

PEDESTRIAN HEART SCHEME

**ADVICE TO DARLINGTON BOROUGH COUNCIL
IN CONNECTION WITH ADDITIONAL COSTS
INCURRED PRINCIPALLY ARISING FROM THE
DISCOVERY OF A GAS MAIN IN PROSPECT
PLACE, DARLINGTON AND OTHER
COMPENSATION EVENTS**

wardhadaway

**Sandgate House
102 Quayside
Newcastle upon Tyne
NE1 3DX**

PARTIES

- Employer: Development and Environment, Darlington Borough Council, Town Hall, Darlington DL1 5QT (“the Council”).
- Landscape Architect, Lead Consultant, Urban Designer, ECC Project Manager, ECC Supervisor and principal Designer, Gillespies, Minton Chambers, 12 Heatons Court, Leeds LS1 4LJ (“Gillespies”).
- Contractor: Birse Civils Limited, 3 Grimston Grange, Sherburn Road, Tadcaster, North Yorkshire LS24 9BX (“Birse” or the “Contractor”).
- Structural and Drainage Engineer: Faber Maunsell, Royal House, 28 Sovereign Street, Leeds LS 1 4 BJ (acting as sub-consultant to Gillespies).
- Quantity Surveyor: Kinsler & Partners LLP, 2145 Marton Road, Middlesbrough TS4 2ET (acting as a sub-consultant to Gillespies).
- Planning Supervisor: White Young Green, Progress House, Fundan Way, Teesdale, Stockton on Tees TS217 6EN.
- Replacement ECC Project Manager: of Clarus Consulting, Sunlight House, PO Box 85, Quay Street, Manchester M60 3JA

1. INSTRUCTIONS

- 1.1. This advice has been prepared in response to instructions received from Darlington Borough Council ("the Council") to advise on responsibility for additional costs incurred by the Council on the Pedestrian Heart Scheme ("the Scheme"). A significant amount of those additional costs are said to be resultant upon the unforeseen discovery and severance of a gas main at Prospect Place in the course of construction of the Scheme.
- 1.2. Our initial advice was that a forensic investigation should be carried out by an expert in utility engineering to establish the facts of the matter and to advise as to the financial validity of amounts claimed by Birse by way of Compensation Events under the Contract. The Report was produced by E C Harris on 28 September 2007. The general conclusion was that whilst there were a number of further enquiries which could be carried they were broadly satisfied that Birse had been paid the correct amount for their work.
- 1.3. We are advised by the E C Harris Report that the costs (unquantified) incurred for dealing with the immediate aftermath of the gas main severance were modest and that additionally they were, £197,272 for subsequent full replacement works and £524,377 in respect of consequent delays and disruption to the overall Scheme. In addition, significant additional costs were subsequently incurred for Compensation Events entitling Birse to additional payment. By way of explanation, these Compensation Events were "certified" by Clarus, rather than Gillespies, upon guidance from the Quantity Surveyor. Whilst it was initially understood from the Clarus meeting (see 1.6 below) that some of the design changes which gave rise to these further

significant Compensation Events, might have arisen from culpability on the part of the designers, this was on further reflection by Clarus deleted in their revision of the meeting notes and we have not seen any material relating to these further Compensation Events which supports or refutes the suggestion of culpability.

- 1.4. Following a review meeting with E.C. Harris arranged for 4 December 2007, it was agreed, in view of the limited factual information available from the Council's own files, that further investigations should be carried out involving Clarus Consulting and Gillespies to try to establish the facts upon which an opinion might be given. Instructions were given to us to proceed in April 2008 with informal exploratory meetings. These were subsequently arranged and detailed notes of these meetings were taken. Both Consultants were given the opportunity to comment upon those notes, as subsequently were Council officers.
- 1.5. This process has been necessary because despite the concerted efforts of the Council officers instructing us, very little information has been forthcoming from the Council's own files recording their involvement in critical decisions and the facts have had to be pieced together from the third party accounts. Those third party accounts are themselves based very much upon memory rather than actual record. What emerges is a complex factual matrix which highlights key issues but does not descend to a level of detail which permits identification of precise decisions and instructions in relation to the Scheme or their timing. We have seen various packages of correspondence but it has not been possible to access complete files such that we have in fact only seen what we suspect is a limited proportion of all of the material which would normally be expected to have been produced in the course of a scheme, such as Pedestrian Heart.

Detailed file notes and correspondence corroborating either party's position do not appear to be available.

- 1.6. We are attaching to this Advice copies of the attendance notes taken in the course of meetings with Clarus and Gillespies. Those meetings were facilitated by informal requests from us for exploratory discussions and neither Clarus nor Gillespies were expected to attend, having prepared for the meeting in detail. However, following the meeting both parties were requested to check the record of the meeting and express any reservations or uncertainties as to the contents of the notes. Both Clarus and Gillespies were very co-operative in trying to assist our understanding of the issues. Gillespies subsequently carried out detailed work and prepared their own submission reflecting their considered position. They subsequently provided copies of a limited number of documents to which they had referred. As stated above, the records regarding this matter are limited and generally unsatisfactory corroboration of the facts. However, the attendance notes of the meetings have been presented to those involved with the Scheme on behalf of the Council and there has been no substantive disagreement with the principal explanations given by Gillespies.

2. THE GAS MAIN INCIDENT

This incident was initially explained to us as being a case where:-

- 2.1. Birse, the contractor, had severed a previously unidentified gas main in Prospect Place,
- 2.2. they were at the time using a mechanical digger rather than hand excavating as required by their contract,
- 2.3. in consequence of encountering the gas mains, substantial costs were incurred which were the direct consequence of the above errors.

- 2.4. It would have been avoided if Gillespies had advised that site investigations should be carried out in advance of Birse commencing work on site.

The account which we have been given, principally by Gillespies, does not confirm the accuracy of the above assumptions and suggests that in many respects the actual incident of the mechanical digger severing the gas main is a "red herring" of limited financial significance and that costs subsequently incurred and attributed to that general cost heading were incurred for different reasons and are indirectly related to the incident. It is suggested by Gillespies that there is in fact a parallel set of facts which are the dominant cause of the cost overrun on the Scheme.

3. GILLESPIES' ACCOUNT OF EVENTS

- 3.1. We are told that the possibility of extensive services, including gas mains, was anticipated across the entire site. A radar survey was carried out in 2004 and the usual enquiries made of statutory undertakers as to the location of services. These were not supplemented by digging trial holes in 2004 because it was not anticipated that the gas main would be at an exceptionally shallow depth such that it would be in breach of current Health and Safety guidance. Further the intended change of level in the new design at Prospect Place was nominal so that the new works would simply replace the existing depth of coverage of underlying services.
- 3.2. Trial trenches were considered in 2005 and a quotation for carrying them out was obtained but it was decided in conjunction with the Council that they would be deferred until Birse was appointed, as the procurement method which had been adopted, anticipated early involvement by the contractor in project planning prior to commencing work on site. This view

was taken because of the cost and the questionable effectiveness of trying to locate all of the services across the entire site.

- 3.3. It is understood that between August 2005 and 1 November 2006 (sic) trial holes were dug at various sample locations and reported upon at monthly meetings but a trial hole was not dug at the point in Prospect Place where the gas main was actually encountered, as there was nothing to suggest that this was a high risk location i.e. exceptionally shallow cover, as subsequently discovered.
- 3.4. The Council allegedly instructed that the works should commence in October 2005 against the advice of Birse and the consultant team. We are instructed that the Council Minutes do not show that Birse were so instructed. We are told by Gillespies that the Council also instructed a resequencing of works so as to delay core works until after Christmas because of their potential impact upon Christmas trading, but that they nonetheless required a start to peripheral works. In broad terms, it is suggested that this decision alone had the effect of causing a significant part of the substantial delay and disruption costs which were subsequently attributed to the cost heading associated with the discovery of the gas main. Gillespies attribute at least £230,000 additional cost to this decision as evidenced, they say, by the issue of programme PO3.
- 3.5. The gas main was breached in early 2006. (Council records state 31 January 2006) by a mechanical digger. Birse's contract required them to hand dig in the near vicinity of services and they were in breach of contract by failing to do so. The cost of dealing with the burst main itself was, we are told, comparatively modest. We have not been provided with an actual figure but E C Harris suggested in its report that enquiry should be made as to whether Birse made recovery through its contract works insurances and whether allowance was made

within the Compensation Events assessment. We are unaware of whether that suggestion was pursued.

- 3.6. We are advised by Gillespies that as a result of encountering the gas main, they suggested in February 2006 that a modification of the street works design be made to accommodate the actual position of the gas main. Details of the design change were provided to the Council. However, following consideration the Council decided that rather than amend the design, the gas main would be replaced in its entirety. We are instructed that this decision was taken in the context that the pipe would require replacement within the foreseeable future and the Council were reluctant to see the Scheme disturbed and dug up, possibly soon after its completion. Because the pipe did not require immediate replacement it was not possible to offset the expense with the utilities. Significant expenditure was thereby incurred on account of disruption costs to the remainder of the Scheme. This decision was made at a meeting with United Utilities, which Gillespies had not been invited to attend and the decision was not discussed with Gillespies. They do, however, suggest that the Council were made aware of the likely cost, for example in the March 2006 Financial Statement which contained an estimate of £745,000. E C Harris' figure for these disruption costs is lower because they do not attribute all of the programme changes in PO4 to matters flowing from the gas main incident.

4. **THE ENGINEERING CONTRACT**

- 4.1. The Scheme was procured using the New Engineering Contract 1995 Option D, NEC being the suggested choice of ONE. NEC is a form of contract published by the Institution of Civil Engineering and since its publication in the early 1990's has become increasingly popular with the public sector. It is the preferred form of contract for use by the Olympic Delivery Authority for the 2012 Olympics.

- 4.2. Option C, in particular, is very popular, being a target cost contract reimbursing the contractor for allowable costs which it incurs within the target sum. There is a painshare/gainshare formula which fixes the sharing of savings and cost between the Employer and the Contractor depending upon whether costs are below or above the target sum.
- 4.3. Option D which was used for the Scheme, is less frequently encountered than Option C. Option D is a target cost contract with a bill of quantities, being suitable for works of a civil engineering nature which are fully designed and quantified as was to be the case with the Scheme. This form of contract places the risk of a change of quantities upon the Council. The target sum is remeasurable depending upon actual quantities worked by the contractor and can be very variable in terms of outturn cost, if unforeseen circumstances are encountered.
- 4.4. The NEC contracts also include for several kinds of Compensation Event which give the contractor the benefit of increases to the target sum if such Events occur
- 4.5. The agreed painshare/gainshare formula was that in the event of costs being above or below target the Council was to suffer 90% of the cost or make 90% of the saving. It is not known precisely how the decision was made to use the same percentage on either side of the target sum, but we are instructed that it was recommended by Kinslers. The two percentages are frequently different with savings being subject to a percentage which favours the Employer and overrun costs being predominantly at the contractor's risk. However, it seems as if the Council anticipated that both should be identical and we are told that the Council wished to claw back the maximum amount of any savings below target and to avoid the overrun share by omitting areas of work if necessary. On the basis of Gillespies' account of the facts, this strategy became inoperable once the decision

was made at the outset of the Scheme in October 2005 to begin work on the peripheral areas rather than to adhere to the planned critical path for the works through the main pedestrian area. The scope to make savings by omission was significantly reduced and therefore the ability to avoid cost overrun was effectively removed. Accordingly, so far as Birse were concerned, this was an extremely low risk contract and for all practical purposes the contract was cost reimbursable, with very limited incentive for efficient working.

- 4.6. Another significant contributing factor to the costs overrun in this case, is the contractual effect of the agreed programme under NEC. Once agreed by Gillespies on behalf of the Council, any subsequent change of sequence of working became a Compensation Event which results in a change to the target sum. Only very recently, commentators in trade journals have suggested that whilst contractors have become adept at recovering potential entitlement under this mechanism, there is some doubt as to whether their skills are as yet matched within the industry by Project Managers and clients, which places contractors at an obvious advantage. Contractors also tend to have greater access to sophisticated computerised planning tools and software which are central to the operation of NEC contracts.
- 4.7. We have discussed with both Clarus, who along with Kinslers, assessed the Compensation Events and also Gillespies, whether there are any grounds for challenging any of the payments claimed by Birse or any of the increases to the target sum for which they applied. We are advised by both consultants that they do not believe that Birse's account can be realistically challenged and that it has been properly valued and is fully payable. As set out above, E C Harris were also unable to

discover any obvious grounds of challenge upon their preliminary headline investigations.

5. **GILLESPIES' APPOINTMENT**

Gillespies were apparently selected as lead consultant in mid/late 2003. We have seen a bundle of correspondence between the technical and legal teams of the Council regarding Gillespies' appointment. We cannot confirm that this is complete but what is apparent is that no appointment was in fact finalised and executed by the parties. The last letter of significance is a letter from Gillespies dated 17 May 2006 which takes issue in some detail with the draft with which they had been previously presented. The absence of a signed contract is not helpful but it does not automatically preclude all potential liability on the part of Gillespies. It is possible for a claim to exist in negligence under the law of tort rather than in breach of contract. In order to establish tortious liability in negligence, it is necessary to establish that:

- (a) a duty of care was owed to the Council in respect of the matter lying at the heart of the issue,
- (b) that Gillespies were in breach of that duty of reasonable skill and care, and
- (c) the relevant damage was a consequence.

In considering the correspondence, it initially appeared that there might be an issue as to whether the services which Gillespies contracted to provide expressly included the giving of advice upon the need or otherwise to investigate for mains services in the ground, including the gas main. At interview, however, it did not appear that Gillespies took issue on that point and they later confirmed that advice on such matters fell within the brief to their own sub-consultant White Young Green (WYG) and consequently they did not challenge that they were to give such advice.

6. **THE POTENTIAL CLAIM AGAINST GILLESPIES**

6.1. It was originally believed by those instructing us that there was a possible breach of duty by Gillespies due to a failure to advise that trial holes should be dug and that in consequence the gas main was struck during construction as a result of the lack of that information. In interview, Gillespies advised that they had given advice that investigations should be carried out using radar testing, that such radar testing was carried out and that later trial holes were dug by Birse the engineering contractor. A trial hole had not been dug at the precise location where the gas main was eventually encountered but that was not unusual as intrusive site investigations could not be carried out across an entire site and the fact that an unforeseen discovery had occurred was an inherent problem with contracts of this nature. Gillespies are therefore confident that they were not in breach of their duty of reasonable skill and care. This duty is measured against the level of skill and care to be expected of a reasonably competent professional. This does not require that such hypothetical professional always gets things right. The law recognises that even reasonably competent professionals make mistakes. It is not therefore a particularly high burden of proof to prove that reasonable skill and care has been used. We have not received any challenge from Council officers to Gillespies' account of events. On the issue of liability, it would be difficult to establish liability against Gillespies and it would require expert evidence from an experienced professional in the same field as Gillespies clearly stating and demonstrating that they breached their normal duty of care in the course of carrying out their services.

6.2. Even if it were possible to establish liability against Gillespies as previously described, it would be necessary to prove that loss in the form of the additional costs of the Scheme resulted from their breach of duty. If Gillespies' account of events at

paragraph 3 above is correct, then there would be limited prospect of linking the additional costs to a breach of a duty of care by Gillespies.

- 6.3. As a result of our discussions with E C Harris and Clarus, we also considered the possibility of a breach of duty by Gillespies in connection with the project management of the aftermath of the severance of the gas main. Gillespies have advised that they did give advice as to how to mitigate the impact but that actions taken by the council both before and after the event were in disregard of that advice. That explanation has not been challenged by Council officers.

7. CONCLUSION

We do not believe that a claim against Gillespies can be realistically pursued further without very clear instructions from the relevant Council officers responsible for the project which challenge Gillespies' account of what happened with regard to the sequence in which the Scheme was realised. In order to proceed further, it would be necessary to comply with the Court procedures which require the formal explanation of the claim in detail accompanied by supporting documents and expert evidence prior to commencement of proceedings. On the basis of current information, any claim would be speculative and with extremely limited prospects of success. We say this with some caution because this view is not based upon examination of the usual level of documentary record which we would typically review to arrive at such an opinion and it is significantly based upon Gillespies account of the facts, albeit unchallenged. In addition, the pursuit of litigation would be extremely expensive and disproportionate to the probable prospects of success, such as they can be established at present. Further, on the basis of the comments of Clarus, Gillespies and E C Harris, it does not appear that there are grounds for challenging the Birse final account.

8. RECOMMENDATION

- 8.1. We are aware that the NEC contract has in recent years become the preferred form of contract for use by the Council in the procurement of capital projects. There is nothing inherently flawed with the contract and indeed it is institutionally praised and supported but it is a contract which relies heavily upon the adoption of assertive project management skills by the Employer and daily involvement with detailed progress as work is carried out. The whole ethos of the contract is based upon joint proactive working to anticipate and avoid risks which will extend and disrupt the duration of the contract and increase costs. It is certainly not a contract which permits the Employer merely to observe the contractor without active direction and intervention. It is very important to adhere to the time limits for assessing the effects of Compensation Events, of which there are many. The outcome of agreeing the consequences of such events in a timely fashion is that the contractor becomes committed to what is effectively a lump sum for the relevant Compensation Event. This will incentivise performance. If assessment of Compensation Events is allowed to be deferred then NEC will tend towards being fully cost reimbursable, because the Compensation Events are priced after the event.
- 8.2. We would suggest that the Council may wish to consider investing in a programme of training technical staff in the detailed workings of the contract so as to highlight the importance and effect of timely decision making and changes of sequence of working upon the payment entitlement under the contract. We would also suggest that in the choice of external project managers, attention is placed, not only upon selecting consultant firms who can demonstrate experience in relation to NEC contracts, but also upon the individuals assigned by them to manage projects, to ensure that they are suitably experienced

in the use of the NEC contract and also temperamentally suited to providing the communication and management skills required for its effective operation.