

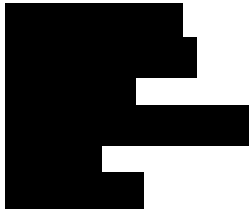


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Private & confidential



Our ref PJ/SH/121

18 December 2019

Dear 

Nottinghamshire County Council: Audit of accounts for the year ended 31 March 2016 – decision and statement of reasons

We are writing to advise you of our decision on your objection to the accounts of Nottinghamshire County Council for the year ended 31 March 2016.

Your objection

Your objection to the accounts for the year ended 31 March 2016 was set out in your letter dated 2 August 2016 and relates to the sale of land by Nottinghamshire County Council (the 'Council') at Sutton Cum Lound. It specifically asked us to:

- Apply to the court under section 28 of the Local Audit and Accountability Act 2014 for a declaration that the following is an unlawful item of account:
 - Income in relation to the disposal of land at Sutton Cum Lound; and
- Issue a public interest report under section 27 of the Local Audit and Accountability Act 2014 in relation to the sale of the land at Sutton Cum Lound.

Your letter sets out a number of points in supports of the above elements of the objection that we have accepted, including that:

- The Council have allowed this land to be undersold and failed to achieve the best possible consideration, primarily because the additional overage offered had not been included properly in the assessment of the bids.
- It has not been open or transparent in its dealings in relation to this matter, including the bidding process; related communications from the Council about the sale of the land; and that one of the bidders was in your view, a 'connected person' to the Council.
- Part of the land being sold was on the edge of Sutton Village and was being considered for inclusion in the 'Village Plan' as a potential site for additional housing, and that this information would have been known to the Council and its agent being in the land sale.

Summary of decision

Decision not to make an application to the court for a declaration that an item of account is contrary to law

Section 28 of the Local Audit and Accountability Act 2014 gives auditors the discretion to decide whether or not to apply to the Court for an Order in relation to unlawful items of account. That discretion takes into account the proportionality of the matter under consideration.

As we have set out in this letter, there were failings in the Council's arrangements in respect of the process to sell the holding. It is arguable that those failings resulted in the Council over time receiving a smaller capital receipt for the land than may otherwise have been the case. However, the loss, if any, was dependent on the uncertainties of overage and the subjective nature of its value.

As we have set out in this decision and statement of reasons, our legal advice (obtained in 2019) is that, on balance there may be an unlawful item of account in the Council's 2015/16 financial statements relating to not obtaining 'best consideration' for the sale of the holding (as defined by s123(2) of the LGA 1972). However, we also note that the legal advice obtained by the Council (at the time of the decision in 2016) came to a contrary view ie that the decision was lawful. We further note that the Council does accept that it needed to improve its arrangements relating to property sales and has taken steps to address these matters (see Attachment 2 for some further details).

Looking at the factors that we may consider when exercising our discretion relating to an item of account being contrary to law (set out on page 3 of this decision and statement of reasons) we consider that none of them apply here. Consequently, in the circumstances of our audit for the year ending 31 March 2016 we have decided that further to our discretion under Section 28 we will not apply to the Court for a declaration. We also do not think that any potential benefit that might be achieved by seeking a declaration would justify the likely costs involved, which would have to be borne by the public purse.

Decision not to issue a public interest report

We have identified failings in the Council's arrangements when dealing with the sale of the land at Sutton-Cum-Lound (the holding). In coming to our decision on whether to issue a public interest report, we have taken into account the NAO's guidance, including the sale value of the land in the context of the Council (for reference, audit materiality for 2015/16 was £18.6 million), and the Council's acceptance in discussions with us that its arrangements in relation to the sale of the holding fell short of the required standard in a number of respects, and has commissioned an external review of its Property Services in order to address the shortcomings. We have also taken into account that the Council has provided written assurances that it will include our report in the public domain on the agenda of its Governance and Ethics Committee meeting, and so the report will be publicly available on the Council's website.

Our decision is not to issue a public interest report. In our view, a report of our findings and recommendations that is presented and considered in the public domain is a proportionate outcome for this matter.

Recommendations

Whilst carrying out our review, we have identified areas for improvement in the Council's arrangements, particularly in relation to procedures and practices in the Property Function. Our written recommendations to address these areas, are made under section 27(6) of the Local Audit and Accountability Act 2014, and are set out in Attachment 2.

Legal background and relevant guidance

The Local Audit and Accountability Act 2014 is relevant for auditors when considering objections. Guidance is provided by the National Audit Office (NAO) in Auditor Guidance Notes 04 and 07 for auditors to assist in their consideration of matters brought to their attention by local government electors. The key elements are set out below.

Local Audit and Accountability Act 2014

Action under Section 28 – unlawful item of account

An item of account may be contrary to law if, amongst other grounds, it is an illegal accounting entry and/or expenditure that:

- The audited body had no power to incur;
- Has been incurred where the audited body failed to exercise its discretion reasonably and the level of expenditure is unreasonable;
- The audited body incurred without authority; and/or
- The audited body incurred where it failed to comply with a mandatory procedural requirement.

We have a discretionary power to apply to the Court for a declaration that an item of account is contrary to law. Factors that we may consider when exercising our discretion include whether:

- An audited body acknowledges that it has an item of account which is contrary to law;
- The issue involved is one of national significance;
- The issue involved is one of local importance;
- The sums of money involved are large;
- An important legal point or principle is at stake; or
- The unlawful expenditure is continuing.

Action under Section 27 – report in the public interest

We have discretion whether to make a report in the public interest where we consider there is a matter that should be considered by the audited body or brought to the attention of the public. Factors that we may take into account when considering making a report in the public interest include whether it is necessary to:

- Ensure a matter is considered by the audited body;

- Ensure a matter is brought to the attention of the public;
- Encourage the audited body to take appropriate action;
- Highlight an audited body's failure to take action or respond; or
- Express our view as an impartial person.

The following are reasons why we might consider not making a report in the public interest:

- The audited body has already taken action to remedy the deficiencies;
- It would unnecessarily undermine public confidence in the audited body;
- No actual or only small losses have been incurred; or
- The matter involves a technical failing with no real consequences.

Other considerations and possible outcomes

Other factors that we need to consider when deciding what action (if any) to take include:

- The cost, against the benefits, of taking a particular course of action;
- The significance of the issue;
- What the proportionate response would be;
- Whether there are issues of principle or legal interpretation that need to be determined;
- Which action would be in the public interest;
- Whether the issue is likely to reoccur; and
- What course of action (if any) would make a difference for the future.

Possible outcomes from deciding on an issue or objection, which are not all mutually exclusive, include:

- Taking no action;
- Referring the issue to the audited body to consider;
- Writing a letter or report to the audited body, setting out matters that we want to draw to the attention of its officers and elected Members;
- Including matters in our Annual Audit Letter;
- Making statutory recommendations under Section 27 or paragraph 2 of Schedule 7 of the Act;
- Issuing a public interest report;
- Applying to the court for a declaration;
- Serving an advisory notice (schedule 8 of the Local Audit and Accountability Act 2014); or

- Seeking judicial review of a decision of the authority (section 31 of the Local Audit and Accountability Act 2014)¹.

Work carried out

We accepted your objection on 17 April 2017, following the Local Government Ombudsman (LGO) issuing its final report on this matter.

In terms of your objection, whether specifically referred to in this letter or not, we have considered the written submissions of both you and the Council, reviewed documentation provided by the Council and by third parties, and where appropriate, sought professional and legal advice.

An index to the material documents considered is listed in Attachment 1. We have not provided the material documents with this decision as they were provided previously with our provisional views and there have been no changes to them since then. We have however left the references to the various material documents in this decision letter.

Approach

We have taken into account all of the information available to us and considered it in relation to our responsibilities. Also, both the LGO and Nottinghamshire Police have considered the concerns that you raised with them in relation to their respective responsibilities, and we have liaised with them as necessary in relation to our responsibilities.

As part of these discussions we noted that neither Nottinghamshire Police nor the LGO had identified any concerns in the relationship between one of the bidders (referred to as Bidder A throughout this letter) and the Council. More specifically Nottinghamshire Police decided not to take forward any case, including any charges under the 'misuse of public office' route. We also noted that the LGO concluded that there were faults in the Council's decision making, but that these were not sufficient for the LGO to conclude that the sale should have been made to bidder B.

As a result of our discussions with both Nottinghamshire Police and the LGO and what we have noted above, we determined that we should keep in mind the possibility that the relationship between the Council and Bidder A was inappropriate and had unduly influenced the Council's decision whilst undertaking our work on considering the objection. However, as no specific instances of an improper relationship between bidder A and the Council had been identified by the other parties referred to above, we did not take forward any specific matters when considering this objection.

Having completed our review of the sale and not having identified any concerns regarding the nature of the relationship between the Council and Bidder A we determined that there was no need to seek a specific legal opinion on this particular matter.

We have set out our findings from considering the overall objection in the next section.

¹ Under section 31 of the Local Audit and Accountability Act 2014, auditors can apply for judicial review of a decision of that authority, or of a failure by that authority to act, which it is reasonable to believe would have an effect on the accounts of that body.

We have identified a number of areas where the Council's arrangements should be improved. We have set out our recommendations based on our findings (set out in Attachment 2), and included the Council's responses.

When coming to our decision on the lawfulness of the sale of land at Sutton Cum Lound ('the holding' in this report), and whether a public interest report is appropriate, we have considered the legal background and guidance as set out above.

We have also taken into account that the Council has provided a written commitment to take our report on our findings to its Governance and Ethics Committee in public session.

Findings

We have set our findings out below in chronological order.

Committee consideration of the Council's Farm and Smallholdings Portfolio

Officers provided a paper to the Finance and Property Committee (the "Committee") titled "*Nottinghamshire County Council Farm and Smallholdings Portfolio*" (**Document A and Exempt Document A1**) at its meeting on 12 October 2015. The paper set out options for the future management of the Council's rural portfolio of holdings and made recommendations for consolidation of the Estate. The paper contained general information about the portfolio, including the current use of the holdings, estimated capital value and rental income. It also summarised the holdings into two categories, being;

Category A – Holdings considered to have '*short to medium term significant development potential*'; and

Category B – Holdings considered to have '*limited or no potential for significant development*'.

All five holdings in Category B were recommended for disposal, and the Committee approved the recommendation. The holding was included in Category B, described as '*Cross Roads Farm, Sutton Cum Lound*'.

We note that the paper did not refer to the fact that the existing tenant of the holding had a rental agreement that required the Council to give 12 months' notice on 1 October. In our view this was a relevant factor for the Committee's overall considerations, as it meant that if the holding were to be marketed in the near future, any buyer other than the existing tenant would need to wait until 1 October 2016 to give notice, and would only be able to gain access to the land from 1 October 2017. Whilst this may not be relevant for the Committee's strategic decision to sell the holding, we consider that it is relevant for any resulting decision on the timing of the sale. This is because following Committee approval of the sale, the timing of the marketing of the holding was in the officers' gift.

Arranging for the disposal of the holding

Following the Committee's approval, officers commenced the disposal process for the holding. Officers documented the operational decision (**Document B**) for approval to dispose of the holding, and the appointment of a land agent. The operational decision was approved by the Service Director – Transport, Property and Environment on 3 November 2015. We note that the operational decision states that an overage percentage of 30% was to be applied to the holding over 25 years, which is different to the percentage (25%) and number of years (50) in the subsequent marketing material (**Document C**) of the holding. These inconsistencies appear to have been administrative errors in the operational decision document – there is no repeat of the operational decision figures in any other documentation that we have seen.

The operational decision includes an observation that the Council *'should get Vacant Possession price or near it as new owner can have access from October 17 (12 month notice can be given on 1 October, so first opportunity is 1 October 2016.)'*

Officers engaged a land agent. In an email dated 19 October 2015 (**Document D**) to the Council the land agent has referred to *'your requirements to dispose of this land swiftly'*.

We have been unable to establish why officers wanted to move *'swiftly'*. The Service Director for Finance, Procurement & Improvement, the Council's S151 officer now and at the time, has told us that he is not aware of any reason for this motivation.

Officers were aware that by proceeding with the sale soon after the Committee approval that any potential non-tenant buyer would face a delay in obtaining vacant possession, but as noted above they did not consider that this would affect the Council's ability to *'obtain Vacant Possession price or near to it'*. We note that subsequently the land agent commented in the email dated 19 October 2015 that *'matters working against value on this property include lack of vacant possession potential until October 2017'*. We calculate that any potential buyers would be due to receive gross rent of £6,750 per annum from the existing tenant, which would have equated to a gross rate of return of 0.675% per annum on the expected purchase price for the holding of £1 million.

In our view, the disposal timetable did not maximise the potential interest from non-tenants. The land agent's comments relating to both the potential impact of the tenant being in situ until 1 October 2017, alongside the relatively low rental level, offered the opportunity for officers to pause and reflect. However, officers chose to proceed.

Marketing the holding

Officers discussed the most appropriate method to sell the holding with the appointed land agent. Officers accepted the land agent's recommendation to offer the holding under informal tender (officers' description) /private treaty (the land agent's description). One consequence of this decision was that there could be negotiation up to the point of the sale contract being signed, rather than for example an open auction, where there is a binding contract *'at the fall of the hammer'*. The land agent marketed the holding in November 2015, and the marketing material states that a 25% overage applies to the land for 50 years after the sale.

The land agent received several expressions of interest in the disposal of the holding. Officers and the land agent agreed to set a *'best and final offer'* deadline of 18 December 2015.

Parish Clerk comments on the holding

The Parish Clerk Sutton ('the Parish Clerk') wrote to the Council on 10 November 2015 and 9 December 2015 regarding the proposed sale (**Document E**). The email of 9 December 2015 stated that the Parish Council was developing a Neighbourhood Plan, and one of their *'favoured sites'* was a piece of land within the holding. Officers have subsequently stated that their view was that the possibility of the strip of land being developed remained remote (**Document I – points 7, 9 and 14**). There is no documentation available of any such consideration by officers at the time of the Parish Clerk's observations.

As noted above, in the paper to the Committee on 12 October 2015, the holding had been placed in Category B, described as *'Holdings considered to have limited or no potential for significant development'*. In our view officers should have at least considered if the Parish Clerk's comments meant that the element of the holding referred to - the *'favoured site'* - should be considered for re-allocation to Category A, *'Holdings with short to medium term significant development potential'*.

Bids received

The land agent reported (**Document F**) to officers that there were two bids received by the deadline of 18 December 2015. One bid ('Bid A') offered a lower amount than the other, but with an escalating element that increased the final offer to £1,000 above any other bid, up to a set ceiling amount. The other bid ('Bid B') was for a set amount (higher than Bid A's starting point, but below its ceiling amount), but offered a higher overage of 35%.

We noted that the letter from the land agent to the Council setting out the details of the two bids did not correctly report the ceiling amount of the escalating element of Bid A. The ceiling amount that they reported was £4,000 higher than the amount actually offered in Bid A (**Document G**). In addition, the written description of the maximum amount in Bid A was different to both the actual bid and the incorrectly reported number in that letter. The land agent is not able to provide an explanation for what appear to be administrative errors.

Whilst we accept that officers had no way of knowing that the incorrect figure had been reported by the land agent, careful scrutiny of the letter would have afforded the opportunity to challenge why the numerical figure in the letter was different to the written description of it, and may have enabled a correction to be made.

The nature of the respective bids meant that there were two complicating factors that officers needed to consider. These were the escalating element in Bid A (see (i) below), and the higher percentage overage bid in Bid B (see (ii) below).

(i) Escalating element

There is no documentation of officers' consideration of the escalating element of Bid A. Officers have confirmed to us that the Council had no policy relating to escalating bids. In addition, the Service Director Environment, Transport and Property confirmed that neither he nor any of the Property team had ever encountered an escalating bid in their professional careers. The marketing material made no reference to the acceptability or otherwise of escalating bids (**Document C**).

(ii) Higher percentage overage

There is no documentation available of officers' consideration prior to the Committee on 25 January 2016 (which approved the recommendation to accept Bid A) of the higher overage offered in Bid B.

Officers have stated (**Document I**) to us that overage is a complicated matter as each agreement is subject to many factors, and so is difficult to quantify. They consequently did not attribute any additional value to Bid B in respect of the higher percentage overage when evaluating the bids. We consider the overage matter later in relation to events after the Committee's approval of Bid A.

The land agent has confirmed to us (**Document J**) that in the agricultural sector in their view *‘while escalating bids are not unheard of they are rare and in my experience it has been up to the vendor whether to accept them or not.’* In our view, the absence of either a Council policy on or officer experience of escalating bids, together with there being no reference in the marketing material, meant that officers should have sought advice/guidance as to the acceptability of the escalating bid before proceeding. This could have encompassed consultation with Council colleagues specialising in legal and governance matters, and potentially Members (especially if a policy were to be needed). Officers decided that the escalating element of Bid A was acceptable, but did not document their reasoning.

Officers’ decision on which bid to propose to Committee for acceptance

Officers considered the two bids notified by the land agent. Bid B was lower than the maximum of Bid A’s escalating ceiling amount. Officers did not attribute any value to the additional overage offered by Bidder B. The result was that officers assessed that Bid A was of a higher value.

Officers informed the land agent that they intended to recommend to the Committee at its meeting on 25 January 2016 that it should accept Bid A. The land agent informed the winning bidder on 23 December 2015 of the proposed outcome (**Document K**). The land agent confirmed the proposed sale price with Bidder A, being the amount offered in Bid B plus Bid A’s escalating element of £1,000 (the ‘proposed sale price’).

Revised bid received

On 18 January 2016, Bidder B offered a revised bid via the land agent. The revision was an additional £50,000 (**Document L**), whilst retaining the 35% overage as part of the offer. As the sale was being conducted under informal tender/private treaty, our understanding is that the Council had discretion to accept the bid, despite having asked for best and final offers by 18 December 2015.

Officers considered that the revised Bid B still did not exceed the ceiling amount of Bid A (there is no documentation of this evaluation). Officers confirmed to us that their evaluation of the revised Bid B did not attribute any value to the additional overage.

The Council needed to decide if the revised bid was to be treated as valid. If the Council treated the revised bid as valid, then the proposed sale price in the land agent’s letter of 23 December 2015 no longer constituted ‘the highest other bid plus £1,000’ – it was £49,000 lower than the revised Bid B. If the Council decided that it wished to honour the ‘best and final’ bids received on 18 December 2015, then the revised bid would be rejected.

On 21 January 2016 (**Document M**) the Estates Surveyor emailed the land agent to instruct them to revert to Bidder A to request their best and final offer, to be received by 25 January 2016. This was the date of the Committee meeting that was to consider officers’ recommendation for acceptance of Bid A. This email appears to indicate that officers regarded the revised Bid B as being valid in this process. This is in contrast to other statements made by officers to the effect that the Council should regard the 18 December bids as final. We have considered this apparent contradiction later in this report.

There is no further documentation available at the Council nor the land agent in relation to any further discussions in relation to any further revision to Bid A prior to the Committee on 25 January 2016. Officers made a reference to the land agent emailing the Council to the effect that the winning bidder complained that a late bid had been forwarded to the Council. Whatever discussions took place, there was no uplift to the amount of Bid A, as the amount of Bid A presented to the Committee was as the same as the proposed sale price in the land agent's letter of 23 December 2015.

We have reviewed the offers made, including the effect of the escalating element. We calculate that the revised Bid B was £1,396 lower than the ceiling amount of Bid A. Applying the £1,000 escalating element means that there is £396 headroom between the revised Bid B and Bid A's ceiling amount. Using the erroneous figure supplied by the land agent, that headroom would have been £4,396. In line with officers' approach at this stage these calculations do not attribute any value to the additional overage offered by Bidder B.

Finance and Property Committee, 25 January 2016

Officers submitted a paper (**Document N and Exempt document N1**) to the Committee meeting on 25 January 2016, setting out the background to the proposed land sale. The paper included a recommendation that *'approval is given to the highest bid for the sale, subject to contract....as set out in the exempt appendix'*. The exempt appendix contained *'information and advice'*. This included the *'best and final offers'*, and lists the two bids received on 18 December 2015. Officers included a note explaining that the £1,000 difference between the bids was as a result of the escalating bid element.

There is a further note in the exempt appendix that states that *'the sale will be subject to an uplift clause. It is thought that there may be limited future development potential to the West of Sutton Lane which would mirror the properties to the East of Sutton Lane, effectively squaring off the village. This would however be subject to a policy change by the Local Planning Authority.'* This is the strip of land that the Parish Clerk was referring to in his emails to the Council, but there is no reference to the Parish Clerk's comments (eg relating to *'favoured site'*) within the report, and officers have confirmed that the Committee was not made aware of them.

In addition, the paper and the appendix make no reference to the revised Bid B or the Council's subsequent instruction to the land agent to approach Bidder A for a further *'best and final offer'*. Officers did not include any evaluation of the additional overage offered by Bidder B.

We accept that officers have to make judgements regarding the amount of information to be provided to Members when compiling reports, and that it is important not to provide too much detail. However, in our view officers should have made the Committee aware of the revised Bid B, including that it was higher than the amount of the proposed winning Bid A as presented in the exempt appendix, and why they had decided not to accept it. Additionally we consider that officers should have reported the Parish Clerk's comments to the Committee, and that the Committee should have been invited to consider if it wished to revisit its approval of the whole of the holding being classified as *'Holdings considered to have limited or no potential for significant development'*.

The Committee agreed to the officers' proposal to accept Bid A based on the information provided, and the land agent informed the two bidders of the outcome.

Challenge by the failed bidder

In a letter dated 5 February 2016 (**Document O**) to the Service Director – Environment Transport and Property, Bidder B raised a number of concerns in relation to the proposed land sale, including whether full consideration had been given to his bid, in particular the offer of additional overage and an acre of the land for Community Benefit.

The Service Director – Environment Transport and Property responded on 18 February 2016 (**Document P**). He stated that the additional overage and the offer of land for the community *‘were not conditions under which offers were invited. It is thus the Council’s privilege as to whether these are taken into account.’*

In respect of the additional overage, the letter states that *‘No planning consent exists for any alternative use and therefore there was no uplift to quantify.’*

Bidder B emailed the Service Director – Environment Transport and Property on 18 March 2016 (**Document Q**) and stated his view that the value of the increased overage offer *‘should not have been cast aside.’* He referred to the Village Plan highlighting an area of the land as having building potential. He also referred to the case of *‘London Jewish High School v Barnet Council’* which he stated *‘held that whilst overage payments were only ‘perceived benefits’ the Council was right to accept them as part of the price, even though they were based on some future planning application’.* He expressed concern that the Council had not met its responsibility to obtain best value under S123 of the Local Government Act 1972. He also stated that he was considering a judicial review.

Value of additional overage

On 22 March 2016 the Estates Surveyor documented his calculation that Bid B’s additional overage bid had a value of £8,769 (**Document R**). We note that Bidder B’s view that the value was considerably higher.

We calculate that if £8,769 is added to the revised Bid B received on 18 January 2016 then the resulting total of the revised Bid B exceeds the ceiling amount of Bid A. This would indicate that there is in theory at least an arguable case that Bid B could now be regarded as the highest bid. Any such evaluation of the respective bids would need to take into account the uncertainty factor associated with the overage, and would also require a clear decision as to the acceptability of the revised bid made on 18 January 2016, and indeed the escalating bid itself. However, there is no evidence that officers sought to review their overall bid evaluation in the light of the Estates Surveyor’s calculation of the value of the additional overage. In our view officers’ evaluation of the potential impact of the additional overage was inadequate.

We also calculate that the £4,000 error in the land agent’s letter regarding the ceiling amount of Bid A does not have any impact on our observations or conclusions (**Attachment 3**).

We have noted that you consider that the value of the additional overage as calculated by the Council is an under-estimate. In your response to our provisional views you have provided a calculation estimate that the additional overage is more likely to be in excess of £60,000. It may be that this estimate is more accurate than the estimate originally put forward by the Council, due to it being based on the development that has been given planning permission by Bassetlaw District Council in May 2019. However, for the reasons set out in this letter (even with the updated information using your estimate of the overage), we do not consider that we would change our decision regarding the objection before us.

Internal consultation

On 23 March 2016 (**Document S**) the Estates Surveyor sought legal advice internally via email on the Council's position in relation to the potential judicial review, and stated that the aim was *'to complete the sale before the 31/3/2016 year end.'*

The Team Manager – Property and Strategy was copied in to Estate Surveyor's email and provided comments, including that at this stage *'contracts are not exchanged, so if it was felt that it was unsafe to proceed, then we are not yet contractually committed and could pull back'* (**Document T**). He noted that this would mean remarketing the land. He had *'little doubt that it WILL sell'*, but noted that the proceeds would be in the following financial year. He also commented that the revised Bid B was *'an unsolicited offer'* that *'was made a MONTH after the 'best and final bids' deadline'*, and stated his view that it would not be appropriate for the Council to proceed with a bid so long after the *'clearly stated bid deadline'*.

There is an apparent contradiction between the Team Manager – Property and Strategy's observation that it was not appropriate to proceed with the revised bid, and the Estate Surveyor's instruction on 21 January 2016 that Bidder A be asked for their best and final offer following receipt of it. There is no evidence that officers identified or reviewed this contradiction, nor of any consideration of the Team Manager – Property and Strategy's observation that there was an option to *'pull back'*. In our view this is indicative of the lack of a coherent strategy for selling the holding.

External legal consultation

Officers referred the issues raised by the failed bidder to external legal advisors on 23 March 2016. Following various additional communications between the Council and its legal advisors, to clarify a number of issues, the Council received the final legal advice on 30 March 2016. In summary, the Council's legal advice concluded that a decision to accept Bid A would, on balance, be lawful. The legal advice did also refer to improvements to documentation that would help to support the decision making of the Council for the sale of the holding.

As part of our discussions with the Council we set out that we considered that the legal advice sought and received by the Council would be considered as material evidence that we would use to reach a decision on the objection, and thus share with you. However, the Council has declined to waive its legal privilege for that advice to be shared with you.

Consequently, we determined that we would need to seek our own legal advice, in order to assist us to reach a decision on the objection, and be able to share that advice with you to assist in understanding the decision we have come to.

We received the final legal advice from our legal advisors, Bates Wells & Braithwaite (BWB), on 26 March 2019 (**Document U**). In overall terms BWB consider that the situation is not clear cut, with arguments on both sides regarding the reasonableness of the Council's decision. However, BWB have concluded, on balance, that the Council may have acted unlawfully in its decision to complete the sale of the holding as described in this decision and statement of reasons in terms of meeting the duty under s123(2) of the Local Government Act 1972 (LGA Act 1972)².

² We have used the term 'may' because ultimately it is only a court that can determine whether there is an actual unlawful item of account.

We have repeated the BWB main conclusions below, but note that BWB's advice is confidential and privileged and providing this extract does not amount to a waiver of privilege. No other person is entitled to rely on this advice.

The Council had the power (or vires) to dispose of the Holding under section 123(1) LGA 1972, provided that it met the requirements of section 123 and otherwise complied with public law principles.

However, in our view it is arguable that the Council acted in breach of its duty under section 123(2) LGA 1972 to achieve the best consideration for the Holding, by failing to consider relevant considerations. Although there are arguments both ways, in our view the better argument is that the Council (acting through its Committee) acted unlawfully in failing to consider the revised bid and whether it could obtain a better price for the Holding than had been provisionally accepted on 23 December 2015. This is on the basis that no reasonable authority would have failed to consider whether it could have obtained a better price for the Holding further to its duty under section 123 LGA 1972 by entertaining the late bid (notwithstanding that it may have been entitled to reject the late bid for ethical reasons, had it considered it).

It is arguable that the Council failed to take into account other factors (the escalating element of Bidder A's bid, the additional overage element of Bidder B's original bid, and the Parish Clerk's comments about potential development of the Holding), but we do not think that any of these on their own render the Council's disposal of the land unlawful. They could however have a cumulative impact along with the failure to take into account Bidder B's higher bid.

We do not think the failure to implement a formal bidding process had a material impact on the Council's ability to achieve best consideration in this case.

For the avoidance of doubt, we are not suggesting that Bidder B should have won the bid, but that the Council may have acted in breach of section 123(2) by failing to consider whether it could have achieved better consideration in light of Bidder B's revised bid. Moreover, it is important to note that even if Bidder B had brought a successful judicial review on the above grounds (or others), there is no guarantee that the Court would have granted Bidder B any remedy.

Sale of the holding and the sale contract

The sale to Bidder A went ahead on 31 March 2016. We note that the objector has correctly pointed out to officers that the Council's standard bribery and corruption clauses were omitted from the contract. The Council has obtained confirmation from its legal advisors that in their view the absence of the clauses did not affect the legality of the transaction itself, nor has it jeopardised the Council's position unduly should evidence of inducement, reward or other bribery emerge. Whilst the omission of the clauses was regrettable, we are satisfied that this did not remove the legal obligations on both parties in respect of bribery and corruption. We note that the contract included the overage term of 50 years at the 25% rate.

Response to Bidder B

On 8 April 2016 the Service Director – Environment, Transport and Property responded (**Document V**) to the Bidder B's email of 18 March 2016. He stated that he was '*satisfied that the County Council has undertaken a proper and lawful approach to the marketing and ultimately sale*' of the holding. He also stated that '*the two bids were evaluated in respect of both the purchase price offered and also the overage proposal advanced. It is accepted that an offer of overage should be considered in the context of the financial value of a bid and in this case such consideration occurred.*'

We note that the Council's response states that the overage proposal was evaluated in respect of both Bid B and revised Bid B. However, we consider that the response is confusing. It does not make clear that the evaluation attributed no value to the additional overage when the bids were presented to the Committee.

In relation to the revised Bid B, the Service Director – Environment, Transport and Property's letter dated 8 April 2016 stated that '*in our view, it would have been wrong for the County Council to entertain the submission of late bids.....I am satisfied that this is, ethically, the appropriate approach to adopt.*'

We consider that this stance contradicts the Estates Surveyor's instruction to the land agent on 21 January 2016 (**Document M**) to revert to Bidder A to request their best and final offer.

As noted above, we have no evidence that the financial value of the additional overage as documented on 22 March 2016 (£8,769) was at any stage factored into the total financial value of the revised Bid B for comparative purposes. Our calculation is that the total of the revised Bid B plus the £8,769 is higher than the ceiling amount offered by Bid A. We note that the relevance of this calculation is dependent on whether the revised Bid B is regarded as valid.

In our view, officers' decision processes in response to revised Bid B were poorly co-ordinated and documented, and inconsistent.

Failure to pause and reflect

There were a number of opportunities throughout the sale process for the officers involved to pause and reflect, and to consult on the way forward. An overriding aim to complete the sale by 31 March 2016 appears to have been a significant barrier to doing this. We have not been provided with any reasoning for this, and the Council's S151 officer is similarly unclear as to why the officers involved considered this to be so important.

In terms of interactions with Members, we have already stated our view that officers should have made the Committee aware of the tenancy notice terms, of the Parish Clerk's comments, that there was no policy on or no officer experience of escalating bids, and that there had been a revised Bid B and that Bidder A had been approached in relation to it. In addition, officers do not appear to have considered the option to consult with the Committee regarding the complexities and challenges that arose after its meeting on 25 January 2016. In our view officers should have at least considered the need to revert to Committee to enable it to consider the option of re-running the process to sell the holding. We recognise that there is no way of determining what the Committee would have decided had it had all of the facts and issues available to it.

Subsequent events noted for information

Whilst we have been carrying out our review we have been notified of two matters that we consider to be of interest.

Firstly, the Council has commissioned an external review of the Property Services in recognition that transformation of its practices is required. The review is on-going. Officers have confirmed to us that the results of the review will be reported at Committee in open session.

Secondly, we understand that an outline planning application for building residential properties was made in 2018, developing the land highlighted by the Parish Clerk as being a 'favoured site'. Whilst we note that the application was refused, we understand that a second application has been submitted. (We have also noted that the area referred to by the Parish Clerk is included as a potential site for development in the Sutton Cum Lound Neighbourhood Plan.³) We consider that it highlights the failure to report the Parish Clerk's comments to the Committee regarding the potential for developing an element of the holding.

Consideration of other observations in your letter of objection

Your letter of objection dated 2 August 2016 refers to other matters which we do not consider to be formally part of our consideration as to the lawfulness of the Council's disposal of land at Sutton Cum Lound, or do not accept as valid. We have included comments on them below for completeness.

You have questioned why the Council did not serve notice to the existing tenant prior to 1 October 2015, which would have allowed vacant possession by 1 October 2016. We accept the officers' view that it would not have been appropriate to serve notice to the existing tenant prior to 1 October 2015, before the Committee decision, as this would have meant that officers were effectively pre-judging the Committee – there would also be a risk that there would be no tenant and no approval to sell. We have commented on the timing of the sale being a potential barrier to non-tenants as we consider that the issue was the timing of the marketing and sale.

You have expressed concern that the Council allowed the holding to be undersold, and that it failed to achieve the best possible consideration, and you refer to as its legal and fiduciary duty to obtain the best price reasonably obtainable. You have referred to Section 123 of the Local Government Act 1972 which states '*except with the consent of The Secretary of State, a council shall not dispose of land under this section otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained.*' Officers have stated that they did not seek Secretary of State approval as they sought to achieve best value (Councils also have discretion up to an undervalue of £2 million where they decide not to obtain best value under certain circumstances). We have noted that the acceptance of an escalating bid builds in an inherent expectation that the price to be paid will be less than the full amount that the bidder is prepared to pay. However, in this case, the difference is small in the context of the Council. In terms of achieving best value, in the event, the Council obtained near to its target price for the land.

³ The Sutton-cum-Lound Neighbourhood Plan has been formally 'made' by Bassetlaw District Council following the Referendum held on 15 February 2018. The Neighbourhood Plan now forms part of the existing statutory Local Development Plan for Bassetlaw and shall be used when either applying for planning permission or determining planning applications within the Neighbourhood Plan Area.



KPMG LLP

*Nottinghamshire County Council: Audit of accounts for the year ended 31 March 2016 – decision
and statement of reasons
18 December 2019*

In your letter of objection you challenged the Council's historical management of the holding, in particular in relation to the level of rent charged to the tenant. As set out in my letter to you on 12 April 2017, objections must relate to an item in the year of account for which the audit is still open, and I did not accept this element of your objection. I note that in a letter to you dated 5 May 2016 the Council acknowledged that it had failed to carry out a rent review of the holding in 2009, and that the review should have been carried out by a Council officer. The letter clarified that rents were looked at across the portfolio in 2014 and a rolling process of rent review was begun using external agents.

Right of appeal

You have the right to appeal our decision not to apply for a declaration under section 28(3) of the Local Audit and Accountability Act 2014. Please note that there is no right to appeal against a decision not to issue a public interest report. Should you wish to do so, you must issue your appeal within the period of 21 days beginning with the day after you receive this statement of written reasons.

Should you wish to appeal this decision, we recommend that you seek legal advice.

We have copied this decision to the Council.

Yours sincerely

Phil Johnstone
Director

For and on behalf of KPMG LLP



Attachment 1

Index to material evidence to support our decision

Ref	Document details
A	<i>Nottinghamshire County Council Farm and Smallholdings Portfolio</i> - Finance and Property Committee - 12 October 2015 – publicly available report
A1	<i>Nottinghamshire County Council Farm and Smallholdings Portfolio</i> - Finance and Property Committee - 12 October 2015 - Exempt appendix
B	Operational decision to approve the disposal of the holding – 3 November 2015
C	Marketing material for the holding
D	Land agent email to the Council - 19 October 2015
E	Parish Clerk Sutton emails to the Council - 10 November and 9 December 2015
F	Land agent's letter to the Council – 18 December 2015
G	Bid A – 18 December 2015
H	Copy of the original objection addressed to KPMG LLP – this version has been date stamped by the Council (3 August 2016) and has been annotated with numbers to reflect the separate points made, which are used in material evidence Document I.
I	Officer comments to KPMG LLP in response to the objection, including comments on overage
J	Correspondence between KPMG LLP and the land agent - various
K	Land agent's confirmation to the winning bidder – 23 December 2015
L	Revised Bid B submitted to the land agent – 18 January 2016
M	Email from Estates Surveyor to the land agent requesting best and final offer – 21 January 2016
N	<i>Sale of 49.52 Hectares (122.3 acres) agricultural land at Sutton Cum Lound DN22 8PY</i> - Finance and Performance Committee - 25 January 2016 - publicly available report
N1	<i>Sale of 49.52 Hectares (122.3 acres) agricultural land at Sutton Cum Lound DN22 8PY</i> - Finance and Performance Committee - 25 January 2016 - exempt appendix
O	Bidder B letter to the Service Director – Environment Transport and Property - 5 February 2016
P	Service Director – Environment Transport and Property letter to Bidder B - 18 February 2016
Q	Bidder B email to the Service Director – Environment Transport and Property - 18 March 2016
R	Estates surveyor documentation of the calculation of the higher overage bid – 22 March 2016
S	Estates surveyor email seeking legal guidance - 23 March 2016
T	Team Manager – Property and Strategy email - 23 March 2016
U	Bates Wells and Braithwaite LLP legal advice to KPMG LLP – 26 March 2019
V	Service Director – Environment Transport and Property letter to Bidder B - 8 April 2016

Attachment 2

Recommendations

Issue	Recommendation	Response:
1) Insufficient information was provided to the Finance and Property Committee in relation to the sale of the land at Sutton-Cum-Lound (the holding). This included not informing the Committee of the vacant possession date, the observations provided by the Parish Clerk, the revised bid received on 18 January 2016 and subsequent discussions prior to the 25 January 2016 Committee meeting.	The Council should review the procedures and guidance available to officers when considering the information to be provided to Committees in respect of property disposals.	<p>The Council recognises that practice and procedure can always be improved upon and its commitment to achieving such improvements is demonstrated by the work of the Property Transformation Programme which has now been underway for some time and included an external review, the findings of which have been reported to the Council's Policy Committee in open session and where periodic progress reports have been taken over the course of the past 18 months. Alongside the ongoing work of that Transformation Programme, the Council has also made a commitment to report the outcome of the auditor's findings in respect of this matter to a public meeting of its Governance and Ethics Committee following receipt of the final report. The Council's response in respect of the recommendations made should be viewed in that overall context and against the backdrop of that commitment.</p> <p>The effective preparation of committee reports requires an author and challenge process. The authority has a report preparation process in place, so its preparation is logged and then undertaken. A professional officer's report is reviewed by an appropriately qualified senior manager and then finally reviewed by the Service Director prior to presentation. This enables a qualitative assessment process to be undertaken. In addition, all Committee reports are seen by both legal and finance colleagues as part of a sign off process. As part of the authority's property service restructure additional supervisory management levels have been introduced to ensure a more effective process for production and review of draft reports and reflection and challenge of draft documentation.</p>

Issue	Recommendation	Response:
2) The Council's Constitution requires the achievement of the best price reasonably obtainable on the open market. There was an apparent desire within the Property Team to ensure that the land sale of the holding was completed within the financial year, but it is not clear why this was the case. Officers were able to decide when the holding was marketed and sold. It is arguable that potential buyers other than the existing tenant would be discouraged by not being able to obtain vacant possession until October 2017.	The Council should have a clear process for documenting the strategy to achieve the best price reasonably obtainable on the open market for each property disposal, taking into account all relevant factors (eg social or other policy factors may not result in the highest price option being chosen).	The Council's capital programme arrangements are set out on a rolling basis which should alleviate any pressure to achieve a particular disposal by a specific date. In operational terms the approach to transactions falls into whether a sale will be achieved by informal tender/private treaty, formal tender or auction. Each approach has strengths and weaknesses. A transparent process indicating what approach has been taken and why will be developed within the transformation programme and consideration will be given to whether any additional wording is required in the Council's Constitution.
3) The Constitution provides options for the method of asset sales, including public auction, formal tender and informal tender/private treaty. However, the Council did not have a policy for deciding on which method of sale to use when selling the holding. In addition, having chosen the informal tender/private treaty route for the holding, there was no process on how to deal with the revised bid received after the date set for receipt of the 'best and final' offers.	The Council should have a policy for deciding which method of sale is to be used for property disposals, and clear procedures for each methodology. This is particularly important for methods such as informal tender where there is more flexibility for both the Council and potential purchasers.	The Council will review the provisions in the Constitution alongside the work of the transformation programme in light of this recommendation but would be wary of introducing something too prescriptive which may reduce flexibility and potentially impact on the price and public value/outcomes achieved.
4) One of the bids for the holding included an escalating element. There was no policy in relation to escalating bids, and the Property team had no experience of dealing with them. There was no reference to the acceptability or otherwise of escalating bids in the marketing of the holding.	The Council should have clear procedures setting out how to deal with unusual/'non-standard' bids and what senior officer/Member review and approval is needed.	The Council will review the provisions in the Constitution alongside the work of the transformation programme in light of this recommendation but would be wary of introducing something too prescriptive which may reduce flexibility and potentially impact on the price and public value/outcomes achieved.

Issue	Recommendation	Response:
<p>5) One of the bids received in December 2015 included an overage percentage higher than the level stipulated in the marketing material. Officers did not document their consideration of the higher amount when evaluating the bids. Officers' estimation of the potential financial value of the higher overage was not documented until 22 March 2016, following challenge from the losing bidder. There was no documentation of the impact of the estimate of the financial value of the higher overage amount on the overall financial offer.</p>	<p>The Council should ensure that there is a policy on overage that includes evaluation criteria for bids received. The Council should also ensure that the evaluation of all aspects of all bids received is appropriately documented.</p>	<p>The Council will be reviewing the section of the Council's Constitution relating to Land and Property Financial Regulations and will consider whether any changes are required, particularly where tenders are received by agents and not the Council directly. As with the previous recommendation, a key consideration will be ensuring that any changes are not too prescriptive. It is envisaged that as part of the process of recording tenders received, varying factors such as overages will be set out and analysed accordingly.</p>
<p>6) The Council commissioned external legal advice following challenge from the losing bidder. The external legal advisors made three recommendations, but there is no documented consideration of them, and two were not actioned.</p>	<p>The Council should ensure that there is documented consideration of any recommendations made by external advisors to determine if they are to be accepted. If the recommendations are accepted then there should be a process to ensure that they are actioned.</p>	<p>The Council will consider how best to document consideration of advice received and how it has been taken into account as part of good case management practice, particularly if that consideration does not form part of a report to Committee.</p>
<p>7) The Property Team commented that the pressures caused by a senior member being on secondment had contributed to the failings in arrangements.</p>	<p>The Council needs to ensure that appropriate arrangements are in place when considering the viability of internal secondments, particularly in relation to ensuring that the secondees' existing role will be covered adequately.</p>	<p>The Council will consider whether any changes to existing procedures around secondments to ensure that the Property function remains properly resourced. Resourcing issues will be monitored to ensure that cases are progressed effectively and efficiently. In particular where handovers or changes of officer takes place an effective handover process will take place. An appropriately managed and resourced team will have secondary roles to minimise disruption in the event of absence.</p>

Issue	Recommendation	Response:
8) The review of the sale of the holding has highlighted numerous instances of poor documentation of evaluation processes and decision-making, the absence of coherent strategy for sale and a lack of consistent collective thought in officers' approach. We note that the Council has commissioned a review of the Property Services.	The Council should ensure that the issues raised in this report are considered as a part of the transformation of its Property Services, and that the lessons arising from it are learnt and resolved.	The transformation programme includes areas covering strategy and also roles responsibilities and governance. The issues arising from this case and lessons learnt will be incorporated into the appropriate areas.

Attachment 3

Calculation of bids received

	Bid A				Bid B	
Original Bid	£1,051,105	(A)		Original Bid	£1,050,105	(D)
Ceiling amount (reported by land agent to Council)	£1,105,501	(B)		Revised Bid	£1,100,105	(E)
Ceiling amount (actual amount in the bid)	£1,101,501	(C)		Revised Bid (plus overage)	£1,108,874	(F)

Notes

Original Bids

- the bids received by the original deadline of 18 December 2016 resulted in Bid A (A) being higher than Bid B (D) by £1,000 due to the £1,000 escalating element of Bid A.

Revised Bid (no amount attributed to the additional overage)

- the revised Bid B (E) made on 18 January 2016 was lower than the ceiling amount of bid A (for both the amounts reported to the Council by the land agent (B) and the actual level (C)).
- if the escalating element of £1,000 were to be added to Revised bid (E), the amount payable by bidder A would be £1,101,105. This is £396 lower than the actual ceiling amount of Bid A (C), indicating that Bid A would remain the highest, regardless of the error in the ceiling amount reported to the Council. Note that this is on the basis of no value being attributed to the additional overage offer.

Revised Bid (adding in the amount attributed by officers to the additional overage)

- if the officer's valuation dated 22 March 2016 of £8,769 for the additional overage is added to the revised bid, the total value of the revised Bid B (F) is greater than the actual ceiling amount of Bid A (C) and the amount reported to the Council by the land agent.

Impact of the wrong ceiling amount being reported to the Council

- The above calculations indicate that the wrong ceiling amount being reported to the Council did not have any impact on the evaluation of the bids.