

## 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]<sup>1</sup>;
  - 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).
- 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

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<sup>1</sup> Where applicable.

in writing as soon as they become aware of any matter which may adversely affect the viability of any New Project.<sup>2</sup>

- 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.

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<sup>2</sup> The provisions of Paragraph 5.15 shall not apply to any Relevant Participant which is a Local Planning Authority exercising its functions as such.

Bevan Brittan 

**APPENDIX A**

**APPROVAL PROCESS FOR NEW PROJECTS**

