

TAUNTON DEANE BOROUGH COUNCIL

Joint Report of Strategic Directors, Chief Solicitor, Financial Services Manager and Corporate Property Manager to the Executive Meeting on 6 December 2006

The Wellsprings Centre

1. Purpose

- 1.1 This report is to inform the Executive that all the issues arising out of the recovery of the project to build the Wellsprings Centre have at long last effectively been resolved and to formally report the outcome of the Council's claim against its original contractor Mr R W F Warner – trading as the Warner Group.
- 1.2 The report also provides details of the overall cost of the project and recommends how the small underspend on the approved budget set aside for its completion should be dealt with.

A A Summary of the Progress of the Project

2. History of the Project

- 2.1 In the mid 1990's the need for a sports centre that would serve the community and the needs of Ladymead School were identified and the project formed part of the North Taunton package under a "Capital Challenge" scheme.
- 2.2 In early 1998 tenders were received to construct a dry sports centre on the site at Ladymead School based on a design and build scheme. At the same time an application was submitted to Sport England for grant assistance towards the cost of the scheme. Sport England gave approval to a grant of approximately £2.2 million in the Autumn of 1999.
- 2.3 In May 2000 work commenced on site, the contractor being R W F Warner. For a variety of reasons the formal written contract with Warner was not finally signed until April 2001 but Warner was nevertheless contractually bound to complete the scheme by November 2001.
- 2.4 Early in 2001 it became clear that the contract was not progressing in accordance with the agreed programme and – despite a succession of unfulfilled promises - the agreed date for completion passed with the Centre being far from complete. From October 2001 to March 2002 pressure on Warner was increased with formal discussions taking place with the aim of having Warner comply with the terms of his contract with us by resolving the unsatisfactory progress with construction.
- 2.5 Detailed advice was sought from our external lawyers as to how we could bring this to a head. As a result, in March 2002 we served Warner with the formal notice legally required to start the contract termination process. Our advisors made clear that he had still to be given some chance to fulfil his contractual duties. He did not do so and, it soon became quite clear that Warner was not going to be able to complete the construction work within an acceptable period. The Council therefore decided in June 2002 to take the final step available to it by serving further notice formally terminating the contract with him. The site was immediately re-possessed and secured.

- 2.6 The next phase was particularly demanding and complex. The Council needed to recover the project as quickly and as efficiently as possible yet with the threat of major litigation involving Warner being very real. Consequently in July 2002 the Symonds Group Limited was appointed as our project managers to complete the building of the Centre. On their appointment their initial focus was upon a “stock-take” of both the quantity and the quality of what had been constructed so as to assess the scope of the work required to complete the Centre and to support the Council’s eventual financial claims against Warner.
- 2.7 Having prepared the necessary procurement process, tenders were invited from appropriate contractors for the completion of the Centre and Bluestone Plc was appointed as the Council’s chosen contractor in 2003.
- 2.8 In view of the substantial additional costs which the Council now needed to find, an application for additional grant support of £550k was submitted to Sport England in January 2003. The normal rule is that no further work should be carried out whilst such an application is being considered by them. Given the condition of the Centre – they agreed that we could nevertheless proceed with the limited work of making sure that the Centre remained wind and water tight. This work was carried out in April 2003.
- 2.9 Sport England’s decision was delayed even further because of their policy of not making funding decisions around the time of elections. Thus it was that the unwelcome and unexpected decision by Sport England not to increase the grant aid already given to the Council was received immediately following the Borough elections in May 2003.
- 2.10 Having thus exhausted all options for additional external funding, the works by Bluestone to complete the Centre started. Practical completion was achieved just before Christmas 2003 and the Centre was opened to the public in January 2004.

3. The Council’s Claim against Mr R W F Warner

- 3.1 In October 2003 Council Officers and our external lawyers met with Warner to outline the claim which the Council intended to make against him for the cost of completing the Centre. It was estimated that our claim would be in excess of £2 million. In turn Warner was intending to seek compensation of £250,000 against the Council - claiming he had not been properly paid for the work he had carried out. When confronted with the Council’s claim Warner claimed that he was insolvent and that any such claims against him would be fruitless.
- 3.2 In December 2003 Warner initiated court action to prevent himself being made bankrupt. During this process it became apparent that there were a multitude of other creditors with claims against him including suppliers, sub-contractors and one other local authority – Derbyshire Dales DC.

- 3.3 Warner held a creditors meeting in January 2004. This was in order to get approval from his creditors for him to create an Individual Voluntary Arrangement (IVA) which would have the effect of staving off his personal bankruptcy. Warner's trustee decided to initially disallow both Councils' claims against him under their construction contracts.

This meant that legally we were not at that stage able to vote in any meaningful way against the proposed IVA. As a result in February 2004 our lawyers and those of Derbyshire Dales DC issued court proceedings to challenge the decisions taken at the creditors meeting.

Between February and April 2004 the court proceedings and discussions with Warner and the lawyers acting for the Chairman of the creditors meeting continued to see if the various competing claims could be resolved.

- 3.4 When the Council was given details of Mr Warner's assets and liabilities we decided to instruct a firm of "forensic accountants" to carry out a thorough investigation of Warner's financial affairs so that the Council could be confident that nothing was being hidden. It would also ensure that decisions about our claims against him could be soundly based.
- 3.5 The conclusion which we and our legal and financial advisors came to with considerable regret on the conclusion of these investigations was that there were no prospects whatever of recovering the kind of compensation which would otherwise have been properly claimed by us in the courts from Warner. Whilst we were successful in having our claim eventually admitted in the IVA, Warner's assets were so small that the amount awarded and paid to the Council amounted to only £59k. That amount appears in the final account set out in the next section.

4. Financial Summary

- 4.1 When the Wellsprings Centre was first commissioned by the Council (1997/98) the expected net cost, after taking into account the expected level of support from external funding partners such as the Lottery was £578k.
- 4.2 The difficulties with the Warner contract, the subsequent determination of that contract, together with the "rescue" package to finalise the construction of the Centre have required approval from Full Council for supplementary estimates totalling £2.5m. This brought the budgeted net cost to the Council to £3.095m.
- 4.3 A summary of the how the budget has increased in recent years is shown below:

Year	What for	Amount £000
1997/98	Original Net Budget	578
2001/02	To meet additional costs following changes in the BCIS inflation index and its subsequent impact on the overall contract cost	128
2002/03 (via Budget Process)	Contingency to meet expected overspend	80
2002/03	Additional costs arising from decision by Full Council in March 2002 to continue contract with Warner (including an allowance for "incentive payment" if project was completed	362

	by June 2002)	
2002/03	To meet costs arising from subsequent contract determination	99
2003/04 (via Budget Process)	To part fund expected completion costs	696
2003/04	To meet additional costs arising from the Guaranteed Maximum Sum provided by Bluestone	1,062
2003/04	Repairs to external blockwork	90
Total		3,095

- 4.4 With the construction of the Centre now complete and all legal cost recovery mechanisms having now been exhausted, Officers are now in a position to be able to report on the final cost of the project. In summary the net cost to the Council is £2.849m. The table below details its final costs when compared to the approved budget:

Cost Heading	Budget £000	Actual £000	Variance £000
External Legal Fees	200	182	-18
External Project Managers	207	257	50
Construction Costs	5,397	5,237	-160
Total Expenditure	5,804	5,676	-128
External Income	-2,709	-2,827	-118
Total	3,095	2,849	-246

- 4.5 This is £246k less than the revised budget cost of £3.095m. Below is a schedule of the main savings achieved on the project – as compared to the approved budgeted figures:-

Cost Heading	Saving £000
Guaranteed Maximum Sum - underspend	-69
Legal Fees	-18
Retention withheld from original contractor	-77
Emergency expenditure re: drainage works	36
Additional external income	
• Claimed back from original contractor	-59
• Other additional external income	-59
Total Underspend	-246

Members should note that these costs exclude the substantial time spent by a range of senior officers on the management and recovery of the project. It is estimated that these amount to in excess of £200k. In total the Council has been able to recover only around £79k of its costs from Warner. This has been in the form of both legal expenses (£21k) and the dividend accruing to the Council from the IVA (£59k).

- 4.6 With the construction of the centre complete and no other works now required, it is recommended that the underspend of £246k is now returned to unallocated general fund reserves.

B Review of the Wellsprings Project

Having set out this outline of events of this ill-fated construction contract and its financial consequences, the remaining sections of this report outline the processes which we put in place to manage an exceptional – and probably unique - set of challenges for the Council's members and officers. The report also summarises some of the significant lessons that were learnt and the far-reaching changes which have been put in place since that time.

5. Recovery Project Control

- 5.1 In order to manage the complex task of recovering the Wellsprings Centre project a new Multi Disciplinary Officer Group was established early in 2002. It took control of the closing down of the Warner contract, the recovery and completion of the project and the attempts to sue Warner for compensation. In this we were helped by external project management consultants - appointed by Sport England to protect the grant assistance they had already made to the project – and by procurement officers of the County Council.
- 5.2 At Member level an all-party Project Steering Group was also created in 2002 comprising the Leader and Deputy Leader of the Liberal Democrat Group (who were then the majority party) together with the Leaders of the other political groups. When the political control of the Council changed in May 2003 the membership of this Members' Steering Group then consisted of the Leader of the Conservative Group, the Leader of the other political groups together with the Portfolio Holder for Leisure and Recreation and one other Conservative councillor. During the pre-completion phase, the Steering Group also invited representatives of the County Council and of Ladymead Community School to be present at their meetings.
- 5.3 In addition to the internal arrangements detailed above, when it was clear in the Autumn of 2001 that the contract with Mr Warner was not progressing properly the Council engaged one of the country's leading firms of construction lawyers to advise it on its dealings with Warner and on the legal issues arising not only from the termination of his contract but also on the new contract to complete the Centre.

6. Reviews/Scrutiny Arrangements

- 6.1 Throughout the whole of the period since the contract was first let to Warner, the project has been examined on a number of occasions by our internal Auditors and the District Auditor and has been the subject of a number of internal and external reviews.
- 6.2 In particular, in January 2003 (after the collapse of the Warner contract and before construction re-commenced) the District Auditor issued a review report with recommended actions aimed at minimising the future risks to the Council. The recommendations were immediately accepted and implemented in full.

- 6.3 An extract from the 2003 Annual Audit letter summarises the District Auditor's comments:-

“Wellsprings Project

Work started on site in May 2000 for the Wellspring Centre but as the project progressed it became clear that the original contractor could not complete the work to agreed timescales and budget. The Council ‘determined’ the contract in June 2002, and this raised a number of issues for the Council and for us as the external auditors. We carried out a review of the project and reported our findings in January 2003.

Throughout the duration of the contract there were a number of events, which with the benefit of hindsight were warning signs that the contract may not be delivered within the agreed timescales and budget. The Council could have responded to these events more proactively by increasing their input and staff resources in the management and supervision of the project. Whilst this may have resulted in bringing matters to a head earlier, it is unlikely that the end result would have been any different.

Although there are lessons to be learnt with regard to risk assessment and project management, there is no evidence to suggest that the Council has acted imprudently or improperly.

There remain many issues with the original contractor, which need to be resolved by the Council, in order to bring the original contract to a conclusion. The Council is rigorously pursuing the recovery of the increased costs from the contractor.”

- 6.4 As mentioned earlier, the management of the recovery of the project has also been thoroughly reviewed by an independent Project Manager appointed by Sport England. As a result of his report the grant support awarded to the Council in 1999 has also been paid in full.
- 6.5 Weekly bulletins on progress were shared with the Members Steering Group throughout 2002/2003. Regular reports on the project have been submitted to the Executive since June 2000 and to the Council through to July 2004. All significant decisions as to the Warner contract termination and as to the funding needed to effect the Centre's completion have also been taken through Full Council.

7. Lessons Learned

- 7.1 The Wellsprings Centre itself – now that it has been open for use for three years – has been an undoubted success and is contributing to the local community just as was hoped when it was planned in the mid-90s. But the construction contract posed more problems for this Council than any other in its lifetime. It has cost substantially more than was originally planned and its eventual delivery was more than two years late. The recovery process demanded the input of significant amounts of the scarce time of a range of senior officers and from lead councillors from all parties. The expectations of the school and of the local community to have this Centre available by the end of 2001 were dashed.

- 7.2 Without doubt the Warner affair was a major contractual failure which caused real damage to the Council through those years. No-one who has been affected by it would wish to see a repeat. Thus significant work has gone into learning from this - hopefully - unique experience.
- 7.3 A number of formal reviews of the project were carried out – independent of the Council – notably by the District Auditor and by Sport England. Whilst none pointed to any significant event or approach on the Council’s part which led to the contract’s failure – other than the actions of Warner himself - each made recommendations as to how the risk of a recurrence should be minimised. All such recommendations were immediately acted upon.
- 7.4 In addition, the Officer Group has carried through a searching review of what other lessons needed to be learnt and what changes should be made in our approach to procurement. This review was facilitated by external project management consultants. As it progressed it was evident that a wide range of improvements or changes had already been made in response to the extreme problems which had come to light during the recovery process. The appendix to this report contains a summary of some of the main issues which we noted during that exercise

8. Present Position

- 8.1 Although one or two minor items still remain to be resolved with the Centre, it forms an important and successful element of the leisure facilities being managed by Tone Leisure.
- 8.2 The facility is a popular one and is trading well - providing a valuable resource for both the school and the community of North Taunton.

9. Conclusions and Recommendation

- 9.1 The failure of the original construction contract with Warner was extremely damaging to the authority and to the local community. Its recovery has required considerable resources, in both financial and people terms, to get the project completed.
- 9.2 A range of lessons have been learned and implemented - as detailed in this report - and those lessons have made a considerable impact on the way that our procurement management now operates.
- 9.3 The budgets approved by the Council to ensure the completion of the project have not been fully exhausted and a sum of £246k remains. It is recommended this sum should be returned to unallocated general fund reserves.

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APPENDIX

	Issue	What happened?	Action taken?
1	Contract definition	There were early problems over elements of the contract where Warner took advantage of ambiguities to gain a limited financial advantage	DA Action Plan. All recommended changes adopted.
2	Pre-contract checks	Full, proper financial checks were carried out pre-contract. But in retrospect we concluded that these could have been more rigorous and could have been updated as the contract start became delayed.	Procedural changes have been made to tighten up this aspect
3	Procurement process	<ul style="list-style-type: none"> Warner was <u>not</u> the lowest tenderer, yet - in retrospect - this contract largely failed because he had contracted to provide the Centre for an unrealistic sum. Construction projects inevitably cost what they are truly worth – whatever the price label originally claims. Our formal contract standing orders and tendering mechanisms needed to be updated. 	<p>A rigorous approach needs to be adopted to overly-attractive contract offers.</p> <p>Our procurement procedures were reviewed and new contract standing orders adopted by the Council in 2003.</p>
4	Contract Documentation	<ul style="list-style-type: none"> Minimise all ambiguity of wording in documentation pre-contract Ensure written contracts completed as early as possible 	District Audit Action Plan included recommended changes. These were implemented in early 2003
5	Risk Management skills	At the time of its procurement stage in the late 90s, a full Risk Management approach had not yet been adopted by the Council. This has subsequently become an integral and important part of the Council's corporate governance arrangements and is now invariably applied to the management of all our projects	Done
6	Project Management skills	These too had not been formalised at the procurement stage of this contract. They became an important part of the approach during the recovery phase. They have now similarly been recognised as a vital skill for all staff involved in delivering a wide range of council-initiated schemes	Fully introduced and developed
7	Contract management capacity	The intensity and complexity of the work needed to enable contracts of this size and difficulty is hard to overestimate. Over the years we have been extremely fortunate to	Whilst the use of external consultants can often be far from

	Issue	What happened?	Action taken?
		have had staff with the ability and experience to be able to manage very demanding and sizeable contracts. "Punching above our weight" is a compliment often rightly paid to us. However, when things go wrong – as in this case – the demands far outweigh the capacity which we could reasonably expect to have available. .	ideal, we have now accepted the reality that - for larger and more specialist projects – the employment of such external expertise is essential.
8	Succession Planning	Similar to the previous item, the retirement of a number of staff who were key to the delivery of this project created very real problems in terms of our capacity	As above. We have now acknowledged that external skills – and the costs associated - do need to be imported more often - and at an earlier stage - than we have previously hoped was necessary.
9	Future acceptability of the Design and Build approach	The adoption of the Design and Build approach has often been quoted as a significant contributor to the failure of this project. Sport England decided during the recovery phase that it no longer supported D&B as a delivery method. D&B <u>can</u> be an effective way of delivering some types of project. It has its strengths and its risks. With the proper application of a Risk and Project Management culture there is no "in principle" reason to exclude this method for all purposes. But it does need to be treated with caution.	It is unlikely that major capital projects of this scale - directly commissioned by the Council - will now arise too often. Whilst not ruling out D&B, the experience gained here will need to be fully taken into account in any such procurement.
10	The recovery process – how well did it cope	The Council – both at member and officer level – devoted an exceptional amount of time and energy into the unattractive task of recovering this project from the brink of complete failure. It has been generally accepted that the recovery process that we put in place worked well and the individual lessons learnt as a result have been implemented – and are referred to elsewhere in this report	
11	The roles of the Officer Group and of the Member Steering Group	It was essential that a joint approach was taken to this project with full input from senior elected members and officers. That was achieved successfully. Whilst inevitably there were occasional strongly voiced disagreements, the two groups worked well together and devoted an exceptional amount of time and energy to achieving the best it could for the Council.	

	Issue	What happened?	Action taken?
12	The all-party approach to effective disaster recovery	This was the council working at its best. The recovery was managed across the May 2003 elections by an all-party working group who remained united throughout despite considerable external pressure and the unattractive nature of the task before them. Without that unity of purpose any prospect of the project's successful recovery would have been remote.	
13	Communications – internally, with our partners and with the public	This is not the sort of story that anyone enjoys either writing - or reading. Wellsprings figured significantly in the local media throughout the contract's painful collapse and recovery phases. After some initial uncertainty, the communication links were revised and a full and regular sharing of current information was put in place. Given the highly litigious atmosphere prevailing at the time and the consequent need to take extra care as to confidentiality – the extent and nature of the information released is regarded as having worked well.	This has acted as a useful reminder of the power of transparency and openness at times of rumour, suspicion and misunderstanding. This lesson subsequently helped us see how best to support local communities when afflicted by other crises - such as the Oxen Lane North Curry invasion
14	The necessity for - and the part played by - external advisors during the recovery phase	Lessons were learnt as to both the benefits and the inevitable limits of external advisors. "Getting it right" at the start can save the need for substantial remedial work further down the line. Of equal importance is the need to make sure that the nature of the task is fully understood by potential appointees and that their track record shows their experience in dealing with this demanding type of work.	There is now a greater recognition that we cannot realistically hope to meet all exceptional situations from within our own resources.
15	Understanding the legal restrictions created by the contractual relationship and the limits placed on the clients' ability to apply immediate and effective sanctions.	Contracts can be blunt instruments and – when they start to fail – are often not capable of immediate and effective remedial action. Once chosen, legally, a contractor and the client have a duty to do all they can to co-exist and to overcome obstacles.	For all involved in the recovery, the strong legal advice about this duty posed real problems for us. The natural instinct of many at the time was to terminate immediately. That was simply not deliverable.
16	Should contracts of this type be supported by a financial bond to	It has not been the Council's practice to require bonds to support contract delivery. Bonds do not come cheaply. It is doubtful whether a bondsman would have materially improved the	

	Issue	What happened?	Action taken?
	guarantee its delivery?	recovery of this project	
17	Appreciating the impact which such a contract failure has upon the approach taken by external contractors and consultants	For anyone – and this includes external consultants - being associated with a contract failure is an extremely unattractive activity. In terms of their reputations, the work carries high risks and yet the rewards for a successful recovery are small. None is obliged to take on such work and – if they do – they will inevitably take a cautious approach to putting it right.	This is an inevitable consequence of such a contract failure. Recovery from such a crisis must be accepted as being an expensive and slow business
18	The slowness of the recovery process	Linked to 17. The process was necessarily painstaking and took 18 months from Warner termination until the building's completion. There were two main contributors to this. First was the necessity to stock-take and to ensure we had a strong basis to sue Warner. Secondly was the need to pursue further grant from Sport England. As it has turned out, litigation by Warner (or against Warner) had limited scope (as described earlier in the report); and Sport England decided not to increase its grant to us	These aspects were reviewed. Although - in hindsight - a number of months delay occurred - the right decisions were made at the time
20	RWF Warner	A great deal has rightly been written about the Wellsprings contract failure and as to what we could have done to avoid it. It is right that we should do so. But the key to this crisis is the actions of Mr RWF Warner himself and the level of competence shown by him in managing this project. This is borne out by our discovery during the recovery phase of similar problems being encountered with other of his contracts in the South and Midlands. Yet it is this Council which has had to take the brunt of the financial damage he caused. He himself has substantially limited the financial consequences of his actions by entering an IVA. Every effort was made – and external specialist advice taken - to avoid this result. But rightly or wrongly that is the way which the insolvency law of the land now works	A painful lesson has been learnt
21	We should not have contracted with an individual. If the contractor had been a corporate body we would have been in a stronger position to recover our costs	This is not actually the case. If a similarly ill-fated contract had been with a limited <u>company</u> then their financial ability to cope with the substantial legal claims may not have been any greater. Insolvency – albeit of a different kind – would have surely followed.	
22	Sport England – the refusal of additional	A substantial amount of work was devoted to this new application to Sport England which	No substantive reason was given

	Issue	What happened?	Action taken?
	funding – could we have done more	was submitted in January 2003 but not decided by them until May of that year. The application was worked up with the officers of Sport England and we felt we had quite some reason to be optimistic about its chances of success. The decision announced immediately after the elections came as a considerable surprise.	for the rejection and although a strong plea for an urgent review of their decision was requested, no further comment was made by them.
23	The demands placed on staff during the recovery phase.	This recovery project across 2002 and 2003 placed exceptional pressures on a number of our senior staff who formed the recovery team – in addition to the demands of their “day jobs”. The nature of the task – along with its regular setbacks and disappointments - made it far from attractive. Taunton Deane was very fortunate to have a group of officers with the expertise to take on this task.	There are issues of capacity here. When they happen, crises soak up excessive amounts of our scarcest resources. The taking of a proper Risk Management approach will reduce the frequency and gravity of such crises but they cannot eliminate them.
24	The District Audit Report – completion of the Action Plan?	All recommendations made by the District Auditor in January/February 2003 were acted upon immediately.	