COUNCILLOR QUESTIONS

The Projects & Finance Officer response is shown in red text and the Football Foundation has been asked to comment on anything further they wish to add.

Questions 1-3 have been passed to a solicitor to confirm per the contract.

Questions highlighted in blue are repetition refer to earlier questions noted in the red text below.

1. Could the Council by signing the Joining Agreement as an additional client be compelled in future stages of the process to accept a contract with a 3G pitch provider that contains Rubber Crumb Infill?
   No. Quite clearly as per the report at the end of the last Full Council agenda, the Football Foundation have confirmed that the pitch infill choice would need to be determined by Stage 3 (Tendering the Project) whereby we would deliver a clear brief and examination of choices to provide a preferred infill, as for the suppliers to then cost out for us. This is confirmed by the "AGP Framework Delivery Process Map" that confirms that "during stage 3 AGP Suppliers submit Guaranteed Maximum Price (GMP) 1st Stage tender. RLF completes tender evaluation based on Most Economically Advantageous Tender (MEAT) criteria and issues report and recommendation to you and the FF for approval."

2. Would the Council be liable to pay any costs if at the end of stage 3 of the process they did not enter a Pre-Contract Services Agreement with the selected Contractor ?
   Potentially. As per the report at the end of the last Full Council agenda, if we were to be the party to pull out at any stage, which we are entitled to do, The Football Foundation may decide to seek to recover the costs of the exploratory work. The amount the Football Foundation have told us all along that they put into the process up to stage three is up to £20,000.

3. Would the Council be liable for any costs if at stage 5 the Football Foundation did not offer the Council a grant at the expected level, the consequence of which resulted in the Council not being able to issue instructions to the contractor to proceed into the delivery stages ?
   Potentially. As per the report at the end of the last Full Council agenda, if we were to be the party to pull out at any stage, which we are entitled to do, The Football Foundation may decide to seek to recover the costs of the exploratory work. The amount the Football Foundation have told us all along that they put into the process up to stage three is up to £20,000. The Council would then need to consider if it is able to meet the gap to proceed in another way for example sponsorship or donors or a loan. This is part of the standard risk management of a project and the Football Foundation will be open with their expected contribution. This will all be part of the consultation process whilst applying for the grant.

4. May the council enter into this arrangement? Which includes a paid contract with a management company, given the covenant on the Layham Road Sports Ground? Are we allowed to arrange for the use of that land for to be for commercial purposes? What is the definition of commercial purposes?
   The definition of commercial is "concerned with or engaged in commerce" by "making or intending to make a profit".

   Yes – see previous legal advice, but it is important to note that the covenant is about the land being used for the public which is largely in reference to the access over the land. Granting a long lease for exclusive use rather than public use could be construed as breach of the 1981 covenant, but if the public would still be able to access the land then the solicitors advised that they think the risk of a successful action for breach is low.

   Also, based on this advice from solicitors, the Council has already resolved to follow this path (minute HTC21.171 in the meeting of 20th May 2021), if it is deemed viable and if there are interested parties upon tendering. (It may well be that because it is such small fry, that nobody is interested in managing the site, therefore it may still be managed in house by the Town Council.) It is highly likely that if at all, it would be managed by Abbeycroft who are not-for-profit, and conversations with them, or any management party, and solicitors advice already received agrees that the covenant would be written into any contract and passed down in a lease or contract.

5. What may we do and not do to raise the money for the shortfall between grants/ donations and costs?
   As per the business case – there are private donors sponsorships and loans that can be explored beyond reallocating Council reserves. The costs are all detailed up to the current situation in the business case.

6. What are our rights should costs increase due to delays caused by partners?

This would be a standard clause in any agreement and would not be different to if we entered into an agreement for anything of a construction nature. All tenders/quotations have a life for the costs to be honoured and any increases due to delays cause by partners would have to be absorbed by the partner. Clause 3.1 Article 15: Agreement of the Construction Phase Terms of the FF's framework documentation appendix D states "the amount of the Contract Sum attributable to the Sub-Structure Works and such amount and the Contract Sum shall be agreed prior to the Contractor commencing any part of the Supply & Installation Works;", and clause 4.1 further states that "that the "tender price" obtained in a competitive award exercise shall be the Guaranteed Maximum Price (GMP)." That is the beauty of working on a competitive tender process which incorporates GMP.

7. What will happen if FF do not give us enough money, what will we be liable for if we pull out because we can't afford it?
   This is the same as question 3 above – same answer applies. The Council would then need to consider if it is able to meet the gap to proceed in another way for example sponsorship or donors or a loan. This is part of the standard risk management of a project and the Football Foundation will be open with their expected contribution. This will all be part of the consultation process whilst applying for the grant.

8. Can you explain the term 'clawback period' and what will that mean for us?
   A clawback is a provision which can be included in the terms of an incentive award which allows the company to reclaim value that the participant has received in respect of the award after that value has been delivered to them. Clawbacks generally act as insurance policies in the event of fraud or misconduct, a drop in company profits, or for poor performance.

   I.e. if the conditions of the clauses set out below in the Terms and Conditions are not met for the 21 year clawback period, the Football Foundation would be within its rights to seek to recover its invested costs.

   The definition of the clawback period is on page two of the General Terms And Conditions paper and in this contract means the period of 21 years from the date of acceptance of the Grant.

   In this agreement, the clawback clause would potentially be used if the security of tenure lapsed or we sold the land or failed to use the AGP as intended:
   - Clause 3.2 of the General Terms And Conditions referred to tenure. A copy of the title register of the land has already been sent to the FF to satisfy this clause.)
   - Clauses 5.1 and 5.3 of the General Terms And Conditions refers to the use of the facilities. "The purpose of the Project, the arrangements for management and community use of the Facilities and the purpose for which the Facilities are used shall be as set out in the Application and the Grant Agreement and shall not be changed throughout the Clawback Period without the prior written consent of the Foundation."
   - Clause 10.1 refers to advertisement of the Football Foundation as main contributor by erecting signage at the site and in all communications surrounding the project will acknowledge the support received from the Football Foundation.
   - Clause 11 – project monitoring: The Project and the Facilities shall be closely monitored by the Foundation throughout the Clawback Period to ensure that the aims and objectives specified in the Application. At any point audits, spot checks etc may be undertaken.
   - Clause 12 – accounts and records: "if all or any part of the Grant is awarded for the purchase of Grant Assets the Organisation shall maintain a detailed register of the Grant Assets throughout the Clawback Period and shall supply the Foundation with a copy of this annually, or when new assets are acquired or disposed of (whichever is the sooner)."
   - Clause 13 - Mortgage, Disposal, Lease, or Change of Use of Facilities (Capital Funding Only) "subject to the terms of any charge or charges to which the Foundation shall previously have consented, the Organisation shall not without the prior written consent of the Foundation's Chief Executive: 13.1.1 transfer, sell, lease, licence or otherwise dispose of all or any part of the Facility; 13.1.2 grant any charge, mortgage or other form of security or encumbrance over all or any part of the Facility; or 13.1.3 cease to use the Facility for the purposes previously approved by the Foundation."
   - Clause 14 - Cessation or Suspension of Grant and Termination (all Grants)
   - Clause 16 – "Unless otherwise agreed by the Foundation in writing, the Organisation must notify the Foundation in writing of any legal actions, claims or proceedings made or threatened against it (including any actions, claims or proceedings made or threatened against members of its governing body or staff) during the Clawback Period. Such notification shall be made as soon as practicable and in writing."

- Clause 24 – "The Funders shall have all rights conferred on the Foundation by the Grant Agreement including without limitation all rights to information, inspection, disclosure, access and clawback."

9. Will we have to do due diligence, background checks on any and all sponsors/ donors/ gifters of money to this project and have contracts with them?
   Clearly. This is obviously part of the normal financial processes and anti-money laundering requirements by any organisation.

10. What is the cost and what is required of us regarding disposal of the pitch at the end of its life?
    See email sent to all councillors on 16th June. Removal and disposal of the existing surface and infill and professional fees are included in the estimations of regeneration that the Football Foundation provide i.e. the £200,000. This will be covered by the sinking fund as per the business case.

11. What will happen if the pitch material is banned?
    That is entirely dependent on the situation at the time if it were to occur. A solicitor would not able to say different as there are two entirely hypothetical scenarios after the fact of installation:
    1) Legislation comes in to say that any new constructions may not use the material – this would mean that the material would remain until the next renewal of the pitch, at which point different materials would need to be used to replace.
    2) If the legislation banning the material deemed the material to be so hazardous that it would require immediate removal and replacement, insurance would cover this.

12. Can the council request that particular materials only are used in the construction of the AGP?
    YES – this has already been answered by The Football Foundation and at Stage 3 this is where we would dictate our requirements.

13. What will partner organisations be liable for? Insurance? Maintenance? Renewal?
    No – they are funders and contractors – the asset will belong to the Town Council upon completion and all associated insurances maintenances, renewals will fall to the Town Council as per any asset purchased. Should a management company be contracted, then any passdown of maintenance and insurances will be considered in their contract. Renewal will remain responsibility of the Council.

14. What legal advice will we need going forward?
    That's a moot point as it's not something that you know until it crops up. The only thing I can think of that may potentially require advice would be on the contract with management company if it is too complicated for me to deal with comfortably.

15. In this relationship with FF and a third party management company, who is liable for injuries caused by the facilities we have purchased?
    Once constructed, the Football Foundation's part is played and they will be only involved in the monitoring and evaluation of the project. The asset will belong to HTC and if managed by a third-party company, then dependant on the level of service agreement the contract enters into, will depend on the level of liability of each party. Ultimately, the Town Council and any management company will both have public liability insurance in place.

16. At the end of the clawback period, who pays for the pitch to be disposed of and land returned to 'natural' state?
    This is the same as question 10 and the same answer is see email sent to all councillors on 16th June. Removal and disposal of the existing surface and infill and professional fees are included in the estimations of regeneration that the Football Foundation provide i.e. the £200,000. This will be covered by the sinking fund as per the business case.

    The pitch will be in replaced before the end of the clawback period and hopefully at the end of the clawback period the pitch is still being utilised and will continue to be so for long after the 21 years. The clawback period is simply the time stated by the FF as their monitoring and availability to clawback funds if we do not meet the clauses. Beyond that time, we are released of our obligations and it simply means we do as we will with it.

17. If the land is found to be not suitable (eg flooding) will we be liable for any costs and what might they be?
    This is the same as question 2. The answer being as per the report at the end of the last Full Council agenda, if we were to be the party to pull out at any stage, which we are entitled to do, The Football

Foundation may decide to seek to recover the costs of the exploratory work. The amount the Football Foundation have told us all along that they put into the process up to stage three is up to £20,000.

18. Can we progress the pavilion ahead of the pitch? Can we separate the two and progress with one or the other? Would this mean that we cannot take advantage of the FF offer?
Of course we can if we so chose, this is a HTC project through and through. This question has already been covered in the supporting information at the end of the agenda for the Full Council meeting on 16th June. The FF have already advised that if we were to split the projects, the pitch would continue on the path with them as expected, but the funding they'd be able to provide towards the pavilion would be unlikely to exceed £25k. The joint project allows the Football Foundation to consider the pavilion as part of the "on the pitch" investment, whereas if they were not a joint project, the Football Foundation would not view the pavilion as such, hence the reduced expectation of the grant.

19. When the playing fields cannot be used for playing on, does anyone have a right to complain to the council for change of use or similar?
There will still be plenty of available space for "playing on" the fields. The pitch will not take up the entire fields as can been seen in the plan.

20. What is the benefit to the council and the (majority of) residents of Hadleigh of this contract with FF? Is the benefit only to the clubs who have contracts with the Town Council at Layham Road Sports Ground? And the management company who wins the tendering contract?
The answer to this question is the business case prepared.

In a nutshell though, the benefit is that Hadleigh would have an all weather pitch which would be able to be used by a multitude of clubs and individuals. It would allow the rugby and football clubs to progress to higher levels within their regulatory bodies and it would allow other clubs and users a space to train on that is not grass. There is plenty of interest and support from users of a variety of clubs and other users in Hadleigh – see appendices f-l of the business case. These are not limited to sports clubs. Having a management company would release the management from an ill-equipped council provision (who, should the pitch and facilities be used as anticipated and planned for) would have to hire a new member of staff and they would be able to be based on site (if not all the time, then some of the time) within a group of similar facilities with marketing experience and an existing customer base which the Council currently does not have, as per the business case.

21. How much money will this all cost? Is there anything missing from the business documents which we should expect to pay normally? What is our duty as a council?
See business case.

22. What are the council's general obligations under this contract?
See the document entitled General Terms and Conditions.

23. Will any individual/s be liable for any money/ be held personally responsible at any time if anything goes wrong?
No, this project is being undertaken by Hadleigh Town Council. Councillors are not personally liable for the work the Council undertakes. The Council has adequate insurance and will continue to do so with annual reviews undertaken.

24. Who will conduct the tender processes for management company and build? HTC or FF?
The management company solution has nothing to do with the Football Foundation so will be entirely HTC led.

The build will be a joint venture between both parties and the tender process will be led by the FF for the pitch, but HTC for the pavilion, with the expertise of the architects leading on HTC's behalf.

25. How much would they charge to hold our hand/ advise us throughout this whole process?
Nothing – that is the point of the framework – that is exactly what the framework will do for, hold our hand and walk us through the process.

26. Can HTC specify the pitch solution has to use organic infill (ie. non-rubber crumb) before Stage 3? If so, how and where do we do that?
Yes, by research, conversation with the Technical Manager at the Football Foundation and the Projects & Finance Officer. However, it would be prudent not to enter into this decision without first

knowing if the technical specifications suit our position at Layham Road.

27. If we do so, are suppliers who propose rubber crumb or other polluting solutions excluded from the tendering process? Ie. would a rubber crumb proposal be filtered out completely, or would it just mean the supplier got a low score or one 'Fail' on one criterion, and could still in be the running due to high scores on other criteria (eg. cost)? In the FF Alliance contract (between the FF and suppliers – not the contract with HTC) it says: "Unless otherwise specified in the Concept Design Document, the Performance Infill shall be End of Life Tyre (ELT) granulate [ie. rubber crumb]".
Yes – the town council will have the right to determine the criteria with the FF as per the email from FF on 27th May. We do not have to accept any tenders at all as always, and the project may be closed at any point, but the FF may recover its costs to date at that point under the clawback clause. As per the Concept Design Document quotation in the question, it is "unless otherwise stated", so it would be made very clear in the tender documents that it is stated that Hadleigh Town Council does not wish to use ELT infill and the tenderers will need to provide the cost for the alternatives. This will incur additional costs tot eh suppliers tenders but that will just need to be factored in to the overall project.

28. HTC doesn't want rubber crumb. Where is the Concept Design Document set, at what point in the process? And who writes the CDD? How does HTC get its requirements into the CDD? Who approves it, and what happens if HTC does not want to approve it?
At stage 3 as per the Framework Delivery Process documentation. The FMC will write the CDD and this will then be approved by the FF and HTC. If HTC do not wish to approve it they will simply work with the FF and FMC to revise the CDD.

29. As I understand the contract, both the HTC and the FF have to approve the bid recommended by the FMC in order to progress beyond Stage 3. Is this correct?
That's correct, both parties at every stage are joint partners in approvals. The "AGP Framework Delivery Process Map" that confirms that "during stage 3 AGP Suppliers submit Guaranteed Maximum Price (GMP) 1st Stage tender. RLF completes tender evaluation based on Most Economically Advantageous Tender (MEAT) criteria and issues report and recommendation to **you and the FF for approval**."

The FMC is Robinson Low Francis (RLF) - a national construction and property consultant which has a dedicated AGP Framework team based in its offices in Birmingham. RLF has worked on three successive AGP frameworks over an eight year period and was appointed as FMC for the current Framework via a full OJEU tender process. During stage 3 the FMC will:
- Ensure the brief and feasibility is robust
- Produce a budget estimate for your project
- Produce the Employers Requirements document
- Gather and review Health & Safety information
- Issue the 1st Stage tender documents to the suppliers
- Review and report on tender returns
- Formalise the appointment of the Supplier based on the PCSA
- Perform the role of Employer's Agent, Cost manager and CDM Advisor during the Construction phase

30. As I understand the contract, if the HTC and FF do not both approve the recommended bid at Stage 3, HTC is liable for all of the FF costs incurred to that point in Stages 1, 2, and 3. Is this correct? Are there any other liabilities if we walk away at the that point? Would those costs include:
    - the costs of FF staff and FF-appointed consultants and their work (The Engagement Manager, the Framework Managing Consultant, the Technical Project Manager)?
    - the costs incurred by the Survey Company?
    - the costs incurred by suppliers doing 'pre-contract' work?
This is the same as questions 2 and 17. Same answer applies.

31. The only environmental assessment criterion to be used in the selection process that I could find was this: "Environmental Considerations – A commitment to act responsibly within communities in which they work, by reducing travel, ensuring efficient working practices and sourcing local materials". Are there any other environmental criteria used in the process?

This question is very vague and unclear. What document is it referring to and what process?

32. Could HTC and/or the FF use the Direct Award mechanism in the contract to assign the contract to a supplier who was not recommended by the Framework Managing Consultant?
Direct Award Contracts (DACs) occur when a contract is awarded to a contractor without competition, or where there is a material change to an existing contract. This will not be the case as it is only applicable in extreme circumstances but HTC would be best to get as many competitive tenders as possible as this is a lesser known field (alternatives to rubber crumb) and it is part of our regulations. The FMC is only going to be recommending and the FF have already made it very clear that HTC and the FF will make joint decisions throughout the process..

33. What are HTC's potential risks and liabilities if the Environmental Agency objects to the pitch due to a rubber crumb solution (as at Bishops Stortford)? See: https://www.eastherts.gov.uk/latest-news/2022/3g-pitch-grange-paddocks-given-green-light
HTC have already resolved, minute number HTC22.XXX of the Full Council meeting on 16th June 2022, **not** to agree to the use of rubber infill so this question is null and void as the Council will not be entering into any agreement or contract to use rubber infill.

34. What are HTC's potential liabilities if planning permission is refused?
Refer to questions 2, 17 and 30.

35. What are HTC's potential liabilities and risks if the EU (and UK) bans microplastics such as rubber crumb: before Stage 3? After Stage 3 but before completion? After completion?
Refer to question 11 for the specific answer, however also refer to question 33, this is also a null and void question as HTC have already resolved that it **will not** be using rubber crumb infill.

36. In your opinion, are there particular aspects of the contract that should the council be particularly aware of?
Not in my opinion. This is a framework that is tried and tested by hundreds of places around the entire country; we are not any different to anybody else that has used it previously and the FF are a body that is backed by the government.

37. What are the potential implications for the ownership of the land and any covenants the council has on it?
There is no potential implications for the ownership of the land. The land is owned by HTC and has the HM Land Registry title as proof. The question about covenants can be answered by previous solicitor advice. The grounds will still be accessible to the public and any covenant is able to be assed down in contracts and leases to third parties, such as happens with the rugby club agreements presently.

38. What does the agreement say about what happens under the following circumstances, and in particular what are the risks and liabilities for HTC under those circumstances:

- The income from the use of the pitch is insufficient?
This is part of the monitoring process over the 21 year period and the Football Foundation would aid the Council in how to get sufficient income if that was the case. The Town Council would be at risk of not meeting clause 11 - monitoring and the FF could instate the clawback clause if HTC had not fulfilled their duties to generate sufficient income.
- Any of the clubs that are seen as the main users of the pavilion and pitch (ie. Hadleigh United Football Club or Hadleigh Rugby Club) fold/dissolve prior a). prior to the completion of the project or b). after completion?
What is the actual question here? The agreement is not to do with clubs that use the pitch and pavilion, the agreement is a design and construction agreement with HTC so the risks are held by HTC and that's why we have got supporting letters from the said clubs for the project, see appendices f and I of the business case. As a matter of fact, as described by the clubs themselves to councillors in public forums of meetings, and as per the business case, these developments will enhance the clubs, their reputations and their league statuses allowing them to compete better and work their way up leagues whereas if the facilities are left as is, then HTC will be more liable in aiding their dissolution.
- Any of the main clubs that are envisaged as the main users of the pitch and the pavilion (ie. Hadleigh

United Football Club or Hadleigh Rugby Club) relocate themselves to another venue a). prior to the completion of the project or b). after completion?
Again, the agreement is not to do with clubs that use the pitch and pavilion, the agreement is a design and construction agreement with HTC so the risks are held by HTC and that's why we have got supporting letters from the said clubs for the project, see appendices f and I of the business case. As a matter of fact, as described by the clubs themselves to councillors in public forums of meetings, and as per the business case, these developments will enhance the clubs, their reputations and their league statuses allowing them to compete better and work their way up leagues whereas if the facilities are left as is, then HTC will be more liable in aiding their dissolution.

- The Football Foundation closes or dissolves at any point during the project or after?
Then the laws of dissolution of a charitable foundation would apply. This is a very very unlikely scenario.