

# ITEM NO: 9 APPENDIX 1

## Appendix 1: Summary of Marchwood Energy Recovery Facility (ERF) Conciliators Report on Pass-Through Costs.

### Terms of Reference for Conciliators Report

In the context of this particular Conciliation process the prime objective is to produce a robust and independent assessment (including expert opinion) on the submission and information produced by Hampshire Waste Services Limited (HWS) for Pass-Through Costs (PTC) at Marchwood ERF.

The parties require that the assessment shall, in the Conciliator's opinion, reflect a fair valuation of the additional costs arising from the change of site and architectural enhancements necessary to obtain planning approval for the Marchwood ERF plant.

Furthermore, in consideration of the evaluation, the Conciliator shall in particular comment upon areas of the Pass-Through Cost submission that are significantly important to Hampshire County Council and its Members, Southampton City Council and its Members, senior legal, technical and financial officers of the two authorities and external bodies such as the Audit Commission and Portsmouth City Council (PCC).

In the Terms of Reference for the assessment agreed by the parties, The Conciliator has been asked to undertake the following:-

- Examine the contractual entitlement for Pass-Through Costs, resulting from the change of site, under the Waste Service Contract.
- Examine the early cost forecasting for Pass-Through Costs and comment upon the information provided to the Authority during the design and construction phase.
- Determine whether or not, under the Waste Disposal Service Contract, the detailed bill of quantities submission can be supported by the use of overall construction costs compared with the indicative tender sum for the Marchwood ERF.

- Comment upon the ‘value for money’ aspect of the Marchwood ERF plant, using the indicative tender sum and Pass-Through Cost bill of quantities submission, when compared with similar facilities at current market prices.
- Determine the detail/extent of examination required with regard to the submitted costs and level of supporting information. It is anticipated that additional specialist measurement and cost checking will need to be undertaken by a suitably qualified professional.
- In accordance with paragraph 5.3 of the ICE Conciliation Procedure, the Conciliator is not required to give reasons for any Recommendation. However, the Conciliator has proposed to the parties, for ease of understanding, that summary reasons will be included with any Recommendation, all parties have confirmed, in writing, their acceptance of this proposed course of action.

**The Conciliators Recommendations are as follows:**

**Question 1:** Examine the contractual entitlement for Pass-Through Costs, resulting from the change of site, under the Waste Service Contract

**Comment:** HCC and SCC are agreed on the overall conclusion reached by HWS, namely that in accordance with the terms and conditions of the Waste Service Contract, the costs resulting from the change of site fall within the Pass-Through Costs submission. The Parties’ consensus on this issue is recorded in the jointly agreed written submission by the Parties to me, the Conciliator. In any event, independently I had reached this same conclusion.

**Conciliators Recommendation is:** to follow the agreement reached by the Parties themselves by acknowledging that under the Waste Disposal Service Contract, the costs resulting from the change of site fall within the Pass-Through Costs submission.

**Question 2:** Examine the early cost forecasting for Pass-Through Costs and comment upon the information provided to the Authority during the design and construction phase.

**Conciliators Recommendation is:** that the Parties should acknowledge that both the level and accuracy of information provided to the Authority by HWS during the design and construction phase, including the guide costs given on 18<sup>th</sup> December 2000, was given in good faith as representative of the likely PTC and, as evidenced by conduct, also appeared to be satisfactory and sufficient for the Authority's needs.

**Question 3:** Determine whether or not, under the Waste Disposal Service Contract, the detailed bill of quantities submission can be supported by the use of overall construction costs compared with the indicative tender sum for the Marchwood ERF.

**Conciliators Recommendation is:** that the Parties themselves acknowledge that under the Waste Disposal Service Contract, the detailed bill of quantities submission, supplemented by supporting documentation demonstrating the costs incurred, is a recognised accurate method of costing and that furthermore this degree of accuracy will certainly not be obtained by the use of overall construction costs compared with the indicative tender sum for the Marchwood ERF.

**Question 4:** Comment upon the "value for money" aspect of the Marchwood ERF plant, using the indicative tender sum and Pass-Through Cost bill of quantities submission, when compared with similar facilities at current market prices.

**Conciliators Recommendation is:** that taking the indicative tender sum and Pass-Through Cost bill of quantities submission to arrive at an adjusted present-day cost for the Marchwood ERF plant, demonstrates that "value for money" has been achieved when this cost is compared with the cost of similar facilities at current market prices.

**Question 5:** Determine the detail/extent of examination required with regard to the submitted costs and level of supporting information. It is anticipated that additional specialist measurement and cost checking will need to be undertaken by a suitably qualified professional

**Comment:** The BoQ (bill of quantities) methodology to the evaluation of 'pass through costs' is almost certainly the fairest means of ensuring an even-handed approach. However, at the time I was appointed as the Conciliator the following difficulties remained:-

- A recognised Standard Method of Measurement for the preparation of the BoQ had not been adopted, therefore it was not possible to compare outturn rates and prices from other completed Facilities with a high degree of precision.
- The BoQ contained a high proportion of lump sum items.
- There was no clear BoQ for the base ('black box') Facility as a reference point from which to evaluate enhancements.
- Whilst some BoQ items were clearly extras resulting solely from the enhanced architectural features, other items were not so unmistakably total 'add-ons'.
- It was open to question as to whether or not some items, particularly internal finishes, should be regarded as 'pass through costs' given that these items were not directly included within the planning requirements.

With the benefit of the successfully completed PTC exercises at both the Chineham and the Portsmouth ERFs, it was decided to adopt a similar process for evaluation of PTC at the Marchwood ERF. Accordingly, it was necessary to carry out detailed measurement and cost checking of the major items. These included the structural steelwork, secondary steelwork and external cladding. This work was performed by suitably qualified professionals within HCC, under the direction of Keith Gale. The results of this exercise produced a strong correlation with the measurements presented by HWS/CNIM in the PTC submission and thereby confirmed the confidence in the PTC process.

**Conciliators Recommendation is** that the additional costs incurred by Kaupp in completing the outstanding work originally contracted to Geris, in the sum of £514,650, should not be included in the Pass-Through Cost (PTC) submission.

**Question 6:** Examine the Authorities submission relating to Pass-Through cost savings made by HWS as a result of delays to construction of a waste transfer station on site.

**Comment:** I have carefully considered the submissions made by the Parties. I agree with the Authority, namely that the matter is complex and that in order to resolve it on its own a significant amount of further work would be necessary. It is my belief that the cost associated with the amount of further work required would be disproportionate to the cost benefit in terms of reaching an agreement, or otherwise,

in respect of this portion of the PTC. Accordingly, I am inclined towards the Authority's proposal.

**Conciliators Recommendation is** that the Authority should withdraw its claim for any cost savings relating to the temporary waste transfer station as part of the overall settlement of the PTC conciliation process, provided a full and final settlement is reached between the Parties that includes all and any future monetary claims, from either Party, that might be alleged to have been incurred as a result of the architectural enhancement works.

#### **Question 7: Other ("Secondary") additional costs**

**Comment:** HWS allege that extra maintenance and life cycle costs and loss of income from electricity generation due to delays were, or will be, incurred as a result of architectural enhancement works. These indicative extra maintenance and life cycle costs have been estimated as £41,830.00 per annum throughout the 20-year contract period and loss of income at £7.2m. Such costs, claimed under Paragraph 2.5.1 to Schedule 3 of the Waste Service Contract, have yet to be precisely established, but HWS have indicated that they would be willing to abandon these heads of claim with the proviso that their "pass through costs" submission was to receive a favourable acceptance from HCC, in order to draw a line and proceed with the project refinancing. HCC have neither accepted nor rejected the principle of these claims at this stage but have pointed out that consequential costs may not be admissible. Upon initial inspection of the Contract documents it would appear that certain of the heads of claims may well be warranted.

Whilst HCC welcome the offer made by HWS to abandon claims in respect of alleged extra maintenance costs and delays, they are also keen to reach agreement with HWS on the shared use of certain internal parts of the Marchwood ERF, in particular the visitors' room (albeit that the parties recognise that the ability to reach any such agreement is strictly outside the terms of reference of this conciliation).

It is clearly desirable that if at all possible any agreement for the PTC should be in full and final settlement for all issues related to the Marchwood ERF. Given that the conciliation process is assisted negotiation it is extremely unlikely that the Parties would then accept my Recommendations in isolation unless it was linked in some way to an overall resolution of all outstanding operational & financial issues. Whilst I

respect & acknowledge the position adopted by the Parties, namely that any agreement on shared use of the internal facilities of the Marchwood ERF is outside of the conciliation brief, I consider there is little or no prospect of the Parties achieving an absolute settlement in respect of the PTC, and/or accepting my Recommendation in full, unless that settlement also includes all issues related, directly or indirectly, to pass through costs at the Marchwood ERF plant.

**Conciliators Recommendation is:** that my overall 'pass through costs' evaluation will include the proviso that Hampshire Waste Services (HWS) for their part also abandon all claims, including but not limited to claims such as loss of income from electricity generation due to delays, extra maintenance and life cycle costs and the costs of delays in the planning process, for which they allege have been, or will be, incurred as a result of change of site and architectural enhancement works. In addition the Parties should reach an early agreement on any shared use of the internal facilities (such as the visitors' room) of the Marchwood ERF.

#### **Conciliators Overall Conclusion and Main Recommendation**

**Conciliators Recommendation is** that Hampshire County Council (HCC) should accept the revised 'pass through cost' account in the sum of £13,332,036 at July 1998 prices (previously £14,012,986 at July 1998 prices), as set out in Schedule 4 of this document, as a fair representation of the additional costs of complying with the change of site and architectural enhancements required at the Marchwood Energy Recovery Facility (ERF) on the understanding and with the proviso that Hampshire Waste Services (HWS) for their part also abandon all claims, including, but not limited to claims such as loss of income from electricity generation due to delays, extra maintenance and life cycle costs and the costs of delays in the planning process, for which they allege have been, or will be, incurred as a result of change of site and/or architectural enhancement works. In addition both Parties should reach an early agreement, albeit that it is acknowledged by all that this is outside the scope of any conciliation agreement, concerning any shared use of the internal facilities (such as the visitors' room) of the Marchwood ERF.