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Reference

Date

Pages

### Conwy County Borough Council – Emergency Shoreline Repairs 2013-14

In response to your objection to Conwy County Borough Council's accounts for 2013-14 under s31 of the Public Audit (Wales) Act 2004 and to related concerns raised with me in correspondence and meetings, I have now completed my consideration of these matters.

I have not upheld your objection and will not be applying to the court for a declaration that an item of account is contrary to law. The attached detail provides a statement of my reasons for this decision. You may appeal to the court against this decision before the end of the permitted period which is 28 days starting with the day on which you receive the statement of reasons.

In exercising my discretion I will not be issuing a report in the public interest under s22 of the Public Audit (Wales) Act 2004. You do not have a right of appeal against this decision.

I have identified a number of shortcomings in the processes adopted by the Council and have made nine recommendations to the Council. A copy of this letter and appendix have been sent to the Council. The implementation of these recommendations will be followed up by the local audit team in the course of the audit of accounts for 2016-17.

This completes our consideration of your objections on the 2013-14 accounts

Yours sincerely

**Anthony Barrett**

for and on behalf of the Auditor General for Wales

Enc.



## Appendix – Emergency works to shoreline in 2013/14

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You have raised a number of detailed questions about Conwy County Borough Council's ("the Council") approach to contracting for emergency shoreline repairs in 2013/14. For clarity, we have dealt with them under two separate headings:

1. The specific tendering process and work at Llandudno North Shore and Kinmel Bay; and
2. The Coastal Term Agreement the Council has in place for emergency works. The Council did not procure the works at Llandudno North Shore and Kinmel Bay under this Term Agreement, but you make valid points that the Council need to consider.

### 1. Remedial works at Llandudno North Shore and Kinmel Bay

#### Background

- 1.1. There was severe weather across the UK in the winter of 2013/14, and one effect was significant damage to coastal defences around Wales, including several sites along the Conwy coastline. The Welsh Government made funding available, and the Council successfully applied for grants. The grant award was made on 5 March 2014, and included £1,514,500 for Llandudno North Shore and £1,281,950 for Kinmel Bay. There were further grants totalling £1,012,844 made for nine other sites within Conwy. Of the total grant awarded by Welsh Government to Conwy Council, £3,318,666 was required to be spent before 31 March 2014. This, combined with concerns over future high tides, meant the Council expedited the process of completing remedial works at Llandudno North Shore and Kinmel Bay.
- 1.2. The Council procured private contractors to carry out the works and you have questioned both the basis for payments made and the tendering process.

#### The tendering process

- 1.3. The grant allocation received by the Council is specifically classified as emergency funding by the Welsh Government and associated expenditure is not, therefore, subject to the Council's usual tendering and approval process, enabling the Council to deal with works quickly. The status of this grant means that the Council's existing arrangements for emergency work could have been applied with works being completed under the terms of the existing Coastal Term Agreement.
- 1.4. Instead, the Council decided to run what they refer to as a 'mini tender' exercise for the two largest grant allocations, being Llandudno North Shore and Kinmel Bay. The Council took this decision as they considered there may have been savings to be made when compared with the emergency works contract given the scale of the two pieces of work required. They believed that running a quick tender exercise (over 4 days) would secure better value for money without introducing an unnecessary delay into the delivery of the repairs.

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 Kinnel 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 Kinnel 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 Kinnel 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 Kinnel 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



intention that Jennings could secure the only practical source of rock, thus ensuring that Jennings would obtain all the work.

- 1.10. We have examined key documentation, emails, minutes and Council records and set out the timeline of what the Council refer to as the 'mini tender' below.

Date	Item	Comment
5/12/13 and 3/1/14	Date of damage to coastal defences	
20/2/14	Date of application to WG for grant	
5/3/14	Date of grant award	
7/3/14	Date of decision to run mini tender	A meeting was held on 7/3/14. We have confirmed this meeting with Council officers. There are no formal notes of the meeting, but email evidence (7/3/2014 17.05) of the decisions taken and consideration of using either the Term Agreement or running a mini tender have been provided.
7/3/14	Tender document (Invitation to Tender – ITT) sent to both contractors	The two locations are listed separately, but it is not clear whether they are to be treated as two separate contracts or a single contract for the two sites.
10/3/14	Tender amendment for the specification of the beach cobble to be used in the repair.	Sent to both Jennings and Jones Brothers
11/3/14	Both tenders received by the Council.	Evaluation based on price.
11/3/14 14:28 email	Council notifies Jones Brothers of award of contract for Kimmel Bay	Tenders were assessed for each site and awarded to the lowest cost contractor for each element
11/3/14 14:39 email	Council notifies Jennings of award of contract for North Shore	As above
18/3/14	Following discussions with Jones Brothers over their inability to deliver contract, the Kimmel Bay works were also awarded to Jennings	
13/05/2014	Officers take retrospective report to Cabinet	When emergency decisions are taken, officers take a report to Cabinet to explain the circumstances and the decision. This is not required under Standing Orders but is good practice and transparent.

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

original tender submission from Jones Brothers. Further discounts from Jones Brothers would also have been available.

- 1.16. As a result we have concluded that the Council did achieve savings of £313k through running the tender. Greater value for money savings, however, could have been made had the Council been clearer on the award of the contract.
- 1.17. We are making two recommendations to the Council relating to clarity on invitations to tender (R1), and on carefully reviewing and acting upon information submitted by tendering firms (R2).

R1: All Invitations to Tender should be properly reviewed by senior officers before they are submitted to tenderers. Where there is potential for components of the work to be allotted to different firms, the Council must make it clear whether the work can, or will, be allotted as separate components, or in total, or either.

R2: The Council should read and carefully consider submissions by bidding firms and take action if there are issues that affect the tender more widely.

### **Your allegations of impropriety**

- 1.18. We have completed a full review of all email correspondence (sent or received) between the Council and Jones Brothers and the Council and Jennings looking for any indication that a proper contract award process has not been followed. To enable this we have utilised the Enterprise Vault feature within the Council's Microsoft Outlook email system, which stores a record of all email traffic. We have extracted all emails between 5 March 2014 and 11 March 2014 which covered the period before, during and up to the award of the contracts for the repairs to Llandudno North Shore and Kinnel Bay. During this period, the Council was liaising with both contractors on a number of matters other than the remediation works at Llandudno North Shore and Kinnel Bay (for example with Jones Brothers in respect of the North Slipway and Jennings in relation to works at Penrhyn Bay). Emails make reference to the fact that telephone conversations have taken place but there is no record of what the conversations covered (e.g. 'following on from our earlier conversation'). We are, therefore, unable to form a view on the nature of these discussions. We do not however, consider the fact there were discussions on other matters or the fact that telephone conversations were not recorded to be unusual or unacceptable given that the Council has ongoing relationships and engagements with both parties.
- 1.19. In the period prior to the ITT being sent out on 07 March 2014 at 16.58, the email exchanges between the Council and Jennings show that discussions had taken place in respect of the works to be completed at the Llandudno North Shore and Kinnel Bay. Jennings had clearly been informed by the Council of the need to complete the works quickly. This allowed Jennings to make initial enquiries to local quarries and transportation suppliers. Such a dialogue is not unusual given that the Council had an existing Term Agreement in place with Jennings which could have been used as the basis for completing the required works. The Council did not, however, make any instruction or provide approval for Jennings to commence

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

due to the timing and the negotiations that may already have taken place with local rock suppliers. The initial outcome of the tender exercise was to award the Kinmel Bay works to Jones Brothers, who also provided the cheaper overall quote and were able to alert the Council to the shortage of locally sourced rock. On that basis, we consider that although the process was flawed in this regard the weaknesses were not sufficient to undermine the whole process.

- 1.26. Email correspondence from Jones Brothers after the contract award highlights that it is the decision by the Council to split the award of works and the short supply of locally sourced rock and the costs of transport of alternative rock, that present the challenge to them fulfilling their obligations.
- 1.27. The Council did not make a specification or direct where the stone should be sourced from, and as such it was reasonable for them to expect either party to be able to deliver the work in line with their tender submissions.
- 1.28. Following Jones Brothers email of 13 March 2014 at 11.07 stating that they "would be approximately 25-30% complete by 31st March" the Council concluded that Jones Brothers would not meet their expectation to 'substantially complete' the required work the end of March 2014. The Council state in an email to Jones Brothers that "the contractor carrying out the Llandudno works has also obtained material from a different quarry". Based on the correspondence that we have reviewed we have not identified communications from Jennings raising concerns around their ability to deliver the contract in line with their original tender submission.
- 1.29. In conclusion, while we consider that the tender process could have been executed more effectively, we have seen no evidence that one of the firms was improperly notified in advance of the other at award of the contract in order to ensure the work ultimately went to the more expensive firm. We have not seen evidence that onerous conditions were placed on one contractor that were not applied to the other. The Council acted on the information and concerns raised by Jones Brothers and did not have similar reservations about Jennings' delivery capabilities.

### **Savings achieved through the tendering process**

- 1.30. The Council states that the tender exercise generated lower prices for the two larger projects of Llandudno North Shore and Kinmel Bay, compared with the existing Term Agreement. We have checked the rates in the tender document to the Term Agreement and confirm that beach shingle per metre cubed (m3) is priced at £44.00 in the 2014 mini tender rather than the £51.04 in the Term Agreement. We will discuss in Section 2 our conclusions on the Term Agreement.
- 1.31. We confirmed these rates by performing an examination of invoice 135, which you specifically reference in your letter of 12 January 2015, stating "*The works carried out were clearly not evaluated at the rates contained within the contract 2008 rates or analogous rates. For example invoice 135 dated 19 March 2014 was paid at £44.00 m3 which is the rate quoted in March 2014. Hence the big red hand payment on a 2008 contract at 2014 rates. The 2014 should be reduced by at least 10% if not 15%.*"

- 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 m3 on 30,000 m3 for Llandudno North Shore, giving an estimated saving of £211,000. At Kinnel Bay, the saving against the Term Agreement was £4.06 per m3 on 25,000 m3 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.

- 1.39. We have examined evidence and interviewed officers relating to the use of the bond. We have seen the email sent which 'summarises the phone call' with Welsh Government officials. This email sets out that use of the bond was acceptable to meet the Welsh Government requirement for the full claim to be made by 31 March 2014. We have not seen a response from the Welsh Government and Council officers have told us that there was no response. In matters like this, where the Council are taking a course of action to meet another party's requirements, it would have been better to ask for confirmation in writing and to chase if the confirmation did not arrive. (R3)

R3: Where the Council is carrying out a course of action that they would not normally have taken, but which is being taken to meet another party's requirements, then the Council should seek written confirmation from the other party.

- 1.40. The Council considered the meeting with Welsh Government officials to be confirmation that monies were to be spent by 31 March 2014 and that if it were not possible to complete the works by 31 March, then the Welsh Government would accept either an advance payment to the contractor or use of a bond. The Council were keen to do the repairs and to take advantage of the significant financial support available from Welsh Government, so they decided that the more prudent approach was to secure the bond and release monies as work was completed and certified, rather than pay the contractor directly in advance. The Council also make this clear in the interim grant claim documentation, where the amount placed on bond is separately identified.
- 1.41. Although there is no direct communication from the Welsh Government approving the use of the bond, the Council clearly set out in its interim claims that this was the mechanism for being able to claim the grant within the deadline. The Welsh Government has then paid the grant as a result of this evidence.
- 1.42. Taking the above into account, the Council acted to complete the work by 31 March 2014 and utilised the bond as a mechanism for paying for works in advance in order to ensure that expenditure was incurred and that grant funds were not lost.



## 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



material delivered was just in excess of the 30,000m<sup>3</sup> that the contractor had been paid for.

- 1.47. The Council concluded that these two procedures confirmed that the works had been completed in line with the design profile and supported the payment of the final invoice. An alternative practice would be for the Council to obtain a signed certificate from a quantity surveyor (QS) to confirm that the invoice reflected the amount of material delivered. The Council did not obtain QS certificates; however it did check the invoiced amount to supporting weighbridge tickets before payment was made. We have reviewed the process followed and agreed a sample of signed delivery notes to weighbridge tickets, to ensure they were appropriately completed and provide evidence of receipt of the materials.
- 1.48. As part of their review, the Council's Internal Auditor also considered the payment mechanism and reported that "For the payments we've reviewed, payment has only been made after officers have certified that the specified quantity of material had been delivered and graded correctly so we are satisfied that work was valued prior to payment".
- 1.49. While we can conclude the Council followed a process to confirm that the invoices received reflected the value of material received, we would expect formal QS approved interim valuations to be completed for a project of this size. The Council could also have considered appointing a staff member to oversee the signing of delivery notes on the beach – although this level of inspection would not be the normal way of managing a capital project. We have raised a recommendation (R4) on the use of interim valuations.  
  
R4: The Council should obtain formal valuations from a qualified quantity surveyor to support the interim valuations of large projects.
- 1.50. Purchase orders for emergency works are raised and authorised on the date the invoice is received. We have previously raised this matter with the Council. The Council's reasons are that the emergency works are by their nature responsive and therefore a purchase order is not raised in advance for specific items, rather an overall approval and contract for the works is put in place. The purchase order is, however, necessary to allow the processing of invoices through the financial systems (common to many financial systems). Where services are emergency or responsive, this is reasonable, although the Council must minimise the number of purchase orders raised retrospectively in order to maximise the value of the purchase order as a financial control. In the case of the two works at Llandudno North Shore and Kinmel Bay, we consider that there was sufficient time for Council officers to prepare purchase orders before the work started and invoices were submitted for processing; however we do not consider that this was a failure in authorisation controls as authorisation was obtained through formal acceptance of Jennings tender submission. In this instance, the purchase order was only required to allow transactions to be processed.
- 1.51. You have raised a number of concerns in respect of invoice number 136 from Jennings in relation to works at Kinmel Bay. We have obtained a copy of this

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".

- 1.59. Although we cannot comment on whether the correct planning decision was made or not in respect of Llandudno North Shore and Kinnel Bay, the Council should have formally considered and documented the planning considerations before works commenced.
- 1.60. In respect of the other coastal emergency works, we reviewed the Council's monitoring arrangements and action plans as at 13th January 2015. The monitoring states progress made with works at each location and also whether planning permission is in place or required and the timetable for the application and approval process. On this basis, whilst we agree with your statement that there are areas where emergency works had not commenced or are incomplete, we are satisfied that the Council had appropriate monitoring arrangements in place to manage progress and ensure compliance with planning conditions.
- 1.61. We are aware that some members of the public and businesses locally have claimed that the work carried out at Llandudno North Shore was inappropriate (in summary that the rocks were too large, too sharp and piled too high). The Auditor General cannot comment on this as he has no role over the regulation of planning decisions. It is clear, however, that there was, and remains, public dissatisfaction with the scheme. The Council has now recognised the need to consult with the public about future flood defence work at Llandudno North Shore and other beach schemes, and we encourage this to proceed. We also recognise that the Council was under time pressure (from both the Welsh Government funding commitment and the need to restore defences) that would have made public consultation more difficult in this circumstance.

### **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.

- 2.4. We have examined the relevant reports and contract documents in relation to emergency works. The following table sets out the times at which a formal contract was in place with Jennings between February 2009 and September 2014:

Date	Item	Contract in place?
Feb 2009 – Feb 2012	Original acceptance of tender	Based on acceptance of tender. No additional written contract.
Feb 2012 – December 2012	Contract ended in February 2012, and no formal extension despite works carrying on	No
December 2012 - 6 January 2014	First extension. Paper not presented to Council Members during formal Council meeting.	As above – no separate written contract.
6 January 2014 – 7 March 2014	First extension ended and second extension not requested.	No
7 March 2014 – 8 May 2014	Second extension to contract. Paper presented and approved by Cabinet to extend the term agreement.	As above – no separate written contract.
8 May 2014 to 6 September 2014	The first formal contract covering all elements is 8 May 2014, which formalises original, first and second extensions to 6th September 2014	Yes

- 2.5. The original agreement was based on acceptance of the tender only, and works were completed in line with the tender document from this date. The Council has not taken external legal advice as the Council's in-house qualified lawyers believe that the formal acceptance of the tender constitutes a legal contract. Although it is not necessary in many situations to have a written contract, it is best practice for councils to have a clear agreed summary of work, prices and terms and conditions. This can be important where judgement might be involved, and is useful in managing the risk of disputes and controlling cost. I have therefore raised a recommendation on this matter (R5).

R5: The Council should prepare formal contracts in arrangements where the expenditure could be large, or where there are risks of judgements and differences of opinion between the supplier and the Council.

- 2.6. I have also confirmed that the original December 2012 extension was granted by way of approval by required members outside a formal meeting. The Council has explained that a paper was prepared that communicated details of the first contract extension to all relevant people within the Council. This was approved but was never added to the final cabinet meeting agenda. The Council have confirmed that "Exemptions from obtaining Tenders on the basis of one or more of the reasons listed in Contract Standing Orders 10.1 may be granted in the following manner:

(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.

- 2.11. We have reviewed an analysis of payments made by the Council to Jennings during 2013/14 and 2014/15 in order to understand the value of expenditure incurred. The breakdown provided shows that £4.4 million was paid to Jennings in total; however of this, only £411k was incurred under the Term Agreement. The remaining £3.99 million was incurred under the separately tendered emergency works contract (as per paragraph 1.4 above). The value of costs incurred under the Term Agreement is significantly below the 2014 OJEU tender threshold of £4.3 million for works contracts and also below the £1 million Cabinet approval threshold.
- 2.12. The evidence from the recent tender for Llandudno North Shore and Kinmel Bay suggests that it could have been possible to procure these services at a lower price by opening a new competition in 2012, although the large scale of the work in 2014 would have been more attractive to bidders than a call-off emergency works contract with no guarantee of any work, and a track record of small volumes. Similarly, the extensions to the contract were both done as a stop-gap measure when the Council needed work quickly; rather than employing a more structured approach. We conclude that in this matter, whilst the Council did achieve value savings of £313k through running a tender, greater value for money savings could have been made on the on the award of this contract. That leads us to two recommendations:

R7: The Council should carry out a formal review of term and other contracts, so that end dates are known and planned for in advance.

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.

### **3. Internal Audit Report**

- 3.1. In completing this work we have also considered the Internal Audit report from September 2014 and supporting evidence. Internal Audit completed a large amount of testing and background work. The report provided a summary of the issue and context, but did not reflect the amount of supporting work that had been completed.
- 3.2. However, we also consider that the report gave too much assurance over the speed of the Council response and the potential to make savings and did not comment sufficiently on the controls and processes.

- 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.



## Recommendations

We have sent this letter to the Council to advise them of these recommendations, and will ensure they are responded to and monitored as part of the existing recommendation tracking process in place at the Audit Committee.


### Recommendations summary:

Ref	Recommendation	Action	Officer responsible and due date
R1	All Invitations to Tender should be properly reviewed by senior officers before they are submitted to tenderers. Where there is potential for components of the work to be allotted to different firms, the Council must make it clear whether the work can, or will, be allotted as separate components, or in total, or either.		
R2	The Council should read and carefully consider submissions by bidding firms and take action if there are issues that affect the tender more widely.		
R3	Where the Council is carrying out a course of action that they would not normally have taken, but which is being taken to meet another party's requirements, then the Council should seek written confirmation from the other party.		
R4	The Council should obtain formal valuations from a qualified quantity surveyor to support the interim valuations of large projects.		
R5	The Council should prepare formal contracts in arrangements where the expenditure could be large, or where there are risks of judgements and differences of opinion between the supplier and the Council.		
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.		
R7	Our work found that the emergency works contract was twice extended by members when work was required. I recommend that contract monitoring is put in place so that contract end dates can be anticipated and planned for rather than requiring emergency action.		

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.		

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Apologies but it looks like a decision to extend the Coastal Term Agreement is still under review. It is possible a decision may be made by the end of today but more than likely Monday, therefore please do not start works at either site until further notice.

Permission has been granted to close the car park at Kinmel Bay, if needed. As discussed to keep the car park open during the works we will use four parking bays to house the welfare unit and plant to minimise disruption to the kiosk owners (especially towards the build up to the Easter break), so when arranging the site compound please bare this in mind.

Kind regards,





Further to our telephone conversation last Wednesday, I write to inform you of our predicted spend in relation to Emergency Coastal Repair Works before 31<sup>st</sup> March.

As it stands today we predict that the following will be completed before the end of this month:

**Emergency Works Total Expenditure**

North Shore, Llandudno	£488,136.00
Kinmel Bay	£190,879.74
Reinstate fencing West Shore	£4,110.00
Ael y Bryn	£3,730.00
Penrhyn Bay	£3,863.00
Topographical Surveys	£4,950.00

<b>Total</b>	<b>£695,668.74</b>
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Llandudno vested material	£667,381.80
Kinmel Bay vested material	£739,076.10

<b>Total including vested material</b>	<b>£2,102,126.64</b>
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When we spoke two weeks ago you advised that you would be comfortable if we were able to spend £1m to £1.5m before the end of the month and demonstrate that works had commenced on site. The remaining amount would then be accrued into next financial year. However, following our subsequent conversation last Wednesday you stated that if possible we needed to claim for the full amount (£3,318,666) that had been allocated to Conwy in 2013/14. This sudden change came about following a meeting that you had with your Finance Section last week.

We have made every effort to expedite spend, but due to the short time scale, restrictions at the quarry and the need for external approvals we have not been able complete as much work as what we had hoped.

Following your agreement you will note in the above figures that we have vested beach nourishment material for Kinmel Bay and Llandudno to maximise spend within this financial year.

I will arrange for an interim grant claim to be completed for the amount identified above and arrange for it to be sent to you electronically and by post.

I apologise if we have not delivered your expectations, but as previously acknowledged it has been extremely difficult for us to spend the amount of funding that has been allocated to Conwy within this very short timescale.

I would like to take this opportunity once again to thank you and Welsh Government for the funding you have offered to Conwy.

