



Executive
13 February 2013

**Report from the Director of
Children and Families**

Wards Affected:
ALL

**Authority for exemption to allow the award of contracts to
Brent schools for specific education services**

1.0 Summary

- 1.1 This report details special educational needs and learning support services delivered to the Council by four academies and makes recommendations on the contractual arrangements to be put in place to formalise these arrangements.

2.0 Recommendations

- 2.1 That an exemption be approved from the usual tendering requirements of Contract Standing Orders, to allow the award of an interim framework agreement to the academy Alperton Community School on a negotiated basis up to 31st August 2013 (with provision for a two-year extension).
- 2.2 That the council enter into an agreement with Alperton Community School to protect the interests of both parties following the financial contribution made to the cost of constructing a building for use by the service at Alperton Community School.
- 2.3 That an exemption be approved from the usual tendering requirements of Contract Standing Orders:
- 2.3.1 That an interim block purchase contract be awarded for 10 places for children with a significant hearing impairment to the academy Kingsbury High School on a negotiated basis up to 31st August 2013 (with provision for a two-year extension).
- 2.3.2 That an interim block purchase contract be awarded for 35 places at the City Learning Centre, to the academy Queens Park Community School on a negotiated basis up to 31st August 2014

(with provision for an annual review/ break clause at 31st August 2013).

- 2.3.3 That an interim block purchase contract be awarded for 35 places for Brent children to the academy Claremont High School on a negotiated basis up to 31st August 2014 (with provision for an annual review/ break clause at 31st August 2013).
- 2.4 That delegated authority be given to the Director of Children and Families to conclude negotiations with these four Academies and award the proposed contracts/ agreements.

3.0 Detail

- 3.1 The Academies Act 2010 and its predecessor legislation allowed publicly funded schools in England to become academies, still publicly funded but with an increased degree of autonomy.
- 3.2 Academy status means that the school is funded directly by government. Where the school provides specialised services to meet special educational needs, funding still comes from the local authority.
- 3.3 This report concerns four schools which have become academies at which Brent Council continues to fund specific services as ARPs (Additionally Resourced Provision). Academy status for a school makes the school an independent contractual entity thereby making the existing funding arrangements for pupil services inappropriate. There is a need to regularise the situation by seeking authority for an exemption to the competitive requirements of the Council's Standing Orders, that allow the Council to agree with individual schools formal contract arrangements. The schools and services delivered by those schools to pupils within Brent are outlined in Table 1. below.

Table 1.

No.	School	Service	Funding
1.	Alperton Community School	Specialist service using a new building (newly constructed and finished in November 2012) providing education for children with moderate learning difficulties.	£377,040 pa at 20 filled places, currently 8 places (£18,852 per place per annum)
2.	Kingsbury High School	Specialist enhanced education support for Brent young people who have a significant hearing impairment and delayed communication skills	£74,796 pa.
3.	Claremont High School	The Greenway Project – Transitional education for newly arrived young people with English as an additional language, (EAL)	£167,000 pa.
4.	Queens Park Community School	City Learning Centre annexed to the school. Delivers specialist ICT support for language acquisition for Key Stage 3 and 4 children new to borough of Brent	£167,722 pa for 35 places (£4,792 per place)

- 3.4 Government funding reforms affect the funding of education to children with Special Educational Needs, (SEN) including funding of (ARPs). From 1 September 2013 for academies, those with ARPs will receive base funding, which has been set at £10,000 per pupil per annum, The local authority will then pay any additional sum or ‘top-up’ when agreeing the placement of a child at the unit with the academy.
- 3.5 The council needs to secure the places in the ARPs and safeguard the Council’s financial interests. Officers therefore need to assess the implications of academy funding in the longer term and develop further the strategy around ARPs. In the short-term however, the council needs to ensure that the informal existing arrangements with academies are formalised contractually within the current funding envelope.
- 3.6 In addition property issues arise for Alperton Community School where the council has funded 80% of the capital costs of the building of a centre to be used for the education of children with moderate learning difficulties (MLD). As the centre has been built by the Council on academy land, legal ownership of the property vests in the academy, however the Council has an interest in ensuring in the long-term that the academy retains and uses the building for its original purpose. This is addressed in more detail in paragraph 4.2 and section 10 of this report.

4.0 Issues

4.1 This section addresses the arrangements required to convert current arrangements into formalised contractual arrangements.

4.2 Alperton Community School

4.2.1 The ARP at Alperton Community School.

The new centre has 20 places, of which 8 are currently filled, to be followed by a further 12 year 10 pupils from Woodfield Special School from September 2013. The council's current projections, indicate that in the short and medium term all the places will be filled by children living in Brent.

Following completion of the centre, it is important that the Council secures its return on its investment on the funding it provided for the project. Ideally, the return is some form of guarantee for the longer-term of service provision to Brent children.

4.2.2 Alperton has also secured a place on the government's Priority Schools Building Programme. If this leads to a full rebuild of the school then the Council will again be keen to secure the future of the new building and the service it provides.

4.2.3 In addition, now that the new ARP is complete and the academy assumes ownership of the building, it makes good sense to transfer to the school ongoing responsibility for enforcing against the building contract in the event of any latent defects to the ARP. It is therefore proposed to novate the building contract to the academy.

4.2.4 Replacing an existing service level agreement with a contracted service when the service is 'Part B' as defined by EU directives is technically in breach of the competitive requirements of Council Standing Orders. This report is therefore seeking an exemption from the tendering requirements of Contract Standing Orders to enable the council to agree a contract with the school without needing to go to market in order to ensure continuity of service for those children using the unit. In view of the uncertainty over the future funding arrangements it is proposed to enter into two agreements with Alperton academy (these proposals have been discussed with the school but are nevertheless subject to agreement with the academy;

- A novation and licence agreement, whereby the building contract for the new ARP is novated to the academy trust at the end of the works contract defects liability period; also confirming beneficial ownership (as opposed to legal ownership) of the building by the Council and accordingly a licence for the Council to place it there and remove it if no longer required. Subject to legal opinion, this agreement will also

include a commitment from the School to give first refusal on new places at the ARP to the Council. This will require the school to amend its admission criteria.

- An interim service framework agreement to 31st August 2013 setting out the basis on which the academy will deliver the ARP services for Brent with provision for a two-year extension.

4.3 Kingsbury High School

At this school the ARP provides for young people who have a significant hearing impairment and delayed communication skills, is currently delivered from existing school buildings, therefore none of the property implications relating to Alperton Community School apply. However, the need for the Council to secure service provision within the existing funding envelope and the procurement challenges remain. Once again it should be noted that the academy supports the Council's aspirations to continue this service for Brent pupils.

4.3.1 The Council currently funds 10 places at the school and any change in need would be varied by the Council in accordance with the funding arrangements for ARPs agreed with the Schools Forum.

4.3.2 This report is seeking an exemption from the tendering requirements of Contract Standing Orders in relation to a block contract for 10 places, though with provision for extension of 2 years in the event that the funding changes have little impact on how the service is delivered.

4.4 Queen's Park Community School (QPCS)

The City Learning Centre (CLC) at QPCS operates in two ways. One of these does not concern the Council, as it involves other schools booking facilities at the Centre directly with QPCS. The second service sees the Council purchasing places mainly for Key Stage 4 at the City Learning Centre (CLC) for children new to Brent who have English as an additional language (EAL). Although there are up to 35 places available at the CLC, Brent children move through the unit and into settled mainstream schooling quickly meaning that their places often operate on a roll-on, roll-off basis with up to 100 children moving through the unit over a year.

4.5 The council aims to reduce use of this provision and cease placements over the next two years.

4.6 Officers acknowledge the same commissioning and procurement issues apply and recommend that a relatively simple contractual arrangement be agreed with the school covering required provision for the next 2 years subject to review at the end of the first year to

determine either the end of the arrangement or extension as determined by commissioning needs. This will be for 35 places.

4.7 Claremont High School Academy

The Greenway project delivered from the above academy meets the needs for certain secondary age pupils who will arrive in the borough late in their school careers. The unit focusses upon preparing pupils for mainstream provision where they have English as an additional language, (EAL). The Council currently commissions 35 places at the project and demand is expected to continue for the service.

- 4.8 The same commissioning and procurement issues apply and it is recommended that a relatively straightforward contractual arrangement be agreed with the school covering required provision for 35 places for the next 2 years subject to review at the end of the first year to determine on-going requirements.

5.0 Supporting Arguments for non-competitive approach

- 5.1 There are strong supporting arguments in favour of a non-competitive approach on this occasion for the four academies in question. None of these services have been tested by the market, however officers have compared funding arrangements with equivalent units in other authorities. The changes in funding for two of the Academies mean that it is best to adopt an interim approach for these two services until 31st August 2013 so that the details of how the funding changes interact with the law on SEN admission arrangements can be verified.
- 5.2 Competitive processes could not be completed for all four schools before 1st September 2013, bearing in mind that TUPE would be likely to apply to current academy staff delivering the services. Furthermore the education of the young people currently attending the SEN provision would be disrupted if there were any changes provision.
- 5.3 The services are part B under the Public Contract Regulations 2006 (the "EU Regulations"). However, although the principles of transparency, non-discrimination and equality apply there is a low risk of challenge arising from a non-competitive process, particularly in the context of the reasons outlined at 5.2.
- 5.4 Officers are aware that although there is an exemption in Brent Council's Standing Orders for 'spot' purchase arrangements relating to individual personal services such as individual special educational needs provision, there is no such exemption for umbrella arrangements that support such individual packages of care or for block purchase arrangements. In this situation current arrangements for one of the academies are akin to a framework arrangement whilst the remaining

three are a form of block purchase, with the Council funding a specified number of places on an annual basis.

- 5.5 Positive discussions have been held with all four academies and all four are committed to continuing the existing provision as part of the Brent education offer. There is therefore every reason to work at keeping this arrangement in place for the timeframes proposed.

6.0 Financial Implications

- 6.1 The expenditure covered in this report is fully funded via a specific grant received from the DfE called the Dedicated Schools Grant. There is therefore no financial impact on the Council's general fund resources from the proposals in this report. From April 2013 the basis of the DSG will fundamentally change as will the funding for SEN for maintained schools and from September 2013 for Academies. Funding for the places at the schools set out in this report have been considered and agreed with the DfE to ensure the funding is secure and available from the newly created High Needs Block which will be created as an element within the DSG from April 2013.
- 6.2 Securing places at the schools covered in this report is also an important element of securing best value and meeting the savings plan integral to the SEN One Council Project and the Schools Budget Deficit Recovery Plan agreed with the Schools Forum.

7.0 Staffing Implications

- 7.1 These services are currently provided by schools that now have academy status and therefore arrangements put in place will recognise the schools as external contractors. In light of this there are no direct implications for Council staff arising from the award of contracts.

8.0 Legal Implications

- 8.1 The Council, being a public body, has to comply with legislation which includes the EU Treaty Principles; the Public Contract Regulations 2006; the Council's Financial Regulations and Contract Standing Orders when awarding contracts.
- 8.2 The nature of the services means that they are categorised under the Public Contract Regulations 2006 ("the "EU Regulations") as a part B service.

- 8.3 The estimated value of the proposed contracts over the aforementioned contract terms (including possible extensions) is approximately £193,223 (Kingsbury High School), £264,419 (Claremont Academy), £167,722 (Queens Park Community School) and £377,040 (for Alperton Academy assuming 20 places, not currently filled). All proposed arrangements with individual schools will exceed the EU financial threshold for services under EU public procurement Regulations. However, even where the thresholds may be exceeded, the services are Part B services under the EU Regulations and as such are not subject to the full application of the regulations with regard to competitive tendering. An Interpretative Communication was issued by the European Commission in July 2006 which indicates that the general duties of transparency, non-discrimination and equal treatment will normally require advertising and some form of competitive process before contract award for Part B services, especially if the contract is likely to be of interest to overseas EU providers. Given the current limited market in the type of services provided by the schools it is considered that there would be little interest in contracts from overseas EU providers so as to require an advertise process, and so the risk of a challenge on the basis of breach of the general EU duties is extremely low.
- 8.4 The value of the proposed contracts are such that they are classed as medium value contracts for the purposes of the Council's Contract Standing Orders. The Council's Contract Standing Orders provide that Medium Value and High Value Contracts should be let by inviting competitive tenders. However Contract Standing Order 84(a) states the Executive may agree otherwise where there are "*good operational and/or financial reasons*". Officers consider that there are good operational and good financial reasons for directly awarding contracts / framework agreements with the academies rather than carrying out a formal tendering process at this stage. These reasons are set out in sections 4 and 5 of the report.
- 8.5 For each of the four academies that are the subject of this report, the Council has entered into a transfer agreement recording the conversion in status. In the case of Alperton, this made provision for a transfer of the building contract, for the agreement of a service level agreement to cover the period up to 31st August 2013 and beyond, and for the parties to use reasonable endeavours to enter into an agreement allowing the Council first refusal on places. In addition, a form of agreement should be entered into with Alperton School in regard to the prefabricated school building 80 % funded and constructed by the Council on Alperton School land. The terms of the licence agreement will protect the Council's beneficial interest in and rights to the prefabricated building and its use for Council funded services and make provision in the event it ceases to be used for Council funded services. In addition, the Kingsbury and Claremont transfer agreements noted the need to

co-operate on formulating future contractual agreements for the services there.

- 8.6 The legal issues around the interaction between legislation on admission arrangements and the wish of the Council to have guaranteed places is set out in section 4.6 above.

9.0 Diversity Implications

- 9.1 There are no direct diversity implications associated with the letting of contracts to the academies through a negotiated process. Services at three of the academies are continuing in the same form, however if the service at Queens Park does diminish then this will require an Equalities Impact Assessment in relation to the final decision to end this service. Full provision for diversity implications, if required will be made in the contract documentation.

10.0 Property Implications

- 10.1 There are no property implications relating to contractual arrangements for Kingsbury High School, Claremont High School and Queens Park Community School. All three schools deliver services to the Council at existing premises on their own sites. However, officers need to consider wider property implications as other schools obtain academy status in the future.
- 10.2 For Alperton Community School a purpose built ARP centre has been completed in November 2012. The new unit has cost £550,000 of which the Council has funded £450,000 and legal title of the building rests with the Academy as the centre is on school land. The Council has a clear interest in seeking a return on its investment and most obviously this should be in the form of a contractual relationship with the academy that supports service delivery to Brent Council children on-going. In addition, as this building is pre-fabricated, it can be moved elsewhere and the Council is seeking the right to do this in the event, although unlikely, that the academy decides that it no longer wants to provide this service.
- 10.3 Officers are aware that plans are proceeding for the Alperton High School site to be significantly developed although no date has been agreed. If the school has to move from the site there is a risk to the Council that the ARP centre would be moved and that any relocation temporary or otherwise may not suit the needs of children attending the Centre. In the longer term the pre-fabricated building may no longer be required due to a complete rebuild.

- 10.4 Officers therefore propose (see section 4 above) that an agreement be entered into, separate from the services agreement, specifying that beneficial ownership of the pre-fabricated building vest in the Council (who would have the right to remove it) and that any proposal to move the ARP centre would need to be agreed with the Council. This agreement would also need to recognise that the academy will maintain the building.

11.0 Background Papers

- 11.1 There are no background papers associated with this report. Supporting information to this report is contained within the appendices.

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