

Date - 16 June 2017
Report of the - Lead Director, Dr Anthony Leonard
Subject - Draft Inter Authority Agreement

Recommendation: It be RESOLVED: That:

- 1) Eastbourne Borough Council, Hastings Borough Council, Lewes District Council, Rother District Council and Wealden District Council formally sign the Inter Authority Agreement no later than 30 June 2017 and proceed with the joint procurement of Waste, Recycling and/or Street Cleansing Services; and
 - 2) each Council committing to the procurement, fund an equal share of the total cost.
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Introduction

1. Following on from the Mutual Exit Agreement with Kier it is necessary to progress the work required to procure a new contract which must commence on 29 June 2019. The councils who are members of the Joint Waste Partnership (JWP) have been considering their options and now need to take decisions which will allow officers to proceed with the procurement of the service required. It is therefore necessary to re-visit the Inter Authority Agreement (IAA) to set the legal position and commitments from each Council at the beginning of the procurement process.
2. The IAA is principally aimed at creating a binding legal relationship between the councils as a basis for undertaking the procurement exercise with a view to jointly appointing a contractor for the delivery of waste services.
3. Contractors actively seek this type of legal agreement between councils so that they have certainty that each council is committed to proceeding with the procurement. This is an important consideration for contractors because their bidding teams incur considerable time and cost while participating in procurement processes. It is therefore in the Councils' best interests to provide such reassurance and seek interest from as many contractors as possible.
4. By creating a legal relationship between the councils, the councils will be demonstrating their commitment to the joint procurement process. This will ensure that the appropriate levels of financial and staff resources are in place to deliver the procurement project, and sets out a clear mechanism for cost recovery should any council subsequently withdraw from the procurement. Appendix 1 provides a draft copy of the IAA.
5. The IAA can only be finalised when the number of parties to the Agreement are known and approval for the procurement process and associated cost

forecasts are in place. Since concluding that a mutual exit should be sought from the current contract (Minute JWC16/11 refers) each Council has been considering their position with regard to the future delivery of waste services and membership of the JWP. To conclude these matters and enable officers to progress the procurement work Eastbourne Borough Council, Hastings Borough Council, Lewes District Council, Rother District Council and Wealden District Council are invited to confirm their commitment to participating in a joint procurement project with the future intent of a joint contract (subject to successful procurement). To meet the recommended procurement each Council is asked to confirm their position in writing to the Partnership Manager by 30 June 2017. The Project Management and Resources report, also on this meeting agenda, seeks approval for the procurement procedure to be used, the timetable and the procurement cost plan which will form Schedule 2 to the IAA.

6. Members are reminded that the IAA created in 2011 expired upon completion of the procurement project and was succeeded by the Joint Waste Contract. Each Council's participation in the JWP is therefore established through participation in the Joint Waste Committee (JWC) and the terms of the Joint Waste Contract. As such, each Council has been acting within agreed budget and policy approvals and is therefore advised to consider its own constitutional requirements with regard to budget and policy approvals if it wishes to withdraw from the JWP when the current joint Contract ends on 28 June 2019.
7. It should be noted that the current JWC constitution (Schedule 3 of the IAA) has enabled the councils to jointly consider performance and service related activities together. If one or more councils leave the JWP then further work will be needed to determine what changes to the JWC constitution are required to allow matters pertinent to the current contract to be considered separately to the decisions needed for procurement.
8. The draft IAA details the various legal provisions that are proposed for this arrangement. The provisions are standard to agreements of this nature and are designed to set out the basis of the legal relationship. As well as standard terms, the agreement deals with matters that have already been considered and established through operation of the JWP since 2011. So for instance, it confirms the administering authority, the duration of the agreement, the joint committee and delegation arrangements, the project team and so forth.
9. The most significant aspects of the agreement relate to the costs arising from the procurement project as the costs in themselves are significant and it is proper that the legal agreement enshrines how the costs will be distributed between the parties.
10. The resources required for the procurement project and associated cost forecast are the subject of another report on this meeting agenda (see paragraph 5 above).
11. There are always risks attached to a sizeable project of this nature. One of the most significant risks is that one of the councils withdraws from the project at a point after the commencement of the procurement process but prior to the award of the contract. This is a key risk which could require re-starting the procurement and would certainly result in increased procurement costs being apportioned to the remaining councils. Similarly, a withdrawal of one or more

councils could result in a challenge from one of the ultimately unsuccessful companies, or alternatively may result in increased contract costs for the remaining councils.

12. A clause has therefore been included in the draft IAA (Clause 9.2) to provide financial comfort to the remaining councils should such a risk materialise. Given the potential significance of this issue, Members of the JWC are being asked to consider this clause and the definition of loss to ensure that it covers all areas of loss and damage that the councils would expect to see included.
13. In relation to how the clause is drafted, contracts cannot provide for a pure financial 'penalty' rather they need to demonstrate that the other parties to the contract are being recompensed for losses that the parties are able to ascertain in advance of the loss being incurred. The level of damages needs to be based upon a reasonable assessment of the type and value of the loss or additional expenditure that is likely to be incurred due to one of the councils withdrawing.

Conclusion

14. In preparing a revised draft IAA the aim has been to create a document that provides a fair and equitable legal basis to govern the delivery of this procurement project. The document will be refined pending confirmation of which councils are committed to the procurement being planned.
15. The most significant issue to conclude at present is the number of councils who will be party to the IAA. The recommendations of this report therefore seek the commitment of each Council to proceed with the joint procurement of Waste, Recycling and/or Street Cleansing Services by the signing of the IAA. If an Authority does not confirm their commitment by 30 June 2017 then the procurement will proceed on the basis they are not included in the tender process.

Dr Anthony Leonard
Lead Director

Risk Assessment Statement

The Inter Authority Agreement seeks to create a legal basis to govern the relationship of the parties to the procurement project. In doing so, it seeks to manage and reduce the risks to the parties by seeking commitment from the parties to this process and by imposing a financial clause should a party subsequently withdraw. In doing so, it is expected that this will reduce the risks associated with this project and ultimately make it more appealing to the market place.