

**Executive**

**15 June 2023**

Report of the Head of HR & OD  
Portfolio of the Executive Member for Finance and Performance

## **Agency Worker Contract Review**

### **Summary**

1. The report seeks permission to approve the direct award for the provision of temporary staff to the City of York Council (CYC) to City of York Trading (“CYT”), trading as Work with York (“WwY”).

### **Recommendations**

2. The Executive are asked to:
  - a. Approve the direct award of a contract to CYT for the provision of temporary staff to the City of York Council for an initial period of five (5) years plus up to two (2) years of extensions (maximum term of seven (7)) years and to delegate authority to the Head of HR (in consultation with the Chief Finance Officer and the Director of Governance, or their delegated officers) the authority to take such steps as are necessary to negotiate with CYT any changes to the current specification around the rates and fee structure and enter into the resulting contract.

Reason: To keep agency costs to a cost-effective level for the Council whilst maintaining quality of service

### **Background**

3. CYT is a company wholly owned by the Council, with profits made by the company coming back to CYC in the form of dividends. CYT provide recruitment services for temporary, permanent and seasonal jobs to both the public and private sector on an ad hoc, part and full-time basis for clients based in and around York, filling a wide range of vacancies including administration, customer service, Information Communication Technology (ICT), technical and finance to social work, events and

manual work. It has three recruitment divisions Work with York, Work with Schools and Work with Yorkshire.

4. A decision was made by Executive in June 2013 that all requests for agency staff or casual work would be made through Work with York (“WwY”).
5. The Executive agreed these arrangements because of a clear business case which demonstrated that there were advantages to CYC using CYT over external agencies, and the following benefits and flexibilities by:
  - keeping agency staff costs to a cost-effective level for the Council whilst maintaining quality of service;
  - ensuring that we meet our commitments of paying a Living Wage; and
  - growing a successful commercial business and profits that can be returned to the Council.
6. The current contract was let under the “Teckal” exemption (also called “**Vertical Arrangements**”) under Regulation 12(1) of the Public Contract Regulations 2015 (the “**Regulations**”) and is due to expire on 31<sup>st</sup> August 2023. This means that the contract was exempt from the full tendering process and could therefore, be directly awarded to CYT. Under Regulation 12(1), a contract directly awarded by CYC to CYT will fall outside of the scope of the Regulations if **all** the following three conditions are met:
  - a. CYC exercises over CYT a control which is similar to that which it exercises over its own departments (in other words, CYC exercises a decisive influence over both strategic objectives and significant decisions of CYT),
  - b. more than 80% of the activities of CYT are carried out in the performance of tasks entrusted to it by CYC, or by other legal persons controlled by CYC (the “**Function Test**”); and
  - c. there is no direct private capital participation in CYT except for non-controlling and non-blocking forms of private capital participation required by national legislative provisions, which do not exert a decisive influence on CYT.
7. The Council has a number of other Teckal arrangements in place including Make it York, Veritau, Yorwaste and YPO procurement holdings.

8. Since 2013, CYC has received £734k in dividends. A breakdown is shown below:

<b>Year</b>	<b>Dividend</b>
2013/14	29,575
2014/15	59,000
2015/16	75,000
2016/17	80,000
2017/18	90,000
2018/19	100,000
2019/20	110,000
2020/21	55,000
2021/22	135,000
2022/23	TBC

9. The table below shows the number of WwY placements across the authority over the past 4 years. Agency workers are used for several different reasons including short term absence cover, specialist projects and “as and when required” arrangements such as translators. They are placed in a variety of different roles including social workers in Adults and Childrens services, specialist project roles in transport and waste loaders/drivers in Place.

<b>Directorate</b>	<b>2019/20</b>	<b>2020/21</b>	<b>2021/22</b>	<b>2022/23</b>
City of York Council (exc. schools)	1082	986	994	665
Adult Social Care and Integration	N/A	159	117	140
Children and Education	N/A	186	153	122
Corporate Services	67	24	63	17
Customer & Communities	134	69	84	98

Place	412	335	330	286
Public Health	7	199	247	2

10. A breakdown of the percentage of WWY spend across the directorates in shown below:

<b>Directorate</b>	<b>2019/20</b> <b>%</b>	<b>2020/21</b> <b>%</b>	<b>2021/22</b> <b>%</b>	<b>2022/23</b> <b>%</b>
Adult Social Care and Integration	14.89	15.60	20.03	26.25
Children and Education	28.12	30.82	27.57	25.26
Corporate Services	3.9	4.26	2.87	1.88
Customer and Communities	11.53	7.6	5.69	7.58
Place	41.16	36.01	33.47	38.62
Public Health	0.4	5.71	10.37	0.41

## Consultation

11. There is no specific formal consultation taken place, however, discussions have taken place with relevant officers in CYC and CYT regarding the renewal and direct award of the Agency Contract. Trade Unions have also been briefed.

## Options

### Option 1 - Direct Award of Contract under *Teckal* Arrangements

12. The current contract spend with CYT and CYT's turnover for 2021/22 was as follows (excluding VAT):

<b>CYC spend</b>	<b>CYT Turnover</b>	<b>% CYC activities</b>
£'000	£'000	

<b>CYC spend</b> £'000	<b>CYT Turnover</b> £'000	<b>% CYC activities</b>
£9,681	£10,995	88%

13. Based on current spend levels, this contract could be directly awarded to CYT without the need for a full formal tender (assuming all three criteria under Regulation 12(1) are still being met).

14. CYC have made the following commitment to reduce the spend on agency workers.

<b>Ref</b>	<b>Proposal Description</b>	<b>2023/24 Impact £000</b>	<b>2024/25 Impact £000</b>	<b>Total Saving Impact £000</b>
CORP03	<b>Interims and Agency</b> Stopping the use of interims and agency for senior roles and significantly reducing the use of interims across the Council.	500	300	800

15. As spend levels drop because of the Council's commitment to reduce agency spend, the contract may fall outside of the exemption due to failure to meet the 80% activity threshold required under the Function Test. The following table shows the percentage of activities performed as CYC spend falls, assuming CYT's non-CYC income remains the same.

	<b>% reduction in CYC spend</b>	<b>CYC spend</b> £'000	<b>Turnover</b> £'000	<b>% CYC activity</b>	<b>Notes</b>
<b>21/22 spend</b>	<b>%</b>	<b>£9,681</b>	<b>£10,995</b>	<b>88%</b>	<b>Current spend</b>
	25%	£7,261	£8,575	85%	
	40%	£5,809	£7,123	82%	
	50%	£4,841	£6,155	<b>79%</b>	<b>Under the 80%</b>

	<b>% reduction in CYC spend</b>	<b>CYC spend</b> £'000	<b>Turnover</b> £'000	<b>% CYC activity</b>	<b>Notes</b>
<b>21/22 spend</b>	<b>%</b>	<b>£9,681</b>	<b>£10,995</b>	<b>88%</b>	<b>Current spend</b>
	60%	£3,872	£5,186	75%	threshold for Vertical Arrangements
	70%	£2,904	£4,218	69%	
	75%	£2,420	£3,734	65%	

16. However, it seems unlikely that agency spend will reduce by more than 50% and therefore, a direct award would be possible, so long as 80% or more of CYT's activity relates to CYC. The Procurement Bill 2022 is currently going through the parliamentary approval process. This replaces the current Regulations following Brexit, but the same Teckal principles will remain under Paragraph 2 of Schedule 2 of the Bill.

17. If a direct award is agreed, then a new contract with CYT will be required. It is recommended that we look at a number of changes regarding the fee structure and profit returning to the Council. Potential areas of discussion would be:

- a. Fee structure – Agencies charge an uplift of to cover pay, employers NI, pension, holiday pay, apprenticeship levy, timesheet costs and their overheads. An option would be to request a reduction or freeze to future fees.
- b. Change to finder fee structure
- c. Increase or negotiate a dividend to be returned to CYC
- d. Improved management information/booking system

#### Option 2 - Formal Re-tender of Current Contract

18. There is also the option to go through a formal retender process involving other external agencies.

19. A retender process would take a minimum of 4 months and therefore, it would not be possible to complete the process before the contract ends in August 2023. If the decision was made to go for a formal retender, a request would need to be made to Executive to extend the current contract for a further 18 months.

20. Retender options could include using a neutral vendor arrangement instead of the current master vendor arrangement. Neutral vendors are not a recruitment agency but form partnerships with various recruitment agencies. When a client needs vacancies to be filled, the neutral vendor goes to the market to their different partner agencies to find the most suitable and cost-effective candidates to fill the requirement.
21. If CYT were not successful through the procurement process, there would be implications including potential TUPE to the new provider. To undertake this option it is anticipated that there would need to be a 12 to 18 month project implementation plan.

### Option 3 - Move agency process in-house

22. A further option would be to create an in-house bank of agency workers.
23. Setting up an internal bank would require additional CYC resource to be allocated to manage the bank and source candidates.
24. Additional resource would also be required in Business Support to manage adding and removing agency workers from the payroll. A new weekly payroll system would need to be set up as it is unlikely that agency workers would want to be paid monthly in line with Council employees. There would also be pension implications and auto-enrolment of temporary staff to the Local Government Pension Scheme. A timesheet facility would also need to be set up managed alongside a resourcing database of agreed terms, in addition IT costs associated with additional licences would be required for iTrent (HR and payroll system) as they are charged based on the number of active employees/workers on the payroll. A team would also need to ensure that references and qualifications are checked (WwY currently do this on CYC's behalf) and DBS check costs would also increase as CYC would need to pay for the checks. To undertake this option it is anticipated that there would need to be a 12 to 18 month project implementation plan and therefore, a request to extend the current contract by 18 months to explore and complete this.
25. There would also be TUPE implications if this option were agreed.

### **Implications**

#### **Financial**

26. The budgets for temporary staff are held within service budgets. Temporary staff come with additional oncosts that can often be an efficient way to fill short term vacancies. There is an assumption within the budget that the use of temporary staff will reduce in 2023/24 and this will need to be monitored throughout the year to ensure the saving can be delivered. This will mean that there will need to be an acceptance of a higher vacancy factor across services.

## **Human Resources (HR)**

27. Depending on which option is approved, there may be TUPE implications for WwY current staff. Where appropriate procedures will be followed accordingly.

## **Equalities**

28. The Council recognises its Public Sector Equality Duty under Section 149 of the Equality Act 2010 (to have due regard to the need to eliminate discrimination, harassment, victimisation and any other prohibited conduct; advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and foster good relations between persons who share a relevant protected characteristic and persons who do not share it in the exercise of a public authority's functions). An Equalities Impact Assessment has been completed and attached at **Annex 1**.

## **Legal**

29. The following legal implications should be considered

### **Option 1 - Direct Award of Contract under Teckal Arrangements**

- a. Legal Services has been consulted regarding the Council's continuing reliance on Regulation 12(1) of the Regulations to directly award the contract to CYT.
- b. So long as the criteria under Regulation 12(1) continue to be met, then a direct award can be justified.
- c. CYT is a private limited company, whose sole shareholder is CYC. Further, CYT is governed by the rules set out within its Articles of Association which are filed at Companies House; and the provisions set out within a Shareholders Agreement between CYC and CYT. In particular, the Shareholders Agreement sets out those decisions that the CYT Directors can only make with the



approval of the Council. In particular, the Council can control the strategic direction of CYT through having the right to approve substantial changes in its Business Plan and has the right to appoint both directors to the Board of CYT, and the Chairperson (who to date has always been a Councillor). The cross-party Shareholder Committee has had oversight of CYT since its inception and receives a quarterly report. The Shareholder Committee has no decision-making powers but, in accordance with the 2015 Shareholders Agreement, may advise the CYC Executive on the exercise of its powers as shareholder and may make recommendations to the Board in respect of the appointment of Directors. Based on these facts, if this continues to be the case the Control Test under Regulation 12(1) will have been met.

- d. The main issue, as identified in this Report, is if due to reduced Council spending CYT's activity in relation to CYC falls below the 80% threshold under the Function Test under Regulation 12(1). For the short-term, this appears not to be the case, but if a contract is awarded under Regulation 12(1), this will require rigorous oversight and contract management on the part of the CYT Link Officer at CYC to ensure CYT's CYC related activity does not fall below this threshold.
- e. As soon as it appears likely that the Function Test will no longer be met, this will trigger the need for a full procurement, under the Regulations and the Council's Contract Procedure Rules ("**CPRs**") under Article 24 and Appendix 11 of the Constitution and will require the support and advice of both Legal Services and the Procurement Team where appropriate.
- f. Regardless, any negotiation, drafting and agreement of any contract entered with CYT pursuant to Regulation 12(1) will need to involve officers from Legal Services.
- g. Further to Article 12 of the CYC Constitution, the CYC Executive has exclusive decision-making authority with regards to entering, amending, or terminating any agreements which create a potential liability for CYT in excess of £500,000. Executive approval will therefore, be necessary before entering into the final agreement with CYT. Subject to Executive approval, this will also necessitate a formal written shareholder's resolution that will need to be signed by a member of the Shareholder Committee on behalf of CYC prior to the contract being completed. As the

contract is a private document between CYT and the Council, this can take the form of an ordinary resolution and does not need to be filed at Companies House. Legal Services will work with CYT and Shareholder Committee members to finalise the relevant corporate documentation.

### **Option 2 - Formal Re-tender of Current Contract**

- h. Any contract procured under this option must be commissioned in accordance with a robust procurement strategy that complies with the CPRs and the Regulations. Advice should be sought from both the Procurement and Legal Services Teams where appropriate.
- i. The comments above in Option 1 in relation Article 12 of the CYC Constitution and Shareholder approval will also apply equally to Option 2.
- j. Further, if following re-tender of the contract CYT are for whatever reason unsuccessful, this could give rise to a “Relevant Transfer” of CYT staff to the new contractor, within the meaning of Regulation 3(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“**TUPE**”). The impact of TUPE on the tender process will be that, should CYT be unsuccessful in securing the contract, all of CYT’s rights, powers, duties and liabilities under or in connection with the current contracts of transferring CYT employees will transfer automatically to the successful tenderer with effect from the date of any transfer. This in turn is likely to have the effect of increasing tenderers’ costs of providing the services, particularly (but not limited to) pension protection of any CYT staff currently signed up to the Local Government Pension Scheme, which is likely to result in an increased price to CYC. This will also give CYT an advantage over any other bidders taking part in this process. It will be a question of fact whether TUPE applies and will not be possible for the organisation and successful tenderer to contract out of it.

Advice should therefore be sought from the HR, Finance, Procurement and Legal Services Teams where appropriate, to ensure TUPE and any ancillary legislation and/or regulations (e.g., pensions) are properly complied with, any tender and contractual documents deal with the possible impact of TUPE, and also to ensure that other tenderers apart from CYT are not unfairly disadvantaged against when submitting their tenders so

that CYC can meet its duty of fair and equal treatment and transparency under Procurement Law.

- k. Consideration should also be given to other areas in the event CYT were unsuccessful, such as (but not limited to):
  - i. the transfer of any assets, equipment, etc. from the CYT to the new service provider;
  - ii. any property implications, if CYT are currently renting any property from CYC, or if any new provider requires to enter into any property arrangement(s) with CYC to deliver the services;
  - iii. the secure transfer of any confidential information and/or personal data relevant to the service from CYT to any new provider in line with Data Protection law;
  - iv. the procurement of new assets, infrastructure, or additional support/professional advice for the service area to facilitate the change in service; and
  - v. any necessary comms/marketing regarding the new service, and if applicable any additional services/resource need to be commissioned to facilitate this.

### **Option 3 - Move agency process in-house**

- l. Any insourcing of the agency service back into CYC could also give rise to a “Relevant Transfer” of CYT staff to CYC, within the meaning of Regulation 3(1) of TUPE. Advice should therefore be sought from the HR, Finance, and Legal Services Teams where appropriate, to ensure TUPE and any ancillary legislation and/or regulations (e.g., pensions) are properly complied with.
- m. Other considerations if we proceed with Option 3 may include:
  - i. What performance indicators and/or outputs will be used to measure the performance of the new in-house service, in order to ensure the new service is delivering the quality of service and value for money expected, and how will this be documented?
  - ii. Does the move in-house require the transfer of assets from the CYT, and how will this be documented?

- iii. As the move in-house will involve the secure transfer of confidential and personal data, how will this be documented and carried out to ensure compliance with Data Protection law?
  - iv. Are there any property implications (e.g., are CYT currently leasing any premises from CYC that will need to be surrendered as part of the move in-house)?
  - v. Will the move in-house require the procurement of new assets, infrastructure, or different suppliers and/or additional support/professional advice for the service area in line with our CPRs and the Regulations?
  - vi. Will the move in house require drafting of internal SLAs/T&Cs by Legal Services for other service areas to use the new agency service?
  - vii. What comms/marketing is necessary for the new in-house service, and will any additional services/resource need to be commissioned to facilitate this?
- n. The comments above in Options 1 and 2 in relation Article 12 of the CYC Constitution and Shareholder approval will also apply equally to Option 3.

**Crime and Disorder** – There are no Crime and Disorder implications

**Information Technology (IT)** – In Option 3 additional licence requirements would be needed which would mean additional costs to set up an in-house system. This would be in addition to setting up a suitable payroll for temporary staff.

**Property** – There are no Property implications

**Other** – There are no other implications

**Risk Management**

30. There are no other specific risks associated with this proposal.

**Council Plan**

31. The proposals in this report contribute to the following key outcomes in the 2019-23 Council Plan:

- a. Well paid jobs and an inclusive economy
- b. An open and effective council

**Contact Details**

**Author:** Helen Whiting  
Head of HR & OD

**Chief Officer Responsible for the report:** Ian Floyd  
Chief Operating Officer

**For further information please contact the author of the report**

**The report has been approved by the following people**

<b>Role</b>	<b>Name</b>	<b>Date of sign off</b>
<b>Legal</b>	Dan Moynihan Contract Commercial Senior Lawyer	19 <sup>th</sup> May 2023
<b>Finance</b>	Patrick Looker – Head of Service - Finance	23 <sup>rd</sup> March 2023
<b>Director of Governance</b>	Bryn Roberts	1 <sup>st</sup> June 2023
<b>Chief Finance Officer</b>	Debbie Mitchell	31 <sup>st</sup> May 2023

<b>Background papers</b>	None	
<b>List of appendices</b>	Annex 1 – Equalities Impact Assessment	
<b>Equalities Impact Assessment Template</b>	Must be completed for all reports and authorised by the Director. A summary of any identified impacts must be attached to the report as an appendix. Please tick the box below to confirm it has been completed.	<input checked="" type="checkbox"/>
<b>Wards Affected</b>	List wards or tick box to indicate all	<b>All</b> <input checked="" type="checkbox"/>