

Policy on when to tender for Early Years and Childcare Provision

1. BACKGROUND

- 1.1 The Council has a statutory duty to secure early years (EY) education and childcare for all 3 and 4 year olds and for up to 40% of 2 year olds (nationally set eligibility criteria) of 15 hours a week for 38 weeks a year.
- 1.2 Effective from 1 September 2017, the duty was extended to secure an additional 15 hours per week, 38 weeks a year of free childcare for 3 and 4 year olds for those parents who qualify where:
 - both are working (or the sole parent is working in a lone parent family); and,
 - each parent earns, on average, a weekly minimum equivalent of 16 hours at national minimum wage and less than £100,000 per year.
- 1.3 The Council also has a more broadly defined duty to secure sufficient childcare for parents to enable them to work or undertake education or training which could lead to employment.
- 1.4 The Childcare Act 2006 expands and clarifies in legislation the vital role local authorities should play as strategic leaders in facilitating the childcare market, which was first laid out in the Childcare Act 2004. The 2006 Act reinforces the framework in which local authorities already work – in partnership with the private, voluntary and independent (PVI) sector – to shape children's services.
- 1.5 The Council's role in providing early years and childcare places is principally, therefore, that of commissioning or securing providers of childcare where new settings or opportunities are created and facilitating the market to ensure that there is sufficient childcare provided across the county. This is achieved through:
 - the annual publication of a Market Position Statement, which sets out where new provision is required and also monitors capacity within existing provision and is reviewed regularly to reflect the impact of new development:
 - ensuring that all future tender opportunities are advertised on the Council's website as well as on Contract Finder.
 - sending out an email communication to all providers about any future tender opportunities to establish new provision or take over provision in the event that an existing provider indicates they plan to serve notice and we have a sufficiency need for places in that area.
 - ensuring that information on any future tender opportunities to establish new provision or take over provision in the event that an existing provider indicates they plan to serve notice and we have a sufficiency need for places in that area is included in the next edition of Jigsaw (the Early Years Service publication) in cases where the timing of the two coincides.

- 1.6 Section 8(1) of the 2006 Childcare Act gives local authorities the power to assist any person providing, or proposing to provide, childcare and to make arrangements for the provision of childcare. Section 8(2) specifies that the assistance local authorities may give includes financial assistance.
- 1.7 There is very little Local Authority maintained EY provision in the County. Different organisations operating in the PVI sector provide most of the EY provision in the County
- 1.8 PVI settings can be privately run companies, sole traders or community interest companies. A significant number are not for profit charities that often operate with a volunteer committee comprised of parents and staff. They are providing in the main EY and childcare services to their own local communities and have done so over many years. These groups operate out of a mix of permanent and temporary buildings, many of which are on school sites, making use of Council land and building assets under formal lease or licence arrangements. However, the overall position can be fluid with existing settings closing and new ones opening as they operate as individual/independent businesses.
- 1.9 Schools are also key providers of EY education and care – they have appropriate facilities and skills.
- 1.10 Where new provision is established on a school site operated by a PVI provider, the collaboration of the host school is essential in establishing (at the earliest possible stage) clear arrangements for usage of the accommodation and facilities, and a fair allocation of any shared costs. Support in developing these arrangements is available from the 0-19 Service.
- 1.11 Statutory guidance gives a number of factors as the “benchmark” of sufficiency. The guidance states that “Local authorities will need to satisfy themselves that, so far as is reasonably practicable:
- There are sufficient **places overall** in each sub-local authority area, having regard to demographic trends and to patterns of employment and travelling to work.
 - There is sufficient **flexibility**, with places being available at the right times...to fit in with working patterns.
 - Places are sufficiently **accessible**, so that parents do not have to travel too far out of their way to access childcare.
 - Childcare places are high **quality**, in terms of judgements made by Ofsted (the Office for Standards in Education).
 - There is sufficient **range**, with the balance of sessional and full day care being appropriate to meet the needs of parents.
 - There is sufficient **knowledge and information** about the supply of places.
 - Childcare places are sufficiently **affordable**.
 - Childcare places are sufficiently **inclusive** and meet **particular needs**.
 - Childcare places are sufficiently **sustainable**.
- 1.12 The Council has a role as the provider of last resort in circumstances where there is no other organisation able to provide the places required. To date, the need to fulfil this role has proved to be extremely rare (currently only two settings, the Oasis Nursery in Wisbech and Trumpington Park in Cambridge). However, the potential always exists

that the Council may have to step at short notice to take over the running of a setting in order to provide continuity for parents/carers and children and ensure it is meeting its duty to secure sufficient and suitable places.

2 EARLY YEARS FUNDING

- 2.1 The core funding provided by the Council to any individual EY and childcare provider is through the EY funding formula. This funding is paid on a per capita basis to each setting for children who take up the hours for which they have a statutory or free entitlement.
- 2.2 There is the potential for EY and childcare providers to generate additional income by charging for “private” hours that are taken in addition to the free entitlement or funded hours. These opportunities have been eroded by the extension of the universal entitlement for 3 and 4 year olds from 15 to 30 hours and are mostly provided by the larger private day care providers who have their own premises and sites. Such commercial opportunities are limited for small scale settings operating from Council buildings, including mobiles, on school sites. In large parts of Cambridgeshire, there does not appear to be a significant demand for additional “private” hours.
- 2.3 Funding for early years provision is subject to Council approval and may be withheld if provision is set up inappropriately, and/or if there are concerns about its quality and sustainability.

3 WHEN TO TENDER AND WHEN TO SEEK AN EXEMPTION TO PROCUREMENT RULE

- 3.1 The Council’s Constitution defines a key decision as one which ‘results in the Council incurring expenditure or making savings in a single transaction, in excess of £500,000.’ Therefore, given the potential contract value of most EY provision, it is currently necessary to seek Committee approval to carry out a tender process to identify new EY providers.
- 3.2 A tender, in accordance with the Council’s procurement rules, will be the preferred course of action and will be undertaken in the circumstances set out in 3.3.

An exemption from the tender process will be sought in the circumstances set out in 3.4.3

This list is not exhaustive and other examples may arise.

3.3 A Tender Process is Undertaken

(A) The Council commissions a new School with new EY and Childcare Premises

(B) A reorganisation of services or accommodation creates a new space which has been agreed to be used for EY and childcare and there are no existing providers on site

For example, an extension to a school or a community centre on a new development

(C) The service is being provided by a commercial organisation for profit and not re-investing a surplus back into the business

(D) Where an existing setting has an OFSTED rating of “Requires Improvement” or “Inadequate” and has been at this rating for x time and is judged to have limited capacity to improve

(E) Where a setting is not offering a pattern of provision that reflects the Council’s policy requirements or the needs of the local community (eg funded 2 year old places/wrap around care)

(F) Cases where the lease requires renewal/review and the tenant does not have statutory protection or where there is a contracted-out lease which provides an opportunity to test the market

(G) where the management or the business model of the setting causes concern and is judged by the LA to present sufficient risk to the Councils ability to meet its statutory duty.

Every tender specification should require a provider to submit supporting evidence to demonstrate their ability to deliver compliance (for example safety and fire) for the setting, along with the ability to meet their obligations under the occupational agreements.

3.4 A Tender Process is not carried out

(A) Where Council officers have been alerted to an EY and childcare setting operating in a building in poor condition and there is an identified sufficiency need for the places provided. Officers will then work with the provider to find new premises on a like-for-like basis or new premises are identified for its use within the local community.

In these cases, an exemption from the need to go out to tender for the provision would be sought.

(B) School sites on which a setting is located convert to academy status and there is a requirement to renew the lease and the tenant has statutory protection.

(C) The renewal of a lease for a childcare provider in a County Council/school building and the tenant has statutory protection.

(D) A reorganisation of services or accommodation creates a new space which provides the opportunity to move an EY and childcare provider operating from the same site from mobile/temporary accommodation to permanent accommodation and there is an identified sufficiency need for the places provided.

(E) The lease requires renewal/review and the tenant does not have statutory protection

3.5 An exemption from the need to go out to tender would be sought in cases when:

- there would be an adverse impact upon the sustainability of the setting and the continued provision of the places, without any break, thereby jeopardising the Council's ability to meet its statutory sufficiency duty.
- external notice from a provider of the intention to break the lease or cease trading does not provide sufficient time in which to conduct a tender process in what can be considered an emergency or exceptional situation. Internal notice of the need for renewal or review may also be received late but this cannot be used as a reason for exceptionality, the Council must ensure that internal processes are robust enough to ensure that this does not occur.
- no expressions of interest are received other than from the existing provider.
- the rental income provided for in both the existing and new lease is less than £20,000pa so that it falls within the existing Council policy and officer delegations providing that the total value of any contract is not above 500K. A full financial business plan must be provided so that officers can establish an affordable rent in the absence of testing the market through a tender process.

It is not the intention that all of the above criteria have to be met in order to seek an exemption

- 3.6 In order ensure that the Council can continue to meet its childcare sufficiency duty and to avoid being in a position where it becomes the provider of last resort, the CYP Committee on 30th November 2021, approved the establishment of a Childcare Framework to identify childcare providers when needed, both at short notice and when service agreements and leases are approaching the point at which they are to terminate, and a tender is required.
- 3.7 Therefore, in circumstances where there is no existing provider and/or a full tender process cannot be undertaken, it will be possible to select a provider from the Childcare Framework to run the provision in question. The selection process will depend on the eventual details of the Framework contract and whether there will be a provision for direct award and/or mini-competition between providers on the framework.
- 3.8 The advantage to the Council is that in these circumstances some pre-screening of the providers in terms of their quality and cost will have been undertaken as part of their selection to be on the Childcare Framework.

4. Establish Lease/Rental Value

- 4.1 In situations where a tender exercise is undertaken the consideration offered by prospective bidders for use of the premises in effect determines the market rent – what providers of this service are prepared to pay. Where the exemption to tender route is followed, a market valuation will be undertaken by the Council's Strategic Assets team and the final level of rent/lease established following an overall assessment of the financial viability of the provider using all available financial evidence.

- 4.2 Local authorities have a fiduciary duty to obtain the 'best consideration reasonably obtainable' for the disposal of any interest in property in accordance with Section 123 of the Local Government Act 1972. In June 1999, the Council's Policy Committee agreed a policy whereby all disposals should take place for 'best consideration.' Members also expressed a willingness to consider exceptions to the policy, but only where service directors and appropriate Members endorsed non-financial benefits. Final approval of any financial discount required the authority of the Policy Committee (the relevant Committee in place at that time).
- 4.3 On 30 July 2003 the Government introduced a General Disposals Consent (GDC) that relaxed regulation. This allowed local authorities to exercise limited discretion and dispose of interests in property for below 'best consideration.' Discretion can be exercised where disposal is likely to contribute to economic, social and environmental well-being of the area. In September 2003 Members confirmed the Council should continue with its established policy of securing the best consideration reasonably obtainable for the disposal of all property interests, subject to any exceptions on a case-by-case basis being referred to Cabinet (the decision-making body in place at that time).
- 4.4 On 15 June 2010, Cabinet approved a recommendation that the Executive Director: Children and Young People and the Corporate Director: Finance, Property and Performance in consultation with the Portfolio holders for Learning and also for Resources and Performance, should be granted the ability to grant leases and licences at less than best consideration on transactions to provide childcare places and Children's Centres in Council-owned premises when agreed criteria were met. Those criteria are set out in **Appendix 1**.
- 4.5 The Director of Finance has delegated authority (General Purposes Sub-Committee October 2014) to authorise the disposal of property assets by occupational agreements of less than 7 years to community-based users on school and other Council sites at less than best consideration, where the annual market rental value of the site is less than £20,000.
- 4.6 The General Purposes Committee re-affirmed these delegations in 2014 following the move by the Council from a Cabinet to a Committee governance model.
- 4.7 In practice, the Council has previously recognised over a number of years the need for the disapplication of strictly commercial criteria to the use of Council assets in order to manage the PVI market and provide the EY and childcare places required by local communities. Each case is reviewed on its merits and a decision made on a case-by-case basis considering the future viability of the EY setting in question using the actual financial evidence.

5 Decision Process Summary

- 5.1 A tender or call on the framework will be the preferred course of action and will be undertaken in the circumstances set out in paragraph 3.3.
- 5.2 A tender will not be undertaken in the circumstances described in paragraph 3.4.

- 5.3 An officer case review Panel will determine whether an exemption to procurement rules should be sought. It will reference the criteria above (paragraph 3.5) and utilise the attached flow chart (**Appendix 2**) to ensure consistency of approach
- 5.4 The Panel's recommendation will be referred to the Head of Procurement and the Head of Pathfinder Legal for review and approval.

Criteria to inform decisions on Less Than Best Consideration

1. The legal entity of the group has been identified and a list of current board members/directors/trustees/elected members and chair provided.
2. The group's main purpose is provided
3. The group has Public Liability Insurance
4. Evidence that agreement to a lower rate than 'best consideration' will support the provision of continued financial viability.
 - Based on a robust and detailed business and financial planning
 - Previous two years accounts submitted
 - All revenue and proportioned maintenance costs taken into account
 - Affordability and flexibility of services considered.
5. Evidence that the continuation of the provision is needed, through
 - Local Authority gaps in provision identified through Childcare Sufficiency assessment
 - Demographic information available
 - Expressions of support from potential users
 - Waiting lists in existing provision locally
6. Evidence of good practice and engagement with Local Authority
 - Ofsted registered provider
 - Staff training and development plans implemented
 - Engagement in Quality Framework and agreed action plan
 - Cambridgeshire Local Agreement signed by provider
 - Actively engaged with partnership working

In buildings funded from the Sure Start Capital Grant:

All Ofsted-registered private, voluntary and independent sector early years and childcare providers (Ofsted registration ensures that the provider meets clear legal standards relating to staffing, quality and health and safety):

- Day nurseries
- Pre-school playgroups
- After school clubs
- Breakfast clubs
- Holiday clubs

Any organisation operating under contract with the local authority:

- Children's centre service providers

In educational premises in the Council's control, not funded from the Sure Start Capital Grant:

Voluntary sector or not-for-profit early years and childcare providers who are registered with Ofsted

Private or independent early years and childcare providers, who are registered with Ofsted, where:

- Evidence indicates that open market operations would not be sustainable
- Evidence is available to show that existing early years and childcare services are insufficient to meet local need

On educational land in the Council's control being used to provide a site for a third party building:

Private, voluntary or independent sector childcare providers who will be registered with Ofsted, where officers have assessed:

- The financial viability of the provision
- The governance and legal structures
- Partnership with the school
- The sustainability and design of the building
- The quality of any existing settings operated by the provider

The amount of reduction to be applied will be:

- (a) 100% reduction in **buildings funded from the Sure Start Capital Grant:**
- (b) 0 – 100% reduction **in educational premises in the Council's control, not funded from the Sure Start Capital Grant** with the amount to be determined by an assessment of the business plans produced in conjunction with the local authority officers.
- (c) 0 – 100% reduction **on educational land in the Council's control** with the amount to be determined by an assessment of the business plans produced in conjunction with the local authority officers.

The amount of the reduction will be limited in all cases to an annual payment of £100 for each lease or license agreement. The lease / license holder will also be expected to meet the legal and establishment charges for the agreements. The potential exists for these costs may be met by grant support from the Council.

The agreement to 'less than best consideration' will be time limited and therefore reviewed every three years. The above criteria will inform the review.