

**CABINET
6TH OCTOBER 2009**

ITEM NO.

PEDESTRIAN HEART

Responsible Cabinet Member – Councillor John Williams, Leader

Responsible Director – Cliff Brown, Director of Community Services

SUMMARY REPORT

Purpose of the Report

1. The purpose of this report is to seek a decision from Cabinet on whether to commence any form of action for recovery of payments made to contractors in relation to the Pedestrian Heart Project.

Summary

2. In January 2007 Cabinet accepted recommendations from Resources Scrutiny that a review should be conducted into whether payments made to the contractors were appropriate. Since that time a detailed investigation has been undertaken to examine the management of main contract and the payments made under that contract, as well as payments made to the project managers.
3. Forensic engineers prepared a report and an addendum report which has been presented to external solicitors to consider whether any action is appropriate. The solicitors have not recommended action at the current time because there is insufficient evidence to support such action.

Recommendation

4. It is recommended that :-
 - (a) Members accept the report from E C Harris (forensic engineers) and Ward Hadaway Solicitors in relation to the Pedestrian Heart contracts.
 - (b) Members agree not to take further action at this time unless further evidence comes to light.

Reasons

5. The recommendations are supported by the following reasons :-
- (a) Legal advice is that there is no sensible claim to be made with reasonable prospects of success.
 - (b) Further action is unlikely to be cost effective.

Cliff Brown
Director of Community Services

Background Papers

No Background papers were used in the preparation of this report.

C Whitehead: Extension 2306

S17 Crime and Disorder	There are no implications for Crime and Disorder.
Health and Well Being	There are no implications.
Sustainability	There are no implications.
Diversity	There are no implications.
Wards Affected	All Wards are affected equally by this report.
Groups Affected	There are no groups specifically affected.
Budget and Policy Framework	This does not represent a change to the budget and policy framework.
Key Decision	This is not a key decision.
Urgent Decision	This is not an urgent decision.
One Darlington: Perfectly Placed	There are no specific implications for the SCS.
Efficiency	The report recommends no further expenditure in relation to this issue.

MAIN REPORT

Information and Analysis

6. In September 2003 Gillespies were appointed as the lead Consultants to work with the Council to develop a design for the public realm of Darlington town centre. In July 2005 Birse Civils Limited were appointed as the main contractor. On 31st January 2006 an excavator hit a cast iron gas pipe. On 23rd March Council approved funding for the diversion of the gas main and in September 2006 further funding was approved by Council to cover the additional costs which had arisen during the contract. The Resources Scrutiny Committee undertook a review of the gas main incident in July 2006 and on the Pedestrian Heart project in October 2006 and reported its findings to Cabinet on each occasion. At the Cabinet meeting on 11th July 2006 Cabinet accepted the following recommendation
 - (a) In the light of the survey information provided, further works could have been undertaken and Darlington Borough Council explores the possible legal implications;
7. Following the further review Cabinet at its meeting on 16th January 2007 agreed this further recommendation:
 - (f) that the Council continues to review the Pedestrian Heart scheme to ensure that all payments made are appropriate
8. Since that time a detailed review has been carried out. The initial review of Resources Scrutiny had impacted on the working relationship during the contract and concern that it may have jeopardised progress. Initial consideration by officers accepted that an investigation into the contract may affect the willingness of the contractor to complete the contract ahead of the estimated time, and the decision was therefore made to delay enquiries directed at the contractors until the contract had been completed.
9. However initial enquiries were made to Ward Hadaway Solicitors construction team who advised that a forensic engineer would need to be instructed to establish the facts and to advise as to the financial validity of amounts claimed by Birse, the main contractor. E C Harris was selected after quotes were obtained. Initial instructions lead to a proposal from E C Harris at the end of March 2007 which was agreed to on 28th April 2007. The investigation was undertaken and a finalised report was produced in September 2007. The report contained a number of detailed recommendations. Following receipt of the final report the matter was referred back to Ward Hadaway Solicitors for a view on whether or not any action could be taken against either contractor to recoup any of the money.
10. In relation to payments to Birse the report concluded:

‘At this stage it appears that the financial administration of the contract in respect of determining the amounts due to Birse has generally been correct in accordance with the Contract and the Price for Work Done to Date (the overall cost of £6,891,069) has generally been calculated correctly, though there are some possible exceptions. A more detailed audit of this calculation and supporting document could be beneficial to the Council.

11. It was apparent through the investigation that detailed documentation which would assist EC Harris on the decision making at the outset of the project, particularly in relation to the decision about the trial holes, was not in the hands of the Council. The financial detail obtained by EC Harris through examination of all the compensation events particularly in relation to how the significant elements of additional cost had arisen indicated that the main costs were due to the delays and disruption to the programme not the severance of the gas main.
12. Ward Hadaway advised that it was necessary to obtain clarity about Birse's final account before any sensible assessment could be made about any claim against Gillespies because if there was uncertainty about the amounts paid, Gillespies could argue that it was the responsibility of the project manager, by then Clarus, to dispute the Compensation Events which resulted in some elements of the costs. Discussion between Clarus and Ward Hadaway resulted in a meeting on 21 April 2008 to go through the various compensation events. The meeting led to the view that the amounts in the compensation events were accurate and were properly challenged. On the basis of those instructions a meeting was established with Gillespies on 10 June 2008 for initial discussions to sound out what their view was of the causes of the overspends.
13. The meeting was a without prejudice discussion to establish the facts. The details of the discussions with Tom Walker are set out in the report from Ward Hadaway (**Appendix 1**) at paragraph 1.6. Following consideration of the accounts provided by Gillespies and the information provided by the Council, Ward Hadaway Solicitors have concluded that a claim against Gillespies cannot be pursued without detailed instructions and supporting documentation to dispute the account of events provided by Gillespies. The report further concludes that there is no basis for challenging the Birse final account.
14. A report setting out the legal opinion of Ward Hadaway was dated 8th January 2009. It was circulated to senior officers and presented to the Council's Corporate Management Team. Following this consultation it became apparent that a number of additional documents were available for consideration which may be relevant to the reports from E C Harris and Ward Hadaway. The additional documents were held in electronic form and were numerous. These documents were then referred to forensic engineers E C Harris who considered the additional documentation. They prepared an addendum report and that addendum was referred to Ward Hadaway solicitors to see if it altered the report.
15. Ward Hadaway have provided an addendum letter to their report which proposes that no legal action should be taken in relation to either of the contractors. (**Appendix 2**).

Review costs

16. There have been concerns raised about the time taken to conduct the review and the costs. The review has required detailed analysis by external experts of all of the compensation events on the contract and the programmes. The progress of the review has been hampered by the lack of documentation. The costs of the review have been as follows:-

EC Harris £20,000 (including £5,000 for the addendum)
Ward Hadaway £20,000 (approx)

Summary and Conclusion

17. The Council has previously and on numerous occasions acknowledged that this project has not been well managed. Significant changes have been made as a result of this project to the Council's process for handling capital projects. The review has identified that there is no positively stated case made out which would permit a sensible claim to be made with reasonable prospects of success.