



John Gregory,  
Grant Thornton UK LLP  
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West Midlands B4 6AT

22<sup>nd</sup> January 2021

Dear Mr Gregory,

**Re: Gloucestershire County Council: audit of accounts 2016/17 – objection in respect of waste PFI contract – provisional views. Your revised provisional views circulated 15<sup>th</sup> December 2020**

Attached is our response to your Provisional Views document - thank you again for quite properly seeking our comment. This is a matter of unique importance to Gloucestershire - historically in respect of decisions regarding the 2013 and 2016 Javelin Park contracts themselves but also in terms of ensuring better financial governance within Gloucestershire County Council (GCC) in future.

We welcome the fact that you have indicated that you intend to issue a 'report in the public interest' under s.27 of the Local Audit and Accountability Act 2014. It is over 3½ years since the last objection was raised, and five years since the contract was entered into, quite wrongly in our view, by officers acting for GCC.

As you acknowledge, this is a very significant change in your position, having previously maintained that the new, 2016, contract with UBB was not material to your determination. This conclusion contributed to GCC maintaining secrecy on this contract. Your new position indicates that you now agree that what we now know was a £163 million, 36% increase in costs in this second contract, agreed in secret and kept secret by a small group within the GCC, raises important matters of public concern and breached both procurement rules and established processes for securing Value for Money for the Council.

We consider that this change in your position should be immediately communicated to the Council's Audit and Governance Committee in particular so that the serious failings in financial oversight can be addressed. Further delay, perhaps until after local elections, would compromise the public interest and the issues of democratic accountability that your report addresses.

We are sure that you have not come to your revised conclusion lightly because we note that reports in the public interest are very rare. The NAO records that from April 2015 to Jan 2018 only 3 public interest reports were issued under the 2014 Act

( See §15 [nao.org.uk/wp-content/uploads/2019/01/Local-auditor-reporting-in-England-2018.pdf](http://nao.org.uk/wp-content/uploads/2019/01/Local-auditor-reporting-in-England-2018.pdf) )

Examination of previous such reports, including by Grant Thornton, suggests they are only undertaken in cases of financial mis-management or lapses in governance. With this in mind we draw your attention to the following points highlighted here which we would like you to further consider in your report in the public interest (RITPI). Full details are provided in the response attached.

## **1 Content of the Report in the Public Interest (RITPI) and Value for Money Processes**

Guidelines from the National Audit Office, the Green Book, Government Guidance, EU procurement guidelines and the Public Contract Regulations (PCRs) 2015 all advise that strong competition is required in order to ensure Value for Money (VfM) in procurement.

Both Grant Thornton (GT) and GCC accept that use of competition as part of the process to deliver (VfM) was appropriate and that the PCRs 2015 apply.

GT has clear legal advice (Page 9) that the 2016 contract was *not* subject to any exceptions in PCRs 2015 that would have allowed a substantial new set of contractual terms to replace those in the 2013 contract.

We present further evidence of the failure of GCC to comply with EU procurement rules.

We note that GT's responsibilities as auditor include the requirement to examine and assess the arrangements GCC had in place to follow procurement processes.

We show that these are not a separate 'legal' issues but central to the determination of VfM.

Whether or not Grant Thornton is concerned with assessing actual value for money, the huge increase in price of the 2016 contract over the 2013 contract is the result of a deeply flawed procurement process.

**The test of economy, efficiency and effectiveness fails and therefore the 2016 contract cannot be said to provide Value for Money. This conclusion should be absolutely clear in the proposed Report in the Public Interest and should also be the subject of a qualification of the council's accounts.**

## 2 Change in economic balance

The issue of a change in economic balance is key to determining whether the 2016 contract represents Illegal State Aid.

Despite the legal requirement for GCC to show evidence that they have assessed economic balance, your report shows this did not happen.

*'The Council has not provided Grant Thornton with evidence showing that it contemporaneously assessed whether the package of modifications altered the overall economic balance of the contract in UBB's favour'*

By contrast, we provide compelling evidence that the economic balance in the contract *did* change:

- the 36% increase in contract price from £450m to £613m;
- the gate fee cost of £166.22 per tonne in 2019/20, way above the industry average of £93 per tonne;
- the fact that, if termination costs are discounted, the 2016 contract is more expensive than landfill.
- the £8.5m increase in the residual waste budget the year the incinerator started operating, significantly more expensive than the previous landfill contract;
- the lack of transparent information on costs which would show the above; and
- the admission by Mr Bungard, the Chief Executive of GCC at an OSM Scrutiny meeting on 22<sup>nd</sup> March 2019 that:

**'The £450m was an artificial figure and needed to be adjusted for inflation - 50% of the increase relates to this. The other 50% relates to the fact that the contractor was in an advantageous position.'**

**We ask that Grant Thornton should indicate in their report that: GCC has provided unsubstantiated evidence and not followed required procedures to determine economic balance; that there is strong evidence to suggest that the economic balance has changed; and that this implies improper overpayment to UBB which should be investigated further and recovered for the benefit of GCC..**

## 3 Process, Oversight and Misleading Statements Regarding Legal Advice

There is no mention in your provisional views report of the numerous failures in Governance processes, which are in breach of GCC's governance principles.

We consider that it should be a subject of concern to Grant Thornton – and for this report - that Scrutiny Committees of the Council, and the Council's Audit and Governance Committee have not been able to

perform their functions because they have been kept in the dark on the most expensive contract in the Council's history.

We provide evidence that the operation of these committees has been further compromised by misleading, incomplete and possibly dishonest information.

For example, at the Scrutiny Committee meeting of March 2019, Mr Peter Bungard, CEO, answered questions on the 2016 contract,(minute 15.5):

*'One member [Cllr Smith] questioned the Chief Executive on whether the contract renegotiation had led to a material change in the agreed gate fees to be paid. In response it was explained that there was the capacity for price variation within the contract. The Member commented that it was her view that £450m - £600m constituted a material change. In response it was stated that the contract had that mechanism for change and that the **legal advice supported that.**' [Our emphasis]*

The implication of your report is that you now accept that *either* the legal advice given to the Council was deficient, *or* it was mis-reported to the scrutiny committee; in any event, the committee was misled.

We ask that GT clarifies the legal advice given at the time and whether officers and the Cabinet acted properly on this advice, including ensuring that oversight committees were properly appraised. In order to do so we suggest you ask GCC to waive legal privilege in this matter so that you can see the advice and report fully in the public interest.

**Grant Thornton should address the failure of good Governance processes and make recommendations for ensuring they are never replicated, for consideration by Audit and Governance Committee in the first instance. These should include recommendations on officer behaviour and accountability, particularly in the light of misleading information about the 2016 contract, its award, its cost and its legality being given to a number of key oversight and scrutiny committee meetings.**

#### **4. Whether it is proportionate to further investigate – role of Members**

The provisional views report repeatedly suggests that it is not 'proportionate' to do any further work to clarify many of the uncertainties referenced in the report. It is our strong view that it is not up to Grant Thornton to determine this issue.

**Grant Thornton should provide an objective view, stating both the pros and cons of undertaking further analysis. The Audit and Governance Committee should decide what action to take.**

#### **5. Other issues which show that the contract does not provide VfM**

- *2013 contract termination costs.* We provide information to show that the termination costs were over-stated, affecting the decision made in 2015/16 to not follow good process and to agree a new contract with UBB that is vastly more expensive.
- *Waste Hierarchy.* We show that the contract and the Javelin Park incinerator fails to take the County's waste management up the Waste Hierarchy. We quote recent research that puts incineration costs on a par with landfill; and we show that incineration is carbon intensive, does not represent 'renewable energy' and is a barrier to the further prevention, reuse and recycling of resources.
- *Inaccurate assumptions.* We comment on the inaccurate predication of future waste tonnages which have resulted in a very high price per tonne.
- *Pricing.* The council contract enables UBB to offer low, anti-competitive prices for commercial waste;
- *Inflexibility,* which we notice you acknowledge is a feature of the technology chosen;

- The uncertainty of *legislative changes* and *technological developments* which were not properly assessed;
- *Social Value*. That the Public Services (Social Value) Act 2012 which came into force on 31 January 2013 was not properly considered.

With regard to all these points GT tends to take at face value the *assertions* made by GCC, discounting the *evidenced statements* that we have made. We feel that is not helpful when presenting what should be an objective and well-researched report. We also feel that collectively, they provide valid criticism on the VfM of the contract and that this should be incorporated into the Report in the Public Interest.

**Grant Thornton should make corrections to statements and conclusions made in these sections of the report in line with our evidence and representations and include these in the Report in the Public Interest. This evidence should then be taken into account when assessing VfM.**

## **6 Confidentiality - Informing the Audit Committee, Councillors and Public**

As you know, we do not agree with the confidential nature of the provisional views report or these exchanges. As we wrote to you earlier this month:

*'... we certainly do not believe that your draft should be confidential. We think it is compromising to the operation of the Audit & Governance Committee and other proper Council oversight for Councillors to have this withheld from them .... We believe that certain members of Cabinet have been wrongly keeping councillors and oversight committees in the dark about key details of the 2016 contract for far too long and this has stifled debate, enabled financial mismanagement and damaged good governance. Indeed, in our view there are examples where crucial committees have been specifically misled by certain officers.*

We have taken legal advice on your response alerting us to possible legal action in the event of any breach of confidentiality. We are advised confidentiality would apply *only* to any information provided from GCC which was *not* in the public domain. We are not aware of any such information. Indeed, there is now considerable information in the public domain, including that which emerged in open Court at the four day Preliminary Issues trial. Confidentiality does not apply for example to the legal advice you have received and shared with us, which is consistent with our own advice in any case.

You will be aware that these Council committees and the public have been (wrongly) told that the 2016 contract was a legal change of a properly awarded contract, and that the public has been (wrongly) told that the contract represents a major saving to the Council, when in fact waste disposal costs have increased.

Previous Audit Committees have heard from officers and a Grant Thornton representative (Peter Barber) that your previous draft provisional views contained no serious matter of concern, and it was only 'difficult' objectors that were delaying the issue of this report.

We appreciate that you may perhaps have been under very significant pressures from the Council and their solicitors Eversheds throughout this process. We surmise that it was as a result of their representations that you previously concluded that the 2016 contract was not material to your determination. While you now recognise that was a mistake, it has caused considerable delay and compromised the public interest and accountability. We are concerned that you may again be under considerable pressure from GCC to maintain secrecy on a matter which is clearly of immediate and ongoing public interest.

**Given the long delay, the very significant change in your position and the timing of the democratic cycle we consider it essential, in the public interest, that your conclusions are understood by the public and Councillors without further delay.**

## Next Steps

We support your intention to produce a report in the public interest, subject to clarifications and corrections as outlined in our response, enclosed. ***In relation to the content of your proposed report in the Public Interest, we ask that you take note both of our comments and our recommendations.***

In respect of process going forward, we ask that Grant Thornton:

- Sets out a clear timetable for finalising your report and the public meeting to follow.
- Ensures that the public and Councillors can be fully apprised of this process, in particular that the Council's Audit and Governance committee can immediately provide independent oversight of submissions from the County and take immediate action to address failures in process, openness and communications.
- Ensures that the draft conclusions, in particular the significant change in your position regarding the 2016 contract award, is immediately communicated to the Council's Audit and Governance Committee. Ensure that the public is able to properly engage with the process through the objectors, and your concerns about the 2016 contract award are not kept secret from the public.
- Encourages and supports a review of your draft conclusions (or your final report if that is completed) at a special meeting of the Audit Committee to be held in February - well in advance of Council elections to avoid your public interest observations being politically compromised.
- Ensures that representations from the Council on your report are not compromised by potential conflicting interest, some of whom may wish to 'excuse' or 'cover up' errors in the 2016 contract award. In particular we suggest that Eversheds are recused from providing advice on this matter since they were clearly heavily involved in the contracting in 2016, and the secrecy that followed, including two unsuccessful appeals against Information Commissioners Office on Freedom of Information Grounds.

Thank you again for seeking our response to your provisional views. We would appreciate confirmation of receipt and we look forward to hearing from you regarding next steps

Kind regards,

A handwritten signature in blue ink, appearing to read 'Tom Jarman'.A handwritten signature in blue ink, appearing to read 'Sue Oppenheimer'.

Tom Jarman, Sue Oppenheimer

On behalf of all objectors, Community R4C Ltd and members of the public who have expressed their concerns about this contract and public accountability