

Finance and Resources Committee

3pm Tuesday, 4 December 2018

Edinburgh Schools Partnership - Settlement

Item number	7.20
Report number	
Executive/routine	
Wards	
Council Commitments	

Executive Summary

This report seeks the authority of the Finance and Resources Committee to enter into a settlement agreement with the Edinburgh Schools Partnership (“ESP”) on the material terms set out in this report. Some further legal and financial detail is provided in the confidential appendix to this report on the B Agenda for this Committee.

This report also provides an update on progress with regard to rectification of defects within the PPP1 estate by ESP and their sub-contractors.

Edinburgh Schools Partnership – Settlement

1. Recommendations

- 1.1 The Finance and Resources Committee is asked to:
 - 1.1.1. authorise the Chief Executive to enter into a settlement agreement with ESP on the material terms set out in this report and the confidential appendix to this report on the B Agenda for this Committee;
 - 1.1.2. note the progress made in relation to the rectification works carried out at the PPP1 schools; and
 - 1.1.3. approve the terms of the new inspection and monitoring regime in place throughout the PPP1 estate.

2. Background

- 2.1 The Council entered into a Project Agreement with ESP in November 2001 in terms of which ESP undertook to design, construct, refurbish and provide facilities management services to the Council in respect of certain Edinburgh schools (the “PPP1 Schools”).
- 2.2 In January 2016 the external gable wall of Oxfangs Primary School collapsed following high winds. The investigations following this collapse identified a number of underlying structural defects at Oxfangs Primary School. Further checks revealed that similar building defects existed across the PPP1 estate.
- 2.3 The Council required ESP and its subcontractors to rectify the defects in the schools. These works required the PPP1 Schools to be closed in order to enable the remedial works to be carried out.
- 2.4 A full independent review into this matter was carried out by Professor John Cole, who reported his findings to Council in February 2017. During this review, further issues were identified, including concerns related to fire protection and the lack of building warrant certificates for two of the schools.
- 2.5 In April 2018, further issues with the roof were discovered at Oxfangs which resulted in further inspections being required across the PPP1 estate.

3. Main report

Dispute

- 3.1 The issues noted above led to a formal dispute between ESP and the Council in relation to ESP's contractual liability in respect of these matters.
- 3.2 Discussions and negotiations have continued with ESP following the school closures in 2016 in respect of responsibility and liability for the various rectification costs and losses arising.

Progress of works and building certification

- 3.3 ESP completed certain remedial works to the structural elements of the schools in 2016 in order that children could safely return to these schools.
- 3.4 It was agreed that the other defects (fire protection works and the obtaining of building control certificates (or equivalent)) would be remedied as soon as possible.
- 3.5 The fire protection works have taken longer than expected due, in part, to the need to limit disruption to ongoing school activities. In addition, demand for fire protection related expertise has increased dramatically following the Grenfell tragedy.
- 3.6 The Council has retained its own fire protection experts to provide additional independent assurance in relation to the processes being followed by ESP and its contractors in remedying the defects.
- 3.7 Positive progress has now been made and ESP have confirmed that the fire protection remediation works identified as being required at all the PPP1 schools has been completed. This is being confirmed by final checks by the Council's own fire protection experts.
- 3.8 In relation to Royal High and Craigmount High schools, Council Building Standards staff are working with ESP to arrange for appropriate certification to be granted following final inspection.

Costs incurred

- 3.9 To date the Council has incurred significant costs. This includes cost of the decants, buses, temporary classrooms, extra staff costs and advisers' fees.

Financial disputed matters

- 3.10 In 2016 the Council made significant deductions to the monthly charges due under the contract. A dispute arose with ESP as to whether these deductions were either contractually valid and/or correctly calculated. Further detail is provided in the confidential appendix to this report on the B Agenda report to this Committee.
- 3.11 As is common with many long-term contracts, there have been changes in the contractual position since 2001, with additional building works undertaken and new arrangements agreed between staff at the time in relation to matters such as lifecycle costs and catering.

- 3.12 In recognition of the fact that the contract with ESP still has a significant period (15 years) to run and that there is a complex contractual position, the Council and ESP entered into detailed discussions to see whether settlement terms could be agreed to avoid formal litigation.
- 3.13 From the Council's perspective, settlement could in no way cut across the requirement for the buildings to be fully rectified and maintained as safe for occupation. This has remained the case throughout.
- 3.14 In turn, ESP have had to have commercial discussions with those of their partners and subcontractors who would be affected by any such proposed settlement.
- 3.15 Following lengthy and complex discussions, which has required the Chief Executive and other senior officers to correspond directly with ESP's sub-contractors, settlement terms have been proposed. The key proposed terms are as follows:
- 3.15.1 all structural and other defect rectification works will have been carried out at the sole expense of ESP or their subcontractors. It is understood that the cost of this is very significant.
- 3.15.2 in respect of the structural building defects and fire related works, the Council will be entitled to retain an agreed sum.
- 3.15.3 the Council and ESP agree to split the catering bill for the school closures period to reflect the fact that all affected children were fed during the period, not just those entitled to the free school meals.
- 3.15.4 ESP will agree to open the PPP1 buildings for longer hours at no cost to the Council on an ad-hoc basis to allow the PPP1 buildings to be used for sports and other activities (approx. an extra 8-9 hours per week).
- 3.15.5 Previous un-invoiced charges for lifecycle costs since the contract commenced will be settled.
- 3.15.6 The parties have agreed further contractual requirements for Amey (ESP's facilities management subcontractor) to report performance or service failures to the helpdesk and agree that they will discuss and agree any proposed changes to that performance reporting requirement moving forward (subject to the Council being satisfied with any such changes).
- 3.15.7 The parties have agreed an additional independent inspection and reporting system to provide both ESP and the Council with further assurance as to the performance of Amey. This addresses the Council motion approved in May 2018 and further detail is provided below.
- 3.15.8 The parties have agreed to work together to simplify the current catering payment mechanism.
- 3.16 Accordingly, the overall sum retained by the Council exceeds the associated closure related costs and this is in addition to the significant benefits of clarified reporting obligations, additional inspections, continuing good relationships, additional opening hours for the facilities and the avoidance of costly litigation for

both parties. Further detail is provided in the confidential appendix to this report on B agenda for this Committee.

- 3.17 To keep the Scottish Government informed, Scottish Futures Trust have been updated as to progress.

Ongoing inspection regime

- 3.18 Concerns were again raised about the confidence which the Council could have in the PPP1 inspection and maintenance regime when a roof flashing came loose at Oxfangs earlier in 2018. A Council Motion was approved on 3 May 2018 which, in summary, set out the following requirements:

3.18.1 ensure that ESP deliver their contractual obligations and require regular inspection of all PPP1 schools by an independent surveyor in addition to checking any remedial works which are carried out; and

3.18.2 Finance and Resources Committee are to approve the new inspection regime as set in this report and for the outcome of said inspection reports to be publicly available.

- 3.19 In addition to Amey's requirements to inspect and report any issues, the Settlement Agreement incorporates various negotiated amendments, the effect of which is to materially tighten ESP and Amey's inspection, maintenance and reporting obligations throughout the PPP1 school estate. This includes an independent technical party auditing, monitoring, and reporting on both the performance and reporting of the operational services being provided by the facilities management contractor (Amey) in relation to the PPP1 estate. Importantly, it also significantly improves the Council's oversight and monitoring capabilities.

- 3.20 This new regime includes quarterly checks on Amey's monitoring of, and compliance with, the contract, coupled with random or targeted sampling of the works and services undertaken by Amey. This will all be at ESP's expense. The Council will be a joint client, entitled to access to the reports at the same time as ESP. The first such inspections will be by 31 December 2018.

- 3.21 In order to comply with the Council Motion requirements set out above, it is proposed that an annual report by AECOM summarising the relevant quarterly report's findings and any associated actions will be available to be made public as required.

- 3.22 This checking regime will give both ESP and the Council further comfort that Amey's contractual obligations are being properly complied with.

Other matters

- 3.23 The May Council motion also requested:

3.23.1 an outline of what contact there has been with ESP shareholders and their role in ensuring that ESP meets the expectations of the council and school communities. Council officers can confirm that they have had regular

ongoing contact with the ESP shareholders, both directly and through their delivery managers, Infrastructure Managers Limited.

- 3.23.2 arrangements in future years for rigorous contract performance monitoring. Ongoing monitoring through the PPP Contract Management team in Corporate Property and Facilities Management, together with the quarterly inspections by AECOM, will ensure rigorous contract performance monitoring. Any other issues identified and reported will be swiftly dealt with.
- 3.23.3 the extent to which arrangements for new school procurement now take account of lessons emerging from these PPP1 contracts. Details of the response to the recommendations of the Cole report are reported to Corporate Policy and Strategy Committee and these reports contain further details of these arrangements.

4. Measures of success

- 4.1 The Council has a PPP1 school estate which has been remedied in respect of both the original defects and those subsequently identified. It will be inspected and maintained more effectively and efficiently moving forward.
- 4.2 The Council obtains the benefit of further opening hours and clarity on other important rights under the contract.
- 4.3 The Council receives appropriate financial recompense for the direct and indirect impacts of the disruption caused.

5. Financial impact

- 5.1 The settlement sum exceeds the costs incurred by the Council. Any residual sums have been earmarked to take forward any necessary remedial works in buildings across the Council estate of similar construction to the PPP1 schools.

6. Risk, policy, compliance and governance impact

- 6.1 Not accepting the settlement terms creates a risk for the Council of a lengthy and costly litigation with the current contractor. Whilst the Council has robust legal advice on its position, litigation has no certainty of outcome.

7. Equalities impact

- 7.1 There are no equalities impacts arising directly as a result of this report.

8. Sustainability impact

8.1 There is no anticipated sustainability impact arising directly as a result of this report.

9. Consultation and engagement

9.1 None.

10. Background reading/external references

- 10.1 [City of Edinburgh Council 3 May 2018 - Motion Item 9.18 - Schools Inspection and Maintenance Regime](#)
- 10.2 [City of Edinburgh Council 9 February 2018 - Edinburgh Schools Report](#)
- 10.3 [Report of the Independent Inquiry into the Construction of Edinburgh Schools](#)
- 10.4 [Corporate Policy and Strategy Committee 5 December 2017 - Edinburgh Schools Inquiry Report](#)
- 10.5 [Corporate Policy and Strategy Committee 14 June 2016 - Edinburgh Schools Independent Inquiry](#)
- 10.6 [Corporate Policy and Strategy Committee 17 May 2016 - Edinburgh Schools Report](#)

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11. Appendices

Confidential Appendix on the B Agenda for this Committee on 4 December 2018