

SUMMARY



WYCOMBE
DISTRICT COUNCIL

Report for:	COUNCIL
Meeting Date:	21/02/2019
Part:	Part 1 - Open Report with Part 2 Appendices
If Part 2, reason:	Para 3 - Information about the financial or business affairs of any particular person (including the authority holding that information).
Title of Report:	EXTENSION WORKS TO COURT GARDEN LEISURE COMPLEX - PROCUREMENT PROCESS
Cabinet Member Officer Contact: Direct Dial: Email:	Councillor G Peart (Community Portfolio) Elaine Jewell 01494 4213800 elaine.jewell@wycombe.gov.uk
Ward(s) affected:	Marlow
Reason for the Decision:	<p>A fit for purpose leisure complex, including sports hall, swimming pool and up-to-date changing facilities in Marlow for the use of all residents, including children and older people, both for now and the future. At present the sports hall floor has failed repeatedly, the large flat roof leaks regularly, the swimming pool tank and most of the centre's plant are end of life and the changing area has inadequate drainage and does not meet modern user requirements.</p> <p>Minimal closures and/or disruption to the centre during the project. PL, as the current operator of the facility under the Leisure Operator Agreement and the procurer of the works, is best placed to manage these works and to minimise their impact on customers. This ensures there will not be a loss of income claim against WDC.</p> <p>PL's ownership of the design, procurement and management of the project means PL will 'own' the quality of the design and works from the start. Their expertise and ongoing responsibility for maintenance will ensure that high quality, durable solutions are sourced.</p> <p>Improved customer experience: The project aims to reduce customer churn and an ongoing decline in use and increase in customer dissatisfaction and, over time, produce an upturn in use. This will in turn, rally business performance with a rise in revenue and support.</p>

	<p>Without this project parts of the centre will need to be closed as they fail. This will generate a requirement to compensate PL for lost income and will give rise to significant resident dissatisfaction and protest.</p>
<p>Proposed Recommendation:</p>	<ul style="list-style-type: none"> (i) To provide an exemption from Contract Standing Orders (“CSO’s”) to allow the non-competitive award of a Development Agreement with a value of £2m to allow Places Leisure (“PL”) to complete refurbishment works at Court Garden Leisure Complex (“CGLC”). (ii) To delegate authority for entering into a Development Agreement, Deed of Variation and any associated legal documents in relation to the existing Leisure Operator Agreement to the Head of Community Services, in consultation with the District Solicitor, Head of Finance and Commercial Services with the Cabinet Member for Community Services.
<p>Sustainable Community Strategy/Council Priorities - Implications</p>	<p>Risk: The management of the works by PL will minimise closures, and/or disruption to the centre, as well as avoiding loss of income during the works. PL will also be able to utilise the benefits of having an established supply chain to achieve quality and value for money.</p> <p>Equalities: It will improve health and swimming facilities for Marlow residents.</p> <p>Health & Safety: Parts of the current Centre are close to the end of their life, in many cases temporary repairs</p>

	<p>have been undertaken. Undertaking the project enables all parts of the Centre to remain in public use for the foreseeable future. The Council and PL will continue to operate safe facilities for residents.</p> <p>Broad EU Principles and case law set the wider legal framework for those contracts which fall below the threshold for EU Procurement. The broad principles include the requirement to prevent, identify and remedy conflicts of interest, to avoid any distortion of competition and to ensure equal treatment of economic operators.</p> <p>Officers have considered best value, case law and the EU principles, taking into account any risk, and recommend that the Council enters into a development agreement with People for Places directly without advertising to enable them to deliver the project.</p> <p>The Council's Contract Standing Order stipulate that its rules should not be waived without Member consent. This paper seeks that consent and sets out the alternative that Officers propose should be followed.</p> <p>The scope of the project is within the approved capital programme.</p>
Monitoring Officer/ S.151 Officer Comments	<p>Monitoring Officer: Legal comments have been included throughout this report.</p> <p>S.151 Officer: Finance comments have been included throughout this report.</p>
Consultees:	<p>Places Leisure, Ward Member briefing programmed. Centre users will be informed as work is sequenced that affects the areas they use.</p>
Alternative options:	<ol style="list-style-type: none"> 1. Do nothing. Customer dissatisfaction will increase. There will also be a reduction in usage and membership of the leisure complex as areas deteriorate and are removed from public use. This may lead to loss of income claims from the operator. 2. Comprehensive refurbishment and extension of the leisure complex providing a new location for the Marlow Museum, relocation of the café to the

	<p>reception area, a new viewing gallery for the pool hall and additional parking spaces.</p> <p>Inadequate budget for this purpose.</p> <p>3. Demolish and build a modern purpose built leisure centre.</p> <p>Planning approval is unlikely to be given due to the site's listing and other protections, eg conservation area, historic park. A considerable amount of finance would be required for a project of this magnitude.</p>
<p>Next Steps:</p>	<p>If Council approves the decisions requested in this report, the next step will be for the Development Agreement and Deed of Variation to be completed under delegated authority, and then signed by the Council and PL. PL will then instruct their professional team to develop a fully detailed programme of works, with a view to procuring one or more specialist contractors for the agreed refurbishment works.</p>
<p>Background Papers:</p>	<p>CGLC Refurbishment Project – Development Agreement Deed of Variation document – in circulation and review</p>
<p>Abbreviations:</p>	<p>PL – Places Leisure CGLC – Court Garden Leisure Complex</p>

1. Detailed Report

1.1. Executive Summary

This report seeks an exemption from CSOs to allow the non-competitive award of a Development Agreement (“DA”) with a maximum value of £2m for PL, the incumbent Leisure Operator to complete refurbishment and development works at CGLC, which are essential works identified as necessary in recent condition surveys. An initial condition survey in 2016 identified numerous, high priority works that were necessary to enable the Centre to continue to operate. A capital sum was requested in March 2017 from Cabinet to complete these works. The sum involved included a number of estimates for which detailed quotes have since been sought from a number of specialist providers. The Council’s standard award process would be to advertise the opportunity on the Government’s national portal “Contracts Finder” (Contracts Finder is a national website which provides information to potential bidders about contracts worth over £25,000 with the government and its agencies), and to run an open competitive tender exercise to select the most economically advantageous tender in accordance with relevant legislation and the Council’s CSO’s. In this case it is proposed that the Council will procure the refurbishment works via PL in order to utilise the benefit of its established supply chain to secure works that are competitively priced and of high quality. Most importantly this procurement route should minimise delays and disruption to the day to day operations of the centre by enabling PL to integrate the works programme with operational management considerations.

1.2. Sustainable Community Strategy/Council Priorities – Implications

The need to comply with a procurement process which achieves best value is a principle within UK law. This continues to apply alongside other requirements for contracts below the EU threshold. The Development Agreement (the “DA”) and associated legal documents will include the requirement for PL to achieve and demonstrate competitive pricing through its supply chain and procurement procedures. This approach involves PL seeking best price from its works contractors, and using the same client team as it has used on a similar recent procurement, the Risborough Springs Swim & Fitness Centre (RSSFC) Extension Project. PL have agreed to conduct a competitive procurement process, similar to that applied for the RSSFC project, this paper seeks authority to non-competitively award a contract of maximum of £2 M to PL the budget approved by Cabinet in March 2017.

PL’s competitive process involves benchmarking from its database of similar previous projects. Independent construction cost estimates are prepared by its external cost consultant and where appropriate, sums are compared to the Building Cost Information Service (BCIS) cost database as published by the Royal Institution of Chartered Surveyors (RICS).

The process also involves open book tendering with detailed tender documents developed to enable competitive tenders from PL's database of four principal main contractors with which it partners. Tenders are based on detailed design/requirements, PL design guide, technical specifications and site specific pre-construction information. Final tender prices are agreed on a lowest cost tender ‘Value for Money’ negotiated basis which achieves an acceptable quality standard.

1.3. Background and Issues

Research conducted on behalf of the Council highlighted the need for major refurbishment of the leisure complex, in particular of the roof covering as well as the sports hall floor, pool hall, the pool tank and plant and the changing areas. The Council intends to sign a DA with its current leisure management contractor PL so that PL can directly manage the building works from initiation through to completion of the works at CGLC.

Officers believe the most appropriate procurement route is to:

- (i) Non-competitively sign a DA with PL, which will provide an agreed sum of money to develop and manage the works on the Council's behalf;
- (ii) To enter into a Deed of Variation varying the Leisure Operator Agreement to allow for the improvement works to be carried out to allow for the new facilities. There may also be a surrender and re-grant of leases on completion to take into account any changes in the plans for the facilities.

The characteristics of a Development Agreement (the "DA") are as follows:

- a. It will form the legal agreement between the Council and PL as to the outline scope of what works will be delivered and what funds are to be made available by WDC in order to do this. PL will be required to carry out and complete the improvement works in accordance with the requirements set out in the DA, using all reasonable endeavours to achieve completion by an agreed planned completion date.
- b. It will set out mechanisms for collaborative working during the project, and also for reviewing costs and making payments against an agreed schedule. It will also include detail of how PL will communicate and manage any issues relating to cost or quality that may arise during design development and works.
- c. PL would remain responsible for any latent defects arising in the improvement works.
- d. The professional team appointed by PL and the eventual contractor/s selected by PL will be required to provide appropriate collateral warranties for the benefit of the Council and any other third party that has an interest in CGLC.

1.4. Need for a Waiver

The Development Agreement has a maximum value of £2m and so is below the EU works threshold; as such, the Public Contract Regulations 2015 (PCRs) as they relate to "above threshold contracts" do not apply.

Part 4 Chapter 8 of the PCRs applies to contracts valued between £25,000 and relevant threshold ("Below Threshold Contracts"). PCRs require: "where a contracting authority advertises a contract award opportunity"... "In those circumstances the Contracting Authority shall publish information about the opportunity on Contracts Finder". The Council's CSOs require us to advertise contracts over £10,000, so following the standard Council process would result in this opportunity being advertised nationally. Setting CSOs aside will remove this obligation so that the process outlined in this report can be followed.

Also it is necessary to exempt this procurement from the Council's CSOs because, subject to the commitments set out in the Development Agreement, the appointment of any advisors PL may require and the appointment of the works contractor will be in accordance with PL's processes and outside of the Council's control. Additionally CSOs do not offer a process to authorise the non-competitive award of contracts in excess of £ 100,000.00.

1.5. Benefits

PL's ownership of the procurement and management of the improvement works has been identified as the most suitable approach as this will mean they 'own' the quality of the design and works from the start; ensuring the works deliver a fit for purpose sports complex that provides improved continuing service to local residents. As well as this overarching reason for the chosen approach, Officers believe that non-competitive award of the DA to PL is the most appropriate procurement route because:

- A benefit to PL being awarded responsibility for the design and works via their established supply chain of contractors is that, as the current operator of the facility under the Leisure Operator Agreement, they are best placed to closely manage works to minimise closures and or disruption to the centre. PL's established relationship with their contractors means that the contractors are experienced in ensuring any disruption is minimised and in health and safety and other aspects of carrying out works in a 'live' site open to the public. For the Council to appoint a third party/ its own professional team and contractors directly would be highly disruptive to the continued operation of the facility, and would present an increased delivery risk for the Council. This would include having to appoint the professional team, manage multiple contracts directly and also managing any claims from PL if anything was to go wrong.
- If there were any works changes required, the Council would have to manage that process and coordinate between contractor/s and PL and deal with any impact those changes could have on PL's projected FM costs, as well as facilities mix and expected revenue. This could lead to a higher cost for the works from contractors/ consultants having to take into account those interface issues and possible associated delays. It would also be resource intensive – with cost implications - for the Council to manage this process. If PL procures and manages the design development and works, it manages those risks itself and will be able to utilise the benefits of having an established supply chain to achieve value for money.
- Another benefit is that if PL procures the improvement works, and once they are complete, PL will remain responsible for any latent defects in those works for the duration of the Leisure Operator Agreement and would have to rectify any such defects at its own costs, leaving PL with the risk of recovering any damages/ costs incurred and loss of revenue from the contractor in default. If the Council procures the Improvement Works, that risk remains with the Council.
- In addition, under paragraph II.2.1 of the OJEU Contract Notice for the Council's appointment of PL to provide leisure management services, the scope of the required services includes the management, operation and maintenance of WDC's leisure centres. PL's project management of these

works could be said to fit within the scope of this appointment given that PL is responsible for maintaining the new improved facilities.

1.6. Risks

The benefits this approach delivers in terms of financial and operational risks are stated above. Potential risks to the Council include the following:

- The works delivered under the contract established with PL's successful tenderer does not match the Council's requirements. This will be mitigated by clear procedures for collaborative working and agreement of designs (as permitted under the contractual approach adopted), plus reviews of works as they progress. Council officers will agree with PL the designs and then will let PL manage the contract/s. A joint Project Board and team has been set up and will be in constant communication throughout the project.
- The works costs of the PL procurement come in above budget. This would be dealt with contractually by PL as part of robust contract monitoring and management, and the joint Project Board will regularly review progress and cost reports. The Development Agreement will allow for the requirement for the joint Board to meet to review any issues arising and reach agreement as to way forward.
- Publication of contract award. Where a Below Threshold Contract is awarded, Regulation 112 of PCRs requires Contracting Authorities to publish certain basic information about that contract on Contracts Finder, this obligation would apply to the Council's award of the DA to PL. For contacts below the EU Thresholds there are general requirements for transparency and competition imposed under EU Treaty Principles. If the procurement were to be found to be subject to these principles there is a risk of challenge. However PL have provided details that it has followed processes similar to that outlined above on several occasions and no such challenge has ensued.

The risk of challenge is considered low – the works are specialist in nature and are complex in terms of timing and linking to operations at the centre. The works relate to improving the current operations within the sports centre and PL regularly carry out improvement works of a smaller scale using their own contractors at the centres as part of their contractual responsibilities. A similar DA was awarded by WDC to Places for People ("PFPL"), PL's previous legal identity, for works at Risborough Springs last year under similar circumstances without incident. It should however be noted that if it were necessary for WDC terminate the DA as result of a procurement challenge, under the DA, the Council would be liable to PL for:

- (a) costs due and invoiced in respect of the period prior termination;
 - (b) the value of completed works; and
 - (c) losses as a direct result of the termination
- In order to minimise the value of these exposures it is proposed that the Contracts Finder award notice be published as early in the process such as two weeks in in an effort to identify challenges before significant sums have been spent.
 - Risks relating to increased costs for closure/ loss of income and operational related delays would be much higher with a new contractor brought in, that

potentially has less experience (or none) of working on a 'live' site that is operational and open to the public during the period of the works.

1.7. Conclusion

Council is invited to approve the recommendations set out at the beginning of this paper.