

| | | | |
|------------------------------------|-------------------------------|--|--|
| Item No. N/a | Classification Open | Date: 6 December 2017 | Decision Maker: Cabinet Member for Finance, Modernisation and Performance |
| Report title: | | Commercial Waste Collection Options | |
| Ward(s) or groups affected: | | All | |
| From: | | Strategic Director of Environment & Social Regeneration | |

RECOMMENDATIONS

That the Cabinet Member for Finance, Modernisation and Performance:

1. approves the decision to wind up the Southwark Business Waste and Recycling Limited (SBWR) and transfer the provision of a commercial waste service in-house
2. notes that this decision carries a potential financial risk to the Council as set out in paragraph 17 of this report and delegates the authority to write off debts in relation to this decision to the Strategic Director of Environment and Social Regeneration, up to a value of £10,000
3. approves the termination of the agreements and novation of the waste collection contracts from the LBWR to the council as set out in paragraph 14 of this report
4. approves the prices set out in paragraph 31 in relation to the commercial waste service until these can be updated in the Council-wide fees and charges report to be considered by Cabinet in January 2018

BACKGROUND INFORMATION

5. In June 2015 London Waste and Recycling board (LWARB) outlined proposals to establish a company to work with boroughs to develop commercial waste collection services. The council was interested in this concept.
6. LWARB committed funds to set up a new venture, London Business Waste & Recycling Limited Ltd (LBWR). LBWR was established to undertake sales and administrative functions that are required to operate commercial waste collection services driven by two principal objectives:
 - To assist London boroughs to generate new revenues from waste services
 - To promote good business waste management across London and increase recycling
7. The Joint Venture Agreement (JVA) for Commercial Waste Sales Function Cabinet report of November 2016 recommended that the council enter into a JVA with London Business Waste and Recycling Limited to create a Special Purpose Vehicle Company (SPV) for the purpose of providing a commercial waste collection service.

8. The JVA was signed in June 2017 and Southwark Business Waste and Recycling (SBWR) was created. LBWR and LBS each own 50% of the shares in SBWR. LBWR provides the commercial waste sales and invoicing function and LBS provides the core service collection function. The council charges SBWR for the provision of the commercial waste collection and disposal services in line with the Fulfilment Contract. Profits generated by SBWR would be paid to LBS as a dividend. LBWR also entered into JVAs with Ealing and Hounslow.
9. LBWR's proposed business case was reliant on four boroughs signing up and securing a high number of contracts. However, only three boroughs ultimately took part in the initiative; Ealing, Hounslow and Southwark. Hounslow only successfully contracted a small number of customers and Ealing's contracts, although significant financially, were not due to transfer to the joint venture until January 2018. Southwark, whilst showing promising growth recently, only joined in June 2017. The combination of these factors meant that the business case presented to LWARB was no longer viable.
10. SBWR is expanding rapidly. To date SBWR has secured over 100 core service collection contracts. SBWR's model is proving successful and is delivering in line with initial income projections. However this income alone is not sufficient to maintain LBWR's viability.
11. LWARB notified Southwark and the two other participating boroughs in September 2017 that LBWR was no longer financially viable and would need to be wound down. Because of this there is now a need for a managed withdrawal process from the joint venture arrangements.
12. This process will need to put in place alternative arrangements for provision of all the sales and invoicing functions currently provided by LBWR, in order for the council to be able to provide commercial waste services on an on-going basis.

KEY ISSUES FOR CONSIDERATION

13. There are five options available to the council. These options are as follows:

| Options | Risks | Recommended? |
|--|---|--|
| 1) Close SBWR and do not provide commercial waste collections. | The council has set challenging income generation targets around commercial waste. Failing to generate income from commercial waste would lead to savings or income having to be found elsewhere. | No. This option is not recommended as SBWR is growing rapidly and future sales, and therefore income, is predicted to be high. |

| Options | Risks | Recommended? |
|---|---|---|
| <p>2) Create a new shared service. This could be delivered through restructuring the current sales and marketing service to maintain continuity of business and shared model, while reducing costs and risks; or setting up an arm's length company for a shared service with another borough(s) to provide the sales and invoicing function.</p> | <p>The council would need to assess liabilities and risks in the current corporate structure and which of these would be transferred in a restructure.</p> <p>Operating as a limited company requires administration and accounting; without LBWR on board these arrangements would need to be managed by the council.</p> <p>It may not be a suitable option where there is no established income-generating base to pay the cost of operation (the same issue that affected LBWR).</p> <p>There would need to be excellent corporate, insolvency and tax advice on whether it is possible to keep the best parts of the business while not taking on costs and liabilities.</p> | <p>No. This option is not recommended. It is very complicated and resource intensive. The size of the business does not justify the work involved in creating a shared service.</p> |
| <p>3) Bring the existing commercial waste contracts in-house and develop a sales and invoicing function.</p> | <p>LBS may not be able to incentivise sales staff in the same way as the private sector which could make it difficult to recruit and retain staff who are motivated to sell.</p> <p>Southwark does not have the expertise of managing commercially orientated sales operations.</p> | <p>Yes. This option is recommended. The council would retain control over all of the functions required to operate commercial waste collection services, including where and how resources are deployed to greatest effect and control over the expansion of the business.</p> <p>The operation of functions in-house potentially allows efficiency of existing back office services to be improved provided they can flex to meet the increased work demand. It also supports the business case for improved IT systems by spreading the cost across more business units.</p> <p>Income can be maximised as the council is not sharing profits.</p> <p>The sales staff employed by LBWR have been approached with a view to keeping them in the business and they seem keen to transfer to LBS.</p> <p>Southwark is expanding its commercial operations both</p> |

| Options | Risks | Recommended? |
|--|--|---|
| | | here and in Traded Services, and is developing the expertise to run these more commercially. |
| 4) Keep SBWR as a stand alone company. | <p>Operating as a limited company requires administration and accounting; without LBWR on board these arrangements would need to be managed by the council.</p> <p>Liabilities in the current company would need to be assessed.</p> <p>Again, it may not be a suitable option where there is no established income-generating base to pay the cost of operation (the same issue that affected LBWR).</p> <p>The constraints on making a profit from trading that require separate in house companies do not apply to commercial waste services as these are statutory services.</p> | No. This option is not recommended. It adds complications to the in-house option without commensurate benefits. |
| 5) Establish a new wholly owned Southwark council trading company and transfer the existing shares to the new company. | The new local authority trading company would be a separate legal entity, which would be liable in respect of its own contracts and for torts (civil wrongs) committed either by it or by its officers in the course of their employment or in the exercise of the company's function. The directors of the new company would owe various duties to the company and one needs to be mindful of the risk of conflict of interest between council officers who may also be a director of the company. The council will also need to be mindful of potential state aid issues. | No. Setting up this structure is time consuming and complicated. |

14. The report seeks approval to bring the existing collection contracts in- house (as set out in option 3 above) and to develop our own sales and invoicing functions. In order to do this the council will be required to:

- Explore the legal and operational steps required to un-wind current group structure ensuring that the Joint Venture Agreement, Services Agreement, Fulfilment Agreement and the Brand Licence Letter are terminated.
- Quantify potential liabilities and obligations that sit with each party.
- Ensure new arrangements are documented e.g. new Waste Collection Contract.
- Update the annual fees and charges report to reflect the new pricing strategy.
- Investigate staffing and TUPE opportunities and create clear management structure for new team.
- Evaluate whether existing staff can help with the back office support required.
- Establish a clear process for closing down the SPV.
- Ensure that process flows with the collection team are formalised.

- Review position with SBWR commercial waste contracts and make arrangements to novate contracts or re-contract them to the council.
 - Instruct sales staff to sell new contracts in the name of Southwark Council.
 - Ensure regular project groups are set up to ensure stakeholders are engaged.
 - Ensure the council follows legal advice on the process of transferring services in-house.
 - Choose a CRM system which can fully support an in-house commercial waste collection service.
 - Update Southwark's website and any other promotional material with new, up to date contact details.
 - Write to existing customers during the month of December 2017 to inform them that the existing contracts will be serviced by the council (via a novation agreement) with effect from 1 January 2018.
 - Ensure LBWR has closed down their website/telephone service and redirected this to the council.
15. The SBWR directors will be required to formalise and action contractual and legal steps having obtained their own independent advice.
16. After the transfer, the SBWR will have little to do except prepare for winding-up, given the business will now be undertaken by the council and the SBWR contract will be terminated. The SBWR will still need directors until the winding-up has been initiated, which may take some time.
17. The directors of the SBWR are seeking independent legal advice on their ability to make a declaration of solvency but in order to make such a declaration, the directors must be confident that the company can pay all its creditors.
18. It is understood that the two creditors of the SBWR are LWARB and the council. LWARB has confirmed to the council that they will not seek to recover the amount spent to date or the amount set aside to ensure that the company functions until 31 December 2017. SBWR is seeking written confirmation from the council that the council will not pursue any invoices remaining unpaid under the Fulfilment Contract in the event that there is lack of funds in the SBWR to honour debts. The scale of the risk is not yet known but is estimated in the closed version of this report.

RESOURCE IMPLICATIONS

19. The main resource implications arising from this proposal is the delivery of the back office functions. Please see below table which details the back office functions required, the existing resources in place and whether additional resources are needed. The head of Financial Control & Processing (FC&P) has already been approached and is confident they can take on this work.

| Function | Existing resource | Additional Resource |
|--|---|--|
| Setting up accounts | FC&P | May require additional resource, depends on volumes. |
| Automatically generated invoicing by Direct Debit | FC&P | May require additional resource, depends on volumes. |
| Manually generated invoicing (where there is no Direct Debit in place) | FC&P | May require additional resource, depends on volumes. |
| Producing instructions for manually generated invoicing for dispatch to F&CP (where there is no Direct Debit in place) | W&C Team | Additional resource required in W&C Team to cope with volumes, estimate 0.5 FTE. |
| Handling of payments collected when setting up contracts | W&C Team | None. |
| On-line payment system for one-off sack purchases | Web-labs | Requires set up, but following that no on-going additional resource. |
| Handling and processing of collection contracts and duty of care consignment notes, includes arrangements for bin deliveries and scheduling of collections | Secondment in place linked to vacant post in W&C Team | Permanent additional resource required in W&C Team to cope with volumes, estimate 1.0 FTE. |
| Handling of customer calls, e-mails and other correspondence | None | Additional resource required in W&C Team to cope with volumes, estimate 0.5 FTE. |
| Selling trade waste service on street | None | Additional resource required in W&C Team to cope with volumes, estimate 2.0 FTE (possible TUPE). |
| Management of commercial waste service | None | Additional resource required in W&C Team, estimate 0.5 FTE. (There is a vacant post in the W&C structure that was set up to develop commercial opportunities.) |

Staffing implications

20. The council has estimated that 4.5 FTE staff are required to successfully operate the in-house commercial waste service. As there are 2.0 FTE staff in existing posts the council would need to recruit an additional 2.5 FTE staff.

| | FTE |
|--|----------------|
| Total resources required within Waste & Cleansing Team as follows: Technical Officer (Commercial Waste Accounts) - 0.5 FTE Technical Officer (Commercial Waste Operations) - 1.0 FTE Technical Officer (Commercial Waste CRM) - 0.5 FTE Commercial Waste Sales Officer - 2.0 FTE Commercial Waste Manager - 0.5 FTE | 4.5 |
| Existing posts/resources within Waste & Cleaning Team as follows: Business Development Officer - 1.0 FTE Business Development Manager - 1.0 FTE | 2.0 |
| Additional posts/resources required within Waste & Cleansing Team | 2.5 FTE |

21. There are two experienced sales staff employed by LBWR dedicated to signing commercial waste collection customers in Southwark and to date they have performed well. The council would like to bring these two sales staff into the council's service as soon as possible, and no later than 31st December 2017.
22. The council will need to carry out due diligence for the two sales staff employed by LBWR. Clarification is needed on whether TUPE will apply to transfer them to the council. LBWR has not yet served notice on these sales staff.
23. Any new staff members would need to be incorporated into structures; this will be facilitated through the recognised re-structure procedures with new posts created as required.
24. Additional staff may be required if there is a significant increase in business turnover in future years but these additional staff will be funded from the increased income arising from the increased business.

Transitional arrangements

25. To ensure the smooth transfer of services to the council it is important that sufficient back office support is in place at the time of transfer. The preferred option is to transfer the two sales staff onto the council's service and for the council to carry out all the administration and invoicing arrangements (currently undertaken by LBWR) by 31st December 2017.

26. The costs of these transitional arrangements will need to be explored further after the best options for transition have been agreed. The council's aim is to bring the service in house as swiftly as possible, with a target completion date of 31 December 2017. The council would not be supporting the continued cost of LBWR back office support after this date.

Financial implications

27. The main financial implications arising from this proposal is the additional resources required to incorporate the sales, invoicing and other back office functions within the in-house council functions.
28. The resource and staffing implications section above provides details of the functions that would be required and how some of these functions could be integrated within the current working arrangements and staffing capacity in the waste and cleansing division.
29. The analysis indicates that an additional 2.5 FTE will be required within the waste and cleansing division. There will also be some other additional costs within the council's central Financial Control and Processing section to absorb the billing, Direct Debits and other accounts function for operating the in-house commercial waste function.
30. The above costs and the direct operational costs of the service have been summarised in the closed version of this report.
31. The prices set out in the table below will apply until they can be amended by the Council-wide fees and charges report to be considered by Cabinet in January 2018.

| Product | Bin size or service | Material | Cost to Customer per lift or sack (£) |
|---------------------|---------------------|-----------|---------------------------------------|
| Euro Bin | 1100 | General | 15.30 |
| Euro Bin | 660 | General | 11.43 |
| Wheelie Bin | 360 | General | 6.03 |
| Wheelie Bin | 240 | General | 4.91 |
| Sack - General | 7.5kg | General | 1.69 |
| Euro Bin | 1100 | Recycling | 9.22 |
| Euro Bin | 660 | Recycling | 7.60 |
| Wheelie Bin | 360 | Recycling | 3.80 |
| Wheelie Bin | 240 | Recycling | 3.31 |
| Sack - Recycling | 7.5kg | Recycling | 1.03 |
| Sticker - Cardboard | 7.5kg | Recycling | 1.03 |
| Clearance | | | Price on request |

32. Legal implications

Please refer to paragraph 35 of this report for the supplementary advice from the director of law and democracy.

33. **Community Impact Statement**

The proposals in this report relate to arrangements for operating commercial waste collection services for businesses in Southwark. There is no direct impact on other service design, outcomes or access. The operation of a commercial waste collection service will give the council more control over the management of commercial waste in Southwark which could produce indirect positive outcomes.

34. **Consultation**

No consultation has taken place yet. The consultation will take place with existing trade waste customers once approval for a decision is received and the start date for new arrangements agreed. Customers will be informed about the novation of their contracts by post throughout December 2017.

SUPPLEMENTARY ADVICE FROM OTHER OFFICERS

35. **Director of Law and Democracy**

36. The Council is both a collection and disposal authority and could undertake the SBWR's current business itself under sections 45 and 55 of the Environmental Protection Act 1990. It is able to make a "reasonable charge" through which it can make a profit.
37. The Council has the power under section 111(1) of the Local Government Act 1972 and section 1 Localism Act 2011 to undertake sales and marketing activity to sign up waste collection contract customers.
38. From a procurement perspective, given that the Council would be delivering services under the waste contracts directly with no sub-contracting to third parties, there are no procurement issues to consider with this model (i.e. no works/services contract is being awarded to a third party and no concession is being granted).
39. From a contractual perspective, the SBWR's role in the waste contracts would need to be novated and will take effect on 1 January 2018. In order to formally novate the SBWR's role in collecting the commercial waste under the waste contracts to the Council, all the parties to the original contracts (i.e. the outgoing SBWR and continuing customers) and the incoming party (the Council) must consent to the novation. Given the balance of the SBWR board, the SBWR's consent is effectively that of LBWR and therefore any consent given will form part of the wider negotiation with LBWR over the wind-down of its role in the current joint venture
40. Paragraphs 21 and 22 of this report refers to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) potentially applying in respect of two sales staff employed by LBWR. If TUPE does apply to transfer the employment of any employees of LBWR to the council they would transfer on their existing terms and conditions but would, as employees of the council, be entitled to join the Local Government Pension Scheme. The Joint Venture Agreement sets out the respective contractual obligations of the council and LBWR in the event that there is a relevant transfer under TUPE.

41. In addition to novating the waste collection contracts, the Fulfilment Contact, the Joint Venture Agreement and the Brand Licence letter will need to be terminated with effect from 1st January 2018. A Transfer Agreement will also need to be prepared setting out the parties financial liabilities prior to the transfer date and post transfer.
42. In order to wind up the SBWR without any significant court involvement a member's voluntary liquidation is required and it involves the directors making a statutory declaration of solvency. A statutory declaration is a statement made by the majority of directors to the effect that, having made a full inquiry into the company's affairs, they are satisfied that the company will be able to pay its debts in full, together with any interest, within a specified period not exceeding 12 months from the commencement of the winding up (section 89(1) Insolvency Act 1986). Paragraph 17 of this report states that the directors of the SBWR are seeking independent legal advice in relation to the possibility of issuing a declaration of solvency.
43. The steps for a member's voluntary liquidation are set out in Insolvency Act 1986 and can be summarised as follows:
- The members of the company must pass a special resolution to wind up the SBWR within five weeks of the statutory declaration.
 - A liquidator will be appointed by members, either by a separate general resolution or (usually) as part of the special resolution.
 - The statutory declaration and special resolution are required to be filed at Companies House within 15 days of resolution.
 - Within 14 days of appointment, the liquidator must publish notice of appointment, together with the resolution appointing him or her, in the London Gazette and file notice of his appointment at Companies House.
 - The business ceases as does the power of the directors and the liquidator takes control to collect and distribute assets in the order prescribed by the Insolvency Act 1986.

BACKGROUND DOCUMENTS

| Background Papers | Held At | Contact |
|--|---|-----------------------------------|
| Joint Venture Agreement for Commercial Waste Sales Function Cabinet Report | E & SR Department offices, 160 Tooley Street, SE1 | Michael McNicholas, Head of Waste |

APPENDICES

| No. | Title |
|------|-------|
| None | |

AUDIT TRAIL

| | | |
|---|--|--------------------------|
| Lead Officer | Deborah Collins, Strategic Director, Environment & Social Regeneration | |
| Report Author | Catherine Snell, Research & Development Officer | |
| Version | Final | |
| Dated | 1 December 2017 | |
| Key Decision? | No | |
| CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / CABINET MEMBER | | |
| Officer Title | Comments Sought | Comments included |
| Director of Law and Democracy | Yes | Yes |
| Strategic Director of Finance and Governance | Yes | No |
| Cabinet Member | No | No |
| Date final report sent to Constitutional/Community Council/Scrutiny Team | 4 December 2017 | |