

	<p align="center">London Borough of Hammersmith & Fulham</p> <p align="center">CABINET</p> <p align="center">6 JULY 2015</p>
<p>TERMINATION OF THE S113 AGREEMENT WITH THE LINK</p>	
<p>Report of the Cabinet Member for Finance : Councillor Max Schmid</p>	
<p>Open Report.</p> <p>A separate report on the exempt Cabinet agenda provides exempt information in connection with the financial and resources implications.</p>	
<p>Classification - For Decision</p> <p>Key Decision: Yes</p>	
<p>Wards Affected: All</p>	
<p>Accountable Executive Director: Nigel Pallace, Chief Executive</p>	
<p>Report Author: Maureen McDonald-Khan, Director of Building and Property Management</p>	<p>Contact Details: Tel: 020 8753 4701 E-mail: Maureen.McDonald-Khan@lbhf.gov.uk</p>

1. EXECUTIVE SUMMARY

- 1.1. This report is seeking approval to terminate the Section 113 agreement entered into on the 5th December 2013 with Westminster City Council and the Royal Borough of Kensington and Chelsea for "Tri-Borough Joint Working Agreement Total Facilities Management Services" ("the Link Agreement").
- 1.2. The agreement was entered into to realise economies and efficiencies in co-ordinating and managing the Total Facilities Management Contract through the combination, sharing and closer integration of a Shared Service facilities management services team, performing the Intelligent Client Function ("ICF"), including the creation of a single shared management team and support functions. The Councils entered into the

agreement in order to set out the overall relationship between the Councils. Each Council has given a Sovereignty Guarantee to ensure that the independence of the Councils as political and legal entities is protected.

- 1.3. References in this report to “the Link” shall mean the Shared Service described in paragraph 1.2 which was set up under the Link Agreement.

2. RECOMMENDATION

- 2.1. To serve Notice Terminating the Link Agreement entered into by Hammersmith and Fulham Council on the 5th December 2013 with Westminster City Council and the Royal Borough of Kensington and Chelsea.

3. REASONS FOR DECISION

- 3.1. The unsatisfactory performance of the Link in managing and properly representing the interests of Hammersmith and Fulham Council in relation to the management of the Total Facilities Management Contract between the three Councils mentioned in this report and Amey Community Limited contract (“the Project Agreement”).

4. INTRODUCTION AND BACKGROUND

- 4.1. At the Cabinet meeting held on the 13th May 2012 Cabinet resolved to outsource the provision of ‘Total Facilities Management’ (TFM) and to award a Tri-Borough contract to Amey Community Limited (“Amey”).
- 4.2. For the purposes of the Public Contracts Regulations 2006 (as amended) London Borough of Hammersmith & Fulham (H&F) was the contracting authority and the Royal Borough of Kensington and Chelsea (RBKC) and Westminster City Council (WCC) were named in the Official Journal of the European Union (OJEU) as “Participating Authorities”.
- 4.3. The Cabinet awarded the Tri-Borough contract for the provision of TFM (“the Project Agreement”) to Amey Community Limited with the services commencing on 1 October 2013 for a period of 10 years (with an optional 3 year extension).
- 4.4. The Cabinet also awarded a London-wide Framework Agreement for the provision of facilities management services to Amey Community Limited for a period of four years.
- 4.5. The Cabinet approved the structure of the Link (see Appendix A) and agreed that RBKC would be the host employer for the Link. Consequently on 5 December 2013 the three Councils entered into the Section 113 agreement (Link Agreement).

4.6 The purpose of the Link is to provide a means of directing and managing the performance of Amey and managing the Performance Management System. A single team delivers this on behalf of the three Councils. The Link is also responsible for stakeholder engagement, complaints resolution and managing the communications between Councils and Amey.

5. PROPOSAL AND ISSUES

5.1. The Council has a right to terminate the Link Agreement under clause 24.1 with the proviso that the Councils do not exercise until two years from the Commencement Date (1st June 2013). The notice of termination can be served in accordance with the Agreement at any time after the 1st June 2015.

5.2. The notice of termination will come into effect 12 months after the notice is served. The notice must be:

- In writing;
- Sent registered post or delivered by hand;
- Sent or delivered to the *Representative* of the other two Councils at the address specified in the Link Agreement at 27.4.

5.3 The Project Agreement date is the 10th June 2013 and continues until the tenth anniversary of the Service Transfer Date which is the 1st October 2013 “or such other period as is notified by the Councils in writing.”

5.4 The Project Agreement is designed to be managed by a Client facility (the Link was the structure chosen) provided by Royal Borough of Kensington and Chelsea. If Hammersmith and Fulham unilaterally terminates the Link Agreement then it will still be bound jointly with the other two Councils and will have to re-negotiate the ICF and Link or successor structure.

5.5 The Link Agreement provides that the Council that withdraws from the Link Agreement and / or the Project Agreement will be responsible for paying the breakage and other costs of the Project Agreement. Therefore it is necessary to ensure that the termination period required in the Link Agreement is managed in such a way that the Project Agreement survives termination of the Link Agreement. The withdrawing Council will be liable for any direct or indirect costs, or indirect Losses of the remaining Councils. It is possible that the remaining Councils could claim that the termination of the Link Agreement requires reimbursement of associated costs of the of the Link Agreement.

5.6 The Link Agreement, however, requires the parties to cooperate in the event of partial termination to agree necessary variations to the Link Agreement.

5.7 The costs, direct and indirect are not yet quantifiable but these categories should be seen as a budget risk. It will be necessary to ensure that the

Council uses the 12 month notice period to ensure that the parties to the Link Agreement successfully transition to a new arrangement that protects the Council's interest in the Project Agreement.

- 5.8 It follows that a variation of the Project Agreement will be required upon termination of the section Link Agreement and it will be necessary to consider the costs which may be associated with such variation. Clause 60 of the Project Agreement provides that the Project Agreement shall not be amended except in writing and is therefore subject to written agreement by all parties. Therefore the Council will have to negotiate with Westminster City Council and the Royal Borough of Kensington and Chelsea.

6. OPTIONS AND ANALYSIS OF OPTIONS

- 6.1 In late 2014 a review of the performance of the Link was commissioned. The primary focus of this review was the interfaces between Amey and the Link; and between the Link and the Councils in order to improve current methods of working, achieve common goals and drive value for money for the funding Councils.

- 6.2 The recommendations of this review are still outstanding.

- 6.3 The unsatisfactory performance of the Link in managing the Amey contract has led to unacceptable time delays in progressing service requests, works etc. from Hammersmith and Fulham which cannot be tolerated any longer.

- 6.4 The Council therefore has the following options:

- 6.4.1 To maintain the Link in its present state, consider the review referred to in 6.1 above;
- 6.4.2 To terminate the Link Agreement and negotiate the successor organisation between the other two Councils and Amey;
- 6.4.3 To negotiate a successor arrangement and then terminate the Link Agreement by agreement between the Councils, party to the Link Agreement.

- 6.5 It is, considered that 6.4.2 above is progressed. The implications for Hammersmith and Fulham would be the establishment of a Client function to manage the Amey contract. The proposed areas which would be managed by the Client Function are: Hard and Soft service management, performance and contract management of Amey. Option 6.4.1 is not an option; the performance of the Link has not resulted in the management and appropriate representation of the interest of Hammersmith and Fulham in relation to the management of the Total Facilities Management Contract between the three Councils mentioned in this report and Amey Community Limited contract ("the Project Agreement"). Option 6.4.3 if the negotiations became protracted or no agreement could be reached with the Link this would result in a further delay as the notice would not be served until the conclusion of the unsuccessful negotiations.

7 CONSULTATION

- 7.2 Consultation will be undertaken with representatives of the Link, Westminster City Council and the Royal Borough of Kensington and Chelsea in due course in order to achieve an efficient and effective transfer of responsibilities from the Link to Hammersmith and Fulham.

8 EQUALITY IMPLICATIONS

- 8.1 An Equality Impact Assessment will be undertaken in due course if required.

9 LEGAL IMPLICATIONS

- 9.2 This report identifies the ability of the London Borough of Hammersmith and Fulham to terminate the Link Agreement and the financial and operational risks associated with such termination. The Link Agreement contains various options for the parties to terminate the Link Agreement including for breach of the Link agreement by another of the Councils, by agreement between the parties and by twelve months' written notice by one Council to the remaining two Councils.
- 9.3 It has been identified that termination (by agreement or notice) can take place after the period of two years from the Commencement Date of the Link Agreement (1 June 2013) which is 1 June 2015. As such the Council is now entitled to serve notice of termination on the other two authorities in the Link Agreement at any time.
- 9.4 The report also notes that the termination of the Link Agreement will be within the context of the continuing obligations of all the parties under the Project Agreement for the outsourced Total Facilities Management Service.
- 9.5 Noting that Councils are to be held jointly and severally liable under the Project Agreement it is necessary to ensure that termination of the Link Agreement does not prejudice the Project Agreement. It is likely that the remaining Councils will seek to recover from Hammersmith and Fulham some element of the costs of the termination of the Link Agreement. It is also possible that the Councils may at some point seek to enforce indemnities against Hammersmith and Fulham in the event of termination of the Link. This must be considered as a commercial risk.
- 9.6 The Link takes the place of the ICF. Termination of the Link Agreement will therefore require that a replacement service is agreed between Hammersmith and Fulham and Amey and that any residual obligation to the other two Councils is met. It would be to Hammersmith and Fulham's benefit to deal with any ongoing obligations under the Link Agreement and to ensure that the alternative arrangements between the Councils are fully

negotiated during any termination period and the risks in clause 9.5 are mitigated via commercial negotiations, which has been stated in 7.2 of this report .

9.7 Cost implications need to be considered including:

9.7.1 The costs of re-instituting a successor structure to the ICF;

9.7.2 Costs claimed by RBKC and WCC which may relate to the termination of employment include TUPE, and other practical costs such as a reduction in the efficiency of the Link once Hammersmith and Fulham has left as well as a contingency for claimed indemnities;

9.7.3 Costs claimed by Amey for amending the service delivery associated with the structure referred to in 9.7.1.

9.8 Failure to negotiate successfully with the other two Councils and Amey may leave the Council exposed to risk of indemnities in the Link Agreement that purport to survive termination of the Link Agreement and also the liability provisions of the Project Agreement in the event of withdrawal. Unilateral termination of the Link Agreement, however, does not preclude a successful negotiation of the Link Agreement and the Project Agreement while the notice period under the Link Agreement is in effect.

9.9 Implications verified/completed by: (Jonathan Miller, Legal Officer, 07779 333041)

10 FINANCIAL AND RESOURCES IMPLICATIONS

10.1 As set out in the exempt report on the exempt Cabinet agenda

11. IMPLICATIONS FOR BUSINESS

11.1 There are no implications for businesses in the Borough.

12. RISK MANAGEMENT

12.1 The Link performance monitor a number of statutory duties delivered by the contractor. The future management of these will need to be considered to ensure that the duties are being performed according to the law. Failure of major partnerships and major contracts is a strategic risk, number 10 on the Shared Services Risk Register. Ensuring continuity of service during transition from the Link will be important, service continuity is also a strategic risk, risk number 6 on the Register. These and other operational risks will be the ongoing responsibility of the Transport and

Technical Services Department which operates within a risk management framework.

21.1 Implications verified/completed by: Michael Sloniowski 020 8753 2587

13. PROCUREMENT AND IT STRATEGY IMPLICATIONS

13.1 There are no procurement issues at this stage.

13.2 Implications verified/completed by: (Alan Parry, Procurement Consultant telephone 020 8753 2581).

LOCAL GOVERNMENT ACT 2000
LIST OF BACKGROUND PAPERS USED IN PREPARING THIS REPORT

No.	Description of Background Papers	Name/Ext of holder of file/copy	Department/ Location
1.	None		