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Report title: Integrated Waste Handling Service Delivery Options	
Report to: Cabinet	
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Date: 16 February 2021	**For:** Decision
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County Divisions affected: All Essex	

Confidential Appendix
This report has a confidential appendix which is not for publication as it includes exempt information falling within paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972, as amended.

1. Purpose of Report

1.1 To provide detailed information (as noted at Cabinet on 24 November 2020) about the arrangements for Essex County Council (ECC), as the Waste Disposal Authority (WDA), to ensure suitable arrangements for the disposal of certain wastes and the provision of recycling centres.

1.2 To seek approval of the recommended delivery model for the operation of the Recycling Centres for Household Waste (RCHW) and Waste Transfer Stations (WTS) to replace the current Integrated Waste Handling Contract (IWHC).

2. Recommendations

2.1. Agree that, after the expiry of the current contract on 31 March 2022, ECC assumes responsibility for operating the RCHW and WTS service using an in-house delivery model.

2.2. To delegate to the Cabinet Member for Environment and Climate Change Action, in consultation with the Cabinet Member for Finance, the approval of the additional resources and structure changes required to deliver the in-house delivery model.

3. Summary of issue

3.1. ECC, as WDA for Essex, must provide RCHW services, and ensure that suitable arrangements are in place to treat and dispose of all Local Authority Collected Waste (LACW). Such waste arises from the kerbside waste collections undertaken by the Essex Waste Collection Authorities (WCAs) and from the RCHWs. As part of this service, ECC provides WTS's where LACW is bulked for more efficient onward transport.

3.2. The current IWHC delivers the following core waste service elements for ECC:

a) operating and maintaining ECC's RCHW network
b) operating and maintaining ECC's WTS network
c) treatment and disposal of waste deposited at the RCHW (excluding residual and garden waste)
d) bulk haulage of waste from waste transfer stations to treatment and disposal facilities.
e) haulage of residual and green waste from RCHWs.

3.3. On 24 November 2020 (and as recorded in decision FP/803/09/20), Cabinet decided that:

i) after the expiry of the current contract on 31 March 2022, ECC will assume responsibility for operating RCHW's and WTS's using a Hybrid Sourcing Model. This will include the direct delivery of the service by ECC with haulage, plant and equipment and the marketing of materials being procured for delivery by contractors.

ii) the Director, Environment and Climate Change Action will undertake a detailed appraisal of options for the delivery of the RCHW's and WTS's and a recommended approach for delivery will be brought back for a further decision by Cabinet in 2021.

3.4 This paper outlines the detailed appraisal of the delivery options for the insourced service from April 2022.

3.5 The future operating landscape for the service is uncertain with emerging national policy, legislation and European Union Exit. These combined with ECC's long term waste treatment challenges will require the service to be as agile as possible.

3.6 The delivery model will need to adapt to changing waste compositions, fluctuating markets and customer behaviour. These are looked at in more detail in Appendix 3, but it is important to retain tight direct control of the service to maximise flexibility and ensure that ECC meets evolving needs and deliver value for money services.

3.7 ECC have identified two viable operating models for the insourced operation of RCHW's and WTS's through a process of internal analysis and review of other local authority approaches. These two models were subject to qualitative and quantitative reviews to identify a recommended approach to future service delivery. The reviews considered a number of factors including flexibility, deliverability, future fit with ECC ambitions and services, emerging national policy, changing public behaviour and current service operations. These delivery models are:

a) In-house
b) Local Authority Trading Company

In-house

3.8 As a WDA, the Council is empowered to arrange itself to directly provide the statutory waste disposal services required by s51 of the Environmental Protection Act 1990 rather than do so via an external operator.

3.9 An in-house model involves the operation of the RCHWs and WTSs being directly delivered by ECC with all staff transferring into ECC on existing Terms and Conditions (T&C's) as required by legislation. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) would apply.

3.10 Once all staff are transferred in, ECC may offer access to the Local Government Pension Scheme (LGPS) and Essex Reward Gateway, although TUPE would not require this. This is likely to increase cost if a future decision is taken to outsource the service as employees transferred out of ECC in the future would retain access to the LGPS. However, the analysis of the market in Appendix 3 suggests that a value re-procurement in the short to medium term is unlikely due to a lack of competition, a change in supplier focus and the fact the ECC would lose the operational benefits that the in-house service would offer.

3.11 Any new staff engaged by ECC either prior to or post transfer would be employed on ECC T&C's (which includes access to the LGPS) and other benefits open to ECC employees. This could lead to disparity in the terms and conditions of employees who transferred over as compared to new staff. Any decision to harmonise the terms and conditions of the workforce so as to ensure parity would need to be handled carefully and pursuant to legal advice. Any decision to change the terms and conditions of transferring staff could potentially be a breach of TUPE regulations, even when the terms are more beneficial. However, it seems unlikely that transferring staff would object, although they would need to be consulted. As regards new staff, in the unlikely event that their terms and conditions (and those of pre-existing ECC staff) are less favourable by comparison, ECC would run the potential risk of an Equal Pay claim and ECC would need to evidence that the difference is not directly or indirectly discriminatory.

3.12 The key benefit of this option is that ECC will retain complete control over the service using existing governance to adopt an agile decision-making approach to change policy and operational practice to meet evolving need and legislative pressures.

Local Authority Trading Company (LATC)

3.13 ECC under the Localism Act 2011 has a power to do anything that individuals generally may do, subject to certain exceptions (the general power of competence). The LATC would be set up under the general power of competence and other relevant statutory provisions.

3.14 A LATC would be established to deliver the same services as the in-house model but would deliver this via a trading company. The initial setup costs would be higher due to setting up separate systems for the company. All staff would be transferred into the company on their existing T&C's and TUPE would apply. However, unlike the inhouse model, the LATC could establish their own T&C's/policies for new staff rather than use ECC's. The new T&C's and policies for any new staff would need to be similar to the provision for existing staff including an equivalent pension arrangement to ensure equity.

3.15 ECC would be able to make a direct award to the LATC by virtue of Regulation 12 of the Public Contracts Regulations 2015 (Teckal exemption) and would not be required to undertake a procurement exercise prior to this award.

3.16 The Teckal exemption applies where a contracting authority contracts with a company that the authority has set up and observes the strict limitations on trading with third parties. However, the company would need to follow public sector procurement rules in letting its own contracts. There are conditions that must be satisfied to comply with this exemption, which are summarised in Appendix 3.

3.17 The timescales involved in setting up a LATC that is fully aligned with ECC's systems and governance represents a significant risk, as it could take up to two years to fully implement and may not be ready for service implementation in April 2022. This may also bring additional unknown costs, as emergency arrangements could be required to ensure the management of the service in the interim and that all staff can still be transferred.

3.18 The delivery vehicle for the LATC would either be a Limited Company (Ltd) or a Limited Liability Partnership (LLP) and the key differences are shown in Appendix 3. There is little between the options as the tax liabilities are similar and the current commercial environment means that there is limited ability to trade externally. However, an LLP would provide more security over potential Corporation Tax implications.

3.19 This option would still enable ECC to retain control over the service, but there would be an extra layer of governance requirements with a company board. The services of the LATC could be offered to other authorities in the future, but it should be recognised that trading in the current waste market would be challenging and the company would be likely to lose any Teckal status, so it would then need to bid for any work with ECC. The LATC would not be guaranteed to win the contract to deliver the service.

Evaluation of Model

3.20 To arrive at the recommended approach, officers evaluated the options using qualitative and quantitative techniques, which are outlined in detail in Appendix 3.

3.21 The qualitative and quantitative evaluation undertaken has assumed that the in-house model transfers eligible staff directly into ECC and the LATC would transfer staff into the new company.

3.22 Both options deliver savings against a re-procured service. The LATC cost is anticipated to initially be marginally lower. However, the operational and reputational risks surrounding setting up and running a new company do not justify this marginal saving.

3.23 Both options may have an adverse impact on ECC's insurance premiums if insurers consider that this affects the risk profile of ECC's activities. However, the LATC would be more significant, as finding insurers that will provide suitable cover has been challenging in other areas, where this approach has been adopted.

3.24 The delivery models for both the In-house and LATC options are complex and have been investigated and assessed by ECC Officers in the Organisational Development and People (ODP), Finance, Legal and operations specialists.

4 Options

4.1 The following analysis identifies the key benefits and risks surrounding the two delivery options for managing the insourced RCHW and WTS service to inform the recommendation within section 2.

Option A (recommended): In-house Model

4.2 This approach is recommended as it is best placed to provide ECC with full control of key operational elements of the frontline services to residents and delivers the following benefits:

- Maximum control and agility to ECC during period of service change and uncertainty.
- Greater opportunity to align the service with the priorities and values of ECC ensuring whole system benefits are maximised.
- Flexibility to explore options for waste diversion and reuse, which could generate savings and improve performance.
- Improves motivation of staff by embedding them into ECC with the potential of additional benefits offered by the LGPS and Essex Reward Gateway.
- Greater opportunity for working with other ECC departments to deliver innovation and make best use of assets.
- Reduced delivery risk.
- Lower insurance risk through using ECC existing arrangements.
- Reduced cost of capital to establish new service.

4.3 If ECC had an Economic, Technical or Organisational (ETO) reason to consider harmonisation of T&C's for the incoming staff to their benefit this would need to be carefully managed to comply with TUPE requirements.

4.4 LGPS may be offered as staff transfer into ECC and any new staff would be employed on ECC T&C's. This offer would increase the cost of TUPE obligations if future re-procurement of the service is considered.

4.5 The results of the qualitative and quantitative evaluations indicate that this model can offer maximum flexibility and agility with a marginally increased cost over Option B. The financial implications of the options can be found in the Confidential Appendix.

4.6 Further detail on both risks and opportunities of this model are provided in the qualitative evaluation and the risk log in Appendix 3.

Option B (not recommended) – Local Authority Trading Company

4.7 This option is not recommended. The LATC would have a marginally lower cost and many of the same benefits as the in-house option. However, this option carries a higher insurance risk. There is also a high risk for the service implementation in April 2022, as this is a challenging timescale for the model.

4.8 A LATC requires the formation of a Board, in-turn introducing an additional layer of governance over the in-house option. The Board are required to demonstrate the viability and operation of the company and these obligations may limit service options that Members may choose to implement.

4.9 In establishing a LATC there needs to be key drivers and a benefit is the commercial flexibility. However, opportunities at this time to trade outside of ECC are limited. There is huge variability in operational models with other authorities, whilst operating within the parameters of providing subsidies to corporate entities (previously known as state aid). This results in the LATC only working for ECC and therefore there is no benefit to a profit-based model.

4.10 Support services for a LATC would also be needed to ensure legal compliance and new systems would be required from procurement and finance perspective.

4.11 A LATC would require a significant amount of working capital to establish. ECC would need to comply with the subsidy rules whilst providing prudential borrowing to the company. It is envisaged a market rate for borrowing would need to be adopted by an uplift in interest rates to ensure compliance.

5 Next Steps

5.1 Following the Cabinet decision, the mobilisation of the delivery model will commence immediately with various workstreams including Human Resources, Governance, Operations, Procurements and Technology services.

5.2 To manage the implementation of the service additional resource has been identified within the financial model. The recruitment of two ODP Officers, a

Project Manager and a part time Technology Business Analyst are recommended. This resource would be required for either option, so costs have been factored into the Financial Model and a separate Cabinet Member Action have been prepared to facilitate this.

5.3 The integration of new staff into ECC may require structural changes and further work will be completed in preparation of the transfer to ensure that incoming operational, contract management and administration staff align with the existing Waste Operations Team to deliver the In-house delivery model.

5.4 A project board has already been established to manage the project and this will ensure that all key milestones and risks are managed throughout the mobilisation process.

6 Issues for consideration

6.1 Employment Implications

6.1.1 TUPE will apply to either option. At this early (options) stage only indicative due diligence can be undertaken upon information provided by the Contractor in accordance with the contract terms. All modelling (including financial) has been undertaken based on the information provided by the current contractor to date and any outlined assumptions. Any associated benefits / risks should be considered in the same context.

6.1.2 Good workforce culture is a key to the effective and efficient delivery of such transfers. This would be key for both options, so supporting the change and transition into the new organisation structure will be essential.

In-house

6.1.3 The staff currently employed by the contractor are committed to the delivery of services which ECC provides to residents. However, such staff transfers may lead to increases in staff costs. These have been carefully assessed from a financial perspective. As the new employer ECC would be required to take on eligible employees on their existing T&C's and would be prohibited from making any changes to these T&C's for the transferred employees if the sole or principal reason for the variation was the transfer. However, changes to the workforce can be made when there is an ETO reason.

6.1.4 ECC policies and systems for payroll, recruitment and learning and development could be adapted for any transferred staff.

LATC

6.1.5 TUPE would still apply to the LATC and employees would transfer in on their current T&C's and the LATC would still need an ETO reason to make any changes to the workforce or to their terms and conditions as a whole.

6.1.6 The LATC would likely want to create their own people policies and terms and conditions rather than use those of ECC. Whilst establishing new policies would be time consuming, it would protect ECC against the potential costs of Essex pay.

6.1.7 The LATC would require the setup of new systems for payroll, recruitment and learning and development.

6.1.8 Background information and additional detail of the identified employment and people implications relating to TUPE are highlighted in Appendix 3 section 7.

6.2 **Financial implications**

6.2.1 The Hybrid Sourcing Model recommendation will require Capital Expenditure, which has been factored into the financial model. An analysis and business case will be brought forward once quantified to add this to the capital programme.

6.2.2 The financial modelling for the in-house option assumes the worst-case scenario from a financial perspective, where all staff could be harmonised onto ECC T&C's, including 100% sign up to the LGPS. The modelling for the LATC assumes that all staff stay on current T&C's and retain access to an equivalent pension scheme.

6.2.3 The current Medium Term Resource Strategy (MTRS) 2020/21 contains an increased expenditure post April 2022 for a new contractual provision of £765,000 per annum, against an average annual contract spend of c.£12.8m. There is currently no capital provision allocated for the proposed capital requirement as per table 1, in the confidential appendix ranging from £3.4m to £7.5m dependant on procurement options post tender.

6.2.4 Taking the midpoint of the analysis in the table for the in-house position this would instigate a further budget pressure of c.£1.24m which is not included in the MTRS at the current time, from April 2022 including the cost of capital. This includes c.£250,000 of project costs, (surveys/implementation fees) prevalent to the successful project delivery. The service will seek to contain the increase in costs through service transformation initially or, subject to governance, would propose to be met via the Waste Reserve as a last resort if containment was not possible and other funding sources were not identified.

6.2.5 The results of the financial modelling indicate that the in-house option delivers the best value for money in terms of mid-point delivery and net present value (NPV). The LATC option is marginally less beneficial and contains significant implementation risk in the delivery timescale.

6.2.6 **Financial Risks**

6.2.6.1 **Price**
All references to the prices have been supplied as part of the market testing and information gathering carried out during the summer of 2020. Should the

procurement generate a different level of lease and capital costs, or should the attractiveness not generate a sufficient competition from that provided as part of this exercise from either a move in the market, or deliverable third-party capacity (e.g. Covid Restrictions/EU Exit), then the information compiled in this document would need to be subject to re-evaluation.

6.2.6.2 **Macro-Economic Risk**

All reference prices have considered indexation within the procurement. The model has recognised this throughout the modelling and assumed an indexation level of 2.5% annually throughout the term. No assumptions have been modelled around currency exchange rate changes or EU Exit risk.

6.2.6.3 **Staff**

Staff costs have been modelled over several scenarios and conceptual designs in order to run the service as effectively and efficiently as possible. ECC's ODP service have been consulted and approved the methodology applied throughout the scenarios modelled. Final TUPE information would not be available until 28 days before the transfer, although the contractor is required to provide initial information through the existing contract.

6.2.6.4 **Operating Vehicle**

The scenarios demonstrated within this report assume full integration of some staff into the ECC current staffing structure or a separate LATC. Officers will continue to evaluate the TUPE implications and procurement options under the Hybrid Insourcing Model to ensure risk mitigation and cost efficiency

6.2.6.5 **Model Assumptions**

The project has been modelled on a like for like basis with the same service offering as today.

6.2.6.6 **Financial Summary**

This paper is based upon assumptions gathered throughout the business case review to source a more financially viable, flexible, and sustainable delivery vehicle for the operation of the RCHWs and WTSs operations. The service operation team have been consulted in detail on the modelled assumptions, staff, plant/equipment requirements, and operational costs, approving the model. The continued aim to reduce the impact of costs on the taxpayer drives the financial conclusion, subject to deliverability, affordability and risk mitigation.

The options reviewed are outlined in section 4.

6.3 Legal implications

6.3.1 The provisions of TUPE must be considered and adhered to when in-sourcing the service or taking the service into an LATC. This includes recognition of the existing T&C's for eligible employees.

6.3.2 By taking direct responsibility for this large physical operation ECC will have the primary duty for the health and safety of employees, customers and visitors at the site. Proper procedures must be in place for a safe system of work and all applicable laws must be observed.

6.3.3 By taking direct responsibility for this operation, ECC will also have the primary duty for the lawful operation of the services and site. All necessary licensing and permits must be obtained and applicable laws observed.

6.3.4 Any reform of local government is likely to impact both options considered in this Report.

7 Equality and Diversity implications

7.1 The Equality Act 2010 and 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 equality impact assessment indicates that the proposals in this report will not have a disproportionately adverse impact on any people with a particular characteristic.

8 List of appendices

Appendix 1 - EQIA
Appendix 2 - Confidential Appendix
Appendix 3 - Evaluation

9 List of Background papers

- November Cabinet paper - Integrated Waste Handling Contract Service Delivery (FP/803/09/20)
- IWHC Qualitative Options Appraisal
- IWHC Financial Model
- Records of the market engagement exercises.