

AGENDA ITEM: Pages –

Meeting	Cabinet Resources Committee
Date	24 June 2013
Subject	Catalyst Contract Renegotiation – Future Role of The Fremantle Trust in Care Provision
Report of	Cabinet Member for Adults Cabinet Member for Resources
Summary	This report sets out the outcome of negotiations with The Fremantle Trust for the on-going provision of care in the Catalyst Care Homes.

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Status (public or exempt) Public

Wards affected All

Key decision Yes

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 proposal from The Fremantle Trust, dated 6 May 2013, in respect of the future operation of the residential and day care contract is accepted and in this regard that the Council:**
- 1.1.1 Enters in to a contract with The Fremantle Trust which reflects the content of their proposal. The contract to be for a minimum period of 10 years with an option to extend up to the termination of the leases on each care home.**
 - 1.1.2 By mutual agreement with The Fremantle Trust terminates the novated care contract on the same date the new contract is entered into.**
 - 1.1.3 Accepts the surrender of the existing sub-leases, previously granted to The Fremantle Trust, and enters into new sub-leases with The Fremantle Trust, the terms of the new sub-leases to include a term requiring the Fremantle Trust to comply with repairing obligations which have been imposed upon the Council pursuant to the headlease between Catalyst and the Council.**
 - 1.1.4 Works with The Fremantle Trust and current day care service users to facilitate the development of a range of services which meet the needs of those users.**
 - 1.1.5 Makes provision within the revised contract to enable other service developments to be progressed to meet the changing needs of users and the Council.**

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 to the Council.
- 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 Delegated Powers Report No 1264, 18 February 2011 – approved the Council’s contribution to Catalyst’s legal costs in respect of the Arbitration.
- 2.11 Cabinet Resources Committee, 2 March 2011 (Decision item 6) – set out the results and consequences of the arbitration proceedings and the Council’s initial objectives for a renegotiation of the contract.
- 2.12 Cabinet resources Committee, 7 November 2011, approved the negotiated agreement with Catalyst for the future operation of the Care Contract.
- 2.13 Cabinet Resources Committee, 28 February 2012 – approved the pricing strategy for older adults Residential Care.
- 2.14 Cabinet Member Delegated Powers Report, 26 March 2012 – approved the implementation of the agreement reached with Catalyst Housing Association and for negotiations to take place with The Fremantle Trust in respect of the provision of care in the Catalyst homes. It also approved the termination of the Catalyst Care Contract, the novation of The Fremantle Trust contract to the Council, the leasing of the Catalyst Care Homes by the Council, the surrender of the Rosa Freedman lease by Catalyst and the subletting of the Catalyst Care Homes to The Fremantle Trust.

3. CORPORATE PRIORITIES AND POLICY CONSIDERATIONS

- 3.1 The 2010-2013 Corporate Plan priority of ‘Better Services with Less Money’ relates to the recommendations in this report to accept the proposal from The Fremantle Trust as that proposal provides for more flexible service provision, more flexible contractual arrangements, a reduced bed price and the removal of the need to continue to purchase a fixed number of day care sessions.
- 3.2 The 2013-2016 Corporate Plan priority of ‘Promoting a healthy, independent and informed over 55 population in the Borough so that Barnet is a place that encourages and supports residents to age well’ relates to the proposals submitted by The Fremantle Trust which will result in higher quality services, increased choice and the introduction of new services tailored to the needs of users at a competitive price.

4. RISK MANAGEMENT ISSUES

- 4.1 The risks associated with the negotiation and its consequences have been formally logged in the Adults and Communities Risk Register.
- 4.2 The key risk following the novation of The Fremantle Trust contract was that the on-going price chargeable under the contract was, based on independent benchmarks figures, significantly higher than the market price in the rest of Barnet. Without the Council taking action to ensure that The Fremantle Trust's prices fell in line with the wider market and the Pricing Strategy for Older Adults Residential Care approved by this Committee there was a risk of a challenge under State Aid rules. The proposal submitted by The Fremantle Trust is fully aligned to the Council's Pricing Strategy for Older Adults Residential Care and is below the indicative prices received under the soft market test and thus mitigates against the risk of a State Aid related challenge.
- 4.3 The proposal from The Fremantle Trust delivers a significant saving to the Council and, in itself, included some potential risks. Officers subsequently met with members of The Fremantle Trust's management team to explore the proposal and potential risks in more detail and were assured that:
- The proposal had been priced independently of other contracts operated by The Fremantle Trust and was making a contribution to both overheads and reserves.
 - The market for private residential care beds in Barnet had been fully researched and assessed with the gradual move towards increasing the overall level of private beds being part of The Fremantle Trust's management of the risk of being unable to fill all of the beds. They had also recognised the need to upgrade the furnishing, fixtures and fittings in the homes to increase their attractiveness and had accounted for the cost of such developments in their proposed price.
 - Appropriate plans were in place to manage the adjustments to the terms and conditions of some of the staff.
 - The proposal to take over the Council's repairing obligations on the Care Homes was included at the insistence of the Board of Trustees. This was on the basis that The Fremantle Trust needed full control of repairs and maintenance to enable them to keep the homes at a standard of repair that would continue to attract private residents. The availability of independent survey reports which accompanied the lease agreements coupled with The Fremantle Trust's extensive knowledge of the buildings provided assurance that the pricing in respect of repairs and maintenance was realistic.
- 4.4 In May 2013, The Fremantle Trust was advised that it was to be prosecuted under Health and Safety legislation following an incident at Dellfield Court in December 2011 creating a risk of adverse publicity for both parties given the proposals in this report. Both the Police and the Health and Safety Executive decided not to prosecute and this case is being taken forward by the Council's Environmental Health Department. The actions subsequently taken by The Fremantle Trust have provided assurance that their health and safety processes have been appropriately enhanced. Further detail is provided in the accompanying 'exempt report'.
- 4.5 From an overall risk perspective the Council is in a strong position in that it can terminate the current contract with 12 months notice and undertake a re-procurement exercise if the detailed terms and conditions underpinning The Fremantle Trust's proposal cannot be agreed within a reasonable timescale.

5. EQUALITIES AND DIVERSITY ISSUES

5.1 Under the Equality Act 2010, the council has a public sector equality duty to have due regard to three specified matters when exercising its functions:

5.1.1 stopping unlawful discrimination, harassment and victimisation;

5.1.2 promoting equality of opportunity between people who share protected characteristics and those who do not; and

5.1.3 promoting good relationships between people who share protected characteristics and those who do not.

5.2 Having 'due regard' means: (i) consciously thinking about the three aims as part of the decision-making process; (ii) that an incomplete or erroneous appreciation of the duties will mean that due regard has not been given to them; and (iii) that the duty must be exercised in substance, with rigour and with an open mind.

5.3 The service is inclusive and provided to all older people eligible for residential care or requiring day care that meet the Council's set criteria. There are specialist units for people who have dementia and a unit for Asian people and under the proposal submitted by The Fremantle Trust there is an ability to introduce new specialist units as necessary within the homes.

5.4 In terms of improving service provision, negotiations with The Fremantle Trust in respect of the future provision of day care services were based on the 2012 consultation 'Proposals for Modernising Day Opportunities for Older People in Barnet'. This consultation indicated a need to provide a broad range of day care opportunities to widen access, increase participation and improve individual independence. The Fremantle Trust have agreed to introduce new and innovative services to widen participation and improve equality of access as part of their proposal with implementation planned in the current financial year.

5.5 The Fremantle Trust's proposals will be subject to a full equality impact assessment particularly as regards the changes to the provision of day care services. Both service users and their families/carers will be fully consulted.

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

Performance & Value for money

6.1 The objectives of the negotiations with The Fremantle Trust were to:

- Secure improvements in the quality and range of services offered.
- Negotiate a price for the provision of residential care which provided value for money and was in line with the Pricing Strategy for Older Adults Residential Care approved by CRC on 28 February 2012.
- Negotiate changes to day care provision which reflected services users' feedback and reduced the number of block booked sessions the Council needed to fund.

- 6.2 Given the negotiation with The Fremantle Trust was for the continued provision of the Care Service, the Company which had contributed to the development of the Pricing Strategy for Older Adults Residential Care undertook a detailed analysis of The Fremantle Trust's cost for provision of the service to ascertain whether they were providing value for money. Their report, which The Fremantle Trust did not challenge, concluded that the costs of provision were significantly higher than the market price for such services in Barnet.
- 6.3 Given the disparity between The Fremantle Trust's costs and the market rate for such services in Barnet, The Fremantle Trust were asked to review their cost base and put forward proposals to the Council which demonstrated that they could provide high quality residential care in Barnet at a cost which was comparable to that of the wider residential care market in the Borough.
- 6.4 At the same time that The Fremantle Trust was asked to review its costs a PIN notice was published inviting potential suppliers of residential and day care services to partake in a soft market test the objective of which was to:
- Ascertain the level of market interest in providing the services.
 - Understand what approaches the market would take to improve the quality of services.
 - Where possible, obtain indicative prices for service provision for comparison with the Council's Pricing Strategy for Older Adults Residential Care and The Fremantle Trust's proposals.
 - Ascertain the contract durations, guaranteed purchases and other key factors which would attract potential suppliers if the Council were to decide to re-procure the service.
- 6.5 The PIN notice resulted in 17 expressions of interest of which 13 organisations attended an open day at the Council on 10 April 2013. Ten of these organisations took up the Council's offer of a one to one session or provided detailed feedback and can generally be categorised as:
- Nationally recognised older adult care providers (2).
 - Housing providers looking to expand into the older adult care market (3).
 - Medium sized learning disabilities providers (2).
 - Care and nursing staff agencies looking at new business ventures (3).

They all provided detailed feedback on a series of commissioning questions prepared by the Council which varied significantly between the nationally recognised care providers and the remaining organisations. In essence, the nationally recognised care providers were seeking long contracts, tapering block contracts and all of the homes being included whereas the other potential providers were happy with shorter contract durations and preferred separate contracts to be let for each care home. It was also clear that Rosa Freedman, with 18 residential care beds, was seen to be an inefficient home to operate in terms of residential care for older adults and given the future redevelopment plans it was suggested that it could be more advantageous to look at alternative uses.

6.6 If these services were to be subject to a procurement exercise the soft market test indicated, that to maximise competition, the Council would need to:

- Give bidders the opportunity to bid for an individual home, a combination of homes or all of the homes.
- Allow for a variety of contract durations, potentially linked to the break clauses in the leases.
- Seek bids with a reducing level of block beds throughout the contract period.
- Exclude Rosa Freedman or allow for a change of use.
- Allow for a 12 month period at current rates for a potential provider to change the day care offering.
- Allow potential providers to participate in a PQQ process even if they had not provided such services previously.
- Give potential providers a choice as to whether they assumed responsibility for repairs and maintenance on the homes or left it as the responsibility of the Council although it was indicated that running a fully integrated service was more efficient by some potential suppliers.

These requirements would increase the complexity and cost of any procurement process. Furthermore, the general lack of experience of providing such services amongst the potential providers could reduce the competitiveness of any procurement process with many of the organisations struggling to pass the pre-qualification questionnaire stage.

6.7 In terms of indicative pricing all but two of the potential providers indicated they would be unable to provide a view on costs to the Council. Subsequently, one of the national providers submitted some heavily caveated bed prices after they had been provided with some high level data in respect of the current workforce and their pension provisions. These prices are outlined in the accompanying 'exempt report' due to their commercial confidentiality.

6.8 Whilst the soft market test was being undertaken The Fremantle Trust submitted an offer to the Council. Whilst the prices submitted are discussed in the accompanying 'exempt report' the key features of the offer were:

- A minimum contract duration of 10 years.
- A tapering block contract for residential care beds, reducing the current block of 209 beds down to 116 beds by 1 April 2015 and thus increasing the number of beds to be sold privately by The Fremantle Trust.
- The removal of the block contract for day care places from 1 February 2014 (assuming contracts could be agreed by 1 August 2013).
- The development of a range of day care services in line with the outcome of the Council's consultation on modernising day care services in 2012 to increase the choice available to service users.

- To assume responsibility for the Council's repairing obligations in accordance with the leases agreed with Catalyst Housing Association for the homes.
- To facilitate the sale of increased numbers of private beds in the homes an undertaking to refresh furniture, fixtures and fitting and hence improve the living environment for all residents.

6.9 Comparing the proposal submitted by The Fremantle Trust against the cost that would have been incurred if the Catalyst contract continued against the indicative offer from a national provider and the Council's Pricing Strategy for Older Adults Residential Care indicates that acceptance of the proposal from The Fremantle Trust:

- Delivers significant savings against what the Council would have continued to pay Catalyst.
- Is in line with the rates of the rest of the care market in Barnet.
- Is better than the indicative offer made by a national provider and would start delivering savings earlier as a procurement exercise would not be necessary.
- Provides for the modernisation of day care services in the current financial year.
- Avoids the need for a full procurement exercise which would have required external support at an estimated cost of £100-150,000.

Acceptance of the offer would also mean that savings would be delivered from the current financial year as opposed to from 2015/16 which would be the earliest possible timescale for another provider to be selected and implement the necessary changes.

Procurement

6.10 The original contract with Catalyst Housing Association (with The Fremantle Trust as the agreed care provider in a sub-contractual arrangement linked to the main care contract) commenced in April 2001 and was due to end when the last resident placed by the Council after 1 April 2016 left one of the Catalyst care homes. Hence, the original contract was open ended but realistically would not have ended until 2020 if the Council stopped placing residents in the homes as soon as the contract permitted. On this basis and, at today's prices (excluding the impact of the Arbitration Award to Catalyst) the original contract value was a minimum of £131million and was let in accordance with OJEU requirements at the time.

6.11 The main care contract with Catalyst was terminated on 28 March 2013 and The Fremantle Trust sub-contract was novated to the Council, as previously approved by Cabinet Resources Committee, on the same date including, where relevant, any necessary provisions of the main care contract. At the same time the opportunity was taken to update the requirements placed upon The Fremantle Trust to reflect changes and improvements in care provision since the initial contract was let. New termination clauses were also introduced to allow the Council to terminate the novated contract with 12 months written notice. This was introduced to enable the contract to be terminated if the proposal submitted by The Fremantle Trust did not provide value for money for the Council and thus provided much more flexibility than the original contract. However, in overall terms the contract is substantially the same as the original.

6.12 The savings set out in the MTFS are as follows:

MTFS Savings	
2012/13	300,000
2013/14	839,000
2014/15	833,000
2015/16	167,000

6.13 This contract will be managed within existing Adult's Service budgets.

7. LEGAL ISSUES

7.1 Residential and day care services fall within Part B of Schedule 3 to the Public Contracts Regulations 2006 (as amended). Consequently, the full European procurement regime is not invoked. However, the council must act transparently and fairly and in a non-discriminatory way in awarding the residential and day care contract. Failure to comply with this requirement could result in a challenge.

7.3 The EU Treaty on the Functioning of the European Union, specifies that State aid occurs when: (a) the aid is granted by the state or through state resources; (b) it favours certain undertakings; (c) it distorts or threatens to distort competition; and (d) it affects trade between member states. On the basis that the payments which will be made to Fremantle, under the new contract, will not be higher than the market rate the arrangement should not constitute 'state aid'.

7.4 The existing contractual arrangements for the provision of residential and day care services comprise:

7.2.1 A residential and day care contract between the Council and The Fremantle Trust.

7.2.2 Leases, of the residential homes of Dellfield, Apthorpe and Meadowside, from Catalyst to the Council.

7.2.3 Sub-leases of the residential homes of Dellfield, Apthorpe and Meadowside, from the Council to The Fremantle Trust.

7.2.4 A lease of Rosa Freedman from the Council to The Fremantle Trust.

8. CONSTITUTIONAL POWERS

8.1 The Council's constitution, Part 3, Responsibility for Functions, paragraph 4.6 states the terms of reference of the Cabinet Resources Committee.

8.2 The Council's Contract Procedure Rules provide for this form of contractual variation. The proposed variation meets the conditions specified in the Contract Procedure Rules, section 14.2. The value is above £500,000 and therefore acceptance is required by the Cabinet Resources Committee (CPR Appendix 1, Table A).

9. BACKGROUND INFORMATION

9.1 The complete background to this report is set out in the previous reports to the Cabinet Resources Committee, and its predecessors, set out in section 2 above. These reports can be summarised chronologically as follows:

- 2001. The Council entered into a contract with Ealing Family Housing Association (now known as Catalyst Housing Association) which involved the transfer of its existing care homes to Catalyst Housing Association. At the same time the associated staff were transferred under TUPE to The Fremantle Trust who were sub-contracted by Catalyst Housing Association to provide care in the homes. Under the contract Catalyst were required to redevelop a number of sites and provide new, modern care homes with surplus sites being sold to contribute to the redevelopment costs.
- 2007. Catalyst Housing Association advised the Council that it was making significant losses on the operation of the contract.
- 2008. Attempts were made to reach a mutually acceptable agreement in respect of Catalyst Housing Association's deficit claim but the negotiations were unsuccessful and Catalyst Housing Association initiated the arbitration process.
- 2010. Following receipt of the Arbitrator's report the decision was taken to seek to renegotiate the contract with Catalyst Housing Association to remove the risk of further claims under the deficit clause.
- 2011. A general agreement was reached with Catalyst Housing Association.
- 2012. A detailed agreement was reached with Catalyst Housing Association and The Fremantle Trust which comprised the termination of their contract, the novation of their sub-contract with The Fremantle Trust to the Council, the Council leasing from Catalyst Housing Association the new care homes, Catalyst Housing Association surrendering the lease to the Rosa Freedman Care Home, the Council subletting three of the Care Homes and leasing one Care Home to The Fremantle Trust. It was further agreed at this stage that the Council should seek to renegotiate the terms of The Fremantle Trust's novated contract to provide a more flexible arrangement at a lower cost.
- 2013. The agreement reached with Catalyst Housing Association was implemented with all relevant legal documents being executed. Detailed negotiations with The Fremantle Trust regarding the future operation of the contract were concluded and are the subject of this report.

10. LIST OF BACKGROUND PAPERS

10.1 None

Legal – Approved
CFO – Approved