

METROPOLITAN BOROUGH OF WIRRAL

CABINET – 13th JANUARY 2011

REPORT OF THE DIRECTOR OF LAW, HR & ASSET MANAGEMENT

NEW BRIGHTON PHASE 1: GOVERNMENT OFFICE NORTH WEST REQUEST FOR CLAWBACK

1.0 EXECUTIVE SUMMARY

- 1.1 This report seeks Members approval to the partial repayment of an ERDF grant in the sum of £223,355 following the completion of an Article 10 audit inspection carried out by Government Office North West in connection with the delivery of the Brand New Brighton Phase 1 project.
- 1.2 If Members agree to this request capital borrowing can be used to finance the repayment of grant.

2.0 BACKGROUND

- 2.1 The first phase of regeneration in New Brighton comprised of the construction of the Floral Pavilion Complex by Neptune Developments in its role as the Council's preferred development partner for the scheme.
- 2.2 The project was successfully completed in December 2008 at a total cost of £11.40m of which £3.7m was secured from the North West Development Agency through the Mersey Waterfront Regional Park Programme, £4.6m from European Regional Development Funding (ERDF) through the Merseyside's Objective 1 Programme with the balance coming from the Council's own resources.
- 2.3 The project since its completion has been acclaimed as a premier venue in the North West Region and it has won a number of prestigious awards. It has created 5,673 square metres of new and high quality floorspace and the theatre, since opening, has hosted over 650 events selling over 235,000 tickets to a value of £2.9m. The Conference Centre has now hosted over 166 events, meetings, seminars, conferences, and exhibitions. The increase in visitor numbers is acting as a catalyst for increased investment activity in the area and is contributing to an increased public confidence in the future of New Brighton.

3.0 ARTICLE 10 INSPECTION

- 3.1 Members will be aware that when any European Structural Funds contribute towards the costs of a project there are always grant requirements which must comply with European State Aid Rules and EC procurement directives and breach of either or both of these undertakings may result in the Council being

asked to repay some or all of the grant monies. This project and its requirements were reported to Cabinet In July 2007.

- 3.2 The framework for public procurement law is set out in Directive 2004/18/EC and in the UK the Public Contract Regulations 2006. Unless an exemption applies the regulations require works and service contracts above pre-determined thresholds to be awarded through an open competition advertised by way of an OJEU (Official Journal of the European Union) notice. In 2007 when construction works commenced on the new pavilion the threshold for a public works contract was £3,611,319 and for a public services contract which covers all professional fees was £144,371.
- 3.3 When the contract works were subsequently awarded Neptune in accordance with accepted practice at the time immediately carried out an OJEU process for the main works contract but let the professional fees contract for services such as Architects, Quantity Surveyors and Mechanical and Engineering Consultants as a series of mini commissions which all except one were below the public services contract threshold of £144,371.
- 3.4 Following the physical completion of the New Brighton Phase 1 project Government Office undertook a mandatory Article 10 audit inspection of the scheme examining how Neptune had been engaged and whether their appointment was in compliance with EC Public Procurement regulations. In addition the inspection also examined whether the works and service contract (professional fees) commissioned by Neptune adhered to EC procurement regulations.
- 3.5 Whilst the works sub-contract commissioned by Neptune was procured following an open competition through the OJEU notification process and hence EC compliant, the auditors deemed that the service contract for the various professional fees which totalled £552,723 was in breach of EU procurement regulations as it had not been competitively tendered as an aggregated single contract and therefore was unlawfully awarded. This interpretation of the procurement rules has had the benefit of being informed by emerging case law since the New Brighton scheme was first put together and as a result of the audit report findings GONW has requested that the ERDF grant contribution of £223,355 paid against the total professional fee contract should be returned to the Commission. This sum equates to 4.8% of the total ERDF grant received for the project and is 1.95% of the overall project cost.
- 3.6 Notwithstanding this fact when notice of the audit findings was first received by the Council it was immediately challenged on the basis that all of the individual professional fee contracts except the sum paid to Neptune to project manage the construction works were below the EC Procurement threshold of £144,371 and it is this criteria that should take precedence. In addition officers argued that not all of the professional fees incurred on the project were capable of being competitively tendered due to their specialist nature and this included Neptune's Project Management costs, the one item that was above the EC Procurement threshold. As a result of this lobbying

GONW accepted the Council's rationale that some of the disputed fees were specialist in nature, such as the United Utilities and Council's professional fees charged against the scheme and these were omitted from the final clawback calculation. However according to the strict interpretation of the rules as confirmed by emerging case law they concluded that Neptune's Project Management costs could have been competitively tendered.

- 3.7 Despite officers continuing to try and negotiate on this issue over the last six months GONW has been pressing for the repayment of this grant to allow it to formally close down the Objective 1 Programme for Merseyside.. GONW sought advice from their lawyers within the Communities and Local Government Department who reiterated that repayment of £223,355 from the ERDF contribution of £4.6m towards the scheme remained repayable notwithstanding the representations of the Council.
- 3.8 In a final attempt to mitigate or reduce this payment, officers sought further advice from Counsel. Counsel confirmed that the law on public procurement has developed during the last decade. Initially there was widespread understanding in the legal profession that development agreements were not embraced by the EC procurement regulations. However recent judgments have eroded this position.
- 3.9 Counsel has advised that the terms of the grant letter in 2007 enables the Secretary of State to require part or the entire grant to be repaid if the Council has not followed the EC procurement regulations for contracts falling within its scope.
- 3.10 At the time the development contract was awarded, the Council was advised by Counsel that, on balance, it had taken sufficient steps to ensure that it had complied with the EC procurement regulations as they were interpreted and applied at that time. However recent legal judgments, which have retrospective application on the interpretation of the EC procurement regulations, have widened the scope of the regulations.
- 3.11 After careful consideration of all relevant facts and issues, Counsel has advised that the sum of £223,355 is repayable by the Council given the terms of the grant and the manner in which the EC procurement regulations are now interpreted and applied.

4.0 FINANCIAL IMPLICATIONS

- 4.1 As this scheme formed part of the Council's capital programme, the repayment of grant can be financed by borrowing.

5.0 STAFFING IMPLICATIONS

- 5.1 There are no staffing Implications as a result of this report

6.0 EQUAL OPPORTUNITY IMPLICATIONS

6.1 There are no equal opportunity implications arising out of this report.

7.0 COMMUNITY SAFETY IMPLICATIONS

7.1 There are no community safety issues arising from this report.

8.0 LOCAL AGENDA 21 IMPLICATIONS

8.1 There are no Local Agenda 21 issues arising from this report.

9.0 PLANING IMPLICATIONS

9.1 There are no planning implications arising from this report.

10.0 ANTI-POVERTY IMPLICATIONS

10.1 There are no anti-poverty implications arising out of this report.

11.0 SOCIAL INCLUSION IMPLICATIONS

11.1 There are no social inclusion issues arising out of this report.

12.0 LOCAL MEMBER SUPPORT IMPLICATIONS

12.1 This report will be of interest to all ward Members.

13.0 BACKGROUND PAPERS

13.1 The background papers that have been used in the preparation of this report are held in the Corporate Services Department.

14.0 RECOMMENDATIONS

14.1 That the repayment of grant be funded by borrowing.