



LEE VALLEY REGIONAL PARK AUTHORITY
AUTHORITY MEETING
23 JANUARY 2020 AT 14:00

Agenda Item No:

7

Report No:

A/4278/20

OPTIONS FOR MANAGEMENT OF THE SIX SPORTS VENUES

Presented by the Chief Executive

SUMMARY

This report outlines the current position following the decision by the Authority in October 2019 (paper A/4275/19) to move to the preferred bidder stage following the procurement process and decision to award the contract for the new 10 year Leisure Services Contract to GLL. This paper updates Members on the progress since then, outlines issues that have arisen relating to a legal challenge made on the procurement process and provides three (3) management options for the Authority to consider and agree to ensure continuation of the services at the six sports venues from 1 April 2020.

RECOMMENDATIONS

Members Note: (1) bringing the six sports venues under Authority management for a short period from 1 April 2020 following the expiry of the current Leisure Services Contract and pending the application to lift the block on signing the longer Leisure Services Contract with GLL for the reasons set out in the report; and

Members Approve: (2) the Executive Committee recommendation that the Authority commences the TUPE process in relation to the 6 sports venues.

BACKGROUND

1 As Members are aware the current Leisure Services Contract (LSC) with Lee Valley Leisure Trust Ltd (the Trust) expires on 31 March 2020. Members approved the commencement of the procurement process for the new LSC in accordance with the Public Contract Regulations 2015 (Regulations) in November 2018 (Paper E/598/18).

2 The procurement related to the six sports venues only which are:

- Lee Valley VeloPark (LVVP);
- Lee Valley White Water Centre (LVWWC);

- Lee Valley Hockey & Tennis Centre (LVHTC);
 - Lee Valley Riding Centre (LVRC);
 - Lee Valley Athletics Centre (LVAC); and
 - Lee Valley Ice Centre (LVIC).
- 3 At the final stage of the procurement process, two bidders (the Trust and GLL) remained in the process and each submitted bids. Following the scoring stage officers recommended that GLL, who achieved the highest overall score, as the preferred Bidder be awarded the new LSC. Members approved this decision in October 2019 (Paper A/4275/19). Authority officers informed both bidders by way of a contract award letter dated 17 October 2019 at which time the 10-day Standstill period required by the Regulations commenced. The Trust questioned the detail of the award letter and its sufficiency to satisfy the procurement requirements. To resolve that issue, an amended contract award letter was sent out on 1 November 2019, which in turn initiated a further 10 day standstill period and then the Authority received a legal claim from the Trust on the last day of that standstill period.

LSC PROCUREMENT CHALLENGE

- 4 On 20 November 2019, the Authority received a legal claim ("Claim") from the Trust challenging the lawfulness of the Authority's decision to award the LSC to GLL. The challenge alleged that the Authority has:
- failed to provide adequate information to the Trust to enable it to understand the decision to award the contract to GLL;
 - failed to treat all bidders equally and act in a transparent manner for failing to disclose relevant criteria;
 - failed to take proper account of information provided by the Trust; and
 - it also alleged that there were manifest errors in the evaluation of the Trust's bid.
- 5 By way of outcome, the Trust are seeking to set aside the Contract. They are also making, as an alternative, a substantial claim for damages.
- 6 Following external legal advice, the Authority has entered its defence which robustly defends all aspects of the Claim made. The Trust has made an application for disclosure of a wide-ranging series of categories of documents including the bid from GLL which the Authority has voluntarily responded to, providing some but not all of the material sought by the Trust. This may result in a court hearing to determine the extent of disclosure that should be given at this stage. It is clear that the process of litigation will take time and it is estimated that, in the event the Claim proceeds to a full trial, it could take at least a year from this point before the outcome is known, taking into account the need to satisfy all of the preliminary stages of the litigation procedure before a trial date can be set.
- 7 As a result of the Claim there is currently a block on the Authority being able to sign the contract that it has awarded to GLL. Absent of any action by the Authority to remove that block, that will prevent the Authority from entering into that contract.
- 8 The 3 possible outcomes from the Claim are:
- Claim is unsuccessful and long term contract entered into with GLL;
 - Claim is found to have merit - damages awarded to the Trust; and/or

- the Authority is directed to set aside its decision to enter into the contract with GLL (which in practice will require the Authority to carry out a fresh procurement exercise).

9 The Authority has taken and continues to take external legal advice in connection with its defence of the Claim, including in connection with action it may take in the short-term to remove the block on entering into the GLL contract.

OPTIONS FOR MANAGEMENT OF THE SIX SPORTS VENUES FROM 1 APRIL 2020

10 As mentioned above the Authority is currently unable to enter into the new 10 year LSC with GLL. There is a process by which the block may be lifted, involving an application by the Authority to the Court. Any such application will not be determined until around end of March/April at the earliest. The current LSC and the related commercial lease arrangements end on 31 March 2020 and so the Authority needs to put in place arrangements for the management and operation of its 6 sports venues. On the assumption that the Trust continues to pursue the Claim this could take in excess of a year to resolve. The Authority is therefore looking at an interim arrangement.

11 Any interim arrangement would be for the 6 sports venues. The current LSC is for 14 venues. In October 2019 (Paper A/4273/19) the Authority made a decision to bring the 8 smaller (non LSC) venues back under Authority management and the process of implementation for the transfer of those venues is underway. There is therefore no option to extend the current contract in its existing form with the Trust – the contract would need to be varied to take out the smaller venues.

In addition, the likelihood of being able to agree terms to vary the current contract (including setting an appropriate level of Management Fee for the interim period) within the short timeframe appears very challenging, given that the setting of the Management Fee for the final year of the current contract is now the subject of High Court litigation brought by the Trust.

For these reasons, extending the Trust's existing contract with the Authority does not appear a viable option.

12 There is a requirement to create a trigger for the transfer of undertaking – the TUPE process that requires a minimum of 45 days (and needs therefore to commence no later than 15 February). Therefore, the decision to determine the interim arrangements for the 6 sports venues needs to be taken before the end of January. There is also the process of negotiating any new contract with a third party operator which could commence once a decision has been taken and run in tandem with the TUPE process. Recognising that extending the existing contract with the Trust is not an option, there are 3 options for interim management which are set out in the report. These options are:

- to enter into an interim contract with GLL;
- to enter an interim contract with the Trust; and
- the venues come under the Authority's management for an interim period.

13 Analysis of these options is provided in the Part 2 report (Paper A/4277/20).

NEXT STEPS

- 14 For the reasons set out in Paper A/4277/20, it is the officers' recommendation to the Authority that the Services which are subject to the current LSC until 31 March 2020 return under the Authority management at the expiry of the current contract. Whilst there are increased financial costs associated with this decision it is currently the option with the most financial certainty and control and provides certainty and assurance for the staff, which in turn will provide the business continuity required. It is also the option that carries the lowest level of legal risk, given the procurement law issues identified in the privileged analysis set out in the Part 2 report (Paper A/4277/20). Officers can then proceed to liaise with the Trust on TUPE and final contract arrangements to bring the current contract to an end and bring the venues back under Authority management.
- 15 In the meantime, the Authority will continue to pursue an application to lift the block on signing the longer term LSC and if successful will be able to enter into the new contract with GLL whilst the litigation against it continues.

STAFF COMMUNICATION

- 16 There will be two stages to staff communications following the Member decision. Firstly, on Thursday afternoon the decision itself will be communicated to all Authority staff via email. The part 1 paper will be attached. The part 1 report will also be posted on the Authority's intranet.
- 17 The second stage which will be the formal TUPE consultation period will involve meetings between Authority and Trust staff respectively. Staff meetings across the Authority and the Trust will need to take place by the second week in February to comply with TUPE requirements.

ENVIRONMENTAL IMPLICATIONS

- 18 There are no environmental implications arising directly from the recommendations in this report.

FINANCIAL IMPLICATIONS

- 19 The financial implications are provided in the Part 2 report (Paper A/4277/20).

HUMAN RESOURCE IMPLICATIONS

- 20 Transfer of Undertaking (Protection of Employment) Regulations (TUPE) will apply to all staff operating at the 6 sporting venues within the LSC. The staff will return to the Authority on their current terms and conditions.

LEGAL IMPLICATIONS

- 21 Legal considerations are also covered within the main body of this report. The Regulations apply to the procurement of the new LSC. As the contract value of the 6 sports venues is above the threshold for the provision of services, the Regulations also apply for any temporary contract arrangement.
- 22 The obvious means by which to mitigate procurement challenge risk would be to run a procurement procedure in accordance with the Regulations for a contract to provide the Services for the duration of the Interim Period. There is, however,

unlikely to be sufficient time to prepare and run a compliant (and satisfactory to the Authority) process to enable service readiness in time for the commencement of the Interim Period (1 April 2020). There are exemptions from the requirements of the Regulations applicable to certain public sector contracts but on an initial assessment it is considered unlikely that any of these would apply to a short-term contract award. In addition, an obvious drawback with running a procurement procedure for the Interim Period (accelerated or otherwise) would be the potential allocation of costs and resources. This needs to be weighed up against the benefits of avoiding potential further procurement challenges by running such a process.

- 23 The Authority is permitted to enter into arrangements with third parties and grant commercial leases by virtue of the Lee Valley Regional Park Act 1966 (the Park Act). As any temporary arrangement for the Interim Period would be for less than 7 years there will be no need to demonstrate best consideration under the Park Act and obtain consent from the Secretary of State. If option 1 or 2 is decided, then the Authority will need to negotiate the terms of a short-term contract with a third party and will also need to grant 6 separate leases for occupation of its venues. If the venues return to Authority management for an interim period, then the venues will simply revert to the Authority. The commercial lease arrangements which are in place for the venues on the expiry of the current LSC on 31 March 2020. The commercial lease arrangements in place are excluded leases under the Landlord and Tenant Act 1954 (LLTA 1954) and cannot be extended in any event. If arrangements were put in place post 1 April 2020 with a third party operator then new leases would need to be granted to comply with the LLTA 1954.
- 24 The Trust commenced a legal challenge against the Authority in the High Court on the procurement process and award of the new LSC to GLL. The Authority has filed its defence and the Trust have made an application for disclosure which is being responded to by the Authority. The effect of the challenge is to place a block on the Authority in that it is unable to proceed to sign up to the new 10 year LSC with GLL. The Authority is able to make an application to lift the block and if successful it would mean that it can proceed to signing up to the long-term contract with GLL whilst the challenge on the procurement process continues to run its course. If the application can be made in the next few weeks then there is a likelihood that the application can be heard in April. This may mean that the need for the short-term arrangement could be as short as 3 or 4 months taking into account the work that will still be needed to complete the longer term arrangement with GLL.
- 25 At the point when the Authority is able to proceed to sign the new 10 year LSC contract with GLL officers will return to Members with an overview of the legal documentation setting out the main terms of the contract and highlighting the main obligations/liabilities that will sit with the Authority. Formal approval will also be required for entering into commercial leases for the 6 sports venues for the longer term LSC with a valuation report for best consideration. Following this approval any consents will be sought from Sport England (and other venue funders) and Secretary of State consent will be required under the Park Act for the leases as they will be for a period longer than 7 years.

RISK MANAGEMENT IMPLICATIONS

- 26 Risk management implications are provided in the Part 2 report (Paper A/4277/20).

EQUALITY IMPLICATIONS

- 27 There are no equality implications arising directly from the recommendations in this report.

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PREVIOUS COMMITTEE REPORTS

Authority	A/4275/19	LSC Tender Process Update	17 October 2019
Executive	E/632/19	LSC Tender Process Update	21 March 2019
Executive	E/614/19	LSC Tender Process Update	21 November 2018
Executive	E/598/18	New LSC – Shadow Bid, Part 2 Affordability Threshold, Investment Strategy, Pension, Financial Waiver and Negotiable Areas	23 November 2018
Authority	A/4254/18 Part 2	New LSC – Procurement Strategy	26 April 2018
Executive	E/523/17	Appointment of Consultant to assist in the procurement of a new LSC	23 November 2017

LIST OF ABBREVIATIONS

LSC	Leisure Services Contract
the Trust	Lee Valley Leisure Trust Ltd (trading as Vibrant Partnerships)
LPFA	London Pension Fund Authority
the Regulations	Public Contract Regulations 2015
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 2006
the Park Act	Lee Valley Regional Park Act 1966
LLTA 1954	Landlord and Tenant Act 1954