

Cabinet Member for Adult Social Care and Health

Procurement of Contracts for A Place to Live and Supported Living Services for Adults with Learning Disabilities

October 2015

Report by Executive Director Care, Wellbeing and Education and Head of Health & Social Care Commissioning

Ref No: ASCH08(15/16)
Key Decision: Yes
Part I
Electoral Divisions: N/A

Executive Summary

This report seeks approval to commence a procurement process for the A Place To Live Services (APTL) and the Supported Living Services (SLS). These services provide assistance and support to adults with learning disabilities who are resident in supported living accommodation in West Sussex. The SLS also provides outreach services for people living in their own home, helping adults with learning disabilities to live in their own homes in the community.

The contracts for SLS and APTL have been delivered via the Learning Disability Supported Living Framework Agreement since 2012 and have been extended, following Cabinet Member approval, until 31 March 2016 (decision ASCH14 (14/15) refers).

Recommendations

That the Cabinet Member approves:

- (1) The undertaking of a competitive procurement process for the re-procurement of contracts for APTL and SLS as set out in paragraph 3, up to a value of approx. £4,250,000 per annum (including TUPE related payments).
- (2) The award of the contracts for a period of 3 years commencing on 1 April 2016 with an option to extend for a further 3 years, subject to the outcome of a market analysis as set out in paragraph 3.2, up to a maximum of 6 years, until 31 March 2022.
- (3) The delegation of authority to the Executive Director Care, Wellbeing and Education to award the contracts and to extend the contracts, if appropriate, in accordance with the County Council's Standing Orders on Procurement and Contracts, subject to this being affordable within the limits of planned budgets.

1. Background and Context

- 1.1 In March 2015 Cabinet Member decision ASCH14(14/15) - Extension to existing contracts for A Place to Live and Supported Living Service for Adults with Learning Disabilities, extended the contracts for APTL and SLS until 31 March 2016.

A Place to Live Services (APTL)

- 1.2 These are supported living accommodation based services that were set up in 2010 following a project to close NHS "campus" provision for adults with learning disabilities, inline with government policy.
- 1.3 Contracts to deliver the support to those customers living in APTL services were let via a competitive procurement process. Southdown Housing Association, Royal Mencap Society and Grace Eyre Foundation were awarded the business.
- 1.4 Former employees of Sussex Partnership NHS Foundation Trust were transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**), with protected terms and conditions, including continuing access to the NHS Pension Scheme (**NHSPS**), to the organisations who were awarded the contracts.
- 1.5 Since 2013, APTL services have been delivered under the terms of the Supported Living Framework (SLF). Savings were made by reducing the hourly rate by around £1.
- 1.6 In the financial year 2014/15, the total cost of the APTL services (including TUPE payments) was approx. £3.5 million.

Supported Living Services (SLS)

- 1.7 These are outreach and accommodation based supported living services that were previously provided by the County Council in-house until 2012.
- 1.8 Since 2012 these services have been operated by Grace Eyre Foundation following a competitive procurement process.
- 1.9 Former employees of the County Council were TUPE transferred to Grace Eyre Foundation with protected terms and conditions, including continuing access to the Local Government Pension Scheme (**LGPS**).
- 1.10 In the financial year 2014/15, the cost of the SLS services (including TUPE payments) was approx. £720,000.

2. Consultation

- 2.1 There has been substantial and detailed consultation with the County Council's legal, finance, procurement and HR advisers in relation to the options available to the County Council in re-procuring these services.

- 2.2 To inform the procurement process, a market consultation exercise was undertaken with provider organisations in June 2015.
- 2.3 A market consultation paper was published on the County Council's eSourcing portal and organisations were asked to comment on the following areas:
- The size and type of their organisation. Whether they are a current provider for the Framework Agreement for Supported Living and Family Support Services for Adults with learning disabilities and Disabled children and young People in West Sussex (SLFSSF)
 - If they are interested in submitting a bid to deliver the APTL/SLS Services
 - If their organisation would be capable of delivering all the services as a single provider or would they propose to bid as part of a consortium. If as a consortium, they were also asked if they already deliver any services in similar arrangements and what these arrangements looked like.
 - Whether they would be interested in submitting a bid for the whole service, geographical "lots" or individual services, and their reasoning and also whether they had any alternative suggestions for how the services could be delivered
 - The most suitable contract duration
 - Experience of dealing with TUPE transfers involving public sector or ex-public sector staff (NHS and Local Government)
 - Whether providing continued access to the Local Government Pension Scheme and/or the NHS Pension Scheme or a broadly comparable pension scheme would present any difficulties for their organisation
 - Which payment option in respect of additional TUPE costs, would best suit their organisation
- 2.4 Forty two organisations expressed an interest in the project via the e-Sourcing portal, of which thirteen responses were received by the deadline return date of Friday 3rd July 2015, demonstrating a 31% return rate. A summary of responses to the consultation paper is included at Appendix 2.
- 2.5 All thirteen organisations confirmed that they would be interested in submitting a bid to deliver the APTL/SLS services, of which twelve indicated that this would be as a single provider and only one organisation expressed that they would be interested in submitting a bid as part of a consortium. Ten of the organisations confirmed that they are current providers on the Framework Agreement for SLFSSF.
- 2.6 Responses from organisations did not give any clear indication as to the preferred model of service delivery, with five organisations stating that they would prefer to bid for geographical lots, five organisations preferring individual services and three organisations preferring to bid for a whole service model.
- 2.7 Over 50% of organisations stated that they thought an initial contract term of at least three years would be required in order to enable costs to

be spread over an extended period, provide stability and minimise initial set up costs.

- 2.8 Nine organisations indicated that they had relevant TUPE transfer experience and seven organisations advised that the provision of continued access to LGPS and/or NHS pension schemes would not present a problem for them.
- 2.9 Eight organisations, representing 62% of the response rate, stated that they would prefer the County Council to pay at up to the maximum ceiling hourly rate (currently set at £14.96 as per the terms of the SLFSSF) for the support costs and to receive a separate payment for the additional costs arising from the protected terms and conditions related to the TUPE transferred staff.
- 2.10 The Cabinet Member for Finance has been consulted and approves the recommendations of this report.

3. Proposal

- 3.1 To undertake a competitive procurement exercise, and in response to comments made in the market consultation, to award new contracts for APTL and SLS from 1 April 2016, for a period of 3 years with an option to extend for a up to a further 3 years, up to a maximum 6 years.
- 3.2 In making a decision to extend the Framework after the initial three year period, the Council will undertake an analysis of the market (including benchmarking services) to check for development of the market and/or further savings opportunities to ensure that any agreed contract extensions, terms and conditions and prices continue to represent the best value contract option.
- 3.3 In recognition of the difference in complexity of need of the customers of APTL and SLS, it is proposed that separate contracts will be awarded for each service area.

Model of services and award of Contracts for the APTL Lot

- 3.4 The APTL services are currently being provided in 41 tenancies across the county in 3 separate geographical lots, as detailed below:

Lot	Town where Supported Living Scheme is based	Number of Tenancies	Indicative support hours per scheme*
Southern	Worthing	4	226
	Worthing	8	728
Northern	Haywards Heath	3	384**
	Haywards Heath	5	579**
Western	Chichester	6	599
	Midhurst	4	585
	Bognor Regis	6	603
	Chichester	5	323

**Indicative support hours are subject to change as relate to individual tenant need*

***Plus sleep in*

3.5 It is proposed that the current geographical lots are maintained for this tender.

3.6 The continuance of this structure will:

- Allow some flexibility of staffing between the services in each area
- Reduce the risk that bids will not be received for services located in more remote areas of the county
- Acknowledge that the market consultation exercise did not indicate a preference for any one service delivery model

3.7 The customers who are supported in these services are some of the most vulnerable people that the County Council is responsible for. The procurement will be structured to maximise resilience in the market.

Model of services and award of Contracts for the SLS Lot

3.8 The SLS services were originally tendered as 4 lots all of which are currently being provided by one organisation as detailed below:

Area/Service	Customers living in the community receiving an Outreach Service	Customers living in a Supported Living Scheme	Indicative support hours
Coastal	20	0	110
Western	19	0	227
Northern*	10	4	315 (Scheme: 139, Non-scheme: 176)

** Originally 2 lots, split into scheme and non-scheme*

*** Indicative support hours are subject to change*

3.9 It is proposed that the SLS will be split into three geographical lots for this tender. This is in response to the outcome of the market consultation which indicated that organisations did not express a preference for any one service model and will enable organisations who can demonstrate a local presence to submit a bid. Organisations bidding for more than one lot will be asked to demonstrate economies of scale.

TUPE and Best Value Authorities Staff Transfers (Pensions) Direction 2007 (Pension Direction) Obligations

3.10 The SLS and APTL contracts currently have additional TUPE costs built into the charges payable, which relate to the previous TUPE transfer of staff to the current provider organisations from the County Council (for SLS) and from the NHS (for APTL). The additional costs are therefore due to the

obligation to protect public sector employment terms and conditions and pension benefits (LGPS and NHSPS) of the previously transferred staff.

- 3.11 If TUPE applies to the new procurement, the TUPE obligations held by the current providers will continue and be passed to any new provider employer(s), who must honour the transferring employees' public sector employment terms and conditions.
- 3.12 The County Council can and will under the procurement process seek to reduce the current cost of services. However, due to the legal requirements of TUPE, any new provider employer cannot simply change TUPE staff terms and conditions so as to remove the existing public sector employment benefits in order to achieve such cost reductions, without exposing itself to challenge by affected staff.
- 3.13 Further, the County Council is obliged under the Pension Direction to ensure that the new provider employers continue to maintain membership of the LGPS or equivalent (or better) for all transferring ex-County Council (SLS) staff. Although the Pension Direction does not apply, to require the similar protection of NHS pensions for transferring ex-NHS (APTL) staff, following non-statutory Fair Deal 2013 guidance, the recommended approach for this procurement (for reasons of equality of treatment, maintenance of partnership working and in line with other recent County Council procurements) is for the County Council to require that the new provider employer provides all transferring ex-NHS (APTL) staff with continued access to the NHSPS.
- 3.14 The outcome of the above is that if TUPE applies, any new provider will still be required to meet their TUPE obligations in respect of the protected employment benefits and ensure that the relevant employees are given access to an appropriate pension scheme, meaning that the costs associated with TUPE requirements may still be included within the new contract unless the new provider makes legally compliant savings to the cost of delivering the service.

Payment Options

- 3.15 Currently there are two arrangements in place for paying the additional costs arising from TUPE requirements:
 - (a) Support hours are paid up to the SLFSSF maximum ceiling hourly rate (currently £14.96) and organisations raise a separate invoice which represents the additional costs of TUPE transferred terms and conditions of employment in respect of each service provided. This provides the County Council with clarity and transparency over the additional TUPE costs and allows these to be reviewed as each ex-NHS and ex-County Council staff member leaves the organisation.
 - (b) An inclusive hourly rate is paid, which is agreed each year depending on any changes to the number of TUPE transferred staff and any changes to the NHSPS or LGPS.
- 3.16 The market consultation did not provide a clear direction from providers about their preference for either of the above options. Option (a) results

in more transparency in relation to costs and is therefore preferred by the County Council. The County Council therefore wishes to explore options for payment over the period of the contract through dialogue during the procurement process.

- 3.17 The Council will ensure that the maximum ceiling hourly rate is set at a level which enables employers to meet their obligations to pay staff at the National Living Wage rate to be introduced in April 2016.

Procurement Model

- 3.18 The APTL and SLS services are deemed to be "social and other specific services" under the Public Contracts Regulations 2015. The value of these services exceeds the relevant EU threshold of €750,000 (£625,050). As such, the regime set out in chapter 3 section 7 of the Public Contracts Regulations 2015 (known as the "light touch regime") will apply for the purpose of procuring the services. Undertaking a competitive procurement process for these services is also in line with County Council's Standing Orders on Procurement and Contracts.
- 3.19 It is proposed that the tender process allows for a dialogue/negotiation approach at the commercial stage to enable officers to discuss the basis of the financial payment with individual providers. This will be available only to those organisations that pass the County Council's minimum technical requirements.
- 3.20 It is proposed that customers and families will be given the opportunity to contribute to the drafting of method statements and also to be represented in evaluation of presentations as part of the procurement process.
- 3.21 UNISON have an interest in this procurement as there are formal recognition agreements in place with the current organisations. It is therefore proposed that UNISON are given the opportunity to contribute to the drafting of method statements.
- 3.22 All organisations tendering for APTL and SLS will need to demonstrate that they meet the standards required for the SLFSSF. Organisations who have already submitted a compliant bid for this will not be required to re-submit in relation to this aspect of the tender.

4. Other Options considered

- 4.1 These services could be provided by enabling each customer to be supported to have maximum control over their personal budget, including choice of provider. However, this option could result in additional costs as there would be no economies of scale as well as unclear accountability in relation to duty of care to the group of tenants within schemes. Particular challenges with provision of night time support would arise and there may be disagreements between support providers. This would be extremely complex to introduce given the issues around TUPE and could result in redundancies at significant cost.

- 4.2 These services could be insourced. However, this option would represent an immediate increase in the number of staff employed by the County Council and would result in increased costs as any new staff would be employed on the County Council's terms and conditions. It also needs to be acknowledged that the County Council currently does not have experience in supporting customers with this complexity of need and that the County Council had previously been unable to maintain staffing continuity for part of the SLS service.
- 4.3 Neither of these options appear to offer any advantages either to the County Council or the customers. It has therefore been concluded that there should be continuation of the current model.
- 4.3.1 Further, it is proposed that both APTL and SLS are let as 3 geographical lots, but with the possibility that a provider could be successful in more than 1 lot. For the reasons set out in Section 3 above, the SLFSSF ceiling rate of £14.96 is not achievable. Additional costs arising from TUPE obligations to existing terms and conditions are likely to arise and the way in which these are paid will be determined following negotiation as set out above.

5. Resource Implications and Value for Money

- 5.1 This procurement is for an alternative provider for services already funded and in place. Whilst the procurement process will ensure Best Value is achieved for the new contracts, and the proposed costing of the services will be a criterion for contract award, it is unlikely that significant savings will be achieved because:
- Given the scale of investment required in this accommodation, it was necessary for the County Council to enter into void agreements with the Housing Providers for APTL, in respect of unoccupied/vacant tenancies. As a result, fundamental change to the model of service would incur significant costs.
- 5.2 A recent exercise using assistive technology to evidence the need for waking night staff has been undertaken and the results will be implemented during the remaining term of the current contract.

6. Impact of the proposal

- 6.1 If the outcome of the procurement process is that the current service provider is changed in any of the lots, and if TUPE is applicable, the direct impact on customers should be minimised as direct care staff currently employed within these services will TUPE transfer to the new provider organisation. It is possible that there may be some changes in management and that some staff will leave the service. If there are changes to management, this would be a change that would affect direct care staff and families who often liaise primarily with the manager. There would also be some impact on customers.

Equality Duty

6.2 An Equality Impact Report has been undertaken and is attached as an Appendix 1.

6.3 The Equality Impact Report outlines the methods of consultation, engagement and research which have enabled consideration on the impact of the proposals.

Crime and Disorder Act Implications

6.4 None

Human Rights

6.5 As the service involves the provision of and support to people in their homes there is an impact on the Article 8 duty to have regard to the right to respect for private family life and home. This obligation will be fully considered as part of the risk assessment within the evaluation of bids so as to ensure that the impact of any change on individuals is fully considered. Service providers will be required to ensure that the service is delivered with due regard to this continuing duty.

Social Value

6.6 The commissioning and continued development of supported living and personal support services for these customer groups will make reference to County Council policy on social value and will take full account of the social, environmental and economic impacts of any decisions upon the local communities concerned.

6.7 The service has an inherent social value in that support is commissioned to enable customers to maintain independence within their communities.

6.8 The primary environmental impact of the contracts is the carbon footprint created by the travel requirements of staff providing the service. To mitigate this and to ensure a positive impact on the environmental well-being of the area, the service specification will require service providers to ensure that sustainability, and the corporate priorities set within the Sustainability Strategy are embedded into service delivery and continuous service improvement. The County Council will engage with providers in relation to their carbon monitoring and reporting.

6.9 All of the service provision is delivered from within the county and as such supports local employment. Through the procurement, providers' approaches to recruitment, retention and workforce development will be evaluated to ensure an approach to employment which supports recruitment and incentivises retention.

7. Risk Management Implications

7.1 Extensive legal, financial, procurement and HR advice has been taken in relation to the re-procurement of these services. This advice has shaped the procurement model and financial structure of the services to ensure that there is limited reputational risk to the County Council.

- 7.2 There is a small risk that the procurement will not attract any compliant tenders from provider organisations. However the market consultation indicated that providers who are interested in this opportunity have sufficient capability and experience in dealing with TUPE transfers involving public sector staff and would be able to offer continued access to pension schemes.
- 7.3 In the event that the current incumbent providers are not awarded their existing business, it is anticipated that staff will be entitled to TUPE transfer to the new organisations. Sufficient time has been allowed in the procurement timetable to facilitate a smooth mobilisation period from contract award to contract start date. However, if accurate TUPE information is not obtained prior to the commencement of the procurement process this could lead to delays in awarding the new contract or affect the bid prices submitted by bidders for the new contract. To mitigate this risk, due diligence to gather employee information from current providers shall be undertaken at the earliest opportunity and in any event prior to issue of the invitation to tender and the procurement timescales will be regularly reviewed in relation to this aspect.
- 7.4 The County Council will under the procurement process achieve Best Value for the new contracts, including seeking to achieve savings on current cost of services where possible. In implementing any plan to achieve cost savings the new provider will be responsible for ensuring that all activity is legally compliant and in line with all Employment Law requirements (including TUPE). The County Council's HR and legal advisors will assist in the procurement exercise relating to TUPE as relevant and appropriate indemnities will be sought from providers under the new contract.
- 7.5 It is possible that there will be unforeseen costs e.g. redundancy, where there are changes in the model of service which may result in a change of staffing structure. All such changes will be discussed at the commercial stage of the tender process and made in agreement with the County Council.
- 7.6 If – as seems most likely - TUPE applies to the new procurement, there is likely to be continuity of staff to provide existing service provision for most customers and in this case, there would be minimal disruption to customers and their families. In the event that TUPE does not apply to the new procurement, there would be substantial change to the staff delivering the service and therefore recruitment activity would be necessary. In this instance, the new organisation would be required to demonstrate how they would provide the service without disruption or risk to customers prior to award.

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Appendix

Appendix 1 – Equality Impact Report

Appendix 2 – Market Consultation Summary Report

Background Papers

None