

The background of the slide features the coat of arms of the Government of Yukon. It consists of a shield divided into four quadrants. The top-left quadrant shows a yellow diagonal cross on a blue background. The top-right quadrant depicts a white moose head with large antlers on a blue background. The bottom-left quadrant shows a white sailing ship on blue wavy lines representing water. The bottom-right quadrant features a white eagle with spread wings on a blue background. Above the shield is a crown with four yellow maple leaves. A white banner at the bottom contains the motto 'A NE FOR A' in blue capital letters.

Agenda Item 6

End of Schools PPP Contract

Falkirk Council

Title: End of Schools PPP Contract
Meeting: Education, Children and Young People Executive
Date: 21 June 2022
Submitted By: Director of Children's Services and
Director of Transformation, Communities and Corporate
Services.

1. Purpose of Report

1.1 The purpose of this report is to provide the Education, Children and Young People Executive (EC&YP Executive) with:

- information on the contractual and legal position of the Council's Public Private Partnership (PPP) contract with Class 98 Limited (the contract) which covers the schools detailed at paragraph 4.1 below;
- details of the relevant timeframes that are involved;
- an overview of current revenue and capital financial position; and
- an assessment of the options that are available to the Council once the 25-year contract period comes to an end.

1.2 A decision is sought on whether to bring the contract to an end as at 1st August 2025 or to seek to extend the contract for an additional period.

2 Recommendations

2.1 Education, Children and Young People Executive is asked to:

- (i) note the content of this report;
- (ii) note the revenue and capital financial position outlined in Section 5.6 and 5.7;
- (iii) agree that the Council does not serve a notice of extension of the contract on Class 98 Limited on or before the extension option date of 1 August 2022;
- (iv) request and authorise the Directors of Children's Services, Transformation, Communities and Corporate Services and Place Services to take all necessary administrative, technical and contractual steps to bring the contract to an end at 1st August 2025 and transfer the schools back to the Council; and
- (v) request that the Director of Children's Services brings an updated progress report to the EC&YP Executive in June 2023.

3 Climate Change Implications

3.1 All project infrastructure work has been developed in a way that supports and enhances the quality of our school estate. Many aspects of this work have also

augmented and improved energy efficiency targets and our overall aim to meet national climate change ambitions, this has included the replacement of older equipment, heating/lighting systems and buildings.

4 Background

4.1 Current PPP Contract

Falkirk Council was the first Council in Scotland to complete and enter a PPP contract for part of its school estate. This also means that Falkirk will be the first such Council to reach the expiry date of a PPP Contract for schools.

The contract was entered into by the Council with Class 98 Limited in 1998. The construction of the schools detailed below was completed by August 2000 when they started to be used as functioning school premises. Under the contract, Class 98 Limited are responsible for the management, operation, maintenance, and servicing of the school facilities so that they are available for use by the Council for education and community use. The contract was for 25 years of school use and is, accordingly, due to expire on 1 August 2025. It covers the undernoted school buildings/sites:

- Bo'ness Academy
- Braes High School
- Graeme High School
- Larbert High School
- Old Carrongrange School

- 4.2 The Council requires to decide before 1 August 2022 if it wishes to allow the contract to expire as of 1 August 2025 with the Council taking back the management, operation, maintenance, and servicing of the schools at that time or if it wishes to serve an extension notice on Class 98 Limited.

5 Considerations

Timelines/Critical Contract Dates

- 5.1 The contract will come to an end on **1 August 2025** if the Council either:
- does not serve an Extension Notice on Class 98 before 1 August 2022; or
 - does serve an Extension Notice on Class 98 before 1 August 2022, but it is then unable to agree the Secondary Period Price by 1 August 2024.
- 5.2 The Secondary Period Price is the price the Council would pay if it wanted to extend the contract beyond 1 August 2025. The contract prescribes that the Secondary Period would be 25 years i.e. the contract would continue until 1 August 2050 if the Council decides to extend the duration of the contract by issuing an Extension Notice to Class 98 before 1 August 2022 and agrees the Secondary Period Price by 1 August 2024. It may be possible to agree that the Secondary Period would be shorter than 25 years subject to careful

consideration of relevant procurement regulations and consent of the senior lenders under the financial documents for the project.

Options Available at the Contract End (1 August 2025)

5.3 Accordingly, the Council has 2 options:

- Option 1 – Expiry of the contract as at 1 August 2025
- Option 2 – Extension of the contract.

Appraisal of Option 1 – Expiry of the Contract

5.4 The potential benefits accruing from this option are summarised as follows:

(i) Cost Reduction

- This could allow the Council to bring the services provided by Class 98 Limited back “in house” to achieve consistency of service provision across the overall school estate.
- There would be no management fee or margin paid to Class 98 Limited.
- Best value for money could be demonstrated if the services (in whole or part) were competitively tendered for, given the current competitive market for the provision of all Facilities Management (FM) Services.

(ii) Flexibility

- Bringing services back “in-house” (in whole or part) could provide the Council with increased budget flexibility regarding life cycle.
- Decisions made in respect of the school estate would be easier as there would be no need to seek assurances from a third party. For instance, community use of the schools could be adjusted or increased without the involvement of Class 98 Limited.
- If services were unable to be provided in-house and required to be re-procured (in whole or part) it is likely that the contract period would be less than 25 years i.e., 5 years. This would in turn allow more frequent value for money assessments, adaptability and potential provider changes to be made.

(iii) Certainty

- Cost certainty would be achieved by giving notice to “buy back” the school sites before 1st August 2024. That is the deadline in the contract for the Council to serve notice on Class 98 Limited that it intends to buy back the school sites and buildings in anticipation of the contract ending on 1st August 2025. Paragraph 5.7 sets out the sums to be paid to transfer the schools to the Council through the buyback arrangements. These sums are not held at the same level through a secondary period, however, with market value applying at the end of a secondary period.
- Ending the contract as at 1 August 2025 would, accordingly, avoid the significant risk that the market value of the school sites could increase during a secondary contract period beyond the

fixed/unindexed sums which for which the Council is entitled to buy the schools back at 1 August 2025.

(iv) Potential Dispute Avoidance

- There is a risk that the current procurement regulations could prove challenging in relation to the process set out in the contract for extending the contract. Depending on the circumstances, it could, arguably, be open to a competitor of Class 98 to raise a challenge to an extension arguing breach of the Council's public procurement duties.
- If the Council opts to enter into discussions about Secondary Period Price without being certain that this option is ultimately preferred (i.e. to explore further the options with Class 98) and no price is agreed, it may be open to Class 98 to argue that the Council has not used "all reasonable endeavours" and or acted in "good faith" to agree a Secondary Period Price, "all reasonable endeavours" being an onerous obligation.

Appraisal of Option 2 – Contract Extension

5.5 The potential benefits accruing from this option are summarised as follows:

Continuity

- This would allow the existing contractual relationships to continue and offer familiarity to both parties.

Contractual Re-set

- An extension affords the Council the opportunity to re-set the current contractual arrangements by agreement with Class 98.

Transfer of Undertakings (Protection of Employment) (TUPE)

- The Council would avoid the operation of TUPE in 2025 and the potential transfer of employees of the main service providers to the Council at that time.

Procurement

- The Council would avoid having to go through a new procurement exercise for the provision of the existing services if it was unable to provide the services in-house.

Payment Deferral

- The Council would be able to defer the "buy back" payments for the existing school sites (while noting the risk around price increase identified above).

Option to Improve

- Following an Extension Notice, both parties (Council and Class 98), have a 2-year period (to 1 August 2024) to agree the revised arrangements for the provision of the services and the cost for this. If no agreement on the cost is reached by 1 August 2024, then the Council can still trigger the "buy-back" option. This could, however, be labour intensive and would, of course, be subject to achieving the threshold of

acting in good faith and using all reasonable endeavours to agree the Secondary Price Period.

Financial Overview

5.6 Revenue Position

- The current (2022/23) budgeted position for the project is:
 - PPP Unitary Charges £13.6m
 - PPP Pass Through Costs £ 4.4m
 - Total Costs (Gross) £ 18.0m
 - Less: Scottish Government Support £ 8.6m
 - **Net Cost/Budget £ 9.4m**
- The Unitary Charges include life cycle asset investment, repairs, cleaning, janitorial and insurance costs etc.
- The “pass-through” costs include expenditure on Rates, Utility Costs, Catering, Telephones and Community Use etc.
- If the Council agrees to allow the contract to expire on 1st August 2025, then **£9.4m** would be available to fund provision of the services (in house or external) referred to above and to provide for life cycle asset investment and maintenance costs. This will also include costs associated with the transfer of the current staff under TUPE rules.
- The Working Group will be undertaking detailed work on the future financial position over the next few months. Details on this will be included in a future report.
- The future revenue budget will be designed to ensure that all costs remain within the funding envelope.

5.7 Capital Position

- If the “buy-back” option was progressed (the deadline for notification of buy back being 1st August 2024), then the Council would be required to pay the **lesser** of:
 - £5m or
 - The market value of the school sites.
- The current Council Capital Programme (2022/23 – 2025/26) has earmarked £5.6m for this. This includes the potential £5m purchase fee and funds for the legal and financial fees attached to this.

Staffing Matters

- 5.8 Class 98 have advised that c.95 staff from existing service providers would be deemed to be “in-scope” for potential TUPE transfers if the Council allows the contract to expire as at 1st August 2025.
- 5.9 The c.95 staff members provide the following services:
- Catering
 - Cleaning
 - Janitorial (Hard FM)
 - Site supervision (Snr Janitor)
 - Technical Asset management

Proposal

- 5.10 Based on Officers' assessment of the information provided and taking account of the professional external advice provided, it is proposed that the Council agree to Option 1 – expiry of the contract as at 1 August 2025. It is considered that the benefits of allowing the contract to expire as at 1st August 2025 (as set out at paragraph 5.4) outweigh the benefits of seeking an extension of the contract.
- 5.11 Council Officers have met with senior representatives of Class 98 Limited to discuss the recommendation to bring the contract to an end on 1st August 2025. They have noted the position and have indicated that they are willing to maintain a dialogue with the Council over potential extension options as the project develops and would be willing to consider acceptance of a notice of extension after 1st August 2022 should a mutually beneficial approach be identified.
- 5.12 As noted in Section 5.4(iv) above, any such approach would require careful consideration of the relevant public procurement rules. Officers will, of course, keep members updated on this.

6. Consultation

- 6.1 As part of this exercise, a Project Team was set up to consider and evaluate all options. This Team consisted of Officers from Children's Services, Place Services, Finance and Legal Services and included external representatives from The Scottish Futures Trust and specialist legal advisors.
- 6.2 This Team has met regularly over the past 2 years.

7. Implications

Financial/Resources

- 7.1 These are outlined in Section 5.6 and 5.7.

Legal

- 7.2 Depending on the decision taken to either bring the contract to an end on 1 August 2025 or to extend the contract, careful regard will require to be given to compliance with the provisions of the contract and the relevant public procurement regulations.

Risk

- 7.3 The risks are summarised within the Sections 5.4 and 5.5 which assess the 2 Options available. In addition, Section 5.12 confirms the potential risks associated with the public procurement rules if the option to extend the contract for a "secondary period" was progressed.

Equalities

- 7.4 All options considered assume that all staff will be treated fairly. If the Council proceeds to bring the contract to an end on 1 August 2025 and not to seek to agree an extension, TUPE regulations would apply. It is not considered that there are any equalities implications that would result from a decision to bring the contract to an end or to extend the contract.

Sustainability/Environmental Impact

- 7.5 There are no direct impacts on this from the proposals.

8. Conclusions

- 8.1 As this contract was the first School based PPP project in Scotland, it will therefore be the first one to end. Given the contractual challenges associated with this it has been beneficial to have had a dedicated Project Group set up to consider all aspects of work that require to be considered in the lead up to the contract end date of 1 August 2025. This Group has also had significant input from representatives from the Scottish Futures Trust, external professional advisors and from Class 98.
- 8.2 The views and opinions of this Group were important for Officers making the proposals outlined in Sections 5.10 and 5.11.
- 8.3 Officers have also instigated external building surveys to be undertaken across all 5 schools to ensure that between now and the end of the contract Class 98 Limited undertake all the necessary and appropriate investment and work to comply with the contract requirements for handback. In addition, Officers have also arranged for the District Valuer to visit the properties to provide a “market value”, in line with the contract requirements.

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and

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Appendices

None

List of Background Papers

None