

## EXECUTIVE COMMITTEE – 7 JUNE 2010

### PART II – PART DELEGATED

#### 2 WILLIAM PENN LEISURE CENTRE (DCES)

***This report is NOT FOR PUBLICATION because it deals with information in respect of which a claim to legal professional privilege could be maintained in legal proceedings***

##### 1. Summary

- 1.1 To advise the Committee on options for resolving the dispute with contractor/s in relation to the refurbishment of the William Penn Leisure Centre (WPLC). This report shares with Members legal advice from the Council's solicitors Bird & Bird and is subject to legal professional privilege.

##### 2. Details

- 2.1 Members will be aware that the refurbishment of WPLC is now complete, and initial informal feedback from users and Hertsmere Leisure, who manages the venue on behalf of the Council, has been very positive. Whilst officers' priorities were focused on completing the venue, work has also been undertaken in conjunction with the Council's legal advisers, Bird & Bird on the options to seek redress against GEE Construction and possibly Atkins. GEE were the original principal contractors for the building works and Atkins the Design team.

The Committee will be aware that in February 2009 the Council terminated the building contract with GEE on the advice of Bird & Bird (GEE to this date maintain this was an incorrect termination). The Council then proceeded to complete the project by directly appointing new contractors on the advice of Atkins. It was anticipated that the scheme would be complete by July 2009. Subsequently it was discovered that there were major problems with the laying of the drainage system by GEE, along with other issues such as tiling. All of this has been previously reported. The result of resolving all these issues has resulted in additional projected costs of approximately £2.5m (excluding legal costs to date) and completion over two years late. In terminating the contract with GEE, GEE did lay the blame at Atkins' door due to poor design and contract administration. Atkins blamed GEE. Based on current information it seems probable that GEE's workmanship was the primary fault but there have been concerns regarding Atkins administration of the project and possible aspects of the design, although currently evidence is limited in this regard.

The Officers' view is that now the main priority of completing the venue and opening to the public has been achieved, the focus should be on resolving the dispute with the contractors involved, bearing in mind that none of the contractors accepts any liability for the construction problems and delays. The options based on the advice of Bird & Bird are as follows:

##### **Do Nothing (Option 1)**

As the title suggests, the Council does not take any legal action against GEE or Atkins at all. The benefit of this option is that it has minimal risk in terms of incurring additional legal costs, beyond those already incurred. This option will also minimise any further TRDC staff resource. Currently, significant staff resource has had to be committed to deal with all aspects of this project. The downside is that this option will not enable any cost recovery, beyond that possibly of the bond (value £350,000). The necessary preliminary steps leading

to the recovery of the bond are being taken; although this is anticipated to be a prolonged process and to involve significant staff time as bondsmen are traditionally loathe, to part with sums of this amount. Members will also want to consider the public relations aspect of this option ie will residents be content with the Council not attempting to recover costs? Essentially this is low risk, but will not recover costs, beyond that of the bond. There is also a significant risk that GEE will see this as the Council not wanting to engage in any kind of legal action and commence their own action against the Council.

### **Protect the Council (Option 2)**

As highlighted above (2.1) GEE have stated that they believe categorically that the Council terminated the contract with GEE incorrectly. Bird & Bird advise otherwise and have reaffirmed this advice. Officers have held two meetings with GEE's senior management and Chairman, to encourage them to consider a settlement, thus avoiding major litigation costs. GEE still maintain it was the fault of Atkins and the Council terminated incorrectly and therefore have indicated that they are not prepared to settle unless the Council pays them. Members will also recall that, just prior to Christmas 2009, GEE submitted an adjudication for time against the Council, but only on the dry side works. This is only 5% approximately of the scope of the contract. This has been reported previously. GEE have threatened to submit an adjudication against the Council on the wet side works, although to date haven't done so. It is the view of officers that on balance GEE are unlikely to adjudicate on time and termination but it is still a very real risk. In respect of managing this risk, Acutus, who acted as delay analysts for the Council in the previous adjudication, can be asked to complete their work on the wet side aspects of the refurbishment. It is anticipated that it will cost up to £50,000 for Acutus to complete their work. This work will enable the Council's interests to be protected should GEE decide to adjudicate. If the work wasn't undertaken and GEE did adjudicate and won, then the costs to the Council could be high. Although GEE's financial claims have not so far been presented in any sensible form and are therefore difficult accurately to assess, Bird & Bird advise that the cost to the Council in these circumstances could exceed £1m. The £50,000 could be found from the existing budget for the project. This work will take approximately three to four weeks to complete as advised by Acutus.

### **Council Adjudicates (Option 3)**

Bird & Bird advise that if the Council want to attempt to recoup at least some of the costs from GEE and also determine any liability by Atkins the Council should launch its own adjudication against GEE on the basis of defects only. This will focus on the defective work by GEE and the consequent costs. If of course GEE won then the defective works would be attributable to the Design team, Atkins. If the Council wins - as would be expected - then the Council could claim costs of up to £2.5m as highlighted in 2.1, paragraph 2 above. The only issue of course is that the costs are so extensive that GEE could go into liquidation and therefore the major risk with this option is that the Council would have incurred further expense and not been able to recoup any monies beyond possibly some negotiated with Atkins.

Bird & Bird do advise that to maximise the chance of success with this option, the Council should also employ an independent architectural adviser to fully review the design and specification for the refurbishment works by Atkins. As mentioned above, GEE blame Atkins for poor design and management: At this stage officers do not know whether this is the case or not and if so to what degree. Bird & Bird advise that GEE, in rebutting the adjudication, are likely to blame Atkins' Design work as part of their defence. Therefore if this course of action is the preferred option, officers would recommend that an expert is appointed prior to the adjudication. Bird & Bird can advise of competent experts

to undertake this work, and also advise that the cost of the Architectural expert would be of the order of £40,000; in addition the cost of undertaking the adjudication by Bird & Bird would be a further £80,000. Total cost approximately £120,000. The cost of the architectural expert (£40,000) can be met from current budgets, but not the cost of the adjudication ie the £80,000. This would require a growth bid to Council. Although the costs appear high this does appear to be the best chance of recouping some or all of the additional project costs without going through the Courts (see next option). Bird & Bird also advise that if the Council submit the adjudication and won GEE could not retaliate with another of their own until they have paid the Council what they owe.

Members should also note that whilst officers do hold a significant amount of design information they do not have access to Atkins' files, which the independent expert may require access to. The extent of this is currently being investigated. Atkins senior management have indicated that they will cooperate with the expert, but only if they are paid for all their time as well. Atkins has also submitted a further invoice for their fees of £130,000, which they estimate will go up to £150,000. Atkins has submitted information allegedly corroborating the claim, but to date officers have not paid the invoice. This is due to concerns over Atkins' liabilities and the fact that this would be outside budget. Members may take the view that they would only pay Atkins if the independent expert indicates that Atkins were not at fault, which may assist in obtaining Atkins' support to the expert, if appointed. Members should also note that, whilst this option is the preferred one, this will take up significant amounts of staff time, particularly Leisure staff.

It is anticipated that the Council could be in a position by the middle of August to submit the adjudication if this is the preferred option. A further advantage of this option is that residents will see that the council is prepared to recover public funding incurred on the scheme as a result of poor workmanship

#### **Pre-Action Protocol (Option 4)**

This option is in effect being prepared to fully litigate against both Atkins and GEE via the Technology and Construction Court "TCC"), a division of the High Court. As advised by Bird & Bird, this process could take up to anywhere between fourteen and eighteen months and cost in the region of £700,000, possibly more. Although this would give the Council the best chance of success, it is also the most risky option as, if the Council wins and as a consequence GEE go into liquidation, the Council would have incurred significant additional costs with no return.

However this option does involve structured negotiation and potentially mediation between all parties prior to moving through to the TCC, hence the term "Pre-Action". Essentially all parties would be asked to meet to attempt to agree a settlement before going to court, in order to mitigate potential costs. This meeting could, if unsuccessful in resolving the dispute, potentially lead on to mediation and would force all parties to at least discuss settlement. However GEE have already indicated that they are not prepared to mediate and should there be no settlement then Court action would be inevitable with all the consequent costs. Bird & Bird have indicated that they could as a possibility invoke the Pre- Action Protocol to gauge GEE's and Atkins response, but be prepared to back down if neither or both parties decline to be involved. One or other of options 1 to 3 would then be invoked.

#### **Summary Analysis**

In summary it would appear, based on the advice of Bird & Bird, that a combination of options 2 and 3 is the best course of action:

- a) To protect the Council's position should GEE launch adjudication against the Council on time and termination
- b) To attempt to recoup some or all of the additional costs incurred on the project, whilst keeping the additional financial outlay as a low as possible

The independent Architectural expert will be critical to the success of this approach and it would be very helpful to keep Atkins on board as long as possible, before making a final decision on whether or not to pay their final invoice of between £130-150,000. The current capital budget for William Penn for 2010/11 could meet the costs for Acutus and the independent architectural expert. But based on the cost advice from Bird & Bird and Acutus the additional costs of undertaking the adjudication by Bird & Bird and meeting the final payment to Atkins could not be found from the current capital budget and would therefore need to be referred to Council in July.

The table below summarises the option with costs and level of financial risk

OPTION	ADDITIONAL COST (£)	TIMESCALES	RISK *
1	None	None	MEDIUM
2	50,000	3-4 weeks	LOW
3	120,000	4 months	LOW
4	700,000	14-18 months	HIGH

Note

\* risk in this context is the balance between incurring additional costs and recovering additional costs incurred on the project whilst protecting the Council's position

### 3. **Options/Reasons for Recommendation**

- 3.1 Recommend a combination of option two and three as detailed in the report

### 4. **Policy/Budget Reference and Implications**

- 4.1 The recommendations in this report are within the Council's agreed policy but not budgets. The relevant policy is entitled Strategic Plan 2010-13 and was agreed in February 2010
- 4.2 The purpose of this proposed policy is to detail the Strategic direction of the authority by March 2013. At the end of one year, it is anticipated that the policy will have achieved the targets as detailed in the plan. As regards William Penn Leisure Centre, that the facility will have been fully open for a full year to all local residents, meeting the targets in the annual management plan

### 5. **Financial Implications**

- 5.1 Attached at Appendix 1 are the budget approvals to date. Attached at Appendix 2 is expenditure to date and the officers' estimate of the final costs before any further action is taken. This shows an under-spend of £114,000.
- 5.2 Assuming members choose options 2 and 3, then there is a budget shortfall of approximately £60,000 (£170,000 less £114,000)
- 5.3 Assuming members agree to further growth of £116,000 (£150,000 less £34,000) to cover Atkins fees, then a further supplementary estimate will be required.

6. **Legal Implications**

6.1 As contained within the body of the report.

7. **Equal Opportunities Implications**

7.1 **Relevance Test**

Has a relevance test been completed for Equality Impact?	No
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8. **Staffing Implications**

8.1 Significant staff time and resource, particularly in Leisure and Community Services and more recently in Property and Facility Management has had to be expended to achieve the completion of William Penn. Significant staff resource will continue to be expended, subject to any approvals on legal action.

9. **Environmental Implications**

9.1 The new facility will make use of low energy technology ie solar heating. This will result in significantly reducing carbon emissions

10. **Community Safety Implications**

10.1 None specific. However recent consultation with young people in Mill End identified that William Penn provided much needed positive leisure activities for young people in the locality.

11. **Customer Services Centre Implications**

11.1 None specific

12. **Communications and Website Implications**

12.1 None specific. However throughout the extended refurbishment period regular community updates were provided via the website to customers and residents. Hertsmere Leisure who manage the facility on behalf of the Council were regularly kept abreast of progress

13. **Risk Management and Health & Safety Implications**

13.1 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.

13.2 The subject of this report is covered by the Leisure and Community service plan. Any risks resulting from this report will be included in the risk register and, if necessary, managed within this plan.

13.3 The following table gives the risks if the recommendation(s) are agreed, together with a scored assessment of their impact and likelihood:

	Description of Risk	Impact	Likelihood
1	Gees submit an adjudication on the wet side works and	IV	E

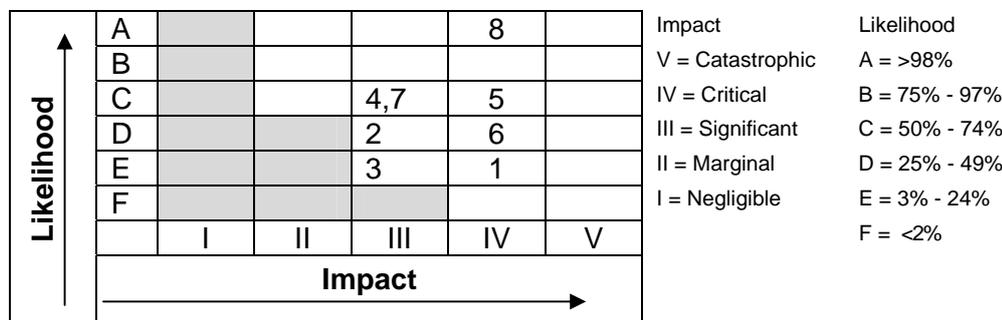
	still win, despite undertaking the work of the Delay analyst		
2	The Council adjudicates against GEE but loses	III	D
3	The Council has to go to the Construction and Technology Court to either defend or recover the costs of the remedial works	III	E
4	The continued input of staff in leisure and Community Services impacts on other Leisure projects, schemes etc.	III	C

13.4 The following table gives the risks that would exist if the recommendation is rejected, together with a scored assessment of their impact and likelihood:

Description of Risk		Impact	Likelihood
5	Gee submit an adjudication on the wet side works and win significant costs	IV	C
6	The Council is taken to the Construction and Technology Court by GEE	IV	D
7	Staff are still involved in legal actions, subject to GEE adjudicating	III	C
8	The Council recovers no monies from GEE or indeed Atkins	IV	A

13.5 Of the risks detailed above none is already managed within a service plan.

13.6 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.



13.7 In the officers' opinion none of the new 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.

#### 14. Recommendation

14.1 That the Executive Committee instructs officers to ask Acutus to complete their delay analysis (option two).

14.2 That an independent architectural expert is appointed to analyse the robustness of Atkins Design and to prepare a report for the purposes of potential litigation.

14.3 That the Committee approve an adjudication for defects against GEE.

To Council:-

14.4 That the Committee requests Council for an additional budget of £60,000 in 2010/11.

- 14.5 That the Committee consider requesting Council for further growth of £116,000 to cover Atkins fees.
- 14.5 That public access to the report be denied until issue resolved (see future agenda).
- 14.6 That public access to the decision be denied until Council agenda publication.

**Committee Decision on Public Access:-**

1.	Public access to report	-	immediate
2.	Public access to report	-	denied until (date): .....
3.	Public access to report	-	Council agenda publication
4.	Public access to report	-	denied until issue resolved (see future agenda)
5.	Public access to decision	-	immediate or Council agenda publication

- Note: (a) The timescales for public access to reports and decision(s) may differ.
- (b) Minutes of the Development Control Committee are approved at the next Development Control Committee meeting.
- (c) Minutes of special meetings of standing Committees are generally included in the Council agenda ie normally before the next meeting of the Committee.

Report prepared by: Chris Hope, Head of Leisure and Community Services  
 Peter Brooker, Director of Community and Environmental Services  
 David Gardner, Director of Corporate Resources and Governance  
 Steven Halls, Chief Executive

**Data Quality**

Data sources:

Council's Financial Information System

Data checked by: Patrick Martin, Performance and Contracts Manager

Data rating:

1	Poor	
2	Sufficient	
3	High	X

**Background Papers**

None

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

**APPENDICES / ATTACHMENTS**

- 1 Budget Approvals
- 2 Expenditure