

Birmingham City Council

Report to Chief Executive



Subject: Proposed Termination of Home to School Provider

Report of: Garath Symonds, Assistant Director of Commissioning, Education and Skills

Relevant Cabinet Member: Cllr Sharon Thompson; Vulnerable Children and Families
Cllr Tristian Chatfield; Finances and Resources

Relevant O &S Chair(s): Cllr Narinder Kaur Kooner, Education & Children's Social Care O&S Committee; Cllr Mohammed Aikhlaq, Resources O&S Committee

Report author: Brianne Thomas, Strategic Commissioning Lead, Education and Skills

Are specific wards affected?	☐ Yes	☒ No – All wards affected
If yes, name(s) of ward(s):		
Is this a key decision?	☒ Yes	☐ No
If relevant, add Forward Plan Reference:		
Is the decision eligible for call-in?	☐ Yes	☒ No
Does the report contain confidential or exempt information?	☐ Yes	☒ No
If relevant, state which appendix is exempt, and provide exempt information paragraph number or reason if confidential:		

1 Executive Summary

- 1.1 This report seeks to gain an emergency decision from the Chief Executive in accordance with Part B6.6 of the Council's Constitution.
- 1.2 As set out within this report, there is a requirement to terminate an agreement with a supplier who delivers statutory services on behalf of Council due to a breach of contract. This decision cannot wait until the next scheduled Cabinet on 7th September 2021

- 1.3 The school term is set to start on 2nd September 2021 and the Council is required to provide transport from this date; therefore, officers are required to secure alternative provision at speed in this emergency.

2 Recommendations

That Chief Executive, under the powers set out at Para. 6.6 of the Constitution:

- 2.1 Notes the contents of this report and;
- a) authorises the termination of the agreement with a provider on the Home to School Transport Dynamic Purchasing System (DPS) due to a significant breach of contract described in paragraph 3 below; and
 - b) authorises the commissioning of an alternative provider using a Dynamic Purchasing System open to public bodies and an escalated procurement timeline.
- 2.2 Authorises the Director of Education and Skills (or their delegate) in conjunction with the Director of Council Management (or their delegate) and the Assistant Director of Procurement (or their delegate) to:
- 2.2.1 Agree any award reports associated with the implementation of the recommendations set out above.
- 2.2.2 Authorise the City Solicitor (or their delegate) to execute any documents to give effect to the above recommendations if required.

3 Background

- 3.1 During the period of 4 August to 8 August 2021 the Home to School Transport suspected that a provider on the Home to School Transport Dynamic Purchasing System (DPS) had breached condition 27.1.1 in their agreement with the Council by making a material misrepresentation in relation to providing correct and accurate information in regards to Disclosure Barring Services (DBS) certificates which present a significant safeguarding risk to the Council.
- 3.2 In addition, on 11 August 2021 two compliance officers attended the site of the provider to undertake an on-site audit of all documentation relating to employee suitability for transport of vulnerable children. Officers could only assure themselves of 51 out of a 110 employee records and in addition there were 16 positive DBS disclosures of which officers could only assure themselves of 2.
- 3.3 Contractually, the provider has an obligation to satisfy the Council and themselves as a Regulated Activity Provider the suitability of each employee. The Council monitors the suitability of provide employees through a Council ran DBS Panel where drivers who have a positive disclosure must apply, demonstrating their suitability. On the 4 August 2021, the provider supplied a panel outcome form which

approved an employee to work on the Services. The form appeared to be tampered and did not look like an original. When an officer queried this with HR, it was confirmed that the unique reference number did not exist and there was no record of the employee did not appear in any of the records kept by HR on behalf of the service.

- 3.4 The Council has issued two Rectification Notices to the provider in the last month for further concerns around information supplied and safeguarding concerns. Officers have lost confidence in this provider's ability to carry out their safeguarding duty effectively and will therefore terminate the contract with no notice as result of a material misrepresentation set out in paragraph 3.3 amounting to breach of contract.
- 3.5 The matters referred to paragraph 3.3 has also been referred to the Local Authority Designated Officer (LADO) and the Council's Audit team for further investigation and possible referral to the police. It should be noted, that this not the first occasion that officers have referred this provider to LADO.
- 3.6 The incumbent provider will run 125 routes across six special and mainstream schools in Birmingham and transport 848 children. It is difficult to ascertain the exact cost of these services due to COVID-19 and the requirement to bubble pupils in the last academic year. The value of the service pre-COVID-19 is estimated at £1.9m per annum however due to increase in children it is estimated to be higher the academic year 2021/22.

4 Options considered and Recommended Proposal

- 4.1 The Council must now seek an alternative provider to step-in and the following options were considered:
 - (a) Do nothing: Taking no action would mean the Council would be unable to assure itself as a Regulated Activity Provider that children and young people are safeguarded while being transported to school.
 - (b) Utilise the existing DPS: Birmingham's own DPS is saturated and previous mini competitions have seen little to no interest, it risks having no and/or a break in transport in place for September.
 - (c) Utilise existing fleet the Council hold: The Council does not have enough vehicles or employees to undertake these services given little notice.
- 4.2 Recommended option:
 - (d) Utilise another DPS open to public bodies: A national framework is in place to supply non-emergency patient transport and home to school transport. Given the scale of such operations it is likely that more than one supplier will be able to mobilise at speed and step-in.
- 4.3 Officers discussed this proposal with a framework host on 12 August 2021 and pre-engagement with existing suppliers shown that there are at least two organisations who are large enough and feel capable of mobilisation within the timeframes given.

5 Consultation

- 5.1 The Director Education and Skills; Director of Council Management; City Solicitor; Assistant Director of Procurement and Cabinet Member for Vulnerable Children and Families have been briefed on the content of this proposed action.

6 Risk Management

- 6.1 There are several risks associated with the recommended option, however it does present the Council with the least cumulative risk which are outlined in this report. Management of risk will be owned by the Assistant Director of Commissioning, Education and Skills using the CPS Risk Management Framework template.
- 6.2 The current provider (to whom the Termination Notice will be addressed) may dispute the Termination Notice and proceed to initiate Dispute Resolution under the contract. Notwithstanding paragraph 7.4 below, the effect of any legal challenge to the Termination Notice, may result in the procurement of a new provider being paused pending the outcome of a legal challenge by the current provider. However, there are mechanisms available to BCC to progress re-procurement in these circumstances.

7 Compliance Issues:

- 7.1 How are the recommended decisions consistent with the City Council's priorities, plans and strategies?
- 7.1.1 The Council has a statutory duty to make transport arrangements for eligible children including those with Special Educational Needs and Disabilities (SEND) and to provide free transport to eligible children based on distance, safe walking routes and low income. Some children and adults have needs that require specialist vehicles and escorts; this can be provided under the proposed contract. Failure to provide this transport could mean a significant number of children with SEND are unable to access their educational provision.
- 7.1.2 Having access to appropriate travel assistance ensures every child is supported to attend school. Regular reviews of travel plans will support the development of increased independence where appropriate.
- 7.1.3 Supporting educational attainment and independence helps to tackle the causes of deprivation and inequality through improving educational performance and confidence and therefore contributing towards the Council Priority to ensure that Birmingham is an aspirational city to grow up in.

7.2 Legal Implications

- 7.2.1 Part B, B6.6, Council's Constitution states that "In an emergency an executive report may be agreed by the Chief Executive following consultation with the Leaders of the Political Groups." Given the nature of services and the limited time available to mobilise large scale services, it is felt this decision is needed prior to

the next planned Cabinet and that a decision cannot be deferred while preparations are made for a special cabinet meeting.

- 7.2.2 The Council has a duty under Section 508B of the Education Act 1996 to make suitable home to school travel arrangements for eligible children.
- 7.2.3 The Education Act 1996 requires local authorities to provide young people of sixth-form age (Section 509AA) with the transport or otherwise that the authority considers necessary to facilitate their attendance at their place of education or training.
- 7.2.4 The Education Act 1996 (Section 508F) requires local authorities to make such arrangements for the provision of transport and otherwise as the authority considers necessary for facilitating the attendance of young adults at their place of further or higher education.
- 7.2.5 The Council is under a duty to have regard to statutory guidance issued by the Department for Education when carrying out its duties in relation to home to school travel and transport.
- 7.2.6 Service users and those with an Education, Health and Care PLAN (EHCP) will have the right to issue a legal challenge at Court for a breach of statutory duty or by way of Judicial Review of the Council's decisions, if there is a failure to provide a statutory service or if changes to the service are made without adequate notice or could be considered 'unreasonable'.
- 7.2.7 Section 111 Local Government Act 1972 allows the Council to do anything which is calculated to facilitate or is conducive or incidental to the discharge of its functions.

7.3 Financial Implications

- 7.3.1 Understanding the exact costs of these services have been difficult. The Council's Dynamic Purchasing System (DPS) was not operational for a full academic year before COVID-19 occurred meaning school closures and bubbled routes have affected annual figures. Previous spend indicates that the cost of these services are between £1.9m – 4.3m pa.
- 7.3.2 The financial implications are not yet fully understood; as there will be an additional cost to mobilising services at short notice. However, the costs of these services will be fully detailed within the award report and the supplier will be required to sign up to open book accounting.

7.4 Procurement Implications

- 7.4.1 In order to limit potential legal challenge, the services shall be tendered via a mini competition using escalated procurement timescales through a national framework.
- 7.4.2 It is proposed that a strategy and award report is completed to set out the process followed at the point of award.

7.5 Human Resources Implications

- 7.5.1 The Council will be working with both the incumbent and new supplier to take into account the TUPE Regulations which are relevant in these circumstances.

7.6 Public Sector Equality Duty

- 7.6.1 Many of the service users have a disability and could be adversely affected by any changes to the service. The aim will be to minimise disruption as much as possible, and to retain service quality

8 Appendices

9 Background Documents