

CABINET

15 February 2016

Title: Expansion of Abbey Children's Centre Nursery Service and Procurement of John Perry Children's Centre Nursery Service	
Report of the Cabinet Member for Education and Schools	
Open Report	For Decision
Wards Affected: Abbey and Village	Key Decision: No
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Accountable Divisional Director: Jane Hargreaves, Divisional Director of Education	
Accountable Director: Helen Jenner, Corporate Director of Children's Services	
Summary: By Minute 6 (2 June 2015), the Cabinet approved the outsourcing of the two remaining Council Children's Centre Nurseries, Abbey and John Perry, to a private, voluntary or independent sector (PVI sector) provider. However, following a procurement exercise, no tenders were received for the nurseries due to the high pension liabilities of the Council staff subject to Transfer of Undertakings (Protection of Employment) (TUPE) Regulations. Having reviewed all possible options, as detailed in this report, it is proposed to build on Abbey Children's Centre Nursery's success and reputation by retaining and expanding the nursery. Staff from John Perry Children's Centre Nursery would be redeployed to fill the staff vacancies created by that expansion and then John Perry Children's Centre Nursery would be retendered with no TUPE requirements applying, which should prove to be more attractive to potential PVI sector providers.	
Recommendation(s) The Cabinet is recommended to: (i) Agree to the retention of Abbey Children's Centre Nursery as a Council provided service and its expansion to create an additional 40 places with effect from September 2016; (ii) Note that the current Council staff at John Perry Children's Centre Nursery shall be redeployed at the appropriate time to fill the staff vacancies created by the expansion at Abbey Children's Centre Nursery; (iii) Agree the procurement of a five-year contract, with an extension option of up to three years, for the provision of nursery services at John Perry Children's Centre Nursery with effect from September 2016, as detailed in the report; (iv) Indicate whether Cabinet wishes to be further informed or consulted on the	

progress of the procurement and award of the contract; and

- (v) Delegate authority to the Corporate Director for Children's Services, in consultation with the Cabinet Member for Education and Schools, the Strategic Director of Finance and Investment and the Director of Law and Governance, to award and enter into the contract and coterminous lease to the successful bidder in accordance with the strategy.

Reason(s)

Securing sufficient childcare to enable parents to access work and training and providing early education for children, supports the Council's three priorities of "Encouraging civic pride", "Enabling social responsibility" and "Growing the borough".

1. Introduction and Background

- 1.1 In June 2015, Cabinet approved the outsourcing of the two remaining Council Children's Centre Nurseries, Abbey and John Perry to a PVI provider. Under the proposals, the Council staff employed at the nurseries would be subject to TUPE regulations. At that time, the number of full-time equivalent staff involved at both nurseries who would be subject to TUPE was 22.
- 1.2 Plans were also put in place to expand the childcare places at both nurseries, to meet the rising demand for two year old places and the future 30 hours offer of free childcare for three and four year olds, from September 2017. Both nurseries provided 52 full-time equivalent (FTE) places for children between the ages of 0-5 years. However, the intention was, and continues to be, that the Abbey Children's Centre Nursery would expand to accept a further 40 FTE places, taking the total number up to 92. The intention in respect of the John Perry Children's Centre Nursery is to extend provision to allow for up to an additional 16 places.
- 1.3 The procurement exercise for the nurseries began, as detailed in the attached Cabinet report, in June 2015. Abbey and John Perry were tendered as one Lot, known as Lot 3. The Council received two expressions of interest for this Lot. The expressions of interest were from Pre-School Learning Alliance (PSLA) and London Early Years Foundation (LEYF). The PSLA operates a number of children's centre nurseries across England but none in Barking and Dagenham. LEYF is a successful social enterprise organisation currently running over 35 nurseries across London, including five nurseries in Barking and Dagenham.
- 1.4 Both providers were very keen to take on the two nurseries, but concerns were raised around staff costs and in particular pension liabilities. The Actuaries report, containing staff pension information, indicated the need for a substantial indemnity bond to protect the pensions of the staff subject to TUPE. As a result of this and other financial considerations, neither provider submitted a return.
- 1.5 This situation has led to Children's Services having to consider its possible options, going forwards, in regards to the two nurseries.
- 1.6 The almost doubling of the capacity at Abbey Children's Centre Nursery from 52 to

92 FTE places has offered the opportunity to overcome the problems associated with the high pension liabilities of Council staff for a PVI provider. This would be achieved by retaining Abbey Children's Centre Nursery as an in-house service and transferring the John Perry Children's Centre Nursery staff into that Nursery. The expanded service at the Abbey Children's Centre Nursery would require a minimum of seven additional FTE staff to meet statutory minimum child / carer ratios. Although there are up to eight staff at the John Perry site who would currently be eligible for TUPE transfer, it is already known that two of those staff will shortly be leaving their positions to take up new jobs so the remaining complement of staff can all be accommodated in the expanded Abbey Children's Centre Nursery without adversely impacting on the on-going viability of the service.

2. Proposed Procurement Strategy for John Perry Children's Centre Nursery

2.1 Outline specification of the works, goods or services being procured.

2.1.1 The nursery service will provide high quality, affordable and sustainable childcare. Eligibility for the nursery service will be any child from the age of three months, up to the end of foundation stage, five years. The service will be accessible to all families and children that meet the eligibility criteria, from Monday to Friday, 8am to 6pm for fifty one weeks a year.

2.1.2 The service will promote and support all children to develop new skills, ensuring that children make progress towards the early learning goals and will allow children to play and learn together in well organised, safe and structured environments.

2.2 Estimated Contract Value, including the value of any uplift or extension period.

2.2.1 The costs of the provision will be borne solely by the provider. There will be no direct costs arising from the contract and ancillary lease to run the nursery for the Council. The operational running costs of the nursery will be met by the successful bidder, through fees paid by parents/carers on a total cost recovery basis.

2.2.2 Market rent for the nursery has been assessed by an independent agency. Rent will be paid to the Council and will be used as and when required for any necessary repairs to the nursery. The provider will pay a service charge that will cover all utilities and other services related to the building/service, so the rent is an income for the Council that can be used to maintain the nursery and make the provision cost effective. The provider, where applicable, will also be expected to pay business rates for the nursery.

2.3 Duration of the contract, including any options for extension.

2.3.1 The duration of the contract and coterminous lease will be five years with an option to extend for a further three years (eight years in total).

2.4 Is the contract subject to the (EU) Public Contracts Regulations 2006? If Yes, and contract is for services, is it subject to the Light Touch Regime?

2.4.1 As the service being procured will be provided and charged directly by the provider, with no element of income, only rent, being paid to the Council, this contract will

constitute a concession contract. Concession contracts for services are currently exempt from the (EU) Public Contracts Regulations 2006 (the “Regulations”).

2.5 Recommended procurement procedure and reasons for the recommendation.

2.5.1 The tender process will be conducted in compliance with any European Union rules and principles and the Council’s Contract Rules. The tendering of the nursery will be advertised on the Council’s website and on Contracts Finder. Contracts Finder is a free service for businesses, government buyers and the public. The service comes from the government under its commitment to transparency and allows suppliers to find contract opportunities.

2.5.2 There is no requirement for this tender to be advertised in the Official Journal of the European Union (OJEU) as this contract is a service concession and this tender is therefore, not subject to the Regulations. The Council’s own Contract Rules require a formal tender process to be followed and the EU Treaty principles of transparency, non-discrimination and equality of treatment do apply. The route of a tender process has previously worked well: providers engaged with and had no issues with the way in which the procurement process was run. Interested parties will be invited to tender on the basis of a compliant tender process.

2.5.3 All providers who express an interest in the tender will be issued with a tender pack which will give clear details on the price/quality criteria and weightings. The weighting will be 95% quality and 5% cost and award will be based on the most economically advantageous tender.

2.5.4 The weightings are expected to be as follows (this is an overview; tenderers will be made aware of any sub criteria in the tender documents):

Stage One of the tender (Evaluation of Method Statements)

- 15% on service delivery ;
- 20% on management, staffing and business planning;
- 10% on communication and partnership working;

Stage Two of the tender (Unannounced visit)

- 5% based on an unannounced visit to a nursery operated by the selected provider/s;

Stage Three of the tender (Interview session)

- 45% on a presentation and interview session. Again, tenderers will be made aware of all sub criteria in advance.

If there are any revisions to the weightings during the tender exercise all providers who have requested a tender pack will be informed immediately.

2.5.5 Expected Tender Outline

Cabinet approval	15 th February 2016
Advertise and send out tender application packs	Late February 2016
Tender submissions to be returned	Late March/ Early April 2016
Tender evaluations, unannounced nursery visits and interview	Early/Mid April 2016
Approval and award of contract	Late April/ Early May 2016
Start of contract delivery	September 2016

2.5.6 Providers will also be issued with an Application Questionnaire as part of the tender pack. Providers will be informed that they have to reach a pass mark of 75 or above. Of those providers that score 75 or above the top five providers will then have their tender application reviewed and scored.

2.5.7 Following the scoring of the tender application the top two providers will then be invited to a presentation and interview session. Before the interview sessions take place Council Officers will make unannounced visits to one of the provider's nurseries. The contract and lease will be awarded to the successful bidder for a period of five years with an option to extend for a further three years depending on performance. The contract period has been agreed upon to ensure consistency of service provision.

2.6 The contract delivery methodology and documentation to be adopted.

2.6.1 Service to be delivered by an external provider. Documentation to be adopted will be the Council's standard terms and conditions.

2.7 Outcomes, savings and efficiencies expected as a consequence of awarding the proposed contract.

2.7.1 Service Outcomes

- a) Provision of additional childcare places for children, allowing more parents (especially lone parents) the chance to study, enter or re-enter the job market;
- b) Provision of a nursery service that ensures every child at the setting makes progress and no child is left behind. Equality of opportunity and anti-discriminatory practice will ensure that every child at the nursery is included and supported;
- c) Provision of a nursery service where children are safeguarded and where they feel safe, secure and well.

2.7.2 Savings, income and efficiencies

For John Perry Children's Centre Nursery, market rent and business rates will be paid to the Council. The rent payment will be used for and will ensure the upkeep and repair of the nursery building. This may lead to additional income for the Council.

Abbey Children's Centre Nursery has always generated a small profit and should

continue to do so, especially with an increased number of places. The Nursery will continue to be a centre of excellence for the support of young children with special educational needs (SEN).

2.8 Criteria against which the tenderers are to be selected and contract is to be awarded

2.8.1 Overall quality/price weighting: quality 95% and price 5% with award to be based on the most economically advantageous tender.

2.9 How the procurement will address and implement the Council's Social Value policies.

2.9.1 The Council's Social Value policies and the Social Value Act 2012 are broadly aligned, and thus, this contract will address and implement the aims by:

- providing job opportunities and apprenticeships for local people;
- providing childcare places, enabling parents/carers to seek employment and/or training;
- provide a safe and secure environment for children to play, learn and develop.

3. Options Appraisal

3.1 The following options were considered.

Option 1: Do nothing; the Council continues to operate Abbey and John Perry Children's Centre Nurseries.

This option would involve trying to make John Perry Nursery more financially stable and profitable. The nursery could be expanded, but with the expansion of Abbey Nursery as well, this would involve employing additional staff at both nurseries. The new nursery staff would be paid in line with the National Joint Council (NJC) salary scales, with salaries being higher and employment benefits being more substantial than those usually paid or offered by PVI childcare providers. Additional staff, pay levels and employment benefits would also make any future outsourcing of either Nursery even more difficult.

Option 2: The Council closes the nurseries/ a nursery.

Since September 2014 the Council is required to deliver free early education places to 2,055 two year olds, in addition to the statutory 3 and 4 year old places. It is the duty of the local authority to manage its market to ensure that sufficient capacity is available to deliver this. If any of the nurseries were to be closed, the Council would not be in a position to meet its statutory duty.

Option 3: Both nurseries are re tendered with a substantial financial incentive.

In the current financial climate, it would be very challenging to be able to find the available funds to re-tender the two nurseries with a substantial financial incentive, or to cover the cost of staff pension liabilities, for those staff subject to TUPE.

Option 4: Expand Abbey Nursery and move staff from John Perry Nursery to fill the vacancies and then re-tender John Perry with no staff subject to TUPE.

If Abbey Nursery is expanded to create an additional forty (40 places), staff from

John Perry Nursery could be redeployed to fill the staff vacancies created by this expansion. John Perry could then be outsourced as a viable business but without any staff subject to TUPE. This would then make John Perry Nursery more attractive to PVI providers and would provide an income (rent and business rates), to the Council. Abbey Children's Centre Nursery has always generated a small profit and should continue to do so, especially with an increased number of places. The Nursery will continue to be a centre of excellence for the support of young children with special educational needs (SEN).

3.2 Option 4 is the recommended option. This option would build on Abbey Children's Centre Nursery's success and reputation. The expansion of the Nursery would also provide much needed additional capacity for childcare places in the Borough.

4. Waiver

Not applicable.

5 Equalities and other Customer Impact

5.1 With a number of families now opting for part time places, both nurseries will be providing childcare for 100's of families. Parents will be eligible for all current childcare support, including access to free education places. The provider and the Council will be able to signpost parents and children to other services including Children's Centre services.

5.2 Children's Services will be responsible for supporting any preferred bidder at John Perry Children's Centre Nursery, to deliver high quality and fully inclusive childcare which is financially sustainable. As part of the procurement process, potential providers will be assessed for adherence to necessary legislation and regulations in particular around equalities. Equality of opportunity and anti-discriminatory practice will ensure that every child with a place at the nursery is included and supported.

6. Other Considerations and Implications

6.1 Risk and Risk Management

6.1.1 The procurement exercise for John Perry Children's Centre Nursery will assist in assessing the financial stability of any prospective providers. Credit checks will be conducted and audited accounts reviewed, if necessary. Providers will also be asked to submit a proposed financial plan for the first three years of running the nursery. Once financial stability has been established the main risk will be the quality of the service to be delivered. Technical ability will be assessed during the tender stages and will cover a range of areas including: experience, management and staffing, and safeguarding.

6.1.2 Once a provider has been chosen for John Perry Children's Centre Nursery and approval has been given, written contractual arrangements will contribute to ensuring a quality service. The contract and lease will be monitored and managed by a dedicated Contract Manager. The Contract Manager will liaise with the Council's Legal Team in order to resolve any contractual issues that arise during the life of the contract. Quarterly monitoring meetings will be conducted, with the provider having to complete and submit monitoring forms before any monitoring meeting.

6.1.3 Council Officers will conduct unannounced visits to John Perry Children's Centre Nursery to monitor the quality of the provision. Quality surveys will be conducted by the provider and the Council and will be aimed at parents / carers and children attending the nursery. Parents/carers will be made fully aware of how to make a complaint about the service being delivered. The provider will have to report any complaints made to the Council and where relevant Ofsted.

6.1.4 Both nurseries are and will also be subject to external inspection from Ofsted.

6.2 **TUPE, other staffing and trade union implications**

6.2.1 Staff from John Perry Children's Centre Nursery will be redeployed to fill the staff vacancies created by the expansion at Abbey Children's Centre Nursery. This will allow John Perry Children's Centre Nursery to be outsourced with no TUPE involved.

6.3 **Safeguarding Children**

6.3.1 Any chosen provider for John Perry Children's Centre Nursery will be required to conform to all the Council's local safeguarding procedures. This will be explicitly dealt with in the contract which will be drafted by the Council's Legal Department.

6.4 **Property / Asset Issues**

6.4.1 Children's Services will work closely with the Council's Legal and Property Services to ensure that a lease is put in place and runs concurrently with the John Perry Children's Centre Nursery contract and is capable of being terminated, for whatever reason and justification, in accordance with the service contract awarded. The nursery will be let at market value which will cover the cost of the Council carrying out routine repairs at the property.

6.4.2 Children's Services will be working closely with the Council's Property and Asset Management Teams, around the expansion of Abbey Children's Centre Nursery (and any future possible expansion of John Perry Nursery). This will ensure that any works are completed to a high standard and in line with all relevant Procurement Regulations and the Council's Contract Rules.

7. **Consultation**

7.1 The most recent Childcare Sufficiency Assessment was finished in September 2015. Details can be found at <http://www.lbbd.gov.uk/ChildrenAndYoungPeople/ChildChoices/Pages/SufficiencyAssessment.aspx>.

7.2 Consultation for this expansion and tender exercise has taken place through circulation of this report. The proposals in this report were considered and endorsed by the Corporate Procurement Board at its meeting on 19 January 2016.

7.3 Staff and Trade Union representatives have been kept fully informed of developments and the proposed way forward.

8. Corporate Procurement

Implications completed by: Francis Parker - Senior Category Manger

- 8.1 As the service is a concession, the EU Regulations in regards to mandated timescales do not apply, however it is recommended that the procurement is managed in the same manner as an open ITT tender to ensure transparency and a level playing field approach is utilized to mitigate any risk of challenge.
- 8.2 Although 95% Quality weighting seems one-sided, due to the fact that the service is of a technical and regulated nature this is deemed to be appropriate for this procurement.
- 8.3 The removal of any TUPE implications should make the offering more appealing to potential providers.

9. Financial Implications

Implications completed by: Carl Tomlinson, Group Manager Children's Finance

- 9.1 This report requests approval for the retention of Abbey Children's Centre Nursery as a Council provided service and its expansion to create an additional 40 places with effect from September 2016. The expansion of the Nursery will be funded from £1m revenue grant that has been capitalised to fund the development of new places. The Secretary of State authorised the request to disapply the financial regulations to support the development of new nursery places. Cabinet approved the inclusion of £1m in the capital programme in November 2015.
- 9.2 This report also requests the approval to procure a five year contract with an option to extend for a further three years for the provision of nursery places at John Perry Children's Centre Nursery with effect from September 2016. Staff from this nursery would be redeployed to the expanded Abbey Children's Centre Nursery with no TUPE involved.
- 9.3 The contract also includes an ancillary lease to run the nursery for the Council and requires the successful bidder to be responsible for its operational running costs. A market rent will be paid to the council and will be used for any repairs. A service charge will also be payable by the provider to cover utilities and other services. Children's Services will need to ensure that the lease that is entered into has the flexibility to terminate the contract and lease without any financial penalties. A full financial assessment and approval will be required before the award of the contract.

10. Legal Implications

Implications completed by: Kayleigh Eaton, Contracts and Procurement Solicitor, and Erol Islek, Property Solicitor

- 10.1 This report is seeking Cabinet's permission to retain Abbey Children's Centre Nursery as a Council provided service and carry out a new tender exercise for the appointment of a provider at the John Perry Children's Centre Nursery.

- 10.2 The proposal set out in the report is that the contract is let as a concession contract which means that there is no direct cost to the Council and all costs are borne solely by the Contractor. Until the draft Concession Contracts Regulations 2016 come into force, expected to be 18 April 2016, the Public Contract Regulations 2006 (the "Regulations") continue to provide for the general exclusion for service concession contracts under Regulation 6 (2) (m) which states that the Regulations do not apply to the seeking of offers in relation to a proposed public contract 'which is a services concession contract awarded by a contracting authority'. However in conducting the procurement, the Council still has a legal obligation to comply with the relevant provisions of the Council's Contract Rules and with the EU Treaty principles of equal treatment of bidders, non-discrimination and transparency in conducting the procurement exercise.
- 10.3 The EU Treaty principles noted above encourage the advertisement of contracts in a manner that would allow any providers likely to be interested in bidding for a contract to identify the opportunity and bid for a contract, should they wish to do so. This report states that the Council's website and the Contracts Finder website will be utilised for advertising to potential bidders.
- 10.4 Legal services note that an expected tender outline has been inserted in paragraph 2.5.5 of the report. Legal Services would advise that should there be any slippage or deviation from the proposed timetable, resulting in delays in the procurement exercise being carried out, that advice should be sought from Legal Services on any possible implications of the draft Concession Contracts Regulations 2016.
- 10.5 One of the recommendations of this report is that Cabinet delegate authority to the Corporate Director of Children's Services to award and enter into the contract and coterminous lease to the successful bidder. Contract Rule 47.15 provides that in the absence of any direction to the contrary from Cabinet, contracts may be awarded by the Chief Officer or in accordance with the scheme of delegation as long as the necessary financial approval has been given by Corporate Finance.
- 10.6 The report author and responsible directorate are advised to keep Legal Services fully informed at every stage of the proposed tender exercise. Legal Services are on hand and available to assist and answer any queries that may arise.
- 10.7 This report is also seeking Cabinet's approval to retain Abbey Children's Centre Nursery as a Council run service and carry out a new tender process for the appointment of a new provider at the John Perry Children's Centre Nursery. The Council owns the freehold land and building known as Abbey Children's Centre Nursery North Street, Barking, IG11 8JA and there are no property implications for the Council to carry out its statutory duties within its own property and land. The Council owns the freehold land and building known as John Perry Primary School, Charles Road, Dagenham, Essex, RM10 8UR and is therefore able to grant the required lease following a tender process. The Council's powers are contained in section 123 of the Local Government Act 1972, and Section 1 of the Localism Act 2011 also provides local authorities with a general power of competence.

Background Papers Used in the Preparation of the Report: None

List of appendices: None