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Report title: Residual Waste Services Procurement	
Report to: Cabinet	
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Date: 24 May 2022	For: Decision
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County Divisions affected: All Essex	

1. Everyone's Essex

- 1.1 Everyone's Essex sets out the Council's strategic purpose, including the aim of developing a high-quality environment. This includes a specific commitment to minimising the impact on the environment by supporting residents and businesses to reduce waste and increase the amounts recycled. Essex County Council are working closely with District, City and Borough Councils and contractors to better protect the environment by seeking to reduce our reliance on landfill and provide more sustainable services.
- 1.2 The purpose of this report is to seek approval to commence a new procurement for the treatment of Essex's residual waste to secure disposal arrangements that support the Everyone's Essex vision, particularly by encouraging disposal options that reduce greenhouse gas emissions and promote social value.
- 1.3 The new contractual arrangements will provide residual waste treatment and disposal services for approximately 350,000 tonnes of waste per annum. ECC has a statutory duty to dispose of the waste collected at the kerbside by Borough, City and District Councils and at Recycling Centres for Household Waste. The procurement will aim to provide best value to the taxpayer and encourage a greater emphasis on environmentally friendly disposal or treatment options for residual waste for a minimum seven-year period.

2 Recommendations

- 2.1 Agree to procure contract(s) for the treatment and disposal of Essex's residual waste at an estimated first contract year value of £45m and an estimated total value of £340m over the initial seven-year contract term.
- 2.2 Agree that the contract(s) will commence no earlier than 1 October 2023 and no later than 1 April 2024, with an initial term of seven years expiring on 31 March 2031, with an option to extend in any number of periods not exceeding a total of a further seven years.

- 2.3 Agree to use the Competitive Procedure with Negotiation and agree that the following award criteria is applied: 55% price: 45% quality, of which 5% of the quality score will assess social value.
- 2.4 Agree that the services will be procured in three lots accommodating a total of 350,000 tonnes capacity per annum. The total required capacity will be divided into three tonnage lots of 200,000, 100,000 and 50,000 tonnes per annum, each with a guaranteed minimum tonnage ("GMT") of up to 80% of their respective lot size.
- 2.5 Agree that the lots and associated contracts contain provision for the award of additional tonnage of up to 20% of the total tonnage.
- 2.6 Agree that the Cabinet Member for Waste Reduction and Recycling, in consultation with the Cabinet Member for Finance, Resources and Corporate Affairs, is authorised to award the contract(s) to the successful bidder(s) following completion of the procurement process, subject to the outcome being within budget.

3 Background and Proposal

- 3.1 Essex County Council ("ECC") is the statutory Waste Disposal Authority ("WDA") for Essex and is required to make arrangements for the disposal of local authority-collected waste. This includes residual waste, which is non-recyclable waste, typically comprising black bin waste collected by the Essex Waste Collection Authorities ("WCAs") and residual waste collected at Recycling Centres for Household Waste ("RCHW").
- 3.2 ECC and the WCAs provide extensive opportunities to help residents reduce their residual waste, recycle more, and reduce their carbon footprint, thereby contributing to our net zero target commitment as part of Everyone's Essex. Despite success of residents in this area, some residual waste remains and disposal or treatment of this waste is required.
- 3.3 As the Mechanical Biological Treatment facility that was intended to take all of ECC's residual waste is unavailable, it has been necessary for ECC to use contingency arrangements to meet its statutory responsibilities for waste disposal using a framework agreement that was set up for this purpose. ECC are no longer able to award contracts under this framework and the existing service orders expire on 31 March 2024, therefore a new procurement is required. The service orders in place under this framework agreement involve the landfilling of significant quantities of waste, which is an unsustainable solution in the long-term. It is ECC's desire to stop using landfill at the earliest opportunity and this procurement process will therefore be structured to encourage alternative solutions from the market to reduce ECC's reliance on landfill.

- 3.4 ECC will be undertaking this procurement in a challenging period for the waste treatment and disposal market. This is due to the national waste strategy that seeks to dramatically reduce reliance on landfill at a time when limited capacity exists at major waste treatment facilities in the South-East and East of England. In addition, the Environment Act 2021 recently received royal ascent, but the regulations to provide the detailed implementation of the policies facilitated by the Act are still to be finalised, which creates uncertainty around specific commercial risks.
- 3.5 ECC propose to use the Competitive Procedure with Negotiation (“CPN”) to procure these services. This is because the contract cannot be awarded without prior negotiation because of risks attached to the services that are being procured. These risks arise because delivery of the services is likely to be dependent on more than one technical service or solution and because of external factors that are likely to affect the specified outcomes. These risks, and the areas for negotiation, are detailed later in this report. The CPN process will enable ECC to set out the minimum requirements that must be met by all tenders, and to award a contract on the basis of the initial tenders but reserve the right to negotiate with bidders to improve defined aspects of their tender.
- 3.6 It is proposed that the CPN will be a three-stage process. The first stage will assess the suitability of bidders to ensure that they meet specific requirements and are able to perform the contract. The second stage will be the Invitation to Submit Initial Tenders. Following the receipt and evaluation of initial tenders, negotiation will take place with bidders on specific aspects of their bids to improve their content. Once negotiations are concluded, the Invitation to Submit Final Tenders will be published. Whilst it is proposed that ECC will conduct negotiations with bidders, ECC will reserve the right within the tender documentation to award contracts following receipt of Initial Tenders.
- 3.7 The procurement will focus on landfill diversion, and this will be incentivised through the evaluation criteria. This approach accords with the Essex Waste Strategy (2007–2032) which follows the principles of the waste hierarchy as defined in the Waste (England and Wales) Regulations 2011. However, due to the lack of residual waste treatment capacity in the market (particularly in the South and East of England), complete diversion from landfill cannot be guaranteed. It is therefore essential that ECC allows all types of waste treatment and disposal solutions to be proposed by the market to maximise price competition and to ensure that all tonnage requirements will be met. It is also recognised that bidders may need to design solutions that draw on different disposal or treatment techniques over the period of the contract to ensure the most sustainable and cost-effective approach.
- 3.8 The contract(s) will have an initial term of seven years with an option to extend in any number of periods not exceeding an extension period of seven years in total. This term is recommended as it provides a period of stability in residual waste treatment and disposal arrangements for ECC, whilst the impact of the Environment Act is resolved, and a revised waste strategy for Essex is developed and implemented. The market has also expressed a clear preference for contracts with a term of at least ten years and seven years is the

longest initial term that ECC is prepared to commit towards this desired position due to the likely outcome of the new Essex Waste Strategy that is currently being developed.

- 3.9 Within the CPN process, a limited number of areas for negotiation are proposed. A negotiation plan for each area will be produced as part of the procurement strategy for this contract. The areas for negotiation are shown in Table 1 below.

Table 1

Area for negotiation	Justification
Change in law and new taxes	Due to potential changes in legislation and the potential for new taxes, it is essential that ECC allow the optimum risk apportionment to be explored with bidders in order to provide the best value commercial position. Bidders seeking additional change in law or taxation protections will receive a lower quality score under the proposed tender evaluation methodology and will therefore need to offer an improved price to gain a competitive advantage in this area.
'Gainshare'	Certain solutions proposed by the market will generate income streams for the supplier such as the sale of electricity generated from the treatment or disposal of Contract Waste, sale of treatment capacity in situations where Contract Waste volumes drop below the guaranteed minimum tonnage levels, or from the sale of recyclates. It is expected that the gainshare proposals will enable ECC to enjoy the benefits of certain upside situations such as, by way of example only, significant increases in the value of electricity. All bidders will be encouraged to consider ways in which both sides can be incentivised to reduce costs or increase income to the benefit of both parties.
Compensation on termination	Termination provisions will be drafted as a base position with set triggers to enable ECC to exit the contract if a supplier is failing to adhere to certain performance conditions or meet the contract requirements. However, bidders may be concerned of the level of remuneration to ECC for compensation on termination for contractor default. This may result in their price not being optimised and could require negotiation of termination costs with bidders to achieve best value from a commercial perspective.

- 3.10 The division of the contract into lots of 200,000, 100,000 and 50,000 tonnes per annum over the contract period has been arrived at through market engagement. This will allow some smaller waste disposal providers and those running sites with limited capacity to bid for smaller packages of tonnage and

suppliers with more capacity to bid for the larger lots. Bidders may be awarded more than one lot and it is anticipated that this approach will achieve the best value for money for ECC and provide a deliverable solution. Those suppliers unable to offer the tonnage capacity for the required minimum seven-year period will be encouraged to form a consortium with another supplier(s). All contracts will run concurrently, and waste will be delivered in accordance with an annual tonnage delivery plan based on an anticipated weekly input so that suppliers are aware of when tonnage will be delivered.

- 3.11 The contract will include a guaranteed minimum tonnage (GMT) of up to 80% of the total tonnage for each lot. This has been used on previous procurements to reduce the contractor's volume-risk exposure arising from waste tonnage fluctuations. In the event that the tonnage drops below the GMT levels, the supplier will still be paid as if up to 80% of the lot tonnage had been delivered. There will be an opportunity for either ECC or the supplier to replace the shortfall tonnage through the 'substitute waste' provisions, which will be negotiated as part of the Gainshare approach under paragraph 3.9. The GMT provides a reliable monthly payment to the supplier(s) so that the necessary waste treatment and disposal capacity can be safely ringfenced for ECC. Bidders will be encouraged to submit their lowest possible GMT and this bid back will be scored as part of the quality evaluation. Each lot will also include provision for the award of additional tonnage of up to 20% of the total tonnage to allow ECC flexibility if tonnages increase in the future, due to pressures such as population and household growth. Any decision to deliver increased tonnages will be subject to a further Cabinet Member Action.
- 3.12 The payment mechanism will include measures to ensure the successful bidder(s) delivers on their proposed solutions. Bids will be evaluated on the whole system costs of the proposal, including associated haulage. There will be liquidated damages for the non-acceptance of waste and additional haulage costs to contingency sites that will keep ECC financially whole for any additional costs incurred. Financial deductions will also be levied for any under-performance against the Performance Management Framework for failures to achieve the recycling, recovery and carbon reduction targets guaranteed by the supplier(s).
- 3.13 The financial evaluation will include assessment of the gate fees provided by bidders and the distance from a central point in Essex which will be used to evaluate the haulage cost to nominated facilities to generate a whole system cost.
- 3.14 Bids will be evaluated with 55% of the overall tender weighting allocated to price and 45% assessing quality (of which 5% will assess social value). The proposed financial and quality weightings are aimed to keep gate-fees to a minimum yet ensure that the qualitative aspects of bidders' proposals have sufficient weight to meaningfully impact final tender scores.
- 3.15 The 45% quality weighting has been proposed to ensure that solutions are robustly tested and quality aspects evaluated, to avoid ambiguity and ensure clarity of the proposed solutions and associated risk transfer.

- 3.16 ECC's aspirations for carbon reduction and environmental improvement are reflected in the evaluation criteria, with the objectives of the Essex Climate Action Commission strategy being a key aspect of the procurement. The approach includes introducing a waste industry recognised calculator to enable bidders to estimate the greenhouse gas (GHG) emissions generated by their solution, reward greener solutions, and to track and hold suppliers responsible for the environmental impacts of their proposed solutions. The model outputs will be contractually binding and will be subsequently utilised by ECC to actively contract-manage emissions for the duration of the contract, with financial deductions being made at the end of each year where GHG emissions exceed the target values set by the suppliers. If a supplier exceeds their annual target by producing fewer tonnes of harmful emissions, they can carry-over the surplus emissions tonnage to offset in other years where they may have produced more. However, ECC will apply deductions if emissions are exceeded both in year and cumulatively over the length of the contract. At the end of the contract any financial deductions accumulated by ECC will be ring-fenced and channelled into carbon reduction or carbon off-setting projects (further details can be found in Appendix 2). This approach and awarding 5% of the total quality score to Carbon Management, made up of 4% of carbon outputs of the contract and a further 1% to supplier's organisational Carbon Reduction Plan commitments, further demonstrates ECC's commitment to net zero ambitions.
- 3.17 Social Value is also recognised as a key requirement for ECC, and proposals from suppliers to enhance the lives of the residents of Essex will be evaluated. The outputs will be monitored, and suppliers held contractually responsible for delivery throughout the lifetime of the contract through performance management.

4 Links to our Strategic Ambitions

- 4.1 This report links to the following aims in the Essex Vision:
- i. Develop our County sustainably
- 4.2 Approving the recommendations in this report will have the following impact on the Council's ambition to be net carbon neutral by 2030:
- i. This procurement actively encourages a non-landfill waste treatment solution.
 - ii. Bids will be evaluated according to their GHG (carbon) impact, including transportation to the disposal or treatment destinations.
 - iii. Social value measures, along with carbon-reduction targets, are embedded over the lifetime of the contract.

- 4.3 This proposal links to Everyone's Essex Strategy to deliver a high-quality environment, minimise waste, and contribute towards ECC's net zero carbon ambition. This links in with ECC's climate change aspirations by seeking to maximise energy recovered from the waste disposal process and reduce the amount of waste which goes to landfill. ECC will also evaluate innovation opportunities through tender submissions which may include potential gainshare opportunities and/or energy agreements with suppliers to further support circular economy.

5 Options

5.1 Option 1 – Procure contract(s) for the disposal of ECC's residual waste using the Competitive Procedure with Negotiation (Recommended):

- 5.1.1 This option is the recommended option and involves undertaking a three-stage procurement process using the CPN to appoint supplier(s) to manage the treatment and disposal of ECC's residual waste for a seven-year period with an option to extend for up to a further seven-year period. This term will allow time for the development and implementation of the new Essex Waste Strategy to cater for the long-term management of ECC's waste.
- 5.1.2 The approach will enable ECC to achieve its strategic objectives to meet statutory and local obligations by seeking greater landfill diversion and deriving best value from the contractual arrangements.
- 5.1.3 The use of the CPN will enable ECC to negotiate key aspects of the procurement with bidders to improve the content of the bids received. This will help ECC develop bids to achieve better value for money across the range of disposal technologies and bidder-specific situations present in the market.

5.2 Option 2 – Procure a new a Framework Agreement to procure a contract for the treatment and disposal of ECC's residual waste (Not recommended):

- 5.2.1 A re-procurement of a replacement framework based on the current arrangements or a redesigned version was considered. The current framework was procured to manage the disposal of residual waste and Mechanical Biological Treatment ("MBT") outputs arising during commissioning of the MBT plant which had an uncertain duration and potentially variable waste composition. This was a bridging solution to facilitate the disposal of this waste until the MBT plant was commissioned and an outlet for a solid recovered fuel of known quality could be procured. Therefore, the flexibility of a framework was required.
- 5.2.2 A disadvantage to a framework is that they are limited to a term of four years unless exceptional circumstances exist. Contractors have been very clear through market engagement that their preference is for contracts with a term of at least ten years, therefore framework contracts are unlikely to provide the

security sought by the market. This could lead to significantly reduced competition and leave ECC exposed to the risk of treatment capacity shortages in future years, meaning we are unable to fulfil our statutory responsibility as the Waste Disposal Authority for Essex. ECC is also effectively in competition with other WDAs who are offering contracts with longer durations.

5.3 Option 3 – do nothing (Not recommended):

- 5.3.1 This option is not recommended. Failure to procure a new contract would see the Council having to spot purchase capacity which would not provide best value to the taxpayer or provide longer term waste treatment or disposal security.

6 Issues for consideration

6.1 Financial implications

- 6.1.1 The financial evaluation of treatment and disposal options for Essex's residual waste must consider the whole system costs of any solution proposed via the procurement exercise. While the gate fee price per tonne offered by suppliers is one element of the cost of the solution, the cost to transfer and transport the material to the proposed facilities must also be considered. The transfer and transport costs will be derived from the new in-house integrated waste handling service as well as any 'tipping away' costs, where WCAs are asked to deliver material more than five miles from the WCA's border.
- 6.1.2 The whole system cost for residual waste currently runs at circa £46.4m per annum. This is split approximately £41m per annum on gate fees and landfill tax, £2.3m on tipping away payments to WCAs and £3.1m per annum on transport. The residual waste budget for 2024/25, when the contract is due to commence, is £51.1m. The increase mainly being in landfill tax (£3.4m), gate fee (£0.5m) and haulage (£0.5m).
- 6.1.3 The new contract(s) will aim to provide an economical and sustainable disposal option for residual waste. The existing framework does not provide adequate long-term capacity nor financial security.
- 6.1.4 The main financial risks of the procurement are:
- a) obtaining pricing within budget and subsequent inflation
 - b) fluctuations to the volume of tonnage
 - c) change in law risk
- 6.1.5 While treatment and disposal prices for residual waste have remained relatively constant in recent years and ECC would hope to leverage the best prices from the market, there is a risk that with the increasing scarcity of treatment and disposal capacity in the region, the procurement will lead to an increase in whole system costs. The payment mechanism will include annual inflation as it is seen as the best way to reduce risk pricing and will reflect the inflation

impacts on the activities carried out under each lot. The likely impact of indexation will form part of the price assessment in the final award.

- 6.1.6 Volumes of residual waste have remained reasonably constant over recent years, apart from during the pandemic. A GMT of up to 80% for each lot size is being offered to the market, which is designed to protect the authority for foreseeable volume reductions and to afford the contractor(s) a degree of commercial certainty. Bidders will be able to bid a lower percentage and be rewarded with a higher quality score. This will encourage competitive pricing. It is felt this is a reasonable offer and the risk of actual tonnage falling below that level is low. Tonnages are expected to remain consistent with current levels due to housing growth offsetting any increased recycling/recovery or diversion from the residual waste stream. In the unlikely event that tonnages fall below the GMT level, we will rely upon substitute waste provisions in the contract to mitigate our financial exposure.
- 6.1.7 There is a risk of cost increase due to changes in law over the term. It is proposed that ECC continue to take the passthrough cost of landfill tax, where relevant, but also the risk on the potential introduction of a tax on incineration, although this tax is not yet confirmed. This is felt to be the best way to avoid risk pricing at the tender stage for changes that may only happen later in the term, if at all. Other changes in law will be negotiated with bidders through the CPN process to ensure these risk positions align with the proposed solutions to provide best overall value and protection to ECC.
- 6.1.8 The tender will ask for gainsharing proposals from the market to establish the potential for cost-reduction from performance or operational impacts that are better than those forecast at the time of the tender. For residual waste treatment and disposal, this may be most likely focussed on the solutions which include energy-production but it may not be limited to these.
- 6.1.9 The opportunity cost of running this procurement will be met from existing service budgets, including support services.

6.2 Legal implications

- 6.2.1 ECC is the Waste Disposal Authority for the County of Essex under Section 51(1)(a) of the Environmental Protection Act 1990 and has a statutory responsibility to arrange the disposal of local authority collected waste, which includes residual waste arising within Essex.
- 6.2.2 ECC is a Contracting Authority for the purposes of the Public Contracts Regulations 2015 (the "Regulations") and is required to comply with the provisions of the Regulations when purchasing goods or services with a value in excess of £213,477 (including VAT).
- 6.2.3 The Regulations stipulate that Contracting Authorities must utilise one of the procedures detailed within the Regulations when purchasing goods or services above the threshold. One of the permitted procedures is a Competitive Procedure with Negotiation.

- 6.2.4 Regulation 26(4) enables Contracting Authorities to use the Competitive Procedure with Negotiation when contracts cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity or the legal or financial make up or because of the risks attached to them. The use of the Competitive Procedure with Negotiation is proposed because of the nature and complexity of the solution and the risks attaching to them.
- 6.2.5 It is important the minimum requirements to be met by all tenders are clearly stated in the procurement documents. The minimum requirements and the award criteria must not be subject to negotiation. ECC must ensure equal treatment of all bidders throughout the process including notifying all tenderers who have not been eliminated before negotiations commence of any changes to the technical specifications or other procurement documents.
- 6.2.6 The issues to be negotiated with bidders should be clearly defined to prevent delay and additional costs in the procurement process. Negotiation must improve the content of the tenders. There can be no negotiation on the final tender.
- 6.2.7 ECC may wish to award contracts on the basis of initial tenders without negotiation, this is permissible provided that the right to do so is included within the published Contract Notice.
- 6.2.8 Contracts must be awarded on the basis of the most economically advantageous tender and qualitative, environmental and/or social aspects should be linked to the subject matter of the contract.

7 Equality and Diversity implications

- 7.1 The Public Sector Equality Duty applies to the Council when it makes decisions. The duty requires us to have regard to the need to:
- (a) Eliminate unlawful discrimination, harassment and victimisation and other behaviour prohibited by the Act. In summary, the Act makes discrimination etc. on the grounds of a protected characteristic unlawful
 - (b) Advance equality of opportunity between people who share a protected characteristic and those who do not.
 - (c) Foster good relations between people who share a protected characteristic and those who do not including tackling prejudice and promoting understanding.
- 7.2 The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, marriage and civil partnership, race, religion or belief, gender, and sexual orientation. The Act states that 'marriage and civil partnership' is not a relevant protected characteristic for (b) or (c) although it is relevant for (a).

- 7.3 The equalities comprehensive impact assessment indicates that the proposals in this report will not have a disproportionately adverse impact on any people with a particular characteristic. This is because the decisions required are to launch a procurement. The award of any resulting tenders will be the subject of a separate decision.

8 List of appendices

- 8.1 Appendix 1 - Equalities Comprehensive Impact Assessment
- 8.2 Appendix 2 - Carbon reduction plan and carbon quality evaluation

9 List of Background papers

- 9.1 None declared.