



DERBY CITY COUNCIL

COUNCIL CABINET 15 MARCH 2005

Report of the Director of Finance and
Director of Corporate Services

ITEM 20

Contract and Financial Procedure Matters Report Addendum - Recommendations 1.5 and 1.6 and Paragraph 2.4

RECOMMENDATION

- 1.5 To approve, in principle, a funding agreement with the Arts Council for the Quad scheme, including clawback and other terms as explained in paragraph 2.5, and authorise the Director of Corporate Services to enter into it.
- 1.6 To approve the commencement of spending on the Quad scheme Architects fees only, to a total of £300,000 funded from the first tranche of the Arts Council funding.

SUPPORTING INFORMATION

2.4 Arts Council Quad scheme funding – recommendations 1.5 and 1.6

- 2.4.1 The Arts Council funding being offered is £2,500,000 and will be paid in tranches as the project proceeds. Up to £300,000 can be drawn down to provide funding for work needed to get the project to a stage at which a definite decision can be taken whether or not to proceed with it.
- 2.4.2 If a decision is taken not to proceed with the project then the City Council must repay to the Arts Council all funding drawn down. As soon as the Council draws down any sum in excess of £300,000, the Council becomes obliged to carry out and complete the entire project. It is therefore essential not to draw down more than £300,000 until the Council is absolutely certain that it has all other necessary funding in place and has taken a definite decision to carry out the project.
- 2.4.3 £50,000 of the £300,000 first tranche can be drawn down immediately. Draw down of the remainder of the initial £300,000 depends upon the Council agreeing with the Arts Council what work is to be done and upon that work progressing in a satisfactory way. The amount of draw down permitted in relation to subsequent stages is to be agreed with the Arts Council as the amount of work comprised in each of those stages becomes known.

- 2.4.4 The funding agreement is based on a total project cost of £9,870,000, which includes a figure of £1m for the value of the land being donated to the project by the Council. Should there be an under spend on the project, the Arts Council's grant would of course be reduced by the appropriate percentage.
- 2.4.5 The grant is to be drawn down in quarterly instalments, subject to provision of evidence of expenditure made in relation to the project. This means that the Council will have to make the payments due to any building contractors, architects, etc and then reclaim this from the Arts Council. The funding is conditional upon the Council providing various supporting information, for example two years' audited accounts from Quad Arts and Metro Cinema, a copy of the current business plan.
- 2.4.6 It is a requirement that on or before 31 December 2005 the Quad vehicle (i.e. a limited company) is brought into existence and signs an agreement with the Council saying that, on completion of the construction work, a lease in an agreed form will be granted and a management agreement in an agreed form will be signed.
- 2.4.7 The Arts Council is to be given a legal charge over the benefit of this agreement for lease and the Council, Quad and the Arts Council are to sign a tripartite agreement confirming that the Council will not terminate the agreement for lease without giving the Arts Council the opportunity to step in and take over Quad's position.
- 2.4.8 As with all such funding agreements, the Arts Council retains a great deal of discretion and has the right to refuse to hand over funding if the project is not going as it thinks it should. However, as is mentioned below, the Arts Council is obliged to act reasonably and the agreement provides for the project to be broken down into various Key Stages, each having its own pre-agreed set of deliverables. So long as those deliverables are delivered as agreed, there should be no reason for the Arts Council to refuse further funding.
- 2.4.9 There are various obligations for the Council to comply with public procurement law and other legal requirements, to seek the Arts Council's approval of building contracts, consultants' appointments, etc, generally to keep the Arts Council fully informed of what is going on and publicise the Arts Council's involvement in the financing of the project.
- 2.4.10 Once the construction work has been completed and the lease and management agreement have been signed, Quad is required to grant legal charges over them in favour of the Arts Council. It is therefore essential to ensure that the contract between the Council and Quad obliges Quad to do everything required by this funding agreement.
- 2.4.11 At the discretion of the Arts Council, the grant may have to be repaid in full or in part if certain events occur. These include the obvious ones such as fraud, breach of contract, etc, but they also include the insolvency of Quad, Quad failing to operate the building in the intended way, and the Council or Quad disposing of their interests in the building.

- 2.4.12 This means that the Council is exposed to the failure of Quad. However, since the Arts Council would not agree to provide funding if there were any risk that the building it funded could end up as offices, shops, or whatever, this is something the Council has to accept if it wants the funding.
- 2.4.13 The Council's protection is in two ways. Firstly, the lease must provide that it can be forfeited, so that the building comes back to the Council in the event of Quad defaulting on these obligations and secondly the Agreement, which obliges the Arts Council to act reasonably and in good faith and not to exercise its discretions unreasonably or unjustly - no matter what has happened to Quad as an entity, so long as the building is still there and is still being used for the sorts of purposes for which it was intended, it is difficult to see how the Arts Council could reasonably require repayment of the funding.
- 2.4.14 Should the Arts Council agree to a future sale of the building, then it would of course require an appropriate percentage of the proceeds to be paid to it.
- 2.4.15 The capital costs of the development and construction of Quad are being met through the various funding sources as detailed in previous reports to Cabinet. There will be no capital cost to the Council apart from the £1m capital investment the Cabinet and Council have agreed to invest in the project, as included in the approved indicative 2007/08 capital programme.
- 2.4.16 Part of the ACE agreement states that ACE agree to 'frontload' the award by paying up to £300,000 for the development costs during the period from March 16th 2005 to June 2005 inclusive before the other funding streams have been secured. By July 2005 there should be further certainty about capital funding decisions from the East Midlands Development Agency and the Government Office for the East Midlands.
- 2.4.17 The ERDF award of £1.7m will have been secured and also the additional £400,000 offered by Arts Council to fund the final 'shortfall' on the project. Emda funding is forecast for final approval in September at the point planning permission is granted.
- 2.4.18 The payment of the initial £300,000 from ACE will enable the project to press on through the design phase. Currently the project is held up as the architect cannot be appointed until the Arts Council agreement is signed.
- 2.4.19 The costs during the period to July 2005 are for the detailed design of the building and for other development costs. The forecast costs for each month are:

	Mar-05	Apr-05	May-05	Jun-05
Design development fees	£29,189	£76,417	£76,417	£76,417
Other development period costs	£8,423	£9,523	£9,807	£8,423
Total	£37,613	£85,941	£86,224	£84,841

- 2.4.20 Cabinet approval will be sought before further spending or drawdown of Arts Council funding beyond the £300,000 considered in this report.