

R8 The Council should complete a full tender exercise for a new contractual arrangement for coastal emergency works. Part of the exercise should be a consideration of whether a Term Agreement is the correct approach, whether larger projects should be treated differently from smaller projects, and whether the Council should take more active involvement – e.g. negotiating for the purchase of rock, rather than allowing bidders to compete for a limited supply. This process should be completed on a timely basis and should be used for any new works going forward.

R9 Internal audit findings and concerns should be linked to recommendations, so that responses and corrective action can be monitored.

- 3.3. The report mentions the emergency works contract but does not make any recommendation around this issue. In discussion with internal audit, their opinion was that including it in the summary gave it appropriate weight. We do not agree with this approach, as it leads to a risk that important findings are not tracked and actioned. We have therefore recommended (R9) that when Internal Audit identify and report issues, they should include appropriate recommendations for improvement, and the management responses can be tracked.

R9: Internal audit findings and concerns should be linked to recommendations, so that responses and corrective action can be monitored.

(a) by the Head of Financial Services based on a written report from the Head of Service, having consulted with Internal Audit, if the Contract value is between £15,000 and £100,000;

(b) by the Monitoring Officer and Section 151 Officer, in consultation with the relevant Corporate Director based on a written report from the Head of Service, having consulted with Internal Audit, if the Contract value is between £100,000 and £1m;

(c) by Cabinet if the Contract value is over £1m.

There is nothing in the CSOs which prevents such exemptions being granted by email”

- 2.7. Although the paper was circulated and responses received, and therefore considered to be in line with contract standing orders, the paper should at least have been presented and formally minuted as approved at the next meeting once it was realised that it had not been presented. I have raised a recommendation (R6) that responsible project and contract officers should not proceed until they have been informed that all due process is complete.

R6: The original extension of the contract appears to have been approved by appropriate individuals but outside the relevant meetings. In order to follow Council standing orders and formally minute approvals, any papers which are not on an agenda should be included in the following meeting. The officer who has operational responsibility for the contract should only proceed once they have received a formal confirmation that all due process is complete.

- 2.8. The table shows that there are number of occasions during the timeline when the Council did not have a formally approved contract in place. The Council's internal legal team consider that as both parties were continuing as if the contract were still in place, then this mutual acceptance forms a continuing legal agreement. We have not taken our own legal advice on this issue.
- 2.9. There is no formal minute or paper that the Council can provide as evidence. We have discussed the matter with the Council's legal department, who still consider the point to be valid and that it is advice given rather than requiring a formal paper, stating “The view of legal officers was that there was a contract in place through course of dealing and there is no legal requirement for a contract to be in writing. Jennings were providing services in response to orders which were then paid for by the Council on the basis of the rates submitted in 2009. There was no written legal advice provided in relation to this matter.”
- 2.10. While this may be the case under contract law, the Council has not been sufficiently diligent in keeping this commercial arrangement up to date.

### **Material tonnage used in restoration works**

- 1.62. You raise questions about the tonnage of stone used during the remediation works, specifically enquiring about the amount of stone delivered to Kinmel Bay by 31 March 2014.
- 1.63. We have reviewed and re-performed a sample of the detailed work that Internal Audit completed and are satisfied that they have performed appropriate testing on the volume of materials. Internal Audit tested all delivery notes for both sites and also confirmed that delivery to Kinmel Bay in w/c 24 March 2014 was over 6,000 tonnes, therefore meeting the requirement to deliver 6,000 tonnes by 31 March 2014.

### **Conclusion**

- 1.64. While we have noted a number of issues and made recommendations to the Council, our audit work has not identified any items of account which we consider to be contrary to law. We will not, therefore, be applying to the courts for a declaration. This document is the Statement of Reasons for not making an application to the court. Neither have we identified any matters that, in our view, should be reported in the public interest. We have, however, made a number of recommendations to the Council.

## **2. Emergency works Term Agreement**

- 2.1. As reported earlier, the two largest coastal repair projects, Llandudno North Shore and Kinmel Bay, were subject to a mini tendering exercise. The grant funding covered a number of other locations, where the Council used the existing emergency works contract (the Coastal Term Agreement). You have raised a number of questions about the validity and value for money of the Term Agreement.
- 2.2. You first question whether the Council had a contract in place with Jennings at the date they were asked to complete emergency works. You state that "the Contractor was engaged in the execution of a large volume of work after his contract expired in February 2012."
- 2.3. As described in paragraph 1.4 of this letter, the Council completed the works at Llandudno North Shore and Kinmel Bay under a separately tendered contract, and not under a Term Agreement.

invoice, which is dated 19 March 2014. The invoice was received by the Council on 21 March 2014; however it was not paid until 31 March 2014.

- 1.52. You correctly state that the invoice was for the import and placement of 4,063m<sup>3</sup> of shingle at Kinmel Bay. It is not clear from the invoice when the delivery of material commenced or concluded. It is also not clear whether the invoice was an 'interim invoice' or 'final invoice'. Within our report responding to your questions to the 2012/13 accounts of Conwy Council, we have already made a recommendation that the Council request suppliers to provide adequate detail on invoices.
- 1.53. You state that the invoice raises a question over whether Jennings commenced their work at Kinmel Bay before the award of the contract on 18 March 2014. We have already considered this matter within this report (paragraphs 1.18 to 1.29). We have also reviewed all e-mail correspondence with both Jones and Jennings in the period from 5 March 2014 to 11 March 2014, which was the initial contract award date, and have found no evidence to support your assertion.
- 1.54. Due to insufficient detail on the invoice, we have asked the Council to explain why this invoice was presented by Jennings before the works could have been completed.
- 1.55. The Council has explained that the invoice was submitted early by Jennings and was an estimate to reflect the amount of work that would be completed before 31 March 2014. The Council did not pay the invoice until 31 March 2014, by which time it had gained assurance that sufficient rock had been delivered. The Council has confirmed that 4,544m<sup>3</sup> was actually delivered by 31 March 2014 against the invoice which claims 4,063m<sup>3</sup>. Although the Council should have requested the invoice to be credited and re-issued to reflect the actual amounts delivered, we consider that withholding payment demonstrates the Council's approval process was effective in ensuring that it only paid for material that had been delivered.

### **Planning permissions and public consultation**

- 1.56. You question planning permissions being sought appropriately and whether works have been completed in accordance with the permissions.
- 1.57. As the external auditor, the Auditor General has no role in relation to planning decisions. Our comments are therefore limited to whether the Council properly complied with planning decisions as part of their project management of repairs to Llandudno North Shore and Kinmel Bay.
- 1.58. The Council's view is that no planning permission was required as the intention was to restore the area to its previous condition. The Council has provided the marine licences that it obtained from Natural Resources Wales, dated 25 February 2014 and 27 February 2014. The Council has been unable to provide the original minuted decision to return the beach to its former state, but included in a report of 13 May 2014 which was approved by Cabinet, is the following statement: "The works will restore the shingle upper beach to the levels provided by the beach recharge works in 1998 and 2000, which in turn replicate the natural beach conditions seen before the construction of the promenade c1890".

## Invoices and retentions

1.43. You question the validity of some specific invoices, which we have reviewed and summarised below.

Invoice	Amount £	Retention applied	Calculated retention	Actual retention per invoice £	Description	Order
141	1,187.50	5%	59.38	62.50	Temporarily cover tip	AM 47819
142	85,500.00	5%	4,275.00	4,500.00	Shingle import	AM47824
144	8,650.00	5%	432.50	432.50	Sand trap fencing	AM47828
167	21,936.00	5%	1,096.80	1,096.80	Repair of collapsed rock revetment	AM47839
166	125,000.00	5%	6,250.00	6,250.00	Import beach material	AM47837
149	2,000.00	5%	100.00	100.00	Reinstate fencing	AM47838

1.44. You question whether the retention has been appropriately applied on these invoices. We have recalculated the retention at 5% as above. There are two variances, but in both cases the Council has retained more than 5% so has in effect taken additional security. There are no significant variances or items where no retention has been applied to the contracted works.

## Certificates for work completed

1.45. You question whether there should be completion certificates against works before the Council authorises payments.

1.46. The Council applied two methods to test the volume of rock:

- Independent final survey - On completion of the works the Council engaged Malcolm Hughes Land Surveyors to complete a topographical review and have provided me with copies of the survey. The survey of 20/6/2014 confirmed to the Council that, compared with the post storm surveys, the material had been delivered to the design profile. The contractor had therefore completed the work as requested, and had therefore delivered the necessary amount of rock to the correct location.
- Checking of weighbridge tickets – the contractor supplied the Council with a schedule of deliveries and weighbridge tickets. The Council checked the schedule to the tickets at the interim stage payments to ensure that material in excess of the interim invoices had been delivered. On 20/8/2014 the Council again assessed the total material delivered by reviewing all weighbridge tickets for material delivered and confirmed that the volume of



- 1.32. As we have set out earlier in this letter, the two pieces of work for Llandudno North Shore and Kinnel Bay were subject to a specific tendering process and not procured under the Term Agreement. It is reasonable for the Council to use the 2014 Term agreement rates as a comparison for measuring the saving. In our view the Council correctly evaluated the invoice at the new tendered rate, rather than using the more expensive Term Agreement. Carrying out the mini-tender, rather than using the Term Agreement, saved the Council £7.04 per m<sup>3</sup> on 30,000 m<sup>3</sup> for Llandudno North Shore, giving an estimated saving of £211,000. At Kinnel Bay, the saving against the Term Agreement was £4.06 per m<sup>3</sup> on 25,000 m<sup>3</sup> of stone giving an estimated saving of £102,000. The total saving against the Term Agreement prices based on these tendered rates was approximately £313,000.

### **Timing of the work and spend**

- 1.33. You question the grant award and the need to spend the funding awarded within a short timescale, stating “The Officers of the Authority it would appear invented a mythical completion date of 31 March 2014, to which no basis exists. There is nothing in the document from the Welsh Government stipulating that a percentage of the expenditure must be incurred by 31 March 2014.”
- 1.34. We have reviewed correspondence from the Council which shows there was an initial drive to get the remediation works completed before 31 March 2014 as the Council was expecting very high tides which posed an increased risk to the public. Therefore completion by this date was initially seen as critical for both practical and safety reasons.
- 1.35. In later correspondence, it is clear that funding deadlines set by the Welsh Government support the drive to complete works before the end of March 2014.
- 1.36. We have examined the grant documentation from the Welsh Government. Their letter of 5 March 2014 awards £3,809,294 of funding (page 1) and states that £3,318,666 of the funding relates to 2013/14 (page 2), stating: “(b) £3,318,666 of the Funding relates to the period 2013/14” and: “(c) £490,628 of the Funding relates to the period 2014/15”. This means that while the Council has until 31 March 2015 to submit the detailed claim, the expenditure must be incurred in 2013/14 in order to receive the funding, and so the deadline is 31 March 2014.
- 1.37. Council officers maintain that they had discussed this a number of times with officials from the Welsh Government. While there are no records of these discussions, we have examined an email (attached) from the Council to the Welsh Government summarising the telephone conversation and confirming that a requirement was to claim the full amount in the 2013/14 year.
- 1.38. To comply with this requirement, the Council used a mechanism of paying for works in advance using a bond. Effectively the full contract value was placed with an intermediary bank, but only released to the contractor upon receipt of completion certificates. In examining this issue we have also considered the legality of the use of the bond by management to defray costs and claim grant, though you do not specifically question this element in your correspondence.

- works or place any orders. The Council did not enter into a similar dialogue with other suppliers.
- 1.20. When Jennings emailed to request confirmation of the work, the Council responded by email on 07 March 2015 at 11.37 (attached) stating that 'a decision to extend the Coastal Term Agreement is still under review...therefore please do not start works at either site until further notice'. Following this exchange, the Council issued a formal ITT to both Jones Brothers and Jennings by email. The email, which begins 'further to our telephone conversation earlier today', indicates a telephone conversation had taken place between the Council and both contractors. We have not been unable to determine the nature or content of these discussions.
  - 1.21. Following the ITT being sent out, both parties emailed the Council for clarification of the specification. The Council provided responses to the questions raised and also issued a formal clarification and amendment in relation to the specification to both parties. At no point during the tender period did either contractor request clarification as to whether the works were to be awarded as one lot or split between the sites.
  - 1.22. Following a review of the respective tender submissions, the Council emailed Jennings on 11 March 2014 to inform them that they had been successful with their submission for Llandudno North Shore. The Council also emailed Jones Brothers to tell them of their success in respect of the Kinmel Bay works. The email evidence shows that the Council informed Jones Brothers one minute before they informed Jennings.
  - 1.23. In our meeting on 22 September 2015 you specifically mentioned an email from Jones Brothers to the Council which you consider to be evidence that the contract was placed before the tender process took place.
  - 1.24. On 11 March 2014 at 14.37 the Estimating Manager from Jones Brothers asks the Council to confirm that "Llandudno North Shore contract was not awarded last week, and that the contractor has already placed his order". The Council's Environment Officer responded on 11 March 2014 at 15.21 as follows "I can confirm that the North Shore Contract was not awarded to the contractor last week".
  - 1.25. From a review of email correspondence, and of the files held by the Council, we have not found any evidence that the Council had notified Jennings of the award of the contracts for Llandudno North Shore before the tender process had properly concluded. It is true that the Council had communicated its requirement to Jennings (and not Jones Brothers) before the two firms were invited to tender. Given that: Jennings were the existing supplier for emergency coastal defence work; the Council were not obligated to run a competitive tender for the emergency work at Llandudno North Shore or Kinmel Bay; and there was pressure to complete the works in a short time period, We consider that these conversations were reasonable and a useful way for the Council to understand the potential scale and cost of the work. Once the Council decided that the work would be put to a tender, the advance discussions could have allowed Jennings a competitive advantage



- 1.11. The ITT issued to Jennings and Jones Brothers was not clear whether the two sites were to be treated as two separate contracts or a single contract for the two sites. This would make a difference to how tenderers would respond, and how the Council would evaluate the tender submissions. In summary:
- Jennings (the eventual contract winners for both sites) gave the breakdown by location and a total. Jennings were cheaper by £7k at Llandudno, but more expensive at Kinmel Bay.
  - Jones Brothers gave the amounts for each site but did not give a total. They were cheaper for Kinmel Bay by £65k. They warned in their submission that there was not enough material available to do both sites by 31 March 2014, so offered to discuss options and a possible financial saving to the Council of leaving one until later. Jones Brothers were net £58k cheaper across both elements.
- 1.12. Following the tender, the Council awarded separate contracts for North Shore and Kinmel Bay. The Council intended this to achieve the most economically beneficial price for the works in total. Allocating separate contracts should have been cheaper than giving the work to the cheapest single source supplier (Jones Brothers).
- 1.13. Jones Brothers then informed the Council they had not tendered on the basis the sites would be awarded separately and that there was no longer enough material available in the local quarry for them to do the works at Kinmel Bay. There was a discussion by telephone and email, including different options such as Jones Brothers sourcing the rock from a more distant location, with consequent extra cost.
- 1.14. The additional costs were unacceptable to the Council and Jones Brothers, therefore, confirmed that they were unable to deliver the contract at the quoted cost and in the necessary time. The Council subsequently awarded the Kinmel Bay contract to Jennings on the basis of their initial tender submission.
- 1.15. The consequence of the lack of clarity in the tendering process was that the Council ended up with one of the more expensive options for the work. Allocating both sites to Jennings was £58k more expensive than allocating both sites to Jones Brothers, and £65k more expensive than the preferred approach of taking the cheaper contractor for each site. The Council had not considered, even though they had been warned by one of the suppliers, that there was insufficient local rock available to carry out all the work at both sites by 31 March 2014. Jennings were equally unable to deliver all the work at both sites as Jones Brothers, but had been quicker at securing their supply of rock – which was essentially all of the local rock available in the necessary timeframe. Once Jennings had secured the rock, they were the only supplier that could do any of the work before 31 March 2014. The Council agreed that Jennings would carry out part of the work at both sites before 31 March 2014, and complete the work in early April. This was the same outcome that Jones Brothers had offered in their tender submission, but this was rejected by the Council at the time. It would have been cheaper had the Council accepted the

1.5. The Council contacted the two local contractors, Jennings Building and Civil Engineering Contractors (“Jennings”) and Jones Brothers Civil Engineering UK (“Jones Brothers”), whom they believed (based on previous tender responses and work completed) had the capability and capacity to complete the works. The responses detailed below show that the Council achieved savings of approximately £313k compared to the Term Agreement and this supports the Council’s decision to run the tender exercise.

1.6. At our meeting on 22 September 2015 you challenged whether these works were awarded under the Term Agreement or a separate contract and referred me to the Cabinet report of 13 May 2014. We have reviewed the Council’s formal decision making process and the report to Cabinet. At this meeting the following recommendation was resolved:

“That retrospective Cabinet approval is obtained to award the Contract for the emergency coastal repair works that were required, in accordance with Clause 29.1 (iii) of Contract Standing Orders.”

1.7. The report presented to Cabinet confirms that the works are emergency in nature, but does not make any reference to them being completed under the emergency works Term Agreement. Paragraph 4.22 of the report confirms that a separate tender was run for the work at North Shore, Llandudno and Kinmel Bay. The successful contractor (Jennings) is referred to as the contractor who is also appointed under the Term Agreement for other emergency works. The report does not state that the award is under the emergency works Term Agreement.

“4.22. Within the timescales available and coupled with the need to carry out emergency works before the next high tide a full tender process was not possible. For the high value beach management works at North Shore, Llandudno and Kinmel Bay (combined value £2.75m), quotations were obtained from two suitably competent local Contractors. The works were awarded to the CCBC appointed Term Contractor for coastal repairs. This decision was supported by the Senior Leadership Team.”

1.8. The main driver for the “timescales available” was the need to agree the work plan, appoint a contractor and begin work before 31 March 2014 so that the Council could access the significant funding from the Welsh Government (see 1.33). In addition, the Council was expecting very high tides at the end of March, which posed an increased risk to the public. Therefore completion by the end of March 2014 was seen as critical for both practical and safety reasons.

1.9. You question whether the contract for Llandudno North Shore and Kinmel Bay was awarded in line with Council policies, specifically: “It is also concerning that offers were submitted by two Contractors to execute the works at both Llandudno North Shore together with Kinmel Bay, for which actions were taken by Officers which possibly excluded one of the Contractors to the advantage of the other”. You have explained to us that you believe an officer or officers in the Council alerted Jennings about the contract award before notifying Jones Brothers, with the