

Report of the Director of Adult Social Services

Report to

Date: 23rd September 2020

Subject: Proposal for the contracting model for 10 complex dementia beds at the Hub @ South Leeds : Request to utilise the negotiated procedure without prior publication of a notice under Regulation 32 of the Public Contracts Regulations 2015 to engage with Leeds Community Health Trust to establish a new contract for a period of 2 years

Are specific electoral wards affected? If yes, name(s) of ward(s):	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Has consultation been carried out?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Are there implications for equality and diversity and cohesion and integration?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Will the decision be open for call-in?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Does the report contain confidential or exempt information? If relevant, access to information procedure rule number: Appendix number:	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No

Summary

1. Main issues

- A robust commissioning and contracting approach needs to be agreed and implemented for the 10 complex dementia beds that are being established in the Hub @ South Leeds. The model is aimed at best meeting the expectations of all parties whilst adhering to procurement and contracting regulations. No party should be disadvantaged as a result of opting to enter into this collaborative initiative.
- The proposed contracting model is as follows: The total revenue funding for the service will be pooled in the Better Care Fund Section 75 Agreement (the Section 75) . The Section 75 will nominate the CCG as the lead commissioner of the service and LCC as the lead provider. LCC would source nursing and physiotherapy services from Leeds Community Healthcare Trust (LCH) as a sub-contractual arrangement.

2. Best Council Plan Implications (click [here](#) for the latest version of the Best Council Plan)

- Supports a compassionate and caring city and

- tackles inequality with a service that seeks to provide a better experience for people living with dementia and for their families/carers

3. Resource Implications

- The total revenue funding for the service is £1.883m over two years. The majority of the funding for the service comes from repurposed CCG funding (£1.410m) with additional financial support of £0473m from Leeds City Council. These figures include a part of the agreement reached at ICE that the CCG and LCC invested an additional £368k per annum for the two years of the pilot to be shared 50:50 based on the split of historical expenditure for similar placements. For this additional element this means that LCC is contributing £184k per annum over the two years (£368k total). This spend is already approved in the 2020-21 budget set at the February Full Council meeting (mins page 127, appendix 8, section 3.10.2) so does not form part of this key decision.
- In order for LCC to act as the lead service provider the Directorate of Adults and Health will utilise its in-house provision to undertake the care and support service requirements to the value of £1.315m
- In order to award the contract/enter into partnership with Leeds Community Healthcare Trust for the provision of nursing and physiotherapy services, the Director of Adults and Health is asked to grant the authority to procure the above service by utilising the negotiated procedure without publication of a notice under regulation 32 (2) (b) (ii) of the Public Contracts Regulations 2015 where services can only be provided by LCH subject to the completion of the procurement and governance processes due to absence of competition due to technical reasons to the value of £465,000.

Recommendations

The Director of Adults and Health is recommended to:

1. enter into an agreement with the CCG to pool previously approved LCC funding and re-designated CCG funding in the Better Care Fund Section 75 Agreement with Leeds CCG (total pooled value £1.883m over 2 years) – for the service.
2. use Adults and Health in-house provision to undertake the care and support service requirements to the value of £1.315m to establish LCC to be the lead provider of the service
3. to approve the use of the negotiated procedure without prior publication of a notice under Regulation 32 (2) (b) (ii) of the Public Contracts Regulations 2015, for an initial period of 2 years at a total value of £465,000, resulting in the award of a contract to Leeds Community Healthcare Trust to deliver nursing and physiotherapy services.

1. Purpose of this report

- 1.1 The purpose of this report is to seek approval for a proposed contracting approach for the 10 complex dementia bed service that has been put together through dialogue with the three parties involved (LCC,LCH and Leeds CCG) based on procurement and contracting advice. The contracting model has implications on funding flows and contractual decisions as set out in 3.2 below.

2. Background information

- 2.1 In November 2019 the Integrated Commissioning Executive (ICE) agreed to support the implementation of a pilot 10-bedded complex dementia service based in the Hub @ South Leeds. The service was originally scheduled to open in June 2020 but the project was put on hold due to the Coronavirus pandemic. In June 2020 ICE reinstated the project and it is now scheduled to open in late October 2020. The service will primarily take referrals from the Mount at LYPFT and will meet a gap in the current market that causes people with dementia to experience long delayed transfers of care.
- 2.2 The Hub @ South Leeds previously provided 40 Community Care Beds (CCBs) as part of the 'Alliance' CCB contract with Leeds CCG. The introduction of the 10 complex dementia beds therefore reduces the CCB capacity of the Hub @ South Leeds from 40 to 30 beds. Leeds CCG is comfortable with this reduction in the number of CCBs as there is an established under-utilisation of CCB beds as well as a recognition that more community capacity was needed for people with more complex dementia needs. Part of the proposal around the contracting arrangements will therefore include a mutually agreed variation to the CCG contract with the Alliance (lead provider LCH) to reduce the CCB contract by 10 beds.
- 2.3 The total revenue funding for the service is £1.883m over two years. The majority of the funding for the service comes from repurposed CCG funding (£1.410m) with additional financial support of £0.473m from Leeds City Council. These figures include a part of the agreement reached at ICE that the CCG and LCC invested an additional £368k per annum for the two years of the pilot to be shared 50:50 based on the split of historical expenditure for similar placements. For this additional element this means that LCC is contributing £184k per annum over the two years (£368k total). This spend is already approved in the 2020-21 budget set at the February Full Council meeting (mins page 127, appendix 8, section 3.10.2) so does not form part of this key decision.
- 2.4 Leeds and York Partnership Foundation Trust (LYPFT) will also provide specialist support into the 10 beds as part of their ongoing core contract responsibilities with Leeds CCG.
- 2.5 Following discussions between LCC, the CCG and LCH, including procurement and contracting steer, and the appraisal of various options, consensus was reached on a contracting model proposal that best meets the requirements of the parties involved; reflects the partnership and voluntary nature of the initiative and complies with appropriate procurement and contracting regulations and flexibilities.
- 2.6 The proposed contracting model is as follows: The total revenue funding for the service will be pooled in the Better Care Fund Section 75 Agreement (the Section 75) (note that all of the funding, with the exception of the additional £368k per annum referred to in 2.3 above, is already part of the Section 75). The Section 75 will nominate the CCG as the lead commissioner of the service and LCC as the lead provider. Nursing and physiotherapy services would be sourced from Leeds Community Healthcare Trust.

3. Main issues

- 3.1 A robust commissioning and contracting approach needs to be agreed and implemented for the 10 complex dementia beds in order to best meet the expectations of all parties whilst adhering to procurement and contracting

regulations and which leaves no party disadvantaged as a result of opting to enter into this collaboration.

- 3.2 With the exception of the additional £368k per annum referenced in 2.3 above (50:50 CCG:LCC contributions), the £1.883m total cost of operating the 10 beds for two years is funded through the repurposing of existing CCG monies that already sit within the Leeds Better Care Fund, i.e. Community Care Bed funding. This is a key decision because under this contracting proposal:-

From a financial perspective:

- LCC would become lead provider of the 10 beds and receive the BCF funding income of £1.883m over the two years of the initiative.
- Sourcing the nursing and physio support from Leeds Community Healthcare Trust (LCH) would mean passing on approx. £465k of the £1.883m over the two years of the initiative to LCH.

From a contractual and in-house service delivery perspective:

- Agreement to pool the £1.883m within the BCF section 75
- Agreement to nominate LCC as the lead provider and utilise Adults and Health in-house provision to undertake the care and support service requirements for the 10 complex dementia beds.
- Agreement to contract directly with LCH for delivery of nursing and physiotherapy services using the negotiated procedure without prior publication of a notice under Regulation 32 (2) (b) (ii) of the Public Contracts Regulations 2015.

- 3.3 In conjunction with Procurement and Commercial Services (PACS) and the wider stakeholders an options appraisal has been undertaken regarding the approach for commissioning the 10 complex dementia care beds. On the outcome of the options appraisal and the current contractual obligations with the same partners for the 40 Community Care Beds at The Hub @ South Leeds, only LCH are considered able to meet the requirements in terms of being a suitably qualified and experienced provider able to provide and deliver the services required under the current partnership model defined under section 2.2.

- 3.4 The award of a contract to LCH utilising the negotiated procedure without publication of a notice under the Public Contracts Regulations 2015 (Regulation 32 (2) (b) (ii) is therefore recommended.

- 3.5 Regulation 32 (2) (b) (ii) of the Public Contracts Regulations (2015) states:-

In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated procedure without prior publication.

General grounds

(2) The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:—

(b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:—

(ii) competition is absent for technical reasons

3.6 It is considered the above ground applies in this case as there is strong evidence that no reasonable alternative to LCH providing the services exists in the unique circumstances in which the service will operate:

3.6.1 It is considered that Leeds Community Healthcare Trust (LCH) is the only provider that can feasibly deliver this service because:

- the service is being provided on one corridor within the same care home as an established wider care home service (namely the Community Care bed service) which is delivered jointly by LCC and LCH (with LCH as the lead contracted provider with Leeds CCG)
- LCH provide the nursing and therapy input into the Community Care bed service and will provide the same into the 10 complex dementia beds
- The model relies on the flexibility of both LCH and LCC staff being able to work across BOTH service areas (i.e. the 10 complex dementia beds AND the 30 Community Care Beds)
- Furthermore, having a third care provider operate in the same care home would create challenges to the safe and co-ordinated operation of the whole home.

4. Corporate considerations

4.1 Consultation and engagement

4.1.1 The development of the 10 complex dementia beds is driven by the priorities set out in the Leeds Dementia Strategy (due for final sign off at the Health & Well Being Board September 2020). The process for agreeing the content of the Strategy included consultations with all stakeholders including people living with dementia and their families/carers. The Leeds Dementia Partnership which oversaw the development of the strategy includes representation from a number of carers of people living with dementia.

4.1.2 The service consulted on the new development proposal with Trade Unions representing LCC staff members at meetings on 02.12.2019, 03.02.2020 and 15.06.2020

4.2 Equality and diversity / cohesion and integration

4.2.1 The 10 complex dementia beds are being developed in line with Leeds Dementia Strategy (see 4.1.1 above). A primary aim of the service is to better meet the needs of people living with complex dementia and their families. One aim of the new service is to provide informal family carers with more options when the cared-for person is being discharged from an acute dementia bed.

4.3 Council policies and the Best Council Plan

4.3.1 Supports a compassionate and caring city and tackles inequality with a service that seeks to provide a better experience for people living with dementia and for their families/carers

Climate Emergency

4.3.2 A Climate Emergency Impact assessment and Action Plan will be required from the service and its delivery will be monitored.

4.4 Resources, procurement and value for money

4.4.1 The total revenue funding for the service is £1.883m over two years. The majority of the funding for the service comes from repurposed CCG funding (£1.410m) with additional financial support of £0.473m from Leeds City Council. These figures include a part of the agreement reached at ICE that the CCG and LCC invested an additional £368k per annum for the two years of the pilot to be shared 50:50 based on the split of historical expenditure for similar placements. For this additional element this means that LCC is contributing £184k per annum over the two years (£368k total). This spend is already approved in the 2020-21 budget set at the February Full Council meeting (mins page 127, appendix 8, section 3.10.2) so does not form part of this key decision.

4.4.2 One of the drivers for this initiative is the fact that the market is not currently able to meet demand for people discharged from the Mount, the evidence for this can be seen in the NHS Delayed Transfers of Care data. This service will provide additional capacity to the market. Furthermore in 2019 LCC and the CCG jointly externally commissioned a number of packages of care in excess of £2,500 per bed per week which this service could have been able to provide at a lower unit cost. This aspect will form part of the service evaluation with improved value for money being one of the key success criteria.

4.5 Legal implications, access to information, and call-in

4.5.1 This is a key decision as the maximum cost of the service is more than £500k. A notice was published on the List of Forthcoming Key Decisions on 21st August 2020 and the report will be subject to call in.

4.5.2 This report does not contain any exempt or confidential information under the Access to Information Rules

4.5.3 Regarding the use of the negotiated procedure without the publication of a notice, it must be noted that there is the potential risk of challenge that there are no real technical reasons justifying the use of the negotiated procedure without publication of a notice under regulation 32 (2) (b) (ii) in accordance with the Public Contracts Regulations 2015, and that the Council is simply seeking to circumvent the application of the procurement rules. The reasons set out in Section 3.6 of this report are the justifications the Council would rely on to defend the decision.

4.5.4 In addition, this risk can be further mitigated by the publication of a Voluntary Transparency Notice (VTN) in the Official Journal of the European Union (OJEU) in accordance with the Public Contracts Regulations 2015, immediately after the decision to enter into negotiation has been taken and waiting 10 days to see if any challenges are made. If no challenges are made the chances of a claim for ineffectiveness being brought are significantly reduced, and would only be successful if the Council had used the negotiated procedure without publication of a notice incorrectly. Further, publishing such a notice will also start time running for any other potential claim for breach of the Public Contracts Regulations 2015, 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.

- 4.5.5 It should be noted that voluntary transparency notices themselves can be challenged. The recent case of Italian Interior Ministry v Fastweb SpA (Case C-19/13) highlights the limited protection that the voluntary transparency notice route can offer to contracting authorities wishing to make direct awards without following an OJEU process. A grey area remains around whether the protection of a voluntary transparency notice will be available where the contracting authority genuinely, but mistakenly, considers it was entitled to award the contract without notice. It shows that the safe harbour will only be 'safe' to the extent that the justification for the direct award is in itself sound and ready to stand up to the increased scrutiny that the publication of the voluntary transparency notice may well invite.
- 4.5.6 Any subsequent decisions arising from this report, for example the decision to award the contract, will be treated as a consequence of this key decision and will therefore be a significant operational decision which will not be subject to call in.
- 4.5.7 These comments should be noted by the Director of Adults and Health. In making the final decision as to proceed with the recommendations as being the best course of action for the Council and that in doing so it represents best value for the Council.

4.6 Risk management

- 4.6.1 The implementation of this contracting model is dependent on all external parties involved (Leeds CCG and LCH) implementing this model within their own governance procedures in a timely fashion. The mitigation to the risk is to continue to work in partnership with these organisations and to provide them with clear timetables for the actions required from them.
- 4.6.2 Other external factors have the potential to delay the mobilisation of the service itself (pandemic restrictions; recruitment issues amongst the provider partners; any delays to the completion of environmental building works). In this circumstance the implementation of the contracting arrangements would need to be delayed but all background and documentation preparation could continue.
- 4.6.3 There is a likelihood that the proposed sub-contractual arrangement with LCH won't be in place until after the service start (potentially mid-November to get this in place to allow a reasonable period for negotiation). Leeds CCG are aware that this period may require a bridging arrangement and we will work with them to ensure that they put in place an interim arrangement using their existing contractual relationship with LCH.
- 4.6.4 If the recommendation is not approved there is a high risk that that we will have very limited options for placing people with complex dementia given the limited specialist nursing home availability within the wider market. This would increase the likelihood of more expensive and out-of-area placements and could lead to lengthy delayed transfers of care from LYPFT acute beds. Any delay would mean that the service would not be in place to meet additional Winter 2020-21 pressures.

5. Conclusions

- 5.1 The contracting proposal for the 10 dementia beds has been arrived at through lengthy dialogue with all parties involved and with contracting and procurement advice from LCC and Leeds CCG. The proposed contracting model allows LCC to

be lead provider (which is logical given that the service will be delivered within an LCC care home, primarily with LCC staff and that LCC is the CQC-registered provider) and also makes use of our partnership flexibilities within the BCF Section 75. LCH also prefer this model whereby they are more appropriately the sub-contractor and not the lead provider.

6. Recommendations

The Director of Adults and Health is recommended to:

1. enter into an agreement with the CCG to pool previously approved LCC funding and re-designated CCG funding in the Better Care Fund Section 75 Agreement with Leeds CCG (total pooled value £1.883m over 2 years) – for the service.
2. use Adults and Health in-house provision to undertake the care and support service requirements to the value of £1.315m to establish LCC to be the lead provider of the service
3. to approve the use of the negotiated procedure without prior publication of a notice under Regulation 32 (2) (b) (ii) of the Public Contracts Regulations 2015, for an initial period of 2 years at a total value of £465,000, resulting in the award of a contract to Leeds Community Healthcare Trust to deliver nursing and physiotherapy services.

7. Background documents¹

7.1 None.

8. Appendices

8.1 None

¹ 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.