

EXECUTIVE COMMITTEE – 9 MARCH 2009
LEISURE AND COMMUNITY SAFETY POLICY AND SCRUTINY COMMITTEE –
10 MARCH 2009

PART II - NOT DELEGATED

**1. WILLIAM PENN LEISURE CENTRE REFURBISHMENT –
PROGRESS REPORT
(DCES)**

This report is NOT FOR PUBLICATION because it deals with information relating to the financial or business affairs of any particular person (including the authority holding that information), and information in respect of which a claim to legal professional privilege could be maintained in legal proceedings (paragraphs 3 and 5 of Schedule 12A).

1. Summary

1.1 This report updates Members on completion of the refurbishment of William Penn Leisure Centre following termination of the main contractor's employment.

2. Details

a) Termination

2.1 Leisure and Community Safety Policy & Scrutiny Committee received a report on 27 January 2009, which described the formal Default Notice which had been issued to Gee Construction on 9 January 2009, due to their failure 'to proceed regularly and diligently' and to carry out instructed remedial works. Gee failed to resolve these matters to the Council's satisfaction, and after taking specialist legal advice (see 2.7 below) the Council terminated Gee Construction's employment as main contractor on 2 February 2009. At Gee's request the Council's Chief Executive and officers met the Chairman and Director of Gee on 4 February in a final but unsuccessful attempt to resolve matters by negotiation.

b) Completion planning

2.2 On the day of termination officers acted to take immediate possession of the site and compound, and to make them safe and secure. Work then began to achieve the prompt and cost effective completion of the project through the direct employment of previous subcontractors under the supervision of Atkins as construction managers. A copy of the Completion Plan describing this process is enclosed as Appendix A.

2.3 The Completion Plan outlines the critical tasks required to secure completion:

- Secure site
- Condition surveys
- Develop work packages
- Issue tenders to trade contractors
- Agree fixed prices for work packages
- Appoint trade contractors and mobilise
- Work on site
- Commissioning (Hertsmere Leisure)

2.4 As of 24 February, several of these tasks were already advanced, and progress against the plan was as follows:

Task	Progress	Next action
Secure site	100%	
Condition surveys	90%	Risk report due
Agree contract structure	90%	Atkins to confirm
Identify required trades	75%	Confirm packages
Develop work packages & programme	10%	Drafts to be issued

2.5 The condition surveys have identified the details of the remedial works that will be required to correct poor or out of sequence works by Gee. This information is being used to draw up the detailed work packages. Key trades have been identified, and the first work package (for a general builder) should be issued by 27 February. An update on progress will be made to the Committee meetings.

2.6 The design team (Atkins) are preparing more detailed programmes covering both the tender and construction periods. The Construction Managers Report (Appendix B, to follow) will feature the latest version of these programmes.

c) Litigation

2.7 See '6. Legal Implications' below for a report on the adjudication referral threatened by Gee, and on legal advice received by the Council.

d) Customer Information

2.8 Following the termination of Gee's employment, a public statement was immediately displayed at the venue for the benefit of customers, and published on the Council's website. This information was updated following the commencement of the completion plan, and will be further updated as the plan proceeds in order to advise them of the likely completion date.

3. Options/Reasons for Recommendation

3.1 To update members on the refurbishment of William Penn Leisure Centre.

4. Policy/Budget Reference and Implications

4.1 The recommendations in this report are within the Council's agreed policy and budgets. The relevant policies were agreed as part of the 2009-12 Strategic Plan on 24 February 2009, and are entitled:

2.1.5 To improve and facilitate access to leisure and recreational activities

3.2.1.1 We will ensure our services provide value for money

5. Equal Opportunities, Staffing, Environmental, Community Safety, Customer Services Centre, Communications, Website and Health & Safety Implications

5.1 None specific to this report.

6. Legal Implications

6.1 The Council has recently appointed an experienced external solicitor specialising in construction litigation and disputes for advice on contractual matters, adjudication and potential litigation

6.2 Gee issued a formal Notice of Adjudication under the contract disputes procedure on 26 January 2009, advising the Council that they had applied for

the appointment of an independent adjudicator to resolve their outstanding claims for extensions of time.

6.3 The adjudication process is designed to resolve disputes within four weeks of initiation. The Council's solicitor, John Wright of city firm Bird and Bird was therefore asked to work intensively with the design team to prepare to defend Gee's detailed Referral Notice, which was due within seven days of the Notice of Adjudication. The Notice of Adjudication was served in letter form. The Notice itself is a preliminary step and the Adjudication proper does not commence until service of a Referral Notice. However no Referral Notice was received from Gee, and the Council's solicitor has also confirmed that the initial Notice of Adjudication was not delivered by Gee to the adjudication body with the result that no Adjudicator could be appointed. There is therefore no current adjudication claim against the Council.

6.4 Gee wrote to the Council on 12 February disputing the grounds under which their employment was terminated, and alleging that the Council's action constituted a 'repudiatory breach of contract'. The Council has rejected Gee's assertions through its solicitor. Although further action has been threatened, none has yet been initiated. Gee claimed to have instructed City Firm Herbert Smith. This is one of the largest litigation firms in the City, with a highly aggressive reputation.

6.5 The Council's external solicitor has recently advised that the case for recovering costs incurred due to the delayed completion of the project remains strong. Officers are currently considering the most effective legal strategy to follow.

7. Financial Implications

7.1 None specific to this report. Provision has been made in the 2009/10 capital programme for the additional costs expected to be associated with the completion of the refurbishment. Cost projections will be updated as available.

8. Equal Opportunities Implications

8.1 Relevance Test

Has a relevance test been completed for Equality Impact?	No
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A relevance test is not appropriate for this recommendation

9. Risk Management and Health & Safety Implications

9.1 The Council has agreed its risk management strategy which can be found on the website at <http://www.threerivers.gov.uk>. In addition, the risks of the proposals in the report have also been assessed against the Council's duties under Health and Safety legislation relating to employees, visitors and persons affected by our operations. The risk management implications of this report are detailed below.

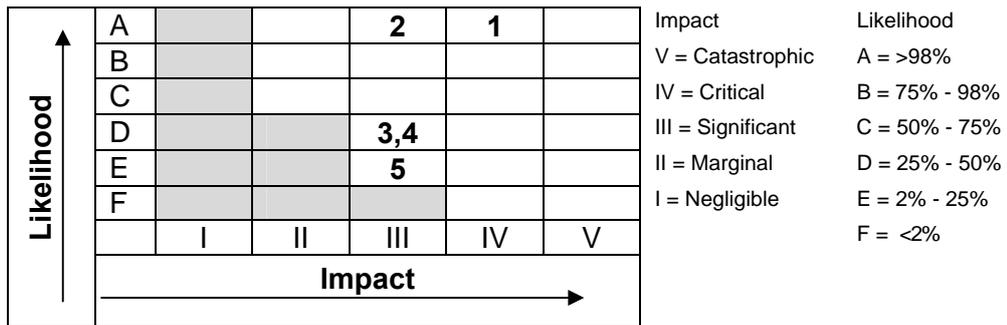
9.2 The subject of this report is covered by the Leisure service plan. Any risks resulting from this report are included in the risk register and managed within this plan.

9.3 The following table gives the risks already identified for this project, together with a scored assessment of their impact and likelihood.

Description of Risk		Impact	Likelihood
1	Project over-runs budget	IV	A

2	Project is delivered late	III	A
3	Loss of key project personnel	III	D
4	Project does not deliver the required outputs	III	D
5	Contractor fails	III	E

9.4 The above risks are plotted on the matrix below depending on the scored assessments of impact and likelihood, detailed definitions of which are included in the risk management strategy. The Council has determined its aversion to risk and is prepared to tolerate risks where the combination of impact and likelihood are plotted in the shaded area of the matrix. The remaining risks require a treatment plan.



9.5 In the officers' opinion none of the risks above, were they to come about, would seriously prejudice the achievement of the Strategic Plan and are therefore operational risks. The effectiveness of treatment plans are reviewed by the Audit Committee annually.

10. Recommendations

10.1 That the Leisure and Community Safety Policy and Scrutiny Committee instructs officers to:

- a) Continue to aim to ensure that the project is completed as soon as is practicable, within the Council's quality and financial requirements
- b) Report to members on any cost implications associated with delays to the project.
- c) Subject to the continuing external legal advice received, take action to recover remedial and other costs as far as is practicable.

10.2 That public access to the report be denied until the issue is resolved.

10.3 That public access to the report's recommendations be immediate.

Report prepared by: Patrick Martin
Leisure Performance & Contracts Manager

Background Papers

The recommendations contained in this report DO NOT constitute a KEY DECISION.

APPENDICES / ATTACHMENTS

- A Completion Plan as of 11 February 2009 (enclosed)
- B Construction Managers Report (to follow)

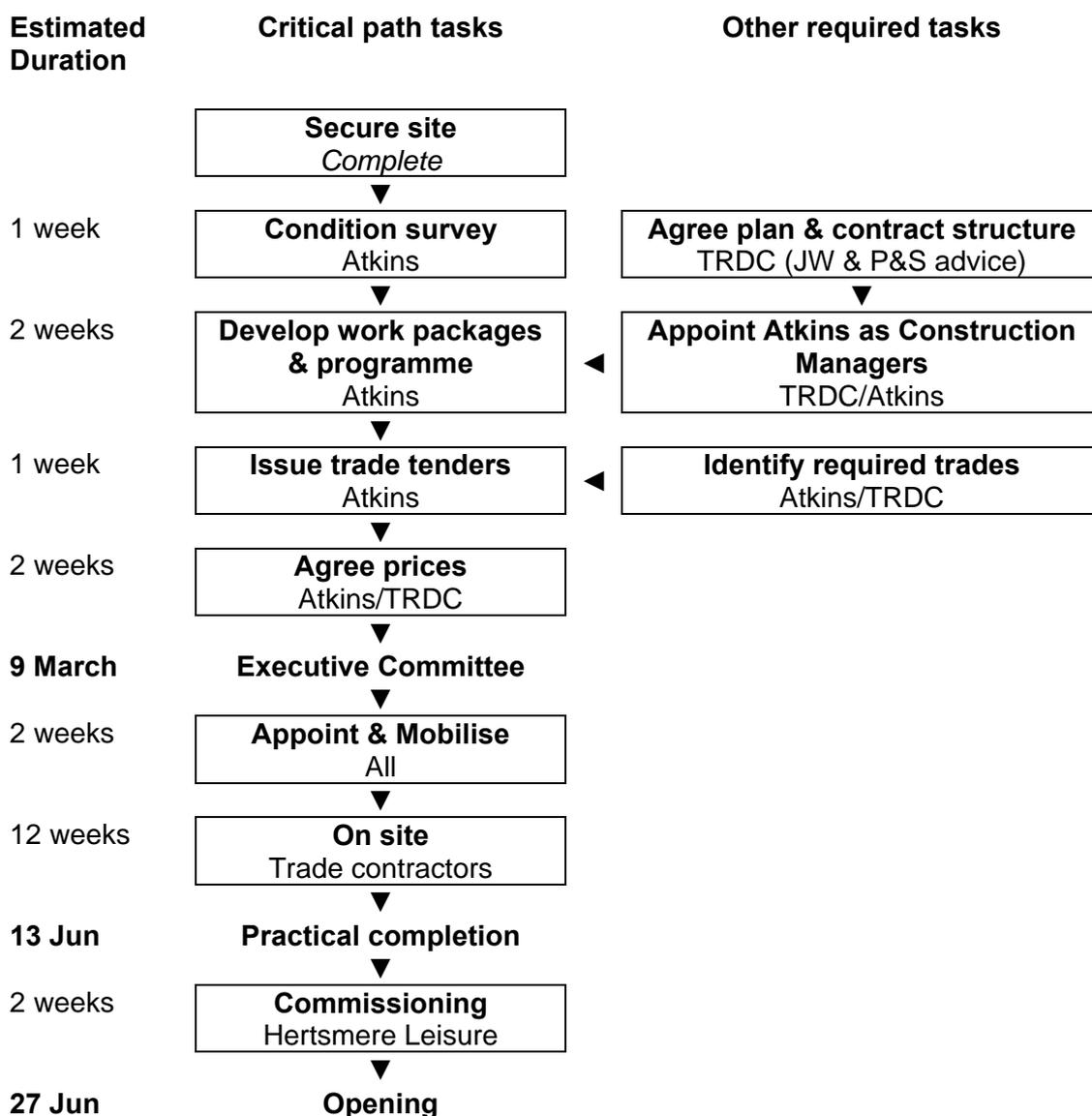
CONFIDENTIAL - WILLIAM PENN LEISURE CENTRE REFURBISHMENT

COMPLETION PLAN

1. Summary

This report summarises the method proposed for achieving the prompt and cost effective completion of the refurbishment of William Penn Leisure Centre, and describes the role of Atkins/Faithful & Gould as Construction Managers. It excludes the management of claims/litigation, and PR.

2. Process

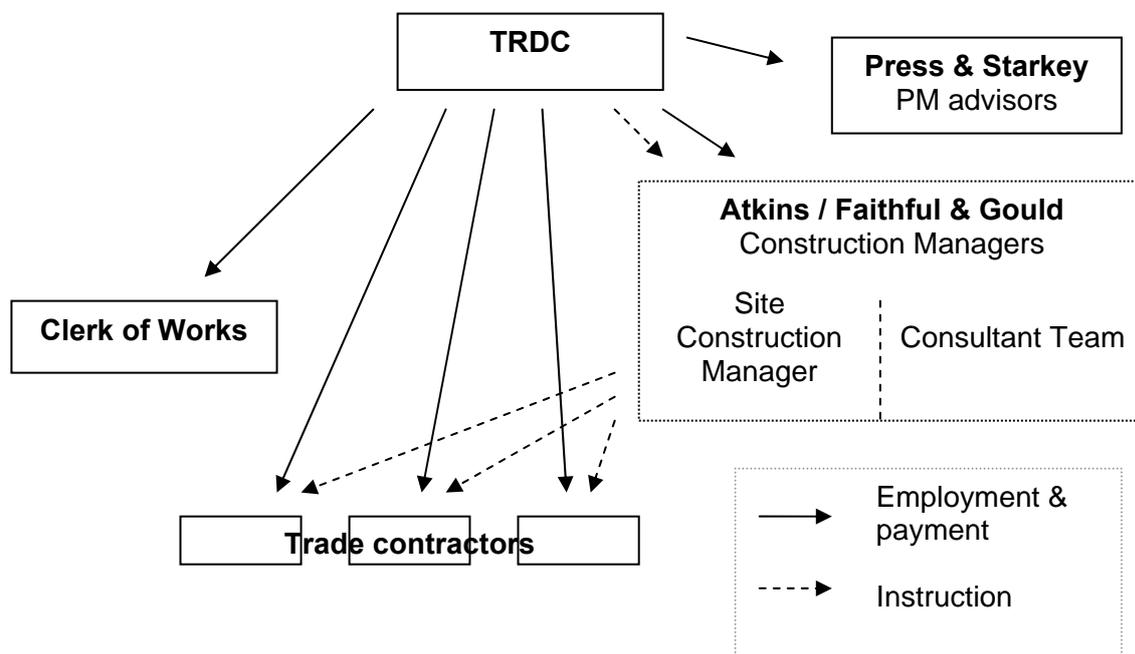


3. Progress update as of 11 Feb 09

The condition survey began on 9 February (including an independent ‘line and level’ survey which can be used for as evidence for claims) and will confirm all required remedial works. It will inform the work packages most of which will be initially issued as tenders only to previous subcontractors. A progress report covering key trades will be brought to the Executive

Committee on 9 March, prior to the awarding of trade contracts, although some preparatory work may be instructed before then in order to advance the programme.

4. Contract structure



a) Employment

TRDC will directly employ each of the trade contractors under a JCT Construction Management Trade Contract (CM/TC). Trade contracts will be for fixed prices as far as possible, but will include some daywork rates, for which provision will be made in cost projections. Provisional sums will need to be incorporated into each trade package to cover for unforeseen defective works following additional intrusive surveys of works undertaken to date.

TRDC will employ Atkins/Faithful & Gould under a Construction Management Agreement (CM/A) for a fixed price (see (5) below). Atkins will employ the Site Construction Manager (Colin Phelps) on a consultant contract, as well as the full consultant team.

TRDC will also need to place orders for the continuing provision of welfare facilities and accommodation of site operatives together with other services e.g. scaffolding, temporary works, electricity, water and a multi-services labour force etc.

TRDC will continue to retain Press & Starkey and the Clerk of Works on modified forms of their current consultant contracts.

b) Instruction & Monitoring

The management and co-ordination of the trade contractors will be the responsibility of Atkins, acting through their Site Construction Manager. All instructions will be issued by the Construction Manager.

As previously, the Clerk of Works will monitor the quality of all works, and Press & Starkey will advise TRDC on the execution of the contracts. Press & Starkey will also observe and verify valuations (see below).

c) Principal Contractor

The Construction (Design and Management) Regulations 2007 require that a Principal Contractor be identified for all construction projects:

The principal contractor is the key duty holder, who is required to ensure effective management of health and safety throughout the construction phase of the project.

The main duty of the principal contractor is to properly plan, manage and co-ordinate work during the construction phase in order to ensure that hazards are identified and risks are properly controlled.

(CDM Industry Guidance for Principal Contractors, Construction Skills, 2007)

Atkins are to confirm that a trade contractor will be acting as Principal Contractor. The CDM-C role will continue to be undertaken by Atkins.

d) Valuations

Atkins will conduct regular valuations of individual trade contracts and certify payments, observed and verified by P&S. Following receipt of these certified valuations, TRDC will then pay trade contractors directly by BACS. This will involve weekly payments and will require prompt payments and open books.

5. Control & Reporting

In order to ensure effective management of the project and control of costs, TRDC will require the following in advance from Atkins:

- Confirmation that the fee proposed in Mike Salter's letter of 7 January 2009 will cover all required services as outlined in this report, excluding the condition survey and the independent line and level survey. Atkins will also be reimbursed for the employment of the Site Construction Manager, Mr Colin Phelps, on a consultancy basis on an open book time basis. It is noted that work associated with examining and verifying contractual, financial and adjudication claims beyond 7 January 2009 is excluded from this fixed fee.
- Commitment to open accounting of costs incurred in the delivery of the scheme, including the provision of timesheets and other audit records to the Council and its agents.
- A description of the control procedures proposed including:
 - Weekly written project management reports summarising progress against programme, and listing any instructions or variations issued in the period, with their cost and/or programme implications. To include an updated projected completion date.
 - Monthly cost reports updating projections of all actual and anticipated payments to trade contractors etc.
 - A summary of the roles and responsibilities, and delegated authority of the Construction Manager, Site Construction Manager and Clerk of Works.

As well as these routine reports TRDC will require a tender report in advance of its 9 March Executive Committee meeting, providing it with adequate cost, programme and risk information in order to approve the awarding of the key trade contracts.

Press & Starkey and John Wright are also invited to provide immediate advice on this proposed contract structure, and recommendations for any improvements.

6. Risks

Outline risks which will need to be mitigated include:

- Condition survey identifies additional major remedial works
- Delays in preparation of work packages, or in tender price negotiations
- Incomplete work packages leading to delays / disputes on site
- Loss of key trades / inability to agree warranties for previous works with key trades
- Failure to manage costs on site
- Disputes between trades / failure to co-ordinate trades

7. Next Actions

- a) Atkins to confirm updated fee & contract proposal as described above. TRDC to then confirm Atkins appointment as Construction Managers
- b) Press & Starkey and John Wright to advise on proposal
- c) Early stages of plan to be progressed as described above
- d) Update and tender report to be brought to Executive Committee on 9 March and Leisure & Community Safety Policy & Scrutiny Committee on 10 March.
- e) Plan to be described to customers through refurbishment bulletins and website

Patrick Martin
Leisure Performance & Contracts Manager
11 February 2009