


<p>Details of Leadership Team meeting or (in the case of individual Lead Member or Executive Director decisions) by whom and the <u>earliest</u> date the decision will be taken</p>	<p>Leadership Team</p> <p>Date of report: 25/06/21</p> <p>Date of decision (i.e. not before): 07/07/21</p>	 <p>THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA</p>
<p>Forward Plan ref:</p>	<p>05946/21/K/AB Alternative Provision and Behaviour Outreach Contract Award</p>	
<p>Report title</p>	<p>ALTERNATIVE PROVISION AND BEHAVIOUR OUTREACH CONTRACT AWARD</p>	
<p>Reporting officer</p>	<p>Sarah Newman, Executive Director of Bi-Borough Children's Services</p>	
<p>Key decision</p>	<p>Yes</p>	
<p>Access to information classification</p>	<p>PART A – PUBLIC</p> <p>PART – B of this report is currently exempt from disclosure on the grounds that:</p> <p>(i) it contains information relating to the financial or business affairs of a particular person (including the authority holding that information) under paragraph 3 of Schedule 12A of the Local Government Act 1972,</p> <p>(ii) it contains information in respect of which a claim to legal professional privilege could be maintained in legal proceedings under paragraph 5 of Schedule 12A of the Local Government Act 1972;</p> <p>and in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information</p>	
<p>Wards</p>	<p>All</p>	

1. EXECUTIVE SUMMARY

- 1.1. This paper is seeking approval for the direct award of a twelve-month contract to Ormiston Academy Trust (OAT) for the delivery of alternative education from September 2021, with the option to extend the contract for a period of three years.

- 1.2. This paper is seeking approval for the direct award of a twelve-month contract to OAT for the delivery of behaviour outreach from September 2021, with the option to extend the contract for a period up to one year, with a three-month break clause.
- 1.3. Over the past 18-months, officers have been working on the development of a Bi-borough Inclusion Strategy that will shape the way the whole system works to support school inclusion. One of the priorities that has emerged from this work is to reduce spend on full time AP and reinvest this funding into strengthening our early intervention offers. The award of these contracts supports this commitment.

2. RECOMMENDATIONS

The Leadership Team is recommended to agree:

- 2.1. A contract for the provision of full-time alternative provision (AP) education from Latimer and Beachcroft AP Academies (TBAP) to be directly awarded to Ormiston Academy Trust (OAT). To waive the Contract Regulations' requirement for competitive tendering prior to contract award to make this direct award to OAT for a period of twelve months from September 2021, with the option to extend the contract for a further period of three years, dependent on a successful negotiation between RBKC and OAT. In RBKC, the value of the initial twelve-month term for the AP contract is £493,500 and the estimated value of the three-year extension period is £1,133,869.
- 2.2. A contract for the provision of behaviour outreach (off-site managed intervention placements for secondary students from the Westminster Education Centre (WEC) and Golborne Education Centre (GEC) and on-site behaviour interventions for primary pupils) to be directly awarded to OAT.
- 2.3. To waive the Contract Regulations' requirement for competitive tendering prior to contract award to make this direct award to OAT for a period of twelve months from September 2021, with the option to extend the contract for a further period up to one year, with a three-month break clause, dependent on a successful negotiation between RBKC and OAT and on the outcome of a service review in line with the principles set out in the Bi-Borough Inclusion Strategy ahead of approaching the market with a competitive tender to deliver these services. The value of the initial twelve-month term for the behaviour outreach contract is £244,000 and the estimated value of the one-year extension period is £244,000¹.
- 2.4. The breakdown of how the funding is allocated is included in Part B of this report.

¹ There are other targeted elements of the current SLA that would not be included in the proposed contract as they will continue to be purchased through micro-commissioning arrangements, for example children with an AP setting named on their EHC plan taking up special school places.

3. REASONS FOR DECISION

3.1. It is recommended that arrangements are made for the provision of these services in order to meet the following duties:

- The Local Authority has a statutory duty to arrange and fund full time education provision for children and young people who are permanently excluded from school. We are also responsible for children who have had trouble getting a school place and who are placed via the Fair Access Panel (FAP).
- Schools have a duty to arrange and fund education provision for children and young people who receive a fixed term exclusion (from the sixth day). Schools are also responsible for children and young people who are directed off-site for short term interventions to improve their behaviour.

3.2. The provision of these services is currently covered by a Service Level Agreement (SLA), which is set to expire in August 2021. Published guidance does not detail any expectations for whether a contract or SLA should be put in place for this type of service. Over the last few years other LAs have moved away from SLA arrangements for these services in favour of contracts that provide more robust legal assurances and protections². Therefore, it is recommended that these arrangements are formalised under a contract.

3.3. The recommendation to waive the Contract Regulations' requirement for competitive tendering and to directly award the contracts to OAT is made because:

- There is a risk that if this contract were to go out to the market with a September 2021 start it would not be attractive to smaller providers who do not already have the backing of the DfE. The current Multi-Academy Trust (MAT) responsible for the delivery of these services on behalf of RBKC is in the process of being dissolved, and the transfer of the TBAP academies to OAT by September 2021 is being overseen and managed by the Regional Schools Commissioner (RSC). The TBAP academies are currently loss-making and therefore OAT, as one of the largest MATs in the country, has been identified by the RSC as a provider that will be able to transform the service into one that is financially viable. This will help to provide some much-needed stability to the delivery to this statutory provision.

² A contract deals with provisions that the SLA does not including Information Governance and information sharing, insurance and indemnity, TUPE, termination provisions, confidentiality, payment provisions, default provisions, premises and property requirements, subcontracting and novation.

- Market research has indicated that there are no other AP settings within the borough that would be in a position to deliver the volume of provision that is required to meet need in RBKC. In addition to this, there are children and young people living in Kensington and Chelsea who are currently on roll at Latimer and Beachcroft AP Academies. Directly awarding the contract to OAT would ensure continuity for these placements and avoid destabilising children and young people who are already at risk of poorer educational and life outcomes than their peers.
- 3.4. The recommendation to include an option to extend the contract for AP education for a period of three years after the initial term is made because:
- As part of their due diligence process, OAT is keen to establish the financial viability of the academies before committing to take them on as the new MAT sponsor. There is a risk that without a commitment from RBKC to explore a longer-term arrangement with OAT, their Board of Trustees will not agree to take over the sponsorship of the academies and there will be no provider in place for the 2021/22 academic year.
 - There is an ongoing requirement for RBKC to invest High Needs Block (HNB) funding into Latimer AP Academy, whether or not commissioning arrangements to use this provision are in place. As the academy was previously an in-house PRU it continues to be the duty of RBKC to provide the place funding for this setting, at a rate of £10,000 per place.
- 3.5. The recommendation to include an option to extend the contract for behaviour outreach for a period of up to one year is made because:
- Although likely that the extension period will be asked for, commissioners want the flexibility to vary and extend the contract after the initial period to ensure the service is meeting need and is delivering value for money. Following the development of the Bi-borough Inclusion Strategy (due to be launched during the 2021 Summer term) there are several related areas of work to pilot targeted interventions for children and young people at risk of exclusion. These pilot programmes will commence in September 2021 and the impact of these interventions will not be seen for at least two terms which will not afford enough time to run a competitive procurement based on this learning.
- 3.6. The level of investment from the HNB into the AP contract reflects a reduction in the per place contributions for managed moves as the referring mainstream schools will be asked to contribute to the cost of delivering these places from September 2021. The onus will be on the new provider (OAT), with support from the Local Authority, to agree future contributions from schools to ensure there is no funding gap for non-statutory provision. This change reflects the ambitions of the inclusion strategy as it is expected to increase accountability for the young people placed into AP. This change will help to ensure that the right placements are being arranged at the right time, that all avenues have been explored before a managed move into AP is considered and that opportunities for reintegration into a mainstream setting are proactively pursued.

4. BACKGROUND

- 4.1. All children and young people are entitled to inclusive, high quality education which is suitable, meets their needs, and which paves the way to a successful future. Over the past five years there has been an increase, nationally and locally, in the rate of both permanent and fixed term exclusions from school. Whilst our most recent data suggests a reduction in the level of fixed term exclusions locally, our rates remain high and our most vulnerable children and young people are at a greater risk of being placed outside of mainstream education.
- 4.2. Pupils excluded from school or pupils directed off school site to improve their behaviour are typically placed into Alternative Provision. Government guidance defines Alternative Provision as:
- ‘education arranged by local authorities for pupils who, because of exclusion, illness or other reasons, would not otherwise receive suitable education; education arranged by schools for pupils on a fixed period exclusion; and pupils being directed by schools to off-site provision to improve their behaviour.’³*
- 4.3. Prior to 2013, RBKC provided full time education for children and young people removed from mainstream education as a result of their behaviour from an in-house PRU. In March 2013, the PRU (along with the PRUs in Westminster and in the London Borough of Hammersmith and Fulham) converted to AP Academies governed by a Multi Academy Trust (MAT) under the name Tri-Borough Alternative Provision (TBAP).
- 4.4. Since 2013 the commissioning arrangements between the Tri-Borough, and then Bi-Borough (from 2018), and TBAP have been captured under an SLA. The budget for this provision is from the High Needs Block (HNB) of the Dedicated School’s Grant (DSG) and the level of spend is agreed by Schools’ Forum each year. Both Latimer and Beachcroft AP Academies were judged as ‘good’ by Ofsted at the last inspections.
- 4.5. There is pressure on the High Needs Block locally and year-on-year investment into AP provision in RBKC has reduced, primarily through a reduction in underoccupied places.
- 4.6. The relevant services that would be covered by the contract from September 2021 are:
- **Alternative Provision (AP)** for children and young people removed from mainstream education as a result of their behaviour.
 - **Managed interventions** in the form of short-term off-site placements for secondary students at risk of exclusion or on a fixed-term exclusion for more than five days.
 - **Primary interventions** carried out on-site at mainstream primary schools for pupils who are at risk of exclusion.

³ Alternative Provision: Statutory guidance for local authorities, 2013

- 4.7. In August 2018, following a rapid expansion across London, Cambridgeshire and the North West, often taking on PRUs that were in need of improvement, TBAP received a financial notice to improve from the Education and Skills Funding Agency (ESFA). TBAP were unable to repay advance funding to the value of £950,000 by the August 2020 deadline and unable to demonstrate financial viability to the ESFA. This resulted in a decision taken by the Minister, Baroness Berridge, for the Trust to be dissolved by mutual consent, and for the academies to transfer to a new academy sponsor.
- 4.8. The identification of a new sponsor and the transfer of the academies has been managed by the Regional Schools Commissioner (RSC) within the Department for Education (DfE). The DfE will write off the Trust's deficit so the new sponsor will have a clean slate from which to develop a financially sustainable delivery model going forward.
- 4.9. OAT will take over Latimer AP academy in RBKC as well as Beachcroft AP Academy in WCC and the Bridge and Courtyard Academies in LBHF from 1st September 2021, along with several other academies across the country.
- 4.10. Over the past 18-months, officers have been working on the development of a Bi-borough Inclusion Strategy that will shape the way the whole system works to support school inclusion. One of the priorities that has emerged from this work is to reduce spend on full time AP and reinvest this funding into strengthening our early intervention offers - developing and piloting targeted interventions aimed at reducing the risk of exclusion at specific stages (such as the transition to secondary school) and for children and young people with characteristics that put them at greater risk of exclusion (such as boys from Caribbean backgrounds).
- 4.11. We will work closely with the new provider through robust contract monitoring to deliver the commitments set out in the inclusion strategy, particularly the ambitions to improve the outcomes for children and young people who are excluded from school, and to improve re-integration rates from AP back into mainstream settings.

5. OPTIONS, ANALYSIS AND PROPOSALS

- 5.1. The current SLA with TBAP ends in August 2021, with the option to extend for twelve months. Option 1 is set out within the body of this paper. Several alternative options have been considered and these are outlined along with the associated risks below:

Option 2: Allow the current SLA to expire in August 2021 and have no formalised commissioning agreement from September 2021 – not recommended

The LA would need to make spot purchase arrangements for full time education provision for children and young people who have been permanently excluded from mainstream schools.

This could result in a weak negotiating position with neighbouring LAs and local AP providers in terms of agreeing value for money rates for these places.

It is very unlikely that OAT would agree to take over Latimer and Beachcroft AP Academies without a twelve-month contract with RBKC and WCC being agreed. There are currently no other MATs in the running to take over sponsorship of these academies, and therefore there is the risk that the academies would close.

Option 3: Run a competitive procurement to award a contract from September 2021 – not recommended

The TBAP academies are currently loss-making and therefore OAT, as one of the largest MATs in the country, has been identified by the RSC as a provider that will be able to transform the service into one that is financially viable. This will help to provide some much-needed stability to the delivery to this statutory provision. There is a risk that if this contract were to go out to the market with a September 2021 start it would not be attractive to smaller providers who do not already have the backing of the DfE and may dissuade OAT from taking over as the MAT for these two AP Academies.

6. CONSULTATION AND COMMUNITY ENGAGEMENT

- 6.1 The proposed contract will not involve alterations to the service received by children and young people and their families. The settings will remain the same and teaching staff will be given the opportunity to TUPE to the new MAT. At this stage we are simply seeking agreement to formalise the current SLA arrangement into a contract with the new sponsor appointed by the RSC with the support of the DfE and funding arrangements with schools to support the ambitions within the Inclusion Strategy.
- 6.2 As part of our commitment to the delivery of the Bi-Borough Inclusion Strategy we have consulted with local schools, parents, young people and VCS organisations on their priorities for strengthening inclusion and for improving outcomes for children and young people who are excluded.
- 6.3 We will continue to engage with these stakeholders as we deliver the ambitions outlined in the Inclusion Strategy, which will inform our future commissioning plan.

7. LEGAL IMPLICATIONS

- 7.1. The Contract for alternative provision is for 'services' under the Public Contracts Regulations 2015 ('PCR's'), which fall within the scope of Schedule 3 services of the PCR's. As the contract value exceeds the relevant threshold the full implications of the PCR's apply.
- 7.2. The contract for managed and primary interventions is for 'services' under the Public Contracts Regulations 2015 ('PCR's'), which fall within the scope of Schedule 3 services of the PCR's. As the contract value does not exceed the relevant threshold the full implications of the PCR's do not apply.

- 7.3. Under section 14 RBKC's Contract Regulations ('Regulations') approval of a waiver from the Regulations requirement to competitively procure services can be granted by the lead member, or leadership team, as appropriate. The authoriser would have to be satisfied that the grounds under section 15 of the Regulations are met as it pertains to the waiver.
- 7.4. Approval of the contract awards constitutes a Key Decision to be placed on the Forward Plan and approval is required from the Lead member, or Leadership team, as appropriate.
- 7.5. Approval to extend the contract as detailed in this report would also require constitutes a Key Decision to be placed on the Forward Plan and approval is required from the Lead member, or Leadership team, as appropriate, who can delegate this approval to the relevant Executive Director.
- 7.6. Appropriate Contract award notices will need to be issued in accordance with the PCR's and the Regulations respectively.
- 7.7. Legal input should be sought in the preparation of the contracts, which should be executed in accordance with the Council's Regulations. Legal input should also be instructed to prepare the appropriate Joint data controller agreement.
- 7.8. Further legal implications which are legally privileged and/or commercially sensitive are contained in Part B to this Report.

Legal Implications by Christina Worrell (Contracts), Bi-Borough Shared Legal Services

8. FINANCIAL, PROPERTY, IT AND ANY OTHER RESOURCES IMPLICATIONS

- 8.1. The Director of Education is the budget holder. These costs will be charged to the High Needs Block of the Dedicated Schools Grant (DSG) which is allocated annually by the Education and Skills Funding Agency (ESFA). The DSG budget for this provision is agreed annually by the Schools' Forum and the forecast expenditure is reported to each meeting of the Forums. The agreed budget for RBKC is £737,500 which is the same as the proposed contract cost.
- 8.2. Assuming that the high needs block funding increases by inflation in future years there is funding within WCC. RBKC has a DSG deficit and the DSG deficit management plan submitted to the ESFA includes the proposed costs at 2021/22 prices. If the ESFA change the future funding methodology for alternative provision or high needs block funding the funding received may change, if there was a reduction this impact on all Local Authorities and create a national funding issue.

Current/future costs:

- 8.3. In RBKC the annual budget within the DSG is £737,500. The proposed contract cost for 2021/22 is £737,500. Any reduction in the annual cost of the alternative provision for current numbers of placements will be used to cover any increases in pupils placed in alternative provision, be used to reduce the DSG deficit or be partially reinvested in the outreach service.
- 8.4. The effective start date of the proposal is September 2021.
- 8.5. There are no start-up, lifetime or close-down costs.
- 8.6. Inflation and DSG funding increases have been assumed at 2.6% per annum.

Savings / value for money:

- 8.7. The proposal does include a small annual reduction in year two and three on the non-statutory element charged to the DSG as a result of increasing schools' contribution in line with the ambitions of the inclusion strategy. There is no impact on the Council's General Fund.
- 8.8. The proposals ensure that the cost of AP and Behaviour Outreach remain within the DSG agreed budget provision.

Financial Implications provided by Anita Stokes, Lead Strategic Finance Manager Children's Services

9. PROCUREMENT IMPLICATIONS

- 9.1. Procurement and Commercial Services have been consulted on this paper.
- 9.2. The services which are recommended to be directly awarded are to meet Local Authority statutory duties from 1st September 2021, on expiration of the current Service Level Agreement (SLA).
- 9.3. The decision to move from an SLA to two separate sovereign contracts on standard terms and conditions provides greater legal assurance and protection for both Local Authorities and the provider, especially as this report is seeking to enter a contract for up to a maximum term of 4-years until 31st August 2025 for Alternative Provision.

- 9.4. The option to directly award contracts to the new MAT provider, does present risk of challenge from alternative providers in the market. However, this risk is minimised by the fact the Regional Schools Commissioner and not the LA is overseeing and managing the transfer of Latimer and Beachcroft AP Academies to a new sponsor. Directly awarding the contract to the appointed trust, provides the new MAT service with financial stability and aids their future business planning, where the service was previously loss-making. Also, it is understood from market analysis that no other Alternative Provision provider has capacity to provide the required number of places across both boroughs without the need for out of borough provision. Therefore, the risk of not having statutory Alternative Provision by not directly awarding this contract is seen as a greater risk than the potential for challenge from the market, at this point.
- 9.5. The report recommends directly awarding behaviour outreach services to the new provider for the initial term of 12 months, with the option to extend for a further 12 months subject to performance and potential variation and negotiation if necessary before conducting a competitive tendering exercise. The procurement strategy for this will be developed during Winter 2022 following market engagement and consultation with schools and service users.

Procurement Implications Endorsed by Sarah Risby, Senior Commercial Specialist

10. EQUALITIES IMPLICATIONS

- 10.1. The work to develop the Bi-Borough Inclusion Strategy has highlighted the reality that boys, children and young people at secondary age, those with SEN support or with SEMH identified as a primary need, eligible for free school meals or living in areas of greater deprivation and young people from Black Caribbean, mixed or Bangladeshi backgrounds are all disproportionately affected by exclusion.
- 10.2. Without approval to directly award the contract to OAT for the coming year there is a risk that the children and young people currently accessing provision at Latimer or Beachcroft AP Academies or through the behaviour intervention services would be disproportionately affected by the potential closures of these settings.
- 10.3. An equalities impact screening document has been completed for this piece of work and is attached.

Ian Heggs

Bi-Borough Director of Education

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Mandatory clearance requirements for all Key and Executive Decision reports

Cleared by <u>Corporate Finance</u> (officer's initials)	[AS]
Cleared by Director of Law (officer's initials)	[CW]
Cleared by Communications (officer's initials)	[AR]