

STATES OF JERSEY



ENERGY FROM WASTE FACILITY: RESCINDMENT (P.8/2009) – COMMENTS

**Presented to the States on 3rd February 2009
by the Minister for Transport and Technical Services**

STATES GREFFE

COMMENTS

A Report and Proposition (P.8/2009) has been lodged au Greffe calling for –

- (a) the rescindment of a decision by the States to procure an Energy from Waste Facility (P.72/2008) including cancellation of the Engineering Procurement and Construction Contract entered into by this Department on 14th November 2008 with CSBC (Jersey) Limited;
- (b) that the Minister for Transport and Technical Services, in conjunction with the Minister for Treasury and Resources, take all necessary steps to reduce the cost of cancellation; and
- (c) to request that the Minister for Transport and Technical Services revert to the States with a month, if the proposition is approved, with options for dealing with the Island's Solid Waste in an environmentally sound, publicly acceptable and cost-effective way.

The recommendations within the rescindment Report and Proposition are wholly rejected as they cannot be in the best interests of the States of Jersey. The following report sets out the reasons for this and will respond in relation to the recommendations within the rescindment Proposition.

(a) Recommendation to rescind P.72/2008 and cancellation of the Engineering Procurement and Construction Contract

The States approved the Minister's Proposition "Energy from Waste Facility: Establishment and Acceptance of Tender" (P.72/2008) in July 2008 – just over 6 months ago. Since that time no significant changes have occurred in waste management, except for the unfortunate impact on recycling exports following the financial downturn.

The approval of P.72/2008 followed a long consideration of alternative options for the replacement for the current Bellozanne Incinerator, which involved 10 years' review of emerging technologies and developments within the waste industry.

Following approval of the "Solid Waste Strategy" (P.95/2005), the States then considered in detail and approved the location of the proposed facility within "Solid Waste Strategy: locations for proposed facilities" (P.45/2006), before the third debate on the subject within the States on the preferred solution – P.72/2008. There have therefore been 3 significant States debates, all of which have considered the issues raised within the rescindment proposition P.8/2009.

P.72/2008 required the Minister for Transport and Technical Services to respond to P.95/2005, which charged –

the (then Environment and Public Services) Committee to investigate fully alternative and conventional technologies to provide the final disposal route for the residual waste remaining following the implementation of the systems and facilities (for recycling as set out elsewhere within P.95/2005), and to recommend a preferred solution for a replacement of the Bellozanne incinerator to the States with an accompanying cost/benefit analysis, environmental and health impact assessment no later than December 2008.

To address these requirements, P.72/2008 set out how the environmental and health impact assessments had been concluded, and included a Cost Comparison Report and an updated Technology Review Report, which had reviewed all available waste treatment technology types and 78 technology companies. P.72/2008 therefore met all of the requirements set out by the States for progressing the Energy from Waste facility, and the rescindment debate Report and Proposition only re-raises issues which have been previously addressed in detail within these debates.

The arguments suggested within P.8/2009 for rescindment of P.72/2008 and the Engineering Construction and Procurement Contract are not convincing –

- The rescindment Proposition suggests that the decline in the economic situation requires prudence in the management of public funds. This is an argument for retaining the approved Energy from Waste Facility, not an argument for rescindment, for the following reasons.
- The cost of cancellation is significant – a figure of £45.9 million has been calculated by the Department and its Advisers (the reason for which is explained below) – for which the Island would get no benefit, and would receive significant damage to its reputation as a stable jurisdiction to do business with. This does not include all of the costs associated with rescindment, as there are many indirect costs in addition to the main contract; there are significant development costs which will be required to formulate a new Solid Waste Strategy and those to develop a new procurement.
- P.72/2008 included a full Cost Comparison Report of 6 comparative solutions based upon alternative waste treatment technologies. This considered the whole life capital and operational costs of the solutions and a full Net Present Value analysis which was quality-assured by Deloitte and Touche LLP.
- The Cost Comparison Report concluded that –
 - “the cheapest long term waste management solution for Jersey’s residual waste is to install an energy from waste plant as proposed.”
- An Energy from Waste Facility, whilst expensive, still provides the most affordable, flexible and proven long-term solution for treating the Island’s solid waste available to the Island.
- Rescinding the approved facility would require the Island to procure an alternative waste treatment solution. Whilst the economic situation has declined, the demand for waste treatment facilities has not. Demand within Europe for waste treatment facilities is based upon the need for jurisdictions to comply with the requirements of the European Landfill Directive 99/31/EC which has targets for reduction of bio-degradable waste sent to landfill through to 2020.
- The anticipated cost of waste treatment facilities has not reduced either. Whilst the costs of civil works and construction steel have become more competitive recently, the low value of the Pound against the Euro appears to be more than offsetting this reduction.
- Having rejected the previous procurement, many proven waste management companies will consider the Island a risky place to work and, if willing to tender, will price that risk as a major premium.
- There is no evidence put forward that wider public opinion on Jersey is against the approved Energy from Waste facility.
- It is also incorrect to state that recovering Energy from Waste is perceived to be unsustainable. Every significant European and developed nation (including Denmark, Holland, Germany and Switzerland) has Energy from Waste facilities, predominantly grate-based, conventional incineration like that approved for Jersey, as a key part of their sustainable waste management strategy.

(b) that the Minister for Transport and Technical Services, in conjunction with the Minister for Treasury and Resources, take all necessary steps to reduce the cost of cancellation

The Department has provided the anticipated cost of cancelling the Engineering Procurement and Construction Contract with CSBC (Jersey) Limited in a written answer to Deputy Wimberley (Written Question 4167 refers) and this is attached as an Appendix to this Report. The response to Written Question 4167 explains the contractual requirements of the Contract when the Contract has been terminated for the Purchaser’s (the Department’s) “convenience”. The cost is anticipated to be at least £45.9 million. This is for the following reasons–

- Terminating for convenience always has significant financial consequences for the terminating party on engineering contracts, as considerable investment is required to offset the risks involved and the injured party must cover all the costs incurred, including loss of profit.
- It is poor procurement practice to terminate for convenience, as major engineering procurements are long (several years in this case), complex and therefore expensive, and failure damages the reputations of both parties involved in the cancellation.
- Several milestone payments have already been made. All engineering contracts of this type require down-payment to Contractors to secure investment in pre-ordering equipment, for co-ordination of detailed design and for site preparation works.
- There are long lead times for the purchasing of many items of equipment on Energy from Waste facilities: for example the Steam Turbine requires over 15 months from order to delivery and a significant deposit on the overall cost.

There are many indirect costs of terminating the contract at this stage not included within the £45.9 million. These include –

- the Adviser fees for managing the cancellation;
- the costs of terminating the related agreement with the Jersey Electricity Company;
- the wasted investment in enabling works (already in excess of £2 million expenditure); and
- the costs of strategy development, feasibility and procurement works, which exceed £2 million due to the length of the process undertaken.

There are also the costs of –

- developing an alternative solid waste strategy;
- procuring an alternative waste treatment facility, where bidders would be concerned about the commitment of the States to the procurement; and
- maintaining the current Bellozanne incinerator until such time as the alternative facility can be made available.

Whilst the Minister for Transport and Technical Services and the Minister for Treasury and Resources would, if this Proposition and Report were approved, use their best endeavours to reduce the impact of this cost, this will have little impact on this overall cost due to the decision to terminate being “*for convenience*”. The sunk indirect costs would mean that the overall impact of rescindment would be well in excess of £50 million.

P.8/2009 refers to the cost of the Project and specifically to the impact of currency fluctuations. This issue is subject to a review by the Comptroller and Auditor General (CAG) and it would be inappropriate for the Minister for Transport and Technical Services to comment further on the matter until this review is complete and the CAG has published his report.

(c) to request that the Minister for Transport and Technical Services revert to the States with a month if the proposition is approved with options for dealing with the Island’s Solid Waste in an environmentally sound, publicly acceptable and cost-effective way.

The wording of this recommendation and the Report as a whole indicates a lack of understanding of the

complexity, time and cost involved in developing an integrated waste management strategy.

P.8/2009 indicates a number of questions that the proposer considers relevant to any review of the approved Solid Waste Strategy that would follow a rescindment of the approved Energy from Waste Facility procurement. Whilst these are relevant issues, all of these matters have already been considered in significant detail in obtaining approval for the Solid Waste Strategy and in obtaining Planning Approval for the Energy from Waste Facility at La Collette.

Cancellation of the Engineering Procurement and Construction Contract would have significant consequences for Jersey.

- Rescindment would mean that conventional Energy from Waste treatment was rejected as an appropriate treatment for residual waste. Energy from Waste treatment was the cornerstone of the approved Solid Waste Strategy (P.95/2005). Removal of Energy from Waste as an option would create difficulty in developing a balanced review of the Solid Waste Strategy and any replacement strategy would therefore be at risk of being sub-optimal. Other alternative treatment solutions have been reviewed in detail as part of the development of the Solid Waste Strategy and are considered to carry a higher degree of risk of not providing a sustainable waste disposal outlet for the Island.
- The Solid Waste Strategy would therefore have to be developed from scratch in the light of any rescindment decision. The remaining available alternatives would have to be considered and an alternative strategy developed, consulted upon and then put before the States for approval.
- The other related elements of the Solid Waste Strategy would also have to be reconsidered as they may no longer be appropriate or of the right scale. These include the recycling initiatives which underwrite the States' current recycling service, including expansion of kerbside collection services and the proposed 'In-vessel Compost' facility. Many alternative strategies rely upon treated organic material being co-mixed with green waste and the residue disposed of to land. This process has been reviewed several times as part of the development of the Solid Waste Strategy and it has always been concluded that it carries a significant degree of risk in terms of potential contamination or damage to the Island's land bank and agricultural sector.
- The first draft of the previous Solid Waste Strategy was presented to the (then) Public Services Committee in January 1999. The final version of the Solid Waste Strategy was approved in July 2005 – 6 years later. The Minister for Transport and Technical Services considers that, under a very optimistic timetable, a minimum of 6 months would be required to review the Solid Waste Strategy and to produce a new draft for consultation. Thereafter, the consultation and consenting process, including development of a new Environmental Impact Assessment, Health Impact Assessment and possible Public Inquiry, would take a minimum of a further 6 to 9 months before a revised Solid Waste Strategy could be presented to the States for consideration. A new procurement process would then take a further 12 to 18 months.
- The very earliest that the States of Jersey could return to its current position of having a competent proven contractor on site ready to construct a significant waste treatment facility would be beyond the autumn of 2011 – the time when the current approved Energy from Waste Facility is due to be commissioned.
- The Bellozanne Incinerator is operating beyond its operational life and has in the past year suffered significant failures and required significant repairs to the chimney, bunker wall and turbine. At one point, in spring 2008, untreated putrescible waste had to be stored in open pits at La Collette because the Bellozanne Facility could not operate consistently enough to be able to accept this waste. The risk of a catastrophic failure at Bellozanne remains and any extension to the required operating life of this facility is likely to be extremely and increasingly perilous.

In conclusion, at this stage of the project, with a proven technology procured, a robust contract entered into, and a high quality contractor ready to commence, there do not appear to be any merits to the Island of rescindment.

There have been no changes in the waste management industry which prompt a reconsideration of the Solid Waste Strategy adopted by the States in the 6 months since the Energy from Waste facility was approved.

The economic downturn requires an even more prudent approach to public finances, which would make the cancellation of a robust project with no meaningful reason highly questionable.

The proposed rescindment of the approved Energy from Waste Facility would have severe financial, reputational and operational negative consequences for the States of Jersey.

The Minister for Transport and Technical Services therefore urges States Members to reject the Rescindment Report and Proposition.

**WRITTEN QUESTION TO THE MINISTER FOR TRANSPORT AND TECHNICAL SERVICES BY
THE DEPUTY OF ST. MARY**

ANSWER TO BE TABLED ON TUESDAY 20th JANUARY 2009

Question

Given that any cancellation costs would be contested and determined at arbitration, would the Minister advise the Assembly what the Transport and Technical Services Department estimates the cost to the Island would be if the contract for the new Energy from Waste Plant at La Collette was cancelled, set out and justified under as many clear headings as are necessary for the estimate to be verifiable by peer review, and outline the variations in potential liability to the States, if any, should the date of cancellation be taken to be 16th February 2009, or an earlier or later date?

Answer

In the absence of a default or Insolvency of the Contractor, the Engineering Procurement and Construction Contract allows for termination for convenience by the Purchaser.

Where the Contract has been terminated for convenience the following sums are payable:

- (a) the amount (if any) due to the Contractor under the Contract for the Works carried out prior to the receipt by the Contractor of the Termination Order;
- (b) the amount due to any third party in respect of which the Contractor has (prior to the receipt by him of the Termination Order) properly and irrevocably entered into a commitment relating directly to the Contract; and
- (c) the amount of any additional Cost properly incurred by the Contractor for any work in connection with the termination authorised by the Project Manager, plus Profit thereon;

less any sums that have already been paid to the Contractor.

The sums referred to in (a) – (c) are assessed by the appointed Project Manager following receipt from the Contractor of any supporting information required by the Project Manager. If the Contractor disputes the Project Manager's assessment then the dispute is referred to the disputes mechanism under the contract. This sets out the following mechanism for this type of dispute:

- (a) in the first instance disputes are referred to the Project Manager;
- (b) if the parties have failed to resolve the dispute through negotiation they can agree to refer the dispute to mediation;
- (c) if the parties have failed to negotiate and either do not agree to mediate or are unhappy with the mediator's decision, then the dispute is referred to the Technology and Construction Courts in England (which have exclusive jurisdiction in relation to this type of dispute).

The estimated cost of terminating the Engineering Procurement and Construction Contract prior to 16 February 2009 is £45.9 million. The cost already expended under the Contract would be included in this sum.

It should be noted that if terminated, the Contractor would have delivered almost nothing of any value to Jersey, so this amount would have to be written off.

Details of the Technical Adviser's calculation of this sum are available if required for peer review but are subject

to commercial confidentiality under the contract.

In addition to costs for termination of the EPC Contract, TTSD would also incur termination costs for the termination of the Technical Consultants Appointment, Enabling Works contracts and the JEC Agreement.

In the event of a challenge by the Contractor of the evaluation of the termination costs (which is considered to be very likely) there would also be additional management, project manager and legal costs in dealing with the dispute. From previous major contractual disputes, this form of dispute resolution can take months or years to resolve. Whilst it is not possible to put a price on this work, it is likely that the total cost for termination would be in excess of £50 million.

This sum does not consider the cost in terms of having to redevelop the solid waste strategy and procure another plant to replace the Bellozanne incinerator.

It is likely that the State of Jersey's reputation would be seriously damaged by any appearance in the Technology and Construction Courts in England.

Any termination at this stage will push subsequent tender prices up, or may simply restrict the number organisations willing to engage in major contracts, and not just for waste. On this basis it is likely be difficult or very expensive to procure an alternative waste management facility - irrespective of the technology selected.

Termination of the contract now will result in having to keep the existing Bellozanne incinerator running for several years as a new waste strategy will have to be developed and debated by the States. This would then have to be followed by a technology selection and tender process before any construction commenced.

The impact of keeping the existing plant operating will result in further untreated emissions and the significant risk of failures of the plant that will put the Island in a vulnerable position in terms of treating its putrescible waste.