

Report of the Built Environment Programme Manager

Report to the Head of Service, Learning Systems

Date: 26th April 2016

Subject: Transfer of East Ardsley Primary School from Leeds City Council to The Leodis Academies Trust



Are specific electoral Wards affected? If relevant, name(s) of Ward(s): Ardsley and Robin Hood	<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 (including Children’s Services, Legal Services and PPPU) have negotiated the Commercial Transfer Agreement (“**CTA**”) between (1) LCC; (2) The Governing Body of East Ardsley Primary School (“**Governing Body**”) and (3) The Leodis Academies Trust (“**LAT**”) and agreed a commercial position in preparation for the academy transfer on 1st June 2016. All issues have been resolved to the Project Team’s satisfaction and the formalisation of the CTA is recommended in preparation for the transfer of East Ardsley Primary School to Academy status.

Similar negotiations have also taken place in connection with the various agreements required as a result of East Ardsley Primary being a PFI school, again all issues have been resolved and positions agreed in preparation for the conversion on 1st June 2016.

Recommendations

It is recommended that the Head of Service, Learning Systems:

- Notes the negotiations held with Solicitors acting on behalf of the Governing Body of East Ardsley Primary School, The Leodis Academies Trust and the DfE;
- Gives authority for the following agreements (“**The Agreements**”) to be executed and completed to enable the Academy to open on 1st June 2016, (subject to the PFI Funders/Banks approval):

- Schools Agreement;
- Principal Agreement;
- Deed of Variation;
- Long Term Lease; and
- Commercial Transfer Agreement;

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 Children’s Services (as approved by the City Solicitor and the Deputy Chief Executive) in relation to the Deed of Variation, to be issued at close.
- Gives authority for the City Solicitor to give an indemnity to the Director of Children’s Services in respect of the signature of the Local Government (Contracts Act) 1997 certificate in relation to the Deed of Variation.
- Gives authority for any other necessary action to be taken to effect the transfer.

1 Purpose of this report

1.1 The report provides a summary of negotiations to date, advises on issues and risks and requests the Head of Service, Learning Systems to:

- Note and approve the negotiations held with the Solicitors for the Governing Body of East Ardsley Primary School, The Leodis Academies Trust and the DfE.
- Approve the signing of the Agreements required to enable the Academy to open on 1st June 2016.

2 Background information

2.1 The new East Ardsley Primary School building opened in September 2005 following a full new-build construction funded through PFI credits under the Leeds Ten-Primaries PFI programme.

2.2 The Governing Body of East Ardsley Primary School applied to the DfE to be granted Academy status and on 28th November 2014, the Director of Children’s Services received the Academy Order (dated 26th November 2014) enabling East Ardsley Primary School to convert to an Academy under Section 4 of the Academies Act 2010.

2.3 The DfE’s proposed conversion date was 1st April 2015, however negotiations around reimbursement of LCC’s legal fees became protracted and therefore progress on the conversion stalled until agreement was reached with both the Governing Body and DfE at the end of November 2015. Once agreement had been reached regarding fees, a proposed conversion date of 1st April 2016 was subsequently agreed between the parties. However, due to delays in achieving

Funder/Bank approval, the DfE have agreed to re-schedule the conversion date to 1st June 2016, which should provide sufficient time for all consents to be in place.

3 Main issues

- 3.4 Under the Academies Act 2010, publicly funded schools in England may become Academies. Schools may be converted into academies by an Academy Order made under s4 of the Act, and on 28th November 2014, the Director of Children's Services received an Academy Order enabling East Ardsley Primary School to convert.
- 3.5 To enable East Ardsley Primary School to open as an academy on 1st June 2016, 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).
- 3.6 To enable the Funding Agreement to be approved by the Secretary of State, 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.
- 3.7 The School Agreement, Principal Agreement, and Deed of Variation are required because East Ardsley Primary School is one of the schools built under the Leeds Ten-Primaries PFI Project. These documents are based on template agreements issued by the 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 LA no longer maintains the school and loses its other powers in relation to school management.
- 3.8 A Deed of Variation has been drafted to include provisions to accommodate East Ardsley conversion and future academy conversions of schools under the same PFI package (and therefore separate deeds of variation will therefore not be required for subsequent conversions).
- 3.9 The Agreements have been subject to extensive negotiation between the various parties and are now fully agreed between LCC, the Leodis Academies 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 funders' consent is received and East Ardsley Primary School Governing Body have subsequently signed the documents to which they are party.
- 3.10 Below is an outline of the main issues that have been concluded on each of the above Agreements.

3.11 School Agreement

- 3.11.1 Community Schools subject to PFI arrangements are maintained schools subject to LA influence under education legislation. Once the Academy is established, the LA 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.
- 3.11.2 The DFE model has been developed to balance 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 their school. The School Agreement sets out in much clearer terms the relationship between the Academy and LA, 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.
- 3.11.3 The School Agreement follows the precedent agreed on previous conversions and includes the additional revisions first agreed on the Swallow Hill Community College conversion, 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 Leodis Academies Trust.
- 3.11.4 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. In 2013, 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 has been included for all subsequent PFI conversions. With regards to East Ardsley, it has been agreed that the City Council will recover an annual management fee of £5,000 (indexed) from the Academy.
- 3.11.5 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.
- 3.11.6 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 to ensure that the details were as succinct as possible, whilst also providing sufficient clarity and breakdown of the contribution to be made - this drafting has been included on all subsequent PFI conversions and has been used for East Ardsley.

3.12 Principal Agreement

- 3.12.1 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. The DfE also offer an indemnity to the City Council where such payments are not made by the Academy.
- 3.12.2 The 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.
- 3.12.3 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”*.
- 3.12.4 The Principal Agreement provided by the DfE in respect of this conversion is based on a revised template document. The DfE have previously made changes to the document, namely the removal of the clause 5 indemnity protection which provided comfort to local authorities, should an Academy either breach the Schools Agreement, or as a result of that, subsequently put the City Council in breach of the PFI Project Agreement.
- 3.8.5 However, following extensive and protracted negotiations with the DfE in 2013 over the loss of this protection, a solution was reached for the Swallow Hill conversion. Essentially the DfE agreed to the City Council request for an amendment to the Principal Agreement on the basis that the City Council can require the 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. It should be noted that LCC is the only authority to have received this concession.
- 3.12.6 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 have been adopted as the standard LCC position for all subsequent PFI conversions.

3.13 Long Term Lease

3.13.1 The PFI contractor was granted a licence to operate on the East Ardsley site (as on all later PFI contracts), to enable them to deliver the services as required under the PFI contract and this will remain in place.

3.13.2 The long-term 125-year lease to the academy has been subject to the panel approvals referred to in section 3.16. Key issues that have been agreed are:

- Insurance – the academy will take on the responsibility for insuring the building once the PFI contract has expired.
- Repairs and Maintenance Liability – LAT have accepted the standard terms / clauses around repairs and maintenance once the PFI contract has expired.

3.14 Commercial Transfer Agreement

3.14.1 As part of the conversion process for publically funded schools, a Commercial Transfer Agreement is entered into between the relevant Academy Trust and Leeds City Council. If the Commercial Transfer Agreement is signed prior to the conversion then the Governing Body of the outgoing school also joins into the Agreement, as is the case at East Ardsley.

3.14.2 The Commercial Transfer Agreement deals with the transfer of the assets, staff and contracts from the Council to the new Academy Trust (where applicable). When a community school converts to Academy status, the Commercial Transfer Agreement provides for apportionments of payment of salaries, pension contributions, etc. and indemnities from both parties in relation to employment matters.

3.14.3 The standard form (which provides for extensive indemnities from the City Council to the Academy) was 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 (known as TUPE), specifically in relation to our obligations under Regulations 13 and 14 of the Regulations, or any award of compensation under Regulation 15. Although both LAT and the DfE do not agree with this position, they have accepted the position and the drafting has been retained within the final version of the CTA that has been agreed and signed off between LCC and LAT.

3.14.4 In respect of Trust schools, all of the staff are already employed by the Governing Body. As such the Commercial Transfer Agreement in relation to a Trust school would normally ensure that it's clearly documented that the employment liabilities sit with the Governing Body/Trust and not LCC. However, East Ardsley is a Community School and therefore the staff are currently employed by LCC.

3.14.5 Other key issues that have been agreed are:

- What assets / contracts will transfer

- How historic liabilities will be dealt with

3.14.6 All of the contracts and SLA's that LCC or the Governing Body currently have in place in respect of the school will be assigned to LAT where third party consent is not required, or where consent has been obtained (excludes the PFI contract). Where consent is required but has not been granted prior to the conversion date, all parties should use their 'reasonable endeavours' to obtain the consent of other parties to the assignment and then assign or procure the assignment or novation of that contract(s). For LCC contracts, where this has not been achieved LCC will continue with the contract as agent for LAT.

3.15 Deed of Variation to the PFI Contract

3.15.1 The Deed of Variation to the PFI Contract is between the City Council and QED Leeds Limited (QED – essentially the PFI Contractor).

3.15.2 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).

3.15.3 Funders and PFI SPVs require local authorities to provide a new Local Government (Contracts) Act 1997 (LGCA) certificate in relation to deeds of variation for academy transfers, and also an obligation not to pay all the expenses of the Academy (which would breach section 6(2) of the Academies Act 2010). The City Solicitor has approved the issue of a certificate under the LGCA and will continue to do so for all future PFI conversions. The requirement not to pay all the expenses of the Academy is not an unreasonable request and it is recommended that this is accepted.

3.15.4 The LGCA Certificate for this deed of variation will be signed by the Director of Children's Services. The City Solicitor will give an indemnity to the Director of Children's Services on behalf of the Council in respect of the certification of a deed of variation in relation East Ardsley conversion to academy status (and future conversions to an academy) under the Local Government (Contracts) Act 1997. The indemnity will be incorporated into the Director of Children's Services' contract of employment.

3.16 Property Approvals (Lease / Sub Underlease)

3.16.1 On the 14th 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.

3.16.2 The Director of City Development approved the principles and extent of the property arrangements for the 125-year long term lease on 29th March 2016.

4 Corporate Considerations

4.1 Consultation and Engagement

4.1.1 It should be noted that a 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 All consultations regarding the proposed academy are undertaken by the Governing Body and it is for the Governing Body to decide upon a level of consultation which is deemed appropriate under the circumstances. However, it should be highlighted that there is no set guidance on how to quantify what appropriate consultation actually means in terms of duration and consultees. All interested parties should however, be provided with opportunity to respond and ask questions.

4.1.3 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, City Development and PPPU. The Director of Children's Services was made aware of the proposed conversion on receipt of the Academy Order on 28th November 2014, and both the Executive Member for Children and Families and local Ward Members have been informed and are aware of the conversion via a written briefing submitted on 26th April 2016.

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 Commercial Transfer Agreement between LCC and the Academy Trust, due to the decision to convert not being a decision the Council has made, and that the Council has 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 Best Council Plan

4.3.3 The 'Leeds for Learning' policy 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.

4.3.4 The Local Authority has a duty to promote high standards and champion educational excellence. The relationship between the authority and its schools must influence the city wide agendas such as 'improve attainment and close the achievement gap', 'improve attendance and develop positive behaviour' and to 'create a life ready for learning'; all of which are aspirations from the Children and Young People's Plan. We will continue to apply the cycle of monitor, evaluate, challenge and support with schools in order that they become strong and capable of contributing to the key priorities of the city.

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. However it has been agreed that East Ardsley Primary / LAT will reimburse the Council's internal legal costs up to a capped limit of £20,000, as well as the full external funder/bank legal costs incurred up to a capped limit of £28,500.

4.4.2 As highlighted at 3.7.4, it has been agreed that the City Council will recover an annual management fee of £5,000 (indexed) from the Academy for the ongoing management of the School Agreement and the PFI Project Agreement on behalf of the Academy.

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 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 Deputy Director (Learning) and the Head of Learning Systems are responsible for approving all matters relating to operational PFI projects including variations to Project Documents under 'Executive Functions', specifically, Function 2 (Procurement), Part (b).

4.5.3 A Local Government (Contracts Act) certificate will be signed by the Director of Children's Services (as approved by the City Solicitor and the Deputy Chief Executive) in relation to the Deed of Variation, in accordance with the Director of Children's Services Scheme of Delegation.

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

4.6 Risk Management

4.6.1 Negotiations around the various Agreements have been handled by procurement and contract specialists in PP&PU 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 various academy conversion documents.

5 Conclusions

5.1 Under the circumstances, negotiations have progressed well and have been concluded – furthermore the relationship with East Ardsley, The Leodis

Academies Trust and their advisors continues to be positive. Therefore the key documents and agreements are agreed and ready for sealing/signing as appropriate.

6 Recommendations

6.1 It is recommended that the Head of Service, Learning Systems:

- Notes the negotiations held with Solicitors acting on behalf of the Governing Body of East Ardsley Primary School, The Leodis Academies Trust and the DfE;
- Gives authority for the following agreements (“**The Agreements**”) to be executed and completed to enable the Academy to open on 1st June 2016, (subject to the PFI Funders/Banks approval):
 - Schools Agreement;
 - Principal Agreement;
 - Deed of Variation;
 - Long Term Lease; and
 - Commercial Transfer Agreement;

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 Children’s Services (as approved by the City Solicitor and Deputy Chief Executive) in relation to the Deed of Variation, to be issued at close;
- Gives authority for the City Solicitor to give an indemnity to the Director of Children’s Services in respect of the signature of the Local Government (Contracts Act) 1997 certificate in relation to the Deed of Variation.
- Gives authority for any other necessary action to be taken to effect the transfer.

7 Background documents¹

7.1 None.

¹ 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.