



Cabinet Report

Meeting	CABINET
Date	8 SEPTEMBER 2022
Title	TRANSFER OF OWNERSHIP AND MAJOR SHAREHOLDING OF AMEY (IOW) SPV Limited
Report of	CABINET MEMBER FOR COMMUNITY PROTECTION, REGULATORY SERVICES AND WASTE

EXECUTIVE SUMMARY

1. The Isle of Wight council delivers the majority of its duties as a Waste Collection Authority (WCA) and a Waste Disposal Authority (WDA) through a Public Private Partnership Contract with Amey (IOW) SPV Ltd, a child company of Amey Plc. This is a 25 year contract with a value of £216m.
2. Ferrovial S.A, the ultimate parent company of Amey Plc, has made a decision to sell Amey UK Plc. This sale will take place in the Autumn of 2022. The sale of Amey UK Plc will not include the four UK Waste Contracts that sit under the Waste Treatment Division, which includes the Isle of Wight collection and treatment contract.
3. Ferrovial and Amey UK plc are required to seek consent from the IWC to change the ownership of the Waste PPP to a new subsidiary of Ferrovial. Under the new structure, the waste treatment business is gathered under a single company, creating a standalone, consolidated unit focussed on waste treatment.
4. This paper seeks to set out the proposal to change the ownership and recommend a provisional consent subject to satisfactory completion of legal and financial documentation.

RECOMMENDATION

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| <ol style="list-style-type: none">5. Cabinet to agree:<ol style="list-style-type: none">(a) to provide provisional consent to the transfer of the ownership of the service provider and novation of the works and operating sub-contract to the entity know as Thalia Waste Management subject to the completion of suitable due diligence processes. |
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- (i) between now and the date of transfer, to agree terms of the legal documentation in Amey Waste Treatment and Ferrovial;
- (ii) The completion of financial due diligence prior to the date of transfer.

6. Cabinet approval that the decision to complete the consent legal documentation is delegated to the Director of Neighbourhoods in consultation with the Cabinet Member and section 151 officer and is subject to:

- (a) Satisfactory completion of legal documentation maintaining a no better, no worse position for the council
- (b) Satisfactory completion of financial due diligence

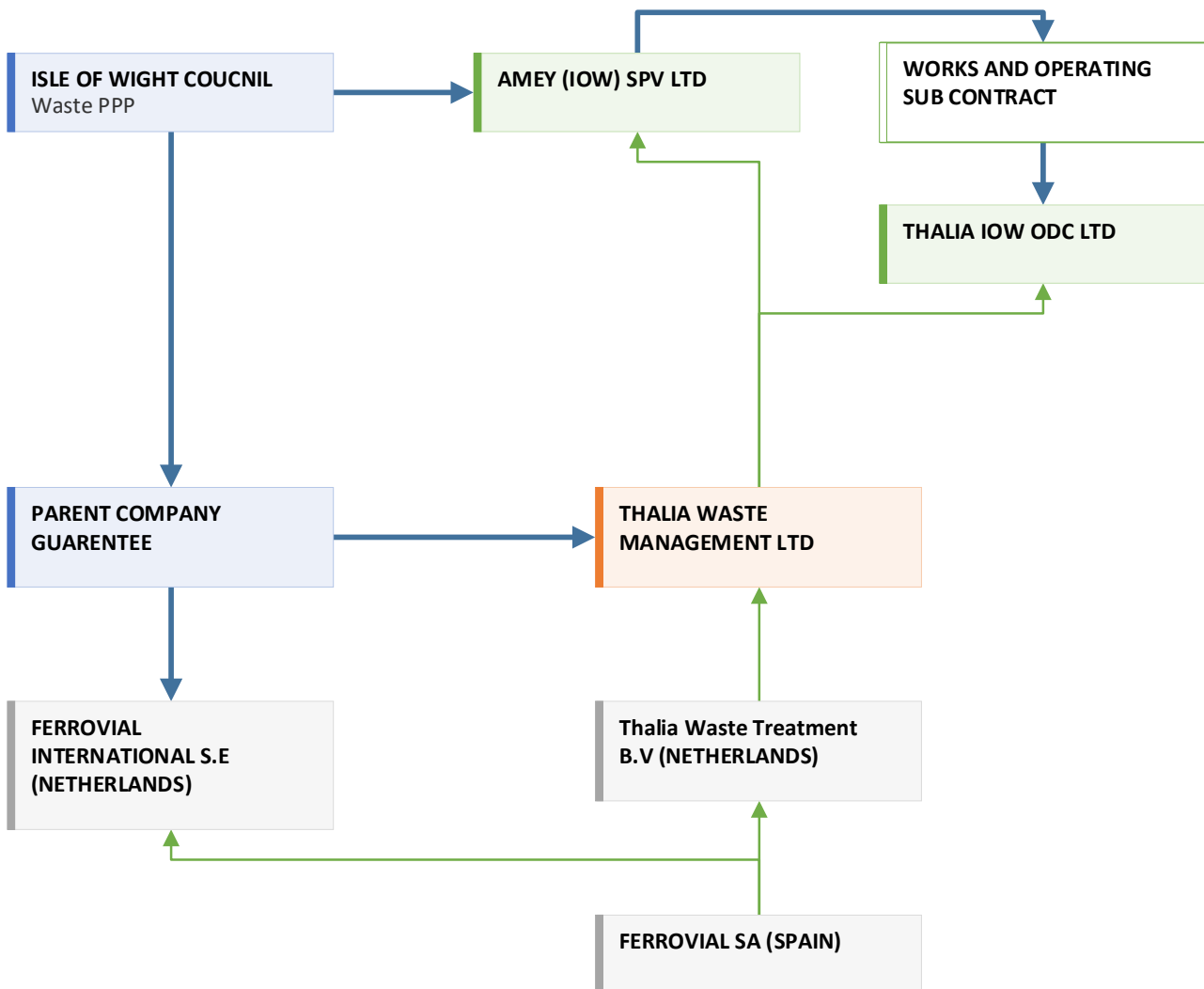
BACKGROUND

- 7. The Waste Project Private Public Partnership Contract (the Waste PPP) was awarded to Amey following decision by Full Council in 2015.
- 8. The Waste Contract delivers works and services to ensure that the council has sufficient treatment and disposal facilities and provisions for all local authority collected recycling and waste. The total contract value is £216m (in 2015 prices) and will inflate with indexation over the contract period.

Current structure Under Ferrovial and Amey UK Plc

13. Amey LG Limited are the current works and operating sub-contractor (WOSC). The Amey LG business will remain part of the Amey group following the reorganisation.
14. The intention of the sale and transfer process is that both Amey (IOW) SPV and the current team from Amey LG contracted on the Isle of Wight will move to Thalia Waste Management Ltd. They will retain separate identities within the new company to ensure commercial boundaries are maintained and will have separate representatives (as is the case now).
15. As a result, the Works and Operating Sub-Contract (“WOSC”) will need to be moved to an entity that will be within the new waste treatment group and it is therefore proposed that the WOSC will be novated to become Thalia IOW ODC Limited.
16. Locally the business will be branded as Isle of With Council Waste Services to insulate against any branding change and associated costs in the future.
17. Following the novation of the WOSC to Thalia IOW ODC Limited the entire issued share capital of this entity will be transferred to Thalia Waste Management Limited (who will be its direct parent company).

Proposed Structure under Ferrovial and Thalia Waste Management Ltd



CORPORATE PRIORITIES AND STRATEGIC CONTEXT

18. Within the [Corporate Plan 2021 – 2025](#) there are key areas of activity that will be our main areas of focus for the lifetime of this plan which will need to be central to everything we do as a council.

Responding to climate change and enhancing the biosphere

19. The delivery of the ambitious targets for waste minimisation, recycling and diversion from landfill within the waste contract directly contribute to reducing greenhouse gasses and the carbon footprint of Island residents and businesses.
20. The continued delivery of this contract under the proposed structure wil ensure that best practice in the delivery of energy from waste plants, including maintaining good air quality and emissions below legal limits.
21. The islands biosphere will continue to be enhanced through protecting our historic land assets through diversion of waste from landfill and enhancing the ecology and environment through the minimisation and waste and sanitary efficient collection of waste and recycling from homes.

Economic Recovery and Reducing Poverty

22. The waste contract employs around 140 island residents in the delivery of its services and has included a £60m investment programme delivering waste infrastructure for the long-term future on the Island.
23. Through the delivery of this contracts island residents and businesses have been engaged in employment and will continue to create employment opportunities.
24. A skilled work-force is required to deliver the waste contract and our service provider is committed to providing training opportunities to all employees and utilise local training providers.

Impact on Young People and Future Generations

25. The continued delivery of the Waste Contract supports ensuring that young people will grow up in a sustainable and clean environment.
26. The contract will deliver educational opportunities through schools and the education centre that will open in the coming year.

Corporate Aims

27. The aspiration to support and grow our economy and continue to deliver excellent waste management services will be supported by the recommendation.

CONSULTATION

28. Consultation on this matter with the portfolio holder, the council's lawyers and internal and external accountants has been undertaken.
29. Further consultation has taken place, in confidence, with DEFRA as a strategic waste disposal facility and provider. Defra will continue to monitor the progress and stability of the new contracting structure arising from all of the four waste treatment contracts and provide support to waste disposal Authorities via the Waste Infrastructure Development Programme (WIDP) board and provide support as necessary.

LEGAL IMPLICATIONS

30. The arrangements to be implemented under the Proposed Restructuring would, be modification in respect of the Project Agreement which includes:
 - (i) a change of to the key subcontractor to the Works and Operating Sub-Contract from Amey LG Limited to a new OpCo. This will include an amendment to clause 14A of the Project Agreement which requires that the WOSC Sub-Contractor is Amey LG Limited;
 - (ii) a change in respect of the Parent Company Guarantee such that the existing Guarantor (Amey UK plc) shall be replaced by new Guarantors (Thalia Waste Management Limited and Ferrovial International SE); and

- (iii) the new Guarantors will not meet all of the Guarantee Criteria, and therefore Amey are proposing that the Council agree to waive its rights in respect of such non-compliance.

Procurement Law

- 31. As regards procurement law, the council raised a concern with Amey that the proposals might amount to a modification to the contract triggering a requirement for you to run a new procurement. It has been clarified that the proposals falls within the scope of Regulation 72(1)(d) of the Public Contracts Regulations 2015/102.
- 32. Regulation 72(1)(d) provides that contracts may be modified without a new procurement procedure “*where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of...(ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Part*”.
- 33. The proposal involves the new operating company replacing the contractor to which the contract was initially awarded (Amey LG Limited) as a consequence of succession following corporate restructuring in circumstances where:
 - (a) The new operating company is effectively the same as the original contractor in that the assets and personnel that service the contract will be transferred to it;
 - (b) there are no other substantial modifications to the contract; and
 - (c) the proposal is not aimed at circumventing the application of the procurement rules – rather it is aimed at maintaining the status quo i.e. the contract continuing to be performed by the same personnel using the same assets as is the case today.

NEW PARENT COMPANY GUARANTORS

- 34. The current guarantor of your project is Amey UK PLC. As Amey UK PLC would no longer form part of the same corporate group as the SPV and WOSC Contractor. Therefore, as part of the restructuring, it is proposed that the guarantees currently provided by Amey UK PLC in respect of the Project Agreement and WOSC would be replaced by joint and several guarantees from Ferrovial International S.E. (“FISE”) and Thalia Waste Management Limited.
- 35. FISE is the owner of Ferrovial’s international assets and its financial position is even stronger than that of Ferrovial SA and a net worth, which represents 90% of the Ferrovial group’s total valuation.
- 36. Thalia Waste Management Limited is proposed to be the ultimate UK holding company of the new group and undertake the role of performance guarantor.

FINANCIAL / BUDGET IMPLICATIONS

37. The council is conducting due diligence on FISE and its financial position, with external consultant reviewing the annual accounts for 2018, 2019 and 2020 and the financial auditor's report for 2020.

ALTERNATIVE GUARANTEE CRITERIA LIMB (C)

38. FISE satisfies the first two limbs of the Guarantee Criteria, as stated in the Project Agreement and WOSC (a turnover in excess of £250m; and a current ratio (current assets/current liabilities) in excess of 1.05:1). However, FISE does not satisfy the third limb of the Guarantee Criteria, being a retained earnings figure of at least 80% of current year's net profit after tax but before dividends.
39. Despite this, Amey and Ferrovial believe that FISE is the most advantageous option for a financial guarantor for the Waste PPP, given its financial standing and net worth. Ferrovial has considered other entities in the Ferrovial group for this role, but is confident that FISE provides the strongest covenant. FISE has a stronger net cash position (ex-infrastructure projects) with higher cash and no external debt at a consolidated basis. FISE has a large net worth, which represents 90% of the Ferrovial group's total valuation.
40. FISE are therefore seeking conditional and temporary alternative arrangements for the of the third Guarantee Criterion, to last only for so long as FISE and Thalia Waste Management Limited are joint and several guarantors of the Project Agreement and WOSC.
41. The current proposal (subject to due diligence) would be conditional on FISE holding cash of an amount equal to the cap on liability under the Project Agreement and the WOSC, and on your request we will provide evidence of the same to you in the form of audited and half yearly management accounts of FISE.
42. **It is recommended that until such time as financial due diligence is completed that only provisional consent for the transfer of ownership is provided to Amey and Ferrovial. This work is expected to be completed prior the proposed date of transfer.**

EQUALITY AND DIVERSITY

43. The recommendation of this report does not impact in Equality and Diversity and will not impact on policy or procedures.

PROPERTY IMPLICATIONS

44. Property leases and licences under the waste Contract will be novated to the new works and operating subcontractor at the same date that the transfer of ownership occurs.

OPTIONS

45. **Option 1:** The council denies consent to the transfer of ownership and the contract remains with Amey UK plc as a standalone waste collection and treatment contract.
46. **Option 2:** Cabinet to agree:

- (a) to provide provisional consent to the transfer of the ownership of the service provider and novation of the works and operating sub-contract to the entity known as Thalia Waste Management subject to the completion of suitable due diligence processes;
- (i) between now and the date of transfer, to agree terms of the legal documentation in Amey Waste Treatment and Ferrovial;
- (ii) The completion of financial due diligence prior to the date of transfer;

Cabinet approve that the decision to complete the consent legal documentation is delegated to the Director of Neighbourhoods in consultation with the Cabinet Member and section 151 officer and is subject to:

- (b) Satisfactory completion of legal documentation maintaining a no better no worse position for the council
- (c) Satisfactory completion of financial due diligence

RISK MANAGEMENT

Option 1.

RISK: The contract fails

DESCRIPTION: The current parent company have no desire to retain a single waste contract amongst the local government services portfolio and may choose to sell or abandon the contract.

IMPACT: High, would have significant budget and resource impact on the council

RISK: the Energy from waste plant fails

DESCRIPTION: All technical and engineering knowledge in respect of thermal treatment of waste is being transferred as part of the wider sale and transfer of Amey Waste Treatment to Thalia Waste Management Ltd. No expertise will be retained with Amey UK PLC

IMPACT: High, potentially the ErF would not be completed and become a loss.

Option 2:

RISK: Legal and financial due diligence is not complete prior to the date of sale

DESCRIPTION: The transfer may take place without consent leading to protracted and costly legal dispute.

IMPACT: Significant legal cost to the council

MITIGATION: Work closely on tight briefs with external lawyers and accountants to achieve completion prior to transfer date.

EVALUATION

- 47. This contract change will not amend or alter the contract provisions or outcomes and will deliver the same services and price as currently commissioned.
- 48. The transfer of ownership of the councils waste contract along with the other waste treatment contract under Amey's commission will provide continuity of services and works.

49. Providing Ferrovia and Amey with provisional consent will allow the final negotiation of legal documents to move forward following due diligence and provide our business partners with the assurance the council is committed to the partnership contract.
50. The recommendation is to take forward Option 2.

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