

EXECUTIVE COMMITTEE – 5 SEPTEMBER 2011

PART II – NOT DELEGATED

2a WILLIAM PENN LEISURE CENTRE REFURBISHMENT - UPDATE (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This report is NOT FOR PUBLICATION because it deals with information relating to the financial or business affairs of any particular person (including the authority holding that information),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 further update members on legal action related to the refurbishment of William Penn Leisure Centre, and to request an additional budget provision to fund formal mediation of the dispute.

2. Details

- 2.1 The original report under Item 2a of Part II of this meeting's agenda was considered by Leisure & Community Safety Policy and Scrutiny Committee at its meeting on 12 July 2011, and describes developments in the Council's claim against Gee Construction and Atkins Design Solutions relating to the refurbishment of William Penn Leisure Centre. The Council has now received fee proposals for the next stage of its legal action, hence the request for an additional budget provision set out in this updated version of this report.
- 2.2 Members may recall that Executive Committee was advised in June 2010 that pursuing a claim against Gee and Atkins under the High Court's Pre-Action Protocol for Construction and Engineering Disputes might cost 'in the region of £700,000, possibly more'. Executive Committee resolved to pursue an action under the Pre-Action Protocol ('PAP') on 6 September 2010 (EX36/10 refers), and the Council's formal Letter of Claim was issued to both parties on 7 September 2010, supported by independent expert reports on delays to the works in the period leading up to the termination of Gee's employment on 2 February 2009, and the defects identified during the subsequent completion works which concluded on 30 April 2010. The Letter of Claim also summarised in 'global' terms the costs which the Council holds each party to be liable for under their contracts, at £3.26m for Gee, and £3.13m for Atkins.
- 2.3 The PAP aims to avoid court action by requiring all parties to exchange information and arguments at an early stage, and to demonstrate that they have exhausted every opportunity to resolve disputes through negotiation and mediation before beginning court proceedings.
- 2.4 Solicitors acting for Gee formally responded to the Council's Letter of Claim on 11 January 2011. Their response asserts that 'liability for the delays to the project, and the resultant additional expense, lies solely with Atkins... it is Atkins who are liable for TRDC's claims'. Gee's

response includes a counterclaim against the Council for £3.63m which they assert that they are owed in unpaid expenses, lost profits and reputational damage. Although the Council's solicitor and expert team continue to advise that Gee's Counterclaim has little substantiation, it is detailed and supported by a large amount of documentation. It therefore requires a detailed analysis and response, so as to protect the Council from the continuing risk of any action initiated by Gee.

- 2.5 The Council's solicitor has been asked to update previous advice as to the strength of the Council's case, in the light of recent information. This advice is enclosed as Appendix B.
- 2.6 The Council's contract with Gee requires the issuing of a final account within 12 months of Practical Completion (i.e. by 30 April 2011), and the duty of preparing such an account fell to Atkins as contract administrators. Despite repeated reminders and assurances Atkins failed to provide this account on time, leaving the Council potentially in breach of its own contractual obligation to Gee. Atkins finally issued a 'Notional Final Account' for Gee's contract on 12 July 2011, however the Council has been advised by its own recently appointed 'quantum analysts' (forensic quantity surveyors required to substantiate the financial aspects of the Council's claim) that this account is seriously deficient, and reveals several shortcomings in Atkins administration of Gee's contract. The work of completing the Final Account, and investigating these shortcomings, is currently underway. The delays and deficiencies in the Final Account have also delayed the completion of the Council's rejoinder to Gee's Counterclaim.
- 2.7 Atkins have made only a limited response to the Letter of Claim, as they and their solicitors have repeatedly rejected both the Council's claim and Gee's counterclaim out of hand. They argue that responsibility for all costs incurred rests with Gee alone, and a series of formal and informal negotiations between the Council and Atkins have failed to reach any agreement. Counsel's Advice commissioned by TRDC has refuted the assertion by Atkins that their contract severely limits any liability they may have.
- 2.8 Since negotiations to date have failed to resolve this dispute, the Council has been advised that a mediation involving all three parties offers the best remaining opportunity to avoid litigation, and that the High Court would look unfavourably on the Council's case if it had not been attempted. To ensure that the Council is able to present the strongest possible case at a mediation, as well as mitigating the risk of a counteraction by Gee or Atkins, officers have been advised that the additional expert reports should now be commissioned, including:
- Further exchanges of information and opinion with experts for Gee and Atkins, to narrow the scope of the dispute where possible
 - A completed final account for Gee
 - Rejoinders to the delay and defects analysis provided to date by Gee and Atkins
 - The detailed quantification of the Council's claims against Gee and Atkins, informed by other expert reports

2.9 Officers have now received fee proposals from the Council's solicitors and expert analysts for the work required to take the Council's case to mediation. These quotes have been supported by programmes and task lists, with the exception of the initial estimate from Acutus, for which a more detailed breakdown of tasks has been requested. The tasks covered by each quote are set out in Appendix A, and can be summarised by firm as:

| Specialism | Firm | Principal | £ |
|-----------------|-----------------|-----------------------|---------|
| Solicitor | Goodman Derrick | John Wright | 52,940 |
| Defects Analyst | Probyn Miers | Christopher Miers | 45,680 |
| Delay Analyst | Acutus | David Aldridge | 50,000 |
| Quantum Analyst | Jackson Rowe | Duncan Hughes-Philips | 103,358 |
| Total | | | 251,978 |

2.10 The Council's solicitor has given his opinion as to the cost-effectiveness of the estimates received on page 2 of Appendix B. All consultants would be required to submit weekly timesheets so that progress against programmes could be reviewed by officers.

2.11 Officers are advised that the majority (approximately 80%) of the work commissioned for a mediation will also be of use in a subsequent High Court action should the mediation fail to resolve the dispute. Officers are also advised that the bulk of these costs should be recoverable, principally from Atkins.

2.12 Since receiving the June 2010 estimate of the cost of legal action at '£700,000, possibly more', the Council has expended £376,000 in legal and related costs. The fee estimates summarised in 2.9 above, together with a reasonable contingency provision, would bring the Council's legal costs since June 2010 close to this £700,000 estimate. However still further costs would be inevitable after mediation, were the Council to take its case to the High Court. The Council's solicitor has given his opinion as to the likely scale of these costs in Appendix B.

2.13 The fee proposals received, plus expenditure in the year to date, also exceed the current budget provision. Officers are therefore recommending an increased budget provision to finance the costs of mediation. See Financial Implications (6.1 below).

2.14 The Council's solicitor has been instructed to make initial enquiries with solicitors representing both Gee and Atkins concerning mediation. Both parties have expressed initial agreement to participate in mediation, and at the time of writing it appears likely that agreement could be reached on a date in December 2011.

2.15 Should mediation fail to provide an acceptable negotiated settlement, the Executive Committee will then need to review options for further action. Such a review would be informed by the mediation, which will necessarily have tested the strength of all parties' cases, and any offers made by the other parties, as well as more detailed fee proposals for the costs of further action.

2.16 As Members will be aware, the refurbished William Penn Leisure Centre has proved to be popular with residents, and is enjoying good levels of

usage. The operation of the building by Hertsmere Leisure was recently awarded a 'Highly Commended' Quest quality assurance rating. Nevertheless there are defects, mostly minor, that remain to be resolved, such as the control of air temperatures in the gym and dance studios. Atkins have ignored all requests to assist the mitigation of these defects, in breach of contract, and the Council has been obliged to commission an independent review of the air handling controls in the refurbished area, to identify the most cost effective way to remedy these problems, and to establish whether their cause lies with poor design or workmanship. This review will be used to support the Council's claim for the costs of mitigating latent defects from whichever party it finds to be responsible.

2.17 The Council has been legally represented in this dispute since 2008 by John Wright, a construction specialist and partner of solicitors Bird and Bird. Mr Wright changed firms to Goodman Derrick on 5 July 2011, and it has been agreed with both firms that he should continue to represent the Council in this matter, at discounted rates agreed at the beginning of his engagement.

3. Options/Reasons for Recommendation

3.1 Officers recommend that claims continue to be pursued through formal mediation, so as to avoid the further costs of court action if possible, and protect the Council against the risk of counterclaims.

4. Policy Reference and Implications

4.1 The recommendations in this report are within the Council's agreed policy. The relevant policy is entitled Three Rivers Strategic Plan 2011-14 and was agreed on 22 February 2011.

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

5.1 None specific to this report.

6. Financial Implications

6.1 The fee proposals described above are in excess of the current budget for 2011-12, which also covers repairs to outstanding defects. Taking account of expenditure in the year to date, and a contingency provision which officers feel would be prudent for Counsels opinions and other possible costs, the shortfall against the current year's budget is as follows:

| | Actuals to 11 Aug | Fee Proposals | Further Provision | TOTAL |
|----------------------------|------------------------------|--------------------------|------------------------------|---------------|
| | £ | £ | £ | £ |
| Repairs to defects | 5,279 | 0 | 5,000 | 10,279 |
| Non-legal Sub Total | 5,279 | 0 | 5,000 | 10,279 |

| | | | | |
|------------------------|---------------|----------------|---------------|----------------|
| Solicitor | 15,141 | 52,940 | | 68,081 |
| Defects Analyst | 0 | 45,680 | | 45,680 |
| Delay Analyst | 8,458 | 50,000 | | 58,458 |
| Quantum Analyst | 41,810 | 103,358 | | 145,168 |
| Counsel's opinions | | | 5,000 | 5,000 |
| Legal Contingency | | | 40,000 | 40,000 |
| Legal Sub Total | 65,409 | 251,978 | 45,000 | 362,387 |
| TOTAL | 70,688 | 251,978 | 50,000 | 372,666 |

2011/12 Budget **191,700**
Variance **180,966**

6.2 Officers are therefore recommending that an increased budget allowance of £180,966 will be required in order to take the Council's case to mediation.

7. Risk Management and Health & Safety Implications

7.1 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.

7.2 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 Services service plan. Any risks resulting from this report will be included in the risk register and, if necessary, managed within this plan.

8. Recommendations

8.1 That the report is noted.

8.2 That officers continue to follow the Pre Action Protocol process against Atkins and Gee for the recovery of refurbishment costs.

8.3 That an additional budget provision of £180,966 is made to cover the costs of taking the Council's case to mediation.

8.4 To delegate authority to the Chief Executive and the Director of Community and Environmental Services, in consultation with the Leader of the Council and the Portfolio Holder for Resources, to agree a binding settlement of all aspects of the Council's claims against Gee Construction and Atkins Design Solutions arising from the refurbishment of William Penn Leisure Centre.

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

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

Report prepared by: Patrick Martin
Leisure Performance & Contracts Manager

Data Quality

Data sources: Council correspondence and report files

Data checked by: Alan Head, Asset 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

- A Breakdown Of Mediation Fee Proposals
- B Letter from John Wright, Goodman Derrick , 31 August 2011

APPENDIX A

BREAKDOWN OF MEDIATION FEE PROPOSALS

| | £ | £ |
|---|--------|----------------|
| SOLICITOR (Goodman Derrick) | | |
| Dealing with Notional Final Account | 1,440 | |
| Arrange mediation date and mediator | 1,180 | |
| Review Counsel's advice on Atkins liability | 520 | |
| Advise JR on heads of claim and damages | 1,300 | |
| Legal guidance to quantum analysis | 780 | |
| Advise TRDC on rebuttal of Gee witness statement | 7,120 | |
| Liaise with PM over rejoinder to Gee defects response | 10,200 | |
| Liaise with Acutus over rejoinder to Gee delay response | 8,200 | |
| Review TRDC evidence on Atkins performance | 3,280 | |
| Reviewing JR quantification of TRDC claims | 8,500 | |
| Prepare for mediation and position papers | 4,900 | |
| Attend mediation | 5,520 | |
| | | 52,940 |
| DEFECTS ANALYST (Probyn Miers) | | |
| Instruction, familiarisation & meetings | 6,160 | |
| Review Gee response to initial report | 4,160 | |
| Review Gee response to Atkins condition survey | 1,760 | |
| Update initial report in light of Gee response | 7,680 | |
| Review latest delay analysis reports | 2,400 | |
| Liaise with quantum analyst over NFA and betterment | 8,320 | |
| Liaison with Gee defects analyst | 9,920 | |
| Review and advise on witness statements | 1,760 | |
| Mediation preparation | 3,520 | |
| | | 45,680 |
| DELAY ANALYST (Acutus) | | |
| Review Gee delay report | 10,000 | |
| Additional investigations into key issues raised | 27,500 | |
| Attend meetings and prepare mediation documents | 12,500 | |
| | | 50,000 |
| QUANTUM ANALYST (Jackson Rowe) | | |
| Review of Gee variations account | 983 | |
| Review of Gee loss & expense claim after delay update | 6,246 | |
| Quantification of TRDC entitlement from Gee | 42,948 | |
| Quantification of TRDC entitlement from Atkins | 42,650 | |
| Mediation submission | 10,530 | |
| | | 103,358 |
| TOTAL | | 251,978 |