

Report

Subject : Office Project
Report to : Special Full Council
Date : Tuesday 7 August 2007
Author : David Crook, Acting Chief Executive
Cabinet Member: The Leader, Councillor Paul Sample

1. Purpose of Report:

1.1. To approve the revised agreement negotiated with Bluestone (now known as Morgan Ashurst), or instruct officers to proceed with an alternative course of action.

2. Background:

2.1 At its meeting of 25 July 2007, members considered the latest options appraisal relating to the contract for the construction of centralised offices at Bourne Hill. The Council resolved;

“to authorise the Chief Executive, in consultation with the Leader and Deputy Leader of the Council to instruct Bluestone to proceed with the existing centralisation project and contract subject to the modification set out on the attached plan (appendix F to the Council report of 25 July 2007) and to seek modified planning permission and listed building consent as works proceed.

And, failing agreement with Bluestone, for the matter to be brought back to Full Council on 7 August 2007”

3. Progress:

3.1 Two meetings have taken place with Bluestone since the Council meeting. It is fair to say that a good deal of progress has been made in devising an approach to comply with the Council resolution.

3.2 The main headings of the agreement are:

- Payment of an interim valuation to Bluestone of £525,000.
- Revisions to the existing contract to construct a modified extension to the rear of Bourne House.
- Start on site deferred until fresh planning and listed building consents are obtained.
- Terms for negotiation of revised costs on an open book basis. (Essentially requiring the contractor to obtain 3 quotes from sub-contractors for each work element, the information to be shared with the Council to demonstrate best value.)
- The proposals to be formalised in a Deed of Variation to the existing contract.

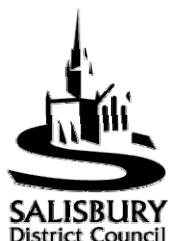


INVESTOR IN PEOPLE



CUSTOMER SERVICE EXCELLENCE

Awarded in:
Housing Services
Waste and Recycling Services



- 3.3 Because the proposal would retain the existing contract, officers believe that the costs to date can continue to be capitalised, and that the Council would avoid the transfer of up to £6m of costs from capital to the revenue account. Whilst it is true that this process offers the council less certainty than the original fixed price contract, it does offer an orderly, structured approach to the problem of modifying the design.

Despite the progress made to date, there is one problem which officers have been unable to resolve.

4. The Problem:

- 4.1 A draft agreement was received from Bluestone yesterday lunchtime. Officers are unhappy with the proposal contained in Clause 5 of the contract. It imposes a guillotine date of 14 September 2007 to complete all the details of the Deed of Variation.
- 4.2 Officers have made representations to Bluestone expressing concern that it may not be possible to complete all negotiations by this date. Bluestone have amended the agreement by inserting wording at Clause 6 which offers some reassurance, but officers remain concerned that;
- The draft agreement will not allow the service of an instruction to proceed with the original design (or a modified design) in the event of a failure of negotiation.
 - The agreement will allow Bluestone to effectively impose the terms of agreement.
- 4.3 Whilst it should be said that there is no evidence of Bluestone taking anything other than a constructive and reasonable approach to negotiations, I feel that I must seek the Council's view on the level of risk it is willing to take in order to secure a modified design. The draft agreement puts Bluestone in a very powerful position, and conversely the Council in a very weak one.
- 4.4 Members are therefore asked to confirm that they wish me to sign the draft agreement, thereby accepting the terms negotiated with Bluestone. Should members be unwilling to agree this, then they will need to revisit the options set out in the report to the Council meeting of 25 July 2007.

5. Recommendations:

- 5.1 Council is recommended either to:
- 5.2 Instruct officers to sign the draft agreement attached to this report and thereby accept the terms negotiated with Bluestone or;
- 5.3 To instruct officers in an alternative course of action.

6. Implications:

6.1 Financial

Whilst the negotiations are ongoing and the contract still in place all costs can continue to be capitalised, and whilst potentially compromising the value for money of the final solution do not put the Council's finances in material jeopardy. Should the negotiations fail then the amount of compensation payable to the contractor would be revenue costs. This was estimated in the report of 25 July 2007. In that scenario the council would at its next meeting be required to adopt a strategy to deal with the potential loss of its entire revenue reserves.

6.2 Legal

The legal status of the draft agreement is not certain. Some of the heads of terms such as the payment of the Agreed Sum are likely to be seen as legally binding. Whatever its exact legal status is it will be difficult for the Council to negotiate new terms which are not covered by the draft or to negotiate significant changes to those terms covered by the draft. The legal implications associated with alternative options are set out in the report to Council considered at the meeting on 25 July 2007.

6.3 Personnel None

6.4 Community Safety None

6.5 Environmental -

6.6 Human Rights - A contract is a property right for the purposes of Protocol 1 Article 1 (protection of property)

6.7 Wards Affected - All

6th August 2007 – Revised Proposal following MCP/John Crawford discussion.

Morgan Ashurst PLC
Ground Floor
1650 Parkway
Solent Business Park
Fareham
Hampshire
PO15 7AH

Dear Sir,

Bourne Hill - Office Centralisation Contract

We confirm the following agreements in connection with the postponement, variation, redesign and change of the scope of Works to be undertaken in respect of the Bourne Hill project.

The parties have agreed that the following heads of terms shall be formalised by the preparation of a Deed of Variation to the Building Contract executed by the parties on the 27th April 2007.

1. Salisbury District Council will pay Morgan Ashurst, on or before 31st August 2007, the sum of £525,606.04 (excluding VAT) in compensation for:
 - Loss and expense incurred in respect of suspension of the Works following the issue of Architect's Instruction 07 dated 24th May 2007.
 - Compensation in lieu of Damages in recognition the direct losses occasioned to Morgan Ashurst in consequence the Building Contract not being progressed in accordance with its terms as a result of the Council's wish to revise the scope of the scheme and to retain Morgan Ashurst as Contractor for the revised scheme .
 - Costs incurred in preparing and agreeing the Deed of Variation.

Details of the above are set out in your letters dated 30th July and 2nd August 2007, and have been agreed on Gardiner & Theobald's Valuation Recommendation 03 and certified in Stanton Williams' Interim Certificate 03, both dated 3rd August 2007.

2. In consideration of the reimbursement set out above Salisbury District Council and Morgan Ashurst will work collaboratively to negotiate a revised contract sum, and programme, for the modified scheme on the following basis. It is upon this basis that a Deed of Variation will be prepared:-
 - A revised Contract Sum will be negotiated exclusive of VAT.
 - The revised Contract Sum will comprise of inter alia:-
 - The Agreed Sum of Compensation as above – such sum will not be adjusted by any variation to the Building Contract.
 - A Preconstruction Fee – reimbursement of costs in arriving at a revised contract sum and providing assistance in developing the revised Scheme Design.

- The Revised Priced Bills of Quantities, Preliminaries and Provisional Sums prepared or procured by the Employer in order that these may be substituted on an Omit and Add back basis for the revised scheme.
 - Main Contractors Overheads and Profit applied as a percentage of 8.5% to:-
 - The Preconstruction Fee
 - Revised Bills of Quantities
 - Revised Preliminaries
 - Provisional Sums
- Revised Bills of Quantities will be prepared by or procured by the Council. The revised Bills of Quantities will take into account the revised drawings and specifications for the project. The Revised Priced Bills of Quantities will be arrived at by renegotiation of works packages (i.e. trade packages) with Morgan Ashurst's originally intended subcontractors.
 - Where it is not possible to renegotiate works packages, or is not considered value for money, work packages will be retendered on an open book basis.
 - Upon receipt of sufficient information from the Employer and the Design Team the Contractor shall prepare a revised draft Master Programme for agreement. The revised Master Programme shall define the revised dates for Possession and Completion that will be substituted for those contained in the Building Contract.
 - Revised preliminaries are to be agreed for the amended scheme based upon the rates included within the original Building Contract uplifted to reflect the delay to commencement of the Works and differing sequences and circumstances in which the Works will be progressed.
 - Reimbursement of Morgan Ashurst's preconstruction costs based upon an agreed programme and level of preconstruction input required will be agreed as a Preconstruction Fee either as a lump sum or on a timesheet basis. The Preconstruction Fee shall for the avoidance of doubt include lead-in / mobilisation costs for the site team (the details of which are to be agreed with the consultants by 31st August 2007). Payment of the preconstruction Fee is to be made on a monthly basis in accordance with the payment terms of the Building Contract.
 - The timescale for developing and agreeing the revised contract sum for the revised scheme shall be as detailed in Nisbet's programme for the modified scheme (with planning award before construction) dated 11th July 2007. Any variation to this programme is acknowledged as a cause for additional reimbursement in accordance with the principles set out above and may require further compensation to become payable to Morgan Ashurst.

3. For the avoidance of doubt the Council/Design Team will be responsible for providing inter alia:-

- o Design Drawings
- o Bills of Quantities in accordance with SMM7
- o Specifications
- o Other such information as is necessary to enable the Works to be priced by the Contractor in order to arrive at a revised Contract sum

4. For the avoidance of doubt matters such as:-

- o Planning Applications and Risk
 - o Building Regulations
 - o Listed Building Consents
 - o Party Wall Matters
 - o Environmental Impact Assessments
 - o Archaeological matters
 - o Ground Investigation
 - o Site Surveys
 - o Condition Surveys
 - o Temporary Works Designs
 - o Asbestos Surveys
 - o Costs of design
 - o The preparation of Bills of Quantities
 - o Preparation of Specifications
 - o All other permissions, licences, consents, statutory obligations and the like necessary to carry out and complete the Works and the like;
- will also be at the responsibility of the Council and no risk in respect of such matters shall pass to Morgan Ashurst.

5. Salisbury District Council and Morgan Ashurst will enter into a Deed of Variation to the JCT Standard Building Contract with Quantities 2005 dated 27th April 2007 to encompass the above. The Deed of Variation is to be based on the draft submitted by Morgan Ashurst in their letter dated 2nd August 2007 as amended and agreed between Veale Wasborough and Clarke Willmott, and is to be executed by 14th September 2007.

Should the Deed of Variation not be concluded by this date then it is hereby acknowledged that either party may treat the Building Contract as determined subject to a final fourteen day notice.

Further it is acknowledged that in the case of Morgan Ashurst following expiry of fourteen days from the issuing of a final fourteen day notice by either party then Morgan Ashurst may recover all costs and losses arising from such a termination in accordance with the terms of the Building Contract dated 27th April 2007 as if the termination notice had been issued between the 8th August 2007 and 18th August 2007. This position allows the Council further time to resolve the detailed matters relating to the Deed of Variation and acknowledges the compromise position agreed by the parties relative to the period for agreement of the Deed of Variation and further agreements regarding the strict timing of termination notices provided for with the Building Contract.

6. There are a number of matters in respect of the Deed of Variation that have yet to be agreed. These will be agreed so as enable the date of the 14th September 2007 to be achieved. Matters yet to agree include inter alia:-

- Revised Liquidated and Ascertained Damages.
- Date of Possession
- Date of Completion
- Sectional Completion Dates
- Contractor Designed Portions

The parties acknowledge that it may not be possible to have all these details concluded by the 14th September 2007. Where such details are identified then the parties have agreed to incorporate an agreed mechanism within the Deed of Variation that will allow such details to be concluded after the 14th September 2007. In this way the Deed of Variation can be concluded but will afford the parties a degree of flexibility on a number of specific matters of detail that may need to be resolved after the 14th September 2007 and after the Deed of Variation has been concluded.

In consideration of the agreements set out above Morgan Ashurst will withdraw the notice to terminate their employment under the contract, issued 25th July 2007, and will continue to work with the Council in accordance with the principles set out above.

In order to record your agreement to the foregoing we request that you sign and return a copy of this letter by return.

Yours faithfully,

.....
for and on behalf of Salisbury District Council

Signed:
.....
for and on behalf of Morgan Ashurst

Date:
.....

Recommendations to Council

That we note the progress made on negotiating the retention of the existing contract, and the process for proceeding with a modified design, and;

1. Instruct the Acting Chief Executive to sign the draft agreement attached to the report
2. Authorise the Acting Chief Executive to continue the process of negotiation on the details required to complete a Deed of Variation and at his discretion to enter into it by 14 September 2007.
3. If Morgan Ashurst seeks to terminate the existing contract after 14 September 2007, this matter be reported back to Full Council within 10 days of notice of termination.
4. In the event of (3) above, officers submit proposals to that Council meeting to appoint an alternative contractor to complete the process of constructing the modified design and ;
5. Also in this event, officers present a robust financial strategy in consultation with the Leader and Deputy Leader to deal with the consequences of the termination of the existing contract.