

RB
Richard Burbidge

020 8489 2923

020 8881 2660

richard.burbidge@haringey.gov.uk

06 December 2006

To: All Members of the Executive
c.c. All Other Persons Receiving Executive Agenda

Dear Councillor,

Executive Procurement Committee – Thursday 7 December 2006

I attach a revised version of the following report:

**4. NEW SIXTH FORM CENTRE AT WHITE HART LANE - REQUEST FOR
WAIVER OF CONTRACT STANDING ORDERS AND TO VARY THE
CONDITIONS OF CONTRACT**

(Report of the Director of the Children and Young People's Service): To seek agreement to vary the conditions of contract and to waive the requirement to enter into a contract Performance Bond and to vary the conditions of contract with regard to Collateral Warranty.

Yours sincerely

Richard Burbidge
Member Services

This page is intentionally left blank

*** HARINGEY COUNCIL ***

Agenda item:

[No.]

Procurement Committee

On 7th December 2006

Report Title: **New Sixth Form Centre at White Hart Lane:**

**Request for waiver of Contract Standing Orders and to vary the
Conditions of Contract**

Forward Plan reference number (if applicable): -

Report of: **Director of the Children and Young People's Service**

Ward(s) affected: **All Wards but
particularly East Haringey**

Report for: **Non-Key**

1. Purpose

To seek Member agreement to:-

- 1.1 Vary the Conditions of Contract and to waive the requirement to enter into a contract Performance Bond under Contract Standing Order 12.07 and 13.02;
- 1.2 Vary the Conditions of Contract with regard to the Collateral Warranty and grant delegated authority to the Director of the Children and Young People's Service and Head of Legal Services to agree the final wording

2. Introduction by Executive Member

- 2.1 "I support the proposal to waive the requirement to enter into a contract Performance Bond and to vary the Conditions of Contracts with regard to the Collateral Warranty. This is acceptable in the circumstances of this well-advanced contract and with the assurances spelt out in paragraph 7.5."

3. Recommendations

- 3.1 That members agree to waive Contract Standing Order (CSO) 12.07(a) the requirement for security in the form of a bond, in respect of the Main Contract relating to the Design and Build of the Haringey 6th Form Centre dated 3rd July 2006 between the London Borough of Haringey and Willmott Dixon Construction Limited as permitted under CSO 7.
- 3.2 That members agree to waive Contract Standing Order (CSO) 12.07(a) the

requirement for security in the form of a bond, in respect of the Demolition and Asbestos Removal Contract for Haringey 6th Form Centre dated 28th July 2006 between the London Borough of Haringey and Willmott Dixon Construction Limited as permitted under CSO 7.

3.3 That Members agree to a variation of both the Main Contract (referred to in 3.1 above) and the Demolition and Asbestos Removal Contract (referred to in 3.2 above) to remove the requirement for a Performance Bond as permitted under CSO 13.02.

3.4 That Members agree to a variation of the terms of the Collateral Warranty contained in both the Main Contract (referred to in 3.1 above) and the Demolition Contract (referred to in 3.2 above) as permitted under CSO 13.02 and give delegated authority to finalise those terms to the Director of Children and Young Peoples Service and the Head of Legal Services.

Report Authorised by: **Director of the Children and Young People's Service**

Signed: *J. M. Alcock* Date: *06/12/06*

Contact Officer: **Brendan Wells, Head of Property and Contracts, Tel: 020 8489 3805**

4. Executive Summary

There are a number of contract and related issues to be finalised relating to the main works and the earlier contract for the demolition works to managing risk and securing the Council's position in the event that the main contractor is in breach of contract or becomes insolvent either during construction or after.

These include waiving the contract standing orders need for a performance bond as there is a Parent Company Guarantee; amending the wording of the collateral warranty; and issuing a Deed of Variation for both the main and demolition Contracts to this effect.

5. Reasons for any change in policy or for new policy development (if applicable)

5.1 None

6. Local Government (Access to Information) Act 1985

6.1 List of background documents:

- JCT Standard Form of Building Contract With Contractor's Design 1998 Edition
- Haringey Employer's Requirements Document Volume 1

7. Background

- 7.1 There is a contract in place between the Council and Willmott Dixon Construction Limited as main contractor for the construction of the 6th Form Centre in White Hart Lane, Tottenham and work has commenced. As recommendations 3.1 to 3.4 advise, there are a number of contract details to be finalised to secure the Council's position in the unlikely event that the main contractor is in breach of contract or becomes insolvent either during construction or after.
- As previously reported in the Award of Contract report Members can be reassured that as part of the qualitative evaluation following tender, extensive financial checks were undertaken with regard to the financial standing of Willmott Dixon Construction Limited and the risk to the Council in entering into contract with them. This included a Dun and Bradstreet business analysis and credit risk report which rates the company in financial strength and credit worthiness as sound. Also this contractor is the only non-international constructor selected by Partnerships for Schools for the BSF Framework.

Approved budget	£28.57m (excl. land purchase £5.7m)
Contract Sum	£23.3m

Performance Bond

- 7.2 It is a Contract Standing Order requirement that the Council may require a contractor to provide security for completing the contract in the form of a bond. In this instance it is recommended that this requirement be waived as a bond would provide little benefit beyond the Parent Company Guarantee (Ref. 7.3).
- 7.3 The industry has moved away from use of Bonds and the Corporate Procurement Unit has agreed to review their use. The cost to the contractor of obtaining a bond valued at 10% of the contract sum on this construction project is in the region of £60,000. This is indicative that the financial services sector considers the contractor to be a good risk as contractors considered to be high risk would cost considerably more, possibly over £200,000.
- 7.4 This cost has not been allowed for in the contract and should the Council require a bond the contractor would be likely to seek full recompense of the cost from the Council. Members can take assurance that: -
- this contractor is low risk
 - there is additional security for the Council in that the retention fund (which after valuation eight stands at £324,600) will rise incrementally to £700,000 at the time of practical completion
 - there is added security in the form of a Parent Company Guarantee and this is with the contractor for execution. (ref. 7.5 below)

Parent Company Guarantee (PCG)

- 7.5 A Parent Company Guarantee is a guarantee by the contractor's ultimate holding company for securing the contractor's performance of the contract. Unlike a performance bond (which typically expires at practical completion or completion of making good defects) a parent company guarantee usually does not expire until twelve (sometimes six) years after practical completion. A PCG was included in Appendix C to the Employers Requirements which form part of the Conditions of Contract and this is being executed.

Collateral Warranty

- 7.4 Contractors or consultants generally only owe a duty of care to the party paying them. This development is being carried out under a "design and build" contract, the point of which is to make the main contractor responsible if anything goes wrong. This causes problems if the main contractor goes bust, as the employer can be left with no-one to sue for any defects that materialise.

Collateral Warranties get around this problem by making a direct contract between the employer and the consultants, and the employer and sub-contractors, all of which provide the necessary duty of care in the event of defects arising.

- 7.5 There is a Collateral Warranty document included in Appendix C to Haringey's Employers Requirements Volume 1 which forms part of the Conditions of Contract. Corporate Legal Services have recommended some re-wording and reinforcement to reflect current industry practice and to protect the Council's interest. The Executive is requested to agree to the Collateral Warranty being amended and to delegate the final wording to the Director of the Children and Young Peoples Service and Head of Legal Services. A Deed of Variation would therefore be required to allow the terms of the contract to be varied and it is requested that a waiver of standing orders be agreed to allow the conditions of contract to be varied.

- 7.6 The issues regarding performance bonds and collateral warranties apply to both the main contract (currently on-site) and the demolition contract (completed).

8. Recommendations

- 8.1 That Members agree to waive Contract Standing Order (CSO) 12.07 (Conditions applying to all contracts over £150,000) and 13.02 (Executive may vary or extend), as allowed under CSO 7, in accordance with waiver requirements noted under CSO 7.03 to: -
- 8.2 Waive the requirement that the Council may require the contractor to provide security for completing the main contract in the form of a performance bond;
- 8.3 Vary the wording of the Collateral Warranty for the main contract and give delegated authority to finalise those terms to the Director of the Children and Young Peoples Service and Head of Legal Services;

- 8.4 Waive the requirement that the Council may require the contractor to provide security for completing the demolition contract in the form of a performance bond and a collateral warranty;
- 8.5 Vary the wording of the Collateral Warranty for the demolition contract and give delegated authority to finalise those terms to the Director of the Children and Young Peoples Service and Head of Legal Services.

9. Equalities Implications

- 9.1 There are no equalities implications as a result of this report.

10. Health and Safety Implications

- 10.1 There are no health and safety implications as a result of this report

11. Sustainability Implications

- 11.1 This report requests variations to the conditions of contract and has no sustainability Implications.

12. Financial Implications

- 12.1 There will be a saving to the Council of around £60,000 as a result of not requiring the Contractor to provide a Contract Performance Bond. A Parent Company Guarantee is in place and a Performance Bond would be in effect “doubling up”.
- 12.2 The retention fund is set at 3% and this percentage is deducted from each monthly valuation. The retention fund will rise to £700,000 at practical completion and in the event of the main contractor defaulting; the retention monies will be available to the Main-Contractor's creditors.
- 12.3 Before the Council committed contractually a “Dunn and Bradstreet” financial check was undertaken which showed the main contractor to be financially stable at that time.

13. Comments of the Director of Finance

- 13.1 The Director of Finance was consulted in the preparation of this report and concurs with the recommendations of the report subject to a suitable Parent Company Guarantee being executed

14. Comments of the Head of Legal Services

14.1 Performance Bonds

CSO 12.7 states that ‘every contract which exceeds £150,000 must contain a clause to cover the following: a. if it is a contract for works, that the Council may require the contractor to provide security for completing the contract in the form of a bond.’

The purpose of the bond is to provide the Council with security in the event the contractor who has been awarded a contract, has proved to be in breach of contract, or has become insolvent. Where either of these events apply the bondman (insurance company) will pay the Council the value of the bond. The Council is therefore compensated, up to the value of the bond. The bond does not represent full compensation of the losses which the Council may incur but the advantage of the bond is that the monies can be claimed without court proceedings.

Contract standing order 12.7 gives the Council a discretion whether to require a contractor to provide it with a Bond. The value of this contract is £23.3 million. The usual practice is that a bond equal to 15% of the contract value, is requested, in this case the value of the bond would be approx £ 3.5 million.

Members if they agree with the recommendation to dispense with the requirement of a bond, will have to satisfy themselves that the Council has suitable alternative security in the event there is a breach or act of insolvency by a contractor.

Collateral Warranty

In a building contract the Council does not generally have a direct contractual relationship with the sub contractor of the contractor who has been awarded the contract (main contractor) . Collateral Warranty is required as this agreement between the Council and the sub contractor then permits the Council to enforce guarantees made by the subcontract in respect of the sub contractors works.

The Collateral Warranty must be in a form approved by the Head of Legal Services.

The Committee under the Council Constitution has powers to delegate its powers to an officer to agree the wording of the Collateral Warranty; the power is derived from section 15 of the Local Government Act 2000.

The Head of Legal Services confirms that there is no legal reason preventing the consideration of recommendations in this report.

[click here to type]

15 Comments of the Head of Procurement

15.1 The recommendations made above have been discussed in detail with both the Corporate Procurement Unit and the Construction Procurement Group.

15.2 The contractor (whilst not appointed for this contract from the Haringey construction frameworks) has been recently fully evaluated in the course of the framework

selection process. Part of that evaluation did include a full consideration of the contractor's financial capability.

15.3 The contractor does have the security of a Parent Company Guarantee (PCG), providing the Council with financial security in the event of breach of contract or other unforeseen eventualities on the part of the contractor preventing completion of the project.

15.4 Performance bonds are often seen as security against higher risk projects and /or contractors. However, they are an expensive provision for the contractor to put in place, and the cost will inevitably be passed to the employer (the Council), which in itself represents a risk.

15.5 The contractor is deemed to be a lower risk contractor in the construction market.

15.6 The decision whether or not to request a bond should be made on a project contract by contract basis. In the case of the Sixth Form Centre project, given the existence of a PCG with a relatively low risk main contractor, the request to waiver the standing order to request a bond seems appropriate and the Head of Procurement supports this.

15.7 The Head of Procurement also supports the request for a collateral warranty, to provide extra security for the Council in respect of defects in the main contractor's supply chain.

16. Use of Appendices / Tables / Photographs

16.1 None

This page is intentionally left blank