

ABERDEEN CITY COUNCIL

COMMITTEE	Finance Policy and Resources
DATE	01 December 2017
REPORT TITLE	Delays in Capital Programmes of Works Attributed to the Contractor – Motion by Councillor Jennifer Stewart (24 January 2017)
REPORT NUMBER	CHI/16/326
DIRECTOR	Bernadette Marjoram
REPORT AUTHOR	Arthur Barrie

1. PURPOSE OF REPORT:-

- 1.1 At the meeting of the Communities, Housing and Infrastructure Committee of 24 January 2017 the Committee agreed the terms of the motion by Councillor Stewart be reported to this Committee.

The motion by Councillor Stewart was “ To instruct the Interim Director of Communities, Housing and Infrastructure to report on the proposition that where there are unreasonable delays in Capital Programmes of Works attributed to the Contractor, that (i) Council tenants and other affected householders should receive an appropriate payment payable by the contractor (to be provided for in the contract between the Council and the Contractor) to cover their reasonable losses and/or

(ii) other methods of recompense should be made available. The report will also look at best practice adopted in this area by other Scottish Local Authorities”

- 1.1.1 The Communities Housing and Infrastructure committee at its meeting on 24 January 2017 instructed the Director of Communities Housing and Infrastructure to bring a report to a future Finance Policy and Resources Committee.

2. RECOMMENDATIONS

- 2.1 The Committee is recommended to
- a) note the report and in particular that Council tenants and other affected residents should not receive compensatory payments under the contractual terms for capital works; and

- b) instruct officers to engage Council tenants and others affected by any future delayed works and contractors to assist negotiation on any remedial actions that can be taken to counterbalance unreasonable delays.

3. BACKGROUND/MAIN ISSUES

3.1 The motion is effectively structured around two requests: one is to ascertain if third parties (tenants/residents) can be compensated by contractors employed by the Council if works are delayed; and the second is to ascertain how other Local Authorities manage this issue.

3.2 Scottish Building Contracts – Contractual Position Regarding Delay by Contractor followed by Aberdeen City Council

3.2.1 Building contracts funded from the Council's Housing and Non Housing Capital Budgets are let under Standard Building Contracts for use in Scotland. These contracts are issued by the Scottish Building Contracts Committee.

3.2.2 Within these contracts there is a clause which entitles the Employer to deduct liquidated damages at the rate stated in the Contract Particulars, or at such a lesser stated rate, from sums due to the Contractor. A liquidated damages clause gives the Contractor the advantage of knowing with a reasonable degree of certainty the extent of his liability if he commits a particular breach of contract.

3.2.3 These sums can be withheld from the Contractor in the event that the contract is breached and in a building contract liquidated damages relate to the Contractor failing to achieve Practical Completion by the date set in the contract document.

3.2.4 Liquidated Damages are not penalties, they are pre-determined estimated damages set at the time a contract is entered into, based on a calculation on the actual loss the Employer is likely to incur if the Contractor fails to meet the contracted completion date. Examples of losses might be rent on temporary accommodation, removal costs, extra running costs etc.

3.2.5 As liquidated damages are not a penalty they must be based on a genuine calculation of damages when they were set. If they are not genuine, they may be considered a penalty by the courts and so will be unenforceable. The amount is decided on the understanding and intention that liquidated damages will compensate the Employer and not to coerce or punish the breacher.

3.2.6 Liquidated Damages will be the Employer's exclusive compensation if the applicable type of breach applies.

- 3.2.7 Therefore if the Employer has no material loss then liquidated damages cannot be applied and if the Employer attempted to do so then the amount would be open to challenge. In short the Employer is unable to quantify its loss.
- 3.2.8 Most of the contracts funded from the Housing Capital Budget are executed to buildings where the tenants and other householders remain in their dwellings for the duration of the works. Protection of access arrangements and all facilities are provided through the contract therefore the Council has no additional cost/expense if the Contractor is late in completing the works in this area as these provisions by the Contractor must remain in place at no cost to the Employer until the Certificate of Practical Completion.
- 3.2.9 In contracts such as these the liquidated damages rate is included as a fixed sum and is limited to the Council's additional expense for professional/technical and administrative costs for the period between the contracted completion date and the actual date of Practical Completion. These costs include additional time spent by internal and external consultants, additional time spent by building inspectors and tenant liaison officers.
- 3.2.10 There is no provision in the contract that requires the Contractor to reimburse third parties for their losses. Only the Employer can deduct monies due to the Contractor under the contract for the amount stated in the Contract Particulars. There is no financial loss to the Council for the unfortunate disruption to tenants and other householders.
- 3.2.11 It would be illegal and unenforceable to incorporate a provision in our contracts whereby it is incumbent on the Contractor to reimburse third parties for losses that are unknown to him and where losses cannot be substantiated.
- 3.2.12 It should be made clear that the term "tenant/owner loss" does not refer to any damage to property or personal effects caused by the contractor's negligence. In this case the Contract Administrator would instruct the Contractor to make good any damage to property to the satisfaction of the Contract Administrator and tenant/owner and replace any damaged personal effects or compensate the tenant/owner all at the Contractor's expense.
- 3.2.13 In summary, the legal position which protects all building contracts in Scotland though the industry standard adopted called 'Scotland Building Contracts' and which the Council follows does not require that payment be made in any form to third parties through the contract (Tenants and residents would be considered third parties in this instance). In effect the tenants and householders are not parties to the relevant contracts and therefore have no losses under the contract. It is acknowledged that due to the complicated nature of construction projects delays to completion are not uncommon. This can be inconvenient for tenants and householders.

To minimise inconvenience and additional costs the Council exercises its legal rights under the relevant contracts to minimise such delays. Whilst delays can be inconvenient it is preferable for the Council to maintain its ongoing Capital Programmes of Works to ensure it adheres to mandatory legal requirements such as with regard to safety.

3.2.14 Should recompense be made that would be as a good will gesture agreed by all parties.

3.3 Best Practice Adopted by other local Authorities

3.3.1 Through SHOPS (Scottish Heads of Property Services), an umbrella group formed to discuss and support best practice in the provision of property services in Local Authorities in Scotland, a request was made to ascertain the practices adopted by any other Local Authority on this matter. The method adopted was for the motion to be circulated anonymously and responses invited by the property services of the Local Authorities to it.

3.3.2 16 property services from Local Authorities replied to the request out of 32 that the request was made to.

3.3.3 The summary of the responses are in the tabular form below

Comment	Yes	No
Policy to compensate tenants in contract	0	16
Response as to whether above policy would be enforceable	0	6
Ad hoc arrangements for compensation from contractor	1	9
Other Compensation	3	0
L&A damages enacted	16	0

3.3.4 The clear understanding is that

- a) no formal provision is made to recompense tenants through contractual arrangements from the Local Authorities who replied
- b) recompense is structured around the required clauses written within the contracts agreed by each authority and contractors (L&A damages)
- c) the recompense takes the form of ascertained damages which are deducted from the final account of the contract
- d) individual arrangements have been made on an ad hoc basis, and not on a contractual basis

3.3.5 Aberdeen City Council has already applied an 'ad-hoc' arrangement to compensate tenants and residents for delayed work in Hazlehead where the contractor has agreed to deliver some environmental works to improve the area on conclusion of the contract because of delays.

3.3.6 With the inability to seek compensation through contracts officers consider that the best solution is to continue to explore 'ad-hoc' arrangements similar to the approach described above at Hazlehead and to those taken by other Scottish Local Authorities.

4. FINANCIAL IMPLICATIONS

- 4.1 If the Committee approves the recommendations there are no financial implications to the Council as a result of this report. If the committee decides on a policy to recompense tenants as part of a policy the Council potentially may breach obligations in relation to the requirement to seek best value for expenditure of public money as it would be exceptionally difficult to cap such costs and agree upon settlements satisfactory to all parties. The impact on officer time across the Council would be significant and it could detract from the time spent implementing the Capital Works Programme.

5. LEGAL IMPLICATIONS

- 5.1 There are no direct legal implications arising from the recommendations of this report. Any future legal implications will be reported after an options appraisal as instructed in recommendation b). If the committee seeks to put in place a policy to compensate residents a legal basis for doing so would have to be determined as paying public in compensation potentially could be *ultra vires*. The rationale of providing compensation when there is no legal basis for doing so could lead to criticism and reputational damage.

6. MANAGEMENT OF RISK

- 6.1 These are the identifiable risks which may impact the decision being sought from the Committee.
- 6.1.2 **Financial** – There are no financial risks to the Council in agreeing the recommendations. All financial risk is to be met by the contractor.
- 6.1.3 **Employee** – There is no understood risk to an employee of the Council in agreeing to the recommendations.
- 6.1.4. **Customer / citizen** – There are no understood risks to Aberdeen’s citizens in agreeing the recommendations
- 6.1.5 **Environmental** – There are no environmental risks in agreeing to the recommendations.
- 6.1.6 **Technological** – There are no technological risks associated with agreeing to the recommendation.
- 6.1.7 **Legal:** - There are no legal risks associated with agreeing to the recommendations
- 6.1.8 **Reputational;** - There are no reputational risks associated with agreeing to the recommendations.

7. IMPACT SECTION

7.1 Neighbourhood Regeneration - Improving Customer Experience –

- 7.1.1 Not applicable to this report

7.2 Community development - Improving Customer Experience

7.2.1 Not applicable to this report

7.3 Corporate

7.3.1 Not applicable to this report

7.4 Public

7.4.1 Not applicable to this report

8. BACKGROUND PAPERS

None

9. APPENDICES (if applicable)

None

10. REPORT AUTHOR DETAILS

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