GLOUCESTERSHIRE COUNTY COUNCIL: AUDIT OF ACCOUNTS 2016/17 – OBJECTION IN RESPECT OF WASTE PFI CONTRACT – PROVISIONAL VIEWS 15TH DECEMBER 2020

REPLY FROM OBJECTORS – 25TH JANUARY 2021

1. INTRODUCTION

The four objectors (all Gloucestershire residents) put in an objection in March 2017 under s.27 and/or s.28 of the Local Audit and Accountability Act 2014 in relation to the Value for Money of the 2013 Javelin Park incinerator contract. The details of our complaint used financial figures from the 2013 contract since this was the only one in the public domain, however our complaint of course applies to the 2016 contract which replaced it. We requested but were not supplied details of the 2016 contract. We requested that Grant Thornton (GT), as auditor of Gloucestershire County Council (GCC), use its powers to:

- make a public interest report under s.24 and Schedule 7 to the Act(or finding of unlawful activity by GCC under s.28); and/or
- make a recommendation to take action (specifically to terminate the contract with UBB) under in response to this complaint.

Grant Thornton accepted the objection and decided it was to be considered under s.27(3)(a)). On 15 December 2020 it provided a provisional decision to make a public interest report, i.e. to take one of the forms of action envisaged under s.27(3)(b). We welcome this provisional decision and, as invited, comment on the form/content of such a public interest report.

We consider that the content should include a much clearer commentary and more robust criticism from GT as to the failures of GCC's procurement process, as comments appear in only a vague and disconnected form in the current preliminary views.

We would also like to see recommendations from Grant Thornton to address the failings identified and to seek to recover mis-allocated public funds, with an offer of support for the Council's Audit and Governance committee in its consideration of appropriate action to take in the public interest.

2. FAILURE IN PROCUREMENT PROCESS

We are pleased that the report confirms that the procurement process was deeply flawed. In summary, these are some of the key points:

i That the 2016 contract was agreed without competitive tender *"We provisionally agree that the competitive tension was lessened during the RPP negotiation process"* (page.8 final para)

ii That "*The Council's reliance on regulation 72(1)(a) is not legally sustainable in the circumstances on the basis that paragraph 3.3 of the 2013 contract cannot realistically be regarded as coming within reg.72(1)(a)." (p.9 point.b)*

iii That "*The Council's reliance on regulation 72(1)(e) could be correct, but only if the modifications did not alter the overall economic balance of the contract in the*

contractor's favour." (p.9 point.c)

iv That *"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 – an assessment which would have a materially different focus from assessing whether agreement of the modifications represented the 'best value' option for the Council in 2016, as compared with such other practicable options as were available."* (p.9 point.d)

v That *"It is of some concern that the Council may have agreed the modifications without assessing (either properly or at all) whether the modifications altered the economic balance of the contract in the contractor's favour. If that is what the Council did, then it would, in counsel's view, follow that the Council did not properly satisfy itself that it had a sound basis for deciding that it was acting lawfully in agreeing the modifications. "* (p.10 point.f)

vi That *"Certainly, the absence of such information and contemporaneous assessment suggests that there was at least a potential for the modifications to have so altered the economic balance"* (p.10 point.g)

vii That *"Where, however, a contract has not been awarded using a competitive process, there is the potential for the remuneration paid under that contract to be greater than the market rate. The same is true where, as may be the case here, the terms of an awarded contract are materially altered during the contract term in a manner which was not permitted by procurement law, and therefore amounts, under procurement law, to the unlawful direct award of a new contract."* (p.11 point. iv)

viii That *"it would not be safe to rely on the economic balance encapsulated in the 2013 contract as a reliable benchmark against which to assess whether the terms of the 2016 contract were favourable to UBB, as compared with the terms of a (hypothetical) equivalent contract awarded in 2016 using a competitive process."* (p.11 point. viii)

ix That *"We have provisionally decided to issue a report in the public interest on the public procurement issue because:*

> *we have provisionally concluded that it is not possible for Grant Thornton to come to any definite conclusion, based on the material currently available to it, as to whether the Council's entry into the 2016 contract with UBB involved a breach of procurement law, and that it would be disproportionate for us to seek to determine whether there has been a breach of procurement law in the circumstances. However, the Council's entry into the 2016 contract with UBB resulted in an increase in the contract value in the region of £150m[1]. It has been the subject of a legal challenge to the Council's actions based on public procurement law; the challenge was dismissed by the High Court on the basis of a preliminary point and permission to appeal has been refused by the Court of Appeal. Therefore it appears that the courts will not consider the lawfulness of the amendments to the contract; the 2016 contract is ongoing;*

1 This should read "£163m". £13m is not an insignificant sum.

 given the degree of local interest in these matters we consider that this particular aspect should be reported upon in public in order to give a clear statement of our view." (p.25 last para and p.26)

This narrative provides plenty of strong evidence to show that GCC did not follow proper procedures to ensure Value for Money (VfM) prior to awarding the 2016 contract. This is a very serious conclusion and we support your proposal to produce a Report in the Public Interest. However, we consider that there is a need to simplify and strengthen your conclusions in order that the purpose of the Report in the Public Interest can be achieved by corrective action being taken.

3. VALUE FOR MONEY

First, we should comment that, whilst GT cites "Government Guidance", the NAO treats value for money in the context of relationships between public bodies and third parties (https://www.nao.org.uk/successful-commissioning/general-principles/value-for-money/value-for-money-and-csos/. The NAO says the following as regards VFM:
:

- **Use competition**, *where appropriate, to help you choose your provider. The Office for Government Commerce (OGC) says value for money 'should normally be established through the competitive process.* ***A strong competition from a vibrant market will generally deliver a value for money outcome'****.*

All agree that competition was 'appropriate' – indeed a compliant procurement process is the most fundamental part of GCC's 'defence' of its actions. It was the basis on which GCC carried out everything leading to the 2013 contract and it still maintains it is the competitive process that it followed that was robust and ensured value for money (VfM). If done properly it would have given rise to both a legal and *factual* assumption – one adopted for instance by the NAO as above ("will generally deliver a VfM outcome") that GCC had adopted the best process.

GT recognises this in its preliminary views, though for some reason seeks to make the 'legal' (competitive process) issue 'separate'.

GT describes (page 6) how the Council's "arrangements for ensuring economy, efficiency and effectiveness" were achieved, summarising this by way of 5 bullet points. Every single one of those bullet points relates directly or indirectly to procurement law or procedures:

- *adherence to* EU procurement processes; (not achieved for the 2016 contract)
- *use of a technology neutral procurement process* (not achieved for the 2016 contract)

or indirectly

- the Green Book guidance refers *at length* to procurement rules and competitive tenders, and indeed to managing contract and other risks in PFI and PPP procurements;
- the SOPC4 contract cited as if it exhibits good processes was a model contract (version used) in force prior to the changes to the EU procurement rules (which GCC says it adhered to) following changes in case law, a directive in 2014 and the Public Contract Regulations (PCRs) and guidance in 2015. Things had

changed since SOPC4 was drafted in around 2007. One key issue you have addressed is the legal (in)effectiveness of Clause 26 in the version used. Perhaps this is an issue GCC might have spotted given their final bullet point moves away from a boilerplate contract from 2007 to emphasise:

- Employment of appropriate technical, finance **and legal experts to assist with evaluation and negotiations**.

There is no disjunct *in cases concerning competitive procedures in contracting with third parties* between ensuring compliance with legal provisions aimed at ensuring VfM on the one hand and some other assessment of 'value for money'.

Indeed, as the NAO notes regularly, the PCRs 2015 set out the *relevant legal obligations* as to 'achieving vfm through competition'. For instance see https://www.nao.org.uk/wp-content/uploads/2019/02/The-award-of-contracts-for-additional-freight-capacity-on-ferry-services.pdf see for instance §2.6 . The Department for Transport in that case used an exception in the PCRs: 'urgent basis for negotiated procedure'. But even in that instance the DfT nonetheless still tried to follow the procurement rules as closely as possible (noted at paragraph 2.8 by the NAO), and aside from not advertising, *it invited and assessed a number of bids under a competitive process.*

This has been accepted (indeed advanced as their case) by GCC in court and by Grant Thornton. It has been accepted as applicable law by the High Court (in considering the claim commenced under it including 4 days hearing preliminary issues), and it is accepted by Grant Thornton that the PCRs 2015 apply having taken expert legal advice. It has *never* been suggested that there were any 'compelling reasons' at stake in respect of the UBB contract to take some other approach, including in the provisional views.

The PCRs 2015 require regard be had to government guidance, a laudable approach that GT has adopted to this matter. That therefore includes having regard to Guidance On Amendments To Contracts During Their Term [2]This guidance *on changes to a contract during its term* sets out a summary of what is (or might be, depending on the facts) permissible. See in particular paragraph 6:

"6. ***A contract/framework may change without re-advertisement in OJEU where:***

- *The change, irrespective of the monetary value, is provided for in the initial procurement documents in a clear, precise and unequivocal review or option clause, which specifies the conditions of use and the scope and nature of the change; and the overall nature of the contract/framework is not altered; or*
- *The change, irrespective of its value, is not "substantial" as defined in regulation 72(8)."*

Grant Thornton has clear legal advice that the first 'exception', raised by GCC in court proceedings as well as in its dealings with you just does not hold water. GT first cites GCC's *view* that it benefitted from a review clause (top paragraph of your page 8 you cite the "*RPP" being heavily proscribed within the contract. The main areas were 'fixed…*", But your legal advice, which coincides with ours, is clear: there is **no** 'clear, precise and unequivocal review or option clause'. As you say on page 9 point (b):

2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/560262/Guidance_on_Amendments_to_Contracts_-_Oct_16.pdf

> *"The Council's reliance on regulation 72(1)(a) is not legally sustainable in the circumstances on the basis that paragraph 3.3 of the 2013 contract cannot realistically be regarded as coming within reg.72(1)(a). That is because paragraph 3.3 is framed in broad terms and could (at least absent constraint from procurement law) permit very extensive modifications to the project plan, allocations of risk, and/or remuneration. That paragraph essentially permits the Council and the contractor to negotiate and agree with one another a substantially new set of contractual terms in replacement for their original bargain (which reflected the terms on which the contractor bid for, and won, the original contract**). A contractual provision of that kind seems to counsel to be very far away from constituting a "clear, precise and unequivocal" review clause of the kind envisaged by reg.72(1)(a).**"*

What is confounding is that GCC has tried and failed to convince anyone, including Grant Thornton, that they had complied with EU procurement rules, or more specifically, that Schedule 26 was defensible.

How does this square with Grant Thornton's role as auditor?

GT recognises earlier (page 6) that its duty is, under the legislation, essentially as follows:

> *"Auditors are under a duty to assess councils' arrangements for ensuring economy, efficiency and effectiveness in the use of resources and to report this as part of each year's audit report. This 'value for money' conclusion refers **to the arrangements a council has in place for ensuring value for money**, rather than being a judgement on the value-for-money actually achieved."* (p.6 para 6)

That being the case, what are the 'Council's arrangements'?

The provisional views reports notes that GCC *itself relied on adherence to procurement law* and indeed the detail of its procurement process. They cite Schedule 26 as (a "part of the SOPC4 contract") on page 7 para 5. This is not a 'separate' legal issue as the report seeks to say, because the procurement rules set out processes that are generally recognised (as we objectors say and as the NAO says) to lead to VfM. It is no arid legal issue for Grant Thornton to say this of Schedule 26:

> *"That paragraph essentially permits the Council and the contractor to negotiate and agree with one another a substantially new set of contractual terms in replacement for their original bargain." (p.9 point.b)*

That is what happened. As is pointed out, the price changed from c £450m to c£613m – ignoring the higher NPV arising from increased up front payment. Whether or not it is GT's role to assess actual value for money, this is a clear result of a deeply flawed set of processes.

It follows that the test of economy, efficiency and effectiveness fails and therefore the 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.

4. ECONOMIC BALANCE & RECOVERY OF WRONGFULLY AWARDED PUBLIC FUNDS

As to the second 'legal' issue, ie whether was there a change in overall economic balance (the 72(1)(e) /72(8) exception also relied upon by GCC, GT first (necessarily) alludes to what the documents disclosed by the Council *do show* (page 7 final para.):

> *"The documents disclosed by the Council in December 2018 show that the value of the contract signed in 2013 was circa £450m over 25 years (with an option to extend for a further 5 years). The 2016 Contract was for the same duration but the value of that contract was estimated by the Council to be £613m over 25 years."*

You then allude to what GCC has then failed to show:

> *"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"* (p.9 point.d)

How does this square with the obligation on GCC (the processes it must have in place) as set out in the 2014 Act at section 3, to keep adequate accounting records, defined at 3(2):

> (2)"Adequate accounting records" means records that are sufficient—
> (a) **to show and explain the relevant authority's transactions**,
> (b) to disclose at any time, with reasonable accuracy, the financial position of the authority at that time, and
> (c) **to enable the authority to ensure that any statements of accounts required to be prepared by the authority comply with the requirements imposed by or under this Act**.

We are astounded to discover - given it raised this as a defence in court proceedings – that GCC did not apparently have any (or any compelling or sufficient evidence to show its local auditor, GT) that it had even assessed the overall economic balance. Yet GCC's position as put to GT is (as you convey variously but for instance on page 8 para2)):

> *"The Council was supported by its technical, financial and legal advisers and there were long negotiations over a period of several months. The Council submits there was no significant change in the risk allocation position as a result of these negotiations."*

It appears that is yet another unsubstantiated submission that GT has uncovered.

GCC have not therefore presented evidence to show that the economic balance has not shifted. However, we submit that there is plenty of evidence to show that it has indeed shifted significantly in favour of UBB at the expense of GCC and the County's taxpayers.

A. Contract Price.

As stated above, Grant Thornton accepts that the contract price increased from £450m to £613m. This is a 36% increase over a three year period when the inflationary increase in

New infrastructure project costs according to the ONS was 8%[3]. There could not be a clearer indication that the economic balance has changed in favour of UBB.

The VfM justification in both Ernst and Young reports is based on a false comparator. The baseline of the 'do nothing' Termination Landfill Alternative includes the assumption of a very high £100m termination cost. We examine termination costs in more detail in Section 7a below, but the point here is that the £100m terminations costs are more than the NPV saving identified by EY (which is £63m) showing that the underlying contract is £37m more expensive than the landfill alternative, which clearly does not represent VfM.

The latest WRAP gate fee report[4] shows the median gate fee per tonne of waste at £89 a tonne, with this increasing to £93 per tonne for post 2000 facilities. We do not accept GCC's argument, summarised by Grant Thornton, that the WRAP report *"is not a truly valid comparison to a single 25 year contract"* (p.13, second to last bullet point). The information is broken down to cover the range of facilities, as shown in the table below, and the number of responses is statistically very credible, since there are many more responses than actual EfW plants (42 in 2018) (presumably reflecting the fact that one plant may have contracts with more than one local authority).[5] 42 respondents have contracts and the data shows the range of price. It is a comparison of today's price taken from a number of 25-year contracts and is therefore a good indicator of broad (but not precise) costs. It is also noticeable that EY used a comparison with the WRAP gate fee figures in Section 6 of their December 2018 Explanatory Note, justifying the Real Average Gate Fee as *"within the range of gate fees published by Waste & Resources Action Programme".* GCC have not questioned the validity of that comparison.

Table: WRAP 2019 Gate Fee report

Table 5: Summary of Energy from Waste (Incineration with energy recovery) gate fees reported by local authorities 2018 (£/tonne)

Type of facility		Median	Mode	Range	Responses
All		£89	£85 to £90	£44 to £125	68
Pre-year 2000	All responses	£65	£65 to £70	£44 to £89	20
	With contracts	£66	£65 to £70	£44 to £89	16
	Without contracts	£54	£45 to £50	£47 to £81	4
Post-year 2000	All responses	£93	£85 to £90	£50 to £121	45
	With contracts	£92	£85 to £90	£50 to £121	42
	Without contracts	£93	£90 to £95	£92 to £110	3

3 https://www.ons.gov.uk/businessindustryandtrade/constructionindustry/datasets/interimconstructionoutputpriceindices/current Shows an increase jan 2013- Jan 2014 of 4.8%, and of the index from 124.6 in Jan 2014 – 128.6 in Jan 2016, making a total of approximately 8% inflationary increase.

4 https://www.wrap.org.uk/sites/files/wrap/WRAP%20gate%20fees%20report%202019.pdf

5 https://tolvik.com/wp-content/uploads/2019/06/Tolvik-EfW-Statistics-2018-Report_July-2019-final-amended-version.pdf In 2018 there were 42 fully operational EfWs in the UK, with a further 5 EfWs accepting waste during the year as part of late stage commissioning.

These prices are very far from the £189.33/tonne paid by GCC to UBB for the first 108,000 tpa. Our calculations below show that in the last recorded full year, *assuming all the residual waste had been processed at the incinerator*, the cost per tonne would have been **£166.20.**

	Residual waste	**COST**
Total residual waste 2019/20[6]	124689	
First 108,000 at Tier 1 rates £189.33		£20,447,640.00
Remaining 16,689 at Tier 2 rates £16.54		£276,036.06
TOTAL GATE FEE		£20,723,676.06
Price per tonne		**£166.20**

This is strong evidence that the 2016 contract is priced much higher than market comparators, providing an indication that this has affected the economic balance. Because basic costs of incineration do not vary much across different facilities, the large variation must therefore be increased profit.

B. Annual cost increase compared to landfill

GCC's annual budget for residual waste increased from £15,836k in 2018/19 to £24,332k in 2019/20 when the incinerator came on line, an increase of nearly £8.5m or approximately 50%.[7] After consideration of income (presumably from electricity), this reduces to £22,140k which is still an increase of over £6m, a more than 30% increase on the 2018/19 budget. The contract is priced much higher than the previous landfill contract, yet the whole business case for the GCC contract with UBB is based on an assessment that it would be cheaper than landfill. This is evidently not the case.
It is generally agreed that incinerator contracts are priced at about the same price as, or slightly lower than landfill in order to be competitive. The fact that the UBB contract seems to be so much higher than landfill is another indicator that the economic balance has shifted.

C. Comments made by the CEO of GCC at OSM Scrutiny Committee on March 22nd 2018

The only occasion when Members have been able to scrutinise the 2016 UBB contract was at an overview and Management Scrutiny Committee on 22nd March 2019 (over 3 years after the contract was signed). The CEO, Pete Bungard, made a presentation and answered questions. Minutes of that meeting are available on the Council's website - see item 15. Residual Waste Project – Value for Money Affordability Analysis.[8] However, the official minutes are more noticeable for the omissions made rather than the information included. Sue Oppenheimer (one of the complainants under the 2014 Act) took near verbatim notes at that meeting which are attached to this reply.

Individuals quoted include:
Peter Bungard – CEO GCC
Cllr Rachel Smith
Cllr Jeremy Hilton
Cllr Paul Hodgkinson

6 Copy of chart showing residual waste totals provided as an appendix to this submission
7 https://www.gloucestershire.gov.uk/media/2089711/budget-book-2019-20-v5.pdf
8 https://glostext.gloucestershire.gov.uk/ieListDocuments.aspx?CId=264&MId=9174&Ver=4

Extracts are as follows. [please excuse style and Sue's notes in capitals – we did not expect this document to become key evidence but we wanted to keep it in its original form to show it has not been changed]:
Pete [Bungard] stated that the 'weakness of the council's position' was a problem.
……

Pete Bungard: The price variation was in accordance with the RPP mechanism in the contract.
……

Rachel Smith: Is £600m a material change?

Pete Bungard: It is a valid change. (Rachel pressed him on this but he wouldn't comment on whether or not it was a material change)
…….

Rachel: Was it carried out in line with procurement law

Pete: It was not a new contract, it was an RPP.
……

Jeremy [Hilton]: Are you confident that GCC has not compromised State Aid rules?

Pete: We employed Eversheds to give us advice on Section 72 of the procurement regs and we were told that is was a valid change. 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*** *(SO HE'S ADMITTING AN INCREASE IN CONTRACTOR PROFIT)*

Paul Hodgkinson: Why did GCC not have a better position re exiting the contract?

Pete: A contract is written assuming 'good will' on either side […]. It is normal to recompense for loss of profit. This contract had an affordable exit from planning failure, but if planning was agreed, construction would follow - you can't write into a contract a clause that allows the 'client to change their mind'. "We were in a disadvantageous position. There was no reason why planning should take more than 2 years"

Paul: We managed to get into a situation where they had us over a barrel.

Corroboration of these notes being a true record can be found on the Javelin Park Inquiry website. This website was set up in support of an open letter calling on *"the Chief Executive of Gloucestershire County Council to immediately establish an independent inquiry into the award and structure of the Javelin Park Incinerator Contract."* [9] This open letter was signed by hundreds of people including GCC and District councillors and Stroud's then MP. Immediately following the OSM meeting, a write up (by Tim Davies, a member of the public who attended the meeting) was posted on the website that included the following[10]:

9 https://javelinparkinquiry.org.uk/open-letter/
10 https://javelinparkinquiry.org.uk/more-unanswered-questions-as-council-admit-private-contractor-had-the-upper-hand-in-2015-contract-renegotiation/#more-572

"During the Revised Project Plan process in 2015, conducted without competitive pressure, the authority admits it was in a weak negotiating position, ***and around 50% of the contract price increase could be attributed to this. (Our analysis: That could add up to an extra £50m over the contract lifetime because of a failure to anticipate the full range of possible planning delays.)****"*

The CEO of Gloucestershire County Council clearly stated at that meeting that 'approximately 50%' of the increase between the 2013 and 2016 contracts was 'because UBB were in an advantageous position' rather than because costs had increased. **This is a clear admission that the economic balance changed between the two contracts, therefore strongly indicating illegal state aid.**

In the words of Grant Thornton's Counsel, (page 10 point ii): "*Market rate remuneration paid by the State to an economic entity in consideration for goods or services supplied to the State by that entity does not constitute an "economic advantage". Where, however, the State pays remuneration which exceeds market rate remuneration, then this is in principle likely to constitute an "economic advantage".* (p.11 point iv)... *"Where, however, a contract has not been awarded using a competitive process, there is the potential for the remuneration paid under that contract to be greater than the market rate."... (p.11 point v)"This does not mean, however, that remuneration paid under such a contract can be assumed to exceed market rate remuneration. Whether remuneration being paid under a contract exceeds market rate remuneration is essentially a question of fact, to be* ***established by evidence****."*

We contend that Mr Bungard has provided that evidence.

The evidence of a change in economic balance indicates the strong possibility of illegal State Aid. There is an opportunity to recover significant illegal state aid from UBB, and this should now be investigated further.

D. No transparent information on pricing

There seems to be no publicly available precise information showing exactly how the additional sum of £163m in the 2016 contract was arrived at. The Ernst and Young 'Explanatory Note' (Table 2 p.5) shows some ballpark increases (including Capex, SPC and bid costs, operating costs, increased borrowing costs, etc) which come to approx. £128m. That means that about £35m is unaccounted for**.** Could this be increased profit?

It is extremely hard to identify a shift in economic balance when the information provided is so opaque, leaving one to question whether this shows a deliberate attempt to cover things up. Hidden within this information, if it is available, there would be an answer to the question of economic balance, but Grant Thornton has failed to explore this in sufficient detail.

Taking the above points together 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.

5. PROCESS, OVERSIGHT AND MISLEADING STATEMENTS REGARDING LEGAL ADVICE

The Value for Money processes sit within a governance framework for the Council, in which the role of the Council's oversight and scrutiny committees, in particular the Audit and Governance committee are crucial. That committee receives an annual report on these matters, and within its role as auditor Grant Thornton will report on whether the Council has adequate processes to provide effective oversight, and whether these were followed. These are non-political committees and they must have full knowledge of the facts in order to carry out their duties.

The report for 2019/20 is here:
https://www.gloucestershire.gov.uk/media/2102833/annual-governance-statement-19-20-final.pdf

There is no mention in this report of the failures in at least two Governance processes:

GCC Governance Principle A: *Behaving with integrity, demonstrating strong commitment to ethical values, and respecting the rule of law*;and

GCC Governance Principle B: *Ensuring openness and comprehensive stakeholder engagement.*

Yet it has been acknowledged in the High Court that the details of the 2016 contract were kept secret from Councillors, the public and oversight committees, despite these principles, and despite explicit rulings from Information Commissioners Office, until finally revealed in December 2018. It was established in the court case that no one but a 'small cabal ' inside Council can have known the details of this contract until this date.

It must surely be a subject of concern and necessary to report that scrutiny committees of the Council, and the Council's Audit and Governance Committee have not been able to perform their function because they have been kept in the dark on the most expensive contract in the Council's history.

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

At Full Council on 23rd October 2015 Cllr Jeremy Hilton asked a question regarding the increase in contract value:

Question 12 – Cllr Jeremy Hilton asked for a breakdown of the estimated £5-6 million costs associated with the delay of the Javelin Park incinerator as indicated in the financial monitoring report in July and still yet to be seen.

Cllr Ray Theodoulou explained that these figures were estimates based on the best knowledge available and that there was no reason to think this would be exceeded."[11] This is an extraordinary piece of misinformation from the Cabinet Member.

At Cabinet on 11th November 2015, when the decision to agree the new contract was taken, (and Cabinet Members had access to the information in the Ernst and Young Report though other councillors did not), Cllr Theodoulou made the following statement in answer to a question from Cllr Hilton, (knowing full well that the EY report put NPV savings at only £62.7m, which with the £17m capital upfront, reduce to £45.7m):

11 https://glostext.gloucestershire.gov.uk/ieListDocuments.aspx?CId=333&MId=7890&Ver=4

"Ultimately one needs to consider the value for money for the project which produces a saving of £153m having taken account of these rising prices."[12] *Cllr Hilton responded "Your answer states savings of £153 million, when you previously stated this would be £190 million, down by £37 million. This is a financial disaster for the council."* Cllr Hilton believed that costs had increased by £37m. We now know the actual increase in cost was £163m, far more than he and other Councillors were led to believe.

The November 2015 decision by the Cabinet to delegate powers to sign the new contract was subsequently 'called in' by petition of five opposition Liberal Democrat Councillors. At the OSM Scrutiny Committee meeting to review this, key information about the value of the contract and the underlying material change was withheld and obscured from Councillors. All Councillors should of course have had access to the information relating to the material change in value of the contract. Yet, at the OSM Meeting on 22nd March 2019, Sue Oppenheimer's notes record Cllr Paul Hodgkinson, the Leader of the opposition LibDem group, stating that "*I was at the (November 2015) Scrutiny meeting. Nothing explicit was said there about the increase to £600m. No one wanted to make it clear and explicit because it was embarrassing. Officers should have explained."*

The evening prior to the meeting of the Scrutiny Committee in November 2015, the Council Chief Executive Peter Bungard held a 'strictly confidential' meeting with the Chairman of the scrutiny committee (Cllr Brian Oosthuysen) in a car park in order to persuade him not to vote in favour of the call in motion. In the event Cllr Oosthuyen did change his casting vote, the call in failed on the casting vote and the contract details remained secret until three years later. This has all the hallmarks of a cover up, quite at odds with the principles of openness, democratic oversight and public accountability. After a report by Cllr Oosthuysen this matter was investigated by the police for 18 months. However, surprisingly the Council has dismissed the matter *because no criminal charges were brought against the Chief Executive*. We contend that it is clearly a matter for audit and oversight as to whether this behaviour was consistent with the governance framework of the Council.

We also suggest there is a requirement to question the legal advice obtained by the Council, and the way this was conveyed to Councillors, particularly those on scrutiny committees. Councillors had been told that the 2016 contract was no more than a "revised project plan" under the 2013 contract and that this was a legal change with little financial impact on the Council. Grant Thornton now accepts that this is not the case. Your attention is drawn again to the Scrutiny Committee meeting of 22nd March 2019, in which Peter Bungard, CEO, answered questions on the 2016 contract. In response to a question from Cllr Smith, Councillors were told (minute 15.5)

"One member 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."***

Sue Oppenheimer's contemporaneous notes of that same meeting broadly confirm this minute and show the CEO saying: *"We employed Eversheds to give us advice on Section 72 of the procurement regs and we were told that is was a valid change."*

12 https://glostext.gloucestershire.gov.uk/documents/b11276/Member%20Questions%20and%20Answers%20-%2011%20November%202015%20Wednesday%2011-Nov-2015%2010.00%20Cabinet.pdf?T=9

Clearly as part of GT's role as auditor it is important to clarify the advice given at the time and whether officers and the Cabinet acted properly on this advice, including ensuring that oversight committees were properly appraised. The implication of this is that GT should now make clear either that the legal advice given to the Council was deficient, or it was mis-reported by the CEO to the scrutiny committee.

We understand that, unlike in some other contexts, Grant Thornton does not have the automatic right to see this advice. We would suggest GCC is asked to waive legal privilege in this matter so that you can see the advice and report fully in the public interest.

In any case we consider that it is important that Eversheds are asked to recuse themselves from acting on GCC's behalf in relation to GT's report. There are issues of conflict of interest in potentially defending the advice or the way this was conveyed to the committee and the public interest in openness and the nature of a report in the public interest. As a matter of record Eversheds have been paid many £100k's by the Council for advice relating to the contract, and then to resist, ultimately unsuccessfully, rulings on openness before the ICO.

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.

6. WHETHER PROPORTIONATE TO INVESTIGATE FURTHER – COUNCILLORS' ROLE

Grant Thornton argues that it is not proportionate to do any further work to clarify many of the uncertainties outlined in its provisional views report:

"However, taking account of all of the circumstances, it is our provisional view that it would not be proportionate for us to seek to determine whether there has been a breach of procurement law, in circumstances where it is likely to be a time-consuming, complex and expensive exercise and even if a great deal of time and money were expended, it might fail to produce a clear conclusion as to whether the economic balance of the contract was altered. It should be recalled that the costs of such an exercise would be carried by local electors". (p.10, 2nd to last para)

"It would not be proportionate for us to seek to determine whether there has been a breach of procurement law," (p. 12 para 7)

"Our provisional view is that, in circumstances where we are satisfied that the Council made appropriate arrangements for ensuring VfM (this being the focus of the auditor's role in relation to VfM), including to some extent seeking expert advice from EY on the VfM of the RPP (see below), it would not be proportionate for us to undertake the further analysis of the actual VfM of the RPP, given that this would involve seeking further expert advice, the costs of which would have to be borne by local taxpayers." (p.13 final para)

"we have provisionally concluded that it is not possible for Grant Thornton to come to any definite conclusion, based on the material currently available to it, as to whether the Council's entry into the 2016 contract with UBB involved a breach of procurement law, and that it would be disproportionate for us to seek to determine whether there has been a breach of procurement law in the circumstances". (p.26 1st para)

"(mindful however that our view was that it would be disproportionate to come to a definitive view on the legality of the RPP in terms of procurement law)".(p.26 mid para)

We appreciate that this is a slightly sensitive topic given that Grant Thornton would effectively be recommending it be paid to do more work. However, the issues here are very important in terms of past and future governance and lack of clarity and transparency has already arguable cost the County £100's millions. This must not happen again so it is our strong view that it is not up to Grant Thornton to determine this issue – **it is an issue for Councillors on the Audit and Governance Committee**.

Audit and Governance Committee's role was recently explained at a training session for its members in October 2020:

"[The Committee] *Provides independent assurance to the Council on the adequacy and effectiveness of the governance arrangements, risk management framework and internal control environment."*[13] In order to carry out this function effectively, the Committee needs both access to objective information and the independence and opportunity to evaluate and ensure adherence to the seven key principles of good governance. We do not believe that this has happened in relation to the incinerator contract and the procurement process by which it was awarded, and this report continues to deprive them of their full role by providing a one-sided view of this issue of proportionality.

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

7. OTHER POINTS ARISING FROM THE PV REPORT

The following points for consideration also collectively contribute to our view that this contract does not offer Value for Money:

a) Does the predicament justify the actions taken? Termination costs.

Grant Thornton consistently states that the actions taken by GCC in relation to the procurement process were justified by the predicament they were in, e.g:

"In terms of value for money, the Council had limited options at this stage, having signed the contract – any other options to negotiating an RPP would have required incurring expenditure on termination of the contract and either continuing to landfill or starting a completely new procurement process for an EfW or other technology solution, thus introducing further long delays, presumably with continuing reliance on landfill until the new solution was operational." (p.9 first para)

Apart from the obvious over-riding truth that the law should not be broken, whatever the excuse, we also contend that the information presented in the report to justify this predicament is wrong:

13 https://glostext.gloucestershire.gov.uk/documents/s65516/Annual%20Governance%20Statement%202019-2020%20AGC%20Training%209th%20October%202020%203.pdf

- The cost of termination was consistently over stated at £100m, a figure repeatedly quoted by Councillors. We are now aware that this included a hypothetical re-tendering cost (dealt with below) which was clearly misleading and used to improperly affect member consideration and voting on the matter.

- In the Ernst and Young report of November 2015 in Appendix A p.29, the cost of termination (net of re-procurement costs) is estimated at between £35.4m - £69.8m. The lower figure is in line with the work of our consultant, Steve Burdett, who estimated costs of around £36m – see our original complaint. But EY then picked a figure between these two extremes of £59.8m. We note that the modelling for the termination costs was done by Grant Thornton. We contend that negotiation would have brought the figure down, as is normal in these processes, possibly below the £36m we calculated. GCC paid £38m in capital to UBB, and termination would not have been significantly more than that and might even have been less.

- Even if termination costs were higher, and even if GCC had chosen to return to landfill, this could have saved approximately £6m -£8.5m p.a. since this is the difference between the Residual Waste expenditure before and after the incinerator came on line, as evidenced in Section 4 b) above. This saving, together with the re-direction of the capital budget would have brought the council back into a neutral financial position.

- The claim made by GCC that re-procurement would have cost £40m is outrageous. The Residual Waste Working Party had met in 2014 and put forward recommendations including the use of short-term contracts with existing residual waste providers which would therefore not have cost anywhere near the £40m estimated to re-tender. The key recommendation was:
  *"In the event that the UBB contract fails, the Council should further explore both Option 2 phase 1 (providing local MT/MBT to manufacture SRF) and Option 3 (securing short term merchant capacity) through soft market testing."..."****a soft market testing exercise and a procurement process for these options could be quickly mobilised****"*

  Our research in our original complaint showed that the cost of short term merchant capacity would have been significantly cheaper than the cost of the UBB contract. GCC's arguments against this are all entirely irrelevant: they say that some of the companies originally bid for the contract and were discounted; that Gloucestershire is geographically isolated – a nonsense when you consider that we are surrounded very closely on all sides, particularly at Avonmouth, by incinerators which had capacity at the time, as shown in our original report; that transport costs were not costed in (they were); that these alternatives offered incineration (yes of course). The point is that there were cheaper short-term facilities immediately available, which would have allowed for immediate savings and for Option 2 Phase 1 to be explored, in line with the recommendations of the Residual Waste Working Party.

  There were therefore affordable and speedy options available to GCC, and the 'predicament' was largely political and about loss of face, neither of which are good reasons, or excuses, for breaking procurement law.

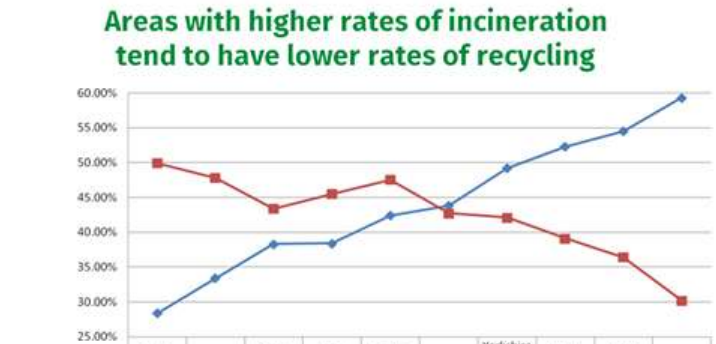
b) Waste Hierarchy (p.12-14)

The report states "*In our provisional view, the 2011 Regulations do place a specific requirement on the Council to take all such measures as are available to it to apply the waste hierarchy, but only as are 'reasonable in the circumstances' and they may depart from the hierarchy in order to achieve* ***the best overall environmental outcome*** *where this is justified by life-cycle thinking on the overall impacts of the generation and management of the waste." (Page 14 para 5)*

We disagree with the current report's conclusions that this test is met.

i. There is mounting evidence that waste incineration is (or will soon be)on a par with landfill in terms of CO2e emissions. A report by Zero Waste Scotland a government funded body tasked with delivering the Scottish Government's waste policy) on the CO2 impact of incineration concluded *"If the proportion of plastic waste in residual municipal waste is increased from 15% to 17%, EfW emissions rise to the same level as landfill. As the composition of residual municipal waste changes over time, there is a risk that the greenhouse gas emissions per tonne of waste sent to EfWs will increase above those landfilled, leading to unnecessary climate change impacts."* [14] This puts incineration on a par with landfill at the bottom of the waste hierarchy.

ii. The report repeats the claim by GCC that *"EfW needs to be seen alongside the priority given by the Council to kerbside collection, which reduces residual waste (and is clearly in accordance with the hierarchy)" (page 14 first bullet point)* Evidence shows that those councils that incinerate more recycle less (see chart below). Recycling in Gloucestershire has flat-lined and, judging from experience elsewhere, is unlikely to increase because of the negative effects of the incinerator contract on meeting the waste hierarchy.



	South West	Eastern	East Midlands	North West	South East	ENGLAND	Yorkshire and the Humber	West Midlands	North East	London
Incineration Rate	28.40%	33.40%	38.30%	38.40%	42.40%	43.80%	49.20%	52.30%	54.50%	59.30%
Recycling Rate	49.90%	47.80%	43.40%	45.50%	47.50%	42.70%	42.10%	39.10%	36.40%	30.20%

Source: Defra statistics on English Local Authority Collected Waste treatment in 2018/19

iii. The average gross CO_2 emissions from incinerators in the UK in 2019 was **1.037** tonnes per tonne of waste burnt. Of this, the amount of fossil CO_2 emitted was **0.510** tonnes per tonne of waste burnt.[15] The Javelin Park incinerator is therefore responsible for close on 200,000 tonnes of CO_2 per annum, of which half is from burning fossil-fuel derived plastic. To put this in context, ""*There are close to 500 incinerators in Europe. Last year, these incinerators created 52Mt of fossil CO2 – that's*

14https://www.zerowastescotland.org.uk/sites/default/files/ZWS%20%282020%29%20CC%20impacts%20of%20incineration%20TECHNICAL%20REPORT.pdf
15Tolvik's report "UK Energy From Waste Statistics 2019 (https://www.tolvik.com/wp-content/uploads/2020/05/Tolvik-UK-EfW-Statistics-2019-Report-June-2020.pdf)

more than the annual greenhouse gas emissions of Portugal.".[16] Incinerators have a huge impact on climate change and can in no way be described as providing the 'best overall environmental outcome'.

It follows that the claim in Grant Thornton's report that "*EfW provides energy security for the Council in the form of renewable energy"* is disingenuous since at least 50% of energy comes from burning plastics. The calorific value of the 'renewable' sources of waste (the majority of which is wet food waste) is much lower than the calorific value of the fossil-fuel (plastic) waste, so the proportion of electricity derived from non-renewable sources is in fact even higher than 50%. We contend that only 36% of the energy can be considered renewable energy.

EfW produces 2.6% of the UK's energy (electricity and heat) but 13% of the power sector fossil CO2 emissions.[17] The average carbon intensity of the grid in 2019 was 214 grams per kilowatt-hour (kWh), while the current average fossil carbon emission intensity of energy from EfW incineration is four times that: 860 grams per kWh.[18] Incineration as a form of energy production flies in the face of the climate crisis and the Committee on Climate Change target to decarbonise the electricity sector by 2035.[19] Incineration cannot in any way be described as providing the 'best environmental outcome".

iv. The report states that *"The Council has considered but dismissed further separation of recyclates from the residual waste stream because of the costs involved and the uncertainties in therecyclates market." (page 14 bullet point 3).* This statement clearly shows that GCC is not planning on increasing recycling rates, and shows lack of compliance with the national waste and resources strategy.[20] This is despite their own evidence that more than 60% of the residual waste stream is recyclable (see graphic). More than 90% of residual

16 https://www.euractiv.com/section/circular-economy/opinion/waste-incineration-across-europe-and-the-uk-profit-at-the-expense-of-climate/?fbclid=IwAR0T9MjmCaiTbomQ815sI6pWoL20HipyYCG1XLd4WpibhR78g2zd7R4AOFo

17 The share of EfW carbon emissions in the power sector is 13%, or 7.4 millions of tonnes of carbon dioxide equivalent (MtCO2e) of a total of 57.3 MtCO2e. Committee on Climate Change, Reducing UK Emissions: Progress Report to Parliament, June 2020, https://www.theccc.org.uk/publication/reducing-uk-emissions-2020-progress-report-to-parliament/; BEIS, Provisional UK greenhouse gas emissions national statistics, 2020, https://www.gov.uk/government/collections/provisional-uk-greenhouse-gas-emissions-national-statistics The other figures—2.4% of the power sector electricity supply and 0.2% of the heat supply—are based on the 7.7 TWh electricity and 1.4 TWh heat supply generation figures in Tolvik Consulting, UK Energy from Waste Statistics; 2019, May 2020, https://www.tolvik.com/wp-content/uploads/2020/05/Tolvik-UK-EfW-Statistics-2019-Report-June-2020.pdf. The heat supply value of 760 TWh is based on Ofgem, Decarbonisation of heat, 2016, https://www.ofgem.gov.uk/system/files/docs/2016/11/ofgem_future_insights_programme_-_the_decarbonisation_of_heat.pdf. The value of 324 TWh of electricity supplied in the UK is based on BEIS, Fuel used in electricity generation and electricity supplied, 2020, https://www.gov.uk/government/statistics/electricity-section-5-energy-trends.

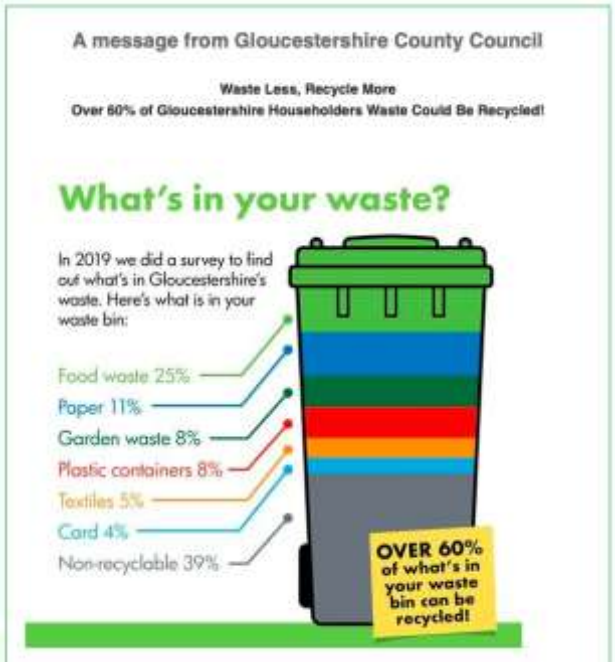
18 Carbon intensity is calculated from data provided by the National Grid in partnership with the Environmental Defense Fund, the University of Oxford, and WWF (Carbon Intensity API, n.d., https://carbonintensity.org.uk/). Carbon intensity from EfW incineration is based on 455 kg of fossil CO2 per tonne of waste and 531 kWh of net energy generated per tonne of input. For parameter values, see Tolvik Consulting, UK Energy from Waste Statistics: 2019, May 2020, https://www.tolvik.com/wp-content/uploads/2020/05/Tolvik-UK-EfW-Statistics-2019-Report-June-2020.pdf; Dennis Gammer and Susie Elks, Energy from Waste Plants with Carbon Capture: A Preliminary Assessment of Their Potential Value to the Decarbonisation of the UK, Catapult Energy Systems, May 2020, https://es.catapult.org.uk/reports/energy-from-waste-plants-with-carbon-capture/?download=true; and Ramboll, North London Heat and Power Project: Carbon Impact Screening Edmonton ERF, 2019, http://northlondonheatandpower.london/media/udfapcyh/nlwa-carbon-impact-study-report-ver-2-f.pdf.

19 https://www.theccc.org.uk/publication/sixth-carbon-budget/

20 https://www.gov.uk/government/publications/resources-and-waste-strategy-for-england/resources-and-waste-strategy-at-a-glance

waste could be reused, recycled or avoided according to a recent WRAP report.[21]

The un-evidenced claim that the cost of recycling and uncertainties of the market are justifications for not recycling more waste is wrong. Recycling, combined with the cost of renewable energy is between 20%-50% cheaper than incineration[22]. The uncertainties of the market are no more of a risk than the myriad of risks facing incineration, which include amongst other things, the risk of the costs of a potential carbon tax[23]; of the requirement for carbon capture and storage[24]; of lack of a market for electricity, as has recently been the case with a shortfall of £1.160m from the sale of electricity;[25] of stranded assets[26]. The council has a key role in supporting services to increase recycling and supporting change in resident behaviour, yet the reality is that the amount of resources directed to getting waste higher up the waste hierarchy is minimal. Indeed they have cut their budget to support separate food waste collection by 175K in 2020/21[27] and again with a £72k cut proposed in 2021[28] despite the fact that their graphic below shows 25% of residual waste is food waste that could be separated and anaerobically digested.



~~0.~~21 https://wrap.org.uk/sites/files/wrap/National%20household%20waste%20composition%202017.pd f

~~1.~~0.

22 https://www.xrzerowaste.uk/annex-1 Section V

23 https://www.theguardian.com/environment/2020/aug/25/legal-challenge-uk-exclusion-waste-incinerators-emissions-trading-scheme

24 https://www.theccc.org.uk/publication/sixth-carbon-budget/

25 https://glostext.gloucestershire.gov.uk/documents/s67374/Budget%20Monitoring%20Report%20Forecasts%20made%20October%202020%20P7%20V7%20Post%20CLT%201911.. .pdf

26 https://www.xrzerowaste.uk/annex-1 SectionVI

27 https://www.gloucestershire.gov.uk/media/2095608/council-mtfs-doc-final-approved.pdf p.60

28 https://glostext.gloucestershire.gov.uk/documents/s67609/Draft%20MTFS%20Doc%20-%20CABINET%20NEW%20Dec%202020.pdf p.78

All these points show that the incinerator contract has stopped GCC's efforts to treat waste higher up the waste hierarchy, to the detriment of meeting both climate change targets and the government's waste and resources strategy.

c) Assumptions (p.14 - 16)

Assumptions about waste arisings are essential to assessing VfM. If assumptions are too high and actual residual waste tonnages are lower, then the price per tonne (or the Real Average Gate Fee as defined by Ernst and Young in their explanatory note) increases. This was certainly the case in 2019/20 as explained in section 4A above, when tonnages were 124,689, well below the 142,775 predicted in the Waste Core Strategy (a difference of 18,086)[29]. Tonnages in 2018/19, at approximately 130,000 tonnes[30] were also well below the prediction in the Waste Core Strategy (WCS) of 145,674.

The WCS[31] required *"Provision for between 108,000 - 145,000 tonnes/year residual waste recovery capacity for municipal waste by 2027."* The Council has always used the top end of these figures to predict capacity required and the Grant Thornton report states that "*The Council also suggests, while not accepting that it has done so, that it is better to over-than under-predict residual waste, because of the risk of having too little capacity and thus having to resort to landfill". (page 15 para 3)*

Our evidence shows the error in this approach to achieving VfM. The Council has consistently over-predicted and the cost per tonne is therefore much too high. The council would not have had to resort to landfill; as previously shown, there was plenty of short-term capacity nearby should a sudden unexpected spike in figures have occurred. It was an error not to use a median prediction figure, an error which has fundamentally affected the VfM of the contract. As the Grant Thornton report states *"It is the tonnages which were predicted at that stage which impacted on the Council's decision-making around the contract, and not any subsequent observed trends.*" (page 16 para 4) and those predictions were flawed.

d) Pricing (p. 16 -17)

Firstly, the gate fee figures quoted in this section (presumably due to a carry over from the previous PV report) are based on the 2013 contract and need to be updated to reflect the figures in the 2016 contract as shown in the EY Explanatory Note of December 2018.

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29 Table 31: Yearly MSW Facility Requirements. Table attached to this report. The figure is arrived at by adding together the amount in the 'Residual Treatment' column with that in the 'Residual after Treatment' column.

30 https://glostext.gloucestershire.gov.uk/documents/g9027/Public%20reports%20pack%20Tuesday%2008-Oct-2019%2010.00%20Gloucestershire%20Joint%20Waste%20Committee.pdf?T=10

31 https://www.gloucestershire.gov.uk/planning-and-environment/planning-policy/gloucestershire-waste-core-strategy/ See 'Strategic Objective 3 – Other Recovery'

Although we did not previously comment on the Tier 3 pricing (set at £62.92 in the 2016 contract) we would like to draw your attention to a new service launched by UBB for collecting commercial waste.[32] The tier 3 pricing allows them to offer this at below-market rate because GCC has met all the fixed costs of the plant. Grant Thornton report states: "*The 108,000 tonnes represents the guaranteed minimum tonnage, and it is therefore sensible for the fixed costs of the plant to be recovered through the price charged up to this threshold.*" (page 16 second to last para). It cannot be right that the contract, by covering all fixed costs, allows a subsidised service to the commercial sector.

The 'greenwash' in the UBB press release is particularity galling:

"We can help companies improve their green credentials with circular solutions and implementing strategies to achieve Zero to Landfill.
"We can also help implement circular solutions to achieve Zero to Landfill with more sustainable methods of disposal such as energy to waste and other forms of greener electricity production".

Studies show that approximately 75% of commercial waste is recyclable[33], yet the service provided by UBB burns this waste, claiming it is a green solution. This waste should be recycled and treated higher up the waste hierarchy.

e) Use of PFI (p.20 - 21)

In this section, we note with interest Grant Thornton's comments on inflexibility of technology: *"it is the technology which drives the perceived inflexibility. If the technological solution requires a significant capital investment which is likely to have a long life, there is bound to be a degree of inflexibility, whether that asset is owned by the public sector, is provided through a long- term PFI or through an outsourced service contract" (page 20 para 6)*

This statement accords with our view that incineration is the wrong technology because it is inflexible and cannot adapt to new developments, to changes in waste streams or to changes in government policy. Other more flexible technologies were available and should have been assessed when GCC was considering what actions to take in 2015, in order to ensure VfM.

The Council's response to our suggestion that contracts can be cancelled is irrelevant. The main point of our evidence was to illustrate that these contracts can be and are cancelled, for whatever the reason. This contract with UBB is unreasonable, and could/should have been cancelled in 2015.

f) Legislative change (p.21 -22)

32 https://www.letsrecycle.com/news/latest-news/urbaser-launches-commercial-waste-arm/
33 https://www.wrapcymru.org.uk/reports/composition-analysis-commercial-and-industrial-waste-wales

We are pleased to see agreement from Grant Thornton that the *"on balance, it would have been better for the Council to formally revisit this aspect of the project before agreeing the RPP, to ensure that there were no major changes in the regulatory environment which would have a major impact."* (Page 22 para 5)

It is hard to see therefore how GT can then conclude that this is not an issue for VfM. There are already[34] (and will be in the future) legislative changes that impact on resource use, waste disposal and incineration. Section 44 of the Contract quoted by GCC provides little comfort:

> *44.5 Financing*
>
> *If the Contractor has used reasonable endeavours to obtain funding for the Capital Expenditure referred to in Clause 44.3, but has been unable to do so within forty (40) Business Days of the date that the agreement or determination referred to in Clause 44.3 occurred, then t**he Authority shall pay to the Contractor an amount equal to that Capital Expenditure** in accordance with paragraph 9.2.1 of Part 1 of Schedule 21 (Change Protocol)*

The recent report by the Climate Change Committee[35] recommends that incinerators still operating in 2040 be required to have Carbon Capture and Storage, a very expensive solution. Who will pay for that?

g) Technological developments (p. 22 - 23)

The Grant Thornton PV report states that *"the Council has stated that it could not have re-evaluated the possible costs and benefits of other technologies without carrying out a fresh procurement exercise." (page 23 para 4).* This is exactly our point, a fresh procurement exercise should have been carried out. As Grant Thornton also state "*it would have been better for the Council to document a formal consideration of the impact of technological developments prior to agreeing to the RPP". (page 23 para 5).*

However they find that GCC's alternative action was adequate in the circumstances: *"Instead, it instructed its financial advisors, EY, to revisit the value-for-money assessment of the project which compared its costs and benefits against the baseline of continuing with the existing technology of landfill." (page 23 para 4).*

As already mentioned in Section4A above, this was not a valid comparison. The only factor considered was price, and the price of the baseline position was dramatically skewed by the inclusion of termination costs estimated at £100m – £37m more than the NPV saving claimed for the UBB contract in the EY report. In other words, the 2016 contract was more expensive than the 'do nothing' option per se.

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34 See discussion at Gloucestershire Joint Waste Committee on National Resources and Waste Strategy12.02.19 Para 82:

"It was emphasised that this would have fairly significant impact as it sets an ambition for the UK to become a world leader in using resources efficiently and in reducing the amount of waste created. It was also pointed out that the strategy re-instated the commitment to eliminating plastic waste within the next 25 years and eliminating all avoidable wastes for 2050. (p.3)"
https://glostext.gloucestershire.gov.uk/documents/g9028/Public%20reports%20pack%20Tuesday%2003-Dec-2019%2010.00%20Gloucestershire%20Joint%20Waste%20Committee.pdf?T=10

35 https://www.theccc.org.uk/publication/sixth-carbon-budget/

An example of technology improvements that will impact on the contract is a recent article in LetsRecycle[36] which describes the changes that are anticipated up to 2030 in the recycling of plastic: *"With a drive to divert more plastic to recycling, plastic going to Energy from Waste (EFW) is expected to decrease to 30% (from over 45%)"*

This will have a substantial negative effect on the efficiency and calorific value of the plant. One cannot assert VfM for a 25-year contract when such technological risks are already known or could easily be anticipated.

h) Social Value (p.24 - 25)

We disagree with Grant Thorton's conclusion on Social Value. As stated this was a requirement in the Public Services (Social Value) Act 2012 which came into force on 31 January 2013. It was therefore in force in 2015/16 when the decision was made to enter into the new 2016 contract, and so should have been considered. There is nothing in the contract to require UBB to establish a Community Fund. They set this up on their own initiative, and it distributes a maximum of £25k per annum to good causes in surrounding parishes. This is in contrast to Cornwall Energy Recovery Centre where the requirement for a grant fund of £100k was written into the contract.[37] However, social value does not come from a small stipend for community projects, but rather from a material change towards a more sustainable, community friendly circular economy.

To sum up

Taken collectively, all the above points in Section 7 above show a tendency to take at face value any assertions made by GCC, discounting the evidenced statements that we have made. We feel that this provides a picture that is not helpful when presenting what should be an objective and well-researched report.

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.

CONCLUSIONS AND RECOMMENDATIONS

The Javelin Park incinerator contract is the most expensive in Gloucestershire's history and it has been controversial and subject to widespread opposition since it was first proposed and remains so today. Yet, as matters stand, not only will it remain an environmental and financial millstone around the County's neck for the next 25 year but the errors which led to its existence could well be repeated.

This is a very serious situation. We therefore warmly support Grant Thornton's intention to produce a report in the public interest which will examine the contract and how it came to be concluded.

36 https://www.letsrecycle.com/news/latest-news/what-is-the-future-of-plastic-recycling/

37 https://www.cornwall.gov.uk/environment-and-planning/recycling-rubbish-and-waste/the-cornwall-energy-recovery-centre-cerc/?page=15877&page=15877

It is very important that the comparatively simple issues which underlie these errors (eg 'no competition = no value for money') do not get lost in a fog of uncertainty and confusion. Well versed though we are in the subject matter it is fair to say that we found both structure and wording of the provisional views report somewhat hesitant and inconclusive. This is perhaps because the authors have attempted to build on the work done in the two previous GT provisional views with, as acknowledged, some 'cut & paste'.

So our first recommendation is that Grant Thornton looks at the whole matter holistically rather than simply adding to previous reports. We believe that there is a need to simplify and strengthen your conclusions in order that the whole purpose of the Report in the Public Interest can be achieved by corrective action being taken.

This should include recommendations for actions to address the issues you raise.

We ask that the report should address, inter alia, the following points:

- The strong evidence that GCC did not follow proper procedures to ensure Value for Money (VfM) prior to awarding the 2016 contract.
- That the test of economy, efficiency and effectiveness fails and therefore the 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.
- GCC contend, without any supporting evidence, and having not followed required procedures, that the economic balance was not shifted by the second, 2016, contract. However, there is plenty of evidence to show that it has *indeed* shifted significantly in favour of UBB at the expense of GCC and the County's taxpayers.
- The evidence of a change in economic balance indicates the strong possibility of illegal State Aid. The possibility of improper overpayments to UBB should be investigated further with a view to recovery for the benefit of GCC.
- Grant Thornton should address the neglect of good Governance processes and make recommendations for ensuring they are never replicated, for consideration by Audit and Governance Committee in the first instance.
- Grant Thornton should not rely on its own view as to whether further investigations are 'disproportionate' but rather provide an objective assessment regarding both the pros and cons of undertaking further analysis - and allow the Audit and Governance Committee to decide what action to take.
- The provisional views report shows a tendency to take at face value assertions made by GCC regarding the environmental & financial benefits of incineration, discounting the evidenced statements that we have made. We feel that this provides a picture that is not helpful when presenting what should be an objective and well-researched report. Grant Thornton should make corrections to statements and conclusions made in the remaining sections of the report in line with our evidence and representations. This evidence should then be taken into account when assessing VfM.

Ends

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