

**Report to Interim Director of Adult Social Services**

**Date: 23<sup>th</sup> February 2015**

**Subject: Approval to award a contract to a Social Enterprise in the form of a staff led mutual to deliver the Learning Disability Community Support Service**

Are specific electoral Wards affected? If relevant, name(s) of Ward(s):	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Are there implications for equality and diversity and cohesion and integration?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Is the decision eligible for Call-In?		<input checked="" type="checkbox"/> No
Does the report contain confidential or exempt information? If relevant, Access to Information Procedure Rule number: 10.4.3 Appendix 1	<input checked="" type="checkbox"/> Yes	

**Summary of main issues**

1. The Learning Disability Community Support Service, the Council's in-house provider of care services supports over 1000 adults with learning disabilities utilising a staff team of over 700. Despite undertaking major transformational change in recent years and being a highly regarded service it has seen its market share in Leeds fall from around 40% to 20% as demographic growth has been met by other sectors. The Council has approved the process to establish a social enterprise model to deliver the services, which will enable sustainability of the service for the medium term future.
2. The development of a Social Enterprise offers a timely opportunity to realise the Council's ambition to become smaller and more influential. It provides the Council with a positive opportunity to adopt a different method of market retraction from that which has taken place in other areas of its provider services. This approach will put the service in a much stronger position to meet the needs of some of the most vulnerable citizens in the city by providing long term continuity of care whilst securing jobs and prospects for staff.
3. The proposal to provide the Learning Disability Community Support Service through a Social Enterprise model will lead to the TUPE (Transfer of Undertakings Protection of Employment) transfer of around 700 staff from the Council. The business case for the Social Enterprise confirms the intention that the organisation will be an exemplar employer and will pay at least the Living Wage to all new employees.
4. At its meeting on 11 February 2015, Executive Board authorised (as a Key Decision) the Interim Director to approve award of a contract for services
5. This report details the further progress made in respect of outstanding matters, and seeks approval for the award of contract and final approval of the terms of the contract documentation, together with approval of any further necessary steps to enable the creation of the social enterprise structure and transfer of the service to the social enterprise.

## Recommendations

The Interim Director of Adult Social Services is requested to:

1. Note the further progress made :
  - to finalise the terms of the Services Agreement
  - to finalise agreements required for the enterprise to function including those relating to the transfer of the service including staff and non-buildings based assets, provision of support services by the Council and those relating to the occupation / use of property by the Social Enterprise,
  - to complete discussions on achieving an appropriate commercial balance between the Council and the Social Enterprise
  
  - relating to formal consultation with staff and trade unions in relation to the TUPE transfer of all staff defined as 'in scope' for this service.
2. Note the advice now received on state aid risk
3. If the Interim Director is satisfied with the progress of matters as now reported approve:
  - a) the award of the contract for services without competition to Aspire Services (Leeds) Limited for a period of 5 years to commence on 1 June 2015 with the option for the Council to extend this period for a further 12 months;
  - b) the terms of the following documentation to complete the transfer of the service and contract for services to the Social Enterprise:
    - (i) Services Agreement between the Council and Aspire Services (Leeds) Limited
    - (ii) Transfer Agreement between the Council and Aspire Community Benefit Society Limited
    - (iii) Admissions Agreement between the Council, West Yorkshire Pension Authority, and Aspire Community Benefit Society Limited
    - (iv) Support Services Agreement between the Council and Aspire Community Benefit Society Limited;
  - c) the value of the contract in the first year of £20.027M per annum (subject to any minor variations necessary following final due diligence as set out in paragraph 3.4.1), this will be pro rata in Year one (2015/16) if the contract commences on 1<sup>st</sup> June 2015 and the anticipated value of the contract in subsequent years of the contract as contained in exempt appendix 1, identifying savings to the Council over the current cost of provision in subsequent years.
4. Note and approve that Aspire Services (Leeds) Limited will enter into a sub-contract with Aspire Community Benefit Society for provision of the services
5. Note that following consultation a report has been submitted through the Director of City Development's governance process for approval (under existing delegated powers) to the terms of the necessary leases/licences (co-terminus with the Services Agreement) to document the occupation of premises to be utilised for the provision of the service.
6. Approve, using the authority set out in Contract Procedure Rule 1.3, the waiving of Contracts Procedure Rules 9.1 and 9.2 to enable award of the services contract

## **1 Purpose of this report**

1.1 This report seeks formal approval from the Interim Director of Adult Social Services for:

- The transfer of the service to the Social Enterprise,
- The awarding of a contract for services for a 5 year period as set out in this report.

## **2 Background information**

### 2.1 National trends

2.1.1 The 'Better Lives' programme details the Council's commitment to making Leeds the best city in the UK for people with social care needs, giving residents the best possible support for maintaining their health and wellbeing. The 'Better Lives' vision refers to greater integration of services, and improved range of daytime activities for people with eligible needs and the development of a new kind of enterprise in the Leeds care market, which will provide a variety of services geared to responding to people needing all levels of support and care, including those with learning disabilities.

2.1.2 The February 2015 Executive Board report provided further detail regarding background information and national trends, specific to the Learning Disabilities Community Support Service.

### 2.2 The Learning Disability Community Support Service

2.2.1 The Leeds Learning Disability Community Support Service is the Council's in-house provider of care and support for adults with learning disabilities. The service meets the needs of some of the most vulnerable citizens in the city whose requirements range from advice and support for managing their own affairs, to those with complex multiple needs who require hands-on personal care with all aspects of their lives, including assistance with eating, bathing and postural management.

2.2.2 Information in relation to the main functions of the service and it's significant transformation programme, efficiencies achieved in the form of cashable savings, market share and demographic trends, breakdown of numbers of customers, staff currently in post was provided and can be found in more detail in the February 2014 and 2015 Executive Board reports.

2.2.3 Executive Board is fully supportive of the proposal and authorised further work to be undertaken in February 2014, and following staff providing a positive endorsement of the proposal following formal consultation, a significant amount of further work was undertaken as detailed in the subsequent February 2015 Executive Board report.

## **3 Main issues**

3.1 The Executive Board report in February 2015 provided Members with information on progress to creation of the Social Enterprise and negotiations to date on the terms of the transfer and services agreement. This report should be read in conjunction with that report and updates the Interim Director on progress since the issue of the Executive Board report. Executive Board resolved as follows:

(a) That the following be noted:-

(i) The significant progress which has been made to date (including obtaining staff support), in relation to the creation of a Social Enterprise for the Learning Disability Community Support Service;

(ii) The creation of Aspire Community Benefit Society Limited as a separate legal entity as the Social Enterprise;

(iii) The revised social enterprise organisational structure and contractual arrangements as detailed in section 3.6 of this report;

(iv) The requirement to complete all outstanding work required to:

finalise all necessary supporting agreements required for the enterprise to function, including those relating to the transfer of the business including staff and non-buildings based assets, provision of support services by the Council and those relating to the occupation / use of property by the Social Enterprise;

award a contract for the delivery of services to the newly formed Community Benefit Society or its subsidiary, as detailed in paragraph 3.6 of the submitted report;

complete formal consultation with staff and trade unions in relation to the TUPE transfer of all staff defined as 'in scope' for this service.

(b) That approval be given to the Council's participation in Aspire via the nomination of 3 Elected Members, as approved by Member Management Committee, to join the board of directors of Aspire, and (if so nominated by the Aspire board), the board of directors of Aspire Services (Leeds) Ltd.

(c) That subject to the satisfactory completion of the tasks identified in the resolutions above, it be noted that the Interim Director of Adult Social Services will:

(i) approve the award of the contract for services to the newly formed Social Enterprise;

(ii) approve the detail of any necessary documentation to complete the transfer of business and contract for services to the Social Enterprise, subject to the value of the contract in the first year not exceeding £21.454M per annum (which in turn is less than the cost of provision had the service remained within the Council);

(iii) In relation to pensions, agree that the Council will act as a guarantor to the Social Enterprise's admitted body status to the West Yorkshire Pension Fund, as detailed in sections 3.5.7 to 3.5.9 of the submitted report.

(d) That approval be given for the Director of City Development to enter into negotiations with the Social Enterprise in order to agree the necessary leases/licences (co-terminus with the Services Agreement) to document the occupation of premises to be utilised for the provision of the service and to agree details of rent/service charges to be paid;

(e) That the following key next steps be noted:-

(i) February/March 2015 - Finalise and award contract;

(ii) February - May 2015 – Mobilisation;

(iii) 1 June 2015 - Full service commencement.

(f) That it be noted that the Interim Director, Adult Social Services is the lead officer on such matters

### 3.2 Services

3.2.1 The Social Enterprise delivers four distinct services that are:

- Fulfilling Lives day services
- Supported living services
- Respite Care Service
- The Crisis Service (emergency respite)

### 3.3 Contract Structure

3.3.1 In order to ensure that future growth can be managed in a way that is sustainable and affordable, whilst ring-fencing risk and protecting the main body of the Community Benefit Society, Aspire has developed a group structure by having a wholly-owned subsidiary to undertake elements of its trading. The rationale behind this was explained in the Executive Board report.

3.3.2 Aspire Community Benefit Society Limited will be the principal social enterprise vehicle delivering the care services and registered with CQC. It has been set up as a Community Benefit Society under the Cooperatives and Community Benefit Societies Act 2014.

3.3.3 Aspire has a wholly-owned subsidiary –Aspire Services (Leeds) Limited as part of this group structure. This is a company limited by shares with sole shareholder Aspire Community Benefit Society Limited. This subsidiary will enter into a Services contract with Leeds City Council, with all appropriate contractual terms flowing through to the Community Benefit Society.

3.3.4 As well as offering future flexibilities to Aspire in terms of growth, the group structure provides enhanced value for money to the Council, and thereby ensuring it receives the most value from the Leeds Pound, since a group structure would have fiscal benefits and a reduced overall cost profile when compared to a single entity, which translates into a reduced contract price.

### 3.4 Key Commercial Terms

3.4.1 Sufficient progress has been made since the writing of the Executive Board report to enable award of the contract for services to Aspire Services (Leeds) Limited. No significant commercial issues remain but some scheduled information and final drafting to reflect the agreed commercial position remain to be finalised which, once complete, will lead to contract signature (subject to the voluntary transparency notice process highlighted in section 8 below). Additionally, certain matters are subject to final due diligence of the parties which may result in limited and minor reconciliation of the contract payment, including relating to the Transport SLA, and costs of caretaker support, and property..

The next paragraphs set out the position reached on commercial matters for approval by the Interim Director. A verbal update will also be given.

### 3.5 Services Agreement:

- The contract will be for a five year fixed period with no break clause

- The Council will have an option to extend the contract at its sole discretion by one 12 month period
- It will be based on the City Council's standard terms and conditions (including standard remedies in the event of under-performance) with some contract specific amendments
- There will be periodic reviews of the services to identify any service improvements which can be made.
- The initial cost of the Services in year one is £20.027M (subject to any minor variations necessary following final clarification of the property and other matters reported in 3.4.1)
- The cost of the services to the Council are calculated on a unit cost basis across each of the four services, enabling flexibility over the contract period in particular to take account of increased take-up of individual service funds, and reductions in costs of the Social Enterprise over the contract period. Limited and specified cost risk will be retained by the Council in relation to certain pay and pensions costs (see below), which will be subject of an annual review.
- Exempt Appendix 1 contains the full details of the costs of the services both from a unit cost perspective and how the contract payment is anticipated to reduce over the contract period.
- There will be regular monitoring of performance against specified quality standards
- There will be an escalation process to resolve any disputes about service delivery
- An annual review will take place to assess the impact of nationally agreed pay settlements, and will include a process enabling the price to be adjusted, subject to the parties discussing how the impact of such costs can be minimised. The annual review will be a mechanism for identifying the actual value of these costs in a transparent way. This will also apply to the increase in National Insurance contributions from 2016 onwards, and any specific changes in law which impact on the employment costs (this may include changes in case law on matters such as holiday pay on overtime hours, and cost of sleep-ins). The Interim Director should also note the pensions contribution rate risk share detailed in paragraph 3.9.1. This process mitigates unnecessary risk pricing within the contract on the main cost area which is pay.
- The agreement provides for Aspire to own newly-created IPR during the period of the contract, with a licence to the Council, and a provision requiring discussion on sharing of income from any IPR capable of exploitation

### 3.6 Support Services Agreement

- The support services involved are HR, BSC, IT, Information Knowledge Management, Transport and Finance. Transport has been added to the list of services due to the vehicle arrangements with Civic Enterprise Leeds that were originally proposed have recently changed, requiring the need for an SLA to cover the activity.
- The agreement provides for the Social Enterprise to buy back support services from the Council over the life of the contract at a rate representing the proper cost of such services to the Council
- The provision of support services will be subject to ongoing performance monitoring and a formal review after 2 years which would offer both parties an

opportunity to consider and exercise break clauses in the agreement, with an appropriate period of notice to enable a managed exit from the affected service(s)

- The remedy available to the Social Enterprise for Council breach of the Support Services Agreement is relief from their obligations under the Services Agreement. The Social Enterprise will also be able to recover specified additional costs which result from Council breach.
- SLAs have been drawn up which describe the services which the Council will provide to the Social Enterprise over the period of the contract. Each document contains agreed performance measures and specifies the roles and responsibilities of each party to achieve a successful partnership
- The Social Enterprise will pay an inclusive annual charge (representing the proper cost for such services) for the delivery of these SLAs over the five year period of the contract.

### 3.7 Transfer Agreement

- 3.7.1 A Business Transfer Agreement will provide for transfer of the staff and non-buildings based assets to the Social Enterprise. The general principle underpinning this agreement is that the Council will be responsible for costs, outgoings and risk up to the date of transfer and the Social Enterprise thereafter. This agreement will include certain specific warranties offered by the Council in relation to the service transferred. Remedies for breach of the warranties is limited to relief from obligations under the Services Agreement, and a capped amount for any additional costs. Most of the warranties have minimal risk attached to them, and where matters are disclosed against them no liability applies (such as any known claims or litigation). Care is needed to ensure disclosure against one particular warranty, that the employment related information, is not affected by any known matters at the date of the agreement. The Chief Officer HR will be asked to confirm whether further matters exist for disclosure before the date of completion.

### 3.8 Property documentation

- 3.8.1 A number of property leases and licences are being put in place to enable the service to operate from existing locations post transfer. These documents will contain details of the terms of occupation, the roles and responsibilities of both parties in relation to property maintenance and facilities management. In addition, they will also cover the costs which the Social Enterprise will be required to pay in order to occupy and deliver services from such property which will be set at a market rate. A full schedule of such properties is attached at Appendix 2. A report has been submitted through the Director of City Development's governance process for approval (under existing delegated powers) to the terms of the lease/licence agreements including the rent and service charge for each property listed in Appendix 2 under his sub delegation scheme.

### 3.9 Admission Agreement

- 3.9.1 An admission agreement will be entered into with the West Yorkshire Pension Fund to continue and preserve the pension rights of staff in the Local Government Pension Scheme. This will be an 'open' agreement which means that staff who join the Social Enterprise and are engaged in the provision of services to the Council will also be able to join the pension scheme. A level of funds will be transferred within the pension fund to the new employer such as to equal the actuarially assessed level of liabilities, so that the new employers scheme is 100% funded, with no historic deficit

transferred. In terms of the future pensions costs, an actuarial assessment has recently been undertaken which proposes an employer's contribution rate of 16.9% for the newly formed Social Enterprise. These costs have been incorporated in the updated business plan of the Social Enterprise. It is proposed that in the event of a change in the assessed contribution rate for the Social Enterprise at the next fund valuation, the Council will take the benefit of any reduction, or alternatively the risk of an increase.

3.9.2 Executive Board approved the Council entering into a guarantee in relation to any pensions shortfall arising due to insolvency of the Social Enterprise.

### 3.10 Form of Social Enterprise

3.10.1 The proposed form of the social enterprise has not changed since the Executive Board report and is set out in that report

3.10.2 Aspire Community Benefit Society Limited and Aspire Services (Leeds) limited have been established and are receiving advice from legal and financial advisers appointed by the Cabinet Office as part of its staff mutuals support initiative

3.10.3 The proposed governance of the organisations remains unchanged since the Executive Board report

### 3.11 State Aid

3.11.1 State aid occurs when public resources are used in a way that confers a selective advantage on an organisation in a way which distorts or has the potential to distort competition between EU Member States. For example, if the Council provided an organisation with premises at lower than market rent and that company was active in a European market then that could be State aid.

3.11.2 In determining if aid is State aid, it is not necessary to establish that aid has a real effect on trade between Member States and that competition is actually being distorted; if there is a European market for the services which the recipient of the aid provides, it is presumed that assisting the recipient will distort competition.

3.11.3 Similarly, the size of the recipient and its share of any market are irrelevant – if the aid which it is receiving is selective and will strengthen its position in the market, then the aid will be State aid; there is no threshold or percentage below which it might be considered that trade between Member States is not affected.

3.11.4 Based on previous procurement exercises which the Council has carried out in relation to the provision of care services, there is no evidence that there is a European market for the provision of such services; no expressions of interest have ever been received from any companies based in any other Member States. In so far as there is no European market for the provision of care services, then the Council providing Aspire with assistance will not be State aid.

3.11.5 In so far as there might be a European market (and given that the Council does not have full knowledge as to the provision of care services across the UK or throughout Europe, this cannot be totally ruled out) the European Commission has ruled that State aid can be given in certain circumstances, subject to certain conditions being met, but if aid is given outside those rules then it will be unlawful and the recipient of the aid may be ordered to repay it. In addition, the giver of the aid can be surcharged and can also be sued for damages by a disadvantaged competitor of the recipient.



- 3.11.6 Of the current exemptions, given the nature of the arrangements between the Council and Aspire, the only one that would appear to be of any help is the 'de minimis' exemption. This allows any organisation to receive up to 200,000 euro's worth of aid (approximately £160,000 at current exchange rates) from all sources over a three year rolling period. It should be noted though that Aspire have already received £45,486 of 'de minimis' aid within the last six months so the amount of assistance which the Council can provide Aspire with under this exemption for the next three years is limited to approximately £115,000 in total. It is suggested that the minimal support provided by way of a proposed small advance cash-flow sum, together with support by transferring assets to a value of £7k at commencement for a nominal sum, means that the additional Council assistance is not significant, however any challenge might highlight other matters which are not considered at this point by the Council to be aid for the purpose of the limit.
- 3.11.7 However, there is a general rule that if aid which would otherwise be State aid is given on a commercial basis then that aid cannot be State aid. In the case of Aspire, whilst it is recognised that the Council may be providing them with assistance, there will be an estimated cost saving to the Council of £2.1m over the life of the arrangements. In addition, given the TUPE requirements to which the Council is subject, and that another provider would effectively have to receive staff on current terms and conditions, it is unlikely (in light of the fact that the vast majority of costs of the service are staffing costs) that any other provider would be able to provide the same services at a lesser price.
- 3.11.8 It is therefore considered that in so far as there might be a European market for the provision of care services and the assistance that the Council is providing to Aspire cannot be accommodated within the 'de minimis' exemption, then the arrangements between the Council and Aspire are sufficiently commercial that State aid will not arise.
- 3.12 Organisational impact
- 3.12.1 Officers are continuing consultation with staff and trade unions in respect of the TUPE transfer from the Council to the Social Enterprise. This formal consultation will build on the various engagement activities with staff and trade unions including written communication which has been taking place for some time. New staff who join the organisation will be paid as a minimum the Living Wage.
- 3.12.2 As was reported in the previous Executive Board reports, current staff will transfer under TUPE on the terms and conditions which are applicable at the time of the transfer including any which they are under notice of change. Staff on temporary contracts will be made permanent prior to commencement of the contract.
- 3.12.3 At the meeting of the directorate's Joint Consultative Committee on 16<sup>th</sup> February 2015 the Trade Unions were advised that Executive Board approval had now been given. A period of consultative meetings would now commence with the Trade Unions both with Leeds City Council as the outgoing service provider and with Aspire as the incoming provider. In order to ensure complete consultation staff meetings will be set up during March 2015 to inform all affected staff of the proposals to transfer the service to Aspire. These meetings will also allow all affected staff to have the opportunity of an individual consultation meeting.

## **4 Corporate Considerations**

### **4.1 Consultation and Engagement**

- 4.1.1 The extensive consultation and engagement with staff and service users that was undertaken was set out in the February 2014 and 2015 Executive Board reports.

## **5 Equality and Diversity / Cohesion and Integration**

- 5.1 The Executive Board report in February 2014 contained details of the Equality Screening and the Equality, Diversity, Cohesion and Integration Impact Assessment which had been completed at that time to ensure that equality considerations had been fully considered. A range of positive impacts were identified and these are presented in the February 2015 Executive Board report.
- 5.2 The Equality Impact Assessment notes that the various services which will be provided by the Social Enterprise are delivered to vulnerable people with a learning disability including some of the most vulnerable people in Leeds. Continuity of service provision is critical to such people and therefore the impact assessment has identified the importance of ensuring robust business continuity arrangements which are currently in place are maintained by the Social Enterprise and that further measures are put in place to counter any new risks which may arise as a result of the organisation leaving the Council.
- 5.3 The Equality, Diversity, Cohesion and Integration Impact Assessment has been and will be subject to regular review with the latest version presented to Executive Board in February 2015.

## **6 Council Policies and City Priorities**

- 6.1 Like many local authorities, Leeds City Council continues to face a major transformation challenge with regard to Adult Social Care in relation to what it can sustainably fund as demand continues to increase at the same time as overall funding is reduced. Linked to this challenge is the continued Council wide direction of travel, again in order to make best use of limited resources, in terms of moving from a large direct provider of services to one where there is a much greater emphasis on commissioning services and developing community capacity.
- 6.2 The creation of a Social Enterprise is a response to both of these challenges and will also contribute to a number of Council's strategic objectives i.e. 'Better Lives through Enterprise', 'Promoting sustainable and inclusive economic growth' and 'Civic Enterprise' as proposed by the recent Commission on the Future of Local Government.
- 6.3 The proposal for the creation of a Social Enterprise for learning disability services will also contribute to the delivery of the City and Council's priorities as outlined in the February 2015 Executive Board report.

## **7 Resources and value for money**

- 7.1 The business case for the development of a Social Enterprise was covered in the previous Executive Board report in February of this year. It was stated that the proposal whilst not delivering immediate financial savings, would provide a vehicle for the service to obtain new work in competition, and in turn providing improved value for money for the Council and therefore to the pooled budget in relation to the funding of new packages of care and support for people with learning disabilities. It was also stated that the Social Enterprise will be able to win new work in competition at a lower rate by employing new staff on salaries which will still be higher than the market average and commensurate with the Living Wage.
- 7.2 Although the immediate savings are marginal in the first year, the Council will realise cashable efficiencies of £2.1M over the whole contract period when compared with similar assumptions being made to keep the service in house. As explained earlier in

this report the contract is based on the Council's standard terms and conditions and as such will contain detailed performance standards to ensure ongoing quality of service which will be subject to regular review.

- 7.3 As explained in the section on proposed contractual arrangements, the contract will contain an annual review mechanism where the actual cost of known financial risks can be agreed. These costs are essentially increases in pay applicable to the TUPEd workforce and which would have been incurred if the service had remained in house.
- 7.4 Built into the contractual arrangements will be an agreement for the Social Enterprise to purchase support services from the Council at a market rate over the period of the contract with a formal review taking place after 2 years, together with minimum notice periods for changes to service level. The approach being followed is to ensure an arrangement which will provide benefit to both the Council in terms of minimising financial risk in relation to any future changes in the level of the provision of support services, and for the Social Enterprise in relation to access to professional and business support services at a market rate which enables it to compete for both new work and also sustain delivery of the main contract work in future years.
- 7.5 In general the contract documentation is being drawn up to reflect that current liabilities (to the date of transfer) will remain with the Council, and during the contract period there is an allocation of risk which reflects that this is a services contract between the parties on commercial terms.
- 7.6 In preparing the Social Enterprise business plan, financial provision has been made for additional costs related to the fact that it is a new and separate organisation from the Council. These costs were identified in the confidential Appendix A to the Executive Board report and have been subject to ongoing review in order that they are kept to a minimum. The provision contained in the business plan is therefore considered both reasonable and affordable over the lifetime of the contract.
- 7.7 The proposed legal status of the Social Enterprise is a Community Benefit Society, with an 'asset lock' written into its rules to ensure that private profit cannot be distributed by way of dividends, and that any surpluses are used for the benefit of the community.

## **8 Legal Implications, Access to Information and Call In**

- 8.1 Appendix 1 is exempt from publication in that it contains commercially sensitive financial information and information about business affairs of the Social Enterprise and the Council. Publication of this information would or would be likely to prejudice the commercial interests of the Social Enterprise, and of the Council. It is acknowledged that there is always a strong public interest in transparency and accountability in relation to contracts entered into by the Council, and also that there is a strong public interest in the public understanding the new arrangements for the Learning Disability Community Support Service. However, there is also a strong public interest in the new Social Enterprise being placed on a "level playing field" with potential competitors. In addition, the new Social Enterprise and its subsidiary will be subject to statutory requirements for the publication of certain financial and business information in the same way as all other Community Benefit Societies, and private companies. It is therefore recommended that in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- 8.2 The Executive Board report contained confirmation of the powers available to the Council to establish the social enterprise and the contract arrangements.
- 8.3 The procurement implications of this proposed contract award have been considered by the Chief Officer (PPPU and Procurement) and it should be noted that the

services proposed to be subject of the Social Enterprise model are Part B services under the current EU procurement regulations. As such, whilst the value of the services is above the relevant EU Services threshold (£172,514), the full requirements of the regulations in relation to the publication of a notice in OJEU etc., do not apply. However, European case law suggests that contracts of this value must be subject to a degree of advertising if providing these services would be of interest to contractors operating in another Member State.

- 8.4 Over the past 3 years, ASC has made contract awards in excess of £100m for Adult Social Care related services. The process undertaken in relation to those awards including publication of voluntary transparency notices (see paragraph 8.9 below) provides evidence that there has been no interest in tendering for such work by contractors in other European member states. The Executive Board report confirmed that Interim Director of Adult Social Care has considered this and, considering also the nature of the services being delivered and the requirement to be physically located in the City of Leeds, is of the view that the services involved in this contract would not be of interest to contractors based in other EU member states.
- 8.5 The anticipated new Public Contracts Regulations have recently been enacted, with an implementation date of 26 February 2015.
- 8.6 The Chief Procurement Officer has advised that given the current law, and case-law in relation to advertisement of Part B services, there is a risk associated with the course of action proposed. However, due to the nature of the contract the risk appears low and can be mitigated in advance of contract award by publication of a voluntary transparency notice in OJEU immediately after a decision to award the contract has been taken and then waiting 10 days to see if any challenges are made. If no challenges are made a claim for ineffectiveness cannot be brought. In addition, publishing such a notice will also start time running for any other potential claim for breach of the Regulations, which must be brought within 30 days of the date that an aggrieved party knew or ought to have known that a breach had occurred.
- 8.7 The Interim Director of Adult Social Services will need to waive Contracts Procedure Rules rules 9.1 and 9.2 to enable the award of a contract without competition to the Social Enterprise. The information contained in the Executive Board report and this report set out the risk, financial, social, and service reasons for such waiver.

## **9 Risk Management and Allocations**

- 9.1 The creation of a Social Enterprise, the associated contract award and transfer of business is a complex exercise and carries with it a number of areas of risk. Key risks in relation to procurement have been discussed in the previous section.
- 9.2 The previous Executive Board report confirmed that a detailed risk log together with mitigating actions had been prepared and a summary of this was available as a background document. The earlier report also stated that a number of risk areas had been identified and mitigation plans for both the Council and the emerging Social Enterprise have been addressed with the support of a range of officers across the Council including Finance, HR, Risk Management Unit, Procurement Unit and Taxation Team. The full risk log has been subject to regular review and update since that time.
- 9.3 A key risk area, given the proposed transfer of services from the Council to the Social Enterprise, relates to the inability of the latter to deliver the services as specified in the contract. In relation to business continuity planning, the service currently has well developed plans which are subject to regular review and these can transfer and be applied to the new organisation for immediate use.

- 9.4 From a financial perspective there is a related risk that the Social Enterprise may not be able to fulfil its obligations under the contract due to a deteriorating financial position i.e. if significant unplanned costs arise for which the Social Enterprise is deemed liable. The five year business plan for the Social Enterprise summarised in the Executive Board report identifies a relatively small deficit in the first year of the contract period which is largely explained by the initial set up costs and the fact that winning new business and delivering efficiencies will take time.
- 9.5 A number of actions are in place to mitigate against this, including the detailed financial planning and support currently taking place, the financial review undertaken by the independent support from the Cabinet Office Mutuals Support Programme, and the various check and challenge activities provided by corporate support colleagues, including a detailed financial risk allocations matrix. The cashflow statement shows that there will be sufficient working capital throughout the contract period. If the Social Enterprise could not fulfil its obligations under the contract, the Council would need to secure alternative provision, either by reverting to in-house provision or by procuring services externally, and in either case additional costs would be incurred. However the independent financial advisers to the Social Enterprise consider the business plan to be financially viable and the Interim Director of Adult Social Services considers the level of financial risks to be acceptable. In addition to the above the Social Enterprise will be putting in place sufficient insurance to cover itself against e.g. public liability claims.
- 9.6 The Interim Director of Adult Social Services has reviewed the growth assumptions within the model and considers these to be prudent and based on the demographic demand trends for learning disability services from the pooled budget. These assumptions include the conversion of temporary 1:1 arrangements into the creation of new posts in the Social Enterprise in year one and the development of one new service in each of years two and three. These two services are of the kind for which there is under supply in the market and which would otherwise lead to high cost out of area placements.
- 9.7 In addition to the key risks that have been addressed within the main body of the report, an updated summary risk table which details the high level risks for both the Council and an emerging Social Enterprise is available at Appendix 3.

## **10 Conclusions**

- 10.1 Discussions have now progressed to a position where the Interim Director is able to award the contract to Aspire Services (Leeds) limited, and the transfer arrangements to the group as a whole.
- 10.2 Property matters will be subject of further reports to the Director of City Development, and the social enterprise will be granted leases and licences as appropriate at market rents/licence fees, and service charges.
- 10.3 The final steps in the process to signature will include the issue of a voluntary transparency notice in the Official Journal of the EU (OJEU).

## **11 Recommendations**

The Interim Director of Adult Social Services is requested to:

1. Note the further progress made :
  - to finalise the terms of the Services Agreement

- to finalise agreements required for the enterprise to function including those relating to the transfer of the service including staff and non-buildings based assets, provision of support services by the Council and those relating to the occupation / use of property by the Social Enterprise,
  - to complete discussions on achieving an appropriate commercial balance between the Council and the Social Enterprise
- relating to formal consultation with staff and trade unions in relation to the TUPE transfer of all staff defined as 'in scope' for this service.
2. Note the advice now received on state aid risk
  3. If the Interim Director is satisfied with the progress of matters as now reported approve:
    - a) the award of the contract for services without competition to Aspire Services (Leeds) Limited for a period of 5 years to commence on 1 June 2015 with the option for the Council to extend this period for a further 12 months;
    - b) the terms of the following documentation to complete the transfer of the service and contract for services to the Social Enterprise:
      - (i) Services Agreement between the Council and Aspire Services (Leeds) Limited
      - (ii) Transfer Agreement between the Council and Aspire Community Benefit Society Limited
      - (iii) Admissions Agreement between the Council, West Yorkshire Pension Authority, and Aspire Community Benefit Society Limited
      - (iv) Support Services Agreement between the Council and Aspire Community Benefit Society Limited;
    - c) the value of the contract in the first year of £20.027M per annum (subject to any minor variations necessary following final due diligence as set out in paragraph 3.4.1), this will be pro rata in Year one (2015/16) if the contract commences on 1<sup>st</sup> June 2015 and the anticipated value of the contract in subsequent years of the contract as contained in exempt appendix 1, identifying savings to the Council over the current cost of provision in subsequent years.
  4. Note and approve that Aspire Services (Leeds) Limited will enter into a sub-contract with Aspire Community Benefit Society for provision of the services
  5. Note that following consultation a report has been submitted through the Director of City Development's governance process for approval (under existing delegated powers) to the terms of the necessary leases/licences (co-terminus with the Services Agreement) to document the occupation of premises to be utilised for the provision of the service.
  6. Approve, using the authority set out in Contract Procedure Rule 1.3, the waiving of Contracts Procedure Rules 9.1 and 9.2 to enable award of the services contract

## 12 Background documents<sup>1</sup>

---

<sup>1</sup> The background documents listed in this section are available to download from the Council's website, unless they contain confidential or exempt information. The list of background documents does not include published works.