

Report to Cabinet

12 January 2022

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| Subject: | SEND Transport arrangements: February 2022 to July 2024 |
| Cabinet Member: | Cabinet Member for Children and Education, Councillor Karen Simms |
| Director: | Director of Children and Education, Michael Jarrett |
| Key Decision: | Yes |
| Contact Officer: | Sue Moore, Group Head, Education Support Services Sue_Moore@sandwell.gov.uk |

1 Recommendations

- 1.1 That the Director of Children and Education, in consultation with the Section 151 Officer and Cabinet Member for Children and Education, be authorised to:
- (a) abandon, for the reasons set out at paragraph 2.12 in this report, the mini-competition undertaken under the Dynamic Purchasing System (the new DPS), pursuant to which the contract award decision was deferred by Cabinet at its meeting on 16 June 2021 and inform all operators who are on the new DPS of the decision to abandon this process.
 - (b) extend the existing contracts with providers for the continued provision of SEND transport beyond the current expiry date of 23 February 2022 until 21 July 2022, in accordance with the terms of those contracts, to ensure/enable continuity of service pending the award of new contracts, with any extension to be subject to the additional checks and balances on providers as approved by Cabinet on the 21 July 2021.



- (c) tender any new SEND Transport work or any SEND Transport work that is not undertaken by operators using the current DPS Framework to cover the period 23 February to 21 July 2022.
 - (d) agree any necessary exemptions pursuant to the Council's Procurement & Contract Procedure Rules to enable the course of action referred to in (b) and (c) above to proceed.
- 1.2 That, subject to the approval of recommendation 1.1(a-d) above, the Director of Law and Governance & Monitoring Officer be authorised to agree, enter into and/or execute under seal (if necessary) all requisite contracts and ancillary documentation in relation to the extension of the contracts for the continued provision of Sandwell's SEND transport.
- 1.3 That the Director of Children and Education, in consultation with the Director of Law and Governance and the Section 151 Officer, be authorised to (i) undertake a new procurement exercise to establish a new Framework Agreement to award new contracts for SEND Transport from 1 September 2022 to July 2024 (inclusive), and (ii) undertake, if necessary, the procurement of any new additional ad-hoc SEND Transport work arising during this period, not covered by the new contracts awarded under (i) using a new DPS.
- 1.4 That the Director of Children and Education and the Director of Law and Governance, be granted delegated authority to agree, enter into and execute all requisite contracts and documentation (including under seal) in relation to the provision of SEND Transport work pursuant to the procurement exercises referred to at 1.3 above, and award contracts to all successful bidders as appropriate/required.

2 Reasons for Recommendations

- 2.1 The Local Authority has a duty and has powers to make particular travel arrangements for children with special educational needs and disabilities to facilitate their attendance at an appropriate education provision.
- 2.2 In summary, the three recommendations above are:
 - (i) To abandon the mini-competition undertaken under the new DPS
 - (ii) To extend the existing arrangements to ensure the continued delivery of this essential service, with the appropriate additional safeguards

- (iii) To embark on the procurement of a framework agreement with measures and provisions in place to ensure the needs and priorities of the Council and the service users are most appropriately and fully met, with support (if required) by using the new DPS for additional ad-hoc service.

2.3 Abandonment of the Mini-Competition

- 2.4 In planning for the end of the existing arrangements (which were due to expire February 2022) the Council established a new DPS, which included a new approach to the procurement of the provision of SEND Transport for the next 5 years. It was established with the intention of being able to contribute to the Council's evolving priorities and to address new and important safeguarding concerns, that had not been envisaged when the previous arrangements (under the old DPS) were set up.
- 2.5 The new DPS had several significant differences to the old DPS. Most notably, rather than the DPS being used simply for ad hoc contracts for services as required, it was intended to be used to award four large contracts to deliver the majority of the services required by the Council for the whole of the term of the new DPS. The new DPS also sought to implement more stringent requirements on the providers/contractors, and was intended to make contract management easier, and less resource intensive, the consequence of which would be that more officer time could be spent on improving performance.
- 2.6 Following the evaluation of the tenders submitted under the new DPS, a recommendation to award four contracts was included within a report to Cabinet, and, submitted on 16 June 2021 for consideration. If approved by Cabinet, contracts for the provision of the services for the next five years would have been awarded to the bidders identified in that report.
- 2.7 During the consultation process leading up to the 16 June 2021 Cabinet, Members raised concerns (set out in more detail at paragraph 2.12 below) about the procurement approach taken, and as a result of these concerns, no decision was made at Cabinet. Members also asked for this procurement to be included in the wider review of governance being undertaken by Grant Thornton. Childrens Services and Education Scrutiny Board also undertook their own review of SEND Transport Models to inform future decision-making. The Review is attached as Appendix A and the External Audit Review is Appendix B and Appendix Ba.

2.8 A further report was brought to Cabinet on 21 July 2021 seeking approval to extend the existing contracts until 23 February 2022 to ensure transport arrangements were in place for the start of the new academic year. This period of time also enabled the internal review, Grant Thornton review and Childrens Services and Education Scrutiny Board review to take place and to be considered.

2.9 The reviews that have been undertaken have identified the following recommendations (among others):

- Increasing the number of lots, changing the way price and quality are assessed and greater financial modelling (Internal review completed in June 2021)
- Improving quality of provision by requiring all drivers and passenger assistants to undertake a first aid accreditation (Childrens Services and Education Scrutiny report October 2021)
- Encouraging competition from a wide range of suppliers including small and medium enterprises and avoiding the increased risk associated with awarding contracts to a small number of providers (Childrens Services and Education Scrutiny report October 2021)
- Sufficient documented consideration does not appear to have been given to both financial modelling and the risks, particularly around resilience, associated with the potential placing of all four large contracts with just two companies, who in themselves come under the ownership of one individual (Grant Thornton review)

2.10 A public body is entitled to abandon a mini competition under a DPS provided its reasons are rational, not based on a desire to favour or penalise certain providers and proportionate. Public bodies in such situations are legally entitled to make a decision to abandon a mini-competition and run an entirely new procurement process. Any new procurement process should be designed to remedy reasons for abandonment.

2.11 SEND Transport also formed part of Grant Thornton's (the Council's external auditors) Value for Money Governance review (a copy of which is set out at appendix B). They noted that the Council already uses a DPS for commissioning travel assistance services, so has familiarity with the approach, as do providers. The review recommended:

- Not losing the significant progress made on the contract specification's focus on service quality.

- Greater support, involvement, dialogue and oversight with the officer teams with responsibility for progressing the procurement.
- Ensuring the contract provides the Council with effective management and oversight of the personal transport market.
- Record keeping, and declarations of interest are undertaken in line with Council policies and procedures.
- Decision making does not create real or perceived risks in relation to inappropriate procurement decisions.
- Procurement timescales provide adequate time for both suppliers to submit high quality bids, and the Council to undertake appropriate evaluation, scrutiny and decision making. This timescale should include appropriate time in advance of the procurement for the council to undertake the necessary strategic thinking and planning required, and mitigate the risk of not making an award in the planned timescale

2.12 Whilst it is recognised that a DPS has many benefits, which have been highlighted in paragraph 2.5 above, the recommendation is however that this mini-competition is abandoned, for the following reasons:

- (i) Financial resilience – the risk to the Council, and the Service Users in not having a wider pool of contractors in terms of financial resilience is considered to be unsuitable and undesirable. The impact of one of such a small number of providers failing financially was not fully considered and mitigated during the procurement process and in the evaluation process. If one provider were to fail financially, then the Council would be in a position of having to re-procure either the whole or a significant proportion of the service, in a position where the primary procurement vehicle (the new DPS) was no longer regularly used, and bidders have no incentive to actively participate. The financial impact of this on the Council is unpredictable, but, is considered to put the Council in a position of being exposed to the market to an unsustainable degree.
- (ii) Service resilience/sustainability – the risk to the Council and the Service Users in not having a wider pool of contractors is considered to be unsuitable and carries to greater a risk. The impact of one of such a small number of providers failing in terms of service standards was not fully considered and mitigated during the procurement process and in the evaluation process. Whilst it is envisaged that a smaller number of contractors would enable the Council to manage service standards more effectively, if service standards still fell to an unacceptable standard (despite the Council's efforts, the Council would have little choice but to re-procure either the whole or a significant proportion of the service. Only having two contractors raises concerns over the sustainability

of the service and service delivery interruption. Both expose the Council and Service Users to an unacceptable risk, which is compounded by very limited cost-effective mitigations being available.

- (iii) The Evaluation Process - The assessment exercise undertaken in relation to the mini-competition submissions pursuant to the new DPS needed to be more robust
- (iv) Implementation of External and Internal Recommendations – it is not possible to give effect to the recommendations made by the Council's external auditor and the Scrutiny Board within the mini-competition. In order to implement a new procurement, which would address the concerns and recommendations raised by the external auditor and Scrutiny Board, the mini-competition would need to be abandoned.

2.13 Extension of the existing arrangements

- 2.14 The Council has a duty to continue to provide a service to this group of vulnerable service users, with the minimum of risk and disruption.

The extension of the existing arrangements is permitted under the Public Contract Regulations 2015.

Extension will ensure a continuous service and involve the least disruption for the service users.

One implication of extending the existing arrangements for these services is that any improvements intended to be implemented as a result of the new arrangements will not be delivered as quickly as initially planned (although they will be implemented as part of the new procurement exercises). However, in the interim, the team managing the existing contracts will continue to carry out additional checks and inspections on current providers, with a clear instruction to providers that any safeguarding issues or other significant failure in service standards that are not addressed promptly will result in the Council taking robust action as it deems necessary to address such failings, which could include termination of the contract.

Another implication of extending the existing arrangements is that the anticipated overspend will continue until new arrangements are put in place, at which point new financial projections will be prepared.

2.15 Evaluation of the appropriate procurement methodology

2.16 There are several methods of procuring SEND Travel services, which range from a traditional fixed term service contract/number of contracts, to call-off contracts from a new Framework Agreement, to call-off contracts from a new Dynamic Purchasing System, through to spot purchasing. Each method has advantages and disadvantages, and some fit more closely with certain types of product or service than others, and with some it is easier to include certain requirements, safeguards and remedies.

2.17 An evaluation of each of the approaches has been undertaken to consider which approach the Council should adopt, as the most suitable approach.

- A fixed-term service contract/number of contracts is usually suitable where a defined service is required for a specific period, it gives the most certainty to providers in terms of what is required of them, and also provides certainty to the Authority in areas such as the cost and performance. However, it can be quite rigid in terms of not taking into account a changing regulatory environment or variations in service requirement.
- A Framework Agreement establishes a list of suppliers, from whom the Authority can request individual categories of work. This has more flexibility and is most suitable where there are going to be multiple but uncertain contractual requirements, but it can be expensive to establish, and does not allow new entrants to the market to be added during the term.
- A Dynamic Purchasing System is a fully electronic framework agreement, which allows new bidders to be added, and for bidders that no longer meet the entry requirements to be excluded, over the life of the DPS. It is intended to be used where there are easily defined, standard form or “off the shelf” requirements that are needed to be procured on an ad-hoc basis, and is also intended to encourage competition between bidders within the DPS. It is not traditionally used for long term contracts, and the mini-competitions are usually evaluated primarily on cost (the bidders having already satisfied the conditions for admission to the DPS, when they apply to be admitted).





2.18 The evaluation of all of the methods of procurement provides the necessary assurances to the council that the best and most suitable approach is being used to ensure the best outcome in terms of quality of provision and how that provision can be monitored and the effective steps that can be taken if operators fail to meet the necessary standards.

2.19 The evaluation of the available procurement approaches also provides the opportunity for the recommendations from Scrutiny's Review of Special Educational Needs and Disabilities Transport Models to be incorporated within the procurement process, and given due consideration, including ensuring (so far as is able) that:

- providers should ensure drivers and Passenger Assistants are trained, and accredited where appropriate, in First Aid, non-verbal communication, use of safety harnesses and manual handling. In addition, there should be Advanced Passenger Assistants who are specifically trained to provide emergency medication on transport, including but not limited to administering pre-loaded EpiPens or pre-loaded buccal midazolam devices;
- the approved procurement model encourages competition from a wide range of suppliers;
- small and medium enterprises should be afforded opportunities to tender for the contracts;
- local/mainstream schools should be the first consideration if they can address the needs of pupils, whilst recognising that some parents may prefer alternative places;
- some harmonisation of provision should be considered to balance effective management of contracts whilst retaining a diversified group of providers;
- the model for provision should avoid the increased risk associated with awarding contracts to a small number of providers.

2.20 Approval is now sought to implement a Framework Agreement, which will include provisions to address the concerns and issues identified, and to deliver the best solution for service users and their families, provide sufficient assurances for the Council around quality of provision and deliver the most economical and sustainable solution.

3 How does this deliver objectives of the Corporate Plan?

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|  | <p>Best start in life for children and young people</p> <p>The Council is required to make arrangements for all children who cannot reasonably be expected to travel to school because of their mobility problems or because of associated health and safety issues related to their special educational needs or disability (SEND).</p> |
|  | <p>Strong resilient communities</p> <p>Sandwell now has a national reputation for getting things done, where all local partners are focused on what really matters in people's lives and communities.</p> |
|  | <p>A strong and inclusive economy</p> <p>Using local operators to provide transport enables the local economy to thrive.</p> |
|  | <p>A connected and accessible Sandwell</p> <p>Public transport is an important component of the system for organising travel to school. Travel assistance training is made available to all children and young people who can benefit from independence in their travel to school.</p> |

4 Context and Key Issues

- 4.1 The Local Authority has a duty and has powers to make particular travel arrangements for children with special educational needs and disabilities to facilitate their attendance at an appropriate education provision. These responsibilities are set out in the Education Act 1996, as amended by the Education and Inspections Act 2006 and are summarised in Department for Education Guidance as follows:

“To make arrangements for all children who cannot reasonably be expected to travel to school because of their mobility problems or because of associated health and safety issues related to their special educational needs or disability (SEND). Eligibility, for such children should be assessed on an individual basis to identify their particular transport requirements.”

- 4.2 Since February 2018 the provision of passenger transport services has been arranged via a Dynamic Purchasing System (DPS) which was originally due to end on 31 July 2021. In total there were 122 different contracts delivered by 18 different operators. At present 659 pupils access SEND transport attending 82 Sandwell schools and 47 out of borough schools.
- 4.3 Existing measures to monitor the performance of operators will be continued to ensure acceptable standards and good practice is maintained.
- 4.4 The current contracts were awarded pursuant to the DPS and are due to expire in February 2022. It is possible to extend the existing arrangements with operators pursuant to the DPS until the end of the academic year.
- 4.5 There are risks and mitigations to be considered by extending the existing contracts

| | Risk | Mitigation |
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| 1 | Concerns raised previously regarding the poor business practices of some operators cannot be fully addressed through the continued use of the current DPS. | Measures that have already been put in place and increased monitoring will help to continue to mitigate this risk between February 2022 and July 2022 |
| 2 | Some of the current providers may not want to extend their contract to July 2022 or may have now accepted other work and no longer have capacity. | If this happens the work will be re-tendered using the current DPS And other providers on the current DPS could be contracted to cover any immediate need or shortfall. |
| 3 | Increased costs from operators | Continued promotion of alternative offer of travel assistance support Robust contract management |
| 4 | Risk of potential challenge with regard to the procurement | The Council is entitled to extend the existing DPS and award contracts pursuant to it in accordance with the Public Contract Regulations. All of the current bidders would be entitled to continue to bid for work. |

- 4.6 In addition the following contracts will also need to be extended until 21 July 2022

- (a) SEND transport for pupils who will be attending High Point Academy, a new secondary special school in Wednesbury, the financial value of which cannot be determined until all school places are confirmed and eligible pupils are assessed regarding their need for transport;
- (b) transport for excluded primary pupils on behalf of Primrose Pupil Referral Unit, the financial value of which is provided by Primrose Pupil Referral Unit;
- (c) transport for Looked After Children on behalf of Sandwell Children's Trust, the financial value of which is provided by Sandwell Children's Trust.

4.7 It is legally permissible to extend the contracts issued via the current DPS for a reasonable period, until 21 July 2022, in order to give the Council an opportunity to undertake a new procurement process, taking into account the Council's priorities and the needs of service users. It is necessary to take this action prior to the expiry of the current contracts, which are due to expire 23 February 2022.

5 Alternative Options

5.1 *Running a new mini-competition under the New DPS*

5.2 A new mini-competition could not be split into smaller lots, for shorter periods, so would not remedy all the issues arising and raised during the review process, particularly in relation to the mini-competition again producing only two successful bidders.

5.3 *Continue to use the existing arrangements, under the previous DPS.*

5.4 It is possible for the Council to extend the previous DPS (completed in 2018), however this would not address the concerns and issues raised recently and would not positively contribute to the Council's current priorities.

5.5 This option would be the quickest, and simplest in terms of operational issues, and would result in the least amount of disruption for the service users.

However, it would be difficult to manage the financial implications of continuing with the existing arrangements, and it would be difficult to deliver the improvements in terms of safe-guarding and passenger safety and encourage the use of green technology by continuing the existing arrangements.

5.6 *Procure a new Fixed Term Service Contract.*

This would be the least flexible option and high risk in terms of service delivery due to the rigid nature of a fixed term contract. Once a fixed term contract has been let, no further suppliers can be added to the contract, therefore should any suppliers wish to leave the contract, there would be no mechanism available to replace them with an alternative supplier.

It would not be possible to resolve some of the issues that have been identified in respect of the outcome of the mini-competition undertaken pursuant to the new DPS, by utilising a Fixed Term Service Contract.

The changeable needs of the service users, are not easily dealt with within a fixed term contract, with individual suppliers, and it is more difficult to retain financial control, and ensure best value when new service users are added, or service users switch off or their needs change during the term. Some degree of flexibility can be included within a fixed term contract however, the very fluid nature of the requirements means there is risk that the contract would not provide the degree of flexibility required.

A single supplier, for all or a significant proportion of the service requirements would expose the Council, and service users to the risk of service interruption in the case that the single supplier was unable to deliver the required service.

Financial models, and payment mechanisms traditionally associated with fixed term contracts, where service requirements are subject to change, are not easily adaptable to situations where the needs of the service users are subject to such a range of requirements and degrees of support, as is the case with SEND transport.

6 Implications

- 6.1 The previously agreed extension to existing contracts is due to expire on 23 February 2022 under clause 1.3 of the contract. The order forms of the contracts anticipated that annual contracts, starting in February each year would be granted, up to 23 February 2022, in accordance with the special terms of the Contract Part A Section 8 of the Invitation to Tender (ITT).
- 6.2 The extension should be kept under review and reconsidered further ahead of the expiry of any extensions that are sought to ensure that they are not longer than reasonably necessary.

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| Resources: | <p>The projected overspend for 2021/22 is £1.87m over the revised allocation of £5m, (which includes an additional allocation of £3.1m allocated to reflect the increase in demand and overspend in 2020/21) The increase is partly due to an increase in pupil numbers from 818 to 899 and ongoing impact of delay re-procurement.</p> |
| Legal and Governance: | <p>The Legal obligations on the Council in respect of this service and the rules relating to the extension of the existing contracts are set out within the body of this report.</p> <p>It is possible that a challenge to the approach taken by the Council may be made, and whilst it is not possible to forensically assess the risk of such a challenge until it is made, the legal advice received on this matter is that the extension is in accordance with the Public Contract Regulations 2015.</p> <p>Any new procurement undertaken, would be undertaken in accordance with the Council's constitution and Public Contract Regulations 2015.</p> |
| Risk: | <p>The Corporate Risk Management Strategy (CRMS) has been complied with – to identify and assess the significant risks associated with this decision / project. This includes (but is not limited to) political, legislation, financial, environmental and reputation risks.</p> <p>Based on the information provided, it is the officers' opinion that for the significant risks that have been identified, arrangements are in place to manage and mitigate these effectively.</p> <p>The risk implications and mitigating measures as a result of extending the existing contracts are set out within the report in Section 4.5.</p> |
| Equality: | <p>An Equality Impact Assessment (EIA) screening has been completed and a full EIA is not required for this proposal.</p> |

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| | <p>Children and young people with special educational needs and disabilities (SEND) have protected characteristics under the Equality Act 2010. The Local Authority has a duty and has powers to make particular travel arrangements for children with special educational needs and disabilities to facilitate their attendance at an appropriate education provision.</p> <p>Local authorities must publish details of school transport for children and young people with special educational needs and disabilities in their local offer. This is set out in the Special Educational Needs and Disability Regulations 2014 – schedule 2 paragraph 14.</p> <p>Children who cannot reasonably be expected to walk to school because of SEND, disability or mobility difficulty are eligible for transport under section 508B and schedule 35B (2) of the Education Act 1996. The policy should explain how a child with SEND meets the criterion for school transport.</p> |
| Health and Wellbeing: | <p>The DfE/DHSC Code of Practice for children and young people with SEND is the statutory guidance that sets out the duties for health and wellbeing.</p> <p>Sandwell's education system has a strong approach to inclusion and the majority of children and young people with Education, Health and Care Plans attend mainstream provision, or focus provision within a mainstream setting. This enables children to develop firm relationships with peers in a mainstream environment and supports an inclusive Sandwell society.</p> |
| Social Value | <p>Contracts awarded under the new Framework will require suppliers to demonstrate how they will be responsive to Social, Environmental and Local Economic prospects, and how they will construct and operate their works to deliver a positive impact on the local economic, social and environmental well-being of the local area.</p> |

7. Appendices

Appendix A – Scrutiny Review

Appendix B and Appendix Ba – External Audit Review

8. Background Papers

- Sandwell's SEND Travel Assistance Policy can be found here:
[Special Educational Needs Travel Assistance Policy](#)
- Cabinet report – 12 August 2020
<https://sandwellintranet.moderngov.co.uk/CeListDocuments.aspx?Committeeld=143&MeetingId=974&DF=12%2f08%2f2020&Ver=2>
- Cabinet report – 16 June 2021
<https://sandwellintranet.moderngov.co.uk/ieListDocuments.aspx?CId=143&MId=144&Ver=4>
- Cabinet report – 21 July 2021
<https://sandwellintranet.moderngov.co.uk/ieListDocuments.aspx?CId=143&MId=6007&Ver=4>
- Report to Children's Services and Education Scrutiny Board on Monday, 27 September
<https://sandwellintranet.moderngov.co.uk/ieListDocuments.aspx?CId=144&MId=6075&Ver=4>
- Childrens Services and Education Scrutiny report October 2021