

WEP STRATEGIC PARTNERING DELIVERY MODEL
FREQUENTLY ASKED QUESTIONS AND ANSWERS

Strategic Partnering Agreement

1 PARTNERING SERVICES AND EXCLUSIVITY

1.1 Do we have to use WEPCo to deliver our MIM Band B scheme?¹

Once a Participant has entered into the SPA, it gives WEPCo the exclusive right to deliver 21st Century Schools and Colleges (Band B) MIM Programme projects for a period of ten years from the commencement date of the Strategic Partnering Agreement (SPA). However, these MIM Band B projects must be approved and meet the relevant criteria set out and agreed with the relevant Participant through Schedule 5 (*New Project Approval Process*). Exclusivity can be suspended by Participants in limited circumstances – please see further question 1.6 below.

1.2 If we do not have a MIM Band B scheme, why should we sign up? What else could we use WEPCo for? Can we use WEPCo to deliver facilities outside of education, e.g. libraries, leisure centres, office accommodation?

Signing up to the SPA will give Participants the flexibility to use WEPCo in the future to provide Partnering Services or Project Services for capital projects for education or associated community facilities. Participants may request WEPCo to deliver:

Project Development Partnering Services in respect of potential new projects which are not MIM Projects

The role of WEPCo is to develop proposals for a new 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. 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 the new project.

Strategic Support Partnering Services

Strategic Support Partnering Services are 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 on an *ad-hoc basis* on terms and conditions appropriate for the particular circumstances.

Project Services

Project Services means services required to be provided in relation to the design, construction, testing, commissioning and completion of premises (including any temporary works) and the installation of equipment; and/or the provision of hard facilities maintenance services.

Participants may request WEPCo to deliver:

- (a) Project Services relating to major capital projects in the education sector (not just MIM Projects);
- (b) Project Services relating to capital projects required for the provision of education sector services or community services. Associated community facilities may include libraries, leisure and

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

children's and other educational community based services strategically related to MIM or other capital projects delivered through WEPCo;

- (c) Project Services in relation to the provision of hard facilities maintenance services required for the provision of education sector services or community services.

1.3 What partnering services may WEPCo provide?

WEPCo may provide a range of Partnering Services to Participants.

These fall into three categories:

- 1.3.1 *Ongoing Partnering Services* (day to day operational services, partnering and collaborative working, supply chain assembly and overall management, value for money);
- 1.3.2 *Project Development Partnering Services* (working up new projects for delivery, supply chain assembly, funding and value for money); and
- 1.3.3 Strategic Support Services (strategic estate planning, strategic service planning and value for money).

Please see **SPA Summary** for further details.

WEPCo shall provide Project Development Partnering Services to implement Qualifying Projects in accordance with the specification, KPIs (including community benefits) and rates set out in Schedule 3 (*Partnering Services*).

Participants may request WEPCo to deliver Project Development Partnering Services in respect of potential new projects which are not MIM Projects. Recipient Participants and WEPCo agree the scope of services to be provided. Participants can also request WEPCo provide Strategic Support Services on an ad-hoc basis on terms and conditions appropriate for the particular circumstances.

1.4 How do we request services from WEPCo?

WEPCo will provide the Ongoing Partnering Services on a continuous basis (without formal request to do so by the Participant).

Participants can request that WEPCo provides Project Development Partnering Services, to develop proposals for a new project in accordance with the process set out in Schedule 5 (*Approval Process for New Projects*) of the SPA.

Participants can request WEPCo provides, on an ad hoc basis, Strategic Support Partnering Services on terms and conditions agreed in advance between the Participant and WEPCo.

1.5 How is WEPCo paid for the services it provides?

WEPCo's Ongoing Partnering Services are recovered through the OPS Relevant Proportion payable as part of the Project Development Fee charged by WEPCo for New Projects.

WEPCo charges a Project Development Fee for the provision of Project Development Partnering Services. Please see further question 3.7 below.

For Strategic Support Partnering Services, WEPCo is paid by the relevant Participant within 30 days of a valid invoice, the cost being calculated at rates and prices quoted by WEPCo in accordance with Section 4 of Schedule 3 (*Partnering Services*) of the SPA, and updates as agreed in advance by the Participant.

Please see **SPA Summary** for further details.

1.6 If WEPCo is performing poorly are we still bound by exclusivity?

WEPCo is at risk of having its rights of exclusivity suspended for poor performance. This is not subjectively determined. The SPA sets out what constitutes a “WEPCo Event of Default” that is sufficiently serious to trigger the suspension of exclusivity and the process that must be followed by Participants to suspend exclusivity. If this is the case, each Participant can suspend the exclusivity granted to WEPCo which will include any New Projects that have not yet reached stage 2 approval under Schedule 5 (*Approval Process for New Projects*) of the SPA. The Participants can lift that suspension at any time and the suspension of exclusivity will be lifted on remedy of the default (or where the private sector delivery partner’s shares in WEPCo are sold).

1.7 How will our requests be prioritised by WEPCo? How will projects be prioritised for delivery by WEPCo, if there are competing demands on the resources and capital of the WEPCo?

One of the objectives of the Strategic Partnering Board (SPB), on which representatives from each Participant, WEPCo and Welsh Government sit is to give guidance on and approve the order in which New Projects should be progressed and on what basis. WEPCo is then obliged to prioritise New Projects on a basis consistent with the decisions of the SPB. As the Participant representatives sit on the SPB, they will have a direct say on which New Projects are prioritised over others, following discussions between all SPB representatives.

1.8 What are the expected timescales for signing the SPA?

Completion of the procurement process is set for September 2020. We will be guiding each Participant through the process of signing all documents, including the SPA, in preparation for completion and we expect this to take place in June and July, to allow plenty of time before completion.

2 ROLE AND INVOLVEMENT AS A PARTICIPANT

Strategic Partnering Board

2.1 We do not have a scheme in the pipeline to be delivered by WEPCo – will we still have to attend the SPB meetings?

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.

Each Participant that has entered into the SPA is obliged to appoint a representative to the SPB under clause 14 of the SPA to act on its behalf in relation to the SPA. The identity of the Participant’s Representative may change at any time, provided written notice is given to WEPCo and the other Participants.

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.

As part of its role, the SPB will approve the Strategic Delivery Plan and prioritisation of New Projects. It is a benefit for each Participant to attend SPB meetings and take SPB decisions even if it does not currently have a scheme in the pipeline. Where permitted by a Participant’s own governance framework, a Participant’s Representative can delegate responsibility to any other person to attend the SPB and vote on behalf of the delegating Participant’s Representative by written notice to WEPCo. 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 (with adjourned meetings as a result of a lack of quorum in the initial meeting having a quorum of one Participant Representative (being the Welsh Government representative) and the one WEPCo Representative).

2.2 Do we have to attend the SPB meetings in person?

SPB meetings can be held by telephone conference call or video conference or a combination of both, providing all participants are able to speak to and hear each other and a quorum is always present.

2.3 Who would be the right representative on the SPB?

Representatives are expected to be senior representatives of the Participant, with the appropriate authority to make decisions on behalf of the Participant. 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. Participants 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 Participant organisation.

2.4 Does a decision of the SPB bind us if we have not voted in favour of that decision?

SPB decisions are taken by majority vote (of Participant Representatives and the Welsh Government Representative) and so if a majority of the SPB voting representatives approve a decision, it will be passed. However decisions of the SPB which affect a Participant in a way which result in expenditure or liability being incurred by the Participant, or have an adverse impact on the manner in which the Participant discharges a statutory function, will only bind that Participant where it has voted in favour of the decision. If the Participant has not voted in favour of a decision which affects it in this way, it will not be binding on it.

Investment and financing

2.5 Can we take up shares or invest in the WEPCo?

No, it is not open to Participants to take shares or invest in the WEPCo.

2.6 Can we make a capital payment or contribution on our MIM project(s) to reduce the revenue commitment?

Legally it is possible for a capital contribution to be made under a Project Agreement but this is a policy matter and would be subject to approval by Welsh Government. The quantum and timing of the capital contribution would also be limited by accounting treatment rules to ensure it does not bring a project on balance sheet.

2.7 How much profit will the private sector make?

This will be governed by the WEPCo Shareholders' Agreement and the SPA. Under the SPA (Schedule 4, Appendix 1) the equity returns for projects and project management fees are capped, and these caps will be bid back by bidders.

In competition, bidders will be tested on the daily rates for delivery of Partnering Services and Internal Rate of Return (IRR).

Obligations and liabilities

2.8 Do we have any ongoing liabilities or commitments as a Participant if we decide not to procure any works or services from WEPCo?

As a Participant you will be bound by the terms of the SPA, and will have committed to attending the Strategic Partnering Board. You will also be subject to the freedom of information obligations set out in clause 50 and the further assurance provision (to do all things and execute all further documents necessary to give full effect to the SPA). However, save in the circumstances set out in question 2.10 below, there is no joint liability of the Participants (and only then does this apply where two or more Participants have both breached the terms of the SPA), which means that no act or omission of any Participant shall bind any other Participant.

2.9 How does the default of one Participant affect the others?

There are only limited grounds which constitute a Participant Event of Default under the SPA. If a Participant Event of Default occurs, WEPCo may serve notice on the Participant(s) responsible for the Participant Event of Default suspending or terminating the SPA insofar as it relates to such Participant(s). The SPA will remain in place and effective as between the WEPCo and the non-defaulting Participants.

2.10 If WEPCo is in default, can each Participant decide whether they want to terminate or continue with WEPCo?

If there is a WEPCo Event of Default, the Participants may or may not have the right to terminate the SPA (depending on the nature of the default, and whether or not WEPCo has the opportunity to remedy its breach). If there is a WEPCo Event of Default there are a number of potential consequences, and each Participant (acting through Welsh Government) may be able to elect to suspend WEPCo's exclusivity, or require WEPCo to replace a non-performing Supply Chain Member, or serve a SPA Material Default Notice or a Default Termination Notice to terminate the SPA. Where a right of termination has arisen, Participants can each decide whether to do so or continue with WEPCo.

2.11 What happens in a conflict situation between the Participants?

The SPA governs the relationship between the Participants and WEPCo. The role of the SPB and decision making is set out in response to question 2.1 above.

Where Participants need to act together to request WEPCo to deliver, for example, a batch of projects, we would recommend the procuring Participants enter into a co-operation agreement governing that joint request and any disputes that arise in relation to it, including how WEPCo's costs will be apportioned between the Participants where such costs relate to some or all of the projects.

2.12 If WEPCo gets into financial difficulties, are we liable for their debts?

No, WEPCo is a separate legal entity and is responsible for its own debts and liabilities.

2.13 What are our potential liabilities if we default under the Strategic Partnering Agreement?

If a Participant commits a Participant Event of Default, WEPCo can either:

- suspend performance of services to that Participant until that Participant can demonstrate to WEPCo's reasonable satisfaction it is capable of performing their obligations; or
- notify the Participant of the Event of Default. If the default is capable of remedy and hasn't been remedied within 30 Business Days of notice or is not capable of remedy, 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 schedule 14 section 1. If the SPA is terminated in its entirety by the default, additional compensation under schedule 14 section 2 will also be payable.

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.

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 losses of WEPCo will be split between the defaulting Participants.

2.14 What happens to Projects if WEPCo is in default under the SPA (or vice versa)?

Depending on the severity of the WEPCo Event of Default, in the worst case scenario, Participants may suspend WEPCo's exclusivity and during that period serve an SPA Material Default Notice which allows the Participants to terminate the SPA immediately.

Please see **SPA Summary** for further details.

3 DELIVERING PROJECTS THROUGH WEPCO

3.1 What business case approval will we need to deliver our project?

WEPCo will assist each Participant in recommending potential New Projects. Each Participant will then need to obtain approval in accordance with its governance procedures prior to it requesting WEPCo to produce a stage 1 submission in relation to a New Project. Once that approval has been obtained, WEPCo will then prepare the stage 1 and stage 2 submissions and as part of that process, will assist the Participant in obtaining an outline business case and full business case approval, which will be required to enable the New Project to progress to Approved Project status.

Please see **separate guidance published by Welsh Government** in respect of business case approvals. This is published on the E Portal under Welsh Government Guidance.

3.2 What is the process to develop project proposals?

Schedule 5 (*Approval Process for New Projects*) of the SPA outlines the approval process for New Projects.

Please see **SPA Summary** for further details and **separate guidance note**.

A Participant can request WEPCo prepare a proposal for a New Project. WEPCo will then prepare a stage 1 submission and if successful, a stage 2 submission, before the New Project becomes an Approved Project and is developed.

3.3 What do we need to fund and what will Welsh Government fund? What do we expect WEPCo to do - will WEPCo support site identification?

Welsh Government will fund the capital cost and 81% of the Participant's unitary charge in relation to MIM Projects delivered under the WEP Strategic Partnering Delivery Model. Each Participant will need to pay the remaining 19% of the unitary charge.

Welsh Government will pay Bevan Brittan LLP's legal fees in advising the Participants on the pathfinder projects. Please see separate note on the scope of Bevan Brittan's services published on the E Portal.

WEPCo will analyse and discuss with Participants, the individual accommodation requirements of each Participant. It will assist in developing local delivery plans and identify options for meeting the Participants' accommodation requirements and recommend New Projects to progress, including developing the Participant's requirements for each New Project, discussing the range of funding options for that New Project and assisting Participants in preparing outline business cases and obtaining the necessary approvals.

3.4 When does statutory consultation fit into the new project approval process?

Under the SPA, WEPCo must undertake widespread consultation, as agreed with the relevant Participants, within the local community throughout the New Project Approval Process. The Participant procuring the New Project and WEPCo will need to agree a time within the stage 1 and 2 submission preparatory framework in which consultation will take place, and its results then fed into the proposal for the New Project.

3.5 What do we need to do at "stage zero" to get our project ready to submit to WEPCo? Do we need to develop our BIM requirements?

Please see **separate guidance published by Welsh Government**.

WEPCo will work with a Participant to recommend New Projects and subsequently develop the Participant's requirements for each project. This includes preparing an outline business case. WEPCo will also, as part of the stage 1 submission, provide a detailed Project execution plan which includes a BIM Execution Plan.

3.6 How is WEPCo paid for the work it undertakes to progress our project to the point it is ready for contract signature?

WEPCo will be paid for this work as payment for Project Development Partnering Services in accordance with Schedule 4 (*Partnering Services Costs*) of the SPA.

Please see **SPA Summary** for further details.

3.7 How can we be assured our project is value for money?

WEPCo is obliged to evidence that its proposals for New Projects deliver value for money and continuous improvement in value for money.

WEPCo's specific obligations are set out in Schedule 5 (*Approval Process for New Projects*), Schedule 6 (*New Project Pricing Report*) and section 5B of Schedule 3 (*Partnering Services*). Please see **SPA Summary** for further details.

3.8 How are we involved in selection of our project's contractor and FM service provider?

Participants will have a key role in the selection of a contractor and FM service provider. Whilst WEPCo will lead on the procurement and selection of the project's contractor and FM service provider, as the procuring Participant, you will have the opportunity to feed into the tender evaluation and award criteria, attend meetings relating to the procurement process and discuss with WEPCo, the choosing of the preferred tenderer for construction and FM services. WEPCo is obliged to increase opportunities for local employment and training and so will need to look to local employment and labour for the delivery of these services.

Bidders will be tested on their approach to supply chain assembly during the procurement to select the PSDP. This includes the preparation of detailed methodologies that will be incorporated into the SPA.

3.9 Can WEPCo access professional team / construction / FM suppliers on our existing frameworks or panels?

WEPCo will separately procure the construction and FM service providers for individual projects, WEPCo may be able to access existing frameworks or panels, but this will need to be assessed on a case by case basis, and is dependent on being permissible under the terms of that existing framework or panel. This will be jointly considered with the relevant Participant on a project specific basis.

3.10 How can WEPCo ensure that our project delivers wider community benefits, e.g. use of local labour?

One of the WEPCo Objectives is to increase opportunities for local employment and training. WEPCo is also obliged, as part of the specification of services it will provide, to ensure it includes local communities in the development of New Projects and associated community improvement initiatives and ensure the enhancement of user satisfaction by developing and designing facilities that present a focal point for the community. WEPCo will be required to meet specified KPIs, including those linked to community benefits. This will be robustly tested throughout the procurement to select the PSDP.

3.11 Can community groups use the school facilities delivered by WEPCo? Will this allow revenue to be generated that we can keep?

Yes. One of the obligations of WEPCo in developing New Projects is to consider out-of-hours community use including having a reception and social areas for community use for use outside of normal hours and associated security. WEPCo is also obliged to ensure that it includes local

communities in the development of New Projects and associated community improvement initiatives and ensure the enhancement of user satisfaction by developing and designing facilities that present a focal point for the community. It is permitted for schools to retain revenue from community use out of hours.

3.12 How will WEPCo ensure new facilities are sustainable, energy efficient and net carbon zero/carbon neutral?

Ensuring WEPCo delivers facilities that are environmentally friendly is built into how WEPCo will develop and deliver New Projects under the SPA. This is a WEP Objective. WEPCo will also be obliged in obtaining stage 2 approval of all New Projects, to agree with Participants and adopt appropriate standards for development, which includes BREEAM. It will therefore be important that Participants discuss and agree with WEPCo the environmental standards they wish to achieve in developing the new facilities, such as ensuring the facilities are developed using sustainable materials and developed to be run as energy efficient and net carbon zero/carbon neutral on completion.

3.13 How will WEPCo ensure new facilities are secured by design to minimise vandalism and malicious damage?

WEPCo is obliged to consider security in developing plans for New Projects. The standards for development of the New Project are agreed between the Participants and WEPCo and so Participants will be able to request particular specifications that it would like the development to meet. The terms of the Project Agreement will govern construction and maintenance standards.

3.14 How will we negotiate the terms of the Project Agreement, including agreeing changes to the terms?

A template of the Project Agreement is included in Schedule 7 (*MIM Projects*) to the SPA, along with other template documentation, including a template D&B Development Agreement.

The Project Agreement includes a number of MIM education sector specifics including:

- Optional drafting suitable for use for Schools or College projects
- Optional drafting suitable for batched Schools projects
- Optional drafting suitable for “Post Completion Works”
- “ICT Handover” principles adopted
- Notification of Examination Periods
- Unavailability of Existing Facilities/Disruption Events
- No handover during term time
- Late completion remedies
- Malicious Damage
- Local Authority College specific drafting.

There is a standardised approach to allow the project specific tailoring of the template Project Agreement. Part of Bevan Brittan’s role will be to develop and tailor appropriately with you the template Project Agreement for submission to Welsh Government for approval.

Please see **separate guidance from Welsh Government and separate guidance on the Project Agreement.**

Bevan Brittan LLP

11 May 2020