



EASTERN SHIRES
PURCHASING
ORGANISATION

A LOCAL AUTHORITY PURCHASING AND DISTRIBUTION CONSORTIUM

CONSORTIUM SECRETARY: JOHN SINNOTT, MA, Dipl. P.A.,
CHIEF EXECUTIVE, LEICESTERSHIRE COUNTY COUNCIL

Date: 7 November 2014
My Ref: BH/ESPO
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To: Members of the ESPO Finance and Audit Sub Committee

Dear Member,

ESPO FINANCE AND AUDIT SUBCOMMITTEE

A meeting of the Finance and Audit Sub Committee will be held on Monday, 17 November 2014 at 10.30 am in the Gartree Committee Room, County Hall, Glenfield.

Yours faithfully,

Ben Holihead
for Consortium Secretary

AGENDA

1. Minutes of the meeting held on 9 September 2014 (Pages 3 - 8)
2. Declarations of interest in respect of items on the agenda.
3. To advise of any other items which the Chairman has decided to take as urgent elsewhere on the agenda.
4. MTFS Monitoring for the First Six Months of 2014-15 (Pages 9 - 18)
(Joint Report of the Director and Consortium Treasurer)
5. Progress Against the 2014-15 Internal Audit Plan (Pages 19 - 28)
(Report of the Consortium Treasurer)
6. Procurement and Risk Management Update (Pages 29 - 40)
(Report of the Director)

Democratic Services ◦ Chief Executive's Department ◦ Leicestershire County Council ◦ County Hall
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7. Dates of future meetings

16 February 2015
9 June 2015
8 September 2015
16 November 2015

8. Any other items which the Chairman has decided to take as urgent.

The public are likely to be excluded from the meeting during the consideration of the following items of business in accordance with the provisions of Section 100 (A) (4) of the Local Government Act 1972.

9. Strategic Discussion Document to Inform MTFS Assumptions for 2015-19 (Pages 41 - 58)

(Exempt under paragraphs 3 and 10 of Schedule 12(A))

(Joint Report of the Director and Consortium Treasurer)

Minutes of a meeting of the ESPO Finance and Audit Subcommittee held at County Hall, Glenfield, Leicestershire on Tuesday 9th September 2014.

PRESENT

Cllr J. Clarke (chair)	Warwickshire County Council
Dr R. K. A. Feltham CC	Leicestershire County Council
Cllr S. Rawlins	Lincolnshire County Council
Cllr J. Reynolds	Cambridgeshire County Council

1. MINUTES

The minutes of the meeting held on 10th June 2014 were taken as read, confirmed and signed.

2. DECLARATION OF INTERESTS

The Chairman invited members who wished to do so to declare any interest in respect of items on the agenda for the meeting.
No declarations were made.

3. URGENT ITEMS

There were no urgent items for consideration.

4. DRAFT STATEMENT OF ACCOUNTS AND ANNUAL GOVERNANCE STATEMENT 2013/14.

The Subcommittee received a joint report of the Consortium Secretary and Consortium Treasurer setting out the Accounts and Annual Governance Statement 2013/14. A copy of the report, marked 'item 4', is filed with these minutes.

The following principal points were noted: -

- i) ESPO had experienced continued growth during 2013/14 in stores turnover and in the use of framework contracts. The Subcommittee was pleased that this allowed ESPO to continue investing in low prices and provide excellent service and procurement expertise;
- ii) Leicestershire County Council had adopted the principles of the Public Sector Internal Audit Standards (PSIAS) 2013 and as its internal auditor, also applied them to ESPO. The PSIAS required the Head of Internal Audit Service to have developed and had approved for

Leicestershire County Council as servicing authority, and consequently also for ESPO, the following:

- An Internal Audit Charter which scoped internal audit relationships and governance; and
- a Quality Assurance and Improvement Programme;

Whilst the Internal Audit Service held historic documentation and undertook practices that aligned to the required documentation, it was noted that it did not yet have a formal internal audit charter or Quality Assurance and Improvement Programme (QAIP);

- iii) The PSIAS state that an internal audit activity can only report that it 'Conforms with the International Standards for the Professional Practice of Internal Auditing' if the results of the QAIP support this statement. Given that a formal QAIP does not yet exist, the HoIAS is currently reporting 'non-conformance with the PSIAS'. Minor amendments would be required to the Annual Governance Statement 2013/14 to reflect this position in respect of report pages 65 (weakness/area for improvement), 71 (note of non-conformance) and 77 (additional key improvement area and deadline of December 2014) accordingly prior to reporting it to the Management Committee;
- iv) The Head of Internal Audit Service confirmed that a formal Charter and QAIP would be ready for approval by the Servicing Authority's Corporate Governance Committee in November 2014, with a view to it being provided to the February 2015 meeting of the Subcommittee for its consideration and submission to the Management Committee in March 2015, for approval.

RESOLVED:

- a) That the draft Statement of Accounts 2013/14 and Annual Governance Statement 2013/14, inclusive of the minor amendments as now reported, be recommended to the Management Committee on 25 September 2014, for its approval;
- b) That it be noted that the Head of Internal Audit Service will provide a draft Internal Audit Charter and Quality Assurance Improvement Programme for consideration at the subcommittee meeting to be held in February 2015.

5. MANAGEMENT ACCOUNTS TO JULY 2014

The subcommittee received a joint report of the Consortium Secretary and Consortium Treasurer setting out the Management Accounts to July 2014. A copy of the report, marked 'item 5', is filed with these minutes.

Arising from discussion, the following principal points were noted: -

- i) Current stock levels as at the end of August 2014 were in between the levels of stock registered for the same period in 2012 and 2013 which was pleasing as this was a period of high demand from schools following the end of their summer holidays;
- ii) Whilst stock sales had fallen over the first quarter of the year, this was forecast to be ahead of budget by the end of August following strong levels of school transactions and them being fully invoiced following delivery, during September;
- iii) Following a query regarding the current policy for achieving a return of interest on its cash balances. the Consortium Secretary confirmed that ESPO followed Leicestershire County Council's Treasury Management Policy which placed particular emphasis of the risk of placing money with banking counterparties and selected such counterparties accordingly;
- iv) Although noting that the Servicing Authority's management of ESPO's cash balances slightly outperformed the national average for rate of return of interest, members considered it would be a worthwhile exercise for the Chief Officer Group to review whether the level of risk appetite for both cash balance interest and debt repayment was at the optimum level for ESPO and report back to the subcommittee accordingly.

RESOLVED:

- a) That the Management Accounts to July 2014 be noted;
- b) That the Chief Officer Group be requested to give consideration to ESPO's current approach to Treasury Management and provide a report back to the Subcommittee at its next meeting.

6. CHANGE TO THE ORDER OF BUSINESS

The Chairman, with the consent of the Subcommittee, confirmed a change to the order of business to that set out on the agenda.

7. EXCLUSION OF THE PUBLIC

RESOLVED:

That under Section 100(A)(iv) of the Local Government Act 1972 the public be excluded from the meeting on the grounds that it will involve the likely disclosure of exempt information during consideration of the following item of business entitled:

'Supplementary Information Informing the Management Accounts to July 2014' as defined in paragraphs 3 and 10 of Schedule 12A of the Act; and, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'

8. SUPPLEMENTARY INFORMATION INFORMING THE MANAGEMENT ACCOUNTS TO JULY 2014.

The Subcommittee received an exempt report of the Director and Consortium Treasurer setting out further information informing the Management Accounts to July 2014 which was of a commercially sensitive nature. A copy of the exempt report, marked 'item 9', is filed with these minutes.

RESOLVED:

That the report be noted.

(THE MEETING THEN RECONVENED INTO PUBLIC SESSION.)

9. INTERNAL AUDIT SERVICE – PROGRESS AGAINST THE 2014/15 INTERNAL AUDIT PLAN

The subcommittee received a report from the Consortium Treasurer setting out the Progress Against the 2014/15 Internal Audit Plan. A copy of the report, marked 'item 6', is filed with these minutes.

Arising from discussion, the following principal points were noted: -

- i) There were no new high importance recommendations to report this quarter;
- ii) ESPO had recently volunteered to be a part of the National Fraud Initiative, a sophisticated data matching exercise designed to prevent and detect fraud;
- iii) It was clarified that the proposed completion date of audits was usually within two months. However some audits stretched over longer timespans, for example the audits of elements of the key financial systems because of having to meet the 'full year' requirements of the external auditor.
- iv) All close down work for the previous audit year had been completed. Out of four audits classed as 'in train' for the current year, it was reported that the GEMS replacement, supply chain, and business strategy audits were making progress. A high number of the audits planned for 2014/15 were due to begin in Q3 but some can not begin to start until Q4.

RESOLVED:

That progress against the 2014/2015 Internal Audit Plan be noted.

10. DATE OF NEXT MEETING

It was noted that the next meeting of the subcommittee would be held on the 17th November at 10:30am.

11.15 am – 12.00 pm
9 September 2014

CHAIRMAN

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ESPO FINANCE AND AUDIT SUB COMMITTEE – 17 NOVEMBER 2014

AGENDA ITEM NO. 4

MTFS MONITORING FOR THE FIRST SIX MONTHS OF 2014-15

REPORT OF THE DIRECTOR AND CONSORTIUM TREASURER

Purpose of Report

1. To update Members on the financial performance for the first six months of the financial year.

Background

2. The detailed MTFS monitoring for the first six months of 2014-15 is set out below;
3. The stated business goals in the MTFS strategy were:

	Financial Target (where applicable)	RAG Rating (current)
Value for Money		Amber
Cost Efficiencies	£765k (Cumulative)	Amber
Adapt to maintain core business		Green
Grow volume by 20%	4% this year	Amber
Maintain rebate income	£5m this year	Green
Grow Net worth of business	£2.2m this year	Amber
Fair return to Members	£1.4m this year	Amber
Competitive pricing		Green
Develop Staff Capabilities		Amber
Expand services offered to customers		Amber

The summary current MTFS updated for 2013-14 actuals is shown below:

ESPO BUSINESS PLAN MODEL				SUMMARY				
	2010/11 Actual	2011/12 Actual	2012/13 Actual	2013/14 Actual	2014/15 Year 1	2015/16 Year 2	2016/17 Year 3	2017/18 Year 4
	£m	£m	£m	£m	£m	£m	£m	£m
PROJECTED USE OF ESPO SERVICES								
INVOICED SALES	86.6	86.5	94.0	95.6	100.1	103.0	105.5	110.2
CONTRACTS & COMMISSIONING	449.1	1009.0	500.0	510.0	520.2	530.6	541.2	552.0
TOTAL	535.7	1095.5	594.0	605.6	620.3	633.6	646.7	662.2
TRADING INCOME	18.1	17.8	17.9	19.3	18.7	18.9	19.4	19.8
TRADING SURPLUS	3.1	2.6	2.7	2.4	2.2	2.4	2.7	3.0
MEMBERS' DIVIDEND	1.0	1.7	1.5	1.6	1.4	1.6	1.8	2.1
USABLE CASH RESERVES	5.9	6.6	7.5	8.3	9.1	9.9	10.7	11.6
NET WORTH	6.8	9.8	11.0	12.3	12.6	13.4	14.3	15.2
PROPERTY, PLANT AND EQUIPMENT	11.0	11.2	10.9	11.0	11.0	11.0	11.0	11.0
LOAN LIABILITY	-10.0	-9.5	-9.0	-8.5	-8.0	-7.5	-7.0	-6.5
FORECAST ASSUMPTIONS:								
Stores Income Growth		3.8%	7.0%	5.0%	4.3%	4.1%	3.0%	7.4%
Stores Price Inflation		3.0%	1.9%	0.3%	0.3%	0.3%	0.3%	0.3%
Stores Volume Growth		-3.3%	5.1%	4.8%	4.0%	3.8%	2.7%	7.1%
Stores Gross Mark Up		31.6%	32.3%	33.4%	32.2%	32.8%	32.4%	30.3%
Wage Inflation		0.0%	0.0%	1.0%	2.0%	2.0%	2.5%	2.5%
Headcount - Stores Average FTE		196.4	194.7	163.2	175.6	175.6	175.6	175.6
- Procurement Average FTE		150.9	150.5	178.0	182.6	182.6	182.6	182.6
-Total		347.3	345.2	341.2	358.2	358.2	358.2	358.2
Cost Efficiencies			0	0	765	1110	1298	1574
Warehouse Payroll Costs as % of Stores T/O		11.52%	11.35%	10.04%	10.04%	9.63%	9.30%	9.30%

4. Progress against the financial plan is summarised in the paper below:

Financial Performance for the First Six Months of 2014-15 Compared to the MTFS

Sales

	<u>YEAR TO DATE</u>		<u>PRIOR</u>
	<u>ACTUAL</u>	<u>BUDGET</u>	<u>YEAR</u>
	£000	£000	£000
<u>SALES</u>			
STORES	24,109.6	24,276.7	23,695.5
DIRECT	10,235.5	9,633.3	10,479.5
GAS	8,408.5	12,525.3	10,631.0
CATALOGUE ADVERTISING	736.2	849.7	841.0
REBATE INCOME	1,800.3	1,420.1	1,778.3
MISCELLANEOUS INCOME	31.0	90.0	111.5
<u>TOTAL SALES</u>	45,321.2	48,795.1	47,536.9

5. Total sales at 45.3m are behind budget of £48.8m principally down to lower gas sales which are showing an adverse variance of £4.8m. This is weather dependant and not a reflection of lost business.
6. Store sales are £167k behind budget but £414k ahead of last year.
7. Direct sales have held up strongly considering that the Phonics Department for Education initiative came to an end last October. They have largely been replaced by the current school meals initiative.
8. Rebates are £380k ahead of budget and fractionally ahead of last year by £22k. It is vital that rebates come in at least at last year's level of £5m.
9. Catalogue advertising remains behind budget but the expectation is that this will recover by year end.

Margin

	<u>YEAR TO DATE</u>		
	ACTUAL	BUDGET	PRIOR YEAR
	£000	£000	£000
<u>Margin</u>			
STORES	5,992.8	5,840.2	5,754.9
DIRECT	1,192.9	1,041.0	966.4
GAS	98.1	146.4	120.2
CATALOGUE ADVERTISING	736.2	849.7	841.0
REBATE INCOME	1,800.3	1,420.1	1,778.3
MISCELLANEOUS INCOME	31.0	90.0	111.5
<u>TOTAL MARGIN</u>	<u>9,852.2</u>	<u>9,387.5</u>	<u>9,572.4</u>
<u>Margin %</u>	21.7%	19.2%	20.1%

10. Overall margin is £465k ahead of budget due to higher rebates and improved stores margin.
11. Stores mark-up is 33.1% compared to a budget of 32%. Overall the mix has been more favourable towards higher margin items than expected in the budget. Last year the comparable figure was 33.3% and we expected a fall as a result of the sub inflation pricing strategy.
12. The impact of the shortfall in gas sales of over £4.8m is reduced margin of £48k.

Expenditure

	<u>YEAR TO DATE</u>		
	ACTUAL	BUDGET	PRIOR YEAR
	£000	£000	£000
<u>EXPENDITURE</u>			
EMPLOYEES			
Staff	4,906.7	4,732.0	4,535.1
Agency/Contract	783.5	551.6	614.4
Total	<u>5,690.2</u>	<u>5,283.6</u>	<u>5,149.4</u>
OVERHEAD EXPENSES			
Stores	1,979.1	1,987.5	1,967.5
CP	1,201.5	1,212.7	1,045.6
Total	<u>3,180.6</u>	<u>3,200.2</u>	<u>3,013.1</u>
TOTAL EXPENDITURE	<u>8,870.8</u>	<u>8,483.7</u>	<u>8,162.5</u>

13. Total expenditure is £387k ahead of budget principally driven by higher agency costs and staff costs. The pressures experienced at peak servicing the demand have contributed to this result.
14. Overhead expenses are in line with budget with no major variances to report.
15. Compared to last year overheads are higher due to:
 - Last year a £114k release of a bad provision for YPO
 - Additional agency costs of £170k
 - Impact of implementation of Procurement and Marketing restructure
 - Senior Management Team implementation

Surplus

	<u>YEAR TO DATE</u>		
	ACTUAL	BUDGET	PRIOR YEAR
	£000	£000	£000
TRADING SURPLUS	981.4	903.7	1,409.9

16. Trading surplus is £78k ahead of budget principally down to higher rebates offset by higher agency and employment costs.
17. Last year's surplus was helped by a number of one off releases such as a bad debt provision for YPO.
18. There are risks associated with the costs of service delivery in the warehouse in Q3 whilst further enhancements to the operation are implemented. It is considered unlikely that this will be recovered in Q4 and hence the RAG status on achieving the year end surplus is now amber and a forecast of a £2m surplus compared to a budget of £2.2m is considered prudent.

Service Line

19. The detailed service line analysis is included in Appendix 1 showing performance compared to budget for the Stores, Directs, Energy, Frameworks and Consultancy. All areas are making a net contribution apart from consultancy which is showing a small loss.

Balance Sheet and Cash Flow

20. A detailed balance sheet and cash flow is included in Appendix 2.
21. Overall stock levels are now lower than at last year end reflecting improved stock optimisation and post peak normal patterns.

22. Debtors are £2.8m higher than year-end but this is seasonal and cash receipts in September were ahead of last year and by the end of October I expect debtors to be at March 2014 levels.
23. Creditors are lower as a result of paying winter gas charges to Total for our customers.
24. At the Finance and Audit Sub Committee meeting in June 2014 Members asked

“That the Chief Officer Group be requested to give consideration to ESPO’s current approach to Treasury Management and provide a report back to the Subcommittee at its next meeting.”
25. A paper prepared by LCC treasury department addressing this question which was considered by the Chief Officers Group on October 27th 2014 is included in Appendix 3.

Resources Implications

26. None

Recommendation

27. Members are asked to note the current performance for the first six months of the year compared to the MTFS.

Equal Opportunities Implications

28. None

Risk Assessment

29. None identified

Officers to Contact

Mr J Doherty – Director (0116 265 7931)

Mr C Tambini – Treasurer to the Consortium (0116 305 7831)

Appendix 1: Service Line Analysis

Appendix 2: Balance Sheet and Cash Flow

Appendix 3: Treasury Report

ACTUAL	STORES	DIRECTS	ENERGY	FRAMEWORK	CONSULTING	MAJOR	TOTAL
	£000	£000	£000	£000	£000	£000	£000
			& FUELS	CONTRACTS		PROJECTS	
STORES	24,110	0	0	0	0	0	24,110
DIRECT	0	10,235	0	0	0	0	10,235
GAS	0	0	8,408	0	0	0	8,408
CATALOGUE ADVERTISING	368	221	0	147	0	0	736
REBATE INCOME	-137	0	276	1,548	113	0	1,800
MISCELLANEOUS INCOME	0	0	1	23	8	0	32
Total Sales	24,341	10,456	8,685	1,719	121	0	45,322
Less Cost of Sales	18,117	9,043	8,309	0	0	0	35,468
Surplus on Trading Account	6,224	1,414	376	1,719	121	0	9,854

Wages and Salaries	1,932	308	160	616	103	0	3,119
Agency Costs	714	2	0	4	1	0	720
Other Expenses	895	41	6	82	14	0	1,038
Transport	1,084	0	0	0	0	0	1,084
Operating Surplus	1,600	1,063	211	1,017	4	0	3,893
%	6.6%	10.2%	2.4%	59.2%	2.9%		8.6%

Contribution to Central Costs

Finance and IT	261	261	51	261	8	0	843
Marketing	481	481	93	481	16	0	1,551
Directorate	160	160	31	160	5	0	516
Net Surplus	697	161	36	115	-26	0	983
Check Balance	2.9%	1.5%	0.4%	6.7%	-21.2%		2.2%

BUDGET

BUDGET	STORES	DIRECTS	ENERGY	FRAMEWORK	CONSULTING	MAJOR	TOTAL
	£000	£000	£000	£000	£000	£000	£000
			& FUELS	CONTRACTS		PROJECTS	
STORES	24,277	0	0	0	0	0	24,277
DIRECT	0	9,633	0	0	0	0	9,633
GAS	0	0	12,525	0	0	0	12,525
CATALOGUE ADVERTISING	425	255	0	170	0	0	850
REBATE INCOME	0	0	360	960	100	0	1,420
MISCELLANEOUS INCOME	0	0	0	68	22	0	90
Total Sales	24,702	9,888	12,886	1,198	122	0	48,795
Less Cost of Sales	18,436	8,592	12,379	0	0	0	39,408
Surplus on Trading Account	6,265	1,296	507	1,198	122	0	9,387

Wages and Salaries	1,944	329	185	658	110	0	3,225
Agency Costs	479	0	0	0	0	0	479
Other Expenses	904	40	15	79	13	0	1,051
Transport	1,084	0	0	0	0	0	1,084
Operating Surplus	1,854	928	307	461	-1	0	3,549
%	7.5%	9.4%	2.4%	38.5%	-1.0%		7.3%

Contribution to Central Costs

Finance and IT	260	260	50	260	8	0	839
Marketing	515	515	100	515	17	0	1,661
Directorate	45	45	9	45	1	0	145
Net Surplus	1,035	108	148	-359	-28	0	904
Check Balance	4.2%	1.1%	1.1%	-29.9%	-22.8%		1.9%

ACTUAL V BUDGET VARIANCE

ACTUAL V BUDGET VARIANCE	STORES	DIRECTS	ENERGY	FRAMEWORK	CONSULTING	MAJOR	TOTAL
	£000	£000	£000	£000	£000	£000	£000
			& FUELS	CONTRACTS		PROJECTS	
STORES	-167	0	0	0	0	0	-167
DIRECT	0	602	0	0	0	0	602
GAS	0	0	-4,117	0	0	0	-4,117
CATALOGUE ADVERTISING	-57	-34	0	-23	0	0	-114
REBATE INCOME	-137	0	-85	588	13	0	380
MISCELLANEOUS INCOME	0	0	1	-45	-14	0	-58
Total Sales	-360	568	-4,201	521	-1	0	-3,473
Less Cost of Sales	-320	450	-4,070	0	0	0	-3,940
Surplus on Trading Account	-41	118	-130	521	-1	0	466

Wages and Salaries	13	21	26	41	7	0	107
Agency Costs	-235	-2	0	-4	-1	0	-241
Other Expenses	8	-1	9	-3	0	0	12
Transport	0	0	0	0	0	0	0
Operating Surplus	-255	135	-96	555	5	0	345

Contribution to Central Costs

Finance and IT	-1	-1	0	-1	0	0	-4
Marketing	34	34	7	34	1	0	110
Directorate	-115	-115	-22	-115	-4	0	-371
Net Surplus	-337	53	-112	473	2	0	79

Appendix 2**EASTERN SHIRES PURCHASING ORGANISATION****CONSOLIDATED MANAGEMENT BALANCE SHEET AS AT** Sep-14

31st March 2014			
£	£	£	£
	11,164,612		
5,166,626		4,792,888	
9,609,086		12,483,392	
639		1,907	
8,056,000		4,816,000	
	22,832,351		22,094,187
646,842		500,000	
12,690,660		9,464,637	
231,381		1,784,865	
-440,633	13,128,250	-494,139	11,255,363
	<u>9,704,101</u>		<u>10,838,824</u>
8,500,000		8,500,000	
	<u>12,368,713</u>		<u>13,503,436</u>
10,303,588		11,438,311	
2,065,125		2,065,125	
	<u>12,368,713</u>		<u>13,503,436</u>
1.35	Acid Ratio		1.54
36.7	Debtor Days		42.0
58.7	Stock Days		47.6

Cash Flow from 01/4/2014 to

Sep-14

Surplus	<u>854,722</u>
<u>AFINIMOFs</u>	
Allocations to Maintenance and Equipment Reserves	1,233,525
Movement in Fixed Assets	0
Movement in Unusable/Earmarked Reserves	(953,524)
Total	<u>1,134,723</u>
Movement in Long Term Borrowings	0
Payment of Dividend	0
Movement in Long Term Items	<u>0</u>
(Increase)/Decrease in Stock	373,738
(Increase)/Decrease in Debtors	(2,874,306)
Increase/(Decrease) in Creditors	(1,819,381)
Movement in Working Capital	<u>(4,319,949)</u>
Total	<u>(3,185,226)</u>
Movement in Cash Balances	<u>(3,185,226)</u>
	0

Appendix 3

Note on ESPO financial position in respect of Treasury Management

ESPO's cash is held separately to the Servicing Authority, although the Servicing Authority is responsible for carrying out treasury management policy for ESPO. Other than the three loans taken (in May and June 2005) to fund the new ESPO building, there is no ESPO borrowing requirement; to all intents-and-purposes ESPO's treasury management activities relate to the lending of cash that is available at any point in time.

At 30th September 2014 ESPO had cash-backed reserves of £5.468m to cover such things as vehicle and IT renewal, property maintenance and extension etc. The actual cash balance of ESPO – the balance available for lending on any day – is, however, quite variable. In the year ended 30th September 2014 the maximum balance was £11.489m (in April 2014) and the lowest point was £2.423m (September 2014).

The variability and unpredictability of these balances and the relatively low level of the balance (even at its peak) makes it very difficult, and highly impractical, to run the ESPO loan portfolio on a stand-alone basis. Committing anything other than relatively small sums to longer term loans runs the risk of having an overdraft (at a relatively expensive cost) on certain occasions, and the current interest rate premium within money markets for being willing to lend for a longer term is insufficient to justify the risks, and costs, of becoming overdrawn. If ESPO's cash balances become consistently higher and the yield advantage for lending in the longer term becomes more attractive, the current position will be reconsidered. At present, however, a simple method of carrying out treasury management activities (transferring fund backwards and forwards to a single counterparty paying an attractive interest rate) remains the optimal position.

As with all lending activities the three main considerations will be security, liquidity and yield – in that order. Repayment of the capital invested is paramount in all lending decisions. A policy in respect to acceptable counterparties that is agreed annually by the servicing authority for its own lending activities is the one that is also used for ESPO. It would be considered strange if the servicing authority was running a looser policy for ESPO in respect of counterparties than it was for itself.

The three loans that were raised on behalf of ESPO in 2005 (and which are recharged to ESPO by the servicing authority on a pound-for-pound basis) have an average interest rate of 4.54%. The loans have just over 15½ years to maturity and are on an 'equal instalments of principle' basis, with half-yearly capital repayments of £250,000.

Questions could be asked about why ESPO continues to have debt on which it is paying 4.54% interest, whilst at the same time it has available cash balances that are currently earning 0.5% and are highly unlikely to be paying as high as 4.54% for many years to come. The three loans are all with the Public Works Loan Board (PWLB) and early repayment would currently incur a substantial additional payment on top of the outstanding capital – for every £100,000 repaid there would be a requirement to meet a repayment premium of just under £21,000. To repay the whole of the existing debt of £8m would actually cost £9,662,000.

There are two main reason for this significant premium – interest rates have dropped very sharply since 2005 (although rates were considered very attractive when the loans were taken!), and the introduction by PWLB of a significant bid/offer spread (the difference between borrowing new money in a specific period and repaying existing debt that has the same period until maturity) in November 2007. This premium makes it very difficult to justify any premature repayment, as it is unlikely to provide good value for money over the remaining period of the loan. Even if it were considered likely to be good value in the long term (which would require average interest rates over the next 15 years to be below 1.6%), ESPO does not have sufficient cash balances to make the repayment.

It is also worth pointing out – although it is fairly obvious – that if the cash balance is used to make a premature debt repayment, it will not be available, when required, for the purpose for which the cash is held.



**ESPO FINANCE AND AUDIT SUBCOMMITTEE – 17 NOVEMBER
2014**

AGENDA ITEM NO. 5

**INTERNAL AUDIT SERVICE - PROGRESS AGAINST THE 2014-15
INTERNAL AUDIT PLAN**

REPORT OF THE CONSORTIUM TREASURER

Purpose of the Report

1. To give a summary of Leicestershire County Council's Internal Audit Service (LCCIAS) work to the Subcommittee and highlight any audits where high importance (HI) recommendations have been made and the position against implementing action.

Background

2. The Consortium Treasurer (the Treasurer) is responsible for the proper administration of ESPO's financial affairs. Rule 15 imposes a specific responsibility for arranging a continuous internal audit is delegated to the Treasurer. Under its terms of reference the Finance and Audit Subcommittee (the Subcommittee) should receive and review audit and governance reports. The Subcommittee also monitors the adequacy and effectiveness of the internal audit service provided to ESPO. To achieve this, the Subcommittee is provided with periodic progress reports.
3. The audits undertaken are based on the annual internal audit plan. Variations to the plan can occur but need to be considered with and agreed by the Treasurer and the Director of ESPO.

Summary of Progress

4. This quarter is unique in that there have not been any concluded audits (final agreed reports issued) between 23rd August and 31st October, and hence the routine appendices summarising progress and any High Importance recommendations are not included.
5. Nevertheless, there were a significant number of audits in progress at 31st October, some of which were very close to final report status.

6. **Appendix 1** summarises: -
 - a. in progress audits and outlines the scope, current position and projected completion dates (pages 1 to 4)
 - b. planned audits for remainder of year (page 5)

Update on LCCIAS' adoption of the Public Sector Internal Audit Standards (PSIAS)

7. An Internal Audit Charter (the Charter) which is a mandatory requirement of the PSIAS is scheduled to be approved by Leicestershire County Council's Corporate Governance Committee at its meeting on 24 November 2014. The Charter is a formal document that defines the internal audit activity's purpose, authority and responsibility and sets out the Head of Internal Audit Service's (HoIAS) functional reporting relationship with the appropriate governing body, authorises access to records etc. and defines the scope of internal audit activities. Once approved, the Charter will be adapted to align to the appropriate governance requirements for ESPO.
8. A Quality Assurance and Improvement Programme (QAIP) is being developed by the HoIAS. The QAIP is designed to enable an evaluation of LCCIAS' conformance with the PSIAS, assesses the efficiency and effectiveness of the internal audit activity and identifies opportunities for improvement. The QAIP is scheduled to be approved by the Council's Chief Financial Officer and Corporate Management Team by the end of December. There is not a requirement for the Council's Corporate Governance Committee to formally approve the QAIP, only to receive results of future assessments against it. Nevertheless, progress against the development of the QAIP and its approval will be reported to the February Corporate Governance Committee.
9. The adapted Charter and confirmation of the development and approval of the QAIP will be reported to the ESPO Finance and Audit Committee at its meeting in February 2015.

Recommendation

10. That the contents of the report be noted.

Equal Opportunities Implications

11. There are no discernible equal opportunities implications resulting from the audits listed.

Background Papers

Report to ESPO Management Committee on 27 September 2012 – Finance and Audit Subcommittee – Proposed terms of reference and indicative work plan

Report to ESPO Finance and Audit Subcommittee 10 June 2014 – Annual Internal Audit Plan

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Appendices

Appendix 1 - Progress against the internal audit annual plan - Audits in progress at 31st October 2014 and planned for the remainder of 2014-15

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Progress against the internal audit annual plan

Audits in progress at 31st October 2014 and planned for the remainder of 2014-15

Note: ToE (Terms of Engagement)

<u>Audit title</u>	<u>Scope</u>	<u>Stage @ 31/10</u>	<u>Finalise by</u>
Anti-Fraud & Corruption	Evaluate progress against adopting Leicestershire County Council's (the Servicing Authority) revised policies, procedures and training.	<p>The Council's revised employee's code of conduct and policy on whistleblowing are to be launched 18th November and will then be available to be adopted and promoted by ESPO management.</p> <p>The Council's Anti-Fraud & Corruption Policy & Strategy Anti-Money Laundering Policy and Guidance and e-training on fraud are planned to be approved in time for the February committees.</p>	<p>Confirm the code and policy have been shared with employees (end of December)</p> <p>Confirm adoption and roll out (end of February)</p>
Distribution of Surplus 13/14	There's a robust approved methodology which ensures an accurate calculation and distribution of surplus.	Work complete and draft report being reviewed	End of November

<u>Audit title</u>	<u>Scope</u>	<u>Stage @ 31/10</u>	<u>Finalise by</u>
Counter Fraud	<p>There is no pattern of fraud in large data sets - use of LCCIAS data analysis and matching tool</p> <p>Note : since the Internal Audit Plan was approved, ESPO has volunteered to submit data sets to the biennial Audit Commission National Fraud Initiative (NFI) for which LCCIAS will act as co-ordinator and recipient of any data matches for further investigation.</p>	<p>Relevant NFI reports have been produced and issued. LCCIAS will receive any data matching reports at end Jan 15.</p> <p>Any additional LCCIAS work will avoid duplicating the NFI requirements.</p>	<p>Q4</p> <p>Q3</p>
GEMS Replacement	<p>The replacement of the GEMS (Energy) system is well planned, risk managed and governed throughout.</p>	<p>Senior management is aware of and is managing risks associated with delays to migrating data to the new system. The planned implementation date is likely to be further delayed to December. This has impacted on the interfaces with accounting ledgers, and testing.</p> <p>Draft highlight report awaiting review</p>	<p>Q3</p>
ESPO Services	<p>The key principles to providing the individual categories within the ESPO service menu are complied with</p>	<p>Testing almost completed</p>	<p>Q3</p>
Supply Chain	<p>ESPO identifies, evaluates and monitors its supply chains to ensure integrity and sustainability</p>	<p>Testing currently being undertaken</p>	<p>Q3</p>

<u>Audit title</u>	<u>Scope</u>	<u>Stage @ 31/10</u>	<u>Finalise by</u>
Business Strategy	Attainment of the objectives of the Strategy is well governed	Discussions were held with the Director to ascertain whether a framework has been developed to effectively govern delivery of the Strategy. Recent COG decisions to update assumptions used in the Strategy and MTFs will require revised plans and so the audit of the adequacy of the framework design has been postponed.	Potentially Q3 but likely Q4
Business Strategy - Projects -	Control design (of specific project(s)) is adequate to mitigate risk	This was going to be 'part 2' of the audit above and is similarly postponed until there is a control framework to measure against	Potentially Q3 but likely Q4
Electronic Transactions	P-card and other electronic transaction methods are PCI compliant	ESPO requested to commence the audit earlier than planned. Audit is now split into two distinct jobs, one in relation to compliance with PCI Industry Standards – at testing stage & one in relation to Payment Card procedures – scheduled for December	Q4

<u>Audit title</u>	<u>Scope</u>	<u>Stage @ 31/10</u>	<u>Finalise by</u>
IT General Controls	The range of controls expected by the External Auditor are well designed and consistently applied.	Commenced earlier than planned to meet External Auditor timescales. Work in progress – PwC required risk assessment of required coverage currently being undertaken in conjunction with ESPO IT Manager	Q4
Rebates Income	Annual audit to evaluate whether rebates received conform to estimates of supplier business generated	Commenced earlier than planned. Testing commenced	Q4
Fleet Management	The outcomes from the logistics review are embedded so that fleet is managed effectively and efficiently	ToE with client. Testing scheduled in November/December	Q4
E-tendering	ESPO complies with its role in e-tendering arrangements	ToE currently being produced now e-tendering is the 'norm' per October CoG	Q4
Procurement & Compliance Risk Management	The framework is sufficiently robust to prove effectiveness and avoid liability	ToE currently being produced to align with framework detailed at October COG.	Q4
Servicing Authority	The servicing authority is providing service in line with the agreement	ToE currently being produced	Q4

Audits planned for the remainder of 2014-15

<u>Audit title</u>	<u>Scope</u>	<u>Agreed planned start</u>
Governance Framework	The requirements of the Consortium Agreement, Constitution and appropriate schedules are embedded - to include role of Servicing Authority.	Q3
Risk Management	The revised policy and framework is operating as intended. Lines of defence are understood and complied with.	Q3
Annual Governance Statement	There are adequate arrangements to demonstrate compliance to the principles of good governance outlined in the CIPFA/SOLACE Framework.	Q4
Information Management	Information is secure both on and off site and in transit and breaches are identified and investigated	Q4 - will use LCC testing etc
Applications management	Risks (e.g. continuity and resilience) to the successful operation of key business management systems within ESPO have been identified and appropriately mitigated.	Q4 - progressing IT General Controls audit first to avoid duplication
General ledger reconciliations (*)	Reconciliations are undertaken to facilitate the accuracy and completeness of the general ledger. Usual coverage of cash & treasury; receivables; payables; payroll and stock	Q3 - discussion required with External Auditor re changes to scope
Trading performance & distribution of surplus (*)	The trading results provided by ESPO, both for internal use and reported to the Management Committee, are well founded in the general ledger and the distribution of surpluses process is robust.	Q4 - Trading Performance 14/15 Q1 15/16 Distribution of surplus for 14/15



ESPO FINANCE AND AUDIT SUBCOMMITTEE – 17 NOVEMBER 2014

AGENDA ITEM NO.6

PROCUREMENT AND RISK MANAGEMENT UPDATE

REPORT OF THE DIRECTOR

Purpose of Report

1. The purpose of this report is to act as an update and discussion enabler relating to the risk position within the Procurement activities at ESPO. It reviews the background context; the activity ESPO undertakes, the processes and procedures utilised and highlights areas of ongoing risk and potential future opportunity.

Background

2. The Deloitte's review of 2010/11 established a control mechanism for the legal decisions ESPO makes, ultimately on behalf of its members, relating to the procurement of goods, services and works. The decisions can be subject to the general public procurement framework in the EU stemming from the 1957 Treaty of Rome principles, or specifically under the UK Public Contract Regulations or a matter of contract law.
3. Today ESPO continues to operate a system of panels – both at pre-procurement stage or contract award/variation. The risk approach could be described as having succeeded. Against the backdrop of an ever litigious public procurement environment, fuelled by the macro economics of the last few years and a growing awareness of the legislation, ESPO has not faced formal legal challenge progressing into court action over the last 18 months although the environment remains litigious. See Appendix 1 for recent case law
4. The incoming Assistant Director (AD) Procurement and Compliance, replaced the previous Deputy Director of ESPO as the point of responsibility to chair the panels and advise the Director and its owners with regards to the management of procurement compliance risk. The AD Procurement and Compliance has sought to ensure a healthy balance between compliance and a model of 'good procurement'.

A Broader Risk Agenda

5. In addition to the known legal consequences of not getting public contracting 'right' there is also the imperative to let effective contracts that are fit for purpose but ultimately can seek to drive improved value for money at a time of national austerity, set to continue for the next Parliament.
6. The risk of poor procurement therefore can sensibly be described via a compliance outlook, a good contracting outcomes outlook but also a commercial outlook. ESPO's mandate of being a public owner asset, by the public sector, for the public sector continues. However, the original financial boundaries of a 3.5% return on capital employed have understandably been under scrutiny in recent months.
7. In the scenario of improved financial return there emerges a broader risk agenda which includes the medium term 'funding risk' and also the potential for a changing risk profile.

ESPO's Funding

8. As a summary ESPO currently lets circa 200 framework agreements. These are a combination of national, member or individual procurement solutions. They attract typically a 1% retrospective supplier rebate from expenditure through them. ESPO currently receives 43% of its £5m rebate income from just 10 (5%) of its framework solutions. This essentially presents an obvious funding risk from reliability on such a precious few solutions. Likewise, the only other source of funding, day rate consultancy fees produces circa £200k per annum of funding. ESPO is therefore highly dependent from a funding perspective on a relative small number of solutions. See Appendix 2 for full details.
9. The decision on scope of framework solutions also has non-financial considerations. ESPO has a service mandate that stretches beyond the 3.5% return on capital employment investment requirement. As an example ESPO lets a range of procurement contracts that are best served centrally. A recent example is the banking services framework recently let by ESPO following changes in the supplier market. A procurement exercise that required aggregation and time investment to get a solution advantageous to the public sector. The prospect of individual attempts to contract effectively for such services would be both inefficient and highly likely to be ineffective. The actual rebate return from such an investment is low but the service outcome/value is very high.

ESPO's Sales Cycle

10. In addition to the extreme 'Pareto' characteristics of examples income, there is also a noteworthy inherent risk in the type of business and sales cycle. For example to conceive procure and let a new framework may take a year – publishing and uptake to a significant usage level could also be rather protracted. However, by contrast, a decision not to utilise an agreement by customers can be a quick one and this creates a difficult commercial scenario. Each time a major contract is let there is risk at renewal of loses of current custom, at the same time production of replacement solutions is a slow sales process. ESPO therefore needs to be constantly rolling its outlook forward and being prepared to not only retain but have excellent replacement solutions coming through in a timely way if it is to maintain or improve its income from such activities.

The Procurement that Sits behind ESPO's Trading Activity

11. In addition to the letter of compliantly procured and effective framework contracts, ESPO undertakes procurement activity that could be described as 'trading activity.'
12. There are procurement teams that specifically undertake the procurement activity relating to the ability of ESPO to sell goods either via its warehousing operation or indeed via direct delivery. This is some £65m of trade in a year, £40m of which is warehouse throughput; £25m is via direct delivery. There are clearly the same commercial imperatives in this aspect of ESPO's procurement activity. Within ESPO this activity has been characterised as needing to achieve the three C's for procurement. That is it must be customer driven, it must be traded commercially and it must be compliantly procured.
13. In reality these three guiding principles can have a significant tension between them. The AD Procurement and Compliance since joining ESPO in 2013 has flagged as part of a separate report the risks of current procurement practices in this area and this has been the subject of a major risk record (MRR). The commercial and customer aspects have been satisfied but there is long term latent risk in how the products are procured. Examples of such relate to the chronology of contracts to catalogue production, the lack of specification and sampling capability, the need to procure brands for re-sale (which needs to be achieved in a very specific way for public procurement compliance).
14. In addition ESPO has on its P&L some £30m of gas and electricity activity whereby it is providing an end to end procurement and billing service. This activity carries the same potential vulnerability on income as a result of a uncontrollable demand profile i.e. this year as an exceptionally mild winter has pushed down volume and

as a result ESPO income. This covered in more detail later in the report.

A Risk Profile at ESPO

15. ESPO's principle risk management opportunities are as follows:
 - The employment and retention/management of procurement professionals
 - The use of internal processes and governance – see the Procurement Control Record (PCR) and panels
 - The use of a major risk record (MRR) and SMT day to day ownership
 - The use of internal audit
 - The use of professional indemnity insurance
 - Working within the consortium agreement and the tolerances delegated to it as a result.
 - Working collaborative on knowledge and activity pan local government (and beyond)
16. Whilst there are a large number of opportunities and tools to support management of risk there is no one formal risk profile. There are iterations of something similar e.g. the MRR escalation based on risk score, the requirement for each procurements risk profile to be scored and approved or referred via the procurement control process and the energy price risk strategy/panel that exist and operate effectively.

Energy Trading

17. Wholesale purchase of energy is undertaken in accordance with a price risk strategy developed in consultation with an approved by customers through a stakeholder Energy Governance Panel. This Panel meets three times a year to review and monitor price risk strategy and actual price performance.
18. Contract terms and conditions limit ESPO's exposure through placing the liability for consumption on the consuming authorities/customers. Customers also carry the price risk on the energy contracted and risk on re-contracting in the event of a supplier's business failure is also carried by customers (ESPO undertakes to carry out any necessary market engagement within existing rebates up to £50k operational cost without further recourse to cost recovery). Generally, ESPO liability limited to the fees recovered from each client.

Delay in Migration of Supply Points to a New Energy Supplier

19. Typically at the time of a change of framework supplier, or when a new customer joins the framework. The principal risk is that if one or more supply points do not transfer to the contracted supplier and

remain with the existing supplier beyond the point at which their contract (and associated prices) expires, the customer will continue to be supplied, but this could be at the suppliers “out-of-contract” tariff rates. These are typically 2-3 times higher than prevailing contract rates. As a rule, however, suppliers do not apply these terms for short term delays due to the additional administrative effort required.

20. Contract terms and conditions put the responsibility and liability for prompt transfer on the new supplier, subject to the provision of timely and accurate supply point data. There is similar provision in the Service Agreements with Customers. In the event the supplier and customer have met their obligations ESPO could be exposed to a claim for meeting any additional costs incurred by a customer, as a result of the act error or omission of ESPO leading to a delay in the transfer of supply points. The process is actively managed by ESPO, with the supplier providing daily reports identifying ‘exceptions’ during the transfer process – typically in the six weeks leading up to the transfer – to ensure the smooth and timely transfer of all supply points and, in the event of any delays, that these are kept to a minimum so that customers’ exposure to “out-of-contract” rates are eliminated or minimised.

Loss of Revenue Due to Customers Not Remaining on Contract on Renewal

21. As the gas and electricity contracts represent a significant proportion of ESPO’s rebate income, and all customers on these contracts have the opportunity to make alternative arrangements when contracts are renewed (every three to four years) a major loss of customers on contract renewal could have implications for ESPO’s revenue.
22. Individual customers alone do not represent a significant proportion of revenue – a large authority typically equating to between 7-8% of the total, but there could clearly be an impact if a number of such customers chose to remain on the ESPO frameworks at renewal.
23. Customer engagement prior to renewal is key to customer retention and as part of this process, key customers have been identified and have been consulted on the renewal, and dialogue over the renewal is continuing. An assessment based on a RAG principle of the risk of individual customers not renewing is also made, as a result of those discussions, to seek to have an early warning of non-renewal.
24. The timescale for renewal of the gas and electricity contracts is being re-aligned, so that they are renewed 18 months apart, primarily to aid capacity planning. However, this also reduces the risk exposure within a single financial year should a large number of customers not renew.

25. Fee income is collected from suppliers quarterly, so the risk of income being lost due to supplier failure is limited.

Summary

26. The review and management of risk within ESPO remains a significant responsibility of ESPO's SMT working to its owner's delegations and leadership. A background of compliance risk has also developed to include a greater risk awareness relating to our trading activity, achievement of income, our sales cycle and the relationship between risk and return.
27. This paper was aimed at highlighting the activities of ESPO and specifically the procurement staff undertake, the range of day to risks being managed.
28. Members are invited to discuss the risk profile of ESPO, and confirm their comfort in ESPO's management of that risk.

Appendix 1: Recent case law

The 18 procurement-related cases from the UK courts and the European Court of Justice last year are summarised below:

Nordecon AS v Rahandusministeerium (C-561/12) [2013] EUECJ

The European Court was asked whether an authority is free to revise mandatory technical requirements included in its tender documentation as part of the negotiation process in the negotiated procedure, if a non-compliant tender is actually better than the authority's technical requirements would allow.

The Court refused to allow such a negotiation. Where a requirement was mandatory in the tender, it remained mandatory and could not be negotiated away. To do so would undermine the entire nature of a mandatory requirement.

Ministeriet for Forskning, Innovation og Videregaende Uddannelser v Manova A/S (Case C-336/12) [2013] EUECJ

A losing bidder challenged the Danish education ministry for having allowed (at pre-qualification stage) the two winning bidders to submit financial balance sheets after the deadline for submission of applications, and having been alerted to their absence by the ministry. The balance sheets were needed to permit the usual assessment of a potential supplier's financial strength.

The court rejected the bidder's challenge, on the grounds that provided the balance sheets themselves pre-dated the deadline, it was reasonable for the ministry to seek them as part of a post-submission clarification process, when it was normal to correct any obvious errors. The court did however confirm that had the ministry's documentation expressly stated that failure to provide information by the deadline would lead to exclusion, then the ministry could not have requested them, and any bidders concerned would have to be excluded.

Swm Costruzioni 2 SpA, Mannocchi Luigino DI v Provincia di Fermo (Case C-94/12) [2013] EUECJ

This case centres on a conflict between Italian state law, and European law. In European law, an applicant for a tender may cite the resources of third party entities in order to meet qualification criteria, provided that the applicant proves to the contracting authority that it will actually have at its disposal the resources of those entities necessary for the execution of the contract. Italian law limits the number of such third parties to one. The court ruled that European law takes precedence, and applicants may rely on the capacity of as many other parties as appropriate.

Healthcare At Home Ltd v The Common Services Agency [2013] ScotCS CSIH_22

The court rejected a challenge concerning the clarity of the award criteria for a framework agreement. The court said that the criteria were formulated in the ITT in such a way as to allow all reasonably well-informed and normally diligent tenderers

to interpret the criteria in the same way, and in the way intended. The *subjective* views of any particular tenderer do not need to be taken into account by a purchaser when considering a challenge.

Evropaiki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission (Cases T-457/10 and T-474/10) [2013] GC

Evropaiki Dynamiki (European Dynamics, or ED) claimed multiple failings on the part of the Commission in its procurement of information services. These included claims that the Commission should have excluded the winning bidder (whom ED suggested were ineligible because one of its subsidiaries relied on work carried out in a country which was not a signatory to the Agreement on Government Protocol), and that there were errors in the way ED's tender was evaluated. The court rejected all these claims, and dismissed ED actions.

Waste Services Ltd v Northern Ireland Water Ltd & Ors [2013] NIQB 41

This is a Utilities case, so does not *necessarily* apply to local authorities (etc.). The case mainly concerns whether a tender *award* evaluation scheme can involve two stages – e.g. a minimum quality threshold 'hurdle' which a tender must meet in order to qualify to proceed to a second stage of evaluation (which in this case focussed on price). A bidder challenged the purchaser's right to do this, claiming that it blurred the distinction between selection and award criteria. The court however rejected the challenge. This case (along with others) has thrown further light on the *Lianakis* (2008) case, which first established the strict split between selection and award criteria – more recent cases repeatedly imply that it may well be permissible to look at factors normally regarded as selection criteria at award stage, such as experience and resources, provided that the purchaser shows that these are 'properly linked to the subject matter of the contract'.

Montpellier Estates Ltd v Leeds City Council [2013] EWHC 166 (QB)

Leeds City Council conducted a competitive dialogue for the development of a music arena in the city. Montpellier Estates Ltd (MEL) participated, but feared from the start that they were being used by the Council as a 'stalking horse' and could not win, as the Council actually wished to develop its own scheme on its own land. The Council assured them this was not the case, but subsequently terminated the procurement, and duly developed its own scheme. MEL claimed that Leeds had breached the Regulations by prematurely terminating the procurement; and by introducing a public sector comparator secretly and in parallel to the procurement process.

The court rejected MEL's claim, confirming that the Council terminated the procurement at the point it became apparent that it was unlikely to deliver value for money (and in so terminating it the Council avoided imposing on bidders the cost of preparing final tenders). The court also confirmed that the Council had a right to develop its own fall-back solution.

Joined Cases T-339/10 and T-532/10 - Cosepuri Soc. Coop. pA v EFSA, judgment of 29 January 2013

Cosipura is a bus operator in Italy which having failed to win a contract asked to see, amongst other things, the tender submitted by the winning bidder. EFSA declined to disclose this document, which the court agreed they were correct to do, on the grounds that 'a successful tender can fall within the scope of the exception [i.e. the exception to the obligation be transparent in disclosing documentation] relating to the protection of commercial interests and this restriction is integral to the objectives of the EU rules on public procurement, which are based on undistorted competition'.

Case C-115/12 - French Republic v European Commission (26 September 2013)

The case concerned public aid to a company renovating a holiday village in Martinique. The French government had allowed generous tax breaks on the project, which the court said amounted to a public subsidy. When this was added to a separate contribution from the European Regional Development Fund, the project was held to be publicly funded to more than 50% of its cost, and hence should have been subject to the (works) procurement regulations. The French government argued that a tax break was not a public subsidy, but the court did not agree.

European Dynamics Belgium SA and others v European Medicines Agency (Case T-638/11) [2013] GC

The court agreed with the claim of European Dynamics (ED) that the Agency had failed to provide a sufficient statement of reasons as to the grounds for rejecting ED's tender for software applications. The court therefore annulled the Agency's decision not to award to ED.

Covanta Energy Ltd v Merseyside Waste Disposal Authority [2013] EWHC 2964 (TCC)

A competitive dialogue process had already taken six years to conduct when the Authority declared Covanta's bid to be fundamentally unacceptable. Covanta could not use the 2009 remedies (automatic suspension) in challenging the decision – this was not available, as the procurement had begun in 2006, so they instead called for an injunction preventing the Authority awarding a contract.

The court agreed and granted the injunction, on the basis that i) damages (if the contract were awarded and Covanta subsequently won a case) would be almost impossible to assess; ii) given the procurement had already taken so long, the consequence of further delay would be modest; and iii) any sizable damages payment would be a burden on the taxpayer.

Lowry Brothers Ltd and other v Northern Ireland Water Ltd [2013] NIQB 23

The water company (NIW) was facing a challenge to the award of a framework agreement, the grounds for which the court did not consider strong. NIW applied to have an automatic suspension of the award lifted, and the court agreed, stating that even if the case ultimately went against NIW, payment of damages would be an

adequate remedy. (Whilst damages are hard to assess in procurement cases, this does not 'give rise to the proposition that [they] would be inadequate'.)

Nationwide Gritting Services Ltd v The Scottish Ministers [2013] ScotCS CSOH_119

Nationwide Gritting Services (NGS) challenged the Ministers over the non-publication of an OJEU notice for winter road salt supplies; salt was apparently simply being bought from a range of suppliers, without formal tender process on what were claimed to be grounds of extreme urgency. The Ministers rejected NGS's challenge on the grounds that it was launched more than three months after the relevant purchases were made (i.e. it was outside the qualifying period for actions to be brought).

The court however upheld NGS's right to challenge, on the basis that NGS could not have known about the purchases at the time they were made, because no notices of any kind (including a notice of award) were posted. NGS's suspicions that they were missing opportunities to supply were founded on hearsay, market intelligence, and so on. They only knew for certain when they received a confirmatory email reply from the Ministers, and the date of this email was *within* the time limit, so the case was referred for full trial (at a later date).

Corelogic Ltd v Bristol City Council [2013] EWHC 2088 (TCC)

Corelogic challenged the Council's award of a contract, claiming breach of certain obligations under the Regulations concerning provision of feedback, and commenced proceedings within the permitted 30 day time limit. Subsequently Corelogic sought to amend the claim, raising specific objections about the Council's evaluation procedures. The court held that the amendments represented a fresh claim, and it was rejected as ineligible as it was by now outside the time limit. Although Corelogic claimed that the substance of their claim was the same, the court disagreed and even though the amended form apparently presented a far stronger case, the time limit ruling precluded this being considered. The case illustrates to bidders the importance of covering all possible grounds for challenge at the earliest opportunity.

Pearson Driving Assessments Ltd v The Minister for the Cabinet [2013] EWHC 2082 (TCC)

This case concerns the timing of the disclosure of information in a situation where a contract award is suspended as a result of a challenge (in this case by Pearson, an unsuccessful tenderer). The court acknowledged that bidders in such situations are often in a difficult position, but even so did not instruct the contracting authority (the Minister) to disclose documentation ahead of a planned hearing because of the burden this would place on the authority and also because the authority would then not be able to rely on any controversial witness statement evidence in its application. Further document disclosure could be ordered during the hearing itself if this proved necessary.

Roche Diagnostics Ltd v The Mid Yorkshire Hospitals NHS Trust [2013] EWHC 933 (TCC)

Essentially, this case also focusses on the timing of disclosure, but also on *what* documents should be disclosed by a contracting authority to a bidder challenging an award. The Trust had provided some documents to Roche by way of feedback, including spreadsheets created after the award in support of the decision. The court decided that the challenger was in fact entitled to see such documents as were necessary to allow them to take a considered view as to the legality and fairness of an evaluation process. These include instructions issued to evaluators, and contemporaneous records of the evaluation process.

R (All About Rights Law Practice) v The Lord Chancellor [2013] EWHC 3461 (Admin)

In error, in tendering for a contract to provide legal services, R submitted a blank tender form. The tender was rejected on these grounds – an action which R claimed was disproportionate, saying that the matter should have been remedied by post-tender clarification.

The court rejected this claim. Clarification could not deal satisfactorily with a situation where there was effectively no information to clarify. Moreover the tender documentation was clear as to what needed to be submitted and by when, and stated that no amendment would be permitted later. Had the purchaser allowed R to submit a completed tender, then this would have been to the disadvantage of other bidders whose tenders would by then already have been received and opened.

Appendix 2: Income distribution from frameworks

Contract Number	Year 2013	Number	Cum Total	%
272d	506,419	1	506,419	9.3%
653F	349,668	2	856,087	15.8%
860ADD	326,915	3	1,183,003	21.8%
191	295,562	4	1,478,565	27.2%
191 Job 73041	245,694	5	1,724,259	31.7%
79	153,888	6	1,878,147	34.6%
RM1599	136,954	7	2,015,101	37.1%
All Business	118,185	8	2,133,286	39.3%
88	113,690	9	2,246,976	41.4%
191 NNH	109,883	10	2,356,859	43.4%
3A	106,146	11	2,463,006	45.3%
one-off	103,652	12	2,566,657	47.3%
191 NHH Flexi	100,590	13	2,667,247	49.1%
191 NHH	100,193	14	2,767,440	50.9%

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