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31 August 2011

Dear Patrick

**William Penn Leisure Centre, Rickmansworth  
Updated Advice for Councillors**

Following our telephone conversation yesterday, I set out below as requested my brief views on the three points that you raised with me. I understand that you will incorporate or otherwise use the comments in reporting further to Councillors in connection with the application for further funding.

**1. Updated views on the merits**

- 1.1 You asked whether there had been any change in my views on the overall merits of the case against Gee Construction Limited ('Gee') and Atkins Limited ('Atkins'). I have, as you know, provided various pieces of advice in the past and it is of course entirely appropriate that this advice should be updated to take account of developments. Most recently, updates of the general advice given to TRDC have been in the course of meetings and I refer particularly to those held on 19th January, 28th February and 20th April 2011.
- 1.2 In those meetings, I expressed the view that despite the very bulky document received from Gee comprising their Response to the Pre-Action Protocol Letter of Claim, in broad terms my views on the case against Gee had not materially changed. That view has generally been confirmed by the preliminary reports from Christopher Miers on the defects claim and from David Aldridge on the delay claim. David Aldridge's recent discussions with his opposite number, Rob Palles-Clark, have indicated that although David understands the logic of the case made against Atkins (and thereby TRDC) on delay he still largely does not agree with it.
- 1.3 Gee have said in their Response that the majority of the delay should be laid at the door of Atkins in relation to slow release of information, particularly on the M&E element. In turn, Atkins say that the delay was largely caused by Gee's lack of ability to manage the project. On the face of it, therefore, it is immaterial which of these viewpoints are correct as TRDC will ultimately recover from the party that is found to be incorrect.
- 1.4 The matter is not, however, quite as simple as that in that there is one potential 'black

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hole' for TRDC. As I have mentioned before, this relates to the scenario where Gee are found to be entitled to a significant extension of time for completion of the project because of, for example, late information or other matters beyond their control; yet, at the same time, Atkins are not liable for that delay because their conduct did not technically amount to negligence in the performance of their duties to TRDC. That would mean that, if Gee obtained a substantial extension of time, the termination of the contract might be held to be invalid, therefore negating the majority of TRDC's claim against Gee in respect of defects, and yet TRDC would not be able to recover from Atkins either in respect of the delay or the defects, unless the majority of the defects were caused by design issues, which is not presently the view held by Christopher Miers.

1.5 I have always made plain that in my view the risk of TRDC falling into this 'black hole' is very small. I last reiterated this view at the meeting held on 20th April 2011 (see paragraph 11 of the notes of that meeting) and I remain firmly of this view. Indeed, receipt of the recent opinion from Adrian Hughes QC on the net contribution clause issue raised by Atkins reinforces the view that Atkins will not be able to escape liability on the basis of any limitation clause in their contract.

1.6 On this basis, therefore, my view on the merit of the case remains unchanged and that is that TRDC should recover substantial sums either against Gee or (in the event that they cannot pay) against Atkins both in relation to the delay to the project and, more significantly, in relation to the defects. That view is likely only to change if there is a significant shift in the opinion of the experts relating to liability in regard to the delay and/or the defects and I have seen no sign of this yet.

## 2. How rigorous are the current fees estimates given for the mediation?

2.1 I can deal with this aspect relatively shortly. All the fee estimates are clearly expressed and well broken down, with the possible exception of that from Acutus. At the time of preparing this note, I have not yet spoken to David Aldridge but will do so and seek to obtain a more specific indication of the work that he will be doing and the costs that will be incurred. Nevertheless, there is no reason to believe that the costs for the mediation will exceed, to any significant extent, the estimates already given since to some extent the amount of work can be tempered to fit the estimates without materially affecting the presentation of TRDC's case at the mediation.

2.2 On this basis, I believe that the fee estimates given for the mediation are rigorous and can reasonably be relied upon as accurate in the absence of significant changes in circumstances such as those mentioned under the heading 'Assumptions' at the end of my firm's own fee estimate.

## 3. Further costs in the event of the mediation failing

3.1 I note the comments in your email of 30th August regarding the expenditure from 1st June 2010 to date and also taking into account the fee estimates to the end of the mediation. These total approximately £630,000, although about £50,000 of that relates to work carried out by Jackson Rowe which should properly have been carried out by Atkins.

- 3.2 This plainly represents an increase on the anticipated spend, caused at least in part by the very substantial Gee Response to the Letter of Claim.
- 3.3 If one assumes that the total cost from 1st June 2010 to end December 2011 (this December) will be in the region of £630,000, plainly it will not be possible to complete the entire litigation for a further £70,000 so as to adhere strictly to the figure of £700,000 provided in the Report to the Executive Committee on 7th June 2010. Although the further work necessary for the mediation will largely be work which will have value for any subsequent litigation, the fact remains that approximately 12 months it will take to bring this case from the conclusion of a mediation to trial expenditure of significant further sums is inevitable. I think it will be useful if I were to prepare, at some stage prior to the mediation, a detailed estimate so that TRDC can assess at the mediation the value of any settlement offers that might be made. However, for present purposes I have looked back at the broad estimate that I gave in my letter of 17th March 2010 to James Baldwin (which informed the £700,000 figure which I then gave in June). Given the necessary involvement of the Quantity Surveyors I think we are looking at an overall estimate throughout 2012 in the region of £400,000 - £450,000 given that :-
- a. a great deal of the expenditure for litigation comes at the end when the trial is held; but
  - b. a fair proportion of the work required to, for instance, finalise the experts reports and generally analyse the position will already have been carried out as part of the preparation for mediation.
- 3.4 I realise that this represents an increase of some 50% over the estimate given 14 months ago but the lack of any cooperation from either of the other parties, plus Atkins' continued failure to properly carry out their duties, has inevitably had a significant effect on the budget. As I have mentioned above, I suggest that prior to the mediation I prepare a more detailed estimate so that any offers made by the parties during the course of the mediation can accurately be assessed.
- 3.5 It should not of course be overlooked that the pre-action costs will be taken into account in the mediation (and in any subsequent litigation) and TRDC will seek to recover these from either or both parties. This will certainly apply to the vast majority of the costs incurred since last June as it was about then that the Pre-Action Protocol process started.

I hope that this analysis is sufficient for your purposes but please let me know if you require any further information.

With kind regards

Yours sincerely



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