**Report from Dublin City Council**

**Waste to Energy Facility at Poolbeg**

**Background**

The history of this project goes back to 1996 when the four Dublin Local Authorities held an EU competition for the engagement of a consultancy to prepare a wide ranging waste management strategy for the Dublin Region. The competition was ultimately won by the MCCK consortium led by the M.C. O’Sullivan practice. In addition, Mary Murphy & Associates were appointed as communications consultants.

The Strategy Study commenced in February 1997 with a wide ranging public consultation and ultimately led to the publication, in January 1998, of a new Waste Strategy for the Region which advocated an integrated approach to waste management in line with best international practice. Among the many recommendations in the Strategy were proposals to develop:

* Biological treatment facilities on two sites, north and south of the Liffey of either composting or anaerobic digestion and
* A Thermal treatment facility for up to 750,000 tonnes per annum (subsequently reduced to 600,000 tonnes per annum in the PPP contract) for residual waste.

The Strategy recommended gained broad political acceptance with the elected members of the four Dublin Authorities and all four Councils formally adopted the Regional Waste Management Plan in 1998. Following this, Dublin City Council, as the lead Authority, commissioned consultants to further investigate biological and thermal treatment options and to carry out site selection studies. Tobins and M.C. O’Sullivans were respectively appointed to carry out the required studies after a public procurement process. The site selection study for thermal treatment recommended Poolbeg as the optimum site but left the technology choice and eventual size of the plant open to the PPP procurement process.

In May 2000, the process of procuring a Client’s Representative for the Thermal Treatment Plant at Poolbeg commenced. A Group headed by a joint venture of M.C. O’Sullivan and COWI Consulting Engineers and planners, with sub-Consultants E.C. Harris, Price Waterhouse Coopers and McCann Fitzgerald were eventually selected. The group also included a Public Information / Public Consultation element provided by Mary Murphy & Associates, Pat Delbridge International and Judith Petts. In March 2001, a contract was signed engaging the consortium as Client’s Representative for the Plant.

During the period from March 2001 to July 2002, the new Client’s Representative team was involved in sourcing an independent review of background data on the project, the setting up of a local task force for Community involvement and of a local office in Ringsend, various workshops with Council and Department staff, taking market soundings and preparing a report on same as well as the development of a Procurement Plan with Milestones, a Project Information Memorandum and a Project Questionnaire.

During the second half of 2002, contract documentation was developed by the consortium in cooperation with the Council and the Department leading to the completion of documentation on an Invitation to Negotiate and a Project Agreement with 30 Schedules. Also, during this period, a District Heating Feasibility Study was prepared in respect of the Docklands area.

The Thermal Treatment Project was to be developed as a Public Private Partnership and the procurement carried out as a Negotiated Process under the EU Works Directive. A pre-qualification phase served to select suitable bidders for the Project. In 2002, the Council advertised in the EU Journal and other media for expressions of interest to participate in the Project. Interested consortia were invited to submit applications for pre-qualification to bid for the Project. Thirteen groups submitted applications to pre-qualify but, following detailed examination of the applications, it was determined that only four of the applicants met all the necessary criteria to qualify. The successful applicants were notified in May 2003 and invited to bid for the Project. Following meetings with the four Bidders and visits to reference sites, the Invitation to Negotiate was issued to the four bidders in November 2003.

In late November 2003, one of the four advised that it would not submit a Bid due to the company being put up for sale.

A Project Board was established and first convened in January 2004. It was chaired by the Dublin City Council Assistant City Manager and comprised representatives from the Council, the Department of Environment, Heritage and Local Government, The National Development Finance Agency and the Client’s Representative. The role of the Board developed as the project progressed but was generally considered to be an Advisory Body that, among its roles, set policy, conveyed information to the project stakeholders and provided advice on the Statutory Approvals required. There was a clear distinction between the Project Board, which operated in an advisory capacity and the Project Executive Board (consisting of members of management of Dublin City Council) with day-to-day responsibility for project management which was established within the same period. A Process Auditor from the Department of the Environment, Heritage and Local Government was also appointed and coordinated directly with the Project Executive Board on matters relating to the PPP Procurement process and acted as an observer on the Project Board.

Three bids were received in April 2004 and, over the period to June 2005, were assessed. One of the three was deemed not to comply with the bid requirements. It also became clear that one of the remaining bidders was unable to commit finance to the project in accordance with the terms of the Invitation to Negotiate and that bidder subsequently withdrew from the process. The remaining bidder was Elsam A/S. The Client’s Representative proceeded to negotiate a Project Agreement and related documents (the Project Documents) during this period until finally in mid 2005, the Project Documents were submitted for approval to the Department and to the NDFA and the Project Agreement was sanctioned by the Department in September 2005.

During the negotiations process, Elsam A/S was acquired by Danish Oil and Natural Gas (DONG) as part of a transaction involving several major companies active in the northern European electricity market and which resulted in a series of asset and business line acquisitions and disposals. Following the Elsam acquisition, DONG considered taking on a project partner and proposed to the City Council that it would invite Covanta Energy to become a shareholder in its Irish subsidiary, DONG Generation Ireland Limited. The pre-qualification process was revisited in January 2007 which concluded that DONG Generation Ireland Ltd, under its proposed new ownership structure, could be recommended as a PPP Co. partner for Dublin City Council for the Project. A Project Board meeting in May 2007 approved a proposal to award the contract for the Project in accordance with the original sanction. A legal report requested by the Board, completed in May 2007, determined that the procurement of the project had been carried out by the Council in accordance with its obligations under procurement law and the requirements of the negotiated procedure under the Works Directive.

The Project Agreement was executed by all parties on 4th September 2007.

The signing of the Project Agreement was a milestone in the Project but, in the absence of the achievement of a number of Conditions Precedent within the Project Agreement, it did not, in itself, deliver the Project. Negotiations continued in the intervening period with a view to delivering all of the Conditions Precedent in order to allow the Project to progress. The Conditions Precedent had to be met by September 2010 to ensure that the Project would continue in line with the terms set out in the Project Agreement. Failing that, the powers available to the Council under the Project Agreement would be severely curtailed.

**Statutory Procedures**

**Planning application**

A Planning Application, including an Environmental Impact Statement, was lodged with An Bord Pleanala on 30th June 2006. Further information was requested by the Board and lodged between September 2006 and March 2007. This further information included reports on Major Accident Hazard Assessment, Traffic Noise Impact Assessment and revised plans and drawings. These were notified to the public indicating that observations could be submitted to the Board within a specified timeframe. 165 separate submissions and 2,591 signed observations were submitted. The bulk of the submissions/observations were in the form of objections to the proposed development.

An Oral Hearing was held by the Board extending over a period of 18 days between 19th April 2007 and 7th June 2007. A Decision to Grant Permission issued in November 2007, subject to conditions.

**Commission for Energy Regulation**

Two applications were made to the Commission for Energy Regulation. These were an ‘Authorisation to construct a new generating station or reconstruct an existing generating station’ and an ‘Authorisation to generate’. Both applications were lodged with the Commission in May 2008 and approval was received in September 2009.

**EPA Waste Licence**

An application for a Waste licence, including an Environmental Impact Statement, was submitted to the Environmental Protection Agency (EPA) in July 2006. Notification to a Proposed Decision was issued by the EPA in November 2007. Objections to the Proposed Decision were lodged and an Oral Hearing was held by the EPA between 14th April and 1st May 2008. The EPA issued the final Waste Licence on 1st December 2008.

It is worth mentioning that the Project Agreement conditioned the Council to use its “best endeavours” to help the PPP Co obtain the necessary statutory approvals. This involved work by the Client’s Representative to this end. In addition, the number and nature of the conditions attaching to the Planning Permission and the EPA Licence required further negotiation with the EPA and the PPP Co on what were deemed “satisfactory” permissions to ensure that the PPP Co could meet Conditions Precedent under the Project Agreement.

**Site Acquisition**

An application for the confirmation of the Compulsory Purchase Order to acquire the site at Shelly Banks Road for the Waste to Energy facility was lodged with the An Bord Pleanala in 2002. It was decided by the Board that this application would not be dealt with until the planning application for the development, plus the Environmental Impact Statement had been submitted to the Board. 3 objections to the CPO were lodged with the Board and one was subsequently withdrawn. The objections to the CPO were heard at the Oral Hearing on the Planning Application and EIS referred to above.

The CPO was confirmed at a meeting of the Board on 16th November 2007. While the Notices to Treat were issued in 2007 it should be noted that the conclusion of the arbitration process has still not been finalised in one case although it is expected that this will be dealt with in 2012.

**Foreshore Licence**

In August 2008, an application was lodged with the Department of Agriculture, Fisheries and Food for a Foreshore Licence in respect of a cooling water channel for the Plant. The acquisition of this licence was a Condition Precedent for the City Council. In January 2010, responsibility for Foreshore Licensing was transferred from the above Department to the Department of the Environment Heritage and Local Government.

The Council, on becoming aware of this, wrote to the Department of the Environment, Heritage and Local Government on 26th January 2010, 24th February 2010, 15th April 2010, and 10th June 2010 seeking information on the status of the application. No response was received to any of these letters.

We again wrote on 17th June 2010 indicating that the Council was considering the use of its Compulsory Purchase powers to acquire the necessary lands in the absence of a Foreshore Licence or even information in relation to the application for same. This proposal elicited a response from the Department seeking further information in this regard. The Council responded on 21st July 2010 indicating our intention to proceed with the CPO.

The Compulsory Purchase Order in this regard was lodged with An Bord Pleanala on 17th August 2010. By letter of 8th October 2010, the Board indicated that the Council could proceed to confirm the order, with or without modifications. The Compulsory Purchase Order was confirmed, by Order of the Assistant City Manager, on 19th October 2010.

By virtue of the fact that neither a foreshore licence nor the CPO on the cooling water channel lands were in place by 4th September 2010, this Condition Precedent was not met and this had major, negative implications for the Council’s ability to progress the project in line with the terms of the Project Agreement. Had all Conditions Precedent been met by that date, the Council could, and would, have insisted that Covanta proceed to construction stage using balance sheet financing, in line with the Project Agreement. By failing to meet this particular Condition Precedent, the Council lost this power. As a result of this, Covanta were in a position to alter their position on funding for the project and indicated that they wished to secure either Project Funding or Equity Funding. In the current financial climate and in light of the uncertainty which has surrounded waste policy in Ireland in recent years, this has led to the delay in the development of the Project.

**Appointment of Authorised Officer**

A further issue in relation to the progress of the Project occurred with the appointment by the Minister for the Environment, Heritage and Local Government, in February 2010, of an Authorised Officer under Section 224 of the Local Government Act 2001. This Officer was appointed with a remit to investigate matters related to the Project, the Project Agreement, the financial risks associated with the Project and the consequences of alteration or abandonment of the Project. The Council co-operated fully with the Authorised Officer appointed but this again caused delay and uncertainty around the overall Project and considerable additional work.

The Report was submitted to the then Minister in the Autumn of 2010 but the outcome of the Report was not published until June 2011 and no issues arose from the Report.

**Competition Authority and EU Commission**

In February 2010, the Competition Authority notified the City Council that it had received a number of complaints from the Irish Waste Management Association in relation to the Waste to Energy Project and that it would be investigating the complaints. Again, the Council co-operated fully with the Authority in an effort to have such vexatious complaints dealt with in the most expeditious manner. A detailed response to the complaints was prepared by the Client Representative’s team on behalf of the Council and submitted to the Authority.

In July 2010, the Competition Authority wrote to the City Council following their assessment of the complaints made by the IWMA to confirm that there was no breach of Irish competition law in relation to the Dublin Waste to Energy plant at Poolbeg and the Public Private Partnership Contract between the four Dublin Local Authorities and their private sector partners in the Dublin Waste to Energy Limited project. The Competition Authority rejected all four complaints made by the Irish Waste Management Association about the Waste to Energy Plant at Poolbeg.

The Irish Waste Management Association had not objected to the Poolbeg Waste to Energy Plant in the ten years it was going through the statutory processes and during which time they had had plenty of opportunity to have their view considered. This was indicative of the continuing frustration of the Project by various interested parties and contributed, in no small part, to the work of the Council and the Client’s Representative team extending over a considerably longer period than had been originally envisaged.

In June 2011, the Department of Environment, Community and Local Government notified the City Council that it had received correspondence from the EU Commission in relation to “state aid” complaints received by the Council in relation to this Project. The Department had previously responded, in late 2010, to correspondence on this matter but the Commission responded looking for more information at that stage.

The nature of the information required meant that it was necessary for the Client’s Representative team to again prepare detailed papers to answer the complaints and to clarify the nature of the Project and how it did not breach EU Commission Regulation in this regard.

The above clearly demonstrates that this project encountered considerable delays, due, mainly, to circumstances outside the control of the City Council. So significant have these delays been that, despite some elements of the construction stage having been completed, a substantial start has yet to be made on the construction of the Plant some 5 years after this work was originally due to be completed.

**Current Waste Situation**

**EPA Waste Report**

On the 1st March 2012 the EPA launched its most recent national waste report. While there was positive news on the recycling front there was also a clear indication of the impending crisis regarding waste management infrastructure. The shortage of landfill space is again highlighted in the Report. The most likely scenario is that Ireland will be out of landfill capacity in as little as 8 years.

**EU Waste Framework Directive**

However landfill is not the option we should be pursuing in any event. Article 4 of the EU Waste Framework Directive (which was transposed into Irish law last year) introduces a requirement to apply the waste hierarchy as a priority order in the management of waste. Article 10 requires Member States to take measures to ensure waste undergoes recovery operations. In effect Ireland needs to move from it’s over reliance on the bottom tier of the hierarchy i.e. disposal to landfill.

**Contractual Position**

The decision date on this project has been deferred on a number of occasions since September 2010. In concluding discussions on commercial arrangements the City Council has also agreed a final decision date with Covanta of the 31st August 2012. In effect they must notify us by that date if they are in a position to commence no later than the 5th November 2012.

**Summary**

It is acknowledged that the costs in bringing this project forward are very significant due to the reasons outlined in this report. The final total net outlay is forecast at close to €100m including land acquisition etc. However when this is matched against the turnover associated with the project over its lifetime it becomes a small percentage in comparison and the agreement is structured so that over time the four local authorities will recoup those costs (reflected in net present value).

With landfill capacity decreasing and EU policy directing waste away from the landfill option the need for facilities such as the proposed Waste to Energy Plant in Poolbeg was never clearer.

It has to be said that in spite of incredible obstacles we have still maintained the opportunity for the project to proceed in accordance with national and EU policy. It is vital for the local and national interest that it commences as soon as possible.