

## **Committee: Cabinet**

**Date: 1 July 2013**

Agenda item: 5

Wards: All

### **Subject: SLWP Supplemental Inter-Authority Agreement**

Lead officer: Chris Lee, Director of Environment & Regeneration

Lead member: Councillor Andrew Judge, Cabinet Member for Environmental Sustainability and Regeneration

Forward Plan reference number: **1274**

Contact officer: Cormac Stokes, Head of Street Scene and Waste

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#### **Recommendations:**

- A. For Cabinet to note the final form of the Supplemental Inter-Authority Agreement prepared and approved by the Management Group of the South London Waste Partnership (SLWP); and
- B. For Cabinet to delegate authority to the Director of Environment and Regeneration in consultation with the Head of Legal to authorise the execution of the Supplemental Inter-Authority Agreement in accordance with the details contained in this Report and the form of the Agreement hereto appended.

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## **1 PURPOSE OF REPORT AND EXECUTIVE SUMMARY**

- 1.1. This report provides details on the current arrangements in place between the partner boroughs of the South London Waste Partnership in the form of the partnership's Inter Authority Agreement (IAA) that relates to the procurement and management of waste treatment and disposal contracts procured by the SLWP.
- 1.2. With the completion of the Phase B Procurement there has been a requirement to review and update the current IAA to take into account provisions set out within the Phase B residual waste treatment contract.
- 1.3. The report highlights the key issues that have been addressed and incorporated within the proposed supplemental inter- authority agreement and seeks authority for the council to enter into the said agreement.

## **2 DETAILS**

- 2.1. On 26 August 2008 the four partner boroughs (Croydon, Kingston, Merton and Sutton) entered into an Inter-Authority Agreement (IAA1) to procure jointly waste management, treatment and disposal contracts (known as the Phase A contracts). A further agreement (IAA2) was entered into on 23 February 2011 that committed the partner authorities to proceed with a further joint procurement exercise to deliver a long term waste treatment solution (Phase B).

- 2.2. The IAA1 established the contractual arrangements between the four partner boroughs, identifying the Royal Borough of Kingston as the Lead Authority with respect to the procurement of waste management contracts and the recruitment and commissioning of resources required to support the partnership. It also set out the schedules by which the partners agreed to apportion costs associated with procurement, resources, contract management and contract costs.
- 2.3. A second Inter-Authority Agreement (IAA2) was agreed in 2011 to replicate the first agreement but putting in place the London Borough of Croydon as the Lead Authority for the purposes of the procurement of the Phase B residual waste treatment contract.
- 2.4. The IAA2 does not cover matters relating to the ongoing contract management and service costs resulting from the new Phase B contract, which was awarded to Viridor Waste Ltd. in November 2011. Following an extended period of clarifications the contract was signed in November 2012.
- 2.5. As the partnership moves through the transition phase from procurement to contract management it has been necessary to review further the current Agreement to ensure proper arrangements are put in place with respect to ongoing contract management.
- 2.6. The proposed Supplemental Agreement re-confirms the partnership principles with respect to the apportionment of service costs, contract management costs and procurement costs and any potential relocation costs that are contained within the current IAA.
- 2.7. Further principles have been incorporated which cover:
- 2.7.1 Haulage costs and royalty payments
- The royalty payment made to Royal Borough of Kingston for the receipt and management of commercial waste at Villiers Road will be used to off-set the costs relating to the haulage of RBK's waste from Villiers Road to Beddington Lane, which are currently contained within the gate fee payable by all authorities. The royalty payment shall be apportioned between the Authorities on the basis of the respective tonnage input of each Authority.
- 2.7.2 Guaranteed minimum tonnage
- The Supplemental Agreement sets out a process by which the partner Authorities shall work together to prevent a failure by the Partnership to achieve its contractual obligations with respect to guaranteed minimum tonnage. Should all measures fail to mitigate such a problem, the Agreement provides a principle and formula which calculates and apportions the financial penalties that will be incumbent upon those authorities who have failed to deliver their required contribution.
- The required contribution will be reviewed on an annual basis and agreed by 31 December for the following year. This review will take into account both external factors that may impact on waste arisings and any planned service changes that may also impact on projected waste flows.
- 2.7.3 Third Party Income

Any additional third party income received from the contractor that has resulted directly from the tonnage input by the Authorities shall be apportioned amongst the Authorities on the basis of the respective tonnage input of each Authority. Where Third Party income is not directly as a result of the tonnage input of the Authorities then the apportionment between the Authorities shall be on the basis of equal 25% shares.

The proposed supplemental Agreement recognises that commercial opportunities may arise that were not anticipated for at the outset and for which the Phase B contract does not contain specific provisions. The Authorities shall agree the apportionment of the Third party Income that may arise as a result of such circumstances on a case by case basis, in accordance with the principles outlined above.

#### 2.7.4 Vehicle routing into the proposed facility

The Supplemental Agreement incorporates the principle that the Authorities will endeavour to minimise the use of sensitive areas in designing routes for waste collection vehicles and will endeavour to treat such sensitive routes appropriately.

- 2.8. This review has been completed and all proposed changes are incorporated within the proposed supplemental Agreement.

### **3 ALTERNATIVE OPTIONS**

- 3.1. There are no alternative options. The principles and obligations contained within current agreements do not provide the partner authorities with appropriate mechanisms sufficient to manage on-going waste management and treatment contracts.

### **4 CONSULTATION UNDERTAKEN OR PROPOSED**

- 4.1. The principles contained within the proposed supplemental agreement have been developed through consultation with the SLWP Joint Waste Committee, Finance Directors of the partner boroughs and the Governance Group comprised on the partner borough Environment Directors and Chaired by the Chief Executive of the Royal Borough of Kingston. The drafting of the proposed Supplemental Agreement has been completed by Merton Legal officers in consultation with legal officers from the partner authorities.

### **5 TIMETABLE**

- 5.1. Subject to approval of the proposed supplemental agreement it is envisaged that the Agreement can be executed before September 2013, well in advance of the contract commencement date of 1 April 2014.

### **6 FINANCIAL, RESOURCE AND PROPERTY IMPLICATIONS**

- 6.1. There are none specific to this report.

### **7 LEGAL AND STATUTORY IMPLICATIONS**

- 7.1. As set out in the main body of this report the Supplemental Inter-Authority Agreement builds on the previously established and agreed principles set out in the Inter-Authority Agreement and Inter-Authority Agreement 2.

7.2. The Partner Authorities have addressed the matters requiring resolution and have reached agreement on the proposals set out above. These proposals will be codified within the Supplemental Inter-Authority Agreement which shall, when formally approved, provide appropriate and comprehensive contract management principles for the duration of the Phase B Contract.

7.3. Following approval of the recommendations set out herein the Agreement shall be circulated to the other partner authorities for appropriate execution of the Supplemental Inter-Authority Agreement.

## **8 HUMAN RIGHTS, EQUALITIES AND COMMUNITY COHESION IMPLICATIONS**

8.1. None

## **9 CRIME AND DISORDER IMPLICATIONS**

9.1. None

## **10 RISK MANAGEMENT AND HEALTH AND SAFETY IMPLICATIONS**

10.1. None

## **11 APPENDICES – THE FOLLOWING DOCUMENTS ARE TO BE PUBLISHED WITH THIS REPORT AND FORM PART OF THE REPORT**

- Proposed Supplemental Agreement

## **12 BACKGROUND PAPERS**

12.1. None

THIS SUPPLEMENTAL AGREEMENT is made this  
2013

Appendix  
day of

BETWEEN

- (1) **London Borough of Croydon** of Taberner House, Park Lane, Croydon, CR9 3 JS (“Croydon”)
- (2) **Royal Borough of Kingston upon Thames** of Guildhall, High Street, Kingston upon Thames, KT1 1EU (“Kingston”)
- (3) **London Borough of Merton** of Civic Centre, London Road, Morden, SM4 5DX (“Merton”)
- (4) **London Borough of Sutton** of Civic Offices, St. Nicholas Way, Sutton, SM1 1EA (“Sutton”)

Together referred to as the “**Authorities**”

WHEREAS :

- (A) The South London Waste Partnership (the “Partnership”) was formed between the London Boroughs of Croydon, Merton and Sutton and the Royal Borough of Kingston upon Thames in pursuance of arrangements made under sections 101 (5) and 101 (5B) and 102 Local Government Act 1972, section 20 Local Government Act 2000 as amended by Local Authorities (Arrangements for the Discharge of Functions) (England) (Amendment) Regulations 2001, the Local Authorities (Goods and Services) Act 1970, Section 1 of the Localism Act 2011 and all other relevant enabling powers.
- (B) The Partnership was formed to provide improved waste transport, transfer and disposal services and meet the Landfill Allowance Trading Scheme (LATS) targets of the Authorities.
- (C) By an agreement dated the 26<sup>th</sup> of August 2008 (the “Agreement”) the Authorities agreed to procure the Contracts referred to therein and be part of the contractual arrangements made thereunder at the dates set out in condition 6.2 of the Agreement (the “Phase A Contracts”).
- (D) By a further agreement dated 23 February 2011 (the “IAA2”) the Partnership decided to undertake a further joint exercise to procure a further contract or contracts to secure residual waste treatment transport transfer and disposal to landfill services to meet the additional requirement for such services. A contract notice issued in the Official Journal of the European Union on the 13<sup>th</sup> of May 2009 under reference no. 2009/S 91-131446 (the “Phase B OJEU Notice”) defined the nature and extent of the Phase B contract to be procured (the

“Phase B Contract”) and a copy of the Phase B OJEU Notice was attached to the IAA2). On the 5<sup>th</sup> of November 2012, the Phase B contract was entered into with Viridor South London Limited (‘the Contractor’) in respect of the services.

(E) This Supplemental Agreement is entered into by the Authorities to confirm and supplement the IAA2’s provisions as regards to:-

- 1) the method for dealing with the apportionment of Service Costs and the agreed annual tonnage which each of the Authorities is to deliver to the Contractor under Phase B;
- 2) the sharing of the Procurement Costs for Phase B;
- 3) the method of calculation for the Management Costs of the Phase B Contract; and
- 4) the amount agreed for Relocation Costs for the Phase B Contract.

(F) For the sake of clarity it is confirmed that:-

- 1) the Agreement and its provisions shall continue in full force and effect unchanged by the IAA2 or this Supplemental Agreement and Kingston shall continue to act as the Lead Authority for the purpose of the Phase A Contracts; and
- 2) Croydon shall continue to act as the Lead Authority for the purpose of the Phase B Contract on behalf of the Partnership.

**IT IS HEREBY AGREED AS FOLLOWS :-**

## **1 Interpretation**

- 1.1 Other than as supplemented by the definitions set out in this Supplemental Agreement or as may be required to give effect to the provisions herein the terms and definitions used in this Supplemental Agreement shall be interpreted and construed as those defined in the IAA2 and the Agreement.
- 1.2 This Supplemental Agreement is intended to be read in conjunction with and as mutually explanatory of the provisions contained in the IAA2 but where a conflict occurs then the provisions of this Supplemental Agreement shall prevail.

## **2 Apportionment of Service Costs**

- 2.1 Subject to Clause 4.3 below the service element of costs of the Phase B Contract will remain apportioned as under the general Phase A principle that each Authority shall bear its own transport and service costs for the “Gate Fee” tonnage each Authority has treated, moved or has removed under the Phase B Contract. In this Supplemental Agreement the term “Gate Fee” refers to the amount payable for each tonne of waste treated under the Phase B Contract.

### **3 Haulage Costs/Royalty Payments**

- 3.1 The Phase B Contract provides for a royalty payment from the Contractor to Kingston on a per tonnage basis for commercial waste dealt with at the Villiers Road Waste Transfer Station.
- 3.2 The Authorities hereby agree that the aforementioned royalty payment shall be shared amongst the Authorities by way of set-off in respect of the costs related to the haulage of Kingston’s waste to Beddington Lane. The royalty payment shall be apportioned between the Authorities on the basis of the respective tonnage input of each Authority (as detailed) in the Phase B Contract.

### **4 Minimum Tonnage**

- 4.1 The Phase B Contract requires that the Authorities collectively deliver, on an annual basis, a minimum volume of residual waste referred to as the Minimum Tonnage (defined and further detailed in the Phase B Contract). Each Authority has an individual required contribution to the Minimum Tonnage as set out in the Waste Flow Model of the Project Agreement. The failure by an Authority to meet its individual required contribution will result in the payment of an additional financial contribution by that Authority to the Lead Authority if the Minimum Tonnage is also not met (subject to Clause 4.6). The amount of the additional financial contribution shall be calculated in accordance with Clause 4.3.
- 4.2 If an Authority anticipates being unable to, or in fact becomes unable to meet its individual required contribution of the Minimum Tonnage, it shall immediately notify the other Authorities. The Authorities shall, to the extent possible, mitigate such shortfall. Should the Authorities be unable to do so, then the Contractor shall be approached to mitigate the shortfall by securing Substitute Waste (as defined in the Phase B Contract) or such other means as are available. If the Contractor also fails to fully mitigate the shortfall Clause 4.3 below shall apply.
- 4.3 Where an Authority (or Authorities) fails to meet the Minimum Tonnage in any given year, and it has not been possible to mitigate the same in accordance with Clause 4.2, a shortfall amount will become due to the Contractor. The payment of this amount shall be met solely by the Authority (or Authorities) that fails to meet its required contributions for that year. The sum payable by an Authority shall be the relative

percentage of the Minimum Tonnage deficit attributable to that Authority in proportion to the amount by which it has failed to meet its required contribution. Such calculation shall be made through the application of the rate (for that year) as set out in the Phase B Contract. The formula set out in Appendix One provides the practical illustration of this principle.

- 4.4 The Authorities shall prior to 31 December in each year review and agree the tonnage contribution by each Authority against the service plans for the purposes of this Clause. The Authorities shall utilise the results of the review to identify and address any actions or proposals by each of the Authorities which may affect the ability of the Partnership to meet the Minimum Tonnage. This review will also be utilised to ensure that the Partnership exceeds the Minimum Tonnage and benefits from the Band 2 Gate Fee as set out in the Phase B Contract. In the event that the Authorities fail to reach an agreement the provisions of Clause 10.1 shall apply.
- 4.5 It shall be incumbent upon each of the Authorities to inform the Management Group (established by the Joint Committee) of any significant service changes that will impact upon the overall waste tonnage under the Phase B Contract.
- 4.6 For the avoidance of doubt an Authority will not be required to pay an additional financial contribution;
  - 4.6.1 if the Authority has met its individual requirement; or
  - 4.6.2 the collective Minimum Tonnage has been achieved for the annual period.
- 4.7 As referred to in Clause 4.2 the Contractor may seek Substitute Waste where the Authorities collectively are unable to meet the Minimum Tonnage in any given annual period. Where such remarketing results in a net gain to the Authorities the gain shall be shared proportionately between the Authorities as a percentage calculated inversely on the difference between each Authority's contribution to the Lead Authority for its Service Costs (as set out in Clause 2.1) and the contribution payable to the Lead Authority by that Authority in meeting its annual Minimum Tonnage.

## **5 Third Party Income**

- 5.1 Pursuant to the Phase B Contract where Third Party Income is received by the Contractor and such income exceeds the 20% base case (as set out in the Contractor's Financial Model in the Phase B Contract) the Partnership shall share this additional income with the Contractor on a 50:50 basis. The Partnership's share shall be apportioned amongst the Authorities on the basis of the respective



tonnage input of each Authority (as detailed) in the Phase B Contract, subject to Clause 5.2 below.

- 5.2 Where Third Party Income is not directly as a result of the tonnage input of the Authorities then the apportionment between the Authorities shall be on the basis of equal 25% shares.
- 5.3 The Authorities agree and acknowledge that commercial opportunities may arise that were not anticipated for at the outset and for which the Phase B Contract does not contain specific provisions. The Authorities shall agree the apportionment of the Third Party Income that arises as a result of the same on a case by case basis, such agreement to be made on the basis of the principles set out in Clauses 5.1 and 5.2 above.

## **6 The Phase B Procurement Costs**

- 6.1 For the sake of clarity it is confirmed that the Phase B Procurement Costs shall be payable by the Authorities as provided for in Clause 2.9 of the IAA2.

## **7 The Phase B Contract Management Costs**

- 7.1 Any management costs arising from or during the course of the term of this Supplemental Agreement shall be dealt with in accordance with principle 2.10 of the IAA2.

## **8 The Phase B Relocation Costs**

- 8.1 For the sake of clarity it is confirmed that the principle set out in Clause 2.11 of the IAA2 shall continue to apply.

## **9 Vehicle Routing**

- 9.1 The Authorities currently endeavour to minimise use of sensitive areas when designing the routes for vehicles involved in the collection and delivery of household waste from each Authority to Beddington Lane. Such practice shall continue and the Authorities shall endeavour to treat sensitive routes appropriately.

## **10 Dispute Resolution**

- 10.1 In the event of any dispute (or failure to agree) relating to the apportionment of any costs or financial liability in relation to the Phase B Contract as above or arising elsewhere that dispute (or failure to agree) shall be resolved at the option of any of the Authorities by referring the same for determination by an independent arbitrator to be appointed (unless otherwise agreed) by the President for the time being of the Law Society and otherwise in accordance with the Arbitration Act 1996 (or any modification or re-enactment thereof)

PROVIDED THAT no reference to arbitration shall be made under this clause until the mediation process set out in clause 24 of the Agreement has first been exhausted without resolution.

## **11 Term**

- 11.1 This Supplemental Agreement shall commence on the date above written and shall end on the termination of the Agreement or upon the effluxion of the Phase B Contract or six months following their earlier termination whichever is the longer.

## **EXECUTED AS A DEED BY THE PARTIES**

The Common Seal of the Mayor and Burgesses of the  
**London Borough of Croydon**  
was affixed hereto in the presence of

authorised signatory for and on behalf of Croydon

The Common Seal of the Mayor and Burgesses of the  
**Royal Borough of Kingston upon Thames**  
was hereto affixed in the presence of

Mayor

Head of Legal Services

The Common Seal of the Mayor and Burgesses of the  
**London Borough of Merton**  
was affixed hereto in the presence of

authorised signatory for and on behalf of Merton

The Common Seal of the Mayor and Burgesses of the  
**London Borough of Sutton**  
was affixed hereto in the presence of

authorised signatory for and on behalf of Sutton

## **Appendix One**

Set out below is a worked example of the principle set out in Clause 4.3 of the Agreement with respect to calculating the amount owed by a Party in the event that the Minimum Tonnage is not met.

### **Example**

This example is based on the assumption that in 2025 the minimum tonnage requirement is 160ktpa and the Parties deliver 153ktpa and that the cost per tonne is £125.

<b>Borough</b>	<b>IAA Required tonnage</b>	<b>Delivered Tonnage</b>	<b>+ / - delivered</b>
Croydon	75,000	76,000	+ 1000
Merton	31,000	24,000	-7000
Sutton	26,000	25,000	-1000
Kingston	28,000	28,000	Even
Total	160,000	153,000	- 7000

We assume that every tonne of waste not delivered against a borough's Minimum Tonnage is classified as 'undelivered waste'.

Thus there are 7000 tonnes of undelivered waste. Merton has provided 87.5% of the Undelivered Waste and Sutton has provided 12.5% of the overall undelivered waste. – therefore the cost will be split in the proportions 87.5% of the cost to Merton and 12.5% of the cost to Sutton.

### **Minimum Tonnage Shortfall Calculation: Step by Step**

1. Contractor's Minimum Tonnage penalty = £per tonne of contract waste X quantity of Undelivered Waste (which remains undelivered after attempts to mitigate).
2. Amount payable for the undelivered waste = £125 x 7000 tonnes = £875,000
3. The Minimum Tonnage penalty is then shared against the relative % of undelivered waste coming from each borough which has not delivered its required tonnage.

In the above scenario Merton would pay 87.5% of £875,000 = £765,625 and would Sutton pay 12.5% of £875,000 = £109,375.