

CHESHIRE EAST COUNCIL

Cabinet

Date of Meeting: 4th February 2014
Report of: Director of Adult Social Care and Independent Living, Brenda Smith; Director of Public Health, Heather Grimbaldeston; Director of Children's Services, Tony Crane.
Subject/Title: Strategic Joint Commissioning for Improved Outcomes and Value for Money
Portfolio Holders: Cllr Janet Clowes, Health and Adult Care and Cllr Rachel Bailey, Children and Family Services and Rural Affairs

1 Report Summary

- 1.1 Cheshire East Council is at a key point in its development as a leading Commissioning Council working for the longer term benefit of citizens and businesses. The Council's stated intention is to focus skills and capacity on ambitious transformation of the use of the public purse to improve outcomes for citizens and local business and improve value for money. Improvements in health and well-being outcomes for children and adults will be achieved by developing new approaches that result in positive behaviour and attitudinal changes. Achieving a substantial increase in the numbers of citizens who make healthy lifestyle choices or who improve their educational and vocational attainment will require earlier and different interventions.
- 1.2 The longer term benefits of these redesigns will manifest in better outcomes being achieved for an overall lower cost. As prevention and early intervention begins to improve population health and improve economic success for local citizens and businesses less demand on specialist high cost support should result. Efficiencies will be made by joining up currently separate spends then redesigning jointly to eradicate duplication or ineffective interventions.
- 1.3 In this context the Council's strategy is to de-prioritise or stop activity that does not meet its agreed outcomes, in order that capacity is focussed on that transformation. There is a key opportunity to realise that strategy, for Directors to work jointly and begin to design transformation of services. This joint proposal from adults, children's and Public Health is that a group of existing contracts will not be re-tendered until there has been a whole system redesign across public health, adult social care, children's services, CCGs and other partners. Contracts for social care and health will be awarded without competition to current providers.

- 1.4 The contracts values to total as follows:
- Adult Social Care £4,837,017 p.a.
 - Public Health £10,204,759 p.a.
 - Children's Services £1,648,385 p.a.
- 1.5 Changes to commissioning operation over the last 12 months and the inheritance of NHS Service contracts that were procured under different rules, has led to a number of contracts/areas of spend having been found to be historically non-compliant with Council Procurement Rules. This paper outlines a new approach to ensure this is not repeated in future. To deliver this approach and ensure that Council resources are being utilised appropriately and efficiently to meet outcomes, additional commissioning capacity is likely to be needed. Robust commissioning reviews on all areas of spend in this report will be required.
- 1.6 This approach will require a waiver from the Council's Contract Procurement Rules as detailed in the decisions requested and as outlined in the legal implications below as contracts will be extended with current providers without a competitive tender for a limited and defined period of time.
- 1.7 There will be a planned programme of whole system commissioning reviews across groups of interrelated existing service contracts. These will be prioritised in line with key criteria:
- Value of the spend
 - Scale of the potential to make cashable efficiencies as part of negotiated extension
 - Alignment with the existing commissioning plans
- 1.8 A proposed timetable for these reviews has been developed and as commissioning reviews are completed to that timetable further reports will come to Cabinet with recommendations.
- 1.9 These redesigns will produce creative new service specifications based on outcomes and improved value for money. Redesign will be complex, challenging for existing service providers and will require substantial development of local markets. During this period the local market will be stimulated so that local enterprises can emerge or grow that are able to compete for new outcome driven services.
- 1.10 To enable this, sufficient time and capacity must be allocated to ensure redesigns are realised. Contracts due to end in the next 2 years will be extended for a period of up to two years without formal tendering. This will

avoid a waste of capacity on tenders that replicate existing services which will not be fit for the future.

- 1.11 Before these contracts are extended negotiations with existing providers will seek challenging efficiencies, to be realised as a condition of extensions and within the extended period. In addition opportunities will be taken to agree service realignments where this will enhance outcomes. This will ensure that the Council and partners achieve continuous improvement and value for money during the redesign period. There will be no fundamental changes to the service scopes or outcomes during the extension periods. There will be no negative impact or change for the users of these services.
- 1.12 Should the commissioning reviews indicate that a particular service should cease that will be the recommended action.

2 Recommendations

- 2.1 That there is a waiver from following Contract Procurement Rules for the group of contracts that fulfil the spend areas listed.
- 2.2 That the decisions relating to said contracts are delegated to the relevant Directors in consultation with relevant portfolio holder.
- 2.3 That officers are authorised to take all necessary steps to implement the proposal.

3 Reasons for Recommendations

- 3.1 A number of current contract service specifications will not be fit for the Council's vision of the future. Continuing to tender for those services without radical whole system redesign will delay the transformation required to meet that vision.
- 3.2 The Council's ambition is to increase the positive impact on outcomes for citizens in collaboration with partners such as Health. Resources in communities, public sector and businesses need to be brought together to achieve outcomes and increase value for money for the public purse. This is not how the system currently functions; services are designed separately. Using joint commissioning reviews to achieve better outcomes for all sectors at lower cost has not yet been capitalised on in Cheshire East, other Councils have started to demonstrate the value of this.
- 3.3 Re-design will increase the health and self-reliance of citizens to improve their outcomes. As a corollary the need for specialist high cost services will be reduced to achieve a sustainable future across all the public sector

resource. New joint commissions must focus on prevention and early intervention to achieve that sustainable future.

3.4 Opportunities:

- There is an opportunity to develop a joint commissioned approach but that will require capacity to be invested over the next 18 months in order to achieve new whole system designs
- Commissioners need to articulate how outcomes can be achieved differently and jointly create incentives that will drive innovations in a new direction. New ways of supporting citizens that enable self-help, promote healthy living and prevent or minimise the need for costly specialist services need to be specified.
- The Council has demonstrated an ability to redesign for better outcomes; this is an opportunity to exploit that capacity on a larger scale.
- The market needs to be developed that can maximise that opportunity with new ways of working, innovation and agility. This will be a challenge for many existing providers so new providers need to be encouraged into the local market. Sufficient time periods and market management capacity is required to achieve this.
- To prepare the current providers for a competitive and innovative future negotiation we now need to include an expectation that substantial efficiencies will be realised over the two years as a condition of awarding these contracts without competition.
- Services will be realigned to better meet outcomes as a condition of awarding contract; this will not result in material changes to the specifications.
- All other contracts already in place will also be considered in the commissioning reviews to ensure all resources are aligned effectively.
- Many other Councils are embarking on the same journey and learning can be shared.

3.5 Transformation is not a quick process as it requires new styles of whole system leadership, creativity, market development and excellence in commissioning capacity. This is whole system redesign, whereas often the current system design has been fragmented.

3.6 Market Development and Shaping

Providers need to develop creative solutions to meet the new commissioning ambitions. This will require active market shaping from strategic commissioners; this is resource intensive in both time and skills. New providers may need to be encouraged into the local market to provide suitable alternatives where existing providers cannot meet those ambitions. This market development work cannot be done quickly, a period of two years is recommended to achieve innovative new options.

- 3.7 During this two year period existing and potential providers are challenged and informed by a new set of commissioning intentions that articulate the future vision. For that new set of commissioning intentions to be developed the Council and its partners need to make time and space to work together on the redesign. In addition programmes of cultural change will be required in all agencies and with the public by public services to revise expectations and achieve the behavioural changes needed for success.

4 Wards Affected

- 4.1 All

5 Local Ward Members

- 5.1 All

6 Policy Implications

- 6.1 None

7. Financial Implications

There is currently sufficient budget to fund the contract extensions included in report. There is a risk that as the budget is reviewed over the medium term that there is insufficient budget. The intention is to negotiate with providers who have the contract extension awarded to ensure that the council is achieving value for money. It is recommended that as part of this negotiation the service benchmark against the market and considers reviewing what other councils are paying for services to ensure that value for money is maintained.

- 7.2 The proposed contract extensions will allow the service time and opportunity to develop and tender contracts in a managed way that will deliver value for money for the council and will reflect the services that the council wants to commission in the longer term. It is recommended that the progress of the

contracts commissioning review is regularly reviewed and monitored by the Strategic Commissioning Leadership Team.

8 Legal Implications

The Council's Contract Procedure Rules cannot be waived if the exception will breach National or EU legal requirements. The primary legislation governing public procurement in the UK is the Public Contract Regulations 2006 (the Regulations) The Council is a Contracting Authority for the purpose of the Regulations. If aggregated spend with a supplier exceeds the applicable threshold for public service contracts (currently £172,514) then the contract is subject to the Regulations. The Regulations categorise two types of service contracts. Part B services are the non-priority services of limited cross-border interest that are set out in Part B of the Regulations. Educational and vocational health and health and social services are defined as Part B.

The Regulations (including the provisions requiring competitive tendering) largely do not apply to the award of Part B services contracts but the Regulations do provide that in letting Part B services Contracting Authorities;

- must comply with the detailed requirements relating to technical specifications set out in the Regulations.
- must ensure that a contract award notice is published in the OJEU no later than 48 days after a contract award.
- should ensure that details of procurements of Part B services are included in any reports that contracting authorities must submit to the Cabinet Office.
- must act in a transparent way and treat all potential providers equally and in a non-discriminatory way.

A right to take court action for financial loss against a contracting authority is granted to third parties if there is any failure to comply with the requirements of the Regulations. The Council cannot waive the requirements to adhere to these provisions because to do so would breach National law.

The award of Part B services contracts may also be governed by the principles contained in the Treaty on the Functioning of the European Union (TFEU) which provides for free movement of goods, people and provision of services and capital. This means the contracting authority must comply with the following key principles when awarding public contracts:

- Proportionality
- Mutual recognition.
- Transparency.
- Non-discrimination.
- Equal treatment.

The European Court of Justice (ECJ) has held that the principles of equal treatment and non-discrimination both require transparency in the procurement process. This necessitates a degree of advertising sufficient to enable the market to be opened up to competition. The Commission provides guidance to Contracting Authorities on the requirement to advertise contracts for Part B services and other contracts that fall outside the remit of the procurement directives:

"The standards derived from the TFEU apply only to contract awards having a sufficient connection with the functioning of the Internal Market. In this regard, the ECJ considered that in individual cases 'because of special circumstances, such as a very modest economic interest at stake; a contract award would be of no interest to economic operators located in other Member States. In such a case, 'the effects on the fundamental freedoms are ... to be regarded as too uncertain and indirect' to warrant the application of standards derived from primary Community law.

It is for Council to assess if a contract might be of interest to contractors in other EU member states based on the circumstances, including subject matter, value, specifics of the sector concerned and the place of performance. If it is concluded that the contracts would not be of interest to contractors in other EU member states there is no requirement to advertise the contracts. It is important that the Council is able to evidence the factors taken into consideration; the following are a non-exhaustive list of factors to consider when determining whether there may be cross-border interest in a contract:

- What is the value of the contract?
- What is the nature of the market for these services? (Any market testing exercise will be crucial in determining how international the provision of such services is.)
- Are any providers based in other member states currently offering similar services to other contracting authorities or private buyers in or near the authority's region?
- If other contracting authorities have competitively tendered similar services in the past, did they receive any expressions of interest from providers based or operating in other member states?
- Can the services be provided remotely or is a local presence necessary? How easy would it be for an outside organisation to establish a local presence? Is there enough value in the contract to make such an establishment worthwhile?
- Is the contract for services which are highly prestigious or specialised?

The main sources of challenge for a failure to competitively tender a Part B services contract to which the TFEU principles apply will be the European Commission and an aggrieved supplier. The Commission has failed in two

recent attempts to challenge a direct award of an excluded contract. The Commission has also confirmed that “Infringement proceedings under Article 226 EC Treaty will be opened only in cases where this appears appropriate in view of the gravity of the infringement and its impact on the Internal Market.”

9 Risk Management

9.1 EU procurement law and regulations

The relevant contracts are all Part B services which means commissioners can judge for themselves whether there would be any interest in other EU countries in competing for these services. On this basis the Council has taken the view that none would be of interest and thus they will not be advertised in the EU. There is a low risk that this view could be challenged by a potential provider.

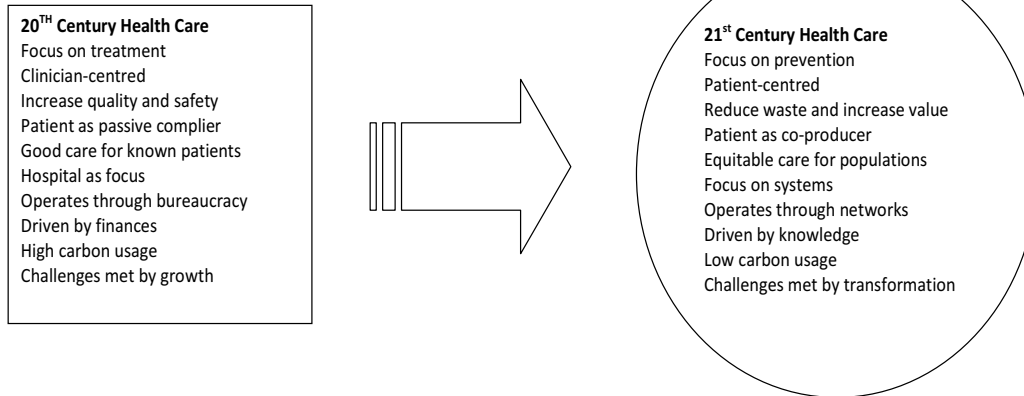
9.2 There is a precedent of other Councils extending their current contracting arrangements for Public Health Services for defined periods examples of this can be seen within - CwaC, Doncaster, North Yorkshire, East Riding, and Greater Manchester. From a regional Commissioning & Procurement meetings the general view is that more time is needed to fully investigate current services and then determine and design services for the future.

9.3 The Director of Public Health’s recent report supports the approach proposed within this report:

‘Changing both unhealthy behaviours and breaking the link between poor health and social conditions will not be easy. It will require different groups who previously may not have needed to work together to do so. It will need professionals such as architects, designers and planners who may not have considered health as part of their remit before to become part of the wider public health workforce; it demands a new era of collaboration and cooperation between statutory, voluntary and business sectors. The recent reorganisation of public health delivery and its move to the Council can provide a catalyst for this to occur. Local Authorities now carry a statutory responsibility for improving health. Bringing together the expertise of Public Health practitioners with the Council’s long standing local responsibilities for tackling the wider determinants of health, such as air quality, education, road accidents, transport, noise, violence, housing, fuel poverty and use of outdoor space means a unified approach can be taken against these causes of ill health. The Cheshire East Health and Wellbeing Board and emerging sub-regional structures will drive and support this work with other commissioners (e.g. NHS, Police and Fire) and partners. These are long term aspirations that require a different approach by all. Figure 1 shows the component changes required to enable this to occur. Sir Muir Grey has described this as a ‘paradigm shift’.

Figure 1: The New Paradigm

THE NEW PARADIGM



Source: Sir Muir Grey, Personal Communication

10 Access to Information

10.1 The background papers relating to this report can be inspected by contacting the report writer:

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