

## Waste Management Contract – Planning Appeal

### SUMMARY

- 1.1 Planning Control Committee rejected Resource Recovery Solutions' (RRS) planning application for the Sinfin Lane waste treatment facility in December 2009. This report looks at the options and recommends the immediate requirements for the way forward.

### RECOMMENDATION

- 2.1 That RRS are authorised to proceed with an appeal of this planning decision.

### REASONS FOR RECOMMENDATION

- 3.1 A successful appeal and subsequent building of the plant will provide a long term solution for diverting residual waste away from landfill with all associated Climate Change benefits.
- 3.2 Delaying the appeal process will cause delays to the project. The costs of one months delay to the project are greater than the anticipated total costs of the appeal.

### SUPPORTING INFORMATION

- 4.1 The contract with RRS was signed on 8 December 2009, but financial close has not yet occurred. All of the conditions in the contract relating to the Sinfin plant are conditional upon reaching financial close. This means that until financial close is achieved we only have the commitment from RRS to take our waste and dispose of it through landfill for a minimum of 2 years.
- 4.2 Planning Control Committee rejected the RRS planning application for the Sinfin Lane Waste Treatment Facility on 17 December 2009.
- 4.3 As a result of this decision RRS have looked at four options:
- prepare and resubmit the planning application
  - appeal the decision
  - submit a Revised Project Plan
  - agree to termination of the contract and re-procurement by the Councils.

- 4.4 It is recommended that RRS submitting a planning appeal is the preferred option for the reasons set out in Appendix 2.
- 4.5 All the conditions in the contract relating to the Sinfin Lane Plant are conditional on Financial Close being achieved. This has not yet happened. Therefore a dedicated decision is required to provide financial support to the appeal in line with the conditions that would apply if Financial Close had been achieved.
- 4.6 RRS have received Counsel's advice that a planning appeal is likely to succeed.

#### **OTHER OPTIONS CONSIDERED**

- 5.1 Failure to build a waste treatment plant would leave the Council exposed to very significant financial risks from Landfill Tax increases and projected LATs deficits.
- 5.2 Failure to build a waste treatment plant would leave the City's waste going to landfill with the consequent impact on the environment from carbon emission.

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**Background papers:** Waste Management Cabinet Reports

**List of appendices:** Appendix 1 – Implications  
Appendix 2 – Implications of planning refusal

<b>IMPLICATIONS</b>
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**Financial**

- 1.1 The waste contract is the largest that the City Council has ever undertaken. The decision by the Planning Control Committee adds to the cost of the project but does not prevent the contract being progressed if a planning appeal is successful.
- 1.2 At final tenders, it would be normal practice to have agreed a fixed price for the main contract with suitable terms for price indexation in the event of various types of delay. Due to the global uncertainty over credit availability and the cost of that credit at that time, it proved impossible to secure such certainty. As a result, the final tender included provisions to run funding competitions with banks to ascertain the final cost of the particular bid. In addition, the costs of foreign exchange is also at risk between now and financial close. Although the contract is signed, financial close has not yet occurred and some financial risk remains.

**Direct Costs of Appeal**

- 1.3 The City Council's share of costs associated with the contractor progressing the appeal, which are estimated to be around £180,000, can be met from waste contingency fund.

**Costs of Delays**

- 1.4 The initial estimate for delays on the project is approximately 12 months due to the appeal process. At this point the project is still cheaper than "Business as Usual" comparison. The comparison comes to break even at a delay of 15 months with further delays beyond 15 months pushing the costs of the project up by approximately £1.75million per month. The City Council's share of this is 32.9%.

**Legal**

- 2.1 The City Council has entered a long term contract (likely to be until 2037) with a joint venture between United Utilities and Interserve, called Resource Recovery Solutions, for the disposal of residual waste jointly with the County Council. The management of the contract will be managed under the Inter-Authority Agreement which was signed on 8 December 2009, with Council Cabinet approval.

**Personnel**

- 3.1 A successful project will create at least 30 jobs in the City.

**Equalities Impact**

- 4.1 None

**Corporate objectives and priorities for change**

- 5.1 The Waste Management Project will help to reduce landfill and help Derby towards a better environment. The cost will increase from current levels but is expected to be cheaper than 'business as usual' and will therefore contribute to better value for money.

## Implications of Planning Refusal

1. In December 2009, the Cabinets of both Derbyshire County Council and Derby City Council approved the award of a contract to Resource Recovery Solutions (Derbyshire) Ltd, a joint venture between United Utilities and Interserve. The contract was for the treatment and disposal of the waste that cannot be recycled or composted in the County and City from 1 April 2010 when the existing waste management contracts expire.
2. A key element of the new contractor's proposals is to deliver a state of the art waste treatment facility and education centre at Sinfin Lane in Derby. The elements of the contract associated with the funding and delivery of this are, however, conditional on financial close which was anticipated to take place before 31 December 2009 but has not yet taken place.
3. On 17 December 2009, RRS failed to secure planning consent for the above facility. Their application was refused by the Planning Control Committee of Derby City Council.
4. It is considered that there are four options available to the Councils in the light of this decision:
  - a. **Resubmission of the Planning Application** – this option which could take up to six months could involve the preparation and submission of a fresh application by the contractor to Derby City Council. In order to progress this option, all parties would need to be confident that a new application would be successful (i.e. the dynamics which resulted in the refusal of the first application would no longer prevail). It was felt by the project team that a resubmission would be unlikely to receive a different result at committee.
  - b. **Revised Project Plan** – this would involve the development of revised proposals on another site. There are no other obvious available sites for such a development. There are likely to be significant time (anything up to two years) and major cost implications associated with the development of a revised project plan. The development of revised proposals, even if this was possible, is likely to cause confusion and undermine the proposals for the Sinfin Lane site regarding its suitability.
  - c. **Termination and re-procurement** – this would involve letting the existing conditional contract with RRS run its course. RRS would deliver waste disposal services including waste transfer, landfill and the operation of the Councils' Household Waste Recycling Centres for a period expiring on 31 July 2012 or 31 March 2014 at which point either party could choose to walk away. Under the terms of the agreement, either the contractor or the Councils must give twelve months notice. The Councils would then either:
    - have to go through a reprocurement exercise to let a new long term contract. The timescales involved in the procurement of a new long term contract could be well in excess of two years, or
    - do nothing and continue to landfill. There are inherent risks of availability and the punitive costs of landfill tax and Landfill Allowance Trading Scheme

penalties. This option has been consistently rejected as both expensive and risky.

- d. **Appeal** – this would involve an appeal to the Secretary of State (SoS) against Derby City's refusal of the planning application. There would be a resulting public inquiry following which the planning inspectorate would prepare a report to the SoS who would then decide the outcome. This process is likely to take at least 12 months from the date an appeal is lodged.
5. The Councils' Project team has met with RRS, since the planning decision, to discuss the above options and has concluded that the preferred option would be for the contractor to appeal the planning decision.
6. RRS has subsequently identified a highly renowned, specialist Planning and Environment QC to present the case and preparation work is underway. The QC's opinions on the prospects of an appeal are positive.
7. An indicative timetable for the appeal process has been prepared by the contractor and the costs associated with the appeal have been investigated. It is estimated that costs will be in the region of £640,000 based on a four week public enquiry of which the City Council would contribute approximately £180,000. These costs may vary dependent upon the actual time required for the enquiry.
8. The Contract includes a provision whereby 90 per cent of the costs of an appeal are borne by the Councils. Although this provision is in a conditional clause, nonetheless it is considered that it would be within the spirit of the contract to honour this commitment. Any such costs would need to be allocated between the Councils based on agreed terms set out in the Inter-Authority Agreement between the two Councils also signed in December 2009. This commits the City Council to funding 31 per cent of the associated costs and is based on the planned use of the new waste treatment facility in the future.
9. The implications of the planning decision are that project costs will inevitably increase and there will be a short-term landfill allowance trading scheme exposure to manage given the new treatment facility will not now come on stream in July 2012 as planned. Even if both authorities succeed in achieving their desired recycling and composting target by 2020, both will fail to meet their landfill allowance targets and could be subject to penalties as a result.
10. The full costs of delay to the project are currently being assessed and a report will be presented to Cabinet later this month, once this analysis has been concluded.

### **Timing of Financial Close**

11. As was previously reported to Cabinet the project had been progressing on the basis of financial close occurring at the end of December 2009.
12. This timetable was extremely challenging due to the complexity of the funding arrangements associated with the project. The instability of the global funding markets as a result of the banking crisis had previously delayed progress.
13. Although funding for the project has however been secured, in principle, and there are 5 banks which have the necessary approvals in place to support the project, the planning refusal has inevitably resulted in the Councils needing to time to reflect on whether progressing to financial close at this time would be in the best interests of the Authorities or whether delaying it until a planning appeal had been concluded would be preferable.

14. The advantages and disadvantages for the Councils associated with progressing to financial close in the context of the planning refusal are currently being assessed in detail and a recommendation on the timing of financial close in the light of this work will also be presented to Cabinet later this month.