

The New Portobello High School

The City of Edinburgh Council

22 September 2011

1 Purpose of report

- 1.1 To provide an update on the project to build the new Portobello High School; advise on the outcome of the procurement process to identify a construction contractor and seek approval for the proposed next steps.

2 Summary

- 2.1 The procurement process to select a construction contractor for the new Portobello High School has progressed very well and generated an excellent response from the construction Industry. Council approval is now being sought to appoint a preferred contractor for the project.
- 2.2 Since the project was first approved by Council in December 2008 the threat of legal challenge has existed. A Petition for Judicial Review was recently lodged in the Court and served on the Council on 9 August 2011 on behalf of a local action group aiming to prevent the construction of the school on the intended site at Portobello Park. This report provides an update on the latest position and the proposed next steps.

3 Main report

Background

- 3.1 In December 2008, Council approved the replacement of Portobello High School be progressed as the first project in the Wave Three Schools Programme. In February 2009, funding was confirmed within the Capital Investment Programme.
- 3.2 Following Council approval to proceed, the educational vision was established by the school through the production of a Strategic Educational Brief being the first important stage in the project to inform and guide the physical aspects of the design.
- 3.3 The design was developed and the planning application advanced through an extensive pre-planning consultation and engagement process with the local

communities and key stakeholders, resulting in the granting of Planning Permission in February 2011.

- 3.4 Construction work was planned to start on site in November 2011 which would have facilitated the intended earlier target date for the opening of the school which is the start of the new school session in August 2013.
- 3.5 Some enabling works have already been undertaken including an archaeological investigation which was a condition of planning consent and the removal of a disused power cable. Local residents were advised in advance of these works which were carried out during the summer. No items of archaeological interest were discovered.
- 3.6 The Project Investment Steering Group meets on a four-weekly basis to manage delivery in terms of programme, cost and quality objectives. An active risk register is reviewed and updated each month to ensure that all project risks are quantified and assessed. This project is also included in the reporting of the Governance of Major Projects to the Finance and Resources Committee.
- 3.7 A key stage review by external consultants Turner and Townsend was completed on 12 August 2011. The consultants state that the team is effective and has worked together to deliver a strong design solution that meets the schools educational needs. The consultants also concluded that the project is well managed and is very clearly on track. They also noted that the risk of legal challenge remains and that this action has the potential to delay and increase the cost of the project, and, in the worst case, to stop the project altogether.

Procurement Process

- 3.8 The procurement process started in December 2010 with the required notice in the European Journal. Twenty-two contractors originally expressed an interest in the project. These were assessed against pre-set criteria and the six bidders short-listed to the tender stage and invited to submit tenders were:
 - Balfour Beatty Construction
 - BAM Construction
 - Bovis Lend Lease
 - Graham Construction
 - Laing O'Rourke
 - Morrison Construction
- 3.9 The formal tendering process has now been concluded and all six short-listed contractors returned tenders on 22 July 2011. The process was administered by the Council's Procurement Team and included a two stage process to evaluate quality. The assessment processes and procedures were carried out in compliance with the Public Contracts (Scotland) Regulations 2006. The Council's Legal Services Team provided advice during the selection process to ensure compliance with procurement legislation. The weightings for the selection of the contractor were 60/40 (price/quality) to reflect the nature and scale of the project.

- 3.10 The six tender returns were checked for technical compliance and all were deemed compliant by the evaluation panel which comprised representatives from the City of Edinburgh Council and the external project team.
- 3.11 As all six tenderers had passed the quality threshold which was necessary to permit the commercial tenders to be opened, the costs were then examined and scored in accordance with pre-determined criteria. Gardiner and Theobald, the project cost consultants, undertook a separate analysis and arithmetical check of the commercial tenders. All six tender submissions were confirmed as being fully compliant from a technical and commercial perspective. The tenders were extremely competitive reflecting the current construction market.
- 3.12 All contractors submitted programmes which were compliant with the target date set in the contract documents which was to achieve the opening of the new school in August 2013.
- 3.13 The six short-listed contractor's scores were as follows:

Principal contractor procurement scores:

Company	Quality Score	Price Score	Combined Total
Bidder 1	284.80	495.00	779.80
Bidder 2	274.60	416.70	691.30
Bidder 3	262.60	345.88	608.48
Bidder 4	261.20	272.13	533.33
Bidder 5	270.80	234.23	505.03
Bidder 6	263.40	200.10	463.50

- 3.14 Following detailed analysis of the tender returns, the most economically advantageous tender is considered to be that from Balfour Beatty Construction Scottish & Southern Limited (Balfour Beatty) in the sum of £26,114,107. Balfour Beatty achieved the highest overall score and also the highest individual score for both quality and price. The current market conditions have produced an extremely competitive tender value which is well within the agreed budget set for this project.
- 3.15 Balfour Beatty is a company founded in 1909 and is one of the United Kingdom's leading building and civil engineering firms. Their headquarters are in London with their Scottish office based in Edinburgh. They have been responsible for many educational building projects including recently completed high schools of a similar size in the west of Scotland. In Edinburgh, notable completed projects are at the National Museum of Scotland and Napier University. They are also the contractor for the works at the Assembly Rooms currently on site for the Council.
- 3.16 Shortly after the completion of the tender evaluation process, a legal challenge was submitted on behalf of a local action group aiming to prevent the construction of the school on the intended site at Portobello Park. This required a review of project risks and consideration of the most appropriate next steps. The outcome from the procurement process was re-assessed and

it was recognised that, in light of the change in circumstances, further information was required from the identified preferred contractor.

- 3.17 In order to mitigate the risks going forward Balfour Beatty was formally approached by the Council's Procurement Team to consider extending the tender acceptance period with price, quality and all other contract items remaining unchanged. This would ensure that the very favourable outcome from the current procurement process could be preserved whilst allowing time during which it is hoped that the legal challenge can be dealt with before committing to the full construction contract.
- 3.18 The resulting confirmation of this extension allows the current procurement process to complete. It is recommended that Balfour Beatty be approved as the preferred contractor and be awarded the contract, subject to the actual timing of the award of the contract being subject to the further approval of Council at an appropriate future date. If the legal challenge cannot be dealt with satisfactorily during the tender acceptance period the approval of the Council may be sought not to award the contract.
- 3.19 The next action in accordance with OJEU regulations would be to notify all bidders of the results of the tendering process and start the mandatory standstill process which requires at least a 10-day standstill period for any feedback and/or challenge by the unsuccessful contractors before the contract is awarded.
- 3.20 Throughout the project and particularly during the pre-planning consultation process an open and collaborative approach has been taken by the Project Team in working with local groups and stakeholders. Likewise it is proposed to sustain this approach and enter into dialogue with the local action group in relation to the current legal challenge.

Legal Challenge

- 3.21 It remains the Council's intention to construct the new Portobello High School on the south area of the current Portobello Park. This land is wholly owned by the Council, having been purchased by its predecessors for the express purpose of providing a recreation ground, and forms part of the Inalienable Common Good of the Council.
- 3.22 The legislation requires that properties falling into this category can only be sold by local authorities if they have first obtained the consent of either the Court of Session or Sheriff Court. As no such disposal, sale or lease is envisaged as part of the project, no such court consent is required.
- 3.23 The Council has previously sought joint Counsels' Opinion on the proposal, which confirmed that the use of the park for the construction of a school, properly termed an appropriation, is permissible. This opinion was reported to Council on 18 December 2008 when the recommendation to progress with the replacement of Portobello High School involving the use of Portobello Park as the site of the new school was approved.

- 3.24 The proposal has attracted both public support and opposition and attempts have been made by a local action group to stop the project, culminating in the recent lodging and serving of a Petition for Judicial Review in the Court of Session in relation to the Council's proposed use of the park.
- 3.25 The Council's position remains that it will robustly defend its declared intention. The Court date is set for Friday, 9 December 2011 and the main impacts of the legal challenge are the possibility of a delay to the opening date of the school and an increase in the project costs neither of which can be determined with any accuracy at this point. It should be noted that, whilst we had intended to achieve an earlier opening date of August 2013 and this will no longer be possible; the target opening date of January 2014 remains achievable and we continue to work towards delivering this.
- 3.26 The consequence of the formal legal challenge to the Council is that it must carefully consider the implications of awarding a contract, to limit its exposure to any risk of damages under the construction contract. With a view to mitigating exposure officers have sought, and received, agreement from the preferred bidder to extend the tender validity period.
- 3.27 During this period the Council will now attempt to reach agreement with the action group through dialogue either to have the Petition dropped or have the matter determined by the Court at an earlier date. Should these attempts prove unsuccessful the Council will defend the court action on 9 December 2011 prior to the formal awarding of a contract for which the subsequent approval of Council would be sought.
- 3.28 In view of the importance of the project, and the delivery of the new school within the original timetable, it is proposed to carry out site preparation works, originally intended to form the preliminary steps of the construction phase, to endeavour to mitigate as far as is practical the delay occasioned by the legal challenge. These works would be carried out in consultation with the preferred bidder following the standstill period. The works would be selected to facilitate the main construction programme and carried out by the Council at its risk. The estimated value of these works is £200,000.

4. Financial Implications

- 4.1 This project is included in the Council's Capital Investment Programme covering the period between 2011/12 to 2014/15 reported to Council on 10 February 2011. The contract value is within the budget allocated to the project and would realise considerable savings as a result of the favourable market conditions.
- 4.2 The present outcome would, allowing for an appropriate level of contingency to be retained, provide the opportunity for savings of around £5m to be reallocated to the delivery of other Wave 3 projects however this will be at risk with a protracted legal challenge and the prospect of significant additional costs being likely.
- 4.3 The key project milestone dates and target opening date will also now be at risk of delay due to the Petition for Judicial Review.

5 Equalities Impact

- 5.1 The implications have been taken into consideration during the project development and procurement stages, including the contract requirement to develop targeted recruitment training and support. These objectives will be progressed by the successful contractor and the Council.

6 Environmental Impact

- 6.1 Environmental impact assessments were submitted as an integral part of the Planning Application and have been considered within this process and approved.

7 Conclusions

- 7.1 The procurement process generated an extremely positive response from the construction industry and the short-listed contractors demonstrated their strong track record and abilities to implement all aspects of the construction contract to achieve a high quality building and local environment.
- 7.2 A clear preferred contractor has been identified. Whilst it is desirable to realise the benefits from this procurement process, the recent submission of a legal challenge requires the associated risks to be considered and managed. The proposed approach would achieve this balance with the approval of any final contract being subject to Council approval at the appropriate future point.

8 Recommendations

It is recommended that the Council:

- a) notes the contents of this report and the latest position relating to the progress on the project and the associated legal challenge;
- b) approves the appointment of Balfour Beatty Construction Scottish & Southern Limited as the Principal Construction Contractor for the New Portobello High School, subject to the approval of the contract being taken to Council at an appropriate future date;
- c) approves that preparatory works up to a maximum cost of £200,000 be progressed to facilitate the main construction programme being progressed and, to an extent, mitigate the risk of delay; and
- d) agrees to a further report when there are material developments in connection with the legal challenge.

Dave Anderson
Director of City Development

Gillian Tee
Director of Children and Families

Appendices	None
Contact/tel/Email	Billy MacIntyre Tel. No. 469-3366 e-mail: billy.macintyre@edinburgh.gov.uk Bill Ness Tel. No. 529-4915 e-mail: bill.ness@edinburgh.gov.uk
Wards affected	14 Craigentinny/Duddingston; 17 Portobello/Craigmillar
Single Outcome Agreement	Supports National Outcome 4 – ‘Our young people are successful learners, confident individuals, effective contributors and responsible citizens’.
Background Papers	<ol style="list-style-type: none">1. Update on Major Projects, Education, Children and Families Committee 21 June 20112. Capital Investment Programme, Council report, 10 February 20113. Portobello High School, Council report, 11 March 20104. Wave 3 Schools, Council report, 12 March 20095. Wave 3 Schools, Council report, 18 December 20086. Wave 3 Business Case Report, Council report, 16 June 20087. Consultations on Site Options for the Replacement of Portobello High School Council report, 21 December 2006