

APPENDIX A

Major Works at Draper House

Report of the Housing, Environment, Transport &
Community Safety Scrutiny Sub-committee

June 2013



Introduction

1. The Chair of the Housing, Environment, Transport and Community Safety Scrutiny Sub-Committee undertook to carry out a scrutiny of recent major works at Draper House after the issue came before the Overview and Scrutiny Committee (OSC) on 4 February 2013. The Chair of OSC specifically requested that the report be as swift as possible and focus on the most important aspects of the major works.
2. The primary reasons for the scrutiny arise from the extremely poor quality of the work carried out by the contractor (Breyer) and poor contract management by Southwark Council. These factors have led to significant distress and inconvenience for residents of Draper House and long delays in getting the works completed. In addition, the failures have led to additional costs being incurred by the council and the Housing Revenue Account (HRA). At the end of November 2012, a serious and life-threatening incident occurred as a result of works being carried out by the contractor.
3. The aim of this scrutiny report is to demonstrate how this situation was allowed to develop and to make recommendations which, if implemented, will ensure this kind of thing never happens again. It is the very strong view of the scrutiny sub-committee, reflected in this report, that a line must now be drawn between the failures of some major works projects in the past, and their future management and implementation. The Draper House works have been complicated by numerous factors, but the council must not let that complexity blind it to the fact that entirely avoidable failures have occurred.
4. The sub-committee would like it to be noted from the outset that it finds it to be completely unacceptable that Breyer, the contractor at the heart of so many of these failures, refused to fully engage in the scrutiny process, despite engagement with the scrutiny functions of the council being specifically stipulated in the original contract. Their only contribution has been a single written report. Senior managers at Breyer refused to attend a session of the scrutiny sub-committee to explain their behaviour. By contrast, the sub-committee appreciates the open and honest engagement with the scrutiny process demonstrated by residents of Draper House, senior officers at Southwark Council and the Cabinet Member for Housing.
5. Draper House is situated at the Elephant and Castle. It is a twenty-four storey block consisting of one hundred and forty homes and three commercial retail units. The property was built in approximately 1965 and transferred to the London Borough of Southwark following the demise of the GLC in 1986.
6. Over the years, residents of the block have been promised major works, but a series of delays has meant that Draper House had not had any major works carried out for several years. Draper House was identified for works through the

previous Decent Homes programme which was the forerunner to the current Warm, Dry and Safe programme. The project was one of the first schemes to be commissioned using the new partnering arrangements, which were set up in 2010 to deliver decent homes through a framework of five partnering contractors.

Methods used in this scrutiny review

7. In order to investigate this issue, the Housing, Environment, Transport and Community Safety Scrutiny Sub-Committee used the following sources of information:
 - Contributions to the sub-committee from residents of Draper House
 - Informal conversations between the Chair of the Sub-Committee and ward councillors (Councillors Neil Coyle, Patrick Diamond and Cathy Bowman)
 - Two separate sessions, including a closed session, taking contributions from senior officers and officers directly involved in the delivery of the project
 - Contributions to the sub-committee from the Cabinet Member for Housing
 - Two written reports from officers on the Draper House Major Works
 - Closed reports containing details of the contract signed between Breyer and Southwark Council
 - Contributions from legal officers regarding the details of the contracts
 - Copies of emails between Councillor Cathy Bowman and the Strategic Director for Housing & Community Services

Chronology

8. **2006 - 2010** - Draper House was identified for works through the Decent Homes programme which was the forerunner to the current Warm, Dry and Safe programme. The project was one of the first schemes to be commissioned using the new partnering arrangements, which were set up in early 2010 to deliver decent homes through a framework of five partnering contractors.
9. **March - June 2010** – A decision was made by the Council's Executive (now re-named the Cabinet) in March 2010 to devolve authority to award the partnering contracts to the then Strategic Director for Environment and Housing. The major works partnering contracts were awarded by the Strategic Director of Environment and Housing in June 2010. The Lot 1 contract was awarded to Breyer Group plc for a period of five years with an option to extend by a further

five years. Lot 1 encompasses the whole of Borough, Bankside and Walworth areas in the north west of the borough.

10. **July 2010 - July 2011** – There was a significant delay in works commencing on site as a result of a Leasehold Valuation Tribunal decision in 2010, which was successfully challenged by the council at the Lands Tribunal. As a result, there were limited opportunities for works to progress until early 2012. The delay was exacerbated by the development of the Strata Building on the adjoining site to Draper House. It is accepted by officers that communications with residents over these delays were poor in quality and irregular.
11. **July 2011** - Contract commencement by Breyer plc for “Contract Area 1” was eventually made on 4 July 2011 when temporary site accommodation and welfare facilities were established. The works programme included; concrete cleaning and repairs, new asphalt roofs, fire risk assessment works, asbestos removal, kitchen and window installation, new front entrance doors, upgrade of electrics, refurbishment of the main entrance to Draper House, decoration to the external of the building, timber repairs and glass replacement and internal decoration to communal areas. The Agreed Maximum Price of £5,186,769 covered the cost of the full programme of works.
12. **July - August 2011** – Pre-contract works are managed by the original project management team.
13. **1 September 2011** – Following a restructure, an entirely new project management team was appointed. The new structure established project teams responsible for specific contract areas and one individual partnering contractor. On handover the new project team identified a number of issues that had not been properly addressed at pre-contract works stage. These included:
 - No full appraisal of the legal ownership issues around and inside Draper House had been carried out
 - Negotiation of a licence agreement with the owners of the Strata building on land previously owned by the council had not been carried out
 - The scaffolding needed to be redesigned to accommodate the flying freeholds on the ground floor commercial units
 - There had been virtually no communication with residents about the reasons for delay and the complexity of the negotiations required to enable the major works to begin
14. **September 2011 – early October 2012** - During the stand down period, and at the start of the major works, the new project team identified potential issues

regarding Breyer's delivery of the programme and compliance with the spirit of the partnering agreement. Concerns included:

- Breyer's ability to properly resource the schemes on site
 - The adequacy of Breyer's management on site
 - Issues raised by Breyer's sub-contractors about delays receiving payment for work carried out beyond acceptable timescales
 - Breyer's approach to working in partnership and providing solutions to difficult problems encountered on schemes
 - Breyer's intransigence around taking instructions or looking for alternative solutions - this was especially relevant around the issue of netting that surrounded the scaffolding
15. Council officers held three meetings where the Managing Director of Breyer was asked to explain and justify the issues arising on the project. Officers specifically pointed out that a number of the issues arose from Breyer's policy of paying suppliers late and reducing payments to sub-contractors.
16. During this period there was an understandable groundswell of concern and discontent from residents. The day to day delivery of works and dissatisfaction with the quality and performance of the contractor had compounded an already difficult relationship. Complaints from leaseholders in particular, facing very large bills for the costs of the major works, were becoming a regular occurrence. Residents contacted local councillors and council officers on numerous occasions. On an ongoing basis, all three ward councillors (Councillors Coyle, Diamond and Bowman) raised these concerns with officers.
17. During this period onsite problems which caused huge inconvenience and distress included, but were not limited to:
- Serious problems with the lifts not working and being left in a filthy condition
 - Snagging problems with the newly installed fire doors (so serious as to result in sacking of staff by the contractor). Some fire doors were not securely fit into their frames
 - New windows not properly matching the dimensions of the original windows. This necessitated the addition of a large section of plastic to the edge of the new windows in order to fill the gap

- Long delays in making good damage caused by the removal of asbestos from each flat. A case by case compensation scheme operated which took approximately six weeks for residents to be reimbursed for damage caused
18. **8 October 2012** - Ward Councillor Cathy Bowman meets with council officers and representatives from Breyer to raise a number of residents' concerns. In subsequent emails to the Strategic Director for Housing & Community Services she explains that she experienced "the frankly surly attitude of some...staff". She went on:

"One of the Southwark officers was making a real effort last night - I don't know his name but he was the only one of the three present who stayed until the end of the meeting. One of his colleagues - the clerk of works - looked thunderous throughout & his only contribution was to mutter asides to the contractor. All told, not a fine performance."
 19. The Strategic Director of Housing & Community Services responded promptly and in detail, putting in place a number of actions to address concerns raised by Councillor Bowman.
 20. **October to November 2012** - The council added additional project management resources. This included the appointment of a new project manager. A door-to-door survey was carried out on the 15 November 2012. The results suggested that the residents surveyed felt the situation was improving.
 21. **26 November 2012** - A dangerous occurrence took place on 26 November 2012 when the window sub-contractor appointed by Breyer removed a flue when installing new windows and did not replace it. The resident suffered carbon monoxide poisoning. They have since fully recovered. Breyer became aware of this on the early afternoon of the 27 November but did not inform the council. Breyer put the resident in hotel accommodation, also without immediately advising the council.
 22. When the council became aware of the situation on 28 November, Breyer were told to stop work on site immediately except for any urgent works required to enable residents to live in their homes. Checks were made to all Breyer's work to ensure no similar incidents had occurred elsewhere. Some residents were left with windows installed in only half their flats and basic kitchen facilities.
 23. **December 2012** - An investigation by the council's gas and water compliance team was carried out and a full report was prepared for the Strategic Director of Housing & Community Services. In light of the findings of this report, Breyer were served with a material breach notice on 6 December 2012 and, as required by the contract, were given five working days to respond, which they did.

24. A meeting was held on 19 December 2012 with Breyer to discuss the response. Following consideration of Breyer's reply, the council made it clear it was not satisfied. There was an underlying issue of trust and confidence in Breyer's ability to deliver the remainder of the contract.
25. Legal advice was obtained from Sharpe Pritchard, one of the council's panel solicitors. In addition, the council also consulted counsel on the council's ability to terminate the contract in this instance.
26. According to council officers, they were concerned that by operating the material breach provisions to terminate:

"... an immediate adversarial relationship would arise between the council and Breyer, which would cause difficulties for transition of the works to a new provider. Following this legal advice, officers therefore began discussions with Breyer to consider how a mutual conclusion of the contract might be achieved. This was felt to be in the council's and residents' best interest as it would enable works to restart quickly on Draper House and ensure contractors could be in place that both the council and residents trust."
27. **February 2013** - The Strategic Director of Housing & Community Services approved the mutual conclusion of the contract with Breyer. The council was contractually committed to the payment of £1,731,619 to Breyer for programmed works and surveys already undertaken or in progress, and not directly consequent upon contract conclusion. In addition, the council also paid a sum towards loss of overhead and profit arising from an early conclusion.
28. Following negotiation with the contractor as part of the mutual settlement agreement, the council committed to pay £314,000. Officers considered this to be *"the most economically beneficial settlement achievable in the circumstances. This ensured the minimum disruption to the works programme for residents going forward."*
29. **March 2013** - Draper House residents voted for the use of the back-up contractor A&E Elkins with over 90% of those voting in favour of the use of the back-up contractor. In order to ensure the quality and health and safety of work on site a full time contract manager and clerk of works are being brought in specifically for Draper to support the current project management team.

Outstanding issues

Leaseholder costs

30. It is the council's intention to cap leaseholder costs for current works in the contract to those in their original notices, unless there are additional works above

those in the original contract, there will be no need for additional formal leaseholder consultation.

Compensation

31. Both the council and the contractor have complaints procedures in place. Complaints received regarding damage or missed appointments caused by the contractor whilst works are on site are the contractor's responsibility.
32. Under Southwark's Complaints Resolution Policy, those residents whose appointments had been cancelled the week the works were suspended have been awarded £50 for missed appointments.
33. All residents will be compensated for the delay and distress. The amounts are prescribed in Southwark's complaints resolution policy. Payments will be calculated from 4 December 2012 to 1 April 2013 (the estimated start date for the physical re-commencement of the works).
34. All residents will be awarded a payment for delay and those residents that have works which were suspended in their properties will also be awarded a payment for distress. These would normally have been assessed at a medium impact of distress.
35. Council officers also state "*...it is recognised that there may be some cases where the circumstances are such that additional considerations will need to be taken into account and these will be looked at on their individual merits.*"

What went wrong?

Investment programme

36. The absence of a coherent, planned and costed major works programme prior to the current Warm, Safe and Dry programme meant that residents of Draper house spent years in uncertainty about when works would be carried out on their homes. This built up a justifiable level of mistrust on behalf of residents regarding Southwark Council's ability to keep its promises.

Breyer

37. On numerous fronts Breyer repeatedly failed to meet the commitments given to Southwark Council and let down residents of Draper House with the low quality of their work. Their 'policy' of paying suppliers late and reducing payments to sub-contractors in relation to Draper House was highly irresponsible and led directly to many of the problems set out above. Breyer's abject failure to respond to concerns repeatedly raised directly with their senior management by

Southwark Council shows a level of contempt for partnership working which should make any potential future customers extremely cautious in engaging their services. Breyer's response to the serious health and safety incident on 6 December 2012 (not immediately informing the council of the incident and then accommodating the person who had been put at risk in a hotel) speaks for itself.

The original project management team:

38. It is clear and undisputed that the way in which the original project management team managed the project up to September 2011 was seriously flawed. It is incredible that there was no appraisal of ownership issues around Draper House, no negotiation of a licence agreement with the owners of the Strata building and no accommodation of the flying freeholds in the scaffolding design. The scrutiny sub-committee has been informed that none of the original project management team is any longer employed by Southwark Council, though clearly there are outstanding issues which need to be addressed over why they were appointed to work on this project in the first place.

Communications

39. The sub-committee has been informed that, particularly during these early stages of the major works, there was virtually no communication with residents about the reasons for delay and the complexity of the negotiations required to enable the major works to begin. This is totally unacceptable and was key in exacerbating the frustration and mistrust between residents and the council. Evidence given to the sub-committee by residents of Draper House makes it clear that communications were poor over long periods of the project.

The attitude and behaviour of some council officers in the meeting held on 8 October 2012 with Councillor Bowman

40. It is clear that the behaviour and attitude of some council officers in the meeting held with Breyer and Councillor Bowman on 8 October 2012 is unacceptable. This behaviour suggests to the sub-committee that one partial cause of the poor contract management was that some council officers working on the contract did not see it as their role to champion the interests of residents of Draper House, but instead saw themselves as an ally of the contractor. This is unacceptable and the sub-committee was pleased to hear evidence that a new, far more stringent attitude towards contract management is now encouraged within the Housing Department. It is also unacceptable for officers to behave in a rude or surly manner in such meetings.

The absence of a “termination at will” clause in the council’s partnering contract with Breyer

41. Some public authorities issuing large-scale contracts to construction companies include within them a clause which allows the public authority to cancel works at will and simply pay for work that has been carried out. No further compensation payments are required. The sub-committee received evidence that no such clause was included in the Breyer partnering contract. The reason given for this was that such clauses reduce the potential for a collaborative and constructive partnership between the council and the contractor. The sub-committee was also informed that such clauses are ‘priced in’ when contractors bid for work. (i.e. they are seen as higher risk contracts by the bidders and so they increase the amount they ask to be paid). There was some difference of opinion in the evidence given by officers over whether or not a termination at will clause is advisable.
42. The sub-committee was told that if such a clause had been present in the Breyer contract, the council could have simply cancelled further works when it became clear that Breyer were not working constructively with the council or certainly when Breyer’s work lead to a serious and life-threatening incident. The fact that the clause was not included meant that Breyer knew the council could not simply walk away without paying a price. It also meant that when Breyer’s work endangered the life of one of our residents they could not simply be sacked. Instead the contract meant that Breyer were required to submit a report explaining how they would improve and remedy the situation. Officers stated to the sub-committee that they knew that the commitments given in the report would not be delivered upon, but were powerless to cancel the contract because of the absence of a termination at will clause.
43. The final outcome of not having such a clause was that the council had to negotiate a further very significant payment to Breyer in order to ‘mutually conclude’ the contract and to get the works completed by other means. To say that this is an unsatisfactory state of affairs would be a huge understatement. It is as if the contractor is being rewarded for its poor work. It is also clear to the sub-committee that Breyer’s attitude to “partnership working” might have been somewhat more constructive if they had known that the council had an inexpensive way of sacking them.

A failure by the council to actively enforce default notices

44. Irrespective of the absence of a termination at will clause, the council did have at its disposal “default notices” which it can issue to the contractor to formally record breaches in its obligations under the contract. Council officers gave evidence that these default notices were not issued often or early enough. As a result issues were not escalated to senior management as quickly as they otherwise

would have been. Officers state that under new contract management arrangements the council is much more pro-active in issuing default notices.

Shorter payment periods for sub-contractors

45. One of the primary reasons for poor quality and delayed work carried out by sub-contractors on Draper House was that Breyer delayed payments to them. As a result sub-contractors sometimes simply walked away from works unfinished. The sub-committee believes it would be advisable for the council to insist (contractually if this is possible) on contractors paying sub-contractors within a shorter period of time. Officers also stated that the process of approving sub-contracting arrangements with Breyer was far from ideal during the major works.

The transmission of information within the 'free market' of public sector contracting

46. It occurs to the sub-committee that there is a fundamental problem with the way in which information about the poor (or excellent or mediocre) performance of contractors circulates to public sector authorities. In the case of Draper House, Breyer's behaviour has been nothing short of outrageous. Yet, because of a conservative interpretation of the law, the council is forced to place almost all critical information about their performance on confidential pink papers and say little or nothing in public about what has really happened. The end result is that companies such as Breyer are then free to move on to the next lucrative contract with their 'partner' aware only of a very partial view of their actual track-record. The sub-committee believes this is wrong and would like to see Southwark Council being more pro-active in co-operating with other councils, particularly those in London, to share information about the performance of contractors.

Logging complaints from residents

47. Residents made persistent and frequent complaints, often to different audiences. The use of issue logging to take on residents' feedback would have funnelled these complaints to the correct recipient and would have enabled more efficient use of officers' time. A regular review of the issues log may have resolved some issues.

Recommendations

1. **Termination at will clauses:** All major works contracts issued by Southwark council should contain termination at will clauses.
2. **Default notices:** Default notices should be considered a primary tool for escalating poor performance at the earliest opportunity. Project managers should be encouraged to use them as a matter of course as soon as sub-standard performance becomes apparent.

3. **Payment of sub-contractors:** In all future contracts the council should stipulate an acceptable period within which the primary contractor must pay sub-contractors for completed work.
4. **Breyer:** The sub-committee is aware that, due to EU Procurement law, the council must consider all future bids from Breyer Group Plc for work in Southwark. However, the sub-committee recommends that the conclusions of this scrutiny report be kept at the forefront of officers' minds in considering these future bids. We hope that the implications of this recommendation are clear.
5. **Complaints logs:** During all major works projects, detailed complaints logs should be kept and reviewed on a regular basis to prioritise issues which need to be resolved for the benefit of residents.
6. **Leaseholder charges:** No leaseholder in Draper House should be forced to pay for more than the value of the original notices on which they were consulted. It is understood that this is already the intention of council officers, but the sub-committee felt it was important to underline this approach in our recommendations.
7. **Sharing information:** Southwark procurement team should investigate setting up a formal network with other London Councils to share information regarding the performance of construction contractors.
8. **Appointing project management teams:** Officers should review how the original project management team for Draper House was appointed. Project management teams should not be appointed to complex projects unless senior managers are absolutely certain that the individuals have the training, qualifications and skills required to deal with the project. Measures should be put in place by senior officers to ensure this is the case in future.
9. **Communications with residents:** The scrutiny sub-committee did hear evidence from officers that new procedures for ensuring residents are communicated with during major works have been put in place. These procedures should be strictly followed and failure to do so should be treated as a serious matter by senior managers.