



Minutes

Special Meeting of Council

Tuesday, 8 June 2021, 6.00pm

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ORDINARY MEETING OF COUNCIL

Minutes of the Special Meeting of Council
held in the South Fremantle Football Club, Griff John Room
on **Tuesday, 8 June 2021** at 6.00 pm.

1 Official opening, welcome and acknowledgment

The Presiding Member declared the meeting open at 6.00 pm and welcomed members of the public to the meeting.

2 Attendance, apologies and leave of absence

2.1 Attendance

Cr Andrew Sullivan	Deputy Mayor/South Ward
Cr Marija Vujcic	South Ward
Cr Doug Thompson	North Ward
Cr Bryn Jones	North Ward
Cr Rachel Pemberton	City Ward
Cr Adin Lang	City Ward
Cr Su Groome	East Ward
Cr Geoff Graham	Beaconsfield Ward
Cr Hannah Fitzhardinge	Beaconsfield Ward
Cr Sam Wainwright	Hilton Ward
Cr Frank Mofflin	Hilton Ward
Mr Glen Dougall	A/Chief Executive Officer
Ms Michelle Brennand	Director Community Development
Mr Paul Garbett	Director Strategic Planning and Projects
Mr David Janssens	A/Director Infrastructure
Mr Graham Tattersall	Walyalup Civic Centre Project Director
Mr Paul Dunlop	Manager Communications and Events
Mr Craig Best	Manager Asset Management
Ms Charlie Clarke	Manager Governance
Mr Emma Aiberti	A/Manager Finance
Ms Melody Foster	Meeting Support Officer

There were approximately 6 members of the public and no members of the press in attendance.

2.2 Apologies

Cr Jenny Archibald	East Ward
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2.3 Leave of absence

Nil

3. Applications for leave of absence

Nil

4. Disclosures of interest by members

Nil

5. Responses to previous public questions taken on notice

Nil

6. Public question time

Ms Elizabeth Megroz asked a question in relation to comments in the officer's report about how the City determines the works are of high quality.

Summary of response by Mr Graham Tattersall, WCC Project Director

Each month, prior to progress payments being made, qualified Engineers assess the progress of works and undertake quality inspections. Inspection reports are then produced to certify that the works have been undertaken in accordance with specifications.

7. Petitions

Nil

8. Deputations

8.1 Special deputations

Nil

8.2 Presentations

Nil

9. Confirmation of minutes

Nil

10. Elected member communication

Nil

11. Reports and recommendations from officers

SC2106-1 WALYALUP CIVIC CENTRE – CONTRACTOR ENGAGEMENT AND PROJECT DELIVERY

Meeting date:	8 June 2021
Responsible officer:	Project Director / Director Infrastructure
Decision making authority:	Council
Confidential Attachments:	<ol style="list-style-type: none">1. Contractor Listings and Cost Summary2. Probity Auditor Statement Stanton's – delivery approach and process3. Legal Advice Jackson MacDonald's – Contract and LG procurement
Additional information:	Nil

SUMMARY

On 19 May 2021, the City of Fremantle (City) became aware that the Contractor Pindan Constructions Pty Ltd (Pindan), contracted to construct the Walyalup Civic Centre (WCC), had been placed under official management as a result of it being placed in external administration and having a liquidator appointed.

The City has subsequently issued the relevant notices to Pindan notifying it that the City is taking over the site and the work this is remaining to be completed. The purpose of this report is to confirm and approve the approach to be adopted to ensure the most effective efficient completion of the WCC.

This report recommends that Council:

Note the City's recent advice in respect to the direct engagement of contractors previously contracted to Pindan Ltd PTY, as Sole Source suppliers and as the most appropriate, efficient and effective approach for the engagement of contractors for the completion of WCC construction contract.

Approve the Sole Source supply arrangements for contractors to complete the construction works as detailed in the report (confidential attachment).

Approve CEO delegation to authorise project expenditure to complete the project works up to the available value of the retained performance bonds, and at an appropriate time, formally terminate the contract with Pindan.

Approve officers progress with a Managing Contractor arrangement for the oversight of completion of the project works and to immediately commence the tender process on this basis.

BACKGROUND

At the 31 October 2018 special meeting of Council, Council adopted the following recommendation:

That Council:

- 1. Agrees to nominate Pindan as the City of Fremantle's preferred tenderer for tender FCC911/18 Construction of New Civic Building and Library (subject to the City and Pindan reaching agreement on the terms of the final construction contract) on the basis that it is considered to be the most advantageous for the City of Fremantle, in accordance with Regulation 18(4) of the Local Government (Functions and General) Regulations 1996;**
- 2. Authorises the Chief Executive officer to enter into negotiations with Pindan in relation to the final specifications of the construction contract (including any value engineering solutions);**
- 3. Agrees, that if the City and Pindan are able to reach agreement on the terms of the final construction contract, to:**
 - a. authorise the Chief Executive Office to accept Pindan as the successful tenderer for tender FCC911/18 Construction of New Civic Building and Library; and**
 - b. authorise the Chief Executive Officer and the Mayor to execute the construction contract with Pindan once prepared and certified by the City's legal representatives.**

Following a period of negotiation and value engineering, a \$41.3 million contract was agreed between the City and Pindan, the Contract was executed by the CEO and Mayor on 20 February 2019.

Construction on site commenced on the 9th April 2019 and was originally programmed for completion in October 2020.

The contract agreement between the City and Pindan was based on a AS 2124 – 1992 Construct-only Contract as modified by agreement and documented within the executed Formal Instrument of Agreement.

The negotiated contract included provisions for:

- The use of a Project Bank Account (PBA) to ensure payment of subcontractors on the project (a first for a Local Government in WA).
- Security of City investment in the project through insurance bonds.
- Contractor novation deed arrangements, providing the City with the ability to novate subcontractors to the City.

Whilst the original completion date for the works was programmed for October 2020, delays have affected the construction program, the most notable being relation to dealings with Westernpower and (more significantly) the impact of the global Covid-19 pandemic, which has had significant implications on numerous supply chains for the project.

The City's Project team and its consultants have maintained a strong working relationship with the Pindan site team and have been pleased with the team's

adaptability, flexibility and dedication to maintaining progress throughout the challenges of the COVID period.

It is noted and acknowledged that in respect to the works to date, the materials, workmanship and finishing on the project is of a high quality.

The latest project Practical Completion date (prior to recent liquidation events) was July 2021.

On Wednesday 19 May 2021, the City, via its lawyers Jackson McDonald, received notification that Pindan Construction Pty Ltd had been placed into liquidation.

As of this date the following main areas / components of the works remain to be completed:

- External façade / building envelop works.
- Roofing works and PV array installation.
- General interior fit out works, inc carpet installation, painting, cabinetry works and cleaning.
- Exterior works, i.e. paving installation works, soft landscaping works, cleaning, defect inspections.
- Final testing, witnessing, and commissioning works.

Following the liquidation event in respect to Pindan, the City moved quickly to manage risk in respect to the effective and timely completion of the project; to that end the City have directly employed Pindan site project team.

This was felt to be a critical move to ensure project continuity and preserve construction knowledge and contractor relationships.

The next stage for the City is to agree and adopt a suitable and acceptable delivery model and approach for the completion of works.

FINANCIAL IMPLICATIONS

The financial position in respect to the project is currently as follows: *(this includes the estimated implications of the liquidation of Pindan on the project.)*

Description	Expenditure	Budget
Current contract sum - Construction <i>(inc. variations to date)</i>		\$42,616,834
Expenditure		
Contract payments to March 2021:	\$38,143,965	
April 21 claims – <i>due to be paid 4.6.21</i>	\$ 837,794	
Remaining Project Budget (19 May 2021)	\$3,635,075	

Recovered - Façade Insurance Bond Money <i>This Bond was provided by Pindan prior to the City making payment for offsite façade materials to facilitate prioritised shipping and assembly works (COVID delays).</i>		\$1,600,000
Recovered – 1# Project Security Insurance Bond	2.5%	\$1,036,528.20
Recovered – 2# Project Security Insurance Bond	2.5%	\$1,036,528.20
Total Insurance Bond Value		\$3,673,056.40

Officers are now working with the Project team to review and update the ‘cost to complete’ figures; this exercise needs to consider all potential cost implications as a result of the Pindan liquidation event.

It is anticipated that as a result of the disruption with stopping works, demobilising so quickly, engaging an in-house team and a new Managing Contractor, and also noting the other associated management and delivery costs / disruption costs, it is expected there will be additional costs to complete the project.

The City would intend to address these additional costs through the relevant insurance bonds.

Officers will require Council approval for CEO delegation to expend funds against and up to the maximum value of the insurance bonds @ \$3,673,056.40 for all works required to complete the project.

It is important to note that unspent / remaining sums may subsequently be claimed from the City by the liquidators (Ernst & Young). Claims against the insurance bonds must be as required to complete the project works and associated costs, the City would not anticipate benefitting from any residual surplus funds, should they occur.

Officers have developed new financial work breakdown structures to accurately track all costs incurred and expended as a result of the Pindan Liquidation event.

The actual final sum for the project will only be known once the whole project has been completed and final costs and claims reconciled. This shall also include all costs associated with the management of the 12-month defect liability period.

LEGAL IMPLICATIONS

The City has proactively engaged with lawyers Jackson MacDonald since the commencement of the project. Their early advice has greatly assisted in establishing many of the safeguards the City has included in its contractual arrangements for this project.

The City has the option, under the executed contract, to novate subcontractors on the project from Pindan Constructions to the City as part of an insolvency event. The city would now intend to enact the provision under the Contract to enable the novation’s of all contractors engaged through Pindan for the delivery of this contract to occur.

Whilst the contract and the contractor deeds facilitate the novation of the contractors to the City, the City does need to ensure that the progression of subsequent works align with Local Government Regulations and Purchasing Policy requirements.

Regulation 11(2)(f) of the Local Government (Function and General) Regulations 1996, provides a Council with the ability to enter into a contract, without going to tender, when:

(f) the local government has good reason to believe that, because of the unique nature of the goods or services required or for any other reason, it is unlikely that there is more than one potential supplier

The City have received legal advice from Jackson McDonald (under confidential attachment) to the effect that the attached list of subcontractors, should be considered as sole source providers because the City has good reason to believe that no other contractor would be prepared to assume the obligations to carry out and complete the works of any current subcontractor, assuming liability for what has been done, at the price that remains payable under the terms of the existing subcontract and taking over existing warranties required under the existing contract.

CONSULTATION

Nil

OFFICER COMMENT

Project Construction Team

Upon formal confirmation of the Pindan liquidation event, the City took immediate steps to employ the Key (site based) personnel previously engaged by Pindan.

The employment of these key individuals was deemed to be of paramount importance in ensuring project continuity, contractor relationships and managing the successful and timely completion of the balance of the works.

The roles included the Project Manager, Site Manager, Senior Contract Administrator and the Finishing Supervisor; these individuals are now City of Fremantle employees and are on site and available to facilitate the completion of the works.

The Construction Team will essentially perform the same role that they have provided on the project to date with the notable exception being that they are employed directly by the City rather than to the Contractor.

It is proposed that all formal communication relating to claims, variations, progress claims, programme assessment, requests for information to the design team and the like continue to be administered via the independent Project Manager / Superintendent as per the normal process.

In addition to this, the City's client-side Project Management / financial control arrangements will remain in place.

Progressing this project in this manner will provide a degree of normality and independence to the project which is familiar to all parties.

Contractor Novation

For the City and the Construction Team to complete the Walyalup Civic Centre construction project in a reasonable time frame and within current and available budgets, the city will need to move quickly to re-engage the contractors who have been engaged in the works to date.

The City had the foresight to include within its contract with Pindan the ability to novate project contractors to the City in the event of an insolvency event by the Head Contractor. In addition to the contractors with novation deeds, the City would also intend to transfer the existing contractual agreements with the remaining contractors.

The project team have now completed a review of all contractors that are listed as being engaged through Pindan for the progression and completion of works at the WCC. These contractors have been listed including their work trades and contracted cost to complete the works (see confidential attachment 1).

The city has taken legal advice to ensure these options can be undertaken in a manner that will see the City remain within the requirements of legislation and in compliance with its current contract (see confidential attachment 2).

The City has also held a risk / process review workshop with probity auditors Stanton's, this allowed the auditors the opportunity to review the current situation, advice to date and proposed delivery model / process moving forward. They have provided a high-level statement in respect to their observations (see confidential attachment 3).

Subject to Council approval to treat these contractors as sole source suppliers, the City has the opportunity under both the contract and the Local Government Regulations to re-engage current subcontractors and resume project works on site.

It is important to note the value of the existing contractor's project knowledge, their warranties and intellectual property. It is felt these are critical to complete the project in a reasonable time frame and minimal cost increases.

If as an alternative, the City was to progress to procure new subcontractors, it will require the city to develop and issue multiple tenders, engage and manage multiple contractors on site, noting timing issues and probable cost implications (given the recent boom in construction in WA). This will severely impact upon the project costs, timelines and the reputation of the city.

Registered Builder

Further to the employment of the Project Construction Team and establishing suitable arrangements to engage the previous Contractors, completion of the remainder of the main construction work will also require the engagement of an alternative Contractor / Registered Builder.

The engagement of an alternative Contractor / Registered Builder will enable the existing Building Permit to be transferred from Pindan Constructions Pty Ltd to the alternative Contractor.

Until such time as this occurs, main construction works onsite cannot be completed.

To address this requirement, the project team (in consultation with key advisors) have developed a proposal to include the engagement of a suitable Managing Contractor.

It is anticipated Managing Contractor would be engaged under a Construction Management Agreement to perform the services required to complete the works as agreed between the parties.

The interaction of the Managing Contractor and the City's on-site Construction Team will be important, the scope of works is being developed to create an interface that will allow the Managing Contractor to assist, support and facilitate works delivery via the City's Construction Team.

It is anticipated that the preferred Managing Contractor would be suitably licence for construction works but would specialise and be skilled in the management and supervision of high-quality finishing and fit out works with similar types of projects.

Proposed services to be performed by the Managing Contractor shall include the following.

- Obtaining a Building Permit / taking over the existing Building Permits.
- Ensuring safe systems of works are in place as to ensure compliance with work, health, and safety laws, including implementation of the site HSE management plan and HSE procedures relating to the site.
- On-site subcontractor coordination in conjunction with the City's project representatives, including collaboration on programme development, tracking and review.
- Causing the works to be completed including:
 - Meeting the requirements of Practical Completion as established within the Building Contract.
 - Provision of Notice of Completion required for the Certificate of Occupancy application; and
 - Rectification of defects during the defect's liability period.
- Engagement of other / additional Subcontractors and/or suppliers as required to enable the completion of the works at the request of the City.

It is currently anticipated that, subject to Council approval, a Request for Tender for a Managing Contractor can be issued on Wednesday 8 June (for a minimum two-week period).

Subject to suitable returns, Council approval and upon successful appointment of a Managing Contractor – it is estimated that the completion of the works can be accommodated within a 3/4-month period.

It is also anticipated the Managing Contractor will provide an ongoing service to assist the Principal through the following 12-month defect liability period.

Consultant support

Through the course of the project to date, the Project Management team of Sirona and Total-PM have provided independent Project Management & Superintendent services to the WCC project.

To date these services have provided good value and support to the client-side team, moving forward, the external project management team will continue to perform a similar role.

The role of the Lead Design Consultant (Kerry Hill Architects) and its subconsultants remains unchanged within the project completion methodology proposed.

The Consultant team will continue to liaise with the independent project management team in a formal capacity, whilst also addressing onsite queries and issues as they arise.

Contract Termination

Whilst the City has now formally taken control of the site, it has not formally terminated the contract with Pindan. It is noted that at the appropriate time, should this be required and when confirmed there are no implications in doing so, the City may formally terminate the contract.

VOTING AND OTHER SPECIAL REQUIREMENTS

Simple majority required

OFFICER'S RECOMMENDATION

Council

1. Note the City's legal advice in respect to the direct engagement of contractors, previously contracted to Pindan Ltd PTY, as Sole Source suppliers.
2. Note the advice from the probity auditor in respect to the City's approach and engagement of contractors for the completion of WCC construction contract.
3. As a result of the unique nature and current status of the project, approve Sole Source supply arrangements under Regulation 11 of the Local Government (Function and General) Regulations 1996, for the engagement of contractors as detailed in confidential Attachment 1, to complete the project works.
4. Approve CEO delegation to formally terminate the Construction Contract with Pindan Pty Ltd at the appropriate time.
5. Approve CEO delegation to authorise project expenditure to complete the project works up to the available value of the retained performance bonds (\$3,673,056.40).
6. Approve officers progress with a Managing Contractor arrangement for the oversight of completion of the project works and to immediately commence the tender process on this basis.

Cr Andrew Sullivan moved the following amended officer's recommendation, with amendments shown in green italics.

COUNCIL DECISION ITEM SC2106-1
(Amended officer's recommendation)

Moved: Cr Andrew Sullivan Seconded: Cr Bryn Jones

Council

1. Note the City's legal advice in respect to the direct engagement of contractors, previously contracted to Pindan Ltd PTY, as Sole Source suppliers.
2. Note the advice from the probity auditor in respect to the City's approach and engagement of contractors for the completion of Walyalup Civic Centre construction contract.
3. As a result of the unique nature and current status of the project, approve Sole Source supply arrangements under Regulation 11 *(2)(f)* of the Local Government (Function and General) Regulations 1996, for the engagement of contractors as detailed in confidential Attachment 1, to complete the project works as *the City has good reason to believe that no other contractor would be prepared to assume the obligations to carry out and complete the works of any current subcontractor, assuming liability for what has been done, at the price that remains payable under the terms of the existing subcontract and taking over existing warranties required under the existing contract.*
4. Approve CEO delegation to formally terminate the Construction Contract with Pindan Pty Ltd at the appropriate time.
5. Approve CEO delegation to authorise project expenditure to complete the project works up to the available value of the retained performance bonds (\$3,673,056.40).
6. Approve officers progress with a Managing Contractor arrangement for the oversight of completion of the project works and to immediately commence the tender process on this basis.
7. *Request that the Walyalup Civic Centre project continue to be monitored through regular updates to the City's Audit and Risk Committee.*

Carried: 11/0

Cr Geoff Graham, Cr Hannah Fitzhardinge, Cr Sam Wainwright,
Cr Su Groome, Cr Frank Mofflin, Cr Doug Thompson, Cr Bryn Jones,
Cr Marija Vujcic, Cr Andrew Sullivan, Cr Rachel Pemberton, Cr Adin Lang

12. Motions of which previous notice has been given

Nil

13. Urgent business

Nil

14. Late items

Nil

15. Confidential business

Nil

16. Closure

The Presiding Member declared the meeting closed at 6.15pm.