Cabinet 9 September 2014

Report of the Cabinet Member for Finance and Performance

FINANCIAL CLOSE FOR THE LONG TERM WASTE MANAGEMENT SERVICE CONTRACT

Summary

1. This report updates Cabinet on

   - the progress of the Long Term Waste Service Contract with AmeyCespa for provision of a waste treatment service at Allerton Quarry, Knaresborough

   - funding for the project in the context of the Government withdrawal of PFI credit support for the project 21 February 2013 and other changes

   The report also asks Cabinet to consider whether the long term waste treatment project should progress to Financial Close within the approved affordability envelope.

2. The City Council resolved at its meeting in December 2010 to enter into a Joint Waste Management Agreement with North Yorkshire County Council (NYCC) which supported NYCC in entering into a contract (the Contract) with AmeyCespa (Allerton Waste Recovery Park Interim SPV Ltd) for the provision of a Long Term Waste Management Service. The primary objective of the Contract is to deliver a long term sustainable alternative to landfill for the treatment of residual municipal waste. The Contract required AmeyCespa to secure a planning consent for a waste recovery facility (AWRP) at Allerton Quarry before confirming the final cost of the service to the Council. A Satisfactory Planning Permission has been secured and the final cost of the service has been provided to the Councils for consideration. The County Council is therefore required to confirm its agreement to proceed with the Contract and the City Council is

required to confirm its agreement to proceed with the Joint Waste Management Agreement.

3. The proposed technology and commercial offer open to the Councils remains essentially the same as described in 2010. Proceeding with the contract allows the Councils to complete delivery of its waste management strategy and provide a long term sustainable service for the management of residual waste. The proposed long term service contract will enable the Councils within York and North Yorkshire to achieve an average household waste recycling and composting rate in excess of 50%, whilst ensuring that a minimum of 95% of residual municipal waste collected in the area is diverted from landfill.

4. The technologies employed will recover value from residual waste through additional recycling and the production of electricity for export to the National Grid equivalent to the domestic needs of a town the size of Knaresborough. Ignoring the longer term potential to recover heat from AWRP, the greenhouse gas benefits compared to landfilling the waste to be processed at AWRP are also significant and are broadly equivalent to the removal of 12,000 average cars from the highway network. Proceeding with the contract therefore enables the management of residual municipal waste in York and North Yorkshire to be moved up the waste hierarchy into a ‘recovery’ process.

5. The financial and economic benefits of proceeding with the long term contract are also relevant considerations. AWRP will add approximately £220m (at 2014/15 prices) to the York and North Yorkshire economy over the life of the Contract through the creation of new jobs, both during construction and throughout the Contract period.

6. The decision to proceed with the Contract must have significant regard to the long term financial cost or saving to the Councils. The costs of both the long term contract and the alternative have changed since 2010 but the long term contract continues to show significant financial benefit. The Contract no longer benefits from PFI credits but this report shows that the Councils can expect the Contract to provide a combined net benefit of £169 million over the life of the Contract (equivalent to £31million in Net Present Value terms) excluding any allowance for the residual value of AWRP to the Councils after 25

years. The cost of the long term service contract is also within the Council's available budget.

7. The structure of the Contract effectively fixes much of the Councils long term waste management price risk from inflation and increases in landfill tax, with the long term average price to the Councils for treatment of waste at AWRP estimated to be below current costs of disposal.

8. This report further summarises the background to the proposal, explains what has changed since December 2010, and details the financial implications of proceeding with the Contract and the options available to the Council, together with the process to Financial Close.

Background

Procurement Process

9. Increasing costs of landfill and imposition of the landfill tax, together with targets for diverting waste from landfill and threats of penalties for Councils failing to achieve their targets led to the Councils pursuing a secure and long term waste treatment service for residual waste. The County Council and City of York Council carried out joint formal procurement for the provision of a long term waste management service using the competitive dialogue process. The procurement process began in 2007 with the publication of a notice in the Official Journal of the European Union. The procurement process was carried out in accordance with the Public Contracts Regulations 2006 and the Councils' own Contract Procedure Rules. The principle objectives of the procurement were:
    - Long term security and value for money
    - Improved environmental performance
    - Effective management of risk and maximum transfer to the private sector (particularly construction, technology and operational risk)

10. The Councils did not specify the number, type or location of plant or facilities to be used in delivery of the service, nor the technology to be used. These were proposed by bidders as part of the procurement. Instead, the Councils specified the outputs of the service required with the primary focus being on diversion of the waste from landfill.

11. On the 17 December 2009, AmeyCespa were identified as the preferred bidder for the Contract having offered the 'most

economically advantageous tender'. DEFRA withdrew the Private Finance Initiative (PFI) credits for the project (see paragraphs 43-48) and the project is now referred to as the Waste PPP (Public Private Partnership).

<u>The Split Close Approach</u>

12. The contract was procured with the 'split' approach to Commercial and Financial Close. Commercial Close is when the parties agree the commercial deal (i.e. what they want to achieve) and Financial Close is when the parties agree the financial arrangements and cost.

13. The resolution made at the County Council's Full Council on 15 December 2010 delegated authority to the Corporate Director, Business and Environmental Services (acting in consultation with the Corporate Director, Finance and Central Services, and the Assistant Chief Executive, Legal and Democratic Services) to determine the final terms of the Contract and Joint Waste Management Agreement with City of York Council at both Commercial and Financial Close.

14. The resolution made at the City Council's Full Council meeting on 9th December 2010 delegated authority to the Director of City Strategy (acting in consultation with the Director of Customer and Business Support Services and the Head of Civic, Democratic and Legal Services) to determine the final terms of the Joint Waste Management Agreement between the City Council and the County Council at both Commercial and Financial Close.

15. A draft of the Commercial Close contract was made available to Members prior to the decision in December 2010 but final terms were subject to clarification and approval by both prospective funders and the Department for Environment Food and Rural Affairs (DEFRA) and the Waste Infrastructure Delivery Programme (WIDP) as at that time the Contract was being procured under the Private Finance Initiative.

16. The final Contract was subject to external legal review to confirm that any changes were not material before being signed on 26 August 2011 between AmeyCespa and North Yorkshire County Council. A Joint Waste Management Agreement between the County Council and City of York Council was completed on the same day.

17. AmeyCespa's principal obligations during the period between Commercial and Financial Close related to securing a Satisfactory Planning Permission for AWRP, and submitting a funding package

detailing how the project is financed, and the cost to the Councils. The Planning Decision Notice was issued on 14 February 2013 and a funding package was submitted in June 2014.

Summary of the Technology

18. The proposal is for the design, construction and operation of an integrated waste management facility which will receive, accept and treat residual household waste (i.e. the waste left after recycling and composting) and some commercial waste. The facility will be located on the site of the existing Allerton aggregates quarry and be known as the Allerton Waste Recovery Park (AWRP).

19. AWRP will treat waste through a series of processes including mechanical separation of recyclable materials (known as mechanical treatment or MT), anaerobic digestion (AD) and thermal treatment through incineration and generation of electricity (known as Energy from Waste or EfW).

20. The Mechanical Treatment plant (MT) will separate metals, plastics and paper and is capable of sorting up to 408,000 tonnes per annum (tpa), although the planning consent limits the throughput of AWRP to 320,000 tpa. The MT plan will also separate approximately 40,000 tpa of organic waste for treatment through the AD plant. The AD plant uses microbes to break down the organic waste in the absence of air to produce a gas and compost like output known as digestate and remaining waste will be burnt in the Energy from Waste (EfW) incinerator. The heat from the EfW is used to produce steam and drive a turbine which produces electricity for export to the national grid. The capacity of the EfW is approximately 320,000 tpa.

21. AmeyCespa has committed to the following minimum performance levels:

- Recycle a minimum 5% of contract waste
- Divert a minimum 90% of contract waste from landfill
- Divert a minimum 95% of biodegradable municipal waste in contract waste from landfill.

22. One of the contractual obligations placed on AmeyCespa is the requirement to maintain the facility so that at the Expiry Date of the contract, the facility is able to be operated for a further five years with a normal maintenance regime. The boilers in EfW plants generally

have a forty year design life, and there are over 140 EfW facilities in the EU which have been operating for over 25 years including four in the UK (Bolton, Coventry, Edmonton and Nottingham) that have been operating in excess of 39 years (with appropriate maintenance / refit schedules).

Summary of Benefits of AWRP

23. The financial benefits of AWRP are detailed in the financial implications section of this report. Other benefits were detailed in the report presented to the Executive on 30 November 2010 and Full Council on 9th December 2010 and remain broadly the same with some minor changes.

24. Environmental benefits were determined by reference to The Waste and Resources Assessment Tool for the Environment (WRATE). WRATE is the Environment Agency's approved tool for evaluating the environmental aspect of waste management activities and was used throughout the procurement to evaluate the potential CO2 saving of alternative solutions.

25. The benefit from the proposed solution was shown in 2010 to be equivalent to approximately 59 million kg CO2 eq. per annum in comparison with landfill. Using the DEFRA/DECC Greenhouse Gas Conversion Factors (2010) this is equal to the emissions of over 140 million miles in an average car, and assuming the average car travels 12 thousand miles per annum, this would be equivalent to the annual usage of almost 12 thousand average cars. AWRP will export around 28.5 MW gross electricity to the national grid (this has increased since 2010 by 2 MW due to the inclusion of a more efficient turbine), which is equivalent to more than the domestic needs of a town the size of Harrogate.

26. The WRATE assessment tool has been updated since 2010, but independent technical advice to the Council has confirmed that as the overall nature of the solution remains unchanged the potential carbon offsets will be of the same order as those detailed previously. AmeyCespa have proposed an alternative design of Steam Turbine Generator which is more efficient (and generates an additional 1.9MW of electrical power than the original proposed turbine)

27. The proposal also has significant additional social and economic benefits for the local area. The planning permission when implemented secures a fund of £839,500 (at February 2013 prices

which will be inflated using the BCIS index at the point of payment to the County Council) to be used to improve the landscape and cultural heritage in the immediate area of Allerton Park. The project will also deliver around 70 permanent skilled and semi-skilled jobs, as well as up to 400 jobs during the 3 year construction phase.

28. Recent analysis carried out by Leeds City Region’s Regional Economic Intelligence Unit using the Regional Econometric Model shows that the generation of employment over the life of the AWRP contract will add approximately £220 million (at 2014 prices) into the local economy. The model takes into account the ongoing multiplier effect of there being increased income and consumer spending within the economy. In addition, the project also secures permanent resources through AmeyCespa to help deliver waste prevention and recycling campaigns in partnership with the Councils. Amey has stated that it is committed to Apprenticeship Schemes and recently supported National Apprenticeship Week (March 2014).

29. The EfW plant has been primarily designed as an energy recovery plant, although it is able to be reconfigured to provide combined heat and power (CHP) if a suitable economic market can be established. AmeyCespa carried out Heat Assessment as part of the planning process and identified potential opportunities around the Harrogate/Knaresborough and Boroughbridge areas. One of the planning conditions placed on AmeyCespa stated that commissioning of AWRP shall not commence until a CHP Feasibility Review assessing potential commercial opportunities for the use of heat from the development is approved by the Planning Authority. Since planning was achieved, the Flaxby area has been highlighted for a number of potential future developments which may create the opportunity for an emerging heat market, however, this cannot be guaranteed at this stage.

30. Importantly, irrespective of any financial benefits, AWRP enables the delivery of the primary initial objectives of the procurement in that it provides long term security using proven and reliable technologies, significantly improved environmental performance, and the effective transfer to the private sector of construction, technology and operational risk.

<u>Planning and Permitting</u>

31. The planning application for Allerton Waste Recovery Park was submitted on 1 September 2011 and the County Council’s planning

and Regulatory Functions Committee resolved to grant permission at its meeting on 30 October 2012. The application was then referred to the Secretary of State who confirmed on 30 January 2013 that he did not wish to determine the application. The planning Decision Notice was then issued on 14 February 2013.

32. An application for leave to appeal for a Judicial Review of the decision to award planning permission was made by Marton cum Grafton Parish Council on 29 April 2013. The Judicial Review related to various planning grounds and was heard on 30 and 31 July 2013 and the Court found in favour of the Council, with further right to appal refused. The applicants then sought an oral hearing at the Court of Appeal which was heard on 15 October 2013. The appeal was dismissed and the Courts again found in favour of the Council. There is no scope for further legal challenge and a Satisfactory Planning Permission was achieved on 22 October 2013.

33. AmeyCespa was granted an Environmental Permit for Allerton Waste Recovery Park on 16 July 2013. The permit Judicial Review period expired without challenge on 16 October 2013. AmeyCespa have therefore secured all necessary regulatory consents required to progress the project.

Longstop dates

34. A report was brought to the meeting of the County Council's Executive on 10 September 2013 and the County Council's Executive and City of York's Cabinet 1 October 2013 that explained that the Contract required AmeyCespa to use 'All Reasonable Endeavours' (ARE) to secure a Satisfactory Planning Permission.

35. The First Longstop Date was defined as two years from the date the planning application was submitted (1 September 2011). The effect of the application for leave to appeal for a Judicial Review by Marton cum Grafton Parish Council was that the planning consent was still subject to a challenge and therefore AmeyCespa were unable to secure a Satisfactory Planning Permission by the First Longstop Date.

36. The Council's resolved that the Planning Application continue to be prosecuted in the same or substantially the same form. This resulted in the longstop date being extended and AmeyCespa subsequently achieved a Satisfactory Planning Permission on 22 October 2013.

37. The contract contains a further longstop date referred to as the Original Financial Close Longstop Date. This occurs twelve months after achieving a Satisfactory Planning Permission i.e. 22 October 2014. The Contract provides that if it is agreed by the parties that Financial Close will not occur by this date then the date can be extended by agreement (in line with the delegated authorities approved in the County Council's Executive Report 1st October 2013) or either party may terminate the Contract. A failure to achieve Financial Close by the longstop date does not in itself give rise to termination of the contract.

Key Changes since December 2010

38. AmeyCespa has secured a planning consent for AWRP and delivered a funding package that has enabled the Councils to determine the cost for providing the long term service. The Councils now have to decide if they wish to progress to Financial Close. This decision will need to be informed by the effect of any political, social, technical or environmental changes that have occurred since the Council last considered the Contract in 2010 (in addition to the financial considerations identified in the financial implications section of the report). The most significant changes are outlined below.

Repeal of Landfill Allowance Trading Scheme

39. Prior to the contract being signed in 2011 (but after the Councils considered entering into the Contracts in December 2010), the Government announced their intention to repeal the Landfill Allowance Trading Scheme (LATS) from 1 April 2013. LATS was introduced through the Waste and Emissions Trading Act (2003) (WET Act) which set a framework to ensure local authorities collectively contained the amount of waste sent to landfill within pre-determined limits.

40. The repeal of LATS had an impact on the overall value for money of the Contract as the financial models had allowed both income from selling surplus allowances (assuming AWRP went ahead) and cost of purchasing allowances under a 'Market Proxy' option (which is detailed in Appendix 1) assuming Market Proxy entailed continuing to rely on landfill as the primary method of disposal. The net difference was estimated in 2010 to be an approximate deterioration of £68 million over the life of the Contract.

41. The WET Act also provided for EU fines to be passed through to any local authority in breach of its obligations. The Localism Act continues the principle that EU fines may be passported to local authorities contributing to a national failure. The prospect of future EU fines must therefore remain a relevant project risk despite repeal of the LATS scheme.

42. The repeal of LATS removed one of the statutory drivers behind the project however, the primary financial driver for the project remains the risk to the authority associated with inflation, unpredictable increases in landfill tax, and the potential for passported EU fines (up to £500,000 per day for the United Kingdom as a whole).

Withdrawal of PFI credits

43. On 21 February 2013 DEFRA announced that they would no longer continue to support the project with Waste Infrastructure Credits (formerly PFI credits). This amounted to approximately £125million of revenue support over the 25 year life of the project. This project was one of 3 projects where funding was withdrawn.

44. The County Council subsequently sought leave to appeal for a judicial review of DEFRAs decision to withdraw Credits on several grounds. Leave to appeal was granted on 21 August 2013 and a directions hearing set for 11 October 2013. The full hearing was set for 23, 24 and 27, 28 January 2014 however after due consideration it was felt that it would not be in the public interest to pursue the application further. The application was withdrawn on 5 December 2013. Whilst the County Council maintains that the decision to withdraw credits was not lawful, it was apparent that at best DEFRA would be forced into making the decision again and it was practically certain that they would reach the same outcome. Since then, a further two projects have also had their Credits withdrawn.

45. When DEFRA announced withdrawal of the projects PFI credits, they published a *‘Forecasting 2020 waste arisings and treatment capacity’* report which analysed future waste forecasts and the need to meet England’s targets for diverting biodegradable municipal waste from landfill by 2020.

46. This report informed DEFRA’s decision to withdraw PFI credits from the three waste projects yet to reach Financial Close and claimed to identify a high probability that England would achieve its 2020 landfill

diversion targets without the need for DEFRA to continue to fund these schemes.

47. The report considered the national need for waste treatment facilities without looking at the regional or local drivers or demand. DEFRA noted that the decision on whether to proceed with individual projects was a local matter. Key assumptions behind the DEFRA analysis were withheld (despite requests made under the Environmental Information Regulations 2004), and the conclusions have attracted criticism and rebuttal across the waste industry including from waste management companies, local government, professional associations and institutions.

48. Most recently the Green Infrastructure Bank has published a report[1] showing that there is likely to be a capacity gap for EfW in the UK in 2020 up to 7.7Million tpa (representing an investment opportunity up to £6 billion). Whilst opinion remains divided in relation to whether there will be a shortfall of capacity in 2020, it is widely acknowledged that there is currently a shortfall in the UK today, which when combined with the fact that financial institutions such as GIB are targeting waste as an investment opportunity, provides significant comfort that if the decision is to proceed, AWRP will be an integral part of the infrastructure needed to deliver national 2020 waste diversion targets. The planning process concluded that there is local need for the development and the need for a sustainable alternative to landfill remains regardless.

<u>Current arrangements</u>

49. The County Council and City of York Council currently rely on landfill as the primary method of disposing of waste which cannot be recycled, composted or reused. This is not a sustainable strategy for the future as the consented landfill void space in North Yorkshire for biodegradable waste is decreasing.

50. The most recent information from the Environment Agency from 2012 indicated around 5,000,000m^3 of landfill void space between the two largest remaining landfill sites in the area currently used by the Councils; Harewood Whin and Allerton Park landfills. This void space has Environmental Permits from the Environment Agency, but is not all available as engineered landfill cells and it is probable that much

[1] http://www.greeninvestmentbank.com/news-and-insight/2014/capacity-gap-means-uk-needs-more-waste-infrastructure/

of this capacity will not be cost effective to develop. The planning permission for Allerton Park landfill expires in 2018, and Harewood Whin's planning permission expires in 2017, however there are no restrictions on future applications being made to extend these planning permissions. There has been no new biodegradable landfill void consented in North Yorkshire since 2010.

51. The City Council's current disposal contracts expire on 28th February 2022 with two potential options to extend for a further five years. The County Council's current disposal contracts expire on 31st March 2015 with no option to extend. The County Council is in the process of procuring a four year framework contract to provide facilities for the disposal/treatment of waste arising from North Yorkshire in order to ensure continuity of a disposal service regardless of the decision to proceed with the Waste PPP. The City of York Council will also have access to contract arrangements accepted onto the framework. The contract notices will be published by OJEU in September to start the tendering process.

52. The Harewood Whin site which is within the green belt, comprises approximately 229 acres and is leased to Yorwaste Ltd who operate the site. The lease is to May 2019 but there is an option to renew for a further 10 years (2 blocks of 5 years).

53. Under its present planning consent the site can operate until 2017 when it is required to be restored to allow an agricultural end use. However due to landfill diversion targets and increased recycling there are reduced volumes going into landfill at Harewood Whin. This may allow the life of the site to be extended beyond 2017. The most recent figures we have estimate that the operational lifetime of the landfill site could extend to 2027.

Market Testing

54. In recent months, an informal soft market testing exercise has been undertaken with local councils and private sector waste management companies. This was undertaken partly to inform the current procurement process and partly to understand any changes in the waste market since 2010.

55. The market testing process concluded that the technologies currently available in the area are broadly consistent with those previously offered or available although a number of private sector companies

are offering to treat waste to produce a Refuse Derived Fuel (RDF) for use in the UK or export to Europe. Significant further capacity for waste treatment through energy from waste incineration has also been consented and developed around the area including at Teesside and Ferrybridge, and a 350,000 tpa gasification facility is in construction by Air Products LTD on Teesside. This is a new technology to the UK and is due to be operational in 2015, with a second similar size plant already in construction on an adjacent site.

56. Much of the capacity at these plants is tied to local authority contracts (with some exceptions) but when considered in aggregate the likely ‘spare’ capacity indicated, together with the potential to export refuse derived fuel to Europe, suggests that it is reasonably certain that sufficient capacity would be available to meet the councils’ needs and provide an alternative to landfill for at least 5 to 10 years if the Waste PPP were not to proceed. This is a change since 2010 when landfill was the only certain alternative at that time however the indicated costs of export or accessing spare treatment capacity suggest that there is likely to be limited financial benefit of these alternatives compared to current costs of landfill.

57. Alternative treatment options have traditionally been more expensive than landfill, and export prices (when the costs of fuel preparation are taken into account) have tracked landfill costs as landfill tax has increased. Landfill tax is now at a rate where alternatives are beginning to compete but demand for RDF in Europe is constraining the waste market in the UK as gate fees in European EfW plant are reduced in order to secure feedstock.

58. The consensus from soft market testing is that gate fees are now at about the level they need to be to provide an alternative to landfill, and that export is a short to medium term option, but will become less attractive over time as spare capacity is reduced and export controls and quality standards improve.

59. The Councils should be reasonably comfortable they would be able to access residual waste treatment capacity in the short to medium term as an alternative to AWRP however costs known as a result of the need to undertake a procurement exercise. It should be noted that the short term nature of the procurement currently underway means that the risk profile and costs will not be directly comparable to AWRP, and the potential cost will therefore not be a direct comparison.

60. Appendix 1 explains the key assumptions behind the establishment of a ‘market proxy’ model used to inform the value for money assessment of the Waste PPP project. It is noted that landfill is used as the proxy for an alternative disposal option although it is accepted that landfill is unlikely to be the long term alternative scenario. The justification for this is that, as described above, landfill costs including landfill tax is now providing the benchmark for the waste disposal market.

61. Actual costs will vary depending on the need for pre treatment, baling and/ or transport of residual waste, and can only be established following a competitive procurement. However, given the assumptions on future values of landfill tax used within the value for money models, it is considered reasonable to base the costs of the alternative to the Waste PPP on the predicted costs of landfill.

62. The Waste and Resources Action Programme (WRAP) publish an annual comparison of gate fees in England that is helpful in order to benchmark the costs of the Waste PPP. The latest (sixth) Gate Fees report[2] summarises the gate fees charged for a range of waste treatment, recovery and disposal options. Local Authority responses for Energy from Waste facilities procured post 2000 have a median gate fee of £90 per tonne, with a range of £62-£126 per tonne. DEFRA also provided information for EfW facilities procured using PFI (or similar PPP structure) since 2005 which indicated a median of £78 per tonne within a range of £57-£105 per tonne.

63. The long term blended average cost per tonne for AWRP at 2014 prices is £82 per tonne, putting it close to the median for PPP/PFI contracts and towards the bottom of the range for local authority responses. However, the report makes specific reference to difficulties in comparing gate fees in relation to PPP/PFI projects:

“The precise terms of individual contracts, in particular relating to the allocation of key operational risks, vary significantly across facilities and directly influence gate fees…. Moreover, it should be noted that long term local authority Public Private Partnership (PPP) contracts, including those supported by private finance initiative (PFI) credits, can be structured in quite complex ways and with differing forms of

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[2] http://www.wrap.org.uk/sites/files/wrap/Gate_Fees_Report_2013_h%20%282%29.pdf

indexation applied. As a result, such gate fees may not be directly comparable."

64. In summary, market information provides reasonable comfort that the Councils would be able to access short to medium term residual waste treatment capacity if it were to choose not to proceed with the Waste PPP, although the short term nature of these arrangements would mean the risk profile and costs of these alternatives will not be directly comparably to AWRP. However, independent third party benchmarking of costs by WRAP suggests that the long term blended average cost per tonne for AWRP is consistent with the market.

Waste tonnages

65. The primary purpose of AWRP is to treat residual municipal waste from York and North Yorkshire. Residual waste is the total waste less the amount recycled or composted. The capacity of the plant was originally based on the Councils' projections of residual waste treatment needs made at the time of Call for Final Tenders in September 2009. Projections assumed growth in waste will be driven mainly by predicted growth in the number of households, less an allowance for waste prevention. In 2010 residual waste requiring treatment was forecast to grow annually each year with 278,000 tonnes predicted in 2039/40. The balance between the Councils' need and plant capacity will be filled with other similar non-household waste.

66. Actual amounts of residual waste have decreased over recent years, with the Councils now collecting approximately 230,000 tonnes in 2013/14. This is predicted to rise to 270,000 tonnes by the end of the Contract (excluding any additional commercial waste collected by Yorwaste – see below). This reduction has been partly due to the effectiveness of recycling (which is beginning to stabilise) and waste prevention campaigns, but probably mainly due to the impact of reduced economic activity experienced in the UK. Some of this reduction was expected but the impact of the recession has been greater and for longer than originally envisaged. There is a strong correlation between economic activity and amounts of household waste produced, and most recent figures suggest that in line with the economic recovery, waste production is now returning to positive growth. It should also be borne in mind that the government has

ambitious targets for housing growth which is likely to further drive household waste arisings.

67. Future tonnage forecasts for NYCC have been updated to inform the estimated long term costs of both AWRP and the ‘Market Proxy’ comparator. The methodology is consistent with that described in 2010 although base data has been revised to better reflect actuals, and the long term impact of waste prevention has been removed from the base case and included instead as sensitivity.

68. Future tonnage forecasts for CYC have been updated particularly in relation to the likely population increases over the next twenty years. Appendix 1 provides details of tonnage assumptions included in the analysis for the councils.

69. A significant change from 2010 is that forecast contract waste tonnages delivered to AWRP have been adjusted each year so as to ensure the Councils receive maximum benefit of relatively low marginal contract prices. This is described in more detail in Appendix 1 but the simple presumption is that the relatively low contract prices available to the Council will assist its competitiveness in the collection of commercial waste to the extent that the Council will always be confident of its ability to optimise the amount of waste it provides to AWRP. The relatively low marginal costs will also help secure the competitiveness of council commercial waste collection services.

70. It is important to recognise that this ‘additional’ waste is waste that would otherwise be disposed of at AWRP anyway but by attracting it through the Council’s commercial waste service it ensures that the Council secures the full income for this waste as opposed to only a potential share of the income if it is delivered by third parties.

71. The risk that the Council will not be able to secure this additional waste is low although it will be sensitive to the charge made by the Council, and the market. The risk to the Council from this approach is therefore that the income the Council is able to recover for disposal of commercial waste is less than predicted. This is discussed further in Appendix 1.

72. In summary, the amounts of waste predicted to be collected by the councils within York and North Yorkshire have reduced marginally from 2010, due probably to the prolonged economic recession. The economy and waste have production have a strong statistical

correlation and evidence is beginning to show waste returning to positive growth as the economy improves. However, the availability of low marginal Contract costs means that the Councils can reasonably increase predicted amounts of waste to be delivered to AWRP to an optimum amount, with the addition of commercial waste collected by the City Council, district councils or Yorwaste on behalf of the County Council and York.

Performance

73. The York and North Yorkshire Waste Partnership continues to maintain its recycling and composting performance, although there is evidence that it is beginning to plateau as district councils fully implement their collection services. The Partnership targets are set out in the Joint Municipal Waste Management Strategy – Let’s Talk Less Rubbish and are:
    - Recycle or compost 40% of household waste by 2010
    - Recycle or compost 45% of household waste by 2013
    - Recycle or compost 50% of household waste by 2020
    - Divert 75% of municipal waste from landfill by 2013

74. Projections from district councils suggest a modest increase in recycling performance over the next few years. There are currently no known plans for any significant changes to collection systems across the area although the full year effect of recent changes has yet to be seen in areas such as Scarborough and Harrogate. Some waste collection authorities are known to be considering alternative collection systems in response to finance pressures but there is currently no indication that recycling performance across the Partnership is likely to increase significantly beyond its current levels in the foreseeable future. The City Council is under similar financial pressures and will potentially need to reconsider recycling systems in future years.

75. The Partnerships performance against the former National Indicator set – NI 191 Residual household waste per household (kg/household), NI 192 Percentage household waste sent for reuse, recycling and composting and NI193 Percentage of municipal waste sent to landfill) is set out in Appendix 2.

Landfill tax

76. In announcing the repeal of the Landfill Allowance Trading Scheme (LATS), Government confirmed their intention to use landfill tax as the primary economic instrument to deliver national obligations to reduce the reliance on landfill. Landfill tax is levied on each tonne of waste sent to landfill. From 1 April 2014, landfill tax for active (biodegradable) waste was set at £80/tonne and inert waste is £2.50/tonne. From 1 April 2015, Government have indicated that both active and inert charges will increase in line with inflation, and that the current prices are a ‘floor’ but as yet, no further announcements have been made about future landfill tax rises.

77. Previous assumptions used in evaluating the costs of landfill under the Market Proxy option in 2010 assumed Government would increase landfill tax by increments of £8/tonne until it reached £104/tonne. This assumption has been reviewed and the base case now assumes Landfill tax increases from current levels only with inflation. The impact of this change is discussed further below in the financial section.

78. The combined cost of landfill tax for City of York and the County Council was £15.95m in 2013/14.

Duties and strategy

79. The legal and policy framework driving the need for an alternative approach to residual waste management has changed since 2010 but the overall objectives remain broadly consistent.

80. The duties of the Councils in relation to Part 2 of the Environmental Protection Act 1990 (EPA) remain the same. The EPA sets out a regime for regulating and licensing the acceptable disposal of controlled waste on land. Controlled waste is defined as any household, industrial and commercial waste. The County Council as a Waste Disposal Authority has a statutory duty to arrange for the disposal of household and commercial waste collected by waste collection authorities, and to provide places where residents can take their own household waste for disposal. The City of York Council, as a unitary authority, has a statutory duty for both waste collection and waste disposal.

81. The EU Landfill Directive 1999 sets targets to reduce biodegradable waste going to landfill to 75% of 1995 tonnages by 2010, 50% by 2013 and 35% by 2020. These targets were incorporated into UK legislation through the Waste and Emissions Trading Act 2003 (the WET Act) and in order to ensure compliance with the targets the UK government introduced the landfill trading scheme (LATS) in 2005 which saw waste disposal authorities receiving allowances to send an ever-decreasing amount of biodegradable municipal waste (BMW) to landfill.

82. As outlined above, the LATS regime was removed from 1 April 2013, and the main diver for diversion of waste from landfill is now landfill tax.

83. The Government undertook a review of waste policy in England in 2011 which placed a greater emphasis on Anaerobic Digestion and treatment of organic waste. A number of objectives were outlined including:
    - developing a comprehensive Waste Prevention Programme and continue to increase the percentage of waste collected from both households and businesses which is recycled, at the very least meeting the revised waste framework directive target to recycle 50% of waste from households by 2020
    - Consulting again on the introduction of landfill bans
    - Support energy from waste where appropriate, and for waste which cannot be recycled

84. In July 2013 government published its Waste Management Plan for England. The Plan is a compilation of existing waste management information and policies. In particular, it reflects the conclusions of the Government Review of Waste Policy in 2011 and developments since the review was published. The plan indicates government's belief that England will reach its 50% recycling target by 2020 along with the requirements of the EU Landfill Directive. Even though the Government has updated its policy framework, since 2010, AWRP continues to offer a strong strategic fit in terms of the choice of technology and guaranteed diversion from landfill.

85. The York and North Yorkshire Waste Partnership (YNYWP), which includes the County Council, the seven district and borough councils and the City of York Council, adopted a Joint Municipal Waste Management Strategy called "Let's Talk Less Rubbish" in 2006. AWRP enables the delivery of the final elements of this strategy, and

the targets described in paragraph 73. If it is decided not to proceed with AWRP the joint waste management strategy will have to be reviewed to identify revised objectives, targets and timescales.

Yorwaste

86. North Yorkshire County Council Executive approved proposals on 18 March 2014 to put the necessary arrangements in place that will enable the County Council to award contracts for future waste management services to Yorwaste without a competitive procurement by relying on the 'Teckal' exemption.

87. Entering into contracts with Yorwaste relying on the 'Teckal' exemption provides a number of direct and indirect benefits, as well as significant opportunity to develop partnerships with district councils and other public sector bodies to reduce risk and help improve efficiencies in delivery of waste services.

88. Such arrangements will mean that future contracts with Yorwaste can be flexible allowing the Councils to adapt to changes in the market or commercial environment that would not be possible in competitively procured contracts without the risk that changes may be unlawful or give rise to a procurement challenge.

89. As described above and in Appendix 1 the proposed arrangements with Yorwaste also enable the Councils to optimise waste delivered to AWRP. This involves the delivery of commercial waste collected by Yorwaste on behalf of the Councils to AWRP under the Council's long term contract. The maximum amount of commercial waste to be delivered on behalf of the Councils is less than the amount of similar commercial waste already collected by Yorwaste.

90. The potential financial benefit to the Council of this arrangement is significant, and is described in detail in the financial implications section below.

Property and related matters

91. The Executive report dated 30 November 2010 noted that negotiations were continuing about the property aspects of the project. These have now been concluded and the following paragraphs provide an update of the position.

92. The County Council entered into an option agreement dated 29 August 2007 (the Option) with the landowners of Allerton Park which entitles the County Council to call for a lease to be granted on exercise of the Option (the Lease).

93. The Option was arranged before the completion of the procurement process and without any certainty that the site would be required. Consequently the Option needed to be updated to reflect the outcome of the procurement process. A Deed of Variation was signed at Commercial Close, enabling the County Council to direct, on the exercise of the Option, that the Lease is granted to AmeyCespa. A further change is now to be made to require the Lease to be granted to AmeyCespa.

94. The rent paid under the Lease is a ‘pass through’ cost to the Councils and is included in the financial assessment of the project costs.

95. There is a suite of property documents (the Property Documents) relating to the project. The documents cover the property and some non-property parts of the commercial deal between the parties to the project and property and non-property parts of the wider commercial deal struck with and between others that enables the site to be provided. Further changes are needed to existing documents and further documents are required to reflect the wider deals that have now been finalised. The changes alter the deal that was approved prior to Commercial Close by the Executive. The majority of the changes relate to property issues and will be dealt with by County Council officers under the authority granted by the Property Procedure Rules. Financial implications have been taken into account in the financial modelling. However, three aspects do not fall under those rules and require decisions to be taken by the County Council Executive.

96. The documents which the County Council will enter into are:

    1. *The Supplemental Deed* between The Landlord (1) the County Council (2) and AmeyCespa (3*)* This was included in draft form at Commercial Close. Its main purpose is to suspend some of the provisions of the Lease in favour of those set out in the Project Agreement. Subsequently, The Landlord and AmeyCespa have agreed that AmeyCespa will contribute an amount to the payment that The Landlord will make to FCC Environmental under another deed (the Payment Deed). This is

a commercial deal between The Landlord and AmeyCespa. The County Council has made clear that this contribution will not form part of the calculation of the Unitary Charge. The liability will be placed on the tenant of the site – initially Amey Cespa. The overall arrangement will be added to this deed. This addition requires approval.

2. *Payment Redirection Deed* between the County Council (1) AmeyCespa (2) The Landlord (3) and FCC Environmental ("FCC") (4). Under this the County Council agrees that if a payment due from The Landlord to FCC under the Payment Deed has not been made then the County Council will redirect the 'pass through' rent due to The Landlord under the Lease to FCC. .

   This deed does not create any additional financial burden for the County Council. It merely creates an obligation to redirect monies that are due to The Landlord to FCC. Entry into this deed requires approval.

3. *The further Deed of Variation of the Optio*n between the County Council (1) and The Landlord (2). This contains, amongst other provisions, a planning indemnity by the County Council in favour of The Landlord. The indemnity is in respect of payments to be made by or any losses suffered or incurred by The Landlord in connection with any breach of the obligations or enforcement action in respect of the Section 106 planning agreement dated 14 February 2013 between the County Council (as local planning authority), The Landlord and AmeyCespa in relation to the development at the site for AWRP. The provision of an indemnity was always envisaged but the terms of it have now been agreed and are included in this deed. The terms do not impose any greater risk to the County Council than those envisaged in 2011. Entry into this indemnity requires approval.

97. The County Council's property legal advisers, Watson Burton LLP, have advised that although there have been a number of amendments to the form of the Property Documents during the period since Commercial Close, the amendments accepted by the Council do not fundamentally alter the risk profile accepted by the Council at Commercial Close and are reasonably justifiable in the prevailing circumstances.

98. A mechanism has been agreed to ensure that if Financial Close is achieved, the Property Documents will become effective at the relevant time. This involves all the Property Documents being signed in advance and then ‘held to order’ which means they will not become effective until the point of Financial Close. If Financial Close is not achieved, the signed documents will never become effective and will be nullified

99. On the date of Financial Close, the Option Notice will be served by the County Council, but only after it is satisfied that the foreign exchange rates and swap rate are within the Value for Money Envelope. The County Council will control completion of all the Property Documents. None of the Property Documents which will be completed unless and until the Option Notice is served by the County Council on Financial Close.

100. The process for implementing the Property Documents for the County Council at the date of Financial Close will be as follows:

(a) The Assistant Chief Executive (Legal & Democratic Services) serves the Option Notice on behalf of the County Council. This triggers the Option with the Landowner)); then

(b) The Landlord triggers his Option with FCC. (The documents are worded such that this is deemed to occur if the County Council triggers its option; then

(c) The Landlord has vacant possession of the site; then

(d) The Landlord and AmeyCespa sign the Lease for the site; then

(e) The Lease comes into effect.

Consultation

101. The councils undertook significant consultation surrounding the award of the contract in 2010. This decision is whether to proceed to Financial Close and as such no consultation is necessary.

Options and Implications

102. There are potentially two issues for determination as a consequence of this report, with the need for the second depending on the outcome

of the first. The primary decision is whether the Councils wish to progress with the Contract to Financial Close? The need for the second question occurs only if the response to the first question is 'yes', and that is "what is the affordability threshold for Financial Close" or in practical terms, "how much is the maximum amount the Councils are prepared to pay"?

103. If the Councils are not prepared to commit to an affordability threshold within the envelope outlined in this report then the effect is the same as not wishing to proceed. In the event that the Council sets an affordability threshold but it subsequently proves impossible to achieve at Financial Close (e.g. due to increases in finance terms) then the effect is the same as not wishing to proceed.

104. Should the Councils not wish to, or not be able to achieve Financial Close by the revised longstop date, the contract can be terminated by either party and the City Council (jointly with North Yorkshire County Council) may become liable for a termination payment to AmeyCespa of up to £5million.

105. Should the City Council not wish to sign the Joint Waste Management Agreement when the County Council wishes to proceed with the Contract the City Council will potentially be liable for the full termination payment.

106. There would then be a need to determine a new strategy for the management of residual waste although continuity of disposal will be retained through current contractual arrangements.

107. AWRP provides the final elements of the current waste management strategy therefore if the decision is not to proceed with AWRP it would then become necessary to determine a revised waste strategy, objectives and targets before a longer term solution can be procured. It is likely that there will considerable public and stakeholder interest in the development of such a strategy given the strong and diverse interests expressed in the delivery of the current one, therefore it may take several years to complete, and procure a solution.

108. During this time the Council will be exposed to the risks of increasing costs through landfill tax and inflation, and is at risk of failure to divert waste from landfill unless it is possible to secure diversion guarantees of the type offered by AWRP. It is also unlikely that the Partnership

will achieve its recycling target without investment in alternative recycling infrastructure.

109. If the Council wishes to proceed to Financial Close it will need to establish an affordability threshold that represents the anticipated cost of the service at Financial Close. The actual price is not fixed until Financial Close and can vary due to changes in finance costs, being the foreign exchange swap rate and an interest rate swap rate (on the basis that the financing package for the Project requires a foreign exchange swap and an interest rate swap in order to secure fixed rate borrowing over the life of the Contract Period).

110. If the decision is made to proceed a Voluntary Ex-Ante Transparency (VEAT) notice (further explained in the Legal Implications section) will be published in the European Journal at the first opportunity following the decision and subject to the ability to deliver within the affordability threshold, Financial Close will occur as soon as possible after the expiry of the notice (minimum 28 days). AmeyCespa will then begin construction of AWRP.

Contractual Arrangements between North Yorkshire County Council and City of York Council

111. The procurement of the long term waste service contract has been carried out jointly by North Yorkshire County Council with City of York Council. Due to the complexities of the contractual arrangements CYC are not party to the Contract with AmeyCespa but instead have entered into a Joint Waste Management Agreement (JWMA) with the County Council that effectively flows down the obligations of the main contract to the City Council and also sets out arrangements between the two councils including payment provisions and governance. The JWMA was signed on 26 August 2011(Commercial Close).

112. The proportion of waste arising in North Yorkshire and the City of York at Commercial Close was approximately at a ratio of 79:21. The Joint Waste Management Agreement assumes that all payments from the two Councils to the Contractor will be shared in these proportions. At the end of each year, actual tonnages will be known and reconciliation relating to the variable tonnage payment will take place.

113. In accordance with the terms of the JWMA it is necessary for both councils to agree to proceed to financial close. This report is going

forward to both North Yorkshire County Councils Executive and City of York Council's Cabinet meeting on the same date. The officer recommendations of North Yorkshire's report are in line with the recommendations set out in this report.

114. The JWMA did not envisage the Councils optimising deliveries of waste to AWRP through the use of Yorwaste as described in 6.6.3 and Appendix 1. It is therefore necessary to amend the JWMA to clarify that the financial implications (costs and benefits) of such arrangements will be apportioned in accordance with the agreed 79:21 ratio.

Financial Implications

115. The financial implications required for inclusion in this report are significant. In order to ensure that all relevant information is included, the following is an outline of the information that follows in this Section of the report:-

- Outline of position as at December 2010 and key financial changes up to September 2014 (paragraphs 117-122)
- Outline of the costs and proposed funding of the AWRP (paragraphs 123-125)
- Value for Money (VFM) assessment – comparing the costs of AWRP with the alternative (referred to as the "Market Proxy") (paragraphs 126-146). This takes place in 3 ways:
    - Comparing cost differences as they fall over the life of the AWRP contract (referred to as "Nominal" terms)
    - Comparing cost differences in a way that reflects the "time value of money" and
    - Carrying out some sensitivities to test impacts upon the VFM assessment
- Affordability assessment – comparing the costs of AWRP with the available budget of the Council(s) (paragraphs (147-151)
- Financial conclusion (paragraphs 152-153)

116. The Councils have received financial advice in support of the Waste PPP project from Ernst & Young LLP. This advice covered all financial aspects of the project and in particular;

- Review and analysis to allow update of the AWRP financial model and advising on the associated financial arrangements with AmeyCespa
- Providing a robust challenge to the financial assumptions used to estimate costs over the contract duration - in particular capital cost indexation, financing, foreign exchange and taxation
- Raising clarification questions to AmeyCespa
- Providing a financial analysis of the Waste PPP project in comparison to the Market Proxy model (as prepared by the Councils) to evaluate the benefit in nominal and NPV terms, and to the Councils budgets to assess the project in affordability terms
- Advising on financial risks in the periods before and after Financial Close including performing a sensitivity analysis on the key assumptions

Outline of position as at December 2010 and key financial changes up to September 2014

117. The report to the Executive in November 2010 and to the Council in December 2010 identified the financial implications of the project using nominal (forecast costs adjusted for inflation) figures. The VFM position was with reference to costs similar to that of waste going to landfill (referred to at the time as the "do nothing" scenario). The affordability position was with reference to the Council's waste strategy budget and provisions made for future costs. The Table below sets out the position at that time:-

		NYCC £m	**CYC £m**	**Total £m**
AWRP Contract	a	676	184	860
Non-PPP Costs*	b	636	119	755
PFI credits	c	(99)	(27)	(126)
LATS Sales		(35)	(14)	(49)
Net cost of Waste Strategy	d (a+b+c)	**1,178**	**262**	**1,440**
Costs of Alternative	e	1,442	322	1,764
Council Budget Availability	f	1,425	310	1,735
Positive VFM Differential	g (e-d)	**264**	**60**	**324**
Affordability Headroom	h (f-d)	**247**	**48**	**295**

* Non-PPP costs include operating costs of HWRCs, costs of processing recyclates and garden waste, costs of waste strategy

unit, payment of recycling credits, transfer station infrastructure costs, and transport between sites costs.

118. There was a projected value for money benefit of £324m. The affordability headroom was reported as £246m which excluded the benefit of LATS sales (as a requirement of WIDP).

119. Just prior to Commercial Close in August 2011 the VFM position was reassessed, using the same basis for costs and comparisons, taking into account factors impacting on the above figures, the most significant of which were:

- revised tonnages based on the latest available forecasts
- the removal of the LATS scheme described in paragraphs 39 to 42
- cost inflation resulting from the delay to the expected financial close date

120. These factors reduced the VFM benefit from £324m to £226m (CYC £60m to £35m). As a way of verifying this benefit using an alternative methodology the project was assessed in NPV terms as +£57m which as a percentage of total project costs was 8% (1.1% excluding PFI credits).

121. Shortly after the Planning Decision Notice was issued in February 2013 the Government withdrew PFI Credits, reducing the VFM benefit by £117m and £41m in nominal and NPV terms respectively. Although significantly reduced, AWRP remained value for money both in nominal and NPV terms, and the projected total costs remained within the affordability envelope set by Council in December 2010. The terms of the Contract therefore required AmeyCespa to confirm the funding package and final cost to the Councils taking into account changes in any revised funding terms or other assumptions.

122. The factors having a significant financial impact are listed below with an indication of whether the impact increased the cost of the AWRP and whether this led to an increase or decrease in the value for money differential.

	Cost of AWRP	VFM Differential
loss of the PFI credits	↑	↓
revised assumption for landfill tax	↓	↓
cost inflation resulting from the delay to the expected financial close date	↑	↓
revised funding terms (foreign exchange rates and swap rates)	↓	↑
revised tonnages and non-PFI costs based on the latest available forecasts	↓	↓
waste to be delivered at top of tonnage band 2 rather than using the original forecast	↑	↑
improvements to the package offered by the contractor	↓	↑

Outline of the costs and proposed funding of the AWRP

123. The table below sets out the costs submitted by AmeyCespa as part of their updated offer in nominal terms. If it is assumed that approximately 7.3m tonnes of waste are processed throughout the contract period, the costs below amount to an average £99.73 per tonne over the life of the contract. In today's prices this equates to a gate fee of £82 per tonne.

		£m
Gross Costs		
Operating costs Capital costs Capital financing costs (inc fees) Equity dividends Taxation		697 261 265 132 45
Total gross cost	a	**1,400**
Less **Guaranteed third party income** Electricity and green subsidies Commercial waste Recyclable materials		 (412) (110) (39)
Total guaranteed third party income	b	**(561)**
Teckal Benefit	c	(111)
Total Income	d (b+c)	**672**
Net cost to Councils	d (a-c)	**728**

124. The capital and associated funding package are together the most significant elements of the costs incurred by AmeyCespa and form part of the unitary charge to the Councils. Since commercial close the capital costs have not changed significantly, reducing by £2m. The funding package has changed in line with economic conditions and changes in funders.

Plant	**£m**	**Capacity ‘000 tonnes**
MBT AD EFW Ground works / project management Capitalised project costs	52 12 170 17 10	408 40 320
Sub-total	**261**	
Financing costs incurred during construction	59	
TOTAL CAPITAL COSTS	**320**	

125. AmeyCespa is intending to finance the capital costs using a combination of debt and equity, details of which are included in Appendix 3.

Value for Money assessment – September 2014

126. There has been a significant time since the value for money assessment was carried out in the prelude to commercial close. Given that fact, and the number of changes that have taken place since, it is necessary to carry out a further and full value for money assessment. This assessment is made up of 3 principal components:-

1. a comparison of costs between the project and the market proxy over the life of the project (ie in nominal terms) plus
2. the same comparison but taking into account the “time value of money” (ie net present value) plus
3. assessment of a number of key sensitivities to highlight possible variances from the comparisons carried out in 1 and 2 above.

127. In addition, a further full assessment has been carried out to ensure that the costs of the project remain affordable for the Councils. This analysis therefore follows the Value for Money assessment.

Nominal VFM Assessment

128. The updated position in nominal terms is as follows.

Value for Money	Note	**NYCC £m**	**CYC £m**	**Total £m**
Cost of Waste Strategy inc AWRP		1,180	254	1,434
Cost of market proxy	1	1,296	307	1,603
Net benefit from AWRP		**116**	**53**	**169**
Split as:-				
AWRP benefit alone		87	45	132
Teckal impact	2	29	8	37
Net benefit from AWRP		**116**	**53**	**169**
Residual Value (RV) of Plant	3	69	18	87
Net benefit from AWRP if RV included		**185**	**71**	**256**

Note 1 The Market Proxy is described earlier in paragraph 69. The detailed assumptions are set out in Appendix 1

Note 2 The Teckal arrangements are referred to in paragraphs 86-90). The favourable rates available to the Councils provide an opportunity for the Waste Teckal to derive additional financial value.

Note 3 AmeyCespa are required to hand the plant back to the Councils at the end of the 25 year contract period so that it is capable of operating for a further 5 years. The residual value (RV) of the plant at the end of the 25 year contract period has been evaluated at £87m in nominal terms.

129. The residual asset valuation of £87m (nominal) £16m (NPV) at the end of the Contract has been estimated following calculations by the Council's financial advisers. It provides a potential operational value of the asset but does not include any potential benefit to the Councils relative to the Market Proxy. If it were to include such a calculation then the nominal benefit would be increased by a further £205m. It is important to note that no account was taken of the RV of the plant as part of the 2010 VFM assessment but the contractual requirement provides a degree of confidence that the Councils should derive further value.

130. It is reasonable to anticipate that the plant will still have a RV after the 30 year period but it difficult to form any view of its value (see paragraph 22). A prudent assumption has therefore been adopted, in that it is expected that the RV will be no greater than decommissioning costs and no net benefit has therefore been attributed in this report.

131. Appendix 4 details the position in nominal terms from 2014/15 through to 2042/43. This identifies that there is a net cost to carrying out the AWRP project in the run up to operation of the plant due to the Councils incurring ‘pass through’ costs associated with the lease and planning consent for AWRP. There are then 7 years in which the projected costs of the project exceed those of the Market Proxy. The Contract then becomes cheaper than the Market Proxy in each year. This continues for the remainder of the Contract and the Contract achieves its cumulative ‘pay back’ position after 15 years. This is achieved predominantly as a result of the project providing insulation for the Councils from increases in inflation and / or landfill tax.

132. For CYC the time in which it takes for the Market Proxy to be cheaper than AWRP is 9 years into operation (2027/28). The Contract then becomes cheaper than the Market Proxy in each year. This continues for the remainder of the Contract and the Contract achieves its cumulative ‘pay back’ position after 14 years. It should also be noted that the main impact on the Market Proxy assumption is the date that the City Council ceases landfilling at Harewood Whin. In practice this could be before 2027/28 which would increase the cost of the Market Proxy and bring forward the time that AWRP is cheaper.

Net Present Value VFM Assessment

133. Based upon the above assessment there is a clear financial benefit of the AWRP project when compared to the Market Proxy. However, the cashflows of the project vary over the short term compared to the medium/long term and it is important that this is recognised in any value for money assessment. One way to achieve this is to use a net present value (NPV) calculation which effectively measures the “time value of money”. This is a well understood in considering investment appraisals.

134. NPV calculations are used by discounting cashflows by a discount factor. The calculation carried out by the Councils uses the discount rate of 3.5% as set out in the Treasury's Green Book. This factor is the compounded by 2.5% to allow for inflation giving a composite discount factor of 6.1%. The Green Book describes HM Treasury guidance for public sector bodies on how to appraise projects and provides for consistency throughout the public sector on project evaluation.

135. The NPV calculation must result in a positive sum for the Councils to satisfy themselves that the project does indeed represent value for money, irrespective of any qualitative benefits that the AWRP option may yield. It is also possible to define the NPV of the difference between the AWRP project and the Market Proxy as a percentage of the NPV of the Market Proxy.

136. Using this discount factor the revised position in NPV terms is as follows:-

Net Present Value	**NYCC £m**	**CYC £m**	**Total £m**	**%**
AWRP benefit	+11	+6	+17	
Teckal impact	+9	+5	+14	
Net benefit from AWRP	**+20**	**+11**	**+31**	**4.5**
Residual Value of Plant	+12	+4	+16	
	+32	**+15**	**+47**	**6.8**

137. Appendix 4 details the VFM position from 2014/15 through to 2042/43 in NPV terms as well as in nominal terms. As explained in the sensitivity analysis below, the project provides insulation for the Councils from increases in inflation and / or landfill tax.

138. In NPV terms the overall position is +£31m which includes £14m benefit from the Teckal arrangements. This represents approximately 4.5% of the NPV of the contract value which compares favourably with the position at commercial close (1.1% ignoring the benefit of PFI credits). If the RV of the plant is taken into account the total position is +£47m which represents 6.8% of the contract value.

139. The calculation of NPV is sensitive to the discount factor used however it is worth noting that the NPV benefit (excluding the residual

value) reduces to zero only when a nominal discount factor of 11.5% is applied. This is significantly above any discount factor which would ever be considered meaningful for a public sector investment and over 5 percentage points higher than HM Treasury's Green Book discount factor (allowing for inflation) as described above.

Sensitivity Analysis

140. There are three key assumptions in addition to the sensitivity analysis described above to test the discount factor required to provide a zero net present value. The relevant key assumptions are:-

- Inflation
- landfill tax and
- financing costs

These sensitivities need to be considered in nominal and NPV terms.

141. Although project costs and landfill tax values used in the evaluation are fixed until financial close the sensitivity analysis on inflation and landfill tax illustrates the effect on the nominal and NPV positions should these assumptions vary as indicated during the life of the project. In contrast, financing costs are subject to change up until financial close and, based on prevailing market rates, are fixed on the date of financial close.

142. The base assumption for inflation is 2.5% per annum. The same assumption was used in the evaluation in 2010 and also in the modelling assumptions issued to Bidders. It is also understood to be consistent with assumptions used in other waste PPP projects. This is the forecast rate of RPIx inflation over the life of the project and is based in part on the Bank of England's target rate for CPI of 2%, as well as current and historical trends for CPI, RPI and RPIx data.

143. The assumption for landfill tax is £80 per tonne in 2014/15, increasing in line with inflation by 2.5% in each subsequent year. This assumption is significantly different from the assumption used in 2010 when landfill tax was expected to increase by £8 per tonne until 2017/18 and by 2.5% p.a. thereafter. Whilst it is not possible to accurately predict future tax rates, it is thought extremely unlikely that HM Treasury will reduce the value of the tax in real terms as it would impact upon tax yields. The assumption on landfill tax is therefore prudent and it has not been considered worthwhile assessing the impact of a reduction in landfill tax for that reason. It is important to

note that the application of landfill tax is not an indication that the Councils will continue to landfill, rather that landfill tax/rates are driving the market.

144. Financing costs consist of the cost of borrowing within an associated swap arrangement to fix the cost over the borrowing period and a foreign exchange arrangement to reflect the borrowings in Euros given the European nature of the capital expenditure. The base assumptions are a swap rate of 2.99% and a foreign exchange rate of £1 = €1.24.

Assumption	Nominal			NPV		
	NYCC £m	CYC £m	Total £m	NYCC £m	CYC £m	Total £m
<u>Factors over the life of contract</u>						
Inflation +0.5%			+73			+16
Inflation -0.5%			-50			-18
Landfill Tax +8/t from 2021/22			+67			+23
<u>Factors in run up to Financial Close only</u>						
Swap Rate +0.10%	-5	-1	-6	-3	-	-3
Fx rate £1:€1.22	-5	-1	-6	-2	-	-2

145. The sensitivity analysis shows the impact of the movements in swap and foreign exchange rates equal to £5m. Although there is only a short period of time before financial close there is a risk of movements of this size in the direction indicated, particularly with regard to swap rates. A fall in the swap rate is considered unlikely given the low rate currently available. Foreign exchange rate movements are difficult to predict and there is a risk that Sterling will fall against the Euro. However, at this stage, the most likely scenario is that Sterling will strengthen.

146. As identified in paragraph 104, there is a requirement to pay £5m in the event that the Councils do not proceed with the Contract. It is therefore proposed that £5m is used as a contingency to allow for the movements identified in paragraph 144 above. This effectively provides for Financial Close to proceed where the Value for Money Envelope reduces to a minimum of £26m (+£31m as set out in paragraph 136 less the £5m contingency).

Affordability position – September 2014

147. As part of the City Council's decision in 2010 Members agreed to set aside additional budgets of £750k per annum growth from 2011/12 to 2015/16 to make sufficient budgetary provision for the project over the contract term. This has been built into subsequent Budget reports.

148. The budget is then assumed to increase at 2.5% per annum to reflect annual price increases. Where increased tonnages have been assumed due to the additional number of households this has been reflected in future budgetary provision.

149. The revised costs of the waste management budget have now been re-assessed to incorporate the latest prices from AmeyCespa and the updated affordability position is as follows:-

Affordability	**NYCC £m**	**CYC £m**	**Total £m**
PFI Contract	575	153	728
Non PFI costs	605	101	706
Net cost of Overall Waste Strategy to Councils	**1,180**	**254**	**1,434**
Provision for Waste Strategy in Councils budgets	1,476	333	1,809
Headroom	**296**	**79**	**375**

150. The cost of the contract is below the overall budget and is affordable in each individual year of the contract.

151. The above analysis all assumes that third party income (e.g. recyclates, electricity) is only at guaranteed levels. In the event that these levels are exceeded then a sharing mechanism applies and further financial value will flow to the Councils. This has not been included in any financial assessment, however, to ensure prudent assumptions.

Financial conclusion

152. The financial position of the project has changed significantly since reported to the Executive in December 2010. There has therefore been a full detailed analysis of the financial implications of the project

and a comparison with what is regarded as a proxy for the market based upon existing knowledge. This financial analysis identifies that proceeding with the project provides a positive value for money differential over the life of the project when compared with the alternative. The characteristics of the project are such that it provides greater price certainty, and insulation from any potential rises in inflation and landfill tax, when compared with the alternative.

153. The costs of the project are, however, greater in the first 7 years of operation (9 years for CYC) so a “time value of money” test is also an important consideration. This test (the net present value calculation) identifies that the value for money differential falls within acceptable financial parameters.

Legal Implications

Contractual Arrangements

154. The proposed Long Term Waste Management Services contract is the primary method by which the Councils will discharge their statutory duties as defined earlier in the report.

155. The detailed contractual arrangements were set out in the report considered by Full Council on 9 December 2010. As stated in paragraph 9, above, the process to procure a provider of Long Term Waste Management Services was undertaken in accordance with the Public Contract Regulations 2006 and the County Council’s Contract Procedure Rules. In summary the contractual arrangements comprised the Project Agreement (between the County Council and AmeyCespa – Interim Company) and the Joint Waste Management Agreement (between the County Council and City of York Council). The Project Agreement was based upon the HM Treasury sponsored Standardisation of PFI Contracts Version 4 (SoPC4)

156. As described in paragraph 12 above, the Contract is structured with a split close approach, with Commercial Close being achieved on 26 August 2011. If the project proceeds to Financial Close, a number of documents will need to be executed. Principally these will be agreements between AmeyCespa and funders relating to the funding package, but there will be new agreements to be executed by the County Council; a Deed of Novation, the Funders Direct Agreement, Collateral Warranties and the Independent Tester Appointment.

Funders, in such long term Public-Private transactions based on the PFI model, tend not to lend to a company that has been trading for any period of time; they prefer to lend to a new (or “clean”) company. That is the reason why the Project Agreement was signed at Commercial Close by an “interim” company. At Financial Close the Project Agreement will be novated with the result that from Financial Close onwards the entity with which the County Council is in contract with will be the special purpose vehicle (SPV) established by AmeyCespa to act as the contractor (Contractor) for the term of the contract. The Deed of Novation “novates” the Project Agreement and allows any necessary amendments to be made. The result is technically a “new contract” although one that is broadly on the same terms as the original contract (except for a number of changes as described below that were required after Commercial Close).

157. In the period since Commercial Close, discussions have taken place between the Parties to agree the financial arrangements and costs in respect of the Contract. The discussions have involved AmeyCespa, their funders, the Councils and the Councils’ advisors. Due to the split close approach, the original contract clearly set out the change mechanism that would operate to deal with the required changes necessary from the delay from Commercial Close to Financial Close. Therefore all bidders were aware that modifications would be needed to the original contract. In addition the changes described in the section entitled “Key Changes since December 2010” (starting at paragraph 38) of this report, have resulted in the Funders requesting a number of amendments to the Project Agreement.

158. However, as with all changes to a contract that is procured through the European Procurement Rules, it is necessary to ensure that the changes are not categorised as a ‘material’ or ‘substantial’ change which would have the effect of creating a ‘new contract’ that was not originally contemplated and advertised at the time of the original procurement. The Council’s legal advisors have confirmed that the changes will not give rise to the deemed direct award of a new contract at Financial Close in breach of procurement law.

They have categorised all the changes under three headings, namely:

(a) “Time Lag Modifications”,
(b) “Clarification Modifications”
(c) “Unforeseen Modifications”

The Time Lag Modifications are purely due to the split close approach and is a means of updating the Final Agreement to take into account new matters at the time of Financial Close. The “Clarification Modifications” are the process of ensuring consistency of drafting and clarity for the Contract at Financial Close. Both the Time Lag Modification and Clarification Modifications are provided for within the terms of the existing contract and are therefore treated as intra-contract modifications. Therefore the Council’s External Legal Advisors have confirmed that they are not classed as variations under European Procurement Rules and are therefore legally acceptable.

The Unforeseen Modifications are largely as a result of funding being removed due to Government Action as detailed in Section 4. The Council’s legal advisors have reviewed the resultant changes under this head and have concluded that there are not material or substantial changes and therefore comply with the European Procurement Rules.

159. In addition to mitigate risk from all Parties perspective including the Funders and to eliminate any risk of uncertainty, it is considered appropriate to publish a public notice (known as a Voluntary Ex-ante Transparency Notice (VEAT) under the European Procurement rules) before the final completion of the documents if the decision is made to proceed to Financial Close.

160. Generally if a contract is successful challenged in courts, one remedy that the Court can give is to impose a declaration of ineffectiveness. This will in effect mean that the contract is cancelled and a new procurement exercise will have to be taken.

161. However a VEAT Notice provides a safe harbour mechanism to protect the Councils against a possible application for ineffectiveness on the grounds that a public contract has been awarded without the prior publication of an OJEU Contract Notice. In publishing a VEAT Notice, setting out the intention to make an award, the Councils must then observe a standstill period for a minimum of ten days before entering into relevant arrangements. An applicant wishing to bring a challenge will have 30 days from the date they knew or ought to have known that a breach of the Regulations had occurred and it is generally accepted that the 30 day period would run from the date of publication of the VEAT Notice. Therefore if it is decided to proceed to Financial Close, a VEAT will be published and Financial Close will

continue after the expiration of the 30 day period so that a remedy of ineffectiveness is mitigated against. There has been an increase in the use of VEAT notices generally, particularly from funders who are keen to de-risk ineffectiveness remedies prior to entering into a long term contract.

Levels of Protection under the Governance Arrangements of the Contract

162. If the matter proceeds to Financial Close, North Yorkshire County Council will enter into the Novation Agreement and the Contractor. The Contractor will then be contractually bound to deliver the services to the Council over the full length of the Contract Period..

163. To mitigate the risk of entering into a contract with a newly formed SPV, a number of protections are built into the Public Private Partnership Contract model, namely:

(a) Performance security (in the form of parent company guarantees, bonds and other instruments) is provided to the Contractor by all of the major Sub-Contractors providing Works and Services.

(b) The Senior Lenders have the ability, via the controls included within the Senior Financing Documents and the operation of the Funders Direct Agreement, to rescue the project in the event that it encounters difficulties. As the procuring authority has no obligation to pay outstanding Senior Debt on termination for Contractor Default, the Senior Lenders have a strong incentive to exercise their rights and have certain powers to direct the SPV to utilise the performance security provided by the Sub-Contractors to the extent required.

(c) In the event that the Project Agreement is terminated for Contractor Default, the Councils will be able to benefit from the step-in rights and/or duties of care contained within the collateral warranties received from the Works and Operating Sub-Contractor and the Tier 2 Construction Contractors. This means that the Council will take the benefit of all the arrangements with the subcontractors to continue to run the facility.

(d) Upon termination of the Project Agreement and release of the Senior Lenders' security, the Assets (including the Facility) revert to the Councils. As such, the Councils benefit from any residual value ascribed to the Assets and the equipment contained therein without having to make any specific payments in respect of that residual value

164. The above protections reflect the standard practice in third party debt financed Public Private Partnership Projects where the Contractor is an SPV. Parent Company Guarantees are not normally given to public sector organisations in such long term PPP Contracts because the Project Sponsors are deemed to have invested enough capital to incentivise them to support the Contractor. In addition the Funders will expect the SPV to carry out their duties to ensure that the Council continues to pay the SPV for disposing of its waste. This reflects standard practice in third party debt financed PPP projects where the Contractor is an SPV.

165. The Councils' legal advisors have confirmed that, in accordance with guidance and with the above level of protections, they would not expect the SPV to provide an additional Parent Company Guarantee to the Council. The position therefore remains the same as in the Executive report of 30th November 2010.

State Aid

166. The law with regard to unlawful State Aid provides that a Council cannot, without prior permission, give state resources to provide assistance that gives organisation an advantage over others to distort competition.

167. The previous Executive Report had due regard to the rules of State Aid and concluded that "*on the basis that AmeyCespa were selected following a procurement exercise in which it was evaluated as offering the most economically advantageous tender, it follows that the payments to AmeyCespa represent a market price and do not confer an economic advantage. The Councils legal advisors have therefore concluded that the award of the proposed contract would not breach State Aid as prohibited by Article 107(1) of the Treaty."*

168. The European Commission investigates complaints regarding an organisation receiving unlawful State Aid. It is understood that

complaints have been made to Commission regarding the allegation that the contract provides unlawful state aid.

169. North Yorkshire County Council has received one response from the Commission dated 28th February 2014 which concludes that there has not been a violation of EU waste legislation or EU Procurement law with regard to the award of the contract. The Commission is still reviewing the State Aid issue and the Councils' legal advice continues to state that there has not been a breach. It is noted that the response from the Commission does state that "*In principle, the award of the contract brings no State aid concerns provided the contract was awarded following an open and non-discriminatory public tender procedure respecting the applicable national and EU Rules*."

170. The Commission will at some point in the future issue a final decision and it is recognised that the European Commission does take time in making a final decision. However the legal advice to the Councils remains that there has not been a breach of state aid rules and that an appropriate procurement exercise has taken place. Therefore a decision to proceed on this project can continue to be considered.

Teckal Arrangements

171. As reported in paragraph 86 above, the proposed arrangements in respect of Yorwaste, approved by the County Council Executive on 18 March 2014, will enable the Councils to optimise the waste delivered to AWRP by utilising the delivery of commercial waste.

172. Legal advice has been obtained in respect of the proposals regarding the application of the Teckal exemption in entering into contractual arrangements with Yorwaste. This advice provides that Yorwaste can be restructured to be categorised as a Teckal Company which means that the Council will be able to award contracts to Yorwaste directly without a procurement exercise. In effect the Company will be treated for procurement purposes as an internal department of the County Council and the City of York Council. The arrangements have been assessed to be lawful in the context of public procurement rules and from a vires and governance perspective.

173. As long as the discretionary charge set by the County Council to third party customers to ensure that it recovers the cost of disposal (including allowances for capital costs, employees etc) and does not

subsidise commercial customer, then the charge will not fall foul of the rules with regard to charging for discretionary services nor the rules regarding unlawful state aid.

Local Government Contracts Acts 1997 Certificates

174. The Local Government (Contracts) Act 1997 facilitates contracts by removing concerns about authorities' power to enter into contracts of this nature. In particular the Act enables it to be certified, in relation to a contract, that the local authority both has the power to enter into the contract and has exercised that power properly in doing so. It is proposed that the NYCC's Corporate Director (Strategic Resources) be empowered to issue certification under the Act to enable Financial Close to take place. The giving of a certificate under these provisions is a personal undertaking by the officer involved and accordingly the Council is asked to indemnify the officer in respect of any potential liability on giving the certificate.

Powers

175. The previous Executive Report identified the following powers to enter into the contractual arrangements with AmeyCespa:

a. Section 51 Environmental Protection Act 1990 which places a duty upon waste disposal authorities to make arrangements for the disposal of waste in their area, as set out below

   - Section 51(1) - It shall be the duty of each waste disposal authority to arrange— for the disposal of the controlled waste collected in its area by the waste collection authorities; and for places to be provided at which persons resident in its area may deposit their household waste and for the disposal of waste so deposited;

b. Section 111 Local Government Act 1972 which contains powers enabling the Council to do anything to facilitate, or is incidental or conducive to the discharge of its functions, as set out below:

   - Section 111(1) - Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.

c. Section 2 Local Government Act 2000, which empowers authorities to do anything for the **promotion of the well-being of their area, as set out below:**

- Section 2 (1) Every local authority are to have power to do anything which they consider is likely to achieve any one or more of the following objects;
  (a) the promotion or improvement of the economic well-being of their area;
  (b) the promotion or improvement of the social well-being of their area, and
  (c) the promotion or improvement of the environmental well-being of their area.

176. These powers continue to operate and in addition, Sections 1-6 of the Localism Act 2011 provide that the Council has the General Power of Competence, which enables the Council to do anything an individual can do provided it is not prohibited by other legislation.

Next Steps

177. Should the County Council agree that the project should proceed to Financial Close, the Council will issue a VEAT notice (as explained in paragraph 159 of the report).

178. Provided there are no challenges, the Councils and AmeyCespa will carry out preparations for the Financial Close process including developing necessary protocols.

179. There will be a number of ‘dry runs’ prior to Financial Close to ascertain likely swap and foreign exchange rates. Once the Councils are satisfied that the rates are within the approved affordability envelope, they will proceed with the finalisation and signing of all necessary project documentation with AmeyCespa.

180. Once all of the documentation has been completed and Financial Close is achieved, AmeyCespa will issue the Notice to Proceed to

their subcontractors who will be able to access the site to start enabling and mobilisation works. There is a 39 month construction programme (including a six month commissioning period) for AWRP. The facility is due to be operational in early 2018.

Conclusions and Reasons for Decision

181. As set out in the report, the decision as to whether or not to proceed through Financial Close is the conclusion of a procurement process which began in 2007. There have been a number of significant changes since 2010 which are detailed from paragraph 38, however, the financial assessment in the Financial Implications has concluded that the project is affordable and offers value for money based on key assumptions and allowing for sensitivities.

182. The Councils have looked at potential market capacity and whilst we should be reasonably comfortable there is residual waste treatment capacity in the short to medium term, costs will only be known as a result of a procurement exercise. It should also be noted that the short term nature of the procurement currently underway means that the risk profile and costs will not be directly comparable to AWRP, and the potential cost will therefore not be a direct comparison. AWRP provides certainty for the long term protection from inflation and future rises in landfill tax

183. The Councils' legal advisers, Ashfords LLP, have advised that although there have been a number of changes since Commercial Close, the amendments accepted by the Council do not fundamentally alter the risk profile accepted by the Council at Commercial Close and are reasonably justifiable in the prevailing circumstances.

184. The environmental outputs of the project remain as previously reported to the Executive. There have only been minor revisions to the way in which the plant is to be operated since that time. The project therefore remains consistent with the County Council's Waste Strategy – "Let's Talk Less Rubbish" and offers significant long term entered environmental and economic benefits including the generation of electricity equal to the domestic needs of Harrogate, saving of CO_2 equal to 12000 cars and contribution to local economy of £220m over the life of the contract.

185. The financial position of the project has changed significantly since reported to the Council in December 2010. There has therefore been a full detailed analysis of the financial implications of the project and a comparison with what is regarded as a proxy for the market based upon existing knowledge. This financial analysis identifies that proceeding with the project provides a positive value for money differential over the life of the project when compared with the alternative. The characteristics of the project are such that it provides greater price certainty, and insulation from any potential rises in inflation and landfill tax, when compared with the alternative.

186. The costs of the project are, however, greater in the first 10 years of operational activity of AWRP so a "time value of money" test is also an important consideration. This test (the net present value calculation) identifies that the value for money differential falls within acceptable financial parameters.

187. If the decision is made to progress through Financial Close, the Original Financial Close Longstop Date (described in paragraph 37) will need to be extended

Council Plan

188. AWRP will support the council in its objectives to reduce the reliance of landfilling residual waste and to increase the council's recycling percentages.

Implications

189. **(a) Financial –** considered in section above

(b) Human Resources (HR) - None

(c) Equalities - The Equality Act 2010 introduced the term protected characteristics and they are gender, disability, race, age, sexual orientation, gender reassignment, religion or belief, pregnancy and maternity and marriage or civil partnership. The Councils has a statutory duty to discharge obligations in relation to the Equality Act 2010 and has carried out an Equalities Impact Assessment to consider the impacts of the Financial Close decision on service users.

It has been concluded that there are no adverse impacts from the Financial Close decision. The contract with AmeyCespa will also require compliance with equalities legislation including any future legislative requirements during the life of the contract and Equalities Impact Assessments will be carried out in advance of service delivery.

(d) Legal – these are considered in the Legal Section above

(e) Crime and Disorder - None

(f) Information Technology (IT) - None

(g) Property - None

(h) Other – Human Rights

The procurement has been conducted in a manner consistent with the Councils' obligations under Human Rights legislation.

The Council is bound to have regard to Human Rights implications in its decision making. The subject matter of this report however is about the award of the waste PFI contract as a culmination of the procurement process, which follows a statutory procedure. That being so, the Human Rights implications of this decision in itself are limited. However, if the County Council ultimately resolves to award the contract to AmeyCespa, the next key stage will be the submission and determination of a planning application for the site upon which the waste facility will be located. Human Rights will be a matter for consideration at that stage, and the following provisions together with any others identified at the time as being relevant, will be subject to consideration, as well as the general requirement that the Councils' actions must be proportionate.

Human Rights Provisions

- Protocol No 1: Article 1

  Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.

- Article 6: Right to a fair trial

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

- Article 8: Right to privacy

(1) Everyone has the right to his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Risk Management

190. The decision to proceed with the Waste PPP requires an understanding of the key risks associated with that decision. It is important to highlight that relevant risk are attached to both the

decision to proceed as well as the decision not to proceed. The key significant risks can also be broken down into those which the Council is exposed to only until Financial Close, and those which continue. There is also the risk of legal challenge.

Risks that will be fixed at Financial Close

191. These are principally risks around finance and macro economic factors such as foreign exchange rates, interest rates, swap rates and actual indexation. The Councils will ensure the final macro economic factors are reflective of the general finance market through the use of independent specialist advisors, but any movement in these rates from those assumed in the financial models may increase or reduce the value for money of the Waste PPP. Paragraph 146 describes how it is proposed to deal with this risk by setting a Value for Money Envelope.

Longer Term Risks

192. These relate to risks that the Council will be exposed to for the period of the waste PPP, and include those which might impact on both the Waste PPP as well as the market proxy alternative. They include:-

Waste Tonnages

193. The amounts of residual waste produced and to be managed through AWRP are an important factor in the evaluation of the value for money of the waste PPP but the projected amounts have reduced since 2010 and with that the sensitivity of the assumptions. The risk that waste will not grow as the economy improves and housing numbers increase is considered low but the inclusion of additional commercial waste to achieve the optimum amount to be delivered to AWRP provides effective mitigation of this risk as it will reduce the overall cost to the Councils.

Inflation

194. One of the most significant future risks is that inflation will be different to that assumed in the value for money assessment. This is discussed in more detail in paragraph 142 together with an indication of the value of this sensitivity. The Waste PPP provides significant protection against inflation risk.

Market Prices and Landfill Tax

195. The value for money of the Waste PPP is based on assumed costs of an alternative. The alternative (Market Proxy) is based on the

costs of landfill as described in paragraph 143. The value for money of the waste PPP will be reduced if the costs of the market are lower than assumed. This is possible although the costs modelled are considered to be prudent, and the risk applies equally that the costs of the alternative may be higher if landfill tax increases beyond inflation. Increases in landfill tax driving an increase in the market costs of disposal are a significant sensitivity for the project and are described further in consideration of sensitivities in paragraph 143.

Change in Law

196. One outstanding area that needs to be resolved in the drafting is in respect of the risks associated with Qualifying Changes in Law during the Contract Period.

197. During the life of such a long term contract, there are likely to be changes in waste specific legislation or binding guidance which affect the Works and/or Services to be provided by the Contractor, including the passing of European legislation. The issue with long term waste contracts is that such "Specific Changes in Law" are often difficult to price, even when foreseeable at the date of the contract. This means that if all the risk of Specific Changes in Law is placed on the Contractor, the Contractor would artificially increase the price of the contract to cover all potential cost risks relating to such foreseeable Specific Changes in Law. DEFRA recognised that this approach would not represent value for money for the public sector and therefore developed the concept of a "waste law list", being a list of Specific Changes in Law that are foreseeable at the date of the contract but which cannot be priced with sufficient certainty. Pursuant to the standard DEFRA position, the financial consequences associated with any of the foreseeable Specific Changes in Law on the waste law list coming into force are stated to be at the public sector's risk and the financial consequences associated with any of the foreseeable Specific Changes in Law that are not on the waste law list coming into force are stated to be at the Contractor's risk. The public sector takes the risk associated Specific Changes in Law which are not foreseeable at the date of the contract in the usual way.

198. In the context of the AWRP Project, the waste law list was agreed at Commercial Close and is required to be updated at Financial Close. The value for money assessment would normally ignore any potential cost to the Council arising from Changes in Law as these are 'normal' project risks and by definition cannot be priced.

However, as the waste law list is stated to apply from Commercial Close (a consequence of the "split close approach" described earlier in this report), it is arguable that the price of any Specific Change in Law giving effect to any of the items on the AWRP waste law list that has come into force since Commercial Close should now be included in the Contractor's Financial Close price.

199. Where a Change in Law leads to a contract price increase, the increase will be determined by reference to a change process detailed in the Contract. AmeyCespa has not notified the Council of any Qualifying Changes in Law that will have an impact on the contract price to date, and further confirmation is being sought that no claims will be made retrospectively after Financial Close for the period between Commercial Close and Financial Close. In the event that such an assurance is not forthcoming it will be necessary for the Council to establish its own estimate of any potential cost arising from a Qualifying Change in Law between Commercial Close and Financial Close, and for that estimate to be included in the value for money assessment and taken into account in the affordability headroom.

200. Final approval of the waste law list is within the scope of the delegation granted to the Corporate Director, Business and Environmental Services (acting in consultation with the Corporate Director, Strategic Resources and the Assistant Chief Executive, Legal and Democratic Services) on 15 December 2010 to agree final contract terms at Financial Close but it is further recommended that approval of the financial treatment of any related changes in law is delegated to the Corporate Director Strategic Resources in consultation with the Assistant Chief Executive (Legal and Democratic Services) to ensure that due consideration within the affordability envelope is given to the potential financial impact of changes arising from the waste law list having effect between Commercial and Financial Close."

201. In addition to change in law risk associated with the waste PPP, there are other general change in law risks associated with alternative options. Waste legislation continues to be driven from Europe with a direction of travel towards increased recycling and further reductions in the reliance on landfill, potentially through landfill bans on certain materials. The technology package at AWRP including mechanical separation of recyclables and anaerobic digestion offers some protection from these changes and the

potential flexibility to provide a solution for any statutory separate collection of food waste. Any further tightening up of restrictions on landfill is likely to increase the viability and value for money of AWRP.

Legal Challenge

202. The risks in respect of a potential procurement challenge have been identified and mitigated as set out in paragraphs 158-161.

203. The risks in respect of a potential challenge regarding the proposed arrangements for Yorwaste have been identified and mitigated as set out in paragraphs 171-173.

204. The risks in respect of the State aid position have been addressed in paragraphs 166-170.

205. As with any decision made by the County Council there is an ability for the County Council's decision making process to be legally challenged. However the County Council has ensured through its internal governance processes that its decision making process is rational and based on sound judgement and advice. The County Council been fully supported by external legal, financial and technical advisors

Recommendations – North Yorkshire County Council

206. The following recommendations are being considered by the County Council in their direct contractual role with AmeyCespa. Since the City Council only has Contractual arrangements with North Yorkshire County Council through the Joint Waste Management Agreement that replicates the key elements of the core contract it is important that the City Council is supportive of the approach to proceed to Financial Close

207. The Executive are requested to endorse and recommend to County Council that the Council proceeds to Financial Close for the Long Term Waste Treatment Service contract given the revised environmental and financial assessments carried out and detailed in this report given the positive long term benefits; subject to the final terms within the Value for Money Envelope set out in paragraph 146.

208. That delegated authority is given to the Corporate Director, Strategic Resources in consultation with the Assistant Chief Executive, Legal and Democratic Services, to ensure that due consideration is given to the Value for Money Envelope of the potential financial impact of changes arising from the waste law list having effect between Commercial and Financial Close

209. That delegated authority is given to the Corporate Director, Business and Environmental Services (acting in consultation with the Corporate Director, Strategic Resources, and the Assistant Chief Executive, Legal and Democratic Services) to determine the final terms of the following documents in preparation for Financial Close as necessary:

a) the form of Public Private Partnership (PPP) contract between the County Council and the contractor
b) the Funders Direct Agreement with the Contractors funders;
c) the Novation Agreement;
d) any documents ancillary to the PPP Contract, Novation Agreement, Funders Direct Agreement, and any other documents necessary to give effect to this project.
e) The Supplemental Deed, the Further Deed of Variation to the Option Agreement and the Payment Redirection Deed

210. That authority is delegated to the Assistant Chief Executive, Legal and Democratic Services, to execute on behalf of the County Council the following documents to achieve Financial Close:

a) the Funders Direct Agreement with the Contractor's funders; and
b) the Novation Agreement, including the form of the amended and restated PPP Contract
c) the Supplemental Deed, the further Deed of Variation of the Option, the Payment Redirection Deed
d) any documents ancillary to the PPP Contract, Novation Agreement, Funders Direct Agreement, and any other documents necessary to give effect to this project.
e) any extension to the Original Financial Close Longstop Date to give effect to the decision

211. That the Executive agrees to trigger the option for the grant of the Lease of the Allerton Park Site to AmeyCespa AWRP SPV Ltd.

212. That authority is delegated to the Assistant Chief Executive, Legal and Democratic Services, to

(a) issue the trigger notice as required at Financial Close, and

(b) amend the Joint Waste Management Agreement with City of York Council as identified in paragraph 114

c) Publish the VEAT Notice as identified in paragraph 159

213. That the Corporate Director, Finance and Central Services, is authorised to issue the certificates under the Local Government (Contracts) Act 1997 to confirm the County Council's powers to enter into the contracts referred to at paragraph 210 above;

214. That an indemnity be given by the County Council to the Corporate Director, Finance and Central Services, against any claim that may arise out of or in connection with the issue of the certificates under the Local Government (Contracts) Act 1997;

215. That all the Executive Decisions recommended above will not be implemented unless and until Full County Council agrees to the recommendation to proceed to Financial Close and Financial Close can be delivered within the Value for Money Envelope set out in paragraph 146.

Recommendations – City Of York Council

216. The Cabinet agree that the following recommendations are put to Full Council

217. The City Council is supportive of the County Councils recommendation to proceed to Financial Close for the Long Term Waste Treatment Service contract given the revised environmental and financial assessments carried out and detailed in this report given the positive long term benefits; subject to the final terms within the Value for Money Envelope set out in paragraph 146

218. That delegated authority be given to the Director of Customer and Business Support Services (acting in consultation with the Director of City and Environmental Services and the Assistant Director (Governance & ICT) to amend the Joint Waste management Agreement and to agree any other documents necessary to give effect to this project.

219. That the Director of Customer and Business Support Services, is authorised to issue the certificates under the Local Government (Contracts) Act 1997 to confirm the City Council's powers to enter into the contracts referred to above;

220. That an indemnity be given by the City Council to the Director of Customer and Business Support Services, against any claim that may arise out of or in connection with the issue of the certificates under the Local Government (Contracts) Act 1997.

221. That all the Executive Decisions recommended above will not be implemented unless and until Full City Council agrees to the recommendation to proceed to Financial Close and Financial Close can be delivered within the Value for Money Envelope set out in paragraph 146.

Reason: In order for Full Council to determine whether to enter into a long term waste management contract.

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<tr><td colspan="4">Wards Affected: All</td><td>√</td></tr>
<tr><td colspan="5">For further information please contact the authors of the report</td></tr>
</table>

Background Papers:

All relevant background papers must be listed here.

Executive Report – Award of Long Term Waste Management Contract 30th November 2010

Appendix

1 Waste Tonnages and other key assumptions used in assessing the PPP Waste Project
2 Summary of Waste Performance
3 Funding Arrangements for AWRP Capital Costs
4 Financial Analysis

List of abbreviations used in the report:

AD - anaerobic digestion
ARE - All Reasonable Endeavours
AWRP – Allerton Waste Recovery Park
CFT – Call for final tenders
CHP - Combined heat and power
DECC – Department for Energy and Climate Change
DEFRA - Department for Environment Food and Rural Affairs
DCLG – Department for Communities and Local Government
EfW – Energy from Waste
EIB – European Investment Bank
EU – European Union
FX – Foreign Exchange
GIB – Green Investment Bank
GMT – Guaranteed minimum tonnage
HWRC – Household Waste and Recycling Centre
JWMA - Joint Waste Management Agreement
LATS - Landfill Allowance Trading Scheme
MBT - Mechanical & Biological Treatment
MSW – Municipal solid waste
MT - Mechanical Treatment plant
NI – National Indicators
NPV – Net present value
NYCC – North Yorkshire County Council
OJEU – Official Journal of the European Union
PFI – Private Finance Initiative
PPP – Public Private Partnership
RDF – refuse derived fuel
RPIx – Retail Price Index
RV - residual value
SPV – special purpose vehicle
SRF – solid recovered fuel
TPA – Tonnes per Annum
VEAT - Voluntary Ex-Ante Transparency
VFM - Value for Money
WET Act - Waste and Emissions Trading Act (2003)
WIDP - Waste Infrastructure Delivery Programme
WRAP – Waste and Resources Action Programme
WRATE - The Waste and Resources Assessment Tool for the Environment
YNYWP - York and North Yorkshire Waste Partnership