

TREASURER'S INDEMNITY
WDA/39/13

Recommendation

That:

1. Members agree to grant an indemnity to the Authority's Treasurer for the purposes of the signing by the Treasurer of certificates under the Local Government (Contracts) Act 1997;
2. Members agree to grant the indemnity on the terms set out in the appendix to this report; and
3. Members authorise the Chief Executive to authorise the Treasurer to obtain his own legal advice about signing the certificates relating to the Authority's Resource Recovery Contract.
4. Members confirm that the Authority will certify it has the power to enter into the Resource Recovery Contract and associated Direct Agreement and it is appropriate for the Treasurer to be indemnified in the circumstances

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Report of the Chief Executive

1. Purpose of the Report

- 1.1 This report explains the need for the Authority to provide an indemnity to the Treasurer to protect the Treasurer against the risk of incurring personal liability when he signs certificates under the Local Government (Contracts) Act 1997 relating to the Resource Recovery Contract and the associated Direct Agreement.
- 1.2 Members are asked to agree to grant an indemnity to the Treasurer on the terms set out in the appendix to this report.

2. Background

- 2.1 The Authority is proposing to enter into a long term Resource Recovery Contract with Sita UK to divert waste from landfill and provide waste management services. Whilst the Authority is no longer benefiting from PFI credits the form of contract still requires that there will be a Direct Agreement with funders.
- 2.2 Although the PFI/PPP projects became a commonplace form of procurement in Central Government, there was great concern, particularly on the part of banks and funders, that deals involving local authorities were not safe. This followed cases where transactions with local authorities had been held to be ultra vires and therefore void. This severely restricted the development of the PFI for local government and other such bodies e.g. Waste Disposal Authorities.
- 2.3 Therefore, the Local Government (Contracts) Act 1997 was introduced. The 1997 Act was designed to clarify local authority powers to contract; section 1(1) confirms that a statutory provision that confers or imposes a function on a local authority also confers powers on the local authority to enter into contracts. The Act then goes on to provide security for those wishing to enter into transactions with the local authority by means of a

certification process (sections 2, 3 and 4), and gives the power for local authorities to agree terms which will survive the setting aside of the main contract. The certification provisions apply to contracts of 5 years or longer. The Act and Regulations made under the Act provide that certificates can be signed by chief officers or deputy chief officers.

- 2.4 During the passage of the Local Government (Contracts) Bill, officers expressed concerns over the potential for personal liability to arise under PFI deals. In particular, concerns centered around the expectation that officers would sign formal local authority certificates to indicate that the arrangement is within the powers of the authority. Concerns were fuelled by the case of *Burgoine and Cooke v The London Borough of Waltham Forest and Another* 1996, where it was held that the Assistant Chief Executive and the Assistant Director of Finance could not rely on any indemnity given by statute or contractually, where the company to which they had been nominated as directors by the Council went into liquidation. In the above case the Council could not give an indemnity because it had no power to participate in the proposed arrangements. They were personally sued for £900,000 worth of debts.
- 2.5 There is also some concern from officers as to whether a new duty of care will arise in PFI/PPP deals, where the Chief Finance Officer certifies a contract as being *intra vires* knowing that the contractors and the bank/funders will rely on this to proceed with the deal. Where the contractor or funder subsequently suffer losses, a claim could be brought against the authority and the contractor.
- 2.6 For most local authorities the issue was resolved by the enactment of the Local Authorities (Indemnities for Members and Officers) Order 2004. Those regulations were made under section 101 of the Local Government Act 2000, which gave power to the Secretary of State to make provision for or in connection with conferring power on “relevant authorities” to provide indemnities to members and officers. The Authority however, is not covered by the 2004 Order and therefore would be required to adopt the approach that many local authorities adopted prior to 2004.
- 2.7 The Authority intends that the Resource Recovery Contract and the Direct Agreement associated with it will be certified contracts for the purposes of the Local Government (Contracts) Act 1997. The certificates must be signed by an officer who is authorised both by the Local Authorities (Contracts) Regulations 1997 and by the Authority. The authorised officer is the Treasurer.

- 2.8 Whilst the Authority is satisfied that it is acting within its powers in entering into the contract and the Direct Agreement, the Treasurer will be concerned that if the Authority were found to have acted outside its powers, the Treasurer himself might incur personal liability. The Treasurer will therefore expect to be indemnified against this.
- 2.9 The indemnity must have addressed the issue of rationality, by considering whether the benefits of the arrangement justify the risks taken on by the authority in terms of the indemnity.
- 2.10 The indemnity will be limited in certain respects, for example to prevent a claim by the officer for the consequence of his own fraud, dishonesty or criminal behaviour.
- 2.11 The indemnity may be general or specific, i.e. either applicable in defined circumstances or relating to a particular arrangement. Given the likelihood of future contracts requiring certification, other than the RRC it is proposed that a specific indemnity is provided for the Treasurer.

3. Powers to grant an indemnity

3.1 Statutory Indemnity

- 3.1.1 Protection in the form of a statutory indemnity is provided to officers (s265 of the Public Health Act 1875 extended by s39 of the Local Government (Miscellaneous Provisions) Act 1976) affording immunity from liability and then immunity from costs if any action is brought against an officer.

3.2 Contractual Indemnity

- 3.2.1 The “second line of defence” for officers is a contractual indemnity. Section 112 of the Local Government Act 1972 gives the Authority the power to appoint officers on such terms as the Authority thinks fit.
- 3.2.2 This could be wide enough to include a protection expressed in the individual’s contract of employment, which indemnifies the officer who acts in the course of their duties. Whilst not the key issue, in the *Burgoine* case, Justice Neuberger felt that it would be possible to draft an indemnity to cover *ultra vires* acts.

4. Legal Advice

- 4.1 The Authority may wish to consider authorising the Treasurer to obtain his own legal advice, independent from that provided to the Authority, if he considers it necessary to do so before he signs the certificates.
- 4.2 If members decide that it would be appropriate to provide such authorisation if the need arises, they will need to make practical arrangements to do so if the Treasurer seeks authorisation.
- 4.3 Members are therefore asked to authorise the Authority's Chief Executive to authorise the Treasurer to obtain his own legal advice about signing the certificates if the Treasurer seeks such authorisation.

5. Risk Implications

- 5.1 Risks arising from the grant of an indemnity to the Treasurer will be managed by the application of established risk management processes. The following are considered as key risk areas:

Identified Risk	Likelihood Rating	Consequence Rating	Risk Value	Mitigation
The Treasurer may need to use the indemnity if there is a judgment that the award of the contract by the Authority was ultra vires.				The Authority has followed appropriate processes and has taken appropriate advice and is confident that it is acting within its powers.

6. HR Implications

- 6.1 The terms and conditions of employment of the Treasurer will be varied by the grant of an indemnity.
- 6.2 An express provision in the terms and conditions of employment should acknowledge that the indemnified officer is entitled to rely on the accuracy of the information contained in the certificate, and if the certificate complies with section 4(1) of the Act, its validity is protected, regardless of its

accuracy or truthfulness. The Authority is therefore creating a duty of care towards the officer.

7. Environmental Implications

7.1 There are no environmental implications associated with this report.

8. Financial Implications

8.1 The Authority will need to be satisfied that it has the finances to provide an indemnity to the Treasurer if he needs to make use of it.

8.2 The Authority may consider taking out separate insurance in relation to bank financed deals which would provide an additional comfort for the officer this is however not proposed as the insurance would provide only marginal benefit to the Authority.

8.3 Should the Treasurer require separate legal advice the cost would not be anticipated to exceed £8k as on the more simple Waste Management and Recycling Contract the former Treasurer received advice that cost the Authority £4.3K.

9. Conclusion

9.1 The Authority needs to be able to issue a certificate under the Local Government (Contracts) Act 1997 to support the Resource Recovery Contract. The Treasurer will require an indemnity from the Authority before he signs that certificate.

9.2 Members are asked to approve the granting of an indemnity to the Treasurer on the terms set out in the appendix to this report.

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The background documents to this report are open to inspection in accordance with Section 100D of The Local Government Act 1972 - Nil.

