

Long Term Waste Service – First Longstop**1.0 PURPOSE**

1.1 To agree to the variation of the Waste PFI Contract to enable a decision on whether to proceed with the Contract to be made at the meeting of the Cabinet on 1st October 2013.

2.0 REASON FOR URGENCY

2.1 Planning consent for the Allerton Waste Recovery Park is subject to Judicial Review. As a consequence the First Longstop Date has past without the plant having a Satisfactory Planning Permission. The long term waste service contract with AmeyCespa will therefore terminate unless agreement on how to proceed is reached before close of business on the 13 September 2013.

2.2 It is proposed to extend this deadline to allow a considered response but approval is needed in the meantime to agree such an extension.

3.0 BACKGROUND

3.1 At its meeting on 30th November 2010, the Council's Executive approved to support the award of a Contract by North Yorkshire County Council to Amey Cespa in relation to the long term waste service and to delegate authority to officers to determine a waste management agreement between the City of York Council and North Yorkshire County Council in relation to this. The Contract between NYCC and Amey Cespa was signed in August 2011 and this is supported by a side agreement between the two local authorities.

3.2 The Contract requires AmeyCespa to use 'All Reasonable Endeavours' (ARE) to secure a Satisfactory Planning Permission for a proposed residual waste treatment plant at Allerton Quarry, near Knaresborough. A planning application was submitted on 1 September 2011, and the Planning and Regulatory Functions Committee resolved at its meeting on the 30 October 2012 to grant planning permission subject to conditions and the completion of legal agreements. The Secretary of State confirmed on the 30 January 2013 that he did not wish to "call in the application for his determination, and the decision notice was subsequently issued on 14th February 2013.

3.3 The decision to grant planning consent has been challenged by Marton cum Grafton Parish Council through an application for Judicial Review. His Honour Judge Gosnell considered the Application and the Hearing together on a rolled up basis on the 30 and 31 July 2013 and refused the application for leave to apply for a Judicial Review on 2 of the 5 grounds. Although leave was granted on 3 of the grounds, the Judge found in favour of the County Council, and refused the Parish Council the automatic right of appeal. An application was subsequently made by the Parish Council direct to the Court of Appeal on the 22 August 2013 seeking further leave to appeal. At the time of drafting, no date has been set for the application to be heard.

4.0 CONTRACTUAL IMPLICATIONS

4.1 The Contract specifies actions that must be taken in the event that AmeyCespa have been unable to obtain a Satisfactory Planning Permission (SPP) by the First Longstop Date. A SPP is defined in detail in the Contract but is essentially a planning consent for the proposed Allerton Waste Recovery Park that is not subject to any statutory challenge. AmeyCespa cannot be in possession of a SPP until (at least) 7 days after the current challenge is exhausted.

4.2 The First Longstop Date is defined as two years from the date the planning application was submitted. Although the application was submitted on the 1 September 2011, further information was required by the Council and it was not validated until 12 October 2011 so there is some room for argument that the First Longstop Date is either of these dates, however it is prudent to assume it is the earlier date.

4.3 As a result of the application for leave to appeal by Marton cum Grafton Parish Council, the planning decision is still subject to statutory challenge. AmeyCespa have therefore been unable to secure a Satisfactory Planning Permission by the First Longstop Date.

4.4 In the absence of a SPP, the Contract requires the parties (AmeyCespa and the Council) to agree how to proceed within 10 Business Days of the First Longstop Date. Such an agreement is outside the scope of terms delegated to Officers, and will therefore need approval of the Executive.

4.5 The Contract provides a number of possible outcomes for the agreement.

A. That the Planning Application continue to be prosecuted in the same or substantially the same form (Decision A).

B. That the Planning Application requires material amendment or to be withdrawn and a further Planning Application submitted and the Authority accordingly requires the Contractor to prepare a Revised Project Plan (Decision B); or

C. That there is no reasonable prospect that the Contractor will obtain a Satisfactory Planning Permission and that this Agreement should terminate (Decision C).

4.6 There is no reason at this stage to believe that that AmeyCespa will not obtain a SPP in due course, therefore it is not appropriate to consider agreement based on Decision B. Decision C is the default in the event of a failure of the Parties to agree an alternative outcome.

4.7 In the event that the Contract is terminated under Decision C above, and provided the Council accepts that AmeyCespa have used ARE to secure a SPP, the Council will become liable for a payment to AmeyCespa of £3 million. It is understood that AmeyCespa would wish to agree that the continuation in accordance with Decision A.

4.8 It will therefore become necessary for the Council to support North Yorkshire Council in determining whether it wishes to agree with AmeyCespa to proceed with the Contract in accordance with Decision A, or whether the Contract should terminate under Decision C.

5.0 TIMING OF THE DECISION

5.1 Given the on-going interest in the project, the decision by the County Council on whether to continue or terminate should ideally be made in a timely manner with appropriate opportunity for public and elected Member engagement. This would not be possible if the decision were to be made within the 10 Business Days required under the Contract.

5.2 AmeyCespa have indicated they would be agreeable to a variation of the Contract to allow a more appropriate period of time for the Council to consider how to proceed. The County Council is therefore proposing that the matter should be brought back to the Executive at its meeting on the 1 October 2013. To coincide with this, it is proposed that a report on this matter will be presented to the Cabinet of the City of York Council on 1st October 2013. In the meantime under the County Council's constitution, there is a requirement for the approval of their Executive to agree a variation of the Contract with AmeyCespa to extend the relevant period for agreeing how to proceed upon reaching the First Longstop Date without a Satisfactory Planning Permission. For the City of York Council, this initial decision to vary the relevant period can be dealt with under officer delegated powers.

6.0 CONSEQUENCES OF THE DECISION

6.1 A failure to agree an extension of time to conclude how to proceed will require a report to be brought to the Executive as an urgent report and makes the outcome potentially more likely to be subject to challenge. It also risks the Council drifting into a Default Outcome of termination.

6.2 The consequences of the alternative outcomes available to the Council as a consequence of reaching the First Longstop Date without a SPP in place will be detailed in the future report.

7.0 FINANCIAL IMPACTS

7.1 There are no direct financial impacts although the implication of the Default Outcome in the absence of an agreement with AmeyCespa how to proceed will be a maximum payment of £3m.

8.0 LEGAL IMPLICATIONS

8.1 The legal implications relate to the contractual obligations and are set out in the body of the report.

9.0 EQUALITIES IMPACTS

9.1 There are no equalities impacts arising from this report.

10.0 CONCLUSION

10.1 The consequence of the application to seek leave to appeal the outcome of the Judicial Review of the award of planning consent for Allerton Waste Recovery Park is that the long term contract with AmeyCespa will terminate unless the Council agree with AmeyCespa how to proceed. The Contract requires any agreement on how to proceed to be reached within 10 Business Days of the First Longstop Date (i.e. by close of business on Friday 13 September 2013).

10.2 It is proposed to agree an extension of time with AmeyCespa such that proposals can be considered at the meeting of the Cabinet on 1st October 2013.

11.0 DIRECTOR DECISION

11.1 That:

i) The Director of City and Environmental Services notes the contractual implications of not achieving a SPP as a consequence of the application for leave to appeal the outcome of the Judicial Review on award of planning consent for Allerton Waste Recovery Park and;

ii) the Director of City and Environmental Services, acting in consultation with the Director of CBSS and Assistant Director for Governance and ICT, agrees terms of a variation or variations to the contract with AmeyCespa that extend the period in which agreement must be reached before triggering the Default Outcome.