

EXTRAORDINARY MEETING OF THE INVERCARGILL CITY COUNCIL 24/6/2019

PUBLIC EXCLUDED SESSION

PRESENT: Sir T R Shadbolt, KNZM JP
Cr R R Amundsen – Deputy Mayor
Cr R L Abbott
Cr A J Arnold
Cr K F Arnold
Cr T M Biddle
Cr A H Crackett
Cr I L Esler
Cr G D Lewis
Cr D J Ludlow
Cr L F Soper
Cr L S Thomas

IN ATTENDANCE: Mrs C Hadley – Chief Executive
Mr C A McIntosh – Director of Works and Services
Mr A Cameron – Executive Officer
Ms D Peterson - Senior Waste Officer
Ms H McLeod – Communications Advisor
Mr W Cambridge – City Solicitor
Ms L Kuresa – Governance Officer

1. EXTENSION OF CONTRACT 650

Moved Cr Thomas, seconded Cr Lewis that the report be received;

AND THAT

Council adopts the Waste Advisory Group recommendation that:

- The WasteNet Councils (being Invercargill City Council, Southland District Council and Gore District Council) agree to the extension of Contract 650 for a period of 12 months at a price of \$ [REDACTED] million per annum excluding GST, excluding rubbish disposal [REDACTED]

Cr Biddle asked for clarification around the contract price. Mrs Hadley said her understanding was that this amount was similar to what SDE had previously been paid with the top up payment from the advance of their exit payment. It was more than Gore and Southland wanted to pay but was accepted on a 12 month basis. At the request of the meeting Ms Peterson outlined Contract 850 and the costs surrounding contamination by rubbish and who would pay.

Cr Ludlow said that his question, regarding the financials, had now been answered.

Cr K Arnold said that previously the Contract had a three month notice period for termination, which had now been removed to give 12 months' surety.

Mrs Hadley said that was a significant point in SDE's acceptance of the extension. She also said that the total cost of the contract was higher than budgeted but this reflected the fact it was a year-long service rather than 15 years, which came with a premium.

Cr Biddle asked for clarification that \$ [REDACTED] was the extra it would cost Invercargill City. Mrs Hadley confirmed that was correct.

Cr Biddle asked whether there was any consideration about the rubbish costs being given to SDE. Mrs Hadley said there was resistance from an Officer at the negotiating table because it was felt the councils would be paying 'over the odds' and it was something they wanted to have 'optics' over.

Cr Cracket asked whether in Contract 850 that SDE and SEL both included rubbish. Mrs Hadley confirmed both did and asked Ms Peterson to comment.

Ms Peterson said both parties included rubbish at 10 percent.

Cr K Arnold said for clarity it was only after the preferred tender had been identified that negotiations continued, and those costings that weren't 'apples for apples' then came into play. Ms Peterson said that was correct.

Mrs Hadley said there was one important factor that had been overlooked in the discussions, that was that what was in front of Council was an extension of an existing contract and the revenue share is still in place. The earlier negotiations on the extension did not cover a revenue share. That was to Council's advantage, she said.

The motion now being put was **RESOLVED** in the **affirmative**.

2. **CONTRACT 850 – NOTICE OF DISPUTE**

Mr Cambridge took the meeting through the report and raised the following points:

- The Waste Minimisation Act only talks about effective and efficient waste management and does not talk about concepts of wellbeing.
- The Local Government Act has a lot of principles that have been covered.
- Under Section 12 Council has the power of general competence but this power is tempered by the rest of the Act and any other Acts.
- Where there is general legislation and specific legislation, the specific legislation applies.
- Therefore the Waste Minimisation Act takes precedence over the general provisions in the Local Government Act.
- The WasteNet Southland Joint Waste Management Agreement is a written document and Council can only deal with what it says and what it provides for.
- [REDACTED]
- [REDACTED]
- [REDACTED]

- [REDACTED]
- [REDACTED]
- The delegations from each council have been extensively covered tonight, including in the Chief Executive's report.
- The ultimate provisions come down to the question of the dispute process. [REDACTED] If that can't be achieved the decision shall be made under dispute resolution procedures. It is that action that the other two councils have undertaken.
- That provides for a process of mediation through senior management. If that's not successful then formal mediation and then arbitration.
- [REDACTED] the decision of arbitration is final and binding.
- There is no right to appeal. It is final and binding.
- [REDACTED]
- [REDACTED]
- As Councillors you had the opportunity to say "no, we don't agree with the resolution that has been put forward" and you did that.
- When you were making that decision you were entitled to consider the Waste Minimisation Act but you were also able to consider all of the other powers under the Local Government Act including the well-beings.
- Council has made its decision. The other councils have not made the same decision. [REDACTED] It is not ICC that is invoking it but the other two councils. Then there is a process of mediation, which if not successful goes to arbitration and goes to an arbiter and the decision is made.
- There are three options:
 1. A process under Standing Orders to reverse the decision. (Which Mr Cambridge did not consider was an agenda consideration.) It could be brought back once, but then if the Notice of Motion is lost it could not be reaccepted within 12 months.
 2. Not choosing a tenderer, as allowed by the tender documents, and reconsidering in 12 months. The issue is the other two councils do not share that view. If they go to arbitration they will almost certainly succeed.
 - Has Council already surrendered its powers? To the extent you signed that contract: yes. Each of the other councils has also surrendered their powers.
 - If you go to arbitration the difficulties are:
 - The Waste Minimisation legislation talks about efficiency not wellbeing. An arbitrator will take that into account.
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 3. [REDACTED] you could agree to go to mediation and argue that neither tender be accepted.

Cr Biddle said Council had been told they could end the RFP. If Council ended the RFP would it still continue with the dispute? Mr Cambridge advised Council could only end the dispute provided the other two councils agreed. Clearly by initiating the dispute process they don't agree. Mediation is to give the opportunity to this Council to put its views as to why it had rejected the tender, if the other two councils didn't agree it would go to arbitration.

Cr Biddle questioned the role the four Councillors named in the recommendation would play in the mediation. She had no experience in mediation and wished to remove her name. Mrs Hadley said no experience was necessary. She had suggested the names because she thought they would reflect the range of views from around the table.

Mrs Hadley drew to Councillors' attention that the principles of mediation require that the parties present must have delegated authority to resolve the matter and enter the process willing to compromise.

With the permission of the mover and seconder, the motion was amended to remove Cr Biddle and include Cr A Arnold as part of the mediation process as follows:

Moved Cr Esler, seconded Cr K Arnold that the report be received;

AND THAT

Council acknowledges the notification of dispute under the WasteNet Joint Venture Arrangement received from Southland District Council and Gore District Council dated 19 June 2019;

AND THAT

Council acknowledges that the dispute notified is to the process and decision making required for the completion of the tender process in the manner established by the tender document and commenced by the Waste Advisory Group in accordance with the delegation to it of that function by Invercargill City Council on 28 August 2018;

AND THAT

[REDACTED]

AND THAT

Council is represented in its mediation by four councillors, being Councillors Abbott, Amundsen, Crackett and A Arnold.

AND THAT

Council note that if mediation does not achieve an acceptable outcome, the matter will be referred to arbitration and the decision will be final and binding.

In response to a question from Cr Amundsen, Mrs Hadley gave a precis of the mediation process.

Cr Soper said she was unable to vote on the extension of Contract 650 because of her conflict of interest due to a close family member working at SDE. Given these recommendations were a matter of process, did Mr Cambridge agree with her position that she was able to vote? Mr Cambridge agreed.

Crs A Arnold and Crackett asked what would happen if the four ICC representatives at mediation didn't agree themselves. Mrs Hadley said at the mediation the representatives might 'caucus' and come to agreement, or not.

Cr Biddle asked what happens to the SDE employees after the 12 months and the outcome of mediation/arbitration? Mrs Hadley said at its meeting 19 days ago Council had considered moving a motion that provided a way forward for the staff of SDE should the award of the tender be against SDE. The difficulty in putting such motion forward tonight was it would be predetermining the outcome of mediation. Cr Biddle asked if there was a way to foreshadow such a motion should the mediation/arbitration go against awarding the contract to SDE. Mrs Hadley advised this was not a procedural matter, but a new one, and would need to be debated by Council at that time.

Mr Cambridge said the difficulty of taking any action preceding an outcome was it would be seen to be predetermining the issue and would be disadvantageous should the decision end up at judicial review.

Cr A Arnold asked if at mediation whether ICC representatives had to express the Council's decision. Mr Cambridge advised that mediation was about balance. The representatives had to do a brief for mediation purposes and that would be worked through.

Cr Crackett encouraged Cr Biddle to participate in the mediation/arbitration process. Cr Biddle said her concern wasn't for process but for the workers at SDE.

Mrs Hadley outlined a potential outcome that could be arrived at through mediation to demonstrate the kinds of things that could be on the table.

His Worship the Mayor said he didn't trust the chief executives because there was not a lot of evidence of major works schemes geared towards disabled workers.

Cr Soper reiterated Council had to undertake mediation in good faith.

Cr Abbott asked whether public statements, particularly by those invited to be part of the mediation, would be detrimental to the mediation process? Mr Cambridge said the issue with public statements was, if they were contrary to good-faith mediation, they would be counterproductive and unhelpful.

Cr Ludlow supported the position Cr Soper put forward regarding good faith. If Councillors were not prepared to consider any option other than the one they supported, he asked them not to put themselves forward for mediation.

Cr Biddle asked about the option to reverse the decision. In doing that would it enable them to put some direction of support around SDE? Or was there a dispute so that could not be overturned?

Mrs Hadley said Council could vote to only receive the report (Notice of Dispute) and then to change how they had voted and change with it what Council wanted as a backstop. If you recognise going to mediation/arbitration could take the decision out of your hands, you could change and vote on accepting the recommendation from the Waste Advisory Group on the award of tender, and say beside that measures to help the workers at SDE. She said, if you want to ensure Council's representatives have the delegated authority to settle at mediation, and authority to commit Council to a course of action in relation to SDE, Councillors need to consider the parameters. This was not about predetermination but what Council was prepared to authorise its attendees to commit to.

Cr Soper said she took that delegation for granted if Council chose people to represent it at mediation.

His Worship asked how long mediation takes. Mr Cambridge replied it would take a minimum of at least two months.

Cr Crackett questioned whether the recommendations needed to be amended to explicitly delegate authority to its representatives at the mediation? Mrs Hadley replied if that was Council's understanding that was fine and the recommendations did not need to be amended. She also pointed out that the costs of mediation and arbitration were dealt with in equal share, not proportionally.

The motion, now being put, was **RESOLVED** in the **affirmative**.

Note: Cr Biddle voted against the motion.

3. **CONTRACT 850 – NOTICE OF MOTION**

Based on the discussions had in the earlier items, this item was withdrawn.

Moved His Worship the Mayor, seconded Cr Ludlow and **RESOLVED** that the meeting moves back into open meeting.
