

NORTH LONDON WASTE AUTHORITY

REPORT TITLE: PLANNING FOR FUTURE SERVICE DELIVERY WITH LONDONENERGY LTD
(LEL)

REPORT OF: MANAGING DIRECTOR

FOR SUBMISSION TO: AUTHORITY MEETING

DATE: 15 DECEMBER 2022

SUMMARY OF REPORT:

This report provides an update on the development of a new contract to operate and maintain facilities being delivered as part of the North London Heat and Power Project (NLHPP).

RECOMMENDATIONS:

The Authority is recommended to:

- A. Note the progress that has been made in developing an Operating and Maintenance Contract for new facilities situated on the Edmonton EcoPark;
- B. Agree to delegate to the Managing Director, in consultation with the Chair and Vice Chairs, the authority to determine whether the criteria for Direct Award to LondonEnergy Ltd have been satisfied; and
- C. Agree to delegate to the Managing Director, in consultation with the Chair and Vice Chairs, the authority to award a Contract in January 2023, for the Operation and Maintenance of Facilities situated on EcoPark South.

SIGNED:  Managing Director

DATE: 15 December 2022

1. PURPOSE OF REPORT

- 1.1. The report updates Members on the development of a new Contract (EcoPark South Contract) for the Operation and Maintenance of facilities being delivered through the North London Heat and Power Project (NLHPP).
- 1.2. The NLHPP is the project to implement the provision of new and replacement waste management and disposal facilities, authorised through a Development Consent Order (DCO) for a new Energy Recovery Facility (ERF) and associated facilities, which was obtained in March 2017.
- 1.3. Construction works have been underway since 2020 on the Resource Recovery Facility (RRF) and Reuse and Recycling Centre (RRC), to add to the recycling facilities for the North London area, and EcoPark House, a visitor centre, providing community and education facilities for local benefit, and a new home for the Edmonton Sea Cadets. All of these new facilities are located in the EcoPark, to the south of the existing energy from waste facility and are referred to as EcoPark South assets.

2. BACKGROUND

- 2.1. Authority members agreed in February 2017 to authorise the Managing Director to agree heads of terms (HoTs) for a new contract with LEL. The New Contract was originally intended to cover operation and maintenance of the new Energy Recovery Facility (ERF), associated facilities on the EcoPark, two satellite transfer facilities and haulage, and to be in place for 25 years.
- 2.2. The current operating contract with LondonEnergy Ltd (LEL) dates from December 2014. It covers all of the operational activity carried out by LEL on behalf of the Authority. There are a number of reasons why the contract should be updated. For example, the current contract assumes that LEL is the owner of the facilities it operates, whereas new assets will be owned by the Authority. In addition, the current contract has relatively few performance criteria.
- 2.3. Due to the complexity associated with entering a single contract that includes the new ERF several years before it becomes operational, officers have held discussions with LEL directors and there is strong agreement that it is sensible to introduce new contractual terms progressively, as new assets come into operation.
- 2.4. The new facilities coming into operation during 2023, listed at 1.3, are long term assets that require a change in asset management roles and responsibilities. The operation is also more complex with an enhanced capacity to receive materials including recyclable waste, a plan to introduce a sorting function, an attached RRC and an Education Centre.

2.5. Officers have therefore developed a new EcoPark South Service Contract to manage the associated facilities on the EcoPark. This has been drawn up in extensive consultation with LEL. In due course new contract provisions will be introduced for the ERF and the existing contract will be superseded.

3. CONTRACT PROVISIONS AND SCOPE

3.1. The main provisions of the new EcoPark South Contract are set out in Appendix 1 to this report.

3.2. The scope of the EcoPark South Contract includes the operation and maintenance of a number of “Relevant Sites”. The Relevant Sites operated under this proposed contract are situated on the EcoPark, Advent Way, Edmonton, London N18 3AG (EcoPark) operating under Permit Number EPR/UP3232AC and comprising:-

3.2.1. Recycling and Recovery Facility (RRF) with capacity to provide the following functions:

Transfer of Contract Waste (bulking Organic materials and materials from the network of RRCs operated)

Fuel Preparation (FP) (Shredder)

Sorting Function (to extract recyclable and reusable materials from waste delivered as residual waste)

Gulley Waste Dewatering

Wastewater Treatment (WWT)

3.2.2. EcoPark Recycling and Reuse Centre (EPRRC)

3.2.3. EcoPark House

3.2.4. Hard and Soft Standing Areas at the EcoPark within the Contractors demised area.

3.3. The existing Energy Centre, Waste Transfers Stations (Hornsey Street & Wembley) and our network of RRCs (excluding EcoPark RRC) will continue to operate under a separate and existing contract with minor adjustments to ensure no duplication of activity between it and the proposed EcoPark South Contract.

3.4. The report recommends the Authority delegates to the Managing Director, in consultation with the Chair and Vice Chairs, the authority to award a Contract in January 2023, for the Operation and Maintenance of Facilities situated on EcoPark South.

4. DIRECT AWARD

4.1. The Authority is permitted to Direct Award a contract pursuant to Regulation 12 of the Public Contracts Regulations 2015. To do so, the regulation requires three control tests to be satisfied.

4.2. **Test of Control** -To satisfy the control test, NLWA needs to exercise a control over LEL which is similar to that which NLWA exercises over its own departments. This requires actual demonstration of control. The following documents demonstrate this control:

LEL constitutional documents

Shareholders Agreement between the Authority and LEL including the Authority's appointment of the LEL Board

the Authority's role in approving LEL Budget and Business Plan

Authority reports and meeting minutes

LEL quarterly reports to Members

LEL board and shareholders minutes

NLWA Standing Orders.

4.3. **Test of Ownership** – As 100% shareholder the Authority demonstrates this test is met.

4.4. **Test of Function** - The function test requires that more than 80% of the activities of the controlled legal person (LEL) are carried out in the performance of tasks entrusted to it by the controlling contracting authority (NLWA) or by other legal persons controlled by that contracting authority.

4.5. Regulation 12(8) states that the 80% test is to be measured by total average turnover, or an appropriate alternative measure, over 3 years preceding contract award. The table at 4.5 will therefore need to be updated in January 2023 to include 2022 outturn and reflect the 3 years preceding contract award

4.6. It is therefore recommended that the Authority delegate to the Managing Director, in consultation with the Chair and Vice Chairs, the authority to determine the requirements of Direct Award have been met.

Percentage of Revenue NLWA	
2019	90.15%
2020	88.81%
2021	96.54%
3 Year Average	91.83%

5. CONSULTATION

- 5.1. In developing the proposed contract Authority Officers sought the views and input of Borough colleagues. The Contract Requirements (Specification) was shared for comment, and these have been incorporated into the final draft. Presentations on the main aspects of the contract have been given at Borough Liaison and Directors of Environment Meetings.
- 5.2. The Authority is required in accordance with s.358(2) of the Greater London Authority Act 1999, to Notify the Mayor of London of our intention to award a contract pursuant to Regulation 12 of the Public Contracts Regulations 2015.
- 5.3. This notice has been served and we are expecting feedback from the GLA in early December.

6. EQUALITIES IMPLICATIONS

- 6.1. The contract will incorporate requirements for recruitment in accordance with suitable equalities and inclusion policies, which will promote a workforce reflecting local demography
- 6.2. As set out below, there is a legal requirement relating to the Equality Duty, and this is met in the Contract and its Schedules. The contract will ensure compliance with these legal obligations.

7. COMMENTS OF THE LEGAL ADVISER

- 7.1. The Legal Adviser has been consulted in the preparation of this report, and comments have been incorporated.
- 7.2. The Law Firm Stephenson Harwood have been engaged to act on behalf of both parties to this proposed contract for EcoPark South and their comments have been incorporated within the body of this report.
- 7.3. The procurement is carried out in compliance with the Public Contracts Regulations 2015 and the Authority's Standing Orders.
- 7.4. In coming to a decision Members must take into account the Public Sector Equality Duty under the Equality Act 2010. In summary, this legal obligation requires the Authority, when exercising its functions, to have due regard to the need to (1) eliminate discrimination, harassment and victimisation and other conduct prohibited under the Act; (2) advance equality of opportunity between people who share a relevant protected characteristic and those who do not; (3) foster good relations between people who share a relevant protected characteristic and those who do not (which involves tackling prejudice and promoting understanding). Under the Duty, the relevant protected characteristics are: Age, Sex, Race,

Disability, Religion or belief, Sexual orientation, Gender reassignment, Marriage or civil partnerships, Pregnancy and maternity.

8. COMMENTS OF THE FINANCIAL ADVISER

- 8.1. The Financial Adviser has been consulted in the preparation of this report, and comments have been incorporated.

List of documents used:

Documents used in the preparation of this report and its Appendix

Public Contracts Regulations 2015, Greater London Authority Act 1999, Equality Act 2010 and the Environmental Protection Act 1990.

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APPENDIX A CONTRACTUAL OVERVIEW OF WASTE MANAGEMENT CONTRACT

<p>Summary</p>	<p>The Table details the form of waste management contract that is intended to be entered into by the North London Waste Authority (the "Authority") and LondonEnergy Limited (the "Contractor") (the "Contract").</p>
<p>The contract Type</p>	<p>The Contract is based on the Waste Infrastructure Delivery Programme ("WIDP") standard form of waste management contract, with the elements in relation to financing and construction removed due to the status of the site, facility and assets that the Contract governs. In addition, project specific changes to the WIDP standard form have been agreed between the Authority and the Contractor.</p>
<p>Commencement and Duration</p>	<p>The Contract commencement date is set in the Authority's Requirements (April 2023). The contract is based on a 10-year term, with the Authority retaining an option to extend the Contract for a period agreed between the Authority and the Contractor.</p> <p>This Contract will however terminate automatically when the Authority and London Energy Limited enter a new overarching agreement that includes the new Energy Recovery Facility, Relevant Sites and Alternative Sites.</p>
<p>Warranties and Undertakings</p>	<p>Except in relation to fraudulent statements, the Authority does not give any warranty in respect of any information disclosed to the Contractor relating to the project and does not have any liability to the Contractor for any inaccuracy in such information.</p> <p>The Contract requires each party to act in good faith and to deal in a timely manner with all obligations under the Contract</p>
<p>Land Issues and Site Conditions</p>	<p>The Authority grants the Contractor underleases and leases in relation to the Relevant Site, which give the Contractor the necessary rights to carry out its obligations under the Contract. The Contractor is required to register each lease and underlease at HM Land Registry.</p> <p>Any change to the conditions of the site after the date of the Contract are the responsibility of the Contractor.</p> <p>The Contractor is also required to maintain and renew all consents that are required to perform the services.</p>
<p>Services</p>	<p>The Contract includes a wide range of obligations for the Contractor in relation to the delivery of the services. The Contractor is obliged to provide the services in accordance with:</p> <p>the Contract</p>

	<p>the service requirements; the service method statements (Contractors Proposals); good industry practice; legislation; and the terms and requirements of any consents.</p> <p>The Contractor is also required to provide the services in a manner consistent with all health and safety precautions required to comply with Good Industry Practice and legislation.</p> <p>The Contractor is obligated, at all times, to comply with its duty under Section 34 of the Environmental Protection Act 1990 (duty of care to manage waste properly) and is also responsible for procuring sufficient qualified staff to perform the services.</p> <p>The Contractor is allowed to propose changes to the service delivery plans in one of two ways</p> <ul style="list-style-type: none"> • as a contractor change, subject to the Authority's approval in accordance with the change protocol set out in the Contract; or • under the review procedure set out in the Contract. <p>The Contractor must accept all contract waste in accordance with the Authority's requirements that is delivered to it by or under the direction of the Authority. Once the Contractor has accepted the waste, it is the legal owner of the waste and responsible for the handling and disposal of the waste.</p>
<p>Scope</p>	<p>Relevant Sites – The Relevant Sites operated under this contract are situated at:</p> <p>EcoPark, Advent Way, Edmonton, London N18 3AG (EcoPark) operating under Permit Number EPR/UP3232AC and comprising:-</p> <p>Recycling and Recovery Facility (RRF) with capacity to provide the following functions:</p> <p><i>Transfer of Contract Waste</i> (bulking Organic materials and materials from the network of RRC's operated) Fuel Preparation (FP) (Shredder) Sorting Function (to extract recyclable and reusable materials from waste delivered as Residual waste) Gulley Waste Dewatering Wastewater Treatment (WWT)</p>

	<p>EcoPark Recycling and Reuse Centre (EPRRC)</p> <p>EcoPark House</p> <p>Hard and Soft Standing Areas at the EcoPark within the Contractors demised area.</p>
<p>Maintenance</p>	<p>The Contractor is responsible for maintaining the facilities at all times in accordance with the contractual requirements to ensure the facilities are available as required and are kept in good structural order.</p> <p>The Contract includes an obligation on the Contractor to repair all defects within certain Asset Classes – It has be determined that all assets associated with the Relevant Sites are within classes that are the responsibility of the Contractor. Where new assets are introduced that fall outside of the current asset classes, the Contractor must act reasonably to procure and evaluate quotes for such repairs and to work with the Authority to agree whether any such quote is acceptable.</p> <p>The Authority can commission an independent survey if it reasonably believes that the Contractor has not been fulfilling its obligations in relation to maintenance, although this right cannot be exercised more than once every two years. The Authority bears the cost of the survey and is obliged to minimise disruption. If the survey confirms the contractor has not been fulfilling its obligations, then the Contractor is obliged to reimburse the Authority for the cost of the survey and to rectify the situation within a specified period.</p> <p>The Contractor must also produce and keep up to date an operating and maintenance manual during the service period.</p> <p>The Authority and the Contractor must comply with all health and safety legislation. The Contractor shall also be responsible for the safety of his own operations and those of any subcontractor and is responsible for the provision of all necessary safety equipment, materials, first aid and emergency arrangements.</p>
<p>Performance Monitoring</p>	<p>The Contractor is to monitor its performance in the delivery of the services in accordance with the procedure set out in the Authority's Requirements.</p> <p>The Authority is allowed to undertake its own monitoring (at its own cost) at any time after the readiness test certificate and the Contract obliges the Contractor to use reasonable endeavours to assist. The Contractor is also required to indemnify the Authority where the</p>

	<p>Authority identifies a need for an increased level of performance monitoring and incurs costs and expenses through such activities.</p>
<p>Market Testing, Benchmarking and Best Value</p>	<p>Market testing involves the Contractor retendering certain services to determine the market price of those services. The Contract requires the Authority to work with the Contractor at the initial scoping stage before the Contractor invites and evaluates tenders. The Authority is entitled to ask the Contractor to share with it the tenders received but can veto the choice of tenderer if that tenderer has committed a prohibited act.</p> <p>Benchmarking will only apply in the limited circumstances set out in the Contract. It involves the Contractor comparing the costs of its sub-contractors providing certain services against a reasonable benchmark. The Authority is required to cooperate in this exercise, with a view to agreeing with the Contractor its financial impact.</p> <p>The Contractor is required to make arrangements to secure continuous improvement in the way in which the services are provided, having regard to a combination of economy, efficiency and effectiveness.</p>
<p>Employment Matters</p>	<p>The Contractor is responsible for procuring sufficient qualified staff to perform the services. The Contractor should also maintain training records relating to the personnel from the services commencement date. The Authority can also ask the Contractor to provide information relating to the personnel and should give reasons for the request at the same time.</p> <p>The Contract obliges the Contractor and all sub-contractors to maintain appropriate personnel policies and procedures in writing. The Contractor must also ensure that all personnel involved in providing the services are required to disclose convictions and the Authority can, by notice in writing, require the Contractor to remove any unsuitable person from involvement in providing the services</p> <p>The Contractor and sub-contractor must follow all non-discrimination laws in their dealing with employees and when selecting any sub-contractors.</p> <p>The contract requires the Contractor to pay the London Living Wage as a minimum.</p>
<p>Supervening Events</p>	<p>The Contract gives the Contractor relief from deductions if an Excusing Clause occurs that interferes adversely with, or causes a failure of, the performance of the services.</p>

	<p>There are specific provisions for protestor action. The Contractor is required to use reasonable endeavours to prevent protestor action. If events falling within the definition of protestor action do occur the Contractor remains fully responsible for any financial consequences including the impact of any delay to the commencement of the services.</p>
<p>Change and Change in Law</p>	<p>Each party may initiate a change in relation to the services in accordance with the procedure set out within the Contract.</p> <p>The Contract requires the Contractor to comply with all applicable legislation and guidance and use Best Endeavours to minimise the additional cost that may result from handling the impacts of a qualifying change in law.</p>
<p>Payment</p>	<p>The Authority will pay a unitary charge.</p> <p>This consists of 12 equal fixed monthly payments for maintenance and operation of the service. Variable payments are made for additional overall tonnage that exceeds the annual expected tonnage by at least 10% or for additional events at EcoPark House over and above those set out in the Authority Requirements.</p> <p>The contractor is permitted to accept 3rd party waste for handling in the RRF, (when authorised to do so by the Authority) and will retain a percentage of any excess revenue share with the Authority.</p> <p>The Contract provides that costs are reviewed and reset every four years. This means that if contract payments move out of alignment with the real costs of operating the facilities the Authority is protected against the risk of long-term overpayments, and LEL is protected against being put under unsustainable financial pressure.</p> <p>Costs of utilities needed to perform the services are the responsibility of the Contractor to pay. The cost associated with Non-Domestic Rates (NNDR) are passed through to the Authority without overhead or margin.</p> <p>The Contractor is responsible for paying any landfill tax associated with waste treated at the RRF. The Contractor is also prevented from recovering any VAT it incurs from the Authority unless that VAT is irrecoverable. There is an obligation on the Contractor to provide the Authority with any information that the Authority reasonably requests in relation to VAT charged by the Contractor to the Authority under the Contract.</p> <p>The Contract requires the Contractor to seek confirmation from the Authority that third party waste or off-take contracts:</p>

	<ul style="list-style-type: none"> • are on reasonable arm's length terms; • contain breakage costs limited to the level that a prudent operator would accept and are limited to direct costs only; and • are assignable, free of charge, to the Authority on termination or expiry of the Contract.
Finance and Audit	<p>The Contract sets out a process as to how any adjustments to the unitary charge would be made.</p> <p>The Contractor is required to maintain certain records for the duration of the Contract. For example, the Contractor must maintain a full record of particulars of the costs of performing the services and books of account in accordance with best accountancy practices.</p> <p>The Contractor is required to send a copy of its newly published annual report and accounts to the Authority within 20 business days of their publication.</p>
Insurance	<p>The Contract specifies the insurances that the Contractor is required to take out and maintain during the contract period.</p> <p>If an insured event under one of the physical damage policies occurs and the assets need reinstating, the insurance proceeds are to be applied to reinstate the asset.</p> <p>The Contractor is required to alert to the Authority the unavailability of any insurance term or condition. Where there is such unavailability, the Contract requires the Authority to waive the Contractor's contractual obligations in respect of that particular insurance term or condition. The Contractor is also required to be proactive in monitoring the insurance market at least once every four months to check the continued unavailability of the term or condition.</p> <p>The Contractor is not obliged to take out insurance in respect of a risk which is uninsurable.</p>
Disputes and Remedies	<p>The Contract sets out a procedure as to how any disputes are to be resolved. This procedure involves in the first instance, disputes being referred to the Managing Director of the Authority and the Contractor. If they cannot resolve the matter, it shall be referred to the Clerk of the Authority.</p> <p>There are certain indemnities in the Contract by which the Contractor agrees to indemnify the Authority on demand. In high level terms, some of the main ones are:</p>

	<ul style="list-style-type: none"> • where the Authority identifies a need for an increase level of performance monitoring by it and incurs costs and expenses through such activities; • unless excluded by the specific terms of the Contract, where there has been death or personal injury, loss of or damage to certain property, third party actions, claims and/or demands which arises out of the operation or maintenance of the assets or the performance or non-performance by the Contractor of its obligations under the Contract; • in the context of an infringement of third party intellectual property rights; and • where there has been a breach of the data protection obligations set out in the Contract. <p>Either party may terminate the contract by written notice if the other party:</p> <ul style="list-style-type: none"> • commits a material breach of the Contract which is irremediable or has failed to be remedied; • become insolvent or enters into administration or liquidation; • suspends or threatens to suspend, or ceases or threatens to cease all or a substantial part of its business; • has had their financial position deteriorated to such an extent in the other party's opinion that they are unable to fulfil their obligations set out in the Contract. <p>Contractor can also terminate the Contract if the Authority fails to pay any amount due under the Contract on the due date for payment.</p>
<p>Expiry or Early Termination</p>	<p>The Contract entitles the Authority to commission a survey of the facility 18 months before the expiry date at its own costs. The Authority has to give at least 5 business days' notice and use reasonable endeavours to minimise the disruption. The Contractor should, at its own costs, give reasonable assistance to the person carrying out the survey. If the survey shows the facility to have been under maintained, the Authority can notify the Contractor of the maintenance required and the time period for carrying out such works. The Authority can also, in this circumstance, recover the cost of the initial survey.</p> <p>The Contractor has to carry out the maintenance at its own expense. If the work has not been completed 12 months before the expiry date, the Authority can deduct the costs. If the Contractor then carries out the maintenance to the standard and in the time period specified, the Authority should reimburse the Contractor for its associated costs.</p>

	<p>If the Contractor does not carry out the works, the Authority can arrange for these to be done. The Contractor is responsible for the cost of this work.</p> <p>The Contractor is obliged to handover all relevant documents within 20 business days of the expiry date or termination date. The Contractor is also obliged to supply all information reasonably required by the Authority to carry out the service within 20 business days of the request and to warrant such information is accurate in all material respects. On expiry or earlier termination, the Contractor shall assign to the Authority the benefit of any contract it may have with third parties and transfer its rights, title and interest in and to the assets.</p>
<p>General</p>	<p>The Contract prevents any assignment by the Authority of the Contract unless it relates to the whole Contract and is to a public body having the appropriate legal powers – i.e.:</p> <ul style="list-style-type: none"> • a minister of the crown; • another Authority of sufficient financial standing; or • another public body guaranteed by the Authority or a Minister of the Crown. <p>The Contractor cannot assign the Contract without the prior written consent of the Authority. The Contractor is also required to seek the Authority's consent before appointing a sub-contractor.</p> <p>The Contract requires each party to keep certain information received from the other party confidential and to use reasonable endeavours to prevent employees disclosing such information. The definition of Confidential Information includes:</p> <ul style="list-style-type: none"> • information where the disclosure would harm the commercial interests of any person; • the trade secrets, intellectual property rights and knowhow of either party; • personal data; and • commercially sensitive information. <p>The provisions of the Contract itself are not counted as Confidential Information unless specifically identified as commercially sensitive. The obligation to keep Confidential Information confidential is subject to a list of exceptions in the Contract. Amongst other things these allow the Authority to disclose such information to professional advisors and to the Waste Collection Authorities provided that the receiving party agrees to keep the information confidential.</p>

	<p>The Contactor is obliged to facilitate the Authority's compliance with its obligations under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004.</p> <p>The Contractor shall procure that the services are conducted in accordance with the approved quality assurance systems as provided for in the Authority's requirements.</p> <p>The Contract restricts the Contractor's right to hold and to disclose personal data and imposes obligations on the Contractor in relation to any personal data held. If it breaches these obligations and the Authority suffers a loss as a result the Contractor is obliged to compensate the Authority under an indemnity.</p>
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