
Meeting	Cabinet Resources Committee
Date	7 November 2012
Subject	Legal advice for the Primary School Capital Investment programme(PSCIP)
Report of	Deputy Leader of the Council/Cabinet Member for Resources
Summary	This report seeks a waiver of the Contract Procedure Rules and authorisation to retain the existing legal advisors for the PSCIP scheme.

Officer Contributors	Omar Villalba, Project Manager, Corporate Programmes James Wills-Fleming, Head of Corporate Programmes
Status (public or exempt)	Public
Wards Affected	All
Key Decision	No
Reason for urgency / exemption from call-in	Not applicable
Function of	Executive
Enclosures	None
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1. RECOMMENDATIONS

- 1.1 That the Contract Procedure Rules as set out at paragraphs 8.2 and 8.3 of the report relating to tendering and quotation, and an extension to a contract, be waived to allow Trowers and Hamlins to be retained to provide legal support for the continuation of the Primary Schools Capital Investment Programme at a cost of £165,000.**

2. RELEVANT PREVIOUS DECISIONS

- 2.1 Cabinet 9 September 2002 (Decision item 3), Investment Needs and Opportunities – Way Forward
- 2.2 Cabinet 20 January 2003 (Decision item 17), Private Finance Initiative – Bid to DfES
- 2.3 Cabinet 5 December 2005 (Decision item 6) Building a Future Barnet's Children: The Primary School Capital Investment Programme
- 2.4 Cabinet Resources Committee, 28 June 2006 (Decision item 12), Building a Future for Barnet's Children: Procuring the Primary School Capital Investment Programme (PSCIP)
- 2.5 Cabinet 4 September 2006 (Decision item 9) Primary School Capital Investment Programme Wave 1 Schools and Financing
- 2.6 DPR 27 April 2007, (Delegated Powers Report Number 242) Appointment of Trowers and Hamlins as Legal Advisers for Primary School Capital Investment Programme

3. CORPORATE PRIORITIES AND POLICY CONSIDERATIONS

- 3.1 The Corporate Plan 2012-2013 has a corporate priority of 'Sharing opportunities, sharing responsibilities' that has a strategic objective of "ensuring that every school is a good school for every child", under which the Council will 'ensure sufficient primary and secondary school places are available to meet demand by delivering a programme of permanent and temporary expansions'
- 3.2 Ensuring there are sufficient school places is also a key component of the Barnet Children and Young People's Plan 2010/11 – 2012/13. Furthermore, as a Local Authority, the Council has a statutory duty to offer a school place to every child of school age in the Borough who requests one.

4. RISK MANAGEMENT ISSUES

- 4.1 Trowers and Hamlins have worked in partnership with Barnet Council to set up the Strategic Partnering Agreement and support the legal component of Primary School Capital Investment Programme (PSCIP). The continuity provided by Trowers and Hamlins during the complex negotiations was beneficial in securing the legal contracts for the inclusion of additional schools and a waiver of the Contract Procedure Rules would enable a continuation of the legal support, avoid a retendering process and also avoid disruption to the projects.

5. EQUALITIES AND DIVERSITY ISSUES

- 5.1 Pursuant to the Equality Act 2010, the council and all other organisations exercising public functions on its behalf must have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act; advance equality of opportunity between those with a protected characteristic and those without; promote good relations between those with a protected characteristic and those without. The relevant protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation. It also covers marriage and civil partnership with regard to eliminating discrimination.
- 5.2 The proposed works will enhance the Borough's reputation as a good place to live and work and will assist in delivering a first class education to all pupils as well as providing a safe environment for staff and pupils.
- 5.3 The Borough's schools provide a service to diverse communities covering a wide range of backgrounds.
- 5.4 Trowers and Hamlins has equal opportunities policies in place which meet the Council's equalities standards. There are no areas of concern in relation to equalities within the submissions as part of the tendering process.

6. USE OF RESOURCES IMPLICATIONS (Finance, Procurement, Performance & Value for Money, Staffing, IT, Property, Sustainability)

- 6.1 A delegated powers report approved in April 2007 provided authority for Trowers and Hamlins to provide Legal support in relation to the new build schemes in the borough up to a total value of £182,600. The appointment of Trowers and Hamlins was conducted by the Council through an open and robust one stage competitive tender process, where Trowers and Hamlins were selected over four other legal firms.
- 6.2 The £182,600 level under the original authority has been reached and a further £165,000 is required to complete the PSCIP legal support.
- 6.3 The cost of the legal fees will be attributed to the school build it is relevant to and will be capitalised. The cost of the school builds and expansion projects are funded from the Children's Capital Programme.
- 6.4 There are no staffing, ICT or property implications.

7. LEGAL ISSUES

- 7.1 The basic premise applying to the letting of contracts for works, supplies or services by contracting authorities is that the provisions of Directive 2004/18/EC, as implemented by the Public Contracts Regulations 2006 (as

amended), should be adhered to. For the most part this set of rules (the “**Procurement Rules**”) requires there to be fair and open competition across the European Community for government contracts.

- 7.2 The Procurement Rules as apply to services differentiate between Part A services and Part B services. Part A services are subject to the full tendering regime. Part B services have a comparatively relaxed regime applying to them, covering only matters such as ensuring that specifications for services are not discriminatory and that reporting and notifying obligations are met. The services which fall within Part B are various, but cover all Legal services.
- 7.3 It should be noted that the Commission takes the view that the Treaty obligations of transparency and non-discrimination apply to Part B services, which means that the contracting authority is expected to ask itself whether there is a market for these services in other member states and if so what form of appropriate notification and advertisement should apply before an award of contract. It has also been confirmed in case law that in the case of sub-threshold contracts and other contracts falling outside of the procurement directives it was only where there was certain cross border interest that the general EU principle of transparency would apply
- 7.4 In addition, it is expected that the Council’s own standing Orders and financial regulations would expect some form of tendering to apply to such contracts or at least an exemption to be sought to standing Orders if not followed.

8. CONSTITUTIONAL POWERS (Relevant section from the Constitution, Key/Non-Key Decision)

- 8.1 Constitution, Part 3, Section 3.6 details the functions of the Cabinet Resources Committee.
- 8.2 Constitution, Contract Procedure Rules, Section 5.6 details the acceptance parameters for contract extensions. In the case of an extension to a contract, Section 5.6.1 provides the following:
- 5.6.1 The initial contract was based on a competitive tender or quotations;
- 5.6.1.1 The initial contract has not been extended before; and
- 5.6.1.2 The value of the extension is less than half the cost of the existing contract without the extension and has a budget allocation having had regard to the following:
- i. If initial contract was subject to EU tender procedure that the extension option was declared within the OJEU notice; acceptance report (Delegated Powers Report/Cabinet Resources Committee Report) and the contract includes extension clauses
 - ii. If initial contract value was subject to sub EU threshold procedure (Barnet tender/ quotation process) the extension does not take the value past EU threshold

- 8.2 Constitution, Contract Procedure Rules, Section 5.8 of the Contract Procedure Rules provides that the Committee has the power to waive the provisions of the Contract Procedure Rules where the Committee is satisfied, after considering a written report by the appropriate officer, that the waiver is justified because:
- 5.8.1 The nature of the market for the works to be carried out or the supplies or services to be provided has been investigated and is demonstrated to be such that a departure from the requirements of Contract Procedure Rules is justifiable; or
 - 5.8.2 The contract is for works, supplies or services that are required in circumstances of extreme urgency that could not reasonably have been foreseen; or
 - 5.8.3 The circumstances of the proposed contract are covered by legislative exemptions (whether under EU or English Law); or
 - 5.8.4 There are other circumstances which are genuinely exceptional.

9. BACKGROUND INFORMATION

- 9.1 The objective of the PSCIP procurement process was to secure external specialist legal advice as necessary to protect the Council's position as it secured complex negotiations as part of the Competitive Dialogue process to secure a construction contractor. Trowers and Hamlins have been supporting the schemes with respect to drafting and negotiating the contractual documentation with the construction contractor and managing the process of securing warranties.
- 9.2 Trowers and Hamlins are recognised nationally as one of the leading firms of legal advisors having extensive experience across both the public and private sectors and have assisted the council to successfully deliver the completed schools projects as part of the First Class Schools Programme. Trowers and Hamlins have the experience and knowledge of the existing contractual arrangements and schemes and it is considered advantageous to retain their services. To revert to an alternative provider would increase the level of risk associated with the high value PSCIP projects and likely cause delay in entering into contracts.
- 9.3 The additional scope of works has had to commence due to the urgent demand for primary school places. A delay in receiving the legal support would have put the Council's statutory duty to provide adequate pupil places at risk.
- 9.4 The original PSCIP consisted of the following schools: Whittings Hill, Broadfields, Northway Fairway. The schools subsequently added to the scheme include Edgware, Childs Hill, Colindale, Garden Suburb, Broadfields extension, Etz Chaim, The Orion, Mill Hill East School as well as three Children's Centres. These projects require a variation to the existing agreement to spend a further £165,000 to support the programme.
- 9.5 As Trowers and Hamlins have established the model contract and hold a significant amount of knowledge in regard to the contract and the approach to how it should be implemented it would not be considered good value for

money to now tender for new legal support. The Council currently engages for Trowers and Hamlins through the North London Legal Framework ensuring costs are competitive. Engaging any new legal partner would incur additional cost and time in bringing solicitors to the same level of knowledge and experience that already exists within Trowers and Hamlins.

- 9.6 Therefore, to retain Trowers and Hamlins provision of legal support for the continuation of the Primary Schools Capital Investment Programme, a waiver of Contract Procedure Rules as set out at paragraphs 8.2 and 8.3 of this report needs be granted.

10. LIST OF BACKGROUND PAPERS

- 10.1 None.

Cleared by Finance (Officer's initials)	MC
Cleared by Legal (Officer's initials)	POJ