

EXECUTIVE DECISION NOTICE

SERVICE AREA:	Governance & Pensions
SUBJECT MATTER:	Alder High School– Urgent Contractual Matters
DECISION:	<p>That the Council:</p> <ol style="list-style-type: none"> 1. Acknowledges the issues, options and risks set out in this report and agree that such risks materialising are outweighed by the statutory requirement to deliver sufficient and suitable school places for the academic year 19/20 and in particular increased pupil intake from 155 to 180 additional pupils at Alder High School through modular build solution extension. 2. Authorises the Director of Governance and Pensions (Borough Solicitor) to sign all contracts and any necessary and/or related documentation to deliver this project including but not exclusively: <ol style="list-style-type: none"> (a) Letter of intention or any undertaking for costs identified in this project and in particular the letter of intent set out at Appendix 1. (b) Any leases or licences required and in particular the licence set out in the form attached at Appendix 2. (c) Any indemnities and in particular the indemnity set out in the form attached herewith at Appendix 3. (d) Any variation and warranties required to the original PFI contractual arrangements to facilitate the additional 4 classes forming part of the school and the ancillary services provided to deliver services and maintain; and (e) To sign any certificates required under the Local Government Contracts Act 1997 and indemnify its officers and any members against any claims made against them (including costs incurred and awarded against them), and the Council will not itself make any claims against any officer and/or member for any loss or damage occasioned by neglect, act, error or omission committed by such officer and/or member in the course of or in connection with, signing a certificate within and for the purposes of the Local Government Contracts Act 1997 (as may be amended from time to time or to any enactment which replaces it), subject to there being no criminal and/or fraudulent conduct by such officers and members who seek to rely on the indemnity. 3. Agree that a review must be undertaken in respect of the contractual arrangements in place with the SPV to ensure that they are delivering as required and are able to support the needs of the school as has not been the case in respect of this project and ensure that we are achieving value for money, and where necessary seek the assistance of the DFE and/or Ministers to review the existing contractual arrangements to avoid such a situation arising again. 4. Note that the Director of Growth and the Assistant Director for Education are reviewing the capacity and skills within

	her service to deliver and manage existing contractual arrangements and schools capital projects going forward to avoid such a situation arising again.
DECISION TAKER(S):	Councillor Oliver Ryan
DESIGNATION OF DECISION TAKER (S):	Executive Member for Finance and Economic Growth
DATE OF DECISION:	9 August 2019
REASON FOR DECISION:	To enable the Council to fulfil its statutory duty to deliver sufficient and suitable school places.
ALTERNATIVE OPTIONS REJECTED (if any):	The project could be delayed until the legal variation and other contractual matters are fully in place and signed off by the Funders – this would significantly delay the build and result in increased costs in terms of both the build works and finding suitable alternative accommodation for the pupils, in addition to the impact there may be on educational development and attainment. The proposals set out in this report are far from idea but the most expedient way of resolving.
CONSULTEES:	Senior Leadership Team
FINANCIAL IMPLICATIONS: (Authorised by Borough Treasurer)	Governance for the capital funding of the project has previously been provided and the project must fall within those costs as set out in the Capital programme. It is unfortunate that the Council has found itself in this invidious position of bearing risks without controls that is the whole purpose of paying the SPV to deliver such projects as they are best placed to manage them and hence why recommendations 3 and 4 are important in this context. Additionally it will be important to conclude the variation agreement quickly although the Council has yet to have sight of it to ensure there is clarity as to how the unitary charge, lifecycle and maintenance costs are being dealt with.
LEGAL IMPLICATIONS: (Authorised by Borough Solicitor)	The Council has a statutory duty under Section 14 of the Education Act 1996, to secure sufficient and suitable places for pupils in primary and secondary schools in its area. It is regrettable that it hasn't been able in an expedient manner to engage through the PFI contracts to deliver a solution which ensures that we meet our legal duty. Accordingly this report proposes an approach which on balance whilst taking considerable risk should enable the Council to achieve its statutory requirement. Clearly this is not a blueprint going forward and the recommendations to review seek to avoid the Council being put in such a situation again.
CONFLICT OF INTEREST:	None
DISPENSATION GRANTED BY STANDARDS COMMITTEE ATTACHED:	None
REFERENCE DOCUMENTS:	The background papers relating to this report can be inspected by contacting the report writer Sandra Stewart Director of

	Governance & Pensions by:
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Telephone: 0161 342 3028



E-mail: Sandra.stewart@[tameside.gov.uk](mailto:Sandra.stewart@tameside.gov.uk)



Signed:

Cllr Oliver Ryan Executive Member for Finance & Growth

Dated 9 August 2019

EXECUTIVE DECISION REPORT

SERVICE AREA:	Governance & Pensions
SUBJECT MATTER:	Alder High School– Urgent Contractual Matters
DATE OF DECISION:	9 August 2019
DECISION TAKER	Councillor Oliver Ryan Executive Member for Finance and Economic Growth
REPORTING OFFICER:	Sandra Stewart Director for Governance & Pensions
REPORT SUMMARY:	Sets out contractual and other issues which have delivered on the impact of delivery of additional school places and provides for a way forward to meet statutory duty with the Council taking on risk not originally envisaged.
RECOMMENDATIONS:	<p>That the Council:</p> <ol style="list-style-type: none"> 1. Acknowledges the issues, options and risks set out in this report and agree that such risks materialising are outweighed by the statutory requirement to deliver sufficient and suitable school places for the academic year 19/20 and in particular increased pupil intake from 155 to 180 additional pupils at Alder High School through modular build solution extension. 2. Authorises the Director of Governance and Pensions (Borough Solicitor) to sign all contracts and any necessary and/or related documentation to deliver this project including but not exclusively: <ol style="list-style-type: none"> (f) Letter of intention or any undertaking for costs identified in this project and in particular the letter of intent set out at Appendix 1. (g) Any leases or licences required and in particular the licence set out in the form attached at Appendix 2. (h) Any indemnities and in particular the indemnity set out in the form attached herewith at Appendix 3. (i) Any variation and warranties required to the original PFI contractual arrangements to facilitate the additional 4 classes forming part of the school and the ancillary services provided to deliver services and maintain; and (j) To sign any certificates required under the Local Government Contracts Act 1997 and indemnify its officers and any members against any claims made against them (including costs incurred and awarded against them), and the Council will not itself make any claims against any officer and/or member for any loss or damage occasioned by neglect, act, error or omission committed by such officer and/or member in the course of or in connection with, signing a certificate within and for the purposes of the Local Government Contracts Act 1997 (as may be amended from time to time or to any enactment which replaces it), subject to there being no criminal and/or fraudulent conduct by such officers and

	<p>members who seek to rely on the indemnity.</p> <p>3. Agree that a review must be undertaken in respect of the contractual arrangements in place with the SPV to ensure that they are delivering as required and are able to support the needs of the school as has not been the case in respect of this project and ensure that we are achieving value for money, and where necessary seek the assistance of the DFE and/or Ministers to review the existing contractual arrangements to avoid such a situation arising again.</p> <p>4. Note that the Director of Growth and the Assistant Director for Education are reviewing the capacity and skills within her service to deliver and manage existing contractual arrangements and schools capital projects going forward to avoid such a situation arising again.</p>
JUSTIFICATION FOR DECISION:	To enable the Council to fulfil its statutory duty to deliver sufficient and suitable school places.
ALTERNATIVE OPTIONS REJECTED (if any):	The project could be delayed until the legal variation and other contractual matters are fully in place and signed off by the Funders – this would significantly delay the build and result in increased costs in terms of both the build works and finding suitable alternative accommodation for the pupils, in addition to the impact there may be on educational development and attainment. The proposals set out in this report are far from ideal but the most expedient way of resolving.
CONSULTEES:	Senior Leadership Team
FINANCIAL IMPLICATIONS: (Authorised by S151 Officer)	<p>Governance for the capital funding of the project has previously been provided and the project must fall within those costs as set out in the Capital programme. It is unfortunate that the Council has found itself in this invidious position of bearing risks without controls that is the whole purpose of paying the SPV to deliver such projects as they are best placed to manage them and hence why recommendations 3 and 4 are important in this context. Additionally it will be important to conclude the variation agreement quickly although the Council has yet to have sight of it to ensure there is clarity as to how the unitary charge, lifecycle and maintenance costs are being dealt with.</p> <p>There will be an initial payment of around £800K on delivery of the modular build within 30 days of this decision.</p>
LEGAL IMPLICATIONS: (Authorised by Borough Solicitor)	The Council has a statutory duty under Section 14 of the Education Act 1996, to secure sufficient and suitable places for pupils in primary and secondary schools in its area. It is regrettable that it hasn't been able in an expedient manner to engage through the PFI contracts to deliver a solution which ensures that we meet our legal duty. Accordingly this report proposes an approach which on balance whilst taking considerable risk should enable the Council to achieve its statutory requirement. Clearly this is not a blueprint going forward and the recommendations to review seek to avoid the Council being put in such a situation again.
RISK MANAGEMENT:	As set out in the report.

ACCESS TO INFORMATION:

The background papers relating to this report can be inspected by contacting the report writer Sandra Stewart Director of Governance & Pensions by:



Telephone: 0161 342 3028



E-mail: Sandra.stewart@[tameside.gov.uk](mailto:Sandra.stewart@tameside.gov.uk)

1. BACKGROUND

- 1.1 The Council's powers to provide and maintain educational facilities are set out in the Education Act 1996. The Council also has a statutory duty under Section 14 of the Education Act 1996, to secure sufficient and suitable places for pupils in primary and secondary schools in its area.
- 1.2 Basic Need Funding is allocated to each local authority to create new places in schools.
- 1.3 The table below sets out the amount of Basic Need Funding held by the Council, allocated in prior years, which is available to spend in 2019/2020:

Basic Need Funding	Amount £
Basic Need funding available to spend in 2018/19	£13,995,524
Earmarked Schemes for 2019/20	£7,751,324
Proposed Changes	£1,322,000
Unallocated as at 31 May 2019	£4,922,200

- 1.4 On 5 October 2017, the Government announced that the 2019/2020 allocation of Basic Need Funding for Tameside Council would be £4,842,699. An amount of £1,064,699 of this allocation was received in March 2019.
- 1.5 On 29 May 2018, the Government announced the 2020/2021 allocation of Basic Need Funding and announced that Tameside Council would receive no further allocation.
- 1.6 The balance of the Basic Need funding is profiled to be spent during this year and next in order to deliver the required additional school places by September 2019 and 2020.
- 1.7 The current focus of the Council's Basic Need programme 2019/2020 is to create additional places in secondary schools where forecasts have indicated a requirement.
- 1.8 Work is currently on-going to ensure that sufficient places are available in both Primary and Secondary Schools for September 2019 where forecasts have indicated a requirements and following previous Council decisions. A summary of the major schemes is set out below:
- 1.9 One of the key projects was to undertake works to enable an increased pupil intake from 155 to 180 additional pupils at Alder High School.
- 1.10 It was intended that these works would be procured through Pyramid Schools (Tameside) Limited, the PFI Special Purpose Vehicle (SPV), which was set up in 2002 to deliver the original schools project. The SPV was originally owned and managed by Interserve plc. Interserve Facilities Management (Interserve FM) continue to provide lifecycle and maintenance services to the SPV under an FM Sub-contract. Albany Management Services (Albany) provide contract and management services to the SPV.
- 1.11 Significant internal alterations were successfully carried out over summer 2018 to enable the first year of additional pupils to be suitably accommodated. However it became clear that a longer term solution was required due to the increase in pupils on the roll.
- 1.12 Final costs were identified to construct a traditional-build four-classroom extension. These costs were agreed last summer and the works were ordered from the SPV on 30 August 2018. Following a procurement process, a new risk emerged associated with the financial stability of Interserve FM, which would be the entity placing the build contract, so the decision was taken not to progress the original plan but to open up discussions with an

alternative contractor. Cost negotiations proceeded but unfortunately the contractor ultimately declined to proceed.

- 1.13 Following a competitive tendering process with a preferred build contractor it became evident that a traditional build solution would not be deliverable before the start of the 2019/20 Academic Year. Following Vear's withdrawal from the process in April 2019, alternative delivery models were considered. They included a modular build solution.
- 1.14 Pyramid appointed Prosiect Consult Limited (Prosiect) as Project Manager for the variation to the scheme, due to capacity constraints within Albany, Pyramid's Management Service provider. The works were split into two packages:
- Package A- installation of 4 number modular units (completion by 02.09.19).
 - Package B- link corridor to existing facility & new reception area (to be completed during the summer of 2020).
- 1.15 Two compliant bids were received and it was agreed between all parties (TMBC, Pyramid, Albany and Prosiect) that discussions should continue with Elite, who are on the OJEU-compliant Crown Commercial Services framework, to ensure that, amongst other things, costs were within budget and the programme for Package A would be completed in time for the commencement of the Autumn term with Package B to follow.
- 1.16 At a meeting on 19 June 2019 held it was agreed that:
- A Deed of Variation would be prepared to encapsulate the Variation, including an exception to Deductions, caused as a direct result of the build works, and the consequential implications in respect of lifecycle, maintenance and soft services;
 - Temporary footpath closure would have to be undertaken to ensure vehicular access to the site (new classroom location);
 - Detailed site investigation would be undertaken;
 - Licence granted to Elite to undertake the works;
 - A separate access to the site would be prepared to allow the SPV to continue with their lifecycle / summer works;
 - TMBC would commit £5k towards progressing the design works at this stage (included within budget);
 - TMBC could not place the order with Elite and that the order / build contract should be placed by Pyramid in accordance with the contractual variation procedure;
 - Clerk of works to be appointed;
 - A standard form JCT contract would be used as the build contract;
 - A warranty would be provided by Elite for 25 years;
 - Detailed maintenance and lifecycle costs to be worked up;
 - FF&E to be agreed and ordered by the school.
- 1.17 It had been agreed that the procurement route would follow the process contemplated by the Project Agreement and SOPC4 Variation Procedure namely Pyramid would procure a Project Manager and Build Contractor and that if appropriate TMBC would pay the Build Contractor directly to avoid any concerns around payment. It was confirmed that both shareholders' approval had been obtained to this route (Aberdeen Asset Management and Dalmore Capital). However on 26 June, following a call from SPV's lawyers it was explained that the time it would take to draft and get the approvals to the variation would mean the program was no longer achievable for a September opening. Additionally the Council were advised that Pyramid required:
- the funding for the variation to be placed in an account to avoid any payment issues; and
 - "indemnities" and in particular to be held harmless from the effect of the construction – for example receive no deductions for matters caused by the building works that impacted on their ability to deliver services.

2. CURRENT POSITION STATEMENT

- 2.1 Unfortunately, the SPV has been unable to deliver on their contractual obligations and have, over the last twelve months, cited the following as barriers to delivery:
- a. Financial instability of Interserve
 - b. Inability to deliver modular accommodation to site
 - c. Indemnification requested from the Council
 - d. Capacity of supply chain
 - e. Programme constraints
 - f. Concerns over the lease and under lease structure for the project (a licence was granted during the initial build phase and the PFI Contract provided for a lease to be granted by the Council to the SPV, with an under-lease granted back to the Council)
- 2.2 The Council has worked proactively, with all parties, to remove these barriers, which had resulted in a contractually compliant solution being agreed. Albany previously confirmed that the agreed procurement route would have secured the delivery of the additional school places by September 2019 as required.
- 2.3 At the end of June 2019, however, the SPV stated that due to issues regarding the time it would take to negotiate the build contract, exemptions from deductions under the PFI Contract, the Deed of Variation and funders consent, the only option for delivery was for the Council to underwrite the costs directly with Elite Systems, a local modular accommodation supplier who had been recommended by the SPV following market testing.
- 2.4 During these discussions the SPV's recommendation for delivery of the works is as follows:
- a) The Council underwrite the costs with Elite, with payments flowing directly from the Council to Elite on agreed staged payment.
 - b) Letter of indemnity provided by Council to Pyramid to protect against deductions/termination and any direct losses as a result of the construction works.
 - c) Deed of Variation prepared which allows the new build to revert to the SPV at practical completion and which amends the FM Sub-contract to include for new classrooms.
 - d) Funder's consent would be obtained on the basis of a de-risked project as TMBC would effectively be taking construction risk albeit construction risk should be passed down to the build contractor.
- 2.5 A letter of comfort was issued to Elite Systems to enable the project to be undertaken and the timetable is to remain deliverable – **Appendix 1**.
- 2.6 This letter of comfort and proposed procurement route is based on the fact that there is no other option to achieve the Council's statutory obligation to deliver additional school places, at Alder High Community School, by September 2019.
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3 NEXT STEPS

- 3.1 In order to ensure that the work progresses to deliver much needed space for the new intake at Alder High School it is necessary to provide:
- 3.2 A licence for Elite, the contractor, to go on site and undertake the works in the form set out in **Appendix 2**.
- 3.3 An indemnity for the SPV (Pyramid) to ensure they carry no risk during the construction phase whilst they seek funder approval to the variation in the form set out in **Appendix 3**.

- 3.4 The next steps will be to agree the variation to ensure going forward the additional classes are an integrated part of the existing contractual arrangements.
- 3.5 Although the immediate priority is to secure a solution to deliver the additional school places by September 2019 it is critical that SPVs performance continues to be monitored and documented and appropriate action taken, for failures in performance.

4. RECOMMENDATION

- 4.1 Recommendations are set out at the front of the report.