

Variation of the current Overarching Agreement for placement of people in a residential or nursing home (Scheme ID: DN339954).

Date: 22nd February 2023

Report of: Head of Commissioning

Report to: Interim Director Adults & Health

Will the decision be open for call in? Yes No

Does the report contain confidential or exempt information? Yes No

Brief summary

In May 2018, the Director of Adults and Health approved a decision to put in place an Overarching Agreement (Framework) for the provision of older people's residential care in the city (Decision reference D47511). The agreement was put in place for a period of 4 years and 9 months from the 1st July 2018 to the 31st March 2023 and governed the placement of people needing residential and nursing care.

This report seeks to vary the Overarching Agreement to allow an extension of the contract term for a period of one year from the 1st April 2023 with the option to extend for a further period of one year if necessary, to allow Commissioners to update the contract document in consultation with the independent sector care home providers.

Recommendations

The Interim Director of Adults and Health is recommended to:

- a) To approve the variation of the Overarching Agreement for placement of people in a residential or nursing home (Scheme ID: DN339954) using Regulation 72(1)(b) of the Public Contracts Regulations 2015 to allow an extension of the contract term for a period of 1 year from the 1st April 2023, with the option to extend this period for a further 12 months if necessary.
- b) To use delegated authority to enter into Care Home Individual Service Agreements for each placement made under the Overarching Agreement.
- c) To note the Commissioning Programme Leader will oversee implementation of the contract variation in conjunction with colleagues from Procurement and Commercial Services, with the service being subject to robust contract monitoring in line with the provisions set out in the Overarching Agreement.

What is this report about?

- 1 The report requests a variation of the existing agreement for the placement of people in a residential or nursing home in the city which currently expires on 31st March 2023, to allow for an extension of the contract term for one year plus option of a further 12 months. There is no extension provision under the current overarching agreement and it is recommended the Council seeks to modify the end date of this agreement using the provision of Public Contracts Regulation 2015 (PCR), Regulation 72 (1)(b) which permits the modification of contracts during their term. This report seeks approval to use Regulation 72(1)(b) of the PCR to modify the current overarching agreement to enable the continued placement of people in residential/nursing homes, which is necessary while the consultation with the independent sector care home providers is carried out, and a new procurement at this current time would cause significant inconvenience and substantial duplication of costs to the Council.
- 2 In May 2018, the Director of Adults and Health approved a decision to put in place an Overarching Agreement (Framework) for the provision of older people's residential care in the City (Decision reference D47511), for a period of 4 years and 9 months from the 1st July 2018 to the 31st March 2023.
- 3 The Overarching Agreement allows the council to place a person in a residential or nursing care home without the need to issue a full set of contract documents relating to that placement. When the council makes a placement in a care home all three parties (the council, the care provider and the resident) will enter into Care Homes Individual Service Agreement (CHISA) which forms part of the Overarching Agreement. The completion of the CHISA will create the contractual relationship between the three parties.
- 4 There are currently 85 independent sector care homes for older people in the Leeds City Council boundary and currently 93% of those homes are signed up to the Overarching Agreement. Participation in the Overarching Agreement is only open to Care Quality Commission registered care homes who are located in the Leeds City Council boundary. To participate in the Overarching Agreement, care home providers are required to go through a simple application process that is facilitated by Procurement and Commercial Services. Following due diligence checks, providers sign up to the agreement and can then accept individual placements through the CHISA. The application process remains open during the life of the contract and providers can apply to join at any time.
- 5 By signing up to the Overarching Agreement this does not place any obligations on providers to accept a local authority placement in their home. Where a care home provider has chosen not to participate in the Overarching Agreement and where a person has made a choice to go to that home the local authority will offer a spot placement with that home based on the same terms and conditions.
- 6 During 2021, the Government introduced a policy paper, People at the Heart of Care: adult social care reform, setting out their plans to fundamentally reform the funding and delivery of adult social care. There were 4 key elements to this reform: a cap on the amount any individual can spend on their personal care over a lifetime; a more generous system of means testing; a 'fair' cost of care exercise and the enactment of section 18(3) of the Care Act which would have meant people who were self-funding their care home placement could ask the council to contract for the care on their behalf. These reforms were due to be introduced in October 2023 and would have had a significant impact on the content of the care home contract the council would need with providers.
- 7 It would normally take approximately 12 months to go through a recommissioning exercise for a significant contract such as the Overarching Agreement, and therefore, given the significant

reforms that were being introduced, it was thought prudent to vary the current Overarching Agreement to allow an extension of the contract on the same terms for a period of 12 months plus a further 12 months during which time the implications of the care reform would be known, and these could then be incorporated into the terms of a new contract going forward. However, during the 2022 autumn statement, the Government announced it was delaying the rollout of the social care charging reforms until 2025.

- 8 Whilst there is still some uncertainty as to whether the charging reforms will be implemented by this date, the Overarching Agreement will still need to be updated given it has been in place since 2018. During the extension period a redraft of the current contract can take place to ensure it is up-to-date and a full consultation process can occur in line with normal commissioning practice.

What impact will this proposal have?

- 9 By extending the contract for a period of 12 months plus a further period up to 12 months, it will allow the continuation of care home placements, through the CHISA, to be made with care home providers who have signed up to the Overarching Agreement.
- 10 During the extension period commissioners will be able to update the Overarching Agreement to ensure it meets current best practice and legislation and will be able to ensure the new document is consulted on in line with normal commissioning practice. As mentioned in 8 above, given the uncertainty with the introduction of the care reforms, a decision will need to be taken about the length of any new contract to ensure the implications of those reforms can be incorporated into the contract should they be implemented.
- 11 The extension of the current contract will allow contract managers in Adults and Health to continue to monitor the care being provided in the care homes to ensure that quality services are being delivered and take the necessary action where this is not the case.

How does this proposal impact the three pillars of the Best City Ambition?

Health and Wellbeing

Inclusive Growth

Zero Carbon

- 12 Under the Care Act 2014, the Council has a statutory responsibility to meet a person's care and support needs where they have been assessed (needs and financial) as requiring a particular type of accommodation. The Care Act also places a duty on the authority to facilitate a care market that offers a diverse range of high-quality and appropriate services. By extending the current Overarching Agreement, it will allow the Council to meet both these statutory duties by ensuring care home placements are available for people who have been assessed as needing one and ensuring contracts can be managed and monitored to maintain high quality services available to citizens.
- 13 By ensuring contracts are managed through robust contract monitoring, this will contribute to a key outcome of the Health and Wellbeing strategy 2023 – 2030 in ensuring the people will live in healthy, safe and sustainable places.

What consultation and engagement has taken place?

Wards affected:

Have ward members been consulted? Yes No

14 The impact of this proposal will have a benefit across all wards within Leeds therefore the Executive Member for Adult and Children's Social Care and Health Partnerships has been kept apprised of the need to extend this contract.

What are the resource implications?

15 The overall Adults and Health budget for older people's care homes in 2023/24 is £71.6m. The extension of the of the current Overarching Agreement will have no direct financial implications however, each Care Home Individual Service Agreement will contribute to the spend against the overall budget. The current cost of a placement in non-specialist care homes based on current framework prices ranges from £31,252 to £37,128 depending on the type of care being provided.

16 Each April, the council sets it's framework rates (fees) for local authority placements being made in independent sector care homes. This is done as part of the Overarching Agreement. The rates are set for each care category in older peoples care homes i.e., residential, residential dementia, nursing, nursing dementia. The setting of fees for care homes for 2023/24 is subject of a separate report to the Interim Director of Adults and Health.

What are the key risks and how are they being managed?

17 As mentioned in paragraph 12 above, The Care Act places a duty on the authority to facilitate a care market that offers a diverse range of high-quality and appropriate services. There are significant risks to the local authority and more importantly to the service uses should care providers fail to provide high quality services at a care home. Under the terms of the Overarching Agreement the council is able to undertake robust monitoring of the service through announced and unannounced visits to ensure quality standards required by the contract are being maintained. Where standards within the home are not being maintained the Overarching Agreement allows the Council to put in place remedial actions for the provider such as improvement action plans and also allows the council to suspend any further placements in the home until improvements have been achieved.

What are the legal implications?

18 This is a Key Decision which is subject to call-in as the value the CHISAs made under the Overarching contract is greater than £500k. A notice has been published on the List of Forthcoming Key Decisions.

19 The current overarching agreement has no extension provision.

20 The modification of the contract is permissible under the Public Contracts Regulations 2015 (PCR) 72 -modification during the term of the contract. When contracts are varied on reliance on Regulation 72(1)(b), it is a requirement to submit a modification notice to Find a Tender (FTS) to alert the market that a modification to the contract has taken place (or is to take place). Once the notice is published on FTS it will start time running for bringing a claim for a breach of the PCR, 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. The service will ensure a modification notice to that effect will be published

21 This decision is compliant with Regulation 72 (1)(b) which permits modification of contracts during their term without a new procurement procedure:

“(b) for additional works, services or supplies by the original contractor that have become necessary and were not included in the initial procurement, where a change of contractor—

(i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement, or

(ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority,

provided that any increase in price does not exceed 50% of the value of the original contract;”

22 It is considered that the above conditions have been met for the following reasons:

- a) the additional services “have become necessary” to ensure a continuation of existing services while the Council is undertaking a consultation with the independent sector care home providers as mentioned at paragraph 1 above;
- b) the additional 12 months plus option of further 12 months is to allow the Council time to undertake the above consultation. As mentioned at paragraphs 6 to 8 above, there has been delay to the social care charging reforms and to re-procure a new contract at this current point in time without knowing the full extent of the reforms will result in significant inconvenience and substantial duplication of costs for the Council; and
- c) the value of the proposed variation is £142m, which equates to approx. 47% of the original contract value. Taking these figures into account, the variation of the contract to allow for an additional 12 months plus a further option of 12 months does not exceed 50% of the initial contract value.

23 However, if this Regulation 72(1)(b) is used incorrectly, and it is subsequently determined that the above conditions are not met, the Council will be open to legal challenge that it has breached the procurement rules. Further, an aggrieved contractor could potentially argue that it has missed out on a competitive opportunity and thereby seek damages for that loss of opportunity. These risks are considered low for the reasons stated in this report.

24 Residential and nursing care contracts are deemed “Exempt” contracts under Contract Procedure Rules as the Council has a duty to provide such services under the Care Act and the recipient of care has a personal choice in the matter, however, compliance with Public Contracts regulations is still required.

25 A simple application process is used for providers to sign up to the Overarching Agreement, rather than a formal procurement process. The application process will remain open for all care homes within the Leeds City Council boundary to apply during the extension period.

26 Although there is no overriding legal obstacle preventing the use of Regulation 72(1)(b), the above comments should be noted by the decision maker in making the final decision and should be satisfied that doing so represents best value for the Council.

Options, timescales and measuring success

What other options were considered?

27 There were no other options considered at this stage.

How will success be measured?

28 Success will be measured by ensuring a sufficient number of care homes sign up to the Overarching Agreement for the extension period.

What is the timetable and who will be responsible for implementation?

29 The Commissioning Programme Leader will oversee implementation of the contract variation in conjunction with colleagues from Procurement and Commercial Services. Care providers will be asked to agree to the variation following expiry of the call-in period, but before the current overarching agreement expires on the 31st March 2023.

Appendices

- Appendix 1 - Equality Impact Screening Tool.

Background papers

None.