

Agenda Item No: 8(h)

DERBYSHIRE COUNTY COUNCIL

CABINET

13 December 2016

Report of the Strategic Director for Children's Services

**APPROVAL TO SIGN A MEMORANDUM OF UNDERSTANDING
WITH THE EDUCATION FUNDING AGENCY WITH RESPECT TO
TWO PROJECTS TO BE FUNDED AND DELIVERED UNDER THE
PRIORITY SCHOOL BUILDING PROGRAMME BY THE EDUCATION
FUNDING AGENCY – (CHILDREN'S SERVICES)**

1. Purpose of the Report

To request Cabinet authorise the signing of a Memorandum of Understanding (MOU) with respect to a project to be funded and delivered under the Priority School Building Programme (PSBP) at Granville Sports College and Heath Primary School and to note an urgent decision taken by the Chief Executive with respect to similar project at Wilsthorpe Community School.

2. Information and Analysis

The Department for Education (DfE) announced in May 2014 that it would support a second phase of the PSBP which is aimed at undertaking major rebuilding and refurbishment projects in those schools in the very worst condition. The Authority submitted a bid following approval by Cabinet on 15th July 2014. In order to submit the bid, Cabinet approved the principle of entering into an (MOU) concerning any bids that were successful.

On 9th February 2015, the DfE announced which schools had been successful and would be part of the PSBP. In Derbyshire, the schools included were: Wilsthorpe Community School, Granville Sports College and Heath Primary School.

On 26th October 2016, the Education Funding Agency (EFA) provided a copy of the MOU that it requires the Authority to sign in relation to these projects. On 1st November 2016, the EFA

informed the Authority that it intends to use the project at Wilsthorpe as a sample scheme and that, as a consequence, it needs the MOU to be signed by the 9th November 2016.

On 2nd November 2016, the EFA provided details of the scheme they propose to provide at Wilsthorpe Community School. This is an extensive scheme which will involve the provision of a new building of 8,100m². This represents a replacement of around 85% of the school. The project also includes external works. A sports hall and a number of smaller buildings will be retained by the school.

The intention of the MOU is to ensure that all parties are aware of their responsibilities in delivering the project. As noted in the Cabinet report of the 15th July 2014, this includes the Authority accepting responsibility for any legal costs required to establish title to the school's site and for the cost of any highway works (S278 of the Highways Act 1980) required by the planning authority (in this case Derbyshire County Council) as part of approval for the project. As with previous PSBP projects, loose furniture and equipment and new ICT equipment are not provided as part of the project.

Given the urgency and short notice given by the EFA for the completion of the MOU for Wilsthorpe, a paper was presented to the Chief Executive for an urgent decision using his powers under the Authority's constitution in order to meet the EFA's deadline of 9 November 2016. A copy of the paper presented to the Chief Executive (which includes a copy of the MOU and the proposal for Wilsthorpe Community School) is included at Appendix A.

The EFA has now indicated that the schemes will be as follows. Granville - – a new block to provide sports hall, science, technology, drama facilities; Heath -extension and refurbishment.

3. Financial Considerations

It is clear that some funding may have to be provided by the Authority to support parts of the project that will not be funded by the DfE. Any funding requirement will be subject to a further report being submitted to Cabinet for approval. Any such costs would need to be considered in the context of the major investment by the EFA.

4. Legal Considerations

Paragraph C1 of the Council's Constitution provides that the Chief Executive shall have power, after discussion, if practicable with the Leader of the Council or the relevant Cabinet Member or Chair, to take such actions deemed to be necessary and expedient in matters requiring urgent consideration and which, because of the timescales involved, or the need to safeguard the interests of the County Council, cannot be dealt with by submission to the next meeting of the Council, Cabinet, Cabinet Member or Committee.

The Director of Legal Services will review the MOU and, arrange for it to be signed with respect to the projects at Granville Sports College and Heath Primary School.

5. Other Considerations

In preparing this report, the relevance of the following factors has been considered: - prevention of crime & disorder, equality of opportunity, and environmental, health, human rights, human resources, social value, property and transport considerations.

6. Background Papers

A file is held within the Children's Services Development Team.

7. Key Decision

Yes

8. Call-in

Is it required that the call-in period be waived in respect of the decisions being proposed within this report? No

9. Officer's Recommendation

That Cabinet authorises the signing of the MOU with the EFA for the PSBPs at Granville Sports College and Heath Primary School, and;

That Cabinet notes the decision taken by the Chief Executive to authorise the signing of an MOU for a similar project at Wilsthorpe Community School.

Jane Parfremment
Strategic Director for Children's Services

Appendix A

DERBYSHIRE COUNTY COUNCIL

URGENT DECISION TAKEN BY THE CHIEF EXECUTIVE

November 2016

APPROVAL TO SIGN A MEMORANDUM OF UNDERSTANDING WITH THE EDUCATION FUNDING AGENCY WITH RESPECT TO A PROJECT TO BE FUNDED AND DELIVERED UNDER THE PRIORITY SCHOOL BUILDING PROGRAMME BY THE EDUCATION FUNDING AGENCY

10. Purpose of the Report

To request authorisation of the Chief Executive, using his delegated powers, to authorise the signing of a memorandum of understanding (MOU) with respect to a project to be funded and delivered under the Priority School Building Programme (PSBP) at Wilsthorpe Community School.

11. Information and Analysis

The Department for Education (DfE) announced in May 2014 that it would support a second phase of the PSBP which is aimed at undertaking major rebuilding and refurbishment projects in those schools in the very worst condition. The Authority submitted a bid following approval by Cabinet on 15 July 2014. In order to submit the bid Cabinet approved the principle of entering into an (MOU) concerning any bids that were successful.

On the 9 February 2015, the DfE announced which schools had been successful and would be part of the PSBP. In Derbyshire the schools included were: Wilsthorpe Community School, Granville Sports College and Heath Primary School.

On 26 October 2016, the Education Funding Agency (EFA) provided a copy of the MOU that it requires the Authority to sign in relation to these projects. On 1 November 2016, the EFA informed the Authority that it intends to use the project at

Wilsthorpe as a sample scheme and that, as a consequence, it needs the MOU to be signed by the 9th November. A copy of the draft MOU is included at appendix A.

On 2 November the EFA provided details of the scheme they propose to provide at Wilsthorpe Community School. This is an extensive scheme which will involve the provision of a new building of 8,100m². This represents a replacement of around 85% of the school. The project also includes external works. A sports hall and a number of smaller buildings will be retained by the school.

The intention of the MOU is ensure all parties are aware of their responsibilities in delivering the project. As noted in the Cabinet report of the 15 July 2014, this includes the Authority accepting responsibility for any legal costs required to establish title to the school's site and for the cost of any highway works (S278) required by the planning authority (in this case Derbyshire County Council) as part of approval for the project. As with previous PSBP projects, loose furniture and equipment and new ICT equipment are not provided as part of the project.

12. Financial Considerations

It is clear that some funding may be required to be provided by the Authority to support parts of the project that will not be funded by the DfE. Any funding requirement will be subject to a further report being submitted to Cabinet for approval. Any such costs would need to be considered in the context of the major investment by the EFA in providing an almost completely replaced large secondary school.

13. Legal Considerations

Paragraph C1 of the Council's Constitution provides that the Chief Executive shall have power, after discussion, if practicable with the Leader of the Council or the relevant Cabinet Member or Chair, to take such actions deemed to be necessary and expedient in matters requiring urgent consideration and which, because of the timescales involved, or the need to safeguard the interests of the County Council, cannot be dealt with by submission to the next meeting of the Council, Cabinet, Cabinet Member or Committee.

The Director of Legal Services will review the MOU and, arrange for it to be signed.

14. Other Considerations

In preparing this report the relevance of the following factors has been considered: - prevention of crime & disorder, equality of opportunity, and environmental, health, human rights, human resources, property and transport considerations.

15. OFFICER'S RECOMMENDATION

That the Chief Executive, using his delegated powers, authorises the signing of the MOU with the EFA for the PSBP at Wilsthorpe Community School.

Appendix A



Education Funding Agency
4th Floor
Priority School Building Programme
Capital Team
Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Tel: 0370 000 2288

www.gov.uk/dfe

Date:

Wilsthorpe Community School, Derby Road, Long Eaton, NG10 4WT;
The Governing Body of Wilsthorpe Community School, Derby Road, Long Eaton, NG10 4WT;
Derbyshire County Council, County Hall, Matlock, Derbyshire, DE4 3AG

Dear Sirs,

As we take forward the delivery of Priority School Building Programme 2 (PSBP2) for the batch of East Midlands A schools and for Wilsthorpe Community School (the Scheme), we want to outline the roles and responsibilities of our respective organisations, to ensure that the Scheme is delivered in the most efficient and practical manner.

The delivery of PSBP2 is being managed on behalf of the Secretary of State for Education (SoS) by the Education Funding Agency (EFA), which is an executive agency of the Department for Education.

For each school the SoS will enter into delivery contracts (for example, he will sign the design and build contract with the contractor). The SoS and the EFA fully understand and acknowledge the vital role that the school, its governing body and Derbyshire County Council has in ensuring the efficient delivery of the Scheme in a way that satisfies all of our respective requirements (in this letter we will refer to these parties collectively as 'the school and its stakeholders'). For this reason, we have set out in this letter the principal roles and responsibilities of the relevant organisations and we are asking that the school and its stakeholders each countersigns this letter to indicate their acknowledgement of the processes involved in achieving a successful and timely delivery.

Prior to final signature of the contracts, we will ask the school and its stakeholders to sign a short letter of agreement with the SoS (the template form of which is attached at Appendix 3). This will set out what is required from all parties to deliver the building works. The final form of that letter of agreement for Wilsthorpe Community School will be prepared in due course and, whilst we will only make changes to the template that are necessary for project specific reasons, we will ensure that it is shared with the school and its stakeholders so that no element will come as a surprise to you at the time of signature.

The Role and Responsibilities of the Secretary of State and the EFA

The EFA's role is of overall programme manager. As regards the centrally-delivered schemes, including the Scheme, the EFA will manage the delivery of the building works 'centrally'. Its primary responsibility is to ensure that the investment of public money achieves the objective of dealing with the condition need at the school at a reasonable cost to the taxpayer.

The EFA will prepare the feasibility study for the school, manage the bidding process (issue the bidding documentation, work with bidders during the bid period, evaluate the bids received and then select the construction company to carry out the works for the Scheme and act as contract manager during the build process following contract signature. In order to deliver this role successfully, the EFA will work closely with the school and its stakeholders throughout the processes described above to ensure that an appropriate level of local input is established and maintained.

The EFA intends to use its Contractors' Framework to deliver the building works.

The Role and Responsibilities of the School and its Stakeholders

The school and its stakeholders will need to work with the EFA so that the feasibility study is submitted on time and thereafter so that the bidding process can progress as efficiently as possible both for the school and for the other schools in the batch. Whilst it is not clear yet exactly what this commitment will entail (and it will be different for each school), the school and its stakeholders should expect to dedicate resources and time to attending meetings and feeding in information and views to the Scheme throughout the feasibility, bidding and construction processes.

To allow the EFA to complete the feasibility study and bidding process in a timely fashion, we will need the school and its stakeholders to supply certain information including information relating to the property's title (so that we can grant appropriate access rights to the construction contractor to come onto the site and to carry out the planned works). We understand that in a number of cases (such as, for example, the provision of detailed property information), the school itself will not be best placed to provide the necessary information. In such cases we would expect the school to assist the EFA in dealing with the person or organisation best able to deliver the required information (for example, the local authority). The school must also allow access to the site for the carrying out of a number of property related surveys (including intrusive surveys).

It is important that information and access is provided in a timely manner and that any information is correct.

As referred to above the SoS will be entering into a design and build contract and, under that contract, he will be taking on certain responsibilities (and thus liabilities) to the contractor relating to local site matters and school activities. The SoS will be relying on the information and access given by the school and its stakeholders and, in the agreement to be signed between the SoS and the school and its stakeholders, may look to the school and its stakeholders to assume some of these responsibilities for themselves. Appendix 1 to this paper sets out in more detail how the contracting will work and Appendix 2 sets out examples of the sorts of responsibilities that the SoS may look to pass to the school and its stakeholders.

There will also be some non-property matters that the SoS will seek to pass to the school and its stakeholders. For example, a general obligation not to disrupt the building works.

Once the building works are complete, the design and build contract provides for a 12-month period during which time, if a problem arises, the contractor can be required by the SoS to solve the issue. The school and its stakeholders will be provided with collateral warranties from the contractor, its design professionals and the principal building sub-contractors (the "Project Team"). These will give the school and its stakeholders rights against the Project Team in respect of any defects in the building which arise after that 12-month period. Consequently, following the expiry of the 12-month period after the completion of the building works, and the resolution of any issues that may have emerged, it will be the school and/or its stakeholders, rather than the SoS, who will be responsible for ensuring the resolution of any defects in the buildings that subsequently arise by enforcing their rights under the collateral warranties against the Project Team.

Whilst the PSBP2 does include funding for certain fixed furniture, fittings and equipment and for ICT network infrastructure, it does not include any funding for loose furniture and equipment (including ICT equipment). As such the school will be expected to re-use as much of its existing furniture and equipment as it considers necessary in the new school and to make up any deficit for itself.

The PSBP2 does not fund any land transactions (including acquisitions, sales, leases, etc.) required to deliver, or contribute funds for, the Scheme. Such transactions (and any necessary approvals) must be sought by Derbyshire County Council. The PSBP2 also does not include funding, either directly or indirectly, for any works which may be required pursuant to the Highways Act 1980 (including section 278 works) or under the Town and Country Planning Act 1990 (including section 106 works). The cost of any such works will be met by Derbyshire County Council.

We look forward to working with you and the other parties involved in delivering this procurement and the improved facilities for Wilsthorpe Community School. Please countersign this letter below where indicated.

Yours sincerely

.....

Rachel Stephenson
Programme Director
Priority School Building Programme
For and on behalf of the Education Funding Agency

In acknowledgement of the expectations upon the School set out in this letter for the delivery of the Priority School Building Programme 2:

Signed on behalf of the School by:

Jonathan Crofts, Head teacher

Signed on behalf of the School's Governing Body by:

Chair

Signed on behalf of Derbyshire County Council by:

Chief Executive

APPENDIX 1

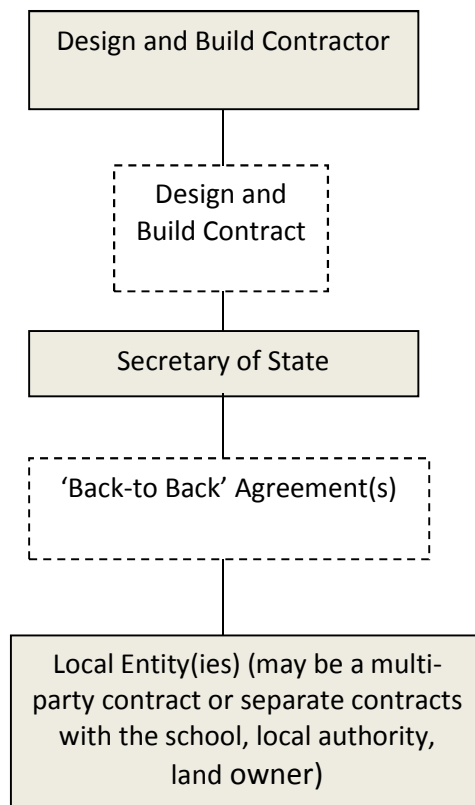
Contract Structure

Under the Design and Build contract, the SoS will assume certain responsibilities to the contractor. A number of these responsibilities relate to 'local' site matters and school activities that the school and its stakeholders are better placed to manage and control than the SoS.

The SoS will use a back-to-back arrangement to pass on those responsibilities (the SoS owes the duty to the contractor and that duty is then mirrored to the school or local entity in its contract with the SoS). With the passing of the responsibilities comes also the right to enforce any failure to carry them out, although there would be no obligation to take any enforcement action should the SoS choose not to do so.

Schools in England are 'owned' under a number of corporate structures and the ownership of the land they are on is yet more diverse. Schools may either be local authority maintained, Academy Trusts, VA, or Foundations; the land they sit on may be owned by the school, the local authority, the local diocese or another third party. Responsibilities passed to a local entity must be passed to the person best able to manage and hold them (i.e. the local school 'owner' and the local landowner (if different)) so there may be a multi-party back-to-back agreement or separate agreements with more than one local entity.

The proposed contract structure for PSBP2 is detailed below:



APPENDIX 2

Examples of Risks and Responsibilities

There are responsibilities that the school and its stakeholders will need to fulfil in order to facilitate the building works at the school. The majority of these relate to property and planning issues and include:

- a. *restrictive covenants over the site or part of the site that need to be released or otherwise addressed (for example a covenant in the title not to build in a specified place on the site):* these are often dealt with either by way of insurance, a release from the covenant holder or via a land tribunal. All of these require the involvement of the landowner or the holder of a material interest in the land. A failure to take the insurance or otherwise deal with the covenant would require either taking the risk that the covenant would not be enforced in the face of the works or varying the Scheme to avoid breaching the covenant.
- b. *Occupational interests (for example, telemasts, substations, and nursery, caretaker or dentist leases):* these are likely to require the landowner or lessor to vary or terminate the interest as necessary for the purposes of the works.
- c. *Adverse rights (for example a group of local residents who have had long uninterrupted rights to walk across playing fields for recreation and to access amenities):* the landowner would need to make the SoS aware of these rights so that they can be rescheduled or the plan for the site varied to accommodate them.
- d. *Access to the site:* the landowner may need to enter into or vary or extend agreements with 3rd party owners of adjoining land to ensure that the school site can be accessed by the contractor.
- e. *Highways/planning/utilities agreements:* Landowners are likely to need to enter agreements to satisfy planning condition or move utilities.

The list above is not exhaustive but experience has shown that they are real when carrying out works of this nature. There are mitigating actions that can apply to each provided they are known about in advance. As such, the responsibility to be passed to the school and its stakeholders is:

- to declare all property interests that are known about and that may affect the site; and
- to take those steps that are needed to enter into agreements and if applicable undertake and fund any highways works required as part of the development as may be required by the local planning authority in order that the mitigating actions are effective and the works can go ahead. All of the agreements with 3rd parties can be facilitated centrally by the EFA as part of the central procurement function but the SoS will not be entitled to enter into the agreements itself.

There are also non-property matters that the SoS will need to pass down. For example, a general obligation not to disrupt the building works (which includes an obligation to comply with the decant programme (i.e. if a school is being delivered in phases the school must be ready to move from an area on time if that area is the subject of the next build phase)).

APPENDIX 3

Template form of letter agreement

To: [♦]

Date: [♦]

Dear [♦]

Priority School Building Programme (PSBP) Capital Project at [♦]¹

The Secretary of State for Education (the “Secretary of State”) intends to enter into a Design and Build Contract with [♦] (the “Contractor”) for the carrying out of design and construction work relating to [♦] (the “School”). A copy of the proposed Design and Build Contract (the “Contract”) has been made available to you and you will be aware that by entering into it, the Secretary of State will assume various obligations to the Contractor. However, the Secretary of State is not the owner of the School’s site nor does he have day-to-day control over the School’s activities. As such, this letter seeks your formal agreement that you will assist the Secretary of State in fulfilling those of his obligations that relate to the School’s site and activities.

Requirements of you

In consideration of the Secretary of State entering into the Contract with the Contractor we ask that each of the other signatories to this letter agree to the following:

1. you will at all times act reasonably in all dealings with the Secretary of State concerning the Contract;
2. to the extent that you are able to do so, you grant to the Secretary of State such property and other rights as are necessary to allow the Secretary of State to grant to the Contractor those property and other rights granted to him by the Contract.
3. to the extent that you are able to do so, you consent to the carrying out of the construction works as described in the Contract (including as that contract may be varied from time to time) by or on behalf of the Secretary of State;
4. you will co-operate fully and in a timely manner (at your own expense) with any request made by the Secretary of State to provide documents, or ensure the provision of documents relating to the School, and to provide, or ensure the provision of any oral or written information relating to the School;
5. you will not wilfully impede either the Secretary of State or the Contractor in the performance of their obligations under the Contract;
6. you will regularly liaise with the Secretary of State and assist with anything that is required of you by the Secretary of State to discharge his obligations under the Contract including

¹ Name of School

(without limitation) complying with the requirements of the planning permission, the obtaining of any third party consents and compliance with the agreed programme for decanting from the old to the new premises²;

7. you acknowledge that the planning permission for the carrying out of the construction works as described in the Contract is subject to the planning conditions appended at Annexe 1. Whilst the majority of these planning conditions will be the responsibility of the Contractor to fulfil in accordance with the Contract, you agree that, without prejudice to the generality of paragraph 6, you will comply with planning conditions numbers [♦] as these conditions can be fulfilled (either wholly or in part) only by you and not (or not solely) by the Contractor or the Secretary of State³; and
8. you will behave reasonably at all times and not do anything or omit to do anything that would cause the Secretary of State to breach his obligations under the Contract or would otherwise allow the Contractor to claim additional time or money.

It is intended that this letter creates legal relations between the Secretary of State and the other parties to it.

Please acknowledge receipt and acceptance of the terms of this letter by signing, dating and returning each copy. Once the EFA has signed all copies a completed version will be returned to you for your records.

Yours faithfully,

Rachel Stephenson
Programme Director, Priority School Building Programme

Authorised to sign for and on
behalf of the SECRETARY OF
STATE FOR EDUCATION

² If necessary insert specific references to any Authority Necessary Consents (e.g. wayleave agreements) that the local parties may be required to enter into.

³ If relevant include statement regarding payment by local authority for s.278 or s.106 works.

We hereby acknowledge receipt and accept the contents of this letter:⁴

[♦]

Authorised Signatory:	
Name:	
Position in Organisation:	
Date:	

[♦] School

Authorised Signatory:	
Name:	
Position in Organisation:	
Date:	

[♦] Governing Body

Authorised Signatory:	
Name:	
Position in Organisation:	
Date:	

[♦] Council

Authorised Signatory:	
Name:	
Position in Organisation:	
Date:	

⁴ Delete as appropriate

