

Commercial Transfer Agreement – Spring Bank Primary School and The Owlcotes Multi Academy Trust

Date: 28 February 2024

Report of: The Sufficiency and Participation Team Lead

Report to: The Director of Children and Families

Will the decision be open for call in? Yes No

Does the report contain confidential or exempt information? Yes No

Brief summary

The Project Team (including Children and Families, Legal Services and Procurement and Commercial Services) have negotiated the Commercial Transfer Agreement (CTA) between (1) Leeds City Council (LCC); (2) The Governing Body of Spring Bank Primary School (“Governing Body”) and (3) The Owlcotes Multi Academy Trust (the “Academy Trust”) and agreed a commercial position in preparation for the academy transfer on 1st May 2024. 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 Spring Bank Primary School to academy status.

Recommendations

It is recommended that the Director of Children and Families:

- a) Notes the negotiations held with solicitors acting on behalf of the governing body of Spring Bank Primary School and The Owlcotes Multi Academy Trust.
- b) Gives authority for the following agreements (“the Agreements”) to be executed and completed to enable Spring Bank Primary School to open as an academy on 1st May 2024 or such later date advised by the DfE;
 - o Schools Agreement
 - o Principal Agreement
 - o Commercial Transfer Agreement between Leeds City Council, the governing body of Spring Bank Primary School, and The Owlcotes Multi Academy Trust

Together with any other documentation required to complete the transfer.

- c) Notes that a Local Government (Contracts Act) certificate was signed by the Director of Resources (as approved by the City Solicitor) in relation to the Deed of Variation dated 1st September 2013 which varied the terms of the PFI project agreement for Leeds Seven Schools PFI programme to accommodate (amongst other things) this conversion

- d) Notes that decisions relating to the transfer of land and/or the granting of any leases or licences are not included for approval in this report. These will be undertaken under separate delegated powers by the Director of City Development.
- e) Gives authority for any other necessary action to be taken to effect the transfer.

What is this report about?

- 1 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 section 4 of the Act and on 23 February 2023 the Director of Children and Families received the academy order enabling Spring Bank Primary School to convert to an academy. The proposed conversion date is 1st May 2024 or such later date as advised by the DfE.

What impact will this proposal have?

- 2 Whilst it is not legally necessary for the CTA to be entered into for the transfer to take place, it is in the City Council's interests for the agreement to be entered into to set out the formal transfer of the assets, contracts, and staff (as applicable). This includes any staffing liabilities. Once the CTA is executed and completed, Spring Bank Primary School will open as an academy on 1st May 2024 or such later date as advised by the DfE
- 3 It is not necessary to undertake an Equality Impact Assessment in relation to either this report or upon entering into a Commercial Transfer Agreement between LCC and the Academy Trust. This is because the decision to convert has not been made by the LCC, and the City Council has limited control over the process. The DfE's own Equality Impact Assessment in relation to the Academies Bill is publicly available on its website.

How does this proposal impact the three pillars of the Best City Ambition?

- Health and Wellbeing Inclusive Growth Zero Carbon

- 4 The recommendation is to give authority for the CTA to be executed and completed, which in turn will help enable Spring Bank Primary School to open as an academy on 1st May 2024. The Local Authority has a duty to promote high standards and champion educational excellence. The relationship between the authority and its schools must influence city-wide agendas such as contributing towards the achievement of the Best City Ambition that people are 'supported to thrive from early years to later life' with a focus on ensuring children in all areas of the city have the best start in life and enjoy a happy and friendly childhood. Our focus is also on the obsession to 'improve achievement, attainment and attendance at school' with a focus on 'enabling all children and young people - particularly those learners who are vulnerable to poor outcomes to realise their potential.' We will continue to apply the cycle of monitor, evaluate, challenge and support with all schools in the city in order that they become strong and capable of contributing to the key priorities of the city.

What consultation and engagement has taken place?

Wards affected: Headingley and Hyde Park

Have ward members been consulted? Yes No

- 5 It should be noted that the statutory consultation process is no longer required, as the Academies Act 2010 streamlined the process and 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.

- 6 All consultations regarding the proposed academy conversion 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. Although there is no set guidance on how to quantify what appropriate consultation means in terms of duration and consultees, all interested parties should be provided with opportunity to respond and ask questions.
- 7 Whilst the City Council has no ability or rights to prevent the conversion from taking place, several stakeholders within the City Council have been consulted as part of the conversion process including Finance, HR and Assets and Access teams within Children and Families, Legal Services, City Development and Procurement and Commercial Services. The Director of Children and Families was made aware of the proposed conversion on receipt of the Academy Order on 23 February 2023, 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 2 May 2023.

What are the resource implications?

- 8 The City Council has incurred costs relating to legal, finance and project management work, including Ward Hadaway's fees for supporting the City Council in producing and agreeing the legal documentation. It should be noted that there is no DfE funding support for these costs. In addition, the PFI contractor, its sub-contractor and lenders have incurred legal costs associated with their due diligence on the conversion. The Project Team submitted a business case to DfE seeking financial support for this, but the DfE declined to fund these costs, therefore the City Council has agreed to pay under its duty to facilitate academy conversions pursuant to the Academies Act 2010.
- 9 On the basis that the staff are currently employed by the governing body, LCC has not accepted any indemnities around staffing which substantially reduces the risk that the Council would be liable for future costs arising from Employment Tribunals should any arise.

What are the key risks and how are they being managed?

- 10 This is a Significant Operational Decision on the basis that there is little risk and that the transfer will proceed even if the City Council does not enter into the Agreement. However, it is in the Council's interests for the Agreement to be entered in to, to set out the formal transfer of the assets, contracts, and staff (where applicable), and to give LCC some protection against future claims.
- 11 Negotiations around the transfer documents have been handled by Ward Hadaway and legal and contract specialists in Legal Services and Procurement and Commercial Services 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 transfer documents.

What are the legal implications?

12 Public Finance Initiative (PFI) considerations

- 12.1 The new Spring Bank Primary School building opened in 2002 following a full new-build construction funded through PFI credits under the Leeds Seven Schools PFI programme.

- 12.2 To enable Spring Bank Primary School to open as an academy on 1st May 2024, 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).
- 12.3 To enable the Funding Agreement to be approved by Parliament, several further agreements are required as follows:
- Schools Agreement
 - Principal Agreement
 - Long Term Lease
 - Sub-Underlease
 - Commercial Transfer Agreement; and
 - Deed of Variation to the PFI Contract
- 12.4 The School Agreement, Principal Agreement, and Deed of Variation are required because Spring Bank Primary School is one of the schools built under the Leeds Seven Schools PFI Project. 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 because the Academy receives funding directly from the DfE, and the Local Education Authority (LEA) no longer maintains the school and loses its other powers in relation to school management.
- 12.5 A Deed of Variation was entered into in respect of the PFI Contract on 1st September 2013. This deed was negotiated in light of the conversion to academy status of Oakwood primary school (also under the Leeds Seven Schools PFI programme. The deed included provisions to accommodate future academy conversions such as Spring Bank. A separate deed of variation is therefore not required for this conversion.
- 12.6 The Agreements have been subject to extensive negotiation between the various parties and are now fully agreed between LCC, the Owlcotes Multi Academy Trust and the DfE. It is intended that all the Agreements will be sealed or signed by the City Council and the DfE as appropriate once the Spring Bank Primary School Governing Body has signed the documents to which they are party.
- 12.7 Below is an outline of the main issues that have been concluded on each of the above Agreements.

13 School Agreement

- 13.1 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. Since 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.
- 13.2 The DfE model has been developed to balance the Local Authority's 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.

- 13.3 The School Agreement follows the precedent agreed on for previous conversions and includes the additional revisions first agreed on the Swallow Hill Community College conversion which took place on 1 July 2013, where clauses reflecting the management fee issue (referred to in paragraphs 13.4 and 13.5 below) were added and where Schedule 2 (referred to in paragraph 13.6), detailing the Academy contribution towards payment of the Unitary Charge, was redrafted/simplified. The signatories to the School Agreement are LCC and the Owlcotes Multi Academy Trust.
- 13.4 Discussions have taken place with the DfE and Academy Sponsors with regards to the continuing role of Children and Families and its decreasing resources in monitoring and managing PFI schools contracts. 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 Trust 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 Spring Bank, it has been agreed that the City Council will recover an annual management fee of £7,000 (indexed) from the Academy.
- 13.5 There are also additional clauses to allow the City Council to recover certain additional fees from the Academy (both in respect of Children and Families input and any professional advice obtained by Children and families) 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.
- 13.6 Schedule 2 of the School Agreement, which details the financial contribution that the Academy Trust 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 Spring Bank.

14 Principal Agreement

- 14.1 The Principal Agreement governs the relationship between the DfE, the Academy Trust and the City Council, and in particular the risk of failure of the Academy Trust to make payments to the City Council (including those supporting the Project Agreement Unitary Charge) under the School Agreement. The DfE also offers an indemnity to the City Council where such payments are not made by the Academy Trust.
- 14.2 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 consortium and its funders to undertake substantial and costly due diligence.

- 14.3 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.”*
- 14.4 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.
- 14.5 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.
- 14.6 The signatories to the Principal Agreement are the City Council, DfE and the Academy Trust. Similar to the School Agreement, the principles agreed in July 2013 for Swallow Hill have been adopted as the standard LCC position for all subsequent PFI conversions.

15 Deed of Variation to the PFI contract

- 15.1 The Deed of Variation to the PFI Contract is between the City Council and The Education Support Company (ESCo – essentially the PFI Contractor).
- 15.2 The purpose of the Deed is to ensure that the PFI contract covers the Academy 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 to back off obligations to the Academy and DfE).
- 15.3 Funders and PFI Special Purpose Vehicles (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 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 approved the issue of a certificate under the LGCA and will continue to do so for all future PFI conversions.
- 15.4 As referred to section 12.5, a 'multi' Deed of Variation was agreed on the previous Oakwood conversion (dated 1st September 2013) which acknowledged that all the remaining schools within the Seven Schools PFI contract may subsequently convert to either Academy or Trust status at some point in the future, and therefore a reduced level of due diligence is required by the PFI contractor as part of their approvals process. Despite this, the PFI company and its lenders insisted on a comprehensive review of documentation (leading to associated fees referred to in paragraph 8 above). This due

diligence, together with negotiations about the scope and cost of such work, led to the conversion process being delayed by several months.

16 Long Term Lease and Sub-Underlease

- 16.1 As part of the PFI package the City Council granted the PFI contractor a 28-year lease of the school site. The PFI contractor then granted the City Council a sub lease for 28 years less a day. The City Council is currently in occupation of the school site under a lease and the PFI contractor is the council's landlord.
- 16.2 The PFI contractor will grant the City Council a licence to sub-underlet to the Owlcotes Multi Academy Trust. And so out of the PFI lease the City Council will sub-let the school site to the Multi Academy Trust for the remainder of the term of that PFI lease until it expires in 2030.
- 16.3 The City Council will also simultaneously grant a 125 year overriding lease to the Owlcotes Multi Academy Trust using the DfE model PFI lease.
- 16.4 When the lease between the PFI contractor and the City Council terminates, and the sub lease between the City Council and the Owlcotes Multi Academy Trust terminates, only the 125-year lease to the Academy Trust will subsist.
- 16.5 The 125-year lease, sub underlease and licence to sub-underlet the building and grounds have been agreed and have been signed off / approved by the Director of City Development under separate report.

17 Commercial Transfer Agreement

- 17.1 As part of the conversion process for publicly funded schools, a CTA is entered into between the relevant academy trust and the local authority. If the CTA is signed prior to the conversion then the governing body of the outgoing school also joins into the CTA, as is the case at Spring Bank Primary School.
- 17.2 The CTA deals with the transfer of the assets, staff, and contracts from the City Council and/or the governing body (as applicable) to the new academy trust. When a community school converts to academy status, the CTA provides for apportionments of payment of salaries, pension contributions, etc. and indemnities from the parties in relation to employment matters.
- 17.3 The standard form (which provides for extensive indemnities from a local authority to the academy trust) was modified in line with Children and Families policy to accept only the minimum obligations required under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (known as TUPE) to pay staff up to the date of transfer and for any personal injuries prior to transfer.
- 17.4 It should be noted that it is not legally necessary for the CTA to be entered into for the transfer to take place; however, it is in the City Council's interests for the agreement to be entered into to set out the formal transfer of the assets, contracts, and staff (as applicable).
- 17.5 Key issues that have been agreed are:

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

17.6 All the contracts that the governing body or the City Council currently has in place in respect of the school will be assigned to The Owlcotes Multi Academy Trust where third-party consent is not required, or where consent has been obtained. 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 novation of that contract(s). For City Council contracts, where this has not been achieved, the City Council will continue with the contract as agent for the Academy Trust.

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

Options, timescales and measuring success

What other options were considered?

18 Whilst it is not legally necessary for the CTA to be entered into, it is in the best interests of the council to do so. The transfer will proceed even if the City Council does not enter into the CTA. There are no alternative options.

How will success be measured?

19 The school will convert to academy status on 1st May 2024.

What is the timetable and who will be responsible for implementation?

20 The academy conversion will take place on 1st May 2024. LCC will arrange for the signing/sealing of the CTA to take place prior to the conversion date.

Appendices

- Appendix A – Schedule 2 of the School Agreement

Background papers

- None