

**CARDIFF ORGANIC WASTE TREATMENT CHANGE OF  
CONTRACTOR OWNERSHIP**

**CLEAN STREETS, RECYCLIN & ENVIRONMENT (COUNCILLOR  
MICHAEL MICHAEL)**

**AGENDA ITEM: 4**

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**DIRECTOR OF ECONOMIC DEVELOPMENT**

**Reason for this Report**

1. To seek agreement and delegation to the Assistant Director (Senior Responsible Officer,) in consultation with the Cabinet Member Clean Streets, Recycling and Environment and Cabinet Member Finance, Modernisation & Performance, to vary the Cardiff Organics Waste Treatment contract as per recommendations of this report.
2. To allow the contractor to seek consent from the Council, at the Council's discretion, to a change of ownership of the contractor, subject to certain conditions set out in this report.

**Background**

3. Following a four year procurement process Cardiff Council, working in partnership with the Vale of Glamorgan Council and Welsh Government on the 15 April 2015 Cardiff Council (as the lead authority), entered into a contract for the treatment of Organic Waste (Food and Green Waste) with Kelda Organic Energy Ltd. The contract commenced on the 1 April 2017 and is due to last 15 years with an option to extend for a further 5 years. Cardiff also entered into back to back arrangements known as the Inter Authority Agreement 2 (IAA2) with the Vale of Glamorgan that sets out our mutual obligations between the two councils.
4. Kelda Organic Energy Ltd is wholly owned by Kelda Water Services (KWS), which in turn are part of the Yorkshire Water Group. Following a review of its business Yorkshire Water have made the decision to exit the non-regulated industries and focus on the core business of water services only. As such they have decided to sell the Organic Energy businesses which include Kelda Organic Energy Ltd. After a brief procurement process, KWS have selected a preferred bidder with whom they have exchanged contracts with contract completion being subject to the outcome of this report.

## Issues

5. Kelda Water Services wish to conclude the sale of Kelda Organic Energy (Kelda) by summer of 2017 and Kelda have approached the Partnership (Cardiff and the Vale of Glamorgan councils,) requesting that they wish to seek the consent of the Council to change ownership of the contractor. In order to do this, the contract needs to be varied. It should be noted that if the contract is varied to allow consent this will be at the Council's absolute discretion due to a one year lock in period which commenced at the start of Contract on 1 April 2017. Any agreement will be subject to the conditions set out in the recommendations of this report and the report generally. Further changes to the contract documents will be needed should the Council consent to a change in ownership. Should that be agreed, it is recommended that approval of such changes is delegated to the Assistant Director in consultation with the Cabinet Member of Clean Streets, Recycling and Environment and Cabinet Member Finance, Modernisation & Performance.
6. If consent is not granted then the sale may be concluded at the expiry of a lock in period on the 1<sup>st</sup> April 2018, without the Council's consent and without the necessary checks that would be made during a consent process.
7. The Council has sought legal advice and this is set out in the Legal implications which sets out that two checks were required to mitigate the Council's risks. Firstly, that the purchaser to whom Kelda is selling should complete and pass the Pre-Qualification Questionnaire (PQQ) associated with the tender arrangements the Council made at the time of commissioning the contract. Secondly, that there are no other changes (associated with the sale) envisaged to be incorporated into the contract's Project Agreement which could be said to be 'substantial', for example to service or payment changes.
8. Prior to proposing consent to change the ownership the Council has satisfied itself that Welsh Water (the purchaser) would have been eligible to participate in the procurement process, by requiring them to complete the PQQ, which included the relevant technical and financial checks. The PQQ has been completed and Dwr Cymru Welsh Water (DCWW) have been assessed as meeting the relevant requirements.
9. If the Council is minded to give consent, as a consequence, some changes will be required to the contract and ancillary documents. The partnership is working through the various amendments needed, but at this stage it is envisaged that these amendments will deal with associated name changes and mechanical amendments only and that the contractual obligations, guarantees and level of service will remain the same as those contracted with Kelda. It should be noted that if these amendments cannot be agreed the contract will not be varied.

10. The Contract has been let on behalf of the Vale of Glamorgan Council by Cardiff Council therefore the Vale Council have been engaged in some of the proposed sale discussions. Minor variation of the Inter Authority Agreement between Cardiff and Vale of Glamorgan will be required to reflect the new contracting company. Consequently, the Vale of Glamorgan will also need to formally consider the same.
11. To help facilitate the proposed transaction and costs, Kelda have agreed to compensate Cardiff Council and the Vale of Glamorgan Council for all costs incurred (internal and external) and all associated administrative matters via a lump sum payment in the sum of £200,000 (two hundred thousand pounds). The payment will become due and payable on completion of the sale.
12. Cabinet are requested to approve, as there are a number of minor amendments required, that this along with any formal consent is delegated to Assistant Director Commercial and Collaboration in consultation with the relevant Cabinet Members.

### **Reason for Recommendations**

13. The company that KWS wish to complete the sale with have passed the relevant PQQ checks that were advised be taken.
14. To enable the Project to proceed with a committed contractor and continue to deliver the same level of service as originally contracted.
15. Cardiff Council and the Vale of Glamorgan Council will be compensated for all costs incurred (internal and external) and all associated administrative matters related to facilitating the transaction via lump sum payment in the sum of £200,000 (two hundred thousand pounds).

### **Financial Implications**

16. Kelda have agreed to compensate Cardiff Council and the Vale of Glamorgan Council for all costs incurred (internal and external) and all associated administrative matters related to facilitating the transaction via a one-off payment to the Authority in the sum of £200,000 (two hundred thousand pounds) which has been negotiated with the Assistant Director (Commercial and Collaboration). In line with the arrangements outlined in the IAA2 a sixth (16.67%) of this payment will be due to the Vale of Glamorgan Council. There will be no direct financial implications arising from the change in ownership as the new owner will be replacing Kelda and committing to meeting the contractual obligations. There will be no change to the key contractual arrangements in particular the operation of the payment mechanism which governs the financial relationship between the contractor and the authority.

## Legal Implications

16. As set out in the report, the contractor is seeking to change its ownership. The contract currently has a restriction on changing ownership until March 2018 (known as the lock in period). Accordingly, the contract requires amendment to allow the contractor to seek consent, at the Council's absolute discretion, to change the ownership of the contractor during the lock in period.
17. The Procurement Regulations set out requirements with regards modification to contracts. As a result, consideration was needed as to whether this change was permissible under the procurement regulations. The Contractor initially sought legal advice and presented its views. The Council also needed to seek advice for its own benefit and sought external legal advice from Pinsent Masons (which the contractor has agreed to fund reasonable costs).
18. Please see below for the question sought and extract of the advice received. This advice was prepared for the benefit of Cardiff and the Vale and may not be relied upon by third parties
19. Question sought –  
  
"Whether (i) the proposed amendment to the Project Agreement to allow the Council to accept a transfer of shares (change in ownership) in the lock in period (at the Council's discretion); and (ii) the actual transfer of those shares (assuming change of name only with no other substantial changes), would be permitted under the Public Contracts Regulations 2015."

Extract of the advice received -

*"We believe the appropriate 'exemption' mechanism in the circumstances, is regulation 72(1)(d) of the Public Contracts Regulations 2015 (the "**Regulations**") – namely, the 'change of contractor' exemption and agree that in principle the proposed change in ownership is permissible under the Regulations.*

*In principle, the Council should be able to utilise regulation 72(1)(d) in these circumstances, provided that:*

- i) the sale of the shares will not lead to fundamental changes in the way in which the services will continue to be delivered (such that the 'new' ProjectCo would fail to meet the original selection criteria utilised at the pre-qualification stage). Therefore, the Council will need to ensure that the 'new' ProjectCo will continue to meet the original selection criteria (i.e. ensure that Welsh Water is capable of satisfying the original PQQ financial and technical minimum requirements), in order to ensure that the transaction is permitted under regulation 72. We would not anticipate any concerns in this regard; and*
- ii) there are no other changes envisaged to be incorporated into the Project Agreement which could be said to be 'substantial'. We will*

*need to regulate and monitor this as part of approving the necessary consequential changes (if any) proposed by Welsh Water.”*

*Further clarification was sought as to whether this exemption also related to the variation of the contract. Please see below –*

*“To confirm, Regulation 72(1)(d) is the correct exemption to use in the circumstances and covers both elements we discussed – i.e. the amendment to facilitate the change in ownership, and then the subsequent change in ownership itself.*

*The key point is that the change in ownership is acceptable in principle (relying upon Reg 72(1)(d)) subject to agreement of any amendments requested by Kelda to the PA. As the proposed change is in the lock in period, if the terms are not agreeable to the Council (at its discretion), the Council can simply reject the requested change in ownership.”*

## **HR Implications**

20. There are no HR implications to this report.

## **RECOMMENDATIONS**

Cabinet is recommended, subject to (a) approval of the specific amendments to the contracts and ancillary documents (including but not limited to the IAA2) and consent being given pursuant to recommendation 2 below; and (b) approval by the Vale of Glamorgan Council,

1. To agree to vary the contract to allow the contractor to seek consent, at the Council’s absolute discretion, to a change in ownership
2. to delegate to the Assistant Director Commercial and Collaboration Services in consultation with the Cabinet Member Clean Streets, Recycling & Environment & Cabinet Member Finance, Modernisation & Performance to
  - a. Approve any specific amendments to the contract and ancillary documents (included but not limited to the IAA2);
  - b. If such is approved, provide any formal consent pursuant to the contract; and
  - c. To deal with any ancillary matters including but not limited to entering in to any associated deed of variation/s.

**NEIL HANRATTY**  
**DIRECTOR**

15 September 2017