

Committee: **ESCC Cabinet Committee
B&HCC Policy and Resources Committee**

Date: **12 March 2003**

Title of Report: **Joint Working Agreement and Constitution Agreement**

By: **Director of Transport and Environment ESCC
Deputy Chief Executive and Director Corporate Services
B&HCC**

District/Ward: **All**

Purpose of Report: **To seek members' authorisation to enter into the Joint Working Agreement and Constitution Agreement.**

RECOMMENDATIONS

1. To authorise the Director of Legal and Community Services of ESCC and the Head of Law of B&HCC to finalise the detailed terms of the Joint Working Agreement.
 2. To authorise the Director of Legal and Community Services of ESCC and the Head of Law of B&HCC to enter into the Joint Working Agreement, contemporaneously with the entering into of the joint Integrated Waste Management Services Contract.
 3. To authorise the Director of Legal and Community Services of ESCC to enter into the Constitution Agreement, for the establishment of the Joint Committee, contemporaneously with the entering into of the joint Integrated Waste Management Services Contract.
 4. Brighton & Hove City Council Policy & Resources Committee to resolve that the decisions to finalise the terms of, and enter into, the Joint Working Agreement are urgent and that any delay in the implementation of those decisions would be detrimental to the Council's interest and accordingly that such decisions may not be called in.
 5. ESCC Cabinet Committee note that the Director of Transport and Environment considers that the decisions in respect of the Joint Working Agreement and the Constitution Agreement are urgent in that any delay "would seriously prejudice the Council's or the public's interests". In accordance with the County Council's constitution (Rules of Procedure, 20), the Director will, if necessary, request the Chairman of the Council to agree that the proposed recommendations, if accepted, are reasonable and to them being treated as a matter of urgency.
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1. BACKGROUND

- 1.1 On the 24th September 2002 members of ESCC Cabinet Committee and the B&HCC Joint Integrated Waste Contract Sub-Committee authorised the appropriate legal officers from both Councils to develop and complete the detailed terms of the proposed Joint Working Agreement and Constitution Agreement.
- 1.2 In respect of the Constitution Agreement the detailed terms have been completed, and an outline of the Constitution Agreement is attached as Appendix 1.
- 1.3 On the 20th February 2003 at a meeting of full Council, B&HCC authorised the entering into of the Constitution Agreement. It only remains therefore for the Cabinet Committee of ESCC to make a similar reciprocal authorisation.
- 1.4 Since the 24th September 2002 both Councils have been developing the terms of the Joint Working Agreement, and an outline of the Agreement is attached as Appendix 2. Although nearing completion, there remain details of some terms of the Agreement that require finalisation, and these issues are also set out in Appendix 2.
- 1.5 When complete, the Joint Working Agreement will be entered into contemporaneously with the principal contract.

2. FINANCIAL IMPLICATIONS

- 2.1 In respect of the Constitution Agreement, there will be costs associated with creating and running a Joint Committee. The apportionment of these costs between the Councils is dealt with by the sharing mechanisms set out in the Joint Working Agreement.
- 2.2 In respect of the Joint Working Agreement, the primary purpose of the Agreement is to ensure the equitable apportionment between the Councils of the payments to the contractor under the principal contract.

3. LEGAL IMPLICATIONS.

- 3.1 Both the Constitution Agreement and the Joint Working Agreement are agreements between the two Councils. The contractor is not a party to them. The proper apportionment of payment between themselves and the management of their joint obligations under the contract are matters for the Councils to determine and regulate.
- 3.2 The Contractor will request payment from the Lead Authority (ESCC) with the Joint Working Agreement setting out the way in which payments will be made and reconciled between the Councils.
- 3.3 The Joint Committee will have its own terms of reference. Appendix 1 attached sets out the outline terms, and sets out those matters that remain with the two respective Councils.

4. SUSTAINABILITY IMPLICATIONS

None directly arising.

5. EQUALITIES IMPLICATIONS

None directly arising.

6. IMPLICATIONS FOR CRIME AND DISORDER

None directly arising.

7. RISK ASSESSMENT

An effective and comprehensive Joint Working Agreement between the two Councils needs to be in place at the commencement of the principal contract. Whilst designed to be effective and comprehensive from day one, with a contract of 25 years duration the Agreement must be sufficiently flexible to cope fully and fairly with as yet unforeseen circumstances.

8. CONSULTATION

8.1 There has been consultation with in-house audit, external audit, financial and legal officers of both Councils and the external financial and legal advisers of both Councils.

9. BACKGROUND PAPERS

Environmental Protection Act 1990

Waste Strategy DEFRA June 2000

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Outline of the Constitution Agreement

The Constitution Agreement is an agreement whereby both Councils agree to create a Joint Committee [in long form the East Sussex County Council and Brighton & Hove City Council Integrated Waste Management Services Contract Committee].

The functions of the Joint Committee would be to:

- be responsible for the operational and management issues arising from the Principal Contract;
- be responsible for the administration of any contract management arrangements as set out in the Joint Working Agreement;
- ensure the effective implementation of the Joint Working Agreement and the Principal Contract;
- administer the budgets set by the respective Councils for the operation of the Joint Working Agreement and the Principal Contract;
- exercise such powers as the respective Councils may from time to time delegate to it.

The Constitution Agreement also sets out the matters the Joint Committee would not be responsible for, namely:

- the determination of the budgets of the respective Councils regarding waste management;
- change to the waste policies and targets of the respective Councils;
- the selection and development of sites for waste disposal and any connected acquisition and planning procedures;
- implementing any change of policy or procedure regarding kerbside source separation.

It is proposed that the Joint Committee would consist of six Members, three members from each Council.

Outline of the Joint Working Agreement

Principles

1. The Joint Working Agreement is the instrument by which the two Councils' respective rights and obligations, as between themselves, flowing from the Principal Contract are regulated.
2. The Councils enter the Joint Working Agreement on the basis of co-operation, commitment, openness and mutual support. The operation of the apportionment mechanisms within the Joint Working Agreement are to be construed accordingly.
3. The primary and major function of the Joint Working Agreement is to apportion each Council's share of the Unitary Payment. The Unitary Payment is the sum payable by the Councils to the contractor for the services provided under the contract. *[The Unitary Payment is more fully explained in the report, also on the Agenda, on contract award]*. Each Council's share of the Unitary Payment is largely calculated on the basis of the tonnes of contract waste actually delivered to the contractor. Thus respective shares of the Unitary Payment based on forecasts of tonnes delivered shall then be reconciled with the respective tonnes actually delivered. The sharing mechanism is structured so as to treat the geographical contract area as an integrated whole so that neither Council can be advantaged or disadvantaged by reasons of proximity to one particular waste management facility or one particular technology.
4. Planning Appeal costs (90% of appeal costs beyond the 'Appeal Contingency', a capped amount to be incurred by the Contractor as set out in the principal contract) are to be split 50/50, irrespective of tonnes of waste delivered by each Council. Planning Authority internal costs are incurred by the relevant planning authority and are not therefore subject to this Agreement.

Based on these principles, the key part of the Joint Working Agreement is set out in the clause on payment. This sets out how each element of the Unitary Charge is to be shared between the Councils. The elements are:

- Baseline Payment
- Payment Bands
- Recovery Supplement
- Recycling Supplement
- Landfill Tax Liability
- Beneficial Use Supplement
- Reconciliation Payments
- Lump Sum Refinancing Gains

- Change to the Works or Services payments/reimbursements
- Change in Law payments/reimbursements
- Unavailability Deductions
- Performance Deductions
- Excess Profit payments
- Household Waste Recycling Site payments
- Land acquisition costs above agreed acquisition amounts
- Excess Contract Waste payment
- Reduced Contract Waste payment
- Compensation payments for WCA diversion of or failure to collect recyclable materials.

The Joint Working Agreement also contains equitable cost sharing mechanisms for those costs falling outside the Unitary Charge. Such costs include:

- Contract management
- PFI Credits received
- Insurance costs met by the Councils
- Insurance costs where there is self insurance

Other key areas in the Joint Working Agreement are the mechanisms for covering the following issues:

- Property acquisition at the commencement of the Contract
- Property ownership at the expiry or earlier termination of the Contract
- Adoption of the Contract Standing Orders of the Lead Authority
- Obligations of the Councils in relation to the Joint Committee
- Review and renewal of the Joint Working Agreement
- Dispute Resolution Procedure
- Information and Confidentiality
- Public relations and publicity

Terms of the Joint Working Agreement that require finalisation are:

- Contract management arrangements
- Cross-indemnities between the Councils