

CABINET

18 October 2016

Title: Future Management Arrangements for the Council's Leisure Services	
Report of the Cabinet Member for Social Care and Health Integration	
Open Report with Exempt Appendix 1 (relevant legislation: paragraph 3 of Part I of Schedule 12A of the Local Government Act 1972 as amended)	For Decision
Wards Affected: All	Key Decision: Yes
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Accountable Director: Andy Knight, Commissioning Lead for Healthy Lifestyles	
Accountable Strategic Director: Anne Bristow, Strategic Director of Service Development and Integration	
Summary As part of the Council's transformation programme it has been proposed to transfer Leisure Services to a new management arrangement in the form of an existing not for profit / trust organisation. This report seeks authority to go in to the market place and to formally commence the competitive tendering process to find an industry specific not for profit organisation to run and manage the leisure services on behalf of the Council.	
Recommendation(s) The Cabinet is recommended to: (i) Approve the procurement of an established operator to manage and operate the Council's leisure services at Abbey Leisure Centre, Becontree Heath Leisure Centre and Jim Peters Stadium, in accordance with the Council's Contract Rules and the strategy set out in this report; (ii) Delegate authority to the Strategic Director of Service Development and Integration, in consultation with the Cabinet Member for Social Care and Health Integration, the Strategic Director of Finance and Investment and the Director of Law and Governance, to negotiate, award and enter into all contracts, agreements and any documents necessary to fully implement and effect this project; and (iii) Delegate authority to the Director of Law and Governance to execute all of the legal agreements, contracts, agreements and other documents on behalf of the Council.	

Reason(s)

The proposal is intended to assist the Council in being 'a well run organisation' by making better use of its resources and assets. If implemented, existing facilities and services will be protected but will be delivered at a lower cost. Also a new way of working that is proposed will enable the service to lever in additional income from grants that are not currently available to the Council.

Leisure Services provides opportunities for social interaction and improving physical and emotional health for the wider community.

In doing so, it supports the achievement of the following Council priorities:

- Encouraging civic pride: Build pride, respect and cohesion across our borough; narrow the gap in attainment and realise high aspirations for every child; Build civic responsibility and help residents shape their quality of life.
- Enabling social responsibility: Ensure everyone can access good quality healthcare when they need it.
- Growing the borough: Support investment in housing, leisure, the creative industries and public spaces to enhance the environment.

1. Introduction and Background

- 1.1 The current economic climate presents a significant and ongoing challenge for the Council. To achieve a balanced budget, it has been necessary to review the range of services provided and explore alternative delivery options to safeguard services, which are valued by Members and residents, but also deliver cost savings and potentially act as a catalyst for business transformation.
- 1.2 An appraisal of alternative delivery vehicles for Leisure Services (as part of a wider review of Leisure and Culture) was undertaken in 2014. In the light of the Chancellor's Emergency (Budget), in February 2015 Cabinet approved the development of a locally established trust to deliver Culture and Sport facilities and services.
- 1.3 Legislative changes to Procurement Regulations in 2015 removed the option of transferring leisure services to a locally established trust without competition. A newly established local trust would not have the capacity or capability to bid successfully for a contract in an open and transparent competitive tender process.
- 1.4 As a result a further options appraisal was commissioned in late 2015 to revisit and update the original study and assumptions. This appraisal recommended that leisure services be transferred to an established provider as this would provide the optimum service delivery model in terms of cost and quality.
- 1.5 In April 2016 Cabinet approved public consultation on the transformation programme for the future delivery of the Council. This included approval of the Outline Business Case (OBC) proposal to transfer Leisure Services to an existing leisure trust.

1.6 Following the public consultation, in July 2016 Cabinet approved the direction of travel and the development of the different work streams and a full business case (FBC) was produced. A copy of the FBC is at **Appendix 1** - this document is exempt from publication as it contains commercially confidential information which is exempt under paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972 (as amended) and the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

2. Proposal and Issues

- 2.1 The leisure facilities play an important role in improving health & wellbeing outcomes for local residents alongside other local provision, facilities and parks. However, in line with national figures the leisure centres currently only reach c. 10% of the local population.
- 2.2 The OBC, which included an early market engagement exercise, and the subsequent full business case, recommended transferring Leisure Services to an existing Non-Profit Distributing Organisation (NPDO) or what is typically known as a trust.
- 2.3 It recognised that an existing NPDO was the most beneficial model to the Council as it is the only one which will deliver the highest level of guaranteed financial savings for the Council, extensive transfer of property and trading risk, whilst protecting, as a minimum, current levels of service provision.
- 2.4 There is a well-developed market of “not for profit” operators, that can secure the current Non Domestic Rates (NNDR) and VAT concessions.
- 2.5 There are considerable efficiencies to be gained by transferring to an established operator, as they will have lower overhead costs, greater experience and capacity to market the service to increase participation and generate new business and income.
- 2.6 The Council will benefit from a contractually assured fee that could be profiled evenly across the contract term, so the Council could potentially secure the financial benefits earlier than when they actually fall and the operator would carry the financial and operational risk.
- 2.7 The service will, as a minimum, maintain the current service standards but operate at a lower cost. The operator will pay the Council a fee to operate and maintain the facilities on their behalf.
- 2.8 This proposal was submitted as one of the work streams for the wider transformation programme which was approved by Cabinet on 19 July 2016.
- 2.9 It is anticipated that the new management arrangements would start in October 2017.

3. Proposed Procurement Strategy

Outline specification of the works, goods or services being procured

- 3.1 The procurement of an established operator to manage the following leisure facilities; Abbey Leisure Centre, Becontree Heath Leisure Centre and Jim Peters Stadium. The operator would be responsible for all trading, operating and property related risks and will pay the Council a fee in return for the concession.
- 3.2 It is recommended that an evaluation of 60/40 price/quality split operates for this procurement. This is to ensure that the quality of leisure services provided remains of a high quality and that the operator proactively engages with the Council to increase participation and improve resident's health and wellbeing.
- 3.3 In addition, the political and reputational aspect of these services being transferred requires the current levels of service provision as a minimum to be protected.
- 3.4 The corporate default evaluation of an 80/20 split could result in the bidders assuming that the Council is after the cheapest possible service and maximum concession payment at the detriment of delivering quality and affordable services, which is not the intended outcome of this procurement.
- 3.5 The 60/40 split evaluation is commonly applied to this type of leisure procurement and should ensure that a healthy amount of bids are received, where the criteria and weighting have already been tried and tested.

Estimated Contract Value, including the value of any uplift or extension period

- 3.6 Over the 10 years the concession value is estimated to be worth in excess of £52 million in income to the Operator and over £4m in profit and contributions, net of the concession payments to the Council and the delivery of the annual £1.162m savings requirement from 2020.

Duration of the contract, including any options for extension

- 3.7 A 10 year contract will be offered on a peppercorn rent basis with the option to extend for a further 5 years and a no fault break option from year 5 which could incur a cost to the Council.

Recommended procurement procedure and reasons for the recommendation

- 3.8 It is recommended that the procurement procedure followed is for a Service Concession, subject to Concession Contracts Regulations 2016 operating under a two stage process (PQQ and ITT).
- 3.9 This is due to the Changes to the EU Procurement Rules which came into effect in April 2015 (in relation to Part B Services) and then again in April 2016 (in relation to Service Concessions) this has brought more clarity into the procurement of concessionary services under the revised EU Regulations.

- 3.10 The nature of delivering leisure services has to comply with the two elements needed for it to operate under the 2016 Concession Regulations namely;
- The grant of a right to exploit services (with a payment).
 - There must be an operating risk (in terms of supply or demand) involving real 'vagaries of the market'.
- 3.11 The value of the concession exceeds the OJEU threshold and the Council is therefore required to issue an OJEU contract notice and an award notice at the end of the process.
- 3.12 A key advantage of the Service Concession under the EU Procurement Regulations provides the Council with flexibility around how to structure the procurement, with the only requirements being that it must ensure they meet the General EU Treaty principles around ensuring fairness and transparency in the treatment of bidders. This would provide the Council with the least complicated and most flexible procurement route that is fully compliant with the current EU Regulations.
- 3.13 The requirement of a two stage process (PQQ and ITT) will allow the Council to vet bidders at the PQQ stage, leaving only suitable and experienced operators to take part in the ITT. This will have a bearing on the timescale and will require sufficient evaluation periods to be scheduled into the diaries of those involved.
- 3.14 We propose that the Contract Notice refers to the Services Concession Regulations and provides an indicative contract term of 10 years, (a five-year concession would certainly not be attractive to the market and would most probably significantly limit market interest.) and that the initial submissions stage invites proposals that would include investment in increasing capacity and justification for their proposed increased contract term. The detailed solutions stage would then be used to refine and develop the proposals of the shortlisted bidders.
- 3.15 There are specific provisions in the regulations making it clear that for those more than 5 years in length, the period of the concession should be based on the time required for the operator to recoup their specific investment taking into account initial and any subsequent investment.
- 3.16 We know from experience that in the early years of a leisure contract operators often make a financial loss as they invest in transforming the services and facilities, and it is often post year 5 before the contract delivers any return on investment, especially if they are offering a Council a flat line fee to fit in with budget demands.
- 3.17 Given we may seek investment from the market for increasing swimming provision within the Borough and potentially other leisure facilities (Barking Riverside), we are therefore confident that the bidders will be able to make a case for having a term significantly longer than 5 years, hence the recommendation of a contract length of 10 years plus a 5 year extension.

The contract delivery methodology to be adopted

- 3.18 The contract would be structured as a service concession, with the operator required to meet the Councils requirements through an outcome based services specification.
- 3.19 A performance management framework will be established that sets targets for participation and KPIs, with financial deductions applied for poor performance or a failure to meet targets. Improvement notices and ultimately termination can be applied for serious and/or persistent under performance.
- 3.20 A 12 month no fault break clause may be exercised by either party following the 5th year of the contract subject to compensation sums if this option were exercised.
- 3.21 The operator will take full repairing leases at a peppercorn rent on the existing leisure facilities and will be required initially to maintain existing pricing, concession and programmes, with any changes requiring the prior approval of the Council, such approval not to be unreasonably withheld.

Outcomes, savings and efficiencies expected as a consequence of awarding the proposed contract

- 3.22 It is anticipated that the concession contract will deliver a net annual saving to the Council of £1.16m by 2020/21 against the current budgeted baseline costs, through a mix of income growth and efficiency savings.
- 3.23 The concession will deliver a high level of trading and operating risk transfer, and price certainty through payment of a fixed contractually secure concession fee paid by the operator.

Criteria against which the tenderers are to be selected and contract is to be awarded

- 3.24 A 60/40 price/quality split will be applied. The higher quality mark is required to provide sufficient weighting to the wide range of service delivery and facilities management requirements and to reinforce the message that the Council is seeking to maintain and enhance a high quality service.
- 3.25 The quality mark will be sub-divided into criteria including, but not limited to, service improvements and innovation, customer pricing and customer care, marketing and promotions, and facilities and asset management proposals.

How will the procurement address and implement the Council's Social Value policies?

- 3.26 Well maintained and vibrant leisure facilities have economic, social and environmental benefits to the local area. They have economic value to home owners, business and the local authority.

4. Consultation

- 4.1 Initial stakeholder engagement took place when developing the updated options appraisal in December 2015 and further engagement has taken place as part of the Council wide consultation exercise undertaken between April and June 2016.
- 4.2 Leisure services received comments in 60 of the 198 valid responses returned, with around 2/3rds being supportive or at least partially supportive of the proposals, with just under a ¼ against.
- 4.3 Concerns were raised about future service delivery around matters such as prices and user charges, programming and choice, and links with health and wellbeing.
- 4.4 These concerns have been addressed in the services specification that has been prepared, which retains Council control over pricing above a threshold and programming changes, and sets targets for ensuring the services remain accessible to and used by local residents. Further protections are in the concession contract around service delivery and the maintenance of the assets.
- 4.5 Stakeholder engagement is an integral part of the project and further consultation will take place during the implementation and mobilisations phases.
- 4.6 The table below sets out what consultation has been carried out to date

Consultation Area	Description
a) Staff	Initial sessions were held with staff at each leisure centre in June 2016 and a staff working group has been established and is meeting regularly. An initial communication plan has been created to underpin the consultation requirements. Formal staff and union consultation will begin in June 17 once the preferred partner has been selected.
b) External	The leisure transfer was included in the wider A2020 consultation and the public responses specific to leisure have been taken into account in the project. The consultation was conducted between 20 April – 16 June 2016. In general support for change was given provided service levels are maintained. The main concerns were around the potential future quality, cost, and choice of services. These concerns will be mitigated through the outcomes specification and performance management framework to ensure a high standard of quality and services is maintained.
c) Members	Sessions have been held with members and with Labour Group in September 2016 to inform the development of the services specification and the high level outcomes sought.
d) Partners	Consultation was undertaken with key internal stakeholders including public health during the options appraisal in October 2015 and their comments taken into account.

5. Financial Implications

Implications completed by: Kathy Freeman, Finance Director

- 5.1 This report requests approval of the formal tender process to seek a partner to run and manage two Leisure Centres and the Jim Peters Stadium.
- 5.2 This will be a concession contract with financial benefits to the Council anticipated at £1.164m per year by 2020. The savings will be generated from business rates and VAT concessions secured by the trust together with anticipated growth in income. The saving to the Council also anticipates reduced support costs. This process will be achieved as part of the Councils overall core review which is a separate A2020 work strand.
- 5.3 The Government is currently consulting on allowing Councils to retain 100% of all business rates generated. It should be noted that although there will be a saving of business rates by the Leisure Trust, the Council may lose the equivalent business rates income from its core funding. It is too early to fully assess the impact of on the potential loss of business rates and further information will be available when the Government publishes the outcome of its consultation.

6. Legal Implications

Implications completed by: Assaf Chaudry, Major Project Solicitor

- 6.1 The Council is a best value authority and is therefore obliged to make arrangements to secure under the Government Act 1999, Section 3 (1)) a continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness. In light of the above the report seeks approval to commence a procurement process subject to delegated authority to award a contract in accordance with Concessions Contracts Regulations 2016.
- 6.2 The Council therefore needs to be cognisant of a number of statutory obligations during the procurement process given the delegated authority as set out in the Recommendations above. The Council should continue to consult under section 3(2) of the Local Government Act 1999; a range of representatives of persons listed in that section for the purpose of deciding how to fulfil its general duty. In addition the Council should not forget their obligations under the pre-procurement consultation consideration requirements under the Public Services (Social Value) Act, duties which may arise from specific legislation, and also legitimate expectations of consultation which may have arisen from a previous course of conduct. Also the public sector equality duty under section 149 of the Equality Act 2010
- 6.3 The Concessions Contracts Regulations 2016 defines a concession contract as “A contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or utilities entrust the provision and the management of services (other than the execution of works) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment....”. It follows that any concession contract must contain the following elements:

- The award of the contract involves the transfer to the concessionaire of an operating risk in exploiting the works or services encompassing demand or supply risk or both.
- The part of the risk transferred to the concessionaire involves real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire is not merely nominal or negligible. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession contract. ([Regulation 3, CCR 2016](#))

6.4 The CCR Regulations further stipulates the selection, exclusion and award criteria including Chapter 3 of Part 3 of the [CCR 2016](#) which contains the rules relating to the limited duration of concession contracts. In particular, where a concession exceeds five years, its maximum duration shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives. ([Regulation 18](#))

6.5 Given that the Council proposes to grant a full repairing lease at a peppercorn rent for the duration of the contract this proposals amounts to a disposal of Council-owned land under Section 123 of the Local Government Act 1972. This section requires local authorities to dispose of property at the “best consideration” unless there is ministerial consent allowing for disposal at an undervalue. It must prior to entering into any binding contract obtain specialist advice from appropriate valuation experts confirming that this disposal accord with the provisions in section 123 of the Local Government Act 1972 relating to “best consideration”

6.6 Finally, the Transfer of undertaking provisions (TUPE) is to apply on the transfer of these services to the new service operator. The TUPE Regulations imposes the Duty to inform and the Duty to consult which needs to undertaken during the procurement process.

7. Other Implications

7.1 **Risk Management** - There is a well established market place that is a tried and tested approach to managing leisure services.

A detailed specification, performance and monitoring framework will be put in place to safeguard the Council’s assets.

7.2 **Contractual Issues** – These are set out above.

7.3 **Staffing Issues** - The service employs circa 140 permanent and casual staff (approximately 100 FTEs) across the three sites.

All existing staff employed by the Council in delivering the services will TUPE transfer. Any new staff that join after transfer will be employed under the standard terms and conditions of the operator.

Initial consultation has taken place with staff and a staff working group has been established to liaise and consult with staff.

- 7.4 **Corporate Policy and Customer Impact** - providing a well maintained social space and high quality leisure facilities which will have a positive impact on social cohesion.

Safe and well maintained facilities offer opportunities for people to lead a healthier lifestyle both physically and mentally. Recreation also promotes positive contact between different ethnic groups and opens communication in a nonthreatening atmosphere.

The development of this new approach and partnership will help residents of Barking and Dagenham to live long, fulfilling and health lives.

- 7.5 **Safeguarding Children** - providing a safe and secure environment for children to play, learn and develop.
- 7.6 **Health Issues** - supporting the connection of public health with the local community and help create an environment that supports well-being thereby encouraging residents to make informed choices for healthy lifestyles and behaviours (i.e. participation in physical activity) which improve their own health. Therefore, this approach also supports the outcomes and priorities of the joint Health and Wellbeing Strategy.
- 7.7 **Crime and Disorder Issues** - by providing well managed and maintained leisure facilities which can help reduce opportunities for vandalism and anti-social behaviour, and allay fears of crime.
- 7.8 **Property / Asset Issues** - A full repairing lease for 10 years with the option to extend for a further 5 years will be issued to the successful operator thus not increasing the Council's asset liability (except in the event of project failure in the future or forfeiture whereby the asset would potentially be returned to the Council).

Provisions of s 123 1972 Local Government Act requiring best consideration to be obtained and the property assets included with this proposal have a value if they were to be let on a normal commercial basis.

External valuation will be commissioned so that the value of this can be established for auditing purposes and may form part of the negotiations with the preferred service provider.

Public Background Papers Used in the Preparation of the Report: None

List of appendices:

- **Appendix 1** – Full Business Case – Future management arrangements for leisure services (exempt information)