

**Report of the Built Environment Lead**

**Report to the Director of Children’s Services**

**Date: 18<sup>th</sup> December 2013**



**Subject: Transfer of John Smeaton Community College from Leeds City Council to the United Learning Trust**

Are specific electoral Wards affected? If relevant, name(s) of Ward(s): Crossgates & Whinmoor	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Are there implications for equality and diversity and cohesion and integration?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Is the decision eligible for Call-In?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Does the report contain confidential or exempt information? If relevant, Access to Information Procedure Rule number: Appendix number:	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

**Summary of main issues**

The Project Team have negotiated the documents in conjunction with Children Services and agreed a commercial position in preparation for the academy transfer date. All issues have been resolved to the Project Team’s satisfaction and are now recommending the formalisation of the documents in preparation for the transfer of John Smeaton Community College to Academy status.

**Recommendations**

It is recommended that the Director of Children’s Services:

- Notes and approves the negotiations held with the DfE and the United Learning Trust (“the Academy”);
- Gives authority for the following agreements (“the Agreements”) to be executed and completed to enable John Smeaton Community College to transfer on 1<sup>st</sup> January 2014:

- Schools Agreement;
- Principal Agreement;
- Long Term Lease;
- Commercial Transfer Agreement; and
- Deed of Variation to the PFI Contract;

Together with any other documentation required to complete the transfer;  
and

- Notes that a Local Government (Contracts Act) certificate will be signed by the Director of Resources (as approved by the City Solicitor) in relation to the Deed of Variation, to be issued at close;
- Notes that a User Agreement regarding use of the adjacent Leisure Centre has agreed between United Learning and LCC.
- Authorises the signing of a 'Letter of Comfort' between LCC Children's Services and United Learning Trust, confirming that LCC will continue to provide Exceptional Circumstances Factor funding to cover the cost of hiring the Leisure Centre.
- Gives authority for any other necessary action to be taken to effect the transfer.
- Note that the responsible officer is Nigel Wilson (PPPU) and the implementation date is 1<sup>st</sup> January 2014.

## **1 Purpose of this report**

- 1.1 The report provides a summary of negotiations to date, advises on issues and risks and requests the Director of Children's Services to:
- Note and approve the negotiations held with the DfE and the Academy.
  - Approve the signing of the Agreements required to enable the Academy to open on 1<sup>st</sup> January 2014:

## **2 Background information**

- 2.1 The new John Smeaton Community College building opened in September 2007 following a full new-build construction funded through PFI credits under the Combined Secondary Schools PFI programme (CSSP).
- 2.2 No statutory notices have been issued; the legislation has changed which means that schools are not classed as closing, merely converting to academies.
- 2.3 The school applied to the DfE to be granted Academy status and on 6<sup>th</sup> May 2013, the Director of Children's Services received the Academy Order (dated 30<sup>th</sup> April 2013) enabling the school to convert to an Academy under Section 4 of the Academies Act 2010. The proposed conversion date is 1st January 2014. This is the fourth attempt to convert to Academy status – two were attempts to 'self-convert' and this is the second attempt to convert under a Sponsor.

2.4 The conversion date has been delayed a number of times, as a result of the negotiations that were ongoing between United Learning and the DfE around the changes the DfE made to the Supplemental Funding Agreement, which LCC is not party to, along with issues relating to future/ongoing funding around the requirement for the Academy to hire facilities at the adjacent Leisure Centre. Negotiations were also ongoing with United Learning around the City Council's proposed introduction of management fees to be payable by academies for the on-going management of PFI contracts.

2.5 All of these issues have now been resolved – the United Learning Trust have agreed to pay the management fee and the DfE has been able to provide a degree of comfort to United Learning around the ongoing provision of funding.

### **3 Main issues**

3.1 Publicly funded / maintained schools may be converted into academies by an Academy Order made under s4 of the Academies Act 2010, and on 6<sup>th</sup> May 2013, the Director of Children's Services received an Academy Order enabling the school to convert.

3.2 To enable John Smeaton Community College to open as an academy on 1<sup>st</sup> January 2014, the Secretary of State must enter into a legally binding Funding Agreement to establish an Academy (the Funding Agreement is between the DFE and the Academy).

3.3 To enable the Funding Agreement to be approved by Parliament, a number of further agreements are required:

- Schools Agreement;
- Principal Agreement;
- Long Term Lease;
- Commercial Transfer Agreement; and
- Deed of Variation to the PFI Contract.

3.4 The School Agreement, Principal Agreement, and Deed of Variation are required because John Smeaton Community College is one of the schools built under the Combined Secondary Schools PFI Project (CSSP). These documents are based on template agreements issued by DFE (except the Deed of Variation) in relation to transfers of schools within PFI Projects. The documentation envisages that the City Council remains as counterparty to the PFI contract, but is intended to apportion potential risks from that continuing arrangement appropriately between the City Council, the Academy, and the DFE. This is in light of the fact that the Academy receives funding directly from the DFE, and the LEA no longer maintains the school and loses its other powers in relation to school management.

3.5 The Agreements have been subject to extensive negotiation between the various parties and are now fully agreed between LCC, the United Learning Trust and the DfE. It is intended that all of the Agreements will be sealed or signed by the City Council and the DFE as appropriate once the John Smeaton Community College Governing Body have signed the documents to which they are party.

- 3.6 Below is an outline of the main issues that have been concluded on each of the above Agreements.
- 3.7 School Agreement
- 3.7.1 Community Schools subject to PFI arrangements are maintained schools subject to LEA influence under education legislation. Once the Academy is established, the LEA will have no control of the funding or otherwise. In light of the fact that the Academy will have limited assets beyond the school and equipment, if liabilities arise under the PFI contract due to the acts or omissions of the Academy, these will fall to the City Council, since it remains a counterparty to the PFI Agreement.
- 3.7.2 The DFE model has been developed to balance the Authorities' concerns over their substantial financial risk in a PFI scheme, whilst at the same time preserving the Academy Trust's independence and ability to run a high performing school. The School Agreement sets out in much clearer terms the relationship between the Academy and LEA, and replaces the Governing Body Agreement currently in place. It will provide for a continuing Academy contribution (as now for the maintained School) and practical interface issues between the Academy and the City Council in relation to the PFI contract.
- 3.7.3 The School Agreement follows the precedent agreed on previous conversions and includes the additional revisions agreed on Swallow Hill and Oakwood, where clauses reflecting the management fee issue (referred to in paragraphs 3.7.4 & 3.7.5 below) were added and where Schedule 2 (referred to in paragraph 3.7.6), detailing the Academy contribution towards payment of the Unitary Charge, was redrafted/simplified. The signatories to the School Agreement are the City Council and the United Learning Trust.
- 3.7.4 Discussions have taken place with the DfE and Academy Sponsors with regards to the continuing role of Children's Services and its decreasing resources in monitoring and managing PFI schools contract. This led to the introduction of clauses in the Swallow Hill School Agreement to allow the City Council to recover an annual management fee from the Academy for the management of the School Agreement and the PFI Project Agreement on behalf of the Academy, and will be included for all future conversions. With regards to John Smeaton, it has been agreed that the City Council will recover an annual management fee of £10,000 (indexed) from the Academy.
- 3.7.5 There are also additional clauses to allow the City Council to recover certain additional fees from the Academy (both in respect of Children's Services input and any professional advice obtained by Children's Services) in specified circumstances, for example managing a dispute with the PFI contractor at the Academy's request and processing a high value change / variation of the Academy's request.
- 3.7.6 Schedule 2 of the School Agreement, which details the financial contribution that the Academy will have to make towards the PFI Unitary Charge, was redrafted in its entirety on the Swallow Hill conversion, as the LCC drafting on previous conversions were eight pages long, whereas AET's previous drafting was no more than eight lines long. The project team accepted that the LCC version first

developed on the South Leeds conversion was excessive and probably duplicated a lot of the drafting within the main body of the School Agreement, however also considered that AET's version did not provide sufficient clarity and breakdown of the contribution to be made. This drafting will be included on all future conversions and has been used for John Smeaton.

3.7.7 It should be noted that the principles agreed for the Swallow Hill, Oakwood and John Smeaton conversions under 3.7.4 to 3.7.6 will be adopted for all other future PFI conversions.

### 3.8 Principal Agreement

3.8.1 The Principal Agreement governs the relationship between the DfE, the Academy and the City Council, and in particular the risk of failure of the Academy to make payments to the City Council (including those supporting the Project Agreement Unitary Charge) under the School Agreement. DfE also offer an indemnity to the City Council where such payments are not made by the Academy.

3.8.2 DfE has recognised that:

- Academy Trusts must retain the independence and flexibility they need to provide high quality education. This cannot be compromised by the arrangements.
- Authorities and PFI Consortiums will not want to re-negotiate the terms of the Project Agreement to accommodate the Academy Trust following conversion (noting the time and cost that this would incur). Nor does the DfE want to create a situation which compels the PFI Consortiums and its funders to undertake substantial and costly due diligence.

3.8.3 The intention of the agreement is set out in clause 2 of the Principal Agreement. This provides that "The Parties acknowledge that neither the Authority nor any of the PFI Schools should suffer, in connection with the Project Agreement, any adverse consequences arising out of the Academy's status as an academy rather than a school maintained by the Authority and that the aim of this Agreement is to avoid or, if that is not practicable, to mitigate any such effects" And an accompanying footnote stated that "*The DfE intends that schools other than the PFI Schools maintained by the Authority should not be adversely affected financially by the Academy's status as an academy rather than a school maintained by the Authority whether initially, on an ongoing basis, or in the event of any future closure of the Academy*"

3.8.4 Following extensive and protracted negotiations with the DfE during the Swallow Hill conversion process, the DfE finally agreed to the City Council request for an amendment to the Principal Agreement on the basis that the City Council can require DfE to compensate the City Council for its direct losses where the Academy's breach of the School Agreement or Principal Agreement has put the City Council in breach of the PFI Contract. This is now viewed to be a 'Leeds specific' document.

3.8.5 The signatories to the Principal Agreement are the City Council, DfE and the Academy. Similar to the School Agreement, the principles agreed for Swallow Hill

and subsequently Oakwood and John Smeaton, will be adopted as the standard LCC position for all other future PFI conversions.

### 3.9 Long Term Lease

3.9.1 The Long Term lease has been subject to panel approvals referred to in section 3.12. Key issues that have been agreed are:

- Insurance – the academy will take on the responsibility for insuring the building.
- The Academy has been granted a right of access over the driveway to the Leisure Centre on the basis that the school car park exits onto the driveway.

3.9.2 On the basis that the school does not have a Sports Hall and utilises facilities within the adjacent Leisure Centre in order to deliver its PE curriculum, discussions have been protracted around the ongoing funding of this usage – LCC currently funds the school for these rental costs.

3.9.3 The Local Authority will continue to include funding in its funding formula to cover the rental costs payable to LCC Leisure Services necessarily incurred to meet the basic curriculum requirements, through the use of the exceptional circumstances factor. The Local Authority is only committed to include such a factor in its formula where school funding regulations allow us to do so, and is dependent upon the EFA replicating our funding formula and including this funding within the General Annual grant (GAG) paid to the Academy. A 'letter of comfort' has been issued to United Learning in this respect and both United Learning and DfE have reach a separate agreement concerning circumstances whereby LCC is no longer able to continue this funding under the regulations.

### 3.10 Commercial Transfer Agreement

3.10.1 The purpose of the Commercial Transfer Agreement is to provide for risks and information obligations for the parties relating to staff, assets and contracts. It provides for apportionments of payment of salaries, pension contributions, etc. and indemnities from both parties in relation to employment matters.

3.10.2 The Commercial Transfer Agreement is between the City Council and the Academy. Key issues that have been agreed are:

- What assets / contracts will transfer;
- How historic liabilities will be dealt with.

3.10.3 The standard form (which provides for extensive indemnities from the City Council to the Academy) has now been modified in line with Children's Services policy to accept only the minimum obligations required under the Transfer of Undertakings (Protection of Employment) Regulations 2006, obligations to pay staff up to the date of transfer and for any personal injuries prior to transfer. This drafting was agreed by all parties in September 2013 prior to the delay to the conversion.

- 3.10.4 However, in the interim period, the DfE have discovered that within the Academy Action Plan (AAP) submitted in June 2013, the Authority signed up to an Indemnities section which stated that “*The Council shall indemnify the Company in respect of all costs and liabilities which transfer to the Company under the Transfer of Undertakings (Protection of Employment) Regulations 2006 and which relate to the period prior to the Transfer Date including without limitation the costs arising out of any equal pay claims relating to that period*”.
- 3.10.5 Despite attempts to argue that all parties had already agreed the drafting of the CTA, the DFE would no longer accept this position and LCC therefore had to honour the undertaking provided within the AAP.
- 3.10.6 The Council therefore has the obligation to indemnify the Academy in respect of all costs and liabilities which transfer to the company under the TUPE Regulations relating to the period prior to conversion. However, it should be noted that this is still a ‘watered down’ position to that required under the DfE model drafting, which means that the Council is not liable for claims for unfair/wrongful dismissal, discrimination etc that arise post conversion relating to the period prior to conversion, which it would have been under the model drafting.
- 3.11 Deed of Variation to the PFI Contract
- 3.11.1 The Deed of Variation to the PFI Contract is between the City Council and Investors in the Community (Leeds Schools) Ltd (IIC – essentially the PFI Contractor).
- 3.11.2 The purpose of the Deed is to ensure that the PFI contract covers the Academy / foundation trust as an insured party under the PFI contract, but also adds the Academy as a City Council Related Party whose actions are the responsibility of the City Council (this is why the Schools Agreement and Principal Agreement are important in order to back off obligations to the Academy and DFE).
- 3.11.3 The DoV previously agreed for Primrose included for the potential that all schools within the CSSP scheme may convert to Academy status, and therefore no further approvals were required from John Smeaton, other than the requirement to inform the PFI Contractor.
- 3.12 Property Approvals (Lease)
- 3.12.1 On the 14<sup>th</sup> December 2011, the Executive Board approved the principle of disposing of land to schools converting to Academies, on the basis set out within the submitted report where final approval of the terms of such disposals has been delegated to the Director of City Development, in consultation with the Director of Children’s Services, Lead Members and appropriate Ward Members.
- 3.12.2 Property Panel have delegated authority to Martin Farrington, Director of City Development. The Director of City Development approved the principles and extent of the property arrangements for the 125-year long term lease on 10<sup>th</sup> October 2013.

## **4 Corporate Considerations**

### **4.1 Consultation and Engagement**

- 4.1.1 It should be noted that the statutory consultation process is no longer required, as the Academies Act 2010 streamlined the process so that when there is a conversion from a single school into a single academy (rather than a merger), there is no longer the requirement to issue a closure notice, as the school converts to academy status rather than closing and re-opening as an academy.
- 4.1.2 Whilst the Authority has no ability or rights to prevent the conversion from taking place, a number of stakeholders within the LA have been consulted as part of the conversion process including Finance, HR and Built Environment teams within Children's Services and also Legal Services and PPPU. The Director of Children's Services was made aware of the proposed conversion on receipt of the Academy Order on 6th May 2013
- 4.1.3 City Development contacted Ward Members by letter on the 29<sup>th</sup> August 2013 informing them of the City Council's proposal to dispose of the John Smeaton Community College site to the United Learning Trust for use as an Academy.
- 4.1.4 A number of briefings have been provided for CSLT and the Lead Member in relation to delays to PFI Academy conversions in general, the latest one being on 23<sup>rd</sup> June 2013.

### **4.2 Equality and Diversity / Cohesion and Integration**

- 4.2.1 An Equality, Diversity, Cohesion and Integration Screening form has been completed and submitted to the Equality Team. The Screening process has determined that although the conversion to Academy status could potentially have an impact on a number of groups, it is not necessary to undertake an EIA in relation to either this report or the entering into the Schools Agreement, Principal Agreement and Commercial Transfer Agreement between LCC and the Academy (and the DfE where applicable), due to the Council having limited control over the process.
- 4.2.2 The DfE have undertaken an Equality Impact Assessment in relation to the Academies Bill and have also completed a Race Impact Assessment in relation to the Academies Programme – both of these are publicly available on the DfE's website.

### **4.3 Council policies and City Priorities**

- 4.3.1 The Leeds Education Challenge is an ambitious city-wide commitment to achieving a child friendly city that drives school improvement and reflects the new relationship with schools, the integrated children's services and the changes to national policy and funding.
- 4.3.2 The conversion of a school to academy status will impact on the "Narrowing the Gap" and "Going up a League" agendas and may be an outcome from the Local Education Challenge. Academies in Leeds have the potential to contribute to the



targets to meet key priorities within the Children and Young People's Plan and the work on the Local Area Agreement.

#### **4.4 Resources and value for money**

4.4.1 The City Council has incurred costs relating to legal, finance and project management. It should be noted that there is no DfE funding support for these costs.

#### **4.5 Legal Implications, Access to Information and Call In**

4.5.1 Legal implications are outlined above in 3.0 Main Issues.

4.5.2 This report does not contain exempt information under Access to Information.

4.5.3 The policy and governance arrangements for the City Council for PFI / PPP projects are set out in the Constitution. Under the Director of Children's Services scheme of delegation, the Chief Officer (Strategy, Commissioning and Performance) is responsible for all decision making in relation to Public Private Partnership / Private Finance Initiative and other major property infrastructure related projects under Section 3, Part E of the Constitution. Specifically, Function 2, Parts (ii) and (iii)

#### **4.6 Risk Management**

4.6.1 Negotiations around the various Agreements have been handled by procurement and contract specialists in Legal Services and PPPU, who have given appropriate due diligence and advice. No risks have been identified which have not been raised within the body of the report. No future risks have been identified which are not mitigated through the Academy conversion documents.

### **5 Conclusions**

5.1 Although negotiations around some of the larger scale commercial points have taken a long time to be concluded, the agreements reached on these points will form the basis of a standard LCC / Children's Services approach for future conversions, and therefore will negate the need to revisit this with DfE on these future conversions.

5.2 Under the circumstances, negotiations around the general school specific issues have progressed well and have been concluded – furthermore the relationship with United Learning and their advisors continues to be positive. Therefore the key documents are agreed and ready for sealing or signing as appropriate.

### **6 Recommendations**

6.1 It is recommended that the Director of Children's Services :

- Notes and approves the negotiations held with the DfE and the United Learning Trust ("the Academy");

- Gives authority for the following agreements (“the Agreements”) to be executed and completed to enable John Smeaton Community College to transfer on 1<sup>st</sup> January 2014:
  - Schools Agreement;
  - Principal Agreement;
  - Long Term Lease;
  - Commercial Transfer Agreement; and
  - Deed of Variation to the PFI Contract;

Together with any other documentation required to complete the transfer;  
and

- Notes that a Local Government (Contracts Act) certificate will be signed by the Director of Resources (as approved by the City Solicitor) in relation to the Deed of Variation, to be issued at close;
- Notes that a User Agreement regarding use of the adjacent Leisure Centre has agreed between United Learning and LCC.
- Authorises the signing of a ‘Letter of Comfort’ between LCC Children’s Services and United Learning Trust, confirming that LCC will continue to provide Exceptional Circumstances Factor funding to cover the cost of hiring the Leisure Centre.
- Gives authority for any other necessary action to be taken to effect the transfer.

## **7 Background documents**

7.1 None

<sup>1</sup> The background documents listed in this section are available to download from the Council’s website, unless they contain confidential or exempt information. The list of background documents does not include published works.