

## **CABINET – 22 JUNE 2010**

# **EXEMPTION REQUEST FROM THE COUNCILS CONTRACT PROCEDURE RULES FOR 16-19 EDUCATION CONTRACTS FOR 2010/11**

**Report by Director for Children, Young People & Families**

### **Introduction**

1. Following the enactment of the Apprenticeships, Skills, Children and Learning Act 2009 (ASCL Act) and the subsequent dissolution of the Learning and Skills Council (LSC) on 31 March 2010, one of the new statutory responsibilities for Oxfordshire County Council is the transfer of financial and contractual responsibilities from the LSC for 16-19 education funding (except for apprenticeships which is the responsibility of the newly formed Skills Funding Agency).
2. The Young People's Learning Agency (YPLA) was launched in April 2010 with a responsibility for supporting local authorities to commission suitable education and training opportunities for all 16-19 year olds.

### **Exemption Information**

#### ***Introduction to the Request***

3. LSC contracts run from 1st August to 31<sup>st</sup> July, aligning with the academic year, and the existing contracts for the period April 2010 to July 2010 have been novated to the Council under a nationally laid down statutory transfer scheme.
4. For the 2010/11 academic year i.e. for contracts running from August 2010 to July 2011 (AY 2010/11), the LSC determined the allocation of funding prior to the transfer of responsibilities and providers have been notified of this allocation.
5. The Council is now the lead commissioner for 8 further education providers and will be contracting directly with these providers for 16-19 education provision in AY 2010/11. One of these providers is the Council itself which has a small contract to deliver 16-19 education (100 places) which will be covered by a service level agreement and is therefore not part of this exemption request.
6. The 7 remaining providers with their AY 2010/11 16-19 funding allocation values are listed in the table below:

<b>Provider</b>	<b>Provider Type</b>	<b>2010/11 Learner Number Target</b>	<b>2010/11 Contact Value</b>
Abingdon & Witney College	College	2,038	£10,584,760
Oxfordshire Ethnic Minority Business Services	Independent Training Provider	60	£15,422
Oxford Brookes University	HE Institution	92	£497,799
Oxford & Cherwell Valley College	College	3,160	£15,983,582
The Henley College	College	1,971	£9,582,450
Languages Training & Development	Independent Training Provider	122	£388,861
Swan Lake	Independent Training Provider	60	£188,848

7. The total value of these contracts for 2010/11 is: £37,241,722 with an associated overall target of 7,503 16-19 year olds participating in 16-19 education.

***Reason for requesting exemption from Contract Procedure Rules***

8. This is the transitional commissioning cycle during which local authorities became responsible for delivering the plans and allocations made by the LSC up to 31 March 2010 for delivery in the academic year August 2010 to July 2011.
9. The AY 2010/11 allocations for 16-19 education provision were negotiated and finalised by the LSC prior to the transfer of responsibilities to the LA. Therefore, although the contracts will be with the Council, the Council was not responsible for nor party to the procurement of this provision.
10. The Council will be bound by grant conditions issued by the YPLA that will specify the individual allocations to providers.
11. As a consequence of the constraints of the funding allocations, the Council is unable to procure these services through a normal procurement route as it is prevented from seeking competitive quotes. A request for exemption from CPR Rule 13.3 is therefore being submitted under CPR Rule 4.

***Consequences if the proposed action is not approved***

12. If approval is not given the Council will not be able to enter into the contracts. This would mean that the Council would be in breach of the grant conditions of the YPLA.

13. If the Council does not sign up to the YPLA grant conditions it will not receive the funding and therefore will be unable to fulfil its statutory responsibilities to provide 16-19 education.

## **Legal, Financial and Procurement Implications**

### ***Legal Appraisal***

14. Set out in the Annex to this report.

### ***Financial Appraisal***

15. The funding allocations to be passed on to FE colleges will be determined by and fully funded by YLPA. The 2010/11 academic year contracts can clarify that the only resources to be passed to the colleges will be those provided by YPLA. Furthermore, Government confirmed in a speech by the Chief Secretary to the Treasury on 24<sup>th</sup> May 10, that budgets for 16-19 Education in 2010/11 would be protected and therefore there should be no risk of reduction in funding to these contracts. Accordingly no ongoing revenue costs can arise.
16. Not entering into the contracts originally procured by YPLA is likely to give rise to substantial revenue costs potentially including damages claims by the colleges.

### ***Procurement Appraisal***

17. It should be noted that this may bring this council into conflict with EU Procurement Legislation and as a result is a risk to the council. Unfortunately, though, the actions and lack of information coming from the LSC in the lead up to the transfer has effectively left the council in a position where it is contractually obliged with no evidence that the legislation has been adhered to prior to the obligations being made.
18. It should also be noted that all other local authorities in England will be in the same situation.

## **RECOMMENDATION**

19. **The Cabinet is RECOMMENDED to approve exemption from the Council's Contract Procedure Rules (under rule 5.4.2) for the 2010/11 academic year.**

MEERA SPILLETT  
Director for Children, Young People & Families

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Background paper: Nil  
May 2010

## Children Young People & Families Directorate

### Request for exemption from tendering under Contract Procedure Rule (“CPR”) 4 in respect of 16-19 Education Contracts for 2010/11

#### Legal Appraisal by County Solicitor

##### A. Background

1. The Children Young People and Families Directorate (“CYP&F”) is seeking exemption under CPR 4 from the tendering requirements under CPRs 12-18 in relation to the letting of seven contracts (“the Contracts”) for the provision of education to 16-19 year olds for the academic year 2010/11.
2. Details of the providers and annual values of the Contracts are shown in the report to which this legal appraisal is attached. In summary:
  - 3 contracts are with colleges (total annual value £36.15m);
  - one contract is with an HE Institution (annual value £498,000); and
  - 3 contracts are with independent training providers (total annual value £593,000) (“the Providers”).
3. On 1<sup>st</sup> April 2010 existing contracts between the LSC and the Providers were novated from the LSC to the Council under a statutory transfer scheme (Apprenticeships, Skills, Children and Learning Act 2009 (“ASCL Act”). It appears that these contracts expire on 31<sup>st</sup> July 2010 (although this has yet to be confirmed as the LSC has not provided local authorities with copies of the original contracts). Under the ASCL the Council has a statutory responsibility for 16-19 education provision.
4. The YPLA which has taken on the role of the LSC has determined allocations and named providers which the Council must contract with for the academic year 2010/11 under its own procurement rules. This will be dealt with in a grant agreement between the Council and the YPLA (yet to be issued).

##### B. Grounds for Exemption

Special factors relevant to the Contracts are cited by CYP&F as follows:

1. Grant Conditions imposed by YPLA

The YPLA has determined providers and allocations for the academic year 2010/11 and the Council will be bound by the YPLA’s grant conditions to pass on such allocations as directed.

2. YPLA procurement

The YPLA/LSC has followed its own procurement rules when selecting providers and making allocations. For some providers (particularly the colleges) providers will have been selected directly without competition whilst in other cases some form of competitive procurement may have been

followed. As a public body the LSC/YPLA is subject to the same procurement rules as local authorities.

3. The Council's Statutory Obligations

Under the ASCL Act the Council has a statutory duty to secure that enough suitable education and training is provided to meet the reasonable needs of—

- (a) persons in their area who are over compulsory school age but under 19, and
- (b) persons in their area who are aged 19 or over but under 25 and are subject to learning difficulty assessment.

If the Council decided to follow its own procurement process and allocate to providers other than those directed by YPLA it would be in breach of its grant agreement with YPLA and could not therefore guarantee receipt of the funding it requires to fulfil this duty.

C. Appraisal

1. In making its contract arrangements, the Council is required to demonstrate that it has acted in accordance with the EU Treaty-based principles of fairness, transparency, non-discrimination and proportionality ("the EU Principles"). Aside from the application of the Council's own Contract Procedure Rules, public bodies are also required to comply with the Public Contracts Regulations 2006 ("the Regulations"), which impose further procedural requirements in relation to contracts for services over a prescribed pecuniary threshold.
2. Both the Contract Procedure Rules and the Regulations are drafted with the EU Principles in mind. The Regulations impose two levels of procedural requirement, depending on the nature of services being procured. The Contracts fall under the much less rigorous Part B regime imposed by the Regulations and are therefore subject to limited procedural requirements.
3. The Council is at risk of failing to comply with EU Principles in awarding the Contracts directly to providers without any form of competition.
4. The YPLA is a public body and so is also subject to the EU Principles when selecting providers and awarding contracts. It has, in the past, viewed certain types of provider (notably the colleges) as not requiring a competitive tender process. One assumes that its justification is that there are no or very few alternative providers for this type of provision and that this market has no cross-border interest.
5. The Contracts are for one year only and so this is a further factor that might mean the Contracts will not be of interest to alternative providers.
6. In assessing the risk of the Council being challenged on the basis of a failure to comply with EU Principles it is important to note that the allocations of the YPLA have been made at a national level and so these issues will affect all

local authorities not just the Council. It is also the way the LSC has been operating for several years without challenge.

7. Although there is some risk to the Council of such a challenge this is clearly outweighed by the greater risk if the Council failed to follow the YPLA's directions in respect of the selection of providers and the allocation of funding. In such circumstances the YPLA may withdraw funding and the Council would be unable to meet its statutory duties.
8. The County Solicitor considers therefore that the requested exemption is justified in these special circumstances.

**D. Recommendations**

In light of the information in the exemption report prepared by the Director of CYP&F, the County Solicitor recommends that the request for exemption is approved in these special circumstances.

Peter Clark  
County Solicitor

26 May 2010