THE BOROUGHS, CITY AND COUNTY COUNCILS OF CAERPHILLY, CARDIFF, MONMOUTHSHIRE, NEWPORT AND THE VALE OF GLAMORGAN

PROSIECT GWYRDD JOINT COMMITTEE **DATE: 07/02/13**

PREFERRED BIDDER, FBC & JWA2 - APPROVED REPORT

REPORT OF: PROJECT DIRECTOR **AGENDA ITEM: 05**

Appendices A, B, C and E and background papers to this report contain information which are exempt from publication under paragraphs 14 (information relating to financial or business affairs) and 21 (public interest test) and/or 16 (legally privileged information) of Schedule 12 A part 4 of the Local Government Act 1972.

It is viewed in the public interest to treat the documents referred to above as exempt from publication. Put simply, the rationale for this is that in order for the Authorities to be able to effectively evaluate tenders received it requires bidders to provide details of the commercial make up of their bid which they may not do if they thought such information would be made publicly available. The adverse impact on contractual negotiations due to such disclosure would result in a less effective use of public money. Disclosure of legally privileged information could materially prejudice the authority's ability to defend its legal interests. Therefore on balance, it is submitted that the public interest in maintaining exemption outweighs the public interest in disclosure. That said redacted versions of key documents will be made available.

Purpose of Report & Key Aims

1. The purpose of the report is to describe the outcome of the Prosiect Gwyrdd procurement process and has three key aims.

2. Key aims:
   - Firstly, to report that after a highly competitive and robustly dialogued and negotiated procurement process it is recommended that Viridor should be appointed Preferred Bidder for Prosiect Gwyrdd with the contract expected to be awarded in July.

- Secondly, to demonstrate that there is a very strong business case (as detailed in the Final Business Case (FBC)) for the Partnership to proceed to contract with Viridor.
- Thirdly, to outline the structure and content of the second Joint Working Agreement (JWA2) and highlight the benefits and obligations that the JWA2 affords to each of the Partner Authorities.

Summary

3. Prosiect Gwyrdd (PG) is a residual waste treatment procurement project, being undertaken in accordance with the EU Competitive Dialogue Procedure. In October 2012 Prosiect Gwyrdd received Final Tenders from Veolia and Viridor for energy from waste incineration facilities in Newport and Cardiff respectively. After a detailed evaluation process it can be reported that Viridor's submission scored very highly across the technical, legal and financial criteria and was the most economically advantageous tender overall. This is the terminology used under procurement processes of this type.

4. The solution is a 350,000 tonnes per annum incinerator at Trident Park, Cardiff and is currently under construction. It is a heat enabled energy recovery facility producing green electricity; with plans to supply heat to local buildings which will further improve the facility's environmental performance. The facility is 'merchant' – that is, it is larger than Prosiect Gwyrdd's requirements, will have waste suppliers other than Prosiect Gwyrdd and ownership will not revert to the Partnership on contract expiry.

5. At the Detailed Solution stage in December 2011 the evaluation scores of the two remaining bids were very close – both representing acceptable and competitive proposals. From January 2012 to Final Tenders in October 2012, robust negotiation resulted in Viridor's tendered payments over the life of contract reducing by an estimated £90m; more than a 17% reduction in price. The contract therefore represents very good value for money.

6. The Net Present Value (NPV) cost of the new service of £222M is well within the Upper Affordability Threshold (UAT) NPV of £443M as agreed by all Partners at the outset of the Procurement in 2009. The table and graph below (see Table A & Figure A) compares the projected annual payments from 2013/14 until the end of the contract in 2040/41 for continuing to Landfill residual waste compared with the cost of Viridor's solution. This illustrates the significant savings to the Partner Authorities throughout the contract term of Viridor's solution. At the start of the new service (in April 2016) the price will be a lot lower than the price each Partner would be paying if they

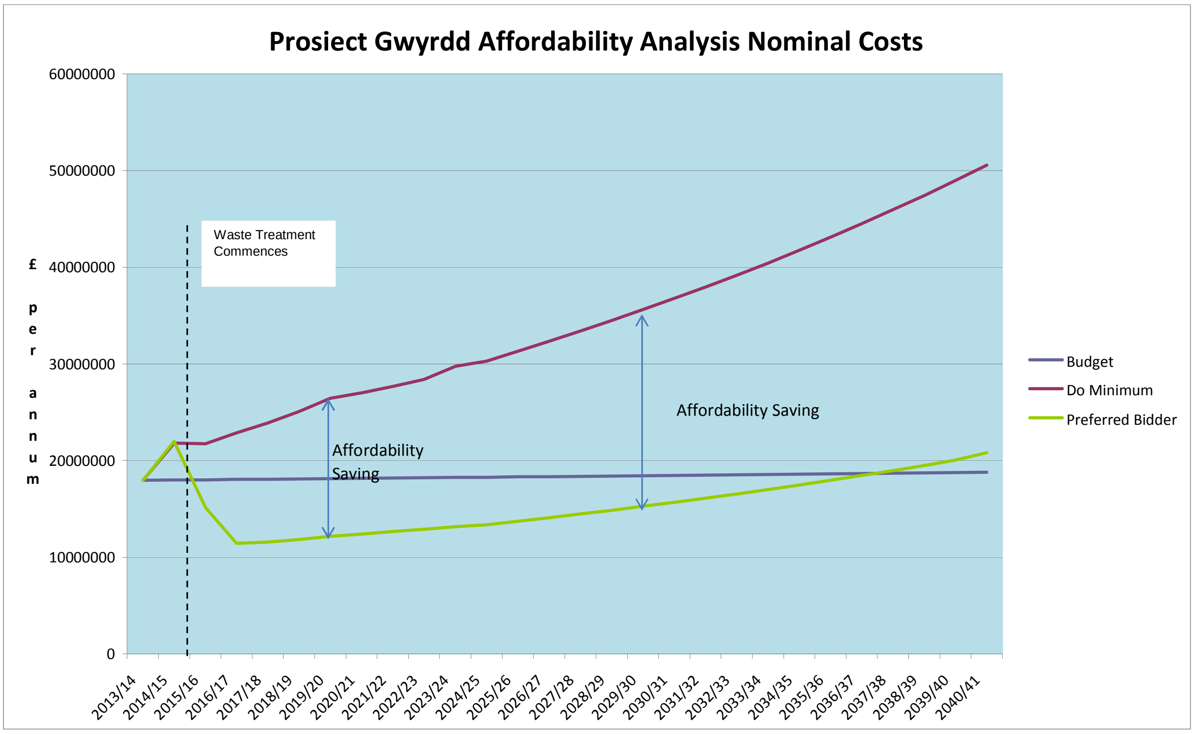
continued with their existing (landfill) disposal service. The WG contribution will reduce the price per tonne by approximately a further 25%. At Contract Commencement, the estimated first year saving to the Partnership as a whole (including the benefit of the WG funding) as compared to the cost of continuing with the current landfill disposal arrangements for one year is greater than £11 million. This is equivalent to the Partnership's combined residual waste disposal budget reducing by a half. Figure A also demonstrates that the Partners aggregated current residual waste disposal budgets are sufficient to fund the costs of Viridor's solution over the contract term.

Table A – PG Affordability Analysis Nominal Costs

	Preferred Bidder Whole System Costs (PB)	**Landfill (Do Min)**	**Budget**	**Affordability Savings (PB vs Do Min)**
	£m	**£m**	**£m**	**£m**
Caerphilly	86	183	95	-97
Cardiff	157	400	186	-243
Monmouthshire	60	107	87	-47
Newport	68	128	60	-60
Vale of Glamorgan	69	131	86	-62
Prosiect Gwyrdd	**440**	**949**	**514**	**-509**

Footnote: Whole Systems Costs include costs directly borne by the Partners such as transportation and contract management as well as payments to Viridor, plus the funding contribution from WG.

Figure A



7. Furthermore, as only a proportion of the gate fee will be subject to indexation, the cost of the contract will rise, year-on-year at a much lower rate than inflation over the 25 year period. This makes the contract highly affordable for the Partner Authorities. The solution will produce renewable energy. It will be a high efficiency power facility, designated as ‘recovery’ rather than ‘disposal’ under EU definitions. Viridor is also exploring opportunities to export heat (as well as electricity). This improves further the facility’s efficiency, its overall environmental performance and reduces its carbon footprint as compared to landfill.

8. Viridor has guaranteed to recycle 100% of the incinerator bottom ash (IBA) using a local recycling business within 5 miles of Trident Park. It has also made a commitment to recycling the smaller volume of fly ash or Air Pollution Control Residues (APCR), as soon as practicable recycling processes have been developed for this material.

9. Incineration is one of the most highly regulated industries in Europe. Strict emission standards are enforced by the Environment Agency. The Health Protection Agency (HPA) has reported that modern well managed

incinerators only make a very small contribution to local concentrations of air pollutants. They also state that any impacts on health (if they exist) are likely to be very small and not detectable.

10. The Joint Scrutiny Panel, set up to scrutinise the work of Prosiect Gwyrdd, undertook a very comprehensive and wide-ranging 'Call-for-Evidence' on the health impact of incinerators. The panel which reported in July 2012 did not find any validated scientific evidence that modern well run incinerators posed a significant risk to health.

11. In its submission to the recent WG Petitions Committee, the Chartered Institute of Environmental Health said that: "*incineration of waste when controlled by the current statutory framework does not pose a risk to human health or to the environment".*

12. Viridor's facility will be a modern, clean and efficient incinerator. It will be a significant environmental improvement on the Partners' current landfill disposal arrangements. The proposal is in line with Welsh Government (WG) Policy and supports the Partners' waste management strategies – including their drive to continually increase recycling to at least 70%.

13. This is a highly capital intensive and complex facility. During negotiations, the Project Team was firm in not taking on any inappropriate risk. Furthermore, and given the 'merchant' nature of the facility, key risks were transferred to the contractor to protect the interests of the Partners. As planning permission and environmental permits have been secured and construction has already commenced; a number of the most significant deliverability risks have been removed or reduced.

14. Prosiect Gwyrdd has ensured that performance controls and flexibility are embedded in the contract. The Partners can be assured that Viridor will be obliged to deliver the high quality service it has promised. The contract has effective quality control measures and financial corrective mechanisms. Furthermore, if circumstances change over the 25 year period, the contract is flexible enough to accommodate legislative, physical or operational changes to the facility.

15. WG has actively supported the Procurement from the outset. Having approved the Outline Business Case (OBC) by WG in 2009, it has provided approximately £1.173 million contribution to the cost of the procurement. Furthermore, it has provided an expert project Transactor to advise

throughout the process and has undertaken a number of project health checks. WG will commit to a funding contribution of approximately 25% of Viridor's price for the 25 year contract period.

16. In summary, this is an affordable, environmentally and financially sustainable solution that represents excellent value for money with a relatively low deliverability risk.

Structure of the Report

17. The body of this report is divided into three main sections, Part A, Part B and Part C:

- Part A describes the outcome of the evaluation of the Final Tenders that were submitted in October 2012. The report describes the detailed evaluation (summarised at Appendix A and exempt due to commercially sensitive information).
- Part B outlines the compelling business case for awarding the contract to Viridor. This part draws heavily on the Project's FBC which is used to justify the contract award and is the document upon which WG will base their funding. It includes an analysis of the Partnership's improved affordability of proceeding with Viridor as compared with a 'business as usual' scenario and a 'maintaining the current budget' scenario. The FBC is attached at Appendix B.
- Part C describes the second Joint Working Agreement (JWA2). This document formally regulates the Partnership during the contract period. The JWA2 is attached at Appendix D.

Recommendations

18. Finally the Report has the following Recommendations that are repeated after each relevant section.

18.1 Project Board having considered the report on Wednesday 30th January 2013 and being satisfied with the procurement process, recommends that Joint Committee considers the matters below and, if satisfied, recommends to each Authority's Council the following:

(i) that Viridor is appointed as the Preferred Bidder;

(ii) that authority is delegated to the Senior Responsible Officer of the Project Board (in consultation with the Project Board) for finalisation of the procurement to successful contractual close (including any refinement of documentation (as referred to in the report));

(iii) that the FBC is approved, including the improved affordability position in terms of both i) the large reduction compared to the original OBC affordability threshold and ii) the significant costs saving relative to continuing to landfill residual waste;

(iv) that, subject to Cardiff Council agreeing, Cardiff Council acts as Host Authority (as defined in the Joint Working Agreement 2 (JWA2));

(v) that the JWA2 is approved (on the understanding that it is subject to any refinement and finalisation as per recommendation (vi);

(vi) that authority is delegated to each Council's Senior Responsible Officer (SRO) on the Project Board to finalise and conclude the JWA2 agreement (including any refinements pursuant to recommendation (ii) on behalf of their respective Authorities;

(vii) subject to WG approving the FBC and confirming subsequent funding, conclusion of the JWA2 and Cardiff Council agreeing to act as Host Authority, that a relevant authorised officer of Cardiff Council on behalf of the Partnership signs the Project Agreement with Viridor;

(viii) that, subject to i - vii above, that following consultation with the s151 Officers from each Partner Authority the s151 Officer from Cardiff Council signs the certificate pursuant to the Local Government (Contracts) Act 1997 on behalf of the other Partner Authorities.

18.2 that the Joint Committee, subject to recommendations i, ii and iii above, authorises submission of the FBC to WG for formal approval on the understanding that the FBC is subject to approval by each Partner Authority.

Background

19. The procurement is being conducted in accordance with the Competitive Dialogue Procedure under the EU Public Sector Procurement Directive (2004/18/EC), implemented into UK law via the Public Contracts Regulations SI 2006/5 with effect from 31 January 2006.

20. Project Board and Joint Committee had previously considered and approved all Procurement documentation (including the evaluation methodology) and short-listing of Participants during the Competitive Dialogue Procedure.

Procurement Summary

21. The following section briefly describes the procurement process; from the approval of the Outline Business Case (OBC) in 2009 to the approval of the Preferred Bidder in 2013.

Outline Business Case

22. This included detailed modelling based on a 'reference technology' to ensure that a single option had the potential to provide an affordable and deliverable solution for the Partners' waste strategies.

All five Partner Authorities approved the OBC in summer 2009

23. Extensive consultation work with a range of stakeholders was undertaken specifically focusing on the bid evaluation and award criteria for each stage of the Procurement. This included:

- Stakeholder Event (September 2009) for Local Councillors, Assembly Members, Environmental Interest Groups and Statutory Bodies
- Questionnaire to seek views on the important technical, environmental, health and social aspects of any waste management solution that should be given weight in the evaluation. Recipients included:
    - Council Members, MPs and AMs surrounding potential known sites:
    - a randomised postal survey to 15,000 residents across the five Authority areas.
- Scrutiny Review on Approach to Evaluation Workshop.

The formal start of the Procurement via a notice issued in the Official Journal of the European Union (OJEU): 23 November 2009

24. The notice stated: 'The partnership does not intend to specify a particular technology solution and will therefore consider any technology solution that meets the Partnership's requirements.'

Supplier Industry Day: 7 December 2009

25. Potential bidders were invited to an event to hear all about the project. The aim was to maximise market interest in the procurement, to ensure good

competition, which would lead to the best value for money outcome. As a result of the industry day and earlier market testing exercises:

- forty-seven (47) potential providers expressed an interest;
- thirty-six (36) organisations downloaded the PQQ.

Pre Qualification Questionnaire (PQQ): 22 January 2010

26. The objective of the pre-qualification stage is to ensure that only those applicants with sufficient financial resources and technical ability and experience will be invited to bid.

    - Fourteen (14) Applicants submitted completed questionnaires.

Invitation to Submit Outline Solutions (ISOS): 25 May 2010

27. The Participants invited to submit ‘outline solutions’ were:

    - Covanta Energy Ltd;
    - MVV Umwelt Gmbh;
    - Shanks Group PLC/Wheelabrator;
    - SITA UK Ltd;
    - Urbasser Ltd;
    - Veolia ES Aurora Ltd;
    - Viridor Waste Management Ltd;
    - Waste Recycling Group Ltd.

28. The Outline Solution stage focused on technical assessment, service delivery and the deliverability and integrity of proposed solutions.

Invitation to Submit Detailed Solutions (ISDS): 7 December 2010

29. Following an in depth evaluation of the outline solutions in accordance with the published methodology, the short list was announced and the following Participants were invited to submit ‘detailed solutions’.

    - Covanta Energy Ltd - Brig-y-Cwm in Merthyr Tydfil;
    - Waste Recycling Group Ltd - Dow Corning in Barry;
    - Veolia ES Aurora Ltd – Llanwern Steelworks in Newport;
    - Viridor Waste Management Ltd – Trident Park in Cardiff.

30. The intention of this stage was to ensure that the Detailed Solutions being offered by the Participants were sufficiently advanced to enable the selection of the two strongest bids to proceed to the Final Solution stage (ISFT Stage). A thorough process of Competitive Dialogue was used so that all technical, financial and contractual matters were either resolved or significantly progressed to the Partnership's satisfaction in accordance with the project's requirements.

Invitation to Submit Final Tenders (ISFT): 20 December 2011

31. Following an in depth evaluation of the detailed solutions, the shortlist was announced and the following companies were invited to submit final tenders.

- Veolia ES Aurora Ltd – Llanwern Steelworks in Newport;
- Viridor Waste Management Ltd – Trident Park in Cardiff.

32. The aim of this stage was to finalise all elements of the proposed solutions and to agree any outstanding issues. It is important to note that the Partnership was inviting Participants to submit Final Tenders based upon their proposal at the detailed stage of the procurement process.

33. Final Tenders were submitted from the two bidders in October 2012 and underwent compliance checks and rigorous evaluation.

34. The aim is for the Preferred Bidder to be appointed in March 2013 following meetings of the Project Board, the Joint Committee, the Joint Scrutiny Panel and each Partner Council.

35. The Project Team will then work with the Preferred Bidder to finalise the fine-tuning of minor contractual details and it is expected the contract will be signed (financial close) in July 2013.

PART A: REPORT ON THE FINAL TENDER EVALUATION

Introduction

36. The evaluation process is designed to select the most economically advantageous tender that meets the Partnership's requirements. For the ISFT stage the Partnership had set and published the detailed Level 1, Level 2, Level 3 and Level 4 Criteria for the Technical, Financial and Legal sections.

37. The ISFT Stage ran from January to October 2012, and as expected the Project received two Final Tender submissions. These sizable and comprehensive documents underwent compliance checks before being distributed to the Advisors for detailed Technical, Financial and Legal (including Insurance) evaluation. The Final Tender submissions (which are background papers) contains information which is exempt from publication under paragraphs 14 (information relating to financial or business affairs) and 21 (public interest test) and/or 16 (legally privileged information) of Schedule 12 A part 4 of the Local Government Act 1972.

Objective of ISFT Stage

38. The objective of the ISFT Stage was to engage in detailed dialogue with the two remaining bidders, to finalise all outstanding issues and use the final opportunity to negotiate the best possible outcome for the Partnership.

Closing Dialogue

39. Under the procurement rules, before the Partnership can call for Final Tenders, it has to formally Close Dialogue. Once dialogue has closed further negotiation is not permitted. It is therefore critical that there are no outstanding issues and that all commercial positions have been resolved. The logic of this requirement is that after receiving and evaluating the Final Tenders, and awarding Preferred Bidder; with only the one Participant remaining, there will be no further competitive tension. If important negotiations resumed at that stage, the Partnership would have lost its commercial leverage to achieve the best deal.

40. In line with best practice, WG undertook a commercial 'health check' on the Procurement. Dialogue could only be formally closed once the WG was satisfied that there were no unresolved issues. The Project Board received a letter from the WG in October 2012 stating that it was satisfied with the health check – this facilitated it formally closing dialogue and calling for the submission of Final Tenders.

41. The Project Team believe that the Final Tender stage was effectively and robustly negotiated. This resulted in good contractual positions being achieved and an excellent value for money tender being selected as demonstrated by the evaluation scores summarised below.

Evaluation Outcome

42. Under the procurement rules, the tender that best meets all of the procuring authority's requirements is defined as the 'most economic advantageous tender'.

43. Viridor's Tender scored very highly across the technical, legal and financial criteria and was the most economically advantageous tender overall. This report will summarise Viridor's evaluation score and show the development of the scores since the ISDS stage.

44. Analysis of both bids is contained in the evaluation reports. These are exempt background papers. A summary of the evaluation reports is available at Appendix A. Appendix A to this report contains information which is exempt from publication under paragraphs 14 (information relating to financial or business affairs) and 21 (public interest test) and 16 (legally privileged information) of Schedule 12 A part 4 of the Local Government Act 1972.

45. Table B below shows that Viridor's final tender submission scored 92.31%, demonstrating a very high quality proposal and an improvement of more than 12% on its ISDS score.

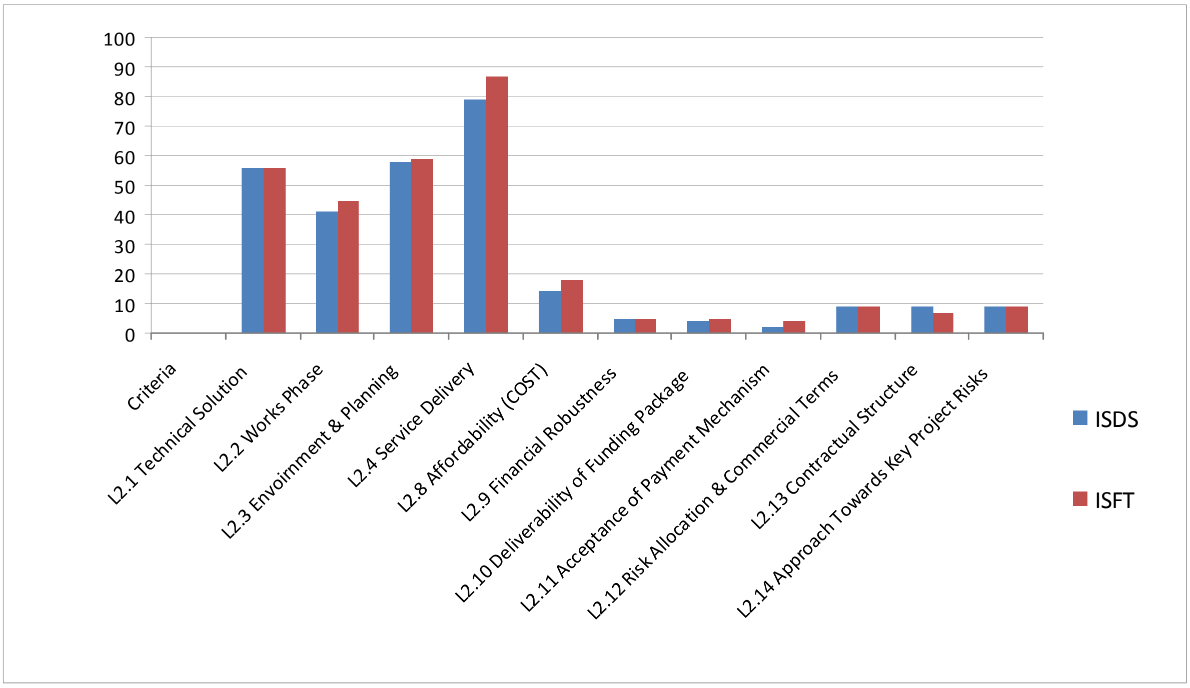
Scoring

Table B: Comparison of Viridor's ISDS & ISFT Evaluation Performance

Level 1 Criteria	ISDS Weightings	Viridor ISDS Summary	% of Criteria Weighting ISDS	ISFT Weightings	Viridor ISFT Summary	% of Criteria Weighting ISFT
L1.1 - Technical & Service Delivery	50%	41.87	84%	30%	26.65	89%
L1.2 - Deliverability & Integrity of Solution	5%	4.33	87%	0	0.00	N/A
L1.3 - Financial & Commercial	30%	20.52	68%	55%	52.61	96%
L1.4 - Legal & Contractual	15%	13.50	90%	15%	13.05	87%
Overall Total	**100%**	**80.22**		**100%**	**92.31**	

46. The graph below (Figure B) shows how Viridor's level 2 scores improved or stayed the same since ISDS. In only one criterion is a score lower at Final Tender than ISDS. This score moved from 'very good' to 'satisfactory' on the 'Contract Structure' criterion and is a result of Viridor's decision to commence construction in advance of the Partnership Contract Award Decision which is deemed as beneficial across other criteria.

Figure B



47. The robust negotiation at Final Tender stage resulted in a number of improved positions across a range of technical, financial and legal aspects. Notable among these were Viridor's move to guarantee:

- 100% recycling of bottom ash, and
- 100% diversion of biodegradable waste from landfill

48. A further significant improvement since ISDS, was with the tendered price which was reduced over the contract life by approximately 17%. This equates to an estimated £90m in reduced payments over 25 years. This makes Viridor's solution very good value for money and very affordable for the Partnership (see Part B on the Final Business Case).

49. In conclusion, Viridor's was the Most Economically Advantageous Tender (MEAT) and therefore it is recommended that Viridor should be appointed as the Preferred Bidder for the Prosiect Gwyrdd Contract.

Next Steps from Preferred Bidder to contract sign

50. If the Partnership approves the Preferred Bidder recommendation, it is expected that Viridor will become Preferred Bidder in March 2013. They will receive a letter outlining the basis on which the Preferred Bidder status is confirmed – this includes the agreed technical, legal and financial positions as set out in the Final Tender.

51. After a statutory 10 day 'stand still' period (EU procurement rules set out provisions to standstill periods and time limits within which challenges can be brought by an aggrieved bidder).

52. Once the standstill period is over, the Partnership will work with the Preferred Bidder to ensure that all the contractual documentation is fully complete and properly reflects all the relevant details agreed throughout the procurement. At this stage, under the procurement rules no 'dialogue' or further 'negotiation' is permitted. Any changes to documentation must be limited to 'fine tuning'.

53. Each set of advisors have outlined the outstanding areas that require resolution through the fine tuning process. It includes issues such as:

- Incorporation of clarification responses into drafting;
- Ensuring consistency across the technical, legal & financial aspects of the documentation;
- Finalising detailed drafting where principles have been clearly agreed;
- Ensuring that the process for amending the financial model is clearly audited and documented;
- Confirmation and documentation of minor operational and design uncertainties

54. It is proposed that the SRO (the lead officer for Cardiff, the recommended Host Authority) in consultation with the Project Board has the delegated authority to finalise the contract arrangements with Viridor.

Recommendation:

18.1 Project Board having considered the report on Wednesday 30th January 2013 and being satisfied with the procurement process, recommends that Joint Committee considers the matters below and, if satisfied, recommends to each Authority's Council the following:

(i) that Viridor is appointed as the Preferred Bidder;

(ii) that authority is delegated to the Senior Responsible Officer of the Project Board (in consultation with the Project Board) for finalisation of the procurement to successful contractual close (including any refinement of documentation (as referred to in the report));

(vii) subject to WG approving the FBC and confirming subsequent funding, conclusion of the JWA2 and Cardiff Council agreeing to act as Host Authority, that a relevant authorised officer of Cardiff Council on behalf of the Partnership signs the Project Agreement with Viridor;

(viii) that, subject to i - vii above, that following consultation with the s151 Officers from each Partner Authority the s151 Officer from Cardiff Council signs the certificate pursuant to the Local Government (Contracts) Act 1997 on behalf of the other Partner Authorities.

PART B: REPORT ON THE FINAL BUSINESS CASE (FBC)

Introduction to Part B

55. The FBC sets out the compelling case for awarding the contract to Viridor. The following section outlines the structure and content of the FBC with the document attached at Appendix B. Appendix B to this report contains in part information which is exempt from publication under paragraphs 14 (information relating to financial or business affairs) and 21 (public interest test) and 16 (legally privileged information) of Schedule 12 A part 4 of the Local Government Act 1972.

Purpose of the FBC

56. The purpose of the FBC is two-fold. Firstly it provides a tool for the Partnership (and its stakeholders) to analyse the outcome of the procurement process and answer a number of questions about the proposed solution, including:

- Does it address all of the Partnership's requirements?
- Does it represent good value for money?
- Is it affordable?
- Is it in line with national Waste Policy?
- Is it a good fit with the Partners' wider waste management strategies?
- Is it an environmentally sustainable solution?
- Is the risk-profile appropriate?
- Taking all the above into consideration, is it the right solution for the Partnership?

57. Secondly, it is a mandatory document which forms part of WG's revenue-support award process (which is worth approximately 25% of the contracted gate fees to the Partner Authorities over the 25 year contract). The WG uses the document to review issues such as those bulleted above, but also to ensure that the basis on which it allocated funding at the beginning of the procurement process (following the Outline Business Case (OBC)) has not changed.

Business Case Summary

58. The Business Case for Viridor's solution demonstrates that it is a highly affordable, environmentally and financially sustainable solution that represents very good value for money with a relatively low deliverability risk.

Structure of the FBC

59. As well as addressing the overarching business case for awarding the contract to Viridor; the FBC analyses the changes since the OBC was published in 2009. This is to establish whether there have been changes in circumstances, key assumptions or a change resulting from the solution offered by Viridor that may have fundamentally altered the basis on which the initial project was approved by the Partner Councils and provisional WG funding was awarded.

60. After a general background section, the FBC is structured into separate but inter-related business cases:

- The Strategic Case;
- The Economic Case;
- The Commercial Case;
- The Management Case;
- The Financial Case.

61. The following section briefly outlines each of these FBC sections in turn.

The Strategic Case

62. This section provides an outline of the Partners and the WG's strategic waste management objectives and any changes since the approval of the OBC. It also provides an analysis of how well Viridor's proposal fits with the Partner's waste strategies moving forward.

The Strategic Case considers key issues including:

- Waste Minimisation;
- Recycling Performance;
- Landfill Diversion;
- Energy Efficiency;

- Environmental Impact.

63. In summary, the Strategic Case found that Viridor's solution is a good fit with the Partners waste strategy objectives. Viridor's commitment to recycle 100% of its bottom ash and recycling its APCR as soon as practicable, will make a positive and significant contribution to the Partners achieving their 70% recycling targets.

64. Viridor's proposal also commits to zero biodegradable waste going to landfill – meeting the WG Landfill Allowance Scheme targets. Furthermore, apart from the relatively small quantities of air pollution control residue (APCR) (until this will be recycled) no other waste will be landfilled.

65. Viridor's facility is very energy efficient and as such is classed as 'recovery' rather than 'disposal' under the EU waste hierarchy definitions (R1). Viridor is also actively looking for customers to take heat directly from the facility. This will further improve the energy efficiency and therefore the carbon footprint of the facility.

66. The overall environmental impact of Viridor's proposal is a significant improvement on the current landfill-based disposal methods. Most notable is the reduced net carbon emission resulting in a much lower climate change impact from the Partners' waste activities.

The Economic Case

67. This section of the FBC is to demonstrate that Partnership has run a competitive procurement structured in accordance with the proposals in the OBC and in line with EU procurement rules. The importance of a good competition is that if the bidders are very keen to be awarded the contract, they will submit the best technical solution, on the best commercial terms for the lowest price.

68. The economic case also considers the flexibility built into the contract; testing its ability to adapt to various changes in circumstances over the 25 year contract duration. Indeed the negotiated contract is flexible and adaptable to changes such as: new legislation; changes to the waste profiles and variations that might be instigated by a Partner's change in Policy.

69. The Economic Case shows that the process was highly competitive, right up to the submission of the Final Tender. Viridor's proposal is better value and more affordable than the Reference Case that was modelled in the OBC. Financial analysis demonstrated that, under competitive pressure, Viridor reduced its Tendered price by more than 17% in the Call for Final Tender stage compared with its Detailed Solutions submission. Furthermore, benchmarking against approximately 20 other similar and recent waste projects, on a like-for-like basis demonstrated that Viridor's Prosiect Gwyrdd tender is one of lowest priced contracts of this type in the UK.

The Commercial Case

70. The Commercial Case considers how the key approach to project risk that was assumed in the OBC has changed for the Preferred Bid. Key to this type of project is ensuring the appropriate level of risk transfer from the Public to the Private Sector. The general assumption is that the Public Sector requires a degree of certainty and attempts to transfer risk to achieve this. However, if too much risk is transferred, the Contractor will price it, putting the cost up and therefore undermining Value for Money.

71. In Viridor's case, a number of the risks normally associated with Projects of this nature were significantly reduced. Some of the differences to a 'standard' risk profile include:

- Due to its 'merchant' nature, Viridor's facility will never transfer to the Partnership so there is no risk associated with hand-back;
- The facility is able to treat waste in excess of the partner's requirements and has an economic life which is longer than the contract. The Partnership has negotiated a 'pro-rata' principle so it will always only pay for its 'share';
- The facility already has planning permission and environmental permits. This negates the risk of future planning failure which would have significant cost and other impacts on the Partnership;
- Construction has commenced and the facility should be operational long before the planned service commencement for Prosiect Gwyrdd. This reduces the potential risk of construction delay.

72. All the 'derogations' to WG's standard contract needs sign-off by the WG before funding can be approved. The WG undertook a Commercial Health Check before submission of final tenders and the closing of dialogue. The aim was to check the agreed commercial positions and approve the proposed derogations. In a letter dated the 17 October 2012 following the Health

Check, the WG confirmed that it was content for the Partnership to close dialogue and proceed to the Call for Final Tenders (CFT) stage.

The Management Case

73. The management case reviews the Project Management and Governance of the procurement – ensuring that it has been in line with best practice and the arrangements outlined in the OBC. But more importantly, it looks forward to ensure that sufficient resources have been identified for managing the contract throughout the transition and operational phases.

74. In summary, the Project has been well managed throughout the procurement process with an appropriate governance structure, Member input and overview and scrutiny as set out in the Joint Working Agreement.

75. Indicative Budget has been allocated for the post-procurement phases and a Transition Plan is being developed. The Transition Plan which has been discussed at the Project Board is to manage the period from financial close, in the summer of 2013, to service commencement in April 2016. During this period, the construction phase requires ongoing monitoring and, most importantly, a contract management manual needs developing along with the setting up of the financial and reporting systems and development of the operations team. The second Joint Working Agreement (JWA2) will govern the Partnership during the operational phase (see Part C of this report).

The Financial Case

76. The financial case analyses the cost of Viridor's solution and tests that it is affordable to each Partner Council. The analysis is based on the current version of the financial model submitted by Viridor as part of its final tender.

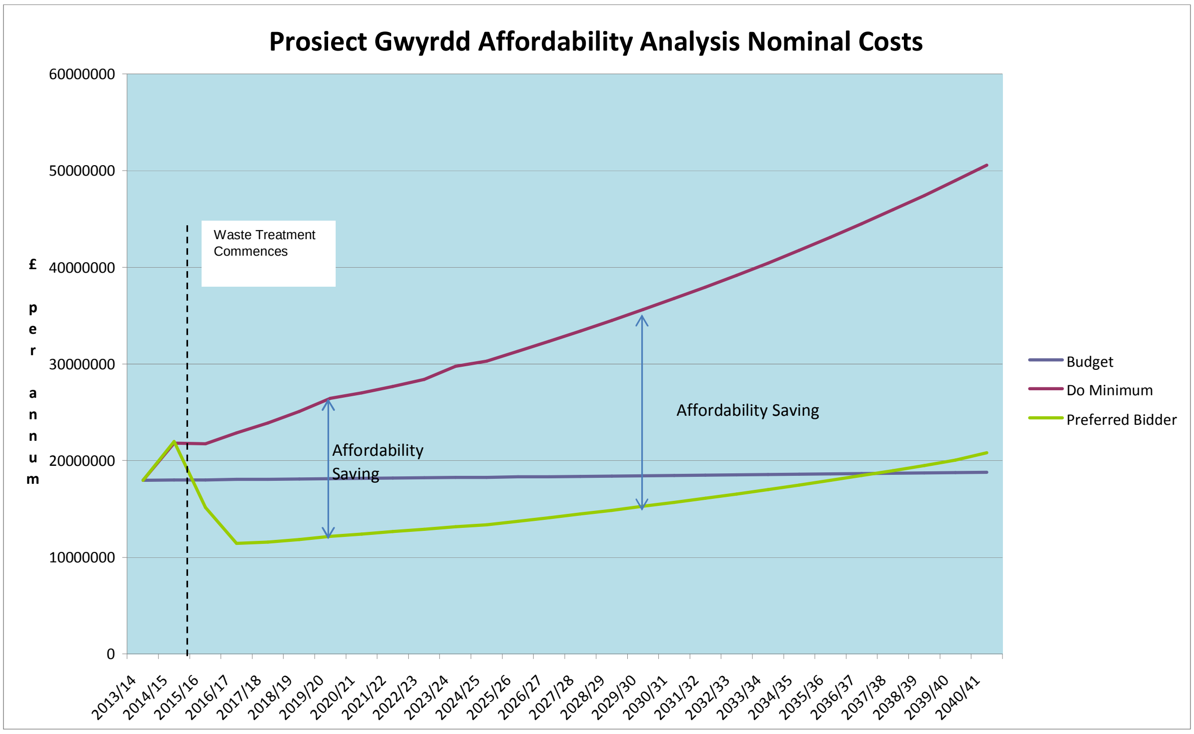
77. Approval of the FBC (and the Financial Case) by each Partner Council will demonstrate that each understands and accepts the financial impact on their respective council of entering into the contract.

78. Furthermore approval of the FBC and the relevant affordability position will underpin the decision by the elected Members for the Project to proceed to Financial Close.

79. The financial case for Viridor as compared with that of the OBC reference case and current landfill (do minimum) disposal option is very strong. The

project is affordable and good value for money as demonstrated in paragraph 6 and shown in Figure C. This graph highlights the significant saving the Viridor solution offers compared to continuing to landfill residual waste. The graph identifies an initial increase in residual waste disposal costs for the Partners which is a reflection of the increased costs of landfill, particularly the impact of the landfill tax escalator, prior to waste treatment commencing. The trendline on the graph is then downward for the Partners with the financial benefit of the Viridor facility accepting the Partnerships waste from 1st September 2015 driving this decrease in costs.

Figure C



80. On approval of the FBC by the WG, the WG will agree to pay the Partnership revenue support which is approximately 25% of the contract value based on estimated profile tonnages and will be paid quarterly on an annuity basis.

81. At Contract Commencement, the estimated saving to the Partnership as a whole (including the benefit of the WG funding) as compared to the cost of continuing with the current landfill disposal arrangements is greater than £11 million. This is equivalent to the Partnership's combined residual waste disposal budget reducing by a half (see Table C below).

Table C: First Contract Year (2016 – 2017) Cost Savings

Preferred Bidder 2016-17 Savings		
Partner	**Saving: Preferred Bidder vs Landfill**	
	£'000s	%
Caerphilly	-2,058	-47%
Cardiff	-5,436	-59%
Monmouthshire	-1,236	-44%
Newport	-1,108	-36%
Vale of Glamorgan	-1,588	-47%
Total : PG	**-11,426**	**-50%**

82. Table D below shows cost information presented as a Net Present Value (NPV) to reflect the impact of time over the life of the contract. This allows a direct comparison with the original Outline Business Case Upper Affordability Threshold (UAT) set when the Partners formally commenced this procurement. This table demonstrates the significant headroom in the NPV affordability calculation for all of the partners.

Table D – Affordability Analysis - NPV

	Upper Affordability Threshold (UAT)	**Preferred Bidder (PB)**	**Affordability Headroom (UAT vs PB)**
	£m	£m	£m
Caerphilly	89	43	-46
Cardiff	189	82	-107
Monmouthshire	49	29	-20
Newport	51	34	-17
Vale of Glamorgan	65	34	-31
Prosiect Gwyrdd	443	222	-221

Recommendation:

18.1 Project Board having considered the report on Wednesday 30th January 2013 and being satisfied with the procurement process, recommends that Joint Committee considers the matters below and, if satisfied, recommends to each Authority's Council the following:

(iii) that the FBC is approved, including the improved affordability position in terms of both i) the large reduction compared to the original OBC affordability threshold and ii) the significant costs saving relative to continuing to landfill residual waste;

18.2 that the Joint Committee, subject to recommendations i, ii and iii above, authorises submission of the FBC to WG for formal approval on the understanding that the FBC is subject to approval by each Partner Authority.

PART C: REPORT ON THE SECOND JOINT WORKING AGREEMENT (JWA2)

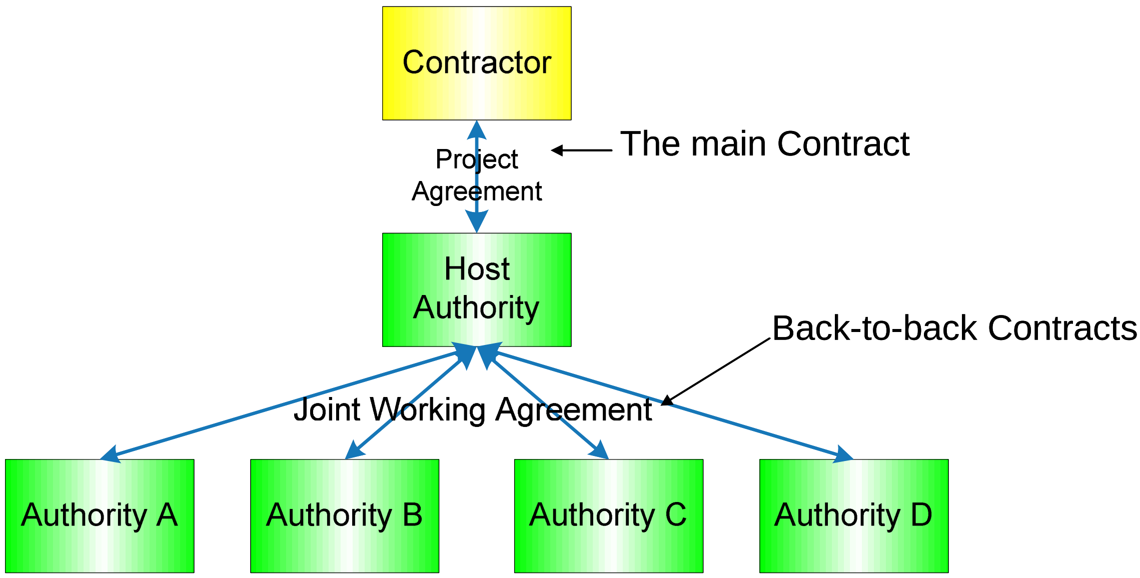
Introduction to Part C

83. At the beginning of the Procurement in 2009, the Partner Authorities signed a Joint Working Agreement (JWA) to regulate working arrangements and decision making among the Partners. This agreement ends when the waste contract is signed with Viridor.

84. Prosiect Gwyrdd as an entity does not have the legal powers to enter into a Contract. It is therefore proposed that one of the Partner Authorities is nominated to be the counter-party to the waste contract with Viridor. Given that the facility is located in Cardiff it is recommended that Cardiff Council will take on the role as 'Host Authority' for this purpose.

85. As the Host Authority will take on the full contract responsibility on behalf of the Partnership, it requires back-to-back assurances that each Partner will meet its obligations in a timely manner to ensure that the Host is never exposed to unreasonable contractual liabilities. Also, each Partner needs assurance that they will receive all the contractual benefits that they are entitled to – even though they have not directly signed a contract with Viridor. This is one of the primary objectives of the second Joint Working Agreements (JWA2). Figure C below is a schematic showing the relationship between the contractor, the Host Authority and the Partner Authorities. The JWA2 is attached at Appendix D.

Figure C



Purpose of the JWA2

86. The overarching purpose of JWA2 is to ensure that the five Prosiect Gwyrdd Authorities are able to work effectively together in true Partnership and with Viridor to get maximum benefit from the residual waste treatment contract.

87. JWA2 accommodates the Host Authority structure described above, to ensure that the Host Authority isn't exposed to disproportionate liability and that the contractual rights and obligations appropriately flow down to all the Partners.

88. At its most basic level, having signed the Contract, the Host Authority is committed to the delivery of all Prosiect Gwyrdd's waste and the full payment for its treatment. Viridor, for its part, is obliged to accept and treat the waste. Given this commitment, the JWA2 needs to ensure that each Partner is committed to deliver its waste to Viridor and pay the Host Authority the correct amount **in advance** of the Host Authority having to pay Viridor.

89. JWA2 also regulates such things as:

- The payment mechanism;
- Decision making;
- Termination and withdrawal (of the JWA2);
- Flexibility to Contract Changes and Changes in Law.

These are summarised below:

The Payment Mechanism

90. Prosiect Gwyrdd negotiated a payment mechanism with the contractors. The mechanism includes a series of tonnage bands based on Prosiect Gwyrdd's projected residual waste tonnage profile, with each band having a different tonnage price. The Guaranteed Minimum Payment provides the contractor with a degree of certainty that allows it to tender a lower gate fee, whereas the project's maximum tonnage requirement provides the contractor with certainty regarding how much plant capacity to 'reserve' for Prosiect Gwyrdd. The banding approach therefore provides the best value for money to the Project, and certainty that its waste has priority within a wide band.

91. After considerable discussion and scenario modelling it was considered that the best and fairest approach for the Partnership was to reflect the same banding mechanism at the individual partner level – a 'mini pay-mech'

approach. Therefore, within JWA2, each Partner is allocated a minimum and a maximum tonnage which are based on their own waste projections (see Table E below).

Table E - Tonnage Profile for each Partner including minimum and maximum tonnage and the Cost Sharing Ratio

Partner	Minimum Tonnage	Profile Tonnage	Cost Sharing Ratio	Maximum Tonnage
Caerphilly	24,774	31,599	18.4%	40,373
Cardiff	56,056	71,498	41.5%	91,350
Monmouthshire	13,134	16,752	9.7%	21,403
Newport	21,348	27,229	15.8%	34,789
Vale of Glamorgan	19,688	25,112	14.6%	32,085
Total PG	**135,000**	**172,190**	**100%**	**220,000**

92. It should be noted that the JWA2 is drafted to optimise fairness to each partner. Partners will not be unfairly penalised for supplying tonnage below its minimum tonnage. The general principle is that if Partner A supplies waste below its minimum tonnage, and this causes an additional cost to the Partnership as a whole; then that cost would be on Partner A's account.

93. Other financial costs and benefits will be shared proportionally between the Partners unless it is specific to a particular Authority, in which case it would get that benefit or incur the cost. An example might be a deduction imposed on the contractor for excessive vehicle turn around times – if that affected just one partner, then that sum would flow back to it.

Decision Making

94. The Partnership will recruit a suitably qualified Contract Manager to run the contract. Though answerable to the Partnership (through the Contract Management Board and Joint Committee) the Contract Manager will be formally employed through the Host Authority for reasons stated above.

95. The Contract Manager will have sufficient Authority to make day-to-day decisions and will liaise on a regular basis with key personnel at each Authority and with the Contract Management Board and the Joint Committee.

For those decisions with a budgetary impact (most likely to be contract changes or variations), the Contract Manager will have authority up to an annual financial threshold of £250,000, over which the decision would have to be escalated to the Contract Management Board. Likewise, the Contract Management Board would have an annual financial threshold of £500,000 over which it would need to escalate the decision to the Joint Committee. The proposed annual threshold for the Joint Committee is £1M with decisions over this threshold being the responsibility of the Partner Authorities. The thresholds specified are aggregated amounts for PG and will be allocated between partners using the Cost Sharing Ratio outlined in Table C above. These may potentially be above their current Standing Orders thresholds.

96. In some cases decisions would have to be taken by each individual Council. Examples include:

- Reserved decisions, such as contract termination or Partner withdrawal;
- Significant decisions such as those that affect the originally approved scope or budget.

97. A general Principle of decision making under a Joint Committee structure is that decisions should be by simple majority voting (rather than requiring unanimity).

Termination and Withdrawal

98. The JWA2 will commence at the same time as the main Prosiect Gwyrdd contract and will expire six months after the expiry of the Prosiect Gwyrdd contract (if not terminated earlier). The JWA2 makes provision for terminating one of the Partners in the event of an unresolved serious breach. An example of such a breach would be the wilful non-payment of their share of the disposal charge to the Host Authority. The defaulting Partner Authority would be liable for any increased cost to the other Partners that result from the default.

99. It is also possible for a Partner to withdraw from the JWA2 if it chooses. The withdrawing Partner Authority would be liable for any losses to the other Partner Authorities that result from withdrawal.

Flexibility to Change

100. The JWA2 reflects the flexibility embedded in the main Prosiect Gwyrdd Contract to accommodate changes in law or a contract change required by one or more of the Partners.

101. If a change in law (for example tighter emission standards requiring extra pollution control equipment) occurs, then under the contract, Prosiect Gwyrdd will pay its share. The JWA2 distributes this share between the Partners on the basis of their tonnage profile (see Cost Sharing ratio in Table E above).

102. If the Partners decide to make a change to the operation or the facility, this follows the main Contractual mechanism and the Partners will pay as above. If, however, one (or more) Partners want to make a change (but others do not) then an agreement can be reached, if those wanting the change will pay the full cost to facilitate the change happening.

Summary

103. The JWA2 attempts to reflect, where appropriate, the Project Agreement (PA) between the Partnership and the Contractor. As described above, because the Partnership, as an entity, does not have the legal powers to sign the PA; this role will need to be taken on by one of the Councils – the Host Authority. As Viridor's facility is located in Cardiff, it is recommended that Cardiff to take on the Host Authority role.

104. The JWA2 tries to balance the potential conflicts: that the Host Authority, as PA counter-party, is not over-exposed in terms of risk and liability; and that the other partners get their fair share of the contractual rights and benefits. The JWA2 is based on the principles of fairness and Partnership working and the Project Board believes the attached JWA2 manages the interests of all the Partners equitably.

Finalising the JWA2

105. Paragraphs 50 to 54 (above) describe the 'fine-tuning' process of finalising the Project Agreement with Viridor. As the JWA2 must reflect, where applicable, the drafting in the Project Agreement, the JWA2 can not be finalised until all the drafting of the contractual documents has been completed.

106. After the JWA2 has been approved by each Partner Authority, it is proposed that it is finalised in parallel with the fine-tuning of the Project Agreement. Minor changes will be made in-line with the principles agreed and to ensure it remains aligned to the Project Agreement.

107. It is recommended that each Council delegates authority to their senior responsible officer on the Project Board to finalise and conclude the JWA2 agreement on behalf of their respective Authorities.

Recommendations:

18.1 Project Board having considered the report on Wednesday 30th January 2013 and being satisfied with the procurement process, recommends that Joint Committee considers the matters below and, if satisfied, recommends to each Authority's Council the following:

(iv) that, subject to Cardiff Council agreeing, Cardiff Council acts as Host Authority (as defined in the Joint Working Agreement 2 (JWA2));

(v) that the JWA2 is approved (on the understanding that it is subject to any refinement and finalisation as per recommendation (vi);

(vi) that authority is delegated to each Council's Senior Responsible Officer (SRO) on the Project Board to finalise and conclude the JWA2 agreement (including any refinements pursuant to recommendation (ii) on behalf of their respective Authorities;

Implications and Next Steps

Legal Implications

108. Prosiect Gwyrdd is a high value complex project which accordingly raises a number of legal matters that require consideration. Namely (i) effects of the Joint Working Agreement 1 on the proposed decisions (ii) procurement law (iii) the form of the proposed contract and (iv) the proposed governance arrangements between the five authorities (Joint Working Agreement 2) (JWA2).

109. It is noted that the project, throughout, has had the benefit of receiving legal and procurement advice from both in-house lawyers and procurement officers and external lawyers (Pinsent Masons) who have worked closely together on this project.

Legal Background - JWA1

110. At the start of the project the five Partner Authorities entered into a Joint Working Agreement (JWA1) to govern the relationship between the authorities throughout the procurement process. Of particular relevance to the proposed recommendations are (i) the JWA1 reserved to each partner council the decision as to the appointment of the Preferred Bidder, approval to enter into the Joint Working Agreement 2 (JWA2) and approval of the final business case and (ii) provided that if a Partner Council decided not to approve the appointment of the Preferred Bidder and conclusion of the project agreement for any reason (other than where the cost of the successful bid exceeded the affordability envelope) then such authority would be treated as withdrawing from the project and be liable for the costs associated with that withdrawal up to a capped liability of £3m. This was not intended as a "penalty" provision but rather to reimburse the other authorities the costs (or part thereof, up to the capped figure of £3m) incurred in running the procurement process, which may prove abortive if one or more authorities decided not to appoint the Preferred Bidder. It is noted that the cost of the Preferred Bidder's solution is within the affordability envelope agreed by all Partner Authorities at the outset. Accordingly this provision would apply should an authority decide not to approve the recommendations.

Procurement Process – Appointment of Preferred Bidder

111. As detailed within the report, final tenders have been evaluated in accordance with the pre-determined evaluation methodology set. Following that evaluation a Preferred Bidder has been identified. Part of the evaluation

comprised the legal evaluation which was completed & approved by the external legal advisers, the in-house lead lawyer & in-house lead procurement officer. The legal evaluation report is referred to in the exempted Appendix A to this report which sets out the high level results of the evaluation.

112. In determining whether to appoint the preferred bidder the partner authorities should satisfy themselves that the solution offered by Viridor represents a competitive offering. The body of the report and appendices, including the financial business case, address these matters and highlights how the procurement process followed was designed to maintain competitive tension throughout so as to secure competitive bids that met the Authority's requirements.

The Proposed Residual Waste Treatment Contract -sometimes referred to as the Project Agreement ("PA")

113. The PA is the contract that is concluded between the Preferred Bidder (who at that stage is referred to as the Contractor) and one of the Partner Authorities (who is referred to as the Host Authority). The PA is based on WG's Standard Form Residual Waste Contract. At its simplest, the PA provides that the Contractor is obliged to provide the residual waste solution to the Partner Authorities for the contract term (25 years) and in turn obliges the Host Authority to pay the Contractor. The PA is a key document. The PA (including its schedules) is a comprehensive document running to over 400 pages so it is not practical to explain each of the contractual provisions in this advice. The Partner Authorities have looked to maximise value for money throughout the procurement by ensuring that risks are allocated to the party (the Contractor or the Partner Authorities) best able to manage the risk. The PA reflects this approach.

114. Due to the merchant nature of the Preferred Bidder's solution and to reflect the commercial proposal put forward by the Preferred Bidder, a number of changes to the standard form residual waste contract are required. These changes are referred to as "derogations". The full list of the derogations proposed are set out in the final business case. Because the project receives WG grant funding the derogations to the standard form of contract need to be approved by WG. Accordingly, throughout dialogue discussions have been held with representatives of WG concerning the derogations proposed. As stated, the formal derogations table is included in the final business case, which will be submitted to WG for approval.

115. The derogations reflect key commercial aspects of the Preferred Bidder's solution and are commercially sensitive, so are not detailed in these public legal implications. (The derogations are exempt from publication on the ground that they contain information relating to the financial or business affairs of a particular business or person and the public interest in maintaining the exemption outweighs the public interest of disclosing the same). The legal evaluation considered the derogations proposed when evaluating the risk allocation and commercial terms. The derogations requested were viewed as being supported by persuasive project specific and or value for money justification backed (wherever possible) with market precedent.

116. Some key contract provisions to note are as follows:-

(i) The proposed contract is for a term of 25 years with an option to extend. This is an important point to note as the Partner Authorities are, put simply, committing to paying (the gross minimum payment) for the solution for that term. Any extension of the contract term will be subject to the agreement of the parties at that time (subject to the prevailing EU procurement rules). This is intended to provide the Partner Authorities with flexibility to continue with the project beyond the original term.

(ii) The services are due to start in 2016. If the services are late (referred to as late service commencement) provisions has been included whereby the Partner Authorities can recover their losses, albeit alternative arrangements would be required.

(iii) The contract sets out what happens in the event of default by the Contractor, how disputes are to be resolved and what "events" enable the Host Authority to withhold/set off payments and ultimately terminate the contract.

(iv) The proposed solution is a merchant facility. What this means is that the facility has not been built to specifically meet the partner authorities' needs, it is larger than the partners' requirements, will have waste suppliers other than partners' waste and ownership of the facility will not revert to the authorities when the contract expires. This is a major difference to standard form finance build and operate waste projects. This is referred to as a "non reverting asset solution" and the standard contract terms have been amended to reflect this and the fact that construction of the facility is ongoing.

(v) Payment provisions. These are explained in the body of the report and financial implications. Reference is made to the obligation to pay the guaranteed minimum payment "GMP", which is calculated by reference to a notional minimum waste tonnage. The key legal point is that the guaranteed minimum payment will have to be paid even if the authorities do not deliver the equivalent notional minimum waste tonnage. Very detailed consideration has been given to the waste profiles underlying the calculation of the GMPs. The PA includes terms which are intended to act as mitigation measures in this regard. The PA obliges the contractor to seek out "substitute waste" in circumstances where there is a shortfall in the Partnership's waste arisings. If there is a shortfall in waste in any year then the contractor is obliged to use its reasonable endeavours to secure third party waste to mitigate the Authority's liability to pay the GMP by reference to a third party waste plan. This provision does not apply where the shortfall has directly been caused by the authorities diverting their contract waste to another residual waste facility. Similarly, the third party income sharing provisions for the Partnership's contract waste will also be disapplied if the waste is deliberately diverted to another treatment facility;

(vi) The PA contains provision in regards to the Environment Agency's R1 standards. This is a WG funding condition;

(vii) Change in law. The PA contains provisions to deal with changes in law and who bears any consequential costs that flow. In certain circumstances this may be the partner authorities:

117. For further legal implications on key contract provisions please see exempt Appendix E. Appendix E to this report contains information which is exempt from publication under paragraphs 14 (information relating to financial or business affairs) and 21 (public interest test) and 16 (legally privileged information) of Schedule 12 A part 4 of the Local Government Act 1972.

118. As stated it is proposed that the PA will be concluded between the Host Authority and the Contractor. The obligations of the Host Authority under the PA will be passed back to (shared by) all Partner Authorities via a back to back agreement that will be concluded between the Partner Authorities. This agreement is referred to as the Joint Working Agreement 2 ("JWA2")

Joint Working Agreement 2 - ("JWA2")

119. The purpose of the JWA2 is to:

   (i) set out the arrangements between the Partner Authorities as to how they will work together throughout the life of the project (the governance arrangements), and

   (ii) provide for the obligations of the Host Authority under the Project Agreement to be passed back to the Partner Authorities.

120. The Joint Working Agreement is attached to this report though may require "refinement" to reflect any refinements made to the Project Agreement prior to financial close. As regards governance, it is proposed that there will be a Joint Committee, each Authority having two members on the Joint Committee with each member having one vote. The Chairperson of the Joint Committee is to be selected from the Host Authority Members.

121. The Joint Working Agreement provides for an officer board (referred to as the Contract Management Board) that will report to the Joint Committee. It is envisaged that there will be Contract Manager that will make the day to day decisions in respect of the contract and the Contract Manager will report to the Contract Management Board. The Terms of Reference for the Joint Committee and Contract Management Board are set out in JWA2, Schedules 2 and 3 respectively. Clauses 6 – 9 of the JWA2 sets out the decision making thresholds/delegations.

122. Specific provision is made as regard how decisions are made, which may impact on the Host Authority (by virtue of the facility being situated within its boundary). These are set out in Clause 6.4.

123. Clause 5 sets out the duties of the Host Authority and other Partner Authorities. Put simply, the Host Authority will act on behalf of the Authorities for the administration of the contract, be responsible for liaising with the Contractor, act as employing authority for employing any staff required in respect of the project and enter into any contracts that may be required (for example, the appointment of consultants) and manage the budget.

124. Clauses 11 and 12 (Schedules 5, 6 and 11) set out the financial provisions. Put simply the JWA2 has been drafted on the basis that the Host Authority

will receive payments from the Partner Authorities before it is obliged to make the payment to the Contractor under the Project Agreement. The aim is that the Host Authority should not be out of pocket. It is noted that under the PA the Host Authority will be obliged to pay the contractor whether or not it has been paid by the other authorities.

125. Clause 14 sets out the liabilities of each Partner Authority and it is noted that the indemnities are limited to losses, claims etc., arising from wilful default, wilful breaches and/or negligent act or omissions (where such negligence, acts or omissions are covered by insurance).

126. The JWA2 addresses when the Project Agreement may be terminated by the Host Authority and that the prior agreement of the other Partner Authorities must be sought beforehand. See Clause 15.

127. Should a Partner Authority wish to withdraw from the JWA 2 (the project)) then the JWA2 makes provision for this and the costs that will apply (Clause 18 and Schedule 7). It should be noted and put simply, that any Partner Authority wishing to withdraw will be liable for all the costs that flow. It is stressed that there is no cap on a Partner Authority's liability should it seek to withdraw. Early withdrawal from the project could lead to significant costs to the Partner Authority wishing to withdraw, given that the Project Agreement is for a term of 25 years and that the Project Agreement guarantees the Contractor a minimum payment (the GMP).

128. The JWA2, as attached to this report, may require further refinement to reflect any refinements made to the Project Agreement prior to financial close. The JWA2 will require completion before or contemporaneously with the Project Agreement. As can be appreciated, it would not be in the interests of the Host Authority to conclude the Project Agreement until it had the comfort that all Partner Authorities had agreed the JWA2.

129. The Host Authority, on behalf of all the Partner Authorities, and as part of the Project Agreement, is required to sign a Certificate under the Local Government (Contracts) Act 1997 to the effect that all requisite authorities are in place enabling it to conclude the Project Agreement. Before the Host Authority is able to sign such a certificate, it will require similar confirmation from each Partner Authority.

130. As will be appreciated, the Project Agreement should not be concluded until the final business case is approved by WG and the grant funding secured.

Non-Fettering Provisions

131. For the avoidance of any doubt it is noted that any planning permissions, consents, permits or the like that may be required in respect of the Viridor's solution are a matter for Viridor and relevant Regulatory Authority (including any of the Partner Authorities in their capacity as local Planning Authority). This report and recommendations proposed should not be seen as fettering the exercise of any Regulatory Authority's statutory discretion or the exercise of any of their statutory functions.

Financial Implications

132. The financial projections in this report are based on the Partnership delivering all its residual waste to Viridor's facility from 1st September 2015 for commissioning. The Contract itself will commence on 1st April 2016 and will have a term of 25 years, expiring on 31st March 2041. For the contract term, the Partnership is committed to making a Guaranteed Minimum Payment (GMP) on the basis that it has delivered 135,000 tonnes per annum of waste to the facility. If the Partnerships waste falls below this GMP level then payment will still be required as if this tonnage had been delivered. The Partnership's average annual projected waste is 172,190 tonnes so there is significant headroom between the GMP and the projected tonnages. In addition the partnership will receive the benefit of any gate fee income from treating waste in the capacity released by the Partnership delivering below the GMP tonnage.

133. The cost of Viridor's solution, expressed as a Net Present Value (NPV), of £222M is significantly below the Partnerships aggregate Outline Business Case Upper Affordability Threshold (UAT) NPV of £443M as approved at the individual full Council meetings during the summer of 2009.

134. Figure A indicates that the Partner Authorities costs will increase in 2014-15 as residual waste continues to be landfilled. The Partnerships disposal costs will then decrease significantly into 2015-16 with the Facility treating the Partnerships commissioning waste. A further fall in expenditure is projected in 2016-17 with the first year of the contract and the receipt of WG funding contribution. Projected Expenditure in 2015-16 will fall below the current committed aggregate level of the residual waste budget and will remain below this extrapolated budget for the Partnership until 2038/39. The "cross-over" position will vary between the individual partners but budgets at the back end

of the contract will need to be increased by the Partnership to match projected expenditure.

135. The very attractive affordability position outlined in the report is subject to receiving WG funding contribution. This will be dependent on WG approving the FBC which is expected to occur after the Partner Authorities have approved the Preferred Bidder appointment. The Partner Authority decisions will therefore be conditional on receiving WG funding commitment.

136. Figure A also demonstrates the significant cost avoidance achieved by Viridor's solution compared with the "Do Minimum" option of continuing to landfill residual waste. Table C illustrates that for the Partnership a projected saving of over £11M is expected in 2016-17 in comparing the costs of Viridor's solution with continuing to Landfill.

137. The relative costs of the two disposal options are projected to widen further as we move through the contract term. A significant factor in this divergence is Viridor's approach to indexation with over 60% of the gate fee, at profiled tonnage, not being subject to any indexation uplift. This results in the costs of the Viridor's solution rising by less than the rate of inflation.

138. The Joint Committee Budget Report in December 2012 highlighted the extra costs arising from the additional time required to close the Call for Final Tender (CFT) stage of the Procurement, a comparison of Viridor's Detailed Solution submission with their CFT submission reveals that total projected payments over the contract term fell by £90M. This demonstrates the benefit of maintaining competition through the CFT stage.

139. The December 2012 Budget Report also included indicative budgets for the Transitional Monitoring and the Contract Management activities for the period 2014-15 to 2016-17 with the recommendation that Partner Authorities acknowledge these commitments in their Medium Term Financial Plans.

140. As the Partnership has passed its UAT affordability test if one of the Partners does not approve the appointment of the Preferred Bidder they could be liable for the £3M compensation payment as outlined in the current JWA. An abortive procurement at this stage would have significant financial implications for the Partnership including the loss of WG funding and the additional costs associated with continuing to landfill residual waste plus it would be questionable how competitive a future procurement would be because of a disposal facility being constructed in the Partnerships area.

141. A fundamental principle of the JWA2 is that the Host Authority receives funding from the other partners before it has to pay the contractor. The JWA2 outlines how these back to back payment arrangements would work.

142. The JWA2 also details how the various payments and deductions in the Payment Mechanism are allocated between the Partner Authorities. In this context the Cost Sharing Ratio in Table C is the standard basis of apportionment where it is appropriate to share costs or income between the Partners. WG funding contribution will also be allocated between Partner Authorities using this ratio. A further important principle is if a Partner Authority delivers below GMT or above Maximum Tonnage then it will be required to keep the PG payment “whole”.

143. The Decision making thresholds are outlined in the JWA2 with a financial cap for approval levels in the decision making structure for authorising additional expenditure such as contract variations. The value of these thresholds are based on the current Cardiff Council Standing Orders but the suggested amounts are annual thresholds rather than for the term of the contract which is a reflection of the length of the PG contract. The thresholds are for PG as a whole and will be apportioned to the individual partners using the Cost Sharing Ratio. As these amounts will be additional to the Partner Authorities expected budgeted payments the Partner Authorities will need to acknowledge this potential additional liability in setting their budgets.

144. The Legal Implications draw attention to the key commercial contract provisions. From a financial perspective the provisions for both Contractor and Authority termination are particularly significant. As Viridor are providing an oversized merchant facility this asset will not pass to the Partnership in the event of contractor termination but financial compensation will be provided as an alternative. The quantum of this sum has been calculated to match the profile of the Partnership’s expected losses. In the case of Authority termination the Partnership will be liable to keep Viridor “whole” subject to the mitigation offered by income from Third Party waste filling the capacity released from the withdrawal of the Partnership.

145. Viridor are proposing an oversized, merchant facility whose treatment capacity is significantly in excess of the Partnerships requirements. The Partnership will however only pay for its relevant share of costs. This principle applies to both current costs, for example National Non-domestic Rates (NNDR) and potential future costs such as those arising from a Change in Law event.

Next steps

146. If all the recommendations are approved (see paragraph 18) by the Project Board, the Joint Committee and each Partner Authority, Viridor will be issued a detailed letter outlining the conditions on which they have been appointed Preferred Bidder.

147. After a statutory 10 day 'stand still' period (EU procurement rules set out provisions to standstill periods and time limits within which challenges can be brought by an aggrieved bidder). All the contractual documentation will be checked and finalised. As described above, this process, that is limited to 'fine tuning', will ensure that the Project Agreement, all its schedules and the JWA2 are ready to sign.

148. In parallel to this we expect to get sign-off of the FBC by the WG and formal approval to a funding contribution of approximately 25% of Viridor's price for the 25 year contract period.

149. The contract (including certificate as referred to in recommendation viii) and the JWA2 is expected to be signed in July 2013 but the Service will not commence until April 2016.

150. The time between signing the contract and service commencement is the 'Transition Period'. During this period the Contractor will finish constructing the facility, providing regular progress reports to the Partnership. The Partnership will set up reporting and payment systems, develop a detailed contract management manual and generally plan for the operational phase (including for the establishment of the Contract Management Team).

151. In September 2015, commissioning with the Partnerships' waste will start. This requires all the Partnership's waste that would otherwise be going to landfill and the Partnership will be charged a reduced cost.

152. The 25 year Service period will commence in April 2016. At the end of the 25 year period, if one or more of the Partners want to continue under the same contract, they have the option to extend for a further 5 years.

Appendices for publication

- Appendix B – FBC (main body except for those parts listed in Appendix E and FBC appendices B, C, G, H & I)
- Appendix D – JWA2

Appendices and background papers exempt from disclosure

Appendices A, B, C and E and background papers to this report contain information which are exempt from publication under paragraphs 14 (information relating to financial or business affairs) and 21 (public interest test) and/or 16 (legally privileged information) of Schedule 12 A part 4 of the Local Government Act 1972.

It is viewed in the public interest to treat the documents referred to above as exempt from publication. Put simply, the rationale for this is that in order for the Authorities to be able to effectively evaluate tenders received it requires bidders to provide details of the commercial make up of their bid which they may not do if they thought such information would be made publicly available. The adverse impact on contractual negotiations due to such disclosure would result in a less effective use of public money. Disclosure of legally privileged information could materially prejudice the authority's ability to defend its legal interests. Therefore on balance, it is submitted that the public interest in maintaining exemption outweighs the public interest in disclosure. That said redacted versions of key documents will be made available.

- Appendix A – Report on: Evaluation Of Final Tenders
- Appendix B – The FBC (those parts of the main body listed in Appendix E and FBC appendices B, C, G, H & I)
- Appendix C – Exempt Legal Implications
- Appendix E – Summary of exempt FBC information