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SUPPLEMENTARY PAPERS

Committee	COVID-19 SCRUTINY PANEL
Date and Time of Meeting	TUESDAY, 14 JULY 2020, 2.00 PM
Venue	REMOTE MEETING
Membership	Councillor Walker (Chairperson) Councillors Bridgeman, Howells, Jenkins and Patel

The following papers were marked 'to follow' on the agenda circulated previously

Mutual Investment Model (MIM) Strategic Partnering Agreement - 2.20pm (Pages 3 - 66)

Davina Fiore
Director Governance & Legal Services
Date: 9 July 2020
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**CYNGOR CAERDYDD
CARDIFF COUNCIL**

COVID-19 SCRUTINY PANEL

14 July 2020

Pre-decision Scrutiny: Mutual Investment Model (MIM) Strategic Partnering Agreement

Purpose of the Report

1. To give Members information to assist the pre-decision scrutiny of the report to Cabinet on the proposal to approve a Strategic Partnering Agreement, with WEPCo¹, to utilise the Mutual Investment Model to deliver new build education and community facilities, potentially at Cathays High School and Willows High School, prior to its consideration by Cabinet at their meeting on 16 July 2020.

Structure of the meeting

2. Councillor Sarah Merry (Cabinet Member – Education and Lifelong Learning), and Richard Portas (Programme Director – School Organisation) will be available to answer Members questions. Members will then be able to decide what comments, observations or recommendations they wish to pass on for consideration.

Structure of the Papers

3. To facilitate the scrutiny the following appendices are attached to this report:

Appendix A – Report to Cabinet

Mutual Investment Model (MIM) Strategic Partnering Agreement

The following appendix is attached is to Appendix A:

Appendix 1 – MIM Background Paper – Bevan Britten LLP

¹ WEPCo stands for Welsh Education Partnership Company

Scope of the Scrutiny

4. Full Council established the Covid-19 Scrutiny Panel on 21 May 2020 to provide measured and proportionate scrutiny in the current emergency and to undertake pre-decision scrutiny of reports to Cabinet. The Cabinet will meet on 16 July 2020 to consider a report on utilising the Welsh Government's Mutual Investment Model (MIM) to finance new build schools for Cathays High School and Willows High School.
5. To ensure all previous scrutiny informs the internal challenge, in advance of this meeting all Members of the Children and Young People Scrutiny Committee were consulted, their comments and enquiries collated and passed to Panel members to follow up, in line with the Panel's Terms of Reference.
6. During this scrutiny, Members have the opportunity to test the recommendations to Cabinet and explore the proposals to utilise MIM, including:
 - Strategic Partnering Agreement
 - Role of the Council
 - Governance arrangements
 - Financial implications
 - Risks to the Council
 - Next Steps and Timelines
 - Any issues identified by the Children and Young People Scrutiny Committee.

Background

7. The Welsh Government has established a 21st Century School Programme, with funding available to address issues with sufficiency of places, condition of buildings and suitability of the environment for teaching. Cardiff Council has assessed its education estate using a detailed and robust methodology that aligns with the Welsh Government's strategic objectives for 21st Century Schools. This methodology rates schools from A to D, with D being the worst category, in the three areas of sufficiency, condition and suitability.
8. From 2012-2017, Cardiff Council addressed the most pressing issues identified and submitted bids to Welsh Government for funding under the first tranche of funding available via the 21st Century School Programme, known as Band A. This

resulted in the new build secondary schools, Eastern High School and Western High School, as well as six primary schools.

9. In 2017, Cabinet considered a series of reports outlining the remaining challenges and opportunities facing Cardiff in the development of the education estate and agreed the Council's vision for its next tranche of school improvements, as part of Welsh Government's Band B 21st Century School Strategy.
10. Five secondary schools were included in Band B: Cantonian High School, Fitzalan High School, Cathays High School, Willows High School and Cardiff High School. These received the following ratings for sufficiency and condition of buildings:

High School	Sufficiency Rating	Condition Rating
Cantonian	D	D
Fitzalan	D	D
Cathays	D	C
Willows	D	D
Cardiff	D	C

11. The Council's vision for Band B includes maximising community benefits from investments in schools, by internal facilities such as halls and dance studios and external facilities such as MUGAs and sports pitches. The Council has explicitly identified this as one aspect of its programme to promote children's rights, as a participating member of the UNICEF Child Rights Partner Programme, with this commitment reflected in tender documentation on a project-by-project basis.
12. The estimated cost of the Council's overall Band B programme, which also includes primary schools and special schools, is circa £284 million. The Welsh Government offers two main routes of funding: the Mutual Investment Model, described below; or a capital grant for a percentage of the costs with the local authority needing to fund the remaining costs, for example via external prudential borrowing and/or available capital receipts.

13. The Mutual Investment Model (MIM) is a revenue funded cost-sharing arrangement. Any new schools funded via this route are funded through a public-private partnership, through a Special Purpose Vehicle, in which Welsh Government is represented. This partnership designs and builds the school and maintains the building fabric over a 25-year period. Local Authorities lease the assets created over a period of 25 years, paying an annual lease payment for use of the new school facilities rather than incurring up-front capital costs. At the end of the 25-year period, the assets transfer to the respective local authority. The Welsh Government funds the balance between the costs and the annual lease payment.

14. In March 2019, Cabinet agreed to pursue a dual funding model strategy to fund the 21st Century School Programme, to include the MIM route for the delivery of the proposed Band B schemes at Cathays and Willows High Schools. A copy of the report to Cabinet is available here:

<https://cardiff.moderngov.co.uk/documents/s28240/Cabinet%2021%20March%202019%20SOP%20MIM.pdf?LLL=0>

15. The Cabinet report attached at **Appendix A** explains that Welsh Government has procured Meridiam Investments II SAS as the Private Sector Delivery Partner to deliver education and community facilities via MIM. Meridiam and a subsidiary of the Development Bank of Wales will form a Special Purpose Vehicle, called WEPCo, to deliver the services to participant local authorities and further education institutions. These services include design, project development and professional services to develop MIM-approved projects. The actual delivery of the projects will be by Project Co, which will have a Project Agreement with the relevant Council and contracts to manage the building and facilities contractors.

Issues identified in the Cabinet Report

16. The report to Cabinet seeks approval for the Council to enter into a Strategic Partnering Agreement (SPA) with WEPCo and other participants. At **point 11**, the report to Cabinet states that:

'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. This includes partnering services for the project such as legal, design and technical advice.'

17. The report to Cabinet states that the SPA is a 10-year agreement, with potential to extend by a further 5 years. At this stage, the SPA commits Cardiff Council to services with the contract and not the delivery of capital projects. Welsh Government has appointed Bevan Brittan LLP as legal advisors to advise them on procurement and the Strategic Partnering Agreement; their advice has been included in the report to Cabinet, at **Appendix 1**.

18. At **point 12**, the report to Cabinet states that a Strategic Partnering Board (SPB) will be established to manage the performance of WEPCo. The SPB will include representatives from all participants and will:
 - Approve the Strategic Delivery Plan
 - Ensure project proposals are consistent with the Strategic Delivery Plan
 - Monitor WEPCo's performance against agreed Key Performance Indicators
 - Approve any extension to the SPA term
 - Approve any proposed disposal of interest in share capital resulting in a loss of control by WEPCo (or subsidiary).

19. The report to Cabinet asks Cabinet to note that the Chief Executive will use his delegated authority to make the appointment to the SPB, who will be either the School Organisation Programme Director or Director for Education and Lifelong Learning.

20. At **points 14-16**, the report to Cabinet sets out the anticipated benefits and potential limitations of MIM; these are supplemented by the Financial Implications at **points 23-26**.

21. The report to Cabinet states that Cathays High School and Willows High School are potential MIM schemes. It is expected that proposals for both schemes will be brought forward in Autumn 2020. Willows High School is proposed to form part of the initial batch of new projects. It

22. Further details of the MIM, SPA and SPB are provided in **Appendix 1**.

23. The report to Cabinet recommends giving delegated authority to the Director of Education and Lifelong Learning, in consultation with the Cabinet Member – Education & Lifelong Learning, section 151 officer and Director of Governance & Legal Services, to make minor amendments to the SPA and to agree any further updates required as well as complete any other documents associated with the SPA.
24. The report to Cabinet highlights that further reports on whether or not to proceed on individual projects will be brought to Cabinet for approval.

Proposed Recommendations to Cabinet

25. The report recommends that Cabinet:

- (a) Note the outcome of the Preferred Bidder Stage of the Competitive Dialogue Procedure under the Public Contracts Regulations 2015 as outlined in this report;
- (b) Subject to recommendation (c) and (d), approve the execution, delivery and performance of the Strategic Partnering Agreement with the Welsh Education Partnership Co in Autumn 2020 to facilitate the delivery of a range of infrastructure services and the delivery of education and community facilities;
- (c) Approve the Strategic Partnering Agreement linked to this report and summarised in **Appendix 1** of this report so as to give effect to recommendation (b), subject to recommendation (d) below;
- (d) Give delegated authority to the Director for Education and Lifelong Learning, after consultation with the Cabinet Member for Education, Employment and Skills, Director of Governance and Legal Services and s151 Officer:
 - i) To agree any minor amendments to the Strategic Partnering Agreement approved here as may be necessary, for reasons including but not limited to finalising any outstanding areas and to reflect advice provided; and
 - ii) To approve any further deeds and documents which are ancillary to the Strategic Partnering Agreement approved here
- (e) Notes that the Chief Executive will use his delegated authority to make the appointment of the School Organisation Programme Director or Director for Education and Lifelong Learning as 'Participant Representative' to sit on the Strategic Partnering Board (SPB);
- (f) Notes that in agreeing to the Strategic Partnering Agreement, it is not being asked to decide to proceed with any project. Any decision to proceed with a project will be reported back to Cabinet in future report(s) for decision.

Previous Scrutiny

26. The Children & Young People Scrutiny Committee has undertaken regular scrutiny of the Council's proposals re 21st Century Schools. In December 2017, the Committee scrutinised Band B proposals and following the meeting, Cllr Bridgeman, Chair Children & Young People Scrutiny Committee, wrote to Cllr Sarah Merry, Cabinet Member – Education & Lifelong Learning. The letter² contained the following points:

- The Committee commended the report to Cabinet.
- The Committee considered that communication of Band B plans and projects was critical to their success and sought assurance that all stakeholders would be kept informed of progress, in addition to statutory consultation.
- The Committee expressed concern that the funding of the revenue consequences of proposals would be dependent on significant annual capital financing costs and failure to fund these costs would severely restrict essential improvements to the school estate.
- The Committee recommended a detailed maintenance programme for the school estate be developed and integrated into future school and council budgets.
- The Committee was particularly concerned that communities should benefit from the programme of new builds, with access to community facilities. The Committee recommended that the operational arrangements of the community facilities at Eastern High be kept in-house.

27. In March 2020, the Children & Young People Scrutiny Committee considered a progress report on 21st Century Schools. Following the meeting, Cllr Bridgeman, Chair Children & Young People Scrutiny Committee, wrote to Cllr Sarah Merry, Cabinet Member – Education & Lifelong Learning; the letter³ contained the following points:

² Letter from Cllr Bridgeman, Chair Children & Young People Scrutiny Committee, to Cllr Merry, Cabinet Member Education & Lifelong Learning, dated 13 December 2017

³ Letter from Cllr Bridgeman, Chair Children & Young People Scrutiny Committee, to Cllr Merry, Cabinet Member Education & Lifelong Learning, dated 13 March 2020

- The Committee was very pleased with progress to date
- With regard to the programme being supplemented by £25m funding via capital receipts, the Committee asked for clarification on if this funding would be provided by education only assets or other Council assets
- The Committee were concerned to hear that under the current arrangements of the MIM, the Council has less control over building specifications and the possible implications this could have in terms of community availability. The Committee sought further information on this.

Way Forward

28. Councillor Sarah Merry (Cabinet Member – Education and Lifelong Learning) and Richard Portas (Programme Director, School Organisation), will attend to take questions from Members of the COVID- 19 Scrutiny Panel, representing the Members of all five Cardiff Council Scrutiny Committees.

Legal Implications

29. The Scrutiny Committee is empowered to enquire, consider, review and recommend but not to make policy decisions. As the recommendations in this report are to consider and review matters there are no direct legal implications. However, legal implications may arise if and when the matters under review are implemented with or without any modifications. Any report with recommendations for decision that goes to Cabinet/Council will set out any legal implications arising from those recommendations. All decisions taken by or on behalf the Council must (a) be within the legal powers of the Council; (b) comply with any procedural requirement imposed by law; (c) be within the powers of the body or person exercising powers of behalf of the Council; (d) be undertaken in accordance with the procedural requirements imposed by the Council e.g. Scrutiny Procedure Rules; (e) be fully and properly informed; (f) be properly motivated; (g) be taken having regard to the Council's fiduciary duty to its taxpayers; and (h) be reasonable and proper in all the circumstances.

Financial Implications

30. The Scrutiny Committee is empowered to enquire, consider, review and recommend but not to make policy decisions. As the recommendations in this report are to consider and review matters there are no direct financial implications at this stage in relation to any of the work programme. However, financial implications may arise if and when the matters under review are implemented with or without any modifications. Any report with recommendations for decision that goes to Cabinet/Council will set out any financial implications arising from those recommendations.

RECOMMENDATION

The Panel is recommended to:

- i) Consider the information in this report, its appendices and the information provided during the meeting; and
- ii) Determine whether they would like to make any comments, observations or recommendations for consideration.

DAVINA FIORE

Director, Governance & Legal Services

9 July 2020

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BY SUBMITTING THIS REPORT TO THE CABINET OFFICE, I, NICK BATCHELAR, DIRECTOR EDUCATION AM CONFIRMING THAT THE RELEVANT CABINET MEMBER(S) ARE BRIEFED ON THIS REPORT

THIS REPORT MUST BE ACCOMPANIED BY THE REPORT AUTHORISATION FORM 4.C.214

**CARDIFF COUNCIL
CYNGOR CAERDYDD**

CABINET MEETING: 16 JULY 2020

**MUTUAL INVESTMENT MODEL (MIM) STRATEGIC
PARTNERING AGREEMENT**

EDUCATION, EMPLOYMENT & SKILLS (COUNCILLOR SARAH MERRY)

AGENDA ITEM:

Reason for this Report

1. For Cabinet to approve the Strategic Partnering Agreement (SPA) with Welsh Education Partnership Co to facilitate the delivery of education and community facilities through Welsh Government's Mutual Investment Model (MIM), subject to minor amendments which will be delegated to the Director for Education and Lifelong Learning. A link to the SPA can be found [here](#).
2. To ask Cabinet to note that the Chief Executive will use his delegated authority to make the appointment of the School Organisation Programme Director or Director for Education and Lifelong Learning, as 'Participant Representative' to sit on the Strategic Partnering Board.

Background

3. At its meeting on the 14th December 2017, the Cabinet received a report which:
 - Outlined the priority schemes to be undertaken as part of Cardiff's Band B 21st Century Schools Programme;

- Requested members note the approval in principle by WG of the Strategic Outline Case submitted by Cardiff Council for Band B of the 21st Century Schools Programme and to authorise discussion with the WG to secure business case approval for individual schemes.
4. This report set out the sufficiency, suitability and condition issues in Cardiff and which form were the basis of the funding request from Cardiff to WG under the Band B programme.
 5. Support for Cardiff' programme was secured in principle to enable the Council to:
 - Remove all "D" condition, end of life, school properties;
 - Address the 8 form of entry sufficiency issue in the English medium secondary sector in the central area of the City;
 - Address the sufficiency, condition and suitability issues in the Special Sector, in both primary & secondary settings;
 - Address local sufficiency issues in Welsh medium primary schools in the East & West of the City;
 - Address local sufficiency issues in English medium primary schools in Cardiff Bay & West of the City.
 6. In developing its outline programme for 21st Century Schools Band B, the Council considered a range of options and prioritised a list of projects and schemes. This work was undertaken in conjunction with external cost consultants to ensure the robustness of indicative costs. The Council utilised standardised construction cost rates as provided by WG.
 7. The indicative cost of the Council's outline Band B programme was £284 million. This cost represented the full "rolled-up" cost of all schemes within the preferred programme. At the point of submission, external cost consultants confirmed that delivering the programme was possible within the overall envelope identified.
 8. As set out in the December 2017 report, the WG's approach to Band B is slightly different to Band A as there are two funding models available to support Local Authorities to finance their investment; traditional capital and MIM. MIM is a national scheme to borrow funds via the private sector to design and build schools, and maintain the building fabric over a 25 year period.
 9. The Cabinet's initial position regarding MIM (following consideration of the overall cost of MIM; the WG's proposed contribution rate at 75:25 and the overall level of risk exposure) was to express an interest in the traditional capital funding model only, when submitting its Strategic Outline Business Case. However, following further consideration in the 21 March 2019 report, Cabinet agreed to pursue a dual funding model strategy to fund the 21st Century Schools Programme to include the

MIM route for the delivery of our proposed Band B schemes at Cathays and Willows (including 3FE primary). The Cabinet were keen to use the MIM new build programme as a vehicle to transform teaching and learning and local communities. This aligned with Welsh Government's proposed contribution rate alteration to 81:19.

Issues

10. Welsh Government has been procuring a Private Sector Delivery Partner (PSDP) to work with it on the delivery of education and community facilities. The PSDP and a subsidiary of the Development Bank of Wales will be required to form a Special Purpose Vehicle (SPV) called WEPCo, which will deliver the services to participants. Welsh Government have also appointed Bevan Brittan LLP as legal advisors to advise them in respect of the procurement and Strategic Partnering Agreement (referred to below). The advice is provided on the basis that it can also be relied upon/used by participants. Their advice has been included in this report.
11. Cardiff Council, along with other local authorities and further education institutions, will be a participant to the arrangements. The participants and WEPCo will enter into a Strategic Partnering Agreement (SPA). 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. This includes partnering services for the project such as legal, design and technical advice.
12. The SPA is a 10 year agreement with a potential to extend a further 5 years between WEPCo and all participating local authorities and further education institutions. The enclosed MIM Background Paper in **Appendix 1** provides a more detailed summary of the SPA. WEPCo's performance is managed through the Strategic Partnering Board (SPB). Participant representation is required on the SPB. 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 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). **Appendix 1** also provides a more detailed summary of the role of the SPB.
13. WEPCo will undertake all partnering services (i.e. the design, project development and professional services). Approved MIM Projects will be developed by WEPCo, but delivered (including hard facilities management) by Project Co which will enter into a Project Agreement with the Council to deliver the relevant MIM Project. The Council will be a contracting party with Project Co which will have contracts in place to manage the building and facilities contractors. The Council will be responsible for payment of the relevant proportion of the monthly unitary

charge (debt repayments) which forms 19% of the capital and 100% of the hard facilities management costs.

14. Evaluating the full financial and non-financial impact of funding projects via the MIM route is challenging and the following is largely based on information and financial modelling provided by WG. The anticipated benefits of MIM are as follows:

- Potential for earlier delivery of schemes, particularly in the context of the slowdown of the traditional capital funded model schemes.
- Earlier delivery would assist with the avoidance of part of the significant cost that will be required to maintain Condition D schools before the new schools are constructed.
- A school asset that is maintained at a high level during the 25 year lease period, with the WG contributing towards 81% of the maintenance costs.
- The Council and schools concerned will have full control over the day to day operation of the building, including soft facilities management and use of the building and its facilities.
- Engagement with the MIM route may provide an opportunity to reconsider the scope of schemes that could potentially be funded via MIM.

15. There are also potential limitations of the MIM funding model, these are set out below:

- The suitability of MIM is limited to complete new builds only, projects that include refurbishment or extensions are not deemed suitable.
- Projects (or a group of similar projects in a local authority area) would need to have a capital value of £15 million or more to be funded through this route.
- MIM is not deemed suitable for small primary schools, PRUs or special schools.
- Statutory consultation needs to have been completed beforehand with no outstanding or complicated land issues.
- The scope of schemes needs to be clearly defined in advance of commencing a MIM scheme with changes to scope being problematic once the scheme is underway.
- The capital, revenue and associated borrowing costs are unknown until the projects have been procured by ProjectCo. However, all will be procured within agreed benchmarked parameters.
- Cardiff Council will not directly manage the procurement and design process, but it will be an important stakeholder to ensure the project meets the local needs and there are clear checkpoints throughout the process. Further information can be found in the enclosed MIM Background Paper in **Appendix 1** alongside general question and answers.

16. Councils will still need to undertake and fund some capital works, including work to develop the school specific brief, and will also be required to undertake and where required fund some works connected to FFE; management and lifecycle of 3G pitches; soft facilities management; catering and ICT. It is envisaged at this stage that where required separate procurement processes will take place.
17. Cardiff Council has only two schemes that have been identified as potential MIM schemes. These are Cathays High School and Willows High School.
18. Willows High School project has been identified as potential Pathfinder projects and will therefore form part of the initial batches of new projects to be taken forward. The process for new projects is set out in Schedule 5 of the SPA and the enclosed MIM Background Paper in **Appendix 1** provides a more detailed summary of the Approval Process for New Projects under the SPA. It is expected that proposals for both schemes will be brought forward in autumn 2020.
19. Welsh Government has completed the procurement process for the Private Sector Delivery Partner (PSDP) and the highest ranked bidder with a score of 91.57% Meridiam Investments II SAS. Meridiam will be appointed as the Selected Bidder on expiry of the Standstill Period. It is an international organisation with vast experience in this field. Meridiam will be supported educationally by the Learning Crowd.
20. The next stage is to enter into the Strategic Partnering Agreement (SPA) with WEPCo in order for the Pathfinder projects to progress. At this stage the agreement of the SPA only commits Cardiff Council to services with the contract and not the delivery of capital projects.

Reasons for Recommendations

21. Reasons for Cabinet to approve the Strategic Partnering Agreement (SPA) with Welsh Education Partnership Co to facilitate the delivery of education and community facilities through Welsh Government's Mutual Investment Model (MIM) are that:
 - The Welsh Government's Mutual Investment Model (MIM) is a delivery model that is deemed value for money;
 - The Strategic Partnering Agreement (SPA) with Welsh Education Partnership Co to facilitate the delivery of education and community facilities is a consistent with other Local Authorities across Wales and provides the required services to deliver future projects;
 - There is limited commercial risk to the Council until projects are progressed under the New Project Approval Process.
22. It is proposed to delegate to the Director of Education and Lifelong learning as set out in recommendation d. This is to allow any minor amendments to the SPA as indicated in the footnotes in **Appendix 1**

and any further updates to reflect advice provided as well as complete any other documents associated with the SPA.

Financial Implications

23. Under the Mutual Investment Model (MIM) new schools will be constructed via a Special Purpose Vehicle and the Council will make a net contribution of 19% (with WG providing 81% of the revenue funding required) towards the annual unitary charge for a period of 25 years. The funding required for the Council's contribution will be made available via the SOP Revenue Reserve, which also meets revenue costs arising in relation to programme delivery and capital financing.
24. Other capital costs arising will be outside of the scope of MIM funding. These costs will include those directly connected to the new school, such as FFE and ICT, as well as other costs not directly connected to the new building. These costs are still within the scope of the 21st Century Schools Programme and will be funded via the traditional capital route, with WG contributing towards 65% of the costs.
25. An updated analysis of the options has been completed, including inflationary uplift and changes in scope, to assess the whole life costs of the two projects. When comparing MIM and standard Band B funding the total revenue cost over the 25-year period is broadly similar, with the estimates suggesting that MIM would result in lower costs over the life of the financial model.
26. The analysis compared the traditional Band B funding (with a 65% WG intervention rate) to the MIM model (81% WG intervention rate). In reality, the overall envelope for Band B is already under significant pressure and the pathfinder MIM schemes would no longer be affordable within Band B. The MIM scheme provides value for money based on the high-level analysis completed to date. Given the limited options available the only other route available for these schemes currently would be to push these schemes into Band C or reprioritise the Band B programme in its entirety.

Legal Implications

27. Approval to enter into the Strategic Partnering Agreement (SPA) is an executive function requiring a decision of the Cabinet.
28. To enter into and participate in the SPA referred to in this report, the Council will be relying upon a number of statutory powers:
 - i. the "well-being" powers contained in section 2 Local Government Act 2000;
 - ii. powers contained in the Education Acts 1996 and 2002;

- iii. the “incidental” provisions of section 111 Local Government Act 1972.

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:

- (a) the promotion or improvement of the economic well-being of their area;
 - (b) the promotion or improvement of the social well-being of their area, and
 - (c) the promotion or improvement of the environmental well-being of their area
29. 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.
 30. In discharging its duties under the Act, the Council has set and published well-being objectives designed to maximise its contribution to achieving the national well-being goals. The well-being objectives are set out in Cardiff’s Corporate Plan 2019-22. When exercising its functions, the Council is required to take all reasonable steps to meet its well-being objectives. This means that Cabinet should consider how the proposed decision will contribute towards meeting the well-being objectives and must be satisfied that all reasonable steps have been taken to meet those objectives.
 31. The well-being duty also requires the Council to act in accordance with a ‘sustainable development principle’. This principle requires the Council to act in a way which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs. Put simply, this means that the Cabinet must take account of the impact of their decisions on people living their lives in Wales in the future. In doing so, the Council must:
 - (a) Look to the long term
 - (b) Focus on prevention by understanding the root causes of problems
 - (c) Deliver an integrated approach to achieving the 7 national well-being goals
 - (d) Work in collaboration with others to find shared sustainable solutions

- (e) Involve people from all sections of the community in the decisions which affect them
32. The Cabinet must be satisfied that the proposed decision accords with the principles above; and due regard must be given to the Statutory Guidance issued by the Welsh Ministers, which is accessible here: <http://gov.wales/topics/people-and-communities/people/future-generations-act/statutory-guidance/?lang=en>
33. 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.
34. Entering into the SPA does not bind the Council in any way. However, the Council will be required to appoint a representative to act on its behalf in relation to the SPA. 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.
35. The power to appoint an individual to the Strategic Partnering Board (SPB) pursuant to Schedule 2 Local Authorities (Executive Arrangements) (Functions and Responsibilities) (Wales) Regulations 2007 is delegated to the Chief Executive in consultation with the relevant Cabinet member for the appointment of officer representatives, in accordance with Part 3 Section 3 of the Constitution. As set out in this report, the Cabinet is asked to take this decision in place of the Chief Executive as part of the recommendations contained herein.
36. The SPA is to be executed as a deed and attested in accordance with Article 13.5 of the Constitution.
37. This report details proposed Pathfinder projects at Willows High School and Cathays High School. It is noted that to proceed with these projects, Cabinet authority will be required to approve the use of the Approval Process for New Projects as set out in Schedule 5 of the SPA. Any decision 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, will be reported back to Cabinet in future report(s) for decision.
38. The Cabinet should be satisfied that the procurement is in accordance within the financial and budgetary policy and represents value for money for the Council.
39. The Cabinet should also have regard to, when making its decision, to the Council's wider obligations under the Welsh Language (Wales) Measure 2011 and the Welsh Language Standards.

Equalities Implications

40. The Council has to satisfy its public sector duties under the Equalities Act 2010 (including specific Welsh public sector duties) – the Public Sector Equality Duties (PSED). These duties require the Council to have due regard to the need to (1) eliminate unlawful discrimination, (2) advance equality of opportunity and (3) foster good relations on the basis of ‘protected characteristics’. The ‘Protected characteristics’ are: • Age • Gender reassignment • Sex • Race – including ethnic or national origin, colour or nationality • Disability • Pregnancy and maternity • Marriage and civil partnership • Sexual orientation • Religion or belief – including lack of belief.
41. Where a decision is likely to result in a detrimental impact on any group sharing a Protected Characteristic, consideration must be given to possible ways to mitigate the harm. If the harm cannot be avoided, the decision maker must balance the detrimental impact against the strength of the legitimate public need to pursue the recommended approach. The decision maker must be satisfied that having regard to all the relevant circumstances and the PSED, the proposals can be justified, and that all reasonable efforts have been made to mitigate the harm.
42. Proposals on a project by project basis will address equalities implications as necessary, and reports back to Cabinet on any individual projects to be taken forward will contain appropriate Equality Impact Assessments.

HR Implications

43. Further information will be required about the operation of the MIM scheme in order to fully assess any HR implications which may arise. This could be as a result of changes in responsibilities for Hard and Soft FM arrangements as well as the management of any facilities proposed for community use. In addition, at the appropriate time an assessment of any TUPE implications under the Transfer of Undertakings (Protection of Employment) Regulations 2006 will need to take place. Full dialogue with any affected staff and trade union colleagues will need to be undertaken during this assessment process.
44. The Education Directorate may also need to consider its capacity for any additional responsibilities which arise as a result of the operation of a MIM scheme.

Appendices

Appendix 1: MIM Background Paper

RECOMMENDATIONS

45. The Cabinet is recommended to:
- (a) Note the outcome of the Preferred Bidder Stage of the Competitive Dialogue Procedure under the Public Contracts Regulations 2015 as outlined in this report;
 - (b) Subject to recommendation (c) and (d), approve the execution, delivery and performance of the Strategic Partnering Agreement with the Welsh Education Partnership Co in Autumn 2020 to facilitate the delivery of a range of infrastructure services and the delivery of education and community facilities;
 - (c) Approve the Strategic Partnering Agreement linked to this report and summarised in **Appendix 1** of this report so as to give effect to recommendation (b), subject to recommendation (d) below;
 - (d) Give delegated authority to the Director for Education and Lifelong Learning, after consultation with the Cabinet Member for Education, Employment and Skills, Director of Governance and Legal Services and s151 Officer:
 - i) To agree any minor amendments to the Strategic Partnering Agreement approved here as may be necessary, for reasons including but not limited to finalising any outstanding areas and to reflect advice provided; and
 - ii) To approve any further deeds and documents which are ancillary to the Strategic Partnering Agreement approved here
 - (e) Notes that the Chief Executive will use his delegated authority to make the appointment of the School Organisation Programme Director or Director for Education and Lifelong Learning as 'Participant Representative' to sit on the Strategic Partnering Board (SPB);
 - (f) Notes that in agreeing to the Strategic Partnering Agreement, it is not being asked to decide to proceed with any project. Any decision to proceed with a projects will be reported back to Cabinet in future report(s) for decision.

SENIOR RESPONSIBLE OFFICER	NICK BATCHELAR Director of Education & Lifelong Learning
	July 2020

Appendix 1

Mutual Investment Model (MIM) Background Paper

Cabinet 16 July 2020

This background paper provides advice on the following:

- Strategic Partnering Agreement Summary
- Strategic Partnering Board Summary
- Approval Process for New Projects Summary
- Strategic Partnering Agreement FAQs document
- Design and Cost Guidance

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.

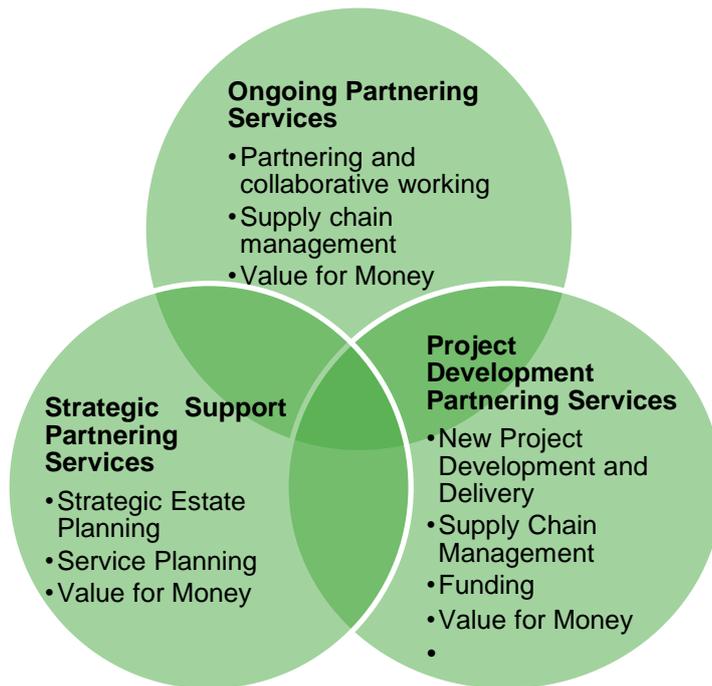


Figure 1 WEPCo Partnering Services

- 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 INTRODUCTION⁴

- 1.1 The WEP Strategic Partnering Agreement (**SPA**) is the agreement entered into between the Local Authorities and Further Education Institutions (**Participants**)⁵ 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:
 - 2.2.1 to develop close working relationships between WEPCo and the Participants at all levels;
 - 2.2.2 to focus on achieving the best value for money operational performance within agreed timescales;
 - 2.2.3 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;
 - 2.2.4 to recognise each other's needs, constraints, limitations, capabilities, roles and responsibilities to achieve mutually beneficial outcomes;
 - 2.2.5 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;
 - 2.2.6 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;
 - 2.2.7 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;
 - 2.2.8 to develop openness and trust in a transparent information and data sharing environment; and
 - 2.2.9 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:

⁴ Capitalised terms have the meaning provided for in the Strategic Partnering Agreement unless otherwise stated.

⁵ 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:

- 3.1.1 one representative from each of the Participants;
- 3.1.2 one representative of WEPCo, nominated by the board of directors of WEPCo;
- 3.1.3 one additional representative of Welsh Government (at Welsh Government's discretion); and
- 3.1.4 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 must 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:

- 3.1.1 other relevant local and national trends;
- 3.1.2 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 **Error! Reference source not found. (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 **Error! Reference source not found.** 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 **Error! Reference source not found.** 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 **Error! Reference source not found.**, Clause **Error! Reference source not found.** or Clause **Error! Reference source not found.**
- 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]⁶;
 - 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).

⁶ Where applicable.

- 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 in writing as soon as they become aware of any matter which may adversely affect the viability of any New Project.⁷
- 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 **Error! Reference source not found. to Error! Reference source not found.**). 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.

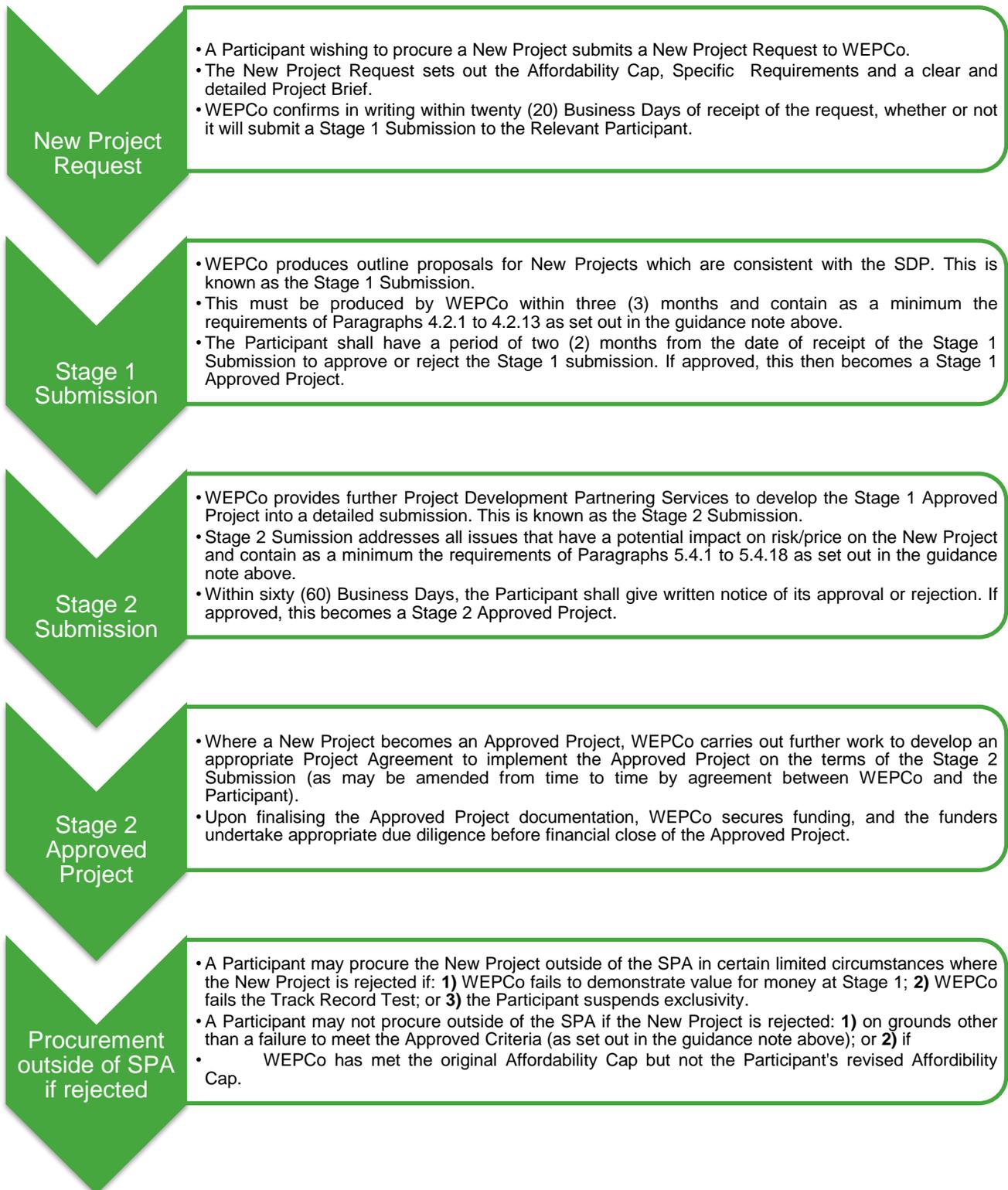
8 SURVEYS

- 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.

⁷ The provisions of Paragraph 5.15 shall not apply to any Relevant Participant which is a Local Planning Authority exercising its functions as such.

APPENDIX A

APPROVAL PROCESS FOR NEW PROJECTS



WEP STRATEGIC PARTNERING DELIVERY MODEL

FREQUENTLY ASKED QUESTIONS AND ANSWERS

Strategic Partnering Agreement

1 PARTNERING SERVICES AND EXCLUSIVITY

1.1 Do we have to use WEPCo to deliver our MIM Band B scheme?⁸

Once a Participant has entered into the SPA, it gives WEPCo the exclusive right to deliver 21st Century Schools and Colleges (Band B) MIM Programme projects for a period of ten years from the commencement date of the Strategic Partnering Agreement (SPA). However, these MIM Band B projects must be approved and meet the relevant criteria set out and agreed with the relevant Participant through Schedule 5 (*New Project Approval Process*). Exclusivity can be suspended by Participants in limited circumstances – please see further question 1.6 below.

1.2 If we do not have a MIM Band B scheme, why should we sign up? What else could we use WEPCo for? Can we use WEPCo to deliver facilities outside of education, e.g. libraries, leisure centres, office accommodation?

Signing up to the SPA will give Participants the flexibility to use WEPCo in the future to provide Partnering Services or Project Services for capital projects for education or associated community facilities. Participants may request WEPCo to deliver:

Project Development Partnering Services in respect of potential new projects which are not MIM Projects

The role of WEPCo is to develop proposals for a new 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. 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 the new project.

Strategic Support Partnering Services

Strategic Support Partnering Services are 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 on an *ad-hoc basis* on terms and conditions appropriate for the particular circumstances.

Project Services

Project Services means services required to be provided in relation to the design, construction, testing, commissioning and completion of premises (including any temporary works) and the installation of equipment; and/or the provision of hard facilities maintenance services.

Participants may request WEPCo to deliver:

- (a) Project Services relating to major capital projects in the education sector (not just MIM Projects);
- (b) Project Services relating to capital projects required for the provision of education sector services or community services. Associated community facilities may include libraries, leisure and

⁸ Capitalised terms have the meaning provided for in the Strategic Partnering Agreement unless otherwise stated.

children's and other educational community based services strategically related to MIM or other capital projects delivered through WEPCo;

- (c) Project Services in relation to the provision of hard facilities maintenance services required for the provision of education sector services or community services.

1.3 What partnering services may WEPCo provide?

WEPCo may provide a range of Partnering Services to Participants.

These fall into three categories:

- 1.3.1 *Ongoing Partnering Services* (day to day operational services, partnering and collaborative working, supply chain assembly and overall management, value for money);
- 1.3.2 *Project Development Partnering Services* (working up new projects for delivery, supply chain assembly, funding and value for money); and
- 1.3.3 Strategic Support Services (strategic estate planning, strategic service planning and value for money).

Please see **SPA Summary** for further details.

WEPCo shall provide Project Development Partnering Services to implement Qualifying Projects in accordance with the specification, KPIs (including community benefits) and rates set out in Schedule 3 (*Partnering Services*).

Participants may request WEPCo to deliver Project Development Partnering Services in respect of potential new projects which are not MIM Projects. Recipient Participants and WEPCo agree the scope of services to be provided. Participants can also request WEPCo provide Strategic Support Services on an ad-hoc basis on terms and conditions appropriate for the particular circumstances.

1.4 How do we request services from WEPCo?

WEPCo will provide the Ongoing Partnering Services on a continuous basis (without formal request to do so by the Participant).

Participants can request that WEPCo provides Project Development Partnering Services, to develop proposals for a new project in accordance with the process set out in Schedule 5 (*Approval Process for New Projects*) of the SPA.

Participants can request WEPCo provides, on an ad hoc basis, Strategic Support Partnering Services on terms and conditions agreed in advance between the Participant and WEPCo.

1.5 How is WEPCo paid for the services it provides?

WEPCo's Ongoing Partnering Services are recovered through the OPS Relevant Proportion payable as part of the Project Development Fee charged by WEPCo for New Projects.

WEPCo charges a Project Development Fee for the provision of Project Development Partnering Services. Please see further question 3.7 below.

For Strategic Support Partnering Services, WEPCo is paid by the relevant Participant within 30 days of a valid invoice, the cost being calculated at rates and prices quoted by WEPCo in accordance with Section 4 of Schedule 3 (*Partnering Services*) of the SPA, and updates as agreed in advance by the Participant.

Please see **SPA Summary** for further details.

1.6 If WEPCo is performing poorly are we still bound by exclusivity?

WEPCo is at risk of having its rights of exclusivity suspended for poor performance. This is not subjectively determined. The SPA sets out what constitutes a “WEPCo Event of Default” that is sufficiently serious to trigger the suspension of exclusivity and the process that must be followed by Participants to suspend exclusivity. If this is the case, each Participant can suspend the exclusivity granted to WEPCo which will include any New Projects that have not yet reached stage 2 approval under Schedule 5 (*Approval Process for New Projects*) of the SPA. The Participants can lift that suspension at any time and the suspension of exclusivity will be lifted on remedy of the default (or where the private sector delivery partner’s shares in WEPCo are sold).

1.7 How will our requests be prioritised by WEPCo? How will projects be prioritised for delivery by WEPCo, if there are competing demands on the resources and capital of the WEPCo?

One of the objectives of the Strategic Partnering Board (SPB), on which representatives from each Participant, WEPCo and Welsh Government sit is to give guidance on and approve the order in which New Projects should be progressed and on what basis. WEPCo is then obliged to prioritise New Projects on a basis consistent with the decisions of the SPB. As the Participant representatives sit on the SPB, they will have a direct say on which New Projects are prioritised over others, following discussions between all SPB representatives.

1.8 What are the expected timescales for signing the SPA?

Completion of the procurement process is set for September 2020. We will be guiding each Participant through the process of signing all documents, including the SPA, in preparation for completion and we expect this to take place in June and July, to allow plenty of time before completion.

2 ROLE AND INVOLVEMENT AS A PARTICIPANT

Strategic Partnering Board

2.1 We do not have a scheme in the pipeline to be delivered by WEPCo – will we still have to attend the SPB meetings?

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.

Each Participant that has entered into the SPA is obliged to appoint a representative to the SPB under clause 14 of the SPA to act on its behalf in relation to the SPA. The identity of the Participant’s Representative may change at any time, provided written notice is given to WEPCo and the other Participants.

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.

As part of its role, the SPB will approve the Strategic Delivery Plan and prioritisation of New Projects. It is a benefit for each Participant to attend SPB meetings and take SPB decisions even if it does not currently have a scheme in the pipeline. Where permitted by a Participant’s own governance framework, a Participant’s Representative can delegate responsibility to any other person to attend the SPB and vote on behalf of the delegating Participant’s Representative by written notice to WEPCo. 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 (with adjourned meetings as a result of a lack of quorum in the initial meeting having a quorum of one Participant Representative (being the Welsh Government representative) and the one WEPCo Representative).

2.2 Do we have to attend the SPB meetings in person?

SPB meetings can be held by telephone conference call or video conference or a combination of both, providing all participants are able to speak to and hear each other and a quorum is always present.

2.3 Who would be the right representative on the SPB?

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.

2.4 Does a decision of the SPB bind us if we have not voted in favour of that decision?

SPB decisions are taken by majority vote (of Participant Representatives and the Welsh Government Representative) and so if a majority of the SPB voting representatives approve a decision, it will be passed. However decisions of the SPB which affect a Participant in a way which result in expenditure or liability being incurred by the Participant, or have an adverse impact on the manner in which the Participant discharges a statutory function, will only bind that Participant where it has voted in favour of the decision. If the Participant has not voted in favour of a decision which affects it in this way, it will not be binding on it.

Investment and financing

2.5 Can we take up shares or invest in the WEPCo?

No, it is not open to Participants to take shares or invest in the WEPCo.

2.6 Can we make a capital payment or contribution on our MIM project(s) to reduce the revenue commitment?

Legally it is possible for a capital contribution to be made under a Project Agreement but this is a policy matter and would be subject to approval by Welsh Government. The quantum and timing of the capital contribution would also be limited by accounting treatment rules to ensure it does not bring a project on balance sheet.

2.7 How much profit will the private sector make?

This will be governed by the WEPCo Shareholders' Agreement and the SPA. Under the SPA (Schedule 4, Appendix 1) the equity returns for projects and project management fees are capped, and these caps will be bid back by bidders.

In competition, bidders will be tested on the daily rates for delivery of Partnering Services and Internal Rate of Return (IRR).

Obligations and liabilities

2.8 Do we have any ongoing liabilities or commitments as a Participant if we decide not to procure any works or services from WEPCo?

As a Participant you will be bound by the terms of the SPA, and will have committed to attending the Strategic Partnering Board. You will also be subject to the freedom of information obligations set out in clause 50 and the further assurance provision (to do all things and execute all further documents necessary to give full effect to the SPA). However, save in the circumstances set out in question 2.10 below, there is no joint liability of the Participants (and only then does this apply where two or more Participants have both breached the terms of the SPA), which means that no act or omission of any Participant shall bind any other Participant.

2.9 How does the default of one Participant affect the others?

There are only limited grounds which constitute a Participant Event of Default under the SPA. If a Participant Event of Default occurs, WEPCo may serve notice on the Participant(s) responsible for the Participant Event of Default suspending or terminating the SPA insofar as it relates to such Participant(s). The SPA will remain in place and effective as between the WEPCo and the non-defaulting Participants.

2.10 If WEPCo is in default, can each Participant decide whether they want to terminate or continue with WEPCo?

If there is a WEPCo Event of Default, the Participants may or may not have the right to terminate the SPA (depending on the nature of the default, and whether or not WEPCo has the opportunity to remedy its breach). If there is a WEPCo Event of Default there are a number of potential consequences, and each Participant (acting through Welsh Government) may be able to elect to suspend WEPCo's exclusivity, or require WEPCo to replace a non-performing Supply Chain Member, or serve a SPA Material Default Notice or a Default Termination Notice to terminate the SPA. Where a right of termination has arisen, Participants can each decide whether to do so or continue with WEPCo.

2.11 What happens in a conflict situation between the Participants?

The SPA governs the relationship between the Participants and WEPCo. The role of the SPB and decision making is set out in response to question 2.1 above.

Where Participants need to act together to request WEPCo to deliver, for example, a batch of projects, we would recommend the procuring Participants enter into a co-operation agreement governing that joint request and any disputes that arise in relation to it, including how WEPCo's costs will be apportioned between the Participants where such costs relate to some or all of the projects.

2.12 If WEPCo gets into financial difficulties, are we liable for their debts?

No, WEPCo is a separate legal entity and is responsible for its own debts and liabilities.

2.13 What are our potential liabilities if we default under the Strategic Partnering Agreement?

If a Participant commits a Participant Event of Default, WEPCo can either:

- suspend performance of services to that Participant until that Participant can demonstrate to WEPCo's reasonable satisfaction it is capable of performing their obligations; or
- notify the Participant of the Event of Default. If the default is capable of remedy and hasn't been remedied within 30 Business Days of notice or is not capable of remedy, 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 schedule 14 section 1. If the SPA is terminated in its entirety by the default, additional compensation under schedule 14 section 2 will also be payable.

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.

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 losses of WEPCo will be split between the defaulting Participants.

2.14 What happens to Projects if WEPCo is in default under the SPA (or vice versa)?

Depending on the severity of the WEPCo Event of Default, in the worst case scenario, Participants may suspend WEPCo's exclusivity and during that period serve an SPA Material Default Notice which allows the Participants to terminate the SPA immediately.

Please see **SPA Summary** for further details.

3 DELIVERING PROJECTS THROUGH WEPCO

3.1 What business case approval will we need to deliver our project?

WEPCo will assist each Participant in recommending potential New Projects. Each Participant will then need to obtain approval in accordance with its governance procedures prior to it requesting WEPCo to produce a stage 1 submission in relation to a New Project. Once that approval has been obtained, WEPCo will then prepare the stage 1 and stage 2 submissions and as part of that process, will assist the Participant in obtaining an outline business case and full business case approval, which will be required to enable the New Project to progress to Approved Project status.

Please see **separate guidance published by Welsh Government** in respect of business case approvals. This is published on the E Portal under Welsh Government Guidance.

3.2 What is the process to develop project proposals?

Schedule 5 (*Approval Process for New Projects*) of the SPA outlines the approval process for New Projects.

Please see **SPA Summary** for further details and **separate guidance note**.

A Participant can request WEPCo prepare a proposal for a New Project. WEPCo will then prepare a stage 1 submission and if successful, a stage 2 submission, before the New Project becomes an Approved Project and is developed.

3.3 What do we need to fund and what will Welsh Government fund? What do we expect WEPCo to do - will WEPCo support site identification?

Welsh Government will fund the capital cost and 81% of the Participant's unitary charge in relation to MIM Projects delivered under the WEP Strategic Partnering Delivery Model. Each Participant will need to pay the remaining 19% of the unitary charge.

Welsh Government will pay Bevan Brittan LLP's legal fees in advising the Participants on the pathfinder projects. Please see separate note on the scope of Bevan Brittan's services published on the E Portal.

WEPCo will analyse and discuss with Participants, the individual accommodation requirements of each Participant. It will assist in developing local delivery plans and identify options for meeting the Participants' accommodation requirements and recommend New Projects to progress, including developing the Participant's requirements for each New Project, discussing the range of funding options for that New Project and assisting Participants in preparing outline business cases and obtaining the necessary approvals.

3.4 When does statutory consultation fit into the new project approval process?

Under the SPA, WEPCo must undertake widespread consultation, as agreed with the relevant Participants, within the local community throughout the New Project Approval Process. The Participant procuring the New Project and WEPCo will need to agree a time within the stage 1 and 2 submission preparatory framework in which consultation will take place, and its results then fed into the proposal for the New Project.

3.5 What do we need to do at "stage zero" to get our project ready to submit to WEPCo? Do we need to develop our BIM requirements?

Please see **separate guidance published by Welsh Government**.

WEPCo will work with a Participant to recommend New Projects and subsequently develop the Participant's requirements for each project. This includes preparing an outline business case. WEPCo will also, as part of the stage 1 submission, provide a detailed Project execution plan which includes a BIM Execution Plan.

3.6 How is WEPCo paid for the work it undertakes to progress our project to the point it is ready for contract signature?

WEPCo will be paid for this work as payment for Project Development Partnering Services in accordance with Schedule 4 (*Partnering Services Costs*) of the SPA.

Please see **SPA Summary** for further details.

3.7 How can we be assured our project is value for money?

WEPCo is obliged to evidence that its proposals for New Projects deliver value for money and continuous improvement in value for money.

WEPCo's specific obligations are set out in Schedule 5 (*Approval Process for New Projects*), Schedule 6 (*New Project Pricing Report*) and section 5B of Schedule 3 (*Partnering Services*). Please see **SPA Summary** for further details.

3.8 How are we involved in selection of our project's contractor and FM service provider?

Participants will have a key role in the selection of a contractor and FM service provider. Whilst WEPCo will lead on the procurement and selection of the project's contractor and FM service provider, as the procuring Participant, you will have the opportunity to feed into the tender evaluation and award criteria, attend meetings relating to the procurement process and discuss with WEPCo, the choosing of the preferred tenderer for construction and FM services. WEPCo is obliged to increase opportunities for local employment and training and so will need to look to local employment and labour for the delivery of these services.

Bidders will be tested on their approach to supply chain assembly during the procurement to select the PSDP. This includes the preparation of detailed methodologies that will be incorporated into the SPA.

3.9 Can WEPCo access professional team / construction / FM suppliers on our existing frameworks or panels?

WEPCo will separately procure the construction and FM service providers for individual projects, WEPCo may be able to access existing frameworks or panels, but this will need to be assessed on a case by case basis, and is dependent on being permissible under the terms of that existing framework or panel. This will be jointly considered with the relevant Participant on a project specific basis.

3.10 How can WEPCo ensure that our project delivers wider community benefits, e.g. use of local labour?

One of the WEPCo Objectives is to increase opportunities for local employment and training. WEPCo is also obliged, as part of the specification of services it will provide, to ensure it includes local communities in the development of New Projects and associated community improvement initiatives and ensure the enhancement of user satisfaction by developing and designing facilities that present a focal point for the community. WEPCo will be required to meet specified KPIs, including those linked to community benefits. This will be robustly tested throughout the procurement to select the PSDP.

3.11 Can community groups use the school facilities delivered by WEPCo? Will this allow revenue to be generated that we can keep?

Yes. One of the obligations of WEPCo in developing New Projects is to consider out-of-hours community use including having a reception and social areas for community use for use outside of

normal hours and associated security. WEPCo is also obliged to ensure that it includes local communities in the development of New Projects and associated community improvement initiatives and ensure the enhancement of user satisfaction by developing and designing facilities that present a focal point for the community. It is permitted for schools to retain revenue from community use out of hours.

3.12 How will WEPCo ensure new facilities are sustainable, energy efficient and net carbon zero/carbon neutral?

Ensuring WEPCo delivers facilities that are environmentally friendly is built into how WEPCo will develop and deliver New Projects under the SPA. This is a WEP Objective. WEPCo will also be obliged in obtaining stage 2 approval of all New Projects, to agree with Participants and adopt appropriate standards for development, which includes BREEAM. It will therefore be important that Participants discuss and agree with WEPCo the environmental standards they wish to achieve in developing the new facilities, such as ensuring the facilities are developed using sustainable materials and developed to be run as energy efficient and net carbon zero/carbon neutral on completion.

3.13 How will WEPCo ensure new facilities are secured by design to minimise vandalism and malicious damage?

WEPCo is obliged to consider security in developing plans for New Projects. The standards for development of the New Project are agreed between the Participants and WEPCo and so Participants will be able to request particular specifications that it would like the development to meet. The terms of the Project Agreement will govern construction and maintenance standards.

3.14 How will we negotiate the terms of the Project Agreement, including agreeing changes to the terms?

A template of the Project Agreement is included in Schedule 7 (*MIM Projects*) to the SPA, along with other template documentation, including a template D&B Development Agreement.

The Project Agreement includes a number of MIM education sector specifics including:

- Optional drafting suitable for use for Schools or College projects
- Optional drafting suitable for batched Schools projects
- Optional drafting suitable for “Post Completion Works”
- “ICT Handover” principles adopted
- Notification of Examination Periods
- Unavailability of Existing Facilities/Disruption Events
- No handover during term time
- Late completion remedies
- Malicious Damage
- Local Authority College specific drafting.

There is a standardised approach to allow the project specific tailoring of the template Project Agreement. Part of Bevan Brittan’s role will be to develop and tailor appropriately with you the template Project Agreement for submission to Welsh Government for approval.

Please see **separate guidance from Welsh Government and separate guidance on the Project Agreement.**

Bevan Brittan LLP

11 May 2020

WEP STRATEGIC PARTNERING SERVICES

OVERVIEW OF INDIVIDUAL PROJECT DESIGN DEVELOPMENT, COSTS AND APPOINTMENT OF SUPPLY CHAIN

1. OVERVIEW OF CONTROL OF DESIGN DEVELOPMENT, COSTS FOR A NEW PROJECT

- 1.1 As a signatory to the Strategic Partnering Agreement (**SPA**), the Council will have control over the development of the design for any new project delivered by WEPCo. The SPA incorporates a New Project Approval Process for all new projects. This governs the arrangements between the Council and WEPCo, for WEPCo to develop proposals for the delivery of a new project (including design) to meet the Council's requirements.
- 1.2 The attached guidance paper at Appendix 1 sets out in detail the New Projects Approval Process, setting out the way in which the Council will be involved in the development of proposals for individual new projects by WEPCo and control throughout the process.
- 1.3 We have identified below an overview of the New Projects Approval Process and the ways in which the Council will be involved and have control of design development throughout, certainty of costs, how WEPCo will be required to demonstrate value for money and that the proposals must meet the Council's requirements (including design and affordability requirements). There are various "gateposts" at which the Council will have control over both the design and costs:
- 1.4 Following a request for WEPCo to develop (as Project Development Partnering Services) proposals for the delivery of a new project (a **New Project Request**), the Council will set out matters such as the Affordability Cap, Specific Requirements (all technical and project specific requirements), and a clear detailed Project Brief for any New Project. The Affordability Cap will be informed by the Council's business case process with Welsh Government. The Affordability Cap is not a focus on input construction costs, but the long term payment for the delivery of the new project, that takes into account the whole life costs of the facility.
- 1.5 WEPCo will assess the New Project Request, and decide whether it will submit a Stage 1 Submission to the Council. If WEPCo were to choose not to proceed on the premise that the Affordability Cap is unrealistically low, then WEPCo would work with the Council in good faith to agree an alternative Project Brief and/or Affordability Cap for a revised New Project.
- 1.6 Based on the Council's Brief, WEPCo will then produce a **Stage 1 Submission**, which is an outline proposal for the New Project, containing amongst other things, a concept design (to RIBA Stage 2) of the New Project, as well as a value for money assessment, and the proposed Project Development Fee Estimate. During this stage, WEPCo will liaise with the Council 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 Council.
- 1.7 It is up to the Council to then approve or reject the Stage 1 Submission. 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 of the SPA), the Council would be entitled to procure the New Project outside the terms of the SPA, without being in breach of the exclusivity provisions of the SPA (unless they seek to commence procurement of the New Project during any period when exclusivity has been reinstated).
- 1.8 If approved, this becomes a **Stage 1 Approved Project**.
- 1.9 The Council would then request that WEPCo provide further services to develop a Stage 1 Approved Project into a detailed submission, as a **Stage 2 Submission**. Again at this stage, WEPCo would liaise with the Council and relevant end users. During this time, the Council would provide WEPCo with information as to its design requirements, and assist WEPCo in the review of further draft designs and proposals for the delivery of the new project.
- 1.10 During development of the Stage 2 Submission, WEPCo must give consideration to agreed approval criteria against which the Stage 2 Submission will be assessed ("Approval Criteria"). The Approval

Criteria, includes (a) a requirement that the cost of the New Project is within the Affordability Cap; (b) that it has been demonstrated that the New Project provides value for money; and (c) that the New Project meets the Specific Requirements set out by the Council at the outset of the New Project Request.

- 1.11 WEPCo would then submit to the Council the Stage 2 Submission, which would contain further value for money assessment, detailed design work (to RIBA Stage 4), and an explanation as to why the Stage 2 Submission meets the Approval Criteria.
- 1.12 The Council would be entitled to reject the Stage 2 Submission if there has been a change to the Affordability Cap since the New Project Request, which has rendered the New Project not Affordable. Similarly, should the Council find that any material aspects of the Stage 2 Submission are unsatisfactory, it can notify WEPCo and offer reasonable assistance to WEPCo to address the deficiencies.
- 1.13 The Council may reject the New Project on the grounds set out in Paragraph 5.7.2 of the SPA. 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. In certain limited circumstances, where the New Proposal has been rejected, WEPCo may be entitled to recover its Incurred Project Development Fee and procure the New Project outside the terms of the SPA.
- 1.14 Where a New Project has been rejected by the Relevant Participant on the grounds that it did not meet the Approval Criteria, WEPCo would 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.
- 1.15 If the Council approves the Submission, this would become a **Stage 2 Approved Project**.
- 1.16 To conclude, WEPCo's role is to develop proposals for the delivery of a new project, this includes developing the design specifically to meet the Council's brief. The Council will be fully involved throughout the process to assess whether the design meets its requirements.
- 1.17 The Council will set the Affordability Cap for the new project from the outset. The Council will have continual opportunities to review the costs build-up. Throughout the process, there is an underlying requirement that the proposals for a new project represent value for money.
- 1.18 Following approval of the New Project, the Council will enter into a form of Project Agreement with a subsidiary of the Private Sector Delivery Partner (which will be a special purpose vehicle (**Project Co**)) for the delivery of the New Project, based on the template form of MIM Project Agreement, appended as a Schedule to the SPA. The payment (unitary charge) by the Council under the MIM Project Agreement entered into by the Council will be fixed and whilst the template MIM Project Agreement has a fixed risk profile, a few issues may increase cost but these are clear risk items often within the Council's knowledge or control (e.g. breach leading to delay or cost).
- 1.19 The certification of the works (and design) is an independent process undertaken by a jointly appointed Independent Tester who will certify the works based on set out agreed criteria. There are rights for the Council to inspect the works and an opportunity for the Council to open up the works in certain circumstances, however, there is risk to the Council in doing so, if no breach in performance in the delivery of the works is found. On completion of the new facility, there are regular "checks" based on the payment mechanism, to ensure the Availability of each area on a daily basis.

2. OVERVIEW OF CONTROL FOR THE APPOINTMENT OF A SUPPLY CHAIN TO DELIVER A NEW PROJECT

- 2.1 For each New Project, WEPCo will need to establish its own supply chain. This has been a deliberate approach for at least two reasons. First, to do otherwise would have required a more substantial and lengthy procurement process where bidders' ability to design and price different sample projects would have been needed. Secondly, the nature of the nationwide programme is such that it is likely to suit smaller regionally based contractors and professionals. It means the contracts include processes for this selection process to occur.

- 2.2 WEPCo will not have a tied supply chain for the delivery of construction and hard FM (Facilities Maintenance) services; these will be competitively tendered through an agreed methodology with the Council.
- 2.3 In Schedule 3, Paragraph 1.3.1 of the SPA, the requirement is for WEPCo to put in place procedures for supply chain assembly for New Projects (such as any project in Cardiff). In selecting and appointing a supply chain WEPCo is to follow the Tender Process. Any appointment must be “commensurate with the Council’s values, goals and vision having regard to a number of areas including, but not limited to, health and safety, commitment to delivery of community benefits, quality and sustainability.” It is for you to stipulate those values, goals and vision.
- 2.4 The Tender Process is set out in Schedule 6 of the SPA and will occur at Stage 2 of the Approval Process. Whilst the process and decision is a responsibility of WEPCo it allows for your involvement at all stages: approval of the scope; media for advertising; evaluation criteria and award criteria; Tender requirements; and then ongoing involvement with input into the questionnaire; the opportunity to attend meetings; review and approval of the Tender Evaluation Report.
- 2.5 The above is a brief summary of some of the procedures in place to ensure that the right supply chain is appointed. It should be recognised that the main subcontractors are likely to face a PFI style risk profile that may be difficult for them, but second tier Key Sub-Contractors roles ought to suit local providers especially if the Council uses its rights to stipulate its requirements and goals.
- 2.6 The Council’s involvement in the selection of the supply chain, and in setting the criteria against which it will be appointed is to drive value for money and to ensure costs controls.
- 2.7 The Council may require WEPCo to carry out the Tender Process in respect of any single New Project (which of itself may include a number of batched facilities) or batch of New Projects. The Council will need to approve where there is any grouping or groupings of facilities management services or any division of them into separate parts, in order to optimise the opportunity for the Council to obtain best value for money. WEPCo could ensure go to market for facilities management services not just in respect of the proposed Council’s new facility, but also across a number of facilities, thereby driving a better price for those contractors who are bidding for it.

3. OBLIGATIONS FOR PROPOSALS TO BE VALUE FOR MONEY AND CONTINUOUS IMPROVEMENT

- 3.1 One of the benefits of entering into the SPA is that the Council can be assured regarding value for money and continuous improvement for the delivery of a pipeline of new projects. The SPA sets out the high-level principles that underpin WEPCo’s values, and the establishment of a framework that promotes excellence and value for money.
- 3.2 Under the terms of the SPA, 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. This is achieved through agreed KPIs, as developed in accordance with the SPA throughout the term.
- 3.3 For all projects, WEPCo will 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.
- 3.4 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*). In particular, value for money will be demonstrated to the Council via WEPCo Performance Reports and Annual Reviews, over the term of the SPA.

Appendix 1

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 **Error! Reference source not found.** 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 **Error! Reference source not found.** 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 **Error! Reference source not found.**, Clause **Error! Reference source not found.** or Clause **Error! Reference source not found.**
- 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]⁹;
 - 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).

⁹ Where applicable.

- 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 in writing as soon as they become aware of any matter which may adversely affect the viability of any New Project.¹⁰
- 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 **Error! Reference source not found. to Error! Reference source not found.**). 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.

¹⁰ The provisions of Paragraph 5.15 shall not apply to any Relevant Participant which is a Local Planning Authority exercising its functions as such.

APPENDIX A

APPROVAL PROCESS FOR NEW PROJECTS

