

Background Material

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The saga of the Poolbeg incinerator continues.

We have made a formal complaint to Europe about the breaches of the Procurement Directives made by Dublin City Council throughout this process. This article explains why.

The EU Public Procurement directives have been breached by Dublin City Council and Ireland. The complaint covers the use of public monies and Cohesion funds by Dublin City Council for procurement of advisors and for procurement of a contractor for the Poolbeg Incinerator.

Some aspects of this saga are only now coming to light as a result of a detailed analysis of internal letters and memoranda released to us under FoI. The documents reveal the original size for the incinerator was 400,000 tonnes per annum. This was increased during the procurement process to 600,000 tonnes – a 50% increase - not because Dublin had more waste but because the Council needed to obtain approval from the NDFA and they needed to keep Covanta on board after the Danish company decided to walk.

DCC have also recently released detailed statements regarding the sequence of negotiations and they gave details of the actual spend incurred on this project.

The construction cost has been put at €350 million by Covanta and the revenue potential of the project has been put at over €1 billion by the Client Representative for the Council.

This procurement process has been flawed from the beginning, has taken over a decade and has yet to reach a conclusion. It has been excessively costly to the taxpayer. The excessive length of the process has affected the validity of the accepted tender and the validity of the contract terms. The delay has dampened competition and discouraged development of other infrastructure of higher merit in the EU Waste Hierarchy.

Our complaint is in two parts. The first part deals with infringements of the Works Directive 93/37/EEC and the second deals with infringements of the Services Directive 92/50/EEC.

Part 1 - Works

There were material changes to the original tender conditions. The first change was to increase the capacity of the plant to 550,000 tonnes per annum from the original requirement of 400,000 tonnes.

The Council had offered a guarantee to deliver 320,000 tonnes of waste per annum or payment in lieu. This is the so-called *Put or Pay* guarantee and it is the most controversial aspect of the project. The *Put or Pay* guarantee keeps the commercial risk on the Local Authority and thus on the State.

The Department of Finance stated that this could constitute a direct or indirect subsidy or guarantee which could place the project inside the government “investment envelope”. In order to keep the project off balance sheet the size of the incinerator was increased to 550,000 tonnes per annum.

The *Put or Pay* guarantee constituted 80% of the original capacity at 400,000 tonnes but, at 550,000 tonnes, the guarantee is reduced to just under 60%. Presumably the reduced percentage of the guarantee allowed the Irish authorities to keep the project off the General Government Balance.

The Local Authorities no longer collect municipal waste and can no longer fulfil the *Put or Pay* clause which guarantees delivery of 320,000 tonnes per annum or payment in lieu.

A Value for Money judgement was made in 2005 by comparing the contracted gate fee to a previously set Affordability Cap decided by the Department of the Environment, Heritage and Local Government in 2003. The contracted gate fee, estimated at around €80 per tonne, which since been indexed using CPI to €90, is far higher than the gate fee of €53 as proposed by Covanta for a comparable incinerator in Wales.

Clearly the value for money claimed by the Authority for this procurement is illusory.

We are asking the Commission to review the manner whereby the Affordability Cap was set by the Department and how a decision was made that the contract provides value for money to the taxpayer.

Bidders

The procurement process failed to attract sufficient bidders in 2004.

From a list of 13 interested parties a shortlist of 4 were invited to bid in 2003. One firm declined because it was put up for sale so 3 bids were received in 2004. One bid was non compliant leaving two bids for evaluation – Onyx from France and Elsam from Denmark.

A few months into the evaluation process, Onyx asked DCC to guarantee their costs of committing finance in advance even though they might not be selected and also their costs for applying for planning permission which might be unsuccessful. This request was refused because DCC said it would be a breach of the tender conditions and Onyx withdrew in October 2004 leaving just the one bid from Elsam. It should be noted here that the Danish bidders later withdrew their offer of finance and so too did Covanta.

The authority proceeded to negotiate with just one bidder – Elsam A/S of Denmark. There was no call for a Best and Final Offer. The EU Procurement Directive recommends a minimum of three bidders in order to get good value from the negotiation process but DCC went ahead with just the one. Without comparative bids it is very difficult to assess the value for money of the proposal and with only one bidder the exercise is almost impossible.

Agreement was reached with Elsam in 2005 and approval was obtained from the various government departments.

Unfortunately for DCC the project almost collapsed when the Danish energy marketplace went through a major reorganization. Elsam was taken over by DONG - the Danish Oil and Natural Gas company which is 75% owned by the State of Denmark.

Following a review DONG decided that they would reduce their commitment of 100% of the finance for the project to just 25%.

Dublin City Council then sought a new partner and in 2007 transferred the contract to a new supplier without going to tender. EU rules were circumvented by the Council with the approval of the Department of Environment when it transferred the award to a non-EU

company namely Covanta of New Jersey, USA. Covanta was not a bidder and could not have bid because it was bankrupt and in Chapter 11 from 2002 to 2004.

The transfer from DONG to Covanta was executed in a manner which breaches the procurement directives. Initially 51% of the project was transferred from DONG to Covanta with provision in the contract to transfer a further 24% before construction commenced and a final 25% before the incinerator started operation. The effect of these manoeuvres was to transfer 100% of the project to Covanta in circumvention of EU rules.

As a rule, acceptance of a new contractual partner instead of the one to which the contract had initially been awarded must be regarded as constituting a change to one of the essential terms of the procurement contract. The tender should have been re-advertised at this point.

Further material changes to the capacity and the term for the project occurred when the final contract was signed with Covanta in September 2007. The capacity was increased to 600,000 tonnes per annum and the term was extended to 25 years. The scale of the changes was such that the lifetime tonnage of the incinerator was increased from 8 million tonnes as expressed in the initial project documentation to 15 million tonnes as revealed after the contract was signed.

Throughout these manoeuvres Dublin City Council did not re-advertise the tender as was required under the Works Directive.

Part 2 - Services

Dublin City Council in 2001 retained the services of the MCOS / COWI joint venture to act as their Client Representative. MC O'Sullivan is an Irish firm of consulting engineers now known as RPS MCOS. COWI is a firm of Danish consulting engineers.

The contract awards to the joint venture under the Services Directive were for €5.6 million for Client Representative services and €1.3 million for Public Relations. The EU Cohesion Fund provided €6.9 million towards these services.

However, Dublin City Council disclosed on 9th January 2012 that over €25.7 million was spent on Client Representative services and over €4.3 million was spent on Public Relations.

Our complaint is that no public tendering process took place for the additional spend of approx €23.2 million.

Current Situation

The delay in getting all the necessary licences in place led to the lapse of the contract in September 2010. Dublin City Council is suggesting that the contract is ongoing but Covanta boss Tony Orlando has stated plainly to shareholders that Covanta has no obligation to continue. In the Covanta Conference Call for Q3 2010, he said:

However the contract longstop date occurred last month. That means we have no obligation to proceed with the project on the original terms.

Covanta has stated that they will no longer provide balance sheet financing for the project as required by the original conditions of tender. This is the third time a potential partner to this project has refused to provide balance sheet financing.

Instead Covanta will seek project financing from lenders presumably in Ireland. The bankability of the contract has been severely compromised by the loss of control of waste by the Local Authorities following a High Court decision in 2009.

Mr John Tierney, Dublin City Manager, stated on 2 March 2012 that DCC would have required Covanta to provide balance sheet finance but now, with the lapse in the contract, Covanta is free of that obligation.

At this time Covanta is in the driving seat because, with the contract in abeyance, they are under no obligation to continue. They have changed the terms for financing this project which means that the original tender conditions cannot be met.

Dublin City Council is insisting that the project is still alive but they are now seeking a change of law to re-monopolise the waste collection market. This change is intended to allow them control the direction of municipal waste by requiring that it be delivered to their incinerator in order to fulfil the *Put or Pay* guarantee. Such interference in the market would prevent the development of more competitive waste disposal options which would have higher merit in the EU waste hierarchy.

Having control of the direction of waste would constitute a conflict of interest for the Council when it has a vested interest in supplying the Poolbeg incinerator to fulfil their *Put or Pay* guarantee. Their vested interest also includes revenue sharing arrangements for electricity generated and for revenue from processing waste above a certain tonnage.

Now, with Covanta as the only option left, we are concerned that further manipulation of the original tender terms will take place in an attempt to retain Covanta in the project.

Such changes could include an increase in the term from 25 to 45 years. This would in effect put the revenue potential of this project well over €2 billion. The *Put or Pay* guarantee could be dropped or the size of the plant could be changed. Any of these changes would be in breach of the procurement directive.

The most recent interference in the public procurement process was referred to in the Dáil by the Minister for the Environment, Community and Local Government, Deputy Phil Hogan who stated on 21 February 2012:

“I understand that an exploratory proposed alternative project has been put to the City Council and other organisations involved in waste management in Dublin; a communication which the company concerned issued on this matter on 3 February 2012 was copied to my Department for information”

We believe this is a reference to the proposal by Indaver to takeover the contract from Covanta. Indaver are offering a 400,000 tonne plant with no *Put or Pay* clause. Any engagement with Indaver without re-advertising the contract would be a gross interference with the EU procurement process.

We have seen nothing but massaging, obfuscation, and downright arrogance by Dublin City Council and their advisors from their very first strategy study in 1997 which had serious omissions, to their two-step shuffle of the contract from Elsam to Covanta in 2007, to the massive changes in the size of the incinerator, to the increase in the duration of the contract, to their admission this year of massive overspend and finally to their attempt to change the law.

We have sent a formal complaint to the European Commission concerning the failure by Dublin City Council to comply with community law with regard to the Poolbeg incinerator.

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