

Cabinet – 24 June 2009

Residential and Nursing Care Services

Portfolio: Councillor McCracken – Health, Social Care & Inclusion

Service: Residential and Nursing Care

Wards: All

Key decision: Yes

Forward plan: Yes

1. Summary of report

1.1 This is a key element of making the Council's contractual arrangements with providers of residential and nursing care more consistent, robust and appropriate to the needs of people using these services. The new arrangements will also address historical complexity and ensure best use of Council resources.

1.2 The main purpose of the report is to provide an update in relation to the tendering of the Council's residential and nursing care services. These services are a core element of the overall modernisation and redesign of services for older people and people with disabilities and details are provided through reference to the following documents contained within the Appendices;

Appendix A: Extract from Overview and Scrutiny Gateway Review.

Appendix B: Residential and Nursing Care Project Update.

Appendix C: Usual cost, preferred accommodation and top up policies.

1.3 Decisions are sought from Cabinet within the report recommendations (Section 2) relating to entering into a formal Section 75 Agreement with the PCT, the established usual costs, the placement list, and associated policies, guidance, protocol documentation and procedures.

1.4 The scope of services and procurement represent an estimated total gross expenditure of £35 million per year and includes the categories of, older people, mental health, physical disabilities, learning disability, and drug and substance abuse services.

1.5 Extracts from the report submitted to the Health Social Care and Inclusion Scrutiny and Performance Panel meeting on 12 February 2009 which highlighted the issues that the joint NHS Walsall and Walsall Council project team and project board had taken into account during the course of this project are included within **Appendix A**.

- 1.6 The business case identified that an NHS Walsall and Walsall Council joint procurement and commissioning project was logical and necessary for a number of reasons (**Appendix A** 4.1 item 2). A number of project deliverables were identified which included:
- 1 Agreement between NHS Walsall and the Council in relation to commissioning, integrated service provision and pooled budgets through a Section 75 agreement.
 - 2 Agreeing policy proposals.
 - 3 Transparent charges and accessible performance measures and signposting to preferred providers.
- 1.7 The residential and nursing care project update is included within **Appendix B** and item 2.2 identifies key components of the procurement strategy for consideration including, different segmentation of services and different service requirements and characteristics (hence phasing of project), the operation of a placement list(s) as a database, the need to ensure that there are no gaps in service provision, and that service user choice is accommodated.
- 1.8 Following the production and issue of the Invitation to Tender (ITT) documents proposals in relation to Phase 1 older people services have been received from a total of 43 Care Homes. An overview indicates that 26 of the care homes are located within the Walsall local authority area, 31 care homes have "WS" postcode addresses. Further work will be undertaken to identify any gaps and it is anticipated and programmed that the bulk of the evaluation work will have been completed by the end of May, so that new contracts can be in place for 1 July 2009.
- Of the 43 homes:
- 1 has a 3 star rating
 - 31 have a 2 star rating
 - 9 have a 1 star rating
 - 2 have a zero star rating.
- 1.9 The Invitation to Tender documents (ITT) Phases 2 and 3 specifications have been issued to providers and are due for return in July 2009 with the new contracts due to commence in October 2009.
- 1.10 Learning disabilities have been exploring the use of the National Care Funding Calculator for the higher cost care packages in excess of £750 per week as a tool for demonstrating value for money and achieving a consistency and equality across all service areas.
- 1.11 The majority of the care homes for Phase 1 services have confirmed the usual cost rate advised by the Council and the procurement and pricing strategy for Phase 1 services and tendering has been successful. Key will be adapting that successful approach to the more complex services within Phases 2 and 3 and linking to the National Care Funding Calculator as a tool for driving up quality and demonstrating value for money and achieving a consistency and equality across all service areas.

- 1.12 The Council's position with regards to charges and policies is determined by the Local Authority Circular LAC(2004)20 Guidance on: National Assistance Act 1948 (Choice of Accommodation) Directions 1992 and National Assistance (Residential Accommodation) (Additional Payments and Assessment of Resources) (Amendment) (England) Regulations 2001. A number of the key points in relation to the "Usual Costs", "Preferred Accommodation", service user choice, and "Top Ups" are detailed and explained within **Appendix C**.

2. Recommendations

- 2.1 That Cabinet notes and approves the approach adopted to date.

- 2.2 That Cabinet agrees:

- a) the project deliverables and requirement for a Section 75 Agreement to be entered into with NHS Walsall in relation to commissioning, integrated service provision and any potential pooled budgets and
- b) delegates the signing of the Agreement to the Executive Director of Social Care and Inclusion in consultation with the Portfolio Holder with responsibility for Social Care and Health.

- 2.3 That the established Usual Cost for Phase 1 older people services as detailed below is agreed.

Type	Category	2009/10 £/ week
Residential	Older People	356.50
Residential	Older People Elderly Dementia (EMI)	374.50
Nursing	Older People	471.00
Nursing	Older People Elderly Dementia (EMI)	471.00

3. Background information

- 3.1 On 17 July 2008 a report was submitted to Cabinet which outlined proposals for the tendering of the Council's residential and nursing care services as a core element of the overall modernisation and redesign of services for older people and people with disabilities.
- 3.2 The Cabinet report identified the need to meet a statutory duty under the National Assistance Act 1948 and that existing services and service contracts had developed over time in an ad-hoc way which had led to wide ranging contract agreements and prices and that the tender ought to provide stability in the market by standardizing contracts and rationalising the pricing mechanism.
- 3.3 It was resolved that
- (1) Cabinet approved the re-tender of the residential and nursing home care service as detailed above;
 - (2) That Cabinet delegates the award of contracts to the Executive Director of Social Care and Inclusion in conjunction with the Portfolio Holder.

- 3.4 A detailed project report in the form of a Gateway Review was submitted to the Health Social Care and Inclusion Scrutiny and Performance Panel meeting on 12 February 2009 which included appendices that set out in more detail the issues that the joint NHS Walsall and Walsall Council project team and project board had taken into account during the course of this procurement. Panel members were invited to question members of the project team at the meeting and to make any observations or recommendations.
- 3.5 Tenders and submissions have now been received for Phase 1 services (Older People) from providers and Invitation to tender documents for Phase 2 and 3 Services have been issued to providers. The tender returns are due in July 2009.

4. Resource considerations

4.1 Financial:

- 4.1.1 Overall no extra resources are required apart from the procurement specialist employed by the corporate procurement team, the cost for which is being offset against the savings generated
- 4.1.2. The rates (Usual Costs) for Phase 1 older people services are competitively benchmarked and are marginally more than the average under the existing contracts. It is expected, however, that the tender as a whole will generate savings as the rates will be more uniform across the blocks and thus reducing the tender average compared to the current average.
- 4.1.3 Savings are anticipated as a result of this tender due to the reductions in unit costs anticipated in association with Phases 2 and 3 services. The savings totalling £1.4m have already been built into the 2009/10 and future years' budgets within adult social care as approved by Council on 23 February 2009. This saving is approximately 4% of the gross budget.

4.2 Legal:

The proposed contractual documentation and service specification are robust and compliant with the European Union procurement rules and regulations and other legislative requirements. Advice and support is being provided by external legal advisers.

4.3 Staffing:

There are no staffing implications for Council employees. Legal, project management and procurement support has been provided by external advisers and costs are being shared with NHS Walsall.

5. Citizen impact

This should improve the quality, choice and access to residential and nursing homes for citizens of Walsall and contribute to better outcomes for those citizens of the borough who are users of our services.

6. Community safety

There are no community safety implications

7. Environmental impact

There are no major environmental impact issues

8. Performance and risk management issues

8.1 Risk:

A detailed risk analysis and assessment has been undertaken for the project and is available on request.

8.2 Performance management:

The increased targeting of the service should ensure that performance improvement and efficiencies are realised with demonstrable value for money through a competitive procurement process and thereby impact positively on the overall performance of the Council.

9. Equality implications

The consultation, tender and contract award processes will be assessed against the Council's Equality Impact Assessment template and will not exclude any citizen who has an assessed need for the service and meets the Fair Access to Care criteria.

The actions being undertaken relate directly to the equitable availability of, and access to, social care and nursing services including continuing health care for adults.

Equality issues have been specifically incorporated into the procurement process and invitation to tender through provider selection as well as tender evaluation. The recent peer assessment for the Equality Standard stated that there was strong evidence of good procurement practice when they reviewed the ITT.

10. Consultation

NHS Walsall has been consulted in the preparation of this report and is represented on the project team and project board. As part of the project procurement process consultations have also taken place with providers, the Providers Forum, the West Midland Care Association, Walsall Voluntary Action, Over 50s Forum, and with two specially convened service user groups.

Background papers

These include:

- Project Initiation Document
- Risk Register
- Invitation to Tender documents Phase 1
- Tender Evaluation Report

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A handwritten signature in black ink, appearing to be 'DM', with a long, sweeping horizontal line extending to the right.

Dave Martin
Executive Director

11 June 2009

A handwritten signature in black ink, reading 'B. McCracken'.

Councillor Barbara McCracken
Portfolio holder

15 June 2009

Extract from Overview and Scrutiny Gateway Review

1.0 Contextual Project Information

- 1.1 A review had identified that existing contracts for residential and nursing care placements have been in place for around 10 years and in that time had not been tendered competitively.
- 1.2 It was considered that Residential and Nursing care services was an area where value could be achieved through the Council and NHS Walsall changing its approach to the procurement of these services and at the same time improving procedures to reflect best practice.
- 1.3 The review considered that all Residential and Nursing Care services commissioned by the Council should be included within scope together with NHS Walsall continuing health and end of life care.
- 1.4 The Scope of services therefore included in the project relates to all residential and nursing home care services with a total gross annual expenditure of £35m for
 - Older people
 - Young adults with a disability service
 - Mental Health
 - Physical disabilities
 - Learning disability
 - Drug and substance abuse
- 1.5 Services provided direct by the Council and NHS Walsall is excluded from the scope of services covered.
- 1.6 The aim is to have new contracts in place commencing with Phase 1 in May 2009, but it is acknowledged that a number of the specialist services are likely to require a longer timescale to identify requirements and accordingly the project has been split into 3 phases with initial phase 3 contracts due to be in place by July 2009.

2.0 Gateway Reviews

- 2.1 Members will be aware of the Gateway Review process which allows members to consider the identified Services as a whole as well as the associated procurement processes within a methodology that provides the opportunity to undertake the review in a robust and structured way.
- 2.2 The purpose of this report is to update members of the continuing progress made in relation to the tendering of Residential and Nursing Care Services so that any comments or suggested action can be brought to the attention of either Cabinet, the Project Board or Project Team.
- 2.3 The appendices to this report provide more detailed information for members to consider. *The Appendix* details the overview of the Gateway 0 – 5 high level

questions, and the Procurement Cycle and Gateway Review Relationship. The project in the main is approaching the Gateway Review Stage 2.

3.0 Gateway Review 0 - 1

- 3.1 The report to Cabinet on the 16 July 2008 outlined the proposals for the tendering of the Council's Residential and Nursing Care Services as a core element of the overall modernisation and redesign of services for older people and people with disabilities. This in the main covered Gateway reviews stages 0 – 1. Accordingly details which have been identified and included within the Project Initiation document (PID) 1.3 dated 31 July 2008 includes:

- Outline Business Case
- Project definition
- Project Organisation
- Communication Plan
- Project Plan
- Project Controls

4.0 Gateway Review 2

- 4.1 In considering Gateway Review Stage 2 (the Procurement approach for Residential and Nursing Care Home services) the following 10 high level questions have sought to be addressed and evidenced as follow:

1. Confirm the outline business case now the project is fully defined.

The outline business case was presented to Project Board and agreed on 31 July 2008, an extract from which is included within *the Appendix*. The nature of the procurement is such that the process is iterative and the outline business case continues to be revisited in an iterative way as knowledge is created through interaction and open dialogue with the Providers, and other stakeholders. Key identified project deliverables are:

- Agreed specification to reflect strategic intent
- Agreed tender documentation
- Section 75 agreement
- Amend procedures as appropriate prior to tendering
- Agreed policy proposals
- Implement short term financial plan
- Contract award
- Implement long term financial plan
- Transparent charges and performance measures which can be made accessible to service users and staff as appropriate
- Signposting to preferred providers for staff and Service Users

2. Ensure that the procurement strategy is robust and appropriate.

The procurement strategy is robust and appropriate and is one that is seeking to encourage a healthy and competitive procurement that demonstrates value for money as well as meeting affordability criteria. Areas of risk are being considered and action taken to reduce uncertainty as far as is possible.

Around £35m (Gross) each year is spent on residential and nursing care services including continuing health care and the scope of services include:

- Dementia (DE) & Elderly Dementia (EMI)
- Mental Disorder excluding a learning disability or dementia (MD)
- Learning Disability (LD)
- Physical Disability (PD)
- Drug Abuse/Problem excluding alcoholism (D)
- Terminally Ill (TI)
- Sensory Impairment (SI)
- Older People (65yrs+) not covered by the above categories (OP)
- Adults (65yrs-) not covered by the above categories.

A joint NHS Walsall procurement and commissioning project was logical and agreed due to

- Similarity of specifications
- Operation of pooled budgets
- Economies of scale through combining expenditure and sharing consultancy costs
- Greater opportunity for continuity of health care for Service Users.
- Providers and market place being very similar
- Sharing of resources and costs
- Experience gained through a previous joint domiciliary care procurement project

As the project seeks to reflect procurement best practice the strategy has been to follow the EU procurement rules and regulations as these reflect best practice.

Following careful consideration the "Open Procedures" were considered the more appropriate approach to adopt, with the qualification questionnaire being incorporated into the tendering documents, accordingly the notice issued in the Official Journal of the European Union (OJEU) on 28 November 2008 (Contract Notice ref 2008-113418) was issued as part of the open procedures under the Public (Services) Contracts Regulations 2006.

Within the notice reference was made to services being for short and long stay to support independent living and that tender documents were to be issued in a phased way. Key components for consideration have been;

- Different segmentation of services and different service requirements and characteristics
- Tender Evaluation Panel
- Accommodating and distinguishing between the different categories of care, residential and nursing, continuing health care and end of life care and long and short term care.
- Tender Evaluation model and weighting of price (50%) and quality (50%)
- Operation of a Placement list(s) as a data base for a given service
- Initial evaluation will be based on tender submission subsequent years will be based on monitored / assessed performance.
- Contractual context, namely a framework contract and agreement is to be in place with the majority of Providers with few exceptions for which

no work is guaranteed. The list of contracts and Providers will form the Placement list from which individual Service User contracts will be entered into.

- Accommodating Service User choice

The conclusion and process of evaluation and placement is outlined for Phase 1 services (Older Persons, Older Persons Dementia (EMI) and End of Life Care / Terminally Ill (TI) within section 7 of the invitation to tender document and has been included within *the Appendix* to this report.

3. Ensure that the project's plan through to completion is appropriately detailed and realistic.

There are a number of key project deliverables (for details please refer to the response to high level question 1) and the project has been divided into three phases to reflect the different services characteristics which are likely to require different treatment. Progress is reviewed updated and amended on a regular basis. The most recent programme/plan is included in *the Appendix*. Whilst Phase 1 services have been delayed by 4 weeks from the original programme it is hoped that by working on Phases 2 and 3 concurrently that the lost time can be recovered.

4. Ensure that the project controls and organisation are defined, financial controls are in place and the resources are available.

The Project Governance structures and processes that are in place are robust, and have developed along with the project. Monthly Project Team and Project Board meetings take place. All meetings are minuted and receive a monthly update. Both Project Board and Project Team have membership and representatives from NHS Walsall. Project Board is chaired by the Director of Social Care and inclusion and the Project Team by the Assistant Director, Adult Services.

5. Confirm funding availability for the whole project.

Funding is available for the project and services which represents a significant element of the Council's and NHS Walsall's expenditure.

6. Confirm that the development and delivery approach and mechanisms are still appropriate and manageable.

Focus has been centred on what is commercially deliverable by the Providers, quality and affordability. Accordingly "Indicative Affordability Prices" and "Indicative Maximum Rates" have been provided based on existing market and benchmarked rates

"Indicative Affordability Price" means the maximum amount of money expressed as a range that the Authority is willing and able to pay towards the costs of each type of placement on behalf of NHS Walsall.

"Indicative Maximum Rate" means the likely maximum amount of money that the Authority is willing and able to pay towards the cost of each type of placement.

Tenders are to be evaluated on the basis of Price (50%) and Quality (50%) as *the Appendix*. Extensive consultation has been undertaken as detailed below:

- Providers Forum meetings 23 July 2008 and 21 August 2008
- Walsall Voluntary Action 17 September 2008
- Over 50 Forum meeting 8 and 24 September 2008
- Commissioner Forum / Workshop 23 September 2008
- Providers workshop 21 and 22 October 2008
- West Midlands Care Association on the 12 November 2008
- Service Users 11 December 2008 and 8 January 2009

7. Check that the supplier market capability and track record is fully understood (or existing supplier's capability and performance).

References and CSCI rating details will be sought for all Providers as part of the evaluation process. It is recognised that this project is of particular importance to the local economy and local businesses. Support has been provided through a number of workshop sessions and through close working with Walsall Endeavours and the West Midland Care Association.

8. Confirm that the procurement (or acquisition approach) will facilitate good client/supplier relationships.

The approach adopted has been one where communication and consultation has been considered as a key component. The invitation to tender documents phase 1 has been issued as a draft to the West Midland Care Association. Workshops have taken place with Providers (approximately 100 attendees) and presentations made to the established Provider Forums. The process encourages annual reviews and partnership working and rewarding and recognising quality.

A web page where Providers get up to date information on the tender has been provided to aid better communication.

www.walsall.gov.uk/index/business/doing_business_with_the_council/procurement/index/business/doing_business_with_the_council/procurement/procurement_open_tenders.htm

9. Confirm that appropriate project performance measures and tools are being used.

A key element of the Invitation to tender (ITT) document is the identified key performance measures and outcome specification, and an annual review which reflects and reward performance.

10. Confirm that quality procedures have been applied consistently since the previous review.

This is covered by points 1 – 9 and the monthly meetings taking place and associated records.

5.0 Conclusion

Accordingly Members are asked to;

- Note this report and the continuing progress made in relation to the tendering of Residential and Nursing Care Services.
- Consider any comments or action that they may wish to bring to the attention of either Cabinet, the Project Board or Project Team.

Residential and Nursing Care Project Update

1.0 Procurement Strategy

- 1.1 A procurement strategy was agreed that was robust, appropriate and sought to encourage a healthy and competitive procurement that demonstrated value for money as well as meeting affordability criteria and accommodating Service User choice. Focus has been centred on outcomes and what is commercially deliverable by the Providers, quality, and affordability and Service User choice. Nonetheless in clinical terms the specification is robust and incorporates the outcome of extensive consultations.
- 1.2 Key components for consideration included;
- Different segmentation of services and different service requirements and characteristics (accordingly services have been divided into 3 phases)
 - The operation of a Placement list(s) as a data base for a given service and to be used to denote value for money and to be an informative database to assist and inform choice
 - The contractual context, namely a framework contract and agreement that is to be in place with the majority of Providers with few exceptions for which no work is guaranteed. The list of contracts and Providers will form the Placement list from which individual Service User contracts will be entered into.
 - The need to ensure that there are no gaps in service provision and that Service User choice is accommodated

2.0 Consultations and communications

- 2.1 To date Extensive consultation has been undertaken. The approach adopted has been one where communication and consultation has been considered as a key component. The invitation to tender (ITT) documents for Phase 1 prior to formal issue was issued as a draft to the West Midland Care Association. Workshops have taken place with Providers (approximately 100 attendees) and presentations made to the established Provider Forums. A Council web page, where Providers get up to date information on the tender has also been developed to aid better communication.

3.0 Performance, Outcomes and Development of Services.

- 3.1 A key element of the ITT document is the identified key performance measures and outcome specification, and a review which reflects and reward performance through the Placement list.
- 3.2 Tenders are to be evaluated on the basis of Price (50%) and Quality (50%). The Initial evaluation will be based on the tender submission and

subsequent years will be based on monitored and assessed performance and achieving required outcomes.

- 3.3 It is recognised that this project is of particular importance to the local economy and local businesses. Support has been provided through a number of workshop sessions referred to above, the web page update and through close working with Walsall Endeavours and the West Midland Care Association. The ITT Section 8 “The Tender Response Document and Declaration” has been structured in a simplified way to reflect the likely inexperience of Providers in tendering and submitting bids.
- 3.4 The adopted approach encourages partnership working and rewarding and recognising quality in a way that is flexible and enables services to be developed and for the money to follow the Service User and Service User choice, accordingly end of life care within a residential care home environment can be accommodated and will be appropriate in right circumstances.

4.0 Programme

- 4.1 The procurement programme from now until the award and commencement of the contract is illustrated in table B1.

Description	When
PHASE 1 Checking and Evaluation	End of May 2009
PHASE 2 and 3 Dispatch Tender Documents	End of May 2009
PHASE 1 Award Process	1 July 2009
PHASE 1 Contract Management	1 July 2009
PHASE 2 and 3 Deadline for receipt / Opening	Middle of July 2009
PHASE 2 and 3 Checking and Evaluation	1 September 2009
PHASE 2 and 3 Award Contract	1 October 2009
PHASE 2 and 3 Contract Management	1 October 2009

Table B1: Procurement Programme

5.0 Phase 1 Services

Proposals were received from a total of 43 Care Homes. An overview indicates that 26 of the Care Homes are located within the Walsall Local Authority area, 31 Care Homes have “WS” postcode addresses. There are 31 Homes with two star ratings, 8 with one star rating, 1 with a three star rating and 1 with Zero star rating.

Further work will be undertaken to identify any gaps and it is anticipated and programmed that the bulk of the evaluation work will have been completed by the end of May, so that new contracts can be in place for the 1 July 2009.

Generally following the initial evaluation of the Phase 1 tender responses Walsall Council and NHS Walsall are pleased with progress and new

contract will provide greater clarity, transparency and fairness in respect of:

- The established usual costs
- Top ups
- Preferred accommodation
- Service User choice.

6.0 Phases 2 and 3

The Invitation to Tender (ITT) documents Phases 2 and 3 will have been issued by the end of May 2009.

Learning disabilities have been exploring the use of the National Care Funding Calculator for the higher cost care packages in excess of £750 per week.

The National Care Funding Calculator was launched in July 2008 with the view of transforming the way care for people with learning disabilities is purchased.

Developed by the Regional Improvement and Efficiency Partnerships, the calculator is available to all English adult care departments following successful trials in over 70 councils and two primary care trusts. The Voluntary Organisations Disability Group has also been closely involved in its development.

With adult care budgets under huge pressure, the calculator – a sophisticated spreadsheet – allows both provider and commissioning staff to assess a fair price for residential care and supported living arrangements for service users.

The care funding calculator gives councils a much better understanding of the market for accommodation-based care and ensures that users' needs are clear and specified in a consistent way. It does this by breaking down the needs of an individual into fine detail and works out accurately, based on benchmarked guide prices, how much it might cost to meet those needs. It ensures that care services are linked directly to the needs of an individual and that clearer contractual arrangements with providers are in place.

Earlier versions of the tool have already proven to be a success in the South East and South West with councils saving an average of 13% on their costs.

The Care Funding Calculator may also be suitable for use with higher need physical disability, sensory impairment and mental health care packages. There are two versions of the Care Funding Calculator one for Residential Placements, and one for Independent Living Placements.

For the reasons outlined it is intended that the Care Funding Calculator be used for Supported living, physical and mental health where a care

packages would otherwise exceed £750 per Week, but with the proviso that whilst the intention is to utilize the National Care Funding Calculator the exact extent to which the tool should be utilised needs to be carefully considered due to the impact it will have on care planning, operational issues and it being a cost base tool, accordingly only aspects of it might be utilised rather than wholesale adoption.

7.0 Conclusion

The procurement and pricing strategy for Phase 1 services and tenders has been successful. Key will be adapting that successful approach to the more complex services within Phases 2 and 3 and linking to the National Care funding Calculator and a consistency and equality across all service areas.

Usual Cost, Preferred Accommodation and Top Up Policies

1.0 Introduction

The details within this Appendix sets out within Section 2.0 the legal position in relation to “Top ups,” Usual Costs,” and “Preferred Accommodation”, within the context of the current procurement and project which is detailed within Section 3.0

2.0 Guidance and Regulations

The Council's position is determined by the the Local Authority Circular LAC(2004)20 Guidance on: National Assistance Act 1948 (Choice of Accommodation) Directions 1992 and National Assistance (Residential Accommodation) (Additional Payments and Assessment of Resources) (Amendment) (England) Regulations 2001. This guidance replaces the previous guidance which accompanied the Directions which are intended to ensure that when Councils with social services responsibilities make placements in care homes or care homes providing nursing care, that, within reason, individuals are able to exercise genuine choice over where they live.

The Regulations give individuals the right to enter into more expensive accommodation than they would otherwise have been offered in certain circumstances. The guidance sets out what individuals should be able to expect from the council that is responsible for funding their care, subject to the individual's means, when arranging a care home place for them. The guidance describes the minimum of choice that councils should offer individuals and states that councils should make all reasonable efforts to maximise choice as far as possible within available resources even when not required to act in a certain way by the Directions or the Regulations.

Whilst the detail of the guidance applies to registered care homes, the principles apply to adults placed in unregistered settings also.

A number of the key points include;

- *Individuals should not be refused their preferred accommodation without a full explanation from councils, in writing, of their reasons for doing so.*
- *Funding councils may refer to their own usual costs when making placements in another council's area.*
- *A council should set more than one usual cost where the cost of providing residential accommodation to specific groups is different.*
- *Only when an individual has expressed a preference for more expensive accommodation than a council would usually expect to pay, can a third party or the resident be asked for a top up.*

- *Councils should not set arbitrary ceilings on the amount they expect to pay for an individual's residential care.*
- *In view of the Community Care (Delayed Discharges etc.) Act 2003, councils should have contingency arrangements in place, that address the likelihood that an individual's preferred accommodation will not always be readily available. Information about how the waiting list is handled should be clear and the individual should be kept informed of progress.*
- *Only when an individual has expressed a preference for more expensive accommodation than a council would usually expect to pay, can a third party or the resident be asked for a top up.*
- *In order to ensure that they are able to exercise proper control over the use of their funds, councils need to be able to impose certain contractual conditions.*
- *Councils must never encourage or otherwise imply that care home providers can or should seek further contributions from individuals in order to meet assessed needs.*
- *National Assistance Act 1948, a council is responsible for the full cost of that accommodation. Therefore, where a council places someone in more expensive accommodation, it must contract to pay the accommodation's fees in full.*
- *Instead of paying a contribution to the council, the resident may pay the same amount direct to the accommodation, with the council paying the difference. However, it should be noted that even where there is such an agreement for the resident to make payments direct to the accommodation, the council continues to be liable to pay the full costs of the accommodation should either the resident or relative fail to pay the required amount .*
- *In order to safeguard both residents and councils from entering into top-up arrangements that are likely to fail, the resident or the third party must reasonably be expected to be able to continue to make top-up payments for the duration of the arrangements. individuals, and/or those who represent them, need information on the options open to them if they are to be able to exercise genuine choice.*

2.1 Preferred Accommodation and Usual Cost

Section 1.3 of LAC (2004)²⁰ states that:

If an individual expresses a preference for particular accommodation ("preferred accommodation") within England and Wales, the council must arrange for care in that accommodation provided:

- *The accommodation is suitable in relation to the individual's assessed needs*
- *To do so would not cost the council more than what it would usually expect to pay for accommodation for someone with the individual's assessed needs. This is referred to throughout the guidance as the **usual cost**.*
- *The accommodation is available.*

- *The provider of the accommodation is willing to provide accommodation subject to the council's usual terms and conditions for such accommodation.*

2.2 Top Ups

Section 1.4 of LAC (2004)20 states that:

If an individual requests it, the council must also arrange for care in accommodation more expensive than it would usually fund provided a third party or, in certain circumstances, the resident, is willing and able to pay the difference between the cost the council would usually expect to pay and the actual cost of the accommodation (to 'top up'). These are the only circumstances where either a third party or the resident may be asked to top up.

Top-up payments should be distinguished from charges made for extra items not covered by the home's basic fees, which are permitted. Item 3.11.1 of the Invitation to tender document states "The authority does not encourage the charging of Service Users for additional services. Where such charges exist then details must be displayed within the home and may include..."

Sections 2.1 and 2.2 of LAC (2004)20 states that:

There should be a general presumption in favour of individuals being able to exercise reasonable choice over the service they receive....Where, for any reason, a council decides not to arrange a place for someone in their preferred accommodation it must have a clear and reasonable justification for that decision which relates to the criteria of the Directions and is not in breach of the Regulations. Individuals should not be refused their preferred accommodation without a full explanation from councils, in writing, of their reasons for doing so.

Sections 2.3 and 2.4 of LAC (2004)20 state that:

The location of the preferred accommodation need not be limited by the boundaries of the funding council. Councils are obliged to cater for placements ... in any permitted care home within England or Wales...Funding councils may refer to their own usual costs when making placements in another council's area. However, because costs vary from area to area, if in order to meet a resident's assessed need it is necessary to place an individual in another area at a higher rate than the funding council's usual costs, the placing council should meet the additional cost itself.

The Directions state that a council must arrange for care in an individual's preferred accommodation subject to four considerations which are detailed within Section 2.5 of LAC (2004)20 as follows :

(a) Suitability of accommodation

Suitability will depend on the council's assessment of individual need. Each case must be considered on its merits.

(b) Cost

One of the conditions associated with the provision of preferred accommodation is that such accommodation should not require the council to pay more than they would usually expect to pay, having regard to assessed needs (the 'usual cost'). This cost should be set by councils at the start of a financial or other planning period, or in response to significant changes in the cost of providing care, to be sufficient to meet the assessed care needs of supported residents in residential accommodation. A council should set more than one usual cost where the cost of providing residential accommodation to specific groups is different. In setting and reviewing their usual costs, councils should have due regard to the actual costs of providing care and other local factors. Councils should also have due regard to Best Value requirements under the Local Government Act 1999.

Individual residents should not be asked to pay more towards their accommodation because of market inadequacies or commissioning failures.

Where an individual has not expressed a preference for more expensive accommodation, but there are not, for whatever reason, sufficient places available at a given time at the council's usual costs to meet the assessed care needs of supported residents, the council should make a placement in more expensive accommodation. In these circumstances, neither the resident nor a third party should be asked to contribute more than the resident would normally be expected to contribute and councils should make up the cost difference between the resident's assessed contribution and the accommodation's fees. Only when an individual has expressed a preference for more expensive accommodation than a council would usually expect to pay, can a third party or the resident be asked for a top up.

Councils should not set arbitrary ceilings on the amount they expect to pay for an individual's residential care. Residents and third parties should not routinely be required to make up the difference between what the council will pay and the actual fees of a home. Councils have a statutory duty to provide residents with the level of service they could expect if the possibility of resident and third party contributions did not exist.

Costs can vary according to the type of care provided. For example, the cost a council might usually expect to pay for short-term care might be different from its usual cost for long-term care. There are also a number of situations where there may be higher costs incurred in providing residential care, be it long or short-term. Examples include specialist care for specific user groups with high levels of need or where necessary to prepare special diets and provide additional facilities for medical or cultural reasons. Councils should be prepared to meet these higher costs in order to ensure an individual's needs are appropriately met.

(c) Availability

Generally, good commissioning by councils should ensure there is sufficient capacity so individuals should not have to wait for their assessed (that is, eligible) needs to be met. However, waiting is occasionally inevitable, particularly when individuals have expressed a preference towards a particular care home where there are no current vacancies.In view of the Community Care (Delayed

Discharges etc.) Act 2003, councils should have contingency arrangements in place, that address the likelihood that an individual's preferred accommodation will not always be readily available. These arrangements should meet the needs of the individual and sustain or improve their level of independence. For some, the appropriate interim arrangement could be an enhanced care package at home.

Councils should give individuals an indication of the likely duration of the interim arrangement. Councils should place the individual on the waiting list of the preferred accommodation and aim to move them into that accommodation as soon as possible. Information about how the waiting list is handled should be clear and the individual should be kept informed of progress. If the duration of the interim arrangement exceeds a reasonable time period e.g. 12 weeks, the individual should be reassessed to ensure that the interim and preferred accommodation, are still able to meet the individual's assessed needs.

Councils should ensure that while waiting in temporary residential accommodation, if an individual has to contribute towards their care costs it is in accordance with the National Assistance (Assessment of Resources) Regulations 1992. Individuals who are waiting in these circumstances should not be asked to pay more than their assessed financial contribution to meet the costs of these residential care services which have been arranged by the council to temporarily meet their assessed needs and councils should make up the cost difference between the resident's assessed contribution and the accommodation's fees. Only when an individual has expressed a preference for more expensive accommodation than a council would usually expect to pay, can a third party or the resident be asked for a top up.

Councils should take all reasonable steps to gain an individual's agreement to an interim care home or care package.... Where patients have been assessed as no longer requiring NHS continuing inpatient care, they do not have the right to occupy indefinitely an NHS bed. If an individual continues to unreasonably refuse the interim care home or care package, the council is entitled to consider that it has fulfilled its statutory duty to assess and offer services, and may then inform the individual, in writing, they will need to make their own arrangements. This position also applies to the unreasonable refusal of a permanent care home, not just the interim care home or care package. If at a later date further contact is made with social services regarding the individual, the council should re-open the care planning process, if it is satisfied that the individual's needs remain such to justify the provision of services and there is no longer reason to think that the individual will persist in refusing such services unreasonably.

(d) Terms and conditions

In order to ensure that they are able to exercise proper control over the use of their funds, councils need to be able to impose certain contractual conditions, for example, in relation to payment regimes, review, access, monitoring, audit, record keeping, information sharing, insurance, sub-contracting, etc.

The contractual conditions required of preferred accommodation should be broadly the same as those councils would impose on any other similar operation. Stricter conditions should never be used as a way of avoiding or deterring a placement. As with suitability, account should be taken of the nature and location of the accommodation. There may be occasions where it would be unreasonable for a council not to adapt its standard conditions and others where it would be unreasonable to expect it to do so. For example, councils should take into account the fact that care homes in other areas, or those that take residents from many areas, may have geared themselves to the normal requirements of other councils.

Councils should be flexible in such circumstances and avoid adding to the administrative burden of care homes.

2.3 More expensive accommodation

Section 3 of LAC (2004)²⁰ guidance applies only where a resident explicitly chooses to enter accommodation other than that which the council offers them, and where that preferred accommodation is more expensive than the council would usually expect to pay. In certain circumstances, councils can make placements in more expensive accommodation than they would usually expect to pay for, provided a resident or a third party is able and willing to make up the difference (to 'top up'). Residents that are subject to the 12 week property disregard or have agreed a deferred payments agreement with the council may make top-ups from specified resources on their own behalf. These are the only situations where the resident may top up. The most common arrangement is that a third party is providing the top-up. A third party in this case might be a relative, a friend, or any other source.

When setting its usual cost(s) a council should be able to demonstrate that this cost is sufficient to allow it to meet assessed care needs and to provide residents with the level of care services that they could reasonably expect to receive if the possibility of resident and third party contributions did not exist.

Where there are no placements at the council's usual rate, councils should not leave individuals to make their own arrangements having determined that they need to enter residential accommodation and do not have care and attention otherwise available to them. In these instances, councils should make suitable alternative arrangements and seek no contribution from the individual other than their contribution as assessed under the National Assistance (Assessment of Resources) Regulations 1992. Councils must never encourage or otherwise imply that care home providers can or should seek further contributions from individuals in order to meet assessed needs.

Where either residents or third parties are making further contributions to costs over and above the resident's assessed contribution under the National Assistance (Assessment of Resources) Regulations 1992 then;

(a) Responsibility for costs of accommodation

When making arrangements for residential care for an individual under the National Assistance Act 1948, a council is responsible for the full cost of that accommodation. Therefore, where a council places someone in more expensive accommodation, it must contract to pay the accommodation's fees in full. The resident's or the third party's contribution will be treated as part of the resident's income for charging purposes and the council will be able to recover it in that way. However, under a deferred payments agreement, where the resident is topping up against the value of their home, their top-up contribution is added to their deferred contribution.

Councils will be aware that under section 26(3A) of the National Assistance Act 1948 (as inserted by the NHS and Community Care Act 1990), it is open to them to agree with both the resident and the person in charge of their accommodation that, instead of paying a contribution to the council, the resident may pay the same amount direct to the accommodation, with the council paying the difference. In such a case, the third party would also pay the accommodation direct on behalf of the resident. However, it should be noted that even where there is such an agreement for the resident to make payments direct to the accommodation, the council continues to be liable to pay the full costs of the accommodation should either the resident or relative fail to pay the required amount.

Where top-ups are required from a resident or third party, the resident will therefore need to demonstrate that either they or the third party is able and willing to pay the difference between the council's usual rate and the accommodation's actual fees.

In order to safeguard both residents and councils from entering into top-up arrangements that are likely to fail, the resident or the third party must reasonably be expected to be able to continue to make top-up payments for the duration of the arrangements. Councils should, therefore, assure themselves that residents or third parties will have the resources to continue to make the required top-up payments. Councils should seek similar assurances when residents top-up against the value of their home when the home is subject to a deferred payments agreement. When the home is eventually sold, it should be possible for the resident or their estate to pay back the deferred contribution including the resident top-ups.

(b) The amount of the resident or third party top-up

The amount of resident or third party top-up payments should be the difference between the actual fee for the accommodation and the amount that otherwise the council would usually have expected to pay for someone with the individual's assessed needs.

(c) Price increases

Arrangements between the council, resident and third party will need to be reviewed from time to time to take account of changes to accommodation fees.

There will also be changes to the council's usual cost, however, fees and usual costs may not change at the same rate, and residents and third parties should be told that there cannot be a guarantee that any increases in the accommodation's fees will automatically be shared evenly between the council and/or the resident or third party, should the particular accommodation's fees rise more quickly than the costs the council would usually expect to pay for similar individuals. A council may find it useful to agree with the resident (or third party) that the resident's (or third party's) contribution will be reviewed on a regular basis on the understanding that clear explanations for proposed increases are given.

(d) Responsibilities of residents and third parties

Councils should make clear to residents and third parties, in writing, the basis on which arrangements are to be made when they seek to exercise their right to more expensive preferred accommodation. It should be clear from the outset to the resident, third party and person providing the accommodation that:

- failure to keep up top-up payments may result in the resident having to move to other accommodation unless, after an assessment of need, it is shown that assessed needs can only be met in the current accommodation. In these circumstances, councils should make up the cost difference between the resident's assessed contribution and the accommodation's fees. Where a resident's top-ups are being made against the value of property subject to a deferred payments agreement, a council will have assured itself from the outset that top-up payments are viable and recoverable when the home is sold;
- an increase in the resident's income will not necessarily lessen the need for a top-up contribution, since the resident's own income will be subject to means testing by the council in the normal way;
- a rise in the accommodation's fees will not automatically be shared equally between council, resident (if making a top-up), and third party.

(e) Suitability and Conditions

The criteria of suitability and willingness to provide on the basis of normal conditions should be applied in the same way as for other preferred accommodation. An exception to this is that it would be reasonable to expect providers entering this kind of arrangement to agree to do so on the basis that the council has the right, subject to notice, to terminate the contract should the resident's or third party's top-up payments cease to be adequate.

(f) Liable relatives

Liable relatives who are making maintenance contributions cannot act as third parties for the care of the relative to whose care they are already contributing under section 42 of the National Assistance Act 1948. This limitation does not apply to top-up arrangements agreed prior to 1 October 2001 with liable relatives.

Neither does the limitation apply to liable relatives who are not making contributions under section 42 of the 1948 Act.

Individuals already resident in residential care

Section 4 of LAC (2004)20 guidance considers *Individuals already placed by a council in residential accommodation, and those already in residential accommodation as self-funders but who, because of diminishing resources, are on the verge of needing council support, have the same rights under these Directions as those who have yet to be placed by the council. Any such individual who wishes to move to different or more expensive accommodation may seek to do so on the same basis as anyone about to enter residential care for the first time. Should a self-funder who is resident in a care home that is more expensive than a council would usually expect to pay later become the responsibility of the council due to diminishing funds, this may result in the resident having to move to other accommodation, unless, after an assessment of need, it is shown that assessed needs can only be met in the current accommodation. In these circumstances, neither the resident nor a third party should be asked for a top-up payment and councils should make up the cost difference between the resident's assessed contribution and the accommodation's fees.*

Individuals who are unable to make their own choices

Section 5 of LAC (2004)20 guidance identifies that *there will be cases in which prospective residents lack capacity to express a preference for themselves. It would be reasonable to expect councils to act on the preferences expressed by their advocate, carer or legal guardian in the same way that they would on the resident's own wishes, unless that would in the council's opinion be against the best interests of the resident.*

2.4 Effect on contracting

Section 6 of LAC (2004)20 guidance identifies that *any block contract or other form of contract that a council may have with a provider should not serve to limit choice. An individual should not be limited to care homes that hold such contracts with the funding council, or care homes that are run by councils. It would not be reasonable for a council to use as a test for the suitability of accommodation, its presence or absence from a previously compiled list of preferred suppliers. The Directions and Regulations do not, however, prevent an authority having a list of preferred providers with which it will contract where a potential resident expresses no preference for particular accommodation, nor from recommending such providers to prospective residents.*

2.5 Information

Section 6 of LAC (2004)20 guidance considers that *individuals, and/or those who represent them, need information on the options open to them if they are to be able to exercise genuine choice. They should be given fair and balanced information with which to make the best choice of accommodation for them. Councils should explain to individuals their rights under the Directions and the Regulations. Councils should also consider providing material in a range of forms including written leaflets in local community languages, Braille, on audio tape and in accessible language e.g. easy words, short sentences, large print and pictures*

(for those with learning disabilities). Councils should supply copies of the Directions and this guidance if requested in appropriate forms. They should work with local Primary Care Trusts (PCTs) and local hospitals to provide clear information to hospital patients as early as possible in their stay about what the council will be able to provide should they require short or long-term residential care at the end of their hospital stay. Individuals should be told explicitly that:

- they are free to choose any accommodation that is likely to meet their needs subject to the constraints set out in the Directions and the Regulations.*
- they may allow the council to make a placement decision on their behalf; and*
- they may choose from a preferred list (if the authority operates such a system).*

Councils should ensure that individuals are informed that they have a choice of accommodation irrespective of whether they express a preference for particular accommodation. Individuals should also be told what will happen if the preferred accommodation is not available... Wherever possible, the individual should be encouraged to have a relative, carer or advocate present during the conversation. A written record of the conversation should be kept, in particular, recording any decisions taken or preferences expressed by the individual. This record should be shared with the individual.

3.0 The Guidance and Services

The guidance and regulations covered within Section 2 describes the minimum of choice that councils should offer individuals and states that councils should make all reasonable efforts to maximise choice as far as possible within available resources.

With this in mind the procurement strategy adopted was to give choice with spot purchasing through the framework contract. Additionally indicative guideline rates for Phase 1 Services were provided based on detailed analysis of the existing costs to the council with an explanation as to how these were arrived at included within the Invitation to tender documents due to the need to establish “a usual cost”.

3.1 Phase 1 Older People Services

This approach has been successful for Phase 1 services thus enabling through competitive arrangements and tendering the establishment of the following;

- Usual Cost (see Table C1).
- Top up.
- Detailed Service Specification and terms and conditions of contract.
- Payment of Service User contribution direct to Provider.
- Data around available beds offered to Council.
- Data around quality of service provision.

Under Section 2.5 of LAC (2004)20 and “costs” it is identified that;

- A council should set more than one usual cost where the cost of providing residential accommodation to specific groups is different.

- Only when an individual has expressed a preference for more expensive accommodation than a council would usually expect to pay, can a third party or the resident be asked for a top up.
- Councils should not set arbitrary ceilings on the amount they expect to pay for an individual's residential care.
- There are also a number of situations where there may be higher costs incurred in providing residential care, be it long or short-term. Examples include specialist care for specific user groups with high levels of need.

Type	Category	2009/10 £/ week
Residential	Older People	356.50
Residential	Older People Elderly Dementia (EMI)	374.50
Nursing	Older People	471.00
Nursing	Older People Elderly Dementia (EMI)	471.00

Table C1: Established Usual Costs

The indicative affordability rates for NHS Walsall are included in Table C2 for Continuing Health Care and End of Life Care.

Type	Category	2009/10 £/ week
Continuing Health Care(1)	Older People	£550 - £600
Continuing Health Care(2)	Older People Elderly Dementia (EMI)	£550 - £600
End of Life Care (1)	Older People	£550 - £600
End of Life Care(2)	Older People Elderly Dementia (EMI)	£550 - £600

Table C2: - NHS Walsall Indicative Affordability Rates

3.2 Phase 2 and 3 Services

The position with regards to Phases 2 and 3 Services and particularly Learning and Physical Disabilities are more complex for a number of reasons. The care packages are generally of a higher value due to their complexity and the higher needs of Service Users, Providers tend to be specialist and therefore defining the "usual costs" has been difficult. Partly due to these complexities historically choice has been limited and top up charges have not been sought.

Within Mental Health Services there are also complexities around the historic payment of an enhanced rate linked to the closures of the asylums in 1993