

**THE BOROUGH, CITY AND COUNTY COUNCILS OF CAERPHILLY, CARDIFF,
MONMOUTHSHIRE, NEWPORT AND THE VALE OF GLAMORGAN**

PROSIECT GWYRDD JOINT COMMITTEE

**REF: 01-18
DATE: 12/06/18**

Viridor Contractor Change Proposal

REPORT OF: SENIOR RESPONSIBLE OFFICER

AGENDA ITEM: 8

Appendices A, B, C and D(1&2) are exempt from publications as they contain information pursuant to paragraphs 14 and 21 of schedule 12A Local Government Act 1972.

PURPOSE OF REPORT

1. This report is to inform and seek authorisation from the Joint Committee for the Partnership to enter into the necessary documentation in relation to the contractor change regarding the increased capacity at the Trident Park Energy Recovery Facility.

BACKGROUND

2. In July 2016, Viridor submitted a scoping request to Cardiff Council in relation to a potential planning application to increase the capacity of the Trident Park ERF from 350,000 tonnes per annum to 425,000 tonnes per annum. Subsequent to this, an application to vary the planning permission and to remove the Section 106 agreement limiting the source of wastes to the South East Wales Region was submitted by Viridor in September 2016. Alongside the planning application, an application was made to NRW to vary the Environmental Permit to increase the capacity also.
3. In spring 2017 Viridor's applications were successful and variation to the Planning Permission and Environmental Permit were granted.
4. Since notification to the Partnership of Viridor's intentions to increase the planned capacity, several discussions and correspondence have been held with Viridor to understand the contractual implications of the revised capacity at the Facility and to reach a commercial agreement regarding the potential additional third party tonnage.
5. From discussions with Viridor, it is understood that no physical modification of the facility will be required to process up to 75,000 additional tonnes per annum. The additional capacity will be achieved by higher than planned utilisation of the facility and by the virtue that waste currently received is of a lower calorific value than anticipated in the contract, thus requiring additional waste to be processed to generate the

assumed power from the facility. Viridor anticipate that the tonnage processed will vary year on year and some years may be below the original capacity of 349,966 tonnes, being dependent on the facility's availability and the future calorific value of the waste.

6. Discussions with Viridor focused on recognising that this is a Contractor Change and maintaining the proportionality principle upon which the contract is predicated. It was agreed that proportionality be maintained primarily in terms of NNDR payments and the Partnerships share of any future Qualifying Change in Law event.
7. Details of the final proposal regarding the contractor change are provided in exempt Appendix A. A Deed of Variation reflecting the above is being drafted and the initial draft Payment Mechanism is included in exempt Appendix B.
8. To facilitate the change it is proposed that Cardiff Council as the Host Authority will enter into a Deed of Variation to the Contract capturing the amendments required to the Payment Mechanism to reflect the change. In addition minor updates will be made to the Payment Mechanism to capture previously agreed low value changes authorised by the contract Manager. Details of the low value changes are provided in exempt Appendix C.
9. To enable the changes to be reflected at a PG Partnership level, it is proposed that each Partner Authority will enter into a Deed of Variation to the JWA2 capturing the amendments to the JWA2 Payment Mechanism (Schedule 11 of the JWA2) to reflect the change referred to in paragraph 8 above. A copy of the draft JWA2 Deed of Variation and amended Schedule 11 are provided in exempt Appendix D(1&2).

Governance

10. In accordance with the JWA2 decision making delegations (Para 6.1 of the JWA2) a joint committee decision is being sought to authorise entry into the necessary documentation.
11. In line with the Welsh Government funding criteria, Viridor's proposals have been discussed with WG's Transactor. He has confirmed that from a WG perspective they are comfortable that the pro rata principle is maintained, and although it requires an annual calculation, it follows a logical process, the values are not material in terms of the overall contract value, and recommends we reach agreement with Viridor quickly and close this matter.
12. Full review of the documentation associated with the change is required by WG as a term of the funding criteria.

Financial Implications

13. The report outlines a positive position for the Partnership in that it has been able to secure a gain share arrangement if Viridor treats additional tonnage above the current capacity of 350,000 tonnes. The extent of any gain share will be dependent on the additional tonnage over 350,000 so it will not be predictable in advance and there is the potential that it could be zero. For that reason, a retrospective reconciliation after

the end of the contract year when information on actual tonnages treated is available is proposed.

14. The position with regard to other elements of the PG contract that relate to facility capacity, in particular the NNDR payment and the QCIL calculation now reflect the maintenance of the pro-rata principle. Expenditure attributable to Prosiect Gwyrdd will therefore reflect the PG share of the Trident Park capacity and in the case of NNDR offer the potential for reduced retrospective expenditure if annual tonnage treated is more than 350,000 tonnes. In the case of QCIL an annual calculation will be required to determine the extent of any rebate due to Prosiect Gwyrdd if annual tonnages treated are more than 350,000 tonnes.
15. The opportunity has also been taken to consolidate into the amended Payment Mechanism a number of minor, low value changes previously agreed by the Contract Manager. These are mainly to clarify drafting in the Payment Mechanism and have no financial implications. The JWA2 has been updated to include the potential gain shares arising from the additional tonnage which will be allocated between Partners using the agreed Cost Sharing Ratio.

Legal Implications

16. As set out in the report, the Contractor has requested a contractor change pursuant to the Project Gwyrdd (PG) contract. The details of the changes are set out in the report.
17. To implement these changes it is proposed that a Deed of Variation will be entered into by Cardiff on behalf of the partnership in respect of the PG contract. As set out in the report, it is understood the payment mechanism in the contract has been updated to reflect the changes. As a consequence of the proposed change to the payment mechanism of the contract, it is proposed to update the payment mechanism in the Joint Working Agreement 2 (JWA2) and for a Deed of Variation to be entered into by each partner.
18. The procurement regulations set out provisions where a modification can be made to a contract without a new procurement. Based upon instructions, the changes are not considered substantial and are permitted under the procurement regulations.
19. The JWA2 sets out the working arrangements between each Partner Authority and established the terms of reference for decision making in respect of PG. Any decision made by the Joint Committee shall be binding on all of the Partner Authorities.
20. With regards to the other updates to the payment mechanism, it is understood that for completeness these have been included in the updated payment mechanism. It is understood that these are low value changes and as a result have been agreed by the contract manager in accordance with the terms of the JWA2.
21. As set out in the report, the recommendations are subject to Welsh Government approval.

Recommendations

1. That the Joint Committee consider if final proposal regarding the Contractor change is acceptable;
2. Subject to recommendation 1 above, 4 below and Welsh Government approval the Joint Committee authorise Cardiff Council to enter into a Deed of Variation in respect of the PG contract (as detailed in the report).
3. Subject to recommendation 1 above, 4 below and Welsh Government approval, the Joint Committee to authorise the partner authorities to enter into the Deed of Variation regarding the JWA2 (as detailed in the report)
4. The Joint Committee to authorise the Contract Management Team in consultation with the Senior Responsible Officer to make any amendments to the documentation in recommendations 2 and 3 in order to:
 - a. complete/update those areas to correct any typographical or formatting errors;
 - b. reflect advice received.

Provided it does not materially alter the substance of the drafts set out in the report.

Tara King
Senior Responsible Officer, Prosiect Gwyrdd
12 June 2018