

<b>Report title</b>	Urgent decision relating to City Learning Quarter – Phase 2 College Contract Award	
<b>Decision designation</b>	AMBER	
<b>Cabinet member with lead responsibility</b>	Councillor Stephen Simkins Leader of the Council	
<b>Key decision</b>	Yes	
<b>In forward plan</b>	No	
<b>Wards affected</b>	All Wards	
<b>Accountable Director</b>	Richard Lawrence, Director of City Development	
<b>Originating service</b>	City Development	
<b>Accountable employee</b>	Mark Bassett	Programme Director
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<b>Report to be/has been considered by</b>		

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**Recommendations for noting:**

Cabinet is asked to note:

1. The following decision relating City Centre Quarter – Phase 2 College Contract Award to made under Urgent Decisions for Cabinet:
  - i. Approved the use of the urgent action powers outlined in Part 12.9 of the Council's constitution detailed in paragraphs 2.1 regarding the use of Urgent Decision.
  - ii. Approved that the Council enters into a NEC4 construction contract for the Phase 2 College with McLaughlin and Harvey Limited to progress and complete the Phase 2 College element of the City Learning Quarter subject to the following:
    - Agreement of terms and conditions to the satisfaction of the Chief Operating Officer and the Director of Finance.
  - iii. Authorised the Chief Operating Officer to negotiate, execute, seal and complete all necessary documents to give effect to the above recommendations.

## 1.0 Purpose

- 1.1 To note the urgent decision taken to enable the Council to enter into contract with McLaughlin and Harvey Limited for the design and construction of the Phase 2 College (a critical element of the City Learning Quarter) in a timeframe which ensures that the project proceeds as planned to deliver this priority scheme for the city, and is not put further at risk of not continuing, owing to dependencies on third parties outside of the direct control of the Council.

## 2.0 Urgent Decision Making.

- 2.1 Under the Council's Constitution, Part 2, Article 12, section 12.9: The Leader (or in their absence the Deputy Leader) in consultation with the Chair of Scrutiny Board, Vice-Chair of Scrutiny Board and Chief Executive, shall be able to exercise the powers of the Cabinet in any matter of immediate urgency making the prompt exercise of the powers of the Cabinet desirable and which cannot await the next meeting of the Cabinet. Decisions made under this provision will be reported to the next meeting of the Cabinet.
- 2.2 The approach to decisions to be made under the Urgent Action powers is that the Council will use its urgent action powers for any urgent decisions that must be taken that cannot wait for the next formal meeting of the relevant Council body, in this case Cabinet. These powers are to be used sparingly and the guiding principles for any decisions are:
- A. Only those decisions that have to be made urgently (e.g. as a result of COVID-19 or related matters, including support of businesses or as a result of an immovable deadline) will be made
  - B. The decisions will be made or endorsed (where the decisions have to be made very urgently) using the Urgent Action powers
  - C. The decisions will be made available in a transparent way, as all decisions of Council bodies, such as Cabinet, are required to be, including through the relevant pages on the Council's website
- 2.3 The need to process the decision and enter into contract on the offered terms as set out for Cabinet on 6 September 2023 has led to the need to seek the urgent decision ahead of the next Cabinet meeting on the 18 October 2023, without these changes to the existing authority the Council cannot enter into the agreement with McLaughlin and Harvey Limited putting phase 2 College at risk, these changes cannot wait until the Cabinet meeting on 18 October 2023.
- 2.4 The Chair and Vice Chair of Scrutiny have been consulted on this proposed decision and both have expressed their support for this decision. The Vice Chair has asked that it be noted that he asked for assurance regarding what measures are in place to prevent the cost of the construction contract continually increasing – details were provided on the nature of the contract that will be entered into (namely an NEC4 fixed price contract- see section 10 – Legal Compliance for details on the contract) and the measures in place to

monitor compliance with that contract and to share with councillors and the steps being taken to implement previous audit reports.

### **3.0 Background**

3.1 On 6 September 2023, Cabinet approved delegated authority to the Deputy Leader: Inclusive City Economy and the Cabinet Member for Resources and Digital City in consultation with the Directors for Regeneration and Finance for the Council to:

- i. enter into the required Development Agreement with the City of Wolverhampton College for Phase 2 of the project.
- ii. enter into a NEC4 construction contract for the Phase 2 College with McLaughlin and Harvey Limited to progress and complete the City Learning Quarter College project subject to the following:
  - a) Confirmation of full funding for the Phase 2 project
  - b) The execution of a grant agreement with the Department for Education
  - c) The execution of the Development Agreement with the City of Wolverhampton College

3.2 It is now the case that the DfE Grant Agreement and Development Agreement will not be completed in time to secure the existing offer from the building contractor, and that an agreed building contract will need to be entered into with the execution of these documents to be completed in parallel.

3.3 Whilst entering into the building contract, ahead of executing both the Development Agreement and DfE Funding Agreement, introduces additional risk to the Council, compared with having both documents already in place, the likelihood of the project not proceeding as a result of the offer from the contractor no longer being available to the Council is considered a higher risk, as it ultimately would put the overall City Learning Quarter project at risk of failure (owing to further increases in costs due to delays outside of the Council's control; requirements related to funding spend profiles, and the completion of the Phase 2 College going beyond the start of the academic year 2025/26 which is a key milestone).

3.4 The following sections consider each of the key elements enabling the progression of the contract.

### **4.0 Update on Funding**

4.1 Cabinet agreed the budget for the overall City Learning Quarter programme comprising Phases 1 and 2 as £69.2 million (6 September 2023) subject to a number of funding streams being confirmed.

#### **Council Funding**

4.2 As part of the £69.2 million, the Council has committed £4 million additional funding for the project. The Council also committed to the joint sale of Wolf Mountain with the

College Paget Road site and the ringfence of net sale proceeds. Also, as previously approved, the Council will continue to cash flow the project until the various funding contributions are received including any proceeds from site disposals. (This funding is being drawn down in accordance with approval given by Council on 6 April 2022).

### **Department for Education**

- 4.3 In July 2023, in recognition of the significant increase in costs due to inflation, the Department of Education confirmed that an additional £2 million (10%) of funding would be made available, resulting in a total grant of £22 million from DfE for the City Learning Quarter.

### **Further sources of funding**

- 4.4 As reported to Cabinet in September the remaining funding required totalling £4 million will be met through a combination of the following income streams: a proportion of joint proceeds from council and college disposal receipts, contributions and additional grant from Government.

## **5.0 Building Contract**

- 5.1 Following full funding confirmation, the Council requires an appropriate approval route to enter into a NEC4 ECC Option A construction contract with McLaughlin & Harvey in order to progress and complete the Main College building works.
- 5.2 By entering into NEC4 Contract with McLaughlin & Harvey, the project will be able to proceed to the RIBA Stage 5 Construction Phase, to achieve practical completion and use of the new facilities by the College from September 2025.
- 5.3 The contract sum is £41.05 million and differs from the figure presented to Cabinet on 6 September 2023 owing to confirmation from the Council's legal advisors that to fully comply with the risk profile as tendered, the risk related to unforeseen presence of statutory utilities/ services in the ground should rest with the contractor and an increased cost relating to the relevant performance bond. The Council fully accepts that the basis of the tender must be maintained to comply with the Public Contract Regulations.
- 5.4 The revised budget and funding strategy for the overall City Learning Quarter programme approved by Cabinet on 6 September 2023 allows the Phase 2 College project to be implemented. The cost of the NEC4 construction contract (£41.05 million) will be met from this updated budget, as the financial provision for this risk was always included within the overall programme budget (in the form of a client contingency).

## **6.0 Development Agreement**

- 6.1 The Council will enter into a Development Agreement with the College based on the Council procuring and implementing the NEC4 Construction Contract and for the contractor McLaughlin & Harvey to access the project site to develop the scheme.

6.2 The Development Agreement also contains obligations under which both parties will act jointly to enable compliance of all grant funding terms and conditions to enable timely release of grant payments including arrangements for the recording of outputs and outcomes a specified dates and within a specific period.

## **7.0 Evaluation of alternative options**

7.1 The Council has an option to do nothing as the PSSC has ended and there is no legal obligation to proceed with the NEC4 Construction Contract with McLaughlin & Harvey. However, choosing this route and not entering into the NEC4 Contract will result in further programme slippage and/ or the project not being delivered at all.

7.2 The option of retendering is not viable as it would substantially extend the programme there is no guarantee that this would result in a lower tendered sum. Not proceeding with the NEC4 Contract award to McLaughlin & Harvey would result in programme slippage and the likelihood that full defrayal of all capital grants will not be achieved by the funders' long stop dates. Consequently, it is probable that the grants may be suspended or withheld.

7.3 There is a risk that prolonged delays may lead to the cancellation of the project as it becomes financially challenged and unviable over time. If this occurs it is likely that the Council may need to repay Towns Fund and Levelling Up Fund grants which have been utilised so far to develop the project.

## **8.0 Reasons for decision(s)**

8.1 The decision to award the Phase 2 Main College build NEC4 construction contract will enable the Main College new build, refurbishment and external works to be delivered to facilitate College occupation as soon as possible during Academic Year 2025 – 2026

8.2 Entering into the building contract, ahead of executing both the Development Agreement and DfE Funding Agreement, introduces additional risk to the Council, compared with having both documents already in place. However, the likelihood of the project not proceeding as a result of the offer from the contractor no longer being available to the Council is considered a higher risk, as it ultimately would put the overall City Learning Quarter project at risk of failure (owing to further increases in costs due to delays outside of the Council's control; requirements related to funding spend profiles, and the completion of the Phase 2 College going beyond the start of the academic year 2025/26 which is a key milestone).

## **9.0 Financial implications**

9.1 An update on the funding strategy is provided in the body of the report. The following table provides a breakdown of the overall funding solution as was approved by Cabinet on 6 September 2023.

Funding Source		£m	Notes
Phase 1	Black Country LEP	0.35	Secured
	WMCA	7.75	Secured
<b>Total</b>		<b>8.10</b>	
Phase 2	Black Country LEP	0.10	Secured
	Council	10.00	Secured within existing approvals
	Towns Fund	5.00	Secured
	DLUHC - Levelling Up	20.00	Secured
	DfE	22.00	Secured
	Contributions	0.30	Secured
	Proceeds from council and college disposal receipts, contributions and additional government grant	4.00	Subject to final matters being resolved
<b>Total</b>		<b>61.40</b>	
<b>Project total</b>		<b>69.50</b>	

- 9.2 This funding strategy is still in applicable, however as outlined above there are a number of outstanding matters to be resolved. The private report outlines mitigations in place to address the remaining risks.
- 9.3 The costs of entering into an NEC4 Construction Contract with McLaughlin and Harvey is £41.05 million which will be met from the approved capital budget of £69.2 million for the overall City Learning Quarter Programme in line with the updated funding strategy.
- 9.4 As noted in the report to Cabinet on 6 September, works to the Central Library and Adult Education buildings are subject to tender. Whilst every effort has been made to forecast these costs, taking into account current inflation levels and risk contingencies, it is recognised that until such time as tender prices are received, the forecasts are subject to change. The pre-existing approvals allow some flexibility if prices increase further.
- 9.5 As previously approved, the Council will also continue to cash flow the project until the various funding contributions are received including any proceeds from site disposals. In accordance with the Constitution the Director of Finance will continue to be responsible for determining the method of financing capital schemes and in any one year will determine the appropriate application of grants, external contributions, council capital receipts and borrowing.
- 9.6 As previously reported, Wolverhampton has been invited by DLUHC to be a pathfinder authority to pilot a simplified approach to funding. This includes understanding how spending flexibility can support local authorities to respond to changing economic conditions. Pilot authorities will have greater ability to make decisions about moving funding between projects in their funding portfolio. The City Investment Board will act as the consolidated governance for the pilot. Currently all funding in the portfolio is committed however should any funding become available the pilot arrangements give

Wolverhampton the ability locally to move funding around to support pressures such as are being experienced on the CLQ project.

[CN/17102023/A]

## **10.0 Legal implications**

- 10.1 The Council's legal team are continuing to engage with the Department for Education (DfE) to finalise the Grant Funding Agreement.
- 10.2 The Development Agreement with the College is in its final stages and cannot be concluded without finalising the Grant Agreement. Both the College's Legal Team and the Council are working together to ensure that these agreements are resolved.
- 10.3 The Council has utilised the CCS Framework RM6088 (Construction Works and Associated Services Framework) for the procurement of the Contractor which is compliant with the Public Contract Regulations 2015.
- 10.4 The form of Contract will be a NEC4 Option A Construction Contract with a fixed price. The Contractor will be responsible for the full design and build of the phase 2 college provide additional warranties to the College and any funders (if requested).
- 10.5 The NEC4 Engineering and Construction Contract (ECC) Option A is the priced main works contract with an activity schedule.
- 10.6 The contractor prices activities in the activity schedule and the Council makes interim payments on completion of each activity. The contractor largely bears the financial risk of carrying out the activities at the agreed prices and prices the contract except for when there is a change in scope (e.g. change in designs) or for Compensation Events which were unforeseen.
- 10.7 In this Contract, the majority of the risks sit with the Contractor and those risks that do not sit with the Contractor have been costed within the overall budget. An example of a Compensation Event which does not sit with the Contractor is the remediation or alteration to the scope due to the discovery of Asbestos in which the contractor will get both time and money, however the Council's has commissioned surveys to identify the risk of asbestos being found.
- 10.8 The Council through its Project Manager (Turner and Townsend) will be responsible for administering the Contract.
- 10.9 In order to meet the timescales associated with the Grant Funding and to ensure that the facility can be opened in time for the College's academic year, it is proposed that the Building Contract will be executed in advance of the Development Agreement and the Grant Funding Agreement with the DfE. Although this presents a risk to the Council, the Council relies upon assurances provided by the DfE and the College, and should the Council not proceed with entering into the Construction Contract then a far greater risk of costs increases may result in the project not continuing at all or the return of funding.

10.10 The Council throughout this project has been advised by the legal team who are supported by external legal advisors to ensure that where possible, risks are mitigated, this includes having robust contractual agreements in place with all stakeholders.  
[SZ/06102023/P]

## **11.0 Equalities implications**

- 11.1 The Council is aware of its requirement to have due regard to the Public Sector Equalities Duty in the consideration of decisions. This includes taking steps to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by the Equality Act 2010, promoting equality of opportunity and fostering good relations between people who share protected and non-protected characteristics withing the Act.
- 11.2 It is not anticipated that there will be any negative impact on any groups with protected characteristics, under the terms of the Equality Act 2010 or those groups not protected, from the proposal to enter into the NEC4 Contract (as set out in the decisions).
- 11.3 The CLQ project will create an accessible city centre learning hub, directly and indirectly positively contributing to the following aims of “Our City: Our Plan”; “more local people into good jobs and training” and “thriving economy in all parts of the city” and “healthy, inclusive communities”.
- 11.4 As part of its statutory duty, the Council in conjunction with McLaughlin and Harvey will continue to consider the equalities implications on protected and non-protected characteristics throughout the project delivery stages so that measures can be affected to mitigate negative impacts, so that the City Learning Quarter remains accessible and inclusive to all.
- 11.5 To address inequalities created by the existing outdated Paget Road College campus, the new replacement City Centre Campus will provide an outstanding, inclusive, highly accessible, modern learning environment to meet specialist educational requirements. It will be highly accessible to staff, students and visitors by multiple transport modes as it is easily accessed by public transport (bus and tram) reducing reliance on private transport and easing traffic congestion.

## **12.0 Schedule of background papers**

- 12.1 City Learning Quarter Update - Cabinet 6 September 2023