

AGENDA ITEM: 6 Pages 15 – 20

Meeting	Cabinet Resources Committee
Date	2 March 2011
Subject	Care Home Contract – Final decision of Catalyst Housing Arbitration
Report of	Cabinet Member for Adults Cabinet Member for Resources and Performance
Summary	This report provides the results and consequences of the arbitration proceedings, the associated costs incurred and details around a renegotiation of the Care Home Contract.

Officer Contributors	Kate Kennally, Director of Adult Social Care and Health Andrew Travers, Deputy Chief Executive
Status (public or exempt)	Public (with separate exempt report)
Wards affected	All
Enclosures	None
For decision by	Cabinet Resources Committee
Function of	Executive
Reason for urgency / exemption from call-in (if appropriate)	Not applicable

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1. RECOMMENDATIONS

- 1.1 That the result of the arbitration be noted.**
- 1.2 That the increase in the amount required to cover the outcome of the arbitration be noted.**
- 1.3 That the basis for renegotiation of the Care Home Contract be noted.**
- 1.4 That the actions being taken in respect of outstanding issues not covered in the arbitration be noted.**

2. RELEVANT PREVIOUS DECISIONS

- 2.1 Council, 23 October 2000 (Decision item 62) – approved the selection of Ealing Family Housing Association (now part of the Catalyst Group) to take a transfer of the majority of the Council’s elderly persons residential care homes and day centres on the basis that these would be replaced with modern purpose built facilities and achieve an ongoing revenue saving for the Council from the commencement of the contract.
- 2.2 Cabinet, 5 November 2002 (Decision item 10) – approved the swap of sites in Claremont Road, Brent Cross NW2 and East Road, Burnt Oak HA8 with Ealing Family Housing Association upon which to develop replacements for the Perryfields and Merrivale elderly persons care homes and day centre.
- 2.3 Cabinet Resources Committee, 8 August 2004 (Decision item 14) – subject to conditions, agreed:
 - i. the freehold interest in an appropriate area of land at Claremont Road, NW2 be transferred to Ealing Family Housing Association for the building of a replacement for the Perryfields elderly persons care home and day centre in exchange for the transfer back to the Council of the current Perryfields site at Tyrrel Way; and
 - ii. the freehold interest in an appropriate area of land at East Road, Burnt Oak HA8 be transferred to Ealing Family Housing Association for the building of a replacement for the Merrivale elderly persons care home and day centre in exchange for the transfer back to the Council of the current Merrivale site at East Road, Burnt Oak.
- 2.4 Cabinet Resources Committee, 3 September 2007 (Decision item 7) – noted the disagreement with Catalyst in respect of its Deficit Claim and also agreed that the dispute with Catalyst in respect of the Perryfields/Claremont Road and Merrivale/Child Guidance Centre sites swaps agreements, and the Project and Abortive Costs claims arising there from, be referred to arbitration and/or independent expert as appropriate.
- 2.5 Cabinet Resources Committee, 2 September 2008 (Decision item 16) – noted the action taken by Catalyst to initiate the arbitration procedure and instructed the appropriate Chief Officers to appoint Counsel and other appropriate consultants and that the costs relating to this would be met from reserves.
- 2.6 Cabinet Resources Committee, 23 April 2009 (Decision item 14) – noted the stage proceedings were at and the amount of money spent in relation to the arbitration.
- 2.7 Cabinet Resources Committee, 8 December 2009 (Decision item 18 and X2) – noted the stage proceedings were at; the amount of money spent in relation to the arbitration and formally agreed not to offer Catalyst a “drop hands” settlement.

- 2.8 Cabinet Resources Committee, 17 June 2010 (Decision item X7) – noted the stage proceedings were at; the amount of money spent in relation to the arbitration and the likely need to renegotiate the Care Home Contract, as well as the retention of Eversheds as legal advisors.
- 2.9 Cabinet Resources Committee, 19 October 2010 (Decision item 11 and X3) – noted the stage proceedings had reached; that a further hearing was to be held; the estimated cost of the preliminary arbitration award; that a renegotiation strategy was being developed.
- 2.10 Cabinet Member for Resources and Performance and the Cabinet Member for Adults approved under delegated powers (DPR 1264) on 18 February 2011 the Council's contribution to Catalyst's legal costs in respect of the Arbitration.

3. CORPORATE PRIORITIES AND POLICY CONSIDERATIONS

- 3.1 The 2010-2013 Corporate Plan priority of 'Better Services with Less Money' relates to the decisions made in relation to this arbitration and the issues which may result from it

4. RISK MANAGEMENT ISSUES

- 4.1 The risks associated with the renegotiation and its consequences have been formally logged in the Adult Social Care Risk Register.
- 4.2 Provision for the estimated total cost of the award to March 2010 was made in the 2009/10 accounts, funded from the risk reserve. The final value of the award is now known and an additional provision will be made in the 2010/11 accounts, funded from the risk reserve.
- 4.3 There are outstanding issues in respect of land swaps which were not covered by the Arbitration process on the basis both parties felt they could negotiate an agreeable outcome. There remains a risk that these negotiations will stall and need to be referred to Arbitration or the costs claimed by Catalyst are greater than the Council is currently estimating.
- 4.4 The Council is seeking to enter into a re-negotiation of the Care Home Contract led by the Deputy Chief Executive and Director of Adult Social Care and Health, to manage on-going financial and service delivery risks. This work has commenced and is aligned to the business and financial planning process for 2011/12.

5. EQUALITIES AND DIVERSITY ISSUES

- 5.1 The referral of the deficit claim to arbitration has not affected the residential and day care services being provided to older people. The service is inclusive and provided to all older people eligible for residential care or requiring day care. There are specialist units for people who have dementia, people who have learning disabilities and a unit for Asian people. However, any substantive changes to the care home contract for the provision of day care and / or residential care will be subject to a full equalities impact assessment.

6. USE OF RESOURCES IMPLICATIONS (Finance, Procurement, Performance & Value for Money, Staffing, IT, Property, Sustainability)

- 6.1 The table below summarises the total amount spent on this matter to date.

Description	Amount spent/(received)
Eversheds	£947,765
Franklin & Andrews	£63,658
Counsel	£178,980
Arbitrator (half share)	£55,000
RSM Bentley Jennison/RSM Tenon	£580,273
Laing & Buisson	£93,830
Other	£25,016
Total	£1,944,522

6.2 Up to 31 March 2010, these costs have been met from a combination of the Adult's Directorate Budget and the Risk Reserve. Costs incurred since 1 April 2010 are being met from the Council's Risk Reserve.

6.3 In overall terms however, the cost of the claim and associated costs has been significant and can be summarised as follows:

Final Award to Catalyst (incl interest and costs)	£8.674m
Council's final estimated legal costs	£2.000m
Outstanding issues (land swaps)	£0.110m
Total cost	£10.784m
Legal costs paid in previous years	(£1.660m)
Provision for deficits since April 2007	£0.046m
Provision Required	£9.170m

The total cost has been offset slightly by net income from Catalyst of £532,000 in respect of overbillings and the Single Status agreement which was agreed early in the Arbitration process by both parties legal teams. Hence, the resultant cost to the Council has been £10.252m.

6.4 A provision of £7.012m to cover the deficit award was made in the 2009/10 Statement of accounts. A further amount will be due in 2010/11 of £2.158m to meet the final cost of the deficit award, a contribution to Catalyst's legal costs and for the resolution of outstanding issues in respect of the land swaps which were outlined in the report to Cabinet Resources Committee on 3 September 2007.

7. LEGAL ISSUES

7.1 All relevant legal issues are addressed in the report.

8. CONSTITUTIONAL POWERS

8.1 The Council's constitution, Part 3, Responsibility for Functions, paragraph 3.6 states the terms of reference of the Cabinet Resources Committee including capital and revenue finance, forecasting, monitoring, borrowing and taxation.

9. BACKGROUND INFORMATION

Overview of Arbitration Proceedings

- 9.1 Catalyst commenced arbitration proceedings against Barnet in July 2008, seeking an adjustment under Condition 11.2.1 of the Care Contract. Condition 11.2.1 provides that Catalyst may seek an appropriate adjustment if it has incurred, or forecasts that it is reasonably likely to incur, a Deficit (as defined in Condition 11.3.5). The dispute arose by virtue of a number of ambiguities in the Care Contract, including (i) whether the Deficit provision in Condition 11 only applied in respect of changes to legislation or guidance which affected the running costs of the care homes, and (ii) how any losses were to be shared between Catalyst and Barnet under Condition 11.
- 9.2 Catalyst's claim increased during the course of the arbitration proceedings such that it was claiming £12 -17 million in respect of the first 6 years of the Contract, plus interest on the amount of any claim. The losses resulted from Catalyst significantly underestimating both the operating costs of the care homes and the development costs of the new care homes.
- 9.3 The results of the initial hearing and the Arbitrator's Final Partial Award were reported to Cabinet Resources Committee on 19 October 2010. The report highlighted that a further hearing was to be held on 18 November 2010 to obtain clarification from the Arbitrator on a number of issues to enable the size of the award to be calculated. These included:
- Calculation of interest charges on the losses.
 - Calculation of interest on the claimable deficit.
 - The allocation of costs.
- 9.4 The supplementary hearing went ahead on 18 November 2010 and the Arbitrator issued his Supplemental Award on 8 December 2010 in which he determined:
- That Barnet should meet the cost of funding all losses incurred by Catalyst in Years 1 to 6 of the contract. Barnet had argued it should only be responsible for funding the deficit it was responsible for.
 - That interest on the claim should run from 1 April 2007 and be calculated on a compound basis. Barnet had argued that the interest should run from 2 October 2009 and be calculated on a simple basis.
 - The costs should be shared between the parties based on the time spent on each issue and which party won the issue. He helpfully provided his analysis of the issues and which party has been successful.
- 9.5 The Supplemental Award enabled the calculation of the deficit, as follows:
- | | |
|--------------------------------|---------|
| Deficit Award to 31 March 2007 | £6.184m |
| Interest to 31 December 2010 | £1.390m |
| Total | £7.574m |

This sum will be recovered over the remaining life of the contract by an adjustment to the weekly bed price.

Outstanding issues

- 9.6 The issues over land swaps have been reported previously (CRC 3 September 2007) and were excluded from the Arbitration Process as it was believed that a mutually acceptable agreement could be reached. Now the Arbitration process has been finalised the outstanding issues need to be resolved through negotiation with Catalyst and provision has been made in the risk reserve to cover the estimated outcome.

Commercial considerations going forward

- 9.7 Adult Social Care is building up a range of options to minimise the losses likely to be incurred by Catalyst and thus the level of deficit funding which Barnet might need to meet in future. Preliminary work in respect of the potential options has been undertaken and initial discussions with Catalyst have indicated a willingness to take forward some of the options for a more detailed appraisal.
- 9.8 The core aim of the renegotiation is to develop a mutually acceptable option which:
- Facilitates the removal of the deficit clause to reduce the Council's exposure to funding future losses.
 - Is financially sustainable and meets the requirements of the Medium Term Financial Strategy.
 - Meets the Council's needs in terms of the availability of residential care beds in a more flexible way and avoids the need to pay for beds which are not required.
 - Continues the use of the new care homes beyond the existing contract term.
 - Links back to the developments in West Hendon/Brent Cross and thus supports the Council's regeneration objectives.
 - Ensures suitable range of day care is available to meet the needs of Older People in Borough with social care needs.
- 9.9 Officers are working to conclude the renegotiation of the Contract within the financial year 2010/11 in order to give some assurance regarding future potential liabilities as part of the financial and business planning process for 2011/12 onwards.

10. LIST OF BACKGROUND PAPERS

10.1 None

Legal – PJ

CFO – AT/MC