

Agenda item 4 – Urgent Business

Leisure Contract – Proposed extension to the Deed of Settlement to reflect the ongoing impact of COVID19 on the performance of the Leisure Operating Contract.

Summary:	Due to the further COVID19 related restrictions on the sports and leisure facilities, and the uncertainty of when the facilities will be able to operate at pre-COVID capacity, the Council has been approached by the Leisure Operating Contract Operator, Everyone Active, for further financial support, in line with Government guidance. The proposal to extend the Deed of Settlement, agreed for the 2020/21 financial year, caps the maximum cost to the Council. These figures have been independently scrutinised by FMG who have confirmed that they are realistic and in line with other local authorities nationwide.
Options considered:	<ol style="list-style-type: none">1. Do not extend the Deed of Settlement.2. Extend the Deed of Settlement but negotiate lower capped monthly figures.3. Extend the Deed of Settlement based on the proposed figures.
Conclusions:	The Leisure Contract is in its third year of a ten-year contract. The contract took significant resource to procure and represented good value for money; it was not possible to foresee the impact that COVID19 would have on the performance of the contract when it was let. Agreeing the extension of the Deed of Settlement is in accordance with current Government guidance and removes the potential for contractual claims by the Operator. Extending on the monthly capped figures proposed by the Operator removes the risk of further contractual claim or failure during the period, limits the financial liability of the Council and provides certainty for the Operator.
Recommendations:	That Cabinet extend the Deed of Settlement with Everyone Active based on the proposed figures for the financial year 2021/22. To finance any financial liability which becomes due from the Delivery Plan Reserve.
Reasons for Recommendations:	To mitigate the risk of claim on the contract and to limit the financial exposure of the Council.

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LIST OF BACKGROUND PAPERS AS REQUIRED BY LAW

(Papers relied on to write the report, which do not contain exempt information and which are not published elsewhere)

Procurement Policy Note - Supplier relief due to COVID-19 (PPN 02/20)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874178/PPN_02_20_Supplier_Relief_due_to_Covid19.pdf

Procurement Policy Note – Recovery and Transition from COVID-19 (PPN 04/20)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891154/PPN_04_20- Recovery_and_Transition_from_COVID-19.pdf

Cabinet Member(s) Virginia Gay	Ward(s) affected All
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1. Introduction

- 1.1 The Council has a contract with SLM, brand name 'Everyone Active', to operate and manage the six sports and leisure centres across the District.
- 1.2 As well as the Council's own leisure facilities at Fakenham Sports and Fitness Centre, Victory Swim and Fitness Centre and on building completion the new Reef Leisure Centre at Sheringham, the contract also includes the three dual use sports centres based at Cromer, North Walsham and Stalham High School sites.
- 1.3 The Leisure Operating Contract commenced 1 April 2019 and ends on 31 March 2029. There is an option to extend the contract up to an additional five years.
- 1.4 The approximate cost of procurement was £100k, which included consultancy advice, condition surveys and legal fees. In addition to this, extensive officer resource was committed across the organisation at a variety of levels, particularly at a senior level, for a considerable period of time.
- 1.5 On Friday 20 March 2020, all sports and leisure facilities across England were closed as part of the national lockdown arrangements, to control the spread of COVID19. This meant that Everyone Active were unable to operate in the way that the contract envisaged. Although restrictions were eased later in the year, further restrictions were then imposed during the second wave and these facilities have only recently been able to reopen. Even during the period of reopening, there was impact, seen nationally, on level of use within centres such as this with lower uptake than before the pandemic began. In March 2020 Government issued in a number of Procurement Policy Notes (PPN's) including Procurement Policy Note 02/20 - Supplier relief due to COVID-19. This document set out information and guidance for public bodies on payment of their suppliers to ensure service continuity during and after the COVID-19 outbreak to ensure suppliers at risk were in a position to resume normal contract delivery once the outbreak is over.

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- 1.6 Based on this Procurement Policy note and, in line with all other local authorities across the country, the Council agreed to provide financial support for 2020/21 under a Deed of Settlement agreement.
- 1.7 Everyone Active agreed to work with the Council (and its consultant FMG) to ascertain the cost of the closures to Everyone Active on an “open book” basis to inform a negotiated position which complied with both the PPN guidance and the ‘no better or worse’ clause within the contract. This means that Everyone Active include no profit on the amounts claimed.
- 1.8 Following a negotiation process an agreed set of monthly capped amounts were presented to Cabinet. The capped amounts agreed limited the Council’s financial exposure but provided certainty to Everyone Active that allowed them to continue with the contract.
- 1.9 Details of the agreed monthly amounts can be found in Table 1 of the exempt appendix to this report.
- 1.10 Across the settlement period there have been months in which the deficit cap had been reached and exceeded but in other months the deficit has been lower. The actual deficit costs by month are set out in Table 2 of the exempt appendix. This shows that the amount paid is less than the capped amount agreed by Cabinet in 2020.
- 1.11 Councils which ran their own in house leisure facilities could claim up to 75% of the loss of income through Government, this was not available to those who had contracted out services. In December 2020, the Government announced some recovery funding for which local authorities could apply for to assist the recovery of externally operated leisure facilities. This Council bid for this funding was successful in being awarded a total of £215,536. This has offset the overall cost to the Council.

2. Current Position

- 2.1 The Deed of Settlement covered the period from April 2020 to March 2021; it was hoped that this would be a sufficient period to get back to normal operating. There have been further national lockdowns which has resulted in the facilities being closed for longer than expected. Although leisure facilities reopened on 12 April 2021 allowing customers to swim and gym, these activities are still operating under government restrictions, and so maximum numbers are limited.
- 2.2 There remains a great deal of uncertainty regarding restrictions, and when leisure facilities will be able to operate at pre-COVID19 levels. We have therefore now received a financial forecast for 2021/22 and a request for further support from Everyone Active.
- 2.3 The announcement of the roadmap out of lockdown caused Everyone Active to revisit the figures they had been preparing, meaning the information was delayed coming to the Council, the consultation with the FMG caused some further, but necessary delay in confirming the figures to be used in the proposed Deed of Settlement for 2021/22 period. This has required an interim

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agreement between Everyone Active and the Council for the months of April and May.

- 2.4 These financial figures have been arrived at using the “open book” method and the Council’s consultant FMG have confirmed that they are in line with expected levels, reflect the position in other local authorities nationwide, and given the continued uncertainties moving forward this represents a prudent approach by the Operator.
- 2.5 The forecast figures and estimated deficit for this year is set out in Table 3 of the exempt appendix.
- 2.6 The figures represent a worst-case scenario, effectively capping the Council’s financial liability each month, as per the settlement in 2020/21.
- 2.7 The approach reflects the advice set out in the Procurement Policy Note 02/20 in respect of supplier relief due to COVID19.
- 2.8 It is anticipated that, based on the performance of the Operator during 2020/21 and the prudent approach taken to the figures, it is highly likely that Everyone Active will perform better than estimated and the total costs will be less than projected. It is however prudent of the Council to use the projections provided as this provides certainty to both the Council and the Operator.
- 2.9 Procurement Policy Note 04/20 sets out guidance in respect of recovery and transition from COVID19. The Council will keep under review the arrangements with Everyone Active throughout the financial year however, as the payments to Everyone Active are based on “open book” accounting, the approach taken in the Deed of Settlement naturally follows the guidance within the Procurement Policy Note.

3. Options

- 3.1 The following options have been considered in developing this report:
- 3.2 **Option 1. Do not extend the Deed of Settlement**
The Council could choose not to extend the Deed of Settlement. This would leave the Operator to bear the losses fully. This option is not compliant with the guidance set out in the Procurement Policy Note in respect of supplier relief due to COVID19. The Operator may choose to instigate contractual provisions and there is a possibility this may result in an uncapped liability to the Council. If the contract was to fail the Council would have to reprocure the contract afresh with a resource implication for the procurement, no contract in place until a new contract was let and the risk that any future contract would be more expensive as contractors would price the risk both in relation to the pandemic and the approach the Council took to supporting the previous Operator.
- 3.3 **Option 2. Extend the Deed of Settlement but negotiate lower capped monthly figures.**
This option reduces the maximum financial exposure of the Council and is compliant with the Procedure Policy Notes, however, there is no certainty that the Operator would agree to lower figures. The proposed monthly capped figures have been assessed independently and whilst found to be prudently

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cautious they are in line with other contracts across the country. Whilst the likelihood of contractual claim or failure is reduced it is not eliminated.

- 3.4 Option 3. Extend the Deed of Settlement based on the proposed figures
This option provides certainty for both the Council and the Operator and removes the risk of further claim and contract failure. It is compliant with the Procurement Policy Notes guidance.

The Deed of Settlement sets the maximum capped monthly cost to the Council although it can be expected that due to the easing of lockdown, performance of the Operator would be significantly better than this and therefore the actual cost would be significantly lower. This option would mean that any future restrictions imposed through resurgence of COVID19 infections, during the financial year, would not need further negotiations.

4. Conclusions

The Leisure Contract is in its third year of a ten-year contract. The contract took significant resource to procure and represented good value for money; it was not possible to foresee the impact that COVID19 would have on the performance of the contract when it was let. Agreeing the extension of the Deed of Settlement is in accordance with current Government guidance and removes the potential for contractual claims by the Operator. Extending on the monthly capped figures proposed by the Operator removes the risk of further contractual claim or failure during the period, limits the financial liability of the Council and provides certainty for the Operator.

5. Implications and Risks

Without the Deed of Settlement, the risk of contract failure or contractual claim is increased. In the event of contract failure then the Council would be left with no one running the activities covered by the contract leading to an increased reputational risk both with the public in terms of performance of Leisure Services and with any future bidders for the contract.

6. Financial Implications and Risks

There is an increased cost to the Council of extending the Deed of Settlement, compared to the estimates set out when the contract was originally let. The maximum cost of extending the Deed is known and providing COVID19 restrictions ease and remain so, performance of the Operator is likely to be better than the worst case position meaning the cost should be lower than the capped limits. The maximum cost to the Council is set out in the exempt appendix to this report.

If the Deed is not extended, there is a risk of contractual failure leaving no one managing the activities of the contract. This is likely to lead to increased cost of the Council managing services itself, costs of repeated procurement, and potentially higher costs of any future contract; partly linked to bidders reflecting the new risk landscape around COVID19 and partly due to them reflecting the lack of support provided by the Council.

There are clauses within the contract which the Operator could potentially use to seek their additional costs around COVID19, which if made could place the Council into an uncapped financial liability situation. Extending the Deed of Settlement removes the risk of such a claim.

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In terms of the actual financial impact, the worst case scenario is outlined within the exempt appendix. The position will be monitored throughout the year and if any financial liability actually becomes due this will be funded from the Delivery Plan Reserve as required.

7. Sustainability

There are no identified sustainability issues arising from this report.

8. Equality and Diversity

There are no identified equality and diversity issues arising from this report.

9. Section 17 Crime and Disorder considerations

There are no identified crime and disorder issues arising from this report