

Legal advice re proposed contract with a Derby City Council maintained school - for provision of catering services

It is understood that a Derby City Council maintained school ran a tender for the provision of catering services to the School. Although, Nottingham City Council, submitted a tender but did not initially win the bid, after the winning tenderer pulled out, Nottingham City Council were invited to submit a quotation. Having accepted the quotation Derby City Council maintained school wish to enter a contract with the City Council for the provision of the services.

The Council/ Authority has the power under the Local Authorities (Goods and Services) Act 1970 to enter into an agreement with other public bodies covered by the Act (and the supporting Orders) for the provision by the authority, to a public body, of any administrative, professional or technical service, on commercial terms and for profit.' Public Bodies' as defined in the Act means any local authority, and so would allow the Council to contact with Derby City Council for the provision of the professional catering services to its maintained school. Derby City Council has the power to establish, maintain and assist primary and secondary schools under section 16 of the Education Act 1996 for the purpose of fulfilling the function under the act to provide such schools for education. Every maintained School must have a governing body, which is a body corporate (section 19, Education Act 2002). Section 20 of the Education Act 2002 requires all maintained schools to have an instrument of government which determines the constitution of the governing body and other matters relating to the school. The governing body's broad powers are contained in paragraph 3 of Schedule 1 of the Education Act 2002. The governing body may do anything that appears to them to be necessary or expedient for the purposes of or in connection with:

The conduct of the school.

The provision of community facilities or services.

(Paragraph 3(1).)

These powers include:

Entering into contracts.

Acquiring and disposing of land and other property.

Borrowing money.

However, the local authority may still be held responsible for the governing body's actions in exercise of the governing body's powers. In connection with a maintained school's delegated budget, any amount made available by the local authority to the governing body:

Remains the property of the authority until it is spent by the governing body.

When spent by the governing body is taken as spent by the body as the authority's agent.

(Section 49(5), School Standards and Framework Act 1998).

As a result, it is standard practice for local authorities to require their schools to adhere to their own (or specially devised for schools) contracts procedure rules or standing orders concerning their contracting. Under these rules, schools may have to obtain director-level approval for expenditure above a certain threshold. More commonly, large contracts would be entered into by the local authority directly with the contractor on behalf of the school.

Like the local authority, schools (as contracting authorities) are bound by the public procurement rules.

The School Governance (Constitution) (England) Regulations 2012 as amended, set out the precise arrangements for the constitution of governing bodies and is supported by the DoE Governance Handbook (Oct 2020) confirm the governing board is the accountable body and key decision maker for a maintained school, although, it may choose to delegate certain responsibilities to the Head teacher (in certain circumstances), a committee or an individual governor. The responsibility for making contractual spending and decisions would be set out within the school's scheme of delegations.

The proposed contract is for an initial period of 3 years with the option at the School's discretion of extending for a further year (subject to 6 months' written notice being given to the Council). The proposed terms and conditions of contract are based on a template contract drafted by Legal Services for the provision of the catering services to academies. The Council should ensure that the contract is reviewed by Legal Services before it is signed to ensure its terms remain substantially the same but that reference to a School does not include an academy in this instance. The Council will need to ensure that the School's legally accountable governing body (or if the function has been delegated to a person) the person with delegated responsibility, enters into the Contract on behalf of the Maintained School and that the correct method of execution is utilised.

Under the proposed contract each party will warrant that it will exercise its responsibilities with due care and skill and in accordance with good industry practice. The Council additionally, warrants that the Products supplied by the Council to the School in accordance with this Agreement shall be of satisfactory quality (within the meaning of the Sale of Goods Act 1979, as amended). The Councils proviso of services will be in consideration of the payment of the Charges stipulated under the Contract to the Council by the School. The Council will need to ensure that it provides its service in accordance with applicable Health and Safety and Food Hygienic Safety laws and the Schools relevant policies in these areas.

The termination provisions in the proposed contract does not allow the School to terminate the contract for convenience or at will by giving written notice to the Council during its term. So the Council would not be exposed to the risk (when there has been no default by the Council) of not being able to recover its unavoidable costs and expenses incurred to that point. The termination provisions apply instead on a mutual basis where a material breach is committed and is not capable of remedy.

The proposed contract limits the Council's liability under the contract, as opposed to that liability being uncapped, thereby reducing the risk for the Council in the event of a contractual breach. The Council must nevertheless maintain insurance to provide an adequate level of cover in respect of all risks which may be incurred by the Council arising from the performance of the contract.

The parties need to enter into a data processing agreement in relation to the processing of personal data before the commencement of the services, to ensure provision of data complies with the UK GDPR and Data Protection act 2018, before commencement of the services to be provided.

There is an adequate contractual dispute resolution provision so that if a dispute arises between the parties during the contract period, the dispute may be resolved informally or by referral to mediation and, in the last resort, to court proceedings. The dispute resolution provision in the

proposed contract does not, allow either party to issue and to commence court proceedings prior to or contemporaneously with the commencement of mediation as this could incur unnecessary costs for the Council or the School.

With regards to responsibility for the provision of equipment and ongoing maintenance the Council comply with the provisions of Part C to Schedule 1 of the proposed contract regarding the provision of Equipment for the supply of the Services and maintenance of the Heavy Equipment. Upon expiry/termination of this Agreement (whichever first occurs), where the Council own the Heavy Equipment, the School shall have the option (but no obligation) of purchasing the Heavy Equipment at the Write-Down Value and upon payment of the same, such equipment shall remain at the Premises and transfer to the ownership of the School. If the School chooses not to exercise this option, the Council shall remove the Heavy Equipment from the Premises.

In addition to the above as a TUPE transfer is involved, the Council is advised to seek additional legal advice from the Council's Employment Solicitor before the contract for services is signed, to ensure the contractual provisions are fit for purpose and protect the Council's interests. A number of risks have been highlighted within the HR advice that will need to be addressed from an employment law perspective.

Richard Bines – Solicitor - Contracts and Commercial Team - Legal Services - 18.07.2023