

Committee/Meeting: Cabinet	Date: 3 rd August 2011	Classification: Unrestricted	Report No:
Report of: Ann Sutcliffe, Service Head Building Schools for the Future Development & Renewal Directorate		Title: Update on Building Schools for the Future Programme including authorisation to issue LGCA Certificates, in connection with the Deed of Variation, to the PFI contract. Wards Affected: ALL	

Lead Member	Cllr. Oliur Rahman
Community Plan Theme	A Prosperous Community
Strategic Priority	<ul style="list-style-type: none"> • 2.2: Strengthen and connect communities • 3.1: Support lifelong learning opportunities for all

Special Circumstances and Reasons for Urgency

The Authority intends to enter into the Deed of Variation to allow the LEP to refurbish and build new facilities for four schools that are part of the existing PFI contract. Through their due diligence, Lenders have made clear that they require the Authority to provide them with fresh LGCA certificates to authenticate the contracts. The issuance of such certificates requires Cabinet approval.

The Authority intends to sign the Deed of Variation in the first week of August in order to maintain the programme for the delivery of the BSF schools. If Cabinet does not approve the assurance of LGCA certificates, then Lenders will refuse to consent to the variation.

1. SUMMARY

1.1 This report provides an update on Building Schools for the Future Programme, including the contract negotiations to amend the existing PFI contract to allow for the £60million investment into four of the secondary schools and a recommendation to authorise the issuance of LGCA Certificates in connection with the Deed of Variation to the Project Agreement and the Funders Direct Agreement to satisfy one of the conditions precedent set by the lenders to the PFI contract.

2. DECISIONS REQUIRED

Cabinet is recommended to:-

2.1 Note the contents of this report, to reaffirm the decisions duly authorised at the January Cabinet (ref 5.3 below);

- 2.2 authorise the issuance of LGCA certificates to authenticate the Deed of Variation to the PFI contract and the Funders Direct Agreement in the forms provided at Appendix 1 and Appendix 2 and delegate to the Monitoring Officer, the authority to make any final amends to these certificates.
- 2.3 agree, subject to the exceptions set out in paragraph 2.4 below, to indemnify the Section 151 Officer (the Director of Resources) against any claims made whatsoever against him (including costs incurred by and awarded against him) and will not itself make claims against him for any loss or damage occasioned by act, error or omission committed by such officer in the course of any work undertaken preceding as well as for the purpose of the act of certification (whether or not necessarily undertaken in order to certify the contract) and generally in connection with the signing of such certificates or documents as are referred to in paragraph (2.2.) above. The indemnity will not extend to loss or damage directly or indirectly caused by or arising from the following, fraud, dishonesty or a criminal offence committed by the indemnified person

3. REASONS FOR THE DECISIONS

- 3.1 The Authority intends to enter into the Deed of Variation to allow the LEP to refurbish and build new facilities for four schools that are part of the existing PFI contract. Through their due diligence lenders have made clear that they require the Authority to provide them with fresh LGCA certificates to authenticate the contracts, as was the case at the last point of variation. The issuance of such certificates requires cabinet approval.

4. ALTERNATIVE OPTIONS

- 4.1 The Authority has been in negotiations with Tower Hamlets Schools Limited for many months and had agreed to enter into the Deed of Variation with THSL on the basis that the existing LGCA certificate was effective for this contract. However, lenders and their lawyers have made it absolutely clear that they require new certificates to be issued for this new variation. On the basis that the authority was content to issue certificates previously and many other certificates have also been issued by other authorities for other variations to PFI schools contracts, the authority has little option other than to issue a new certificate in order to satisfy lender requirements. The issuance of a certificate is not considered to be a new burden on LBTH and as such officers recommend that the certificates be issued, as the alternative approach would jeopardise the delivery of the BSF programme in the four schools affected.

5. BACKGROUND

- 5.1 The Authority is committed to the delivery of the BSF investment in the four secondary schools subject to the PFI contract and has secured the £60m funding and authorisation from DFE to enter into the Deed of Variation

necessary to allow the LEP to go on site and commence works in earnest this summer. The LEP Design and Build contract are ready for signature but cannot be executed until the PFI Deed of Variation is in place.

6. BODY OF REPORT

6.1 Cabinet last considered this matter at its January meeting where it was agreed that

- the Corporate Director of Development & Renewal be authorised after consultation with the Assistant Chief Executive (Legal Services) to negotiate and conclude with Tower Hamlets Schools Limited (THSL) and the THeLEP all necessary certificates/consents/documents/contracts ancillary or incidental to the above schemes, subject to final approval of such certificates/consents/documents/contracts by the Assistant Chief Executive (Legal Services);
- That the Head of Legal Services (Environment) be authorised to enter into all necessary documents to implement the resolutions;

6.2 Since that report significant progress has been made, although negotiations have been protracted. On 10th June the Authority agreed the form of wording for the Deed of Variation with THSL along the 'no better no worse' principles agreed by both sides. Since then lenders have been completing their due diligence of the contract. In the current financial market lenders operate a risk averse approach to credit approval and it must be remembered that the Authority is importing the delivery of a £60m building programme by a third party (the LEP) into an existing PFI contract without borrowing any further funds from the existing lenders.

6.3 The Authority is, at the time of writing this report, in the final stages of negotiating the contract variation with lenders lawyers. Officers are conducting the negotiations within the authority already vested in them by previous Cabinet decisions. It is clear, however, that lenders will only recommend the Deed of Variation to their credit committees for approval if the Council consent to, and authorise the issuance of, LGCA certificates to authenticate the contract variation and by doing so confirm that the contract variation is intra vires and that the lenders (and other parties) can rely on the minutes of this meeting to verify that the Council is entering into the contract with the full authority of the Mayor and Burgess of the London Borough of Tower Hamlets

7. COMMENTS OF THE CHIEF FINANCIAL OFFICER

7.1 This report seeks approval to authorise Local Government Contracts Act (LGCA) certificates to be issued to authenticate the Deeds of Variation to the PFI contract and the Funders Direct Agreement in respect of four secondary schools within the existing PFI contract. These authorisations are necessary to satisfy the requirements of the lenders to the PFI contract.

7.2 Cabinet authorised the negotiations and conclusion between the Council, Tower Hamlets Schools Ltd and THLEP of all necessary legal arrangements required to facilitate the Building Schools for the Future schemes to progress. The total costs will be contained within the existing financial parameters agreed by Cabinet at its meeting of January 2011, with funding primarily through Government Grant.

8. CONCURRENT REPORT OF THE ASSISTANT CHIEF EXECUTIVE (LEGAL SERVICES)

8.1. The Building Schools for the Future programme is central to the Council's Community Plan objective of a Prosperous Community, as referred to in the One Tower Hamlets section of the report. The Council's power to pursue the programme may be found either in its well-being power in section 2 of the Local Government Act 2000, or in its obligations under the Education Acts.

8.2. The Funders have required that the Council give certificates under the Local Government (Contracts) Act 1997. The purpose of the Local Government (Contracts) Act 1997 is to facilitate contractual relationships between local authorities and the private sector by removing concerns, which have grown up over recent years as a result of litigation, about the legal powers ("vires") of local authorities to contract with the private sector.

8.3. The Act provides a "safe harbour" for particular types of contract by means of two stages.

- A strong presumption is established that, where the contract has been self-certified by means of a specified process, then it is lawful and that the certificate itself is lawful. This presumption may be rebutted but only on a public law challenge, i.e. by an application for judicial review or by audit review. Thus, the contract cannot be challenged by the parties in private law.
- The second stage deals with the eventuality of the courts nevertheless finding the contract to be unlawful, despite the presumption. There is an explicitly stated judicial discretion to allow an unlawful contract to continue. There is also provision, if the contract is not continued by the courts, of special discharge terms which will operate to compensate the contractor or its financier even where the main contract is deemed unlawful.

8.4 To forestall the potential situation where the Director of Corporate Resources, faces personal action and loss as a result of issuing and signing such certificate in good faith, Cabinet is asked to approve an indemnity in the terms of the resolution set out above

8.5 The negotiation and ancillary documents to the Deed of Variation have been supported by the Council's external legal advisers and BSF team

9. ONE TOWER HAMLETS CONSIDERATIONS

- 9.1 The BSF investment aims to increase employment, training and educational opportunities for the residents of the borough, either through improved learning environments, with enhanced ICT facilities, access for community learning and opportunities for apprenticeships or through the establishment of a partnership vehicle to deliver the investment.
- 9.2 Schools are an important part of creating and supporting communities and providing a much-needed resource for the local community. It is also critically important to ensure that the quality of the learning environment provides our students and their families with the opportunities to improve their continued learning and work opportunities.

10. SUSTAINABLE ACTION FOR A GREENER ENVIRONMENT

- 10.1 The BSF programme supports and requires sustainable investment of the BSF funding. This is captured in the tender documents in the following areas:
- Building Research Establishment Environmental Assessment method (BREEAM) – all 100% new build solutions should aspire to BREEAM ‘Excellent or Very Good’ and all remodel/refurbishment projects should achieve BREEAM ‘Very Good’;
 - In line with The London Plan, BPEC is required to submit proposals, which achieve 10% (current) and 20% (future) renewables targets. Discussions are taking place with the Planning Department on a strategy that be applied across the estate as a whole to achieve the targets as proposed. It should be noted that refurbishment projects are difficult to achieve these targets.

11. RISK MANAGEMENT IMPLICATIONS

- 11.1 A formal risk register is maintained for the BSF programme and reviewed by the Strategic Partnership Board on a monthly basis. All key strategies, programme and project risks of BSF are captured on the boroughs corporate JCAD automated risk register.
- 11.2 Programme risks are regularly reviewed with identification of appropriate mitigating actions.
- 11.3 The most significant risk facing the Authority at present is the loss of PFS funding for the programme if contracts are not entered into.

12. CRIME AND DISORDER REDUCTION IMPLICATIONS

- 12.1 Schools at both primary and secondary level contribute to the agenda on reducing crime and disorder, but ensuring that students, staff and parents understand their respective roles within their communities, and the importance of being good citizens.

13. EFFICIENCY STATEMENT

13.1 The model for delivering the capital investment is through the LEP, which drives efficiencies around procurement, resourcing and VFM.

14. **APPENDICES**

Appendix 1 - Proposed text for the LGCA certificate to be entered into in August 2011 in relation to the PFI Deed of Variation

Appendix 2 - Proposed text for the LGCA certificate to be entered into in August 2011 in relation to the Funders Direct Agreement

Appendix 3 - Copy of the 2005 LGCA certificate issued on the first Deed of Variation on the PFI contract

Appendix 4 - Copy of the 2005 LGCA certificate issued for the Funders Direct Agreement on the PFI contract.

Local Government Act, 1972 Section 100D (As amended) List of “Background Papers” used in the preparation of this report

Brief description of “background papers”	Name and telephone number of holder and address where open to inspection.
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None

Report authors should refer to the section of the report writing guide which relates to Background Papers when completing this section. Please note that any documents listed in this section may be disclosed for public inspection. Report authors must check with Legal Services before listing any document as ‘background papers’.