

Crawley Borough Council

Report to Cabinet 7 September 2022

Leisure Contract – Extension of Variation Order

Report of the Head of Major Projects and Commercial Services, **HPS/32**

1. Purpose

- 1.1 This report sets out the arrangements the Council has entered into with Sport and Leisure Management Limited, who trade as Everyone Active (EA) following the initial lockdown in March 2020 and recommends the Council extend the variation order to facilitate the continued opening of the leisure centres over the period 1 October 2022 – 31st March 2023.

2. Recommendations

- 2.1.1 To the Cabinet:

That the Cabinet is recommended to:

- a) approve the extension of the contract variation with EA under the terms set out in section 5 of this report.
- b) request a further report in Spring 2023 to apprise members of the future of the leisure contract and associated payments.

3. Reasons for the Recommendations

- 3.1 The recommendation facilitates the continued re-opening of the leisure centres providing the opportunity to continue to grow the customer base and membership numbers while ensuring the Council is using mechanisms within the contract with EA to ensure a legally compliant approach.

4. Background

- 4.1 As part of the Covid-19 response, from 20 March 2020, the Government required leisure centres to either be fully closed or to be partially open with restrictions applied to capacity, social distancing and other specific infection control measures.
- 4.2 Also commencing on 20 March 2020, the Government published Procurement Policy Note 02/20 (Supplier Relief Due to Coronavirus). This note advised contracting authorities to put in place 'appropriate payment measures to support supplier cashflow and ensure suppliers who are at risk continue to be paid as normal'. Reflecting PPN02/20, the Council agreed a Deed of Variation (DoV) with EA for an initial three-month period (April – June 2020) which would permit non-payment of the contract fee (£76K per month) and underwrite EA's operational deficits. The DoV has

subsequently been extended a number of times (we are currently on extension 7) and the current DoV expires at the end of September 2022.

- 4.3 With somewhat intermittent growth and the tapering of Government support for the leisure and hospitality sector, the operational deficit for the financial year 2021/22 was reported at £170,000.00.
- 4.4 In December 2020, the Council was successful in applying for a grant of £220,000 to DCMS to support the costs of re-opening leisure centres, 70% of which (£154,000) could be allocated to offset costs in the financial year 2021/22. The net deficit for 2021/22 was therefore £16,000.
- 4.5 Over the period April – June 2022, EA reported growth in membership numbers and general usage at the leisure centres (albeit these remained below the pre pandemic membership and usage). The Omicron variant did halt the positive trend from the earlier part of the year although stronger sales from April show a return to growth in memberships and usage.

5. Description of Issue to be resolved

- 5.1 On the 22 February 2021, the Government announced a phased re-opening of leisure centres with effect from 29 March 2021. With social distancing and public health requirements in place, the guidance under PN02/20 continued to apply and the Council extended the contract variation for a further six months (covering the period 1st April 2022 – 30th September 2022) to enable the continued re-building of usage and membership numbers.
- 5.2 To provide controls on expenditure for the Council, it has been agreed with EA that:
 - (i) Should any of the major expenditure items exceed the amount stated in the monthly projections, specific Council authorisation will be required for this expenditure.
 - (ii) EA will present income and expenditure projections to the Council on a fortnightly basis to demonstrate that all reasonable efforts are being made to maximise income and mitigate costs.
 - (iii) Should the overall net deficit exceed the projection in a given month, EA and the Council will commit to a review as soon as reasonably practical which will seek to ensure the deficit in the subsequent month(s) is at or below the projection figure for that period.
- 5.3 Utilising EA projections, the Budget and Council Tax 2022/23 report ([FIN/549](#)) assumed a net income of £100,000 from the leisure contract for the year to 31 March 2023. Based upon the trading position from April – June, it would appear that sales and income have been stronger than projected and the actual income achieved will exceed the budget projection. This will continue to be monitored through quarterly monitoring.
- 5.4 Although trading is yet to return to pre pandemic levels, the Council has confirmed its expectation to EA that the Council will revert to the leisure contract and associated payments to the Council with effect from April 2023. A further report will be provided to Cabinet in Spring 2023 to apprise members of the future of the leisure contract and associated payments.

- 5.5. External legal advice has confirmed that it would not be legally compliant to extend the current DoV by allowing the covid relief period to continue, using the provisions from the Cabinet Office (PPN 02/20 and PPN 04/20); doing so would open the Council up to the risk of challenge.
- 5.6 However, the Covid regulations (and subsequent change in K2 Crawley user habits following their ending) have had a real and lasting impact on the revenue generated by EA under the contract, and as a result the Council are able to extend the terms of the DoV using the existing Qualifying Change in Law provisions in the contract between the Council and EA.
- 5.7 By way of background, EA originally maintained that the Covid regulations and their impact should have been regarded as a Qualifying Change in Law, but the Council instead adopted the approach recommended by the government (which was to implement a covid relief period and reduction in fees, via the successive DoVs), which it can no longer continue with following the recent advice.
- 5.8 There has also since been a case involving EA and Westminster Council where the Court has specifically agreed that the covid regulations and closures amounted to a Qualifying Change in Law in their contract, with the contract between the parties in this case being very similar to the contract between Crawley Borough Council and EA.
- 5.9 In particular, in Crawley Borough Council's contract, the clauses dealing with a Qualifying Change in Law note it should receive information from EA identifying 'any Change in Revenue' (which includes both one-off or recurring events). It is noted that EA have continued to provide projections and actual income and expenditure information on a monthly basis, which contribute to the justification to apply the Qualifying Change in Law provisions to extend for a further 6 months through to 31st March 2023.
- 5.10 The Council is therefore satisfied that this new approach will enable it to achieve its aims, whilst acknowledging the current reality impacting EA within the confines of the existing contract.
- 5.11 However, the Council is very clear that this is a temporary approach and will not set a precedent for any future negotiations on the contract between itself and EA. Within this context, it is the Council's expectation that it will be returning to contract at the expiry of this new DoV at the end of March in 2023 when any necessary long term adjustments to revenue sharing arrangements in the contract may need to be considered if trading conditions in Crawley remain challenging.
- 5.12 It is therefore recommended that the Council extend the DoV to facilitate the continued opening of the leisure centres over the period 1 October 2022 – 31st March 2023.

6. Information & Analysis Supporting Recommendation

- 6.1 The two main alternative options which the Council could consider are to close the leisure facilities (which would require us to terminate the contract with EA) or to terminate the existing contract with EA, whilst keeping the leisure facilities open and procuring a new operator. It is felt that both of these options would be more costly to the Council (we would need to pay EA's lost profit, capital costs, unavoidable costs such as redundancy, demobilisation and committed and unavoidable expenditure etc.) and would lead to an extended period of disruption without the service and a longer recovery to return to a normalised service position.

7. Implications

Financial

- 7.1 The Budget and Council Tax 2022/23 report ([FIN/549](#)) to Cabinet on 2 February 2022 and Full Council on 23 February 2022 Table 2 and section 5.5.10 included a provision of £1,092,000 in respect of additional costs and lost income in respect of Covid-19 funding for 2022/23. As part of the quarterly monitoring process during 2021/22 the finance team will report on the draw down from the Covid budget and how it has been allocated including the draw down in respect of the Leisure Contract. Paragraph 5.5.10 of the report states that there is an assumption that the Leisure contractor will in part begin paying the council again in 2022/23 and be back to full contract payments in future years with a small allowance in 2023/24 for a reduced contractor payment.

8. Background Papers

- 8.1 Budget and Council Tax 2021/22 [FIN/514](#) report to Cabinet on 3 February 2021.
8.2 Budget and Council Tax 2022/23 [FIN/539](#) report to Cabinet on 2 February 2022

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