

**HERTFORDSHIRE COUNTY COUNCIL**

**COMMUNITY SAFETY & WASTE MANAGEMENT  
CABINET PANEL  
MONDAY, 3 JUNE 2019 AT 10:00A.M.**

Agenda Item No.

**3**

**VARIATION TO THE RESIDUAL WASTE TREATMENT CONTRACT**

*Report of the Director of Environment and Infrastructure*

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Executive Member: Terry Hone, Community Safety & Waste Management

Local Members: Tim Hutchings, Hoddesdon North  
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**1. Purpose of report**

- 1.1 To provide Members with information to allow a view to be taken in relation to a proposed variation to the Residual Waste Treatment Contract (“the Contract”) entered into with Veolia ES Hertfordshire Limited (“VES”) and Hertfordshire County Council (“the Council”) on 27 July 2011 for the long term treatment of Hertfordshire’s residual Local Authority Collected Waste (“LACW”).
- 1.2 A variation to the Contract is needed to extend a contract deadline (the “Planning Permission Longstop Date”) that if missed could lead to the termination of the Contract. This variation allows time for a decision from the Secretary of State on Rye House Energy Recovery Facility (ERF) to be received and the planning process resolved.

**2. Summary**

- 2.1. The Council entered into the Contract with VES on 27 July 2011. The Contract has been varied on previous occasions including on 15 July 2016. References to “the Contract” in this report are to the Contract as varied. The variation to the Contract that was entered into on 15 July 2016 arose from the failure of VES to secure planning permission for the New Barnfield site and the acceptance of a revised project plan (the “RPP”) submitted by VES for an Energy Recovery Facility at Rye House, Hoddesdon (“Rye House”).

- 2.2. The decision to vary the Contract and accept the RPP was agreed by Cabinet on 14 March 2016.
- 2.3. The Contract with VES for Rye House (as varied in 2016 to give effect to the RPP) is for an operational life of 30 years, securing long term capacity for residual waste disposal and value for money for Council tax payers.
- 2.4. The planning application for Rye House was called in by the Secretary of State (SoS) and a public inquiry took place in the summer of 2018. Notification was received from the Planning Inspectorate on 5 February 2019 that the Inspector's report had been submitted to the SoS and that a decision would be issued on or before 7 May 2019.
- 2.5. Due to the delay experienced in obtaining planning permission for Rye House it is likely that the SoS's decision will not be in place with the requisite challenge period expired (a "Satisfactory Planning Permission") by the date specified in the Contract of 30 June 2019 (the "Planning Permission Longstop Date").
- 2.6. It is possible by agreement with VES to extend the Planning Permission Longstop Date by further varying the Contract but this variation can only be agreed lawfully if it meets the requirements set out in the Public Contract Regulations 2015 (PCR 2015) for post award modifications. Although there are a number of tests to be met, essentially, to meet the requirements of PCR 2015, the changes to the Contract must either be capable of being justified as (a) improving the economic balance in favour of the Council; or (b) being overall neutral in terms of the economic balance.
- 2.7. Negotiations with VES have taken place to agree a new Planning Permission Longstop Date and other consequential changes to the Contract to maintain the economic balance of the Contract or improve it in the Council's favour.
- 2.8. Concessions have been secured including a reduction in the Guaranteed Minimum Tonnage, additional no fault termination rights for the Council, no increase to the planning failure compensation cap beyond the June 2019 price and no change to the Band 1 gate fee as a result of planning delay and a revised Construction Sub-Contractor price.
- 2.9. At the time of writing this report, there has been no decision from the SoS. Depending on the SoS's decision there are a number of potential scenarios:
  - 2.9.1. If the SoS refuses planning permission, then the Contract variation will allow time to understand the reasons for refusal and work with VES to understand whether VES wish to appeal the decision and for the Council to decide whether to support an appeal, or terminate the Contract for planning failure.
  - 2.9.2. If the SoS refuses planning permission and VES do not wish to challenge the decision then the Contract will be terminated for planning failure.

- 2.9.3. If the SoS grants planning permission, but a challenge is lodged, then the Contract variation will allow time for the challenge proceedings to be resolved and the Contract to continue with the benefit of the concessions negotiated and changes described in section 8 of this report.
- 2.9.4. If the SoS grants planning permission (and it is a Satisfactory Planning Permission as defined in the Contract), and there is no challenge by objectors, then the Contract variation allows the Contract to continue with the benefit of the concessions negotiated described in section 8 of this report.
- 2.10. If the decision from the SoS is delayed then the extension enables time for the decision to be received and the scenarios set out in 2.10 above will apply when the decision is received.
- 2.11. Should the Contract not be varied it is likely that the Contract will be terminated for planning failure and the Council will be required to pay compensation on termination as described in section 7 of this report and seek alternative arrangements, likely to be at increased costs to the Council.

### **3. Recommendations**

- 3.1. That the Community Safety and Waste Management Panel recommends to Cabinet that Cabinet:
  - 3.1.1. Approves the variation of the Residual Waste Treatment Contract with Veolia ES Hertfordshire Ltd (VES) to include the matters set out in section 8 of this report which includes extending the Planning Permission Longstop Date to 31 December 2020 subject to the satisfactory conclusion of the legal drafting required to vary the Contract.
  - 3.1.2. Authorises the Assistant Director – Transport, Waste & Environmental Management to conclude the detailed discussions with VES and drafting of the Contract variation and all associated ancillary documents in consultation with the Chief Legal Officer and the Director of Resources.
- 3.2. That the Chief Legal Officer (and in their absence either the Assistant Chief Legal Officer (Environment and Dispute Resolution) or the Assistant Chief Legal Officer (People) be authorised to execute the Contract variation agreement and other necessary documentation referred to in 3.1 as are required to give effect to the above decisions, so far as such power is not already delegated by the County Council's Constitution.

### **4. Background**

- 4.1. The Residual Waste Treatment Programme (RWTP) was initiated to assist the Council to undertake its statutory duties as the Waste Disposal Authority, to provide disposal facilities for all of the residual Local Authority Collected Waste arising in Hertfordshire.

- 4.2. A Contract Notice was placed in the Official Journal of the European Union (OJEU) by the Council on 9 April 2009 and VES was agreed as preferred bidder by Cabinet on 28 April 2011.
- 4.3. On 27 July 2011 the Council and VES, a special purpose project company established by Veolia ES Aurora Limited for the RWTP, entered into the Contract. The Contract was for the provision, by VES to the Council, of residual waste treatment services including the design, construction, financing and operation of a Recycling & Energy Recovery Facility (RERF) at New Barnfield, Hatfield.
- 4.4. The planning permission for the proposed ERF at New Barnfield was refused by the Secretary of State for the Department of Communities and Local Government in July 2015.
- 4.5. The Contract as awarded in 2011 contained provisions allowing the Council, on planning failure, to request a RPP from VES to provide an alternative solution for Hertfordshire's residual LACW.
- 4.6. The RPP, for an Energy Recovery Facility (ERF) at Rye House, Ratty's Lane, Hoddesdon, was accepted in principle by Cabinet on 14 March 2016.
- 4.7. The Contract was varied on 15 July 2016 to bring the RPP into effect.
- 4.8. A detailed history of the RWTP can be found in the Highways and Waste Management Cabinet Panel report dated 4 November 2014 and the Community Safety & Waste Management Panel reports dated 21 October 2015 and 4 March 2016.

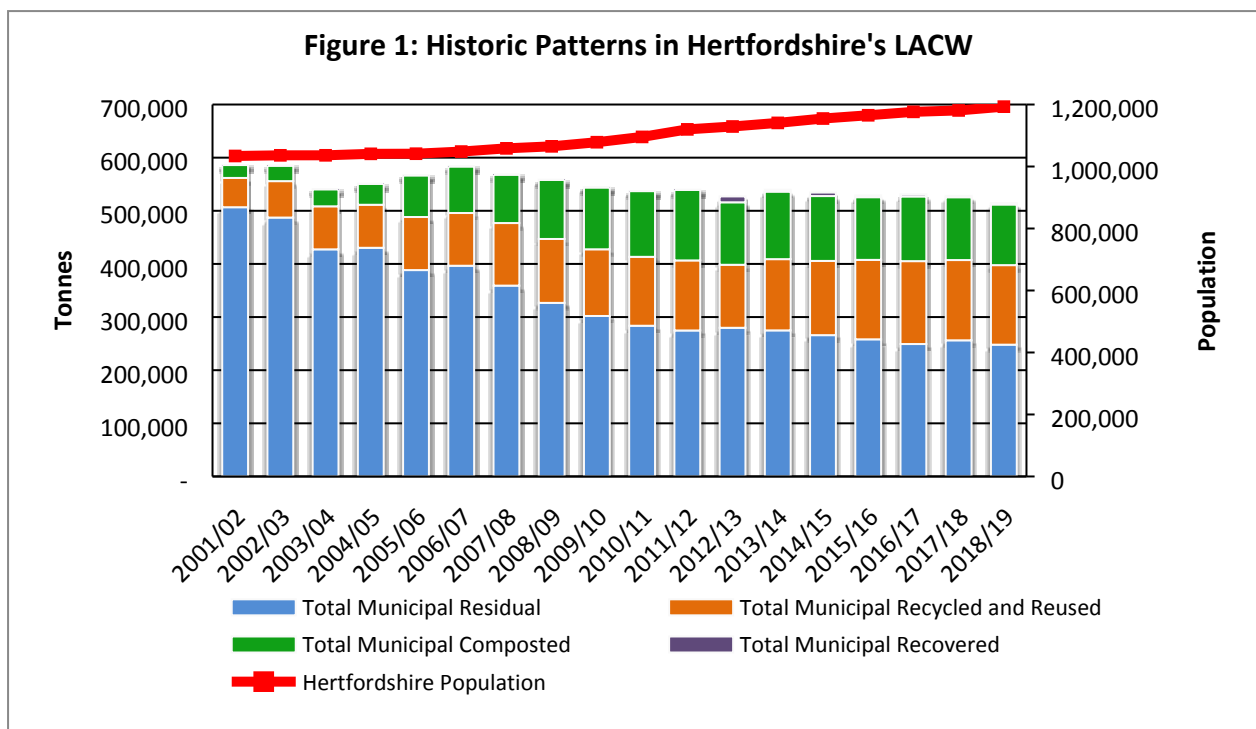
## **5. Planning Process**

- 5.1. Under the Contract it is the responsibility of VES to obtain planning permission for Rye House ERF, the planning application is VES' not the Council's.
- 5.2. A planning application for the Rye House ERF was submitted by VES to the Council (in their capacity of Waste Planning Authority) in December 2016.
- 5.3. Development Control Committee on 20 December 2017 resolved to approve the planning application. However, prior to the Development Control Committee meeting, a letter was received from the Department for Communities and Local Government informing the Waste Planning Authority not to issue a planning decision notice. The direction issued was to enable the SoS to consider whether the application should be referred for his determination.
- 5.4. On 1 February 2018 notice was received confirming that the planning application had been called-in by the SoS and would be subject to a public inquiry.

- 5.5. A public inquiry took place in the summer of 2018, commencing on 19 June and concluding on 3 August 2018.
- 5.6. Notification was received from the Planning Inspectorate on 5 February 2019 stating that the Inspector's report had been submitted and that a decision would be issued by the SoS on or before 7 May 2019.
- 5.7. At the time of writing this report a notice of the SoS's decision on the planning application has not been received.
- 5.8. Once the SoS has made a decision, there is a statutory appeal procedure for challenging the decision (s288 of the Town and Country Planning Act 1990) that is similar to a judicial review process. A s288 challenge is a two staged process with permission to challenge being required before a claimant's case can proceed to a hearing in court. The process can be lengthy which is one of the reasons for the proposed extension to the Planning Permission Longstop Date.

## **6. Context**

- 6.1. Under Section 30(2)(a) of the Environmental Protection Act 1990, the Council is required to perform the statutory functions of the Waste Disposal Authority for Hertfordshire. As Waste Disposal Authority the Council is responsible for arranging the treatment and/or disposal of LACW arising in the County.
- 6.2. In 2018/19 Hertfordshire County Council disposed of c.515,000 tonnes of LACW, c.248,000 tonnes of which was residual LACW requiring disposal. Figure 1 shows the quantity of LACW in each year since 2001/02.
- 6.3. Despite improvements in recycling there remains a significant quantity of material that must be disposed and/or treated and it is becoming increasingly more challenging to deliver further improvements. The County's recycling rate has remained relatively static since 2011/12 at around 50% of household LACW.



- 6.4. The Government document “Our Waste, Our Resources: A Strategy for England” (RWS 2018) was published in December 2018. The RWS contains details on a number of policies, that are currently out for consultation, with measures, that if implemented, not taking place until 2023.
- 6.5. The RWS 2018 includes three key consultations on Deposit Return Scheme (DRS) which will apply to beverage containers, Extended Producer Responsibility (EPR) looking at how the private sector will fund net costs of dealing with the packaging materials and Consistency whereby local authorities will be required to collect a core set of materials, highly likely to include a separately weekly collection of food waste.
- 6.6. The February 2019 report by independent waste consultants Tolvik ‘Filling the gap – The Future for Residual Waste in the UK’ considers how the “gap” between residual waste tonnages and the capacity to treat it may develop in the next 10-15 years.
- 6.7. The February 2019 report, like many of the recent industry reports, highlights the potential shortfall in capacity. The report has examined the effect of the RWS on the tonnages of residual waste in England, and the maximum compound effect of the identified measures is 3.28Mtpa leaving a capacity gap in England of 5.9 Mtpa in 2030.
- 6.8. Such shortfall in residual waste capacity is not uniform across the country with some areas better served with capacity than others. The October 2018 report by Tolvik ‘Residual Waste London and the South East – where is it going to go...?’ highlights the shortfall in capacity specifically for this region.

**Box 1: Key points from 'Residual Waste London and the South East – where is it going to go...?'**

- In 2017 London and South East generated just under 10 Million tonnes (Mt) of residual waste.
- c.1.7Mt was exported out of the UK (a greater dependency on export than the rest of the country), the Brexit impact on RDF exports is uncertain potentially placing more pressure on UK capacity.
- Little debate in the UK that landfill has a role to play in bridging the gap between residual waste generated and EfW capacity.
- Currently there are 21 operational landfills in London and the South East, by 2025 there are projected to be only nine operating.
- The Central scenario modelled in the report (not the pessimistic or optimistic scenario) projects that in the period 2018 to 2025 there will be a cumulative shortfall of 4.66Mt in capacity across London and the South East.

6.9. A shortage in regional capacity has already been experienced by the Council in the recent procurement of residual LACW disposal arrangements where the procurement exercise failed to secure enough capacity for existing volumes.

6.10. The procurement at the end of 2018 for short-term 'bridging' arrangements for residual waste disposal from the end of existing arrangements in 2020 and 2021 to the point where Rye House ERF is estimated to be operational (or alternative arrangements are developed) (up to a maximum of 2024) resulted in five tenders being submitted and accepted.

Contractor	Facility	Max capacity offered
FCC Recycling UK Limited	Greatmoor ERF, Buckinghamshire	60,000 tonnes
FCC Recycling UK Limited	Bletchley Landfill, Buckinghamshire	30,000 tonnes
London Energy Ltd	Edmonton EfW, North London	10,000 tonnes
Veolia ES (UK) Limited	Springfield Landfill, Buckinghamshire	50,000 tonnes
Viridor Waste Management Limited	Ardley ERF, Oxfordshire	75,000 tonnes

6.11. Despite awarding contracts to all bidders there is a shortfall in capacity required by the Council of approximately 25,000 tonnes, the residual waste capacity secured through the awarded contracts reveals a shortfall in capacity available and will see an increase in waste being sent to landfill as the only available options.

6.12. The market will be re-approached later in 2019 in an attempt to secure further capacity to address the shortfall but this context does stress the risks

and importance of requiring sufficient proximate capacity in the medium and long term.

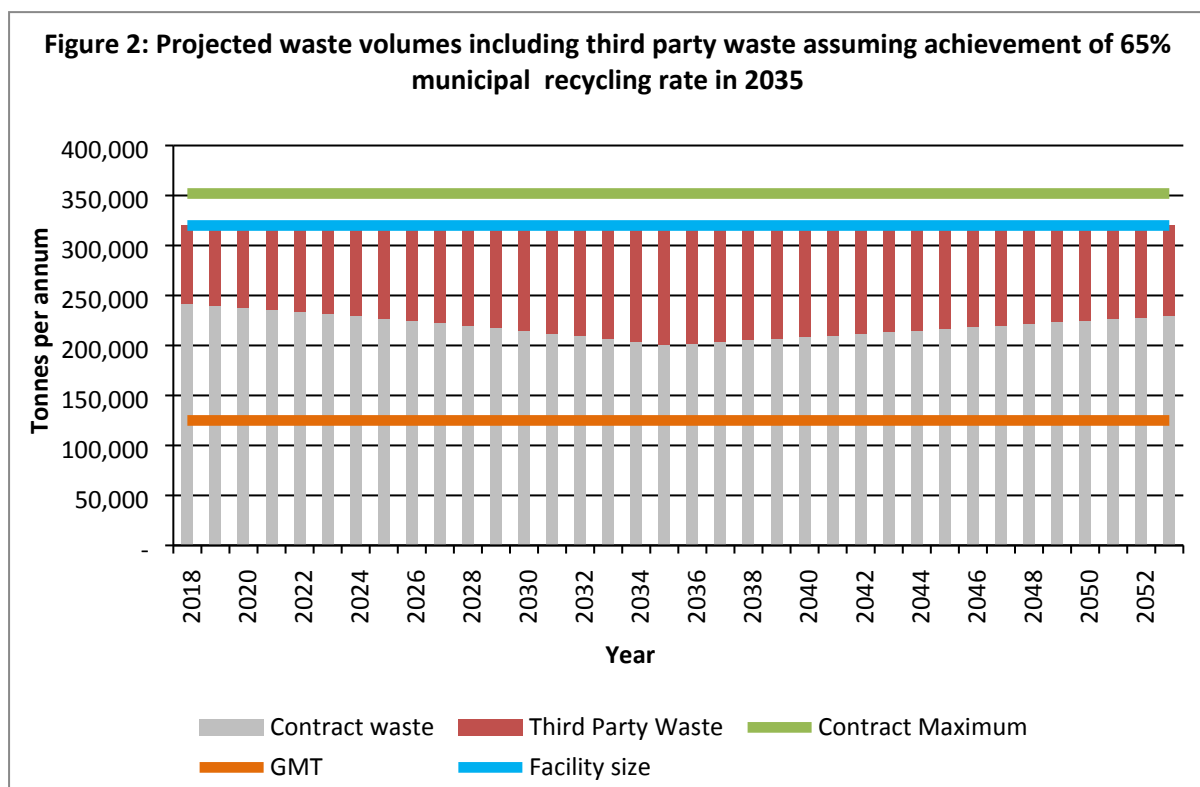
- 6.13. Rye House ERF has been designed to meet the Council’s requirements over the operational life of the Contract, the facility is sized at 320k tonnes per annum but with an obligation to dispose of volumes up to the Contract’s maximum requirements of 352k tonnes per annum should waste volumes prove higher in the long term.
- 6.14. A significantly improved position from that of the New Barnfield ERF on Guaranteed Minimum Tonnage (GMT) input commitment from the Council of 135k tonnes per annum was negotiated as part of the RPP in 2016 and is set at a level that provides a remote risk of breach and furthermore, can be considered to be at a level that does not inhibit the desire to improve the proportion of material that is prevented, separated for re-use or diverted for recycling or composting.
- 6.15. Following negotiations with VES as part of this variation process, VES have agreed to further reduce the GMT to 125k tonnes per annum.
- 6.16. To mitigate risk in relation to the GMT, should waste arisings fall short of the GMT, the Contract contains mechanisms that in the first instance, require VES to source waste from its own or third party sources (“Substitute Waste”) in accordance with an annual plan. The Council may also source waste itself (e.g. from neighbouring WDAs) to fulfil any shortfall. Only after these mechanisms are followed does the “put or pay” mechanism apply.
- 6.17. Analysis summarised in Table 2 below shows the recycling rate that would need to be achieved if 125k tonnes per annum (the GMT) of residual waste was generated by the Council. The projected municipal rate for 2018/19 is 51.02%.

<b>Table 2: Recycling rate if the GMT was met but not exceeded</b>				
	<b>2018/19</b>	<b>2023/24</b>	<b>2033/34</b>	<b>2053/54</b>
Recycling Rate should 125,000 tonnes per annum of residual waste be produced	75.66%	76.76%	78.69%	81.72%

- 6.18. The national Resources and Waste Strategy (RWS) commits to meeting a target of increasing municipal waste recycling rates to 65% by 2035.
- 6.19. The modelling work carried out uses projections of waste volumes over future years; the projections take the current total volume of waste produced and apply a growth factor that takes into account the growth in the county’s household numbers. The figures do not assume any increase or decrease in the total amount of waste produced but reflect the significant housing pressures of in excess of 100,000 new households in the next 13 years with additional excess requirements beyond that period.



- 6.20. Figure 2 starts with the current level of residual waste and recycling rate and applies a steady decline in residual waste until a recycling rate of 65% is achieved in 2035 (as per the RWS 2018). The orange line on the graph shows the GMT, even if the ambitious target of 65% municipal recycling rate is achieved there is more than sufficient contract waste to meet the GMT of the facility.



- 6.21. In order to assess the affordability of Rye House ERF, alternative options have been assessed. Of the alternative potential treatment options available to the Council, the alternative viewed as 'most realistic' and most likely to be achievable, is the use of capacity at existing ERF and landfill facilities in England.
- 6.22. The affordability analysis has been repeatedly updated and monitored since the signing of the RPP in 2016. Following the re-procurement of residual waste disposal contracts and a contract for the operation of transfer stations and haulage of waste, costs have been updated to reflect the latest market position.
- 6.23. It is worth noting that the affordability calculation figures used for Rye House present a conservative view of overall affordability, that is the figures exclude any income from third parties, material recovery or electricity generation, for which the Council would be entitled to a share under the Contract.
- 6.24. Another issue related to the affordability analysis is the impact on the Band 1 gate fee in the Contract of planning delay and the foreign exchange (FX) rate

between the GB Pound and the Euro. The Contract has a significant proportion of its capital expenditure priced in Euros. Currently, until the price is fixed at a set date after Satisfactory Planning Permission is achieved, the Council holds the FX risk on the element of the Contract priced in Euros. The Council also currently holds the risk of construction indexation increases during planning delay until 30 June 2019.

- 6.25. At the time of RPP submission, and evaluation in early 2016 the foreign exchange rate was £1:€1.35. Following the referendum to leave the European Union, the foreign exchange rate has fallen below the level at the time that the RPP was submitted. This has been closely and continually monitored by officers and external advisors. The affordability modelling uses a range of different foreign exchange rates to cover the likely scenarios.
- 6.26. Table 3 shows the cost advantage of Rye House ERF, compared to the current most realistic alternative using a modelled foreign exchange rate of £1:€1.15 over typical short, medium and long term service contract periods of seven, fifteen and thirty years. The modelling shows that over a thirty year period the cost advantage of Rye House ERF would be c.£103.6 million in 2019 terms.

Projected NPV* of Residual Waste Disposal Costs	01-Apr-21	01-Apr-21	01-Apr-21
	31-Mar-28	31-Mar-36	31-Mar-51
	Cost over 7 Years	Cost over 15 Years	Cost over 30 Years
Rye House @£1:€1.15	£178,500,000	£320,400,000	£491,600,000
Alternative	£191,000,000	£359,900,000	£595,200,000
<b>Cost advantage of Rye House</b>	<b>-£12,500,000</b>	<b>-£39,500,000</b>	<b>-£103,600,000</b>

\*Net Present Value (NPV) is the present value of future costs.

- 6.27. An exchange rate of £1:€1.15 has been used as that reflects a consistent position for the foreign exchange rate in the past few months. Should the foreign exchange rate be more favourable then the cost advantage of Rye House ERF would increase.
- 6.28. If the exchange rate falls to £1:€1 then Rye House ERF continues to be value for money in the short, medium and long term and is shown at c.£71.6m million over a thirty year period (as shown in table 4).

	01-Apr-21	01-Apr-21	01-Apr-21
	31-Mar-28	31-Mar-36	31-Mar-51
	Cost over 7 Years	Cost over 15 Years	Cost over 30 Years
Rye House @£1:€1	£189,000,000	£341,800,000	£523,600,000
Alternative	£191,000,000	£359,900,000	£595,200,000
<b>Cost advantage of Rye House</b>	<b>-£2,000,000</b>	<b>-£18,000,000</b>	<b>-£71,600,000</b>

\*Net Present Value (NPV) is the present value of future costs.

- 6.29. In summary, the Contract provides security of disposal arrangements over the operational life ensuring that the Council has the capacity it needs to meet the statutory function as Waste Disposal Authority. The affordability analysis shows that the Contract with VES for Rye House ERF is financially beneficial compared to the modelled, realistic alternatives. It should be noted that based on the recent “bridging” arrangements procurement referred to earlier that such modelled alternatives may not be available to the Council in the market.

## **7. Contractual Position**

- 7.1. The Contract with VES (as varied in 2016 for the RPP) contains a Planning Permission Longstop Date of 30 June 2019 and this is the date by which VES need to obtain a Satisfactory Planning Permission. Under the Contract a Satisfactory Planning Permission is planning permission without a set list of (unacceptable) imposed conditions and with the challenge period expired. The expiry of the challenge period being the period by which a third party may institute a challenge which could result in the quashing or modification of the planning decision, and if a challenge is initiated, the final determination or withdrawal of that challenge plus five (5) business days.
- 7.2. Given the delay in the SoS’ decision and potential for proceedings to follow; a Satisfactory Planning Permission will not be achieved by the current Planning Permission Longstop Date.
- 7.3. If the Planning Permission Longstop Date has passed with no Satisfactory Planning Permission in place, the Contract does not automatically terminate but either party has the right to terminate the Contract for planning failure.
- 7.4. In line with the agreed mechanism when the Contract was originally signed, termination for planning failure would result in the Council having to pay compensation to VES of c.£1.37m.
- 7.5. If the Contract is terminated and planning permission is obtained after termination, VES can build the ERF without the Council and the Council will lose its current contractual right to send residual LACW to the ERF. The Council will be required to manage residual LACW through alternative means with no contractual certainty (or in a re-procurement may secure capacity at the ERF but for a higher price).

## **8. Variation of the Contract**

- 8.1. It is possible to extend the Planning Permission Longstop Date by further varying the Contract but this can only be agreed lawfully if the variation meets the requirements set out in the Public Contract Regulations 2015 (PCR 2015) for post award modifications. Although there are a number of tests to be met, essentially, to meet the requirements of PCR 2015, the changes to the Contract must be either capable of being justified as (a) improving the economic balance in favour of the Council; or (b) being overall neutral in terms of the economic balance.

- 8.2. VES are seeking an extension period of 18 months, to 30 December 2020, based primarily on an assumption of a positive planning outcome in May/June 2019 which results in a third party legal challenge. From previous experience, VES are mindful of the timescales involved once a legal challenge has commenced and enters the realm of the Court. It should be noted that where a challenge is successful and the planning permission is quashed, additional time has to be set aside for the SoS to re-determine the application, there is no fixed or statutory time period for this process of re-determination. Should any challenge process go beyond December 2020 a further variation could be considered.
- 8.3. Subject to the conclusion of the planning, and any associated challenge process, the latest programme anticipates that construction could start in January 2020 resulting in the Rye House ERF becoming fully operational in summer 2023.
- 8.4. Throughout 2019, negotiations have been carried out with VES in order to agree changes to the Contract to make sure that the variation to the Contract is acceptable from a commercial perspective and in procurement law terms. In exchange for an extension in the Planning Permission Longstop Date, officers have secured concessions, in favour of the Council and other changes to maintain the economic balance of the Contract. There are other non-substantial, consequential changes arising from the matters referred to in this report but the changes set out in this section 8 of the report are the principal changes agreed.
- 8.5. A reduction in the Guaranteed Minimum Tonnage from 135k tonnes per annum to 125k tonnes per annum has been agreed. As discussed in section 6 of this report, this reduction allows for authorities in Hertfordshire to make further improvements in waste reduction, reuse and recycling.
- 8.6. A right to 'no fault termination' has been negotiated if the foreign exchange rate falls below an agreed level. If the exchange rate falls below £1:€1 at the time of 'fixing' the foreign exchange rate then the Council will have the opportunity, if it so chooses, to terminate the Contract for the sum payable on planning failure (c.£1.37m). Under the existing contractual terms, if the Council wanted to terminate on the basis that the Contract was no longer affordable, then the Council would be obliged to pay VES a significantly higher sum in compensation.
- 8.7. The negotiations have also secured no increase in the planning compensation cap, the amount that the Council pays to VES on termination for planning failure. This is the 2016 sum, indexed only to June 2019 (the June 2019 figure estimated to be £1.37m).
- 8.8. It should also be noted that VES have secured the Environmental Permit for Rye House ERF and a number of third party rights that were outstanding in

2016 which improves the deliverability of the project and mitigates risk of delay to works or services commencement.

- 8.9. Under the existing contractual terms the cost of planning delay through indexation to the Construction Sub-Contract price passes through to the Council to 30 June 2019. As part of the negotiation for this variation, the Council will not pay any further planning delay indexation costs beyond 30 June 2019.
- 8.10. If there is a further delay to the planning process (for example, a challenge the SoS's decision to grant planning permission), VES take the cost risk of planning delay between 1 July 2019 and 6 January 2020. If the planning delay lasts beyond 6 January 2020, VES will be able to "claw back" indexation costs from the Council's share of third party income as described below but the Band 1 gate fee will not be increased.
- 8.11. The Council did not want any changes to the Band 1 gate fee so, as an alternative, has agreed a claw back mechanism by which VES are able to recover the costs of planning delay after 6 January 2020 through sharing part of the additional income that the Council could otherwise receive through the sale of electricity, income from third party waste and sale of recovered materials. As previously highlighted no calculations of affordability have included estimates of income from these areas.
- 8.12. In accordance with existing mechanisms in the Contract, VES are in the final stages of appointing a replacement Construction Sub-Contractor. As referred to earlier in this report, VES will take the risk on the revised Construction Sub-Contract price so there is no impact on the Band 1 gate fee for the Council or financial affordability modelling as presented in this report. There are also no changes of significance or importance to the environmental or technical performance of the facility and no significant or material change to the permit issued by the Environment Agency as all 'outputs remain the same as agreed in the RPP.

## **9. Commercial Implications**

- 9.1. If this decision to vary the Contract is not taken then the Council may have no other alternative than to terminate the Contract for planning failure. If the Council does not terminate, following expiry of the current Planning Permission Longstop Date of 30 June 2019, VES may exercise its right to terminate the Contract.
- 9.2. If the Contract is terminated for planning failure and planning permission has been granted by the SoS it is possible that the Rye House ERF will be built by VES and the Council may lose its ability to access capacity in it.
- 9.3. Should the Contract terminate because an extension to the Planning Permission Longstop Date is not agreed then it is likely that the Council will continue to procure mid-term service contracts for disposal of residual LACW. Without the security provided by the Contract there is uncertainty

over both where residual waste will be disposed, and what the alternative cost would be to enable the Council to meet its statutory functions.

## **10. Financial Implications**

- 10.1. The affordability modelling continues to show that Rye House ERF is financially advantageous when compared to the alternatives, £103.6million over a thirty year period at an exchange rate of £1:€1.15 (detailed in section 6 of this report).
- 10.2. If the Contract is not varied then at the current Planning Permission Longstop Date of 30 June 2019 either party would be able to serve notice for termination on the grounds of planning failure. In this event, the Council would have to pay VES contract termination costs in the order of £1.37million, which is held in a reserve fund.
- 10.3. If the Contract is varied but VES fail to achieve Satisfactory Planning Permission by the revised Planning Permission Longstop Date (December 2020) then, as above, either party would be able to serve notice for termination on the grounds of planning failure. In this event, the Council would have to pay VES contract termination costs in the order of £1.37million, which is held in a reserve fund.
- 10.4. Following termination of the Contract, the Council will be required to seek alternative arrangements for the disposal of residual LACW. Modelling of the next best alternative (as explained in section 6 of this report) shows that this would have significant financial implications for the Council.

## **11. Legal Implications**

- 11.1. If the Council agrees to vary the Contract, the Council and VES will enter into a Deed of Variation to the Contract that will recite key contextual matters including an updated Project Agreement and relevant Schedules showing the extended Planning Permission Longstop Date and other consequential amendments agreed. The Council will also enter into ancillary documents consequential on entry in to the Deed of Variation.
- 11.2. If the Council does not agree to vary the Contract it is likely that the Contract will be terminated for planning failure and compensation will be paid to VES. The compensation payable on termination for planning failure is detailed in section 10 of this report (Financial implications).
- 11.3. In considering the proposed variations to the Contract to extend the Planning Permission Longstop Date and make the other consequential amendments agreed, the Council needs to consider the provisions of the PCR 2015 and in particular regulation 72 which deals with the modification of contracts during their term. Regulation 72 permits contracting authorities to modify (vary) a contract without a new procurement where the modification (irrespective of its value) is not substantial within the meaning of regulation 72(8) of the Public Contracts Regulations 2015.

- 11.4. Advice has been sought from leading Counsel on the proposed changes to the Contract. Counsel's opinion is that the proposed amendments to the Contract are permitted by regulation 72 of the Public Contracts Regulations 2015 and therefore that the Council may lawfully agree those amendments without first conducting a fresh procurement exercise.

## **12. Equalities Implications**

- 12.1. When considering proposals placed before Members it is important that they are fully aware of, and have themselves rigorously considered the equalities implications of the decision that they are taking.
- 12.2. Rigorous consideration will ensure that proper appreciation of any potential impact of that decision on the County Council's statutory obligations under the Public Sector Equality Duty. As a minimum this requires decision makers to read and carefully consider the content of any Equalities Impact Assessment (EqIA) produced by officers.
- 12.3. The Equality Act 2010 requires the Council when exercising its functions to have due regard to the need to (a) eliminate discrimination, harassment, victimisation and other conduct prohibited under the Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it. The protected characteristics under the Equality Act 2010 are age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion and belief, sex and sexual orientation.
- 12.4. An Equality Impact Assessment (EqIA) was undertaken as part of the procurement process and was refreshed as part of the 2016 decision to vary the Contract and bring the RPP into effect. The EqIA has been refreshed and has concluded that "This Equality Impact Assessment relating to the decision to vary the contract with VES has identified no equality impacts. The contract deals with HCC's statutory duty to dispose of the county's waste, and is not a service that interacts directly with the public. There is nothing to suggest that a particular group of the community will be impacted by this decision".

### 13. Next steps

13.1. The commercial deal with VES is now settled on a subject to contract basis, however the following areas are outstanding at the time of writing this report:

13.1.1 Conclusion of formal legal drafting of the Deed of Variation and ancillary documents that will be required to give effect to the variation.

13.1.2 As is usual practice, if Members decide to vary the Contract then a Voluntary Ex-Ante Transparency Notice (“VEAT Notice”) pursuant to the Public Contract Regulations 2015 will be published. Following publication of the VEAT Notice there will be a 10 day standstill period before the Deed of Variation is concluded.

13.2. Subject to the satisfactory conclusion of the above, it is the intention that the variation process shall be concluded by 28 June 2019.

### 14. Background Papers

<b>Waste Management Cabinet Panel:</b>	<b>Date</b>
Waste Procurement Project	11/01/2008
Waste Procurement Programme Feasibility Study November 2007-February 2008	04/03/2008
Waste Procurement Project	29/04/2008
Waste Procurement Project – Progress Report	09/07/2008
Options for Future Waste Management: Outline Business Case	07/10/2008
Hertfordshire Waste Procurement Programme – Progress Report	06/01/2009
Hertfordshire Waste Procurement Programme – Progress Report	14/04/2009
Hertfordshire Waste Procurement Programme – Progress Report	09/09/2009
Hertfordshire Waste Procurement Programme – Progress Report	18/11/2009
Hertfordshire Waste Procurement Programme	09/07/2010
Hertfordshire Waste Procurement Programme	28/04/2011
Residual Waste Treatment Programme – Recycling and Energy Recovery Facility Timetable	07/03/2013
<b>Highways and Waste Management Cabinet Panel</b>	
Residual Waste Treatment Programme – Options Available to the County Council Following the Secretary Of State’s Decision to Refuse Planning Permission for a Recycling and Energy Recovery Facility at New Barnfield, Hatfield	04/11/2014
<b>Community Safety and Waste Management Cabinet Panel</b>	
Residual Waste Treatment Programme Update	21/10/2015
Future Direction of the Residual Waste Treatment Programme	04/03/2016



<b>Cabinet:</b>	
Options for Future Waste Management: Outline Business Case	20/10/2008
Options for Future Waste Management: Outline Business Case – Responding to Defra’s Clarifications	19/01/2009
Hertfordshire Waste Procurement Programme	16/06/2009
Hertfordshire Waste Procurement Programme	19/07/2010
Hertfordshire Waste Procurement Programme	28/04/2011
Residual Waste Treatment Programme – Options Available to the County Council Following the Secretary Of State’s Decision to Refuse Planning Permission for a Recycling and Energy Recovery Facility at New Barnfield, Hatfield	10/11/2014
Residual Waste Treatment Programme – Variation of the RWTP Contract	14/12/2015
Future Direction of the Residual Waste Treatment Programme	14/03/2016