

APPENDIX 3

RESPONSE TO CALL IN REQUEST:

Introduction:

The purpose of this response is to address the issues raised in the call-in request and to assure the members of the Scrutiny Committee that this decision by the Deputy Leader and Cabinet member for Culture Recreation and Strategic Commissioning and the Cabinet member for Resources has been made wholly in accordance with the principles governing good decision making, according to the Constitution and within the boundaries of the law.

The Cabinet members recognise the importance of this decision and through this response aim to demonstrate that the decision made by the Council in 2007 to move to an energy from waste facility as an alternative to landfill remains as relevant today as it did then, if not more so. The changes in waste legislation, Government policy and the state of the economy (reasons set out in the call in request for referral of the decision to Council) are the very reasons supporting the need for the Committee to affirm this decision and, in doing so, act in the Council's best interests.

The environmental case for the move away from landfill disposal remains as valid today as it did at the inception of the Waste 2020 project. That is the primary driver. But in addition to that objective, the Council has a considerable advantage in developing the Energy Services Company (ESCo) to maximise benefits from this facility harnessing energy from waste and so:

- reducing its exposure to increasing electricity prices and
- improving energy security by reducing reliance on fossil fuelled power sources

Energy diversification and reducing reliance on fossil fuelled power plants is an important part of the government's energy policy and a key component of the Council's aspiration to make Peterborough the Environment Capital.

Legal advice on the scope of the call-in request suggests that this must relate to the decision subject to the CMDN (i.e. the decision to award the contract following the procurement process). Therefore whilst the earlier decision of the Council in 2007 is not the subject of the debate, this response recognises the wider concerns raised in the call-in request and will set out

- why that 2007 decision is still sound policy,
- the continuing relevance of that decision to our environmental landscape and
- the rigorous investigations undertaken by officers in pursuit of the members collective decision in 2007 to move towards a more environmentally friendly solution to waste production.

The following paragraphs deal with each of the call-in reasons in turn:

Ref 4(a) paragraph 1 – Consideration of alternative options:

The purpose of the 'alternative options' section within the CMDN is to demonstrate what alternative options are available for the Cabinet members to consider when making the decision to accept the recommendations. It therefore addresses the particular part of the process the Cabinet members are currently deciding – in this case the award of the contract between two bidders following an evaluation process. It is not possible for the Cabinet members to consider whether they might choose instead to override the decision made by full Council in 2007 and decide upon an alternative public or private sector waste treatment facility.

For this reason wider alternative options were not considered in this section of the CMDN. The only real alternative to selecting a bidder was not to select a bidder, but this did not accord with the 2007 decision or the outcome of the procurement process.

There are two important points here

(1) Officers and members are aware that there are alternative providers of waste facilities and alternative waste solutions but, put simply, alternative providers running waste treatment facilities within the vicinity of Peterborough could not be considered for award of contract because they chose not to enter into the procurement process. Had they done so their solutions would have been considered as part of the procurement process and measured in that process against the ones who chose to compete.

(2) Even if they could have been considered, are any of those alternative options as good as what the Council is getting?

A brief note on the procurement process to address point (1)

Public procurement is the general description given to the process which local authorities must undertake before they can sign off a contract. The rules are designed to protect public funds and therefore the greater the value of the contract, the more stringent the rules.

At this level of spend the Council is required by law to advertise their intention to buy goods, works and services across Europe and make their process as open and fair as possible. As part of this process they have to weigh up the competing commercial interests of any contractor who bids for the contract and therefore the law also ensures a measure of confidentiality for the bidders. This is why there are exempt annexes to the public report as these deal directly with the comparison between the two bidders.

Public procurement is governed by deadlines and contractors have to decide whether they are going to commit to bidding or not at an early stage. In the competitive dialogue process (which this is), contractors are allowed to bid at the early stages but can withdraw or be excluded during a negotiation process built into bidding rounds. What bidders cannot do is join the process later, so the negotiations proceed with only those who choose to participate with final selection reserved to the end of the negotiations.

A brief note on alternative options to address point (2)

It is perhaps useful to note at this point that the Council's own expert opinion is that the proposal for an energy from waste facility i.e the proposal in the CMDN is the best of all the alternative options for waste treatment available on the market.

Officers began to explore what alternative options were available to the market before beginning the procurement and have continued to do so throughout the process.

In July 2009 the Council requested that Mace undertake an Options Appraisal to review the all treatment options now available in the waste market prior to proceeding with the procurement. Mace worked with Amec (formerly Entec) as the technical advisor to produce a technical options report. Workshops were held with the Council, Amec and Mace to establish all the technologies to be considered and the evaluation and risk criteria. The options included:

- (1) advanced thermal treatment/gasification,
- (2) traditional Energy from Waste (EfW), and
- (3) mechanical biological treatment (MBT).

A presentation of the report was made to an open Scrutiny Committee meeting in September 2009, i.e. this was open to all members not just those on the Scrutiny Committee.

The report concluded that Energy from Waste, either in its traditional form, or in the form of advanced technology such as gasification, was the **most environmentally sustainable in reducing greenhouse gas emissions** as well as producing the **greatest financial saving** over the cost of continuing to send waste to landfill.

In order to avoid prejudicing the bidders in favour of any particular solution or technology it was decided not to release this Options Appraisal as part of the Council's documentation i.e we didn't want the bidders to think that the Council favoured any particular proposal. This Appraisal was exempt at that time but is now considered to be a public document.

The only requirement of the bidders' solutions was that the facility should use the Council owned site and be financed by prudential borrowing. Bidders were otherwise free to propose technologies of their choice provided that they could treat all the residual waste (i.e after recycling) that is predicted to be produced by Peterborough over the next 30 years.

The advanced thermal treatment/gasification solution was almost immediately discounted as an option. One company chose to drop out of the procurement citing resource constraints and the difficulties in obtaining parent company guarantees from the advanced gasification companies that they wanted to work with. Viridor also cited this as a reason for not proposing advanced gasification technologies. In other words, no bidder was prepared to financially guarantee the performance of such technology.

Not one of the bidders came forward with a proposal for a mechanical biological treatment (MBT) plant. This was perhaps not surprising given the conclusions in the Options Appraisal referred to above and the Council's stated requirement to achieve 100% diversion from landfill. One disadvantage of MBT processes is that they do not provide a complete solution for the treatment of residual waste and a significant volume of the product produced by the process is either sent to landfill, or in some cases, is processed into a fuel to be burnt in large Energy from Waste facilities. The cost of the second stage of the MBT process tends to make them a more expensive process than Energy from Waste and requires the availability of a long term secure outlet for the product. If the output goes to landfill, there is both a financial and an environmental impact with this process. One of the additional advantages offered by Viridor is that they guarantee to recycle the ash produced by the facility such that there is maximum diversion from landfill.

It should be noted that there is no one size fits all method for waste management and recycling in the UK, if there were every council would achieve the same recycling targets and choose the same treatment technology to deal with the material left over after recycling. The highest performing countries across Europe tend to achieve around 50-60% recycling and composting, with the remainder of the waste being used as fuel in an Energy from Waste facility.

The recommended company, Viridor Waste Management, is offering the Council a very modern evolution of a proven low risk robust technology. This is key to having predictable costs and incomes from the facility through its life and to ensuring that the facility will continue to deliver on the Councils expectations for years to come.

It is very far from "old fashioned". In fact the facility is of exceptionally high efficiency. As an analogy one can consider this facility to be a modern day car, with all of its comfort, safety and emission control systems, compared to a model T Ford. Yes they are

both indeed cars; however one can not say that the modern car is that closely related to the Model T Ford.

Risk assessments have been done at all stages of the procurement.

On their appointment as Project and Programme Managers, Mace conducted a project and due diligence review which included establishing a Risk Register for each of the Lots being procured under the Waste 2020 Programme. Risk workshops were held with the Council officers to review all the risks that impact on the project, resulting in the base risk register for the project. This risk register was reviewed on a regular basis throughout the procurement process.

The procurement documents in the early bidding rounds included the risk matrix setting out which risks were to be borne by the bidders, which are Council risks and which risks are shared.

The second stage of bidding included the draft contract produced by the Council's legal advisors, Pinsent Masons, in association with the Waste 2020 Project Team. The contract reflects the risk assessment of the procurement and ensures that the party who can control a risk bears that risk.

Prior to the closing the competitive dialogue with the bidders, the Waste 2020 project team and its advisors conducted a risk review of each of the bidders' draft submissions. This was to ensure that

- all the commercial, technical, planning and legal risks had been closed off,
- that the positions adopted were fully agreed and signed off and
- that there would be no "open issues" left for negotiation post award of preferred bidder i.e at this stage.

This risk assessment was repeated as part of the evaluation of the final tenders where the bidders' submissions were subject to a full financial, technical and environmental, planning and legal risk review. To ensure that there had been no deterioration in the Council's overall risk position these risk reviews were compared against the initial risk matrix that was issued at the outset.

As Project and Programme Managers, Mace's Head of Corporate Risk and Assurance conducted a Risk Management Review which confirmed that the risk assessment and management processes adopted throughout the procurement were robust and sound. The conclusion and key findings of this review are provided below:

- The project team have set up a sound process for identifying and assessing the risks to the Council of proceeding with the scheme. The risk management process has been clearly and consistently applied during the tendering period

and there is no indication from the bidders that the process, its implications or its role in the procurement has not been understood. There are no indications that the process has been applied unfairly.

- The risk process is broadly in line with the principles outlined in the relevant standard BS ISO 31000 taking into account the particular context and phase of the project, and its adherence to the three stages of risk assessment of identification, analysis and evaluation and the treatment (mitigation) of risk throughout.
- The project team have provided an in-depth assessment of the risks inherent in proceeding with the project and mitigated them to an acceptable level for the type of project and investment being considered including the key risk areas identified.
- The risk profile for each bidder has not been quantitatively assessed but from the qualitative assessment carried out it is evident that there is not a significant difference in their approach to risk although one could be said to have a more mature approach to risk generally as appears from the thoroughness of their responses.
- The risk process has been able to identify a difference in the attitude to the acceptance of risk during the competitive-dialogue process that has been taken account of during the evaluation process. This indicates that the bidder has been forced to consider its specific risks and to how it wants to treat them. This not only helps to clarify the position to specific risks but also to the overall relative risk position of each bidder.
- The Contract has been structured to manage risk from the outset by identifying the risks to the project at the start, getting each bidder to analyse and assess the risks and to identify additional risks and, through the competitive dialogue process, of apportioning it to either Council or the bidder. This means that the agreement will be signed with a clear apportionment of risk for the life of the contract.

The risk assessment documents are currently under review by the lawyers to see what can be made public either prior to or at the call-in meeting. This document contains sensitive material and therefore the Council needs to take care regarding the release of this information into the public domain.

Ref 4(d) paragraph 4 -affordability model

In this response, it is accepted that the Scrutiny Committee's request for better clarification of the term 'affordability model' and the criteria which gave rise to that requires greater explanation. This is explained as follows:

At the outset of this process the Council knew what the likely predicted costs of landfill would be over the lifetime of a potential waste treatment plant. Those costs have been continually rising during the course of this process. The affordability model was developed during the procurement process taking into account financial criteria which emerged during the procurement process.

In the early bidding rounds, bidders submissions were within the budget established for the Waste 2020 Programme. However in the later stages of the procurement the bidders challenged the affordability of the proposals. This is not uncommon at that stage of procurement where bidders may over price risks that are yet to be finalised, however with only two bidders in the competition it was important to ensure that the bidders understood that the project would not proceed if it was not affordable for the Council. Simply being at a lower price than the competitor would not be good enough, it had to be affordable too.

To establish the "affordability model" i.e. what would be affordable to the Council, the Waste 2020 Project Team conducted a further review to look at the cost of alternative treatment facilities. This included taking the Council's waste to regional facilities that potentially had spare capacity and from whom indicative prices could be obtained. The result of this analysis was presented to the Waste 2020 Project Board in August 2011 where the various options were listed with their respective advantages and disadvantages i.e. a SWOT analysis.

The model includes the following elements:

- The landfill tax is currently £64 per tonne and is due to reach £80 by 2014/15
- Disposal costs including gate fees are expected to exceed £100 per tonne at that point and continue to rise
- increased waste volumes from a growing population

The combination of these elements provides a forecast of cost per year for treating waste (and hence a total cost over 30 years). This was the "affordability model" that could be shared with the bidders.

Discussions were held with the bidders to outline the affordability issue for the Council. The bidders were told that the project would not proceed to the final tender stage unless they were able to demonstrate how they could reduce their costs from the earlier bidding round and bring them within the affordability model.

Both bidders responded positively to this initiative. One of the initiatives that Viridor had proposed was to run a competition for its technology provider during the final tender phase. This not only increased their cost competitiveness, it also ensured that they were able to choose the best suited company for this project.

The Waste 2020 Project Board in September 2011 considered their responses and approved the start of the final dialogue phase with the bidders.

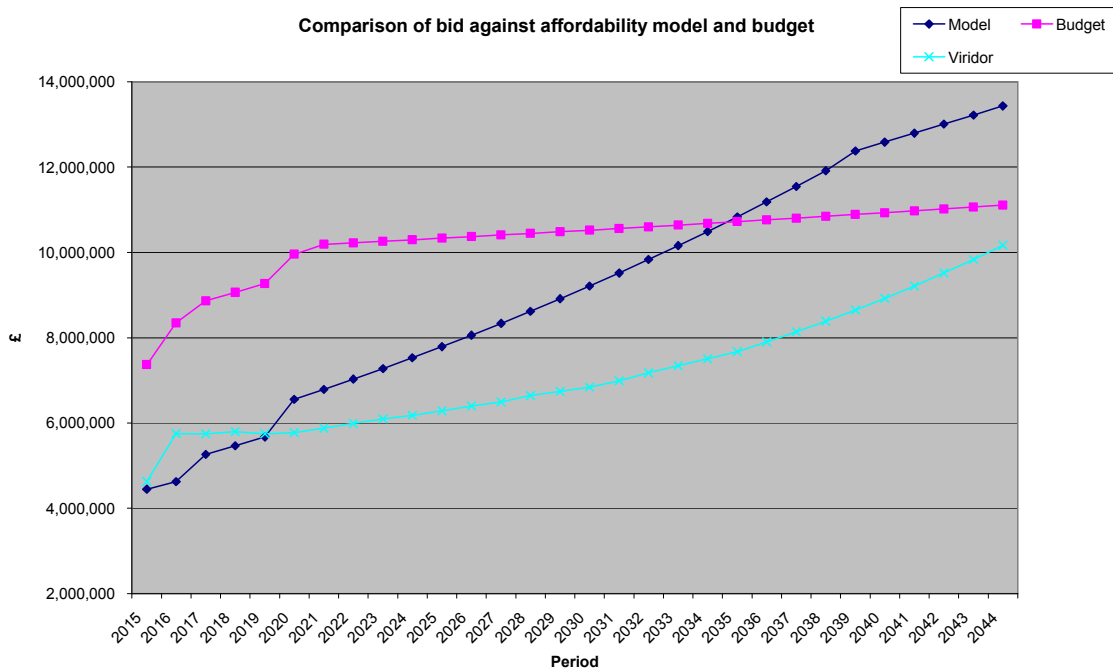
In the final bids the bidders were asked to address the following criteria in each of their bids

- The capital cost of the plant which the Council would borrow to fund, so the impact to the Council of such investment is over the 30 year life of the scheme
- The annual running costs of the plant, including all lifecycle maintenance
- The value of energy income to be generated by the facility, by reference to the volume of electricity generation that the bidders were prepared to guarantee and an assumed tariff rate. The full benefit of such energy income being retained by the Council.

The cost of both bids came within the affordability requirement and approved budget, and as such provide savings to the Council.

The bid prices, and assumptions in them, have been challenged by the officer team to ensure that savings remain even if some of the assumptions change. In a number of cases the Council has taken a prudent view on potential costs.

As is demonstrated in the exempt financial evaluation reports the preferred bidder's overall cost is well within the "affordability model". A modified version of one of the graphs has been produced (below) for the purpose of this call-in response. It shows how the Council will benefit financially from this proposal.



What this graph shows is that:

- The savings the Council will make against landfilling waste is £35.5M over the life of the contract; and
- if the Council fails to implement this decision, there will be no remaining budget to fund the cost of waste treatment by 2035. This is assuming that costs of waste treatment do not rise above the figures in the affordability model. If they do the budget will be exceeded earlier.

It should be noted that the affordability model is not the same as the budget approved in the medium term financial strategy (MTFS), as this reflects the waste strategy. In other words, the MTFS provides higher funding in earlier years to reflect the cost of building the plant, but less funding later on as costs are lower.

Ref 4(d) & (f) – Exempt information

A large amount of information regarding the bids has been included within reports which have not been made public. They have been withheld from publication on advice of the legal advisors. This is because the information is considered to be ‘exempt’.

Exempt information has its basis in law and allows the local authority to disclose certain information only to those members who are making the decision about it. It is necessary in some cases to protect the commercial information which is given to local authorities during a competitive process. Not only does this guarantee that the Council receives a

fair bid - because competition is maintained where bidders do not know what their rivals may be proposing - but, for bidders, they can be reassured that their competitive edge in the market will not be eroded by disclosure of their commercially sensitive information during the bidding process.

In a competitive dialogue process there is a statutory obligation to ensure that confidentiality of bidders proposals is not passed from one bidder to another.

What specifically are these reports exempt? The purpose of these documents is to show direct comparisons between the two remaining bidders in the process. If it were only an examination of the advantages or merits of the winning bidder there may have been greater scope for disclosure, however its purpose was to demonstrate how the evaluation criteria were applied to each of the bidders proposals and how each of those bidders fared against the criteria. The exemptions therefore protect the commercial interests of both of those bidders as well as ensuring a fair process for the Council.

The question of whether information is to remain exempt and at what point it should be disclosed to the public is always a finely balanced issue. However guidance from the Information Commissioners Office on commercially sensitive information in procurement recognises that information is more likely to be sensitive during the procurement process than after.

Legal advice is that these annexes should remain exempt at present as their purpose is to examine each of the bids in detail and draw comparisons between operational and financial aspects of the bids. However as the intended preferred bidder has been announced through the CMDN a review has been undertaken to publicise some of the merits of the winning bid. Officers recognise that the call-in makes a very valid point that information within the exempt annexes is important to public understanding of this process. Information is therefore set out in this response which could not be released to the public in June when the Scrutiny Committee was considering this matter. A press release attached to the covering report also demonstrates the type of information which can be released once the preferred bidder is confirmed.

Conclusion:

As described above the procurement process has on more than one occasion undertaken an analysis of the alternatives to procurement of a facility in Peterborough, both in location and technology type. Indeed the whole procurement has left it to the market place to decide what a deliverable solution for Peterborough is and this process brought forward established and well proven technologies that can be relied upon.

The bidders in the process have put a considerable amount of effort into selecting their chosen technology, and they will have done so knowing that they will be responsible for the repair, maintenance and operation of their chosen technology for 30 years. It can

be seen that this is a prudent approach to managing risk as the bidders have extensive knowledge of those technologies to the extent that they will be expected to stand by their choices and protect the Authority from risks associated with their operation through parent company guarantees.

The proposed solution makes sense for Peterborough. It offers a technology equivalent to that used in the best performing countries in Europe, it is considered to be the best solution available on the market and it seeks to provide a financial solution to a budget deficit if the Council were to continue to landfill its waste. Members are therefore requested to endorse the decision of the Cabinet members and allow this decision to take effect.

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