

BARNSELY METROPOLITAN BOROUGH COUNCIL

REPORT OF: Executive Director of Place Health and Adult Social Care

TITLE: Re-Commissioning of the Adult Community Support and Enablement Service (ACSES) Framework

REPORT TO:	CABINET
Date of Meeting	5 October 2022
Cabinet Member Portfolio	Place Health and Adult Social Care
Key Decision	Yes
Public or Private	Part Exempt Appendix 1 - Local Government Act 1972, Schedule 12A Part 1 Paragraph 3

Purpose of report

To seek approval to re-commission the Adult Community Support and Enablement Service (ACSES) framework contract and resolve the ongoing payment of the costs associated with TUPE (Transfer of Undertakings Protection of Employment) commitment following the out-sourcing of the councils in house provision in 2017.

The key decision required by Cabinet relates to the original 2017 TUPE transfer on costs.

The report sets out the details and commissioning options in light of work to clarify the TUPE details.

The report also sets out the financial savings that have been delivered over the course of the current approach.

Council Plan priority

Healthy Barnsley

Recommendations

That Cabinet:-

1. Approves plans to re-commission the ACSES Framework following consideration of the financial implications highlighted in section 3.1.

2. Approves the direct award of existing care packages to the incumbent providers if their tender is successful; therefore, these packages are not subject to competition. As advised by Legal Services, this is achievable based on the council's obligations under the Care Act to promote wellbeing when carrying out any care or support functions in respect of a person.
3. Notes the complexities of the original TUPE transfer and associated on-costs, the options and risks considered in section 2.6.
4. Approves option 2 to continue to pay an enhanced rate associated with services outsourced to the independent sector based on the vulnerability in the care market, including the financial pressures on this sector and risks associated with capacity and demand.

1. INTRODUCTION

- 1.1 In January 2016, cabinet members agreed to a new model of supported living proposed by commissioners. This model would out-source the council's in-house services, improve the support pathway for people in high-cost placements, and deliver improved outcomes for those we support.
- 1.2 The outcome of the ACSES procurement resulted in a two-tier framework for standard and complex support, with seven providers awarded a place in the framework.
- 1.3 On 1 July 2017, 66 staff transferred from Barnsley Council Supported Living services to two providers awarded a place on the framework under TUPE regulations. The TUPE transfer resulted in a commitment being given of an enhanced hourly rate of £20.76 compared with the average framework rate of £14.20. Usually, a relevant transfer would mean that the transferor would be liable for all employee-associated costs following that relevant transfer. However, the council gave a commitment to the providers due to market factors to pay the TUPE on-costs for three years. During that time, these costs were expected to be reduced through either internal restructuring of the services or natural staff turnover.
- 1.4 The overall aims of the ACSES services are to reduce the reliance on residential care and to provide progression-based support to help people to live independently with supported housing options and/or enablement support in people's homes. This includes accommodation which is privately owned/rented or rented from a Registered Social Landlord (RSL).
- 1.5 The ACSES service is for adults in Barnsley aged 18 years or over (although some preparation can commence to support young people transitioning into adult supported living). People will be assessed as having needs aligned to one or more of the following diagnoses/long-term conditions: -
 - Learning disability, including complex, cognitive and physical needs.
 - Acquired brain injury.
 - Physical disability or sensory impairment.
 - Autistic Spectrum Disorder.

- Enduring mental health difficulties.
 - Young person in transition with one or more of the above.
 - People with co-existing needs, for example, difficulty engaging with services, chaotic lifestyle, drug and/or alcohol misuse, forensic history.
- 1.6 The original framework had an end date of March 2020 but included a two-year extension clause utilised by commissioners due to the pandemic. This was further extended in compliance with the Public Contracts Regulations 2015 to February 2023 to allow reasonable time for a re-procurement to take place.
- 1.7 There are currently 203 people receiving support under the ACSES framework. The current commissioned hours include 4293 hours a week for 90 people supported in supported housing and 6031 hours a week for 113 service users supported in their tenancy.

TUPE

- 1.8 The council agreed to fund costs associated with the transfer of council staff to the independent sector for a period of three years. It was expected that costs would reduce during this period due to natural staff turnover or as a result of the two providers carrying out a re-organisation because of internal growth. However, at a review held with both providers in 2020, it was acknowledged that this had not been delivered. Both providers reported minimal staff turnover due to the terms and conditions of their employment, which continue to be significantly better than those recruited in the independent sector. Neither organisation had taken on enough additional business to allow for the movement of staff and subsequent re-organisation. Both providers confirmed that should TUPE funding be withdrawn, they would serve notice on the contract and hand this back to the council. The council agreed to continue funding for a further two years.
- 1.9 In preparing for a re-procurement, commissioners were required to again review the position under TUPE, including seeking clarity around the current on going costs associated with this agreement. Although savings on the TUPE on-costs have been achieved over previous years, it has become clear that changes to payments made to both providers as part of the core contract should have had a greater direct impact on the overall costs. When exploring the detail, the authority's legal and human resources team have raised the fact that several costs that have been increased over the five years (including staff salaries and overtime) do not fall under the authority's liability as per the original staff transfer agreement. Commissioners have now concluded negotiations with both providers, including removing costs for which the council is not liable under the TUPE transfer agreement

2. PROPOSAL

Procurement

- 2.1 The outcomes for people who use our services are being achieved. 203 are being supported to become more independent, lead full and active lives within their community and exercise as much choice as possible over how they live their lives in keeping with their religious, cultural or family background.

The service model provides independent housing-based enablement support with the people having their own tenancy. The commissioned hours cover a wide range of support needs for everyday tasks, personal care, managing budgets, maintaining health and wellbeing, and being supported in the community regarding appointments and activities. The service providers on the framework can support a wide range of needs, reducing the requirement for residential care. Therefore it is proposed that the ACSES framework be re-commissioned to enable this well-established service to continue for five years.

- 2.2 There are currently two tiers in the ACSES framework based on the level of support required. It is proposed that a third tier is introduced for highly complex support under this framework. This was previously provided through the Yorkshire and Humber Transforming Care framework in relation to those with a learning disability and/or autism with behaviours that challenge, a forensic history, living with other mental health conditions. The new tier aims to prevent unnecessary hospital admission under the Mental Health Act or to support a step down for those currently detained in locked hospitals or secure unit placements.
- 2.3 It is evident from the number of referrals, current spot contracts and out-of-area placements that there is insufficient provision for mental health support in the existing framework. It is proposed that a market testing exercise is undertaken to determine if there are providers in the market that can and are interested in delivering this additional tier of support in Barnsley. If not, what level of market shaping is required with a view that if they are not already on the framework, they will tender once their service is developed.

TUPE

- 2.4 The current TUPE on-costs have continued to be paid separately to both service providers. A 'TUPE rate' was agreed upon, which covers the additional on-costs associated with the transferred staff. Over the years, this rate has decreased, so the cost to the council has reduced.
- 2.5 In considering the re-procurement, commissioners have considered the risks associated with the current packages delivered by the two providers currently funded at an enhanced rate to cover costs associated with TUPE. The total number of packages delivered by the two providers is 45. 58% of these care packages are funded at an enhanced rate.
- 2.6 The table below highlights the three options considered by the commissioner.

Table 2.6a Options and risks with alternative payment of TUPE costs

Option 1	Benefits	Risks
<p>Under the new contract, the council no longer pays the ongoing TUPE costs because these costs have been reduced significantly. Therefore it is reasonable that this liability is now passed on to the two current providers.</p>	<p>The council no longer carries the financial liability.</p> <p>Both providers could restructure their services, enabling staff flexibility across the range of services they currently provide.</p> <p>The service providers are no longer restricted by the conditions set out in the staff transfer agreement, for example, the same staffing role and hours.</p>	<p>Current service providers do not tender due to having to pay the TUPE on-costs. Risk - High</p> <p>Current providers are unable to restructure the service given the number of staff. Risk – High</p> <p>Current providers are not successful in securing a place on the framework, and other providers do not tender due to financial risk. Risk - High</p>
Option 2 (Recommended)	Benefits	Risks
<p>The Council continues to pay TUPE costs for the term of the new framework (Five-years).</p>	<p>The current financial liability for the TUPE costs remains with the council. This is at a significantly reduced rate following negotiations with providers.</p> <p>The financial pressure on the two providers reduces, and they will likely tender for the ACSES framework and be successful. So, no negative change for service users.</p> <p>Staff who transferred under the original agreement continue to benefit from enhanced terms and conditions.</p> <p>Commissioners can increase the monitoring to ensure costs claimed are in line with the agreement.</p>	<p>Current providers do not tender for the new framework. Risk - Low</p> <p>There is no incentive for current providers to find efficiencies whilst the council are paying the TUPE costs. Risk - Medium</p> <p>Further, TUPE savings are not achieved during the term of the new framework. Risk – Medium</p>
Option 3	Benefits	Risks
<p>Staff transferred under TUPE, and the support packages provided by the two providers are brought back in-house.</p>	<p>The council re-develops an in-house service to support people who need additional support.</p>	<p>Disruption to staff and people who use our services. Risk - High</p> <p>Increased costs associated with the in-house provision of services. Risk - High</p> <p>New service development is required, including management structure to deliver service in-house. Risk - High</p>

3. IMPLICATIONS OF THE DECISION

3.1 Financial and Risk

3.1.1 The Council's S151 officer or representative has been consulted as part of drafting this report.

Procurement contract

3.1.2 The 2022/23 budgeted net spend on the Supported Living provision contract (net of health funding and service users charges) is £9.376M. The actual spend in 2021/22 is £9.521M. The budgeted cost to deliver the ACSES Framework includes agreed inflationary uplift for the year and the supplementary payment of £1 above the national living wage.

3.1.3 There has been a steady year-on-year increase in actual spend up to 2021/22, partly explained by increases in commissioned hours and a number of people supported under the ACSES contract framework. This reflects the development of strength-based assessments and the increased focus on supporting more people in the community. The above costs form part of the care provision budget and are included in the approved 22/23 net budget of £60.345M for adult social care.

TUPE

3.1.4 The TUPE costs associated with the above ACSES contract are budgeted and accounted for separately. The commissioning approach has resulted in a year-on-year cost reduction from £0.964M in 2017 to £0.693M in 2021/22. Following the conclusion of the recent negotiations with the two service providers, the TUPE costs for 2022/23 are expected to be £0.344M (a significant reduction compared to last year). The cost reduction has been put forward in 2023/24 as a budget efficiency savings. The table below shows the TUPE costs for the current and previous years.

Table 3.1A Annual TUPE costs

	2017/18	2021/22	2022/23 Negotiated cost	Variance to 2021/22
Provider 1	£465,970	£316,554	£150,655	£165,899
Provider 2	£498,420	£376,822	£193,444	£183,378
Total	£964,390	£693,376	£344,099	£349,277

3.2 Legal

3.2.1 The new framework will be advertised on the open market in compliance with the Public Contracts Regulations 2015. The framework will be subject to the light touch regime, which gives the council certain flexibilities in its procurement approach. The council must also consider its statutory obligations under the Care Act in structuring its re-procurement of these services.

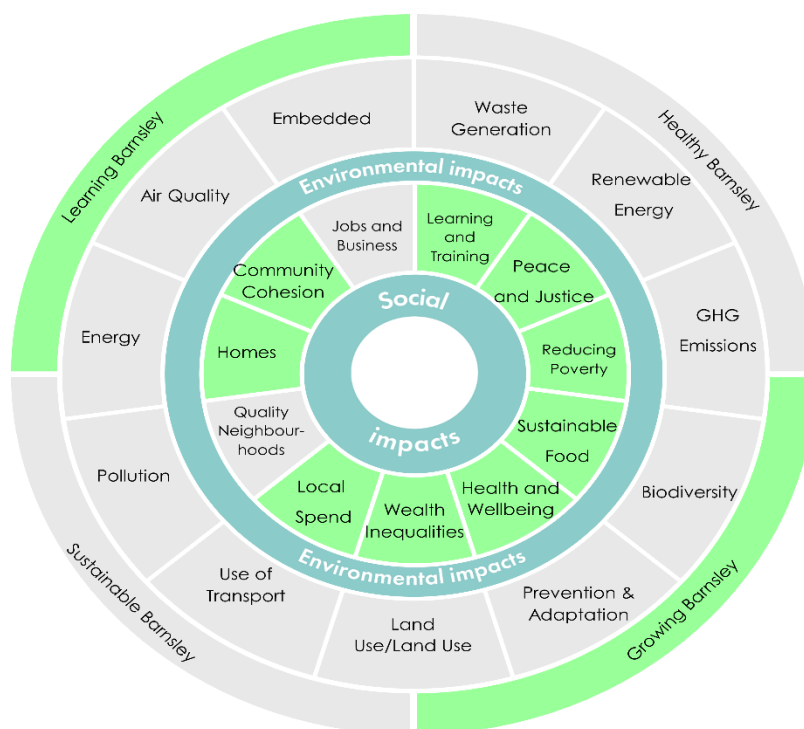
- 3.2.2 Taking the above into account, it is proposed that, subject to incumbent providers submitting a compliant tender and meeting the council's requirements to be awarded a place on the new framework, the council directly award all existing support packages for these services to the incumbent providers. This means that existing support packages for those services will not be subject to competition. The rationale for reserving all existing support packages to the incumbent providers is based upon the council's obligations under the Care Act to promote wellbeing when carrying out any care or support functions in respect of a person.
- 3.2.3 Wellbeing under the Care Act is a broad concept but covers (amongst other things) physical, mental health, emotional wellbeing and control over day-to-day life (including over care and support and the way it is provided) for those who use our services.
- 3.2.4 Although the wellbeing principle applies specifically when the council performs an activity or task or makes a decision about a person, the council should also consider it when it undertakes broader, strategic functions, such as planning, which are not about one person. In this case, a decision is being made regarding the re-procurement of services which affect those who need additional support. The council has a duty under the Care Act to promote their wellbeing in its decision-making.
- 3.2.5 The incumbent providers of the services which form part of the re-procurement have a proven specialism in meeting the needs of those using our services, having built up a history and trust with them. Moving those who use our services to a new provider creates a risk to their mental health and emotional well-being. It also undermines their control over their care and support and how it is provided.
- 3.2.6 The potential for procurement law challenge must, therefore be weighed against the risk of harm to the mental health and emotional wellbeing of those using our services and the council's wider obligations to promote well-being under the Care Act.
- 3.2.7 There is a risk that one or more of the incumbent providers of the services choose not bid for the new contract, for example, if the current TUPE on-costs are withdrawn from the new contract terms or that they do bid, but they do not meet the council's minimum criteria for the award and so are not appointed to the new framework. In which case, the council would have no choice in those circumstances but to offer the existing packages to alternative providers. To avoid those who use our services being unduly affected if the incumbent providers choose not to continue to provide the existing packages under the new framework or if they fail to meet the criteria for award, the council should ensure that their wishes and feelings are taken into account in the appointment of any replacement provider. There is a danger of the council failing to meet its Care Act obligations if that situation arises and is not managed appropriately. Also, new providers may have to TUPE the staff and may seek indemnities and on-costs from the council.

- 3.2.8 Consequently, new support packages commissioned under the new framework will be subject to mini competition amongst all providers that meet the requirements of the specific package, taking into account those who use the services choices and discharge the council's Care Act obligations. To ensure flexibility for people, the framework will also allow for occasions where a direct award of a package in specific (limited) circumstances is appropriate. The process and criteria for awarding support packages will be documented in the framework agreement for transparency.
- 3.2.9 If any incumbent providers do not submit a compliant tender or fail to meet the council's requirements to be awarded a place on the new framework, the intention is that existing support packages (by necessity) will be made available to other providers on the framework, usually by mini-competition or (by exception) by direct award.
- 3.2.10 It is intended that where any existing support packages are affected by the pre-existing TUPE on-costs described in this report (whether those existing packages are delivered by incumbent providers or by new providers), those packages shall be offered with the benefit of the TUPE on-costs until such time as those TUPE on-costs are eliminated. This is to ensure the council mitigates the risk of those support packages not being delivered.
- 3.2.11 In the event that incumbent providers do not submit a compliant tender or fail to be awarded a place on the new framework, the council will need a mobilisation/handover period to allow existing packages to be re-procured under the new framework and handed over to the new providers. This will necessitate a short extension of existing contracts with the incumbent provider(s) to make sure a safe and smooth transition to the new provider. This will be assessed and managed on a case-by-case basis.

3.3 Equality

- 3.3.1 A full Equality Impact Assessment has been completed. The impact assessment summarises that there will be minimal change to the ACSES service when the framework is re-commissioned. The service model and the support provided will remain the same. This is not a review of the service but a requirement to re-commission the framework under procurement legislation. The service will continue to have a positive impact and support adults with learning disabilities, physical disabilities and/or sensory impairments, autistic spectrum disorders, mental health issues, acquired brain injury, and dementia.

3.4 Sustainability



3.4.1 The Decision-making wheel has been completed. The main sustainability impacts are positive. The ACSES service aims to support people to remain independent. There isn't a particular focus on the environmental aspect of Barnsley through the ACSES framework. The ACSES services will, however, positively impact the social aspect for people and the community.

3.5 Employee

3.5.1 There will be no impact on current council employees. If the recommendation that the council continues to pay an enhanced rate is approved, then the risk of either provider not tendering is low. It is unlikely that either provider will not be successful in their tender, but should this happen, this will have an impact on the staff that transferred and the staff employed by the providers. Negotiations with the providers on the framework would then take place, discussing taking on the support packages as well as the staff being TUPE transferred to the provider.

3.6 Communications

3.6.1 Relevant stakeholders have been informed of the requirement to re-commission the ACSES framework.

The Corporate Communications team will promote cabinets decision, highlighting through PR the key areas of this report. They will support Adult Social Care to make sure that users of the service and their families are communicated with, and where necessary, the outcome of this paper is shared with them.

4. CONSULTATION

- 4.1 A significant consultation was undertaken when the ACSES service was first commissioned to develop the service model. The opportunity to consult existing stakeholders about the current service, what works well and what does not work so well, is being undertaken, and the service specification is to be updated with any areas for improvement. It has been made clear to those who use our services and carers that the ACSES service will remain the same and is not subject to review.

5. ALTERNATIVE OPTIONS CONSIDERED

- 5.1 Given the number of people being supported under the ACSES framework and the outcomes being achieved, it is not necessary to consider an alternative.

6. REASONS FOR RECOMMENDATIONS

- 6.1 There are no further options to extend the current ACSES framework , and a new framework needs to be procured to ensure no provision gap.
- 6.2 The current TUPE costs have a significant financial impact on the council. However, we must consider the care sector's current vulnerability and the associated risks. Removing the enhanced rate could result in a number of people who needs additional support being left without a care package due to a lack of capacity.
- 6.3 The information in this report highlights the substantial TUPE on-cost savings that have been achieved, but the recommended decision is that the council continues to pay these TUPE on-costs at the new negotiated rate, given the current financial challenges. Both service providers' front-line staff are now being paid at a minimum £1 above National Living Wage (NLW) at £10.50 an hour. The TUPE staffing rate remains unchanged and the increase in NLW has created a significant savings for the council. However, there remains a risk that the two providers hand back the contracts due to the additional costs not being viable and the uncertainty around pensions deficits, staff shortages and current financial challenges. If the contract is handed back, this will lead to a change of provider.
- 6.4 The recommendation to directly award to incumbent providers is in the best interests of the current users of the service, given they have built trust and positive relationships with the service provider who are supporting them to remain independent, access the community and improve their health and wellbeing.

7. GLOSSARY

ACSES	Adult Community Support and Enablement Service
TUPE	Transfer of Transfer of Undertakings Protection of Employment

8. LIST OF APPENDICES

Appendix 1: Exempt List of Current Service Providers

9. BACKGROUND PAPERS

There are no relevant background papers.

10. REPORT SIGN OFF

Financial consultation & sign off	Senior Financial Services officer consulted and date <i>Joshua Amahwe (23/08/2022)</i>
Legal consultation & sign off	<i>Joanne Haslam (25/08/2022) relating to contract and procurement law implications.</i> <i>David Nuttall (25/08/2022) relating to Employment Law and Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE")</i>

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Date: 2nd August 2022