



## LYME GREEN – Waste Transfer Station

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# **1 Introduction**

- 1.1 The Council is responsible for establishing and maintaining appropriate risk management processes, control systems, accounting records and governance arrangements. Internal Audit play a vital part in advising the Council that these arrangements are in place and operating properly.
- 1.2 This report has been prepared following a request by the Chief Executive and Leader to review the approach taken by the Council in managing the Waste Transfer Station (North) aspect of the Council's Waste Collection Transformation Project.
- 1.3 The Chief Executive's request recognises the significant public and member interest in the issue including the resolution of the Audit and Governance Committee on 31 January 2012 which stated:

a thorough and robust investigation of all issues surrounding the expenditure incurred on the proposed waste transfer station at Lyme Green be added to the work plan; in particular to identify any governance issues and whether all financial and contractual regulations have been complied with.
- 1.4 Terms of reference (Appendix B) have been agreed with the Chief Executive with the prime objective being to provide an independent and objective opinion to the organisation on management's compliance with established policies, procedures, laws and regulations particularly with regard to the use of assets and resources entrusted to it. In summary the review aims to establish whether controls, procedures or policies have been compromised and identify the steps that need to be taken to prevent a re-occurrence.
- 1.5 This report informs, in the first instance, both the Chief Executive and the Leader of weaknesses that existed in the Council's arrangements for the management of the Waste Transfer Station (North) aspect of the wider transformation project.
- 1.6 Following this introduction, the report explains the background to the decision to locate a Waste Transfer Station at Lyme Green. The report goes onto provide conclusions to the review, and the detailed evidence to support those conclusions and the recommendations made to address the weaknesses identified.
- 1.7 It should be noted that Internal Audit is independent of the activities under review which enables the auditors to perform their duties in a way that allows them to make impartial and professional judgements and recommendations. The assurances given by Internal Audit are never absolute because it is impossible to examine every activity and every transaction.
- 1.8 In preparing the report Internal Audit is mindful of the interests that third parties have expressed on the matter in correspondence with the Council. This report deals exclusively with matters that are within the competence of the Internal Audit Section. Complaints and Freedom of Information requests are dealt with separately to this report.

- 1.9 It is also important to stress that under section 8 of the Audit Commission Act 1998 the Council's External Auditor is empowered to issue a report relating to this matter if it is in the public interest to do so. The decision to issue a report in the public interest is entirely a matter for the appointed auditor to decide.

## 2. Background

- 2.1 On 30<sup>th</sup> November 2011 the Council ceased all works in relation to the construction of a Waste Transfer Station at Lyme Green Depot, Macclesfield. The Planning Application was deferred by the Strategic Planning Board on 18 January 2012 and withdrawn on 17 February 2012.
- 2.2 The construction works and the related, partially retrospective, planning application attracted significant public and Member interest together with adverse publicity. Consequently, the Chief Executive instructed Internal Audit to provide an independent and objective opinion on Managements compliance with established policies, procedures, laws and regulations particularly with regard to the use of resources entrusted to it.
- 2.3 Various public statements were made with regard to the Lyme Green development leading to an apology to both residents and Councillors, and a commitment to “diligently examine all possible site options”. Furthermore, a statement was made with regard to this review and to publishing a summary of the report at a date to be confirmed.

### Policy/Financial Context

- 2.4 The development of the Project must be considered against a financial backdrop of pressure upon the Council's finances as a result of the Comprehensive Spending Review resulting in an overall reduction in funding. The “Pre-Budget Report 2011-12” states that 2011-12 overall central government funding is £8.2M less than in comparison to that received in 2010-11. In addition there were further service pressures on the Council's resources. Throughout the financial year 2011/12 the Cabinet and Corporate Management Team kept these pressures under review. At mid-year the Council reported that it was forecasting a budget deficit in the region of £16m and put in place measures to seek to mitigate the pressures. Such measures included introduction of a ‘recruitment freeze’ for non-essential posts, and the bringing forward of capital schemes that might also ease financial pressures.
- 2.5 In support of the initial proposals put forward to merge the former Waste Collection Authorities (WCAs) that now sit within Cheshire East were budgeted savings to be delivered through integrated delivery of refuse and recycling services. These included both short term and longer term savings, to be met initially through a re-routing exercise considering the inherited collection arrangements and then through potential changes in the service delivery method to deliver greater long term savings.
- 2.6 Throughout 2009/10 studies were completed by consultants including the logistics of joint domestic refuse, recycling, garden and bulky waste collections across Cheshire East in order to deliver operational efficiency savings. The work considered current variations in collection methods that existed across the former WCAs, concentrating on recycling collection methods and optimised round design. The work resulted in the Council moving to a co-mingled dry recycle

collection scheme and in order to do so the Macclesfield area required the provision of suitable infrastructure for the receipt and bulking of the material.

- 2.7 In order to address the need £650,000 was included in the 2011/12 Capital Programme for the Council to build a Waste Transfer Facility at its Lyme Green Depot, together with £233,000 in the revenue budget for operating costs. The capital planning process commenced in August 2010. The scheme was classified as invest to save/transformational. The construction costs of £650,000 were taken directly from the cost of the Council's Pym's Lane Waste Transfer site in the South of the Borough and were not directly attributable to the location. Detailed planning/technical considerations were not, at this stage, taken into account when determining the cost, location or the optimal design for the building.

Extract from an Update Report on the Capital Programme 2011 -14 to CMT/Cabinet 17 December 2010

"The Invest to Save/Transformational schemes are required to deliver revenue savings and are linked to saving proposals for 2011/12. Failure to deliver these schemes will have an impact on closing the revenue funding gap"

- 2.8 In accordance with the Councils Finance and Contract Procedure Rules Chief Officers and budget managers are authorised to incur expenditure in accordance with the estimates that make up the approved budget. The 2011/12 budget that was approved by the Council in February 2011 included £650,000 in the Capital Programme for the scheme. The Budget Report described how the 2011/2012 Capital Programme was developed and noted:

Extract from Budget Report to Council 24 February 2011

"the Council is conscious of the impact of repayment costs on the revenue budget and has only considered schemes where capital investment is required to secure longer term revenue savings and repayment costs are affordable"

- 2.9 The report also described service proposals and considered the impact of these on typical groups of service users. In terms of Environmental Services the report noted that:

Extract from Budget Report to Council 24 February 2011

"In order to provide householders with a much improved waste and recycling collection service, the Council will introduce a new system in 2011/12, based in large measure, on three wheeled bins rather than the current mix of bins, boxes and bags. This will increase the number of materials that can be recycled by all householders and reduce the costs of waste and recycling collections by £0.7m in 2011/12, increasing to over £1m per annum from 2012/13"

- 2.10 In March 2011 a report on the transformation of Waste and Recycling Collection Services was taken to Cabinet. The implementation timetable indicated that the project would be rolled out in two phases; phase 1 from the southern depot from 9 May 2011 and phase 2 from the northern depot from 3 October 2011. Cabinet approved the implementation of the new waste collection services as detailed in

the report with the decision becoming effective from 24 March 2011. The report noted that:

Extract from Report to Cabinet 14 March 2011

“Delivery is challenging in a number of respects and will need to be driven hard to ensure all objectives are achieved in the timescales.

“There are several related work streams that support the service transformation ....Of these related work streams, the timely procurement of new contracts, additional containers and waste transfer facilities are integral to the delivery of new services. Without them the new services cannot be delivered and target savings cannot be achieved.

Another key factor in producing the required savings is the provision of waste transfer facilities in close proximity to Macclesfield, through an EU compliance procurement process...without such a facility, it is impossible to provide the service and attain the savings required”.

Steps Taken to Implement the Decision of Cabinet 14/3/2011

- 2.11 The project to transform the Council's waste collection service from a residual waste service to one where the primary services are recycling at a lower cost to the tax payer started in January 2010. The Cheshire East Waste Collection Improvement Project forms part of the Transformation – Places Directorate Savings Programme.
- 2.12 The project identified several related work streams that supported the service transformation including managing the Private Finance Initiative (PFI) project, procuring new processing contracts for dry recyclate and garden waste, procuring waste transfer facilities in the north, purchasing additional containers to roll out the dry recycling collection borough wide and HR related issues relating to the terms and conditions of employment.
- 2.13 The proposed service, designed to operate across the whole of Cheshire East, included fortnightly recycling collections of household co-mingled dry materials with optimised collection schedules. Dry recycling was to be deposited and bulked up at Pym's Lane, Crewe and a site to be determined in the north.
- 2.14 In July 2010 an Official Journal of the European Union (OJEU) Contract Notice was placed for a Contractor to collect the bulked co-mingled Dry Recyclate from the Council's Recyclate Bulking Facility/Facilities (collection points) and to provide haulage to the Contractor's Materials Recovery Facility for separation and onward transport to re-processors. The Contract Award Notice notes that the recycling contractor was awarded the Contract from 14.3.2011 (the date that Cabinet approved the implementation of the new waste collection services) until 13.03.2014 with the ability to further extend up to a maximum of 3 years. At contract commencement the only operational Collection Point was located at the Council owned Pym's Lane Depot, Pym's Lane Crewe, however schedule 1 of the contract notes that “if so established, the Contractor shall be instructed ...to

commence the collection of an additional quantity of co-mingled Dry Recyclate of approximately 16,000 tonnes per year, and take responsibility for its treatment and reuse/recycling..”

- 2.15 In May 2011 an OJEU open notice was placed for the receipt, handling, storage and despatch of Co-mingled Dry recyclates that is to be collected by the Council’s Refuse and Collection Services in the north of the Borough. The notice indicates that approximately 16000 tonnes will be delivered to the Contractors premises over each Contract year. The estimated contract start date is shown as 3/10/11 with an end date of 02/10/2014.

- 2.16 Following the receipt of one tender from a waste bulking contractor on 15 June 2011, the Strategic Director for Places felt that, despite the tender being within budget, the offer may not represent best value and that it was difficult to demonstrate the prices were competitive because only one bid was received.

*The 2011/12 budget that was approved by the Council in February 2011 included £650,000 in the Capital Programme for a Council owned Waste Transfer Facility. The Strategic Director and budget managers had, therefore, been authorised to pursue this option subject to expenditure being within the approved budget.*

- 2.17 The option of a Council owned Waste Transfer Station at the Lyme Green Highways Depot was, therefore, explored and in August 2011 an indicative works programme of 20 weeks with a completion date of Christmas 2011 was established. Whilst the approved budget for the scheme was £650,000, feasibility costs, based on a Pym’s Lane type building being constructed at Lyme Green, were established at between £1.4m and £1.55m. Furthermore, costings, provided by Finance, indicated that a Council run Waste Transfer Station was cheaper when compared to the waste bulking contractor’s, with savings increasing as recyclate collected increased. The capital financing costs were, however, based on a build cost of £700,000 and not the feasibility costs of £1.55m.

- 2.18 In early September the works programme was reviewed, due to initial delays in obtaining approval to commence the survey and investigations works on site, and a revised target date of March 2012 determined. However, the Strategic Director issued instructions to accelerate the “project”.

- 2.19 By mid September the works programme was revised to allow for a completion date of Christmas 2011. The Strategic Director “approved” the Council run waste transfer station option in an e-mail that states “Yes lets get on with it. We do need to ensure we sign everything off as we go as you know some people choose to watch our every move”. The specific authority to proceed is taken from the 2011/12 budget that was approved by the Council in February 2011 which included £650,000 in the Capital Programme for the scheme. The Strategic Director and budget managers are, therefore, only authorised to incur expenditure in accordance with the approved budget.

- 2.20 In order to allow the roll out of the new Waste and Recycling Service on 3 October 2011 the Strategic Director awarded an interim (6-8 months) contract to the waste bulking contractor for the provision of Waste Transfer Facilities at Macclesfield. The Authority to award the contract was taken from a Delegated Decision (DD),

dated 14 September 2011, that waived the requirement for a tendering exercise on the basis that only one company could provide the service and the fact that the quote was within the approved budget. The DD was signed off by the Director of Finance and Business Services and the Borough Solicitor on 15 September following endorsement by Officers from Procurement, Finance and Legal. The estimated value of the contract, at £240,000 was, however, in excess of the EU minimum for a Notice and tendering process for services.

- 2.21 The new Waste and Recycling service was rolled out on 3 October 2011.
- 2.22 A further DD was taken on 4 October by the Assets Manager to grant approval of the direct appointment, without competition, of a waste facility construction contractor (referred to as the main contractor throughout this report) from the existing North West Construction Hub (NWCH) Medium Value Framework. The DD to waive competition was taken on the basis that there was an emergency that required an immediate contract or it was considered appropriate in the interests of the efficient management of the service. When the DD was taken the value of the works, based on feasibility costs that were received on 16 August 2011 and discussion with the main contractor was approximately £1,500,000. The approved capital budget for the scheme was £650,000.
- 2.23 On 21 October the final iteration of the work programme was determined with a completion date for the Building of January 2012.
- 2.24 The main contractor starts on site on 24 October. At this stage the target cost of the works placed with the main contractor were agreed at £1.59m. The approved capital budget for the scheme was £650,000.
- 2.25 On 16 November a Planning Application was received by the Council for the Waste Transfer Station which was registered on 24 November. The application notes that building, work or change of use has already started.
- 2.26 As at mid-May total costs of the incomplete Lyme Green WTS project processed within the Projects module of the Council's Oracle financial accounting system stand at approximately £696,000. Costs totalling approximately £595,000 have been paid to the main contractor, £94,000 to the various consultants and the balance to miscellaneous costs and internal charges. The Professional Services & Framework Manager estimates total costs to this stage of completion at £810,000.
- 2.27 An examination of the consultants' fees schedule indicates some £26,000 consultants fees yet to be charged to the project. This would leave the balance of approx £88,000 attributable to the main contractor. It is understood that the Professional Services and Framework Manager is currently in negotiation with the main contractor to effect a reduction in their outstanding balance.
- 2.28 A detailed timeline of events which, in effect, articulates the findings to this report, is found at Appendix A of this report



### 3 Conclusions

- 3.1 The Council is responsible for establishing and maintaining appropriate risk management processes, control systems, accounting records and governance arrangements. This review has indicated that whilst the arrangements are in place officers have, in certain instances, failed to comply with them. This reduces the ability of the Council to demonstrate value for money and that it has acted responsibly. The most significant breaches being summarised below:

#### The Business Case/Capital Planning Process

- Officers failed to comply with the Council's Capital Strategy because the Capital Appraisal and Monitoring Group (CAMG) did not, in effect, meet as part of the Capital Planning Process 2011 -14. Consequently, the Capital Programme for 2011/12 included £650,000 for the construction of a Council owned Waste Transfer Station without a detailed assessment of the viability of the scheme (including an understanding of costs involved).

#### Project Management

- Officers involved in the project did not use the Council's standard suite of documents which are available for use in managing and reporting progress. Governance arrangements tended to be informal and seem confused when compared to those described in the Council's Project Health Check document. The audit trail is, therefore, blurred and where actions have been taken to address risks/issues it is unclear that decisions were arrived at with the full knowledge of all the relevant factors or a realisation of the full implications.

#### Planning

- Local confidence in the planning process has been undermined because Officers failed to comply with paragraphs 5.5 – 5.9 of the Council's own Statement of Community Involvement which addresses consultation with the local community and development commenced without planning permission. Pre application advice suggested that the application would be "fast tracked".

#### Non Compliance with European Directives

- The Delegated Decision taken by the Strategic Director on 14 September 2011 failed to comply with EU Regulations. The arrangements for approving this decision are, therefore, flawed because as prescribed in the Council's Constitution a DD can only waive the Council's internal rules.

#### Non Compliance with Finance & Contract Procedure Rules

- The arrangements for appointing the main contractor via a DD are flawed because the Asset Manager only had authority to incur expenditure in accordance with the estimates that make up the budget that was suggested by Cabinet and approved by Council. Despite having an approved budget of

£650,000 the DD was used as the basis for agreeing works to the value of £1.5m. As at mid-May total costs of the incomplete Lyme Green WTS project processed within the Projects module of the Council's Oracle financial accounting system stand at approx £696,000. The Professional Services & Framework Manager estimates total costs to this stage at £810,000 but is currently in negotiation with the main contractor to effect a reduction in their outstanding balance. The full extent of the costs associated with this scheme cannot be established until a decision is taken by the Council with regard to the site

- Scrutiny arrangements with regard to the DD have been compromised because no advance publicity arrangements or special urgency procedures were applied to what was described as a key decision.
- There is no contract under seal with the main contractor despite the value of works being agreed at £1.59m
- The monitoring of this capital scheme is flawed because committed expenditure is not reported to Cabinet or fully approved.

#### Risk Management

- At various stages of the project officers deemed a breach of planning control and non compliance with relevant Regulations and Finance and Contract Procedure Rules as tolerable because it was unlikely that adverse consequences would arise. The risk management arrangements are, therefore, flawed because the Council should not breach relevant Rules and Regulations even if adverse consequences are unlikely. Rules, Regulations, Policies and Procedures have been implemented to help ensure the Authority's objectives are achieved in a manner that promotes economical, efficient and effective use of resources and that assets and interests are safeguarded.

- 3.2 It is apparent that Management allowed judgement to be affected by the focus to meet a key objective of providing householders with an improved waste and recycling collection service whilst reducing the costs of waste and recycling collections.

## 4 Findings & Recommendations

### 4.1 The Business Case/Capital Planning Process (August 2010 to February 2011)

- 4.1.1 A vital part of the Council's Capital Planning Process is the scrutiny via detailed business case, of what is proposed to ensure that it is the right sort of investment, affordable and value for money. A partially complete Capital Appraisal Form was submitted by the Waste and Recycling Manager and allowed to progress through the challenge process (See Appendix C for details). The capital appraisal form does not allow all relevant financial and non financial aspects of a proposed scheme to be recorded such as the outcome of options appraisals/feasibility studies.
- 4.1.2 The Capital Appraisal and Monitoring Group (CAMG) which was responsible for assessing the viability of the scheme and providing guidance on all relevant financial and non financial aspects of the proposed project, did not, in effect, meet during the Capital Planning Process. It is difficult, at this stage, to demonstrate that the scheme is the best possible solution for the given set of circumstances.
- 4.1.3 The construction costs of £650,000 were taken directly from the cost of the Pym's Lane Waste Transfer site and were not directly attributable to the location. Detailed planning/technical considerations were not, at this stage, taken into account when determining the cost, location or the optimal design for the building. Capital expenditure was approved without fully understanding whether building a Waste Service Transfer Station was the most suitable option, or whether the proposed scheme was viable, affordable and achievable.

#### June 2011

- 4.1.4 The viability of the scheme was revisited following, what was deemed, an unsuccessful procurement exercise to obtain waste transfer capacity from the private sector. However, the time constraints at this point influenced the path chosen with regard to compliance arrangements.

### **Recommendation**

*The arrangements with regard to business cases must be strengthened to ensure they provide the Council with the evidence to support decision making and provide assurance to other stakeholders that it has acted responsibly.*

*The Capital Planning Process must involve close scrutiny of detailed business cases that include all relevant financial and non financial aspects of a proposed scheme in order to ensure that the best possible solution is selected for a given set of circumstances.*

## 4.2 Project Management

- 4.2.1 All projects will encounter risks and issues which may prevent successful delivery. It is, therefore, important that a disciplined approach is adopted to identify risks and issues and ensure decisions are taken and measures put in place to deliver the desired outcomes.
- 4.2.2 The Council does not have a formal project management framework. There is, however, a standard suite of documents which are available for use in managing and reporting progress. There is also corporate support for project work. Apart from the Risk Log no other document from the suite was used. It is difficult, therefore, to demonstrate that a considered, disciplined and proportionate approach was taken in managing the project.
- 4.2.3 Consequently, there is insufficient evidence to suggest that agreement had been reached with regard to the scope, key milestones, communication and governance arrangements, key links and dependencies and roles and responsibilities at the project initiation stage. Furthermore, as the project progressed it is difficult to demonstrate how much emphasis has been placed on each element and whether this is proportionate.
- 4.2.4 Governance arrangements tended to be informal and seem confused when compared to those described in the Council's Project Health Check document. As a result it is unclear how risk appetite was established/approved and issues resolved. Where actions have been taken to address risks/issues and determine tolerance in terms of cost, quality and time it is unclear that decisions were arrived at with the full knowledge of all the relevant factors or a realisation of the full implications. Formal records of who was asked to do what, when and how well it was done, in order to provide an audit trail, have not been maintained. Regular written project progress reports have not been produced for Senior Management. There is no project plan, reliance being placed on the work programme, which tended to be a stage plan and concerned itself with milestones connected with Construction only.
- 4.2.5 It is acknowledged that action has already been taken by Management within the Places Directorate to ensure that more rigorous project management arrangements are put in place within the Asset Service.

### **Recommendation**

*The Council's Project Management Arrangements must be reviewed and strengthened to ensure that objectives are met, constraints are identified, tolerances defined and benefits realised. Arrangements must ensure there is sufficient evidence to support decision making and provide assurance to other stakeholders that the Council has acted responsibly*

## 4.3 Planning

- 4.3.1 The Planning Application is of a scale and nature to fall within paragraphs 5.5 – 5.9 of the Council's own Statement of Community Involvement which concerns

pre application advice. Pre-application discussions are critically important and benefit developers (in this case the Council), the Council and the wider community in ensuring a better understanding of the existing, and potential objectives and constraints to a development. In this instance the Council failed to undertake appropriate consultation and hence failed to follow its own advice.

- 4.3.2 The steering/project group tasked with providing a new Waste Transfer Station at Lyme Green proceeded with the task, with the consent of its Director, even though the timetable involved the commencement of development without planning permission. Planning Officers advised against this course of action both prior to and during the works. The Council submitted a partially retrospective planning application. Works ceased after objections from Planning Officers and after complaints from local residents and the Ward Member representing them. Commencing development without permission has undermined local confidence in the planning process and contributed to the suspicion that the application was receiving favourable treatment in terms of procedure and substance and that permission was a fait accompli.
- 4.3.3 Pre application advice from the Head of Planning and Housing included a commitment to “fast track” the planning application, once submitted, through registration and deal with it promptly thereafter.
- 4.3.4 The Planning Application was deferred by the Strategic Planning Board on 18 January 2012 and withdrawn on 17 February 2012.
- 4.3.5 It is noted that the Council’s pre-application advice system has been introduced on 3rd October 2011 to “provide a much more structured and improved service for pre-application advice”.

### **Recommendation**

*The Council, as a regulatory authority, should not undertake development without planning permission.*

*All projects that require planning permission should use the Councils pre-application advice system.*

## **4.4 Compliance with European Directives**

### **Appointment of the waste bulking contractor**

- 4.4.1 The purchase of goods, services and works by the Council as a public sector body is regulated by the Public Contracts Regulations 2006 (the Regulations) which implement into English law the EU procurement regime currently in place throughout the EU. The Regulations only apply to contracts with a value that exceeds the relevant thresholds. EU Rules have mandatory procedures and mechanisms which the Council must comply with. Any breach is open to challenge via the civil courts

4.4.2 The thresholds that applied to local authorities throughout 2011 were as follows:

SUPPLIES (GOODS)	SERVICES	WORKS
£156,442	£156,442	£3,927,260

4.4.3 The Council's Constitution contains a set of Finance and Contract Procedure Rules. Where a Chief Officer or his/her designated representative intends to seek an exception to these Rules as they apply to contracts and tenders, he/she shall arrange for a DD to be prepared and submit it for consideration and sign off by the Borough Solicitor and the Director of Finance and Business Services. DDs are not available if the proposed exception will breach national or EU legal requirements. A DD can only waive the Council's internal rules

4.4.4 In order to obtain short term waste transfer capacity a DD was taken by the Strategic Director of Places on 14 September 2011 to award a six month contract to the waste bulking contractor. The estimated value of the contract, at £240,000 was, however, in excess of the EU minimum for a Notice and tendering process for services. The arrangements for approving this decision are, therefore, flawed because a DD can only waive the Council's internal rules. The waste bulking contractor was appointed on an interim 4 month contract, commencing on 3 October 2011, with the option to extend to 6 or 8 months.

4.4.5 The record of the DD indicates that:

- The Council (previously) went out to tender for provision of the service for a 3 year period
- Only one tender was received and it was determined that the waste bulking contractor submitting it was the sole commercial provider of suitable bulking facilities in the area
- In evaluating the (3 year) tender the Council deduced that it could provide the service in house at a lesser cost, however an in house service could not be provided in time to meet an urgent immediate need
- It would take the Council between 6 and 8 months to deal with the construction of a facility and secure the requisite licences and planning permission
- It was, therefore, proposed that in the interim a stop gap contract be entered into
- The quoted price (for the interim contract) was within the Council budget book estimate.
- Under the Council's Finance and Contract Procedure Rules there is the capacity to waive the requirement for competition, via a DD, in circumstances where only one company can provide the service, however this is subject to the contract value not exceeding EU thresholds
- The award of the (interim) contract to the waste bulking contractor did exceed thresholds however the Council had (previously) performed a compliant tendering exercise for a three year term.
- Given the substantial amendment to the term of the (3 year) contract and the potential impact on the cost it was advised that the contract should be retendered.

- It was, however, apparent that due to the geographical and immediate requirements of the Council there were no other companies able to tender and no significant risk of a challenge to this award of contract.
- There were now no alternatives to this offer in order to begin collection of co-mingled recycle on schedule for the 3<sup>rd</sup> of October. The Council had no facilities of its own in the North of the Borough with the necessary permits. It was now too late to arrange haulage and personnel to transfer load material to the Council's South transfer station [at an estimated cost of £35,000 per week]. Delaying the roll out on the 3<sup>rd</sup> October was no longer an option as bins are being delivered to residents which cannot be collected without the change over of vehicles and use of a transfer station from the 3<sup>rd</sup> October.

4.4.6 The quoted price for the interim contract exceeded the tendered price (3 year contract). The quoted price for the 3 year contract was no longer available as the 90 day period for acceptance had expired on 15 September 2011.

4.4.7 In taking the decision the Strategic Director did not comply with EU Regulations seeing this as tolerable because it was unlikely that adverse consequences (challenge via the civil courts) would arise.

4.4.8 A challenge to the decision is available to ANY supplier who felt they would wish to undertake the contract (not just those involved) should they feel the regulations have not been complied with. This could be taken to the High Court should negotiation or arbitration fail to lead to a mutually acceptable result or either party not enter into such a process. The High Court would determine the case and the claim would principally be for damages i.e. financial loss suffered as a result of the decision not to comply with the regulations. If the case were lost the claimant's costs may also be awarded. Depending on the view of the High Court and the stage at which the claim is lodged the tender process can also be suspended or a contract already awarded declared "ineffective" i.e. set aside. Should such a judgement be made there would be additional costs incurred in terms of delay, contingency costs to provide the service in the interim and a further tendering process. The EU may also take action against the UK government for breaches reported to it. Essentially legal action can be taken up to 3 months from the date of the alleged breach, although the Court can determine a longer period where it considers the circumstances warrant it.

4.4.9 The DD was signed off by the Borough Solicitor and the Director of Finance and Business Services who as the Councils Monitoring Officer and Section 151 Officer respectively have specific duties to ensure that the Council acts within the law, and uses resources wisely.

### **Recommendation**

*The Council's Governance Arrangements must be strengthened to ensure that it complies with EU and National Legislation.*

## **4.5 Compliance with Finance and Contract Procedure Rules**

### Appointment of the facility construction contractor

- 4.5.1 A framework agreement was used to appoint the main contractor for construction and related works at Lyme Green Depot and the purchase of the Prefabricated building.
- 4.5.2 As part of the North West Construction Hub (NWCH), of which CE is a member, the process for a Medium Value Framework selection should include a “mini-competition” similar in outline to that described in paragraph 4.5.15 for the CE Consultants Framework. There was no competition for this appointment.
- 4.5.3 The absence of competition was authorised by a DD taken by the Asset Manager on 4 October 2011 and counter-signed by the Director of Finance and Business Services and the Borough Solicitor on 5 October 2011. The main contractor was selected on the basis of being on the NWCH framework and previously submitted tenders.
- 4.5.4 The DD was taken on the basis of the Finance and Contract Procedure Rule exemption that, subject to EU rules (below £3.9M for “works”), competition may be foregone in an emergency or if in the interest of efficiency of the service. The DD indicates that:
- There is the potential risk of a challenge by other companies on the Framework
  - Conducting a mini competition would delay the project by at least 3 weeks a delay that would cost the Council £35,000 per week
  - The planned date for completion and roll out of the second phase of the project (silver wheeled bin service) was published as October 2011 and the Council would suffer potentially adverse publicity and criticism, if the proposed new services were unavailable within the outlined timetable
  - Initial consideration was given to a private sector solution as the preferred solution, although due to unforeseen difficulties with sourcing suitable competitive bids, it was determined that best value should be sought through alternative procurement options, focusing on delivery through a Council owned solution.
  - Asset Management Services were approached in August 2011 to assist Waste and Recycling Services, through the use of the Council’s existing framework contracts, to determine appropriate procurement solutions to ensure those cost increases were kept to an absolute minimum and meet the urgent operational service delivery requirements.
  - The preferred project programme forecast an accelerated 22 week programme with a target completion date for the new building of January 2012 and the Council would be required to accept an element of risk and approve a series of key milestone activities to achieve the required completion dates. The programme, which was attached to the DD, indicates that the planning process will run concurrently with site operations.
  - In order to meet the required key milestone events, a large element of civil works (extensive ground works to be undertaken to reduce overall ground



levels, form retaining Walls, a new concrete base and foundations, together with general upgrading and access improvements to the site entrance roads and infrastructure) was to be completed prior to the delivery and installation of the structural frame (December 2011)

- Waste and Recycling Services would put interim arrangements in place ....by utilising the existing established facilities set up in the South. The service would inevitably incur additional costs with increased transportation and staffing inefficiencies,..current estimates suggested increased costs of £35,000.

4.5.5 The DD does not state the value of the works to be awarded directly to the main contractor.

4.5.6 Alternative options considered in arriving at the decision included an earlier iteration of the programme that was reviewed by the “team” (completion date end of March) allowing more time to procure the project works through well established routes, ensuring formal statutory consents/approvals, together with tendering the appointment and award of the contract to the main contractor, who would then take responsibility for any sub-contract works package. However, the additional project costs together with the costs of the interim service delivery (see last bullet point paragraph 4.5.4) were considered too expensive. The information regarding additional costs is however misleading because an interim contract for Bulk and Waste Transfer Facilities Services with the waste bulking contractor was already in place (DD taken 14 September 2011). Furthermore, the interim contract, which was within budget, would allow the 32 week programme to be implemented because, with extensions, it would expire in June 2012.

4.5.7 When the DD was taken the value of the works, based on feasibility costs that were received on 16 August 2011 and discussion with the main contractor, was approximately £1,500,000. The approved capital budget for the scheme was £650,000. The arrangements for appointing the main contractor via a DD are, therefore, flawed because in accordance with the Councils Financial and Contract Procedure Rules Chief Officers and budget managers are only authorised to incur expenditure in accordance with the estimates that make up the budget that was suggested by Cabinet and approved by Council unless arrangements (see paragraphs 4.5.8 – 4.5.9) that comply with the Constitution are put in place. No such arrangements have been put in place with respect to this scheme.

4.5.8 The Finance and Contract Procedure Rules do allow for virement; that is, switching resources between approved estimates or heads of expenditure (not an increase in overall budgets through the addition of new monies), or approval of a supplementary estimate (where services wish to undertake an activity not originally identified in the budget or extend an existing capital scheme where additional income becomes available in year).

4.5.9 Approval limits for virements and supplementary estimates (as at September 2011) in respect of Capital Schemes are as follows:

<b><u>Approval Level</u></b>	<b><u>Virement Amount/Percentage</u></b>
Chief Officers	Up to £100,000 funded from underspends within the approved Service budget
Chief Officers in consultation with relevant Cabinet Member and Resources Member	Over £100,000 and up to and including £500,000
Cabinet	Over £500,000 and up to and including £1,000,000
Council	£1,000,000 or more; and/or—significant on going financial implications; and/or Significant Policy Change Significant to be defined by the Borough Treasurer and Head of Assets or their representative.

<b>Approval Level</b>	<b>Supplementary Estimate Amount</b>
Chief Officers	Up to £100,000
Chief Officers in consultation with relevant Cabinet Member and Cabinet Member for Resources.	Between £100,000 and £500,000
Cabinet	Between £500,000 and £1,000,000
Council	Over £1,000,000

4.5.10 In accordance with the Councils Procurement Knowledge Map a Delegated Decision will not be approved where there has been a lack of planning to procure a service in good time.

4.5.11 Scrutiny arrangements with regard to the DD have also been compromised because despite being described as a KEY Decision on the face of the document there has been no advance publicity arrangements (it did not appear in the forward plan) or special urgency procedures applied. Such arrangements are necessary so that members of the public and Councillors are able to consider the implications of the decision or seek to influence the decision by making contact with the decision-maker.

4.5.12 The appointment of the main contractor was confirmed by a Letter of Intent that was issued on 6 October 2011 by the Professional Services and Framework Manager. The letter authorised the company to commence work up to a value of £500,000 (subsequently extended to £750,000). The method of appointment fails to comply with the Finance and Contract Procedure Rules which state that contracts/agreements over £10,000 also require sign off by the Borough Solicitor. Furthermore, in accordance with the Asset Management scheme of delegation (dated 1 July 2010) the Professional Services and Framework Manager is only authorised to incur expenditure of up to £250,000 in any one transaction. Schemes of Financial Delegation (also known as schemes of delegation) are the documents that set out all authorisations and approval limits as delegated by the Heads of Service to Authorised Officers within their Service

4.5.13 The target cost of the works placed with the main contractor were agreed prior to commencement on site (24 October 2011) and after the Delegated Decision was taken (4 October 2011). The “agreement” at £1.59m required a contract under seal in order to comply with Finance and Contract Procedure Rules. No formally executed contract exists.

4.5.14 As at mid-May total costs of the incomplete Lyme Green WTS project processed within the Projects module of the Council’s Oracle financial accounting system stand at approximately £696,000. Costs totalling approx £595,000 have been paid to the main contractor, £94,000 to the various consultants and the balance to miscellaneous costs and internal charges. The Professional Services & Framework Manager estimates total costs to this stage of completion at £810,000. An examination of the consultants’ fees schedule indicates some £26,000 consultants fees yet to be charged to the project. This would leave the balance of approx £88,000 attributable to the main contractor. It is understood that the Professional Services and Framework Manager is currently in negotiation with the main contractor to effect a reduction in their outstanding balance. The full extent of the costs associated with this scheme cannot be established until a decision is taken by the Council with regard to the site.

#### Appointment of Consultants

4.5.15 A number of consultants have been engaged to provide various design, construction and quantity surveying services for the Waste Transfer Project.

All have been appointed from the Council’s “Consultants Framework” maintained by the Asset Management Service. This requires:

- An initial outline project brief from the service
- A Full Project Brief developed by the relevant service and Asset Management Services
- For procurements over £10,000 the Full Project Brief must be issued to all consultants on the framework for a “mini-competition” to be conducted
- Proposals are provided by the Consultants
- The relevant Service and Asset Management Services determine the preferred Consultant.

- 4.5.16 In this instance an outline project brief was completed by the Waste and Recycling Service on 16 August 2011. Fee proposals were received from late August onwards and orders placed from 30 August. Analysis of five Consultants out of seven employed indicates that all have been appointed directly with no competition by Officers within Asset Management Services. This is despite the fee proposals/ official orders and actual costs being over £10,000 in three cases. In one further case actual costs incurred exceed £10,000 whilst the order value is below this.
- 4.5.17 For one consultant their fee proposals were £29,000 and costs charged to 27 March 2012 (per Oracle Projects extract) of £58,000. Another consultant carried out work (the feasibility costing estimates dated 15 August 2011) before a fee proposal (estimated at £11,000) was formally submitted.
- 4.5.18 For expenditure over £10,000 the advice of the Borough Solicitor must be sought to agree an appropriate form of contract or written agreement which must be signed by the successful third party and on behalf of the Council by the Borough Solicitor and/or one of his/her authorised signatories, or by two of his/her authorised signatories. This rule has not been complied with.

### **Recommendation**

*The Council's Governance Arrangements must be strengthened to ensure that Finance and Contract Procedure Rules are complied with.*

### **Reporting on the Capital Programme**

- 4.5.19 In accordance with Finance and Contract Procedure Rules Project Managers must ensure that the project specification remains consistent with the approved capital appraisal and continues to represent value for money for the Authority. Where project outcomes or costs alter significantly from those set out in the original appraisal a revised Business Case Template must be completed and submitted to the officer Capital Appraisal Panel. It would then be necessary to scrutinise the proposal and address any shortfall in budget in accordance with approved procedures (see paragraphs 4.5.8 – 4.5.9) A revised Business Case Template was never submitted to the Capital Appraisal Panel by the Waste and Recycling Manager, and arrangements were not made to seek approval for the full value of the scheme. As previously established the approved capital budget for the scheme was £650,000 compared to agreed costs that exceed £1.5m.
- 4.5.20 Progress on individual schemes within the Capital Programme is monitored by the project leads and service accountants. Quarterly Highlight Reports, completed by the named budget holder, in this case the Waste and Recycling Officer, and co-ordinated by Finance are used to write progress reports to Cabinet. The Waste Transfer Station Highlight Reports for Q1 completed in July 2011, Q2 completed in October 2011 and Q3 completed in November 2011 all indicate that cost is on track with the estimated total cost of the scheme being reported as £650,000. There are no issues for decision contained within the Highlight Reports.

- 4.5.21 On 28 November 2011 Cabinet received a report on the mid year review of the Council's financial and non financial performance. The report showed the Waste Transfer Station Schemes approved budget was £650,000, there was no actual expenditure at this date and no request was made for a supplementary capital estimate or virement despite the value of the agreed target costs (construction) being £1.59m. The monitoring of this capital scheme is flawed because committed expenditure is not reported or fully approved.

#### **Recommendation**

*The Council's Arrangements for monitoring capital expenditure must be strengthened to ensure that approval is obtained for the full value of a scheme prior to expenditure being incurred and that reports used to monitor expenditure are accurate and timely.*

### **4.6 Risk Management**

- 4.6.1 At various stages of the project officers deemed a breach of planning control and non compliance with relevant Regulations and Finance and Contract Procedure Rules as tolerable because it was unlikely that adverse consequences would arise. The risk management arrangements are, therefore, flawed because the Council should not breach relevant Rules and Regulations even if adverse consequences are unlikely. Rules, Regulations, Policies and Procedures have been implemented to help ensure the Authority's objectives are achieved in a manner that promotes economical, efficient and effective use of resources and that assets and interests are safeguarded.