



London Borough of Barnet: Procurement and Contract Management

Report for **UNISON**

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Association for Public Service Excellence

2nd floor Washbrook House
Lancastrian Office Centre
Talbot Road, Old Trafford
Manchester M32 0FP
telephone: 0161 772 1810
fax: 0161 772 1811
email: enquiries@apse.org.uk
web: www.apse.org.uk

Executive summary

This report examines contracting practice at the London Borough of Barnet. It was commissioned by UNISON in response to concern about a series of well publicised failures in the Council's procurement and contract management practices. The value of existing contracts is set to be dwarfed through an outsourcing process covering many of the authority's core functions, meaning that these concerns have considerable ongoing relevance.

Two tender exercises currently underway, for Development and Regulatory Services (DRS) and a New Support and Customer Services Organisation (NSCSO), are between them valued at £1bn. The scale of outsourcing envisaged in the Council's One Barnet Programme, represents a largely untested departure from established local government service delivery practice. Many of the functions, which include planning, building control, environmental protection and public health along with revenues and benefits administration, go to the heart of local government responsibilities for the safeguard and protection of public health and economic wellbeing. The impact of failure could be catastrophic.

All authorities utilise the services of private companies to some extent but none have successfully fully implemented what is variously referred to as, a commissioning or enabling, model. As well as a willingness to outsource all front line and back office services, including those regarded as core, the model differs from traditional outsourcing in that contracts are specified in terms of the outcomes they are expected to achieve. Decisions about how to do things are left to the private company, rather than being determined by the Council. The need for Contract Management is consequently much reduced, giving rise to the defining characteristic of the model which is a small, inexpert client, often referred to as thin, light or intelligent. Payment is linked to the delivery of outcomes, with risk of failure therefore transferring to the private company.

There are a number of problems with the model. The first is the measures by which the provider is held to account. The required outcomes of services are often vague and therefore inappropriate for contractualisation. Councils provide meals to school children, for example, because there is strong evidence to suggest that hungry or malnourished children are difficult to teach; providing them with a meal at lunchtime will improve the likelihood of them leaving school with qualifications and therefore being useful members of the workforce. However, the outcome of this intervention cannot be known for many years, whilst there are a myriad of other factors that can be far more significant than whether a child receives a school meal or not. Even if output data, such as take up of meals, is used as a proxy for the expected outcomes, this would not help to avoid a school meal provider cutting its costs by, for example, using inferior ingredients and thus overcharging through underperformance.

Recent examples of traditional outsourcing arrangements failing demonstrate that the use of private contractors to deliver public services is far from risk free. Contracting authorities require highly developed capacity and capability, in both procurement and contract management, if these risks are to be managed effectively.

The adoption of a 'light client', commissioning approach and the letting of contracts for critical activities, such as processing revenues and benefits, greatly amplifies the risks

and therefore the criticality of effective contracting practice. Given this, the track record of Barnet in letting and managing contracts, is a highly significant pointer to the likelihood of the One Barnet Programme being a success. In view of the potentially catastrophic impact that failure could have for the people of Barnet, it is entirely appropriate to take a detailed look at how well the Council has handled recent and current arrangements with its private providers.

An internal audit report considered by the Audit Committee in June 2011 into the Council's dealings with private security firm, MetPro, was heavily critical, not particularly of the framework under which contracting out occurred but of the apparent willingness of officers to ignore the Council's rules and procedures. Most damningly, the report concluded that poor practice was not confined to the relationship with MetPro but identified that: 'there is an absence of signed contracts and sound contract management generally across the Council'.

Detailed recommendations arising from the MetPro case were all accepted by the Council but an examination of a number of other contracts suggests that there is still significant cause for concern. These include the arrangement with Verrus UK for cashless parking which, contrary to the Council's own Contract Procedure Rules, appears to have been let and subsequently extended, without competition. A further associated contract, to implement a cash alternative to the cashless system, was subsequently awarded to PayPoint, the parent company of Verrus. This was also let without competition.

Around the same time, a company called RM Countryside was commissioned to remove the now redundant parking cash machines. Although competitive quotes were sought for this, the other bidders dropped out before the bids were evaluated. This was technically compliant with Contract Procedure Rules but it appears that RM Countryside has been awarded over £2m of work over a two year period, without having to go through a full procurement process.

A further set of contracts go to the heart of the authority's governance arrangements. These are for a range of consultants occupying senior management positions, including the Deputy Chief Executive, the Assistant Director of Human Resources and the Assistant Director for Communications.

The use of interim management to boost capacity is well established in local government but it is usually a temporary measure to backfill a vacancy or tackle a particular problem. In Barnet it is apparently being used as a default mechanism for filling senior roles. If, as appears to be the case, these contracts are service contracts, rather than contracts of employment, they are subject to the full requirements of European competition law. Depending on value, this means that they have to be advertised across the European Union and let in accordance with strictly prescribed procedures.

If they are contracts of employment on the other hand, they are not caught by the competition rules but raise a set of different issues around recruitment practice and employment rights and tax. Similar arrangements found to exist within the Civil Service, have recently been condemned by the Government as tax avoidance schemes and the Secretary of State for Communities and Local Government has ordered an enquiry into their use in local government. It is particularly worrying that the officer who has statutory responsibility for ensuring financial propriety in the Council, is

himself employed on a basis that raises such significant questions at the highest level of government.

One of the recommendations arising from the MetPro case was that the Council should establish and maintain a corporate contracts register. This was accepted and such a register does now appear on the Council's web-site. However, it does not include contracts that were let before January 2011, those with a value lower than £25,000 or those that are not 'compliant'. None of the contracts considered here appear on the register.

RM Countryside is one of a number of contractors to have been awarded a large number of small works and grounds maintenance type contracts over several years. The Council's rules require a 'reasonable process of selection' for contracts under a value of £25,000 but they also require individual awards to contractors to be aggregated. This is to ensure transparency, fair treatment and propriety, as well as compliance with the Public Procurement regulations. The MetPro report identifies the maintenance of accurate directorate and corporate level contract registers as critical to monitoring the amount of work that is awarded to contractors. The failure to include awards under a value of £25,000, defeats this object and ensures that the award of substantial aggregate levels of work to individual suppliers stays off the radar.

Aside from good procurement practice, the impending implementation of a strategy, based on outsourcing service delivery, will demand excellent contract management. Again, the Council has experienced some high profile problems. Most prominently, it has recently been forced to concede an £8m contract claim from residential care provider Catalyst, after it agreed to underwrite losses incurred by the contractor. On the face of it, this seems to have been a foolish move by the Council but at the very least goes to demonstrate the difficulty involved in effectively managing risks associated with outsourcing. This is further exemplified by the consequence to Barnet of having failed to secure a pension deficit indemnity from failed social housing contractor, Connaught. The cost to the authority is expected to be around £1.5m. Other outsourced arrangements, such as with Greenwich Leisure Limited (GLL), have also failed to ensure the delivery of expected outcomes. The GLL contract has been given a lowest possible, 'No' Assurance rating by the Council's internal audit service.

The elected members of the Council are perfectly entitled to develop and pursue their vision for the authority. They are obliged however to do so within the parameters set by law. This includes a requirement to act reasonably whilst taking into account all relevant factors and ignoring irrelevant ones. The numerous examples of failure to abide by internal procedures, as well as various potential breaches of competition law, should be relevant to any decision about whether and how quickly, the authority should implement its planned commissioning approach to service delivery. APSE has not been able to find any evidence that there has been any formal consideration of the implications of the apparently institutional inability to let and manage contracts adequately, for the Council's future contracting strategy.

The evidence considered in this report indicates that there can be little confidence that Barnet has the capability, and perhaps more worryingly the culture, necessary to meet the challenge posed by the letting and management of contracts that, under the One Barnet plan, will be far bigger than anything the Council has previously dealt with. The risk of implementing a strategy based almost entirely on contracting out, is high and

can only be magnified, by the reduction in client capacity envisaged in the commissioning model. A reasonable council would take account of this and if it is unable to take the necessary steps to increase confidence in its procurement and contract management, could only conclude that moving forward to an unprecedented level of outsourcing would be reckless to the point of being unlawful.

Introduction

Unison, the Public Services Union, has asked APSE Solutions to look at a range of contract and contract management issues at the council. The objective is to determine whether recent high profile failures are isolated examples, or an indication of more deep seated problems with the procurement and management of external suppliers. UNISON has become concerned that procurement practice and the management of contracts, may not be up to the challenges posed by the, so called, One Barnet initiative. These concerns are also reflected in the blogs of Barnet residents who, in line with the Government's drive to create an, 'army of armchair auditors'¹, have been closely scrutinising the Council's affairs.

The One Barnet Programme is aimed at turning the authority away from being a direct deliverer of services, towards a so called commissioning model, whereby the Council's primary role is to specify what services are required, whilst leaving delivery to contractors or third sector bodies. This will inevitably involve a significant increase in tendering activity and contract management. A full understanding of, and strict compliance with, the complex raft of European and domestic legislation governing procurement, must be a critical success requirement of the new approach. It will also be important that the processes used for letting and management of contracts are transparent, fair and capable of scrutiny.

This paper is not concerned with the merits of the approach in policy terms, other than the extent to which initiatives under the programme are underpinned by a rational case for proceeding. This reflects a general recognition that a strategy that relies upon contracting must be based on a robust approach to the tendering and management of contracts.

The contracts APSE Solutions has looked at are those with:

MetPro Security Services

Verrus UK

PayPoint

RM Countryside and other small works contractors

Civica

Various Interim Managers

Connaught

Catalyst Housing

Greenwich Leisure Limited

¹ Secretary of State, Eric Pickles, <http://www.communities.gov.uk/newsstories/corporate/1685058>

It should be pointed out that APSE has not sought or received the cooperation of the Council in compiling this report. The documents consulted are those in the public domain and it is freely accepted that the council should be given an opportunity to respond to any of the criticism emerging from the analysis and in particular to challenge any perceived inaccuracies.

The main argument this paper seeks to present is that the London Borough of Barnet is demonstrably not a fit authority to take the high risk strategy of mass outsourcing implied by the One Barnet Programme. Recent history supplies numerous examples of failure to comply with legal and internal requirements with regard to competition, as well as inadequate contract management.

Barnet's Contracting Track Record

As far back as 2008, the Council was warned by PricewaterhouseCoopers (PWC) that its contracting practices threw up a number of learning points. In a draft report detailing the findings of a 'headline review of the lessons learned and experiences of service managers and senior contract sponsors from previous service outsourcings'², the accountants provided some clear advice about how to improve, 'to inform the design, procurement and client side management of any new delivery vehicles, considered as part of the future shape project'. The future shape project subsequently developed into the One Barnet Programme.

The report was high level and did not look closely at some of the more serious issues that have subsequently come to light and which are discussed in this report. However, its findings should have acted as a warning that there were problems with contracting in the authority. That these warnings were not heeded, is clearly demonstrated by the fact that three years later the Council's internal audit service issued a damning judgement on continuing poor practice. This report, discussed below, is all the more damning for the fact that it reflected a failure by the Council to act on the four material findings of PWC, which were:

- Genuine spirit of working within strategic partnerships with key suppliers is limited
- Commercial arrangements and delivery frameworks do not build the customer/resident at the heart of the solutions provided
- Contract and client side management arrangements are inconsistent and in many cases appear inadequate
- There is a lack of management visibility across different contracts and linkages are difficult to achieve

² London Borough of Barnet: A lessons learned review of previous service outsourcings, PricewaterhouseCoopers, 2008

The relevance of what, by comparison with the report discussed below, now looks like gentle criticism, is that it goes to the heart of the strategy that the Council is now pursuing. The One Barnet programme is heavily dependent on the creation of genuine strategic partnerships with key suppliers, aimed at meeting customer/resident need and the mass outsourcing currently taking place can only hope to succeed if contract and client side management is consistent and adequate. All the evidence reviewed in compiling this report indicates that none of the lessons identified by PWC have been learned.

Internal Audit Report

In June 2011 the Council's Audit Committee considered an internal audit report into the use of MetPro Rapid Response Ltd (MetPro)³. The company had been providing security services to the Council since 2006, with an aggregate value of an estimated £1.3m. The report catalogued a series of fundamental breaches of the Council's own procedures and made clear that the arrangement had not been tendered or even formalised into a written contract.

The work awarded to MetPro was in the form of several different contracts, let at directorate or service level, to three different MetPro Companies. The value of the contracts was not aggregated, as required by the Council's internal Contract Procedure Rules (CPR) and there was a general failure to implement effective management control and procedures.

One of the most telling findings of the report was that the Council's Strategic Procurement Team (SPT) recognised the need for a corporate contract, from the time that MetPro was first appointed in 2006. SPT contacted service areas, across the Council, to establish their security requirements, with a view to putting together a tender in 2007. The intention was to create a framework agreement, with a range of suppliers to meet the needs of the main Council buildings, rather than continuing procuring individual suppliers, for individual service areas. The Internal Audit report concludes that: 'CPT have confirmed that this procurement exercise did not progress. The reasons for this exercise not progressing were not known'.

This exemplifies one of the main tenets of this paper, which is that the Council consistently demonstrates an inability to act to put right poor procedure and practice, even when it has been made aware of it. As will be seen, this includes acting on the recommendations arising from the internal analysis of the MetPro contracts itself and is a key reason for concluding that the Council cannot be considered competent to embark on the massive contacting out exercise currently in procurement.

In many respects, the report amounts to a comprehensive indictment of the Council's conduct with regard to contract procurement and management. Whilst it focussed on the MetPro example, it was very clear in its view that this was not an isolated example

³ Barnet London Borough Council, Draft Internal Audit Report, Metpro Rapid Response Ltd, May 2011: Audit Committee, June 16th 2011

and its 10 recommendations were aimed at procurement and contract management in general. There are loud echoes of the earlier criticisms made by PWC.

Given the central importance and general nature of the recommendations, they are set out in full as an appendix to this report but they addressed the following key messages:

- The Council has failed to comply with its CPR and Financial Regulations, exposing the Council to significant reputational and financial risks
- Internal Audit cannot give assurance that this non-compliance is an isolated incident, due to a lack of an accurate and complete centrally held contracts register and effective monitoring arrangements
- We recommend that all spend over the stated threshold in the CPR be reviewed and matched to a central contracts register (in development) in a timely basis

It should also be pointed out that the internal audit report was clear in its conclusion that the errors relating to the contracts with MetPro were not isolated. In a report considered at the same meeting internal audit state that: **'there is an absence of signed contracts and sound contract management generally across the Council'**.

It is worth noting that all of the recommendations of the report were accepted without reservation and various commitments were given with regard to their implementation. The Contract Procedure Rules have not been revised since May 2011, reinforcing the strong impression that the principal issue was a failure by relevant officers to follow the rules, rather than the rules themselves. In view of this, it would be reasonable to expect that contracts let since the MetPro mistakes came to light, would have avoided the glaring malpractice that characterised the procurement and management of this contract. In fact, as is discussed below, some of the mistakes made in relation to MetPro appear to have been repeated and there is some concern that poor and potentially unlawful practice is endemic in the Council's procurement practice. This is particularly worrying given the stated intention of the authority to adopt a commissioning model, under which contracting out of services is expected to become the norm.

Parking services

As might be expected in a busy London Borough, parking enforcement and provision is high profile activity and the changes that have taken place have attracted a great deal of public comment and scrutiny. It might therefore be expected that the Council would have gone out of its way to ensure that the changes it has introduced are based on a solid business case and are compliant with internal and external procurement rules and procedures. In fact, the parking service changes have frequently and consistently raised questions over the Council's approach to following both its own procedures and those required by domestic and European law.

Cashless Parking

The first parking initiative to consider is the 2009 appointment of Verrus UK to implement a cashless parking system. The appointment followed a trial of two competing systems and did not otherwise involve a formal process of competition. It is

not known exactly how Verrus and its rival RingGo were selected to participate in the trial but the resulting contract was not tendered and there is no evidence to suggest that any other potential suppliers were given an opportunity to submit tenders.

It is likely that the failure to subject the contract to competition was a breach of European public procurement rules. The specific regulations are incorporated into UK law through the Public Contract Regulations 2006 but the procurement should also be seen in the context of more general European Treaty obligations around equality of treatment, transparency, proportionality and mutual recognition. Whether the specific rules apply depends on the value of the contract and whether the service is categorised as priority (Part A) or residual (Part B). Parking services is a Part B service, however telecommunications is Part A and it is at least arguable, that the requirements in this case should have been classified as such and that therefore, the full requirement, subject to value, should have applied.

The threshold (aggregate) value at which Part A services are subject to the detailed requirements of the regulations, including advertising through the Official Journal of the European Union (OJEU) and tendering through one of the prescribed procurement processes, was £156,441 at the time the contract was let. Part B services above the same threshold, are subject only to requirements to advertise adequately and to publish a Contract Award Notice in the Official Journal. However, all public contracts, whatever their value or category, are subject to the general treaty obligations referred to above. In practice, this implies a potential requirement for both advertising (transparency) and competition (non discrimination), depending on a judgement about the extent to which a supply market exists, as well as the size of the undertaking (proportionality) and the potential for interest from outside the UK (mutual recognition).

There seems to be little doubt that the contract for cashless parking (and also probably the selection of the trial participants) should have been subject to competition, either as a Part A service, through one of the prescribed procedures or, at the very least, by a process that would satisfy requirements for Part B services, as well as general Treaty obligations.

Whether or not the EU procurement regime was applicable, the lack of a competitive process also amounted to a breach of the Council's internal rules for awarding contracts. These clearly require a competitive tender process to be used for contracts over a value of £24,999, where they are not subject to EU statutory requirements⁴. Moreover, the rules also expressly recognise that, even for below threshold value contracts, European law requires that: 'all tender opportunities should be advertised openly'⁵.

Failure to comply with standing orders with regard to contracts is also a disciplinary offence⁶. The Contract Procedure Rules impose a clear responsibility on Directors and Heads of Service: 'for all contracts tendered and let by their service areas'⁷.

⁴ Contract Procedure Rules Table 6-1

⁵ Contract Procedure Rules 6.5

⁶ Para 12 Financial Regulations – revised May 2011

⁷ Contract Procedure Rules – Revised May 2011

Although the Contract Procedure Rules do allow waivers in some exceptional circumstances, this must be agreed by the cabinet; there does not appear to have been any such justification provided in this case.

The internal audit report discussed above makes specific reference to the cashless parking contract. In a table setting out the strengths and weakness of various transactional activities, the entry for cashless parking identifies no strengths and 7 weaknesses. These include the lack of a signed contract in place with the provider, incorrect accounting in relation to VAT and various inadequate contract management procedures. It is not known whether any Director or Head of Service has been subject to a disciplinary process as a consequence of these, or indeed the MetPro failures, but the internal audit report suggests that failure to comply with Financial Regulations and in particular the Contract Procedure Rules is common practice across the authority.

Pay point and Verrus contract extension

Two further contract awards compound the impression that the Council was prepared to ignore its own internal procedures and the legal framework; even after the MetPro report had brought these issues to prominent attention. These include a 14 month extension to the contract discussed above and an additional contract to implement an alternative to the pay by phone service. This latter, involving the use of local retailers to allow parkers to pay by cash, was awarded to PayPoint Ltd. Although the value of this contract is apparently well below the EU threshold level on its own, it is relevant that PayPoint Ltd owns Verrus UK. It is at least arguable that, for the purposes of calculating the overall value of the contract, the two should have been aggregated. Beyond this, it should also be pointed out that, as the contract value was above £24,999, the Council's internal procedures required a competition to be held. Moreover, as discussed above, there are general European treaty obligations to take account of which appear to have been wholly ignored.

The extension to the Verrus contract was valued at £88,400 per annum (i.e. the cost to the council at 10p per parking transaction). If this reflects the value of the original contract then, over the full 3 years and 2 months of the arrangement, the aggregate value would be just under £280,000. This is well in excess of the European threshold, even without aggregation with the contract awarded to PayPoint.

The decision to extend the contract with Verrus was taken under delegated powers by the Interim Director of Environment and Operations and the Director of Commercial Services. The delegated powers report informing the Council Executive of the decision refers to rules under which single supplier purchases can be authorised in certain circumstances. These circumstances are where: 'the Director/Head of Service is satisfied, following the making of suitable investigations, that there is only one supplier in the market for the required supplies/services/works'⁸. No information is provided as to what, 'suitable investigations' were made but the Council was obviously aware of at least one other company in the market for Pay by Phone services, i.e. RingGo (Cobalt)

⁸ Contract Procedure Rules section 6.11

which participated in the original trial. A peremptory Google search identifies a range of other companies, providing comparable services. These include Vertex, ParkMagic, Telephone Technologies, Park and Phone, Parkmobile and Alphyra.

It is difficult to understand how the officers concerned could have concluded that Verrus UK was the only supplier in the market but they also appear to have acted in contravention of Section 5 of the Contract Procedure Rules. Firstly, the rules stipulate that an extension can only be granted where: 'the initial contract was based on a competitive tender or quotation'. Although the Delegated Powers Report states that the: 'borough wide contract was awarded to Verrus UK Ltd following the outcome of a competitive tendering process', this does not appear to be the case and contradicts the Internal Audit report which pointed out that: 'the service did not have a signed contract in place with the provider'. This latter point raises a further doubt over the legitimacy of the extension, which is that a contract extension, to be lawful under European competition rules must be expressly allowed under the terms of the original contract and where appropriate, must have been mentioned in the Contract (OJEU) Notice and the Contract Award Notice. If there was no written contract, it is difficult to see how this requirement could possibly have been met.

The second potential breach of Section 5 of the Contract Procedure Rules is less clear but concerns the calculation of value. The rules allow Directors/Heads of Service to agree an extension but only up to a value of £156,441 (the delegated powers report quotes a figure of £139,893 which was the threshold at the time). It is not immediately clear whether this is intended to refer to the value of the extension or the aggregate value of the contract, but given the Rule quoted below, covering how contract values are to be calculated, it is apparent that it is the total value that should be considered. The fact that the value stated in Section 5 is the same as the European threshold, serves to reinforce this point. Any potential extension to a contract, that takes the total value above the threshold, should be taken into account at the procurement stage.

There should have been no room for doubt as to the need to include the substantive contract, the extension and the PayPoint cash alternative in calculating the overall value of the contract. The Contract Procedure Rules state that: 'where a value or an estimated value is given in these Contract Procedure Rules it means the aggregate value payable in pounds sterling ... over the entire contract period, including any form of option and any renewal of the contract'. The value quoted in the delegated powers report is just that of the extension and therefore not calculated in accordance with this rule.

The rules go on to stipulate that: 'Contracts must not be artificially under or over estimated or divided into two or more separate contracts where the effect is to avoid the application of Contract Procedure Rules/EU Regulations and UK Legislation.' As with MetPro, this is exactly what appears to have happened with the PayPoint contract, where it is stated that, although PayPoint owns Verrus UK, Verrus: 'continues to trade as a separate legal entity'. If this was an adequate reason for not aggregating the contracts, it would open up the prospect of firms routinely avoiding the need for competition through the creation of subsidiaries to carry out different elements of contracts. In this case, the provision of a pay by cash alternative is clearly part of the same undertaking as the Pay by Phone service and the award of the contract to PayPoint should be properly considered to be an extension or variation of the original contract.

Wider Parking Services Contract

The pay by phone and cash alternative have now both been rolled into a single parking services contract, along with other elements of service provision. The contract was tendered in accordance with the requirements of the public procurement regime and has now been awarded to NSL. It is not known whether any challenge to the process has been made but there are some issues that must be explored before it is possible to conclude that the process was conducted lawfully. In particular, there is some suggestion that PayPoint/Verrus was granted what might be termed, 'preferred supplier status'. It is known that PayPoint/Verrus was named as part of more than one consortium bid and questions have been asked to try and establish whether the Council played a part in this. There is no bar on a supplier being part of more than one bidding consortium but there are a number of potential suppliers of pay by phone services who should each have been able to compete for the work. Moreover, there is no indication that the Council even considered the potential for conflicts of interest arising from the presence of Verrus/PayPoint in more than one bid.

The concern is that competition may have been distorted or restricted, in so far as the provision of the pay by phone and cash alternative is concerned. If this is the case, this would add to the overall question mark over the Council's relationship with PayPoint/Verrus.

RM Countryside Services

A further procurement issue arising from the adoption of cashless parking, is the appointment of a company called RM Countryside Services to remove decommissioned cash machines, at a cost of £83,000. Although this contract is of relatively low value, it is one in a large number of pieces of work that have been awarded to the same company, over a period of several years. According to local bloggers who have expressed concern, this work in aggregate, is valued at more than £2m.

Whether the aggregate value of the work awarded to RM Countryside exceeds the European threshold, depends on whether the contract is for services or works. The threshold for works contracts, at the time the contract was let, was £3,927,260, by comparison with the service contract threshold level of £156,441. Not enough is known about the nature of the work undertaken by RM Countryside to form a definitive view of whether it should be classified as works. However, a number of invoices issued by the firm to the Council have been published by local blogger, Mr Mustard. These indicate that much of the work relates to the manufacture and installation of street furniture, railings, bollards and other similar installations⁹. These are indeed likely to be categorised as works. Moreover, it is not clear that the individual contracts would fall to be aggregated under the European rules.

Given the above, it is unlikely that the Council's dealings with RM Countryside breached public procurement law. However, it is likely that the award of £2m of work to the

⁹ <http://lbbspending.blogspot.com/2011/12/rm-countryside-services-ltd-invoices.html>

Company over the period concerned did contravene the Contract Procedure Rules. Rule 3 requires aggregation, whilst the tendering process requires a prescribed process of competition.

Notwithstanding the aggregation issues, in the case of parking machine decommissioning, the contract was let in technical compliance with the Contract Procedure Rules, in that 3 quotations were sought and received¹⁰. It is a matter of concern though that the other two bidders withdrew their bids once: 'the specifications were confirmed and the timetable provided'¹¹. Although officers acted in technical compliance with the rules in so far as the work was a one off, they do not appear to have considered whether, given the requirement to repeat the competition where fewer than 2 bids are returned, the spirit of the rules would have been better served by retendering,

The relationship with RM Countryside Services bears some similarities to that which the Council had with MetPro. In both cases the Council has awarded work of a substantial value in the form of a series of lower value contracts, raising questions about the relationship with them. The contract for decommissioning parking payment machines does not appear on the Council's Register of Contracts, which purports to contain: 'all the Council's compliant contracts, greater or equal to £25,000 in total contract value, that have been let from January 2011'. It is not known what, 'compliant' means in this context but none of the contracts discussed in this paper appear in the register. They are known to each exceed £25,000 in total value, so it must be assumed that either they are not considered to be, 'compliant' or officers are still failing to comply with Contract Procedure Rules and assurances given in response to the MetPro report regarding the Corporate Contract Register (MetPro report recommendation three).

A further parking related contract that does not appear on the list is Civica's: 'five-year managed software and IT services contract worth £2 million with the London Borough of Barnet for its Civil Enforcement (CE) technology'¹². It is not known whether this contract is, not deemed 'compliant' or whether it is absent simply because it was let before the register was established.

For clarity this contract fell to be procured in accordance with the full requirements of the Public Contract Regulations, as it is for a Part A service and is well above the threshold value for service contracts. It has not been possible to trace an OJEU Notice or a Contract Award Notice, suggesting that the contract was awarded directly. However, it is possible that the contract was called off from the Buying Solutions IT Managed Services framework. Call off contracts do not require publication of a Contract Award Notice, although this might be considered good practice.

¹⁰ CPR Rule 6

¹¹ Delegate Powers Report No 1419, 10 October 2011

¹²

<http://www.civicapl.com/UK/Sectors/Enforcement/Parking+and+Civil+Enforcement/News/Civica+awarded+%C2%A32million+civil+enforcement+managed+service+in+Barnet.htm>

Consultancy and interim management

The Council has appointed a number of, apparently self employed, consultants to carry out a range of senior officer duties. The most significant of these is the Deputy Chief Executive, who has been working for the Council on a consultancy day rate for over two years.

Management consultancy is a Part A service for the purposes of the European competition regime. This means that, above the threshold level (now £173,000), contracts must be advertised and awarded in compliance with the full requirements of the prescribed procedures. This can include the use of pre-procured framework arrangements where they are available.

There is a framework agreement in place through which Councils are able to procure consultancy and interim management services. However, the Deputy Chief Executive, along with a number of other top management staff, appears, from the Council's published data on payments over £500, to have been appointed directly. In some cases the value of the contracts are well in excess of the threshold at which the full requirements of the public contract regulations apply. Moreover, these appointments do not appear to have followed the Contract Procedure Rules, with regard to competitive tendering or advertising.

The Interim Deputy Chief Executive also fulfils the role of s151 Officer. This statutory post is intended to operate as a safeguard of financial propriety. The office holder has responsibilities with regard to advising the Council about financial matters but also has a wider responsibility to the public interest that could see him or her having to bring any issues of concern not adequately resolved internally, to the attention of external regulatory bodies or the public. Legislation requires each council to appoint one of its officers to the role and it might reasonably be argued that an interim officer, with no job security or long term stake in the Council, is not well placed to fulfil the function. Whilst it is understood that the law does not specifically bar the appointment of an interim to the s151 Officer position, it might be expected that this would be pending the appointment of a permanent officer. In Barnet's case there is no suggestion that a permanent appointment is pending and the current arrangement looks set to continue.

It is possible that the Council does not regard these contracts as service contracts i.e. that it considers the officers concerned to be employees and the contracts therefore exempt from competition requirements. If this is the case, then it should be made clear but this would then raise a different set of issues around recruitment practice, tax and employment rights¹³. In any event, entries in the register of payments over £500 show that payments have been made to companies in respect of these contracts, implying that they are not being treated as employees and are in fact contracts for services.

¹³ The issue of interim management arrangements being used as a mechanism for tax avoidance has had a raised profile recently after a top civil servant was named as being employed via such an arrangement. The government has made it clear that such arrangements are inappropriate for public employees. <http://www.bbc.co.uk/news/uk-politics-16854187>

The Contracts Register which, as noted above, purports to list all compliant contracts with a value equal to or greater than £25,000, lists two interim management appointments – one for an Interim Finance Manager and the other for an Interim Senior Management Accountant. At best this indicates a degree of inconsistency but at worst indicates a less than robust approach to the compilation and maintenance of the register. It can only be concluded that the many interim management contracts that the council has entered into are, with the exception of the two mentioned, 'non compliant'.

Conclusions – Procurement

The Council is committed to becoming a so called commissioning authority; good procurement practice is therefore of critical importance. The cases discussed above however, suggest that practice is far from good. The Internal Audit report suggests a cavalier and even reckless, attitude to compliance with internal procedures, whilst the other contracts discussed above, identify a number of potential breaches of European and domestic law. Senior officers seem prepared to ignore rules designed to protect the authority from financial and reputational risk and in the case of the Verrus contract extension, have apparently provided elected members with misleading and inaccurate information.

The cases considered here cast doubt on the assurances given to the Internal Audit Committee in response to the MetPro report recommendations. In particular:

1. Contract procedure rules appear to have been broken in each of the procurement exercises examined (recommendation one)
2. The RM Countryside contract indicates that officers do not seem to have established formal written contracts for all services commissioned by the Council (recommendation 2).
3. The Corporate Contract register does not list all contracts equal to or over £25,000 in value as required by the Contract Procedure Rules (recommendation 3)
4. The RM Countryside contracts suggest that no effective procedures have been implemented to identify and monitor expenditure by category to ensure that current levels do not exceed Contract Procedure Rule limits (recommendation 5)
5. The RM Countryside case indicates that the VAT issues arising in the MetroPro case may well apply to this vendor as well. There can be no confidence that the required changes to monitoring had taken place to ensure that the Council has not overpaid VAT (recommendation 7)
6. Pay by phone provider may have been unlawfully given an advantage over competitors in the tendering of the contract for parking services. This is not something that arises from the MetroPro report but could amount to a serious breach of European competition law
7. The contract with Civica does not appear on the Contract Register suggesting it may not be compliant with CPR
8. The extension of the Verrus UK contract does not appear to have been compliant with CPR requirements (recommendation 8)

9. There does not appear to be consistency of procurement practice across the council or even within directorates (recommendation 9)
10. It is impossible to conclude that Directors/Heads of service have ensured that systems are in place to manage and monitor contracts (recommendation 10)

Outsourcing

A commissioning authority, by definition, is highly dependent on effective contract management. The recent history of local government provides numerous examples of where outsourced arrangements have failed to live up to expectations.

Recent contractor failures, such as that of Connaught, Rok, Southern Cross, and Fountains, amongst others, demonstrate how profitability must, of necessity, drive the activities of external providers. The high profile collapses also show how commercial failure on the part of contractors, rapidly morphs into service delivery crisis for contracting authorities. In many cases authorities have incurred additional cost from having to make alternative arrangements and service delivery has been interrupted whilst these have been implemented. The folly of overreliance on external providers for core service delivery, is amply demonstrated by the fact that authorities with no residual in-house capacity, are invariably the worst affected when providers go out of business.

Barnet has recent experience of the problems arising from supplier failure and how this can expose weaknesses in procurement and contract management. The Council, or more accurately its Housing Management Company, Barnet Homes appointed Connaught to a £7m per annum housing maintenance contract in 2007. The contract was terminated 13 months before it expired after the Company got into serious difficulties which subsequently saw it go into liquidation. As the contract was unpicked it became clear that the council had made a serious error at the point where the contract was let.

The rules governing the Local Government Pension Scheme (LGPS) provide for contractors to gain admission to the scheme on the decision of the administering authority. The rules also: 'provide for an assessment of the level of risk arising from the premature termination of the provisions of the service or assets by reason of insolvency, winding up or liquidation of the admission body'¹⁴. Where the risk - established with the assistance of actuarial advice, suggests a requirement: 'the admission body shall enter into an indemnity or bond to meet the level of risk identified'¹⁵. No such indemnity was required of Connaught and when the firm

¹⁴ Report to Pension Fund Committee, 22 June 2011

¹⁵ Ibid

went into liquidation, a deficit of £1.5m became effectively irrecoverable and therefore, a cost, to the council tax payers of Barnet.

Whilst the failure to assess risk in the case of Connaught resulted in a series of recommendations to the council's pension fund committee,¹⁶ none of these amount to more than an exhortation to follow the existing rules and legal requirements. As with the Metpro report, the message is not that the rules are inadequate but that, if they are not followed, the consequences can be serious. This, and indeed, most of the other examples considered in this paper, indicates that it is the procurement culture of Barnet which gives cause for concern, more than the framework under which it is supposed to operate.

The Connaught collapse exemplifies the maxim that if a deal seems too good to be true, then it probably is. Many of the councils who had engaged Connaught did so on terms that, in hindsight, should have raised concerns about the company's commercial viability.

At the other extreme, the example of the Liverpool City Council partnership with BT provides an indication of how difficult it can be to be sure that what looks like a sustainable, value for money arrangement, really is as it seems. The Liverpool/BT deal¹⁷ was trumpeted for almost a decade as an example of how local government could benefit from partnering with a private company, until an internal report, which in itself cost £250,000, revealed that the Council had been overcharged by £10m per year and would save £23m a year, if it terminated the contract¹⁸.

Liverpool City Council does not operate with the skeletal commissioning infrastructure that Barnet is moving towards but it was still unable to prevent what was, on paper, an excellent deal, from working primarily to the advantage of its private partner. In light of this, it seems very relevant to further examine Barnet's track record of contract management as a pointer to the likelihood of the contracting out strategy working to the benefit of its residents.

Contract Management

The audit reports referred to above provide a good indication of current contract management practice. Although the Metpro contract was the worst example, the audit committee were also made aware of a number of other examples of where the management of external suppliers gave cause for concern, including the parking contracts discussed above.

¹⁶ *ibid*

¹⁷ The £30m a year arrangement involved the creation of a joint venture company to provide all ITC related services to the council. BT has a near 80% stake in the company

¹⁸ Liverpool Daily Post, September 2010

A further example was the PFI contract for street lighting. This is a 25 year arrangement, jointly procured with the London Borough of Enfield, for the replacement and maintenance of the Council's street lights and columns. The following points are highlighted in the internal audit report:

- There was a lack of evidence of formal proactive arrangements to routinely monitor contractor delivery against each of the contract performance standards to assess whether the contractor representations about delivery are correct
- There were delays (in excess of target times) between when street light service requests were received by the Council (including through fix my street route) and when they were submitted to the contractor
- The contractor failed to undertake a significant number of customer satisfaction surveys resulted (sic) in under performance and the analysis of responses by residents to these surveys ceased in April 2012. Officers did not seek adjustment relief from the contractor in light of this
- There is not a formal business continuity plan in place in the event of the contractor unexpectedly withdrawing from the contract

These failings in relation to a multi-million pound flagship project, suggest that the ability of the council to manage contracts effectively is seriously impaired. It also flags up that a strategy that sets out to minimise the size of the establishment, through the default use of external providers, is extremely high risk in the degree to which it is vulnerable to some of the major risks associated with contracting. These are:

- Contractor failure with its consequences of damage to service delivery and an increase in (at least short term) costs as emergency arrangements have to be put in place
- Contractors seeking to renegotiate deals where they prove not to be commercially viable. With no in-house or other contingency arrangements, the commissioning authority may have little choice but to agree to reduced performance levels and/or an increase in cost where the alternative is that a contractor walks away.
- Long term drift away from competitiveness as initially keen prices are undermined by a below par performance which is not picked up along inadequately monitored variations to the contract.

As already noted, internal audit is very clear that the problems it identifies in relation to the street lighting and other projects are not isolated examples. Poor contract management is endemic across the authority.

It may be argued that the authority is in a process of change and that, having become aware of these issues, is therefore, well placed to ensure that they are not repeated in the future. This is not however, what is suggested by the evidence considered above, that, despite the Metpro report, the council has continued with a similar arrangement with RM Countryside services.

Further evidence that the council is unwilling, or unable, to address weaknesses in its contract management is provided by the example of the arrangement with Greenwich Leisure Limited (GLL). Greenwich Leisure took over the running of Copthall Swimming Pool, Hendon Youth Sports Centre, Barnet Burnt Oak Leisure Centre, Finchley Lido, Church Farm Swimming Pool, Queen Elizabeth Leisure Centre (dual use), Compton Leisure Centre (dual use) and Copthall Athletics Stadium under a 15 year deal worth £1.7m pa in 2003.

The 2009/10 Internal Audit Annual Plan included a: ‘...systems review of monitoring and price approval arrangement to ensure effective delivery of expected outcomes through the Leisure Partnership with Greenwich Leisure’ (Report to Audit Committee, 10 March 2009).

According to a review carried out for Unison by the European Services Strategies Unit, no progress was made with this review and: ‘Fifteen months later, the Internal Audit Annual Report included a list of Audit Opinions on 2009/10 completed audits. Leisure Management was given a ‘No’ Assurance, which is the lowest category of opinion and indicates that there is no assurance that the original objectives from the arrangements in the Leisure Partnership will be met (Report to Audit Committee, 21 June 2010)’. This was a damning indictment of the Council’s management of the contract.

The ESSU report goes on to detail the findings of a further report to the Audit Committee, which indicated that 9 months later, the contract was still beset by problems resulting from client side failings. Amongst others: ‘There is a risk that the partnership may not be in line with or meeting Council strategic objectives which may lead to value for money not being achieved and a lack of clarity on the financial approach adopted by the service provider.’

Attempts by the Council to renegotiate the GLL contract in 2011, in response to the realisation that it was not meeting the Councils needs, exposed the inflexibility of long term contracts. A decision to cut leisure expenditure with the aim of a ‘zero cost provision’ forced the Council to seek legal advice as to whether it could negotiate changes to the contract to accommodate this. The answer was a resounding no as the proposed changes would amount to a material change such as to require a fresh tender process under EU law. As a result the Cabinet Resources Committee authorised officers to negotiate termination of the contract. Given that the arrangement has a further six years to run the cost to the Council is likely to be substantial.

Contract Registers and Transparency

One of the recommendations of the MetPro report concerned the keeping of directorate and corporate contract registers. As with most of the other recommendations, this one amounted to no more than a reminder to follow existing contract procedure rules. Rule 4.1.14 requires Directors/Heads of service to keep a register of contracts over £5000. The Internal Audit recommendation stated that the proper maintenance of this register would facilitate the keeping of a corporate contract register, to be published on the internet.

As already noted, the corporate register does appear on the Council's web-site but fails to meet the requirements of the recommendation in three respects: firstly it only lists contract with a value greater than £25,000; secondly it only lists contracts entered into after January 2011; and thirdly it only lists, 'compliant' contracts.

Listing contracts above the value at which the Contract Procedure Rules require competition, means that contractors such as MetPro and RM Countryside, do not appear, despite the fact that the Council spends a great deal of money with them. A further example is Iris Gardening Services Limited, which has been paid in excess of £600,000 for various small grounds maintenance contracts, over a period of 5 years. It is impossible to know what proportion of this work was competitively tendered and therefore impossible to know how fair the process by which it was awarded was.

A guide for suppliers, dated February 2009, published by the Council on its web-site, reiterates the requirement of European law in relation to all public contracts, 'no matter what their value'. It states that: 'The Council aims to carry out all procurement in a framework of fair, transparent and open competition'¹⁹. The examples of MetPro, RM Countryside Services and Iris Gardening Services, amongst others, cast doubt on whether these principles are being adhered to; simply reporting contracts awarded to them in the register would go a long way to assuaging these doubts.

The second shortcoming of the register is that it does not list contracts entered into before January 2011. It is difficult to think of a rationale for this, as anybody using the register would need to know about all live contracts for the register to be fit for its intended purpose with regard to transparency.

The final restriction, i.e. not listing non compliant contracts, is the most revealing. It is arguably these contracts that are likely to be of most interest to any member of the public trying to use the register to hold the Council to account.

¹⁹ How to do Business With the Council – A Guide for Suppliers, Contractors and Service Providers – Barnet London Borough Council February 2009

Responses to a recent Freedom of Information Act request indicate that, of a total of 5,694 current supplier/vendor contracts, just 64 appear on the register. A follow up question to establish whether this means that 5,630 of the contracts have a value below £25,000, has yet to be answered but it seems unlikely – particularly in light of the fact that: ‘375 suppliers have expenditure in excess of £139,893’.

£139,893 was the European threshold level for services contracts until 1 January 2010, when it was raised to £156,442. The answer to a further question reveals that only 20, of the 375 contracts above the threshold level, were let through the procedures prescribed by the Public Contract Regulations and appear in the EU statistical return for the year 2008, 2009 and 2010.

It is possible, that some, if not all, of the remaining 355 contracts were let through framework agreements or were works contracts, subject to a higher threshold and not required to be let through the prescribed procedures. However, even of this is the case, and notwithstanding the fact that some were let prior to January 2011, they should still appear on the contract register – the fact that they do not, makes it far more difficult to establish whether they were let in accordance with the rules.

It has not been possible to establish for certain whether and to what extent, the Council uses pre-procured select lists as the basis for selecting contractors for small works. Such an approach would provide a transparent basis for selection and facilitate the efficient award of contracts on an overtly fair basis. An FOI question asking for a list of suppliers on such a list, along with details of what work they have been awarded, has met with a refusal to answer on the grounds that whilst information is held, ‘relating’ to the information requested, it is not held centrally or even at directorate level and could not therefore be collated at reasonable cost. Aside from amounting to a clear admission that the Council is systematically failing to adhere to Contract Procedure Rules in so far as maintaining contact registers at directorate level is concerned, it also suggests that there are no select list arrangements in place. As a result it is simply not possible to understand the basis on which small works contracts are awarded; rendering the assertion in the guide to suppliers that: ‘The Council strives to ensure that its activities are characterised by honesty, equality, integrity and transparency’²⁰, somewhat difficult to confirm. Moreover, it also indicates that the Council has failed to address the key criticisms of the PWC and MetPro reports which was, in the words of PWC, that : ‘Contract and client side management arrangements are inconsistent and in many cases appear inadequate’.

The lack of transparency rather defeats the purpose of having a published register and raises serious doubts about the willingness of the Council to expose its

²⁰ *ibid*

contracting practice to public scrutiny. This will do nothing to reassure the charge payers of Barnet that the Council is capable of successfully implementing its outsourcing strategy but also implies that the non compliant contracts discussed in this paper, are just a few amongst many others.

Managing Risk

Other examples of contracts giving cause for concern include the high profile agreement with housing provider, Catalyst and its care sub-contractor, Fremantle. It is well documented that a contract claim brought by Catalyst, although resisted by the Council, eventually resulted in an additional, unbudgeted payment of around £8m. At issue was a clause in the contract that entitled Catalyst to recover up to 90% of any overspends not caused by 'profligacy', where it had undertaken, 'all opportunity to reduce the overspend'.

The additional cost that Catalyst claimed was to cover higher than expected charges from Fremantle. These charges related, in part, to a failure by the care provider to anticipate staff turnover levels, and therefore presumably, to realise savings from reducing the terms and conditions of the workforce, as TUPE protected staff moved on. Lower than expected demand for beds reduced revenue and in addition, Catalyst was unable to rationalise places through closure of one of the homes, as had been envisaged in the business case.

The Catalyst case raises several key contracting issues; in particular it highlights the difficulties involved in identifying and then managing risk. It is commonly argued that one of the most compelling reasons for contracting out is that risk can be transferred to the contractor; providing the contracting authority with greater certainty about its costs and relieving it of the possibility of unexpected and therefore, usually more expensive, demands on its resources. Balanced against this and rarely given a great deal of weight, is the fact that risk is priced; meaning that the benefits of risk transfer will always be offset by additional cost. Contracting out should not therefore be seen as an exercise in offloading each and every risk. It is far more of a balancing exercise, gauging the likelihood of a risk coming to pass, against the cost of paying for somebody else to manage it.

With hindsight, it is clear that in this case, Barnet misjudged the risk/cost balance. Without access to confidential documents it is impossible to know for certain whether underwriting of overspends was justified by cost savings but on the face of it, it appears to have been a reckless move on the part of the Council. It is certain that the officers responsible would have believed that the deal they struck was a good one, demonstrating at the very least how difficult it can be to effectively identify and then manage risk, in a contracting relationship.

The One Barnet Vision

The European Services Strategy Unit concluded with regard to the GLL contract that: 'The systemic failures in the management of this contract are graver and not

dissimilar from those exposed in the MetPro security contract, but on a larger scale and extending over a much longer period. Barnet Council's catalogue of contract management failures on relatively small contracts has grave implications for the large, multi-million One Barnet contracts currently in procurement.²¹ This is the key point for this paper. The council is actively moving towards a default strategy that is based on others delivering services on its behalf. Moreover, it intends to let and manage the many contracts that this will involve with a much reduced internal client side capacity. The cases examined here indicate a chronic inability to manage external suppliers effectively - even with current client side resources.

Once the commissioning model is fully in place, the size of the client will be reduced but just as significantly the level of internal expertise will also fall. It is a key characteristic of the commissioning model that it operates with a so called, 'intelligent' or, 'light client', focused entirely on outcome measures. Contractors are expected to police their own activities and develop their own day to day performance measures. The logic is that many of the points of friction are taken out of the relationship, along with transactional cost, thus facilitating a much smaller client, focussed on what really matters. Contractors become responsible for the end result, rather than being held to account for the way that they deliver it.

The argument is seductive, in that it appears to offer a pain-free route to reduced expenditure and transfer of risk to the private sector. Unfortunately, it also flawed in some key respects.

The first problem is the measures by which the provider is held to account. The required outcomes of services are often vague and therefore inappropriate for contractualisation. Councils provide meals to school children for example, because there is strong evidence to suggest that hungry or malnourished children are difficult to teach and that, providing them with a meal at lunchtime, will improve the likelihood of them leaving school with qualifications and therefore being useful members of the workforce. However, the outcome of this intervention cannot be known for many years, whilst there are a myriad of other factors that can be far more significant than whether a child receives a school meal or not. Even if output data, such as take up of meals, is used as a proxy for the expected outcomes, this would not help to avoid a school meal provider cutting its costs, by using inferior ingredients for example, and thus overcharging, through underperformance. An inexperienced, under-resourced, client would be unlikely to pick this up early, or possibly at all, and as with the Liverpool/BT case referred to above, could go for many years, simply not knowing that the contract was failing. It should also be noted that the Council has no intention of using

21 Briefing No. 9 One Barnet Programme Greenwich Leisure contract to be reviewed, European Services Strategy Unit, November 2011

output indicators as proxy measures for outcomes. This point is specifically addressed in the business case for the outsourcing of Development and Regulatory Services which states that: 'Performance management will need to focus on success in delivering outcomes, and move away from current approaches where many performance indicators measure outputs as proxies for outcomes'²².

The second major problem with the small client approach goes to the progressive inability of the Council to make effective arrangements for service delivery. This is seen at its most extreme when contractors fail and there is no internal capacity to either take on provision directly or to specify interim arrangements. However, it also applies to the letting of permanent contracts, where all the expertise is on the provider side and the contracting authority has very little ability to establish for itself what service it should be receiving and how to measure performance.

Examples of the commissioning approach, coupled with mass outsourcing, have yet to arise but there are cases of authorities contracting in this way for some very high value, core services. These include Bradford's, now expired, 10 year arrangement with Serco, whereby the latter took on most of the Local Education Authority function through a special purpose vehicle – Education Bradford. The contract was specified in terms of improving the educational achievement of Bradford's schoolchildren and contained a number of performance targets, based on national indicators. The headline outcome objective was that performance would improve, from being the worst in the country, to high performing levels, within a very short time frame and Serco contracted to achieve this with a reduced level of funding.

There is no doubt that the contract with Serco was very challenging; it is equally clear that it was the promise of rapid improvement, without additional funding, that persuaded Councillors to vote for it. In fact, the terms were renegotiated within two years, to make the performance targets more achievable and to increase funding. By the end of the 10 year term performance was still well below the originally promised levels and the Council felt bringing the service back in house was its only choice. If the Council had implemented the kind of cross authority model represented by the One Barnet Programme, it is highly unlikely that it would have been in a position to recreate an effective in-house infrastructure to take this key service back in house.

The contracts considered in this report, whilst of significant value, are only a fraction of the total potential size of the contracts that Barnet is likely to be running in the future. Already in the procurement process are complex, multi-million pound arrangements, for Development and Regulatory Services (DRS) and a New Support and Customer Services Organisation (NSCSO). These are to be

²² Development and Regulatory Service Project: Business Case, February 2011

followed by a wave of further outsourcing, with the ultimate aim of the council being to withdraw entirely from direct service delivery.

The DRS and NSCSO contracts have a joint value of around £1bn and comprise of some of the most critical services that the Council delivers. Legal advice has forced a rethink about outsourcing some statutory regulatory functions and until the final business case emerges from the tender process the final scope will not be known. It is expected that Development and Regulation will include²³:

Strategic Services:

- Regeneration
- Strategic Planning and Housing Strategy
- Highways Transport and Regeneration
- Highways Strategy

Operational Services:

- Building Control and Structures
- Planning Development Management
- Land Charges
- Highways Network Management
- Highways Traffic and Development

Public Health, Consumer and Regulatory Services:

- Environmental Health
- Trading Standards & Licensing
- Cemetery & Crematorium

The NSCSO contract is expected to incorporate²⁴:

- Customer Services

²³ Cabinet Resources Committee, 14 December 2011

²⁴ Cabinet Resources Committee, 28 February 2012

- Revenues and Benefits
- Estates
- Corporate Programmes
- Finance
- Human Resources
- Information Services
- Procurement

These functions are fundamental to the core role of all local authorities. If mistakes are made in building control, planning and other key controls over the built environment, the long term impact on the borough could be devastating, as could be the impact on Barnet citizens, if benefit and revenue administration do not perform as expected. If, as in the case of Connaught, the chosen supplier gets into commercial difficulty leaving the Council without some of these key services, the borough could literally grind to a halt. The road network cannot function without network management for example.

The consequences of contractor failure could be far reaching, so it is imperative that all risks are adequately identified and subject to robust strategies for mitigation. The evidence presented in this report indicates that the risks associated with poor or inadequate contract management arrangements should be uppermost in the corporate mind of the authority. In fact, they do not appear to have been given any serious consideration. The inflexibility of contractual arrangements that resulted in a decision to terminate the contract with GLL has the potential to result in additional charges that could render the new arrangements hugely expensive. If, as with GLL, the Council decides it needs to get out of the contracts, this would, with the proposed commissioning structure, prove all but impossible without the expense and time demand of letting a new contract.

The key importance of some of the functions and the Council's eagerness to externalise even its most core activities, is apparent in the discussions it has had about the extent to which it is lawful to delegate certain roles to a contractor. The Cabinet Resources Committee was informed in December 2011 that legal advice had concluded that approximately 19% of staff originally in scope, would have to be retained by the authority, 'to carry out non-delegable functions'²⁵. Details of how these staff are to be employed, once the DRS contract is in place, are yet to be

²⁵ Ibid

disclosed but it is telling that the report indicates that: 'It is expected that the cost of these functions will be borne by the provider'. This suggests some kind of secondment arrangement, which must raise doubts as to how far the Council has even considered the reason why these functions cannot be delegated, i.e. that they are considered by law to be of such fundamental significance that they cannot be passed over to a body which is not directly controlled and accountable to the Council.

Back in February 2011 there was a degree of recognition that the outsourcing of regulatory functions might necessitate the retention of a larger client side than, 'would normally be the case'²⁶. This reflected the point discussed above about the legal difficulties involved in transferring these functions to a third party. The Business case indicated that 7.5% of the budget would be retained to cover the client side costs. The December 2011 report reports that this has now been reduced to just 2.5%.

The rationale for this is difficult to understand. The report states that: 'This has been revised from the previous figure of 7.5% as it is expected that the balance required to undertake regulatory functions will be met by the provider'. This possibly also points to an intention to second these staff, despite the fact that the functions they perform cannot be legally outsourced. This may be technically compliant with the legal opinion but suggests contempt for the legal safeguards that the statutory framework represents.

The risks involved in contracts for environmental health, trading standards and public health functions failing are obvious and can only be amplified by the reduced client arrangement. If, as with so many of the contractual arrangements considered in this paper and highlighted by both PWC and the Council's own internal audit team, the Council fails to recognise or act on evidence that services are failing, there is the potential for real harm to Barnet residents. If this is the outcome of outsourcing services that constitute the most fundamental protection of the public from the impact of rogue traders or unhygienic food outlets, it will be too late.

Conclusions

The Council, having been elected by the voters of Barnet, is entitled to pursue its vision within what is allowed by law. This is not under question. However, there is a body of evidence to suggest that the decision to move at pace towards the One Barnet vision may leave the council vulnerable, simply because it does not have the ability or capacity to manage these multiple contracts to the benefit of the Barnet charge payers. The examples examined above, if linked to the findings of

²⁶ Development and Regulatory Services Project: Business Case, February, 2011

PWC back in 2008, suggest that both procurement and contract management has consistently fallen short of good and at times lawful, practice for a number of years. There is little evidence that lessons have been learned and whilst procedures and rules are in place, these are rendered ineffective by an apparent willingness to ignore or avoid them.

Any Council initiative must meet some basic requirements if it is to be considered reasonable. These will include delivering value for money as well as meeting statutory requirements for service delivery. The One Barnet Programme might reasonably be tested against the following baseline criteria:

- Is it likely to secure value for money?
- Will it safeguard the Council's interest?
- Are delivery arrangements assured?
- Will the required outcomes for residents be achieved? – effective management of risks.

These are each considered below with reference to the evidence presented in this report:

Is it likely to secure value for money?

Apart from unwillingness to consider continued in-house provision, Barnet has shown an alarming lack of understanding of the benefits to be derived from fair and open competition. The public procurement rules are purposely designed to ensure that public bodies, where they make use of private companies, do so on the basis of, either the lowest price, or the most economically advantageous tender. If officers ignore or avoid, the competition requirements, they will not be able to demonstrate that value for money is being achieved.

The evidence suggests that direct award of work without competition or award with limited competition is routine in Barnet; whether or not this amount to unlawfulness, it is very difficult to see how the Council can claim to be receiving value for money from its contracts. The two current procurement processes for DRS and NSCSO have both raised cause for concern about how competitive the processes are and whether therefore, they are likely to deliver best price. The sheer size and complexity of the contracts means that there is a limited number of potential providers and therefore effective competition.

Will it safeguard the Council's interests?

One of the most worrying aspects of the MetPro report was its finding that contracts were often unsigned or in the case of higher value agreements were not sealed. The inability of the Council to even list its contractors, or to place them on a central register, does not provide any assurance that this kind of practice has been eliminated. The contracts for DRS and NSCSO are being let through appropriate procedures and there should be no issues with the winning contractors in so far as they themselves are

concerned. However, such complex multi-service contracts are likely to see numerous additional suppliers brought into the supply chain. Whilst the contracts will no doubt place responsibility for managing these suppliers on the main contractor, it is likely that elected members and the residents of the borough will wish to know exactly who and under what arrangements services are ultimately provided by. It would also be reasonable to expect that in the event that things go wrong the Council will be able to take appropriate action to put them right.

Are delivery arrangements assured?

It is important that all stakeholders, including potential suppliers, can have faith that the arrangements the Council makes are lawful and sustainable. Where for example the Council has failed to follow the most basic of good practice – legal compliance, sealing contracts where appropriate, maintaining proper records of what contracts have been awarded, who to and what payment have been made – services to end users are jeopardised along with the financial standing and reputation of the Council. Previous contracts of relatively low value and for less than critical requirements, have frequently demonstrated how poor practice, coupled with the inherent risks of outsourcing, has failed the council tax payers of Barnet. There is no reason to believe that the mega contracts now in procurement and planned for the future will be any less vulnerable. However, the scale of these contracts and the core nature of the services they encompass, means that the impact of failure will far exceed the impact of anything that has gone before. The reputation and financial stability of the Council is at stake but where services such as environmental protection, planning and building control go wrong the risks to the residents of Barnet are literally to life and limb.

Will the required outcome for residents be achieved?

The report considers a number of instances of where the Council has failed to carry out effective risk assessment and left itself vulnerable in the event of commercial failure (Connaught) or delivery failure (Catalyst, GLL). In these cases service recipients often faced the consequences and as the report identifies, the Council faces financial loss. Up to now, the consequences of these failures, whilst serious for those who have to wait for property repairs or who don't receive the service they expect from the local leisure centre, are limited and not catastrophic. Failure to achieve outcomes from services within the scope of the DRS and NSCSO contracts will have a much wider impact on individuals but also on the future economic and social welfare of the whole borough. The council may believe that it is transferring these risks to the companies with which it contracts but there can be little doubt that the public of Barnet will expect the Council to retain ultimate responsibility.

The evidence suggests that at present the Council's contract letting and management practice is unable to satisfy any of these criteria. It is therefore not possible to have confidence that future arrangements will be any more inspiring of confidence. This would be of concern if the Council was planning to continue with a limited programme of outsourcing in line with other similar authorities, but the One Barnet Programme amounts to a massive increase in the volume of outsourcing, as well as in the nature of the functions to be outsourced. This, along with plans to reduce, not strengthen client capacity, raises genuine concerns about the future ability of the Council to ensure the continued and effective discharge of its statutory functions.

As pointed out at the beginning of the report, the Council has not been approached to corroborate the evidence considered. It is therefore recognised that it may have answers to some of the questions posed. To assist with this the relevant issues are set out in summary form below:

- Despite accepting the recommendations of internal audit set out in the Metpro report, the authority continued to award contracts to RM Countryside Services in similar manner without recognising the rules around aggregation and without effective competition.
- The contract with Verrus UK was let without competition in contravention of the Contract Procedure Rules and in all probability, in breach of European law
- The extension of the contract with Verrus was also awarded in contravention of the Contract Procedure Rules on aggregation and competition
- Verrus/Paypoint may have been given an unfair advantage over competitors in the letting of the parking services contract
- The authority has established a Corporate Contracts Register in response to internal audit criticism but this does not include all of its contracts, as it has excluded those let before January 2011, those not deemed to be 'compliant' and those with a value below £25,000. There is no register of 'non compliant' contracts but information received under FOI indicates that there may be a significant number
- An unknown number of local contractors have been awarded very substantial amounts of work in the form of a large volume of small value contracts. These have not been aggregated as required by the Contract Procedure Rules and do not appear on the contract register. It is likely that many of the contracts in question were let without a transparent, open method of selection.
- The council does not maintain a select list of small works contractors and is unable to demonstrate that work is awarded on a fair, equitable or transparent basis
- The Council has let an unknown number of contracts for interim management without following the Contract Procedure Rules and in contravention of European law. Very few of these appear on the Corporate Contracts Register
- The contracts for interim management include some of the most senior officers of the authority, including the one who is legally responsible for ensuring financial propriety.

- The authority has demonstrated a lack of ability to assess and manage risks in contracting through its failure to require a pension fund deficit indemnity from Connaught resulting in an additional, unbudgeted cost of £1.5m
- The authority further undermined the credibility of its approach to risk management when it decided to underwrite overspends by Catalyst resulting in an additional, unbudgeted payment of £8m
- Failure to manage the leisure contract effectively resulted in a 'no assurance' judgement from the internal auditor on the arrangement with GLL
- The weaknesses referred to by PWC, further exposed by the MetPro report and explored in this paper have not apparently been considered as risks to the success of the One Barnet Programme.

If these points are substantially correct, then the ability of Barnet to manage the large volume and high value contracts envisaged in the One Barnet vision must be in legitimate doubt. In determining whether to proceed, elected members must, as a matter of law, consider this and demonstrate how the significant risks it throws up are to be managed. If they are unable or unwilling to do this then going forward with the outsourcing strategy could properly result in external intervention through the statutory channels protecting the public purse.

It is therefore recommended that in the first instance the issues raised are brought to the attention of the council's s151 Officer, Monitoring Officer and Chief Executive. It is expected that they would wish to respond as a matter of urgency and ensure that the council takes appropriate action. If this is not forthcoming then it will be for the external auditor and ultimately the Secretary of State for Communities and Local Government, to consider whether the evidence suggests that Barnet's approach to contracting and contract management warrants intervention to prevent the possibility of further catastrophic failure in the future.

Appendix: Recommendations of Internal Audit Service from Internal Audit Report into MetPro Rapid Response Ltd

Recommendation One

Contract procedure rules should be followed by all services to procure, works, supplies and services

A SAP solution should be explored by Corporate Procurement team to enter vendor limits in accordance with the contract procedure rules threshold

Recommendation Two

Formal written contracts should be established for all services commissioned by the Council as required by the Contract Procedure Rules

Recommendation Three

All directors should maintain a complete register of contracts as required by the current Contract Procedure Rules (CPR). This should assist with the completion of a Corporate contract register, which should be placed on the Council's internet to meet the transparency agenda.

Corporate Procurement should undertake an oversight function to ensure that contracts are in place where expenditure in Services exceeds the stipulated CPR thresholds. Directorate contract registers should enable this monitoring to take place.

Recommendation Four

A fit for purpose contract service specification should be developed for tender evaluation purposes and monitoring service delivery.

Recommendation Five

The Corporate Procurement Team should establish a process for identifying and monitoring expenditure by category by service across the Council to ensure that current levels do not exceed Contract Procedure Rule limits.

Recommendation Six

Independent checks of amendments to key Vendor Master Data records, such as bank data, should be undertaken routinely for an appropriate number of records.

Checks should ensure that appropriate checks are made to confirm details and validity of the requested changes from related parties.

Management should retain all supporting data for vendor set-up and amendment checks. In particular, necessary records to confirm the checks undertaken for amendments for key data fields, such as Bank details, should be retained.

Recommendation seven

There should be review carried out to calculate the exact figure the Council has overpaid VAT on this vendor, and immediately contact HMRC.

Officers should, as standard, refer all name changes on supplier's invoices to the Central Procurement Team who should obtain the advice of the VAT officer for confirming compliance with the VAT regulations before a change can be processed.

Training provided to officers should focus on the implications of name changes on supplier's invoices and how those should be addressed for the purpose of compliance with the HMRC's VAT requirements.

Recommendation eight

Contract extensions should be undertaken in line with CPR requirements.

Changes to conditions of service should be formally documented for referral by all parties who may be required to certify delivery and payment.

Recommendation nine

Standard practice should be reinforced through-out the Council, specifically:

- Changes to contract terms should be formally approved and documented for referral by those involved in certifying delivery per invoice.
- Invoices should be initialled as evidence of confirmation of service delivery in line with current terms and calculation check.
- Supporting documentation should be provided to evidence service delivery.
- Delivery should be confirmed with officers who are able to comment on delivery as part of their respective role.
- Purchase orders should be approved and before delivery of the service to ensure that expenditure is valid and in line with agreed terms.

Recommendation ten

Directors/Heads of Service must ensure that systems are in place to manage and monitor contracts

Most of the recommendations amount to little more than a reminder to officers involved in the procurement of external suppliers, to act in accordance with the rules. None of them go beyond basic good practice and legal compliance in contracting and it should have been of some concern to elected members that officers had to be reminded that contracts should be let and managed in accordance with legal and internal requirements.