

BIRMINGHAM CITY COUNCIL

CABINET

TUESDAY, 15 JANUARY 2019 AT 10:00 HOURS
IN SPECIAL URGENT MEETING - COMMITTEE ROOM 6, COUNCIL
HOUSE, VICTORIA SQUARE, BIRMINGHAM B1 1BB, [VENUE
ADDRESS]

A G E N D A

1 NOTICE OF RECORDING/WEBCAST

The Chairman to advise/meeting to note that this meeting will be webcast for live or subsequent broadcast via the Council's Internet site (www.civico.net/birmingham) and that members of the press/public may record and take photographs except where there are confidential or exempt items.

2 DECLARATIONS OF INTERESTS

Members are reminded that they must declare all relevant pecuniary and non pecuniary interests arising from any business to be discussed at this meeting. If a disclosable pecuniary interest is declared a Member must not speak or take part in that agenda item. Any declarations will be recorded in the minutes of the meeting.

3 APOLOGIES

To receive any apologies.

3 - 20

4 WASTE MANAGEMENT - PUBLIC

Report of the Chief Executive

The report is to follow.

5 OTHER URGENT BUSINESS

To consider any items of business by reason of special circumstances (to be specified) that in the opinion of the Chairman are matters of urgency.

21 - 40

5A DECISION CALLED IN: WASTE DISPOSAL CONTRACT INTERIM **ARRANGEMENT AGREEMENT**

To reconsider the decision of Cabinet on 11 December 2018 called-in by

the Resources Overview and Scrutiny Committee.

A report of the O&S Committee Chairman, an Executive response and a copy of the public report to Cabinet on 11 December 2018 are attached. TO FOLLOW

6 **EXCLUSION OF THE PUBLIC**

That in view of the nature of the business to be transacted which includes exempt information of the category indicated the public be now excluded from the meeting:-

Exempt Paragraph 3 and 4

P R I V A T E A G E N D A

7 **WASTE MANAGEMENT - PRIVATE**

Item Description

8 **OTHER URGENT BUSINESS (EXEMPT INFORMATION)**

To consider any items of business by reason of special circumstances (to be specified) that in the opinion of the Chairman are matters of urgency.

8A **DECISION CALLED IN: WASTE DISPOSAL CONTRACT INTERIM ARRANGEMENT AGREEMENT - PRIVATE**

To reconsider the decision of Cabinet on 11 December 2018 called-in by the Resources Overview and Scrutiny Committee.

A report of the O&S Committee Chairman, an Executive response and a copy of the private report to Cabinet on 11 December 2018 are attached. TO FOLLOW



Subject: Waste Management – Industrial Action Update

Report of: Chief Executive, Corporate Director Finance & Governance and City Solicitor

Relevant Cabinet Member: Councillor Ian Ward, Leader of the Council
Councillor Majid Mahmood, Cabinet Member Clean Streets Waste and Recycling

Relevant O &S Chair(s): Councillor John Cotton Chair of Co-ordinating Overview and Scrutiny Committee on behalf of Councillor Penny Holbrook

Report author: Clive Heaphy, Corporate Director Finance and Governance
Kate Charlton, City Solicitor and Monitoring Officer
Rob James, Acting Corporate Director Place

Are specific wards affected?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No – All wards affected
If yes, name(s) of ward(s):		
Is this a key decision?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If relevant, add Forward Plan Reference:		
Is the decision eligible for call-in?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No (see para 1.3)
Does the report contain confidential or exempt information?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If relevant, provide exempt information paragraph number or reason if confidential :		

1 Executive Summary

- 1.1 This report is not on the Forward Plan. The subject matter is likely to be a 'key decision' and due to the matters set out in this report it is the opinion of the Chief Executive that it is impracticable to defer the decision. The Chair of Overview and Scrutiny Committee, Councillor John Cotton, has agreed that the

matter is urgent and cannot be reasonably deferred. [Paragraph 3.5 Council Constitution 11/9/18]

- 1.2 As a result of the outcome of the strike action in the Waste Management service by Unite Union announced on 14th December 2018 and the ballot result of UNISON Union announced on 11th January 2019, there is a need to urgently mitigate the impacts of the actual and proposed industrial action. This report is late and urgent due to the need to consider fully all the options open to the Council to manage these impacts. The agreement of the Chair of Overview and Scrutiny is required for this report to progress as late and urgent. [Paragraph 3.5 Part B Council Constitution 11/9/18].
- 1.3 The interests of the Council are likely to be jeopardised unless further mitigation options are instituted immediately and the Chief Executive in consultation with the Leader (or Deputy Leader in his/her absence) has determined that such executive decision is so urgent that its implementation cannot wait until the expiry of the call-in period. [Paragraph 3.7 Part B Council Constitution 11/9/18]. The Chief Executive and the Leader of the Council have agreed that the matters in this report require immediate implementation.

2 Recommendations

- 2.1 Cabinet to note the contents of this Report.
- 2.2 Cabinet to note the Options for the management of the Industrial Action as set out in paragraph 4 of this report and Cabinet to approve the recommended strategy as set out in paragraph 4.4.3 and 4.4.4 of this report.
- 2.3 Cabinet to agree the Waste Contingency plan as set out in paragraph 5 of this report.
- 2.4 Cabinet to agree for the purposes of managing the contingency plan for the industrial action in the Waste Service including any residual impact following any resolution or court order, to agree to extend the officer delegation to the Acting Corporate Director of Place from £200,000 up to £350,000 per week for an initial 3 months and to delegate to the Leader, the Cabinet Member Clean Streets Waste and Recycling, the Chief Finance Officer and the Acting Corporate Director Place acting together to agree the procurements arrangements relating to the Waste Contingency Plan.

3 Background

- 3.1 In June 2017, BCC proposed a reorganisation of the Waste Management Service. Details are set out in the private report to Cabinet dated 27 June 2017. Amongst these changes, BCC proposed deleting the post of Gr3 Leading Hand (LH) and changing refuse collection from a compressed 4-day working week with overtime on the 5th Day to a 5-day week with no overtime.
- 3.2 Extensive consultations were held at the time with the recognised trades unions which resulted in the Unite Union taking industrial action from July 2017.

- 3.3 The then Leader of the Council, Councillor John Clancy and Howard Beckett of the Unite Union reached agreement in August 2017 that the Gr3 LH post would not be deleted.
- 3.4 Notwithstanding this BCC issued Leading Hands with notices of redundancy following which Unite resumed industrial action, bringing proceedings against BCC seeking to uphold the August 2017 agreement and restraining the dismissals. In September 2017, the High Court granted an interim injunction to that effect.
- 3.5 Some GMB members in the Waste Service did not cross the picket line during the industrial action in 2017.
- 3.6 The Council sought to negotiate jointly with the recognised unions with a view to resolving the Waste dispute but throughout October and November 2017, the Council agreed to Unite's demands that GMB be excluded from any joint negotiations. Although Unite had made their position abundantly clear (i.e. that Unite would not participate in negotiations if the Council continued to include GMB in joint negotiations), the Council has since admitted that it was wrong at that time to exclude GMB. Unite did not seek the exclusion of UNISON, nor did the Council exclude them.
- 3.7 On 24 November 2017 BCC entered into a written agreement with Unite, and also separately agreed with UNISON by which, amongst other things:
- a new role of Waste Reduction and Collection Officer (WRCO) was to be created, with duties over and above those of the Gr3 LH role, the latter to be phased out and LHs to "transition" into the WRCO role with training and support, and
 - a 5-day week would replace the compressed 4-day week. The 5 day week would impact on all employees working in the Waste Service.
- 3.8 The GMB Union played no part in these talks. UNISON had balloted for Industrial Action but did not receive the mandate for lawful action. Unlike GMB UNISON were included in those talks involving UNITE.
- 3.9 The agreement reached with Unite on 24 November 2017 effectively created the new post of WRCO and confirmed that Leading Hands would transition into these roles. That agreement was expressed to be legally binding and incorporated into individual members contracts of employment in spite of the fact that GMB were not expressly consulted on the role of the WRCO nor during this period were they consulted about the impacts of a 5 day working week, which prior to agreement with Unite and UNISON had not been implemented, and which now resulted in the withdrawal of overtime from all of its members.
- 3.10 At the point of exclusion in October 2017, the GMB union raised a trade dispute with the Council. On 26 January 2018 the GMB commenced Early Conciliation with ACAS in relation to prospective s.188 Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") claims – the mandatory step prior to

bringing Employment Tribunal (“ET”) proceedings – and GMB and the Council then entered into talks at ACAS about potential settlement.

- 3.11 As a result of these ACAS talks and based on external legal advice, the Council considered that GMB had a potentially valid claim on behalf of its members and in May 2018 the Council agreed to pay GMB Members in Waste Management in respect of s.188 claims. The total amount paid to the GMB members was £68,465 which was within the Officer delegation of £200,000.
- 3.12 On 23 November 2018, Unite informed the Council that they intended to ballot their members in the Waste Service. Unite subsequently balloted their members for industrial action within the Waste Management Service based on the payment of sums to GMB Union members which were not made to Unite members (“the settlement payments”). Unite’s position is that such claims by the GMB were unmeritorious, that the payments were in effect a s146 TULRCA detriment to Unite members and that the “payments ... have gone to those who did not strike and are therefore, in the view of Unite, payments that blacklist its members.”
- 3.13 The Council does not in any way agree with Unite’s position; both Unite and UNISON were fully included in negotiations during October and November 2017 whilst GMB was excluded from those negotiations by the Council at Unite’s insistence. There can be no basis for such a payment to Unite.
- 3.14 On Friday 14 December 2018, Unite the Union gave the Council formal notice of its intention to take part in “continuous industrial action, commencing at 00:01 hours on 29 December 2018, consisting of a ban on overtime, Unite members adhering to job grades and descriptions and adhering to contractual start and finish times. In addition, Unite members will be returning to work base yards for washing facilities for every 15 minute concessionary and half hour lunch breaks in line with the Council’s Hygiene Regulations and Instructions.” The action will affect refuse collection crews in each of the four depots with Unite warning that the Council “may be warned of further industrial action, if necessary”.
- 3.15 On 11th January 2019, UNISON the Union gave the Council formal notice of its intention to take part in continuous industrial action commencing 25th January 2019 consisting of a ban on overtime and adhering to contractual start and finish times. In addition, Unison members returning to work base yards for washing facilities for each concessionary 15 minute break and half hour lunch breaks in line with the Council’s Hygiene Regulations and Instructions.

4 Implications of the Strike - options to mitigate risks and recommended option

- 4.1 There are several possible options to consider in determining how to respond to the Unite and UNISON Industrial action; which include whether to issue court proceedings to seek to prevent these Unions from continuing with (Unite) and commencing (UNISON) unlawful industrial action.

- 4.2 These options, including the operational and legal risks and mitigations are discussed in this report and in the Private report.
- 4.3 The recommended strategy for dealing with the Industrial Action in Waste Management is to proceed with :
- a) A formal invitation to Unite the Union and UNISON Union to Binding Arbitration (Unite have been informally invited to Arbitration and have declined), and at the same time
 - b) Commence the legal process for a court application with a view to preventing unlawful industrial action of both Unite the Union and UNISON union continuing.

4.4 Analysis of Available Options to mitigate the risks and issues of the current industrial action by Unite and UNISON

4.4.1 Option 1

Do Nothing

Allow the Industrial Action by Unite Union to continue and now UNISON to commence.

Summary Issues - Option 1

1. Waste accumulation and increased resident complaints
2. Council unable to deliver a consistent waste service due to industrial action.
3. Not taking account of Kerslake observations – Political and Industrial Relations
4. Significant financial costs not accounted for within budgetary framework
5. Value for Money issue for District Auditor and section 24 Notice implications.
6. Through recent ACAS negotiation meetings the Unite Union have not agreed to suspend the Industrial Action pending these talks or suspend the action because the industrial action is considered as unlawful.

This option is not recommended due to the significant issues for the citizens of Birmingham including the impact on service delivery to residents and reputational and financial implications for the Council as a result of the unlawful industrial action.

4.4.2 Option 2

Meet the demand of the Unite Union and UNISON to make a payment to its members employed in the refuse collection service of similar amounts paid to GMB members.

Summary of Issues - Option 2:

1. The Council has express and/ implied statutory powers under S111 and/or S222 to make payments to Unite and or UNISON members of amounts similar to those paid to GMB members.
2. However, there is no legitimate reason to pay both Unite and UNISON members in Waste Management for failure to consult as they would not have valid claims.
3. To make equivalent payments to them could be Ultra Vires.
4. A payment could set a trend in the Council. So that each and every other service area in the Council and potentially Council managed Schools, subject to change in terms of conditions and/redundancy would expect a similar payment, particularly if the affected group are a female dominated group. A strike might only be stopped if a payment was therefore made.
5. This could lead to an increase in industrial unrest, with union members choosing to strike because they would then be likely to expect to receive a financial settlement and not because of specific issues leading to a trade dispute. Paying one union as against another union, would lead to industrial unrest; the union members not paid would likely have a valid trade dispute entitling them to strike.

This Option 2 is NOT recommended due to the service delivery impact for residents, and the significant legal, HR, financial and reputational risks.

4.4.3 Option 3

A formal invitation to both the Unite Union and UNISON to binding arbitration with a view to bringing the industrial action to a resolution.

Summary of Issues - Option 3

1. Unite have indicated (informally) that they would not be to attend this meeting, particularly as the recent ACAS meetings (January 2019) have not resulted in a cessation of the strike action.
2. It will not be possible to offer through Arbitration a financial payment to Unite or UNISON in view of the risks set out in Option 2.
3. If the Unions do not accept the invitation to attend or the Arbitration does not result in a mutually agreed solution then Option 4 should be implemented.
4. Any offer of Arbitration including arranging the meeting must be progressed without delay so as to determine if a likely agreed outcome is possible.

4.4.4 Option 4

Obtain a Court Order to prevent the Industrial action from continuing.

Summary of Issues Option 4

1. The Council setting clear leadership by taking an objective view and legitimately assessing all of its options.
2. Setting precedent not to accept unlawful industrial action.
3. Likely citizen support.
4. Legal costs of injunction and costs of trial c£1.5m balanced against ongoing costs of strike at a likely cost of £350,000 per week.
5. Kerslake recommendations – mature relationship between members and officers with clarity of role. Formally and transparently considering the advice of statutory officers in reaching cabinet decisions.
6. Unite have stated that they would carry on industrial action regardless of any injunction – this is unlikely to have any public support.
7. The Council has explored and undertaken various mitigations since notification of the ballot and the industrial action by Unite Union all of which, to date, have not resulted in an agreed resolution to the dispute.

5. Implications of the Strike - Operational

- 5.1 The implication of the industrial action has had the impact of increased missed collections due to teams returning to the depot and therefore leaving the pitch, which has increased fuel costs and decreased productivity. The 24th November 2017 legally binding agreements between Birmingham City Council and the Unite and UNISON, required each refuse collection crew to have a Waste Reduction and Collection Officer on board, meaning a round cannot go out without a WRCO. There are currently 176 WRCO's for 176 rounds. This figure does not include cover for Annual leave or sickness. To mitigate the impact of this Current Grade 2's have been trained and are asked to 'Act up' or 'Stand In' on a short term basis to reduce reliance on use of agency staff. This industrial action has stated that Unite members must adhere to current grades, removing the possibility of asking Grade 2's to stand in or act up. This action has seen, on average, 20 rounds dropped per day.
- 5.2 Traffic to the call centre reporting missed collections has increased since the industrial action started rising from 214 calls per day to 1030. It is also noted during previous industrial action the amount of refuse put out by residents almost doubles.

- 5.3 Currently, the impact of this industrial action has seen a 40% reduction in the efficiency of collections and the objective of the contingency plan is to mitigate the reputational, financial and environmental impact on the city and its residents.
- 5.4 The contingency plan has been implemented since the start of the industrial action by Unite Union. It was not possible to determine the extent of the impact at the start of the industrial action and so 10 crews were engaged so as to assess the impact of the industrial action and therefore the points made in these paragraphs are refining the plan, including a proposal to move to fortnightly collections for all residual waste. This will keep costs down.
- 5.5 Domestic Collections (Wheelie Bin): It is proposed that current weekly residual collection be moved to fortnightly to correspond with residents' current recycling day and a twin stream (i.e. separate collection for residual and recycling) will be maintained where possible. However, where contractors are collecting missed roads/bins the waste is likely to be mixed and this will impact on recycling rates. Current residual collections are 90 crews per week. Moving to fortnightly for the period of industrial action will free up 45 of these crews, however, these crews will be operating the work to rule as laid out by the action and therefore will only reach 60% efficiency. In order to provide fortnightly refuse and recycling collections the Council will use external contractors to bolster current crews. Please see table below.
- 5.6 High Rise Flats: We have seen a dramatic drop in the collection of high rise blocks during this industrial action and the safety of our residents is of paramount importance. The suspension of the current container collection round is proposed as well as the procurement of contractors to collect from 213 High Rise blocks, ensuring current collection rates are maintained.
- 5.7 Trade Waste: In order to minimise the impact on our trade accounts it is proposed that current containers crews focus all their collection availability on the collection of trade waste to current schedules and contracts.
- 5.8 Sacks: There are currently 22,000 properties which are still using sacks as opposed to Wheelie Bins. The non collection of this waste will become an environmental concern. To address this, Waste Management will suspend Ward based Street Cleansing and allocate these crews (who are not in industrial action) to the 22,000 properties who still have sack collections.
- 5.9 To underpin this work, there will be a suspension of current enforcement activities undertaken by regulatory services and allocate those resources to commercial and arterial roads on an agreed schedule working with the Ward based cleansing teams to ensure the cleanliness of the wards.
- 5.10 Flytipping: The last round of Industrial Action saw a dramatic rise in flytipping across the city. In order to counter this, the establishment of a task force for escalated concerns such as flytipping and environmental health hazards, 8 crews operating from 6 am to 8pm, 7 days a week will be considered.

5.11 Use of Household Recycling Centres: Since the publication of the Christmas Collection schedule we have seen a marked increase in the use of the HRC's by residents. On 2nd January 2018 there were 4629 visits equating to 146 tonnes. On 2nd January 2019, there were 6151 visits equating to 185 tonnes. This shows that residents are increasingly eager to use the HRC's and therefore it is proposed that the opening times for the HRC's are extended to minimise queuing and extend the availability to residents.

5.12 Contingency plan and costs:

Issues	Action	Dependencies	Cost	Impact
Domestic Collection (Wheelie Bin)	Reduce residual collection to fortnightly to correspond with residents Recycling collection days and reinforce with the use of 20 contractor crews, collecting 7 days a week. Keeping, where possible, the twin stream collection but focussing on recycling collections where residents have, historically, minimal contamination	Procurement Corporate Communications Contact Centre Waste Management	As set out in the Private Report	Financial
High Rise Flats	Suspend current container collection round and procure contractors to collect from 213 High Rise, maintaining their current collection rates	Procurement Housing	As set out in the Private report.	Financial
Sack Collection	Suspend Ward based Street Cleansing teams and allocate this resource to the collection of domestic sacks for those 22,000 properties who still have sack collections. Suspend current enforcement activities and allocate to commercial and arterial roads to assist with the clearance of residual waste in sacks on an agreed schedule underpinned by the ward based cleansing teams.	Waste Management Regulatory Services	No cost	Reputational
Flytipping	Establish a task force for escalated concerns such as flytipping and environmental health hazards. 8 crews operating from 6 am to 8pm, 7	Waste Management	As set out in the Private report.	Financial

	days a week.			
Trade Waste	All current container rounds to be allocated to trade.	Waste Management	No Cost	Reputational

- 5.13 Communication: In order for an effective contingency plan to be successful it is imperative that communication to the public continues to be clear and helpful.
- 5.14 When the initial contingency plan was confirmed on 21 December 2018 a number of activities took place – including the publication of a press release to local media (print, online and broadcast), ongoing social media (including paid-for activity to boost the ‘reach’ of messages), messaging on the Council’s website, email updates through channels such as ‘Birmingham Bulletin’ and briefings to contact centre staff (including the creation of dedicated IVR messaging). Information has also been shared with staff and members through the intranet and internal social media (Yammer) and email.
- 5.15 Information about the plan has reached a significant number of people from across the city. For instance from 3 – 6 December 2018 there were three views of the ‘check your collection’ webpage and in the week commencing 24 December 2018 there were 68,115 views of the same webpage.
- 5.16 With a shift to fortnightly collections, prevention messages as well as collection information will need to be available, building on the content and activity already in place. The role of elected members in supporting this is crucial as they play a pivotal role in the link between the council and residents. Therefore, regular updates (email and face to face briefings) will be made available to all elected members for the duration of the contingency arrangements.

6. Options considered and Recommended Proposal

- 6.1 There are possible options to consider in determining how the Council might respond to the industrial action in respect of Unite and UNISON members in the Waste Service. This is discussed in this report and also in the Private Report.

7. Consultation

- 7.1 The Leader Councillor Ian Ward and the Deputy Leader Councillor Brigid Jones and Cabinet Members have been briefed on the Options set out in the Public report.
- 7.2 The Group Leader Conservative Group, Councillor Robert Alden and the Group Leader Liberal Democratic Group Councillor Jon Hunt have been advised of this report.

7.3 John Cotton, Chair of Co-ordinating Overview and Scrutiny has agreed that as this report is not on the Forward Plan and the subject matter is likely to be a 'key decision' and due to the matters set out in this report it is impracticable to defer the decision and has agreed that the matter is urgent and cannot be reasonably deferred to another meeting.

8. Risk Management

8.1 There are significant environmental, financial, operational and reputational risks associated with industrial action. The risks of not mitigating the industrial action would be as follows

8.2 Significant financial costs - contingency crews

8.3 Significant operational issues – missed collections and impact on service delivery for residents.

8.4 Significant reputational issue – missed collections, another industrial action in Waste Service

8.5 Mitigating these risks is discussed in paragraph 4 of this Report and also in the Private Report.

9. Compliance Issues:

How are the recommended decisions consistent with the City Council's priorities, plans and strategies?

9.1 These proposals support the City Council priority of being a great city to live in by keeping the streets free from unnecessary domestic waste.

10.0 Legal Implications.

As set out in the Private Report and

10.1 There is no overarching right to strike under UK legislation. Instead, statutory protection for trade unions is afforded in the form of immunities from liability in civil proceedings. In addition, individuals who take part in lawful industrial action have limited statutory protection against unfair dismissal for taking part in strike action.

10.2 The relevant statutory provisions are principally set out in TULRCA

10.3 In summary, not only have Unite balloted their members for industrial action, and called industrial action, they have also issued an employment claim in the Birmingham ET for not making similar payments to their members, alleging that the Council has subjected their members to a detriment for whistleblowing, for trade union activities, and has blacklisted them. The Council is vigorously defending these claims and they are currently proceeding through the ET.

11.0 Financial Implications

- 11.1 The financial implications of each of the potential responses by the Council to industrial action are considered in the Private Report
- 11.2 However, the cost of industrial action could be up to £350,000 per week and it is clear that the financial impact of prolonged action could place a significant financial burden on the Council. All efforts need to be made to seek a resolution which limits the financial impacts

12.0 Procurement Implications (if required)

- 12.1 Due to the urgent and unforeseen nature of the industrial action and the need for contingency arrangements and therefore procurement requirements, the Negotiation Procedure without a Call for Competition as defined in Regulations 32 (2)(c) of the Public Contracts Regulations 2015 will be used.
- 12.2 Details of the costs will be included within the SCN award report following conclusion of negotiations.
- 12.3 The contracts will be managed by The Assistant Director, Waste Management.
- 12.4 Following satisfactory conclusion of the single contractor negotiations a further report will be presented requesting approval to award the contracts.

13.0 Human Resources Implications (if required)

- 13.1 Whist Unite the Union have clearly stated its intention and requirements the Council remains committed to maintaining discussions with Unite in a genuine effort to bring about resolution. Senior Management have been engaged in those discussions, having utilised the services of ACAS to assist, meetings taking place on 8 January 2019.
- 13.2 The Council remains committed to also having discussions with UNISON with a view to bringing about a resolution to their industrial dispute. And if necessary will also utilise the services of ACAS to assist.
- 13.3 At a more local level the Council remains committed to ensuring that lawful industrial action is able to progress unimpeded and also maintaining employee relations. Regular union meetings in the Waste Service, led by officers in service with the joint Trade Unions continue on 25 January 2019.
- 13.4 During the industrial action the Council will continue to manage the performance of the Refuse Collection workforce in accordance with current protocols.

14.0 Public Sector Equality Duty

- 14.1 The requirements of Standing Order 9 in respect of the Council's Equality Policy and the Equality Act 2010 will be specifically included in the contract documentation.

15.0 Background Documents

15.1 Cabinet Report (Private) 24th November 2018

15.2 Waste Contingency Plan (January 2019)

16.0 Appendix

1. Risks and Mitigations Options Analysis

APPENDIX

Risks and Mitigation Options Analysis

	Reputation	Political	Financial	Legal/EP	HR/Industrial Relations	BIIP / Auditors / Senior Officers
1. Do nothing (implement contingency plan, and engage private contractors)	<ul style="list-style-type: none"> Waste accumulation on streets Increased resident complaints Council unable to deliver a consistent waste service 		<ul style="list-style-type: none"> Significant financial costs not accounted for in budgetary framework 		<ul style="list-style-type: none"> Kerslake – political and industrial relations Unite Union have not agreed to suspend the Industrial action pending talks 	<ul style="list-style-type: none"> Value for Money issue for auditors with S24 Notice implications.
2. Meet Unite demands i.e. make a payment	<ul style="list-style-type: none"> Could lead to additional claims / industrial action 			<ul style="list-style-type: none"> No legitimate reason to make payments to both Unison and Unite Payments to Unite and UNISON to end the industrial action could be Ultra Vires. 	<ul style="list-style-type: none"> Setting a trend when trying to implement future changes across the Council 	
3. Offer Binding Arbitration to Unite and UNISON with a view to ceasing the industrial action				<ul style="list-style-type: none"> Unable to make payment through arbitration due to risks in option 2 	<ul style="list-style-type: none"> Unite have indicated (informally) that they would not attend binding arbitration. Recent meetings with ACAS have not resulted in a cessation of the strike action. 	
4. Legal route; Injunction & ET	<ul style="list-style-type: none"> Setting a precedent for not accepting unlawful Industrial action Resident support BCC seen as making risk assessment and acting on it. 	<ul style="list-style-type: none"> Clear leadership by taking objective view and assessing all of its options 	<ul style="list-style-type: none"> Legal costs of injunction and costs of trial £1.5m against ongoing costs of strike at a likely costs of £350,000 week 	<ul style="list-style-type: none"> Unite stated that they would carry on Industrial action regardless of any injunction 		<ul style="list-style-type: none"> Kerslake – mature relationships between officers and members with clarity of role. Formally and transparently considering advice of statutory officers in reaching cabinet decisions

Birmingham City Council

Public Report – Late Report

Birmingham City Council**Report to Cabinet**

13 November 2018



Subject: Waste Management – Industrial Action Update
Report of: Chief Executive, Corporate Director Finance & Governance and City Solicitor
Relevant Cabinet Member: Councillor Ian Ward, Leader of the Council
 Councillor Majid Mahmood, Cabinet Member Clean Streets Waste and Recycling
Relevant O & S Chair(s): Councillor John Cotton Chair of Co-ordinating Overview and Scrutiny Committee on behalf of Councillor Penny Holbrook
Report author: Clive Heaphy, Corporate Director Finance and Governance
 Kate Charlton, City Solicitor and Monitoring Officer
 Rob James, Acting Corporate Director Place

Are specific wards affected?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No – All wards affected
If yes, name(s) of ward(s):		
Is this a key decision?	<input checked="" type="checkbox"/> Yes	No
If relevant, add Forward Plan Reference:		
Is the decision eligible for call-in?	Yes	<input checked="" type="checkbox"/> No
Does the report contain confidential or exempt information?	Yes	<input checked="" type="checkbox"/> No
If relevant, provide exempt information paragraph number or reason if confidential :		

REPORT

*** To be completed for all late reports, ie. which cannot be despatched with the agenda papers ie. 5 clear working days' notice before meeting.**

Reasons for Lateness

As a result of the outcome of the strike action in the Waste Management service by Unite Union announced on 14th December 2018 and the ballot result of UNISON Union announced on 11th January 2019, there is a need to urgently mitigate the impacts of the actual and proposed industrial action. This report is late and urgent due to the need to consider fully all the options open to the Council to manage these impacts

Reasons for Urgency

The interests of the Council are likely to be jeopardised unless further mitigation options are instituted immediately. The Chief Executive and the Leader of the Council have agreed that the matters in this report require immediate implementation [Paragraph 3.7 Part B Council Constitution 11/9/18].



Waste Disposal Contract Interim Arrangement Agreement

Call In by the Resources O&S Committee

1 Request for “Call-In”

1.1 On 11th December 2018 Cabinet took a decision to:

- Authorise the Corporate Director of Place to enter into a 5 year Interim Arrangement Agreement for the provision of waste disposal services with Veolia.
- Delegate authority to the Cabinet Member for Clean Streets, Waste and Recycling and the Cabinet Member for Finance and Resources jointly with the Director of Commissioning & Procurement, the Corporate Director of Finance & Governance (or their delegate), Corporate Director of Place and the City Solicitor (or their delegate) to finalise and agree the terms of the Interim Arrangement Agreement.
- Delegate authority to the City Solicitor (or their delegate) to execute all other necessary contractual documentation to effect this outcome

1.2 A private report accompanied the public report to Cabinet. Matters discussed at the call-in that refer to that private report are set out in a separate private scrutiny appendix.

1.3 A request for Call-In was made to the Resources Overview and Scrutiny (O&S) Committee by Councillors Sir Albert Bore and Josh Jones on 14th December 2018.

1.4 The Resources O&S Committee met on 20th December 2018 to consider the matter. However, due to key officers being unable to attend (because of ACAS talks), the Committee and the Cabinet Members for Finance & Resources, and Clean Streets, Waste and Recycling, agreed that the meeting be adjourned.

1.5 The committee reconvened on Thursday 10th January 2019, where consideration of the call-in was preceded by an evidence gathering session on the background and circumstances of the decision.

2 Key Issues

2.1 Members of the Committee heard from both elected members and officers involved in the decision:

- Cllr Lisa Trickett (former Cabinet Member with responsibility for waste); Cllr Majid Mahmood (now the Cabinet Member with responsibility for waste, and previously with responsibility for



Waste Disposal Contract Interim Arrangement Agreement

procurement) and Cllr Brett O'Reilly (Cabinet Member with responsibility for finance and resources);

- Rob James (Acting Director for Place since July 2018); Darren Share (Director with responsibility for waste since August 2018); Mike Smith (Acting Head of Commissioning and Procurement with responsibility for the procurement of the contract since October 2018).

2.2 The key issues discussed in the session were:

- a) Loss of strategic capacity. The Cabinet Members and former Cabinet Member all referred to the significant turnover of officers with responsibility for this area of the Council (including the loss of a Head of Sustainability) and how that contributed to a lack of leadership, direction and consistency. Lack of capacity was also an issue. Members of the committee acknowledged the severe detrimental impact of the loss of corporate knowledge and memory and the effect of such a high turnover of staff. As stated by both officers and Members, this is the biggest piece of investment the city has and a new facility certainly would be, so this should be given the priority it requires and deserves.
- b) The lack of reference to the long term vision for the city. The From Waste to Resource Scrutiny Inquiry (2014) set out an important framework within which to do something different as an authority. The 2016 Waste Strategy Report to Cabinet built on this, but this needs to be explicitly stated. The strategic fit of Tyseley Energy from Waste Plant was key to support a move to a low carbon city and to support sustainability priorities. This report does not reference that at all. The long-term vision for the city must be of paramount concern and importance in all of this.
- c) Concerns over best value. Members challenged the benefits listed in the reports (see appendix on private agenda). It was explained by the Cabinet Member and officers that the additional money required from the City Council was to extend the life of the plant (not to undertake maintenance, **which was Veolia's responsibility**). Another issue raised was the additional 2019+ budget requirement (see appendix on private agenda for more detail).
- d) A number of governance issues were uncovered. It was established that at no point did Cabinet authorise the negotiation of a five year extension, but that this was put on the table by Veolia in July 2018. A report to bring this decision back to Cabinet was repeatedly deferred. When it did come, the decision report did not explicitly set out the choice Cabinet had of the two-year or five-year extension. Indeed the report stated that the former option **had been "rejected"** – but did not state by whom or on what authority, given that that was the February 2018 Cabinet decision. Only Cabinet had the authority to reject or amend that decision. Members noted the findings of the independent report into the waste strike of 2017 (published December 2018) which referred to decisions taken at meetings that were not formal Cabinet meetings, so there was no accountability and transparency. The option of a five year extension should have been brought to Cabinet earlier, for it to make a decision on the potential for a five year overrun, which would have laid out a path for Cabinet to make that final determination when all the facts were known. It is also of great



concern that it took more than three months to take a decision paper from Council Management Team to Cabinet, with a cliff edge four months away from the CMT decision. There are significant lessons from this that the City Council must learn from.

- e) Secondly with regards to governance, the issuing of the VEAT notice and the soft market testing was unconstitutional. Whilst members understood the reasons for that – specifically the extremely tight time constraints – these matters should not have been implemented until the expiry of the call-in period.
- f) The move from a two-year to a five-year extension was repeatedly challenged, particularly in light of the serious legal advice given in the private report. Officers responded that the feedback from the market during the soft market testing was that an extension to the overrun and the completion of the essential works on the Tyseley plant would encourage more firms to come forward to bid in future. It was also noted that the community sector required more time to develop processes to provide services. However, it was acknowledged by all participants that we were now in a position where we have little choice but to extend the contract with Veolia – whether that be by two years or five. It is therefore crucial that specific and binding targets on performance are agreed with Veolia whether for a two-year or a five-year extension. These must be enshrined within the contract.
- g) The legal advice contained in the private report raises serious challenge to the decision. The Cabinet Member for Finance and Resources acknowledged those risks but stated that, in his judgement and based on the expert opinion of officers and consultants, there was a risk of challenge from any extension, and that the financial gains for the five year extension made that a risk worth taking. Scrutiny members were at best sceptical that the stated financial benefits would be realised and therefore outweigh the legal risks. Officers further stated that following discussions with potential bidders, the preference was for longer time to prepare for a new contract so challenges may not be forthcoming.

2.3 Other issues discussed included the condition in which the Tyseley EfW plant should be returned to the City Council (in particular whether the original contract had changed in this respect – there was no clear answer to this) and the essential works to be carried out.

3 The Call-In Criteria

3.1 At the meeting, Cllr Jones highlighted the following reasons for the request for call-in:

- 1. *the decision appears to be contrary to the Budget or one of the 'policy framework' plans or strategies* – the decision makes no reference to the 2016 Waste Strategy (point b above) and there are costs associated that are not covered in the budget consultation for 2019/20 (point c above);
- 2. *the decision appears to be inconsistent with any other form of policy approved by the full Council, the Executive or the Regulatory Committees* – the decision is not consistent with the



Waste Disposal Contract Interim Arrangement Agreement

decision made by Cabinet in February 2018 which authorised negotiations for a two-year extension. There is very little reference to this in the December 2018 report and it is not made clear that Cabinet has a choice of a two-year or five-year extension (point d above). It is also not consistent with other previous Cabinet decisions: '*Update on the Development of a Waste Strategy for Birmingham*' on 28th June 2016 and '*Procurement Strategy for Waste Management Services*' on 13th February 2018;

3. *the decision appears to be inconsistent with recommendations previously made by an Overview and Scrutiny body (and accepted by the full Council or the Executive) – the 2014 Scrutiny Inquiry into From Waste to Resource set out a way forward for the waste strategy and consequent procurement, and was agreed by City Council in June 2014 but was not followed, as is demonstrated by successive tracking reports. Also the decision makes no reference to the 2016 Waste Strategy (point b above);*
4. *the Executive appears to have failed to consult relevant stakeholders or other interested persons before arriving at its decision – the report does not mention any consultation with members including Cabinet Members;*
5. *the Executive appears to have overlooked some relevant consideration in arriving at its decision – there are no references to previous policy or the long term strategy for the city;*
6. *the decision has already generated particular controversy amongst those likely to be affected by it or, in the opinion of the Overview and Scrutiny Committee, it is likely so to do – the legal advice suggests there may well be challenge, and the decision is not set in the context of the longer term vision set out in the Waste Strategy;*
8. *there is a substantial lack of clarity, material inaccuracy or insufficient information provided in the report to allow the Overview and Scrutiny Committee to hold the Executive to account and/or add value to the work of the Council – there is a lot of information that the O&S committee received to consider before this call-in and this should be made available to Cabinet Members in considering the decision;*
9. *the decision appears to give rise to significant legal, financial or propriety issues – the significant legal issues are set out in section 7.2 of the private report. The governance concerns (points d and e above) also give rise to significant propriety issues.*

4 The Committee Resolution

- 4.1 The Committee resolved to call-in the decision for reconsideration by Cabinet, five votes to zero, on the grounds set out above.
- 4.2 I therefore formally ask the Cabinet to reconsider its decision. The decision report is deficient in a number of respects and Cabinet should have sight of additional information that is not currently in either the public or private report. The committee recommends that a supplementary report accompanies the decision reports when Cabinet reconvenes. This should include:



- The comparison of the two-year and five-year extension options, which should be clearly set out so as to give Cabinet full insight into the decision to be taken. This should include details of the expected benefits from each option, and the likelihood of realising these benefits, as against the legal risks associated with each;
- How the decisions taken support the Waste Strategy already adopted by the City Council;
- The budget position should be clearly explained (see point c above) and the sentence in the **private report that states that the budget "is provided for in the 2019+ budget proposals"** should be removed.

Councillor Sir Albert Bore

Chair, Resources Overview and Scrutiny Committee

Birmingham City Council Waste Disposal Contract – Interim Arrangement Agreement

Executive response to ‘Call In’ of decision made by Cabinet 11 December 2018

Cabinet Meeting – 15th January 2019

1. Background

The decisions made by Cabinet on 11th December 2018 were to:

- Authorise the Corporate Director of Place to enter into a five year Interim Arrangement Agreement for the provision of waste disposal services with Veolia.
- Delegate authority to the Cabinet Member for Clean Streets, Waste and Recycling and the Cabinet Member for Finance and Resources jointly with the Director of Commissioning & Procurement, the Corporate Director of Finance & Governance (or their delegate), Corporate Director of Place and the City Solicitor (or their delegate) to finalise and agree the terms of the Interim Arrangement Agreement.
- Delegate authority to the City Solicitor (or their delegate) to execute all other necessary contractual documentation to effect this outcome.

A private report accompanied the public report to Cabinet.

A request for Call-In was made to the Resources Overview and Scrutiny (O&S) Committee by Councillors Sir Albert Bore and Josh Jones on 14 December 2018.

The committee initially met on 20th December 2018 but adjourned that meeting and reconvened on Thursday 10th January 2019, where consideration of the Call-In was preceded by an evidence gathering session on the background and circumstances of the decision.

Members of the Committee heard from both elected members and officers involved in the decision:

- Cllr Lisa Trickett (former Cabinet Member with responsibility for waste); Cllr Majid Mahmood (now the Cabinet Member with responsibility for waste, and previously with responsibility for procurement) and Cllr Brett O'Reilly (Cabinet Member with responsibility for finance and resources);
- Rob James (Acting Director for Place since July 2018); Darren Share (Director with responsibility for Waste since August 2018); Mike Smith (Acting Head of Commissioning and Procurement Head of Category with responsibility for the procurement of the contract since October 2018).

2. Reason for Request for Call-in

The reason for the request for Call-In was that:

- a) the decision appears to be contrary to the budget or one of the ‘policy framework’ plans or strategies;

- b) the decision appears to be inconsistent with any other form of policy approved by the full Council, the Executive or the Regulatory Committees;
- c) the decision appears to be inconsistent with recommendations previously made by an Overview and Scrutiny body;
- d) the Executive appears to have failed to consult relevant stakeholders or other interested persons before arriving at its decision;
- e) the Executive appears to have overlooked some relevant consideration in arriving at its decision;
- f) the decision has already generated particular controversy amongst those likely to be affected by it or, in the opinion of the Overview and Scrutiny Committee, it is likely so to do;
- g) there is a substantial lack of clarity, material inaccuracy or insufficient information provided in the report to allow the Overview and Scrutiny Committee to hold the Executive to account and/or add value to the work of the Council;
- h) the decision appears to give rise to significant legal, financial or propriety issues;

3. Key Issues raised by the Scrutiny Committee and response

Loss of strategic capacity. It is acknowledged that there has been high turnover of senior staff in this area. Despite the resource challenges there has been significant progress following the presentation of a revised offer from Veolia in July to move from a two year overrun Interim Arrangement Agreement to a five year Interim Arrangement Agreement. The offer was considered with external technical and legal experts in the field and the proposal presented to the Council's Management Team and the Executive Management Team. The financial implications were discussed at the Executive Management Team away day when considering the budget for 2019/20 and a report was prepared for Cabinet to consider the proposal. Going forward, the service will ensure the correct level of project management and support is available for the re-procurement of the waste disposal contract.

Lack of reference to the long term vision for the City. In July 2014 the Transport Connectivity and Sustainability Overview and Scrutiny Committee undertook a review of waste to resources. There were eight recommendations contained within the report. All were completed and three related to the procurement of the waste disposal contract:

- R04 Draft procurement plan to achieve the goals of the Waste Strategy
- R05 A rigorous analysis of the Tyseley Plant and site
- R07 Develop future options for HRCs (Household Recycling Centres)

The Waste Strategy identified over 200 different approaches to waste disposal and through a process involving the market, service specialists and local elected members the current procurement plan was developed. This plan was tracked through the Overview and Scrutiny process. The procurement plan (R04) has been followed and will be implemented during the period of the Interim Agreement. The Interim Arrangement Agreement and the subsequent contracts will allow time to investigate new technologies before any commitment to replace the Tyseley plant

beyond any life extension works. A significant piece of work will need to be started to procure a long term solution for Birmingham's waste. That work will commence immediately in order to have a clear strategic vision to provide an alternative to the Tyseley plant before it comes to the end of its extended working life. The procurement of this replacement plant will start in year one of the new disposal contract.

The Cabinet report requested the option to pursue an Interim Arrangement Agreement for a five year period to enable the Tyseley plant to be invested in, to extend its working life but only if:

- suitable terms can be agreed with Veolia; and
- procurement risk has been suitably mitigated through no procurement challenge being launched within 30 days of the issue of a VEAT notice.

Soft market testing was undertaken in November 2017. The market raised concerns about the two year timescale and the capital works to be completed, which could give the incumbent operator an unfair advantage and lead to risk pricing.

There are significant benefits of pursuing a five year Interim Arrangement Agreement in lieu of a two year Interim Arrangement Agreement these are outlined more fully in Appendix 1 of the Private Report.

Within the existing contract, Veolia is responsible for the on-going repairs to the City's assets at five waste disposal sites across the city. This obligation ceases on 16th January 2019 when the contract ends.

Concerns over best value. This repairing obligation ceases on 16th January 2019 when the contract ends. The essential works to be undertaken under the five year Interim Arrangement Agreement ("Essential Works") to the EFW (Energy from Waste) plant will be required and technical engineering experts have advised on the ability to deliver these and over what time period.

Veolia has presented a schedule of works along with a financial offer to the City Council that could provide significant financial and operational benefits if a five year Interim Arrangement Agreement is approved. As stated above, this is contained within the Private Agenda Executive response report.

The essential works that have been identified will be funded by the City Council. A series of commercial meetings have taken place between with Veolia and our technical engineering experts, Fichtner, to agree what essential works Veolia are able to deliver and over what time period to have the minimum disruption to the service. Veolia presented a schedule of works along with a financial offer to the Council that could provide the Council with significant benefits if a five year Interim Arrangement Agreement was offered as opposed to the two year overrun currently in place. This arrangement will also ensure the essential works will be completed (subject to the procurement timetable) before the waste disposal contract is re-procured. The benefits of this approach are summarised in the Private report.

In respect of the 2019+ budget, there are assumed savings which are currently identified as a pressure. This assumption did not include a provision for ongoing repairs and maintenance. The five year Interim Arrangement Agreement will make a contribution to this saving target which is over and above that offered by a two year Interim Arrangement Agreement. This is covered in the Private Report.

Governance Issues. During negotiations for the two year deal a five year interim arrangement was offered by Veolia and this had been repeatedly rejected. However when a formal offer was received from Veolia in July 2018 it was presented and discussed at an internal meeting of Officers and the Cabinet Member. The Cabinet Member instructed Officers to investigate the five year Interim Arrangement Agreement. Whilst the five year proposal was to be explored the governance for the decision to proceed sat with Cabinet, hence the Cabinet Report was presented in December 2018.

Issue of VEAT notice. The internal and external legal advice was to issue a VEAT notice. The VEAT notice is the formal way to let the market know the proposed extension by the City Council of this contract. The VEAT notice was required to be issued 31 days before the end of the current contract and was therefore issued on the 13th December 2018. The issue of a VEAT notice is irrespective of the length of time of the contract extension. The VEAT notice has to state the maximum period of time of the extension. Once issued the proposed extension time could be reduced but not extended.

4. The Committee Resolution

The Committee resolved to Call-In the decision for reconsideration by Cabinet, five votes to zero, on the grounds set out above.

Cabinet is being asked to reconsider its decision. The view of the Scrutiny Committee is that the decision report is deficient in a number of respects and Cabinet should have sight of additional information that is not currently in either the public and private report.

The scrutiny committee recommends that a supplementary report accompanies the decision reports when Cabinet reconvenes to include:

- The comparison of the two-year and five-year extension options, which should be clearly set out so as to give Cabinet full insight into the decision to be taken. This should include details of the expected benefits from each option, and the likelihood of realising these benefits, as against the legal risks associated with each;
- How the decisions taken support the Waste Strategy already adopted by the City Council;
- The budget position should be clearly explained and that the sentence in the private report in that states that the budget “is provided for in the 2019+ budget proposals” should be removed.

5. Comments in response:

In response to the concerns raised by the Scrutiny Committee and to support the decision report of the 11th December 2018 the following information is submitted:

5.1 Comparison of the two year and five year options

See Appendix 1 of Private Report.

5.2 How Decisions support the Waste Strategy

The procurement plan completely supports the Waste Strategy. It is proposed that the existing single contract will be broken down to smaller contracts to allow other contractors to bid for the work. The five year Interim Arrangement Agreement will also allow the City Council to respond to Governments 25 year plan for Waste. The consultation has only recently been issued and asks the question about further splitting the waste stream and increasing recycling.

5.3 The Budget Position

This is explained in Paragraph 3 above.

PUBLIC REPORT

Report to:	CABINET
Report of:	Acting Corporate Director Place
Date of Decision:	11 December 2018
SUBJECT:	WASTE DISPOSAL CONTRACT INTERIM ARRANGEMENT AGREEMENT
Key Decision: Yes	Relevant Forward Plan Ref: 005675/2018
If not in the Forward Plan: (please "X" box)	Chief Executive approved <input type="checkbox"/>x
Relevant Cabinet Member(s)	O&S Chair approved <input type="checkbox"/>x
	Councillor Brett O'Reilly – Finance and Resources
	Councillor Majid Mahmood – Clean Streets, Waste and Recycling
Relevant O&S Chair:	Councillor Albert Bore, Resources
Wards affected:	All

REPORT

*** To be completed for all late reports, ie. which cannot be despatched with the agenda papers ie. 5 clear working days' notice before meeting.**

Reasons for Lateness

Further discussions were required with Legal Services.

Reasons for Urgency

There is a requirement to submit this to 11 December 2018 Cabinet.

Public Report
Birmingham City Council
Report to Cabinet
11th December 2018



Subject: Waste Disposal Contract Interim Arrangement Agreement
Report of: Corporate Director for Place
Relevant Cabinet Member: Joint Report with Cllr Brett O'Reilly – Finance and Resources
 Cllr Majid Mahmood – Clean Streets, Waste and Recycling
Relevant O &S Chair(s): Cllr Sir Albert Bore, Resources O&S Committee
Report author: Darren Share, Director – Waste Management

Are specific wards affected?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No – All wards affected
If yes, name(s) of ward(s):		
Is this a key decision?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If relevant, add Forward Plan Reference:		
Is the decision eligible for call-in?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Does the report contain confidential or exempt information?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If relevant, provide exempt information paragraph number or reason if confidential :		

1 Executive Summary

- 1.1 To inform Cabinet of the proposal to enter into a 5 year Interim Arrangement Agreement with Veolia for the continued provision of waste disposal services. A private report deals with the confidential and/or exempt information not covered in the public report and seeks approval of the proposal together with the relevant delegations.

2 Recommendations

- 2.1 That Cabinet:
- 2.1.1 Notes the contents of this report.
- 2.1.2 Authorises the Corporate Director of Place to enter into a 5 year Interim Arrangement Agreement for the provision of waste disposal services with Veolia.

- 2.1.3 Delegates authority to the Cabinet Member for Clean Streets, Waste and Recycling and the Cabinet Member for Finance and Resources jointly with the Director of Commissioning & Procurement, the Corporate Director of Finance & Governance (or their delegate), Corporate Director of Place and the City Solicitor (or their delegate) to finalise and agree the terms of the Interim Arrangement Agreement.
- 2.1.4 Delegates authority to the City Solicitor (or their delegate) to execute all other necessary contractual documentation to effect this outcome.

3 Background

- 3.1 The Council first awarded the waste disposal contract to Veolia for Waste Disposal Services and the construction of a new Incinerator Plant on 9th July 1993 for the duration of 25 years, and the contract commenced on 17th January 1994, expiring on 16th January 2019.
- 3.2 On 28th June 2016 Cabinet approved the recommendation of an Overrun Agreement with a stop date of January 2021. The rationale for this recommendation was the Overrun Agreement would mitigate the risk of any delays in the procurement process which could result in the Council not having a waste disposal contract in place before the mobilisation of a replacement provider. The rationale supporting agreement of this original overrun were to:
- ensure continuity of services through plant availability.
 - ensure asset condition was fit for purpose for the replacement contract.
 - reduce the Council's exposure to additional landfill tax.
- 3.3 A re-procurement strategy was developed during 2017 and agreed by Cabinet on 13th February 2018.
- 3.4 A project group was established in September 2016 consisting of 3 work streams, these being Procurement, Interim Arrangement Agreement and Asset (handback \ condition). The work streams consisted of representation from internal officers and external expertise from within the waste industry. The external representation has been provided by Bevan Brittan providing legal expertise, Price Waterhouse Cooper providing financial expertise, Fichtner Ltd acting as consulting engineers and Ricardo as Energy and Environment Consultants.
- 3.5 Findings (2017 Outage Inspection Report) from plant and site surveys undertaken by external technical experts in readiness for the hand back of assets to the Council identified a number of Essential Works which if not undertaken pose significant high risk to the Council in meeting its continuing obligations to manage waste disposal and reduce waste going to Landfill. During negotiations undertaken with the current provider and our technical experts it was concluded that it is not possible for all of these Essential Works to be completed within the timeframe that the approved 2 year Interim Arrangement Agreement allows.

An alternative option to enter into an enhanced Repairs and Maintenance Programme during the 2 year Interim Arrangement Agreement to include only some of the Essential Works was considered in July 2018 by the Waste Management Service Programme Board but rejected as it would result in;

- a) Higher costs resulting from delivery of the enhanced R & M as the Essential Works are still required and the risk priced in by bidders in the procurement process due to the uncertainty over the condition of the assets.
- b) Significantly increased risk of plant failure impacting on level of waste sent to Landfill, an enhanced R & M still leaves the Council at risk and there will be extended delays to having the works completed while new providers then source and carry out the remaining works needed.

3.6 Following a Waste Management Service Programme Board in June 2018 the impact of not completing the essential works was discussed. This led to a review of detailed options for an Interim Arrangement Agreement. It was identified that an increased 5 year Interim Arrangement Agreement would facilitate and help effectively deliver the new long term strategic procurement and essential maintenance works. The rationale supporting this would include the fact that:

- a) The interim period will enable a suitably structured and thought through procurement process be delivered by the Council over an appropriate time period for the recommissioning of the waste disposal service.
- b) All Essential Works will be undertaken to the Tyseley Energy Recovery Facility (ERF) during the interim period.
- c) The completion of the Essential Works that will be carried out during any extension will be advantageous to all bidders in any re-procurement exercise. For example by ensuring that the ERF plant will meet the agreed specification for handover to a new operator so bidders will not need to risk price for uncertainties in this regard
- d) The interim period will allow for suitable mobilisation arrangements to be made and/or secure consents (if required) for any future waste management sites ahead of re-procurement; and
- e) The interim period will enable greater information to be shared with future bidders about performance of the ERF, and potentially including access to the ERF during planned shutdowns for the purpose of conducting their due diligence in compiling tenders in a future procurement process.

4 Options considered and Recommended Proposal

- 4.1 An in house provision was considered but rejected, details are contained in the private report.
- 4.2 Exercise the decision of Cabinet on 28th June 2016 and extend the existing agreement with Veolia for a period of 2 years whilst the re-procurement exercise is undertaken. This option was rejected because the required Essential Works cannot be completed within this timeframe. In addition and given the

current condition of the plant and the Essential Works required it is highly likely that bidders would include a significant risk premium in their pricing submissions under a new procurement.

- 4.3 Immediately commence re-procurement of a replacement waste disposal contract. This option was rejected because there is insufficient time to complete a tender process and consequently it may leave the Council with a period of time without a contract whilst this process is concluded and the reasons stated above.

5 Consultation

5.1 Internal

Officers from Waste Management, Finance, Commissioning and Procurement and Legal Services have been involved in the preparation of this report and support and recommendation.

5.2 External

- 5.2.1 There has been consultation with specialist Legal and Engineering Companies. The legal issues were raised and mitigated against and are explained in the Private Report due to their commercial nature. Their advice has been used to compile this report.

6 Risk Management

- 6.1 To enable the Council to mitigate the risk of Interim Arrangement Agreement in the procurement and implementation of the new arrangements for the treatment and disposal of waste.
- 6.2 To reduce the risk of plant failure and impact to Landfill which delaying Essential Works presents.

7 Compliance Issues:

7.1 How are the recommended decisions consistent with the City Council's priorities, plans and strategies?

- 7.1.1 The Council approved and adopted the Council Plan 2018-2020, which identifies strategic outcomes for change in Birmingham (Children, Housing, Jobs and Skills and Health). This decision supports the priorities as follows:
- 7.1.2 We want Birmingham to be a great City to live in. This decision will enable improved facilities at household waste recycling centres at Tyseley, Perry Barr and Lifford Lane whilst reducing the risk of plant failure at the Tyseley ERF which would result in increased waste to landfill whilst any plant failures are

rectified. This will not remove the risk of additional waste to landfill from other factors beyond our control e.g. changes in collection or waste flows.

7.2 Legal Implications

- 7.2.1 Maintaining the provision of waste disposal facilities facilitates the discharge of the Council's duty as a waste disposal authority under Section 51 of the Environmental Protection Act 1990.
- 7.2.2 The council has a duty to act as both a Waste Collections Authority and a Waste Disposal Authority under the Environmental Protection Act 1990.
- 7.2.3 Under S.111 of the Local Government Act 1972, the Council is entitled to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions.
- 7.2.4 The Council has best value duty under the Local Government Act 1999 to improve the efficiency, economy and effectiveness of the service it delivers.
- 7.2.5 The legal implications that may occur as a consequence of taking the decision are detailed in the Private Report due to their commercial sensitivity.

7.3 Financial Implications

- 7.3.1 The Interim Arrangement Agreement will contribute towards addressing the existing budget pressures faced by the Service. The financial implications are commercially confidential and are set out in the private report.

7.4 Procurement Implications

- 7.4.1 The Procurement Strategy in support of the outline Municipal Waste Strategy 2017 – 2040 dealing with all long term procurement decisions was approved by Cabinet in February 2018 and this is unchanged apart from the timeline.

7.5 Human Resources Implications

- 7.5.1 It is intended that TUPE arrangements will not be applicable and this will be detailed in the Interim Arrangement Agreement once finalised.

7.6 Public Sector Equality Duty

- 7.6.1 Attached as appendix 1.

8 Background Documents

- 8.1 Appendix 1 - Public Sector Equality Duty Statement
- 8.2 Appendix 2 – Equality Impact Initial Assessment

Appendix 1

PROTOCOL PUBLIC SECTOR EQUALITY DUTY

- 1 The public sector equality duty drives the need for equality assessments (Initial and Full). An initial assessment should, be prepared from the outset based upon available knowledge and information.
- 2 If there is no adverse impact then that fact should be stated within the Report at section 4.4 and the initial assessment document appended to the Report duly signed and dated. A summary of the statutory duty is annexed to this Protocol and should be referred to in the standard section (4.4) of executive reports for decision and then attached in an appendix; the term 'adverse impact' refers to any decision-making by the Council which can be judged as likely to be contrary in whole or in part to the equality duty.
- 3 A full assessment should be prepared where necessary and consultation should then take place.
- 4 Consultation should address any possible adverse impact upon service users, providers and those within the scope of the report; questions need to assist to identify adverse impact which might be contrary to the equality duty and engage all such persons in a dialogue which might identify ways in which any adverse impact might be avoided or, if avoidance is not possible, reduced.
- 5 Responses to the consultation should be analysed in order to identify:
 - (a) whether there is adverse impact upon persons within the protected categories
 - (b) what is the nature of this adverse impact
 - (c) whether the adverse impact can be avoided and at what cost – and if not –
 - (d) what mitigating actions can be taken and at what cost
- 6 The impact assessment carried out at the outset will need to be amended to have due regard to the matters in (4) above.
- 7 Where there is adverse impact the final Report should contain:
 - a summary of the adverse impact and any possible mitigating actions (in section 4.4 or an appendix if necessary)
 - the full equality impact assessment (as an appendix)
 - the equality duty – see page 9 (as an appendix).

Equality Act 2010

The Executive must have due regard to the public sector equality duty when considering Council reports for decision.

The public sector equality duty is as follows:

1	<p>The Council must, in the exercise of its functions, have due regard to the need to:</p> <ul style="list-style-type: none"> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by the Equality Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
2	<p>Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:</p> <ul style="list-style-type: none"> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
3	<p>The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.</p>
4	<p>Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:</p> <ul style="list-style-type: none"> (a) tackle prejudice, and (b) promote understanding
5	<p>The relevant protected characteristics are:</p> <ul style="list-style-type: none"> (a) age (b) disability (c) gender reassignment (d) pregnancy and maternity (e) race (f) religion or belief (g) sex (h) sexual orientation

Title of proposed EIA	Proposed Interim Arrangement for Waste Disposal Services
Reference No	EQUA125
EA is in support of	Amended Function
Review Frequency	Annually
Date of first review	01/09/2019
Directorate	Place
Division	Waste Management
Service Area	Waste Management
Responsible Officer(s)	<input type="checkbox"/> Bethany Hughes
Quality Control Officer(s)	<input type="checkbox"/> Lesley Ariss
Accountable Officer(s)	<input type="checkbox"/> Darren Share
Initial equality impact assessment of your proposal	The proposal is to enter into a 5 year interim arrangement agreement with Veolia for the provision of waste disposal services. The request is that Cabinet, supplementary to the decision by Cabinet in June 2016, approves the principle of an additional 3 year interim arrangement agreement for the provision of waste disposal services and the authority to enter in a 5 year overrun agreement with Veolia.
Protected characteristic: Age	Not Applicable
Age details:	
Protected characteristic: Disability	Not Applicable
Disability details:	
Protected characteristic: Gender	Not Applicable
Gender details:	
Protected characteristics: Gender Reassignment	Not Applicable
Gender reassignment details:	
Protected characteristics: Marriage and Civil Partnership	Not Applicable
Marriage and civil partnership details:	
Protected characteristics: Pregnancy and Maternity	Not Applicable
Pregnancy and maternity details:	
Protected characteristics: Race	Not Applicable
Race details:	
Protected characteristics: Religion or Beliefs	Not Applicable

Religion or beliefs details:

Protected characteristics: Sexual Orientation

Not Applicable

Sexual orientation details:

Consulted People or Groups

Consultation with Senior management team, Legal Services, Procurement and Finance etc and Veolia.

Informed People or Groups

Senior management team, Legal Services, Procurement and Finance etc and Veolia.

Summary and evidence of findings from your EIA

No impact on any service users, employees or the wider community. It it to continue current working arrangements to ensure the following while work continues on the procurement for the long term disposal contract:

- ensure service continuity through plant availability.
- ensure asset condition was fit for purpose for the replacement contract.
- negotiate the Gate Fee and Capacity Fee.
- reduce exposure to additional landfill tax.

Submit to the Quality Control Officer for reviewing?

Yes

Quality Control Officer comments

Decision by Quality Control Officer

Submit draft to Accountable Officer?

No

Decision by Accountable Officer

Date approved / rejected by the Accountable Officer

Reasons for approval or rejection

Please print and save a PDF copy for your records

Yes

Content Type: Item

Version: 3.0

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