



RHONDDA CYNON TAF COUNTY BOROUGH COUNCIL

CABINET

24TH SEPTEMBER 2020

21ST CENTURY SCHOOLS AND COLLEGES PROGRAMME – MUTUAL INVESTMENT MODEL (MIM) 21ST CENTURY SCHOOLS WELSH EDUCATION PARTNERSHIP – STRATEGIC PARTNERING AGREEMENT (SPA)

REPORT OF THE CHIEF EXECUTIVE IN DISCUSSION WITH THE CABINET MEMBER FOR EDUCATION (COUNCILLOR MRS J ROSSER)

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1. PURPOSE OF THE REPORT

The purpose of the report is to:

- 1.1 Provide Members with an update on the Mutual Investment Model (MIM) funding element of Welsh Government's 21st Century Schools and Colleges Programme.
- 1.2 Inform Members of progress Welsh Government has made in procuring a private sector partner to assist with the delivery of education and community facilities in Wales, under the MIM 21st Century Schools and Colleges Programme.
- 1.3 Explain the process and seek Cabinet approval to enter into a Strategic Partnering Agreement with Welsh Education Partnership Co (WEPCo) to facilitate the delivery of education and community facilities. Cabinet are also asked to approve the appointment of Andrea Richards, Temporary Service Director for 21st Century Schools and Transformation and / or Dave Powell, Director of Corporate Estates as 'Participant Representative' to sit on the Strategic Partnering Board.
- 1.4 Request approval to submit the Strategic Outline Business Case for three initial MIM Pathfinder Projects to the Welsh Government. The three Pathfinder Projects are Llanilltud Faerdref Primary School, Pontyclun Primary School and Penygawsi Primary School.
- 1.5 To note that approval to enter into a Project Agreement for any of the Pathfinder Projects will be brought back to Cabinet in future for determination and that agreeing to enter into the Strategic Partnering

Agreement does not commit the Council to enter into contractual arrangements in relation to any projects.

2. RECOMMENDATIONS

It is recommended that Cabinet:

- 2.1 Note the outcome of the Preferred Bidder Stage of the Competitive Dialogue Procedure under the Public Contracts Regulations 2015 as outlined in this report.
- 2.2 Agree to be a party to the execution, delivery and performance of the Strategic Partnering Agreement with the Welsh Education Partnership Co (WEPCo) in September 2020 to facilitate the delivery of a range of infrastructure services and the delivery of education and community facilities.
- 2.3 Approve the Strategic Partnering Agreement at exempt Appendix A of this report and summarised in paragraphs 4.6 to 4.16 and Appendix 1 of this report.
- 2.4 Note that the Strategic Partnering Agreement shall be executed as a deed and attested in accordance with Article 14.05 of Part 2 of the Council's Constitution;
- 2.5 Agree to approve Andrea Richards, Temporary Service Director for 21st Century Schools and Transformation and / or Dave Powell, Director of Corporate Estates for appointment as 'Participant Representative' to sit on the Strategic Partnering Board (SPB);
- 2.6 Agree to begin the Approval Process for New Projects as set out in Schedule 5 of the Strategic Partnering Agreement for the delivery of new school buildings and for a Strategic Outline Business Case for three initial Pathfinder Projects be submitted to the Welsh Government. The three Pathfinder Projects are Llanilltud Faerdref Primary School, Pontyclun Primary School and Penygawsi Primary School. A further report regarding funding arrangements will be brought back to Council for approval at a future date.
- 2.7 Note that formal approval to proceed to deliver any new project including a Pathfinder Project, and to enter into associated legal documentation to facilitate the same including a Project Agreement, would require further approval of the Cabinet

3 REASONS FOR RECOMMENDATIONS

- 3.1 These recommendations continue the Council's ambitious school modernisation agenda and these recommendations are aligned with the 21st Century Schools and Colleges Programme funding criteria. The priorities for this investment are:
- Addressing growth in demand for Welsh medium education
 - Reducing surplus capacity and inefficiency in the system
 - Expansion of schools in areas of increased demand for educational services
 - Addressing condition of educational assets
 - Making assets available for community use where demand exists, to optimise the infrastructure and resources for public services
 - Addressing specific demand for places in Faith Based provision.
- 3.2 To access revenue funding from the 21st Century School and Colleges programme for Band B projects the Council will need to use the Mutual Investment Model (MIM) to access the funding, and WEPCo for delivery. There are no alternative delivery options for such funding.
- 3.3 For projects funded through MIM, Welsh Government finance up to 81%, with the balance of 19% being funded by the Council.

4. BACKGROUND

- 4.1 Members will recall on 18th July 2017, a report was put before Cabinet where members approved the submission of the Strategic Outline Programme (SOP) for Band B of the Welsh Government's 21st Century Schools and Colleges Programme. As stated in the report, Band B has two different funding routes – a capital funding route and a revenue funding route.
- 4.2 The Mutual Investment Model (MIM) is the revenue funding route which enables investment up to a capital value of £500 million across the whole of Wales.
- 4.3 MIM is a platform for delivery of the "Taking Wales Forward" agenda. MIM has been designed to finance major capital projects due to a scarcity of capital funding. It is based on traditional PPP structures but with the following core principles embedded:
- an emphasis on wider community benefits;
 - enhanced stakeholder involvement;
 - public sector equity investment;
 - no soft services; and
 - effective and efficient contract management by the public sector.

- 4.4 The MIM is intended to support additional investment in social and economic infrastructure projects and help to improve public services in Wales. Under the MIM, the private sector partners will build and maintain public assets, and in return the Council supported by funding from the Welsh Government will pay a fee to the private partner, which will cover the cost of construction, maintenance and financing the project. At the end of the contract the asset reverts to the Council.
- 4.5 The Welsh Government has been procuring a private sector partner to work in partnership on the delivery of education and community facilities in Wales, under the MIM 21st Century Schools and Colleges Programme. It will be the only means of delivering revenue funded Band B projects. The Welsh Government has selected a preferred bidder, namely Meridiam Investments II SAS (“Meridiam”). The successful private sector partner and a subsidiary of the Development Bank of Wales (known as WGCo) will be required to form WEPCo, which will deliver infrastructure services to the Participants in Wales.

The Strategic Partnering Agreement (SPA)

- 4.6 The Participants to the arrangements will be a number of Local Authorities and Further Education Institutions. The Participants and WEPCo will enter into a Strategic Partnering Agreement (SPA). The SPA provides the framework and procedures for ensuring that the parties effectively engage over the long term in a collaborative partnering, non-adversarial and open manner to support the effective planning, procurement and delivery of education and community facilities in Wales and the delivery of infrastructure services. The SPA is due to be signed in September 2020.
- 4.7 Under the Strategic Partnering Agreement, WEPCo will be required to provide partnering services to the Participants, including (i) project development and delivery; and (ii) supply chain assembly and management. This may lead to the delivery of revenue supported Band B projects pursuant to a separate Project Agreement or, in due course, capital funded projects could be delivered through this contract structure.
- 4.8 The initial term of the SPA is 10 years. This may be extended by 5 years by any one or more Participants. Under the SPA, WEPCo is required to provide partnering services to the Participants. These services include (i) project development and delivery; (ii) supply chain assembly and management and (iii) other professional services necessary to fund and deliver education and community facilities.

4.9 For the first 10 years of the SPA, WEPCo has the exclusive right to provide services to all Participants (as signatories to the SPA) including:

- Project Development Partnering Services to work up new “Qualifying Projects” (only) for delivery (including supply chain assembly, funding and value for money), set out in more detail in Schedule 3 (Partnering Services) of the SPA; and
- Project Services (design, construction, testing, commissioning and completion of the premises, hard facilities management, and installation of equipment) relating to a “Qualifying Project” subject to it becoming an “Approved Project” within the first 10 years of the SPA and for a MIM Band B project, provided that it has met the criteria set out in Schedule 5 (Approval Process for New Projects) of the SPA.

4.10 “Qualifying Projects” means those identified projects at the outset for delivery by WEPCo and all other 21st Century Schools and Colleges (Band B) MIM Programme projects, where such a project has been identified by a Participant required to enable them to provide education based services in the region.

4.11 Participants may also ask WEPCo to provide additional services, including:

- Project Services relating to capital projects required for the provision of education sector services (where expressly designated and approved under a Strategic Outline Programme) and/or community services;
- Strategic Support Partnering Services (such as estate planning, service planning and demonstrating value for money);
- Project Development Partnering Services in respect of potential new projects, which are not “Qualifying Projects”, but requested by a Participant;
- Ongoing Partnering Services and/or Project Development Partnering Services after ten years, where the initial term of the SPA has been extended; and
- Project Services in respect of Qualifying Projects which become “Approved Projects” after 10 years, where the initial term of the SPA has been extended.

4.12 If a Participant receives funding for a 21st Century Schools and Colleges Band B MIM Programme project, WEPCo has the exclusive

right to develop proposals for the delivery of that project (Project Development Partnering Services) within the first 10 years of the SPA.

- 4.13 Therefore, the most likely outcome for a Participant that becomes a party to the SPA is that they proceed to develop a project or projects using the Approval Process in the SPA resulting in the execution of a Project Agreement which will govern the design, build, finance and maintenance of schools or colleges.
- 4.14 Appendix 1 provides a more detailed summary of the SPA.
- 4.15 The SPA commits the Participants (i.e. the Council) and WEPCo to work to the following nine (9) key principles:
- to develop close working relationships between WEPCo and the Participants at all levels;
 - to focus on achieving the best value for money operational performance within agreed timescales;
 - to set in place business and cultural processes to enable the Participants and WEPCo to establish and agree challenging time and performance objectives and to meet or better them;
 - to recognise each other's needs, constraints, limitations, capabilities, roles and responsibilities to achieve mutually beneficial outcomes;
 - to identify by regular monitoring, weaknesses and strengths in the relationship between and amongst the Participants and WEPCo and to work together to overcome the weaknesses and to build on the strengths;
 - to commit to the early recognition and resolution of differences, conflicts and disputes between and amongst the Participants and WEPCo in a 'no surprises' environment;
 - to appoint within each of the Participants and WEPCo coordinators at senior level who will support, defend and promote the long term strategic partnership between them and its principles of operation;
 - to develop openness and trust in a transparent information and data sharing environment; and
 - in accordance with the Equality Requirements to positively promote equal opportunities and the Ethical Employment Code by combating discrimination on the grounds of race, ethnicity,

religion, nationality, gender, disability, age or sexuality and promoting good relations between all sections of the community in 'everything we do' including:

- a) Delivering high quality Education Sector Services and (where relevant) Community Services for end users; and
- b) Working with the local community and partners in the public, private or voluntary sectors.

4.16 The Strategic Partnering Board (SPB) will be the guardian vehicle of these commitments.

The Strategic Partnering Board (SPB)

4.17 The SPB will act as the primary mechanism for managing WEPCo's performance. The SPB will be the central forum in which the Participants can work together with WEPCo, Welsh Government and Stakeholder Representatives to ensure that the key principles of the SPA are met. Participant representation will be required on the SPB and is proposed to be Andrea Richards, Temporary Service Director for 21st Century Schools and Transformation and / or Dave Powell, Director of Corporate Estates.

4.18 The SPB's role will be to approve the Strategic Delivery Plan (SDP); ensure any new project proposals are consistent with the SDP; monitor WEPCo's performance against agreed Key Performance Indicators; approve any extension to the SPA term; and approve any proposed disposal of interest in share capital resulting in a loss of control by WEPCo (or subsidiary).

4.19 The Welsh Government have advised that the Council's Representative will be expected to be a senior representative of the Council, with the appropriate authority to make decisions on behalf of the Council. They should be experienced in holding a director or similar position and have the required skills to make the decisions required to be made by the SPB. Consideration will need to be given to any likely conflicts of interest and assurances given that conflicts of interest do not prevent the chosen representative from fulfilling their role as representative, as well as any other role they hold directly in the Council.

4.20 The Council's Representative will attend the SPB meetings at least every three months, together with representatives of each Participant, WEPCo, Welsh Government and other stakeholder representatives as agreed by the Participants. These meetings are to review financial and operating issues and provide strategic input into the partnering arrangements including the exchange of ideas in relation to each of the

Participants' accommodation and service delivery requirements. Appendix 2 provides a more detailed summary of the role of the SPB.

- 4.21 Given their current role within the Council and significant experience in delivering 21st Century School projects, it is recommended that Andrea Richards, Temporary Service Director for 21st Century Schools and Transformation and / or Dave Powell, Director of Corporate Estates undertake the role of Council's Representative on the SPB.

Pathfinder Projects

- 4.22 WEPCo shall, if requested to do so by one or more Participants, develop proposals for the implementation and delivery of new projects including Pathfinder Projects through the Approval Process for New Projects set out in Schedule 5 of the SPA. WEPCo will assist Participants in developing proposals for the delivery of new projects, the preparation of an outline business case and the obtaining of all necessary approvals to progress any new project request by a Participant.
- 4.23 The proposed first tranche of Pathfinder projects are three primary schools in the south of the County Borough. They are all in an area of rapid housing development, and are all in need of investment in order to become fully accessible and brought up to a 21st Century Schools' standard. All three have CLASP buildings on site, have issues with access and have come to the end of their useful life. The three schools are Llanilltud Faerdref Primary School, Penygawsi Primary School and Pontyclun Primary School.
- 4.24 The Welsh Government have used these three potential projects during the WEPCo procurement process as a way of market testing and challenging the interested bidders, and as a result have gathered a lot of data on each of the sites. If these three projects are to be the first to be delivered through MIM then the Welsh Government require a Strategic Outline Business Case to be submitted in the Autumn. It should be noted that none of these projects require a statutory school organisation consultation.
- 4.25 WEPCo will be obliged to meet the Participants' requirements for the delivery of any new project including Pathfinder Projects. Authority to proceed to deliver any new project including a Pathfinder Project, and to enter into a Project Agreement, would require further Council approval and reports will be brought back to Cabinet for determination accordingly.
- 4.26 Appendices 3a and 3b provide a more detailed summary of the Approval Process for New Projects under the SPA.

- 4.27 If agreed, these proposals will result in a significant investment in building new schools and delivering learning environments that will ensure learners have access to high quality 21st Century educational settings.
- 4.28 There is clearly a need to continue to significantly invest in the Council's educational assets, to provide equity so that all RCT pupils can benefit from 21st Century learning environments; to support the new curriculum for Wales; to facilitate broader pupil choice and enhanced pastoral support. The investment aims to create environments that meet individual needs and promote achievement and progression.

What Happens If Approval Is Not In Place By September 30th ?

- 4.29 Welsh Government has strongly encouraged Local Authorities and FEIs to sign up to the arrangements with WEPCo via the SPA regardless of whether they have a MIM Scheme in place as WEPCo also offers Strategic Support Partnering Services which can assist Participants with estates planning or associated activities.
- 4.30 The purpose of the SPA is to enable Participants to proceed to develop a project or projects using the Approval Process for New Projects within the SPA, resulting in the execution of a Project Agreement. In order to benefit from that process Participants need to execute and be a party to the SPA.
- 4.31 There is a mechanism within the SPA that will allow for those Participants (named in the OJEU) to sign up after September 2020 by way of a deed of adherence (**DoA**), although this will create delays:
- (a) Where any Participant is to sign the DoA this will require all existing parties to re-execute the SPA. This will require all Participants to take further decisions to re-enter the SPA, creating delays in the delivery of Pathfinder Projects
 - (b) Where any Participant is not signed up to the SPA by the September 2020 deadline, it is unlikely that they will have a Pathfinder Project or be included in the first Annual Business Plan of WEPCo. This will cause delays in the delivery of any education project

If a Participant were to choose not to sign the SPA or the Deed of Adherence (DoA) and then wanted in the future to access Partnering Services or Project Services from WEPCo, it will not be able to do so in a procurement safe manner.

- 4.32 Similarly, with regards to 21st Century Schools and Colleges Band B funding, if a Participant were to choose not to sign the SPA or the DoA but then wanted to utilise WEPCo to deliver a Band B funded project (whether capital or revenue) in the future, it will also not be able to do so in a procurement safe manner.
- 4.33 Should for example, a Participant secure MIM Band B funding downstream from the Welsh Government for a project not currently identified and it was required to use WEPCo, it would not be able to do so in a procurement safe manner if it had not signed the SPA or the DoA. WEPCo has the exclusive right to develop proposals for the delivery of a 21st Century Schools and Colleges Band B MIM Programme project (Project Development Partnering Services) within the first 10 years of the SPA.
- 4.34 It is therefore recommended that Cabinet approve entering into the SPA as set out this report to ensure that the SPA is completed in the Autumn as planned and that the Council is able to utilise the SPA from its go-live date and proceed with the three Pathfinder Projects.

The Procurement Process

- 4.35 The Welsh Government has been engaged in a competitive dialogue tender process. The aim of the competitive dialogue procedure was to enable the Welsh Government as the contracting authority to "identify the solution or solutions which are capable of meeting its needs". Comprehensive dialogue has been held with each of the Bidders during the Dialogue Process.
- 4.36 On 14th February 2020, three Draft Bids were received. These were reviewed and comments sent back on the Draft Bid submissions to inform the next stage of dialogue. On 20th February a "meet the Bidders" event was held at the Yr Hafod facilities in CP2, officers from the Council's Corporate Estates and Education and Inclusion Services departments were in attendance.
- 4.37 Bidders submitted their Bids by 12 noon on 27th April 2020 and compliant Final Tenders were received from the three bidders. Evaluation meetings took place remotely. Meridiam Investments II SAS ("Meridiam") have been appointed as Welsh Government's preferred bidder.

5. EQUALITY AND DIVERSITY IMPLICATIONS

- 5.1 An Equality Impact Assessment and a Children's Rights Impact Assessment will be completed for each project as a part of the Business Case submission process.

- 5.2 Cabinet Members will of course be fully aware and mindful of the general equality duty introduced by the Equality Act 2010 (the “Equality Act”) and the specific public sector equality duties applicable to the Council as a local authority in Wales.
- 5.3 In accordance with the Equality Act, the Council (and consequently Cabinet) when exercising its functions has a general duty to have due regard to the need to:
- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Equality Act;
 - advance equality of opportunity between people who share a protected characteristic and those who do not; and
 - foster good relations between people who share a protected characteristic and those who do not.
- 5.4 The duty covers the following eight protected characteristics: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Public authorities also need to have due regard to the need to eliminate unlawful discrimination against someone because of their marriage or civil partnership status.
- 5.5 The Equality Act outlines that having due regard for advancing equality involves:
- removing or minimising disadvantages suffered by people due to their protected characteristics;
 - taking steps to meet the needs of people from protected groups where these are different from the needs of other people; or
 - encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low.
- 5.6 In addition to the general duty the Council must:
- assess the likely impact of proposed policies and practices on its ability to comply with the general duty;
 - assess the impact of any policy which is being reviewed and of any proposed revision;
 - publish reports of the assessments where they show a substantial impact (or likely impact) on an authority’s ability to meet the general duty; and
 - monitor the impact of policies and practices on its ability to meet that duty.

5.7 Members will be aware that the Welsh language has official status in Wales which means that the Welsh language should not be treated less favourably than the English language in Wales. Any Equality Impact Assessment will consider the potential impact of any proposal on the Welsh language. Members should also have regard to the Council's [Welsh in Education Strategic Plan 2017-2020](#). Members will recall the [Cabinet report dated 9th April 2019](#) which outlines the Council's continued commitment to investing in Welsh medium provision and increasing the number of Welsh medium places within the county borough in line with Welsh Government's target of achieving one million additional Welsh speakers as detailed in 'Cymraeg 2050'. That report and the Council's WESP should be considered as background papers to this report.

5.8 We will seek the advice of the Welsh Language Commissioner in ensuring that the action taken in considering the EIQ and the WESP, is fully compliant with the Welsh Language Standards.

6. FINANCIAL IMPLICATIONS

6.1 If the proposals proceed they will be funded by the 21st Century Schools and Colleges Programme, through its MIM model of funding. This is a revenue model of investment which includes a contribution of up to 81% from Welsh Government. The remaining 19% will be funded by the Council.

6.2 As outlined above, this funding is subject to approval by the Welsh Government following the submission of the relevant Business Cases.

6.3 A report detailing the financial implications and the payment schedule will be presented to Council for approval once final project costs become available.

7. LEGAL REQUIREMENTS

7.1 Approval to enter into the Strategic Partnering Agreement (SPA) is an executive function requiring a decision of the Cabinet.

7.2 To enter into and participate in the SPA referred to in this report, the Council will be relying upon a number of statutory powers:

- the "well-being" powers contained in section 2 Local Government Act 2000;
- powers contained in the Education Acts 1996 and 2002;
- the "incidental" provisions of section 111 Local Government Act 1972.

- 7.3 The well-being powers contained in section 2 Local Government Act 2000 permit the Council to do anything which it considers is likely to achieve any one or more of the following objects:
- the promotion or improvement of the economic well-being of their area;
 - the promotion or improvement of the social well-being of their area, and
 - the promotion or improvement of the environmental well-being of their area
- 7.4 In exercising this power the Council has had regard to the requirements of the Well-Being of Future Generation (Wales) Act 2015 ('the Act'). The Act places a 'well-being duty' on public bodies aimed at achieving 7 national well-being goals for Wales - a Wales that is prosperous, resilient, healthier, more equal, has cohesive communities, a vibrant culture and thriving Welsh language, and is globally responsible.
- 7.5 The incidental provisions of section 111 Local Government Act 1972 permit the Council to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.
- 7.6 Entering into the SPA itself does not bind the Council in any way. However, there are certain requirements of the Council when proceeding with Projects as set out in this report and Appendices 1-3. Further, the Council will be required to appoint a representative to act on its behalf in relation to the SPA and the Cabinet is asked to approve the appointment of Andrea Richards, Temporary Service Director for 21st Century Schools and Transformation and / or Dave Powell, Director of Corporate Estates as 'Participant Representative' to sit on the Strategic Partnering Board . The identity of the representative may change at any time following written notice to WEPCo and all other Participants. Each representative may also at any time, by written notice to WEPCo, authorise others to exercise the functions and powers of the Council.
- 7.7 This report seeks authority to approve the use of the Approval Process for New Projects as set out in Schedule 5 of the SPA for the delivery of new school buildings for Llanilltud Faerdref Primary School, Penygawsi Primary School and Pontyclun Primary School as Pathfinder Projects.
- 7.8 It is noted that formal approval to proceed to deliver any new project including a Pathfinder Project, and to enter into associated legal documentation to facilitate the same including a Project Agreement, would require further approval of the Cabinet.

8. LINKS TO THE CORPORATE AND NATIONAL PRIORITIES AND THE WELL-BEING OF FUTURE GENERATIONS ACT

8.1 The Council's Corporate Plan commits to "Continue to invest in improving school buildings, to ensure the County Borough's pupils have the learning environment fit for the 21st Century."

8.2 The proposals considered in the report contribute to all 7 well-being goals within the Future Generation (Wales) Act 2015 and due regard has been made to the Five Ways of Working, as contained within the Wellbeing of Future Generations (Wales) Act 2015. This is evidenced below:

- A prosperous Wales
Improving educational outcomes and educational provision are priorities for every project delivered within the 21st Century Schools Programme, contributing to the development of a skilled and well-educated workforce.
- A resilient Wales
Newly constructed schools are built to BREEAM excellent standards and include features such as photovoltaic cells, rain water harvesting systems, and a biodiverse forest schools' area, contributing to a healthier natural environment.
- A healthier Wales
The 21st Century Schools Programme delivers modern and multi-use sports provision and flexible external facilities that not only benefit the school but also the wider community. The benefits of which have a positive effect on health and well-being.
- A more equal Wales
All of our new 21st Century Schools are wholly inclusive and fully accessible. All pupils and parents have the opportunity to choose the school of their choice, be it English medium, Welsh medium or a faith provision. In addition, RCT's home to school transport, which exceeds the Welsh Government's statutory requirements, ensures that all pupils have equitable access to any school regardless of social, economic or geographical factors.
- A Wales of cohesive communities
Community facilities are included within our new schools so that schools can provide an additional role within its community and act as a catalyst for creating a local community focus. Facilities include

dedicated community rooms, childcare settings, as well as sports facilities that can be used out of hours thus increasing the connectedness of learners and non-learners from different communities.

- A Wales of vibrant culture and thriving Welsh language
RCT's WESP sets out the Council's vision and objectives to increase the number of Welsh learners; improve the quality of the provision and the educational outcomes; and ensure there is suitably trained and qualified educational workforce. This Plan is a key policy and informs the 21st Century Schools and Education Programme. The proposals will increase the availability of Welsh medium school places in Rhondda Cynon Taf.
- A globally responsible Wales
The larger 21st Century Schools projects are procured using the Official Journal of the European Union (OJEU). This is the publication in which all tenders from the public sector which are valued above a certain financial threshold according to EU legislation, must be published, advertising opportunities on a global scale.

8.3 An assessment of the proposals on The Well-being and Future Generations Act's five ways of working follows:

<p><u>Long Term</u> (The importance of balancing short term needs with the need to safeguard the ability to also meet long term needs)</p>	<p>How does your project / activity balance short-term need with the long-term and planning for the future?</p> <p>Maintaining the existing provision of educational premises within Rhondda Cynon Taf places enormous strain on the Council resources. It is recognised that there is an opportunity through the 21st Century Schools and Colleges Programme to manage these pressures more efficiently in future years.</p> <p>The long term vision for RCT education is to provide all learners with the best opportunity possible to achieve their full potential through the means of education by providing access to the very best learning opportunities with modern, flexible, accessible facilities appropriate for delivering the new curriculum.</p> <p>Improved learning environments will act as a stimulus to creating a better future for through delivering brand new 21st Century Schools facilities for our young pupils.</p>
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<p><u>Prevention</u> (How acting to prevent problems occurring or getting worse may help public bodies meet their objectives)</p>	<p>How does your project / activity put resources into preventing problems occurring or getting worse?</p>
	<p>The Council recognises the challenges of providing everyone with the facilities and opportunities to receive an excellent education in 21st Century facilities. These proposals will enhance and improve the educational environments for all learners affected.</p>
<p><u>Integration</u> (Considering how the public body's well-being objectives may impact upon each of the wellbeing goals, on their objectives, or on the objectives of other public bodies)</p>	<p>How does your project / activity deliver economic, social, environmental and cultural outcomes together?</p>
	<p>These proposals will deliver an increase in school places in the south of the County Borough. They will provide opportunities for wider community collaboration and participation, a more sustainable and accessible educational building meeting BREEAM targets, while providing a more integrated and improved learning experience.</p>
<p><u>Collaboration</u> (Acting in collaboration with any other person (or different parts of the body itself) that could help the body meet its well-being objectives)</p>	<p>How does your project / activity involve working together with partners (internal and external) to deliver well-being objectives?</p>
	<p>If these proposals are to go ahead then collaboration and consultation will be undertaken to ensure that all stakeholders have an opportunity to shape the 21st Century Schools' provision to ensure benefits and well-being opportunities are maximised.</p>
<p><u>Involvement</u> (The importance of involving people with an interest in achieving the well-being goals, and ensuring that those people reflect the diversity of the area which the body serves)</p>	<p>How does your project / facility involve stakeholders with an interest in achieving the well-being goals? How do those stakeholders reflect the diversity of the area?</p>
	<p>Moving forward, engagement with learners, staff and RCT residents will continue and input and information gleaned will shape the new school facilities. In addition, information gathered will influence and inform our future projects so all consultation undertaken shapes the legacy of the 21st Century Schools Programme.</p>

9. CONCLUSION

- 9.1 The Council is responsible for delivering high educational standards and efficient education provision that serves our local communities.

This is achieved by ensuring that the right schools, are the right size, are in the right location and are fit for the 21st Century learner.

- 9.2 To continue to build upon the success of the significant improvements delivered to the Council's education assets through the Band A 21st Century Schools investment, Members are asked to:
- Agree to approve Andrea Richards, Temporary Service Director for 21st Century Schools and Transformation and / or Dave Powell, Director of Corporate Estates for appointment as 'Participant Representative' to sit on the Strategic Partnering Board (SPB);
 - Agree that a Strategic Outline Business Case, for three initial Pathfinder Projects, be submitted to the Welsh Government for the construction of new schools for Llanilltud Faerdref Primary School, Pontyclun Primary School and Penygawsi Primary School.
- 9.3 Agree to be a party to the execution, delivery and performance of the Strategic Partnering Agreement with the Welsh Education Partnership Co (WEPCo) in September 2020 to facilitate the delivery of a range of infrastructure services and the delivery of education and community facilities;

10. APPENDICES

<p>Exempt Appendix A</p>	<p>Strategic Partnering Agreement (SPA) – Engrossment version</p> <p>Containing associated legal documents:-</p> <ul style="list-style-type: none"> - SPA – Schedule 3 – Section 3 – Strategic Partnering Agreement KPIs - SPA – Schedule 7 – Section 1 – Template MIM Education Project Agreement - SPA - Schedule 7 – Section 1 – Authority’s Construction Requirements (Section 3 of Schedule 6 of the template MIM Project Agreement) - SPA – Schedule 7 – Section 1 – MIM – Payment Mechanism (Schedule 14 of the template MIM Project Agreement) - SPA – Schedule 7 – Section 1 – MIM – Service Level Specification (Section 1 of Schedule 12 of the template MIM Project Agreement) - SPA – Schedule 7 – Section 2 – MIM – Template Education Design & Build Development Agreement - SPA – Schedule 7 – Section 3 – MIM Template WEPCo Shareholders’ Agreement - SPA – Schedule 7 – Section 4 – MIM – Template Project Co Shareholders’ Agreement
<p>Appendix 1</p>	<p>Strategic Partnering Agreement Summary</p>
<p>Appendix 2</p>	<p>Strategic Partnering Board Summary</p>
<p>Appendix 3</p>	<p>Approval Process for New Projects and Flow Diagram</p>

11. LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT 1985

Background Papers

- 11.1 Council's [Welsh in Education Strategic Plan 2017-2020](#)
- 11.2 Cabinet Report of 9th April 2019 – 'Planning for Welsh Medium Education Places' – Report of the Director of Education and Inclusion in discussion with the Cabinet Member for Education (Councillor Joy Rosser).

Reasons for exemption

- 11.2 Part B of this report is not for publication by virtue of paragraphs 14 and 16 of Schedule 12A of the Local Government Act 1972 as it contains information classified as exempt under Schedule 12A that it contains information relating to the financial or business affairs of any particular person (including the authority holding that information) and information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
- 11.3 In all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Other Information:-

Relevant Scrutiny Committee: Children and Young People

Background Papers

Contact Officer

Lisa Howell, Business and School Organisation Manager - 01443 744062

LOCAL GOVERNMENT ACT 1972

AS AMENDED BY

THE LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT 1985

RHONDDA CYNON TAF COUNTY BOROUGH COUNCIL

CABINET

24TH SEPTEMBER 2020

**21ST CENTURY SCHOOLS AND COLLEGES PROGRAMME – MUTUAL
INVESTMENT MODEL (MIM) 21ST CENTURY SCHOOLS WELSH
EDUCATION PARTNERSHIP – STRATEGIC PARTNERING AGREEMENT
(SPA)**

**REPORT OF THE CHIEF EXECUTIVE IN DISCUSSION WITH THE
CABINET MEMBER FOR EDUCATION (COUNCILLOR MRS J ROSSER)**

Background Papers

Council's [Welsh in Education Strategic Plan 2017-2020](#)

Cabinet Report of 9th April 2019 - PLANNING FOR WELSH MEDIUM
EDUCATION PLACES - REPORT OF THE DIRECTOR OF EDUCATION AND
INCLUSION IN DISCUSSION WITH THE CABINET MEMBER FOR
EDUCATION (COUNCILLOR JOY ROSSER)

APPENDIX A – Strategic Partnering Agreement (SPA)

NOT FOR PUBLICATION

This appendix will not be open for inspection by the press and public as in the opinion of the Director of Legal Services it contains information as defined in paragraphs 14 and 16 of Part 4 of Schedule 12A of the Local Government Act 1972 (as amended) namely information relating to the financial or business affairs of any particular person (including the authority holding the information) and information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. It is not considered to be in the public interest to disclose such information at this time. Consequently the public interest in maintaining the exemption outweighs the public interest in disclosing the information

WEP STRATEGIC PARTNERING DELIVERY MODEL
SUMMARY OF STRATEGIC PARTNERING AGREEMENT

1 INTRODUCTION¹

- 1.1 The WEP Strategic Partnering Agreement (**SPA**) is the agreement entered into between the Local Authorities and Further Education Institutions (**Participants**)² and WEPCo (being the joint venture company established between the Private Sector Delivery Partner (**PSDP**) and a subsidiary of the Development Bank of Wales).
- 1.2 The SPA provides for how the parties act together over the long term in a collaborative partnering, non-adversarial and open manner to support the effective planning, procurement and delivery of education and community facilities in Wales and the delivery of infrastructure services.
- 1.3 The SPA sets out the high level principles that underpin the delivery of the parties' obligations; the behaviours, vision and values of WEPCo; the establishment of a framework that promotes excellence and value for money; and the monitoring and management of WEPCo's performance.
- 1.4 Under the SPA, WEPCo will be required to provide **partnering services** to the Participants. These services include (i) project development and delivery; (ii) supply chain assembly and management and (iii) other professional services necessary to fund and deliver education and community facilities.
- 1.5 The initial term of the SPA is 10 years. This may be extended by 5 years by any one or more Participants. Certain protections in the SPA continue in force beyond the term of the SPA until the end of the last associated Project Agreement entered into by the Participant(s) for the delivery of individual education facilities.
- 1.6 WEPCo will have the sole and exclusive right for the term of the SPA to nominate a subsidiary of the PSDP (which will be a special purpose vehicle that holds the majority of voting rights, or a wholly owned subsidiary of such a company) (**Project Co**) to deliver MIM Projects, provided that the relevant criteria in the SPA are met. Approved MIM Projects will be developed by WEPCo, but delivered by Project Co which will enter into a Project Agreement with the relevant Participant to deliver the relevant MIM Project.
- 1.7 Participants will be able to request that WEPCo, or a nominated wholly owned subsidiary of WEPCo, provides other **project services** such as the delivery of design and build capital projects for education or community facilities under the SPA, provided that the relevant criteria in the SPA are met. WEPCo and/or its subsidiaries shall enter into all required agreements for the delivery of capital projects and/or FM services directly with the relevant Participant, which in the case of education sector capital projects shall be substantially in the form of the Template Education Design and Build Development Agreement appended to the SPA.

2 NEW PROJECTS

- 2.1 WEPCo shall, if requested to do so by one or more Participants, develop proposals for the implementation and delivery of new projects by a Project Service Provider. For MIM Projects, the Project Service Provider will be the Project Co that will be created for such purpose and for other approved projects shall be WEPCo or a Subsidiary of WEPCo. The role of WEPCo will include the raising of finance, project development, project management and supply chain assembly and management of a new project up to contractual/financial close, during the construction period and operational period.

¹ Capitalised terms have the meaning provided for in the Strategic Partnering Agreement unless otherwise stated.
² Note those named as a "Contracting Authority" in the OJEU notice will be entitled to sign and enter into the SPA.

- 2.2 The obligations on WEPCo and the relevant Participant in relation to the identification, approval and delivery of a new project are set out in Schedule 5 (*Approval Process for New Projects*).
- 2.3 For an overview of Schedule 5 and a flow chart outlining the Approval Process for New Projects, please see **separate guidance**.
- 2.4 WEPCo is obliged to assist Participants in developing local delivery plans, which will form the basis of an annual Strategic Delivery Plan (**SDP**) developed between the Participants and WEPCo. The Participants' requirements for new projects will in most cases be initiated through the inclusion of such projects in the latest edition of the SDP.
- 2.5 WEPCo will assist Participants in developing proposals for the delivery of new projects, the preparation of an outline business case and the obtaining of all necessary approvals to progress any new project request by a Participant.
- 2.6 With each approved new project, WEPCo will (or will procure a Project Service Provider will) enter into a Project Agreement, a template form of which is appended to the SPA at Schedule 7 (*Template Project Agreements*). For an overview of the Template Project Agreement, please see **separate guidance**. For every MIM Project, the Project Service Provider will enter into a Shareholders' Agreement to establish the relevant Project Co.³
- 2.7 WEPCo must evidence value for money both at the beginning and continuously throughout the development and delivery of new projects in accordance with Schedules 3 (*Partnering Services*), 5 (*Approval Process for New Projects*) and 6 (*New Project Pricing Report*).
- 2.8 The Participants will develop with WEPCo the approach to supply chain assembly for the delivery of a new project, the market testing of design and construction, hard facilities management services and the funding of the new project to ensure value for money. WEPCo and the relevant Participant(s) will work together to ensure that the pricing of a new project provides the relevant Participant(s) with robust, transparent and auditable information as to the costs, fees and prices included within WEPCo's proposals.
- 2.9 WEPCo shall, for all projects, monitor and update (where applicable) the predicted capital, whole life cost and any increase or reduction in estimated costs, the final cost of design and construction and the actual cost of maintaining and repairing each project. WEPCo will be expected to demonstrate to Participants through a WEPCo Performance Report and Annual Review, lower costs and/or greater value for money over the term of the SPA.
- 2.10 Planning permission for approved projects to be delivered by WEPCo must be obtained by WEPCo prior to signing the relevant Project Agreement.

3 PARTNERING SERVICES

- 3.1 WEPCo may provide a range of Partnering Services to Participants.
- 3.2 These fall into three categories:
 - 3.2.1 Ongoing Partnering Services;
 - 3.2.2 Project Development Partnering Services; and
 - 3.2.3 Strategic Support Services.

³ This will be substantially in the form of the Template Project Co Shareholders' Agreement appended to the SPA.

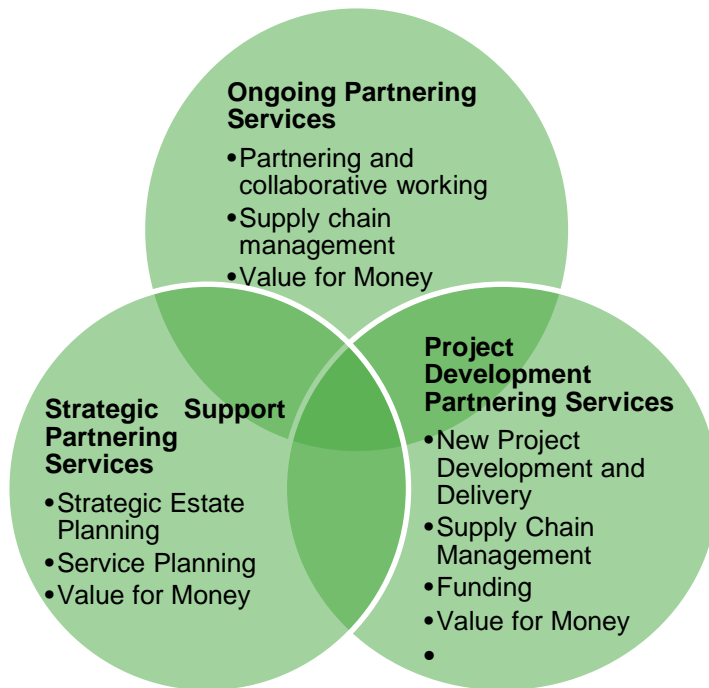


Figure 1 WEPCo Partnering Services

- 3.3 WEPCo shall provide **Ongoing Partnering Services** to the Participants that relate to the day to day operation of WEPCo, the fostering of partnering and collaborative working between the parties, supply chain management and the delivery of value for money.
- 3.4 WEPCo shall provide **Project Development Partnering Services** to implement and deliver projects identified in the SPA and all other 21st Century schools and colleges (Band B) MIM Programme Projects (**Qualifying Projects**) in accordance with the specification, KPIs (including community benefits) and rates set out in Schedule 3 (*Partnering Services*). The role of WEPCo is to develop proposals for a Qualifying Project to meet the Participant's Requirements including affordability and other agreed approval criteria (services, operational, financial and value for money). The scope and specification of the services to be provided by WEPCo will be agreed between WEPCo and the relevant Participant on a project by project basis, together with the approval criteria.
- 3.5 The relevant Participant will remain as "sponsor" for business case approval purposes. The role of WEPCo will be to support the relevant Participant in preparing agreed outputs at each business case approval stage for the delivery of a Qualifying Project.
- 3.6 WEPCo shall also, where requested, provide **Strategic Support Partnering Services**, to support Participants in strategic estate planning and strategic services planning to plan education sector services and where requested, community services. These are discrete, consultancy support services that may be required by Participants. The Participants and WEPCo will jointly develop a Strategic Delivery Plan for the delivery of new accommodation requirements.
- 3.7 WEPCo must monitor the performance of each of the Partnering Services and Project Services at its own cost and expense, meet value for money requirements and demonstrate continuous improvement wherever practicable achieved through agreed KPIs, as developed in accordance with the SPA throughout the term.
- 3.8 For all Partnering Services, WEPCo must provide the Partnering Services in compliance of the WEP Objectives and all objectives set out in the SDP agreed between the Participants and WEPCo. All Partnering Services must meet the requirements for Value of Money set out in clause 13 and seek to obtain continuous improvement in providing the services.

Payment for Partnering Services

- 3.9 Clause 10 of the SPA governs what WEPCo is entitled to charge a Participant for the provision of Partnering Services.
- 3.10 WEPCo recovers Partnering Services Costs relating to Ongoing Partnering Services and Project Development Partnering Services in accordance with Schedule 4 (*Partnering Services Costs*) of the SPA. Partnering Services Costs are recovered either from the Participant on a “pay as delivered” basis, or as a lump sum at financial close of the relevant approved Project, or such costs are rolled into the financial model for the relevant approved Project and are repaid over the term of the relevant Project Agreement.
- 3.11 WEPCo recovers the costs incurred for the delivery of Strategic Support Partnering Services on a “pay as delivered” basis or as otherwise agreed with the relevant Participant procuring such services from WEPCo. The quantum of such costs will be calculated by reference to the rate card which will be included at Schedule 4 (*Partnering Services Costs*).

Subcontracting of Partnering Services

- 3.12 WEPCo is able to subcontract its obligations in respect of the whole or part provision of the Partnering Services to a Partnering Subcontractor but will remain responsible to the relevant Participants for the provision of the contracted out services.
- 3.13 WEPCo is responsible for ensuring the performance by the Supply Chain Members of their obligations under the relevant Supply Chain Agreements.
- 3.14 On the expiry or earlier termination of the SPA, the handover provisions set out in Schedule 20 (*Handover on Expiry or Termination*) will apply. Any staff engaged in the delivery of Partnering Services will transfer under TUPE regulations to the relevant Participant or third party successor provider of services.
- 3.15 For further detail on the scope of Partnering Services in Schedule 3 (*Partnering Services*) and Schedule 4 (*Partnering Services Costs*), please see **separate guidance**.

4 PROJECT SERVICES

- 4.1 WEPCo is responsible for providing **Project Services** to Participants. These are services required under a Project Agreement in relation to the design, construction, testing, commissioning and completion of premises (including any temporary works) and the installation of equipment, together with the provision of facilities maintenance (FM) services.
- 4.2 The SPA acknowledges that Participants may have existing providers in place to provide their accommodation requirements and associated services. WEPCo agrees to work with Participants to ensure the existing providers are treated fairly and that the individuals providing the existing services are, where possible, employed by the Project Service Provider.

5 EXCLUSIVITY

- 5.1 The Participants grant WEPCo the sole and exclusive right for the 10 year term of the SPA to provide:
 - 5.1.1 Ongoing Partnering Services
 - 5.1.2 Project Development Partnering Services in respect of projects identified in the SPA and 21st Century Schools and Colleges (Band B) MIM projects (**Qualifying Projects**)
 - 5.1.3 Project Services in respect of Qualifying Projects that become Approved Projects (as developed through Schedule 5 (*Approval Process for New Projects*)).

After 10 years exclusivity will not apply.

5.2 Participants may request WEPCo to deliver other services:

- 5.2.1 Project Services relating to Major Capital Projects in the education sector, save for MIM projects for a specified period;
- 5.2.2 Project Services relating to capital projects required for the provision of education sector services or community services;
- 5.2.3 Project Services in relation to the provision of FM Services required for the provision of education sector services or community services (not provided as part of any Qualifying Project);
- 5.2.4 Strategic Support Partnering Services;
- 5.2.5 Ongoing Partnering Services and/or Project Development Partnering Services after 10 years (where the term of the SPA has been extended);
- 5.2.6 Project Development Partnering Services in respect of potential New Projects which are not Qualifying Projects.

The above services are not subject to exclusivity.

5.3 The benefits of exclusivity include:

- 5.3.1 Participants will not have to embark on another regulated procurement for the delivery of Partnering Services or Project Services for the lifetime of the SPA.
- 5.3.2 Participants can be assured of the appropriate level of commitment from WEPCo to foster the development of a successful partnership and outcomes over the long term.
- 5.3.3 Participants can be assured regarding value for money and continuous improvement for the delivery of a pipeline of new projects.
- 5.3.4 Delivery of economies of scale over time through the growth of the WEPCo estate.

5.4 Exclusivity can be suspended if WEPCo fails the “Track Record Test” and will not apply until WEPCo passes a subsequent Track Record Test. This is an assessment of whether in the most recent WEPCo Performance Report shared with Participants on an annual basis, WEPCo has met specified KPIs (including those that relate to community benefits) as evidenced.

6 REPRESENTATIVES AND STRATEGIC PARTNERING BOARD (SPB)

- 6.1 Each Participant will appoint a representative to act on its behalf in relation to the SPA. The identity of the Participant’s Representative may change at any time following written notice to WEPCo and all other Participants. Each Participant Representative may also at any time, by written notice to WEPCo, authorise others to exercise the functions and powers of that Participant.
- 6.2 The SPB governs the relationship between WEPCo and the Participants. It will comprise of representatives of each Participant, WEPCo, Welsh Government and other stakeholder representatives as agreed by the Participants.
- 6.3 The SPB will meet at least every three months to review financial and operating issues and provide strategic input into the partnering arrangements including the exchange of ideas in relation to the Participants’ accommodation and service delivery requirements.

- 6.4 A quorum of the SPB is proposed to be five Participant's Representatives (one of whom must be a representative of the Welsh Government) and the WEPCo Representative. For any adjourned meeting, the quorum shall be one Participant's Representative (who must be a representative of the Welsh Government) and the WEPCo Representative. WEPCo and stakeholder representatives will not have a vote at SPB meetings. Decisions will be taken by majority vote. A decision that affects a Participant will only bind it if that Participant's representative has voted in favour of it.
- 6.5 The SPB will approve the annual Strategic Delivery Plan, ensure New Project proposals are consistent with the SDP, manage WEPCo's performance against agreed KPIs, approve any extension to the SPA term and approve any proposed disposal of interest in share capital resulting in a loss of control by WEPCo (or subsidiary).
- 6.6 WEPCo will be obliged to report on its KPIs which will be reviewed by the SPB annually. The SPB will assess whether the Track Record Test has been passed and if any significant performance failure has occurred. Any dispute shall be resolved under Schedule 21 (*Dispute Resolution Procedure*).

7 DEFAULT

Participant Default

- 7.1 Participant Event of Default includes:
 - 7.1.1 one or more Participants being in breach of clauses 9.1, 9.2 and 9.6 (exclusivity clause);
 - 7.1.2 one or more Participants failing to attend SPB meetings which has a material adverse effect on WEPCo or any Project Service Provider;
 - 7.1.3 one or more Participants being in breach of the SPA which delays the execution of any Project Agreement relating to an Approved Project by more than 40 Business Days;
 - 7.1.4 an expropriation, sequestration, nationalisation or requisition of any Facilities or assets and/or shares of WEPCo or its Holding Company or Project Service Provider by a Participant or any other Relevant Authority (where this occurs due to a Relevant Authority, all Participants will be deemed responsible for the Event of Default); and
 - 7.1.5 any non-payment by a Participant under the SPA exceeding £100,000 60 Business Days after demand.
- 7.2 Where a Participant Event of Default occurs, WEPCo may either:
 - 7.2.1 suspend their performance of the SPA in relation to the Participant in default until that Participant can demonstrate to WEPCo's reasonable satisfaction it is capable of performing their obligations; or
 - 7.2.2 notify the Participant of the Event of Default.

If the Participant Event of Default is capable of remedy and has not been remedied within 30 Business Days or is not capable of remedy with immediate effect, WEPCo may either serve notice on each Participant in default terminating the SPA in relation to them with immediate effect or simply notify the Participants in default of the effect their default has had. Any Participants in default will be liable to pay compensation to WEPCo in accordance with section 1 of Schedule 14 (*Compensation on Participant Event of Default and Termination*). If the SPA is terminated in its entirety by the default, compensation under section 2 of Schedule 14 (*Compensation on Participant Event of Default and Termination*) will be payable.

- 7.3 If a Participant is served a Participant Default Notice more than once in any 12 months, it will not receive Project Development Partnering Services or any Strategic Support Partnering Services unless paid monthly in arrears.

- 7.4 The Participants have several liability, other than where two or more Participants have suffered an Event of Default leading to a termination of the SPA, in which case, the loss of WEPCo will be split between the defaulting Participants.

WEPCo Default

- 7.5 The SPA provides for a long list of circumstances which constitute a WEPCo Default including amongst others, WEPCo breaching the SPA, WEPCo failing to provide the Partnering Services, WEPCo breaching health and safety laws; WEPCo failing to pay Participants under the SPA which exceeds £10,000 for 60 Business Days on demand; WEPCo or a Project Service Provider suffering an Insolvency Event; and WEPCo (or WEPCo Party) committing a Prohibited Act.
- 7.6 On a WEPCo Event of Default, each Participant can (acting through the Welsh Government) suspend the exclusivity granted to WEPCo which will include any New Projects that have not yet reached Stage 2 approval. The Participants can lift that suspension at any time and the suspension of exclusivity will be lifted on remedy of the default and where the PSDP shares in WEPCo are sold.
- 7.7 The SPA provides for an escalation of remedies following a WEPCo Event of Default, proportionate to the severity of the default, which may be exercised by the Participants (acting through Welsh Government). These include: suspension of exclusivity; requiring a remediation programme to be implemented; an improvement programme to satisfy Participants that the events will not recur; termination of a non-performing supply chain member; and ultimately termination of the SPA.
- 7.8 WEPCo will reimburse each Participant for all reasonable costs incurred by each Participant as a result of WEPCo's breach of the SPA.

8 WEPCO INDEMNITIES

- 8.1 As would be expected under a long term partnering agreement, the SPA includes provisions under which WEPCo indemnifies the Participants, and the Participants indemnify WEPCo, for certain losses. These are limited to Direct Losses, and exclude Indirect Losses (such as loss of profit and loss of business opportunity), and further Participants partially exclude their liability for their negligence (see below) and claims in tort.
- 8.2 The scope of the indemnity provided by WEPCo is slightly wider than the Participants' indemnities to WEPCo, as the Participants' indemnities are limited to Direct Losses sustained by WEPCo as a consequence of any negligent act or omission by that Participant (or a Participant Party relating to that Participant) relating to the performance or non-performance of the Participant's obligations under the SPA, or a breach of an express provision of the SPA by that Participant. The indemnities provided by WEPCo relate to any act or omission of WEPCo (not just its negligence or breach of an express obligation).
- 8.3 The indemnities cover death and/or personal injury, damage to assets of the other party and third parties. In each case (and subject to the overriding limitation on the scope of the Participants' indemnities described in above), each party is liable for Direct Losses sustained in consequence of any claim for death and/or personal injury of their own employees or persons engaged by them, notwithstanding any act or omission of the other party.
- 8.4 In respect of death or personal injury to third parties, and damage to property, each party indemnifies the other for Direct Losses they cause (save to the extent caused or contributed to by the Participant's own negligence (where WEPCo is indemnifying the Participant) or WEPCo's own acts or omissions (where the Participant is indemnifying WEPCo). Physical damage to property is typically an insured risk, and the indemnity given by the Participants to WEPCo excludes insured losses. Where damage to property has been caused (or contributed to) by the Participant's own negligence, and they are claiming under the WEPCo indemnity, the Participant is responsible for the deductibles under any policy of insurance, and any sums over the maximum amount required to be insured under the SPA insurance policies.

9 DISPUTE RESOLUTION

- 9.1 Disputes are dealt with in accordance with the resolution procedure set out in Schedule 22 (*Dispute Resolution Procedure*). If a Dispute occurs, the parties must consult in good faith. If that is unsuccessful, the Dispute must be escalated to senior personnel. If that is unsuccessful, the Dispute will be escalated to mediation and failing that to arbitration. The exception to this is where a party requires an order restraining another party from doing any act or compelling another to do any act or a judgement for a liquidated sum where there is no arguable defence.

10 INSURANCE

- 10.1 The insurances listed in Schedule 9 (*Insurances*) and any others required by law must be taken out by WEPCo, subject to insurance being available in the market to cover WEPCo in its role during the lifetime of the SPA. The insurance will cover any indemnity claims against WEPCo in relation to any death or bodily injury or third party property damage arising out of or in connection with the Partnering Services.
- 10.2 If a Project Service Provider notices a risk becoming an Uninsurable Risk under the relevant Project Agreement, the Participants and WEPCo will hold a SPB meeting within 7 Business Days and will use their reasonable endeavours to agree a position with regards to the risk within 20 Business Days of notice.

11 INTELLECTUAL PROPERTY RIGHTS

- 11.1 WEPCo grants a free, irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under the SPA or following termination of the SPA) licence to each Participant to use the Intellectual Property Rights which are vested in WEPCo and where possible, where vested in third parties. WEPCo will indemnify Participants where they receive a claim as a result of the Participant infringing third party Intellectual Property Rights (other than as a result of the Participant acting outside of the terms of the SPA).

12 ASSIGNMENT AND SUBCONTRACTING

- 12.1 WEPCo cannot assign or dispose of the SPA without the prior written consent of the Participants, other than where granting security rights in a form approved by the Participants prior to grant.
- 12.2 A Participant cannot assign or dispose of the SPA other than to a limited set of organisations set out in clauses 28.4.1 to 28.4.4, including the Welsh Ministers, an agency of the Welsh Ministers, Government or Local Authority, any other Further Education Corporation or Designated Institution or any person with the legal capacity or sufficient financial resources to perform the obligations of the Participant. Depending on the transferee, the obligations may need to be guaranteed by the Participant.

Bevan Brittan LLP

11 May 2020

WEP STRATEGIC PARTNERING DELIVERY MODEL

ROLE OF THE STRATEGIC PARTNERING BOARD (SPB)

1 INTRODUCTION¹

- 1.1 The WEP Strategic Partnering Agreement (**SPA**) is the agreement entered into between the Local Authorities and Further Education Institutions (**Participants**)² and WEPCo (being the joint venture company established between the Private Sector Delivery Partner (**PSDP**) and a subsidiary of the Development Bank of Wales).
- 1.2 The purpose of the SPA is to establish a long term partnership (initial term of 10 years, which may be extended by 5 years) between WEPCo and the Participants. The SPA provides for the creation of the Strategic Partnering Board (**SPB**); this paper summarises the role of the SPB in the context of the SPA.

2 THE SPA KEY PRINCIPLES

- 2.1 The SPA commits the Participants and WEPCo to work to the following nine (9) key principles, and the SPB is the guardian vehicle of these commitments.
- 2.2 The key principles of the SPA are:
- a) to develop close working relationships between WEPCo and the Participants at all levels;
 - b) to focus on achieving the best value for money operational performance within agreed timescales;
 - c) to set in place business and cultural processes to enable the Participants and WEPCo to establish and agree challenging time and performance objectives and to meet or better them;
 - d) to recognise each other's needs, constraints, limitations, capabilities, roles and responsibilities to achieve mutually beneficial outcomes;
 - e) to identify by regular monitoring, weaknesses and strengths in the relationship between and amongst the Participants and WEPCo and to work together to overcome the weaknesses and to build on the strengths;
 - f) to commit to the early recognition and resolution of differences, conflicts and disputes between and amongst the Participants and WEPCo in a 'no surprises' environment;
 - g) to appoint within each of the Participants and WEPCo co-ordinators at senior level who will support, defend and promote the long term strategic partnership between them and its principles of operation;
 - h) to develop openness and trust in a transparent information and data sharing environment; and
 - i) in accordance with the Equality Requirements to positively promote equal opportunities and the Ethical Employment Code by combating discrimination on the grounds of race, ethnicity, religion, nationality, gender, disability, age or sexuality and promoting good relations between all sections of the community in 'everything we do' including:

¹ Capitalised terms have the meaning provided for in the Strategic Partnering Agreement unless otherwise stated.

² Note those named as a "Contracting Authority" in the OJEU notice will be entitled to sign and enter D

- a) Delivering high quality Education Sector Services and (where relevant) Community Services for end users; and
- b) Working with the local community and partners in the public, private or voluntary sectors.

3 SPB MECHANICS

3.1 SPB Structure

The SPB will comprise of:

- a) one representative from each of the Participants;
- b) one representative of WEPCo, nominated by the board of directors of WEPCo;
- c) one additional representative of Welsh Government (at Welsh Government's discretion); and
- d) a reasonable number of Stakeholder Representatives interested in or affected by Education Sector Services and/or Community Services;

3.1.1 Participant Representatives are expected to be senior representatives of the Participant, with the appropriate authority to make decisions on behalf of the Participant. They should be experienced in holding a director or similar position and have the required skills to make the decisions required to be made by the SPB. Participants will need to consider any likely conflicts of interest and ensure that conflicts of interest do not prevent the chosen representative from fulfilling their role as representative as well as any other role they hold directly in the Participant organisation.

3.1.2 The identity of a Participant's Representative in the SPB may change at any time following written notice to WEPCo and all other Participants.

3.1.3 A Participant Representative may also give written notice to WEPCo authorising others to exercise the functions and powers of that Participant at SPB meetings.

3.1.4 A Chairman will be appointed on an annual basis from amongst the Participants' Representatives. Save where agreed to the contrary by the Participants, it is intended that the post of Chairman will rotate annually amongst the Participants' Representatives in turn. The Chairman will be non-voting in his capacity as Chairman.

3.2 SPB Meetings

3.2.1 The SPB will meet regularly at least every 3 months to provide strategic input into how the partnering established by the SPA is operating, and to review financial and operating (including performance) issues.

3.2.2 Agendas for SPB meetings will be circulated on behalf of the Chairman five (5) Business Days in advance (with supporting papers) and any party wishing to raise other agenda items will notify all other members of the SPB (with supporting papers) in writing no later than three (3) Business Days in advance.

3.2.3 The SPB must have a quorum of five (5) Participants' Representatives (one of whom must be a representative from Welsh Government) and a WEPCo Representative. If a quorum is not present at any meeting of the SPB within thirty (30) minutes of that meeting's start time, the SPA requires that the meeting is adjourned to the same time and place five (5) Business Days later. For any adjourned meeting, the quorum shall be one Participant's Representative (who much be a representative of the Welsh Government) and the WEPCo Representative. Telephone conference calls or video conferences shall be valid as a meeting of the SPB.

- 3.2.4 The Participants must arrange for a person to take minutes of all SPB meetings and circulate the same to all representatives and the Chairman within five (5) Business Days after the relevant meeting.
- 3.2.5 All members of the SPB are obliged to use reasonable endeavours to ensure their regular attendance at all meetings and each Participant will, unless unavoidable, ensure that its representative on the SPB is appropriately empowered to agree matters on its behalf.
- 3.2.6 Each Participant is required to use reasonable endeavours to ensure that its representative on the SPB conducts himself in accordance with the partnering principles contained in the SPA and in a manner intended to ensure that the SPB complies with its obligations and carries out its functions in a timely manner.
- 3.2.7 Decisions will be taken by a majority vote. WEPCo and Stakeholder Representatives will not have a vote at SPB meetings. A decision that affects a Participant will only bind it if that Participant's representative has voted in favour of it.

4 PARTNERING SERVICES

- 4.1 The SPB will serve as a forum for the open exchange of ideas, and will enable the Participants to discuss their forthcoming accommodation and service delivery requirements to ensure an integrated co-ordinated and practical approach to fulfilling such requirements.

4.2 The Strategic Delivery Plan

The Strategic Delivery Plan (**SDP**) will set out objectives based on Participants' local delivery plans and will be developed annually between the Participants and WEPCo. The SPB will be required to approve:

- 4.2.1 the initial SDP put forward in accordance with Section 1 of Schedule 11 (*Initial SDP*); and
- 4.2.2 any amendments made to the SDP in accordance with Section 2 of Schedule 11 (*Updated SDP*).

4.3 The Management System

The SPB shall be required to approve the following systems established by WEPCo:

- 4.3.1 a quality management system for the purpose of ensuring and demonstrating that all aspects of the Partnering Services and all other matters for which WEPCo is responsible under the SPA are carried out fully in conformity with the relevant provisions of SPA and WEPCo's quality management policies and objectives;
- 4.3.2 an appropriate system for implementing WEPCo's occupational health and safety (**OH&S**) policies and objectives to enable it to control its OH&S risks and improve its OH&S performance over time; and
- 4.3.3 an appropriate system for achieving and demonstrating sound environmental performance by controlling the impacts of WEPCo's activities, products and services on the environment, consistent with its environmental policy and objectives.

4.4 The Partnering Services Costs Rates

- 4.4.1 WEPCo is required to provide report of the Partnering Services rates and prices by reference to:
 - a) other relevant local and national trends;
 - b) the rates and prices actually paid by WEPCo for similar services (where WEPCo has used Good Industry Practice to secure best value in respect of those services);

and taking account of value for money objectives set out in the Key Performance Indicators and the outcomes of the Partnering Services Supply Chain Refresh.

- 4.4.2 The SPB shall decide whether to approve any proposal of an increase or decrease of, or no change to the rates.

5 MANAGING WEPCO PERFORMANCE

- 5.1 The SPB will act as the primary mechanism for managing WEPCo's performance.
- 5.2 WEPCo will be required to regularly monitor and report to the SPB on its performance (and its Partnering Subcontractors) under the SPA, of the Project Service Providers and the Supply Chain Members under Project Agreements.
- 5.3 Within twenty (20) Business Days of each Review Date, WEPCo will issue to the SPB the WEPCo Performance Report, which will detail a review of whether each of the Key Performance Indicators has been met.
- 5.4 In less than one (1) month of the Review Date in that year, the SPB will hold a formal Annual Review of the operation of the SPA and WEPCo's performance in the context of the targets and objectives in the SDP and the Key Performance Indicators. As part of this review, the SPB (excluding for such purposes WEPCo's representative) will review WEPCo's progress against the partnership objectives in the SPA and the WEPCo Performance Report and the SPB and WEPCo shall agree any key findings from such review together with the implications relating to WEPCo's future activities.
- 5.5 The SPB shall be entitled to require information and/or clarification from WEPCo in relation to the WEPCo Performance Report including as to whether or not the Track Record Test has been passed and, whether any Significant Performance Failure has occurred.

6 APPROVAL PROCESS OF NEW PROJECTS

- 6.1 In respect of New Projects, the SPB will work with WEPCo and Participants to:
- 6.1.1 identify, analyse and discuss the Participants' collective and individual accommodation requirements;
 - 6.1.2 assist in the development of local delivery plans and review their applicability to the provision of Education Sector Services and Community Services in the Region;
 - 6.1.3 develop further the SDP, in particular to further refine the proposals contained in the SDP;
 - 6.1.4 decide the basis upon which New Projects are prioritised;
 - 6.1.5 identify and appraise available options for meeting the Participants' accommodation requirements and recommend (on the basis of best available value for money) which New Projects to progress;
 - 6.1.6 advise how best to bundle accommodation requirements within a New Project to ensure that the New Project is Affordable, offers value for money and provides a solution with an appropriate level of flexibility;
 - 6.1.7 take into consideration the views of relevant stakeholders in relation to the SDP and actual or potential New Projects;
 - 6.1.8 develop the Participants' requirements in relation to New Projects (which will be developed further during the Stage 2 Approval process) to enable it to form the basis for the agreement of the relevant Project Agreement;

- 6.1.9 analyse and discuss the range of potential funding options for New Projects including the feasibility of third party funding such as sponsorship when considering and developing a New Project;
- 6.1.10 assist in the preparation of outline business cases and obtaining all necessary approvals; and
- 6.1.11 for any New Project in respect of which such Participant(s) has/have indicated an intention to submit a New Project Request, agree:
 - a) the appropriate Comparator for purposes of determining any adjustments to the Project Development Fee Cap pursuant to paragraph 2 of Schedule 4 (Partnering Services Costs) in respect of such Comparator; and
 - b) each part of the Project Development Fee Cap for each stage.
- 6.2 Where the potential Relevant Participant(s) and WEPCo are unable to agree the matters referred to in paragraph 6.1.11 above within a period of three (3) months, the SPB shall determine such matters.
- 6.3 The SPB should be provided with copies of both the Stage 1 and Stage 2 Submissions and will provide a forum for discussion of whether the submissions meet the Approval Criteria. Approval of the New Projects is ultimately decided by the Relevant Participant(s).

7 EXTENDING THE SPA TERM

- 7.1 The term of the SPA may be extended for an additional five (5) years after the Initial ten year term. The SPB will meet twelve (12) months before the Initial Expiry Date to review:
 - 7.1.1 the performance of the Parties under the SPA and, in particular, the performance of WEPCo in delivering the Partnering Services to the performance standards set out in Clause 8.1 (*Services Obligations*);
 - 7.1.2 the Education Sector Services and Community Services needs of the population within the Region; and
 - 7.1.3 whether it would be beneficial to the provision of all or any of the Education Sector Services and/or Community Services in the Region to extend this Agreement for a further five (5) year period from the Initial Expiry Date.
- 7.2 It will then be decided by WEPCo and one or more of the Participants whether to extend the term of the SPA by five (5) years from the Initial Expiry Date.

8 DISPOSAL OF PROPERTIES AND/OR SHARES

- 8.1 SPB approval will be required in respect of any action, which would result in a loss of control (direct or indirect) by WEPCo of any Subsidiary of WEPCo, which is a Project Service Provider. The SPB is obliged to act reasonably and without undue delay, taking into account any proposals put forward. If the SPB does not approve the proposed action, WEPCo must use all reasonable endeavours to procure that its Subsidiary and/or the relevant Project Service Provider shall not proceed with that proposed action.
- 8.2 It will be deemed to constitute a material breach of the SPA by WEPCo if:
 - 8.2.1 any Project Service Provider takes any action under its Project Agreement, which under the terms of such agreement, requires the SPB's consent without such consent having first been obtained, or
 - 8.2.2 WEPCo or any Subsidiary of WEPCo takes any action, which requires the SPB's consent or agreement under the SPA without such consent or agreement having first been obtained.

9 INSURANCE

- 9.1 Where a Project Service Provider for a MIM Project has notified a Project Agreement Counterparty of a risk becoming an Uninsurable Risk (pursuant to the provisions of the relevant Project Agreement), the Participants and WEPCo must ensure that a meeting of the SPB is held as soon as is reasonably practicable (and in any event within seven (7) Business Days of receipt by the Project Agreement Counterparty of such notice).
- 9.2 At that meeting the SPB will consider the situation and the parties will work together to use all their respective reasonable endeavours to obtain an agreed position from the SPB in relation to the risk becoming an Uninsurable Risk within twenty (20) Business Days of the Project Service Provider notifying the Project Agreement Counterparty as described above.

10 CONCLUSION

The SPB will be the central forum in which the Participants can work together with WEPCo, Welsh Government and Stakeholder Representatives to ensure that the key principles of the SPA are met. The SPB's role will be to approve the SDP; ensure any New Project proposals are consistent with the SDP; monitor WEPCo's performance against agreed KPIs; approve any extension to the SPA term; and approve any proposed disposal of interest in share capital resulting in a loss of control by WEPCo (or subsidiary).

WEP STRATEGIC PARTNERING DELIVERY MODEL

APPROVAL PROCESS FOR NEW PROJECTS

1 INTRODUCTION

- 1.1 The WEP Strategic Partnering Agreement (**SPA**) is the agreement entered into between the Local Authorities and Further Education Institutions (the **Participants**) and WEPCo (being the joint venture company established between the Private Sector Delivery Partner and a subsidiary of the Development Bank of Wales).
- 1.2 Schedule 5 of the SPA sets out the procedure by which WEPCo and the Participants will work together to agree which New Projects will be taken forward and approved for development by WEPCo and on what basis. Schedule 5 sets out a two stage Approval Process for such New Projects. The approval process (as discussed in more detail below) shall only apply in relation to Qualifying Projects regardless of whether the period of ten (10) years from the Commencement Date has expired.
- 1.3 The Parties may agree to utilise this process (amended as appropriate) in respect of other Project Services under Clause 9.3 but are not obliged to do so.
- 1.4 A flow diagram outlining the Approval Process for New Projects is appended to this guidance note at Appendix A.
- 1.5 Capitalised terms in this guidance note shall have the meaning given to them in the SPA unless otherwise defined in this guidance note.

2 OBLIGATIONS OF THE PARTIES

How are New Projects identified at the outset?

- 2.1 WEPCo will work with Participants to develop local delivery plans (addressing Participants' requirements) which will form part of the annual Strategic Delivery Plan (**SDP**). WEPCo will then review the applicability of the SDP to the provision of education services in the Participant's Region to decide which New Projects should progress. The SPB shall ensure that WEPCo's proposals for New Projects are consistent with delivery of the latest SDP.

How far will WEPCo's role extend in developing New Projects and obtaining approval?

- 2.2 Paragraphs 2.1 and 2.2 of Schedule 5 lists WEPCo's general obligations in developing New Projects. WEPCo has a full set of obligations, including:
 - 2.2.1 identifying Participants' requirements for future New Projects;
 - 2.2.2 prioritising New Projects and advising on best timeframes for New Projects;
 - 2.2.3 engaging with stakeholders and advising on the preferred funding options;
 - 2.2.4 preparing outline business cases;
 - 2.2.5 obtaining all necessary approvals;
 - 2.2.6 agreeing an appropriate Comparator for determining adjustments to the Project Development Fee Cap; and
 - 2.2.7 agreeing each part of the Project Development Fee Estimate..
- 2.3 WEPCo shall (pursuant to Paragraph 2), without entitlement to specific or additional payment, work with the Participants and other members of the Strategic Partnering Board (**SPB**) to (including but not limited to) analyse and discuss the range of potential funding options for New Projects, as well as

develop the Participants' requirements in relation to New Projects (as more explicitly set out in Paragraphs 2.2.1 to 2.2.11).

What are the Participants expected to do by way of the Approval Process for New Projects?

- 2.4 Paragraph 2.3 of Schedule 5 sets out the Participants' obligations, which mainly includes obligations of co-operation with WEPCo, including providing necessary information; identifying its needs and funding opportunities (including benchmarks); and providing assistance in obtaining necessary Consents.
- 2.5 Each Participant will co-operate with WEPCo in its performance of its obligations (as set out in Paragraphs 2.2.1 to 2.2.11) in relation to any New Project or any potential New Project being developed by WEPCo. Where the potential Participant and WEPCo are unable to agree the matters referred to in paragraph 2.2.11 within a period of three (3) months, the SPB shall determine such matters.

3 NEW PROJECT REQUEST

- 3.1 Any Participant wishing to procure a New Project (**Relevant Participant**) shall first submit a New Project Request to WEPCo to produce a Stage 1 Submission (Paragraph 3.1). This New Project Request will need to set out matters, including but not limited to, the Affordability Cap, Specific Requirements, a clear detailed Project Brief and any requirements in relation to a New Project that must be satisfied as part of a Stage 1 Submission and/or Stage 2 Submission (as set out more explicitly in Paragraphs 3.1.1 to 3.1.3).
- 3.2 WEPCo shall be entitled (pursuant to paragraph 3.2) to raise any queries and request clarification from the Participant in relation to the New Project Request to enable it to fully assess the request and provide a meaningful response.
- 3.3 WEPCo shall then (in accordance with Paragraph 3.3) confirm in writing to the Participant, within twenty (20) Business Days of receipt of a New Project Request, whether it will submit a Stage 1 Submission to the Participant. If WEPCo confirms that it does not intend to do so, or fails to give the necessary confirmation, then the Participant shall be entitled to procure such New Project outside the terms of the SPA and shall not be in breach of the exclusivity provisions as set out in Clause 9 of the SPA (Exclusive Nature of this Agreement).
- 3.4 It is important to note that where the reason for WEPCo not proceeding is the Affordability Cap being unrealistically low, the parties shall (pursuant to Clause 3.3.1) work together in good faith to seek to agree an alternative Project Brief and/or Affordability Cap which will form the basis of a revised New Project.
- 3.5 If the parties fail to agree such terms within six (6) months of WEPCo's original confirmation, the Participant shall be entitled to procure the New Project outside the terms of the SPA and shall not be or be deemed to be in breach of the Clause 9 exclusivity provisions. If the New Project is a Qualifying Project and they commence to procure such New Project prior to the expiry of ten (10) years from the Commencement Date at a substantially greater cost than the Affordability Cap, the Clause 9 exclusivity provisions will still apply.

4 STAGE 1 SUBMISSION AND APPROVAL

- 4.1 Upon WEPCo's confirmation of the New Project Request, WEPCo will (pursuant to Paragraph 4.1) produce outline proposals for New Projects, which develop and are consistent with the SDP where so requested. This is known as the Stage 1 Submission.
- 4.2 All Stage 1 Submissions will be produced within three (3) months (or such longer period up to a maximum of six (6) months where necessary) from the New Project Request. A Stage 1 Submission shall (as set out in Paragraph 4.2) be produced in accordance with the relevant Partnering Services Method Statement (to be incorporated into the SPA) and contain as a minimum (more expressly set out in Paragraphs 4.2.1 to 4.2.13):

- 4.2.1 a value for money assessment in respect of the New Project Request;
 - 4.2.2 a concept design (to RIBA Stage 2) of the New Project;
 - 4.2.3 a desktop study meeting the requirements of the Partnering Services Method Statements, site investigation studies and environmental impacts (as appropriate and as set out in Clause 4.2.3 more explicitly);
 - 4.2.4 confirmation as to whether the New Project requires the transfer of properties by the Participant to WEPCo, to a Project Service Provider, or to a wholly owned Subsidiary of WEPCo;
 - 4.2.5 the identity of the contractual structure and proposed corporate structure;
 - 4.2.6 a schedule of all material amendments required to the New Project Specific Project Agreement and template Project Agreement for MIM Projects taking into account the Approval Criteria;
 - 4.2.7 the identity of the Participant and/or other parties who will become Project Agreement Counterparties;
 - 4.2.8 an explanation as to how the New Project fits into the service delivery strategy as set out in the latest SDP;
 - 4.2.9 the effect (if any) on any employees of the Participant or relevant third party service providers;
 - 4.2.10 a planning brief;
 - 4.2.11 a maximum time period for submission of a Stage 2 Submission on the assumption that the New Tender Project achieves Stage 1 Approval;
 - 4.2.12 the proposed Project Development Fee Estimate; and
 - 4.2.13 a BIM Execution Plan.
- 4.3 The Stage 1 Submission must also be accompanied by a copy of the most recent WEPCo Performance Report and confirmation as to whether or not the Track Record Test has been passed at the date of submission of the Stage 1 Submission.
- 4.4 In developing a Stage 1 Submission, WEPCo shall (pursuant to Paragraph 4.3) liaise with the Participant and relevant end users as necessary to ensure the best available value for money is achieved through the appropriate consideration of all viable options and informed choices by WEPCo, stakeholders and the Relevant Participant(s). WEPCo shall also be obliged to enter into the Project BIM Agreement for the New Project and comply with its obligations thereunder. The Participant shall also (pursuant to Paragraph 4.4) without prejudice to the requirements of Schedule 6 of the SPA, provide WEPCo with such information as to its requirements and other inputs as WEPCo may reasonably require.
- 4.5 As part of its preparation for each Stage 1 Submission, WEPCo shall, save in respect of Pathfinder Projects, carry out a desktop study of the relevant site or sites and report to the Participant of such studies (in accordance with Paragraph 4.5).
- 4.6 Following receipt of a Stage 1 Submission by the Participant, (pursuant to Paragraph 4.6), the Participant shall have a period of two (2) months from the date of receipt of the Stage 1 Submission in which to notify WEPCo that it approves or rejects the Stage 1 Submission. If approved, this then becomes a Stage 1 Approved Project (Paragraph 4.6).

- 4.7 WEPCo's costs in relation to the preparation of a Stage 1 Submission that has been submitted in accordance with Paragraph 4 of Schedule 5 shall be borne by WEPCo unless in certain circumstances e.g. where the New Project subsequently becomes an Approved Project and the relevant costs are included as part of the Project Development Fee for such Approved Project (as more explicitly set out in Paragraphs 4.8.1 – 4.8.3).
- 4.8 It should be noted that if a Stage 1 Submission does not become a Stage 1 Approved Project, then in certain limited circumstances (as set out in detail in Paragraphs 4.9.1 – 4.9.3 including but not limited to where the New Project in question is not a Qualifying Project, then the Participant shall be entitled to procure the New Project outside the terms of the SPA and shall not be deemed to be in breach of the exclusivity provisions as set out in Clause 9 of the SPA, unless (in the case of Paragraph 4.9.1(a)) they seek to commence procurement of such New Project during any period when exclusivity in respect of the Participant has been reinstated pursuant to Clause 9.7, Clause 23.3 or Clause 23.10.1.
- 4.9 Finally, in relation to the Stage 1 Submission, where in respect of a New Project demolition of an existing facility is anticipated within the scope of a New Project and an Asbestos Management survey has not been carried out by the Participant and included within the New Project Request, WEPCo, shall then procure an Asbestos Management Survey with the support and guidance of the Participant, in accordance with the provisions as set out in Paragraphs 4.10.1 to 4.10.5.

5 STAGE 2 SUBMISSION AND APPROVAL

- 5.1 Once the Stage 1 Submission becomes a Stage 1 Approved Project, WEPCo, will (pursuant to Paragraph 5.1) when requested to do so in writing by the Participant, provide further Project Development Partnering Services to proceed regularly and diligently to develop a Stage 1 Approved Project into a detailed submission. This is known as a Stage 2 Submission. This shall then be presented to the Participant as soon as reasonably practicable and in any case within the maximum period specified in the Stage 1 Submission.
- 5.2 WEPCo shall, in developing a Stage 2 Submission (pursuant to Paragraph 5.2) continue to liaise with the Participant and relevant end users (Paragraph 5.2.1) and WEPCo shall be obliged to comply with its BIM protocol obligations under the Project BIM Agreement and submit a BIM Execution plan to the Participant within one month of commencing Stage 2.
- 5.3 As part of the Stage 2 process, the Participant shall provide WEPCo with any such information as to its/their requirements (including the Specific Requirements) and other inputs as WEPCo may reasonably require and shall assist WEPCo in the review of any draft designs and proposals in relation to the Stage 2 Submission (Paragraph 5.3.1) and generally co-operate with WEPCo in relation to any Stage 2 Submission (Paragraph 5.3.2).
- 5.4 WEPCo shall produce each Stage 2 Submission in accordance with the relevant Partnering Services Method Statement and shall procure that the Stage 2 Submission shall address all issues that have a potential impact on risk and/or price in respect of the proposed New Project and shall include as a minimum (including but not limited to and as set out in more detail in Paragraphs 5.4.1 to 5.4.18):
- 5.4.1 a value for money assessment in respect of the option given Stage 1 Approval;
 - 5.4.2 terms for the transfer of properties agreed between WEPCo and the relevant Participants or third parties;
 - 5.4.3 a mark-up of the Project Specific Project Agreement with Project Co's proposals;
 - 5.4.4 detailed design work (to RIBA Stage 4) and submission of relevant building warrant applications;
 - 5.4.5 requirements for planning approvals and all associated costs;
 - 5.4.6 an explanation as to why the Stage 2 Submission meets the Approval Criteria (as set out below);

- 5.4.7 a timetable setting out the stages and timescales for the period between achieving Stage 2 Approval and the execution of the Project Agreement in relation to that New Project;
 - 5.4.8 commitment letters from any proposed tenants or sub-tenants of the Facilities;
 - 5.4.9 details of the competency assessments undertaken and the results of the same, in respect of the potential 'Principal' Contractor for purposes of the CDM Regulations;
 - 5.4.10 the Corporate Structure of the Project Service Provider;
 - 5.4.11 a draft Project Co Shareholders' Agreement relating to any New Project which is a MIM Project;
 - 5.4.12 fully developed sub-contracts for each of the Contractor and (in the case of MIM Projects) the Service Provider and any relevant [Key Sub-Contractors]¹;
 - 5.4.13 details of the proposed security package; and
 - 5.4.14 commitment letters from the senior funders confirming acceptance of the documents submitted by WEPCo (in the case of MIM Projects).
- 5.5 The Approval Criteria consists of the criteria against which any New Project is judged in determining whether it achieves Stage 2 Approval. The criteria are set out in Paragraphs 5.5.1 to 5.5.10 in more detail, but include (and are not limited to) a requirement that the cost of the New Project is within the Affordability Cap; that it has been demonstrated that the New Project provides value for money; and that the New Project meets the Specific Requirements.
- 5.6 After the above has been complied with, WEPCo shall then submit its Stage 2 Submission to the Participants, copied to SPB (Paragraph 5.6). It is then expected that the SPB will provide a forum for discussion of such Stage 2 Submission. If, acting reasonably, the Participant finds that any material aspects of the Stage 2 Submission are unsatisfactory to them, the Participant shall notify WEPCo of the same and offer reasonable assistance to WEPCo to address such deficiencies.
- 5.7 Within sixty (60) Business Days of the later of submission to the Participant of a Stage 2 Submission and the date on which WEPCo provides them with all reasonable further information that has been requested and provided, the Participant shall give written notice of whether they reject or approve the Stage 2 Submission (as per Paragraph 5.7). If approved, this becomes a Stage 2 Approved Project.
- 5.8 Alternatively, the Participant may give notice that they reject the New Project on the grounds set out in Paragraph 5.7.2. One of the grounds is that there has been a change to the Affordability Cap since the New Project Request which has rendered the New Project not Affordable. If WEPCo has not been notified of the Participant decision then they shall be deemed to have rejected the New Project (Paragraph 5.8). In certain limited circumstances, where the Participant has rejected the New Proposal, WEPCo may be entitled to recover its Incurred Project Development Fee and procure the New Project outside the terms of the SPA (Paragraph 5.10).
- 5.9 Where a New Project has been rejected by the Relevant Participant on the grounds that it did not meet the Approval Criteria (Paragraph 5.7.2(b)), WEPCo shall be entitled, should it wish to do so, to refer the matter for consideration under the Dispute Resolution Procedure within ten (10) Business Days after receiving notice of the Rejection by the Participant (Paragraph 5.11).
- 5.10 Where a New Project becomes an Approved Project, WEPCo shall (pursuant to Paragraph 5.14) carry out further work to develop appropriate Project Agreements to implement the Approved Project on the terms of the Stage 2 Submission. The Participant shall (as set out in Paragraph 5.15) notify WEPCo

¹ Where applicable.

in writing as soon as they become aware of any matter which may adversely affect the viability of any New Project.²

- 5.11 The Participant shall then provide all reasonable assistance to WEPCo in relation to the procurement by WEPCo of all relevant Consents and the entering into of the relevant Project Agreement (Paragraph 5.16) and WEPCo shall (pursuant to Paragraph 5.18) novate all of its past, present and future rights, obligations and liabilities under a Project BIM Agreement to the Project Service Provider on or prior to the date of execution of the Project Agreement for the Approved Project.

6 CHANGES TO THE RELEVANT PARTICIPANT REQUIREMENTS

- 6.1 If there are any material variations to the Specific Requirements, Affordability Cap or Approval Criteria, in relation to a New Project by the Relevant Participant after a Stage 1 Submission has been submitted, then (pursuant to the provisions of Paragraph 6.1), WEPCo and the Relevant Participant shall negotiate in good faith as to the implications on the Stage 1 Submission and/or Stage 2 Submission (as appropriate) and shall seek to agree the changes to accommodate such variations.
- 6.2 The Participant may, (pursuant to Paragraph 6.2) at any time, give notice in writing to WEPCo that they propose to cancel a New Project without completing the Stage 1 Submission and Stage 2 Submission process (Paragraphs 3 to 5). This is known as a Cancellation Notice.
- 6.3 Where the Participant issues a Cancellation Notice to WEPCo, the Participant shall (pursuant to Paragraph 6.2) pay WEPCo the Incurred Project Development Fee in respect of the cancelled New Project. The relevant date for calculation being the date of the Cancellation Notice.
- 6.4 It is important to note that, unless the period of ten (10) years after the Commencement Date has expired then, to the extent the New Project in question is a Qualifying Project, the Participant shall not be entitled to procure the Required Facilities and/or the provision of the Project Services outside the terms of this Agreement without recommencing this New Project Approval Process.

7 SUSPENSION OF EXCLUSIVITY

- 7.1 Where the Participant exercises any right to suspend exclusivity in accordance with Clause 9.7, Clause 23.3 or 23.10.1 of the SPA, while WEPCo is preparing a Stage 1 Submission or a Stage 2 Submission in respect of any New Project, then (pursuant to Paragraph 7) the Participant may notify WEPCo at any time while such suspension subsists to cease work on producing the relevant Stage 1 Submission or Stage 2 Submission.
- 7.2 In such circumstances, WEPCo shall then cease work and the Participant shall pay WEPCo the Incurred Project Development Fee in respect of the relevant New Project with the relevant date for calculation being the date of the notice from the Participant.

8 SURVEYS

- 8.1 Where WEPCo recommends that surveys, studies and/or investigations (other than desktop studies) are required for the purposes of a Stage 1 Submission, WEPCo will procure such surveys, studies and/or investigations on the terms and at prices agreed with the Participant.
- 8.2 The cost of the surveys, studies and/or investigations will be payable by the Participant to WEPCo within twenty five (25) Business Days of receipt of a valid invoice. This cost will not form part of the Project Development Fee unless the Participant and WEPCo agree to the contrary.

² The provisions of Paragraph 5.15 shall not apply to any Relevant Participant which is a Local Planning Authority exercising its functions as such.

Bevan Brittan 

APPENDIX A

APPROVAL PROCESS FOR NEW PROJECTS

