

**Offtake Arrangements for Power from the Energy Recovery Facility**

**Councillor Gavin Eley, Cabinet Member for Digital, Waste and Street Scene**

**September 2015**

**Deadline date: N/A**

Cabinet portfolio holder:	Councillor Gavin Eley, Cabinet Member for Digital, Waste and Street Scene
Responsible Director:	John Harrison, Corporate Director Resources.
Is this a Key Decision?	YES If yes has it been included on the Forward Plan: Yes Unique Key decision Reference from Forward Plan: KEY/10JUL15/01
Is this decision eligible for call-in?	YES
Does this Public report have any annex that contains exempt information?	NO

**R E C O M M E N D A T I O N S**

The Cabinet Member is recommended to:

1. authorise the Corporate Director, Resources in consultation with the Director of Governance to agree variations to the contract awarded to Viridor Peterborough Limited (Viridor) to make short term arrangements for Viridor to sell the electricity and/or heat from the energy recovery facility (ERF) for the period up to 31 March 2016;
2. authorise the Corporate Director, Resources in consultation with the Director of Governance to negotiate and enter into short or longer term offtake arrangements for the Council to sell the electricity and/or heat from the ERF for the period after 31 March 2016;
3. authorise the Corporate Director, Resources to act as ‘Superuser’ on behalf of the Council and to have the legal capacity to make any declaration required by Ofgem for the Council to participate in Ofgem’s Renewables and CHP Certificate Registry IT system;
4. authorise the Corporate Director, Resources in consultation with the Director of Governance, to accept delegations from one or more waste disposal authorities to allow waste to be accepted from those waste disposal authorities for treatment at the ERF under Section 9EA of the Local Government Act 2000 and Regulation 5 of the Local Authorities (Arrangements for the Discharge of Functions) (England) Regulations 2012; and
5. authorise the Corporate Director, Resources in consultation with the Director of Governance to enter into delegation agreements with other waste disposal authorities.

**1. SUMMARY OF MAIN ISSUES**

- 1.1 This report seeks approval to undertake a number of actions to maximise the financial benefit to the Council derived from offtake arrangements for electricity and/or heat generated by the energy recovery facility in Fengate, Peterborough ("ERF"). Offtake arrangements include but are not limited to agreements to sell, transfer, or otherwise derive value from the energy generated from the ERF's activities. Previously the development was known as an Energy from Waste facility however they are now more commonly known as Energy Recovery Facilities.
- 1.2 The recommendations relate solely to administrative and contractual requirements of the offtake arrangements. In respect of the contractual arrangements the Council will need to consider whether the offtake solution considered to be suitable in the short term to March 2016 also represents value for money over a longer period. The report seeks approval of the short term arrangement and also consider whether to extend it for a longer period.
- 1.3 The contract awarded to Viridor for the design, build, operation and maintenance of the ERF ("Viridor contract"). The ERF accepts a range of wastes which remain after household recycling, composting and food collections have been undertaken, this is known as residual waste which is used in the facility as a fuel to generate electricity and/or heat for beneficial use. It is also capable of processing similar wastes from commercial and business activities alongside waste from households. The ERF will initially generate electricity from its activities but the facility has been configured to allow a combination of electricity and heat production as may be required.
- 1.4 Under the terms of the Viridor Contract a period of commissioning in respect of the ERF will commence during August 2015 when the ERF starts to accept waste on a limited basis and electricity will start to be produced on or around 9 September 2015. The commissioning period is expected to end on 20 December 2015 (the "Commissioning Period"). Although there is no guarantee that electricity will be produced consistently or at all during the Commissioning Period, the Council needs to put in place offtake arrangements in respect of the Commissioning Period and thereafter in the short term to March 2016 in order to maximise the benefit from electricity and/or heat production derived by the Council. Even once the plant has been handed over from Viridor there remains a period of time when the plant will be going through an extended suite of tests and checks, with electricity production subject to interruptions at little or no notice, and therefore the short term offtake arrangement is required up until 31 March 2016 ("short term arrangement").
- 1.5 The offtake arrangements will in particular include the export of electricity into the electrical transmission network. The electricity market is subject to changes in demand and supply and therefore the approach to the offtake arrangements in respect of electricity needs to be responsive and flexible enough to ensure the Council does not miss out on opportunities to maximise income potential while delivering an acceptable level of risk management. An agreement lasting 30 years may well offer security but is also likely to offer poor value for money and therefore an element of responsiveness and flexibility needs to be built into the ongoing management arrangements.
- 1.6 The financial benefit which the Council can derive from its offtake arrangements is considerable and anticipated by the procurement process for the ERF. The simple sale of power to the national grid through an electricity company may yield between £2 and £2.5 million per annum at 2015 prices, with the potential to increase the benefit to the Council through an element of self-supply for Council building energy needs and sale to the electricity market. During the initial period of export up until end of March 2016 the potential income for the Council is circa £750,000, subject to market prices during the period.
- 1.7 In considering the offtake options available to the Council it has been necessary to consider the statutory powers available to the Council to sell or otherwise dispose of the electricity and/or heat produced by the ERF.

## **2. PURPOSE OF THIS REPORT**

- 2.1 This purpose of the report is to request Councillor Eisey, Cabinet Member for Street Scene, Waste Management and Communications to exercise his delegated authority under paragraph 3.4.8 (a) of Part 3 of the constitution in accordance with the terms of his portfolio at paragraph (i), to approve the recommendations set out above.

### 3. **TIMESCALE**

Is this a Major Policy Item/Statutory Plan?	<b>NO</b>	If Yes, date for relevant Cabinet Meeting	<b>N/A</b>
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### 4. **DETAILS OF DECISIONS REQUIRED**

#### 4.1 Background to Decision Making

- 4.1.1 In August 2012, approval was given to appoint Viridor Waste Management Limited as the preferred bidder for the construction and operation of the ERF, weighbridge and associated site infrastructure and services under decision AUG12/CMDN/077. As part of the bidding process, Viridor Waste Management Limited set up a special delivery vehicle, Viridor Peterborough Limited ("Viridor") to manage the contract. On 1 February 2013, the Council awarded a contract to Viridor for the design, build, operation and maintenance of the ERF ("Viridor contract").

#### 4.2 Decisions Required

- 4.2.1 The ERF is now ready to commence its commissioning phase, where it will be accepting waste and when ready producing energy, and further authorisations are now requested in order to maximise the financial benefit to the Council derived from offtake arrangements in respect of the electricity and/or heat generated by it as follows:

- i. Authorise the Corporate Director, Resources in consultation with the Director of Governance to agree variations to the Viridor contract to allow flexibility in waste management and offtake arrangements for Viridor to sell electricity and/or heat for the initial period of offtake until 31 March 2016.
- ii. Authorise the Corporate Director, Resources in consultation with the Director of Governance to negotiate and enter into short or long-term offtake contracts for electricity and/or heat from time to time as required after 31 March 2016 to maximise the financial benefit available to the Council from its ERF offtake arrangements. The arrangement entered into will be the one that produces the best revenue benefit.
- iii. Authorise the Corporate Director Resources to manage the Council's registration with Ofgem in respect of electricity offtake arrangements. Ofgem is the regulator of the electricity and gas supply industry and the Council will be required to register the ERF as a generating facility in order to report data on power produced and also to comply with requirements to record the origin of energy generated from wholly or partially renewable sources.
- iv. The electricity market is complicated and a number of options for sale, self-supply or a mixture of both add to the complexity of comparing and formalising these arrangements, and there is a requirement for specialist financial, technical and legal advice to ensure the most advantageous outcome for the Council. The advisors have previously been subject to a procurement process prior to their appointment to the Council.
- v. Authorise the Corporate Director, Resources in consultation with the Director of Governance, to accept delegations from one or more waste disposal authorities ("WDAs") to allow waste to be accepted from those WDAs for treatment at the ERF. With joint agreement it is possible for one WDA to arrange for another to undertake some or all of their waste treatment functions. An example of such an arrangement would be for another local authority to make arrangements for vehicles containing

their waste to deliver it to the ERF in order that the Council treat this waste on their behalf. That local authority would then pay the Council for the amount of waste treated by on its behalf

- vi. Authorise the Corporate Director, Resources in conjunction with the Director of Governance to enter into delegation agreements with other WDAs.

## **5. CONSULTATION**

- 5.1 There are no statutory consultations required to be undertaken by the Council to enter into these offtake arrangements.
- 5.2 Consultation has been undertaken with a number of market suppliers for the offtake of electricity so as to better understand the actions the Council needs to undertake in order to receive the best return for its electricity in the short term, whilst keeping the flexibility needed to respond to the changing conditions and requirements of the marketplace. It is not anticipated that the Council will immediately export heat to commercial customers but consultation will be undertaken with the market before such supply commences.
- 5.3 The Council has undertaken a benchmarking exercise to ensure that the arrangements it is putting into place for the short term commissioning period are the best value that might be achieved considering the nature of the electricity export profile through the testing and evaluation period. During this initial period of operation the facility is expected to require period's offline for performance optimisation and therefore electricity export can be interrupted from time to time.

## **6. ANTICIPATED OUTCOMES**

- 6.1 In the event the recommendations are approved, there would be a number of outcomes, including:
  - i. The Council will execute a Deed of Variation with Viridor to provide for a more flexible approach to the management of waste and generation of income from the electricity and/or heat produced by the ERF.
  - ii. The Council will enter into arrangements for the offtake of electricity in the short term, through arrangements with Viridor, its group company Viridor Waste Management Limited and its partner Smartest Energy, a licensed energy supplier.
  - iii. Offtake and/or transmission agreements may be signed with one or more off takers as necessary in the interests of the operational and economic benefit to the Council.
  - iv. Corporate Director, Resources will manage the Council's registration with Ofgem if required.
  - v. The development of a strategy for the evaluation of the different options available for the Council to arrange for the offtake of electricity and/or heat in the longer term post March 2016 including but not limited to direct sale to grid, self-supply or a mixture of both options.
  - vi. The Council will accept delegations from one or more WDAs to allow waste to be accepted from those WDAs for treatment at the ERF.
  - vii. The Council will enter into delegation agreements with other WDAs.

## **7. REASONS FOR RECOMMENDATIONS & ANY RELEVANT BACKGROUND INFORMATION**

- 7.1 The Viridor Contract and Production of Electricity and/or Heat

7.1.1 While the Council structured the contract with Viridor to allow itself flexibility in the way in which it manages the electricity and/or heat produced by the ERF, the recommendations contained within this report aim to enable the Council to increase that flexibility to derive maximum potential benefit now.

7.1.2 Furthermore, in order to generate the maximum benefit, the Council has identified the possibility of an additional source of waste by means of a delegation from one or more Waste Disposal Authorities (WDA) which would allow the ERF to operate closer to its maximum capacity and increase the financial benefit which the Council could derive from the ERF's activities.

7.1.3 Essentially, there are 3 proposed changes to the Viridor Contract which are for: Viridor to sell the electricity produced through its arrangements with Viridor Waste Management Limited and its partner Smartest from the start of the commissioning phase up to 31 March 2016, to give the Council the flexibility to change ownership of the electricity, if it so chooses when selling the electricity, and to allow waste from other waste disposal authorities to be treated at the ERF.

## 7.2 Offtake Arrangements in Respect of Electricity and/or Heat Generated by the ERF

7.2.1 The electricity supply market is subject to continual change and in order for the Council to continue to ensure it delivers best value in respect of income received from electricity produced by the activities of the ERF it needs to develop a flexible offtake strategy. It may not be able to do this effectively through a long term deal so needs to develop a methodology to monitor the value to be achieved from electricity and/or heat in the longer term.

7.2.2 The Corporate Director, Resources requires the ability to respond quickly to energy market developments and to enter into such contractual arrangements as may benefit the Council from time to time.

7.2.3 In respect of the electricity market, these arrangements may require a registration to be held with Ofgem and operated by the Council's authorised representative.

## 7.3 Advisers to the Council

7.3.1 In the development of its offtake arrangements strategy the Council has sought the advice of its external legal, financial and technical advisers and will continue to consult as required to ensure compliance with legal, financial and other regulatory requirements in this complex area. Further details of the advice received by the Council is set out in paragraph 9 below.

## 8. **ALTERNATIVE OPTIONS CONSIDERED**

8.1 The following options were considered.

Option	Description	Reason for Rejection
1	Do nothing	This is not an option as the Council is obligated to make arrangements for the offtake of electricity and/or heat from the ERF facility in order to both comply with the contract it holds with Viridor and to ensure realisation of the energy's value in the interests of its residents. Also the uncontrolled delivery of electricity to the transmission grid is not compliant with the Electricity Act 1989 where all supplies must be registered and regulated so as to ensure efficient and stable electricity supplies.
2	Give Away Energy	The Council could be seen to be negligent in not endeavouring to make adequate provision for the best income available from the market at a particular time and therefore giving away the energy is not acceptable and may also place it in breach of State Aid rules.
3	Set up a	The Council made provision to develop its own company, Blue Sky

	Company to Sell Power	Peterborough, with part of its function being to deal with the sale of power from the ERF development. There are costs associated with such an undertaking and it is possible to avoid these costs by selling the energy directly as a Council and not through this company, so in the interests of best value we should avoid this unnecessary expense.
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## 9. IMPLICATIONS

9.1 A flexible approach to managing the intake of waste and the electricity and/or heat offtake from the ERF will allow the Council to maximise the benefits derived. However this will require continued and structured management to ensure continued value and appropriateness of arrangements.

9.2 Although a flexible approach brings benefits it will also require a structure and internal governance to be put in place to review the benefits of a particular arrangement and plan for regular reviews with a view to alternative arrangements at the appropriate juncture.

### 9.3 Legal Implications

#### 9.3.1 Powers

The Council has considered the various legislative powers available to it to sell electricity under the offtake arrangements envisaged above. On final analysis of these powers, the Council has the power to sell the electricity under Section 11(1) (d) of the Local Government (Miscellaneous Provisions) Act 1976. The Council will not be under an obligation to set up a company to sell the electricity under this power, although it may choose to do so. Additionally, it is not the Council's intention to make a profit from the offtake arrangements as explained in paragraph 9.5.2 Financial Implications below.

Additionally, the Council has also considered its powers to accept waste from other waste disposal authorities for treatment at the ERF. The Council can use its statutory powers (rather than contracts) to enter into delegation arrangements with another waste disposal authority, namely under Section 9EA of the Local Government Act 2000 and Regulation 5 of the Local Authorities (Arrangements for the Discharge of Functions) (England) Regulations 2012 to discharge the waste disposal functions of other waste disposal authorities. On delegation, the function for the waste disposal will pass to the Council, although the responsibility for the discharge of the function will remain with the authority delegating the function.

There is currently no statutory guidance specifically relating to waste disposal authorities exercising its statutory powers to delegate all or some of their waste disposal functions. However, this delegation is not uncommon, for example, Norfolk County Council recently delegated some of its waste disposal function to Suffolk County Council.

#### 9.3.2 Procurement

Variations will be made to the Viridor Contract as set out in paragraph 7.1.5 above to give effect to the recommendations.

There are no procurement implications for the variations proposed to the Viridor Contract for the short term arrangement. The variations are permissible because they are not 'substantial' within the meaning of the Public Contracts Regulations 2015; and/or the value of the variations will not exceed more than 15% of the value of the Viridor Contract.

As and when the offtake arrangements are to be implemented after March 2016, and the Council enters into contractual arrangements with third parties, the Council will need to review procurement implications on an ongoing basis.

In relation to the proposed delegation arrangement between the Council and other waste disposal authorities, there are no procurement implications because this type of public sector to public sector arrangement is excluded from the public procurement regime.

### 9.3.3 State Aid

There are no state aid implications connected with the offtake arrangements as the Council intends to enter into commercial arrangements based upon market rates and conditions.

### 9.4 Governance Implications

This report envisages that as the offtake arrangement strategy is developed and effected, the Council may enter into various contractual arrangements from time to time in the longer term after 31 March 2016 with third parties. In view of the approximate annual benefit that the Council may derive from the offtake arrangements it may be necessary to publish further CMDNs authorising the execution of specific agreements if determined to be Key Decisions.

In addition the Council may enter into one or more delegation agreements with other WDAs and approval of such arrangements will be subject to a business case including financial, governance and other considerations as required.

### 9.5 Financial Implications

9.5.1 The income achieved from the sale of the energy produced by the facility is built into the overall cost model included in the Medium Term Financial Strategy, which includes the costs of constructing and operating the plant, income from energy, and savings in the cost of alternative waste treatment (landfill). The proposed arrangement seeks to ensure that the income element is maximised in line with the MTFS and to provide additional savings if possible. The income until March 2016 is likely to be in the region of £750,000. This income will contribute towards the energy income targets within the existing MTFS. The actual income received for the power will depend on the prevailing rate at the time of generation and offtake.

9.5.2 Although the sale of the electricity will generate a considerable income for the Council no profit is made as the income is used to offset both the operational and finance cost of the project as a whole. This income was included in the original financial modelling for the construction and operation of the ERF.

9.5.3 Where future proposals are developed for either offtake arrangements or delegations from waste disposal authorities, business cases will need to be approved in support of the decision. These business cases will need to include:

- Analysis or potential impact compared to original financial models and MTFS
- Comparison to alternative options, including benchmarking where possible
- Review of any taxation implications, including the VAT position for the Council

External advice may be needed to support this business case development.

9.5.4 There is capacity within the original project budget to cover the additional costs of advisers.

## **10. DECLARATIONS / CONFLICTS OF INTEREST & DISPENSATIONS GRANTED**

None

## **11. BACKGROUND DOCUMENTS**

Used to prepare this report, in accordance with the Local Government (Access to Information) Act 1985) and The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012

- Local Government Act 2000; and

- Local Authorities (Arrangements for the Discharge of Functions) (England) Regulations 2012.