

Cabinet

3 March 2015

Report of the Director of City and Environmental Services and the Director for Customer and Business Support Services from the portfolio of the Deputy Leader and Cabinet Member for Communities

Yorwaste Limited and Implementation of the Teckal Exemption

Summary

1. The purpose of this report is to update Cabinet on progress made towards enabling the award of contracts for the provision of waste services to Yorwaste Limited without competitive tender. This is proposed to be achieved by implementing the 'Teckal exemption', and to seek approval to undertake the required actions to facilitate Yorwaste Limited in meeting the conditions required to achieve Teckal status.

Recommendations

2. The Council is asked to confirm:
 - (i) The City Council is supportive of the County Council's recommendation to its Executive that the County Council takes the steps necessary to facilitate Yorwaste Limited's obtaining Teckal compliant status.
 - (ii) That delegated authority be given to the Director of Customer and Business Support Services (acting in consultation with the Director of City and Environmental Services and the Assistant Director (Governance & ICT) to:
 - to adopt new articles of association(as a shareholder of Yorwaste Limited) to evidence the control condition;
 - enter into a Shareholders Agreement with Yorwaste Limited and NYCC to evidence the control condition;

- enter into a non binding collaboration agreement with Yorwaste Limited and NYCC and other such documents as necessary;
- take such steps and enter into such documents as necessary to approve the transfer of the shares of SJB Recycling Limited once satisfied that due diligence is complete and legal and financial advice has been provided identifying the most appropriate route;
- take any ancillary steps necessary to meet the control condition or the economic dependence condition required to assist Yorwaste Limited in achieving Teckal compliant status; and
- award future waste management to Yorwaste Limited without the need for a competitive procurement exercise if the tests required to make use of the Teckal exemption have been satisfied.

Reason: In order to facilitate Yorwaste Limited meeting the control condition and the economic dependence condition required to utilise the Teckal exemption thereby enabling the Council to award contracts for future waste management contracts to Yorwaste Limited without conducting a competitive procurement exercise.

Background

3. A previous report was provided to Cabinet on 9 September 2014 in relation to financial close for the long term waste management contract. The report included information about the proposed Teckal arrangements and the impact of such arrangements on the long term waste management contract.
4. If Teckal arrangements are successfully put in place it will allow the Council to award contracts for future waste management services to Yorwaste without a competitive procurement by relying on the 'Teckal' exemption.
5. Entering into contracts with Yorwaste relying on the 'Teckal' exemption provides a number of direct and indirect benefits, as well as significant opportunity to develop partnerships with district

councils and other public sector bodies to reduce risk and help improve efficiencies in delivery of waste services.

6. Such arrangements will mean that future contracts with Yorwaste Limited can be flexible allowing the Council and North Yorkshire County Council to adapt to changes in the market or commercial environment that would not be possible in competitively procured contracts without the risk that changes may be unlawful or give rise to a procurement challenge.
7. The proposed arrangements with Yorwaste Limited will (if successfully implemented) also enable the Council and North Yorkshire County Council to optimise waste delivered to Allerton Waste Recovery Park (“AWRP”). This involves the delivery of commercial waste collected by Yorwaste Limited on behalf of North Yorkshire County Council to AWRP under the long term waste contract with Amey Cespa.

Consultation

8. Consultation has been undertaken with the board of Yorwaste Limited and officers of North Yorkshire County Council.

Options and Implications

9. The Council needs to consider whether it should enter into the arrangements to facilitate Yorwaste Limited (of which the Council is the minority shareholder with a shareholding of 22.27%) becoming a Teckal compliant company.
10. The necessary steps which it is envisaged the Council would need to take are as follows:
 - a. To adopt a new set of articles of association of Yorwaste Limited which evidences that the Council and North Yorkshire County Council retain sufficient control to meet the ‘control condition’ for Teckal exemption.
 - b. Enter into a Shareholders Agreement which evidences that the Council and North Yorkshire County Council retain sufficient control to meet the ‘control condition’ for Teckal exemption.
 - c. Enter into a collaboration agreement initially with NYCC and Yorwaste Limited which will reflect the intended arrangements

and cooperation between the parties to facilitate the collection and disposal of commercial waste and the streamlining of waste management services in the Yorkshire area to, amongst other things, maximise the utilisation of capacity which NYCC and CYC have available to them through the Allerton Waste Recovery Park so as to ensure public money is well spent and presents best value to the citizens of its areas.

- d. Take whatever steps are necessary as minority shareholder to allow for the transfer of SJB Recycling Limited from Yorwaste to the Council and North Yorkshire County Council (retaining the same percentage shareholdings) to allow Yorwaste Limited to achieve the 'economic dependence condition' for Teckal exemption, subject to any such steps not having a negative budgetary impact.
- e. To assess in due course whether the conditions to achieve Teckal status have been met by Yorwaste Limited to allow the Council to award contracts for future waste management to Yorwaste Limited without the need for a competitive procurement exercise.
- f. To take any necessary ancillary steps to assist Yorwaste Limited in achieving Teckal compliant status.

Analysis

- 11. The process of achieving Teckal compliant status is complex and the legal due diligence process is ongoing. As such, the exact detail of certain of the steps to be taken is not yet confirmed.
- 12. An example of the arrangements still under consideration is in relation to SJB Recycling Ltd which is a wholly owned subsidiary of Yorwaste Limited. In order for Yorwaste Limited to meet the 'economic dependence condition' for the purposes of achieving Teckal compliance, the Council and North Yorkshire County Council took legal advice which provided that Yorwaste would need to transfer its shares in its subsidiary to meet the condition.
- 13. There are two possible routes to deal with this transfer.
 - a. A transfer of the shares to the Councils (retaining the same percentage holdings as the Councils' shareholdings in Yorwaste Limited itself) at book value; or

b. A statutory demerger.

Due diligence is ongoing and a final report is awaited from Ernst & Young.

14. North Yorkshire County Council has led the process of facilitating Yorwaste Limited in achieving Teckal compliance.
15. North Yorkshire County Council appointed Ashfords LLP as its legal adviser in connection with the proposed arrangements. Ashfords LLP has recently agreed to extend its duty of care in advising on these proposals to the Council and as such the Council is in a position to rely on the legal advice of Ashfords LLP who consider the proposed approach to be lawful.
16. The intention of the parties is to have taken such steps as are required to facilitate Teckal compliance by 1st April 2015 to allow the Councils to award contracts to Yorwaste Limited without competitive procurement. The tests to measure the conditions to achieve Teckal compliance are a matter of fact. The Council will need to be satisfied at the time at which it opts to award any future waste management contracts to Yorwaste that the relevant conditions have been met.

Council Plan

17. AWRP will support the council in its objectives to reduce the reliance of landfilling residual waste and to increase the council's recycling percentages. This proposal is in support of the AWRP project.

Implications

- **Financial**

- There are a number of options currently being considered as to how the transfer of SJB from Yorwaste directly to the councils will occur and the final decision is yet to be taken. The three options currently being considered are

Option 1 (share transfer) – this involves the transfer of shares from Yorwaste to the Councils. This could be pursued without further approvals although would potentially require an amendment to the capital programme albeit with no funding

implications. This option would be reported through the Council's usual capital monitoring process.

Option 2 (cash sale) – this involves the Councils acquiring SJB shares from Yorwaste. This would require council approval as it would require a material change to the capital programme.

Option 3 (no change) – this would have no financial implications although it would make the Teckal status of Yorwaste less certain.

The delegations in this report do not allow for any action that would have a detrimental impact on the council's budgetary position without a further report coming forward to Members.

- **Human Resources (HR)** - *none*
- **Equalities** – *none*
- **Legal** – *as set out in this report*
- **Crime and Disorder** - *none*
- **Information Technology (IT)** - *none*
- **Property** - *none*
- **Other** - *none*

Risk Management

Legal Challenge

18. The risk to the Council in relation to entering into the arrangements to facilitate Yorwaste Limited's Teckal compliance is the risk that such arrangements are subject to a legal challenge. There is limited case law on the use of Teckal so this risk cannot be discounted entirely.
19. The risk of such legal and/or procurement challenge will not arise until such time that the Council seeks to award future waste management contracts to Yorwaste Limited without a competitive EU compliant procurement process in reliance on the Teckal exemption.

20. Such award will not be made (by the officers to which delegation may have been provided pursuant to recommendation 2(ii) above) until due diligence has been fully completed, a final legal report has been provided and all necessary financial and/or tax advice has been obtained to confirm that the Council may rely on the Teckal exemption.
21. The risk of legal challenge has been mitigated by North Yorkshire County Council seeking appropriate legal advice. As mentioned above, Ashfords LLP now also owes a duty of care to the Council in relation to such advice.
22. As with any decision made by the Council there is ability for the Council's decision making process to be legally challenged. However the Council has ensured through its internal governance processes that its decision making process is rational and based on sound judgement and advice.
23. Such award will not be made (by the officers to which delegation may have been provided pursuant to recommendation 18(ii) below) until due diligence has been fully completed, a final legal report has been provided and all necessary financial and/or tax advice has been obtained to confirm that the Council may rely on the Teckal exemption.
24. The risk of legal challenge has been mitigated by North Yorkshire County Council seeking appropriate legal advice. As mentioned above, Ashfords LLP now also owes a duty of care to the Council in relation to such advice.
25. As with any decision made by the Council there is ability for the Council's decision making process to be legally challenged. However the Council has ensured through its internal governance processes that its decision making process is rational and based on sound judgement and advice.

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**Report
Approved**

Date 23.02.15

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**Report
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Date 23.02.15

Specialist Implications Officer(s) List information for all

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Wards Affected: List wards or tick box to indicate all

All

For further information please contact the author of the report

Background Papers: None

Annexes - None