

**Proposed Variation to Project Agreement dated 30 March 2001 to expand  
Barlby Community Primary School**

**REPORT TO** the Corporate Director Children and Young Peoples Service (CYPS);  
Stuart Carlton and the CYPS Executive Member.

**DECISION DATE:** 1 November 2022

**PROPOSED RECOMMENDATION**

It is recommended that Authority is given by the Corporate Director – Children and Young People’s Service to enter into the Deed of Variation and related documents comprising:

- Deed of Amendment to Private Finance Initiative (PFI) Project Agreement with further amendments requested by the lenders. The further amendments relate to the following issues:
    1. During construction performance and unavailability deductions will not apply to the whole site.
    2. Unavailability deductions cannot be charged on the new build classroom block and this includes any time post construction; this will not be limited to the defects liability period. Unavailability deductions will apply to the rest of the site; an exception is that if Latent Defects are found in the Hall extension deductions should not apply to Hall. These defects will be rectified by Triton/GFM.<sup>1</sup>
    3. If the Council need to take enforcement action against the builder, the Council would name borrow from the SPV<sup>2</sup> to pursue the builder. This is the Council’s sole remedy and the Council should indemnify the SPV from cost, damage or counter challenge from such action.
  - Contractor collateral warranty to Authority
  - Architect Collateral Warranty to Authority
  - Civil & Structural Engineer Collateral Warranty to Authority
  - Mechanical & Electrical Engineer Collateral Warranty to Authority
  - Certificate issued pursuant to Local Government (Contracts) Act 1997
  - Notices of assignment
- i. approving the terms of the revised and updated variation documents to which it is party and consenting to the transactions contemplated by such documents;
  - ii. authorising the Assistant Chief Executive Legal and Democratic or persons authorised by them to seal the variation documents to which the Authority is party, in each case in accordance with its Constitution.

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<sup>1</sup> Triton Construction Ltd – principal contractor for the building works; GFM – Grosvenor Facilities Management Limited, the company providing facilities management for the school, including repairs and maintenance, as part of the PFI contract,.

<sup>2</sup> SPV – The Special Purpose Vehicle (Grosvenor House North Yorkshire), a subsidiary company set up to isolate financial risk and protect the asset.

## **BACKGROUND TO SUPPORT THE RECOMMENDATION**

The County Council's Executive authorised the expansion of Barlby Community Primary School through reports on 24 May 2016 (Planning of School Places – Basic Need Programme 2015-2018 Appendix A) and 24 June 2018 (Planning of School Places – Basic Need Programme 2018-2021, Appendix B) including funding for the scheme and that expansion would be delivered by the Private Finance Initiative company that manage the school. The Basic Need Capital Programme 2022/25 report approved by the Executive on 15 March 2022 reaffirmed the budget commitment.

The Corporate Director – Children and Young People's Service has power to exercise all functions of the LEA and to enter into contracts to facilitate service delivery. (Scheme of Delegation 3.3 and 4.2 (a)).

Barlby Community Primary School was constructed under the Private Finance Initiative (PFI). It is now proposed to vary the Project Agreement dated 30 March 2001 to expand Barlby Community Primary School.

The need to expand the school has arisen from new housing within the catchment area of the school. Part of the funding for this scheme has been provided by housing developers through Section 106 developer contributions for infrastructure arising from the need created by the housing development. The remainder of the funding required is coming from Basic Need funding for pupil growth allocated by central government to the County Council.

The Corporate Director gave officers authority to enter into the Deed of Variation and related documents on 11 February 2020 (key decision record CYP10/20) when tender evaluation was now underway in relation to the proposed expansion. Prior to the awarding of the contract, the PFI contractor also requires the Council to certify the contract. The proposed expansion is subject to a Deed of Variation to the PFI contract, which it is recommended be approved by Corporate Director CYPS and signed by both parties. This is required by the PFI provider to be certified pursuant to the Local Government (Contracts) Act 1997.

A contractor has now been chosen, the contractual documentation is being finalised and a schedule of works produced.

Following a request from the Lender to further vary term of the PFI agreement, on 13 October 2020, the Corporate Director Children and Young People's Service was given authority to enter into the Deed of Variation and related documents (decision record CYP35/2020) as set out below:

1. During construction performance and unavailability deductions will not apply to the whole site.
2. During the 12 month Defects Liability Period performance and unavailability deductions will apply to the whole site with the exception of the new build areas.
3. If the Council need to take enforcement action against the builder, the Council would name borrow from the SPV to pursue the builder.

A late request has now been received from the Lender to further vary terms of the PFI agreement as set out below:

1. During construction performance and unavailability deductions will not apply to the whole site (as previously).
2. Unavailability deductions cannot be charged on the new build classroom block and this includes any time post construction; this will not be limited to the defects liability period. Unavailability deductions will apply to the rest of the site; an exception is that if Latent Defects are found in the Hall extension deductions should not apply to Hall. These defects will be rectified by Triton/GFM.
3. If the Council need to take enforcement action against the builder, the Council would name borrow from the SPV to pursue the builder. This is the Council's sole remedy and the Council should indemnify SPV from cost, damage or counter challenge from such action

In terms of the issue of unavailability deductions, there have been only two cases since 2008 where we have claimed unavailability in North Yorkshire PFI schools. Both were at other schools to Barlby and the deduction values were very small. Given that the concession period ends in 2027, there will only be 5 years at most and maintenance and lifecycle in the school have been suitably addressed to date and are to be the focus of the handover process which has recently commenced. We therefore consider that the risk of accepting these variations in terms is considered low. Negotiations have taken place with the Lender and it has become clear that if we seek to further negotiate this will not necessarily improve the terms and will have the effect of causing further delay to a time sensitive and high profile project.

While the building contractor will use all reasonable endeavours to prevent the construction works impacting on the operation of the school site, the Lender is seeking protection against this across the whole site during the construction period, and in the new build areas following handover.

## **LEGAL AND GOVERNANCE COMPLIANCE**

The County Council's Executive authorised on 4 February 2020 for the Assistant Chief Executive Legal and Democratic Services to issue the certificate under the Local Government (Contracts) Act 1997 to confirm the County Council's powers to enter into the Deed of Variation in respect of the proposed expansion of Barlby Community Primary School and that an indemnity be given by the County Council to the Assistant Chief Executive Legal and Democratic Services, against any claim that may arise out of or in connection with the issue of the certificate under the Local Government (Contracts) Act 1997.

## RECOMMENDATION

It is recommended that Authority is given by the Corporate Director – Children and Young People’s Service to enter into the Deed of Variation and related documents comprising:

- Deed of Amendment to PFI Project Agreement with further amendments requested by the lenders. The further amendments relate to the following issues:
    - 1. During construction performance and unavailability deductions will not apply to the whole site (as previously).
    - 2. Unavailability deductions cannot be charged on the new build classroom block and this includes any time post construction; this will not be limited to the defects liability period. Unavailability deductions will apply to the rest of the site; an exception is that if Latent Defects are found in the Hall extension deductions should not apply to Hall. These defects will be rectified by Triton/GFM.
    - 3. If the Council need to take enforcement action against the builder, the Council would name borrow from the SPV to pursue the builder. This is the Council’s sole remedy and the Council should indemnify SPV from cost, damage or counter challenge from such action
  - Contractor collateral warranty to Authority
  - Architect Collateral Warranty to Authority
  - C&S Engineer Collateral Warranty to Authority
  - M&E Engineer Collateral Warranty to Authority
  - Certificate issued pursuant to Local Government (Contracts) Act 1997
  - Notices of assignment
- i. approving the terms of the revised and updated variation documents to which it is party and consenting to the transactions contemplated by such documents;
- ii. authorising the Assistant Chief Executive Legal and Democratic or persons authorised by them to seal the variation documents to which the Authority is party, in each case in accordance with its Constitution.

Report prepared by John Lee, Strategic Planning Officer