

SOUTH WAIRARAPA DISTRICT COUNCIL

21 OCTOBER 2021

AGENDA ITEM C1

Public Excluded

EARTHCARE CONTRACT

Purpose of Report

To inform Councillors of, and seek approval for, the Change of Control for the Waste Services and Recycling Operations contract.

Recommendations

Officers recommend that the Council:

1. *Receives the Earthcare Contract Report.*
2. *Agrees to the change of control from Earthcare Environment Limited (EEL) to Smart Environmental and delegates authority to the Mayor to sign the Change of Control on behalf of the Council.*
3. *That this report and associated minutes stay in public excluded until the Chief Executive determines there are no longer any reasons to withhold the information under the Local Government Official Information and Meetings Act.*

1. Discussion

Earthcare Environmental Limited (EEL) hold the three Wairarapa Councils (Masterton District Council, Carterton District Council and South Wairarapa District Council) Waste Services and Recycling Operations contract which is effective from 2017-2022.

The shareholders of EEL have agreed to merge their business with Smart Environmental Group and have entered into a sale and purchase agreement to sell all shares in EEL to a subsidiary of the Smart Environmental Group - Kakariki Group Holdings Limited (Purchaser).

The Proposed transaction is subject to customary conditions and has not yet completed. To complete the transaction the three councils must agree to the merger. As the terms and conditions of the contract are not changing, the three councils agree to the merger in principal and are targeting an agreement notification date of 30 November 2021.

1.1 The Purchaser

The Purchaser is a subsidiary of Smart Environmental Holdings Limited.

Smart is a wholly New Zealand owned enterprise with a strong pedigree in working with territorial authorities. It has a particular focus on diverting waste from landfill and has a network of materials recovery facilities that complements the operation in Masterton that EEL has developed. Like Earthcare, they are committed to open and transparent business relationships and the expectation is that there will be no material change in how we work together, except for us being able to draw on more resources if needed.

1.2 Agreed Service Levels

There are no proposed changes to service levels; the contract will be rolled over without review as it currently exists.

1.3 Legal Implications

An existing general contract condition (NZS3917:2013) permits the sale of the contract (Appendix 2), therefore we have a legal obligation not to decline the request of sale. There are no other legal implications arising as a result of the business merger and change of contract owner.

1.4 Financial Considerations

There are no change to the contract's financial terms and conditions, therefore there are no financial considerations.

1.5 Financial Delegations

Under paragraph 2.13 of Council's Financial Delegations Policy, the authority to enter sign, go to market, and vary contracts for the supply of goods or services to the value over \$500,000 that have been budgeted in the Annual Plan or Long Term Plan rests with the Council.

2. Conclusion

Officers have had discussions with Masterton and Carterton District Council over this change of control and do not consider there is a risk involved. Officers recommend that Council agree to the change of control and delegate to the Mayor to sign the contract on the Council's behalf..

3. Appendices

Appendix 1 – Change of Control of Earthcare Environmental Limited

Appendix 2 – General Conditions of Contract, NZS3917:2013

Contact Officer: Bryce Neems, Amenities and Solid Waste Manager

Reviewed By: Karen Yates, Policy and Governance Manager

Appendix 1 – Change of Control of Earthcare Environmental Limited

18 October 2021

PRIVATE AND CONFIDENTIAL

BY EMAIL: davidhopman@mstn.govt.nz

Attention: David Hopman, Masterton District Council
Dave Gittings, Carterton District Council
Bryce Neems, South Wairarapa District Council

Masterton District Council
161 Queen Street, Masterton 5810

Carterton District Council
28 Holloway Street, Carterton 5713

South Wairarapa District Council
19 Kitchener Street, Martinborough 5711

Dear David, Dave and Bryce,

Change of Control of Earthcare Environmental Limited and Replacement of Performance Bond

We refer to the Waste Services and Recycling Operations 2017-2022: Contract No. 2-17/22 dated February 2017 (**Contract**) between Earthcare Environmental Limited (**EEL**) and the Masterton District Council, the Carterton District Council and the South Wairarapa District Council (together, the **Councils**).

The shareholders of EEL have agreed to merge their business with Smart Environmental Group and entered into a sale and purchase agreement pursuant to which they will sell all of the shares in EEL to a subsidiary of the Smart Environmental Group - Kakariki Group Holdings Limited (**Purchaser**) (**Proposed Transaction**). The Proposed Transaction is subject to customary conditions and has not yet completed. However, we are targeting a completion date of 30 November 2021.

The Purchaser is a subsidiary of Smart Environmental Holdings Limited (**Smart**).

Smart is a wholly New Zealand owned enterprise with a strong pedigree in working with territorial authorities. It has a particular focus on diverting waste from landfill and has a network of materials recovery facilities that complements the operation in Masterton that EEL has developed. Like us, they are committed to open and transparent business relationships and my expectation is that there will be no material change in how we work together, except for us being able to draw on more resources if needed.

I will remain actively involved and overtime will introduce the broader management team of the enlarged Group into day to day management of the Contract as we integrate into the Smart Environmental Group. As soon as practicable I will arrange for you, and other key contacts, to meet with Smart's CEO Todd McLeay and GM of Operations Ben Day. There will be no loss of operational knowledge or reduction of access to the existing staff who you work with and who provide services to your community today.

Further information about Smart is available at www.smartenvironmental.co.nz.

Change of Control

The Proposed Transaction will constitute a change of control/deemed assignment of/ by EEL under the Contract (**Change of Control**), including for the purposes of clause 2.9.2 of the General Conditions of Contract, NZS3917:2013. We are writing to inform you of this Change of Control and to seek a consent and waiver from each Council under the Contract.

Replacement of Performance Bond

In addition to seeking your consent to the Change of Control, we also request your confirmation that, upon a replacement performance bond of \$500,000 (**Replacement Bond**) (being the same amount as the existing performance bond provided by Greencare Management Limited (**Existing Bond**)) being provided by the Purchaser on or before the completion date of the Proposed Transaction, you will deliver a signed written notice to Greencare Management Limited releasing Greencare Management Limited and any other sureties named under the Existing Bond from their obligations under the Existing Bond in accordance with the requirements of clause 3.1.9 of the General Conditions of Contract, NZS3917:2013. The Replacement Bond to be provided by the Purchaser will be in the same form as is set out in Schedule 10 of the Contract.

Confirmations Required

Please confirm (by signing and returning a copy of this letter by email to mike@earthcare.co.nz as soon as possible and, in any event, by 5.00pm on [insert date] 2021) that each Council:

- (a) consents to the Change of Control (due to the Proposed Transaction) including for the purposes of providing prior written consent under clauses 2.91 and 2.92 of the General Conditions of Contract, NZS3917:2013;
- (b) confirms that, as a result of that consent, any rights under the Contract in relation to the Proposed Transaction and/or the Change of Control are waived;
- (c) confirms that all arrangements pursuant to the Contract will continue unaffected by the Proposed Transaction and/or the Change of Control and the Councils will continue to contract with EEL in the same manner as they did prior to the Proposed Transaction; and
- (d) confirms that, upon receipt of the Replacement Bond, Greencare Management Limited and any other sureties named under the Existing Bond will be released from their obligations under the Existing Bond.

Please do not hesitate to get in touch if you have any questions in relation to the contents of this letter.

Yours sincerely

Mike Jones

Michael Jones
Earthcare Environmental Limited

Signed for and on behalf of the **Masterton District Council**, which consents to the Change of Control and confirms the matters recorded in this letter:

Signature of authorised person

Name of authorised person

Date

Signed for and on behalf of the **Carterton District Council**, which consents to the Change of Control and confirms the matters recorded in this letter:

Signature of authorised person

Name of authorised person

Date

Signed for and on behalf of the **South Wairarapa District Council**, which consents to the Change of Control and confirms the matters recorded in this letter:

Signature of authorised person

Name of authorised person

Date

General Conditions of Contract, NZS3917:2013

There is a change of control provision in the General conditions of NZS3917: 2013:

2.9 Assignment

2.9.1 Neither party shall assign the whole or any part of the Contract without the prior written consent of the other party. Such consent shall not be unreasonably withheld or delayed.

2.9.2 The assignment or transfer of shares in or the restructuring of the Contractor so that the effective control of the Contractor passes to Persons other than those holding it at the date of this Contract will be an assignment of this Contract for the purpose of this clause.

2.9.3 Unless specifically stated to the contrary in any consent to an assignment, no assignment shall release or discharge the assignor from any liability or obligation under this Contract.

and it's also summarised in the Guidelines (of NZS3917: 2013):

G2.9 Assignment

There are restrictions on the assignment of the Contract by either party. Assignment by the Contractor includes any substantial change in ownership or shareholding or restructuring of the Contractor so that the effective control of the Contractor passes to another Person. Subcontracting by the Contractor is different from assignment, and that is dealt with in Section 4.

Appendix 2 – General Conditions of Contract

General Conditions of Contract, NZS3917:2013

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