

Executive

13 January 2022

Report of the Director of Public Health
Portfolio of the Executive Member for Health and Adult Social Care

Extension of Contract for Long-Acting Reversible Contraception ("LARC")

Summary

1. The commissioning of LARC in Primary Care in York is a shared responsibility between the council and the Vale of York Clinical Commissioning Group ("**CCG**"). The service is commissioned by the council on behalf of the CCG via a Section 75 agreement dated 30th October 2019, which commits both organisations to commissioning LARC through shared responsibility and budget allocation. This Section 75 agreement is in place until 31st March 2026.
2. The council holds a contract with Nimbuscare Ltd for the provision of the LARC service, which commenced on 1st April 2020, and is due to expire on 30th June 2022. Nimbuscare Ltd represents the eleven (11) NHS GP practices in York and has a good working relationship with this sector.
3. The council holds a separate contract with York and Scarborough Hospitals NHS Foundation Trust (the "**NHS Trust**") for provision of specialist sexual health and contraception services which is scheduled to be reviewed in 2024.
4. The commissioning intentions of the council and the CCG are to tender for a fully integrated sexual health and contraception service, which will include the council's and CCG's responsibilities for LARC, through one procurement exercise in due course leading to the award of a single contract in 2024.
5. The CCG will cease to exist from 1 April 2022 and its functions will transfer to the Humber, Coast and Vale Integrated Care System Board ("**HCV ICS Board**"). 2022/2023 will be a transition year for the HCV ICS Board.

6. The decision required is for the Executive to agree to the direct award of a further contract, without proceeding with a full tender exercise, to Nimbuscare Ltd on behalf of the council and the CCG for a further two (2) years until 30th June 2024, to allow for the new HCV ICS Board to become established and a new fully integrated sexual health and contraception service to be jointly commissioned through a competitive procurement exercise.

Recommendations

7. The Executive is asked to:

- 1) Approve Option 3, and agree to the direct award of a further contract with Nimbuscare Ltd for provision of LARC in Primary Care for a further two (2) years when the current contract expires on 30 June 2022 without proceeding with a full tender exercise.

Reason: to ensure that the council delivers the joint commissioning responsibilities set out in the Section 75 agreement with the CCG and to ensure that that the statutory public health responsibilities for access to sexual health and contraception are met.

Background

8. The Health and Social Care Act 2012 transferred the responsibility for commissioning of sexual health services to local authorities. Since 1st April 2013, local authorities are required, as part of public health regulations, to ensure that their residents have access to free sexual health and contraception advice and treatment.
9. In September 2019, Executive Member approval was given for the Director of Public Health, on behalf of the Council and the CCG under the Section 75 joint commissioning agreement, to carry out a competitive tender exercise, in accordance with the Public Contracts Regulations 2015 for the provision of LARC in primary care. However the Council was unable to award a contract following this process and as a result Nimbuscare Ltd was asked to provide LARC in primary care with a contract awarded from 1st April 2020, initially for a period of twelve (12) months.
10. Originally, the intention was to re-commission the service via competitive tender at the end of the twelve (12) month period, but because of the

pressures of the coronavirus pandemic, the public health team had no capacity to do this and a waiver to the Council's Contract Procedure Rules was sought and approved to extend this contract until 30th June 2022.

11. At the time the contract was extended, no-one could have predicted that the coronavirus pandemic would still be with us almost two (2) years later. The recent emergence of the Omicron variant has meant the UK Alert Level has been raised to Level 4 on 12th December 2021 confirming high and rising number of cases of COVID-19. The rapid rise in Omicron cases is expected to impact on the NHS. The NHS is under significant pressure already and is having to reprioritise staff and resources to support the COVID-19 vaccination booster programme, and to prepare for an increase in hospital admissions due to Omicron.
12. The Council's Public Health team is also impacted and resources are again having to be reprioritised to support the pandemic response and the roll-out of an accelerated COVID-19 vaccination booster programme. It is anticipated that this heightened public health response will be required until at least 31st March 2022.
13. This is happening against a background of continuing change within the NHS, with the planned government reorganisation of the NHS. This involves the dissolution of Clinical Commissioning Groups and the transfer of functions and commissioning responsibilities to new Integrated Care Systems to be established on 1st April 2022.

Consultation

14. Within the Council consultation has taken place with legal, finance and procurement and their comments are included in the relevant sections of the report.
15. Consultation has been undertaken with the CCG who are supportive of the recommendations.
16. Consultation has taken place with Nimbuscare Ltd who are willing to accept a new contract for the provision of LARC in primary care for two (2) years when the current contract ends on 30th June 2022 if this is the Executive decision.

Options

17. Option 1

Allow the existing contract with Nimbuscare Ltd for the provision of LARC in primary care to end on 30th June 2022.

18. Option 2

To commence on a full re-procurement process before the current contract expires on 30th June 2022.

19. Option 3

To support the direct award of a new contract with Nimbuscare Ltd without running a full procurement exercise under the Public Contract Regulations 2015.

Analysis

20. Option 1

- a) This will prevent the Council from delivering its contractual obligations within the Section 75 joint commissioning agreement with the CCG. It will also mean that the Council will not be able to fulfil its statutory obligations for free and easily accessible contraception. LARC is one of the most effective methods of contraception, particularly for younger women and not being able to access LARC in primary care could potentially result in unintended pregnancies.
- b) Any failure to provide an appropriate LARC service for women living in York will bring the Council under the scrutiny of the Department of Health and Social Care and could potentially lead to a request to return a proportion of the Public Health Grant.

21. Option 2

- a) A full procurement exercise under the Public Contract Regulations 2015 took place in 2019 and failed to award a contract. Given that this exercise took place in the last two (2) years, with no other providers expressing an interest, one could argue that, from a practical Best Value perspective, it is likely that another similar process would result in the same outcome. Therefore it could be argued that the Council has sufficiently tested the market and that

a further tender exercise at this point is unlikely to yield a different result.

- b) Moreover, it could be argued such a procurement exercise will not be the best use of the Council's and local tax payer's money, particularly in light of the ongoing pandemic and the pressures on the Council resources.
- c) Although there is no absolute guarantee that another provider has not appeared on the market within the last two (2) years who may be able to deliver these services, there is no available intelligence to suggest that this is the case.
- d) Therefore, Option 2 does provide the Council with significantly less risk from a Procurement Law standpoint when compared to Option 3 (see **Legal Implications** below).
- e) The ongoing pressures to health care organisations and to the Council's Public Health team of the pandemic do however need to be taken into account when considering this option. The pandemic has shifted significantly in nature since the emergency of the Omicron variant, and with the UK Alert level raised to level 4, and health organisations and public health have had to respond by increasing the level of our response.
- f) The nature of the coronavirus pandemic so far means that it is impossible to predict the path it will take, but it is anticipated by officers in Public Health, that this escalated response will be required until 31st March 2022.
- g) This effectively means that there is no capacity in the Public Health team to be able to plan and execute a full procurement exercise. It should also be noted that, even if capacity were to be found in the Public Health team, because of the pressures on the whole health and care system, it is highly likely that there would no capacity for potential providers to participate in a full procurement exercise, which would create the risk of the Council being unable to award a contract for the provision of LARC in primary care.

22. Option 3

- a) Given the timescales involved, and the ongoing pressures on the Public Health team from the coronavirus pandemic as described

in paragraph 21 above, directly awarding a further contract with Nimbuscare Ltd is the simplest way of ensuring that the Council delivers its public health statutory responsibilities for sexual health and contraception services and fulfils its contractual obligations within the Section 75 joint commissioning agreement with the CCG.

- b) Nimbuscare Ltd are the current provider of the LARC service, they are familiar with the requirements of the contract and they have expressed an interest to further extend the current service.
- c) It is a requirement of the contract that the provider is able to deliver access to LARC in primary care settings across the city. Nimbuscare Ltd has membership from all eleven (11) NHS GP practices in York and provides good access to the service in communities across the city which helps to reduce health inequalities. There have been no patient safety or quality concerns with the current service.
- d) However Option 3 is potentially problematic from a technical, legal standpoint as a direct award since it does not technically comply with the Public Contract Regulations 2015 and therefore such an award carries with it a risk of possible legal challenge. This is explored more fully in the **Legal Implications** and **Risk Management** sections of the report below.

Council Plan

- 23. Sexual health and contraception services contribute to the achieving good health and wellbeing priorities in the Council Plan 2019-23 and the Joint Health and Wellbeing Strategy for York 2017-2022.

Implications

Financial

- 24. Finance are happy to support the extension of the current LARC service with Nimbuscare Ltd by directly awarding Nimbuscare Ltd another contract for the next two (2) years without any prior advertisement or tender exercise further to Option 3. The contract is activity based and there is sufficient budget to cover the costs. These payments are made from the ring-fenced Public Health Grant Allocation to the council.

25. Payments from Quarter 2nd July 2022 until 30th June 2024 would be an estimated total of £888,692.75.

Human Resources (HR)

26. There are no implications from this report.

Equalities

27. LARC is expected to be accessible to all women in York with a need for either contraception or gynaecological use of the service. The provider will be expected to comply with the duties of the Equality Act.

Legal

A) Decision Making

28. The principles of decision making are set out in Article 14 of the Constitution and require all decisions to be taken with regard to them. They include proportionality, lawfulness, and clarity of aims, considering options and giving reasons.

29. It is within the Monitoring Officer's statutory role to ensure these principles are upheld. The responsibility for this decision under the Constitution rests with the Executive.

B) Public Contracts Regulations 2015

30. The LARC Services are subject to the Public Contracts Regulation 2015 ("**PCRs**") and the Council's Contract Procedure Rules ("**CPRs**")

31. For the purposes of the PCRs, the LARC services are subject to the PCR Light Touch Regime ("**LTR**"). LTR services are subject to a threshold of £663,540 (as at December 2021). It is noted the LARC Services are above threshold.

32. For above threshold matters, the PCRs require a contract be advertised and a procurement conducted in accordance with PCR award processes, unless any other grounds under the PCRs apply.

33. Challenges are possible under the PCRs where bodies do not act in compliance with the PCRs. This includes where direct awards without

prior publication are made without following procedural rules of the PCR's when required.

34. Compliance with the PCR's is a legal duty owed by contracting authorities to suppliers. A supplier that suffers a loss as a result of a breach may bring judicial proceedings under the PCR's. Where such proceedings are brought, a court has powers to:
 - a. take interim measures to suspend an award procedure; or
 - b. where a court is satisfied that there has been a breach of the PCR's, it can either order:
 - i. an award decision be set aside; or
 - ii. award damages for the loss of opportunity be awarded to the complainant against the Council; and
 - c. if a contract has already been entered into, the court is able to declare contracts that do not comply with the PCR's to be ineffective in certain circumstances, as well as again a substantial civil financial penalty and an award of damages.
35. Generally speaking, where an aggrieved party seeks to bring a claim in respect of any other breach of the PCR's 2015, it has thirty (30) days from the date when it knew or ought to have known that the grounds for starting proceedings had arisen. Time will start to run from the date of either actual or constructive knowledge of matters that could have been discovered upon a reasonable enquiry.
36. Decisions of public bodies can also be subject to judicial review. A claim for judicial review relating to a decision governed by the PCR's 2015 must also be brought within thirty (30) days, subject to the provisions contained in Reg 92 of the PCR's. Judicial review of procurement decisions rarely involves a determination of the merits of the challenged decision itself, as opposed to the lawfulness of the procedure adopted in arriving at that decision. Save in especially technical matters, a court is unlikely to require expert evidence.
37. The remedies available under Judicial Review are either:
 - a. a quashing order, setting aside the original decision made, which usually results in the matter being sent back to the original decision-

maker to re-make the decision in light of the decision from the court; in rare cases, though, the court may make the decision;

- b. a mandatory order requiring requires the public body to take a particular course of action and/or to take action;
- c. a prohibiting order to prevent a certain action/decision; such an order is rarely sought as it is more usual now to seek an injunction
- d. a court declaration that, for example, an act/decision was unlawful;
- e. an injunction to prevent a certain decision and/or action; an injunction will only be granted in circumstances where it is just and reasonable to do so and may be sought as an interim remedy before the substantive hearing; or
- f. the court may order damages in circumstances where they are claimed and it is satisfied that they would have been awarded if the claim had been made at the same time as making the application for judicial review.

All remedies are at the discretion of the court. The court may refuse to grant the remedy sought if there has been undue delay in making the application, the remedy would cause undue and/or unnecessary hardship and/or there was another potential course of action open to the applicant.

38. Any of the above will also have a significant impact on the Council's insurances as well as the cause substantial reputational harm to the Council.

39. A full PCR procurement process however may not be required for above threshold matters where:

- a. an exemption applies to the type of service (**PCR Reg 10 – Specific exclusions for service contracts**); or
- b. use of the negotiated procedure without prior publication can apply (**PCR Reg 32 - negotiated procedure without prior publication**)

40. It is noted in this instance that:

- a. The list of exemptions at PCR Reg 10 **does not** include LARC type Services.
- b. The use of negotiated procedure without prior publication under **PCR Reg 32** has very limited application in these circumstances. It is the view of CYC legal services that whilst it may be possible to argue that some parts of Reg 32 may apply, this strategy is not entirely without risk of legal challenge under the PCRs, and must be approached with caution.

41. Regarding Reg 32, the following further analysis is provided below for the Executive's consideration:

- a. **Reg 32(2)(a)** - "Where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate **have been submitted in response to an open procedure or a restricted procedure**, provided that the **initial conditions of the contract** are **not substantially altered**"

Comment - The above applies where a tender has been issued, but there has been **no or no suitable tender or participation**.

As a tender has not been issued for the proposed two (2) year arrangement, the negotiated procedure without prior publication under PCR Reg 32(2) (a) would **not** be available.

It is noted that the current contract does not expire until 30th June 2022, so arguably there is technically no reason why the Council cannot run a full tender exercise in the time available.

Even if no suitable tenders were returned, we could still directly award the two (2) year contract at that point under Reg. 32(2) (a) of the PCRs following publication of a VEAT notice (see below - subject to further advice at that point from both the Procurement and Legal Services teams being sought by Public Health to ensure compliance).

- b. **Reg 32(2)(b)** – "*Where the...services can be supplied **only by a particular economic operator for any of the following reasons**:-*

- i) the aim of the procurement is the creation or acquisition of **a unique work of art or artistic performance**,*

ii) competition is **absent for technical reasons**, or

iii) the **protection of exclusive rights**, including intellectual property rights,

but only, in the case of **paragraphs (ii) and (iii)**, where no reasonable **alternative or substitute exists** and the absence of competition is **not the result of an artificial narrowing down of the parameters** of the procurement.”

Comment - i) and iii) do not apply on the facts.

With regards to ii), further to discussions with colleagues in the Public Health Team it is understood that there is sufficient evidence on file to support an argument that if the Council were to go out to tender, this would not generate any kind of meaningful competition as Nimbuscare Ltd. are likely to be the only provider interested in this opportunity or even the only one capable of delivering the Council’s service requirements in this instance.

However, whilst Legal cannot comment on the fullness and accuracy of such evidence, we can add at this point to assist with the Executive’s decision making:

- If what the Public Health team says is correct, and if the Council is comfortable that it can address any concerns raised by the public and the market based on the evidence in its possession, then we may be able to directly award a contract to Nimbuscare Ltd. without prior publication of a tender under Reg. 32(2) (b) (ii).
- If we proceed under Reg. 32(2) (b) (ii), the Council (with advice from Legal Services and Procurement) will need to publish a public Voluntary Ex-Ante Transparency of “**VEAT**” notice in the Official Journal, and the equivalent on the UK’s E-Procurement system, to inform the market of its intention to award under Reg. 32(2) (b) (ii) by providing full and transparent details of the proposed LARC contract.

- The Council will not be able to award any kind of contract to Nimbuscare Ltd. for the LARC services until at least ten (10) days after the publication of such a notice.
- Any benefit of publication of a VEAT notice must be balanced against the risk that publication of a VEAT notice may increase awareness of the proposed direct award and so actually increase the risk of scrutiny and possible legal challenge.
- It should then be noted that if after the end of the ten (10) day standstill period has expired, this would effectively bar any challenge that seeks a declaration of ineffectiveness.

Further, where an aggrieved party seeks to bring a claim in respect of any other breach of the PCRs 2015 and is not seeking a declaration of ineffectiveness, it has thirty (30) days from the date when it knew or ought to have known that the grounds for starting proceedings had arisen. Time will start to run from the date of either actual or constructive knowledge of matters that could have been discovered upon a reasonable enquiry.

Finally, a claim for judicial review relating to a decision governed by the PCRs 2015 must also be brought within thirty (30) days, subject to the provisions contained in Reg 92 of the PCRs.

As such, if the Council were to publish a VEAT notice and waits for thirty (30) days after publication before directly awarding the contract, or if it awards after the minimum ten (10) days and no challenge was received within thirty (30) days of publication, any challenge after that would effectively be time barred, subject to the discretion of the Courts.

- However, deliberate and intentional infringement of the requirement to advertise would mean that a VEAT notice would not be valid and the potential remedy of ineffectiveness would remain on the table. The Council must therefore be satisfied that it has reached a reasonable and justifiable decision under Reg. 32(2) (b) (ii) before proceeding with a VEAT notice.

- Whilst the representations regarding the procurement from two (2) years ago are appreciated, it is the view of Legal Services that further evidence subsequent to the original failed tender will be necessary to properly justify a decision based on Reg 32(2) (b) (ii).
- Further, as already acknowledged by the Public Health team earlier in this report, there is no absolute guarantee that another provider has not appeared on the market within the last two (2) years who may be able to deliver these LARC services, so there is a possibility (however small) that someone could see the VEAT notice and challenge the direct award.
- Again, the current LARC contract does not expire until 30th June 2022, which means there technically is no reason why a full tender exercise cannot be run given the amount time available. If then Nimbuscare Ltd. are the only respondents to such an exercise, then this would allow the Council to directly award under Reg. 32(2) (b) (ii) (as well as Reg 32(2) (a)) following VEAT notice (subject to further advice at that point from both the Procurement and Legal Services teams being sought by Public Health to ensure compliance)., with the risk of challenge reduced significantly. However, the representations above regarding the lack of capacity due to the current pandemic and the emergence of the Omicron variant are noted also, meaning that there are potential practical difficulties at present with running tender exercise.

c. **Reg 32(2) (c)** – “*Insofar as **is strictly necessary** where, for reasons **of extreme urgency** brought about by **events unforeseeable by the contracting authority**, the **time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with**, provided that the circumstances invoked to justify extreme urgency **must not in any event be attributable to the contracting authority.**”*

Comment – At the present time it is arguable that, even with the emergence of the Omicron variant, given that the current LARC Contract does not expire until 30th June 2022 it is highly unlikely that we will be able to rely upon Reg 32(2) (c) at the present time.

Also, as we are now nearly two (2) years into the pandemic, and have seen multiple lockdowns and variants at this stage, if a challenge was made against any kind of direct award it may be the view of the Court that given the amount of time that has passed, the

ongoing pandemic may no longer be a valid justification in relation to Reg 32(2) (c).

However, if the situation with the Omicron variant, which Legal acknowledge is slightly different to other variants form before given its apparent high levels of transmission and its apparent ability to resist vaccines, were to continue well into the first half of 2022, beyond 31st March 2022, there may be a possibility that the Council could argue that Reg 32(2)(c) may apply at that point, so long as the Council can demonstrate that its inability to run a full tender exercise before that point was entirely down to staff and resources having to be completely diverted to the response to the variant and the roll out of the booster programme, but again whether such an argument would be successful or not remains to be seen.

Again, as with Regs 32(2)(a) and 32(2)(b) above, any reliance on Reg 32(2)(c) will require a VEAT notice, which again may increase awareness of the proposed direct award and so actually increase the risk of scrutiny and possible legal challenge under the PCRs, so the Council must be able to demonstrate that any urgency to procure at that point was due to factors completely outside of the Council's control (like the response to the Omicron variant if that was still going on), that as a result we did not have any resource whatsoever to run a tender exercise, and the urgency was not brought about by our unwillingness to engage with the market.

- d. **Reg 32(9)** – *“The negotiated procedure without prior publication may be used for new works and services consisting of the repetition of similar works or services entrusted to the economic operator to which the same contracting authority awarded an original contract, **provided that such works or services are in conformity with a basic project for which the original contract was awarded following a procedure in accordance with Regulation 26(1) and (2).**”*

Comment – This is not likely to apply:-

- The original LARC contract from two (2) years ago, was not awarded following a procedure in accordance with PCRs Regs. 26(1) and (2), but was awarded directly after an original tender procedure failed.

- Also, the contract that was actually directly awarded does not match the scope of the contract that was subject to the original failed procurement procedure.
- Regardless, the current contract does not include any reference to the possibility of further services being awarded under Reg. 32(9).

C) Contract Procedure Rules

42. Internally, CPR Rule 10.4 also applies to service requirements in excess of £100,000. Under 10.4.2 “*where no Internal Service Provider, existing Contract, approved Framework Agreement or Dynamic Purchasing System exists completion is required for procurements over £100,000.*” The LARC services are also subject to this.
43. The Council Executive can potentially waive certain CPR requirements under CPR 25.1 **but only if the PCRs do not apply.**
44. As the proposed contract for the LARC services would be subject to the PCRs (please see above), the Executive unfortunately **cannot** exercise its power under CPR 25.1 on this occasion.
45. Further, the CPRs can be waived and/or varied without going to Executive, **but only if certified by the Chief Finance Officer or their deputy advised as appropriate by the Monitoring Officer and Chief Procurement Officer as meeting any of the specific criteria set out under CPR 25.2.**
46. Any reliance upon Reg 32(2) (a) – (c) above by Public Health for this award would need clearly demonstrate to the satisfaction of the Chief Finance Officer, Chief Procurement Officer and Monitoring Officer that the relevant parts of CPR 25.2 would apply for a waiver to be granted, specifically:
 - a. CPR 25.2.3 - services or the purchase of supplies involving specialist or unique knowledge or skills;
 - b. CPR 25.2.5 - with an organisation already engaged by the Council for a similar and related procurement and where there is significant benefit to extending the Contract to cover this additional requirement, without exposing the Council to unacceptable risk;

c. CPR 25.2.6 - for works, supplies or services which are only available from one organisation (due to their specialised nature); and/or

d. CPR 25.2.7 - involving such urgency that it is not possible to comply with the CPRs.

47. Finally, CPR 25.9 sets out which categories of contracts are exempt from following the CPRs. None of these categories would apply in this instances.

D) Legal analysis of Options

48. What follows below is further analysis from a Legal perspective of each of the three (3) options presented in this Report:

49. **Option 1** – Allowing the Contract to lapse without any kind of replacement service will not incur an procurement risk, however the risk of reputational damage and harm to residents by not meeting our statutory duty of care and our responsibilities to commission these LARC Services under the Health and Social Care Act 2012 and our obligations under our Section 75 Agreement with the CCG, means that this is not a viable option.

50. **Option 2** – Option 2 does not raise significant legal risk as it would be a compliant tender under both the PCRs and the Council's CPRs, provided that such a procurement exercise be carried out with appropriate advice assistance from the Procurement and Legal Services teams.

Further, given that the current LARC contract does not expire until 30th June 2022, there is more than enough time for Public Health, in conjunction with colleagues in Procurement, to carry out both appropriate market engagement and any subsequent tender exercise, as well as deal with any necessary transfer and/or handover arrangements should the incumbent not be successful.

It is also observed that:

i. were a PCR compliant LARC competition to be conducted; and

ii. no tenders, no suitable tenders, no requests to participate or no suitable request to participate were received,

then the Council would potentially be in a more secure position to consider whether the negotiated procedure without prior publication could

apply at that stage under PCR Regs 32(2) (a), 32(2) (b) or 32(2) (c), provided that a full, accurate and transparent VEAT notice is published, the required ten (10) day standstill period is followed and provided further that the Contract without any substantial amendments to its terms and scope whatsoever, otherwise the direct award would still be non-compliant at that point.

Further advice from both the Procurement and Legal Services teams should be sought by Public Health at that point time to ensure compliance.

51. **Option 3** – Further to detailed analysis of the PCRs above, Option 3 could potentially apply, however it would not be entirely without risk of challenge under the PCRs, and our ability to defend such challenges will hinge entirely on the Public Health’s ability to demonstrate that a direct award to Nimbuscare Ltd. was the only viable option due to either (i) the lack of response to a valid tender exercise (Reg 32(2) (a)); or that Nimbuscare are genuinely the only provider technically capable of delivering the LARC service requirements (Reg 32(2) (b)); or (if at the point of commissioning/award) there is genuinely not time or available resource to run a fully compliant tender due to circumstances entirely outside of the Council’s control (Reg 32(2) (c)). The Council must be entirely satisfied that any evidence Public Health have collated to back up such a decision must be robust enough to stand up to scrutiny, particularly as reliance upon Reg 32 requires a public VEAT notice.
52. **Alternative Option** - One additional possible way forward without having to run a full tender exercise could be for the Council to carry out **a market engagement exercise prior to directly awarding any contract to Nimbuscare for LARC Services**, and if the result of said market engagement was that if we went ahead with a full procurement exercise there would either:
- a. be a strong likelihood that there would be no competition due to lack of interest; or
 - b. we received interest only from Nimbuscare Ltd.,

then we may be able to argue **at that point** that a direct award would be justifiable in terms of value for money considerations, rather than spending further time and taxpayer money on this matter, and we would potentially be able to argue that we had considered other potential

providers before deciding upon proceeding with a direct award, which in turn could help to mitigate the risk of challenge.

It is acknowledged that:

- i. due to the proposed contract's relatively short duration and low value (when compared to other longer term higher value LARC contracts or integrated sexual health services elsewhere); and
- ii. given the fact that a fully integrated sexual service for the Council, including the LARC services, will go out to tender in the next two (2) years; and
- iii. as there has been an attempt by the Council to run a full and complaint tender for these services in the last two (2) years, which resulted in the previous direct award for the reasons outlined above; and
- iv. because any procurement of the proposed two (2) year contract is likely to have possible staff transfer implication under TUPE,

one can appreciate that it is highly probable that any market engagement exercise will reveal that there would all likelihood be a distinct lack of interest from providers in a tender exercise for the proposed two (2) year contract.

The problem with this proposed market engagement however is that such an exercise would still technically not comply with Reg, 32(2) (a) of the PCRs. Again, a direct award without advertisement under that regulation can only be made following where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted ***in response to a formal invitation for tenders under an open procedure or a restricted procedure (NOT a market engagement exercise)***. This would mean that direct award following market engagement would still carry a risk of possible legal challenge for non-compliance of Reg 32(2) (a) PCRs.

However, conversely the market engagement could mitigate such risk if what Public Health and Procurement say about this being a small, niche market is true, and provide a possible additional justification of an award under Reg. 32 (2) (b) (ii).

Again, **the current contract does not expire until 30th June 2022**, which means there technically is no reason why a full tender exercise cannot be run given the amount time available. The exercise would guarantee compliance, mitigate risk of legal challenge completely, and even if no suitable tenders were returned we could still directly award the two (2) year contract at that point under Regs. 32(2) (a) or 32(2) (b)(ii) of the PCRs (subject to further advice at that point from both the Procurement and Legal Services teams being sought by Public Health to ensure compliance).

Also, any reliance on Reg 32 following such a market engagement would still require publication of a VEAT notice, and again increased awareness of the proposed direct award which in turn increases the risk of scrutiny and possible legal challenge.

Crime and Disorder

53. There are no implications from this report.

Information Technology (IT)

54. There are no implications from this report.

Property

55. There are no implications from this report

Other – Procurement

56. There was a previous procurement for LARC in primary care that was published inviting tender submissions during 2019/20 and we were unable to award a contract due to the bid submitted being unaffordable for the budget available. Therefore a waiver request form was submitted in March 2020 seeking approval to award the LARC service contract to Nimbuscare Ltd who represents the eleven NHS GP practices in York and this waiver was approved for the period 1st April 2020 to 30th June 2022.

57. It is arguable that the market for this service has been tested relatively recently through an openly advertised procurement exercise where only a single interested provider responded to the service that the council and the CCG wish to commission. And therefore means that this does comply with the procurement competition requirements as stated within

CPR 10.4 (Procurement over £100,000) and relying upon the following CPRs stated under CPR 25 – Waivers and Exemptions:

- a) The nature of the LARC service, which is a mandated service, and the knowledge and skills required to deliver this service means the market of suitable providers is very limited and has been tested within the last two years by the previous procurement that was unsuccessful.
- b) The widespread, ongoing impacts of the coronavirus pandemic on all providers of public health services, including sexual health services, means that it is highly unlikely that there is a suitable alternative provider.

- 58. Procurement support the ambition to achieve a fully integrated sexual health and contraception provision across the city which would mean commissioning both LARC and the integrated sexual health service through one procurement exercise in due course, working jointly with the new HCV ICS Board.
- 59. In order to achieve this goal, procurement support the proposals under Option 3 for the direct award of a new contract to Nimbuscare Ltd, without prior advertisement for the continuation of the service, through the submission of a waiver for the contract period 1st July 2022 to 30th June 2024 provided that a legally compliant route can be found that will allow such a direct award to take place.

Risk Management

- 60. There is a potential technical risk of a legal challenge to the Council if the Executive makes a decision to approve Option 3. However this risk has been assessed as low for the reasons set out in the report. There is, however, a much greater risk of challenge from the Department of Health and Social Care to the Council if we fail to ensure that mandated sexual health and contraception services are effectively delivered to our local population together with a financial risk of clawback of the local authority Public Health Grant Allocation awarded to the council for the provision of public health services.

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Background Papers:

Re-procurement of Primary Care Contraception Service. Report to Executive 26 September 2019.
[Re-procurement of Primary Care Contraception Service Report.pdf \(york.gov.uk\)](#)

List of Abbreviations Used in this Report

LARC	Long Acting Reversible Contraception
CCG	Clinical Commissioning Group
NHS Trust	York & Scarborough Hospitals NHS Foundation Trust

ICS	Integrated Care System
HCV ICS	Humber, Coast and Vale Integrated Care System
PCR	Public Contract Regulations
CPR	Contract Procedure Rules
VEAT	Voluntary Ex-Ante Transparency