

Report to the Council

Committee: Cabinet

Date: 28 July 2005

Portfolio Holder: Councillor C Whitbread

Item: 5(a)

1. ALTERNATIVE MANAGEMENT OF THE COUNCIL'S LEISURE FACILITIES - AWARD OF CONTRACT

Recommending:

That a 7 year contract (3 years for Epping Sports Centre) be awarded to Sports and Leisure Management Limited subject to:

- (a) Agreement on the detailed arrangements for the calculation of the Council's contribution to salaries/wages and pension costs above the rate of inflation;**
 - (b) Satisfactory receipt of outstanding information with respect of Memorandum of Association and Licences to Occupy; and**
 - (c) Satisfactory conclusion of the Method Statements.**
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Introduction

- 1.1 At its meeting on 14 March 2005, the Cabinet reaffirmed a previous decision to enter into negotiations with Sports and Leisure Management Limited as the Council's preferred bidder for the alternative management of the Council's leisure facilities, on the basis of a 7 year contract. The Cabinet also agreed that a further report should be submitted on the outcome of the negotiations to enable the detailed arrangements to be agreed. These decisions were subsequently confirmed by the Council.

Negotiations with Preferred Partner

- 1.2 In accordance with the wishes of the Council, Council Officers met with the Senior Management of LSM on 17 May 2005. Positive discussions were held which enabled a number of issues to be clarified and the main points which required further discussion for resolution were identified.
- 1.3 It was agreed that the three main considerations to be negotiated were:
- (a) The award of relief from national non-domestic rates;**
 - (b) Risk of external challenge to rate relief; and**
 - (c) The management fee annual uplift indice.**

- 1.4 The meeting concluded with the parties agreeing to consider their respective positions in relation to these three key issues, with a view to reconvening within a few weeks.
- 1.5 In the intervening period, SLM's facility management specialists attended Ongar Leisure Centre, accompanied by representatives of movable floor contractors. This meeting confirmed that the movable floor is technically achievable within the tender budget estimates. The visit also helped to clarify ongoing general maintenance responsibilities for the Leisure Centres. In addition SLM confirmed their intention to convert the squash courts and bar at Ongar Leisure Centre to health and fitness facilities, whilst acknowledging the concerns of current users.

The Award of Relief from National Non-Domestic Rate and Risk of External Challenge

- 1.6 Whether SLM are entitled to relief from NNDR, and if they are who should bear the risk of any subsequent loss of this relief is a key consideration, particularly given that the majority of the revenue benefit to the Council, hinges on this matter.
- 1.7 SLM submitted their bid assuming that they could obtain NNDR relief by having a not for profits subsidiary enter into the leases for the buildings with the Council. The trading companies would then occupy the relevant parts of the building through a non-exclusive licence to occupy. This structure raises two main questions:
 - (a) Is the not for profit company a charitable organisation and therefore entitled to relief?; and
 - (b) Are the trading companies occupying such areas such that charitable status is not applicable to those areas?

Charitable Status of SLM Community Leisure Limited

- 1.8 At the meeting on 17 May, SLM outlined their proposed operating structure in more detail and agreed to provide Counsel's opinion supporting their entitlement to NNDR Relief. The opinion was received on 13 June, but the Instructions to Counsel were not. Unfortunately despite further requests, the Instructions to Counsel and copy of the Memorandum of Association of SLM Community Leisure Limited had still not been supplied. However, the Council has received the firm assurance that they will be provided.
- 1.9 SLM Community Leisure Limited satisfies the definition of a charity as it was established only for the purpose of the provision of facilities for recreation or other leisure time occupation with the facilities provided in the interests of social welfare. Counsel has advised that the Memorandum of Association is in line with the Recreational Charities Act 1958 and as a result the objects of the company are charitable and it has been established for charitable purposes only.
- 1.10 Counsel has also stated that in the circumstances, it appears that provided SLM Community Leisure Limited can properly be said to be the occupier of the hereditament that both mandatory and discretionary rate relief can be given. This raises a further material consideration as to who is occupying the property.

Occupation of the Facilities

- 1.11 The Contract would be entered into with SLM Limited who would then grant a sub-lease to SLM Community Leisure Limited which in turn would issue non-exclusive

licences to occupy to SLM Fitness and Health Limited and SLM Food and Beverage Limited. As long as SML Community Leisure Limited is the occupier relief can be awarded. A problem would arise if either of the trading companies are deemed to be occupying the part of the premises they are using. If this is the case then separate rate bills would be issued to the trading companies for their respective areas.

- 1.12 If this matter were to be challenged in the courts, the situation would be determined on the basis of the facts not the paperwork. Therefore, a danger exists that if a challenge is raised, and if that challenge ends up in court, it might be decided that facts were that, the trading companies were exclusively occupying the relevant areas and relief should not have been given for those areas.

Policy and Financial Implications

- 1.13 The Council's current policy on the award of rate relief has been to follow a strict definition of what constitutes a charity. Such that unless an organisation is a registered charity it does not qualify for mandatory relief.
- 1.14 Clearly, having considered Counsel's opinion in this instance and having revisited the legislation an organisation does not need to be a registered charity to be a charitable organisation. However, SLM have advised that they have applied for charitable status for SLM Community Leisure Limited and anticipate the company being constituted as a charitable independent provenance society by October 2005.
- 1.15 A bigger financial implication could follow from the award of the top-up 20% discretionary relief. Currently where premises have qualified for mandatory relief, top-up has not been available except in respect of properties occupied by local scouts and guides organisations, village halls which provide a post office facility and hospices within the district.
- 1.16 Where top-up relief is granted the Council must bear 75% of the cost. The current policy could be expanded to include leisure premises operated by charitable organisations. If top-up relief were awarded to SLM on the Leisure Centres, it would cost the Council approximately £29,350 per annum. If top-up relief were made available to the 8 other leisure premises that have mandatory relief this would have an annual cost in the order of £8,550. Additionally, if the Council were to start awarding top-up relief more widely it might become difficult to defend not giving it to many other organisations.
- 1.17 The cost of expanding the top-up policy, £37,900 is broadly similar to the value of the top-up for Council Leisure Centres, £39,100. However, it was considered prudent, to avoid future potential liabilities from widening the policy, to refuse to grant top-up relief to SLM.

Risk of External Challenge

- 1.18 The other point on NNDR is who should bear the risk of any loss of relief. SLM initially stated that the Council would have to bear this risk. At the discussions held on 17 May, a sliding scale was suggested for sharing the risk such that in the first year, SLM might bear 100% of any loss, then in the second SLM might bear 90% and the Council 10% and so on. SLM indicated they were prepared to consider such a mechanism.

Management Fee Annual Uplift Indice

- 1.19 The Council whilst recognising an entitlement for the contractor to receive an annual uplift to the management fee, to reflect increase in costs, had proposed an all embracing indice to achieve future surety and to assist financial planning. SLM expressed a contrary view, in as much as they believe that some costs are genuinely outside of their control i.e. utilities (water, electricity, gas), pay awards for staff, TUPE transferred on NJC Conditions and similarly employer's pension contributions.
- 1.20 Members will recall that the Council has to bear significant increases in energy costs this financial year as a result of higher tariff from the utilities companies. With respect to the leisure facilities, SLM had previously agreed to contribute to these increased costs in the region of £68,000 per annum. Although the management fee would be raised by £30,000 per annum to reflect the Council's contribution. The Council's position has been, that as experienced commercial contractors, SLM should have priced the risk within their tender. Whilst they claim to have done this in part, largely to cover anticipated inflationary increases, they sought further concessions.

Outcome of Negotiations at a Further Meeting Held on 22 June 2005

- 1.21 On 22 June, a further meeting was held between officers and SLM and part of that meeting was held in the presence of the Leader of the Council and the Leisure Portfolio Holder.
- 1.22 After due consideration of the respective positions and movement by both parties, the meeting reached a mutually agreed general position on the key points. The main points of the negotiation are broadly outlined in the attached letter from the Head of Leisure Services to SLM. SLM have subsequently confirmed their formal acceptance by letter dated 27 June 2005, also attached as an Appendix to this report.

Conclusion

- 1.23 In summary, SLM have agreed in principle:
- (a) That, whilst they accept that the Council are minded to grant mandatory relief (subject to satisfactory receipt and acceptance of the Memorandum of Association of SLM Community Leisure Limited and details of the proposed Licences to Occupy. The Council is likely not to change its current policy with regard to discretionary relief, and therefore, for the duration of the contract, SLM will contribute 50% towards the cost of the remaining NNDR; this currently equates to £40,000 per annum in total and as a result SLM will need to find £20,000 in year 1; and
- (b) That to alleviate concern about the loss of rate relief as a result of external challenge, the parties enter into a tapered risk share arrangement as detailed below; in the event of the contract being extended by the optional 3 further years, this would be split 50/50 in each year; as any successful challenge would be likely to contain a retrospective element, each party would meet their cumulative share at any given time on the tapered basis agreed.

Risk Share:

Year	SLM%		EFDC %	
	annual	cumulative	annual	cumulative
1	100	100	0	0
2	83	91.5	17	8.5
3	67	83	33	17
4	50	75	50	25
5	33	67	67	33
6	17	58	83	42
7	0	50	100	50
8 to 10	50	50	50	50

(c) SLM will bear all future costs of utility cost increases, but the Council will meet the additional costs of salaries/wages of the average NJC Pay Award percentage settlement being in excess of RPI; in addition with respect to employer's pension contributions, on the assumption that SLM achieve admitted body status to the Local Government Superannuation Scheme, the Council will bear the cost of any increase in the rate of employer's contribution in excess of RPI;

(d) SLM will cover the costs of a part-time leisure attendance post omitted from their tender in error; approximately £8,000-£10,000 per annum; and

(e) In order to recognise movement by SLM, the Council will increase the management fee at the start of the contract by £10,000; therefore, this will form part of the annual uplift; this will be in addition to the £30,000 already agreed, to reflect increase in utilities costs.

Statement in Support of Recommendation

- 1.24 The Council has embarked on an extensive review of alternative management options. The tender received from SLM achieves the Council's key objectives, with respect to transfer of the majority of financial risk, capital investment and lower annual revenue costs. The contract documentation will protect the quality and diversity of the service and enable future access. SLM have maintained a consistently high level of interest in the opportunity to manage and develop the Council's leisure provision. They have expanded considerable resources over a protracted tender period and demonstrated good faith in the negotiations. They have also voiced a strong desire to establish an effective partnership.
- 1.25 Whilst this is accepted that the final detailed arrangements to be enshrined in the contract documents will need to be developed and agreed, any further renegotiation or reconsideration outside of the broad principles, will incur considerable delay and further uncertainty for users and staff.
- 1.26 The Council agrees the recommendation that it will be possible to achieve the contract start date of 1 November 2005.

Budget Provision

- 1.27 At the Ad Hoc Working Group on 7 December 2004 members were presented with tables of financial data comparing updated estimates for 2004/05 to the proposals of the 3 providers still involved at that point. The data relating to the 7 year option for SLM is reproduced below:

	Full Elimination of Support Service Costs £ 1,000	No Reduction in Support Service Costs £ 1,000
Total 7 year savings	4109	1378
Equivalent Annual Saving	587	197

- 1.28 As set out above, during the course of negotiations to reflect increased utility costs and other changes it has been necessary to allow an increase in the annual management fee of £40,000, although £20,000 of this is offset by the NNDR that SLM will be paying. This will reduce the savings figures expressed above against the updated 2004/05 position. However, it should be borne in mind that if a comparison is made against current costs and income a different picture would be seen.