

ISLE OF ANGLESEY COUNTY COUNCIL	
Report to:	The Executive
Date:	15 June 2020
Subject:	Mutual Investment Model – Strategic Partnering Agreement
Portfolio Holder(s):	Councillor Robin Williams Portfolio Holder for Finance
Head of Service / Director:	Marc Jones Director of Function (Resoures) / Section 151 Officer
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Local Members:	Not applicable to a specific ward or wards

A –Recommendation/s and reason/s
<p>Background and Reasons:</p> <p>The Welsh Government has designed a Mutual Investment Model (MIM) to deliver major capital infrastructure projects in Wales. The Welsh Government will part fund some projects through the MIM scheme using revenue funding, partly due to scarcity of capital funding.</p> <p>Welsh Government will appoint a private sector partner who will then form a Welsh Education Partnership Company (WEPCo) with a subsidiary of the Development Bank for Wales. Once the WEPCo has been formed, they and all participants will be required to sign a Strategic Partnering Agreement (SPA). The SPA provides for how the parties act together over the long term in a collaborative partnering, non-adversarial and open manner to support the effective planning, procurement and delivery of infracture services, education and community facilities in Wales. The SPA is due to be executed in September 2020.</p> <p>MIM projects can only be delivered exclusively by the WEPCo. <u>Signing the SPA does not commit the Council to participate in any MIM scheme; it provides only the opportunity to do so.</u></p> <p>Approving the recommendations within this report would give the Council the opportunity to participate in a future MIM project should they wish to, and gives greater scope in attracting Welsh Government grant funding. This option gives the Council the most</p>

flexibility to ensure the people on Anglesey can thrive and realise their long term objectives, which is one of the objectives within the Council Plan 2017-2022.

It is recommended that the Executive:

1. Note the progress of the Preferred Bidder Stage of the Competitive Dialogue Procedure under the Public Contracts Regulations 2015 as outlined in this report;
2. Approve the execution, delivery and performance of the Strategic Partnering Agreement with the Welsh Education Partnership Co in Autumn 2020 to facilitate the delivery of a range of infrastructure services and the delivery of education and community facilities;
3. Approves the Strategic Partnering Agreement summarised in Appendix 2 of this report so as to give effect to recommendation (2), subject to recommendation (4) below;
4. Gives delegated authority to the Director of Function (Resources) / Section 151 Officer and the Director of Function (Council Business) / Monitoring Officer:
 - a. To approve the final terms of the Strategic Partnering Agreement, including any amendments to the Strategic Partnering Agreement approved here as may be necessary, for reasons including but not limited to finalising any outstanding matters; and
 - b. To approve any further deeds and documents which are ancillary to the Strategic Partnering Agreement here;
5. Notes that the Strategic Partnering Agreement shall be executed as a deed and attested in accordance with article 14.5 of the Constitution.
6. Approve the appointment of the Director of Function (Resources) / Section 151 Officer] as 'Participant Representative' to sit on the Strategic Partnering Board (SPB);
7. Notes that in agreeing to the Strategic Partnering Agreement, it is not being asked to decide to proceed with any specific project, and that nothing within the SPA obliges the Council to make any such commitment. Any decision to proceed with a specific project will be a matter for future Executive decision/s;

B – What other options did you consider and why did you reject them and/or opt for this option?

Refusing the recommendations would result in the Council losing the opportunity to benefit from the Strategic Support Partnering Services that the WEPCo can provide.

The Council would be unable to participate in a MIM scheme without either signing the SPA, or alternatively, obtaining a Deed of Adherence; which will create several complexities including an unnecessary procurement risk.

The Council further understands that should it wish to access revenue funding (rather than capital funding) for Band B projects within the 21st Century Schools Modernisation Programme, that the Welsh Government will require the MIM as the vehicle to access such funding, together with WEPCo's delivery services. There are no alternative delivery options for such funding.

C – Why is this a decision for the Executive?

Authorising the SPA is an Executive decision pursuant to paragraph 4.8.6.4.1 of the Constitution.

CH – Is this decision consistent with policy approved by the full Council?

This proposal would provide the Council with additional flexibility in addressing any infrastructure, educational or community project adopted by full Council in its current and future annual delivery documents.

D – Is this decision within the budget approved by the Council?

Yes – no additional costs will be incurred directly from these recommendations. Any additional costs relating to a specific project would require separate approval.

DD – Impact on our Future Generations (if relevant)

1	How does this decision impact on our long term needs as an Island	This decision gives the Council greater flexibility to meet the long term needs of the Island.
2	Is this a decision which it is envisaged will prevent future costs / dependencies on the Authority. If so, how:-	This decision could potentially provide a more cost effective method for the Council to deliver future projects, and could provide better value for money.

3	Have we been working collaboratively with other organisations to come to this decision, if so, please advise whom:	The Council has consulted with Bevan Britton as legal advisors on this matter. Bevan Britton have been appointed by Welsh Government to support Welsh Authorities and Further Education Institute on MIM projects. The fees incurred are paid for by Welsh Government.
4	Have Anglesey citizens played a part in drafting this way forward? Please explain how:-	Not at this stage. No commitments are made at this stage to undertake a specific project. Should the Council consider undertaking a MIM scheme, it will have the opportunity to participate as appropriate and in accordance with any relevant legal requirements.
5	What impact if any does this decision have on the Equalities agenda and the Welsh language	The recommendations within this report has no impact on equalities, as no commitment is made at this point to participate in a MIM scheme. The council currently have no pathfinder project. An equalities impact assessment will be undertaken separately should the council identify a future pathfinder project.

E – Who did you consult?		What did they say?
1	Chief Executive / Senior Leadership Team (SLT) (mandatory)	Endorse the recommendations in the report
2	Finance / Section 151 (mandatory)	N/A – This is the Section 151 Officer’s report
3	Legal / Monitoring Officer (mandatory)	Endorse the recommendations in the report
4	Human Resources (HR)	
5	Property	
6	Information Communication Technology (ICT)	
7	Procurement	
8	Scrutiny	
9	Local Members	

F - Appendices:

Appendix 1 - Report for Executive Approval to Enter into the Strategic Partnering Agreement

Appendix 2 – Summary of Strategic Partnering Agreement

FF - Background papers (please contact the author of the Report for any further information):

REPORT FOR EXECUTIVE APPROVAL TO ENTER INTO THE STRATEGIC PARTNERING AGREEMENT

1 SUMMARY

SUMMARY

- 1.1 The Mutual Investment Model (MIM) has been designed by the Welsh Government to deliver major capital infrastructure projects in Wales. The MIM may be suitable for delivering new buildings which have a capital outlay of £20m or more. MIM Schemes will be delivered and maintained by private partners, who will pay the upfront capital costs incurred to deliver the build. Participants of Mutual Investment Model schemes such as Local Authorities or Further Education Institutes will pay the private partner an annual fee for a period of 25 years commencing from the date the asset becomes operational. The annual fee will cover the cost of construction, maintenance and financing of the project. At the end of the 25 year period, the asset will transfer to the ownership of the participant in excellent condition.
- 1.2 The Welsh Government has been procuring a private sector partner to work with it on the delivery of education and community facilities in Wales. The Welsh Government is expected to select and appoint a preferred bidder by September 2020.
- 1.3 The successful private sector partner and a subsidiary of the Development Bank of Wales (known as WGCo) will be required to form a Welsh Education Partnering Company (WEPCo), which will deliver infrastructure services to the Participants in Wales.
- 1.4 The Participants to the arrangements will be a number of Local Authorities and Further Education Institutions. The Participants and WEPCo will enter into a Strategic Partnering Agreement. Under the Strategic Partnering Agreement, WEPCo will be required to provide partnering services to the Participants, including (i) project development and delivery; and (ii) supply chain assembly and management. This may lead to the delivery of revenue supported Band B projects pursuant to a separate Project Agreement or, in due course, capital funded projects could be delivered through this contract structure.
- 1.5 The purpose of this report is to explain the process and seek The Executive's approval to enter into a Strategic Partnering Agreement with Welsh Education Partnership Co to facilitate the delivery of education and community facilities. The Executive are also asked to approve the Director of Function (Resources) / Section 151 Officer as 'Participant Representative' to sit on the Strategic Partnering Board.
- 1.6 Signing the Strategic Partnering Agreement would give the Council the opportunity to participate in a MIM scheme should a suitable project be identified in the future. There would be no commitment made at this stage to participate in any MIM scheme.

2 RECOMMENDATIONS

- 2.1 It is recommended that The Executive:
 - (a) Notes the progress of the Preferred Bidder Stage of the Competitive Dialogue Procedure under the Public Contracts Regulations 2015 as outlined in this report;
 - (b) Approves the execution, delivery and performance of the Strategic Partnering Agreement with the Welsh Education Partnership Co in Autumn 2020 to facilitate the delivery of a range of infrastructure services and the delivery of education and community facilities;

- (c) Approves the Strategic Partnering Agreement, summarised in Appendix 2 of this report so as to give effect to recommendation (b), subject to recommendation (d) below;
- (d) Gives delegated authority to the Director of Function (Resources) / Section 151 Officer, after consultation with the Monitoring Officer:
 - (i) To approve the final terms of the Strategic Partnering Agreement, including any amendments to the Strategic Partnering Agreement approved here as may be necessary, for reasons including but not limited to finalising any outstanding areas; and
 - (ii) To approve any further deeds and documents which are ancillary to the Strategic Partnering Agreement here;
- (e) Notes that the Strategic Partnering Agreement shall be executed as a deed and attested in accordance with Article 14.5 of the Constitution*;
- (f) Approves the appointment of the Director of Function (Resources) / Section 151 Officer as 'Participant Representative' to sit on the Strategic Partnering Board (SPB);
- (g) Notes that in agreeing to the Strategic Partnering Agreement, it is not being asked to decide to proceed with any Project, and that nothing within the Strategic Partnering Agreement commits the Council to make any such commitment. Any decision to proceed with a Project will be reported back to The Executive in future report(s) for decision;

3 REASONS FOR RECOMMENDATIONS

- 3.1 Approving the recommendations within this report would give the council the opportunity to participate in a future MIM project should they wish to do so. This option gives the council the most flexibility to ensure the people on Anglesey can thrive and realise their long term objectives, which is one of the objectives identified within the Council Plan 2017-2022.

4 ALTERNATIVE OPTIONS CONSIDERED

- 4.1 The Council understands that if it wishes to access revenue funding for Band B projects from the Welsh Government then it will need to use the Mutual Investment Model to access the funding and WEPCo for delivery. There are no alternative delivery options for such funding.

5 BACKGROUND

- 5.1 The "Mutual Investment Model", or MIM, was formally launched by the Welsh Government on 28 February, 2017 and is a platform for delivery of the "Taking Wales Forward" agenda. MIM has been designed to finance major capital projects due to a scarcity of capital funding. It is based on traditional PPP structures but with the following core principles embedded:

- 5.1.1 an emphasis on wider community benefits;
- 5.1.2 enhanced stakeholder involvement;
- 5.1.3 public sector equity investment;

5.1.4 no soft services; and

5.1.5 effective and efficient contract management by the public sector.

5.2 The MIM is intended to support additional investment in social and economic infrastructure projects and help to improve public services in Wales. Under the MIM, the private sector partners will build and maintain public assets, and in return the Council supported by funding from the Welsh Government will pay a fee to the private partner, which will cover the cost of construction, maintenance and financing the project. At the end of the contract the asset reverts to the Council.

5.3 The Welsh Government has been procuring a private sector partner to work with it on the delivery of education and community facilities in Wales. It will be the only means of delivering revenue funded Band B projects. The Welsh Government is expected to select and appoint a preferred bidder during the summer of 2020. The successful private sector partner and a subsidiary of the Development Bank of Wales (known as WGC) will be required to form **WEPCo**, which will deliver infrastructure services to the Participants in Wales.

The Strategic Partnering Agreement (SPA)

5.4 The **Participants** to the arrangements will be a number of Local Authorities and Further Education Institutions. The Participants and WEPCo will enter into a Strategic Partnering Agreement (**SPA**). The SPA provides for how the parties act together over the long term in a collaborative partnering, non-adversarial and open manner to support the effective planning, procurement and delivery of education and community facilities in Wales and the delivery of infrastructure services. The SPA is due to be executed in September 2020.

5.5 The initial term of the SPA is 10 years. This may be extended by 5 years by any one or more Participants. Under the SPA, WEPCo is required to provide partnering services to the Participants. These services include (i) project development and delivery; (ii) supply chain assembly and management and (iii) other professional services necessary to fund and deliver education and community facilities.

5.6 For the first 10 years of the SPA, WEPCo has the exclusive right to provide services to all Participants (as signatories to the SPA) including:

5.6.1 Project Development Partnering Services to work up new “Qualifying Projects” (only) for delivery (including supply chain assembly, funding and value for money), set out in more detail in Schedule 3 (Partnering Services) of the SPA; and

5.6.2 Project Services (design, construction, testing, commissioning and completion of the premises, hard facilities management, and installation of equipment) relating to a “Qualifying Project” subject to it becoming an “Approved Project” within the first 10 years of the SPA and for a MIM Band B project, provided that it has met the criteria set out in Schedule 5 (Approval Process for New Projects) of the SPA.

5.7 “Qualifying Projects” means those identified projects at the outset for delivery by WEPCo (as set out in a Schedule to the SPA) and all other 21st Century Schools and Colleges (Band B) MIM Programme projects, where such a project has been identified by a Participant required to enable them to provide education based services in the region.

5.8 Participants may ask WEPCo to provide on a non-exclusive basis:

5.8.1 Project Services relating to capital projects required for the provision of education sector services (where expressly designated and approved under a Strategic Outline Programme) and/or community services;

- 5.8.2 Strategic Support Partnering Services (such as estate planning, service planning and demonstrating value for money);
 - 5.8.3 Project Development Partnering Services in respect of potential new projects, which are not “Qualifying Projects”, but requested by a Participant;
 - 5.8.4 Ongoing Partnering Services and/or Project Development Partnering Services after ten years, where the initial term of the SPA has been extended; and
 - 5.8.5 Project Services in respect of Qualifying Projects which become “Approved Projects” after 10 years, where the initial term of the SPA has been extended.
- 5.9 If a Participant receives funding for a Band B MIM Programme project, WEPCo has the exclusive right to develop proposals for the delivery of that project (Project Development Partnering Services) within the first 10 years of the SPA.
- 5.10 Therefore, the most likely outcome for a Participant that becomes a party to the SPA is that they proceed to develop a project or projects using the Approval Process in the SPA resulting in the execution of a Project Agreement which will govern the design, build, finance and maintenance of schools or colleges.
- 5.11 Appendix 2 provides a more detailed summary of the SPA.
- 5.12 The SPA commits the Participants and WEPCo to work to the following nine (9) key principles:
- 5.12.1 to develop close working relationships between WEPCo and the Participants at all levels;
 - 5.12.2 to focus on achieving the best value for money operational performance within agreed timescales;
 - 5.12.3 to set in place business and cultural processes to enable the Participants and WEPCo to establish and agree challenging time and performance objectives and to meet or better them;
 - 5.12.4 to recognise each other's needs, constraints, limitations, capabilities, roles and responsibilities to achieve mutually beneficial outcomes;
 - 5.12.5 to identify by regular monitoring, weaknesses and strengths in the relationship between and amongst the Participants and WEPCo and to work together to overcome the weaknesses and to build on the strengths;
 - 5.12.6 to commit to the early recognition and resolution of differences, conflicts and disputes between and amongst the Participants and WEPCo in a ‘no surprises’ environment;
 - 5.12.7 to appoint within each of the Participants and WEPCo co-ordinators at senior level who will support, defend and promote the long term strategic partnership between them and its principles of operation;
 - 5.12.8 to develop openness and trust in a transparent information and data sharing environment; and
 - 5.12.9 in accordance with the Equality Requirements to positively promote equal opportunities and the Ethical Employment Code by combating discrimination on the grounds of race, ethnicity, religion, nationality, gender, disability, age or sexuality and promoting good relations between all sections of the community in ‘everything we do’ including:

- a) Delivering high quality Education Sector Services and (where relevant) Community Services for end users; and
- b) Working with the local community and partners in the public, private or voluntary sectors.

5.13 The Strategic Partnering Board (**SPB**) is the guardian vehicle of these commitments.

The Strategic Partnering Board (SPB)

- 5.14 The SPB will act as the primary mechanism for managing WEPCo's performance. The SPB will be the central forum in which the Participants can work together with WEPCo, Welsh Government and Stakeholder Representatives to ensure that the key principles of the SPA are met. Participant representation will be required on the SPB.
- 5.15 The SPB's role will be to approve the Strategic Delivery Plan (**SDP**); ensure any new project proposals are consistent with the SDP; monitor WEPCo's performance against agreed Key Performance Indicators; approve any extension to the SPA term; and approve any proposed disposal of interest in share capital resulting in a loss of control by WEPCo (or subsidiary).
- 5.16 The Council's Representative will be expected to be a senior representative of the Council, with the appropriate authority to make decisions on behalf of the Council. They should be experienced in holding a director or similar position and have the required skills to make the decisions required to be made by the SPB. The Council will need to consider any likely conflicts of interest and ensure that conflicts of interest do not prevent the chosen representative from fulfilling their role as representative as well as any other role they hold directly in the Council.
- 5.17 The Council's Representative will attend the SPB meetings at least every three months, together with representatives of each Participant, WEPCo, Welsh Government and other stakeholder representatives as agreed by the Participants. These meetings are to review financial and operating issues and provide strategic input into the partnering arrangements including the exchange of ideas in relation to each of the Participants' accommodation and service delivery requirements.
- 5.18 The SPB must have a quorum of five (5) Participants' representatives (one of whom must be a representative from Welsh Government) and a WEPCo Representative. If a quorum is not present at any meeting of the SPB within thirty (30) minutes of that meeting's start time, the SPA requires that the meeting is adjourned to the same time and place five (5) Business Days later. For any adjourned meeting, the quorum shall be one Participant's Representative (who must be a representative of the Welsh Government) and the WEPCo Representative. Telephone conference calls or video conferences are valid as a meeting of the SPB.
- 5.19 The Director of Function (Resources) / Section 151 Officer is recommended by the Chief Executive as the Isle of Anglesey County Council's participant representative for the SPB.

Pathfinder Projects

- 5.20 WEPCo shall, if requested to do so by one or more Participants, develop proposals for the implementation and delivery of new projects including Pathfinder Projects through the Approval Process for New Projects set out in Schedule 5 of the SPA. WEPCo will assist Participants in developing proposals for the delivery of new projects, the preparation of an outline business case and the obtaining of all necessary approvals to progress any new project request by a Participant.
- 5.21 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

shall only apply in relation to Qualifying Projects regardless of whether the period of ten (10) years from the Commencement Date has expired.

- 5.22 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.
- 5.23 WEPCo shall, without entitlement to specific or additional payment, work with the Participants and other members of the SPB 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.
- 5.24 WEPCo will be obliged to meet the Participants' requirements for the delivery of any new project including Pathfinder Projects. Authority to proceed to deliver any new project including a Pathfinder Project, and to enter into a Project Agreement, would require further Council approval and reports will be brought back to the Executive for determination accordingly.

What Happens If Approval Is Not In Place By September 2020?

- 5.25 Local Authorities and FEIs are strongly encouraged to sign up to the arrangements with WEPCo via the SPA regardless of whether they have a MIM Scheme in place as WEPCo also offers Strategic Support Partnering Services which can assist Participants with estates planning or associated activities.
- 5.26 It is recognised that the Executive is being asked to agree to enter into the SPA before the Welsh Government has appointed a preferred bidder. As such, the SPA document is not yet in its final form. Whilst it is not envisaged that the draft SPA will change substantially once a preferred bidder is approved, it is recommended that delegated authority is given to the Council's Director of Function (Resources) / Section 151 Officer, in consultation with the Monitoring Officer, to agree the final terms of the SPA and make any necessary minor amendments to it, should these be required.
- 5.27 The purpose of the SPA is to enable Participants to proceed to develop a project or projects using the Approval Process for New Projects within the SPA, resulting in the execution of a Project Agreement. In order to benefit from that process Participants need to execute and be a party to the SPA.
- 5.28 Whilst there is a mechanism within the SPA that will allow for those Participants (named in the OJEU) to sign up after September 2020 by way of a deed of adherence (**DoA**), this will create several complexities:
 - 5.28.1 Where any Participant is to sign the DoA this will require all existing parties to re-execute the SPA. This will require all Participants to take further decisions to re-enter the SPA, creating delays in the delivery of Pathfinder Projects
 - 5.28.2 Where any Participant is not signed up to the SPA by the September 2020 deadline, it is unlikely that they will have a Pathfinder Project or be included in the first Annual Business Plan of WEPCo. This will cause delays in the delivery of any education project
 - 5.28.3 There may be a procurement risk in entering into the DoA, based on time elapsed argument, if the DoA is not entered into within 6 months

Potential Procurement Risk

- 5.29 If a Participant were to choose not to sign the SPA or the DoA and then wanted in the future to access Partnering Services or Project Services from WEPCo, it will not be able to do so in a procurement safe manner.

- 5.30 Similarly, with regards to 21st Century Schools and Colleges Band B funding, if a Participant were to choose not to sign the SPA or the DoA but then wanted to utilise WEPCo to deliver a Band B funded project (whether capital or revenue) in the future, it will also not be able to do so in a procurement safe manner.
- 5.31 Should for example, a Participant secure MIM Band B funding downstream from the Welsh Government for a project not currently identified and it was required to use WEPCo, it would not be able to do so in a procurement safe manner if it had not signed the SPA or the DoA. WEPCo has the exclusive right to develop proposals for the delivery of a 21st Century Schools and Colleges Band B MIM Programme project (Project Development Partnering Services) within the first 10 years of the SPA.
- 5.32 It is therefore recommended that The Executive approve entering into the SPA as set out this report to ensure that the SPA can be completed in the Autumn as planned and that the Council is able to utilise the SPA from its go-live date.

The Procurement Process

- 5.33 The Welsh Government is engaged in a competitive dialogue tender process working to the procurement timetable below at Table 1. The aim of the competitive dialogue procedure is to enable the Welsh Government as the contracting authority to "identify the solution or solutions which are capable of meeting its needs". Comprehensive dialogue has been held with each of the Bidders during the Dialogue Process.
- 5.34 On 14th February 2020 three Draft Bids were received. These were reviewed and comments sent back on the Draft Bid submissions to inform the next stage of dialogue. On 20th February a "meet the Bidders" event was held at the Yr Hafod facilities in CP2, well attended by Participants and other Stakeholders.

Impact of Covid-19

- 5.35 The final intensive stage of Dialogue known as 'boot camp' was due to commence at the Principality Stadium on Monday 16th March 2020. On 14th March a member of the core team and one of the advisers both took ill with coronavirus symptoms. Due to the ensuing events with the Covid-19 pandemic the decision was taken to delay the start of boot camp to make arrangements for it to be conducted remotely via Microsoft Teams or other remote methods where required. Following two weeks of very intensive remote engagement activity separately with the three bidders (which included involvement from bid team members based across Europe) at 18.30 hrs on 3rd April 2020 the Welsh Government successfully Closed Dialogue and invited Final Bids in line with the original procurement programme.
- 5.36 Bidders submitted their Bids by 12 noon on 27th April 2020 and compliant Final Tenders were received from the three bidders. Evaluation meetings will take place remotely if necessary. Appointment of the Selected Bidder is expected to take place in accordance with the timetable set out below.

Table 1

Matter	Date(s)
Issue of ITPDSB to Bidders	21 October 2019
Commencement of Dialogue with Bidders	28 October 2019
Christmas Break	18 December 2019 - 5 January 2020
Continuation of Dialogue with Bidders	6 January 2020
Return of Draft Bid	17:00 hours 14 February 2020
Recess	17 February 2020 - 13 March 2020
Boot Camp	16 March 2020 - 3 April 2020
Close of Dialogue	3 April 2020
Return of Bids	12:00 noon 27 April 2020
Evaluation of Bids and approvals	27 April 2020 - 3 July 2020
Appointment of Selected Bidder	3 July 2020
Standstill	4 July 2020 - 14 July 2020
Following formation of WEPCo, signature of WEPCo Shareholders' Agreement	September 2020
Signature of Strategic Partnering Agreement	September 2020

6 LEGAL CONSIDERTIONS

- 6.1 Approval to enter into the Strategic Partnering Agreement (SPA) is an executive function requiring a decision of the Executive.
- 6.2 To enter into and participate in the SPA referred to in this report, the Council will be relying upon a number of statutory powers:
- 6.2.1 the “well-being” powers contained in section 2 Local Government Act 2000;
 - 6.2.2 powers contained in the Education Acts 1996 and 2002;
 - 6.2.3 the “incidental” provisions of section 111 Local Government Act 1972.

- 6.3 The well-being powers contained in section 2 Local Government Act 2000 permit the Council to do anything which it considers is likely to achieve any one or more of the following objectives -
- (a) the promotion or improvement of the economic well-being of their area;
 - (b) the promotion or improvement of the social well-being of their area, and
 - (c) the promotion or improvement of the environmental well-being of their area
- 6.4 In exercising this power the Council has had regard to the community strategy and gives the council the most flexibility to ensure the people on Anglesey can thrive and realise their long term objectives, which is one of the objectives within the Council Plan 2017-2022.
- 6.5 The incidental provisions of section 111 Local Government Act 1972 permit the Council to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.
- 6.6 The programme will need to operate in line with the Well-being of Future Generations (Wales) Act 2015. The Act sets a framework of seven goals to develop and protect the social, economic, development and cultural well-being of Wales and five ways of working to achieve sustainable development.
- 6.7 Entering into the SPA does not bind the Council in any way. However, the Council will be required to appoint a representative to act on its behalf in relation to the SPA. The identity of the representative may change at any time following written notice to WEPCo and all other Participants. Each representative may also at any time, by written notice to WEPCo, authorise others to exercise the functions and powers of the Council.
- 6.8 The Executive is therefore asked to approve the Director of Function (Resources) / Section 151 Officer for appointment as 'Participant Representative' to sit on the Strategic Partnering Board (SPB).
- 6.9 The SPA is to be executed as a deed and attested in accordance Article 14.5 of the Constitution.
- 6.10 It is noted that formal approval to proceed to deliver any new project , and to enter into associated legal documentation to facilitate the same including a Project Agreement, would require further approval of the th Executive.

Equalities and Community Cohesion Comments

- 6.11 The recommendations within this report has no impact on equalities, as no commitment is made at this point to participate in a MIM scheme. An equalities impact assessment will be undertaken separately should the council identify a future MIM project.
- 6.12 Proposals on a project by project basis will contain appropriate equalities documentation.

7 LINKS TO CORPORATE STRATEGIC PRIORITIES/CONTRIBUTION TO STRATEGIC OUTCOMES

- 7.1 Approving the recommendations within this report would give the council the opportunity to participate in a future MIM project should they wish to do so. This option gives the council the most flexibility to ensure the people on Anglesey can thrive and realise their long term objectives, which is one of the objectives within the Council Plan 2017-2022.

WEP STRATEGIC PARTNERING DELIVERY MODEL
SUMMARY OF STRATEGIC PARTNERING AGREEMENT

1 INTRODUCTION¹

- 1.1 The WEP Strategic Partnering Agreement (**SPA**) is the agreement entered into between the Local Authorities and Further Education Institutions (**Participants**)² and WEPCo (being the joint venture company established between the Private Sector Delivery Partner (**PSDP**) and a subsidiary of the Development Bank of Wales).
- 1.2 The SPA provides for how the parties act together over the long term in a collaborative partnering, non-adversarial and open manner to support the effective planning, procurement and delivery of education and community facilities in Wales and the delivery of infrastructure services.
- 1.3 The SPA sets out the high level principles that underpin the delivery of the parties' obligations; the behaviours, vision and values of WEPCo; the establishment of a framework that promotes excellence and value for money; and the monitoring and management of WEPCo's performance.
- 1.4 Under the SPA, WEPCo will be required to provide **partnering services** to the Participants. These services include (i) project development and delivery; (ii) supply chain assembly and management and (iii) other professional services necessary to fund and deliver education and community facilities.
- 1.5 The initial term of the SPA is 10 years. This may be extended by 5 years by any one or more Participants. Certain protections in the SPA continue in force beyond the term of the SPA until the end of the last associated Project Agreement entered into by the Participant(s) for the delivery of individual education facilities.
- 1.6 WEPCo will have the sole and exclusive right for the term of the SPA to nominate a subsidiary of the PSDP (which will be a special purpose vehicle that holds the majority of voting rights, or a wholly owned subsidiary of such a company) (**Project Co**) to deliver MIM Projects, provided that the relevant criteria in the SPA are met. Approved MIM Projects will be developed by WEPCo, but delivered by Project Co which will enter into a Project Agreement with the relevant Participant to deliver the relevant MIM Project.
- 1.7 Participants will be able to request that WEPCo, or a nominated wholly owned subsidiary of WEPCo, provides other **project services** such as the delivery of design and build capital projects for education or community facilities under the SPA, provided that the relevant criteria in the SPA are met. WEPCo and/or its subsidiaries shall enter into all required agreements for the delivery of capital projects and/or FM services directly with the relevant Participant, which in the case of education sector capital projects shall be substantially in the form of the Template Education Design and Build Development Agreement appended to the SPA.

2 NEW PROJECTS

- 2.1 WEPCo shall, if requested to do so by one or more Participants, develop proposals for the implementation and delivery of new projects by a Project Service Provider. For MIM Projects, the Project Service Provider will be the Project Co that will be created for such purpose and for other approved projects shall be WEPCo or a Subsidiary of WEPCo. The role of WEPCo will include the raising of finance, project development, project management and supply chain assembly and

¹ Capitalised terms have the meaning provided for in the Strategic Partnering Agreement unless otherwise stated.

² Note those named as a "Contracting Authority" in the OJEU notice will be entitled to sign and enter into the SPA.

management of a new project up to contractual/financial close, during the construction period and operational period.

- 2.2 The obligations on WEPCo and the relevant Participant in relation to the identification, approval and delivery of a new project are set out in Schedule 5 (*Approval Process for New Projects*).
- 2.3 For an overview of Schedule 5 and a flow chart outlining the Approval Process for New Projects, please see **separate guidance**.
- 2.4 WEPCo is obliged to assist Participants in developing local delivery plans, which will form the basis of an annual Strategic Delivery Plan (**SDP**) developed between the Participants and WEPCo. The Participants' requirements for new projects will in most cases be initiated through the inclusion of such projects in the latest edition of the SDP.
- 2.5 WEPCo will assist Participants in developing proposals for the delivery of new projects, the preparation of an outline business case and the obtaining of all necessary approvals to progress any new project request by a Participant.
- 2.6 With each approved new project, WEPCo will (or will procure a Project Service Provider will) enter into a Project Agreement, a template form of which is appended to the SPA at Schedule 7 (*Template Project Agreements*). For an overview of the Template Project Agreement, please see **separate guidance**. For every MIM Project, the Project Service Provider will enter into a Shareholders' Agreement to establish the relevant Project Co.³
- 2.7 WEPCo must evidence value for money both at the beginning and continuously throughout the development and delivery of new projects in accordance with Schedules 3 (*Partnering Services*), 5 (*Approval Process for New Projects*) and 6 (*New Project Pricing Report*).
- 2.8 The Participants will develop with WEPCo the approach to supply chain assembly for the delivery of a new project, the market testing of design and construction, hard facilities management services and the funding of the new project to ensure value for money. WEPCo and the relevant Participant(s) will work together to ensure that the pricing of a new project provides the relevant Participant(s) with robust, transparent and auditable information as to the costs, fees and prices included within WEPCo's proposals.
- 2.9 WEPCo shall, for all projects, monitor and update (where applicable) the predicted capital, whole life cost and any increase or reduction in estimated costs, the final cost of design and construction and the actual cost of maintaining and repairing each project. WEPCo will be expected to demonstrate to Participants through a WEPCo Performance Report and Annual Review, lower costs and/or greater value for money over the term of the SPA.
- 2.10 Planning permission for approved projects to be delivered by WEPCo must be obtained by WEPCo prior to signing the relevant Project Agreement.

3 PARTNERING SERVICES

- 3.1 WEPCo may provide a range of Partnering Services to Participants.
- 3.2 These fall into three categories:
 - 3.2.1 Ongoing Partnering Services;
 - 3.2.2 Project Development Partnering Services; and

³ This will be substantially in the form of the Template Project Co Shareholders' Agreement appended to the SPA.

3.2.3 Strategic Support Services.

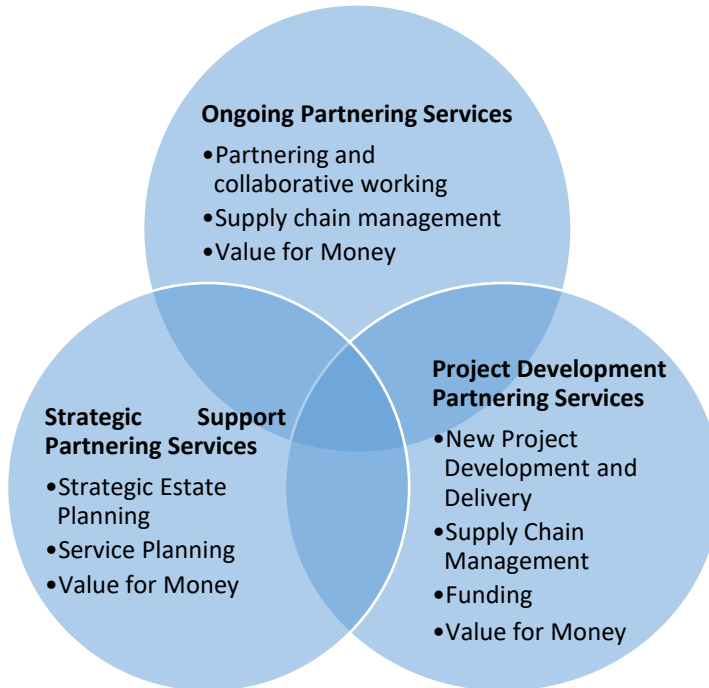


Figure 1 WEPCo Partnering Services

- 3.3 WEPCo shall provide **Ongoing Partnering Services** to the Participants that relate to the day to day operation of WEPCo, the fostering of partnering and collaborative working between the parties, supply chain management and the delivery of value for money.
- 3.4 WEPCo shall provide **Project Development Partnering Services** to implement and deliver projects identified in the SPA and all other 21st Century schools and colleges (Band B) MIM Programme Projects (**Qualifying Projects**) in accordance with the specification, KPIs (including community benefits) and rates set out in Schedule 3 (*Partnering Services*). The role of WEPCo is to develop proposals for a Qualifying Project to meet the Participant’s Requirements including affordability and other agreed approval criteria (services, operational, financial and value for money). The scope and specification of the services to be provided by WEPCo will be agreed between WEPCo and the relevant Participant on a project by project basis, together with the approval criteria.
- 3.5 The relevant Participant will remain as “sponsor” for business case approval purposes. The role of WEPCo will be to support the relevant Participant in preparing agreed outputs at each business case approval stage for the delivery of a Qualifying Project.
- 3.6 WEPCo shall also, where requested, provide **Strategic Support Partnering Services**, to support Participants in strategic estate planning and strategic services planning to plan education sector services and where requested, community services. These are discrete, consultancy support services that may be required by Participants. The Participants and WEPCo will jointly develop a Strategic Delivery Plan for the delivery of new accommodation requirements.
- 3.7 WEPCo must monitor the performance of each of the Partnering Services and Project Services at its own cost and expense, meet value for money requirements and demonstrate continuous improvement wherever practicable achieved through agreed KPIs, as developed in accordance with the SPA throughout the term.

- 3.8 For all Partnering Services, WEPCo must provide the Partnering Services in compliance of the WEP Objectives and all objectives set out in the SDP agreed between the Participants and WEPCo. All Partnering Services must meet the requirements for Value of Money set out in clause 13 and seek to obtain continuous improvement in providing the services.

Payment for Partnering Services

- 3.9 Clause 10 of the SPA governs what WEPCo is entitled to charge a Participant for the provision of Partnering Services.
- 3.10 WEPCo recovers Partnering Services Costs relating to Ongoing Partnering Services and Project Development Partnering Services in accordance with Schedule 4 (*Partnering Services Costs*) of the SPA. Partnering Services Costs are recovered either from the Participant on a “pay as delivered” basis, or as a lump sum at financial close of the relevant approved Project, or such costs are rolled into the financial model for the relevant approved Project and are repaid over the term of the relevant Project Agreement.
- 3.11 WEPCo recovers the costs incurred for the delivery of Strategic Support Partnering Services on a “pay as delivered” basis or as otherwise agreed with the relevant Participant procuring such services from WEPCo. The quantum of such costs will be calculated by reference to the rate card which will be included at Schedule 4 (*Partnering Services Costs*).

Subcontracting of Partnering Services

- 3.12 WEPCo is able to subcontract its obligations in respect of the whole or part provision of the Partnering Services to a Partnering Subcontractor but will remain responsible to the relevant Participants for the provision of the contracted out services.
- 3.13 WEPCo is responsible for ensuring the performance by the Supply Chain Members of their obligations under the relevant Supply Chain Agreements.
- 3.14 On the expiry or earlier termination of the SPA, the handover provisions set out in Schedule 20 (*Handover on Expiry or Termination*) will apply. Any staff engaged in the delivery of Partnering Services will transfer under TUPE regulations to the relevant Participant or third party successor provider of services.
- 3.15 For further detail on the scope of Partnering Services in Schedule 3 (*Partnering Services*) and Schedule 4 (*Partnering Services Costs*), please see ***separate guidance***.

4 PROJECT SERVICES

- 4.1 WEPCo is responsible for providing **Project Services** to Participants. These are services required under a Project Agreement in relation to the design, construction, testing, commissioning and completion of premises (including any temporary works) and the installation of equipment, together with the provision of facilities maintenance (FM) services.
- 4.2 The SPA acknowledges that Participants may have existing providers in place to provide their accommodation requirements and associated services. WEPCo agrees to work with Participants to ensure the existing providers are treated fairly and that the individuals providing the existing services are, where possible, employed by the Project Service Provider.

5 EXCLUSIVITY

5.1 The Participants grant WEPCo the sole and exclusive right for the 10 year term of the SPA to provide:

5.1.1 Ongoing Partnering Services

5.1.2 Project Development Partnering Services in respect of projects identified in the SPA and 21st Century Schools and Colleges (Band B) MIM projects (**Qualifying Projects**)

5.1.3 Project Services in respect of Qualifying Projects that become Approved Projects (as developed through Schedule 5 (*Approval Process for New Projects*)).

After 10 years exclusivity will not apply.

5.2 Participants may request WEPCo to deliver other services:

5.2.1 Project Services relating to Major Capital Projects in the education sector, save for MIM projects for a specified period;

5.2.2 Project Services relating to capital projects required for the provision of education sector services or community services;

5.2.3 Project Services in relation to the provision of FM Services required for the provision of education sector services or community services (not provided as part of any Qualifying Project);

5.2.4 Strategic Support Partnering Services;

5.2.5 Ongoing Partnering Services and/or Project Development Partnering Services after 10 years (where the term of the SPA has been extended);

5.2.6 Project Development Partnering Services in respect of potential New Projects which are not Qualifying Projects.

The above services are not subject to exclusivity.

5.3 The benefits of exclusivity include:

5.3.1 Participants will not have to embark on another regulated procurement for the delivery of Partnering Services or Project Services for the lifetime of the SPA.

5.3.2 Participants can be assured of the appropriate level of commitment from WEPCo to foster the development of a successful partnership and outcomes over the long term.

5.3.3 Participants can be assured regarding value for money and continuous improvement for the delivery of a pipeline of new projects.

5.3.4 Delivery of economies of scale over time through the growth of the WEPCo estate.

5.4 Exclusivity can be suspended if WEPCo fails the "Track Record Test" and will not apply until WEPCo passes a subsequent Track Record Test. This is an assessment of whether in the most recent WEPCo Performance Report shared with Participants on an annual basis, WEPCo has met specified KPIs (including those that relate to community benefits) as evidenced.

6 REPRESENTATIVES AND STRATEGIC PARTNERING BOARD (SPB)

- 6.1 Each Participant will appoint a representative to act on its behalf in relation to the SPA. The identity of the Participant's Representative may change at any time following written notice to WEPCo and all other Participants. Each Participant Representative may also at any time, by written notice to WEPCo, authorise others to exercise the functions and powers of that Participant.
- 6.2 The SPB governs the relationship between WEPCo and the Participants. It will comprise of representatives of each Participant, WEPCo, Welsh Government and other stakeholder representatives as agreed by the Participants.
- 6.3 The SPB will meet at least every three months to review financial and operating issues and provide strategic input into the partnering arrangements including the exchange of ideas in relation to the Participants' accommodation and service delivery requirements.
- 6.4 A quorum of the SPB is proposed to be five Participant's Representatives (one of whom must be a representative of the Welsh Government) and the WEPCo Representative. For any adjourned meeting, the quorum shall be one Participant's Representative (who must be a representative of the Welsh Government) and the WEPCo Representative. WEPCo and stakeholder representatives will not have a vote at SPB meetings. Decisions will be taken by majority vote. A decision that affects a Participant will only bind it if that Participant's representative has voted in favour of it.
- 6.5 The SPB will approve the annual Strategic Delivery Plan, ensure New Project proposals are consistent with the SDP, manage WEPCo's performance against agreed KPIs, approve any extension to the SPA term and approve any proposed disposal of interest in share capital resulting in a loss of control by WEPCo (or subsidiary).
- 6.6 WEPCo will be obliged to report on its KPIs which will be reviewed by the SPB annually. The SPB will assess whether the Track Record Test has been passed and if any significant performance failure has occurred. Any dispute shall be resolved under Schedule 21 (*Dispute Resolution Procedure*).

7 DEFAULT

Participant Default

- 7.1 Participant Event of Default includes:
- 7.1.1 one or more Participants being in breach of clauses 9.1, 9.2 and 9.6 (exclusivity clause);
 - 7.1.2 one or more Participants failing to attend SPB meetings which has a material adverse effect on WEPCo or any Project Service Provider;
 - 7.1.3 one or more Participants being in breach of the SPA which delays the execution of any Project Agreement relating to an Approved Project by more than 40 Business Days;
 - 7.1.4 an expropriation, sequestration, nationalisation or requisition of any Facilities or assets and/or shares of WEPCo or its Holding Company or Project Service Provider by a Participant or any other Relevant Authority (where this occurs due to a Relevant Authority, all Participants will be deemed responsible for the Event of Default); and
 - 7.1.5 any non-payment by a Participant under the SPA exceeding £100,000 60 Business Days after demand.
- 7.2 Where a Participant Event of Default occurs, WEPCo may either:

- 7.2.1 suspend their performance of the SPA in relation to the Participant in default until that Participant can demonstrate to WEPCo's reasonable satisfaction it is capable of performing their obligations; or
- 7.2.2 notify the Participant of the Event of Default.

If the Participant Event of Default is capable of remedy and has not been remedied within 30 Business Days or is not capable of remedy with immediate effect, WEPCo may either serve notice on each Participant in default terminating the SPA in relation to them with immediate effect or simply notify the Participants in default of the effect their default has had. Any Participants in default will be liable to pay compensation to WEPCo in accordance with section 1 of Schedule 14 (*Compensation on Participant Event of Default and Termination*). If the SPA is terminated in its entirety by the default, compensation under section 2 of Schedule 14 (*Compensation on Participant Event of Default and Termination*) will be payable.

- 7.3 If a Participant is served a Participant Default Notice more than once in any 12 months, it will not receive Project Development Partnering Services or any Strategic Support Partnering Services unless paid monthly in arrears.
- 7.4 The Participants have several liability, other than where two or more Participants have suffered an Event of Default leading to a termination of the SPA, in which case, the loss of WEPCo will be split between the defaulting Participants.

WEPCo Default

- 7.5 The SPA provides for a long list of circumstances which constitute a WEPCo Default including amongst others, WEPCo breaching the SPA, WEPCo failing to provide the Partnering Services, WEPCo breaching health and safety laws; WEPCo failing to pay Participants under the SPA which exceeds £10,000 for 60 Business Days on demand; WEPCo or a Project Service Provider suffering an Insolvency Event; and WEPCo (or WEPCo Party) committing a Prohibited Act.
- 7.6 On a WEPCo Event of Default, each Participant can (acting through the Welsh Government) suspend the exclusivity granted to WEPCo which will include any New Projects that have not yet reached Stage 2 approval. The Participants can lift that suspension at any time and the suspension of exclusivity will be lifted on remedy of the default and where the PSDP shares in WEPCo are sold.
- 7.7 The SPA provides for an escalation of remedies following a WEPCo Event of Default, proportionate to the severity of the default, which may be exercised by the Participants (acting through Welsh Government). These include: suspension of exclusivity; requiring a remediation programme to be implemented; an improvement programme to satisfy Participants that the events will not recur; termination of a non-performing supply chain member; and ultimately termination of the SPA.
- 7.8 WEPCo will reimburse each Participant for all reasonable costs incurred by each Participant as a result of WEPCo's breach of the SPA.

8 WEPCO INDEMNITIES

- 8.1 As would be expected under a long term partnering agreement, the SPA includes provisions under which WEPCo indemnifies the Participants, and the Participants indemnify WEPCo, for certain losses. These are limited to Direct Losses, and exclude Indirect Losses (such as loss of profit and loss of business opportunity), and further Participants partially exclude their liability for their negligence (see below) and claims in tort.
- 8.2 The scope of the indemnity provided by WEPCo is slightly wider than the Participants' indemnities to WEPCo, as the Participants' indemnities are limited to Direct Losses sustained by WEPCo as a consequence of any negligent act or omission by that Participant (or a Participant Party relating to that Participant) relating to the performance or non-performance of the Participant's obligations under the

SPA, or a breach of an express provision of the SPA by that Participant. The indemnities provided by WEPCo relate to any act or omission of WEPCo (not just its negligence or breach of an express obligation).

- 8.3 The indemnities cover death and/or personal injury, damage to assets of the other party and third parties. In each case (and subject to the overriding limitation on the scope of the Participants' indemnities described in above), each party is liable for Direct Losses sustained in consequence of any claim for death and/or personal injury of their own employees or persons engaged by them, notwithstanding any act or omission of the other party.
- 8.4 In respect of death or personal injury to third parties, and damage to property, each party indemnifies the other for Direct Losses they cause (save to the extent caused or contributed to by the Participant's own negligence (where WEPCo is indemnifying the Participant) or WEPCo's own acts or omissions (where the Participant is indemnifying WEPCo). Physical damage to property is typically an insured risk, and the indemnity given by the Participants to WEPCo excludes insured losses. Where damage to property has been caused (or contributed to) by the Participant's own negligence, and they are claiming under the WEPCo indemnity, the Participant is responsible for the deductibles under any policy of insurance, and any sums over the maximum amount required to be insured under the SPA insurance policies.

9 DISPUTE RESOLUTION

- 9.1 Disputes are dealt with in accordance with the resolution procedure set out in Schedule 22 (*Dispute Resolution Procedure*). If a Dispute occurs, the parties must consult in good faith. If that is unsuccessful, the Dispute must be escalated to senior personnel. If that is unsuccessful, the Dispute will be escalated to mediation and failing that to arbitration. The exception to this is where a party requires an order restraining another party from doing any act or compelling another to do any act or a judgement for a liquidated sum where there is no arguable defence.

10 INSURANCE

- 10.1 The insurances listed in Schedule 9 (*Insurances*) and any others required by law must be taken out by WEPCo, subject to insurance being available in the market to cover WEPCo in its role during the lifetime of the SPA. The insurance will cover any indemnity claims against WEPCo in relation to any death or bodily injury or third party property damage arising out of or in connection with the Partnering Services.
- 10.2 If a Project Service Provider notices a risk becoming an Uninsurable Risk under the relevant Project Agreement, the Participants and WEPCo will hold a SPB meeting within 7 Business Days and will use their reasonable endeavours to agree a position with regards to the risk within 20 Business Days of notice.

11 INTELLECTUAL PROPERTY RIGHTS

- 11.1 WEPCo grants a free, irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under the SPA or following termination of the SPA) licence to each Participant to use the Intellectual Property Rights which are vested in WEPCo and where possible, where vested in third parties. WEPCo will indemnify Participants where they receive a claim as a result of the Participant infringing third party Intellectual Property Rights (other than as a result of the Participant acting outside of the terms of the SPA).

12 ASSIGNMENT AND SUBCONTRACTING

- 12.1 WEPCo cannot assign or dispose of the SPA without the prior written consent of the Participants, other than where granting security rights in a form approved by the Participants prior to grant.

- 12.2 A Participant cannot assign or dispose of the SPA other than to a limited set of organisations set out in clauses 28.4.1 to 28.4.4, including the Welsh Ministers, an agency of the Welsh Ministers, Government or Local Authority, any other Further Education Corporation or Designated Institution or any person with the legal capacity or sufficient financial resources to perform the obligations of the Participant. Depending on the transferee, the obligations may need to be guaranteed by the Participant.

Bevan Brittan LLP

11 May 2020