



19<sup>th</sup> February 2021

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

*Additional Comments Following Extension of Deadline After Our Response Submitted to you 22<sup>nd</sup> Jan*

Dear John,

Thank you for your letter of 8th February. We will comment on that later.

However, the prime purpose of this letter is to ensure that our response to your previous, 14 November 2018, 'provisional views', is also front of mind and considered an integral part of our current response as you consider your intended report in the public interest.

You may recall that document was drafted by our barrister, Duncan Sinclair (DS), and for ease of reference I attach a copy. I would like to take this opportunity to remind you of some of the key points.

Concerns over lack of transparency

DS states (Clause 7): *"I have been surprised ....that GT has paid so little regard to its own ability ... to disclose relevant information to the objectors"*. It was only in response to a second FOI action that the contract details were finally released in Dec 2018, having been previously concealed from the Audit Committee, Councillors and objectors. You had this information but refused our requests to provide it. Nevertheless, you will have known that the contract costs had increased by £163m, 36%, outside of competitive tensions and this should have informed your November 2018 draft conclusions, and those in your previous draft report in 2017.

DS sets out (Clause 10) the possible actions by GT and possible responses by the objectors. Of critical importance is that GT now ensures that the objectors and the public are no longer prejudiced by a lack of transparency and that concerns on Value for Money and conflict of interest in particular are fairly dealt with. In this context, while you have stated in your draft provisional view that you *"will issue a report in the public interest"*, you have taken steps to keep this very important revised view from the public and the Audit committee.

DS states (clause 37) *"It is not too late for GT to properly deal with this matter, and should it fail to do so the objectors have the ability to (in essence) "step into its shoes" by way of court appeal under s.28 and/or seek to have any "do nothing" decision quashed and remitted to GT by way of urgent judicial review. "*

Your report in the public interest should not be further delayed. We are already five years after the contract signed, 3 ½ years since the objection and four years since Judge Shanks ruled in the first FOI appeal trial concerning release of information about this contract: *"The Cabinet system tends to concentrate decision making in the hands of a small number of people and individual elected Councillors do not always have the capability to ask for or act on the information others might. In the end it is the electorate which must hold the Council as a whole to account, and the electorate is more than able to do that properly if information is available to all"*



A further delay will mean that this would be the second time that the electorate would be denied important information regarding Javelin Park. The above ruling from Judge Shanks was made prior to the last local elections in 2017, yet in defiance of the spirit if not the letter of that ruling the Council did not release the 2016 contract and continued to provide grossly misleading information on the contract value and 'savings' to Councillors and the public.

Grant Thornton has been the Council's auditor over this entire period and has failed to ensure that the facts of this contract, the County's largest ever, have been reported on to the public and councillors. Even the Council's own Audit committee has been kept in the dark. We have written to you on more than one occasion about failures to ensure the audit committee is properly informed of the facts of this contract, and false claims about savings are not presented in the accounts.

### Conflicts of Interest and the Public Interest

Now that you have taken legal advice and confirm that the 2016 contract was improperly entered into, we request that you carefully review and recommend appropriate action on conflict of interest issues, including those applying to Grant Thornton. Some of these are listed below.

- Council officers, reporting to the Chief Executive Peter Bungard, may feel the need to conceal errors in entering into the contract in 2016, and the failure to properly inform councillors and oversight committees.
- Grant Thornton has reported to the Audit committee. It was involved in providing financial modelling for the 2016 contract. This has principally been done through Peter Barber, who has (wrongly) reported to the audit committee on your previous draft reports which he said largely gave the Council an all clear, and the report was only delayed by 'difficult' objectors. He has also verbally 'signed off' to the audit committee on a claim still presented in the Council Accounts that the incinerator will deliver savings of £100m, when in fact the cost of waste disposal has significantly increased. You yourself have issued two previous draft reports which did not consider the 2016 contract, stating that this was 'not material to your determination'.
- Eversheds as lawyers to the Council provided advice to the Council on the 2016 contract, and must have considered the issues of public procurement and State Aid. They have been paid £100k's to twice appeal (unsuccessfully) a ruling from the Information Commissioners office to make the contract public, and have continued to put pressure on you and others to keep the contract confidential despite these rulings *and* the stated transparency principles of the Council. Eversheds really should not now be in a position to advise GCC on a proper response to your provisional views given these contradict their own apparent advice which enabled GCC to enter into this contract in 2016 by direct award.
- The Council's scrutiny committee in March 2019 was told by the Chief Executive. *"...that the contract had that mechanism for change [ie to increase the contract value by 36%] and that the **legal advice supported that**"* This means that either the advice from Eversheds was deficient, or it was mis-reported to the scrutiny committee.

### Role of the Audit Committee

Officers are now instructing Eversheds with regard to responding to your latest draft report, without reference to the independent Audit committee. They requested an extension which you granted. We contend that the interests of Eversheds and the relevant officers are not consistent with the full transparency which the public interest requires.



As Duncan Sinclair states (36) ***"I would expect GCC (/its audit committee) to seek to properly investigate this themselves and/or engage with GT to ensure they do not feel constrained by any conflict of interests"***

DS (37) *"Indeed the GCC as a responsible public body might either waive privilege [ie in respect of the Eversheds advice] .... or failing that to seek a second opinion on how it was advised in relation to the 2016 amendments"*

*"That something has gone seriously wrong is becoming increasingly apparent"*

Given the issues of conflict of interest it is important that the independent Audit committee is empowered to engage directly with you and ensure that necessary actions are taken including informing the public about the true nature of this contract and the way it was entered into.

#### Value for Money and Costs of Identifying Illegal State Aid

Duncan Sinclair sets out the contradictory and illogical arguments on Value for Money you make in the draft Nov 2018 report. You have repeated much of this language in your revised draft.

Our full response of Jan 22nd addresses the inconsistency of your draft views on Value for Money, however the points DS makes remain relevant:

*(Clause 24) the GT "findings" on this point are internally contradictory and irrational: at page 10 it is said in terms that "in our provisional view the Council has followed appropriate processes in entering into the contract for the EfW plant" (it then goes on to conflate this issue with assessing VfM by other processes).*

*(Clause 25) The GT provisional findings, in the abstract, are therefore simply confusing (and confused).*

*(Clause 28) ... it is well established that there is a presumption in law that a properly conducted lawful procurement process will identify the market price (London Underground PPP UK state aid notification decision 2002). But it is on precisely this point that GT said there is reason to believe there was a failure (albeit not consistently, though now there has been disclosure it is apparent they had good reason to say so).*

*(Clause 33) A breach of the procurement rules is a serious failure. It is not "remedied" by some ex post analysis of value for money based on inter alia termination fees, a landfill alternative, or the "costs" of complying with procurement law. The only relevant question as to state aid is a comparison with the market price, for which in this case there is a clear starting point: the terms of the contract negotiated under competitive pressure and signed in 2013.*

Note that DS rightly dismisses the Ernst and Young work on affordability and comparison to landfill as irrelevant.

*(Clause 3) At page 8 GT, largely adopting E&Y has regard to entirely irrelevant considerations (as regards compliance with procurement law) including: ...*

Your provisional views also asks serious questions about this approach and the work done. So neither of the two mechanisms you can use to assess VfM have occurred and your report must address this failure to achieve or demonstrate value for money by any mechanism.

DS also points out on costs of providing a report in the public interest:



(Clause 16) " To the extent GT seeks to rely on the "costs" of properly fulfilling its role<sup>11</sup> it would be patently irrational: at stake is a prima facie illegality that led to an overpayment to the tune of c.£150m ... At stake, in short, is some £150 million of taxpayers' money"

We would be grateful if you would confirm that these points and, indeed, the whole of our previous response to your previous 'provisional views' of 14 Nov 2018 will be taken in account when completing your final report.

With respect to your letter of 8th February, we note that you seek to excuse the Council's further delaying tactics by citing Christmas & COVID-19. I can confirm that both of these factors affected our homes and workplaces as well – yet we managed to respond within your deadline, despite lacking the considerable taxpayer funded resources of the GCC.

You further comment as follows: "I am also conscious that my Provisional Views, with the indication that I may publish a Report in the Public Interest, represents a significant raising of the stakes for the Council." With respect, the stakes have *always* been very high for the people of Gloucestershire both environmentally and financially and, many years later, remain so now.

Given your quasi-judicial role and requirement to be independent, it must be evident to you that the entire history of this contract has been one of concealment and delay by a small group at the GCC - the fact that it was concealed for years has even been confirmed by a High Court judge. This group used every trick in the book - and considerable public funds - to frustrate legitimate attempts by taxpayers to ensure full transparency concerning the Javelin Park contract. Why is that? Because in addition to being ill-conceived it was illegally procured and, as a result of a flawed process with no competition, bad value for money.

We strongly urge you, once again, not only to produce a report in the public interest but ensure that it is robust on the question of value for money - even if that requires further investigation – and makes strong recommendations for remedial action.

A handwritten signature in black ink, appearing to be 'Tom Jarman'.

Tom Jarman, Sue Oppenheimer

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