

CABINET

Date of Meeting	Tuesday, 12 th July 2022
Report Subject	Sustainable Communities for Learning - Mutual Investment Model (MIM) – Financial Close for the 3-16 Campus Project, Mynydd Isa.
Cabinet Member	Leader of the Council and Cabinet Member for Education, Welsh Language, Culture and Leisure
Report Author	Chief Officer (Education and Youth)
Type of Report	Operational

EXECUTIVE SUMMARY

This report follows previous updates to Cabinet on Welsh Government's (WG) Sustainable Communities for Learning (formerly 21st Century Schools Investment Programme, Band B) Mutual Investment Model (MIM) for the proposed 3-16 Campus project at Mynydd Isa.

The report provides the background to MIM and progress the project (post Cabinet approval) has made through the WG business case process and the design development process to cost certainty.

The report goes on to provide details of the capital and revenue liabilities and asks Cabinet to review and approve, the annual Service payment and to enter into a Project Agreement and associated legal documentation for the construction phase, finance and maintenance of the buildings and associated infrastructure for the years 3- 6 campus project. This is based a maximum financial cap set by WG to overcome the challenges the construction sector/supply chain are currently experiencing, the complexities of MIM and in order to keep to project timeline on track.

Given the nature of Public Private Partnership (PPP) the report is written in part to ensure funders' requirements are met, as a consequence the report contains technical and legal wording which has been simplified as much as it is possible.

RECOMMENDATIONS

1	Approve the execution, delivery and performance of the MIM Project Agreement with Project Co (to be established by the Welsh Education Partnership Co Limited) together with the Funders' Direct Agreement, the Collateral Agreements, the Independent Tester Contract and the Insurance Proceeds Account Agreement, Clerk of Works Appointment, Independent M&E Commissioning Manager Agreement (together the " Agreements ") (and any documents to be delivered by the Agreements pursuant thereto) to facilitate the delivery of the Project;
2	Approve the Project Agreement at Appendix 1a, together with Appendix 1b Schedule 14 Payment Mechanism which shall be incorporated into the Project Agreement, and which is summarised in Appendix 2 and 3 of this report; so as to give effect to recommendation (3), subject to recommendation (f) below;
3	Approve the Funders' Direct Agreement, the Collateral Agreements, the Independent Tester Contract, and the Insurance Proceeds Account Agreement (also as Schedules of the Project Agreement), and other legal documentation at Appendix 4a – 4f of this report so as to give effect to recommendation (1), subject to recommendation (4) below;
4	<p>Note that the Monitoring Officer shall complete the Agreements for execution and is approved to:</p> <ul style="list-style-type: none">i. complete all information gaps including but not limited to confirmation of financial obligations (including the Annual Service Charge and Monthly Service Payment) and commitments of the Council and programme dates; andii. make any further genuine project specific drafting changes to the Agreements, as may be required <p>and that by the act of execution any final changes are approved;</p>
5	Give delegated authority to the Monitoring Officer to approve any further deeds and documents for execution by the Council which are ancillary to the Agreements approved here; and
6	Note that the Chief Executive, the S151 Officer, or the Monitoring Officer will complete and sign the certificates under the Local Government (Contracts) Act 1997 and agree to indemnify this officer in the act of doing so.

REPORT DETAILS

1.00	BACKGROUND
1.01	<p>Mutual Investment Model (MIM) is a new form of Public Private Partnership (PPP). It enables Welsh Government to deliver infrastructure projects beyond that set by present UK Government borrowing limits.</p> <p>A private sector contractor is appointed via a new Welsh Government framework (Welsh Education Partnership Company, WEPCo) and the contractor finances, constructs and provides a 25 year 'life cycled' building product. This means that responsibility for funding and constructing the building, and then repairing and maintaining the building for 25 years once built, remains with the contractor. This results in buildings funded by MIM being maintained at a consistently high level for 25 years.</p> <p>The Council pays an annual charge which is funded from revenue similar to a rental payment called the 'service payment'. Through this programme councils will receive intervention rate funding from Welsh Government for a period of 25 years, thereafter the building is handed over to the Council. The funding from Welsh Government will be received in the form of a specific grant.</p> <p>The intervention rate for MIM is set at 81% WG and 19% Council.</p>
1.02	<p>In March 2020, Cabinet agreed to amend the Council's nominated MIM project to the proposed 3-16 campus project in Mynydd Isa and provided a mandate to officers to engage with WEPCo.</p>
1.03	<p>In July 2020, Cabinet agreed to enter into a Strategic Partnering Agreement (SPA) with WEPCo to facilitate the delivery of education and community facilities, which is the only platform through which MIM projects within Wales can be delivered through the Sustainable Communities for Learning programme.</p>
1.04	<p>A further brief update on the proposed project was provided to Cabinet 16th March 2021 as part of report on School Modernisation.</p>
1.05	<p>Thereafter, for the past twelve months, officers and the schools concerned have been involved in detail design development process with WEPCo, WG, the technical appointed teams and Robertson Construction, whom are the second selected contractor for WEPCo on this proposed project.</p>
1.06	<p>Robertson FM have been selected by WEPCo as the hard Facilities Management (FM) provider for the project.</p>
1.07	<p>Planning permission was granted for the 3-16 Campus project in 12th January 2022.</p>
1.08	<p>The WG are currently considering the Council's Full Business Case (FBC), submission, therefore, subject to Cabinet approval the project will only proceed upon receipt of WG and Ministerial approval.</p>

1.09	Previous Cabinet reports had referenced centralised WG support around contract management. Whilst, the detail of how this will work in practise yet to be finalised, WG has reaffirmed its commitment towards the provision of a centralised support service for the contract management functions of MIM projects across Wales.
1.10	Subject to Cabinet Agreement, the anticipated construction start is August 2022, with Building occupation planned for the start of the new academic year, September 2024, thereafter external works will follow, starting with the demolition of the existing Argoed High school. Any delay to the anticipated start may result in a significant project delay and associated cost increases.
1.11	Cabinet approval of the recommendations contained in the report, allows completion of the funding package for the project and enable the Agreements to be entered into and works to commence in line with the programme.
1.12	<p>Over the past twenty four to thirty months, various global issues have been impacting prices in the construction market. The key causes are Brexit, Covid 19 pandemic and now the war in Ukraine. These causes have conflated with the impact being:</p> <ul style="list-style-type: none"> • an increase in demand for construction (post Covid); • Supply chain disruption and an ongoing energy crisis. The consequences of this are: the lack of construction materials; • high inflation and price volatility; • high raw material prices; • high energy prices and increased uncertainty.
1.13	The impact on the construction sector is that: Construction companies unable to fulfil contracts on time; Gaps are emerging between already signed prices and the real cost of materials; and contractors are beginning to refuse to sign contracts with fixed prices. Design and Build (D&B) contractors already have significant exposure under current fixed price contracts that they are currently delivering. In the present market they are now more risk averse when pricing work packages. Some D&B contractors have publicly stated that they will no longer sign fixed price contracts. This scenario was underpinned by the previously selected contractor withdrawing from the process, with WEPCo having to go back out to market to procure another contractor. Previously accepted market practice of D&B Contractors fixing a construction price for a significant period is no longer viable.
1.14	Further to this, the MIM Project Agreement and the associated subcontracts require a higher level of risk transfer than traditional New Engineering Contract (NEC) or Joint Contracts Tribunal (JCT) construction contracts due to the obligation for the contractor to take the design and performance risk of the building over 25 years. The present market conditions together with the level of risk transfer required to successfully deliver MIM means that WEPCo has been challenged with supply chain assembly.

1.15	Analysis of the market by industry professionals is suggesting that nothing is likely to improve in terms of prices dropping or even levelling out in the foreseeable future. Consequently to ensure that this project can be delivered financial close needs to be reached as soon as possible.
1.16	To facilitate this and allow the project to progress The WG MIM team with their commissioned experts have set a funding cap, which sets the estimated maximum annual service charge. This estimate maximum cap, is a direct result of the current market, inflation and supply chain issues faced by the construction industry presently and is a reflection of where the project currently sits in the granular market testing/cost certainty process. However, it is anticipated that the project figure will be confirmed as lower as the project moves towards financial close in July/August 2022.
1.17	The annual service charge cap is set at a maximum figure of £6, 750, 000 (inclusive of Net Zero Carbon NZC) of which Welsh Government contribution is 82.4%, this equates to £5, 563, 000. The Council contribution is at 17.6% which equates to £1, 187, 000. The WG percentage uplift relates from the standard intervention rate, specifically to the prior agreement on delivering a NZC project.
1.18	As Furniture, Fixtures & Equipment (FF&E) and Information and Communications Technology (ICT) are separated from the MIM funded model. Therefore, capital funding is still required to fund FF&E and ICT elements of this project. The capital costs of FF&E and ICT for the project is £2,312,000 which has an agreed intervention rate of 65% WG: 35% Council. Based on this intervention rate the WG funded element for FF&E and ICT is at £1,502,800 and the Council's financial commitment £809,200.
1.19	The Full Business Case to WG also seeks agreement from WG to cap the Council's annual service charge contribution to a maximum value of £1,000, 000 per annum.
1.20	However, it is anticipated that the project figure will be lower than the maximum capped figure as the project moves towards financial close anticipated in July/August 2022. Should the project figure be confirmed as lower, this would reduce the annual service charge figure accordingly to the benefit of both WG and the Council.
1.21	MIM PROJECT AGREEMENT The MIM Project Agreement ("MIM PA") at Appendix 1a (and which shall incorporate Schedule 14 Payment Mechanism at Appendix 1b) is to be entered into by a special purpose vehicle (Project Co) and the Council for the design, build, finance and maintenance of the schools and associated infrastructure. The MIM PA is based on a standard form template to the MIM Strategic Partnering Agreement which Cabinet approved on 14 July 2020. A summary of the MIM PA is provided at Appendix 2.
1.22	The MIM PA is drafted to include any project specific issues for each scheme. The process of populating the template MIM PA for a scheme allows the Council and/or WEPCo to put forward any project specific derogations. Appendix 3 details the derogations to the template MIM PA

applicable to this project which have been approved by Welsh Government and incorporated into the MIM PA.

1.23

ADDITIONAL LEGAL DOCUMENTATION

The additional legal documents to be entered into are set out in Appendix 4a – 4f of this report. The legal documents proposed for approval by Cabinet are:

Note: *Agreements are also Schedules to the MIM PA and to the template Project Agreement previously approved by Cabinet on 14 July 2020.

Legal Agreement	Purpose
Funders' Direct Agreement*	The Funders' Direct Agreement governs the relationship between the Authority and the lenders in the event of termination or threatened termination of the MIM PA. The lender has the right to "step in" to the role of Project Co under the MIM PA if Project Co is in default or if the project is in distress. This gives the lender the opportunity to rescue the project and rectify any defaults.
Collateral Agreements*	The Council will enter into collateral warranties with the Construction Contractor and the Facilities Management Services Provider, Professional Team, Principal Building Subcontractor creating a direct contractual relationship between them and giving direct claims and the ability to step-in to the relevant sub-contracts in some circumstances. The Council's primary recourse is and remains against Project Co, but the collateral warranties give the Council some protection in the event the MIM PA terminates.
Independent Tester Contract*	Project Co and the Council jointly appoint an independent tester whose role is to undertake certification of the completion of the Works, in accordance with the completion tests and terms of the MIM PA. The Independent Tester's fees are payable by Project Co.
Insurance Proceeds Account Agreement*	This is an agreement between the Council, Project Co, the Account Bank and the Security Trustee. Insurance proceeds from the physical damage policies are payable into the Insurance Proceeds Account, and are applied in accordance with the terms of the MIM PA and the Insurance Proceeds Account Agreement.
Clerk of Works Appointment	The Council together with Project Co appoints the Clerk of Works to oversee the performance of the Works on site during the course of the Project.
Independent Commissioning Agreement M&E Manager	This is an agreement between the Council, Project Co and the Independent M&E Commissioning Manager to oversee the performance of the Mechanical and Electrical Commissioning by Project Co.

1.24	<p>CERTIFICATES UNDER LOCAL GOVERNMENT (Contracts) ACT 1997 The Local Government (Contracts) Act 1997 (the “1997 Act”) provides a certification scheme whereby a contractor may be assured that his contract with a local authority will not be treated as being outside the authority’s powers or improperly entered into. For a contract to be certifiable, the contractor must be obliged to provide services for a period of at least five years and his doing so must enable the local authority to discharge its functions or be a contract with a financier or their insurers or trustees where the financier has, in connection with such a contract, made a loan to another party.</p>
1.25	<p>A certificate is generally required for private finance contracts (such as MIM) with the Council. In this instance certificates are required (i) for the MIM Project Agreement, which falls under s4(3) of the 1997 Act as a “provision” contract, for the provision of services for the purpose of the Council discharging its functions for a period of at least 5 years; and (ii) for the Funders’ Direct Agreement, which falls under s4(4) of the 1997 Act as a finance contract in connection with a contract falling within s.4(3) (i.e. in connection with the MIM Project Agreement).</p>
1.26	<p>In accordance with Regulation 7 of the Local Authorities (Contracts) Regulations 1997, the certificates may be signed by a chief or deputy chief officer. It is proposed that the certificates be signed by either the Chief Executive, the S151 Officer, or the Monitoring Officer. Any officer signing a contracts certificate is potentially exposed to personal liability if the information within it were to be incorrect because they are signing it in their personal capacity. Accordingly, the Cabinet is requested to agree to indemnify the certifying officer pursuant to the Local Authorities (Indemnities for Members and Officers) (Wales) Order 2006.</p>
1.27	<p>LEGAL CONSIDERATIONS Approval to enter into the MIM Project Agreement at Appendix 1a and the additional legal documents at Appendix 4a – 4f is an Executive function requiring a Member decision. As a key decision and a decision of significance, this is reserved to the Cabinet to determine under Section 5 of the Council’s Constitution. Furthermore, in accordance with the Contract Procedure Rules (CPR) at Section 18 of the Council’s Constitution, approval of projects with a capital value that exceeds £2 million is the responsibility of the Cabinet (CPR 5.5.4).</p>
1.28	<p>The 3-16 campus, is a WG pathfinder project for MIM, it will be the first true NZC school in both construction and operation in Wales. The benefits of the project are noted in Appendix 5.</p>

2.00	RESOURCE IMPLICATIONS
2.01	The capital costs of FF&E and ICT for the project is £2,312,000 which has an agreed intervention rate of 65% WG: 35% Flintshire County Council. Based on this intervention rate the WG funded element for FF&E and ICT is at £1,502,800 and the Councils element is £809, 200. The Councils element is accounted for in the MTFS.
2.02	The annual service charge cap is set at a maximum figure of £6, 750, 000 (inclusive of Net Zero Carbon NZC) of which Welsh Government contribution is 82.4%, this equates to £5, 563, 000. The Council's contribution is at 17.6% which equates to £1, 187, 000. This is an uplift from the MIM standard intervention rates and specifically relates to the prior agreement with WG on delivering a NZC project.
2.03	As the project has moved through the granular process, the MTFS commitments has been updated accordingly. However, Council's commitment based on the maximum capped figure, exceeds the last updated estimate by circa £336,000pa. This is for the reasons explained in paragraphs 1.12 to 1.16.
2.04	As stated earlier in the report, it is anticipated that the project figure will be confirmed as lower the maximum capped figure as the project moves towards financial close anticipated in July/August 2022, leading to a reduction in Annual service charge commitment.
2.05	Having consulted with the Councils treasury management advisors, it is possible to restructure the debt over a longer period that of the current contract. This is common across all our large investment projects, whereby borrowing period is linked to the building life expectancy. Restructuring debt and managing cash flow, enables in year pressure to be reduced to the levels estimated within the MTFS. An important point to underpin, is the proposed 3-16 Campus is life-cycled, therefore its condition will still be "condition A" at year twenty five.
2.06	Despite the higher than anticipated costs of the project, it still constitutes value for the Council this is based on the fact that WG intervention is 82.4%. The school is built to a high specification based on the WG specification which is part of the SPA and will be constructed to NZC and will be maintained as NZC in operation and as mentioned previously is life-cycled.
2.07	Should the Council not proceed with the project then it would be liable for the abortive fees to date. This would be in the region of £2.7m, this would be a revenue pressure because technically if a project does not exist it cannot be capitalised.

3.00	IMPACT ASSESSMENT AND RISK MANAGEMENT
3.01	All projects are managed using a risk register. Risks are managed accordingly, and financial risks are managed through a project contingency. Any high level risk which cannot be managed with the projects/programme will be incorporated into the risk register for the Education and Youth Portfolio.
3.02	WG have an 82.4% stake in the project, and will be providing centralised resource to support contract management for MIM projects in Wales for the contract duration (25yrs). The MIM Project Agreement and the associated subcontracts transfers a higher level of risk transfer to the contractor than other forms of traditional contract.
3.03	There is an independency on the delivery of the 3-16 Campus Project and the delivery of new Welsh Medium start up provision in the area, as new Welsh Medium provision is reliant on the release of a primary site. Funding for both Capital and revenue for the Welsh Medium Start up provision has been approved in principle by WG.

4.00	CONSULTATIONS REQUIRED/CARRIED OUT
4.01	In additional to the specific reports aforementioned in this report. Further reports on the Strategic Outline Programme for 21st Century school investment Programme have previously been received at Education & Youth Overview and Scrutiny Committee and Cabinet.
4.02	Consultation took place the planning application process, Planning consent was gained in January 2022.

5.00	APPENDICES
5.01	<p>Appendices 1a to 4f are commercially sensitive documents</p> <p>Appendix 1a – Project Agreement Appendix 1b - Schedule 14 Payment Mechanism Appendix 2 – Project Agreement Summary Appendix 3 – Business case Report & Derogations Summary Appendix 4a - Funders' Direct Agreement Appendix 4b - The Collateral Agreements Appendix 4c - Independent Tester Contract Appendix 4d - Clerk of Works Appointment Appendix 4e - Independent M&E Commissioning Manager Appointment Appendix 4f – Insurance Proceeds Account Agreement Appendix 5 – Project Benefits</p>

6.0	LIST OF ACCESSIBLE BACKGROUND DOCUMENTS
6.01	<p>Link to Cabinet report, 4th July 2020:-</p> <p>https://committeemeetings.flintshire.gov.uk/documents/s59963/21st%20Century%20Schools%20-%20Mutual%20Investment%20Model%20Update.pdf?LLL=0</p>

7.00	CONTACT OFFICER DETAILS
7.01	<p>Contact Officer: Damian Hughes, Corporate Manager, Capital Programme & Assets Telephone: 01352 704135 E-mail: damian.hughes@flintshire.gov.uk</p>

8.00	GLOSSARY OF TERMS
8.01	<p>Sustainable Communities Programme (Formerly 21st Century Schools Programme) - Is a collaboration between the Welsh Government (WELSH GOVERNMENT), the Welsh Local Government Association (WLGA) and local authorities. It is a major, long-term and strategic capital investment programme with the aim of creating a generation of 21st century schools in Wales.</p> <p>Capital Funding - Capital funding is usually linked to acquiring or improving a long-term asset such as equipment or buildings.</p> <p>Revenue Funding - Is linked to items that will be used within a year. Examples include salaries, heating, lighting, services and small items of equipment. Routine repairs are revenue expenditures and can include significant repairs that do not extend the life of the asset or do not improve the asset (the repairs merely return the asset to its previous condition).</p> <p>MIM – Mutual Investment Model - MIM is a new form of Public Private Partnership (PPP). MIM is funded by revenue and is an alternative to traditional capital funding.</p> <p>WEPco – A private Sector Partner and subsidiary of the Development Bank of Wales (known as Welsh Government co) will be required to form WEPco, which will deliver infrastructure services to Participant (i.e. the Council) in Wales</p>