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<b>Meeting:</b>	<b>Executive</b>
<b>Date:</b>	<b>10 December 2013</b>
<b>Subject:</b>	<b>BEdR Project Options Review</b>
<b>Report of:</b>	<b>Cllr Brian Spurr, Executive Member for Sustainable Communities – Services</b>
<b>Summary:</b>	This report seeks to provide an update on the Central Bedfordshire Energy and Recycling (BEdR) Project and recommends that the Executive considers the options presented in this report and agrees to no longer proceed to contract award and instead pursue an alternative option.

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Advising Officer:	Marcel Coiffait, Director of Community Services
Contact Officer:	Alan Fleming, BEdR Project Director
Public/Exempt:	<p>Public:</p> <ul style="list-style-type: none"><li>• Report Main Body</li><li>• Appendix 1 – BEdR Project Affordability Review</li></ul>
	<p>Exempt:</p> <ul style="list-style-type: none"><li>• Appendix 2 – BEdR Project Affordability Figures (Exempt by virtue of paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972, being information relating to the financial or business affairs of any particular person (including the authority holding that information)).</li><li>• Appendix 3 – BEdR Project Options Legal Advice Paper (Exempt by virtue of paragraph 5 of Part 1 of Schedule 12A of the Local Government Act 1972, being information in respect of which a claim to legal professional privilege could be maintained in legal proceedings).</li><li>• Appendix 4 – BEdR Project Options Risk Matrix (Exempt by virtue of paragraph 5 of Part 1 of Schedule 12A of the Local Government Act 1972, being information in respect of which a claim to legal professional privilege could be maintained in legal proceedings).</li></ul>

Wards Affected:	All
Function of:	Executive
Key Decision	Yes
Reason for urgency/ exemption from call-in (if appropriate)	N/A

## CORPORATE IMPLICATIONS

### Council Priorities:

CBC is a Waste Disposal Authority (WDA) under Sections 51 and 55 of the Environmental Protection Act 1990 and is under a duty to dispose of controlled waste collected within its administrative area. The Authority must therefore make adequate provision for the disposal of municipal waste arisings produced in Central Bedfordshire.

### Financial:

1. The BEaR Project was designed to realise long-term savings compared to the projected future costs of managing our waste using current methods. At the initiation of the Project, an Affordability Position was set and agreed by the Executive that would represent the upper cost limit for the Project (see Appendix 1). This represented the modelled cost of delivering a Reference Project that was expected to save money over the term of the contract compared to continuing with existing practices (the do-minimum comparator). Both Bidders remaining in the process at the Final Tenders Stage have submitted bids that fall within the affordability threshold therefore demonstrating long term savings compared to the Reference Project costs.
2. However, when considering the short term affordability of the Project, the annual costs of the contract proposed by both Bidders were compared against the latest MTFP position. The comparison was based on the total costs of the services that would be delivered under the BEaR Project and the costs of the same services as projected in the MTFP.
3. The results of this comparison have shown that in the short to medium term the costs of the Bidders' solutions are in excess of those projected in the MTFP (Appendix 2), meaning that if the Authority were to award the contract to either bidder it would be subject to additional costs during the term of the current MTFP. It is these additional costs that mean that the project is unaffordable, especially when considered against the wider financial position of the Authority and the other pressures on Authority budgets in the coming years as described below.
4. Central Bedfordshire Council will have delivered nearly £70m of efficiencies by the end of this year in response to the current and continuing financial situation. However, a headline cut of 10% to the DCLG "Departmental Expenditure Limit" (DEL) was announced in June and it remains to be seen how this will be shared amongst Local Authorities. The impact is likely to lead to further budget cuts that will impact on core activities as the Council seeks to maintain services in the face of significantly reduced funding.
5. Over the term of the MTFP the Authority is subject to significant additional financial pressures in a number of areas other than Waste Services. There is also a significant loss of funding expected in 2016/17 when the Council Tax Freeze Grants are withdrawn and further financial pressures as a result of New Homes Bonus being top sliced and passported to SEMLEP.

- 6. In addition to the above short term affordability issue, recent Government cuts and the potential impact of the Government's continued austerity programme lead to supplementary concerns over the actual long term affordability of the Project. For all local authorities there is now significantly greater volatility in funding than was the case a few years ago. There is currently no indication of any easing of this approach and along with DCLG having moved to an annual financial settlement, this has created uncertainty about the level of change to future Council funding. The Authority therefore has concerns over its ability to fund the Project in future years when it does not know what its budget position will be.
- 7. By locking in to a long term contract in its present form, the Authority would be unable to reduce services or withdraw from the contract completely without suffering significant penalty which limits its flexibility and places a risk on the Authority for this type of long term contracting.
- 8. The detail of the Council's affordability position is set out in Appendices 1 and 2 to this Report and should be considered by the Executive as part of this decision-making process.

**Legal:**

- 9. In delivering the procurement process to date, the Authority has acted in accordance with EU Procurement Directives and the Public Contracts Regulations 2006, undertaking an open, competitive procurement process utilising the Competitive Dialogue procedure.
- 10. As set out in this Report, the Council considers that the Project is not deliverable within an acceptable affordability level for a number of reasons. In light of this, a number of options as to what the Council could do to bring the current bids within a revised affordability threshold have been considered leading to the recommendation set out in this report.
- 11. Detailed procurement advice has been provided by the Council's external legal advisers on the options discussed within this report and is included within appendices 3 and 4 to this report. It should be noted that a procuring Authority has the right to abandon a procurement at any stage, that is to no longer proceed to contract award, provided the decision is taken in accordance with the EU Treaty principles of equal treatment, transparency and proportionality. The term "abandon" is a legal one taken from the Public Contracts Regulations 2006 and is used in this report for certainty. It should be clarified, however, that much of the work undertaken by the Authority in the development of the BEaR Project will not be abortive and will be used to develop alternative solutions going forward.
- 12. The full legal basis for proposing the recommendation included within this report is set out in the accompanying appendices. Should any Bidder (current or previously deselected) elect to challenge the Authority's proposed decision, then the Authority will obtain additional legal advice and react accordingly.

**Risk Management:**

13. The Authority has taken advice from its expert Legal Advisers and has worked to mitigate the risk of challenge to the process as far as possible. A risk assessment of the options considered within this report has been included in Appendix 4.
14. It must be understood by the Executive that all of the options set out have an element of risk associated with them to varying degrees. The risks that have been considered are not limited to the procurement risks that result from each option and include a consideration of the commercial and financial risks that the Authority could be subject to. Option 1 is demonstrated to carry the least risk, however as set out in this report, awarding the contract on the basis of the current solutions is not an affordable option for the Authority making Option 1 unacceptable. The option to abandon the procurement (Option 4) has therefore been assessed as being the best option and is therefore recommended for approval in this report.

**Staffing (including Trades Unions):**

15. The BEaR Project Team, established to procure the BEaR Project, was due to be in place until the delivery of operational solutions on the ground at which point management of the contracts would pass to the Waste team. During this period a gradual withdrawal of staff resources was planned.
16. If, as recommended, Executive approve the abandonment of the procurement, resources will be withdrawn more rapidly than previously planned from the BEaR Project Team.
17. The staffing implications of any subsequent alternative solutions developed by the Authority will only be known once these have been developed. Where prudent, we will seek to retain relevant skills and knowledge gained as part of the procurement process.

**Equalities/Human Rights:**

18. Central Bedfordshire Council has a statutory duty to promote equality of opportunity, eliminate unlawful discrimination, harassment and victimisation and foster good relations in respect of nine protected characteristics; age disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
19. The procurement process has been undertaken to date with full consideration of the requirements of equality legislation, any alternative option pursued by the Council will need to ensure compliance with the Council's obligations deriving from the legislation.

**Public Health:**

20. Not applicable.

**Community Safety:**

21. Not applicable.

**Sustainability:**

22. Landfilling waste leads to the release of substantial amounts of methane, a potent greenhouse gas with over twenty times the global warming potential of carbon dioxide. The solutions delivered through the Project were seeking to limit the amount of waste going to landfill, thereby reducing the impact of waste disposal on the environment.
23. Any alternative option sought by the Authority will be required to meet similar targets for achieving maximum diversion from landfill and also increasing recycling and composting rates where possible.

**Procurement:**

24. The Council's Procurement Team have been involved in the process, acting as internal auditors at each of the evaluation and submission stages. A full audit trail is in place covering the entire exercise which will be kept as a record of the process for the required period.
25. The Project's external Legal Advisers (Bevan Brittan) have provided advice when required throughout the process to ensure that the Authority is acting in accordance with procurement law.
26. If the decision is taken to abandon the procurement as recommended, the Authority will notify all relevant parties promptly setting out its reasons for doing so in order to ensure compliance with the Public Contracts Regulations 2006.
27. The Authority is not obliged to award the contract in any event and has made Bidders aware throughout the process that any costs incurred in bidding for the contract are at their own risk.

**Overview and Scrutiny:**

28. Not applicable.

**RECOMMENDATIONS:****The Executive is asked to:**

1. agree to abandon the procurement (Option 4) for the reasons set out within this report, having given due regard to the options available to the Authority described in the report;
2. approve the closure of the BEaR Project; and
3. instruct the Director of Community Services, in consultation with the Executive Member for Sustainable Communities – Services, to develop alternative options for delivering the Council's duties in respect of the disposal of controlled waste and to submit a Business Case to a future meeting of the Executive.

<b>Reason for Recommendations:</b>	<ul style="list-style-type: none"> <li>• <i>Final tenders received from the two Bidders remaining in the process are not affordable when taken in the context of the significant financial pressures on the Authority in the coming years.</i></li> <li>• <i>Option 1 is the lowest risk option, however awarding the contract to either Bidder is not affordable based on current costs.</i></li> <li>• <i>Options 2 and 3 that seek to address the affordability issue are considered to be high risk options that would put the Authority at high risk of being unable to comply with its legal obligations.</i></li> <li>• <i>Option 4 is the lowest risk option that provides the opportunity for the Authority to deliver an affordable solution.</i></li> <li>• <i>Officers can begin developing alternative options to deliver the Authority's future waste management security.</i></li> </ul>
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## **Executive Summary**

29. Following Executive approval to proceed with the BEaR Project procurement exercise in April 2010, the BEaR Project Team has been running a Competitive Dialogue procurement process to identify the most economically advantageous tender. This process resulted in the submission of Final Tenders by the two remaining Bidders in July this year. The evaluation process has not yet been finalised. However, from the financial evaluation undertaken to date it is clear that the bids are unaffordable.
30. In the short to medium term, the costs of the Bidders' solutions are in excess of those projected in the MTFP, meaning that if the Authority were to award the contract to either bidder it would be subject to additional costs during the term of the current MTFP. It is these additional costs that mean that the project is unaffordable when considered against the wider financial position of the Authority identified in the latest budget review process.
31. In addition to the short term affordability issue, the continuing reduction in government funding being received by the Authority leads to uncertainty over the long term affordability of the Project. Therefore there is significant risk in entering into a long term commitment to provide services that it may not be able to fund in future years.
32. An options appraisal has been undertaken considering the balance of procurement and commercial risk against the delivery of the best solution for the Authority. This has determined that negotiating with the current bidders to bring the solutions within a new affordability threshold could place the Authority in breach of procurement law and at risk of challenge. The Authority therefore proposes that the current procurement is abandoned and an alternative solution is developed as soon as possible.

## **PURPOSE OF REPORT**

33. This report asks the Executive to consider the options available to it at this point in the procurement process and seeks approval to follow the recommended option of abandoning the procurement process in favour of pursuing an alternative solution.
34. In order to provide sufficient information to allow the Executive to take this decision this section of the report sets out the following:
  - (i) the rationale for initiating the BEaR Project, including its core objectives and deliverables;
  - (ii) the history of the Project, including an overview of Council decisions to date and the process which has been followed to deliver the procurement element of the Project;
  - (iii) the affordability issues that have led to the recommendation within this report; and
  - (iv) the options available to the Authority going forward and the risks and benefits of each.

## **BACKGROUND INFORMATION**

### **Project Objectives**

35. The BEaR Project is a procurement project set up to deliver a range of long term waste services for CBC. Its primary aim was to divert waste from landfill and in light of increasing taxation on landfill, limit the future costs of waste services to the Authority. The following services were planned to be delivered under the BEaR Contract:
  - Residual Waste Treatment & Disposal Service (25 year term);
  - Organic Waste Treatment & Disposal Service (15 year term);
  - Household Waste Recycling Centre (HWRC) Redevelopment & Operation (15 year term); and
  - The Construction of one Salt Barn.
36. The key objectives of the Project were to:
  - i) avoid Landfill Allowance Trading Scheme (LATS) penalties and reduce the increasing impact of landfill taxes on revenue budgets;
  - ii) achieve long lasting environmental benefits;
  - iii) be a valued part of CBC's utility infrastructure;
  - iv) minimise the carbon impact of waste in CBC;
  - v) go to the market with a "Technology Neutral" stance, ensuring full and open competition by embracing all technology proposals in the procurement process; and
  - vi) facilitate the delivery of the councils evolving waste strategy.

37. It should be noted that since the initiation of the procurement, the LATS has been abolished and therefore fines for landfilling waste in excess of targets are not currently proposed to be levied by the Government. However, at £72 per tonne currently, increasing to £80 per tonne in 2014/15, Landfill Tax alone remains a sufficient financial driver to divert waste from landfill.
38. Waste growth predicted for the area due to significant population/housing growth alongside a general lack of treatment provision in the area were other key drivers for initiating the Project in order to deliver long term certainty of treatment and disposal capacity.

### **Project History**

39. Following the withdrawal of Bedford and Luton Borough Council from the Project, in April 2010 Central Bedfordshire Executive took the decision to deliver the BEaR Project alone. In September 2010, the scope of the Project was expanded to include those elements set out above in paragraph 35 in addition to a Residual Treatment Solution.
40. In 2010, ten Bidders submitted Pre-Qualification Questionnaires to the Project Team. Following the evaluation of these submissions eight bidding organisations consisting of individual organisations and consortia were selected to proceed to the Outline Solutions Stage which took place between November 2010 and June 2011.
41. Following the completion of the Outline Solutions Stage, four Bidders were then invited to proceed to the Detailed Solutions Stage of the procurement process which took place between July 2011 and March 2012.
42. From March 2012, following the evaluation of the detailed solutions and de-selection of a further two bidders, the Final Tenders Stage has taken place. This stage culminated in the submission of Final Tenders on the 12th and 19th July 2013 (two stage submission).
43. Having now received Final Tenders the procurement has reached a critical point and the Project Team has been working with its internal and external advisers to evaluate the submissions.

### **Issues**

44. From the financial evaluation of Final Tenders that has taken place to date, it is clear that the bids submitted are unaffordable for the reasons set out below. These issues have led to the Project Board undertaking an options appraisal to consider what options are available to the Authority to manage these issues and deliver a satisfactory resolution.

#### **Short Term Affordability:**

45. When considering the short term affordability of the Project, the annual costs of the contract proposed by both Bidders within their Final Tenders (received by the Authority in July 2013) were compared against the latest MTFP position (as described in Appendix 1). The comparison was based on the total costs of the services that would be delivered under the BEaR Project and the costs of the same services as projected in the MTFP.

46. The results of this comparison have shown (Appendix 2) that in the short to medium term, on an annual basis, the costs of the Bidders' solutions are in excess of those projected in the MTFP, meaning that if the Authority were to award the contract to either bidder it would be subject to additional costs during the term of the current MTFP.
47. When coupled with the significant pressures recently identified in other service areas, it is these additional costs that mean that the project is unaffordable in the short term as Council budgets cannot cover the additional costs identified.

**Long Term Affordability:**

48. The long term affordability of the Project demonstrates savings against the Reference Project costs determined at the initiation of the Project and approved by the Executive in order to set the affordability threshold. However recent Government cuts and the potential impact of the Government's continued austerity programme lead to supplementary concerns over the actual long term affordability of the Project. The Authority therefore has concerns over its ability to fund the Project in future years when it does not know what its budget position will be.
49. Due to the nature of the contract, the BEaR Project requires a long term contractual commitment with significant costs being incurred by the Authority if it was to default on its commitment in future years. By locking in to a long term contract in its present form, the Authority would be unable to reduce services or withdraw from the contract completely without suffering significant penalty which limits its flexibility and places a risk on the Authority for this type of long term contracting.

**Value for money:**

50. The Authority considers that it is able to deliver an alternative solution that will achieve better value for money in the short term, aligning more closely with the MTFP. If the Executive approves the recommendation to abandon the procurement, an alternative solution will be worked on for approval at a future Executive meeting. We are hopeful that we can find an alternative solution that is affordable over the short term. Those organisations that have participated in the BEaR Project procurement will be welcome to bid for any alternative opportunity on offer by the Authority in the future.

**Options:**

51. An options appraisal has been undertaken considering the balance of procurement and commercial risk against the delivery of the best solution for the Authority (Appendix 4). The options appraisal should be read in conjunction with the Legal Advice contained within Appendix 3.
52. The options considered within the appraisal are as follows:
  1. Finalise the Evaluation and award the contract to the Most Economically Advantageous Tender (MEAT).

2. Finalise the Evaluation and award preferred Bidder Status to the MEAT then seek to negotiate with the Preferred Bidder to deliver an acceptable affordable solution.
3. Roll back the procurement to an earlier stage in order to re-open dialogue with the final two bidders (or all previously deselected bidders).
4. Abandon the procurement and initiate a process to deliver an alternative solution.

**Option 1 – Finalise evaluation and award the contract to the MEAT:**

53. This option would involve returning to Executive with a recommendation to award Preferred Bidder status to the MEAT, as identified following a short period of time in which the evaluation process would be finalised. The overall delay to the delivery of the procurement phase would be minimised through this approach and it is expected that there would be minimal delay to the delivery of solutions on the ground. The existing interim contracts that are in place would cover any delay experienced ensuring no service delivery impact.
54. An assessment of the risks and issues with this option are included in Appendices 3 and 4 to this report.

**Option 2 – Finalise evaluation and award Preferred Bidder Status to the MEAT then negotiate to achieve an affordable solution:**

55. This option is the same as Option 1 but with an additional stage prior to contract signature within which the Authority would negotiate with the Preferred Bidder. This would lead to some delay to the process compared to Option 1 but would still limit the delay to the overall project, simply adding the time required to negotiate the contract on to the timescales set out in Option 1.
56. An assessment of the risks and issues with this option are included in Appendices 3 and 4 to this report.

**Option 3 – Roll back the procurement to an earlier stage and address the issues with final two bidders:**

57. Rolling back the procurement would involve informing both of the remaining bidders of the issues that the Authority is trying to address and working with both bidders in order to find a resolution via an amended bid. Further dialogue would then be required with the Bidders, the duration of which would be dependent upon the extent of the changes required. Bidders would then be required to re-submit their Final Tenders on the basis of the revised requirements.
58. It is expected that this process would add 4 – 6 months to the timescales currently proposed for the procurement phase of the Project with a resultant similar delay in the overall delivery programme. Although the existing interim contracts provide sufficient flexibility to cover this delay, any further delay is likely to require additional short term arrangements to ensure service continuity.
59. An assessment of the risks and issues with this option are included in Appendices 3 and 4 to this report.

#### **Option 4 – Abandon the procurement:**

60. Abandoning the procurement process would involve notifying the remaining Bidders, those Bidders involved earlier in the process and other stakeholders of the Authority's decision and the reasons for it. The Authority would then close down the Project and consider the development of an alternative solution in order to deliver the Authority's requirements. As part of this process, a detailed review of the Authority's requirements would take place and alternative options would be presented to the Executive for consideration at a later date.
61. The ability to deliver an alternative solution ahead of the expiry of the current interim arrangements is entirely dependent on the alternative solution selected. Although the existing interim contracts provide some flexibility for delay, additional short term arrangements may be required to ensure service continuity. The Council will need to obtain any additional legal advice on procurement risk in this regard.
62. An assessment of the risks and issues with this option are included in Appendices 3 and 4 to this report.

#### **CONCLUSION**

63. As shown in Appendices 3 and 4, all of the options available to the Authority at this point involve an element of risk and have commercial implications for the Authority. Option 1 is demonstrated to carry the least risk, however as set out in this report, awarding the contract on the basis of the current solutions is not an affordable option for the Authority making Option 1 unacceptable. The option to abandon the procurement (Option 4) has been assessed as being the best option which enables the Authority to seek to deliver a solution at a lower cost while acting in accordance with its legal obligations and is therefore recommended for approval in this report.
64. The objectives and drivers for the BEaR Project remain and should the Executive approve the recommendation to abandon the process, each of these objectives and drivers will need to be reviewed and addressed via an alternative process. Delegated Authority is therefore sought to review the Authority's requirements and consider the alternative options available to the Authority to deliver its requirements. A Business Case will be developed and presented to a future Executive for authorisation to proceed.

#### **Appendices:**

Appendix 1 – BEaR Project Affordability Review (Public)

Appendix 2 – BEaR Project Affordability Figures (Exempt by virtue of paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972, being information relating to the financial or business affairs of any particular person (including the authority holding that information)).

Appendix 3 – BEaR Project Options Legal Advice Paper (Exempt by virtue of paragraph 5 of Part 1 of Schedule 12A of the Local Government Act 1972, being information in respect of which a claim to legal professional privilege could be maintained in legal proceedings).

Appendix 4 – BEaR Project Options Risk Matrix (Exempt by virtue of paragraph 5 of Part 1 of Schedule 12A of the Local Government Act 1972, being information in respect of which a claim to legal professional privilege could be maintained in legal proceedings).

**Background Papers:** (open to public inspection)

None.