

## Appendix 2

### LEGAL ISSUES

#### 1. Key Contractual Documentation

1.1 Once all final approvals are in place, including approval of the DFES to the final Business Case, a number of contract documents will be entered into at close of the project. The key contractual documents required to be entered into are explained in the following paragraphs. In each case the contracts are based on standardised documentation issued and amended by Partnerships for Schools and published on the Partnerships for Schools website. The following paragraphs explain the current position in relation to the draft contracts. The final report to the Deputy Chief Executive will detail the final negotiated position.

#### 1.2 PFI Project Agreement

The draft Project Agreement for the phase 1 schools listed in paragraph 3.2 of the report largely follows the commercial principles in previous standard schools contracts and provides for a works period (construction period) followed by a services period during which the contractor will be responsible for the services listed in the main body of the report.

#### 1.3 Design and Build Contract

The phase 1 Design and Build contract will include the schools listed in paragraph 3.2 of the report under which the LEP or special purpose company established for the contract will construct the schools in accordance with proposals developed from those evaluated by the Project Team and Project Board through the procurement process. The Design and Build contract is a target cost contract whereby the contractor takes half of the difference in costs between the target costs and the guaranteed maximum costs and the full commercial risk if the actual cost exceeds the guaranteed maximum cost. The Council have also devised an additional pricing mechanism called the "Survey Risk Price". This is a separate sum of money which sits outside the target cost mechanism and covers all asbestos, latent defects and ground conditions that have been identified by the surveys or ought reasonably to have been found by the surveys. The Contractor takes full responsibility for the cost for these risks. Once the schools have been refurbished they will be handed back to the City Council as the contractor is not responsible for the provision of the services.

#### 1.4 Strategic Partnering Agreement

The Strategic Partnering Agreement is the agreement through which the LEP will deliver future projects and through which the City Council will grant a degree of exclusivity to the LEP in relation to future projects. The SPA will be in place for 10 years with a potential for a 5 year extension if both parties agree, and the LEP will have exclusive rights in relation to certain projects provided it develops and is able to provide those projects appropriately and that it achieves its key performance

indicators and does not default as set out in the agreement. The proposed exclusivity is explained in the following report on the agenda having previously been outlined to and approved by Executive Board on 16 November 2005. The exclusivity relates to:

- The delivery of the projects within the wave 1 BSF investment programme (phases 1,2, and 3)
- Any PFI or Design and Build contract (contracts for refurbishment repair or extension) for a secondary school (other than those New Build funded wholly or mainly through devolved capital spending) in excess of £100k
- Any PFI or Design and Build contract (contract for refurbishment, repair or extension) for a primary school funded through the BSF programme.
- The New Leaf leisure project subject to approval by the City Council and D.C.M.S. of the Outline Business Case.

The LEP will also provide ongoing Partnering Services which will support Education Leeds and which are further explained in the separate report on this agenda, and may also provide Additional Services requested by the Council. The key element of the Strategic Partnering Agreement in relation to future projects is the new projects approval procedure which is explained below at paragraph 2.9.1.

#### **1.5 Shareholders' Agreement**

The City Council will become a shareholder and investor in the LEP, and this agreement will enable the Council to become a shareholder and invest in line with the recommendations in the separate report to Members, subject to approval by Members of that report.

#### **1.6 Governing Body Agreements**

The City Council will enter into an agreement with each Governing Body of the proposed PFI schools, which will, amongst other things, provide for payment of a Contribution by the Governing Body to the Unitary Charge

#### **1.7 Other agreements**

There will be a number of other agreements which will need to be entered into by the City Council, including pensions admission agreements, the appointment of an independent certifier for the Design and Build contracts and for the PFI, a direct agreement with the funders and the contractor, a joint insurance account agreement and appropriate collateral warranties with sub-contractors.

## **2. Key Legal Issues**

### **2.1 Derogations**

As outlined above, the City Council has based the documentation for the procurement and following negotiations on standard form documentation issued by Partnerships for Schools, part of whose role is to ensure consistency and standardisation across all BSF projects. There are some significant Leeds specific areas of amendment including the following:

- 2.1.1 ICT – the City Councils approach (involves the separate procurement of a Strategic Partner for ICT for all schools rather than procuring ICT assets and services through the LEP) was reported to and approved by Executive Board on 20<sup>th</sup> September 2006;
- 2.1.2 The services provided by the LEP – the scope of such services has been modified from the standard model to reflect and complement the existing skills of Education Leeds and the PPPU and was approved by Executive Board on 16 November 2005;
- 2.1.3 The Design and Build contract has been subject of significant development with the approval of Partnerships for Schools (and indeed their model contract now incorporates many of the changes proposed by the City Council);
- 2.1.4 Strategic Partnering Agreement new project procedure – see below paragraph 2.9.1.

The City Council has also made a number of other project specific amendments to the documentation.

All amendments proposed have been submitted to Partnerships for Schools for approval on an ongoing basis, with a small number still outstanding. However all such amendments now need to be formally approved by the DFES as part of the FBC.

There are a small number of outstanding SOPC3 derogations (members will recall that SOPC3 is the central government standard contract template upon which all model contracts are based). These will require final sign off by Partnerships UK and relate mainly to the Funders' Direct Agreement.

### **2.2 ICT**

The procurement separately of an ICT Strategic Partner has created the need to set down clearly the respective roles of the ICT Strategic Partner and the BSF providers to ensure effective integration of ICT into the schools. A separate schedule for insertion into each of the agreements will deal with the key points of effective design development, access arrangements, and insurance responsibilities.

### 2.3 Insurance

The insurance arrangements for the PFI and D&B schools and the Strategic Partnering Agreement largely follow the PFS standard documentation. In the case of the Design and Build contracts an approach more standard to JCT contracts has been proposed which will provide that the City Council will insure existing school buildings whilst the D and B contractor will insure new buildings.

### 2.4 Use of School Premises

In relation to each of the PFI schools the draft contract provides for school requirements for use of school facilities. In light of the provision of extended schools facilities schools have requested, in addition to the school day additional periods of use up to 9pm each evening, and for Rodillian School, the provision of early education and childcare facilities. However the contract would enable these to be changed if necessary during the contract period.

### 2.5 Conduct of Employees on Site

The draft contract sets out the City Councils requirements relating to the conduct of staff and any sub-contractors while they are working at schools during both the construction and operational phases. The contract also makes provision for criminal record checks and other vetting of contractor staff in accordance with current guidance.

**2.6 Legal Implications and Powers:** Appendix 2 gives information on the agreements which will be required and the key legal issues. The following paragraphs identify the principal powers enabling the contracts to be signed. The final report to the Deputy Chief Executive will contain full detail of the Council's powers to enter into the contracts.

2.6.1 Project Agreement and Design and Build contract and ancillary documentation – Leeds City Council has statutory powers to provide schools and to enter into this documentation for that purpose contained within education legislation (primarily Part 1 of the Education Act 1996 and section 22 of the School Standards and Framework Act together with section 1 of the Local Government (Contracts) Act 1997).

2.6.2 Strategic Partnering Agreement and Shareholders Agreement– in addition to the education legislation referred to above, which covers provision of additional school facilities and replacement school facilities through the new projects procedure, the City Council also has powers to enter into the Strategic Partnering Agreement and Shareholders Agreement under, inter alia, the powers contained in section 2 of the Local Government Act 2000 (power to do anything considered to be likely to achieve the promotion or improvement of the social, economic or environmental wellbeing of the area), and section 19 of the Local Government (Miscellaneous Provisions Act 1976 in relation to the New Project (power to provide recreational facilities). When exercising the powers in the 2000 Act regard must be had to the Councils community strategy contained in the Vision for Leeds.

## 2.7 Legal Report

Once all negotiations and contract preparation is finalised, the City Council will receive a detailed report from the City Councils external legal advisors, DLA Piper, in relation to this project. This report is anticipated to

- i. Confirm the Councils statutory powers to enter into the documentation
- ii. Provide advice on the terms of that contract documentation
- iii. Advise on the steps taken to check the terms of the supporting financing documents, sub-contracts, and shareholder and investment documents that they are satisfactory from the Council's point of view, and due diligence undertaken.

It is also anticipated that it will support the proposed certification of the PFI contract and of the direct agreement between the City Council and the contractors and senior lender under the Local Government (Contracts) Act 1997, together with any other certificates deemed necessary. These certificates provide protection to the PFI contractor and senior lender against the consequences of the transactions being outside the Council's statutory powers. Because of the significance of the above it is proposed that the delegations to the Deputy Chief Executive in relation to the approval of the terms of the transaction and the conclusion of the contracts be conditional on the outcome of the report from DLA Piper, as outlined above.

## 2.8 Academies

One key issue which remains to be finally resolved is the issue of the implications of a PFI school changing status during the contract period to an Academy or (with likely less implications since the Governing Body will remain the same) to foundation school status. The City Council is bound into the PFI contract for 25 years. The risk to the City Council of a change of status of a school to an Academy would be that the City Council may not (unless further agreements are in place) have control over that Academy or indeed the school facility. There is a limited risk that the City Council could be put in breach of the PFI Project Agreement, and if such breach is sufficiently serious to trigger termination, would render the City Council at risk of compensation on termination liabilities equating to the outstanding senior debt and additional significant financial liabilities (see Appendix 1). The project team have sought to mitigate such risks (which apply nationally to all PFI projects and BSF programmes) both through the documentation negotiated with the contractor, and through dialogue with Partnerships for Schools and DFES. The project team (and Project Board) are of the view that the DfES, and not local authorities, in relation to the national BSF Programme, should bear the potential additional financial risks of a school changing status, which are properly 'public sector', and this has been acknowledged by Partnerships for Schools. However the City Council is still awaiting confirmation as to how, if at all, this can be addressed formally prior to financial close.

## 2.9 Future Procurements

- 2.9.1 New projects procedure – the Strategic Partnering agreement contains a detailed mechanism for approval of future projects which are not part

of Phase 1. A 2 stage approval process with documentation issue and requirements not dissimilar to the PFI negotiated procurement process itself has been developed from the PFS standard documentation, and this should enable future projects to be value for money, and delivered in a robust manner and a transparent manner for the LEP and the City Council alike.

2.9.2 Procurement Implications -The Project has been procured under the negotiated procedure under EU procurement regulations. The OJEU envisaged (and the SPA provides for) a period of exclusivity in relation to Major Capital Projects. Future projects procured under the terms of the SPA will, subject to the new projects procedure and the City Council being satisfied its requirements are met, will not be subject of competition.

## 2.10 **LEP Proposed Structure**

The structure and relationships between the various parties to the LEP has been subject of discussion on previous BSF projects, and is an issue which remains subject to final discussion on the Leeds project, between the 4 key stake holders, the E4L consortium, the City Council, Building Schools for the Future investments (the investment vehicle set up by PUK and DFES in relation to that part of the public sector investment not invested by the City Council), and Partnerships for Schools, whose concern is to ensure the robustness of the LEP arrangements. The outcome of these discussions will be contained in the final report from DLA Piper to the Deputy Chief Executive.

## 2.11 **Final due diligence**

In light of the City Council's proposed shareholding in the LEP and the additional contractual structures involved in this project, a significant amount of further due diligence will be required on the part of the Council prior to closing the project on the documents underpinning this structure. Any significant issues will be contained in the final report to the Deputy Chief Executive.

## 2.12 **Alcatel**

There is now a formal requirement to notify the award of the contract to unsuccessful bidders in accordance with the Public Contract Regulations 2006, and cannot be finally executed until the expiry of a mandatory 10-day 'standstill period'. That process will now be undertaken.