

APPENDIX 2

CHESHIRE EAST COUNCIL

Audit and Governance Committee

Date of meeting: 14th June 2012
Report of: Strategic Director Children, Families & Adults
Title: Lyme Green

1.0 Report Summary

- 1.1 A review of the Council's proposal to build a waste transfer station at Lyme Green Depot, Macclesfield has been undertaken. This follows cessation on 30th November 2011 of all works in relation to the construction of the facility.
- 1.2 The review, commissioned by the Chief Executive and Leader has indicated that whilst, in the main, appropriate Council procedures are in place to prevent financial and legal irregularities, achieve compliance with Officer Delegations, Standing Orders, EU procurement Rules and ensure effective reporting to Members, in this instance there is evidence that officers failed to comply with many of these arrangements.
- 1.3 This report details the findings of the review, recommendations and proposed management actions to prevent a reoccurrence of such a situation in the future.
- 1.4 Attached at Appendix 1 is the report undertaken by Internal Audit on the project requested by the Chief Executive and Leader.
- 1.5 Attached at Appendix 2 is the agreed Action Plan, detailing proposed actions to prevent reoccurrence.

2.0 Recommendations

- 2.1 Members are asked to:
 - (i) consider the findings and recommendations of the Internal Audit investigation (Appendix 1) and the agreed Action Plan (Appendix 2);
 - (ii) receive progress reports against the identified actions in the Action Plan on a quarterly basis;

- (iii) note that with regard to the Council's planning functions, a further review is recommended to consider whether the current organisational structure compromises the delivery of the Council's often conflicting demands of planning enforcement, service delivery and development;
- (iv) note that the Council in accordance with the Council's Staffing Policies will review the conduct of staff mentioned in the report and consider whether there is a case for appropriate disciplinary or other action to be pursued. This will also include consideration of whether the public or any Members were misled; and
- (v) acknowledge the failings of the Council in dealing with this matter.

3.0 Reasons for Recommendations

- 3.1 Works associated with the construction and operation of a Waste Transfer Station at Lyme Green Depot and the related, partially retrospective, planning application has attracted significant public and member interest together with adverse publicity.
- 3.2 A number of complaints and Freedom of Information requests have been received and have been acknowledged pending completion and publication of this report. This report seeks to address the concerns of members of the public and their representatives including the Ward Member.
- 3.3 By publishing the findings of this review in full the Council is demonstrating its commitment to transparency on this matter and acknowledges evident failings in its efforts to develop a waste transfer facility in the north of the Borough.
- 3.4 While the review does not cover issues relating to communication with the local community, it is apparent that there were shortcomings in the Council's handling of this matter with the public. This is clearly regrettable.
- 3.5 The Audit and Governance Committee has a key role in overseeing governance arrangements and ensuring the Council has appropriate policies and mechanisms to safeguard resources in place.

4.0 Wards Affected

- 4.1 All

5.0 Local Ward Members

- 5.1 All.

6.0 Policy Implications

- 6.1 The Council operates through a governance framework. It is an interrelated system that brings together an underlying set of legislative requirements, governance principles and management processes. Good governance leads to good management, good performance, good stewardship of public money, good public engagement and, ultimately good outcomes for citizens and service users.
- 6.2 In its efforts to develop a waste transfer facility in the north of the Borough the Council has undermined local confidence in its governance arrangements. This report seeks to address the concerns of members of the public and their representatives including the Ward Member. By publishing the findings of this review in full the Council is demonstrating its commitment to transparency on this matter.

7.0 Financial Implications (Authorised by the Council's Deputy Section 151 Officer)

- 7.1 If the Council subsequently decides that it will still develop a Waste Transfer Station in the north of the Borough, but it is not to be sited at Lyme Green Depot, a decision will have to be made to treat the costs incurred at Lyme Green as aborted capital costs and the costs will then have to be treated as revenue. 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. These costs are included within the value of "work in progress" on the Council's balance sheet at 31st March 2012. The Professional Services & Framework Manager estimates total costs to this stage at £810,000 but is currently in negotiation with the facility construction contractor (referred to as the main contractor throughout) 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.
- 7.2 Similarly, if the Council decides not to go ahead with the development of a Waste Transfer Station in the north of the Borough a decision will have to be made to treat the costs incurred at Lyme Green as aborted capital costs and the costs will then have to be treated as revenue.
- 7.3 If a decision has not been made by the date of the approval of the draft Statement of Accounts 2011/12, appropriate disclosures will need to be made in the Statement of Accounts for draft purposes in respect of the costs incurred in 2011/12; explaining the potential for them to be declared abortive after the balance sheet date. This will safeguard against any claim that readers of the accounts have been misled regarding the true value of work in progress.
- 7.4 The Council currently procures waste transfer capacity in the north from the Private Sector. In March 2012 an Official Journal of the European Union (OJEU) Contract Notice was placed for bulking Services in the north of the Borough. The Contract period is 4 June

2012 to 13 March 2014 (initial term) with a break clause exercisable from June 2013. The contract value is estimated at circa £43,000 per month, maximum total value is therefore estimated at £900,000. Should any of the extension periods be taken up, this will increase the overall total value of the contract accordingly. It is estimated that approximately 22,000 tonnes of co-mingled dry recyclates will be delivered by the Council's collection vehicles to the Contractor's premises over each contract year.

8.0 Legal Implications (Authorised by the Council's Deputy Monitoring Officer)

- 8.1 All employees must ensure that they use any Council or other public funds entrusted to them through their job role in a responsible and lawful manner.
- 8.2 Employees must also try to ensure value for money and take care to avoid the risk of legal challenge to the Council in relation to the use of its Financial Resources. The Council's Officer Delegations, Standing Orders, Financial Regulations and Operating Procedures should, therefore, be followed at all times.
- 8.3 Any other legal implications are contained within the report.

9.0 Risk Management

- 9.1 Laws and 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. Controls are, however, designed to provide reasonable assurance not certainty because systems are susceptible to human error and poor judgement and controls can be circumvented or overridden.
- 9.2 An important way for the Council to assess the efficacy of and provide assurance on its risk management, internal control and governance arrangements is to identify issues that have given rise to adverse incidents that it has had to deal with and provide public assurance that action is taken to ensure that any shortcomings are rectified promptly.

10.0 Background and Options

- 10.1 The report attached at Appendix 1 considers 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 reoccurrence.
- 10.2 Key issues the report seeks to address are:

- (i) Did development of the waste transfer facility commence without planning permission ?
- (ii) Were EU Procurement Regulations complied with ?
- (iii) Did management spend beyond the approved budget on the scheme and were Finance and Contract Procedure Rules broken ?
- (iv) Did management comply with the Council's Capital Strategy and the requirements of Finance and Contract Procedure Rules?

Outlined below in relation to each of these questions are detailed the following:

- The processes/procedures that exist
- Details of what did happen, including relevant timeline
- The finding

10.3 Development of the waste transfer facility commenced without planning permission

10.3.1 Section 57 of The Town & Country Planning Act 1990 (as amended) requires planning permission for any development of land. Under s171A carrying out development without the required planning permission constitutes a breach of planning control. Under the Act Cheshire East is the designated Local Planning Authority responsible for the planning approval process and enforcement of the Act.

10.3.2 A project group tasked with providing a new waste transfer site at Lyme Green towards the end of 2011 proceeded with the task, with the consent of its Director, even though the timetable involved commencement of development without planning permission. Work ceased after objections from planning officers and after complaints from local residents. Whilst a detailed timeline is attached at Annex A the key dates are:

- **17 October 2011** - the project work programme indicates that the submission of the planning application and construction were to run concurrently.
- **24 October 2011** The main contractor commences on site.
- **16 November 2011** a partially retrospective planning application was submitted.

10.3.3 The Planning Application, dated 16 November 2011, indicates that works associated with the construction and operation of the waste transfer station had already started on 1 November 2011. The partially retrospective application acknowledges, therefore, that **development work commenced on this project in advance of the appropriate planning permissions.**

10.3.4 The Project Group and Strategic Director appreciated that planning permission was required: adverse publicity was highlighted as a risk. However, **the Council as a regulatory authority, should not undertake development without planning permission** even if adverse publicity is unlikely. **It should apply the same standards to its own applications as it does to third parties.**

10.3.5 **In the future all Council development projects should go through the same planning processes as third party applicants in order to ensure a consistent level of service between external applications and our own planning applications.**

10.4 The Council did not comply with EU Regulations

10.4.1 The Council's Contract Procedure Rules (CPRs) set a clear framework for the procurement of goods, works and services for the Council. This aims to ensure a system of openness, integrity and accountability where the probity and transparency of the process will be beyond reproach. Working within the Rules in turn leads to better value for money and gives confidence to all concerned that the Council is fulfilling its fiduciary responsibilities.

10.4.2 Every contract made by or on behalf of the Council must comply with the Council's Contract Procedure Rules and the associated detailed guidance (E6 CPR's). Where a Service has failed to comply with these Rules then the Chief Officer or his designated representative must issue a report outlining the reasons for the non-compliance and the steps taken to prevent a re-occurrence. The Chief Officer or his designated representative will be required to submit the report to the Borough Treasurer and Head of Assets and Borough Solicitor before reporting to the Audit and Governance Committee. (E11 CPR's).

10.4.3 The CPRs set various value thresholds at points where commensurate competition should be undertaken by officers to ensure that value for money is being achieved and that all tender opportunities are fairly and appropriately advertised to suppliers. The thresholds at E19 CPR's are detailed below:

	Total Value	Procedure to follow where no Contract exists
Informal	Below £10,000	E-mail /telephone quotation(s)
	Above £10,000 but below £75,000 for goods, services and works.	Comparison of written quotations from at least 3 bidders
Formal	Above £75,000 but below the EU threshold for goods, services and works.	Formal tender process from at least 3 suppliers.

	Above the EU threshold for goods, services and works.	Tender process in accordance with EU Procurement Rules.
--	---	---

10.4.4 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 (E35 CPR's). The thresholds that applied to local authorities in September 2011 were as follows:

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

10.4.5 The procedures set out from CPR E36 follow the model set out in the European Procurement Rules. They represent best practice and should be adopted as the norm for all exercises over the threshold values.

10.4.6 However, rather than following the mandatory procedures and mechanisms prescribed by the EU Regulations and the Council's CPRs the Strategic Director of Places sought an exception, via a delegated decision (DD), to the Council's Contract Procedure Rules which was used to award a contract for the provision of bulking facilities to a preferred supplier (referred to as the waste bulking contractor throughout) without competition. Whilst a detailed timeline is attached at Annex B the relevant issues are as follows:

- **14 September 2011** – The Delegated Decision (DD) form completed in accordance with CPR E8 was signed off by Procurement, Legal and Finance. The form was signed by the Strategic Director Places and sent for approval to the Borough Treasurer and Head of Assets and the Borough Solicitor. The request was to waive the requirement for competition in circumstances where only one company can provide the service (CPR E24).
- **15 September 2011** - The Delegated Decision is approved by the Borough Treasurer and Head of Assets and the Borough Solicitor (CPR E23). The quoted price for the 3 year contract was no longer available as the 90 day period for acceptance expired.
- **3 October 2011** – the contract, awarded directly to the Council's waste bulking contractor, commences.

10.4.7 The Record of the DD recognises that the award to the waste bulking contractor would exceed EU thresholds and that DDs are not available if the proposed exception breaches national or EU legal requirements (CPR E24). However, on the basis that the Council had previously performed a compliant tendering exercise for a three year term that had failed to identify any alternative companies able to tender and

there was no significant risk of a challenge to this award of contract the decision was taken. The Council has no facilities of its own in the north of the Borough with the necessary permits. In accordance with the DD 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 3rd 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 3rd October.

10.4.8 On the face of the evidence there is a prima facie case that the Council did not comply with EU Regulations. The officers and the Strategic Director appreciated that compliance with EU Regulations was required: the risk of challenge to the award was highlighted as a risk. The relevant officers exercised their judgement that the risk was low. Under the Council's Constitution Officers did not have the delegated authority to make this decision. They should have escalated the matter to Members for their approval.

10.5 Expenditure beyond the approved budget on the scheme was incurred and Finance and Contract Procedure Rules were broken. Officer Delegations were exceeded.

10.5.1 Finance and Contract Procedure Rules provide the framework for managing the authority's financial affairs. They apply to every Member and Officer of the Authority and anyone acting on its behalf (E1 Finance & Contract Procedure Rules, F&CPRs).

10.5.2 The overall budget is agreed by the Cabinet and approved by the full Council. Chief officers and budget managers are therefore authorised to incur expenditure in accordance with the estimates that make up the budget (A32 b F&CPRs).

10.5.3 As soon as the cost of a project has altered significantly from those approved by Council F & CPRs require the Project Manager to submit a revised Business Case to the Capital Asset Group demonstrating that the project continues to represent value for money for the Authority (B.35 F&CPRs). Prior to committing expenditure the Capital Asset Group would require a virement or supplementary capital estimate to be reported to Cabinet to fund the shortfall, and depending on the funding requirement, an assessment of the revenue affordability of the project.

10.5.4 Virement is the switching of resources between approved estimates or heads of expenditure (not an increase in overall budgets through the addition of new monies) (A.32 c F&CPRs). Cabinet can approve virement over £500,000 and up to and including £1,000,000 for both Revenue and Capital (A.33 F&CPRs).

10.5.5 A supplementary estimate is 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 (F&CPRs A.34). Supplementary estimates can be funded from prudential borrowing or from general reserves or balances. Cabinet can approve fully funded supplementary capital estimates of between £500,000 and £1,000,000 (and schemes where funding is borrowed from reserves and which are subject to a guaranteed repayment plan and are therefore considered to be fully funded) (F&CPRs A37). Supplementary estimates which are not fully funded and are to be funded from general reserves or balances, regardless of value, must be approved by Council (F&CPRs A.36).

10.5.6 The main contractor for construction and related works at Lyme Green Depot and the purchase of the building was appointed via a DD taken by the Asset Manager.

10.5.7 When the DD was taken the value of the works, based on feasibility costs was approximately £1,500,000. The approved capital budget for the scheme was £650,000. 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). As at Mid May 2012 total anticipated spend for the Lyme Green Scheme is approximately £810,000. **Despite the cost of the project altering significantly from the figure approved by Council a revised Business Case was never submitted to the Capital Asset Group and expenditure was committed without a virement or supplementary capital estimate being approved by Cabinet to fund the shortfall.** Whilst a detailed timeline is attached at Annex C the relevant issues are as follows:

- **24 February 2011** -Council approve the three-year Capital Programme for 2011/2012 to 2013/2014, £650,000 is included in the 11/12 capital programme for the Materials Waste Transfer Facility
- **14 March 2011** - Cabinet approved the implementation of the new waste collection services as detailed in the covering report with the decision becoming effective from 24 March 2011.
- **16 August 2011** - Feasibility costs for the scheme, based on the Pym's Lane building and brief discussions with the Engineer on site, were established at between £1.4m and £1.55m based on two options the first with a piled foundation and the second "with cut and retaining walls".
- **4 October 2011** - (DD) taken by the Assets Manager to grant approval of the direct appointment, without competition, of a Main Contractor. The DD notes that the project programme required extensive ground works to be undertaken to reduce overall ground

levels and form retaining walls. DD fails to identify any budgetary issues.

- **5 October 2011** -The DD was approved by the Director of Finance and Business Services and the Borough Solicitor.
- **6 October 2011** The appointment of the main contractor is confirmed by a Letter of Intent. The letter authorised the company to commence work up to a value of £500,000 (subsequently extended to £750,000).
- The target cost of £1.59m for the works were agreed prior to commencement on site (**24 October 2011**) and after the Delegated Decision was taken (**4 October 2011**).
- As at Mid May the total anticipated spend for the Lyme Green Scheme is £810,000.

10.5.8 Management breached F&CPRs relating to Managing Expenditure and Capital Monitoring and Amendments to the Capital Programme. The project group appreciated that compliance with F&CPRs was required: the overall costs being far in excess of current budget was highlighted as a risk. In this instance **the decision to appoint the main contractor and incur expenditure was taken without the necessary authority.** In accordance with Council F&CPRs a revised Business Case should have been submitted to the Capital Asset Group demonstrating that the project continued to represent value for money for the Authority as soon as it was identified that the cost of the project had altered significantly from the figure approved by Council. Prior to committing expenditure the Capital Asset Group would have required a virement or supplementary capital estimate to be reported to Cabinet to fund the shortfall, and depending on the funding requirement, an assessment of the revenue affordability of the project. Only at this stage could a DD be taken and, subject to the DD being approved, expenditure incurred.

10.6 The requirements of the Council's Capital Strategy and Finance & Contract Procedure Rules were not fully complied with

10.6.1 Capital expenditure involves acquiring or enhancing fixed assets with a long-term value to the authority, such as land, buildings, and major items of plant, equipment or vehicles. Capital assets shape the way services are delivered in the long term and create financial commitments for the future in the form of financing costs and revenue running costs.

10.6.2 The Capital Strategy for 2011/2014, which was approved by Cabinet on 20 September 2010, sets out Cheshire East's approach to capital investment and disposals and how it makes decisions in respect of all types of capital assets. The strategy shows how the Council prioritises,

targets and measures the performance of its limited capital resources. Effective management of capital is key to the delivery of the Council's priorities and the Capital Strategy outlines how capital resources are allocated to help achieve these priorities. The requirements of the Strategy are reflected in the Council's F&CPRs.

10.6.3 The strategy describes how schemes are subject to Member and Officer challenge prior to a draft capital programme being recommended for approval by Cabinet and Council in February. As part of this process the strategy and F&CPRs prescribe the following:

- In order to identify and prioritise Capital Schemes an Option Appraisal in the form of a detailed Business Case Template must be prepared for all proposals with a gross estimated cost in excess of £250,000, before being submitted for inclusion in the Capital Programme. These will be used as the basis for assessing the affordability and deliverability of the scheme, as well as for monitoring, reporting and post-implementation review. (F & CPRs B.28)
- The schemes will receive an initial assessment by the Capital Appraisal and Monitoring Group (CAMG) who will assess the viability of the scheme and provide guidance on technical, legal and planning issues to Project Leads

10.6.4 In order to manage the Capital Programme regular monitoring is undertaken throughout the year. Progress updates are submitted to Cabinet on a quarterly basis as part of the financial reporting procedure. The monitoring process focuses on the main issues affecting each service, progress on the Capital Programme, explanations of major variances between the in-year budget and latest forecasts and requests to Members for approval of Supplementary Capital Estimates (SCE's) and Virements.

10.6.5 **A partially completed Capital Appraisal Form (excluded revenue running costs) was submitted as justification for the investment in the waste transfer station at Lyme Green and allowed to progress through the challenge process prescribed by the Capital Strategy.** The construction costs included on the form of £650,000 were taken directly from the cost of the Council's Pym's Lane waste transfer site and were not directly attributable to the site at Lyme Green. Detailed planning/technical considerations had not, at this stage, been taken into account when determining the cost, location or the optimal design for the building.

10.6.6 These issues were not picked up as part of the challenge and approval process due, in part, to the failure of the Capital Appraisal and Monitoring Group (CAMG) to assess the viability of the scheme and provide guidance on technical, legal and planning issues to the Project Lead. **Capital expenditure was, therefore, 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.

10.6.7 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. 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.

A timeline, explaining the variance to approved budget is as follows:

- **24 February 2011** - The 2011/12 budget was approved by the Council in February 2011 with £650,000 included in the 11/12 Capital Programme for the Materials Waste Transfer Facility
- **16 August 2011** - The feasibility costs of the scheme at Lyme Green were established at £1.5m.
- The target cost (£1.59m) 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).
- **30 November 2011** - the Main Contractor was instructed, prior to completion, to cease all construction works and demobilise from site.

10.6.8 As previously stated 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 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 the estimated total cost of the scheme is £650,000. Consequently, the financial performance report to Cabinet shows forecast expenditure at £650,000.

10.6.9 Management failed to fully comply with the requirements of the Council's Capital Strategy and Finance and Contract Procedure Rules.

11.0 Access to Information

The background papers relating to this report can be inspected by contacting the report writer:

Name:	Lorraine Butcher
Designation:	Strategic Director, Children, Families and Adults Directorate
Tel No:	01270 686021
Email:	Lorraine.butcher@cheshireeast.gov.uk