

# CHESHIRE EAST COUNCIL

## REPORT TO: CABINET

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**Date of Meeting:** 8 September 2009  
**Report of:** Borough Solicitor  
**Subject/Title:** Joint Waste PFI Scheme  
**Portfolio Holder:** Councillor Peter Mason

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### 1.0 Report Summary

- 1.1 This report describes the steps that must be taken to ensure that the proposed joint waste PFI scheme receives the necessary legal certification to satisfy external financial sources.

### 2.0 Decision Requested

- 2.1 Cabinet is requested to consider whether it is willing –
- 2.1.1 To issue certificates under the Local Government (Contracts) Act 1997 for the purpose of the PFI waste procurement contract referred to above;
  - 2.1.2 To invite the Borough Treasurer and Head of Assets as section 151 officer to sign and issue certificates on the council's behalf as the Certifying Officer;
  - 2.1.3 Given that the certificate is being given in a personal capacity by the certifying officer, to provide an indemnity to the Certifying Officer ;
  - 2.1.4 To give authority to the Borough Solicitor and Monitoring Officer to execute a form of indemnity (prepared on advice) in favour of the Certifying Officer and to ensure that appropriate insurance cover is either in hand, or can be written to back up that indemnity by the date of its execution;
  - 2.1.5 To allow the Certifying Officer to take independent legal advice on the form of certificate and related due diligence which may be necessary, and to pay for that legal advice. (Noting that the appointment of legal advisers will form a permitted exception under Contract Standing Order E24).

2.1.6 To confirm that the Council's common seal can be affixed to the appropriate deeds of indemnity.

2.1.7 To note and confirm that arrangements will need to be made for the deposit of the certificate, for copies to be made available to the public and for it to be placed for inspection, and for the taking of copies of the certificate if the members of the public require, and for copies to be lodged with the Council's Monitoring Officer and Auditor;

2.1.8 To otherwise approve this report as a matter of record.

### **3.0 Reasons for Recommendations**

3.1 To ensure that tenderers can provide the necessary comfort that the proposed scheme is within this councils legal powers.

### **4.0 Wards Affected**

4.1 All wards

### **5.0 Local Ward Members**

5.1 N/A

### **6.0 Policy Implications including - Climate change - Health**

6.1 Waste treatment has direct links to climate change and health.

### **7.0 Financial Implications for Transition Costs (Authorised by the Borough Treasurer)**

7.1 None (*discussed with but not finalised by Borough Treasurer*)

### **8.0 Financial Implications 2009/10 and beyond (Authorised by the Borough Treasurer)**

8.1 Certification is required to enable a contract to be completed for delivery of the Waste PFI, which is intended to avoid stringent financial penalties in future years. Officers are currently investigating whether any additional premium is required from the Councils insurers to support the indemnity, subject to a policy excess. Quotes will be sought before finalising the choice of legal advisers for

the S151 officers but indicative costs are in the region of £10,000, (*discussed with but not finalised by Borough Treasurer*)

## **9.0 Legal Implications (Authorised by the Borough Solicitor)**

- 9.1 As stated in the report, which has been drafted by Messrs Towers and Hamlin, the solicitors acting for the councils on the waste PFI scheme.

## **10.0 Risk Management**

- 10.1 Failure to let the waste management contract promptly following the conclusion of the tendering process may involve the council in financial loss.

## **11.0 Background and Options**

### **INTRODUCTION**

- 11.1 The Cheshire-wide Waste PFI Treatment Services Contract ('the PFI Contract') will now be entered into by the two Unitary Authorities, Cheshire West and Chester Council and Cheshire East Council. Pursuant to an Inter Authority Agreement between the two Councils dated the 26th March 2009 which sets out obligations between the two Authorities as to how they will manage this major PFI waste contract procurement, they have primary obligations to cooperate expeditiously and act reasonably so as to manage the procurement effectively, and also to provide for the PFI contract to be certified for the purposes of the Local Government (Contracts) Act 1997.
- 11.2 The purpose of the PFI Contract is to provide long term waste treatment facilities and related services under the Private Finance Initiative to enable the Councils to fulfil their joint aim to improve the quality of the services and to meet the economic, social and environmental well being needs of their residents and comply with the objectives of the National Waste Strategy issued pursuant to the Environmental Protection Act 1990 and the Landfill Directive 1999 and Waste Emissions and Trading Act 2003, all in order to divert biodegradable waste from landfill and achieve various important statutory targets.
- 11.3 This is pursuant to the principal partnering obligations set out in that agreement. Initially Cheshire West and Chester is the lead authority but is accountable to Cheshire East but both Authorities are bound by those partnering obligations and the need to provide certification requirements, (1) for the purposes of the 1997 Act, and regulations

made thereunder, and (2) the commercial requirements to contractually close this major PFI procurement.

11.4 This Report addresses:

- 11.4.1 The relevant legislation and current position of the PFI Procurement;
- 11.4.2 The requirement to provide a Local Government (Contracts) Act 1997 Certificate (the reason why the Council should do this is detailed in Section 4 below);
- 11.4.3 the legal due diligence matters relevant to issues regarding the Certifying Officer in relation to the PFI Contract; and
- 11.4.4 further steps and resolutions which the Council needs to take and adopt.

**RELEVANT LEGISLATION**

- 11.5 The Local Government (Contracts) Act 1997 relates to major projects made under the Private Finance Initiative. It was brought in to deal with an issue which arose after a number of highly celebrated cases in the 1990s which created uncertainty over local authority powers to enter into similar contracts. Because of the activities of certain authorities acting *ultra vires* i.e. beyond their statutory powers, the financial markets were reluctant to lend to local authorities and to accept that, despite other provisions in various local governance finance acts relating to local government, there was no 'safe harbour' to give them protection should a local authority be found subsequently to have acted *ultra vires*.
- 11.6 The Local Government (Contracts) Act 1997 therefore creates an assumption of legality for PFI and similar contracts but relies upon a certification process. The certificate is given by a certifying officer. The certifying officer can only be appointed in accordance with the appropriate Regulations and in this case it is proposed that it should be the Section 151 Officers of both unitary authorities (as the Project Agreement will be entered into by both authorities on a joint and several basis).
- 11.7 It is therefore necessary for both Cheshire East and Cheshire West and Chester Councils to sign and execute the main Waste Treatment Services PFI Contract Project Agreement (the '**PFI Contract**') and for each Council to authorise the issue of a Certificate under the Local Government (Contracts) Act 1997, and

in each case for a certifying officer to sign and issue these certificates.

- 11.8 Certifying officers sign in a personal capacity so it is usual for them to request an indemnity from their respective Authority so that they do not incur undue personal liabilities should a transaction or an aspect of it in due course be held to be *ultra vires*.

## **THE CURRENT POSITION OF THE PFI PROCUREMENT**

- 11.9 The PFI Waste Contract procurement has reached an advanced stage under the Competitive Dialogue, the form of procurement procedure appropriate for complex and major PFI Contracts. We are now dealing with two Bidders – known as 'Participants' under the Competitive Dialogue procedure. Within the relatively near future a preferred Bidder and technical solution will be adopted. It is necessary as part of the procurement programme to plan ahead and ensure that the appropriate governance is in place, and that includes the PFI Contract certification process and the related statutory requirements.
- 11.10 Participants and their funders, (if appropriate) will carry out extensive due diligence into the decision making process of the two Authorities which relates to the PFI Contract Procurement, its documentation and decisions taken both prior to and in particular at commercial and financial close of this major project. That will include reviewing all reports and decisions of the two Unitary Councils, to ensure that they are legally and procedurally correct. The two Authorities are entering into this contract on a joint and several basis. It will therefore require two certificates to be issued and two certifying officers to sign and take responsibility for those certificates.
- 11.11 Each Council needs therefore to authorise the issue of the certificate and in due course after the PFI Contract Closure, to supply copies of the same to the Preferred Bidder, and possibly also to funders, where that is appropriate, and also internally to the Council's Monitoring Officer and to the Council's auditor.
- 11.12 Each Council will also need to ensure that copies of the certificate, once they have been signed, are opened to inspection by members of the public at all reasonable times without payment and also that members of the public are afforded facilities to obtain copies of that certificate on payment of a reasonable fee. These

arrangements will need to be put in place once the certificate is signed which will be after commercial and financial close.

### **WHY DOES THE COUNCIL HAVE TO PREPARE A LOCAL GOVERNMENT (CONTRACTS) ACT CERTIFICATE?**

- 11.13 The purpose of the Local Government (Contracts) Act 1997 as briefly mentioned above in paragraph 1 (Introduction) was to provide reassurance to private sector investors over the powers of local authorities (i.e. its *vires*) to enter into PFI and similar contracts, for the duration of five years or longer. Case law had caused significant concern in the private sector in that there was little recourse available if a project was to be struck down as outside a local authority's power (i.e. it was *ultra vires*). One of the main objectives of the 1997 Act was that local authorities would certify PFI contracts as being within their powers (*intra vires*). Such a certificate would also prevent the local authorities pleading its own *ultra vires* act 'after the event', as a reason to avoid the contractual obligations (which had been the case in one or two earlier controversial cases).
- 11.14 In addition, local authorities are required pursuant to the Act to issue a form of certificate in a particular form and commercially it is accepted practice to certify that the Council entering into such a major PFI procurement is acting within its powers and by implication its related project governance is in order.
- 11.15 If in due course a third party challenge, or for some other reason it was shown that the PFI contract was *ultra vires*, the Preferred Bidder would be entitled to be paid compensatory damages (known as 'relevant discharge terms') in the event of the Council's decision to enter into the PFI contract being declared as outside its powers (*ultra vires*) and hence the contract would be set aside as void.
- 11.16 This is why, as mentioned above, the Preferred Bidder and/or their funders and advisers will carry out an extensive due diligence exercise and as part of the response to that, and in order to give the reassurance that is required, a certificate is issued under the Local Government (Contract) Act 1997.

### **WHAT DECISIONS ARE THEREFORE REQUIRED OF THE COUNCIL HAVING REGARD TO THE ISSUE OF THE CERTIFICATES.**

#### **11.17 Certifying Officers - their duties and scope of the Indemnity from the Council**

The Certifying Officer, apart from having general duties to the Council to ensure there is no conflict between their personal interests and the interests of the Council in issuing such certificate, and following their general duty to act with appropriate levels of skill and care, and in the case of the Section 151 officer, to maintain that a general fiduciary duty relating to governance, should consider all relevant matters before issuing a certificate, and in this case in a project of this scale to be entitled to take independent legal advice as to the form of the certificate and the related due diligence issues.

- 11.18 There is some earlier ODPM guidance (now CLG) which suggests that Council officers do not need to rely upon an indemnity where they act in a personal capacity to give such certificate. However, in the light of certain case law decisions, particularly the *Burgoine v Waltham Forest London Borough Council* [1996] whereby an authority's external auditor brought proceedings against an authority's officer in their personal capacity, where in that case he acted as a director of a local authority company which was then declared *ultra vires*, it is felt that certifying officers should seek personal indemnities on the lines mentioned above. Although the *Burgoine* case was based on particular facts, which do not correlate to this particular project, it is nevertheless relevant in terms of ensuring that proper protection is given to certifying officers in circumstances such as these.
- 11.19 The Council has powers to indemnify, deriving from a number of statutory provisions, including Section 39 of the Local Government (Miscellaneous Provisions) Act 1976, Section 265 of the Public Health Act 1865, Section 111 of the Local Government Act 1972, and in addition the Local Authorities (Indemnities for Members and Officers) Order 2004.
- 11.20 The Council, therefore, have sufficient powers to give such an indemnity and delegated authority should be given to the Borough Solicitor and Monitoring Officer to settle the form of indemnity, on advice, and to ensure that appropriate insurance cover has been, or will be effective from the date of the Indemnity (probably contract close - see 11.22 below), following discussions if necessary, with the Council's insurers.

#### **11.21 Some limitations**

The issue of a certificate under the 1997 Act does not prevent a public law challenge nor, in more limited circumstances, a private law claim on the grounds of negligence. If an officer has acted perversely or with reckless indifference, for example, as to the outcome of a particular course of action such a claim might be successful. An act of reckless indifference could invalidate an indemnity. However, it is difficult to see how such a liability would arise unless the Officer and the Council were acting in defiance of clear advice that they should not proceed. On the basis of the facts known, this does not appear to be the case in this instance.

#### **11.22 The period for the certificate**

The Certificate will commence from the date of contract and/or financial close. These may be simultaneous, but if not, the certificate will relate from the date of commercial contract close. It will be issued in a form to comply with the relevant regulations. An indicative form of Certificate is attached based on the relevant regulations which will form the basis of the certificate to be given. (Appendix 1).

#### **12.0 Overview of Year One and Term One Issues**

- 12.1 A decision on the preferred tenderers should be made before the end of year one and contracts should be signed during year two.

#### **13.0 Access to Information**

(To be inserted by Travis Hamblins)

The background papers relating to this report can be inspected by contacting the report writer:

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