



Derby City Council

COUNCIL CABINET
12 September 2018

ITEM 14

Report of the Strategic Director of Communities
and Place

Variation to Waste Disposal Contract

SUMMARY

- 1.1 Dry recyclables collected from residential property across the city are disposed through a specialist waste disposal company. This report sets out pressures on the recyclable market, created in part by the fall in the demand for such material from China.
- 1.2 The report recommends changes to the contract in the form of increased costs that will ensure that the contract remains in place and continues to provide the Council both will access to disposal facilities and at a cost which represents value for money.

RECOMMENDATIONS

- 2.1 To approve the variation to the current disposal contract which is in place until 31 March 2020.
- 2.2 To backdate the variation of this contact to 1 February 2018.
- 2.3 To approve the use of Budget Risk reserve to support the uplift in costs in 2018/19 with future year pressures to be considered in the Medium Term Financial Plan 2019/20 – 2022/23 process.

REASONS FOR RECOMMENDATION

- 3.1 The amendment to the current contract is considered to offer best value to the Council.

SUPPORTING INFORMATION

- 4.1 The UK, in common with most developed countries, has evolved a recycling industry which has been underpinned by demand from China for recycled commodities for use as raw materials. Figures vary but it is estimated that as much as 70% of the UK's fibre and plastic recycling is reliant on demand from China. Therefore any interruption to that supply has serious consequences for the market. China has recently introduced a form of control on the importation of mixed plastics and changes to the importation of recycled fibre which have had a significant impact on the recycling market across Europe.
- 4.2 The current contracted service always envisaged producing a mixed paper for export to China. The sorting facility was set up to accord with previous quality standards and with the contract applying with a fixed gate fee for all materials delivered by the Council. Given the change in the position adopted by China it is no longer possible to supply mixed papers into China in line with previous amounts. To comply with the new contamination threshold an additional sorting process is required to be implemented in order to enable the movement of the paper stream to continue.
- 4.3 Officers met with the disposal contractor in February and again in March 2018 to understand the changes that the contractor needed to make to their operations and to scope out whether the cost of such changes could or should be passed to the Council. The changes required were unforeseen at the point both parties entered into the contract. It was indicated at this point that if the Council were not willing to support them financially then they may seek to terminate the current contract.
- 4.4 Due to additional processing costs to enable the movement of the recycled paper, a request was made to vary the current contract and increase the amount paid per tonne. This variation is requested for the remainder of the current contract which is until 31 March 2020.

OTHER OPTIONS CONSIDERED

- 5.1 Not accepting the request to vary the current contract could result in the current contractor walking away which would leave us with no outlet for dry recyclable material. If this happened we would have to procure a new contract and, considering the rates currently paid by other authorities, it is envisaged this could cost the authority considerably more than the additional cost that has been negotiated.
- 5.2 A further option which is being considered, but which is not a quick solution, is to change the way we collect our dry recyclables and to reduce the need for additional sorting materials which would help us have a more sustainable and lower cost position. This work is being progressed in partnership with other Derbyshire authorities who are also reviewing their waste collection arrangements. The results of this work will be reported in due course and may offer alternative solutions for the future and beyond March 2020.

This report has been approved by the following officers:

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| Legal officer | Richard Burton |
| Financial officer | Amanda Fletcher |
| Human Resources officer | N/A |
| Estates/Property officer | N/A |
| Service Director(s) | David Gartside, Acting Director Partnerships, Planning, Transportation & Streetpride |
| Other(s) | Linda Spiby |

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| For more information contact: | Simon Aitken 01332 641506 simon.aitken@derby.gov.uk |
| Background papers: | None |
| List of appendices: | Appendix 1 – Implications Appendix 2 – Private and Confidential information to support the report |

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| IMPLICATIONS |
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Financial and Value for Money

- 1.1 There currently isn't any budget available to support the variation to contract. The report asks for approval to use Budget Risk reserve with future year pressures to be considered in the MTFP process.

Legal

- 2.1 It is arguable whether the contractor can require the Council to vary the existing contract or not. Clause 10 of the contract states that:

"If an unforeseen fundamental change of circumstances arises of such a kind that it is no longer practical to operate the Contract according to its terms, either party may require such minimum variation in the Contract as will enable the Service to be provided for the remainder of the Contract Period in accordance with the fundamental purpose of the Contract."

- 2.2 The change of policy in China was unforeseen (especially at the time that the contract was entered into in September 2004). The contractor will argue that the change in circumstance is fundamental as it is no longer practical to operate the contract because of the increase costs associated with disposing of waste in China.
- 2.3 The counter argument is that the Contract does not require the contractor to dispose of waste in China; the contractor is simply required to *"take delivery of the co-mingled materials, sort them and then bale, compress or treat them..."* The changes in China do not create any practical impediment to the contractors' ability to perform this obligation and so it may be argued that clause 10 does not bite. If there is any ambiguity about this, clause 2 of the contract states that the ambiguity shall fall to be determined by the Council's Authorised Officer.
- 2.4 If the Council does not agree to the variation, there is a risk that the contractor will walk away from the contract, regardless of whether it has a right to do so or not. The Council will then need to decide whether to sue the contractor for breach of contract and will need to make alternative arrangements for the collection of co-mingled material in the meantime. Those alternative arrangements are likely to significantly exceed the costs under the current contract (even after the proposed variation). Although those costs would be recoverable in the event of the Council successfully suing the contractor, we cannot guarantee the outcome of any litigation. Further, any litigation is likely to take a considerable time and involve significant legal costs.

- 2.5 If the Council decides to agree to the variation, it may proceed on the basis of Regulation 72(3) of the Public Contracts Regulations 2006, which allows modifications to contracts where all of the following conditions are fulfilled:
- (i) The need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen
 - (ii) The modification does not alter the overall nature of the contract
 - (iii) Any increase in price does not exceed 50% of the value of the original contract or framework agreement.

Proceeding on this basis is consistent with the Council's Contract Procedure Rules (CPR) as this change falls within Rule 44.1.3 (Ground 3) of CPR (which reflects Regulations 73(3)).

Personnel

3.1 None.

IT

4.1 None.

Equalities Impact

5.1 None.

Health and Safety

6.1 None.

Environmental Sustainability

7.1 None.

Property and Asset Management

8.1 None.

Risk Management and Safeguarding

9.1 Identified risks have been addressed within other sections of the report and will be monitored on an ongoing basis through our department risk register.

Corporate objectives and priorities for change

10.1 None

