

LEISURE & COMMUNITY SAFETY POLICY & SCRUTINY COMMITTEE –
4 JANUARY 2011

EXECUTIVE COMMITTEE – 31 JANUARY 2011

PART II – NOT DELEGATED

2b. WILLIAM PENN LEISURE CENTRE REFURBISHMENT
(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This report is NOT FOR PUBLICATION because it deals with information relating to the financial or business affairs of any particular person (including the authority holding that information),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 To update members on legal action related to the refurbishment of William Penn Leisure Centre.

2. Details

2.1 The Executive Committee meeting of 6 September 2010 approved the commencement of legal action against Gee Construction and Atkins under the 'Pre Action Protocol for Construction and Engineering Disputes' (EX36/10 refers). A formal Letter of Claim was therefore issued by the Council's solicitors (Bird & Bird) to both parties on 7 September 2010, together with independent expert reports analysing both construction delays and defects. The Letter of Claim also summarised in 'global' terms the actual and projected costs which the Council holds each party to be liable for under their contracts:

Amounts claimed	£ '000s	£ '000s
	Gee	Atkins
Design team - additional fees for main contract	346	
Design team - completion contracts (actual & claimed)	443	443
Main contract - outstanding balance	(508)	(286)
Completion contracts - total construction costs	2,390	2,390
Completion contracts - Clerk of Works	22	22
TRDC internal officer costs (post termination)	175	175
Legal costs post termination (ex. Sec. 2 adjudication)	388	388
Unpaid contribution from Gee to adjudicator's fee	8	
TOTAL CLAIMED	3,262	3,131

2.2 The sum shown above for design team fees incurred during the completion contracts includes an allowance of £151,843 for the full value of outstanding fee invoices claimed by Atkins, which are disputed by the Council and are currently unpaid.

a) Gee response

2.3 The Pre Action Protocol allows defendants to request up to three months in which to respond to the Letter of Claim. Gee Construction (through their solicitors, Fenwick Elliott), have requested and been granted such an extension. They have subsequently advised of a further delay in their response, which is now expected on 7 January 2011.

2.4 Fenwick Elliott have advised that Gee's response will include their own expert delay report, and other evidence in support of a counterclaim for loss and

expense. They contend that 'the delays to their works were caused by Atkins', and 'that it is Atkins who are ultimately culpable'.

b) Atkins response

- 2.5 The initial reaction to the Letter of Claim from Atkins, via their own solicitors Reed Smith, was to threaten the Council with immediate action if their outstanding fee invoices were not settled. Bird & Bird responded on 4 November, using evidence assembled by officers to demonstrate why these invoices are disputed, and why any claim from Atkins should be set against the Council's own much larger claim.
- 2.6 On 19 November Reed Smith provided a brief response to the Letter of Claim, which rejects its legal grounds and Atkins's liability for the costs claimed by the Council. Bird & Bird advise that the Reed Smith response is flawed and poorly argued. However despite its hostile tone, it did offer a 'Pre-Action Meeting' as set out in the Pre Action Protocol, and requested that Atkins's own fee claim be considered alongside other disputed sums at such a meeting.
- 2.7 On 25 November Bird & Bird issued a rejoinder demonstrating the weakness of the key arguments made by Reed Smith, and their failure to address the allegations made in the Letter of Claim, but agreeing that an initial Pre-Action Meeting be held without Gee. Officers attended such a meeting on 17 December 2010. This consisted mostly of a restatement of positions, with Atkins blaming all delays and defects on Gee. However both parties expressed the wish to resolve the dispute through mediation rather than court action if possible. Officers are continuing to marshal evidence of the extent to which Atkins failed to provide adequate service to the Council during the design and construction phases of the scheme.

c) Summary of current advice

- 2.8 Bird & Bird's most recent advice to the Council can be summarised as:
- While minor queries have been raised in recent correspondence, the Council's case against both Gee and Atkins remains strong.
 - Gee's response is likely to be much more substantial and better argued than Atkins's has been, and is also likely to blame Atkins for most of the scheme's delays and cost overruns. It will take considerable time to properly review and respond to, should the Council so wish.
 - The Council should continue to prepare for a full Pre Action meeting with Atkins and Gee, and for mediation.
- 2.9 A verbal update on any further developments will be brought to Members.

d) Leisure Facilities Management Contract

- 2.10 The Leisure Facilities Management ('LFM') contract between the Council and Hertsmere Leisure Trust assumed that the refurbishment of William Penn Leisure Centre would be completed in February 2008, and that by the current year usage would have risen to its projected operating capacity, giving maximum cost benefit to the Council through the contract. The Council has been receiving the benefit of this initial projection, whilst Hertsmere Leisure Trust have not yet had the opportunity to maximise their business. Under an agreement between the Council and Hertsmere Leisure Trust, interim compensation of £16,000 was paid for each month of delay between 1 June 2008, and practical completion on 31 April 2010, a total of £368,000. The final amount of compensation is due to be reviewed once the finished building has

been operating for a year, i.e. after May 2011. These payments have been partly offset by deductions of damages from sums due to Gee Construction under its contract.

- 2.11 Officers have begun reviewing the recent financial and usage performance of William Penn with directors of Hertsmere Leisure Trust, who have suggested that it may be possible to mitigate the financial impact of delayed completion by extending the end of the LFM contract by two years, i.e. from 31 December 2015 to 31 December 2017. Officers have had initial legal advice that such an extension should be permissible (see 7.2 below). It is proposed that officers further explore the financial and legal implications of this option, with a view to bringing proposals back to Members for formal consideration in March 2011, along with recommendations for the establishment of a Partnership Board for the LFM contract.

3. Options/Reasons for Recommendation

- 3.1 Officers recommend that claims continue to be pursued, with a view to resolving the dispute through negotiations or mediation if possible, so as to avoid the additional costs of court action.

4. Policy/Budget Reference and Implications

- 4.1 The recommendations in this report are within the Council's agreed policy and budgets. The relevant policy is entitled Strategic Plan 2010-13 and was agreed on 1 February 2010.

- 4.2 The purpose of this policy is to detail the strategic direction of the authority by March 2013. At the end of one year, William Penn Leisure Centre will be fully open to all local residents for a year, so meeting the targets in the Leisure & Community Service Plan.

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

- 5.1 None specific to this report.

6. Financial Implications

- 6.1 None specific to this report. The financial implications of any proposed extension of the LFM contract will be brought to Members for consideration.

7. Legal Implications

- 7.1 The legal implications of the Council's claims against Atkins and Gee are unchanged as a result of this report.

- 7.2 Extending the Leisure Facilities Management Contract (as suggested in 2.11 above) would not be an amendment so material as to amount to a new contract in that it does not:

- Introduce a new condition which, had it been part of the original award procedure, would have allowed for the admission of tenderers other than those initially admitted or the tender originally accepted
- Extend the scope of the contract to encompass services not originally covered
- Change the economic balance of the contract in favour of the contractor in a way not provided for in the original contract

8. **Equal Opportunities Implications**

8.1 **Relevance Test**

Has a relevance test been completed for Equality Impact?	No
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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 risks associated with this report are the same as reported to Executive Committee on 7 June 2010. The subject of this report is covered by the Leisure & Community service plan. Any risks resulting from this report will be included in the risk register and, if necessary, managed within this plans.

10. **Recommendation**

10.1 That the report is noted.

10.2 That Leisure & Community Policy and Scrutiny Committee recommends to Executive Committee that officers:

- a) Continue to follow the Pre Action Protocol process against Atkins and Gee for the recovery of refurbishment costs.
- b) Explore the financial and legal implications of a two year extension to the Leisure Facility Management contract, and bring any proposals back to Members for consideration.

10.3 That public access to the report be denied until issue resolved (see future agenda).

10.3 That public access to the decision be denied until Council agenda publication.

Report prepared by: Patrick Martin
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Data Quality

Data sources: Council correspondence and report files

Data checked by: Patrick Martin, Leisure Performance & Contracts Manager

Data rating:

1	Poor	
2	Sufficient	✓
3	High	

Background Papers

None.

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

APPENDICES / ATTACHMENTS

None.