

REPORT TO CABINET

30 August 2017

Subject:	Exemption from Procurement and Contract Procedure Rules for Post-16 High Needs Education Provision
Presenting Cabinet Member:	Councillor Simon Hackett - Cabinet Member for Children's Services
Director:	Interim Director of Children's Services – Jim Leivers Director – Education, Skills and Employment – Chris Ward
Contribution towards Vision 2030:	 
Key Decision:	Yes
Forward Plan (28 day notice) Reference:	SMBC 16188
Cabinet Member Approval and Date:	Councillor Simon Hackett - Cabinet Member for Children's Services Agenda Meeting 24 July 2017
Director Approval:	Yes - Interim Director of Children's Services Yes - Director – Education, Skills and Employment
Reason for Urgency:	Urgency provisions do not apply
Exempt Information Ref:	This report does not contain any information that constitutes exempt information
Ward Councillor (s) Consulted (if applicable):	The raising of family aspirations and building communities through post-16 education that are better skilled to give the borough a workforce that is geared up to respond to changes in business needs and the economy are borough-wide ambitions. Individual ward councillors have not therefore been consulted.
Scrutiny Consultation Considered?	Scrutiny consultation has not been considered in the development of the proposals contained within this report.
Contact Officer(s):	Dr Kevin Rowland - Principal Educational Psychologist/Group Head – Inclusive Learning

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DECISION RECOMMENDATIONS

That Cabinet:

1. for the purposes of satisfying Section 38 (Preparation of an Education, Health and Care plan by local authorities) of the Children and Families Act 2014, approve any necessary exemptions to the council's Procurement and Contract Procedure Rules to enable the council to enter into individual contracts with Education and Skills Funding Agency approved institutions and independent specialist institutions named in the approved list under Section 41 of the Act, up to a maximum of the level of grant awarded to the Council in any particular academic year.
2. for the purposes of satisfying Section 38 (Preparation of an Education, Health and Care plan by local authorities) of the Act, authorise the Director of Education, Skills and Employment to place contracts with the providers/institutions named in paragraphs Section 4 and otherwise in accordance with recommendation 1 above.

1 PURPOSE OF THE REPORT

- 1.1 The purpose of this report is to request an exemption to the council's Procurement and Contract Procedure Rules in respect of a number of contracts with Further Education (FE) Colleges and other specialist education institutions for the academic year 2017/18. The contracts will provide specialist education and care provision to meet the needs of young people aged 16-25 as identified in agreed individual Education, Health and Care plans.

2 IMPLICATION FOR THE COUNCIL'S AMBITION

- 2.1 This proposal, if agreed, supports the council's Vision 2030, Ambition 1 - Raising Aspirations and Resilience and Ambition 3 – Young People to have skills for the future.

Children and young people, particularly the most vulnerable, will be supported by offering coordinated training and learning so they have the skills to continue their education or get a job after leaving school, and helping them to become independent adults.

3 BACKGROUND AND MAIN CONSIDERATIONS

- 3.1 From September 2013, all Local Authorities have been required to commission, fund and contract directly with schools, colleges, and other educational institutions for specialist provision for learners aged 16-25 who have high levels of learning disabilities or difficulties. Local Authority contracts are for 'top-up' funding, known as 'element 3 funding'; the Education and Skills Funding Agency contracts directly with the same institutions for 'element 1 and 2' funding using the national High Needs Funding methodology.
- 3.2 Approval was given by the Cabinet Member for Children's Services in July 2013 to use national contracts as amended by Sandwell Legal Services. Government advice issued in 2012 stated that the new 'place-plus' arrangements meant that LA procurement rules did not apply to these contracts, and that decisions about placements and funding should be taken by commissioners and not by procurement officers. At the time Sandwell Council Legal Services' opinion was that Public Contracts Regulations 2006 did not apply to these contracts.
- 3.3 From 1 September 2014 major changes to services for children and young people with special educational needs and disabilities (SEND) were introduced. The reforms were part of a national programme of support for young people with special needs set out in the Children and Families Act 2014. They extend the special educational needs system from birth to 25 and place new legal duties on councils, schools, health services and other agencies to ensure that children with SEND, and their families, get the support they need. The Children and Families Act 2014 places specific duties upon Local Authorities and upon the Education and Skills Funding Agency approved institutions (FE Colleges, schools etc.) and approved independent specialist institutions named in the Section 41 (Children and Families Act 2014) approved list. Local Authorities' published local offer must refer to the institutions on the approved list.
- 3.4 In the case of contracts from September 2014, the students have an Education, Health and Care (EHC) plan, and the decision on which college/institution to attend is made by the student based on their needs, with very few exceptions. In early 2016, Legal Services questioned whether the authority from 2013 was still valid for contracts/ variations, but then agreed to its use for 2015/16 contract s/ variations.

- 3.5 In the summer of 2016, the SEN team agreed provision for specialist post-16 placements to start in September 2016; contracts were drawn up as in the three previous years and issued to providers, and learners started their courses. When contracts were returned to the Council for counter-signature, Legal Services questioned whether sufficient authority existed for them to seal the contracts, and whether the Public Contracts Regulations 2015 had changed the basis for making these contracts. Following meetings with Legal Services and Procurement Services it was proposed that a report should be presented to Cabinet to approve/confirm the procurement/contracting process and gain authority for future contracts from 2017/18.
- 3.6 The Public Contracts Regulations 2015 introduced a threshold, currently approximately £589,000, for contracts for provision of education services at which those contracts should be let following publication of a contract notice in the Official Journal of the European Union. These Regulations also contain provisions requiring contracting authorities to use the total annual spend where they have a requirement for a series of contracts of the same type to establish whether this threshold is met.
- 3.7 From 1 September 2014 major changes to services for children and young people with special educational needs and disabilities (SEND) were introduced. The reforms are part of a national programme of support for young people with additional needs set out in the Children and Families Act 2014. They extend the special educational needs system from birth to 25 and place new legal duties on councils, schools, health services and other agencies to ensure that children with SEND, and their families, get the support they need.
- 3.8 To address any public procurement issues arising from the commissioning of these services, we will issue an Official Journal of the European Union (OJEU) contract notice stating that we procure provision through the EHC plan, which providers we use, how providers are selected in relation to individual learners and how providers can apply to become an EFSA provider and apply to be included on the section 41 list.
- 3.9 Independent special institutions wishing to apply to be included on the Secretary of State's approved list will find the application form, guidance and supporting information available at GOV.UK. There is also the 'high needs students' market entry process for those institutions wishing to apply to receive an EFSA education and training contract for services to deliver education and training for high needs students. Institutions need to email a completed application to HNSMarketEntry.EFSA@education.gsi.gov.uk

3.10 Sandwell Council will contract with Education and Skills Funding Agency funded institutions which include Further Education Colleges, Sixth Form Colleges, School/Academy Sixth Forms (includes free schools), and approved Independent specialist institutions named on the Section 41 (Children and Families Act 2014) list. Section 41 allows the Secretary of State, by order, to publish a list of approved independent special institutions (independent special schools – England and Wales and special post-16 institutions) for the purposes of satisfying Section 38 (Preparation of an Education, Health and Care plan by local authorities) of the Act.

3.11 In this context commissioning and procurement of high quality provision for young people in Sandwell with high needs is underpinned by the statutory obligations of the SEN Code of Practice (Section 19 of the Children and Families Act 2014) which makes clear that local authorities, in carrying out their functions under the Act in relation to disabled young people and those with special educational needs (SEN), **must** have regard to:

- the views, wishes and feelings of the young person, and their parents
- the importance of the young person, and the parents, in participating as fully as possible in decisions, and being provided with the information and support necessary to enable participation in those decisions
- the need to support the young person, and parents, in order to facilitate the development of the young person and to help them achieve the best possible educational and other outcomes, preparing them effectively for adulthood.

These principles are designed to support:

- the participation of children, their parents and young people in decision-making
- the early identification of young people's needs and early intervention to support them
- greater choice and control for young people and parents over support
- collaboration between education, health and social care services to provide support

- high quality provision to meet the needs of children and young people with SEN
- a focus on inclusive practice and removing barriers to learning
- successful preparation for adulthood, including independent living and employment.

3.12 Local authorities **must** ensure that children, their parents and young people are involved in discussions and decisions about their individual support and about local provision.

3.13 Specifically, local authorities **must** ensure the child's parents or the young person are fully included in the EHC needs assessment process from the start, are fully aware of their opportunities to offer views and information, and are consulted about the content of the plan.

4 THE CURRENT POSITION

4.1 It is recognised that there is a tension between the legal framework regarding learner choice and the public procurement rules regarding competition for the award of contracts following public advertisement. For example, from the age of 16, the law recognises young people have rights to take some decisions for themselves (provided they are capable of doing so).

4.2 To address the tension, the Council is establishing a framework of providers following publication of a contract notice based on inclusion in the approved list maintained by the Secretary of State and for contracts in respect of individual learners to be awarded based on learner choice. The framework will be completed by December 2017 and will ensure compliance with statutory requirements regarding learner choice whilst also complying with principles of transparency and equal treatment of providers under the public procurement rules.

4.3 In the academic year 2017/18 the Council still has a statutory duty (Children and Families Act 2014, section 42) to secure special educational provision and health care provision in accordance with EHC Plan with Schools and other institutions named in EHC plan: duty to admit.

4.4 Institutions that have successfully completed the Education and Skills Funding Agency due diligence process are required to approach the individual student's home Local Authority (LA) and request that the placement is funded by that LA from their "top up" funding for the academic year 2017 to 2018.

The Council will therefore only consider funding applications for those Institutions/providers who have been approved and hold a contract with the Education and Skills Funding Agency.

- 4.5 In the academic year 2016/17 the Council was required to contract with 14 institutions for Post-16 High Needs provision for 134 learners. The total value of these contracts was £2.58m, with the average cost per learner being £19,257.
- 4.6 There is already a potential 115 learners who are likely in September 2017 to continue their education in their institution of choice. The value of these Year 2/3 contracts is £1,809,014.67.

Learners carrying their education into Year 2/3 at an Institution of their choice

Provider	No. of Learners*	Estimated cost of provision*
Dudley College	10	£51,675
Halesowen College	10	£85,200
Hereward College	2	£123,778
New College Worcester (NCW)	1	£46,864
Queen Alexandra College	15	£411,974
Ruskin Mill Trust - Glasshouse College	5	£238,601
Sandwell College	57	£672,548
Shrewsbury College	1	£14,310
Walsall College	12	£164,064
Total	115	£1,809,015

*These figure may vary if students decide not to continue with their chosen education provision.

- 4.7 In academic year 2017/18, the Council's SEN team is also working with 69 - Year 1 learners, who are more than likely to start their Post 16 education at the institutions listed below.

Learners anticipated to begin their Year 1 Post 16 education at an Institution of their choice

Provider	Approx No. of Learners	Estimated cost or education provision
Dudley College	7	£40,000
Halesowen College	5	£30,000
Hereward College	1	£103,000
Queen Alexandra College	2	£71,000
Sandwell College	45	£538,000
Walsall College	9	£118,000
Total	69	£900,000

These figures are indicative only as the number of learners reflects the number of students who are currently working with the SEN team, and the cost is based on the initial indications given by individual students of the chosen educational support they would wish to enter into an agreement to be provided with.

- 4.8 Student numbers may also change in year as students change their choice of educational needs to match their changing circumstances. Additionally, because a student's individual needs may change once they have begun their education, contract costs need to be flexible. It will therefore be necessary for the Director of Education, Skills and Employment to vary contracts within year. This variation will, however be capped at 5% of the original contract sum and the cumulative effect will not exceed the maximum level of grant in any academic year.
- 4.9 The Education and Skills Agency issued guidance that stated '*Where a local authority has agreed a placement, it is not appropriate that a pupil or student should be placed there without a contract*'. If there are problems issuing contracts or receiving timely payments, the Education and Skills Agency will examine cases and consider remedial action where there is clear evidence that a local authority is not meeting the required conditions of grant. An exemption to the council's Procurement and Contract Procedure Rules is therefore required to enable contracts to be signed to a maximum value of the grant provision in any academic year. For 2017/18 academic year, this amounts to £2.71m.

5. CONSULTATION (CUSTOMERS AND OTHER STAKEHOLDERS)

The proposals in this report are regarding internal procedures and therefore consultation with external customers and stakeholders was not required.

6. ALTERNATIVE OPTIONS

The funding for this scheme is provided through grant. There are specific provisions laid down for the purposes of satisfying Section 38 (Preparation of an Education, Health and Care plan by local authorities) and there are therefore no other options as the proposal in this report follows council procedure for exemption to contract procedure rules.

7. STRATEGIC RESOURCE IMPLICATIONS

- 7.1 The dedicated schools grant (DSG) is divided into three blocks: the schools block, the high needs block and the early years block. Element 3 top up funding is paid from local authorities' high needs budget to meet the individual needs of children and young people with high needs, over and above the funding provided to institutions through place led funding (element 1 and 2).
- 7.2 The educational costs of the support package should be met through Elements 2 and 3. Other costs are met from contributions from health and social services where appropriate.
- 7.3 In academic year 2017/18 the Element 3 funding is likely to cost the Council £2,71m for 184 learners, with the average cost per learner being £14,722.

In academic year 2016/17 there were 134 learners at a total cost of £2.58m, with the average cost per learner being £19,257.

8. LEGAL AND GOVERNANCE CONSIDERATIONS

- 8.1 Under section 38 of the Children and Families Act 2014, where a local authority is required to secure that an EHC plan is prepared for a young person, it must consult the child's parent or the young person and give the parent or young person notice of their right to request the authority to secure a placement at a particular school or other institution, which will include those institutions approved by the Secretary of State under section 41 of that Act.
- 8.2 Section 41 of the Act allows the Secretary of State to publish an approved list of independent educational institutions, independent special schools and special post-16 institutions and widen the scope of institutions that can be specified on an Education Health and Care plan (EHC plan).

- 8.3 This process by which an institution applies to be on the Secretary of State's approved list relates only to consideration to be listed and will not automatically entitle the institution to receive funds or a contract from the Education and Skills Funding Agency (EFSA). An EFSA contract will be subject to local authorities' commissioning decisions and a separate high needs student market entry process. But, the Council will only contract with EFSA approved institutions and approved Independent specialist institutions named on the section 41 list.
- 8.4 The combined annual value of the contracts to be placed with educational establishments is in the region of £2.71m in the forthcoming academic year. Under Schedule 3 of the Public Contracts Regulations 2015, contracts for educational services should be let by competitive tender in accordance with these Regulations when the life time value of the contract is, or exceeds, EUR 750,000 (approximately £589, 000). In addition, where the contracting authority has a requirement for a series of contracts of the same type, the figure should be based on total annual aggregate spend. Whilst it is considered that the rules on aggregation of spend do not apply to contracts in respect of individual learners, a procurement process as outlined in this report would help ensure compliance where the threshold is reached.
- 8.5 Furthermore, procurement of high quality provision for young people with high needs is underpinned by the statutory obligations of the SEN Code of Practice (section 19 of the Children and Families Act 2014) which makes clear that local authorities, in carrying out their functions under the Act in relation to disabled young people and those with special educational needs, **must** have regard to the views, wishes and feelings of the young person, and their parents and it is important for the young person, and the parents, to participate as fully as possible in decisions and be provided with the information and support necessary to enable participation in those decisions.
- 8.6 The institution is named in the student's Education and Health Care Plan (EHCP) which is put together/agreed by the SEN Team in full consultation and agreement with the student and the student's parents/guardians. This process covering the EHCP is set out in legislation, and if an institution is named in an EHCP the Council is bound to agree it.

9. EQUALITY IMPACT ASSESSMENT

- 9.1 An Equality Impact Assessment screening has been completed. It shows that the recommendations, if implemented, will have a significant positive effect on the lives of young people with high level learning difficulties or disabilities.

By ensuring that there are clear robust contracting arrangements in place, contracted provision will meet the required education, health and care needs of those learners, and should enable them to make the best possible progress at all stages of their education and into adult life.

10. DATA PROTECTION IMPACT ASSESSMENT

10.1 This report continues a well-established practice for the awarding of contracts to organisations. A DPI assessment is therefore not considered necessary.

11. CRIME AND DISORDER AND RISK ASSESSMENT

11.1 The Corporate Risk Management Strategy (CRMS) has been complied with – to identify and assess the significant risks associated with this decision/project. This includes (but is not limited to) political, legislation, financial, environmental and reputation risks.

11.2 Based on the information provided, it is the officers' opinion that for the significant risks that have been identified, arrangements are in place to manage and mitigate these effectively.

11.3 This assessment has identified there are no current "red" risks that need to be reported.

11.4 The most significant risks are that if the report is not approved, this may bring the Council into disrepute with contractors, and the Council would have to find alternate untested arrangements for procuring and contracting such provision. To mitigate these risks we have consulted with other Local Authorities to establish local approaches to contracting, these include Dudley MBC and Walsall MBC; we have also consulted with Legal Services and with Procurement Services to obtain their opinions and have acted upon these.

12. SUSTAINABILITY OF PROPOSALS

12.1 The proposals in this report ensure that the council's exemption from contract procedure rules are adhered to and the council's statutory responsibilities are met.

13 HEALTH AND WELLBEING IMPLICATIONS (INCLUDING SOCIAL VALUE)

13.1 The proposals in this report do not have any impact on health and wellbeing of council employees or external customers.

14 IMPACT ON ANY COUNCIL MANAGED PROPERTY OR LAND

14.1 The proposals in this report do not have any impact on council managed property or land as they request exemption to procedural and contractual rules only.

15 CONCLUSIONS AND SUMMARY OF REASONS FOR THE RECOMMENDATIONS

15.1 The recommendations will ensure the council meets its statutory duty for young people with SEND by entering it to appropriate contracts for their ongoing educational provision.

16 BACKGROUND PAPERS

a. SEN Code of Practice

[www.gov.uk/government/uploads/system/uploads/attachment_data/file/398815/SEND Code of Practice January 2015.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/398815/SEND_Code_of_Practice_January_2015.pdf)

b. EFSA High Needs Funding 2017/18 Operational Guide

<https://www.gov.uk/government/publications/high-needs-funding-arrangements-2017-to-2018/high-needs-funding-operational-guide-2017-to-2018>

17 APPENDICES:

None

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