

Summary Delegated Powers Report

<p>TITLE</p>	<p>Finalisation of the contract for the future delivery of Education and Skills services</p>
<p>DATE OF DECISION</p>	<p>21st March 2016</p>
<p>DECISION TAKER</p>	<p>Commissioning Director – Children and Young People</p>
<p>SUMMARY OF DECISION</p>	<p>At its meeting on 8th December 2015, full Council agreed the following recommendations from the Children, Education, Libraries and Safeguarding Committee:</p> <ul style="list-style-type: none"> a. That Mott MacDonald Ltd trading as Cambridge Education be selected as the Council’s preferred bidder for the future delivery of Education and Skills services; b. That the Council enters into a strategic partnering arrangement with Mott MacDonald Ltd trading as Cambridge Education, including entering into a services contract and a partnering agreement; c. That the Commissioning Director – Children and Young People be delegated to finalise the contract documentation, in consultation with the Committee Chairman; d. That the functions set out in paragraph 1.45 of the report are contracted out to Mott MacDonald Ltd trading as Cambridge Education; and e. That the Commissioning Director – Children and Young People be delegated to proceed with all necessary planning and preparation for mobilisation of the contract, in consultation with the Committee Chairman. <p>The purpose of this report is to confirm that the necessary action has been taken to finalise the contract documentation, in accordance with the submitted tender that was accepted by full Council, and that all necessary action has been taken to mobilise the contract from 1st April 2016.</p> <p>In finalising the contract, legal advice and support has been provided throughout by Bevan Brittan, under the auspices of HB Public Law. Commercial advice has been provided by iMPower Ltd. HR support and financial input has been provided by the council. There has been appropriate consultation with the Committee Chairman and with the council’s s151 officer.</p>

It should be noted that, at the time of writing, officers were continuing to work on finalising the contract documents, including ensuring that the property arrangements are appropriate to meet both parties' needs. The documents will not be sealed until legal officers have confirmed that these outstanding matters have been resolved.

Within the full business case that was considered by full Council, it was recognised that there remained some issues arising from the final tender to be resolved prior to the signing of any contract. In summary, they were:

- Establishing an accountability protocol for working effectively with the Director of Children's Services
- Establishing protocols in respect of joint employment contracts
- Agreeing revisions of the specification for Strategic Management of the Service and minor amendments to other specifications, as required
- Agreeing an appropriate mechanism for dealing with any catering performance deductions
- Finalising the drafting of contractual arrangements in respect of gain share and exclusivity
- Finalising the drafting of a strategic partnering agreement
- Finalising interface arrangements with the Customer and Support Group, together with reaching agreement on the appropriate apportionment of any additional costs and overhead budgets.

It is confirmed that these matters have now all been resolved to the satisfaction of the relevant officers.

Contract overview

The contract is for the provision of a range of specified services to the Council, with a requirement that further specified traded services are offered to Barnet schools on a standard set of terms and conditions and in accordance with agreed service specifications that set out the level and quality of service required.

The contract documents are based on the OGC model contracts, modified by agreement between the parties. The contract documents comprise the Services Contract itself, together with a number of schedules, including:

Service Requirements – service specifications and performance management regime

Supplier Solution – tender documents, including method statements

Financial matters – financial pro forma,

arrangements for invoicing, indexation, gainshare, payments on termination, audit rights etc.

Governance – terms of reference for the Strategic Partnering Board, change control, dispute resolution, exit management, business continuity and disaster recovery

Employment – staff transfer arrangements and key personnel

The contract is for a term of seven years, with the option to extend for up to a further three years. It allows for the strategic partnering arrangement to be converted to a joint venture company in the future, should the council require it. This may prove to be appropriate in the event that the traded business is particularly successful. The total value of the contract over the seven year initial term is £70.9m. The contract will deliver total savings to the council of £11.1m over the seven years. For the MTFS savings period to 2019/20, the contract will deliver annual savings of £1.9m by 2019/20 and cumulative savings of £5.4m over the four years to 2019/20.

The contract is with Mott MacDonald Ltd trading as Cambridge Education. ISS Facility Services has been identified as a key sub-contractor and will deliver the catering elements of the contract.

The final contract documentation will be published in accordance with the council's transparency policy within three months of mobilisation, redacted as appropriate to protect commercially sensitive information.

Key features of the contract

The primary objective of negotiations in respect of the contract clauses has been to ensure a fair and appropriate apportionment of risk, whereby both parties accept the risk for matters that are under their control and there is a reasonable apportionment of other risks over which neither party has control. The purpose of this is to ensure that the council does not pay within the contract price for non-commercial risks that may or may not crystallise and that would have continued to be council risks had the service not been contracted out. On the other hand, the bidder takes on the commercial risks of securing the level of income required to under-write the contract price.

The vast majority of the clauses in the Services Contract are standard OGC clauses. Where appropriate, the council's existing CSG and Re contracts have been used as the model, where the OGC contract provides discretion. The following provisions are of particular note:

Performance Indicators

The proposed performance regime is relatively standard, in that under-performance points can be awarded, which will result in deductions from charges. The maximum that can be deducted is equivalent to the partner fee (profit), as set out in the final tender. We have sought to differentiate between Strategic Key Performance Indicators (SKPIs), which measure outcomes, but which Cambridge Education cannot control (e.g. GSCE results) and Operational Key Performance Indicators (OKPIs), which measure outputs and activity, which Cambridge Education can control (e.g. completion of ECHPs). Over-performance against SKPIs will generate credits against OKPI deductions, but not additional cash payments.

Change

As is fairly standard, any general change in law or specific change in law that was reasonably foreseeable at the time of entering into the contract will not permit Cambridge Education to seek an increase in the contract price. Also, traded services charges are not covered by the change in law provisions, as they are for Cambridge Education to agree with schools, as the individual customers for those services. However, in view of the potentially substantial impact that a change in Universal Infant Free School Meals legislation would have on the overall commercial model, such a change would trigger a discussion about the impact on the contract price. Special arrangements have also been agreed to give the council greater control over increases in school meal prices than would normally be the case in such an arrangement.

Supply Chain Rights and Protections

This governs the appointment of sub-contractors. It requires the contractor to manage its sub-contractors properly and gives the council rights to reject the appointment of key sub-contractors, or require their removal in certain circumstances. It also provides for all of the relevant requirements of the main contract to pass down to the key sub-contractor, including provisions on transparency and open-book accounting.

Limitations on Liability

This sets out standard requirements in respect of general liabilities, i.e. those that cannot be limited, and a financial cap for the contractor on any losses incurred by the council as a result of their default.

The contractor is not anticipating requiring redundancies, but it is recognised that it may be in the interests of all parties for a small number of staff to exit the organisation within the first year of the contract. It is normal practice for the council to meet the costs of this, but each individual case would be agreed with the council and there is a cap on the total cost.

In view of the known likelihood of the closure of the Atrium, it has also been agreed that the council should meet the cost of any redundancies arising out of that event. This would be subject to the contractor seeking to redeploy the staff wherever possible.

Termination Rights

The council may terminate the contract, in whole or in part:

- For convenience
- If a supplier termination event occurs (these are set out in full in the definitions section of the contract, but in essence cover critical performance failure, material default or breach of contract, change of control, insolvency or breach of warranties)
- In the event of a Force Majeure event lasting more than 180 days
- In the event of fraud or bribery
- If the contractor exhausts the liability cap mentioned above (although they do have the option of topping that up, to avoid termination).

The contractor may terminate the contract, in whole or in part:

- If the council fails to pay an undisputed invoice 40 working days after it has received a notice of non-payment
- In the event of a Force Majeure event lasting more than 180 days
- If the council steps in to provide part of the service for more than 180 days.

This gives the council much broader rights to terminate than it does to the contractor. Recognising this, significant effort has been put into avoiding “hair triggers” that would enable the council to terminate the contract for a minor infraction. In terms of the cost of termination, the principle that has been adopted is that costs fall with fault and, if there is no fault, costs are apportioned between the parties.

It is highly unusual for contracts to allow one party to walk away at will and, whilst the council can terminate for convenience at any time, it should be noted that this would be a very costly option.

Consequences of Expiry

Amongst other things, this covers what happens to the traded services at the end of the contract. In summary, there are three options:

1. Incorporate a joint venture; or

2. Continue the existing arrangement (and continue taking the benefit of gainshare, which will continue only as long as income streams existing at the expiry date remain); or
3. The council buys out the contractor's 80% of the business.

Allowable Assumptions

The assumptions on which the tender was based and which it is not possible to verify in advance of contract mobilisation are incorporated in the contract. This sets out the details of those assumptions, the potential impact they would have in the event that they were incorrect, the approach to be taken to verify the assumptions and "true up" the contract if required, and the time limit for verification. The key areas that are covered are the cost and number of transferring staff and the value of the transferring business.

Mobilisation

The mobilisation of the contract has been overseen by a Joint Transition Board, with membership from the council, Cambridge Education and ISS. All parties have been working towards a smooth transition, with minimum change for staff and customers. There has been regular communication with staff and customers throughout the process. Key activities in support of contract mobilisation have been:

1. TUPE consultation with staff and trades unions
2. Provision and checking of data to support the transfer of staff
3. Novation of contracts that will transfer with the service
4. Establishment of the necessary interfaces with CSG
5. Preparation of heads of terms for the necessary leases and licences to occupy

All of these are progressing well, but both parties recognise that there may be some matters of detail that will be finalised post-mobilisation.

Arrangements for mobilisation were the subject of a Local Partnerships Health Check review which was conducted on 11th and 12th February 2016. The conclusion of the review was that "there are no significant obstacles to successful implementation. Any recommendations are made to support the further successful transition, implementation and embedding of the delivery model." A copy of the full report is appended to this Summary DPR.

**AUDIT TRAIL OF
DECISION – RETAINED
AND WHERE?**

The audit trail is retained with the Commercial Team.

DECISION TAKER'S STATEMENT

I have the required powers to make the decision documented in this report. I am responsible for the report's content and am satisfied that all relevant advice has been sought in the preparation of this report and that it is compliant with the decision making framework of the organisation which includes Constitution, Scheme of Delegation, Budget and Policy Framework and Legal issues including Equalities obligations.

I authorise the above decision

Signed **Chris Munday** _____

Designation **Commissioning Director – Children and Young People** _____

Date **21st March 2016** _____