



Joint report of the Deputy Chief Executive and the Director of Children's Services

Executive Board

Date: 9th December 2009

Subject: Proposed Variations to the BSF Capital Programme

Electoral Wards Affected:

All

Ward Members consulted
(referred to in report)

Specific Implications For:

Equality and Diversity

Community Cohesion

Narrowing the Gap

Eligible for Call-in

Not Eligible for Call-in
(Details contained in the Report)

Executive Summary

- 1.1. This report seeks approval for the budget variations proposed by Director of Children's Services and Deputy Chief Executive to the BSF Capital Programme and to inform members of the outcome in respect to the Compensation Event Claims arising from the Phase 1 Design and Build contract.
- 1.2. A number of compensation event claims, which have arisen under the BSF Programme have been successfully resolved in partnership with the Local Education Partnership (LEP).
- 1.3. The report proposes a move towards an overall programme contingency management in the light of the advanced status of the Leeds Wave 1 BSF Programme.

2. PURPOSE OF THIS REPORT

- 2.1. To seek approval for the budget variations proposed by Director of Children's Services and Deputy Chief Executive to the BSF Capital Programme and to inform members of the outcome in respect to the Compensation Event Claims arising from the Phase 1 Design and Build contract.
- 2.2. These Claims have been successfully resolved within the Local Education Partnership and the report reflects the advanced status of the delivery of the City Council's Wave 1 BSF programme.

3. BACKGROUND INFORMATION

- 3.1. The Building Schools for the Future Wave 1 programme has seen the successful delivery of a major programme across fourteen schools in the City of which five schools have been new rebuilds and are now fully operational under the Private Finance Initiative. A further four Design and Build re-modelling schemes are currently in construction with the remaining schemes either in the New Projects Process or shortly to enter the development phase.
- 3.2. The City Council entered into a design and build (D&B) Contract on 3 April 2007 for the design, refurbishment and extension of two secondary schools as part of the first phase of the BSF programme. The D&B Contractor entered into a building sub-contract with Interserve Project Services Limited ("IPSL") at the same time.
- 3.3. The contract made the D&B Contractor responsible for the known defects in the buildings and shares responsibility for latent defects (faults not immediately detectable) between the D&B Contractor and the Council. The D&B Contractor was responsible if the latent defects would have been identified had the building surveys been carried out competently or if they would have been discovered through any additional surveys it would have been reasonable to expect an experienced Contractor to have undertaken in the circumstances. The City Council was responsible for meeting the costs relating to other latent defects, and these were Compensation Events for the purpose of the Contract. This sharing of risk was established in the Partnerships for Schools standard form contract, which was new to the market in 2007.
- 3.4. During 2007 and 2008 several major Compensation Event (CE) claims were received by the Council from the D&B Contractor in respect of major structural latent defects at the phase 1 schools. These were mainly in two and three storey blocks and arose from poor standards of original construction and/or historic poor standards of maintenance or adaptation.

- 3.5. In January 2009 the Council formally rejected all of the claims, believing them to be the D&B Contractor's responsibility. Following further discussions it became apparent that the D&B Contractor's and the Council's positions were irreconcilable. In the context of the strategic partnership with the LEP, and at the mid point of the Wave 1 programme it was apparent to all parties that reconciliation of these positions through litigation was highly undesirable, but at the same time the Council and the D&B Contractor needed authoritative guidance on their respective liabilities, and the Council's Project Board applied clear principles in relation to the need for any claims to be clearly and firmly established before payment. Accordingly, the Council and the D&B Contractor established a Third Party Evaluation process in April 2009 through which they received an Independent Third Party Evaluation from an experienced QC as to the liability for certain defects at one of the schools.
- 3.6. The Evaluator issued his opinion on the 31st July 2009, which involved a sharing of responsibility, with some defects being the Council's responsibility, and some the D&B Contractor's, on the basis of the allocation above.
- 3.7. The remaining structural defects were agreed to be resolved by the application of the principles from the Evaluator's opinion to them. Also, as the Evaluator's opinion related only to liability, it was necessary for the parties to settle quantum where defects were the Council's responsibility. In August 2009, a settlement process was agreed between the parties to do these things and to establish the amount properly due to the D&B Contractor. The process included the establishing of the extent of the delays for which the Council was properly responsible and scrutiny of the additional costs to the contractor of these delays.
- 3.8. Following completion of this work programme, the Director of Children's Services as the City Council's Representative appointed, under the powers delegated to her by Executive Board prior to entry into the Design and Build Contract on the 24th January 2007 and under the Scheme of Delegation, on 13th November approved entry into a Settlement Agreement for all Compensation Event Claims to date arising from the Phase 1 Design and Build contract. Additional costs to the Council relating directly to the need for RM to extend project resources beyond the original milestone dates specified within the ICT Strategic Partner Agreement as a result of the delays also are required to be met.
- 3.9. This Settlement reflects payment in full for the additional works and the cost of the consequential delay to the programme required as a result of the Compensation Events to date for which the City Council was responsible and represents substantially less than the amount originally advised to the City Council. In addition the City Council is required to meet additional costs incurred by its Strategic ICT Partner, RM Plc, for prolongation and delay to their works. The original claims advised by the D&B Contractor amounted initially to £7.934m, reduced to approximately £6m, or circa 4% of the total overall approved budgets for the BSF capital works programme, on clarification. The final settlement of £3.164m represents less than 2% of the overall total.

4 MAIN ISSUES

4.1 The City Council has made a Contingency and Authority Works provision of £3.0m across the Phase 1 PFI and Design and Build Schools. It is anticipated that this contingency provision will be fully expended before taking account of the Compensation Event Settlement.

4.2 In addition the following Contingency provisions, have been approved for BSF Phases 2,3 and 4 within the City Council's capital programme:

Phase 2	£1.664m*
Phase 3	£4.000m
Phase 4	£1.522m
Anticipated Capital Receipts	£1.100m
TOTAL	£8.286m

* excludes £1.490m ringfenced to address any latent defects identified in the works at Priesthope / Crawshaw

4.3 The Executive Board on 4th November 2009 resolved that 'the earmarking of the Wortley High School capital receipt to the Building Schools for the Future programme be approved'. This report seeks the formal injection of £0.8m representing the current market valuation of the asset advised by City Development as at November 2009 although noting that at the point of disposal the actual receipt could be materially different. This receipt is not scheduled to be realised until at least 2011/12 financial year when the buildings are scheduled to become surplus to educational use requirements.

4.4 In addition Asset Management Group on 26th May 2006 gave approval to ringfence the capital receipt for the old school building at Pudsey Grangefield to the BSF capital programme, and the current value of this building is assessed at £300k. It can be confirmed that neither of these assets have been included in the general capital receipts programme.

4.5 Partnerships for Schools have also notified the City Council of the availability of the following additional monies which are required to be formally injected into the Council's capital programme:

Phase 2 schools	£347,000
Phase 3 schools	£291,000
Phase 4 school	£45,000
Total Additional PfS monies	£683,000

- 4.6 After taking into account the proposed injections of additional monies the total contingency to support the remainder of the programme after Phase 1 is £8.969m excluding the provision previously ringfenced for the capital schemes at Priesthorpe and Crawshaw on 3rd December. This would represent a provision of 7.40% of the BSF capital works programme for Phases 2,3 and 4.
- 4.7 The Education PFI/BSF Project Board have supported a revised approach to contingency management in the light of this review, whereby all non Authority Works contingency budgets would be pooled across the remainder of the programme. This approach would see the Settlement of the Compensation claims as being the first call on this contingency. Even after taking into account the proposed Settlement and the ICT claims and the full commitment of the Phase 1 authority works from 2010/11 through to the conclusion of the BSF Wave 1 works programme there would still be a contingency provision of 5.53% of the proposed capital value of the works.
- 4.8 It should be noted however that £1.894m of the contingency referred to above is held within the reserved capital programme and is therefore currently unfunded. The transfer to the reserved programme was done in February 2009 on the basis that Local Authority works on phase 3 schools had still to be identified. The current position now shows that this funding is likely to be required in future years and further consideration will need to be given to how it will be funded within the Council's capital programme going forward.
- 4.9 This approach is supported by an improved approach to managing the risks inherent in refurbishment projects of interfacing with existing buildings through enhanced surveys being undertaken prior to entry into the design development process and the scope of schemes being developed to minimise the risks of Latent Defects and therefore Compensation Events which are the responsibility of the City Council arising. It is therefore recommended that Executive Board approves the proposed changes to the profile of spend against the proposed Programme Contingency and authorise spend against this budget in line with the profile shown at Appendix 1.
- 4.10 If it is determined that any part of the provision of £1.490m for latent defects at Priesthorpe and Crawshaw is no longer required for this purpose, it is proposed that the funding would be reallocated to the general programme contingency.
- 4.11 Within the overall proposed programme contingency it is proposed that the risks remaining are reviewed on a periodic basis. At the conclusion of the programme there is an expectation that all funding identified by the City Council in support of the BSF programme will be spent on the schools within the scope of Wave 1. Accordingly it is recommended that proposals for how any remaining budget is to be allocated would be made at this stage.

4.12 The settlement process allowed the Council, the D&B Contractor and IPSL to reach the proposed settlement in the spirit of seeking to minimise the impact of the uncertainties regarding the attribution of liability for the claimed Compensation Events that arose on the Phase 1 Design and Build Schools on working relationships as follows:

- All parties have worked together in partnership to agree an approach using third party evaluation to help resolve their differences in respect of the contract risk allocation and a process subsequent to the determination that each party bears an element of liability to agree the application thereof.
- All parties have sought to develop subsequent projects with an improved approach to understanding and managing the risks inherent in refurbishment projects of existing school buildings, learning the lessons from what was found on the Phase 1 schools.
- The resolution has ensured that the City Council's liabilities arising from these events can be contained within the overall programme budget without further detriment to the agreed scope of later projects or a further call for additional funding streams from within the Council's capital programme.
- The LEP and IPSL worked as true partners despite the problems encountered on site, continuing to seek to deliver the works despite the uncertainty as to whether and how much they would be paid for undertaking the additional works required as a result of finding the defects. The City Council has reciprocated by agreeing appropriate extensions to the contract programme without prejudicing its position in the contractual discussions regarding attribution of liability.

5 IMPLICATIONS FOR COUNCIL POLICY AND GOVERNANCE

5.1 Reports have been presented to Education BSF / PFI Project Board and Corporate Leadership Team on the Third Party Evaluation process and its outcome, and Project Board has asked for a further report on the lessons learnt.

6 LEGAL AND RESOURCE IMPLICATIONS

6.1 The Settlement of the Compensation Event Claims will be managed within the overall funding envelope for the Wave 1 programme after taking account of the proposed injections to the Education Capital Programme without reducing the respective budgets and scope of remaining projects.

6.2 Capital Funding and Cash Flow

The proposed capital funding and cash flow is as follows:

Previous total Authority to Spend on this scheme	TOTAL £000's	TO MARCH 2009 £000's	FORECAST			
			2009/10 £000's	2010/11 £000's	2011/12 £000's	2012/13 £000's
LAND (1)	0.0					
CONSTRUCTION (3)	159,536.8	35,958.5	24,990.5	42,799.0	46,650.8	9,138.0
FURN & EQPT (5)	0.0					
DESIGN FEES (6)	0.0					
OTHER COSTS (7)	0.0					
TOTALS	159,536.8	35,958.5	24,990.5	42,799.0	46,650.8	9,138.0

Authority to Spend required for this Approval	TOTAL £000's	TO MARCH 2009 £000's	FORECAST			
			2009/10 £000's	2010/11 £000's	2011/12 £000's	2012/13 £000's
LAND (1)	0.0					
CONSTRUCTION (3)	1,783.0		1,713.0	0.0	70.0	
FURN & EQPT (5)	0.0					
DESIGN FEES (6)	0.0					
OTHER COSTS (7)	0.0					
TOTALS	1,783.0	0.0	1,713.0	0.0	70.0	0.0

Total overall Funding (As per latest Capital Programme)	TOTAL £000's	TO MARCH 2009 £000's	FORECAST			
			2009/10 £000's	2010/11 £000's	2011/12 £000's	2012/13 £000's
LCC Supported Borrowing	-22,898.0	-8,324.6	-6,180.1	-4,224.3	-4,169.0	
LCC Reserved Scheme Funding	-1,894.0				-1,894.0	
General Sure Start Grant	-4.8	-4.8				
LCC Unsupported Borrowing	-1,079.0	-542.1	-536.9			
SCE (C)	-110,444.0	-27,080.0	-19,986.5	-38,574.7	-24,802.8	
SCE (R)	-25,000.0	-7.0			-15,855.0	-9,138.0
Total Funding	-161,319.8	-35,958.5	-26,703.5	-42,799.0	-46,720.8	-9,138.0
Balance / Shortfall =	0.0	0.0	0.0	0.0	0.0	0.0

Parent Scheme Numbers : 12137 / 13372 / 13373 / 15414

Title : BSF Wave 1 – Phases 1 to 4

7 RECOMMENDATIONS

7.1 The Executive Board is recommended to:

- Note the contents of this report;
- Inject £683k into the Education Capital Programme to reflect the additional funding notified by Partnerships for Schools.
- Inject £800k into the Education Capital Programme to reflect the current asset valuation of Wortley High School.
- Agree the proposed changes to the profile of spend against the proposed Programme Contingency including the incorporation of the two sums injected above and give Authority to Spend against this budget in line with the profile shown above and in Appendix 1.
- Inject £300k into the Education Capital Programme to reflect the current asset valuation of Pudsey Grangefield School.

Appendix 1 - Proposed Revisions to the BSF Capital Programme

Background Papers

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Director of Children's Services Delegated Decision Notification Reference Number D36173
published 24th November 2009

Appendix 1 - Revised Proposed Capital Allocations For the BSF Programme

SCHOOL	PFS FUNDING £000	LCC APPROVED FUNDING £000	TOTAL APPROVED FUNDING £000	CAPITAL PROGRAMME				
				Est 2009/10 £000	Est 2010/11 £000	Est 2011/12 £000	Est 2012/13 £000	Total Cost £000
PHASE 1								
Cockburn	15,333.0	1,018.2	16,351.2	260.4	0.0	0.0	0.0	16,351.2
Temple Moor	11,747.0	3,783.0	15,530.0	808.9	0.0	0.0	0.0	15,530.0
Contingency and Authority Works - Phase 1	7.0	2,993.0	3,000.0	1,538.7	0.0	0.0	0.0	3,000.0
Development Costs/LEP Equity	0.0	5,224.6	5,224.6	1,621.5	0.0	0.0	0.0	5,224.6
	27,087.0	13,018.8	40,105.8	4,229.5	0.0	0.0	0.0	40,105.8
PHASE 2								
Farnley Park	20,748.0	2,252.0	23,000.0	500.0	8,010.0	12,110.0	2,380.0	23,000.0
Crawshaw	7,454.0	114.0	7,568.0	4,919.2	2,648.8	0.0	0.0	7,568.0
Priesthorpe	13,294.0	1,700.3	14,994.3	11,353.3	3,641.0	0.0	0.0	14,994.3
Contingency: Latent Defects Priesthorpe / Crawshaw	0.0	1,490.0	1,490.0	0.0	1,490.0	0.0	0.0	1,490.0
Authority Works Budget - Phase 2	0.0	644.7	644.7	562.5	0.0	0.0	0.0	644.7
	41,496.0	6,201.0	47,697.0	17,335.0	15,789.8	12,110.0	2,380.0	47,697.0
PHASE 3								
Corpus Christi	12,703.1	0.0	12,703.1	500.0	2,720.0	8,110.0	1,373.1	12,703.1
Parklands	8,124.0	595.2	8,719.2	0.0	0.0	5,570.0	3,149.2	8,719.2
Mount St. Marys	12,545.7	0.0	12,545.7	500.0	2,140.0	7,670.0	2,235.7	12,545.7
Authority Works Budget - Phase 3	0.0	933.0	933.0	125.0	639.0	169.0	0.0	933.0
	33,372.8	1,528.2	34,901.0	1,125.0	5,499.0	21,519.0	6,758.0	34,901.0
PHASE 4								
Leeds West Academy	29,297.0	0.0	29,297.0	500.0	21,050.0	7,747.0	0.0	29,297.0
Authority Works Budget - Phase 4	0.0	350.0	350.0	0.0	175.0	175.0	0.0	350.0
	29,297.0	350.0	29,647.0	500.0	21,225.0	7,922.0	0.0	29,647.0
TOTAL - DESIGN AND BUILD SCHOOLS	131,252.8	21,098.0	152,350.8	23,189.5	42,513.8	41,551.0	9,138.0	152,350.8
CONTINGENCIES								
PROGRAMME LEVEL CONTINGENCY	4,191.2	4,777.8	8,969.0	3,514.0	285.2	5,169.8	0.0	8,969.0
				1,800.0	106.0	2,871.8	0.0	4,777.8
				1,714.0	179.2	2,298.0	0.0	4,191.2
				3,514.0	285.2	5,169.8	0.0	8,969.0
TOTAL - INCLUDING CONTINGENCIES	135,444.0	25,875.8	161,319.8	26,703.5	42,799.0	46,720.8	9,138.0	161,319.8

Financed by:	£000
DCSF Capital Grant	109,761.0
DCSF Committed Supported Borrowing	25,000.0
Additional PFS Monies re Location Factors	683.0
Total DCSF Funding	135,444.0

Contingency as a % of remaining phases 7.40%
 Contingency post 2009/10 as a % of remaining capex 5.53%

CASHFLOW SUMMARY	CAPITAL PROGRAMME				
	Est 2009/10 £000	Est 2010/11 £000	Est 2011/12 £000	Est 2012/13 £000	Total Cost £000
Total - Including Contingencies					
LCC Funding	6,717.0	4,224.3	6,063.0	0.0	25,875.8
PFS Funding	19,986.5	38,574.7	40,657.8	9,138.0	135,444.0
Total Funding	26,703.5	42,799.0	46,720.8	9,138.0	161,319.8