

The Highland Council
Planning, Development and Infrastructure Committee

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| Agenda Item | 19 |
| Report No | PDI 53/16 |

17 August 2016

River Ness Flood Alleviation Scheme Phase 1 Update

Report by Director of Development and Infrastructure

Summary

This report presents an update on the dispute proceedings by Morgan Sindall on the River Ness Flood Alleviation Phase 1 Contract and Budget Forecast.

1. Background

- 1.1 The River Ness Flood scheme (RNFAS) was a complex capital scheme completed within Inverness city centre. In addition to building a 4km flood defence, the project included a utilities diversion contract worth £1.5m, streetscaping works valued at £3m, and the Huntly St/ Young St Junction Improvements contract (incorporating bridge joint replacement and junction improvements).
- 1.2 The scheme, now complete, has transformed the riverside making it modern and accessible attracting tourism and businesses. It also won national recognition, receiving a 'Project' award from the Saltire Society for Civil Engineering in 2015.
- 1.3 The scheme alleviates the risk of flooding to approximately 800 homes and 200 businesses.
- 1.4 The present value benefits of the scheme (in terms of damages avoided by investing in this project) amount to £82.987m. With the predicted forecast out-turn cost (detailed below) this represents a very positive benefit-cost ratio of 2.2, which is good for flood schemes.
- 1.5 Following confirmation of the scheme in 2009, a funding grant was secured from Scottish Government in 2011 amounting to £23.912m (2/3rds of the total outturnscheme cost) which it has received through the general capital grant.
- 1.6 Phase 1 works were awarded to Morgan Sindall. These commenced in August 2013 and were completed in June 2015. Phase 2 works were awarded to McLaughlin & Harvey. These commenced in May 2014 and were completed in September 2015.

2. Morgan Sindall Dispute proceedings – Adjudication 3

- 2.1 Morgan Sindall has consistently sought some £7.8m in addition to that certified by the Highland Council in accordance with the Contract. Members will recall that at the Planning, Development and Infrastructure Committee on 17 February 2016, confidential report (Item 4, PDI 02/16), they were advised on the outcome of Adjudications 1 and 2, which sought to dispute two very distinct issues. The Highland Council won one of these and lost the other. The Highland Council certified a further £65k, in response to the issue of silt being an unforeseen ground condition.
- 2.2 Morgan Sindall commenced adjudication proceedings (Adjudication 3) on 5 May 2016, and detailed all the areas of dispute between the parties. The remedy sought was £5,980,804.59.
- 2.3 As previously agreed by both parties, the adjudication process was undertaken by John Nicholson LLM DipArb DipAdj FRICS FCIArb MAE C.Arb
- 2.4 The adjudication process involved each party, starting with Morgan Sindall, submitting two rounds of evidence. The evidence in total amounted to 6 banker's boxes of legal argument, evidence, and witness statements.
- 2.5 The Highland Council team were supported by the legal firm CMS McKenna, and the claims consultant FTI during the process. The cost of the legal/ financial advice to the Highland Council throughout is approximately £400k.
- 2.6 Thirty areas of dispute were raised by Morgan Sindall, which included a number of lower value items, but also 6 items which (in their valuation) amounted to approximately £5m. These were:
 - boulders on Bank Street £1.06m;
 - additional change control staff £200k;
 - Douglas Row reinforced concrete detailing £437k;
 - Huntly Street services and drainage clash £290k;
 - Bank Street full construction areas £1.05m;
 - Silt impact on works £1.7m; and
 - impact on railing design on copes £268k.
- 2.7 The hearing was held over two days on the 30 June and the 1 July 2016, with the adjudicator's reasoned decisions received on the 22 July 2016. It is a well-defined but compressed process.
- 2.8 The adjudicator analysed all the arguments put forward for each individual event valuation in dispute. He concluded that Morgan Sindall was entitled to be paid an additional £1,758,068.15 (including an interest payment).
- 2.9 On the basis of this decision, the Highland Council sought further legal advice from CMS McKenna as to whether there would be any benefit in challenging this decision through Arbitration. CMS advised that the Arbitration process is a long drawn out (and costly) legal process and the chance of achieving

'success' were in the balance. It is not anticipated that Morgan Sindall will choose arbitration, however it cannot be ruled out. If Morgan Sindall wished to commence the arbitration process they would be required to give notice of its intention to do so within four weeks of issue of the Adjudicator's decision.

- 2.10 Therefore, in accordance with the Adjudicators decision, and the contract, the Highland Council certified the sum due along with their retention payment for the works, on the 29 July 2016.

3. Budget and Forecast Updates

- 3.1 The current approved budget within the capital programme is £34.708m (as reported at the Planning, Development and Infrastructure Committee in May 2016).
- 3.2 The latest estimated out-turn figure for the RNFAS (excluding the adjudication finding) is £36.056m, predicting an exceedance of the approved budget of £1.347m. This represents a 3.8% increase on the approved budget.
- 3.3 When the adjudication payment is included in the estimated out-turn cost for the RNFAS, this is revised to £37.814m, resulting in an exceedance of the approved budget of £3.106m. This represents an 8.9% increase on the approved budget.
- 3.4 The main areas which account for this overspend are: compensation to landowners and businesses (£1.3m more than estimated by the District Valuer's Office); Phase 1 adjudication (£1.758m) and legal costs (c.£400k) and many have not materialised until late on in the programme. Compensation in respect of major works is generally limited where land take is necessary. The legislation associated with Flood Schemes allows adjacent 'individuals' to claim for disruption and loss which was well publicised, and this gives rise to retrospective claims. Many adjacent businesses have now made such claims which have been considered by the independent District Valuation Office and payments made accordingly.

4. Implications

- 4.1 Resource
The updated Capital Plan, approved by Council on 17 December 2015, is fully funded and there is no additional budget provision for extra costs against this project. Consideration will be given at future capital programmes reviews as how this additional cost to the project shall be met. At present it is likely that slippage of existing flood scheme, and other projects, will be sufficient to cover the costs in financial year 2016/17. A lessons learned review will be undertaken to inform budget implications for any future flood schemes. Nevertheless, the total additional cost above budget will either have to be managed by reducing/deferring other projects within the Capital Plan, or through meeting additional borrowing costs within the revenue budget.

- 4.2 Legal
Specialist legal advice has been procured and they have led the formal dispute proceedings, they were also supported by specialist claims consultants to augment the Council's site supervision team.
- 4.3 Equalities
No related issues.
- 4.4 Climate Change/Carbon Clever
The Flood Alleviation scheme has taken cognisance of climate change and sea level rises to determine the level of flood protection.
- 4.5 Risk
Financial risk remains due to the potential for arbitration proceedings – but this risk is thought to be low.
- 4.6 Gaelic
No related issues.
- 4.7 Rural
No related issues.

Recommendation

Members are asked to note the outcome of the dispute proceedings and the forecast outturn on this project. The financial implications will be reported at future committee meeting. In accordance with the Council's project management guidance a lessons learned review will also be undertaken.

Designation: Director of Development and Infrastructure

Date: 4 August 2016

Author: Colin Howell – Head of Infrastructure

Background Papers: HC-18-13, HC/6/15, PDI/84/15, HC/55/15, PDI 02/16, PDI 21/16