

Committee: Cabinet

Date: 20 March 2023

Agenda item:

Wards: All Wards

Subject: Contract Award - Non-Maintained and Independent Special Schools Placement

Lead Director: Jane McSherry - Director of Children, Schools & families

Lead member: Sally Kenny, Cabinet Member for Education and Lifelong Learning

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Recommendations:

- A. To award a new contract for the placement provision of Non-Maintained and Independent Special Schools for Merton's vulnerable children and young people with an Education Health and Care Plan (EHCP) for a period of five (5) years (until 31 March 2028) with no potential of an extension. The contract value is set out in Appendix A.
- B. The providers as listed in Confidential Annex A of this report are awarded a place on the new 'Pseudo DPS' as they have passed the accreditation and enrolment evaluation process, whilst recognising that further organisations will be able to join throughout the duration of the 'Pseudo DPS' if they pass both the accreditation and enrolment stages.
- C. Cabinet delegates its authority to the Director of Children, Schools, and Families to implement the 'Pseudo DPS' and make the decision to award all contracts where the selection criteria has been followed under the 'Pseudo DPS' during its term validity of 5 years (until 31 March 2028).

1. PURPOSE OF REPORT AND EXECUTIVE SUMMARY

- 1.1. The purpose of this report is to explain the procurement process for a new contract for the provision of Non-Maintained and Independent Special Schools placement services and to seek the approval of Cabinet for the award of contracts for the placement provision of Independent and Non-Maintained Special Schools across the Council's administrative area and to recommend that Cabinet approves the award of the contracts to the successful bidders contained within Confidential Appendix.
- 1.2. London Borough of Merton called for competition on Find a Tender procure system by making known the intention to establish a procurement under the 'Light Touch Regime' (LTR) based on a Dynamic Purchasing System style arrangement (referred to in the report as 'Pseudo DPS') compliant with the Council's Contract Standing Orders (CSOs) and as set out in Regulations 74-77

of the Public Contracts Regulations 2015 (PCR). The procurement is supported by software hosted by a software provider procured separately (adam).

- 1.3. Providers who have successfully registered and those yet to complete the registration process during the contract term are recommended to be admitted on the system. Due to commercial sensitivity, the details of approved providers have been circulated as a confidential appendix to this report.

2. DETAILS

- 2.1. This report outlines the key features and benefits of above recommendations and the overall impact on service quality, cost control and value for money.
- 2.2. In Merton, we are working towards meeting the majority of educational needs for children with a Special Educational Need or Disability (SEND) in one of Merton's mainstream settings. However, even with the pursuance of an inclusive approach there are still children who may be identified as needing support in a specialist setting such as a Non-Maintained or Independent Special School. This is due to a shortage of in-borough special school places or their needs cannot be met in local provisions. Placement decisions are made by a Placements Panel, which considers all maintained and in-borough alternatives, but parental choice is a principle in all school choices. Decisions by the authority can be challenged and subject to mediation and challenge through the Tribunal process.
- 2.3. The dependency on and high cost of Independent, Non-Maintained Special Schools is one of the key factors in the deficit in the Dedicated Schools Grant budget. While we are working to increase in-borough maintained provision, we are left with the cost of current placements until the new capacity comes on stream and children in current placements move back in-borough or transition. Improving the contractual basis of those placements is one of the actions in the Safety Valve programme. Whilst it will not directly impact on fees, it will give us better tools to contract manage the placements and where appropriate trigger fee clawbacks and placement reviews.
- 2.4. The Independent, Non-Maintained Special School sector is well developed in London and the South-East. It is a difficult market to operate in because whilst local authorities are the predominant funders, schools see parents as their customers and target them for all their marketing and relationship management. The demand for places and the role of parental choice and tribunals means that it is a supply driven and dominated market.
- 2.5. Merton was previously part of the South London Commissioning Partnership purchasing Independent, Non-Maintained Special Schools in the hope of having stronger bargaining power. However, the benefits did not materialise. As it was based on voting across the ten-authority members, it was difficult for Merton to have any control or influence. In our view, the contract put in place by the SLCP had poor contract monitoring and performance management. It was also weak on financial management. This came to a head when we became aware that they were agreeing levels of uplifts that we would not have agreed to and without reference to quality or performance on a child level data.

- 2.6. There has been no contractual framework in place since we left the South London Commissioning Partnership (SLCP). The Council commissions services as and when required through spot purchasing. SLCP did not provide the contract terms and financial control required. There has been inconsistent and lack of transparency as to how fees are calculated by providers. In addition, the absence of formal contracts, with clear and consistent monitoring arrangements exposes the Council to challenge. Having withdrawn from the SLCP, we reviewed the options in Gateway 1 paper and determined that a Dynamic Purchasing System approach was the best as it allows providers to join the framework and has a fee breakdown requirement and rigorous contract monitoring arrangements.
- 2.7. Merton Council currently spot purchases 402 placements from approximately 72 Independent Special Schools including Independent Schools, Specialist Post 16 institutions and Non-Maintained Special Schools to support the needs of young people with SEND whose needs cannot be met within local special school provision mainly due to lack of capacity in local maintained provision. The annual cost for 2021/22 was circa. £21m.

Type	Total No. of Providers	Total No. of Placements
Non-Maintained Special	9	14
Independent Special	36	307
Independent Other	19	46
Specialist Post-16	8	35
TOTAL	72	402

- 2.8. This 'Pseudo DPS' is underpinned by the Department for Education (DfE) Safety Valve programme, Action 6 which is aimed at strengthening contracting arrangements with Non-Maintained and Independent Special Schools to manage financial pressures and increase capacity of appropriate placements to meet the needs of Merton's vulnerable children and young people with an EHCP and achieve better terms and consistent prices through improved relationships and strong negotiation.
- 2.9. The new contract is open to current and new providers to complete a two-stage process of Accreditation and Enrolment. The contract length will be for a maximum period of 5 years, from the 3rd April 2023 to 31st March 2028.
- 2.10. There is no guaranteed minimum level of spend or volume of placement services under the 'Pseudo DPS' and the council has the ability to procure services outside of this contract should it deem this necessary. The 'Pseudo DPS' remains continuously open to new joiners throughout the term of operation thus making it agile and able to respond to changing demand. There is no guarantee of business for any provider on the 'Pseudo DPS'.
- 2.11. This 'Pseudo DPS' will benefit the council as follows.
- Provide the Council a strategic procurement solution that ensures that children and young people with the most severe and complex special educational needs and disabilities are provided with high quality specialist

provision, matched to their individual assessed needs, with a capable market of providers, in line with the principles of best value.

- Better protection for children by ensuring adequate contract terms are in place for every placement, and protection for the Council from provider disputes due to consistent contract terms, outcomes, and service standards.
- Clarity for placement panel decision makers and SEND teams regarding supplier pricing, discounts, performance, and risk.
- A competitive and transparent process to ensure better value for money by ensuring all suitable providers are invited to bid and the ability to compare offers.

2.12. Establishing the 'Pseudo DPS' has been met with some reluctance from the sector. Some independent educational settings prefer to negotiate on a pupil-by-pupil basis and/or want to use their own terms and conditions or felt they had sufficient demand for placements from parental preference and other local authorities. Other issues were linked to providers' resistance to transparency of costs or use of the Adam Procure system. Other providers were citing reasons that their placement fees are not negotiable and come as part of the holistic service they offer.

2.13. Commissioners are committed to continued working with market providers to gain their increased buy in to working in a transparent manner. New providers are being added to the 'Pseudo DPS' and as a priority, Commissioners are planning to hold a range of market engagement activities to significantly increase the number of providers on the 'Pseudo DPS'.

3. PROCUREMENT PROCESS

3.1. London Borough of Merton called to competition via Find a Tender and Contracts Finder, making it known the intention to establish a structure for the procurement of the services under the LTR. This was set up as a Pseudo Dynamic Purchasing System procured under Regulation 74-77 of the PCR.

3.2. Adam Procure was used for the procurement process, enabling providers to register by successfully completing a two-stage process of Accreditation and Enrolment. (NB Adam Procure was selected through a separate procurement exercise).

3.3. The submissions were evaluated within 10 working days of receipt, whereby providers were either passed for admission or failed with feedback on elements missing which they could rectify and resubmit immediately.

3.4. All future submissions will be evaluated within the 10 days of tender receipts unless there is some justification to extend to 15 days.

3.5. The new Independent and Non-Maintained Special Schools Placement contract length will be for a maximum period of 5 years, from the 3rd of April 2023. With future submissions pro-rata no later than the stated contract term.

3.6. The council stipulated that the contracts would be awarded to the bidders whose tenders were judged to pass both the Accreditation and Enrolment stages as per the below table:

Published Award Criteria	Weighting
First Stage - Accreditation Company Information signed Admission Agreement, Sub-contractor Information.	Pass/Fail
Second Stage - Enrolment Contract examples, Pricing Schedule, Commercially Sensitive Information, GDPR and Tender Declaration	Pass/Fail

3.7. Bidders who at any stage had gaps in submission, they were failed and advised on what required to be rectified or what was missing for them to successfully re-submit.

3.8. Bidders had the option to attend supplier support sessions on 21st November 2022, 5th December 2022, 10th January 2023 and 12th January 2023, call adam support line for system support issues which may have been experienced. Moreover, a detailed step by step user guide was drafted and shared with all providers on adam procure and by email.

3.9. Bidders were advised that contracts would be awarded to all providers that passed both the Accreditation and Enrolment stages.

3.10. The bidders were required to provide within the pricing schedule, two elements of their costings for the council's information:

- Average Cost of a Placement (Based on the last full academic year) - Day Placement and
- Average Cost of a Placement (Based on the last full academic year) - Weekly Boarding

3.11. The return date for initial tender was 20 January 2023. 16 bidders were still in the draft stage for Accreditation and 10 in the Enrolment stage by the initial submission deadline. These bidders will be able to submit post the initial deadline.

3.13 Social Value considerations:

The Social Value Measurement Charter was considered for inclusion in this 'Pseudo DPS'. After discussion with Commercial Services, it was agreed that the nature of the suppliers' businesses, coupled with the fact that LBM wanted to create a Dynamic Purchasing System which in itself creates new challenges and opportunities, SVMCs should not be issued on this project. It was also felt that the inclusion of SVMCs would potentially harm the breadth of potential bidders as a soft market test showed that most were unfamiliar with the concept.

As an alternative, providers were asked as part of their bids to have regard to the economic, social and environmental well-being impact of their provision and work towards positive outcomes in these areas for the CYP placed within their provision as well as the wider community where relevant.

3.14 Contract Management:

Contract and Supplier management is a critical requisite to ensure the success of a contract of this size and importance. The Council will monitor the performance of providers at organisational and individual levels against set Key Performance Indicators outlined in the DAA Schedule 2 – Contract Management on an Academic Term basis unless stated otherwise for individual indicators. Data will be collected on an individual level and monitored on an individual and total cohort basis. Data returns template for providers to complete has been created and tested. This will be sent to providers prior to contract meetings to allow for data analysis.

4. TENDER EVALUATION

- 4.1 The evaluation of bids was undertaken in two parts, where adam and commissioning reviewed and approved the accreditation stage. Only when the provider passed the Accreditation stage then the enrolment stage was reviewed and approved.
- 4.2 The evaluation process was supported by officers from adam procure and overseen by an officer from the Council's Commissioning team, acting in a quality assurance role to ensure national procurement legislation and the council's own procedures were complied with in full, and that the approach of the adam team, to testing and scoring against the evaluation criteria was rational and consistent for all elements of the tender.
- 4.3 Bids were checked for completeness and assessed against the mandatory and then discretionary grounds for exclusion including experience of delivering the required educational services.
- 4.4 The evaluation team assessed each tender pass/fail, with the option for those that failed to resubmit with guidance provided from adam.
- 4.5 Following the conclusion of this initial process, the evaluation team determined that 15 providers met the criteria to supply to Merton Council against the published criteria. It is recommended that all 15 Providers are awarded a place on the 'Pseudo DPS'. Full details of the results of the bid evaluation process are included in the Part 2 report (Confidential Annex).
- 4.6 At the Accreditation stage, there were 22 providers approved, 16 in draft and 8 failed. At Enrolment stage, there were 15 providers approved, 10 in draft and 5 failed. The Council will keep the 'Pseudo DPS' open to allow new providers to join at any time, including those that were unsuccessful or still in draft.
- 4.7 The Council is now in a position to make full use of the 'Pseudo DPS' from 3rd of April 2023. Implementation of the 'Pseudo DPS' and responsibility to award contracts for individual placements made by calling off from the 'Pseudo DPS' will remain with SEND Commissioning.

5. ALTERNATIVE OPTIONS

- 5.1 An alternative option is to do nothing, do not enter contracts with providers and continue with negotiating when a placement is required.
- 5.2 The disadvantages to this would be that the council will not be able to ensure value for money as the balance of power upon requiring placement will be tilted towards providers and the council will be forced to pay high fees due to not having stipulated core costs agreed in advance.

6. CONSULTATION UNDERTAKEN OR PROPOSED

- 6.1 Consultation has been undertaken mainly through meeting discussions on the 'Pseudo DPS' held with our largest providers and all market providers were invited to market engagement events to seek views on joining a 'Pseudo DPS' on the 19th & 25th October 2022 and 2nd November 2022.

7. TIMETABLE

Procurement Stage:	Date:
Publication of Contract Notice and Tender documents on Adam Provider Site	7 th November 2022
Clarification Closes	02 nd December 2022
Initial Accreditation and Enrolment Closes	20 th January 2023
Accreditation and Enrolment Evaluation	23 th to 24 th January 2023
'Pseudo DPS' Appointment Notices, Internal Approvals & 'Pseudo DPS' Admission Agreement Signing	February – March 2023
Delivery Commences ('Pseudo DPS' is live) <i>Note: individual call-offs, or Placements, will have different commencement and end dates</i>	03 rd April 2023

- 7.1 The award of this contract **not** subject to observing a 'standstill' period. Accordingly, the contract can be formally awarded to the successful tenderers immediately after the internal processes are completed.

8. FINANCIAL, RESOURCE AND PROPERTY IMPLICATIONS

- 8.1 There was a total spend of approx. £21m based on 2021/22 budget report (currently waiting for 2022/23 figures) which is funded from High Needs Block (HNB) of the Designated Schools Grant (DSG).
- 8.2 The adam procure system cost the council £30,000 per annum.

- 8.3 The Council has a duty and is responsible for payment of independent and non-maintained special school placements as assessed and approved by the SENDIS service.
- 8.4 Spend on existing packages will continue and existing packages will be maintained with the current provider. Existing placement fees will stay the same for the duration of the placement.
- 8.5 Demand pressures in future years could also cause costs to increase and so too could inflationary increases. The council exited The South London Commissioning Programme (SLCP) in April 2022 as it gave little control over fee uplifts negotiations. This 'Pseudo DPS' will give the Council the right to follow its own process for fee management as set out in DAA Schedule 4 – Fee Uplift Process.
- 8.6 The Council is facing budget pressures and there is ongoing programme of work to establish a balanced budget regarding expenditure funded from the High Needs Block of the Dedicated Schools Grant. This 'Pseudo DPS' approach, with no commitment of spend or volumes, offers the greatest degree of flexibility and may allow us to facilitate these budget pressures.
- 8.7 Commissioners are working with market providers to ensure that a greater number of providers join the 'Pseudo DPS'. A further programme of market engagement events to encourage more providers to join the 'Pseudo DPS'. At present those who have successfully joined the 'Pseudo DPS' represent just over 20% of our total incumbent supply base. As a result, joining the 'Pseudo DPS' will not mean that spot purchasing will cease because of entering this contracting arrangement. Parental choice also impacts on the Council's ability to solely commission via this 'Pseudo DPS' procurement vehicle.

Section 151 Officer Commentary

This expenditure is funded from the Dedicated Schools Grant and the financial implications are outlined within section 8.

9. LEGAL AND STATUTORY IMPLICATIONS

- 9.1 The service procured as described in the report as a 'Pseudo DPS' was procured under the Light Touch Regime (LTR) under regulations 74-77 of the Public Contract Regulations 2015 (PCR). The LTR allows for flexibility for contracting authorities to design compliant procurement processes which must meet basic requirements of transparency and equal treatment of economic operators. Such a procurement will be compliant with the Council's own Contract Standing Orders (CSOs) in particular CSO 15 as well as the PCR.
- 9.2 The Council should retain an auditable record of its compliance with the procedures it has set in place.
- 9.3 Once contracts are awarded, they should be entered onto the Council's Corporate Contracts Register and CSO 19.2.4 and award notices must be published periodically under PCR regulation 75(5).

- 9.4 The Procurement of Adam was undertaken from a framework which will provide a lawful method for the procurement of software services. The council should retain evidence that it has complied with the call of requirements of the framework and the publish the information required by regulation 108 of the PCR in relation to that procurement and enter relevant details on the corporate contracts register.
- 9.5 The Council is entitled to delegate decision making as referred to in the recommendations under section 9E of the Local Government Act 2000.

10. HUMAN RIGHTS, EQUALITIES AND COMMUNITY COHESION IMPLICATIONS

- 10.1 There are no substantive Human Rights, Equalities and Community Cohesion Implications arising from the recommendations contained within this report.

11. CRIME AND DISORDER IMPLICATIONS

- 11.1 There are no substantive crime and disorder implications arising from the recommendations contained within this report.

12. RISK MANAGEMENT AND HEALTH AND SAFETY IMPLICATIONS

- 12.1 All providers that are awarded contracts must be an educational establishment, and where required be CQC or Ofsted or ISI registered.
- 12.2 The UK procurement regulations allow bidders to challenge a contract decision from a public body, especially on matters of procedure. This risk is deemed minimum for this contract, as the route used is the Dynamic Purchasing System, where providers may always re-submit unsuccessful submissions with guidance from the Council.
- 12.3 One of the risks of a 'Pseudo DPS' is that providers choose not to join and continue to operate on a spot purchase arrangement as they are aware that due to demand and/or parental preference they will still be needed by local authorities. This will be mitigated by continued provider conversations to convey the importance of transparency around providing high quality and cost-effective places for children. The council will also have a role in liaising with parents to assure them that we have robust processes in place to reflect this. Where specialist educational need can be met via the 'Pseudo DPS', the Council would work with parents to state this as the placing preference on the Education Health and Care Plan. This will also provide a compelling narrative for providers to join the 'Pseudo DPS'.
- 12.4 Another risk is that some providers might see it as an opportunity to submit higher pricing than the council currently pay them. This was mitigated in the development of the 'Pseudo DPS' through a requirement for detailed breakdown of fees, data integrity checks and comparison of last academic fees and current academic fees.
- 12.5 The following key risks associated with the contract have been identified, along with mitigation activities:

Risk Description	Mitigation Activity
Demand may grow for services resulting in increased costs	There has been an annual increase in demand for services. The 'Pseudo DPS' established maximum process for provision to help control the unit cost.
Poor quality of service and service does not deliver required outcomes.	Strong contract management and quarterly contract review meetings will mitigate the risk of a poor-quality service. Failure to meet the service outcomes and objectives will enable the Council to restrict payment based on performance and ultimately terminate the contract if performance does not improve.
Current placements	Spend on existing placements will be maintained with the current Provider. However, if this Provider is successful in joining the 'Pseudo DPS', they will automatically transfer on to the 'Pseudo DPS''s T&C's excluding costs.
Prices submitted to the 'Pseudo DPS' increases cost of new placements	There is ongoing work through setting market expectations and requiring greater fee transparency to mitigate the risk of higher fees. Ongoing market engagement with providers will help negotiate better value for money.

13. APPENDICES – THE FOLLOWING DOCUMENTS ARE TO BE PUBLISHED WITH THIS REPORT AND FORM PART OF THE REPORT

APPENDIX A - EXEMPT