

EXECUTIVE COMMITTEE – 2 APRIL 2012

PART II – DELEGATED

1 WILLIAM PENN LEISURE CENTRE REFURBISHMENT LEGAL ACTION (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This report is NOT FOR PUBLICATION because it deals with information relating to the financial or business affairs of any particular person (including the authority holding that information),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).

This is a KEY DECISION.

1. Summary

- 1.1 To consider further action in pursuit of the Council's claims relating to the refurbishment of William Penn Leisure Centre, following a mediation held on 20 March 2012. To consider an appropriate budget provision for such action.

2. Details

- 2.1 Executive Committee resolved on 30 January 2012 (EX85/11 refers):

That authority be delegated to the Chief Executive, in consultation with the Leader of the Council, the Deputy Leader of the Council and Group Leaders to settle the Council's claims against Gee and Atkins.

- 2.2 The Chief Executive met the Leader of the Council, the Deputy Leader of the Council and the Conservative Group Leader on 16 March 2012 to consider appropriate delegation of authority ahead of the mediation meeting to be held with representatives of Gee and Atkins on 20 March 2012.

- 2.3 Exchanges of information and joint meetings of experts in advance of the mediation further developed the quantification of the Council's claims from the version reported to Executive Committee on 30 January as follows:

	Primary Claim	Secondary Claim
	£	£
Quantified claim against Gee	£2,703,203	
Quantified claim against Atkins	£571,825	£3,275,028
Total quantified claims	£3,275,028	£3,275,028
Estimated services defects mitigation	£295,000	£295,000
Completion works retentions etc	£16,284	£16,284
Updated total claimed before legal etc costs	£3,586,312	£3,586,312
Legal etc costs to date	£850,360	£850,360
TRDC staff costs	£358,592	£358,592
Updated total claimed including costs	£4,795,264	£4,795,264

- 2.4 The Council's claim was restated in a summary position paper issued in advance of the mediation. In their own position paper Gee repeated their view that their employment was wrongfully terminated and restated their counterclaim against the Council for £3.63m, while Atkins asserted that they should not be considered a party to the dispute at all. Once again both Atkins and Gee blamed each other for the delays and cost overruns of the scheme.

- 2.5 Officers are prohibited by the terms of the mediation agreement from disclosing details of its deliberations; however its outcomes can be reported. Although the mediation was scheduled for two days (20-21 March), Atkins insisted that they would only attend the first day. After opening statements from all three parties, a number of side meetings were held between experts while the mediator moved between the parties trying to bring them to a negotiated settlement. Unfortunately the representatives of Atkins left before any such negotiations could commence in earnest. The mediation could not continue in Atkins' absence, and so it was adjourned at the end of the first day with no agreement. It can be reconvened at a later date should all the parties so wish.
- 2.6 In his own opening remarks the mediator had said that around 80% of such mediations succeed either immediately or soon afterwards, even in complex disputes with entrenched positions, since the process of mediation often convinces parties of the need to negotiate to avoid further litigation. While Council representatives had made it clear that TRDC was reluctantly willing to take a pragmatic approach, the other parties appeared more intransigent. However officers have been advised that there is a significant chance that more viable offers may be received in the weeks following the mediation. Any developments will be reported to the Executive Committee meeting, and it is proposed that the existing delegated authority to settle the dispute remain in place for the time being.
- 2.7 Following the mediation the Council's specialist construction solicitor, John Wright of Goodman Derrick LLP, has issued updated advice which is enclosed as Appendix A. This restates his view that the Council's case remains strong, and advises that since attempts at mediation have failed, the only remaining means of pursuing its claims will be to initiate High Court action. However Mr Wright has advised against launching a simultaneous adjudication action against Gee, which officers had considered in order to forestall Gee's attempts to overturn the termination of their contract. Since issuing this advice Mr Wright has made further enquiries with prospective counsel (barristers) as to the earliest feasible timetable for High Court action assuming immediate instruction:

Issue proceedings	End May 2012
Initial hearing	End June 2012
Trial date (three weeks)	February 2013

- 2.8 The likely costs of High Court action were estimated in an earlier advice by Mr Wright (dated 13 January 2012) which was reported to Executive Committee on 30 January. In his latest advice Mr Wright has proposed increasing these estimates due to the approach demonstrated recently by Gee in particular:

	Solicitor	Experts	Counsel	Total
	£	£	£	£
Pleadings	17,620	1,670	9,000	28,290
Pre-trial	14,500		6,000	20,500
Disclosure	43,500	20,000	3,000	66,300
Evidence of Fact	49,700		6,000	55,700
Expert Evidence	25,760	125,000	9,000	159,760
Hearing Preparation	40,500		75,000	115,500
Hearing / Post Hearing	61,100		85,000	146,100
Total as of 13 January	252,480	146,670	193,000	592,150
Proposed contingency				127,850
Revised Total as of 26 March				720,000

- 2.9 The solicitor and counsel elements of the costs above may be reduced through the use of Conditional Fee Agreements ('CFAs'). Goodman Derrick have already indicated their willingness to reduce their hourly rates in return for a higher fee should the Council's claims succeed (whether through negotiation or a court settlement) which would be recovered from other parties. It may also be possible to agree a CFA with counsel, although expert witnesses are not allowed to enter into such agreements.
- 2.10 Gee's defence and counterclaim largely rest on their assertion that their termination was unlawful, and in their opening presentation to the mediation they threatened an immediate adjudication action to substantiate these claims. It is recommended that any such adjudication is vigorously defended. Members may recall that Gee launched an adjudication for time relating to Section 2 of the works alone (the fitness suite) in November 2009. This attempt to invalidate the termination of Gee's contract through the awarding of additional Extensions of Time ('EoTs') was unsuccessful.
- 2.11 Preparations for the mediation were more expensive than anticipated, due to the need to consider large amounts of information provided by the other parties in its final stages. Expenditure in the current year has therefore exceeded the approved budget of £372,670 by £21,882. Total costs incurred on the project to date in excess of the budget approved at the start of the main contract in January 2007 are currently:

	Budget as Jan 2007	Actuals as 26 Mar 2012	Overspend
	£	£	£
Design & Construction	4,637,532	7,509,965	2,872,433
Legal etc costs		896,549	896,549
Total	4,637,532	8,406,513	3,768,981

- 2.12 There is currently no budget provision for this project in 2012/13. It is therefore proposed that a budget provision be created from capital balances to cover the costs of High Court action as described in (2.8) above, with a further contingency provision:

	£
High Court action costs (as 2.7 above)	720,000
Additional contingency allowance (25%)	180,000
Total budget proposed	900,000

- 2.13 All further costs incurred will be added to the amounts claimed from the other parties, subject to eligibility. It is further recommended that Conditional Fee Agreements be entered into with Goodman Derrick and with counsel as described in (2.9) above.

3. Options/Reasons for Recommendation

- 3.1 Appendix A repeats previous professional advice that the Council's claims for recovery of its unbudgeted costs remain strong, but that the only remaining viable avenue for the pursuit of these claims is now High Court action.

4. Policy/Budget 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 2012-15 and was agreed on 30 January 2012.

4.2 The recommendations in this report are not within the Council's agreed budgets. If approved the recommendations would be financed from capital balances.

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

5.1 None specific to this report.

6. **Financial and Legal Implications**

6.1 The financial and legal implications arising from this report are described above.

7. **Equal Opportunities Implications**

7.1 **Relevance Test**

Has a relevance test been completed for Equality Impact?	No
No change is proposed to current service or policy.	

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

8.1 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.

8.2 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.

9. **Recommendation**

9.1 That the following actions are agreed in relation to the Council's claims for the recovery of costs incurred in the refurbishment of William Penn Leisure Centre:

- a) That the delegation of authority to the Chief Executive, in consultation with the Leader of the Council, the Deputy Leader of the Council and Group Leaders to settle the Council's claims against Gee and Atkins, as confirmed on 16 March 2012 remain in place until further notice.
- b) That High Court action be initiated in pursuit of the Council's claims against Gee and Atkins.
- c) That a budget provision of £900,000 be made from capital balances for the above action.
- d) That any adjudication initiated against the Council be vigorously defended.

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

9.3 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: 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

A Advice from John Wright, Goodman Derrick, 26 March 2012