

8 OCTOBER 2024

REPORT OF THE LEADER OF THE COUNCIL, THE PORTFOLIO HOLDER FOR ENVIRONMENT AND THE PORTFOLIO HOLDER FOR ASSETS

A WASTE AND RECYCLING COLLECTION AND STREET SWEEPING PROCUREMENT – DECISION ON SHORT EXTENSION TO EXISTING CONTRACTS

PART 1 – KEY INFORMATION

PURPOSE OF THE REPORT

To make decisions in respect of a matter delegated by Cabinet on 26th July 2024, minute number 35:

Authorises a delegation to the Leader of the Council, the Portfolio Holder for Environment and the Portfolio Holder for Assets in consultation with the Corporate Director for Operations & Delivery, Section 151 and Monitoring Officers to agree any short term extension to the current contractual arrangements, where permissible to do so and solely for the purpose of assisting with the mobilisation of the new contracts.

EXECUTIVE SUMMARY

- The Council's contracts with Veolia Environmental Services (UK) Ltd for household waste and recycling collection and street sweeping both expire early in 2026.
- Cabinet agreed at its meeting on 26 July 2024 to undertake a tender exercise to find a future provider for the services from 2026 onwards.
- Cabinet delegated the approval of the high level contract specification, the aspects of the tender about which dialogue will be held with bidders and the tender evaluation criteria to be used to the Leader of the Council, the Portfolio Holder for Environment and the Portfolio Holder for Assets and that decision is being taken separately to this one
- Cabinet further authorised a delegation to the Leader of the Council, the Portfolio Holder for Environment and the Portfolio Holder for Assets in consultation with the Director for Operations & Delivery, Section 151 and Monitoring Officers to agree any short term extension to the current contractual arrangements, where permissible to do so and solely for the purpose of assisting with the mobilisation of the new contracts
- A dedicated advice note has been received by the Council from Messer's Sharpe Pritchard LLP who have been appointed to provide legal advice and support to the Council in relation to the waste contract procurement. Whilst that advice note is legally privileged and remains confidential it set out the grounds upon which the existing contract can be extended.

RECOMMENDATION(S)

It is recommended that the Leader of the Council, the Portfolio Holder for Environment

and the Portfolio Holder for Assets, having consulted with the Corporate Director for Operations & Delivery, the s151 Officer and Monitoring Officer:

1. Authorises the extension of the current contracts with Veolia Environmental Services (UK) Ltd for Street Cleaning and Waste and Recycling Collection on the same terms as existing and such that they both expire on 31 March 2026; and,
2. authorises the Corporate Director for Operations & Delivery in consultation with the Head of Legal Services to undertake the necessary actions required to make the contract extensions.

REASON(S) FOR THE RECOMMENDATION(S)

The recommendations are made in accordance with the delegation to the Portfolio Holders provided by Cabinet on 26 July 2024.

ALTERNATIVE OPTIONS CONSIDERED

The options considered have been led by the progress with the procurement process for the new contract that will commence in 2026. The timeline for that procurement suggests that not extending the current contracts beyond their current end dates leaves insufficient time for contractor mobilisation following award of the contract. This means that contractors who are bidding for that contract may be deterred from doing so based on a restricted mobilisation period. As such, an extension to 31 March 2026 is prudent and ensures continuity of service during that period and also allows potential bidders the knowledge that sufficient mobilisation time will be available.

PART 2 – IMPLICATIONS OF THE DECISION

DELIVERING PRIORITIES

The decisions will contribute to Corporate Priorities as set out in the July 2024 Cabinet report.

OUTCOME OF CONSULTATION AND ENGAGEMENT (including with the relevant Overview and Scrutiny Committee and other stakeholders where the item concerns proposals relating to the Budget and Policy Framework)

In accordance with the Cabinet delegation, consultation has been undertaken with the Corporate Director for Operations & Delivery, the S151 officer and the Monitoring Officer who all concur with the proposal.

LEGAL REQUIREMENTS (including legislation & constitutional powers)

Is the recommendation a Key Decision (see the criteria	YES	If Yes, indicate which by which criteria it is a Key Decision	<input type="checkbox"/> Significant effect on two or more wards <input checked="" type="checkbox"/> Involves £100,000 expenditure/income
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stated here)		<p>And when was the proposed decision published in the Notice of forthcoming decisions for the Council (must be 28 days at the latest prior to the meeting date)</p>	<p><input type="checkbox"/> Is otherwise significant for the service budget</p> <p>15 November 2023</p>
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Details relating to the legal background and requirements in respect of the overall procurement are set out in some detail in the July 2024 Cabinet report.

Specific confidential advice received by the Council indicates that Regulation 72 of the Public Contracts Regulations 2015 (as amended) (PCR) provides the legal framework around which a contract extension may be made. As such Regulation 72(1)(e) is relied on. In order to rely on this ground, the modification cannot trigger any of the conditions set out below and therefore be considered "substantial":

- it renders the contract materially different in character from the original contract;
- it introduces conditions that, had they been part of the initial award procedure, would have changed who bid or won the contract;
- it extends the scope of the contract considerably;
- it alters the economic balance in favour of the supplier in a manner not provided for in the original contract; and/or
- a new contractor replaces the original contractor (not relevant here).

An analysis of whether the different 'safe harbours' under Regulation 72 PCR are likely to apply has been undertaken and its considered Regulation 72(1)(e) provides a strong ground for the Council to rely upon to extend the Contracts. If Tending progresses with an extension, it is recommended to protect against a challenge being brought that the extension is as short as possible and is well-defined (i.e. not open ended). It should also commence and announce it has re-let of the services under the Contracts as soon as possible. On this basis, and on the basis of assumptions detailed in legal advice (being protected by legal privilege) and the analysis below, our view is that the likelihood of a challenge being brought is low (on the basis that between a one to three month extension is potentially being entered into) and the risk of a successful challenge, if brought, is also low.

A direct award contract award relying on Regulation 72 PCR is not considered to be unlawful in these circumstances. Should proceedings be brought against the applicability of PCR Regulation 72 as justification for extending the Contracts, the award procedure would be automatically suspended. The Council would need to apply to the court to get a 'stay' lifted before the proposed extensions could be entered into.

Veolia has confirmed they are willing to agree to extend both contracts on the current terms and no changes will be made to the services provided under each for the duration of the extension period. The Change process within the Contracts will need to be followed for a Variation Agreement to be drafted and agreed.

YES	The Monitoring Officer confirms they have been made aware of the above and any additional comments from them are below:
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FINANCE AND OTHER RESOURCE IMPLICATIONS

The finance and other resource implications relating to this procurement exercise are covered in detail within the July 2024 Cabinet report.

These contract extensions, three months in respect of the street cleaning contract and two months for the waste and recycling contract, do not create any cost pressures other than the annual inflationary uplift that is applied to the contract annually, which is accommodated within the existing forecast process. In that sense they offer value for money to the Council as they continue on existing terms which are acknowledged as remaining competitive in the current market.

Yes	The Section 151 Officer confirms they have been made aware of the above and any additional comments from them are below:
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Although there are no comments over and above those set out elsewhere in the report, it is important to highlight the value for money issue discussed earlier along with the practical benefits of aligning future contract start dates with the Council’s accounting year.

USE OF RESOURCES AND VALUE FOR MONEY

The following are submitted in respect of the indicated use of resources and value for money indicators:

A) Financial sustainability: how the body plans and manages its resources to ensure it can continue to deliver its services;	The inflationary cost pressure is recognised and budgeted for annually.
B) Governance: how the body ensures that it makes informed decisions and properly manages its risks, including; and	These are important long term decisions for the Council and as such will be undertaken in accordance with the constitution, making use of delegated powers where appropriate.
C) Improving economy, efficiency and effectiveness: how the body uses information about its costs and performance to improve the way it manages and delivers its services.	Waste and recycling services are significant budget areas for the Council and also ones where we have good levels of information both in respect of operational delivery and cost. This data will be used as part of the decision making processes going forwards.

MILESTONES AND DELIVERY

This decision forms one of the key milestones in the procurement process. Following on from this decision and separate portfolio holder decisions to agree other aspects of the procurement process as delegated by Cabinet, it is anticipated that the formal tender process will be launched during the week commencing 14 October 2024.

ASSOCIATED RISKS AND MITIGATION

Risks and their mitigation associated with the overall procurement process have been set out in some detail in the July 2024 Cabinet report.

A risk register is being maintained in relation to this project.

Risks associated with this particular decision are set out below and based on the wording of Section 72 (1) (e) of the Public Contract Regulations 2015. The main risk is that of challenge from other contractors who might feel they have been disadvantaged:

- On the basis that it renders the contract materially different in character from the original contract – *the contract extension term will be the same as the current terms and there will not be any changes to the scope of services provided or the price.*
- it introduces conditions that, had they been part of the initial award procedure, would have changed who bid or won the contract – *the contract extensions will not introduce any new or additional conditions*
- it extends the scope of the contract considerably – *the scope of the contracts are not altered at all, other than the short extension period.*
- it alters the economic balance in favour of the supplier in a manner not provided for in the original contract – *the contract extension will not alter the economic balance in favour of the supplier and nor will it influence any decision making over the evaluation of the procurement process that is about to commence that the supplier may choose to participate in.*
- a new contractor replaces the original contractor – *a new contractor is not being introduced*

Officers believe that in the circumstances the risk of challenge to this decision is low. If a challenge is successful there are three possible outcomes to be aware of:

- Award decision overturned – requiring a change in the procurement timelines if the challenge is brought before contract award (i.e. before entering into the Proposed Extensions).
- The Council could pay twice – the Proposed Extensions remain in place but the aggrieved bidder might be recompensed for loss of chance/profits.
- ‘Declaration of ineffectiveness’ – the Proposed Extensions are declared void and a civil penalty is potentially required. This outcome is not possible if a valid VEAT Notice is issued.

EQUALITY IMPLICATIONS

There are no equality implications associated with this particular decision. An equality impact assessment has been undertaken in respect of the development of the new service specification that will form the basis of the procurement exercise that will commence shortly.

SOCIAL VALUE CONSIDERATIONS

The Public Services (Social Value) Act 2012 requires public authorities to “have regard to economic, social and environmental well-being in connection with public service contracts; and for connected purposes.” The Council wishes to work collaboratively on social value with suppliers, partners, and the community to benefit Tendring.

Social value does not form part of the contracts that are being extended, however, it does form an integral part of the procurement for the future contract.

IMPLICATIONS FOR THE COUNCIL’S AIM TO BE NET ZERO BY 2030

Implications for the Council’s aim to be net zero by 2030 have been explained in the July 2024 Cabinet report.

OTHER RELEVANT CONSIDERATIONS OR IMPLICATIONS	
Consideration has been given to the implications of the proposed decision in respect of the following and any significant issues are set out below.	
Crime and Disorder	None
Health Inequalities	None
Subsidy Control (the requirements of the Subsidy Control Act 2022 and the related Statutory Guidance)	None
Area or Ward affected	All wards within the district will be affected

PART 3 – SUPPORTING INFORMATION

BACKGROUND
<p>In recognition of the current procurement timeline potentially providing insufficient mobilisation time for a successful contractor between contract award and contract commencement it is prudent to seek to extend the current contracts for a short period relative to their total 14 year terms.</p> <p>Making this decision now, rather than when the procurement process has progressed further, enables potential bidders to know when the services are expected to start. A contract award date of July 2025 and a contract start date of 1st April 2026 will provide them with some comfort around having greater timescales for mobilisation, especially as legal requirements in respect of recycling will lead to high demand in the market for refuse collection vehicles and containers.</p>
PREVIOUS RELEVANT DECISIONS
Cabinet 26 July 2024, item A.6, minute number 35
BACKGROUND PAPERS AND PUBLISHED REFERENCE MATERIAL
Cabinet report, item A.6 26 July 2024 Update on Future Waste and Recycling and Street Sweeping Options. Related minute - number 35.

APPENDICES
None

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