

Birmingham City Council

Report to Cabinet

15 December 2020



Subject: ESTABLISHING A REGIONAL ADOPTION AGENCY

Report of: Dr Tim O'Neill, Director of Education and Skills

Relevant Cabinet Member: Cllr Kate Booth – Children's Wellbeing
Cllr Tristan Chatfield – Finance and Resources

Relevant O &S Chair(s): Cllr Kath Scott – Education and Children's Social Care
Cllr Sir Albert Bore - Resources

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| Are specific wards affected? | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No – All wards affected |
| If yes, name(s) of ward(s): | | |
| Is this a key decision? | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| If relevant, add Forward Plan Reference: 007921/2020 | | |
| Is the decision eligible for call-in? | <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| Does the report contain confidential or exempt information? | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| If relevant, provide exempt information paragraph number or reason if confidential : | | |

1 Executive Summary

- 1.1 This report comprises Birmingham Children's Trust (the Trust) Regional Adoption Agency (RAA) Programme Plan which sets out how the Trust, on behalf of the Council will undertake a procurement exercise to identify a collaborative partner to co-design and co-deliver the RAA for Birmingham in line with the Department for Education (DfE) requirements.
- 1.2 The Trust's Outline Business Case, Adoption Birmingham and other appendices are attached to this paper. This paper provides a summary overview with relevant extracts of the Outline Business Case, which was been submitted to the Council in November 2020.

2 Recommendations

2.1 That Cabinet:

- 2.1.1 Provided that the final operating model for the RAA stays within the parameters set out in the Outline Business Case as annexed to this report (and dated 16 November 2020), and the principles set out in this report, delegates authority to the Chief Executive and Director of Education and Skills, in consultation with the Chief Finance Officer and the City Solicitor (or their nominees), to agree and approve a final operating model for the RAA and subsequently provide written consent to the Trust to enter into a partnership and subcontract a significant proportion of services to the RAA.
- 2.1.2 Notes the procurement approach set out in this report and that the award of the contract will be made by the Executive Board within the Trust.

3 Background

- 3.1 In June 2015, the DfE released a policy paper titled 'Regionalising adoption' in which the department sets out the proposal to make the move from traditional models to RAA's in order to speed up matching and markedly improve the life chances of children; improve adopter recruitment and adoption support; and reduce costs. The programme expects all local authorities to become part of a RAA by 2020. Currently, there are 24 live RAAs, with a further eight in development, which includes the Birmingham model.
- 3.2 The function of adoption services was commissioned to the Trust through the Service Delivery Contract (SDC), which went live in April 2018. Under this agreement the Trust needs prior written permission from the Council to enter into any partnership or to subcontract a significant proportion of services. The Council also has a side agreement with the DfE via the Governance Side Agreement (GSA) whereby the Council needs to seek prior written consent to certain variations of the SDC.
- 3.3 Birmingham Children's Trust has made formal applications to join the already existing West Midlands based RAA; ACE, Adoption@Heart and Together4Children. These applications have been declined due to concerns relating to the impact the Trust's size would have on existing operational arrangements.
- 3.4 Due to the DfE's requirement for all local authorities to join a RAA by 2020, the DfE have agreed to the Trust taking an alternative approach to establishing their own RAA. This approach is to deliver the complete range of adoption functions across Birmingham. It has been recognised that due to the scale of Birmingham's adoption services, the Birmingham RAA will have a broad equivalence to other RAA's regionally.
- 3.5 The aim for a RAA is to improve outcomes for children and adopters by enabling all children with an adoption plan to find a loving, stable home, as quickly as possible. There are seven core design principles for RAAs published by the DfE to support

this aim and will need to be met by the Birmingham model. **Appendix 1, Section B** details further information on these principles.

- 3.6 In August 2020, the Trust undertook a market sounding exercise to understand the level of interest and capacity within the market to identify a collaborative partnership. As part of this exercise the Trust sought feedback on the various models and structures available and in particular, different benefits and dis-benefits of a contractual or corporate Joint Venture (JV). A further market engagement session took place in October 2020 followed by individual meetings with five potential partners who expressed an initial interest. Feedback was overall positive, however there was a general caution towards the JV approach. Specifically, the concerns were in relation to governance, risk share, financial risk with the funding model and the risk to losing their identity or brand.
- 3.7 Both exercises concluded that a collaborative partnership with a Voluntary Adoption Agency (VAA) would have the best prospect of meeting the DfE's design principles and meet the needs of a suitable and willing VAA. It also became clear that the RAA should be co-designed and subsequently co-delivered in partnership with VAA through a competitive dialogue procurement process rather than being pre-determined by the Trust.

4 Options considered and Recommended Proposal

Options Appraisal

- 4.1 In September 2020, the Trust carried out an options appraisal with representatives from the Trust, the Council and the DfE appointed coach. The high-level summary is as follows:
- 4.1.1 **A. Continue in-house:** This option doesn't meet the DfE design principles.
- 4.1.2 **B. Outsource to existing VAA:** This option doesn't allow the Trust to have any control over operational delivery. It has a higher risk reputationally and financially.
- 4.1.3 **C. Council to directly commission:** Through the creation of the Trust all service and subject matter expertise was transferred to the Trust. It would also mean that the Council would have two separate agreements to contract manage.
- 4.1.4 **D. Corporate/Contractual JV between the Trust and a VAA:** Both models meet the design principles of the RAA. These options have been combined because the final model/structure will be decided during the competitive negotiation section of the procurement process. Both models allow the Trust to have sufficient control and input into the shaping and delivery of these services.
- 4.2 Options A, B and C were discounted due to not meeting the required principles of establishing a RAA, not allowing the Trust to have a satisfactory level of control over adoption services and the Council lacking the expertise due to the creation of the Trust. **Appendix 2** of this report provides further details of the option appraisal.

Recommended Proposal

- 4.3 Upon consultation with the DfE, the market and the Council; the Trust is pursuing option D which is collaborative partnership arrangement with a VAA to co-design and co-deliver the RAA. The arrangement will be the first of its kind and signifies a new and innovative way of working. Nationally, RAAs have been formed from a group of local authorities delivering a shared adoption service which is hosted by one lead local authority on behalf of the others, with pooled funding and a single management board. No other RAA has been formed as a collaborative partnership between a local authority / children's trust and a VAA.
- 4.4 The aim of the model is to combine the commercial acumen and best practice excellence of a reputable VAA with the security of the largest children's social care provider in Europe. The combined strengths of the partners are expected to create opportunities for innovation, greater efficiency, high quality services and improved outcomes for children and families.
- 4.5 In addition to meeting the DfE's expectations, the development of an RAA provides the opportunity to design a new service, led by a vision and commitment to excellent practice, pioneering approaches to achieve improvements and value for money. The Trust has decided to not pre-determine the governance or structure of the RAA, this will be determined in the dialogue stages with potential providers in the procurement process.
- 4.6 Dependent on the type of structure that is used, it is anticipated that the successful VAA partner will make a direct contribution to the creation, delivery and management of the RAA by ensuring the voice of adopters is embedded into the business. A VAA will also have the potential to bring in social investment opportunities and access charitable funding, which is currently not available to the Trust.
- 4.7 The new entity is required to be a 'not-for-profit' body corporate that is also registered as a VAA. This therefore limits the range of corporate structures available to pursue. Further information on the potential legal structures for the RAA is detailed in **Appendix 1, Appendix C** of this report.

Operating Model

- 4.8 The RAA will have a scope of services that the Trust will commission, **Appendix 1, Section H** of this report provides a detailed breakdown of services which will be undertaken by the RAA and the Trust.
- 4.9 The RAA will primarily provide services for the Council, although the operating model and the Trust's ambition has identified advantages for the RAA in undertaking some commercial trading of identified adoption related products to other authorities in England. The delivery of sufficient high-quality service provision to the Council will always be the first and foremost priority to the RAA. Trading services would only be within this context and it is anticipated that economies of scale will enable some

trading of over capacity on a small scale which it is anticipated will enhance the RAA's reputation at a national level.

- 4.10 The RAA will require support functions similarly to the Trust. Specific requirements will be scoped, and potential delivery options will be subject to an option appraisal. Options under consideration are 'buy back' from the Trust, or supply of support service by the VAA partner subject to appetite and capacity. However, analysis is being undertaken around potential issues of stranded costs for those support services with fixed costs, which could become stranded if delivery by the Trust was no longer required. To be financially advantageous, these costs would need to be more than offset by a lower price from the market, and this is being examined before determining whether it is viable for support service to be in scope for the procurement.
- 4.11 As above, specific requirement will be scoped for ICT systems, a 'buy back' from the Trust is the likely solution, although another option may be that the RAA could adopt and consolidate onto systems operated by the VAA and become independent of the Trust and Council ICT systems. This will be explored during the procurement process.
- 4.12 As the RAA is small (circa 100 employees) it may not need a specialist IT lead to represent the RAA on management of these services. An IT lead and DPO service will be required which could be purchased via an overall IT service from the Trust using the Trust IT Model or for resources in the Trust to act on behalf of the RAA. If the RAA has a separate ICT Support Service Agreement with the Council this may increase the workload required.
- 4.13 The assets in general will be owned by the Council with hardware (laptops / screens) being rented from the Council. Some specific exceptions to this may occur from time to time. Mobile phones are not considered assets and would most likely be owned by the RAA.
- 4.14 The RAA would be a data controller as it is providing a service which operates autonomously from the Trust and the Council. There may be instances where the RAA, the Trust and the Council are joint data controllers. It is anticipated that the Birmingham Children's Collaborative Data Sharing agreement may cover most of the data sharing requirements with the RAA becoming an adhering party. This would require validation to test coverage as it is focussed on Social Care, Health and Protection of young people and not on HR and finance elements for example.
- 4.15 The RAA will need a suitable case management system (CMS) and required interfaces with the Trust's CMS will need to be identified along with appropriate information governance agreements. The Trust's adoption service currently uses the CHARMs CMS, and an options appraisal will be undertaken together with evaluation of the proposals provided by the potential Providers to identify the most suitable solution for the RAA.

Procurement Approach

- 4.16 The opportunity will be advertised in the Official Journal of the European Journal, Contracts Finder and www.finditinbirmingham.com.
- 4.17 This opportunity will need to be tendered in accordance with the Public Contracts Regulations 2015 (PCR 2015). Given the services involved, the Trust has the option to procure the contract using the 'light touch regime' under Reg. 74 PCR 2015. This will allow for an innovative, flexible and participative approach to the procurement to be taken. The procurement will be based on the basic principles of a competitive dialogue procurement.
- 4.18 Under this procurement procedure, the Trust will undertake an initial pre-qualification process (a Selection Questionnaire and Initial Invitation to Submit Outline Proposal) and then invite shortlisted candidates to participate in a dialogue process during which aspects of the project may be discussed and solutions developed. The Trust may as part of this process identify aspects of its requirements which are not open to dialogue.
- 4.19 The Trust will continue the dialogue until it identifies one or more solutions that can satisfy its requirements (which will need to be identified in the tender documents). The Trust will then close the dialogue and invite final tenders.
- 4.20 The procurement will be carried out in accordance with the general principles of transparency and equal treatment and will be structured to ensure that the objectives identified for the RAA are met efficiently and effectively using the following stages. It should be noted that the first stage will incorporate the SQ and Invitation to Submit Outline Proposal (ISOP) together and only potential partners successfully passing this stage will progress to the Invitation to Submit Detailed Solution (ISDS) stage.
- 4.21 The Specification will set forth the existing service levels and the standards to which those services will be provided along with KPIs to measure performance. It will also set forth the parameters for future service provision the Trust believes should be provided. The Specification will, subject to amendments arising from the Competitive Dialogue process, form part of the Contract and the successful tenderer will be bound to provide services in accordance with the Specification.
- 4.22 The evaluation of tenders will be undertaken by officers from the Trust, supported by the Council. Independent legal and contractual advice will be provided by Burges Salmon. Subject matter expertise will be provided by the Trust's Adoption Service. Officers from the Trust Finance, Commissioning and the Council's Corporate Procurement Services will also be engaged.
- 4.23 The evaluation criteria for each stage will reflect, amongst other key factors, the criteria for the RAA and the Trust's required benefits of an RAA model.

Financial Model

- 4.24 The RAA will operate within an agreed financial payment from the Trust as commissioner of the RAA for delivery of adoption services on its behalf. This payment will be no more than the Trust currently receives from the Council as payment for those adoption services in scope for the RAA. The Trust will retain some specific budgets for related items out of scope for RAA delivery (such as adoption allowances).
- 4.25 The current value of services which will be in scope for the RAA has been identified by taking certain elements of the RAA, including apportioning costs that are currently supporting activities across adoption and fostering, and removing items agreed as out of scope for the RAA, e.g. adoption allowances. Apportionment has involved analysis of activity across two financial years to determine a suitable split. This has produced a baseline of current operating costs, with an analysis of how costs are currently attributed. This provides the indicative funding for the RAA budget modelling process.
- 4.26 Current costs for the support services and accommodation attributable to adoption service delivery have been established. Some of these costs are derived from the Trust's Schedule of Charges relating to the Support Services Agreement with the Council, and others have been determined by activity analysis where support service functions operate across multiple services within the Trust. This work has established an initial sum of £695,808 (plus a further £328,591 for business support services) as a 2020/21 baseline position. This figure is currently being validated and refined.
- 4.27 The result of this exercise shows that the current relevant costs available to the RAA per annum is as below, although these could be deployed differently in line with any final RAA design:

| Services in scope for RAA | Current operating costs |
|--|--------------------------------|
| Central (senior managers, Psychologists, Intelligence Officer) | 381,945 |
| Marketing & Recruitment | 151,433 |
| Adopter Assessment and pre Order Support | 1,048,534 |
| Family Finding | 757,362 |
| Support for those affected by adoption | 531,562 |
| Adoption Panel | 153,282 |
| Interagency Fees | 1,139,602 |
| Business support service | 328,591 |
| Service delivery TOTAL | 4,492,310 |
| Support Services (IT, HR, Finance etc) | 695,808 |
| Current operating Total | 5,188,118 |

- 4.28 A zero-based budget will be built by the RAA partners based on the co-design of the RAA service design solution, with a maximum sum being in line with the Council's current payment for in scope adoption services.

5 Consultation

- 5.1 Initial discussions about the RAA development took place with the relevant unions representatives on 9 September 2020.
- 5.2 Both the Council and the Trust have consulted to with the DfE throughout the programme. The DfE have appointed a coach to support the Trust during the programme planning and set up of the RAA. The Council has and will continue to consult with the intervention lead from the DfE.
- 5.3 On 20 October 2020, the Assistant Head of Service for Adoption met via Teams, with a group of 9 adopters (and one written submission was received) who between them have adopted, or have placed with them, 16 Trust children. The aim was to hear from adopters about their experience of adopting with the Trust and their thoughts about a Regional Adoption Agency. A small number of the group are regular attendees at the existing and well-established adopter 'Your Views Matters' group which acts as a critical friend and helps to shape service delivery from Birmingham's adoption service.

6 Risk Management

- 6.1 The Council will follow the Council Risk Management Methodology and the Education & Skills Strategic Commissioning Service is responsible for local risk management. The Trust has established and will maintain a robust risk management document that is shared and reviewed at the RAA Programme Board fortnightly meetings which the Council attends. A full risk register is also detailed in **Appendix 1, Section J** of this report.

7 Compliance Issues:

7.1 How are the recommended decisions consistent with the City Council's priorities, plans and strategies?

- 7.1.1 The establishment of a RAA is consistent with the Council's obligation and commitment to ensuring Birmingham is an aspirational city to grow up in and give all children from every background and community the best start in life, with clear pathways to achieve success and realise their full potential.

7.2 Legal Implications

- 7.2.1 The principal piece of legislation that provides the framework for implementing plans for adoption in England and Wales is the Adoption and Children Act 2002 (as amended) (ACA 2002). Pursuant to section 2 of the ACA 2002 adoption services that are not provided by a local authority in England can only be provided by a body corporate that operates on a 'not-for-profit' basis (i.e. a voluntary adoption agency (VAA)).

- 7.2.2 Furthermore, the Council has exercised its powers under Part 1 of the Children and Young Persons Act 2008 (CYPA 2008) (and other applicable legislation) to enter into arrangements with the Trust for the discharge by the Trust of the Council's children's social care functions (including the Council's functions as an adoption agency). The CYPA 2008 and the associated Children and Young Persons Act 2008 (Relevant Care Functions) (England) Regulations 2014 (the 2014 Regs) require that the discharge of such functions can only be carried out by body corporate that operates on a 'not-for-profit' basis. Section 2 of the CYPA 2008 provides that the discharge of a local authority's adoption agency functions pursuant to Part 1 of the CYPA 2008 can only be carried out by a 'registered adoption society' (i.e. a VAA).
- 7.2.3 In addition, regulation 4 of the 2014 Regs provides that a local authority's functions under Part 1 of the CYPA 2008 are not to be treated as "relevant care functions" for the purposes of section 1 of the CYPA 2008. It would seem that the intended purpose of this provision is to reserve the powers under Part 1 of the CYPA 2008 to a local authority and not enable such powers to be discharged by anybody corporate that the local authority enters into arrangements with pursuant to Part 1 of the CYPA 2008. This therefore means that, any arrangements between the Trust and a VAA partner in relation to the RAA, will need to be appropriately structured in accordance with this legislative framework.
- 7.2.4 The constitutional and contractual landscape within which the Trust currently operates in as a wholly owned subsidiary of the Council and, pursuant to the Trust's articles of association, the Trust is required to obtain prior written consent of the Council in respect of specific matters. In accordance with the articles, the Trust is required to obtain approval to the following:
- (a) any proposal by the Trust to form or procure the formation of another legal entity or undertaking in respect of which the Trust would be a member, shareholder or hold any analogous position in any jurisdiction (Article 29.2(h)); and
 - (b) the entering into by the Trust of any partnership of joint venture (Article 29.2(i)),

furthermore, under the service delivery contract (SDC) between the Council and Trust, the Trust must also seek prior written consent of the Council and the Secretary of State for Education prior to subcontracting a substantial part of their services.

7.3 Financial Implications

- 7.3.1 The DfE have provided funding of £370k to the Trust to support the setting up of the RAA, with a requirement that funding is also identified by the Trust which has been "in kind" officer time.

- 7.3.2 As part of the procurement process for the collaborative partner, and thereafter within the governance arrangements, the partners (i.e. the VAA and the Trust as service providers) will determine respective payments to be made to each for the service elements each is contracted to provide.
- 7.3.3 The agreed payment made by the Trust as commissioner of the RAA for delivery of adoption services on its behalf will therefore reflect what the Trust receives from the Council as payment for those adoption services in scope for the RAA. The Trust will retain some specific budgets for related items out of scope for RAA delivery (such as adoption allowances).
- 7.3.4 The issue of whether the RAA will require working capital will depend on the structural model agreed, specifically whether there will be a separate legal entity. If the Trust were to make available working capital under specific exceptional circumstances it would be likely to be £400k, based on the maximum funding identified. This would be from within existing Trust resources.
- 7.3.5 Corporation tax and VAT implications for the RAA will depend on the structural model agreed, specifically whether the RAA will become a Legal Separate Entity (LSE). To mitigate any financial risk here, the Trust have sought external legal advice on the matter and have shared this with Council officers. The detail of the advice is contained in the attached Outline Business Case.
- 7.3.6 The contract will include specified demand forecasts and the volumes expected for the contract sum payment agreed between the Trust and the RAA.
- 7.3.7 Any strategy around annual uplifts or tapered funding over the term of the contract for elements to be delivered by the collaborative partner will be for agreement and will need to align to the Trust's overall contractual annual uplifts from the Council.

7.4 Procurement Implications

- 7.4.1 The Trust is the contracting authority for the purposes of this procurement. It is a "contracting authority" for the purposes of the PCR 2015 and is therefore required to comply with the PCR 2015 when procuring works, supplies and services above certain financial thresholds (save where a specific exemption applies).
- 7.4.2 In this case, the value of the Adoption Services Contract is expected to be above the relevant threshold. Furthermore, based on the objectives set out, no exemption from the PCR 2015 is expected to apply to this procurement. The Trust is therefore required to run a competitive procurement process in order to procure the partner for these arrangements.
- 7.4.3 However, a "Light Touch" regime (LTR) applies to contracts for social and other specific services. Given the subject of the procurement, it is expected that the LTR will apply to this procurement which offers increased flexibility in the design of the procurement process. The Trust will be required to advertise the contract through a contract notice in the OJEU but is free to determine the relevant procurement process considering the specificities of the service in question. The

procedure must, however, be sufficient to ensure compliance with the principles of transparency and equal treatment, and all time limits imposed must be reasonable and proportionate.

- 7.4.4 Given the complexities associated with the requirement, some form of negotiation or dialogue will be required with potential partners during the procurement process. The Trust have decided to undertake a competitive dialogue process, which will allow the Trust to continue dialogue with the potential partners until it has identified one or more solutions that can satisfy the requirements of the RAA. The Trust will then be able to close the dialogue and invite final tenders, which will be assessed against published evaluation criteria to determine the successful partner.
- 7.4.5 The duration of the Adoption Services Contract will be five years from contract award with an option to extend up to March 2028, to tie in with the SDC if it is extended beyond March 2023. This is necessary both for the development and stability of the RAA and adoption services, and to ensure the proposal is attractive to the market.
- 7.4.6 Should it arise that the SDC between the Council and the Trust were to end in 2023, a solution will need to be identified that would enable the Adoption Services Contract to have a longer duration than the SDC. There are a number of possible solutions available to the Council and the Trust to manage the potential 'early' termination of the SDC in 2023, including (without limitation) the extension of the SDC beyond March 2023 in respect of adoption services only with a mechanism for the Council to effectively "step-in" and take over from the Trust should the SDC terminate in March 2023. This is a matter for agreement between the Trust and Council.
- 7.4.7 As the Trust was established in accordance with the 'in-house exemption' pursuant to Reg. 12(1) of PCR 2015, the RAA will need to ensure that at least 80% of its activities are carried out in the performance of tasks entrusted to it by the Council. Any trading of the RAA, considered in conjunction with any other trading that the Trust may be doing (if any), would fall within this threshold. In carrying out this analysis consideration should be given not only to the revenue that is generated from these activities, but also a broader consideration and awareness regarding the extent of the activities being carried out by the Trust in relation to tasks that are not entrusted to it by the Council.

7.5 Human Resources Implications

- 7.5.1 The subcontracting of the adoption services to the RAA is likely to trigger a transfer of the relevant employees from the Trust engaged in the provision of the relevant services to the RAA under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). TUPE applies where there is a transfer of a business from one entity to another or a service provision change. If operations are effectively transferred to a new entity, then it is likely that TUPE

would apply. This will be determined following the dialogue process and evaluation of the preferred model.

- 7.5.2 The Trust is an “admitted body” to the Local Government Pension Scheme(LGPS) managed by the West Midlands Pension Fund (WMPF) and appropriate arrangements are going to need to be put in place to ensure that any transferring staff formerly employed by the Council continue to have access to the LGPS (or a comparable scheme).

7.6 Public Sector Equality Duty

- 7.6.1 At this point in the programme, due to the unknown nature of the structure that the RAA will take, once the design process has taken place the Trust and Council will then undertake an initial impact equality assessment.

8 Appendices

- 8.1 **Appendix 1-** Adoption Birmingham RAA, Outline Business Case, V6, 16 November 2020
- 8.2 **Appendix 2** - Full options appraisal

9 Background Documents

- 9.1 Regionalising adoption, DfE, 2015