

## CABINET

**Date: 19 February 2018**

**Wards:** All

### **Subject: LEISURE MANAGEMENT AGREEMENT**

**Lead officer:** Christine Parsloe, Leisure & Culture Development Manager

**Lead member:** Councillor Nick Draper, Cabinet Member for Community and Culture

**Contact officer:** Christine Parsloe, Leisure & Culture Development Manager

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#### **Recommendations:**

A. Members to note the improved financial benefits that have been negotiated and will be available to the council once the new Morden Leisure Centre is open to the public

B. Agree the preferred option and the priority order of alternative choice options detailed below, for an extension of the leisure management contract between the Council and Greenwich Leisure Limited (GLL):

1. Preferred Option - 1<sup>st</sup> Choice

An additional 5 years of operation (by means of a variation to the terms and conditions of the existing contract), whilst retaining the option to further extend by up to 2 years as currently existing within the contract (Option D), subject to there being no substantial challenges to so doing from the published OJEU contract notice (i.e. contract expiry 30<sup>th</sup> November 2030 but the 2-year extension is retained as a possible further extension to 30<sup>th</sup> November 2032)

Alternative Choice Options in Priority Order should the Preferred – 1<sup>st</sup> Choice Option not be possible.

2. 2<sup>nd</sup> Choice Option

An additional 5 years of operation, by accepting now the ability to extend the contract by two years and to increase the term, (by means of a variation to the terms and conditions of the existing contract), by a further 3 years with no right to further extend (i.e. contract expiry 30<sup>th</sup> November 2030) (Option C), subject to there being no substantial challenges to so doing from the published OJEU contract notice (i.e. contract expiry 30<sup>th</sup> November 2030)

3. 3<sup>rd</sup> Choice Option

Take up the 2 years extension currently available within the existing contract (Option B), should there being no substantial challenges from the published OJEU contract notice (i.e. contract expiry 30<sup>th</sup> November 2027)

C. Delegate to the Director of Environment & Regeneration, in consultation with the Lead Member, the authority to finalise the detail of contract extension changes

D. Delegate to the Director of Environment & Regeneration and the Director of Corporate Services, in consultation with the Lead Member for Community and Culture, the authority to enact the addition of café and associated facilities with Madeira Hall at Canons Leisure Centre to the operational management of GLL

- E. Agree not to pursue the change of the contract structure from a management agreement to a lease agreement at this time.
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## **1 PURPOSE OF REPORT**

- 1.1. The purpose of this report is to seek approval for:
- 1.1.1. An extension to GLL's existing leisure management agreement at the time that the council is removing the existing Morden Park Pools (MPP) and adding the new Morden Leisure Centre (MLC). To extend the contract to achieve best value for the council, whilst also ensuring that the proposals are in accordance with procurement rules and regulations.
- 1.2. This report also seeks approval to delegate to the Director of Environment & Regeneration, in consultation with the Lead Member, the authority to:
- 1.2.1. Finalise the detail of contract extension changes.
- 1.2.2. The addition of café and associated facilities with Madeira Hall at Canons Leisure Centre.
- 1.3. This report also seeks the Council's approval not to pursue the change of the contract structure from a management agreement to a lease agreement at this time as has been put forward by GLL.
- 1.4. This report sets out all of the options that are being considered; the business advice provided by the council's professional leisure business advisors FMG; the procurement advice provided by the council's appointed professional legal advisors Blake Morgan (BM); the offers being made by the Leisure Operators Greenwich Leisure Limited (GLL) and internal advice and guidance from experts within the council.
- 1.5. The report evaluates all of the options as far as is possible and considers the risks of implementing each of them.

## **2 EXECUTIVE SUMMARY**

- 2.1. On 1 December 2010 the council entered into a Leisure Management Contract for the borough's three leisure centres with Greenwich Leisure Limited (GLL).
- 2.2. Since that time GLL have performed the operational management well and with the council have improved the leisure centres ensuring, as far as is practicably possible, local people's leisure and sporting needs are properly met within them.
- 2.3. In 2014, the council commenced proposals to build a new Morden Leisure Centre (MLC) and demolish the existing Morden Park Pools (MPP). That project is progressing well and in order for GLL to move from operating MPP to MLC a Deed of Variation (DoV) needs to be undertaken in relation to the Leisure Management Agreement (LMA). When the original contract was let the inclusion of a new MLC and the removal of the existing MPP was contained within the LMA and therefore there is no requirement to vary the existing contract to enable this.
- 2.4. To allow this process to occur, Cabinet agreed on 18 May 2016 to:
- "Delegate to the Director of Environment & Regeneration, in consultation with the Lead Member, the authority to vary the Leisure Management Contract, within the terms drawn, to replace the Morden Park Pools with the Morden Leisure Centre."

- 2.5. This variation will also bring improved financial benefits that have been negotiated and will be available to the council once the new Morden Leisure Centre is open to the public.
- 2.6. GLL have requested that the council consider a further extension to the LMA above and beyond the parameters of the original OJEU notice. GLL have made this request following conversations with council officers regarding the changes needed to the contract to remove the Morden Park Pools (MPP) and add in the Morden Leisure Centre (MLC). Within these conversations council officers requested GLL to find further contract savings. GLL responded that such savings could be made if the council were able to extend the contract period. It is this request that needs to be considered in this report along with one additional element in respect of Madeira Hall that it might be prudent for the council to also include at this time.

### **3 DETAIL**

- 3.1. The existing Leisure Management Agreement (LMA) was procured by OJEU, under the Public Contracts Regulations 2006 (PCR 2006), and was entered into on 1 December 2010 with successful tenderer, Greenwich Leisure Limited (GLL). The contract term was agreed as per the published OJEU notice to be 15 years plus up to 2 years extension. The contract was drawn to include for the removal of the existing Morden Park Pools (MPP) and the inclusion of a replacement facility – Morden Leisure Centre (MLC).
- 3.2. The replacement MLC is currently under construction and following its completion, GLL will move to operate the new facility and the demolition of MPP will be undertaken. There is a need to undertake a Deed of Variation (DoV) as provided for in the existing LMA to ensure the necessary changes are documented for contractual management arrangements.
- 3.3. Cabinet agreed on 18 May 2016 to:

“Delegate to the Director of Environment & Regeneration, in consultation with the Lead Member, the authority to vary the Leisure Management Contract, within the terms drawn, to replace the Morden Park Pools with the Morden Leisure Centre.”
- 3.4. Following discussions with council officers, GLL have requested that the council consider a further extension to the LMA above and beyond the parameters of the original OJEU notice and it is this request that needs to be considered in this report.
- 3.5. GLL have requested that a number of options to extend the LMA at this time are considered. There are a number of reasons why this could be beneficial to the council to do this:
  - 3.5.1. GLL would pay an improved annual revenue amount to the council, dependent on the length of extended term that was approved.
  - 3.5.2. It would ensure that the council had a good quality leisure management company managing the three leisure facilities for the foreseeable future, providing security of service provision.
  - 3.5.3. The provider is a Social Enterprise and therefore invests any revenue surpluses from the company back into the portfolio of services that they provide and Merton would benefit from this during the contract term.

- 3.5.4. The company is owned by the employees and within the Merton contract over 80% of the staff are 'stakeholders'.
- 3.5.5. The extension would allow for stability in operation of the new MLC to a robust business and community facility in accordance with council ambitions.
- 3.6. GLL have also requested that the council consider whether or not it would wish to amend the contract structure from a management agreement to a lease agreement with the relevant terms, and therefore re-structuring the payment as a rental payment rather than a services payment.
- 3.7. The council and GLL also wishes to consider extending some of the services within the existing contract.

These are:

- 3.7.1. As part of the council's delivery of the Canons Heritage Lottery Funded (HLF) project, ensure that GLL could operate the café, should the council so wish. The café is to be an extension to the existing Madeira Hall, which is part of the existing LMA and is also set to be redeveloped within the HLF project.
- 3.7.2. This service will be subject to the procurement advice and guidance as well as each meeting a best value assessment by the council, at the time when it would come forward for inclusion. The reason for including it here is to gain council approval of these options and include appropriate terms within the contract via the Deed of Variation is so that it can be enacted with ease in the future, should that be required.

#### **4 PROCUREMENT**

- 4.1. The council has taken legal advice from Blake Morgan (BM) (the council's appointed legal advisors on the Morden Leisure Centre Project) regarding the procurement risk associated with extending the duration of the contract beyond that which is provided for in the current LMA. BM's Procurement Advice is attached in full at Appendix 3 and excerpts are included as appropriate in the main report.
- 4.2. The original Leisure Management Agreement (LMA) was procured under the Public Contracts Regulations 2006 (PCR 2006), and at the time this contract was procured, variations to contracts were governed by the principles laid out in the Priesse Case and subsequent case law. These principles were codified in Regulation 72 of the Public Contract Regulations 2015 (PCR 2015) and contracts (apart from public works) awarded under the 2006 Regulations are subject to Regulation 72.
- 4.3. Regulation 72 established six permitted types of variation, known as "safe harbours" and the advice provided by BM with regards the implications of these to what is being proposed by GLL can be found in this report at paragraph 9 (Legal and Statutory Implications) and Appendix 3.

#### **5 ALTERNATIVE OPTIONS**

- 5.1. Financial and specialist leisure business advisors, FMG, have prepared a business case on the contract options for the council. There are a number of options offered for the length of term of the contract. These are:

- **Option A** - The Council incorporates the new MLC into GLL's existing contract with no contract extension and the contract expires on 30<sup>th</sup> November 2025;
  - **Option B** - The Council incorporates the new MLC into GLL's existing contract and enacts the two-year extension (contract expiry on 30<sup>th</sup> November 2027);
  - **Option C** - The Council incorporates the new MLC into GLL's existing contract and grants a 5-year extension (i.e. the 2-year extension clause plus a further 3 years – contract expiry 30<sup>th</sup> November 2030). The extension would require a change in the terms and conditions of the existing contract and would be implemented by way of a Deed of Variation;
  - **Option D** – The Council incorporates the new MLC into GLL's existing contract and grants a 5-year extension without enacting the 2-year extension clause (i.e. contract expiry 30<sup>th</sup> November 2030 but the 2-year extension is retained as a possible further extension to 30<sup>th</sup> November 2032) The extension would require a change in the terms and conditions of the existing contract and would be implemented by way of a Deed of Variation;
  - **Option E** – The Council incorporates the new MLC into GLL's existing contract and grants a 10-year extension (i.e. the 2-year extension clause plus a further 8 years – contract expiry 30<sup>th</sup> November 2035). The extension would require a change in the terms and conditions of the existing contract and would be implemented by way of a Deed of Variation.
- 5.2. Additional to the length of the contract term and not dependent on the outcome of that decision there is one further option for inclusion in the LMA going forward. This option is:
- **Option F** – Add in the operation of the café development at Canons Leisure Centre as part of the HLF project;
- 5.2.1. Adding this option into the existing contract would require a change in the terms and conditions, which would be implemented by way of a Deed of Variation.
- 5.3. The option of whether or not Merton would wish to amend the contract structure from a management agreement to a lease agreement was considered by the council's legal advisors, BM, and they have advised that this would be such a fundamental change that it would result in a new contract and Regulation 72 could not be relied on.

## **6 CONSULTATION UNDERTAKEN OR PROPOSED**

- 6.1. Consultation has been undertaken with both the Environment & Regeneration Departmental Procurement Group on the 11 December 2017 and the Corporate Procurement Board on 19 December 2017. The advice and guidance received from those consultations has been included within this report.
- 6.2. The Council will publish an OJEU contract notice advising the industry of the Council's intentions thus allowing any challenges to come forward as part of due process.
- 6.3. Further consultation will be undertaken with GLL to firm up the detailed documentation and final financial position in relation to the selected proposals once the Cabinet decision is known.

- 6.4. Further discussions with the Canons HLF project team as to the inclusion or otherwise of the Café operation linked to the Madeira Hall redevelopment.

## 7 TIMETABLE

- 7.1. The timetable is as follows:

**Table 1 – Timetable for Leisure Management Agreement Implementation**

Activity	Date: 2018
Leaders Strategy Group	29 Jan
Cabinet	19 Feb
Deadline for Internal Council 'Call-In' - noon (If no 'call in' timetable continues – otherwise delayed until 'call-in' considered)	26 Feb (noon)
Finalise discussions with GLL	Mar - May
Publish OJEU contract notice	15 May
30 day period for objections ends	15 June
Changes to LMA approved (subject to no objections)	15 July
Complete DoV documentation for signing	1 August

## 8 FINANCIAL, RESOURCE AND PROPERTY IMPLICATIONS

- 8.1. Prior to any further discussions with GLL the Council will undertake a fresh review of GLL's financial standing to ensure that they are financially capable of being able to deliver against the proposed revised contract at this point in time.

### REVENUE

This section contains exempt information and has therefore been moved to an exempt Appendix (Appendix 1 – Leisure Management Agreement).

### CAPITAL

- 8.15. GLL have advised that they would wish to operate the new café as part of the council's Canon's HLF project, but in order to make this a venue that communities and families frequent they would wish to redevelop the Madeira Hall as a children's soft play facility.
- 8.16. GLL are not able, at this time, to use their own capital finances to redevelop the Madeira Hall into a soft play facility but are able to repay the council over the period of the extended Leisure Management Agreement should the council be able to fund the capital investment.
- 8.17. The current estimated projected cost for this development is £435,039. The current capital programme contains no provision for this loan. If progressed a scheme would need to be added to the programme in accordance with financial regulations.

- 8.18. Should the council be able to agree to the option for GLL to operate the café, officers would bring forward a request for capital funding to be available in line with the HLF capital investment plans. (Note: The revenue position for this development is not included in this report's revenue plans as these are limited to changes relating to the potential contract extension).
- 8.19. This capital investment would be a one-off and GLL/subsequent leisure operators would be expected to bear the costs of refurbishments and upgrading within their base trading accounts.

### **PROPERTY**

- 8.20. The life of a new leisure facility should be expected to be 50-60 years.
- 8.21. As part of the Deed of Variation to the Operations Contract with GLL a new lease will need to be granted for the Morden Leisure Centre and the existing lease for Morden Park Pools brought to an end. These processes will be undertaken during 2018 in readiness for the opening of the new centre.
- 8.22. To provide the necessary electrical supply to the centre it was determined that a new sub-station would need to be provided within the service yard of the new MLC. To provide this the council have agreed to enter into a lease with UKPN for a term of 99 years at a peppercorn rent.
- 8.23. In order for the council to meet statutory obligations under section 123 of the Local Government Act 1972 to enable them to enter into the lease referred to in 8.21 the council is required to carry out a consultation which requires they publish two consecutive notices under section 123 of the Local Government Act 1972 of their intention to grant a lease of a small parcel of land which is public open space to UKPN and consider any objections. The notice was duly published on the 28 July and 4 August 2016, no objections were received. The council is therefore able to enter into the lease with UKPN when required.
- 8.24. In accordance with their statutory obligations under section 123 of the 1972 Act the Council are also required to publish Notices of their intention to grant a lease under section 123 to GLL of Morden Leisure Centre and work on this process has commenced.

## **9 LEGAL AND STATUTORY IMPLICATIONS**

- 9.1. The original procurement process was undertaken in accordance with the Council's Contract Standing Orders, the Council's Procurement Strategy and the Public Contracts Regulations 2006 (PCR 2006).
- 9.2. The operation of the centre will be by Greenwich Leisure Limited (GLL). When the last leisure centre contract was let (December 2010) it allowed for the closure of Morden Park Pools and for the operation of a replacement leisure centre.
- 9.3. The council has a statutory obligation under section 123 of the local Government Act 1972 to advertise its intention to grant a lease of land which is held as public open space and to consider any objections to the proposal. Morden Park is held by the council as public open space. This obligation has been discharged to allow the lease to UKPN to go ahead. The work on the advertisement for the Morden Leisure Centre is underway.

- 9.4. GLL have proposed amending the contract structure from a management agreement to a lease agreement with the relevant terms and re-structuring the payment as a rental payment. This latter option would have advantages for the Council with regards VAT. However as stated above in paragraph 5.3 this would constitute a fundamental and material amendment to the contract structure which would lead to a new contract requiring a new procurement in order not to be in breach of the Public Contract Regulations 2015.
- 9.5. Other modifications have been proposed and advice sought from BM. The modifications in question being Options C and D in Paragraph 5.1 above and Option F in paragraph 5.2 above. The full advice from BM can be found in the exempt Appendix 3 attached to this report.
- 9.6. With regards Option C and D the advantages of these are improved financial outcomes for the Council and a better return on investment. BM had previously advised that there was scope to rely on the provisions of Regulation 72 with regard these options and before finalising their advice they required further information which the Council could provide by way of a business case in support of the modifications. FMG Consulting (FMG) has provided a business case and BM have confirmed that with regards Option C or D, Regulation 72(1)(b) could apply and that on the facts and reasons for the proposed extension both limbs of the test for Regulation 72(1)(b) appear to be met (see Appendix 3 to this report). Regulation 72(1)(b) requires the publication of an OJEU contract notice.
- 9.7. With regards Option F, Madeira Hall is currently under the management of GLL under the current LMA. The Council is delivering a Heritage Lottery Funder project which includes an extension to Madeira Hall and the provision of a café facility. The proposed modification to the LMA is an extension of the services being provided, by including in those services a new café facility and converting Madeira Hall into a soft play facility. The advice from BM is that it is possible for the Council to rely on either Regulation 72(1)(b) or Regulation 72(1)(c) in these circumstances. A contract notice will be required if either of these grounds are relied on.

## **10 HUMAN RIGHTS, EQUALITIES AND COMMUNITY COHESION IMPLICATIONS**

- 10.1. There are not expected to be any human rights implications or community cohesion implications for this report.
- 10.2. The due processes being undertaken by the council in considering changes to be made to an existing Leisure Management Agreement entered into in December 2010 are ensuring that the council gives proper consideration to the equal opportunities of other potential contractors, both from the time of the original procurement and those that could be wishing to bid to future contracts with the council. A transparent and open approach is being taken, as far as is possible, whilst also taking account of the commercial confidentiality of the existing contractor.
- 10.3. The publication of a contract notice within the OJEU will be required.

## **11 CRIME AND DISORDER IMPLICATIONS**

- 11.1. None for the purposes of this report.



## 12 RISK MANAGEMENT AND HEALTH AND SAFETY IMPLICATIONS

- 12.1. There are no health and safety implications for the purposes of this report.
- 12.2. Risk, assumptions, issues and dependencies are being actively managed as part of the programme.

### 12.3. Table 6 – Risk Assessment of the Options

	IMPACT ->	1- Negligible	2- Minor	3 - Moderate	4 - Major	5 - Severe
Likelihood	1 - Rare	INSIGNIFICANT	LOW	LOW	MODERATE	MODERATE
	2- Unlikely	LOW	MODERATE	MODERATE	MODERATE	HIGH
	3 - Possible	LOW	MODERATE	MODERATE	HIGH	HIGH
	4 - Likely	MODERATE	MODERATE	HIGH	HIGH	EXTREME
	5 - Almost Certain	MODERATE	HIGH	HIGH	EXTREME	EXTREME

Option	Details:	Likelihood	Impact	Risk	Risk	Recommended Management Strategy and Response	Likelihood	Impact	Risk	Residual Risk	Current Status
<b>A</b>	No contract extension. Contract expires on 30 <sup>th</sup> November 2025	1	1	1	I	No contract change required	1	1	1	I	Deed of Variation would remove MPP and add MLC
<b>B</b>	Enact the two-year extension. Contract expiry on 30 <sup>th</sup> November 2027	2	1	2	L	Cabinet awarded this decision to be taken under delegated authority	2	1	2	L	Could enact this decision and add two year extension into the Deed of Variation
<b>C</b>	Grants a 5-year extension (i.e. the 2-year extension clause plus a further 3 years) Contract expiry 30 <sup>th</sup> November 2030	3	3	9	M	Publish an OJEU contract notice and wait the statutory 30 days before confirming contract extension decision	3	2	6	M	Await decision and then take necessary steps to minimise risks of challenge. If challenged would revert back to review decision further in light of the challenge
<b>D</b>	Grants a 5-year extension without enacting the 2-year extension clause. Contract expiry 30 <sup>th</sup> November 2030 but the 2-year extension is retained as a possible further extension to 30 <sup>th</sup> November 2032	3	3	9	M	Publish an OJEU contract notice and wait the statutory 30 days before confirming contract extension decision	3	2	6	M	Await decision and then take necessary steps to minimise risks of challenge. If challenged would revert back to review decision further in light of the challenge
<b>E</b>	Grants a 10-year extension (i.e. the 2-year extension clause plus a further 8 years) Contract expiry 30 <sup>th</sup> November 2035	3	4	12	H	Publish an OJEU contract notice and wait the statutory 30 days before confirming contract Note: If a challenge were to be forthcoming reverting back to Options C or D may not be possible	3	3	9	M	Await decision and then take necessary steps to minimise risks of challenge. If challenged would revert back to review decision further in light of the challenge

<p><b>F</b></p>	<p>Add in the operation of the café development at Canons Leisure Centre as part of the HLF project</p>	<p>3</p>	<p>3</p>	<p><b>9</b></p>	<p><b>M</b></p>	<p>Should this option wish to be taken up - Publish an OJEU contract notice and wait the statutory 30 days before confirming contract extension decision</p>	<p>3</p>	<p>2</p>	<p><b>6</b></p>	<p><b>M</b></p>	<p>Await decision and then take necessary steps to minimise risks of challenge. If challenged would revert back to review decision further in light of the challenge</p>
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### **13 APPENDICES – THE FOLLOWING DOCUMENTS ARE TO BE PUBLISHED WITH THIS REPORT AND FORM PART OF THE REPORT**

#### 13.1. Appendix 1 – Leisure Management Agreement – Exempt Sections of the Main Report

13.1.1. Exempt from publication by virtue of paragraph(s) 3 of Part 1 of Schedule 12A of the Local Government Act 1972

13.1.2. This Appendix is exempt from publication as it contains information relating to the financial or business affairs of any particular person (including the authority holding that information)

#### 13.2. Appendix 2 – Business Case – FMG

13.2.1. Exempt from publication by virtue of paragraph(s) 3 of Part 1 of Schedule 12A of the Local Government Act 1972

13.2.2. This Appendix is exempt from publication as it contains information relating to the financial or business affairs of any particular person (including the authority holding that information)

#### 13.3. Appendix 3 – Procurement Advice – Blake Morgan

13.3.1. Exempt from publication by virtue of paragraph(s) 3 of Part 1 of Schedule 12A of the Local Government Act 1972

13.3.2. This Appendix is exempt from publication as it contains information relating to the financial or business affairs of any particular person (including the authority holding that information)

### **14 BACKGROUND PAPERS**

#### 14.1. Project files.