their tendered prices.	This means that bidders may not agree to offer the services at the tendered price. This risk is reduced as the bidders all have entered into the process with a desire to obtain the contracts. (E2)	Bidders will be informed of the current situation and progress made by the Council.

10. Recommendations

That Cabinet:

- 10.1 Instructs officers to re-open the competitive dialogue for the residual waste disposal contract and ask the bidders to re-submit fresh final tenders
- 10.2 Agrees that a capped liability on termination of at least three years unitary charge is an acceptable contract term.
- 10.3 Instructs officers to re-open the restricted procedure for the residual waste/recycling collection and street cleansing contract to clarify the terms upon which variant bids may be acceptable and ask the bidders to re-submit fresh final tenders.
- 10.4 Agrees to re-affirm the award of the contract for green waste processing to Contractor C with a commencement date to be determined by Cabinet.

11. Suggested reasons for decision(s)

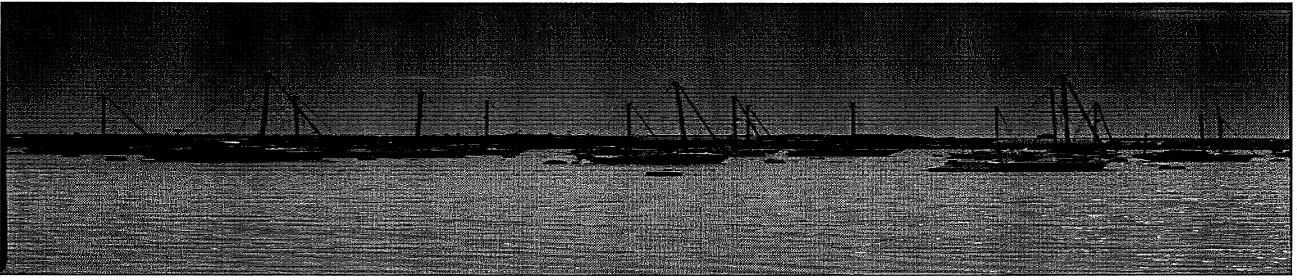
- 11.1 The recommendations support the advice received from both Ernst & Young and Eversheds, and help to reduce the likelihood of a successful challenge from contractors, whilst ensuring that the Council receives best value from its procurements.

Lead officer contact

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Background papers

These were detailed in the report to Cabinet on 14 July 2009 and this together with the report to Cabinet on 25 August 2009 are the two most pertinent background documents.



Cabinet report

Front Line Services

22 September 2009

**Contracts for the Collection and Disposal of Waste
Update**

EXEMPT APPENDIX

CABINET

22 SEPTEMBER 2009

CONTRACTS FOR THE COLLECTION AND DISPOSAL OF WASTE UPDATE

Portfolio Holder: Councillor Phil Filmer, Front Line Services

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

Author: Andy McGrath, Assistant Director, Front Line Services

Summary

To seek recommendations for the next steps for the procurement of residual waste disposal, refuse and recycling collection and street cleaning and the processing of garden & kitchen waste.

1. EXEMPT INFORMATION

1.1 The attached appendices refer to the following paragraphs in the Cabinet report:

Appendix 1 – paragraph 3.9

Appendix 2 – paragraph 4.6

Appendix 3 – paragraphs 4.5 and 5.2

1.2 Paragraph 6.1 of the main report refers to the potential liability for termination costs in the event that the contract extension fails to run the two-year period. The current contractor leases a facility for the transfer and bulking up of residual waste at a capacity of 100,000 tonnes per annum. The extension of the contract required the company to invoke the extension clause in their lease agreement which runs for the two-year period. In the event of the extension of contract not running the full period or there not being a continued use of the facility, then the current contractor has placed the termination liability to the end of the lease with the Council. It should be noted that this capacity is a marketable commodity and officers will seek to ensure that all attempts are made to mitigate any potential financial loss. The cost of the revised lease arrangement that may fall upon the Council is in proportion to a sum of £1 million in a full year.

- 1.3 For the purposes of understanding the evaluation scoring table and Contractor references in the main report the following is a summary of the Contractors involved:

Contractor A	Veolia
Contractor B	Waste Recycling Group
Contractor C	Countrystyle
Contractor D	New Earth Solutions
Contractor E	FOCSA
Contractor F	SITA

2. RECOMMENDATIONS

- 2.1 Details of the recommendations are contained in the main body of the report.

Lead Officer contacts:

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Extract from Ernst and Young report :

1.1 Termination liability cap update

1.1.1 Background

Following pre-qualification and Invitation to Submit Detailed Solutions ("ISDS"), the Council has selected Veolia and WRG for the final tender stage of the process for the residual waste contract. WRG has proposed a base case solution and two alternative solutions which offer the Council different termination liability caps in the event of contractor default, for different gate fees.

For the avoidance of doubt, WRG would still be subject to compensation based upon the "market value" of the contract in the event of contractor default. The termination liability cap relates only to the costs of re-tendering and the additional costs which the Council incurs prior to the new service commencing.

The caps proposed are, the 24 months worth of unitary charge immediately preceding termination for the base case solution and the 36 months and 48 months worth of unitary charge immediately preceding termination for the alternative solutions. Ernst & Young provided a report to the Council in July 2009, summarising the financial impact of the liability caps proposed by WRG in the event of contractor default.

The Council has asked Ernst & Young to update the 24 month and 36 month analyses to:

- (i) reflect the haulage costs associated with a successor residual waste contract, should WRG default under the Councils residual treatment contract; and
- (ii) calculate an estimate of the treatment gate fee in an assumed successor contract, at the point of termination, that could leave the Council in a no-better, no-worse position than had the termination not occurred.

1.1.2 Work Performed

We have updated the financial analysis in two separate excel workbooks; one excel workbook for each of the proposed termination liability caps. The excel workbooks, provided to the Council with this briefing note are titled:

- 1) 24_08_09 Termination liability analysis 24 months update
- 2) 24_08_09 Termination liability analysis 36 months update

Haulage

The following haulage assumptions for the residual waste contract, provided by the Council, were used to update the analysis:

- ▶ Haulage rate to treatment facility, £0.23 per mile per tonne.
- ▶ Haulage rate to landfill or transfer station, £0.31 per mile per tonne.
- ▶ Bulking and transfer rate, £4.30 per tonne.
- ▶ Distance to WRG's Allington facility, 8.9 miles.
- ▶ Distance to WRG's Pepperhill transfer station, 11.3 miles.
- ▶ Successor contractor, Veolia
- ▶ Distance to Veolia's SELCP facility, 28.05 miles.
- ▶ Distance to Veolia's Ockendon landfill site, 23.57 miles.
- ▶ In the event of contractor termination, the Council would save haulage costs payable to WRG and would incur haulage costs payable to the successor contractor.

All other assumptions and limitations set out in our report to the Council dated 10 July 2009, apply to this analysis and report.

Assumptions

For the purpose of this analysis, we have assumed that the successor contractor will offer the same treatment gate fee and landfill gate fee as proposed by WRG.

A potential 'excess' of the proposed WRG termination liability cap compared to the estimated costs to the Council arising from contractor default, will enable the Council to enter into a more expensive successor contract at the point of termination and leave the Council in a no-better, no-worse position than had the termination not occurred. In contrast, a potential 'shortfall' of the proposed WRG termination liability cap compared to the estimated costs to the Council arising from contractor default, will result in the Council having to enter into a less expensive successor contract at the point of termination to leave the Council in a no-better, no-worse position than had the termination not occurred.

Please note, that to derive the potential successor treatment rates, we have assumed that landfill gate fees will remain at the rate proposed by WRG and that only the treatment gate fees will change.

We have also assumed that the termination liability amount is paid in full up to the cap. In practice, WRG are only likely to be willing to fund the actual costs incurred by the Council, which may be less than the cap. We have also assumed that no post termination service amount is paid between the termination date and the date of commencement of the new contract (because the term of the new contract is the same as the unexpired term of the terminated contract).

1.1.3 Results

Based on the updated assumptions for haulage costs stated above, and the assumptions and limitations stated in our previous report, under the 24 month liability cap proposal, the net present value of the liability cap is less than the net present value of the estimated direct and immediate costs to the Council of termination for each of the first 9 years of the contract i.e. a 'shortfall'. In effect, the termination liability cap is less than the estimated costs of re-procurement, landfill, haulage and LATS costs during the re-procurement process, less the savings in WRG unitary charge and haulage costs incurred by the Council that would be avoided as a result of the termination during this period.

Under the 36 month liability cap proposal, the net present value of the liability cap is greater than the net present value of the estimated direct and immediate costs to the Council of termination for every year of the contract i.e. an 'excess'.

- ▶ As a result of the termination liability cap 'shortfall' during each of the first 9 years of the 24 month termination liability cap solution, the Council would have to enter into a new contract with a lower treatment gate fee than in the WRG contract, to leave the Council in a no-better, no-worse financial situation in the first 9 years of the contract.
- ▶ As a result of this termination liability cap 'excess' during the 36 month termination liability cap solution, the Council could enter into a new contract with a higher treatment gate fee than in the WRG contract, and leave the Council in a no-better, no-worse financial situation.

The table below sets out the estimated treatment rates under the 24 month and 36 month termination liability cap solutions that the Council could enter into, at the point of termination, to leave the Council in a no-better, no-worse financial situation.

Please note, as stated in our previous report to the Council, it is assumed that termination occurs at the end of a period and the successor contract will be procured from two years after termination for the period remaining to the end of the original 25 year concession period. For example, in our analysis, if WRG were to terminate the contract in year 22 under the 24 month liability cap proposal, the two preceding years worth of unitary charge income, would need to cover procurement and emergency landfill costs for two years and payment to a successor contract for only one year.

Not for publication under paragraph 3 of part 1 of Schedule 12A of the Local Government Act 1972 as this report contains commercially sensitive information

Contract Year	24 month liability cap			36 month liability cap		
	Estimated successor contract rate	Proposed WRG rate	Difference	Estimated successor contract rate	Proposed WRG rate	Difference
1	£65.88	£66.32	-£0.44	£78.79	£70.32	£8.47
2	£66.58	£67.98	-£1.40	£79.96	£72.08	£7.88
3	£67.38	£69.68	-£2.30	£81.27	£73.88	£7.39
4	£69.32	£71.42	-£2.10	£83.19	£75.73	£7.46
5	£72.01	£73.20	-£1.19	£86.64	£77.62	£9.02
6	£74.60	£75.03	-£0.43	£90.17	£79.56	£10.61
7	£76.78	£76.91	-£0.13	£93.31	£81.55	£11.76
8	£78.70	£78.83	-£0.13	£96.04	£83.59	£12.45
9	£80.68	£80.80	-£0.12	£98.61	£85.68	£12.93
10	£83.53	£82.82	£0.71	£102.09	£87.82	£14.27
11	£86.82	£84.90	£1.92	£106.20	£90.02	£16.18
12	£89.72	£87.02	£2.70	£110.18	£92.27	£17.91
13	£93.02	£89.19	£3.83	£114.88	£94.57	£20.31
14	£96.98	£91.42	£5.56	£120.53	£96.94	£23.59
15	£101.66	£93.71	£7.95	£127.41	£99.36	£28.05
16	£107.10	£96.05	£11.05	£135.80	£101.84	£33.96
17	£113.62	£98.45	£15.17	£146.08	£104.39	£41.69
18	£121.74	£100.91	£20.83	£159.15	£107.00	£52.15
19	£132.28	£103.44	£28.84	£176.57	£109.68	£66.89
20	£146.94	£106.02	£40.92	£201.47	£112.42	£89.05
21	£169.90	£108.67	£61.23	£241.26	£115.23	£126.03
22	£213.70	£111.39	£102.31	£318.39	£118.11	£200.28
23	£340.73	£114.17	£226.56	£545.05	£121.06	£423.99
24	Nil	Nil	Nil	Nil	Nil	Nil
25	Nil	Nil	Nil	Nil	Nil	Nil

IN THE MATTER OF
MEDWAY COUNCIL'S PROCUREMENT
OF WASTE COLLECTION SERVICES

ADVICE

1. I am asked to advise Medway Council in relation to potential challenges to the procurement and award of a contract for the collection of waste. That exercise was undertaken in conjunction with procurement processes for the award of 2 further separate contracts for waste disposal and waste processing, details of which have been provided in outline in my instructions. Although the outcome of those other exercises may impact upon the outcome of the collection procurement exercise, this advice focuses only on the latter, save in respect of one "new" question arising in connection with the scoring of the disposal contract (which I deal with at the end of this advice). I do not propose to set out the full factual background underlying this advice, much of which is contained in my Instructions.
2. Veolia Environmental Services ("Veolia"), Focsa Services UK Limited ("Focsa") and Sita UK Limited ("Sita") each submitted standard bids for the collection contract. Veolia however also submitted a form of variant proposal.
3. Following a recent review of the weighting of the final scores for all three contracts, the correct scoring results in Veolia's variant bid winning the competition on the basis of a 5 mile collection area whereas Focsa wins the competition on the basis of a 15 mile collection area. I am told that this means that if Veolia wins the waste disposal contract, they also win the collection contract (based on 5 miles), whereas if Waste Recycling Group Limited ("WRG") wins the disposal contract, Focsa win the collection contract (based on 15 miles).
4. Depending on the outcome of the competition for the disposal contract therefore, all three bidders for the collection contract may be potential complainants. For the purposes of this advice, I have only seen the Veolia tender documents in view of the potential problems arising from its variant bid. I am not therefore able in this advice to comment upon the strength of any complaint, if any, concerning the Focsa bid, should that be the successful tender. Given the scores awarded to Sita, the risk of challenge by that company is limited since it did not rank highly enough to be a realistic contender. Also, given the scores awarded to Veolia's standard bid, the likelihood of

it challenging on the basis that its standard bid ought to have won is likewise limited. The greatest risk arises from a decision to award the collection contract to Veolia's variant bid on the basis of collection within 5 miles (of Chatham).

The Veolia variant bid

5. The basic requirements for variant bids are set out in Regulation 10 of the Public Contracts Regulations 2006 which provides:

“(1) Where a contracting authority intends to award a public contract on the basis of the offer which is the most economically advantageous in accordance with regulation 30(1)(a), it shall indicate in the contract notice whether or not it authorises economic operators to submit offers which contain variants on the requirements specified in the contract documents and a contracting authority shall not accept an offer which contains a variant without that indication.

(2) Where a contracting authority authorises a variant in accordance with paragraph (1) it shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for the presentation of an offer which contains variants.

(3) A contracting authority shall only consider variants which meet its minimum requirements as stated in the contract documents in accordance with paragraph (2).....”

6. Having authorised variant bids therefore, it was incumbent upon the Council to set out the minimum requirements to be met by the variant and any specific requirements for presentation of the variant bid. In addition to that obligation, the Council is of course bound by the general principle of transparency in Community law and echoed in Regulation 4(3).

7. The Invitation to Tender (ITT) set out the requirements of any variant bid as follows:

“Variants

9.1 A variant means a tender offered that is in addition to the Standard tender that the Council requires to be submitted in accordance with these Instructions.

9.2 Subject to the requirements set out in paragraph 9.3 below, Tenderers may submit any variants on the Specification, Conditions of Contract or any alternative proposals provided they meet the output requirements of the specifications.

9.3 Any Tenderer proposing variants, must as a minimum, a) not change the days of the kerbside collection rounds and b) maintain the programme for the change from the Initial Service to the New Service in respect of Residual Household Waste and the collection of Dry Recyclable Materials from Households.

9.4 A Variant Bid should only be submitted if the Tenderer can demonstrate that it offers better value for money to the Council than its Standard Bid. If a Variant Bid is submitted then the tenderer must highlight all of the differences to the Standard Bid, in its Supporting Information, and the Variant Bid must be accompanied by an explanation as to why, in the opinion of the Tenderer, it offers better value for money to the Council than its Standard Bid.”

8. Although the ITT sets out what “as a minimum” the variant bid may not alter, it arguably fails to set out with any precision what are intended to be the presentational requirements of the variant bid. It is unclear for example whether the variant bid must follow the format of a standard bid, including completion where appropriate of the various Appendices (such as for example the Method Statements, Bills of Quantities and Schedules of Costs). At the very least however, one can reasonably construe from that paragraph that, as a minimum and by reference to the standard bid, the variant bid must do 2 things: include an explanation in a “Supporting Information” of all the differences between the Standard and the variant bid and the variant must be accompanied by a “better value for money” submission.
9. When one examines Veolia’s tender, pages 4 and 5 of the Executive Summary to the tender submission sets out in broad terms the nature of the variant recycling option and gives headline figures for the total cost savings inuring to the Council and that the variant option represents a reduction of £150,000 from the tendered sum (presumably meaning under the standard bid). In view of the fact that the variant proposal generated a new income stream for the Council, the total cost saving claimed to be in the order of £1.098 million. The tender purports to provide details of the variant bid in Method Statement 4 of the tender document. Paragraph 4.4.3 of that Method Statement sets out a further overview of the intended recycling scheme and a “Service Delivery Plan” for the service which sets out Staffing Resources, Vehicles, Plant and Equipment, Productivity and Tonnages and Collection Methodology. There does not appear to be any further explanation of the variant tender and, more importantly, no

clear costings, schedules of rates or bills of quantities are specifically offered for the variant tender.

10. At the evaluation stage, there were a large number of clarificatory questions asked by the Council in respect of all of the standard bids. In particular, a substantial number of questions were directed towards Focsa's Method Statements and likewise in relation to Veolia (it does seem however that a greater number of clarificatory questions were asked of Veolia's standard bid). However, as part of the Council's queries concerning Veolia's Method Statement 4 and in particular paragraph 4.4.3, it stated:

“You are required to support the variant bid by full Method Statements covering all the proposed services with a Bill of Quantities and a Schedule of Rates. The detail must enable the Council to fully understand how the service will be provided, who will be responsible for the provision, and maintenance, of containers and sacks. The Method Statements should also include all individual costs and how you propose the householders will be educated on the proposed changes. If the service cannot start on 1 November 2009 there could be additional costs and these should be clearly identified.”

11. This indicates therefore that the Council did not consider the variant bid to be compliant in the form in which it was submitted and the additional requirements imposed on Veolia would indicate that the variant was substantially and materially non-compliant. Alternatively, the Council was substantially adding, post tender, to the requirements for presentation of a variant bid. Either way, it essentially offered Veolia the opportunity to substantially reformulate its variant bid. Veolia then responded by providing a revised “Service Delivery Plan” for the variant proposal and a Bill of Quantities and Costs Schedule. The question arises as to whether even those documents satisfied the Council's requirements because there followed 2 further sets of fairly extensive clarificatory questions from the Council on the variant bid, followed by confirmation sought that the variant bid is subject to the Council's terms and conditions.

Analysis

12. The extent to which amendments and clarifications to bids are permitted is undoubtedly a grey area in procurement law and there is very little jurisprudence or other authority to assist us at present. The Council and Commission statement concerning Article 7(4) of Public Works Directive 93/37 ([1994] OJ L111/114, which

is of relevance to all public contracts and has been referred to with approval by the Advocate General in the *Storebaelt* (Case C-243/89) as an expression of the principle of equal treatment, expressly rules out any communication between the contracting authority and the bidders which amounts to negotiation of fundamental aspects of the contract. It further states however that discussions can be held for the purpose of clarifying or supplementing the content of tenders or the requirements of the contracting authorities, provided that this does not involve discrimination.

13. Although there would appear to be no objection therefore to permitting the correction of obvious errors or permitting certain amendments to non compliant tenders to bring them in to compliance, the discretion of the contracting authority must clearly be exercised respecting the principles of transparency, equality, and non discrimination. In many cases it is likely to be a matter of fact and degree as to whether amendment is permissible. This overlaps with the question of whether and to what degree clarificatory questions may be asked of bidders since the purpose of those questions may be to supplement the information contained in the tender submitted and permit them to correct errors and deficiencies.
14. I consider there to be a very real and substantial risk that a Court would find that the treatment of the Veolia variant bid went beyond what was permissible in seeking clarification of the bid. First, although the Council's requirements applicable to variant bids were not particularly clear in themselves, it is arguable that Veolia's bid fell considerably short of what was required by the ITT. Secondly, the opportunity given to Veolia to provide Method Statements, Bills of Quantities and Schedules of Costs in support of the variant bid arguably allowed them to re-submit its variant bid "from scratch". Even then, the precise nature of the bid was only drawn out from two sets of further clarificatory questions, many of which went to important aspects of the service provision.

15. It is true that the other bidders were also asked questions permitting them to clarify and supplement their standard bids. Indeed it is arguable that the Council, by questioning Fosca as to its Risk Matrix (which did not comply with the Contract document) also allowed it to render compliant a technically non-compliant bid. Further, it is true that no other bidder submitted a variant bid, and was not strictly therefore in the same position as Veolia. However, I consider that a forceful argument could be mounted to the effect that the Council's treatment of the variant, which was of course being considered alongside the standard bids, amounted to favourable treatment in breach of the principle of equality: whether or not the other tenders were given the opportunity to clarify and supplement their bids, Veolia was given a very considerable advantage in being afforded the opportunity to convert a fairly vague and substantially non-compliant bid into a compliant and ultimately winning bid. It may even be possible to argue on closer inspection of the nature of the questions advanced by the Council that the variant tender was treated more like a "negotiated procedure" in which the precise specification for the service was being hammered out through continual questioning. In my view however it is not necessary to go that far.

Conclusion

16. I consider therefore that the Council's overall treatment of Veolia's variant bid is vulnerable to challenge and risks being found by a Court to be in breach of the Public Contracts Regulations 2006.

17. In view of the fact that the outcome of the disposal contract determines which option is appropriate for the collection contract (ie within 5 miles or within 15 miles), the importance of the variant bid and the potential breaches of the Regulations it entails will not be known until the award of the disposal contract is concluded. Clearly, if WRG were to win the disposal contract, the issue concerning the variant bid falls away. If Veolia wins the disposal contract however, there is likely be a considerable risk of challenge to the award of the collection contract to Veolia. Thus, the appropriate course of action in relation to the award of the collection contract can or need only be determined in the light of the outcome of the disposal contract. It may be necessary at that stage however to consider either eliminating the variant bid or taking a step back in the process and permitting all candidates to submit variant bids.

The Disposal Contract and the assessment of WRG's tenders

18. The tender for the disposal contract (for which a competitive dialogue procedure has been used) has been complicated by the fact that WRG has submitted a bid which varies the Council's standard terms and incorporates a liability cap. They have effectively advanced 3 bids based on differing liability caps. Such capped bids were not anticipated by the Council and hence were not contemplated by the ITT, but they have nevertheless been accepted. Veolia's bid contained no liability cap.
19. I am told that in evaluating the bids for the disposal contract (for which Veolia also tendered), the Council have scored WRG on the basis of additional "notional haulage charges". Those charges have not been included in evaluating Veolia's bid.
20. The rationale underlying the scoring is not immediately clear to me in the absence of any documents concerning the tender process but it appears to be based on one or other of two possible scenarios. The first is that the WRG bid quoted treatment and landfill gate fees which do not account for the haulage costs involved in transporting the waste to the contractor's disposal facilities (which presumably is assumed by the Council to represent additional costs to them arising from the WRG tenders). This is in contrast to Veolia's bid in which treatment and gate fees do include haulage costs and would thus not result in any additional costs for the Council.
21. The second possible scenario is that "notional haulage costs" have been added to the WRG bid and scored accordingly in an attempt to reflect the contingent liability arising in the Council for such costs in the event that the liability cap is in play. That cap presumably arises only in case of termination for default.
22. I think that on either basis, there are potential problems, though a lesser risk is posed by the first.
23. As regards the first, if the ITT and the published evaluation and scoring criteria for the disposal contract specified or indicated that such additional costs would be taken into account then it is clearly permissible to have taken them into account. As I have indicated, I have not seen those documents and I do not know what was set out. Nor do I know against which criterion or sub criterion the additional costs were ultimately considered by I assume it was under the overall pricing criterion.
24. If the tender documents were however silent on the matter, it is more difficult to justify their consideration in the evaluation process. The principles of transparency

and equality of course require that all tenderers must know the basis upon which they will be assessed so that they each know where they stand in formulating a bid. It may however be possible to argue that it is obvious that for every element of cost not covered in the tender, it is likely to affect the assessment of price, since price must be assessed on the basis of a like-for-like comparison of what is included in the tender. Moreover to score the overall pricing criterion in the absence of taking account of additional costs to the Council would be irrational or unreasonable and would not reflect a true assessment of price and, consequently, MEAT.

25. It seems to me therefore that to take account of “notional haulage costs” on that basis and to adjust scores accordingly is potentially open to challenge on grounds primarily of transparency but that the position is reasonably defensible.
26. As regards the second scenario, namely basing the scoring on the assessment of contingent liabilities, I consider it much more difficult to justify the Council’s position. The problem arises from the fact that the ITT did not contemplate capped bids at all. If such bids are accepted however they must be scored on the same basis and according to the same criteria as uncapped bids. That does not appear to have been done. To add a “notional haulage cost” as a contingent liability is not in my view an assessment of the price of the contract. Rather it seeks to reflect the additional risks associated with the cap in a manner which was simply not contemplated by the evaluation criteria and scoring methodology. In my view therefore it would at the very least be in breach of the principles of transparency and non-discrimination (and possibly Regulation 30) to take account of such a contingency which appears, somewhat unreasonably, to assume a breach of contract on the part of WRG.
27. I therefore consider that there is a substantial risk of successful challenge associated with scoring WRG’s bid on the basis of contingent “notional haulage costs”.

REBECCA HAYNES

9 September 2009

SUMMARY OF SCORES

RESIDUAL WASTE DISPOSAL

	Contractor B				Contractor A			
	2YR CAP		3YR CAP		4YR CAP			
Technical	538	3,529	538	3,529	538	3,529	522	3,394
Financial	3,458	3,458	3,299	3,298	3,171	3,171	3,330	3,330
TOTALS	3,996	6,988	3,837	6,828	3,709	6,700	3,852	6,724
Position	1	1	3	2	4	4	2	3

COLLECTION/STREET CLEANSING/RE-CYCLING

	Contractor E		Contractor A		Contractor A Variant		Contractor F	
5 MILES								
Technical	501	2,608	491	2,534	483	2,512	396	2,029
Financial	2,784	2,784	2,795	2,796	2,935	2,935	2,605	2,605
TOTALS	3,285	5,392	3,286	5,330	3,418	5,447	3,001	4,634
Position	3	2	2	3	1	1	4	4
15 MILES								
Technical	501	2,608	491	2,534	483	2,512	396	2,029
Financial	2,916	2,916	2,736	2,736	2,935	2,935	2,722	2,722
TOTALS	3,417	5,524	3,227	5,270	3,418	5,447	3,118	4,751
Position	2	1	3	3	1	2	4	4

GARDEN/KITCHEN WASTE DISPOSAL

	Contractor D		Contractor C		Contractor B	
Technical	669	3,600	672	3,593	549	3,346
Financial	3,428	3,428	3,458	3,458	2,692	2,692
TOTALS	4,097	7,027	4,130	7,046	3,241	6,038
Position	2	2	1	1	3	3

**ORIGINAL SCORES
MEAT BIDS**