

AUDIT COMMITTEE	AGENDA ITEM NO. 10
16 MARCH 2015	PUBLIC REPORT

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Ivatt Way - Enterprise

R E C O M M E N D A T I O N S
FROM : Director of Governance
It is recommended that Audit Committee notes the outcome of the proceedings between the Council and Enterprise Managed Services Ltd.

1. ORIGIN OF REPORT

- 1.1 Audit Committee is responsible for monitoring the council's financial governance process. As part of that function Audit Committee must ensure the proper protection of public funds. This report outlines the proceedings between the council and Enterprise following a contractual dispute.

2. PURPOSE AND REASON FOR REPORT

- 2.1 The purpose of this report is to update the Audit Committee on the current status of the Ivatt Way solar project and the outcome of the recent legal proceedings with Enterprise.
- 2.2 This report is brought to Audit Committee under the following terms of reference:
- 2.2.1.12 To review any issue referred to it by the Chief Executive or a Director, or any Council body

3. ISSUES AND BACKGROUND

- 3.1 On 7 July 2011 the council entered into a contract which required Enterprise to design and install a 1.5MW solar energy plant on its commercial property in Ivatt Way, Peterborough (the property is leased to Tesam distribution limited) with 55kW being completed by 31 July 2011 so that the council would receive income at the higher FIT rate (as opposed to the lower rate which came into force after that date). The original contract sum was approximately £6m. The project was subsequently scaled back to just under 200kW due to physical difficulties with installing the panels. The revised contract sum was approximately £1m.
- 3.2 Enterprise failed to achieve the 31 July 2011 deadline and ultimately Ofgem could not be persuaded to grant the higher feed-in tariff FIT rate to the installation. The council commenced a claim against Enterprise for £1.322m, which is the "price reduction" applicable under the contract for Enterprise's failure to achieve the 31 July 2011 deadline. Enterprise counterclaimed the sum of £658,000, which is the unpaid balance of its last application for payment for work carried out on the contract. The council accepted that this amount (less some minor deductions) would ultimately be due to Enterprise, but argued that it was not yet due.

- 3.3 Mediation was held in May 2014 but a settlement was not reached. In August 2014, the council commenced court proceedings. There was an initial dispute as to whether the court was the correct forum. The court thought the issue was finely balanced and agreed with the council's reasons for wanting the dispute decided by the court. However, on balance, the court thought that the adjudication process provided for in the contract was mandatory and so decided the parties must first follow this process.
- 3.4 The adjudication process took place between October 2014 and January 2015. The council's primary claim was for the price reduction of £1.322m. If this approach was not successful, the council's secondary claim was that alternatively £827,000 plus interest was due, being the council's actual losses for failing to receive the higher FIT rate together with £200,000 in relation to fire damage, professional and legal fees and wasted management time. Enterprise claimed payment of £658,000, as noted above.
- 3.5 On 14 January 2015, the adjudicator awarded: (i) £649,000 plus VAT and interest to Enterprise (having agreed with the council that deductions needed to be made to Enterprise's application) and (ii) £827,000 plus interest to the council for its actual loss claim, together with £135,000 in relation to fire damages and professional/legal fees. The council was therefore the net winner. It should also be noted, as outlined above, that as the £649,000 payable to Enterprise was for the works undertaken, the council has already budgeted for this sum as part of the original scheme budget. Enterprise has paid a net sum to the council, albeit discussions are on-going in relation to some additional interest which the council claims is due to it from Enterprise.
- 3.6 The reason the adjudicator awarded actual loss to the council rather than the higher price reduction was that the adjudicator found that the price reduction became a penalty (and therefore legally unenforceable) when the scope of the contract was reduced in August 2011. At this point, the price reduction exceeded the revised contract sum.
- 3.7 The contract provides for either party to serve a notice of dissatisfaction if it wishes to challenge the adjudicator's decision and have the dispute decided by the court. The deadline for serving this notice was 11 February 2015. Neither party served a notice and so the adjudicator's decisions are now final and binding on the parties. The current legal proceedings are at an end save for (i) any action needed to recover the outstanding interest from Enterprise and (ii) any future disputes which might arise (for example in relation to any future defects which might become apparent). The council identified the potential "upside" to court proceedings as obtaining a decision from the court that the price reduction was enforceable which could lead to the council recovering in the region of an additional £300-350,000 (once irrecoverable costs are taken into account). The risks of court proceedings, in addition to the general inherent uncertainty of litigation, included the council's claims being subjected to a much greater degree of scrutiny and the council thereby recovering much less than awarded by the adjudicator (particularly in relation to the actual loss claim of £827,000 which Enterprise did not defend and which the adjudicator allowed in full). It was therefore decided that on balance the risks of court proceedings outweighed the potential advantages.
- 3.8 The council now proposes to register the Tesam installation with Ofgem so that it can begin to recover the FIT income.

4 ANTICIPATED OUTCOMES

- 4.1 The resolution of the proceedings means that the council can now claim income for the electricity generated from the solar panels.