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| Bath & North East Somerset Council | | |
| MEETING/ DECISION MAKER: | Cabinet | |
| MEETING/ DECISION DATE: | 26th May 2022 | EXECUTIVE FORWARD PLAN REFERENCE: |
| | | E3362 |
| TITLE: | HCRG Care Group Options Appraisal | |
| WARD: | All | |
| AN OPEN PUBLIC ITEM | | |
| <p>List of attachments to this report:</p> <p>Exempt Appendix 1: BDO Supplier Due Diligence Review</p> <p>Appendix 2: HCRG Care Group Risk Analysis Table</p> <p>Appendix 3: HCRG Care Group Options Appraisal</p> <p>Exempt Appendix 4: Legal Advice</p> | | |

1. THE ISSUE

- 1.1 Bath & North East Somerset Council (the **Council**) and Bath and North East Somerset Clinical Commissioning Group (the **CCG**) (together the **Commissioners**) entered into a contract with Virgin Care Services Limited (the **Provider**) for the delivery of a range of health, social care and public health services (the **Contract**) with effect from 1 April 2017. The contract is in the sixth year (2022/23) of the initial seven year term with an option for the commissioners to extend the initial term by three years, taking the full extended contract term to 2026/2027.
- 1.2 The contract covers 51 services to be delivered which are grouped into Children's, Adults, Wellbeing, Adult Social Care and subcontracted services (Virgin Care Services Limited operated as a prime provider and subcontracted services to several smaller community providers within the Bath & North East Somerset locality of which several are in the third sector).
- 1.3 The Commissioners each took a decision on 11 November 2021 (through the Council's Cabinet and the CCG's Governing Body) to approve exercising Option 3 (the **November Decisions**) as follows:

Council Decision:

"Approve Option 3 - Extend the contract term for the 3 year period (until 31st March 2027) but with identified services removed from block contract and/or improvement trajectories

for identified services and delegate to Suzanne Westhead, Director Adult Social Care (DASS) in consultation with Cllr Born, Member for Adult Services authority to serve notice to extend the contract once assured that the total price for the contract as varied is agreed and affordable.”

CCG Decision:

“Based on the information presented in the report and during the meeting, the Governing Body approved option three – to extend the contract term for the three-year period until 31 March 2027.”

- 1.4 On 1 December 2021, the Virgin Care Services Limited notified the commissioners that the business it formed a part of had been sold to T20 Pioneer Holdings Limited which is in turn ultimately held by Twenty20 Capital Limited (via another company) (T20). T20 is a private equity investor.
- 1.5 The change took effect from 30 November 2021 pursuant to the formal change of control notice. The change in ownership is several steps removed from the Provider with intermediate companies being retained but names changed. The Provider is now known as HCRG Care Services Ltd (**HCRG Care Group**). The Provider has stated that it “has no intention or proposal to make a consequential change to its operations”.
- 1.6 The Commissioners were not aware of the potential sale of the Provider prior to making the November Decisions.
- 1.7 Under the terms of the contract, HCRG Care Group should have been notified of the commissioners’ decision to extend or not to extend the contract by 31 March 2022. Due to the change of ownership the time period for such notification was extended to 30 June 2022 following mutual agreement between the commissioners and the HCRG Services Limited (the current Provider).
- 1.8 The November Decisions were made on an assumption that the commissioners would continue to deal with the same provider with the same intentions and risk profile. The various November reports do not explicitly refer to this but do frequently refer to the existing relationship and performance of the provider, its approach to the future and commitments (i.e. not to renegotiate the existing financial terms). That assumption proved not to be the case with the change in ultimate parent ownership.
- 1.9 Therefore, following the announcement on 1st December 2021, the Commissioners paused formal confirmation and notification of the extension decision until the Council and CCG had undertaken a full due diligence review of the change in control and sought legal advice on the change in ownership.

2. RECOMMENDATION

- 2.1 Cabinet is asked to consider all the benefits and disbenefits along with the associated risks highlighted in the report to inform the extension decision. The options appraised have been ranked in order of risk and mitigation.

Cabinet is asked to make a decision between:

Option 1 - Extend the contract term for the 3 year period (until 2026/27) or

Option 3 - Allow contract to end with no contract extension beyond 31 March 2024

- 2.2 Delegate to Suzanne Westhead, Director Adult Social Care (DASS) in consultation with Cllr Born, Member for Adult Services authority to proceed with the agreed option and undertake any appropriate risk mitigation.

3. THE REPORT

Background:

- 3.1 A due diligence review was undertaken on T20 and the implications of the acquisition of the Provider for the Contract, the Commissioners and the delivery of services.
- 3.2 The review of the acquisition of Virgin Care Services Limited did not identify matters or issues of concern that would definitively change the decision taken by B&NES in November 2021.
- 3.3 The review highlighted if a decision is taken not to extend the contract this could adversely impact on other commissioners across the country due to the significance of the contract value to the provider. The loss of the B&NES contract could cause financial/operational difficulties for the provider.
- 3.4 In February 2022, the Commissioners instructed independent legal advice from Bevan Brittan LLP on the implications of exercising the November Decisions. The legal advice provided comments on the scope for the Commissioners to review the November Decisions and high level comments on the alternative options. It was recommended that Commissioners sought to agree an extension to the 31 March 2022 deadline until 30 June 2022. HCRG Care Group Limited agreed to the extension.
- 3.5 An Options Appraisal Workshop was undertaken to gather views and opinions from Commissioner senior managers from both organisations in order to conduct an options appraisal of the Contract based on the following four options:
- Option 1** - Extend the contract term for the 3 year period (until 2026/27)
 - Option 2** - Extend for an alternative period
 - Option 3** – Allow contract to end with no contract extension beyond 31 March 2024
 - Option 4** –Termination of the contract before 31 March 2024
- 3.6 The options were put forward for consideration by the Commissioners to review the matters identified in the Bevan Brittan LLP advice of February 2022.
- 3.7 The workshop was structured to enable the review and discussion of each option, including an evaluation of benefits and disbenefits with associated risks. The output was to inform an agreed joint recommendation from key stakeholders.

Options dismissed on basis of carrying too much risk to Commissioners

- 3.8 Commissioners have dismissed **Options 2 and 4** as they were considered too high risk. Due to the short timescales **Option 4** would not be viable as alternative service provision could not be commissioned or delivered in a legally compliant manner within the 12 month period and would have a significant impact on the delivery of statutory services to the population of B&NES. High termination costs would be borne by the council.
- 3.9 There were some benefits of **Option 2**, the overarching factor that permeates through these benefits is the level of flexibility which this option provides to the design of the service and review of the financial implications of any change in future service delivery.
- 3.10 In relation to **Option 2**, an overarching risk identified by the Bevan Brittan advice of February 2022 and the options appraisal workshop is the need to negotiate an agreement with HCRG Care Group of a change to its current contract. Any change in extension term would need to be agreed and there is no guarantee that HCRG Care Group would accept this offer. This may result in the assurances from HCRG Care Group around operating

within the cost profile being withdrawn. This is a key risk identified by the Commissioners given the short timelines by which the extension decision needs to be taken prior to 30 June 2022.

3.11 The appraisal of **Option 2** also highlighted the risk of business continuity, transformational, operational and financial risk.

- **Business Continuity Risks:**

- HCRG Care Group may ask for an increase in the contractual value to account for the uncertainty an alternative extension will cause. This option is likely to impact HCRG Care Group's ability to negotiate favourable terms with sub-contractors and its own suppliers. This uncertainty could destabilise their workforce resulting in HCRG not being able to recruit and retain staff causing an increased use of agency staff and increase cost pressure on HCRG Care Group which will be passed on to commissioners.
- The approach creates uncertainty to Twenty20 Capital who may sell HCRG Care Group to realise their investment.
- There is a lack of clarity as to how services would be delivered to the B&NES population without affecting their quality of care or breaching statutory requirements.

- **Transformation and operational activities:** this option will likely cause current transformation activity and expected savings to be disrupted which will affect attainment of both the Council and the CCG's strategic goals; resourcing pressures for commissioners in managing a procurement process while the BSW is moving to the new Integrated Care System.

- **Financial risks:** appointing a new provider would incur mobilisation costs and the baseline value of the contract could be higher if terminated before the end of the three-year extension period.

3.12 It should further be noted that offering an alternative (shorter) extension period assumes HCRG Care Group would accept the change in contract term. A decision by the commissioner's to unilaterally impose an alternative contract period is not possible. This heightens the risk of HCRG Care Group using their own termination rights under the contract and serving 12 months' notice to commissioners.

Options for Consideration by Cabinet

3.13 The rationale for the original joint recommendation of the commissioners to exercise Option 3 was contained in the options appraisal presented to Cabinet on 11 November 2021. This is akin to **Option 1** referred to the current options appraisal.

3.14 There are some key elements of the rationale for the decision taken on 11 November 2021 referred to above, which are of relevance in the context of the current decision and options recommended to Cabinet following the change in parent ownership control of Virgin Care Services Limited. These included the following:

- the system remains under considerable pressure from the impact of COVID-19, extending the contract term will limit disruption in the system allowing for focus on response and recovery
- this is a period of significant change for the NHS and social care systems with the embedding of new Integrated Care System and B&NES Integrated Care Alliance from July 2022 and focusing on a re-procurement process would distract from this

- a re-procurement process would require significant capacity from both the Council and CCG and incur one off costs of approximately £1m and will require an approved funding source for both Council and CCG
- **Option 1** approach allows the CCG and Council to wait for the final legislative changes on procurement and consider its future approach.

Option 1 Extend the contract term for the 3 year period (until 2026/27)

3.15 The options appraisal workshop of 4 April identified the following benefits of **Option 1**, extending the Contract for a period of 3 years:

- removes the risk of legal challenge from HCRG Care Group on the basis that the decision to extend for 3 years is upheld
- allows commissioners to work with HCRG Care Group to deliver the previously agreed benefits of the transformation priorities for the remainder of the contract term (Year 2026/27)
- allows HCRG Care Group to provide certainty for their staff and supports their ability to recruit and retain staff. It also provides continued stability for subcontractors under the prime model
- continuation of integrated community services for health care and social care will likely reduce disruption in the system allowing for focus on COVID-19 recovery. This option also provides sufficient time to understand how the demand for services has changed and inform development of the future service model requirement
- HCRG Care Group is ostensibly the same entity as when operating as Virgin Care Services Limited in B&NES with the same staff and senior leadership. There is a formed relationship with HCRG Care Group's senior staff stating they are willing to work with the commissioners for the remainder of the contract to retain commissioner confidence and deliver improved services for the ten year contract term
- there is a known requirement to agree an improvement plan addressing HCRG Care Group's performance in a small number of services (as identified in the November 2021 report). Aside from this they are a known entity and continuity of relationship is likely to deliver improved outcomes for the residents of B&NES and ensure delivery of the Your Care, Your Way priorities
- the Health and Care Bill (and now the Health and Care Act 2022) will likely place requirement to provide integrated provision. This option will give time to understand the implications and develop how the commissioners can build on the work of HCRG Care Group to ensure they can be legislatively compliant with the expected requirement

3.16 Commissioners have considered the disbenefits of **Option 1** as referred to in the options appraisal, which in high level summary include risks under the following key categories:

- **Reputational challenge** to the Integrated Care Board by the presence of a private (equity) provider and such provider having a role as part of the new ICS structure.
- **Ownership** The ability of the provider to sell on the company without consideration and discussion with the commissioners.

- **Operational and contractual matters** such as onerous provisions for termination for convenience; challenges of managing an integrated adult and social care service through a single provider; impact of new legislation such as the Health and Care Act 2022 on contractual provisions
- **Financial risks** associated with HCRG Care Group potentially seeking to renegotiate the pricing structure; Twenty20 seeking to realise their investment and sell HCRG following the endorsement and risks to service delivery arising from the same.
- **Risk of Legal Challenge** by other third-party providers or campaign groups for **Option 1** on grounds that it would be a substantial variation under the Public Contracts Regulations 2015.

Option 3 Allow contract to end with no contract extension beyond 31 March 2024

3.17 The Options Appraisal Workshop of 4 April identified the following benefits of **Option 3** - Allow contract to end with no Contract extension beyond 31 March 2022:

- not extending the contract beyond its current end date could provide an opportunity to align contracts with neighbouring commissioners providing economies of scale when going to market
- opportunity to bring the Adult Social Care inhouse with greater control over how services are delivered. This potentially removes procurement risk from B&NES Council
- allows commissioners greater flexibility and control to adapt community services to changing demands and priorities
- allows commissioners to work with HCRG Care Group to deliver a revised list of previously agreed transformation priorities for the remainder of the contract term (Year 2023/24)
- allows greater integration between the NHS and the Council to plan the new operating model for the future
- both strategic and operational Safeguarding will be directly managed by the council whereas previously this was a delegated function to the provider. There will be an improved line of sight which will benefit the new CQC Inspection Framework
- streamline of IT systems ensuring better oversight of performance of the Adult Social Care Services
- workforce stability as the staff will be directly managed by the NHS and the council with the associated remunerations
- the council will directly commission Public Health and the third sector contract with the ability to align to NHS and Council priorities.

3.18 The NHS and Commissioners have considered the disbenefits and risks of **Option 3** as referred to in the options appraisal, which summarise risks under the following key categories:

- **Contractual:** Underperformance of services in the remaining contract term impacting on population of B&NES with key operational risks relating to safeguarding because of workforce destabilisation leading to increased use of

agency staff as recruitment to vacant posts is likely to be undermined by lack of long term job security. The contract management relationship with the provider is likely to change from one based on strategic partnering to a traditional contract relationship with no scope within the contractual terms for further investment, service improvement and innovation.

- **Capacity:** Insufficient time (21 months) to recommission like for like (or redesign) inhouse (if an option), mobilise and ensure the safe transfer of services as capacity to undertake a procurement process whilst the system remains in COVID-19 recovery mode (a new provider will need to commence delivery on 1st April 2024, this would also come at a time when the CCG is also transitioning its functions into the ICS NHS Board from June 2022). HCRG Care Group could enact their contractual right to serving 12 months' notice of termination to commissioners resulting in having to re-procure and inhouse services within an even shorter timeframe
- **Financial:** Appointing a new provider, from a very limited market choice, would incur mobilisation costs outside the budgeted profile. The baseline value of any new contract could be higher as economies of scale are lost and will have to take into account current economic climate and there is no guarantee that another provider would deem the service to be financially viable which may result in additional costs. Additional costs of pension contributions could be considerable in this area when transferring into an NHS or Local Authority. This option will likely cause current transformation activity and expected savings to be disrupted which will affect attainment of strategic goals
- **Legal:** A risk of public law challenge on the basis that there was '*a legitimate expectation*' that the extension would be granted based on original decision or on the basis that the decision not to extend is irrational. Whilst acknowledged that it is difficult to bring a *legitimate expectation* challenge or an *irrationality* challenge, there is a risk that the provider could seek to bring a Judicial Review claim particularly given the significant implications of a decision not to extend for the provider.

3.19 The outcome of implementing **Option 3** will be the opportunity to completely redesign the community services in B&NES in 21 months.

- The NHS, including some Public Health services would need to secure a new provider for their service delivery requirement. The council would work closely with the NHS to ensure a safe transfer and a new model of service redesign
- Adult Social Care services could be directly managed by the council
- The third sector services will be recommissioned directly by the council and will align with the council priorities

3.20 The option recommended by officers, is that Cabinet should consider supporting the 3 year extension – **Option 1**. The contract represents good value to the Council and is delivering good outcomes for residents.

3.21 If **Option 3** is the preferred option of Cabinet, officers can put in place a range of mitigations.

4 STATUTORY CONSIDERATIONS

4.1 Contractual

- The original Your Care Your Way Full Business Case November 2016 sets out how the procurement and decision-making process for contract award to Virgin Care met legal and statutory duties.
- The decision to extend for the three-year term or not is a requirement that must be completed prior to end of the 30 June 2022 following the extended notification period.
- As joint commissioners the original decision to choose Option 3 included a decision agreed with HCRG Care Group for the removal of 2 statutory services from the contract in year 6. These include strategic adult safeguarding to be returned to the Council and Continuing Health Care returning to BSWCCG.

4.2 Regulatory

The council has reviewed the findings and concluded that there are no grounds under Regulations 57 and 72 of the Public Contracts Regulations 2015 (PCR2015) that the original decision to extend the contract cannot be made. The new owner (Twenty 20) is not excluded from public procurement under Regulation 57 of PCR2015 due to no evidence of:

- *Participation in a criminal organisation*
- *Corruption*
- *Terrorism offences or offences linked to terrorism*
- *Money Laundering or terrorism financing*
- *Child labour and other forms of trafficking human beings*
- *Non payment of tax and social security contributions*
- *Fraud*

The new owner is not subject to a possible discretionary exclusion from public procurement under Regulation 57 of PCR2015 due to:

- *Obligations in the fields of environmental social labour law*
- *Bankruptcy, insolvency*
- *Grave professional misconduct*
- *Distortion of competition*
- *Conflict of interest*
- *Been involved in the preparation of the procurement procedure*
- *Prior performance issues*
- *Misrepresentation and undue influence*
- *Breach of obligations relating to the payment of tax or social security obligations*

The extension is in line with Regulation 72 of PCR2015 as clarified by Crown Commercial Services guidance "Guidance on Amendments to Contracts during their Term" - *A contract/framework may change without re-advertisement in OJEU where certain corporate changes have occurred in the supplier such as merger, takeover or insolvency, provided:*

- *The new supplier meets the original qualitative selection criteria; and*
- *Other substantial modifications are not made to the contract/framework*

The procurement framework is currently changing due to the recently passed Health & Care Act and the Procurement Reform Bill announced in the Queen's Speech.

Within the Health & Care Act competitive tendering remains an important tool for arranging high quality health services, however commissioners will also be able to direct award under the following circumstances:

- where there is the absence of competition, such as A&E provision
- alternative provision is already available to patients through other means (competition within the market rather than competition for the market) for example, primary care contracts
- when they want to extend an existing contract where the incumbent is doing a sufficiently good job and the service is not changing
- where there are reasonable grounds to believe that one provider or group of providers is the most suitable provider
- decisions would have to be clearly justified based on the decision-making criteria:
 - quality and innovation
 - value integration and collaboration
 - access
 - inequalities and choice
 - service sustainability
 - social value

and be subject to appropriate transparency and scrutiny requirements.

Social care contracts will be subject to the Procurement Reform Bill. The Procurement Reform Bill Impact Assessment highlights there is a risk that the reforms result in more challenges to procurement decisions which will increase time taken to procure and increase legal risk. This will be a particular concern early in the implementation of the Act which aims to enshrine in law the objectives of public procurement including delivering value for money, maximising public benefit, treating suppliers equally and without discrimination, and acting, and being seen to act, with integrity.

4.3 Legal advice

The legal advice is contained in **Exempt Appendix 4: Legal Advice**

5 RESOURCE IMPLICATIONS (FINANCE, PROPERTY, PEOPLE)

5.1 Finance summary

Additional Cost arising from Options

| | Option 1 | Option 2 | Option 3 | Option 4 |
|---|-----------------|-------------------|-------------------|--------------------|
| Council including Public Health | £482,000 | £1,128,000 | £0 | £3,781,000 |
| CCG including Better Care Fund | £483,000 | £1,662,000 | £1,745,000 | £6,510,000 |
| Council Cumulative Revenue Budget Funding | £0 | £0 | £7,819,000 | £0 |
| Total | £965,000 | £2,790,000 | £9,564,000 | £10,291,000 |

- **Option 1** – contract will run to Year 10 and be re-procured, additional costs included are procurement costs that would be incurred prior to end of extension period. No additional costs assumed as prices and direction at Year 10 unknown. Any change to the contract value will have to be reviewed in line with any procurement rules in place at the time around substantial/material variation.
- **Option 3** – contract will run to Year 7 and be re-procured, additional costs included are procurement costs and mobilisation costs as council services will be insourced and health funded CCG services will be re-procured. The CCG costs reflect procurement and mobilisation. The council costs are the insource cost for the remainder of the 10 year comparison term and reflect salary uplifts in line with the MTFP.
- If **Option 3** is the adopted option, there will be one off mobilisation cost over 3 years of £2.5m for the council the majority of this costs will be staffing costs to enable the safe transfer of services. From 2024/25 there will be ongoing additional costs of £830,000.

Funding Source (Council)

| | Option 1 | Option 2 | Option 3 ¹ | Option 4 |
|--|-----------------|-------------------|-----------------------|-------------------|
| ASC Reserves* | £482,000 | £1,128,000 | | £3,781,000 |
| Cumulative Revenue Budget Requirement** | | | £7,819,000 | |
| Total | £482,000 | £1,128,000 | £7,819,000 | £3,781,000 |

*ASC Reserves Balance £4.5m

**The cumulative figure is the revenue budget requirement each year for the 3 year period 2024-25 to 2026-27

¹ Inflation of 2% has been applied to the original service values, 3% inflation has been added to future years values

| Annual Budget Impact (Revenue) | Option 3 |
|---------------------------------------|-------------------|
| 2024-25 | £2,150,000 |
| 2025-26 | £452, 000 |
| 2026-27 | £465,000 |

The material annual budget impact is in 2024-25, the above illustrates the additional incremental increase budget requirement for the 2 years thereafter.

One-off costs incurred will be met from the Council's Social Care reserve, future years Council budgets will be aligned following this decision.

6 RISK MANAGEMENT

6.1 A risk assessment has been undertaken in line with the Council's risk management processes. Key risks have been considered within the main report and mitigations considered (see 3.19). Overall **Option 1 and 3** are considered medium risk. If either **Option 1 or 3** are adopted actions will be required to mitigate the increased risk exposure. Not all risks will be able to be fully mitigated

6.2 The identified risks are service continuity when the NHS and Adult Social Care are delivering entire system change under the provisions of the Health and Care Act, which recently received royal consent. The services continue to assess the impact of Covid on services, address backlogs and support a system under pressure due to high demand.

6.3 The risk of legal challenge cannot be completely mitigated; however, the Council and the NHS have followed the legal advice to complete due diligence, review the options, to ensure relevant factors are taken into consideration to avoid a legal challenge

6.4 For either **Option 1 or 3** there will be mobilisation cost either in year 7 of the contract or in the final year of the contract if extended. The increased costs are noted in the resource implication of this report.

7 EQUALITIES

7.1 As with all contracts HCRG Care Group are monitored in terms of their compliance with equalities requirements. Further details can be provided if required.

7.2 The original Your Care Your Way Full Business Case November 2016 sets out how the procurement and decision-making process for contract award to Virgin Care met legal and statutory duties.

8 CLIMATE CHANGE

8.1 The Council has declared a climate emergency and has resolved to enable carbon neutrality in B&NES by 2030. HCRG Care Group as part of the transformation of the service are putting in place mechanisms to reduce the impact of climate change such as mobile working, the integrated care record, multi-disciplinary teams and also multi-agency hubs; the Community Wellbeing Hub is a clear example of this.

9 OTHER OPTIONS CONSIDERED

9.1 All options have been included within the report.

9.2 A joint review of service delivery models will be undertaken by the newly formed Bath, Swindon and Wiltshire Integrated Care System and the council. This will be undertaken irrespective of which option is agreed by Cabinet. Future delivery models will include consideration of the in-sourcing of adult social care services and council commissioned services.

10 CONSULTATION

10.1 Consultation was undertaken in advance of the original decision made on 1st November 2021.

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| Contact person | Suzanne Westhead – Director of Adult Social Care |
| Background papers | 11 th November 2021 Cabinet Report |
| Please contact the report author if you need to access this report in an alternative format | |