Cabinet 19 September 2017	TOWER HAMLETS
Report of: Debbie Jones, Corporate Director, Children's Services	**Classification:** Unrestricted
Leisure Services Contract Fee Waiver Negotiations	

Lead Member	**Councillor Abdul Mukit, Cabinet Member for Culture and Youth**
Originating Officer(s)	Neville Murton Divisional Director Finance, Procurement & Audit Judith St. John Acting Divisional Director for Sports, Leisure and Culture
Wards affected	All wards
Key Decision	Yes
Community Plan Theme	A Great Place to Live, and a Healthy and Supportive Community

Executive Summary

1.1. The Medium Term Financial Plan 2016-17 set out the savings proposals approved at the Cabinet and Full Council meetings in February 2016. The current contract with GLL provides for a management fee to be paid of up to £2.3m on the leisure services contract. There is also a profit share arrangement for the allocation of the surplus at the end of the financial year. The value of the surplus share to the Council is currently £1.05m. The fee waiver delivers a total savings over the Medium Term Financial Plan of £3.82m The arrangement provided for in the proposal was that both the management fee paid and profit share income received would cease for the remainder of the contract period to achieve on-going savings of £1.240m. As a prerequisite to GLL entering into negotiations, confirmation was requested that a capital sum of £2.3m be set aside for investment into the facilities along with a review of fees and charges.

1.2. In attempting to reach an 'in principle agreement with GLL in January 2017, it was made clear by officers that any decision made would be subject to approval by the Executive. In lieu of no management fee and a cessation of the surplus share arrangement, it is proposed that a three year contract extension be awarded to GLL, this is based on the period modelled that enables recovery of the GLL base position i.e. the length of time necessary to recover an annual loss of £1.2m. The agreement does not propose any changes to the current fees and charges structure.. Capital funding is to be provided from the shared development pot of £847k, held by GLL, and identified section 106 resources of up to £1.4m for investment into the facilities.

Recommendations:

The Mayor in Cabinet is recommended to:

1. Agree and approve the fee waiver arrangements and three year contract extension to the current contract due to expire on 30^{th} April 2019. This will be on the existing terms for the current Leisure Services Contract for the period up to April 2022.
2. Authorise the appropriate officers to execute the necessary contract extension agreement
3. Approve the use of Section 106 funds for investment in the Leisure facilities.

1. REASONS FOR THE DECISIONS

1.1 The decision is required in order to enable the Medium Term Financial Savings of £1.240m to be achieved. This will be achieved through a reduction in fees otherwise payable to GLL under the current leisure services management contract which, subject to Cabinet's agreement, it is proposed to extend for 3 years.

2. ALTERNATIVE OPTIONS

2.1 The Mayor in Cabinet could choose not to accept the officers' recommendations in this report. This would result in the Medium Term Financial savings proposal approved by Cabinet not being achieved. Alternative savings options would be required to be found elsewhere in the Council's budget to close the gap.

3. DETAILS OF REPORT

3.1 Background

3.2 The contract was let in May 2004 for a period of fifteen years and operates on a full repairing lease, surplus share basis, this included the management of the following six centres:

- John Orwell Leisure Centre
- Langdon Park Leisure Centre (ended in 2011)
- Mile End Park Leisure Centre & Stadium
- St. Georges Leisure Centre (formerly St. George's Pools)
- Tiller Leisure Centre
- Whitechapel Sports Centre
- York Hall Leisure Centre

3.3 Although the contract operates on a full repairing lease basis GLL are responsible for maintaining the Council's assets, which includes reactive, planned and preventative maintenance.

3.4 The first five years of the contract were projected to be in deficit, which in fact was the case. However, this turned into a more sustainable surplus once the early capital improvements had been completed.

3.5 The high levels of contract performance are also evidenced by the number of industry awards and external accreditations achieved by the service. Benchmarking with similar facilities nationally has seen Tower Hamlets facilities placed in the top quartile for access by disadvantaged communities, as well as the money spent on maintaining the Council's assets.

3.6 The community has also benefited from capital investments during the contract, which have enhanced the leisure services provided to local residents. Some of these benefits included the development of a new facility, Mile End Park Leisure Centre and the development of York Hall Spa London. In addition, leading up to, and during the Olympic period, in the summer of 2012, both the contractor and the Council worked in partnership to provide sporting opportunities and improve the leisure centre infrastructure. This partnership approach led to the delivery of a number of community engagement events with the United States Olympic Committee (USOC), The American Embassy and The Great Britain Synchronised Swimming Team. Approximately 1,500 residents participated in these events. In addition to the engagement activities, the community also benefited from £1.3 million of improvements to the facilities at Mile End Stadium, York Hall and St Georges Leisure Centre which were all used as Games Time Training Venues by national teams from the United States, Great Britain, Spain and Russia. These activities provided considerable profile for the Council and enhanced the borough’s reputation for delivery at the highest level.

3.7 The contract has also provided training and employment opportunities for Tower Hamlets residents. Coach Education training courses organised by the Council and those in partnership with organisations such as the Muslim Women's Collective, have provided free and subsidised accredited courses at level 1 and level 2, which have led to employment with the leisure operator, GLL, as well as other local organisations, as lifeguards, football, basketball and badminton coaches.

3.8 The borough's Leisure Centre's achieved Quest accreditation, which resulted in Tower Hamlets scoring 87.5% and being placed in the top quartile of local authorities for CPA19. The Quest accreditation is the sport and leisure industry’s only recognised Quality Assurance Tool for facility management, sports development and physical activity, it is designed to measure how effective organisations are at providing high quality services. The accreditation has been maintained and the Operator has also achieved a

Service Excellence award demonstrating their commitment to quality management and customer service.

3.9 A key area for measuring the success of the contract is the level of customer satisfaction and leisure centre attendances. A range of methodologies have been used to measure customer satisfaction. In the earlier years of the contract these included the Institute for Sports Parks and Leisure (ISPAL) that represents sport, parks and leisure industry professionals and mystery shopping, but more recently, annual user surveys commissioned by GLL but analysed independently have been utilised. These surveys provide feedback not only on satisfaction but also on centre user profiles. They are completed on a site basis but the results are also amalgamated for the borough. National benchmarking surveys have also been commissioned which conduct an independent analysis of feedback from leisure centre users and compares the data against similar facility types nationally.

3.10 Community Benefits

3.11 In administering the contract GLL are due an annual management fee of just over £2m including annual indexation uplifts. There is also a profit share arrangement in place for the allocation of the surplus at the end of each financial year the Council's share of which currently stands at £1.050m. The arrangements are such that the Council and GLL receive 25% each of the declared surplus in the GLL accounts and 50% goes towards the Development pot.

3.12 Allocation of funds from the Development pot is agreed by both parties to support major works above the planned preventative maintenance schedule (PPM) and agreed Leisure development activities such as 'free swims' and 'Women only activities'. As a result of this investment additional capital improvements and sporting initiatives for the community have been delivered. These include:

- Free Swim Friday Programme
- Free Swim family Saturday
- Investment into St Georges Leisure Centre and redevelopment of disused areas
- Improvements and Extension to Reception area at Mile End Park Leisure Centre

3.13 Throughout the contract a significant number of community based initiatives have been developed and delivered. These initiatives involve joint working and delivery by the Contractor and a few have been included below:

Sport4Women Programme: An initiative developed for the most deprived areas/wards to engage with women and provide opportunities for activity in partnership with, and involving, local community organisations. This activity is currently funded by a Sport England grant secured by the Council with the aim of embedding the programme into leisure centre service delivery.

Young@Heart (50+): A health, fitness & social scheme funded initially by a Sport England Grant secured by the Council's Sports Team and subsequently embedded in core delivery as part of the leisure centre programme

Get Active - An initiative developed for the most deprived areas/wards to engage with inactive people to increase participation levels in sport and physical activity

Free Swimming Programmes: Free Swim Friday, Free Swim Family Saturday, Under 16 free swimming, and Women and Girls Programmes.

3.14 The options open to the Council that would enable the current contract to be varied during the remaining 3 years and secure a cashable contribution to the Medium Term Financial Strategy are limited other than the current contract being renegotiated by both parties, with the Council seeking the waiver of fees and GLL requiring an extension to the contract in order to compensate for the fee forgone.

3.15 Based on clear legal advice to the effect that GLL should be left in a position which is no better no worse than under the unaltered contract the approach taken by the parties was to determine an appropriate length of extension during which GLL would be able to recover their losses resulting from the withholding by the Council of the management fee. This meant that a reasonable determination of population growth was agreed between the parties in order to estimate the level of income receivable by GLL throughout the period of the extension. Other factors were also taken into account such as the maintenance of current ticket prices, special sessions and other local benefits previously agreed as well as issues such as the anticipated capacities of the centres beyond which growth without further significant investment by the Council could not be obtained.

3.16 The modelling undertaken looked at the level of population growth and was used to determine the point at which the contract should expire in order that GLL would be left in a position no better off, nor no worse off than under the original contract.

3.17 As part of the negotiated agreement GLL will look to introduce the London Living Wage to all GLL staff excluding Apprentices operating the Council contract in line with the Living Wage Foundation criteria from 1st April 2017. This forms part of continual review of the service and the wider corporate objective of GLL to move towards all staff being paid the LLW it should be noted that some job roles are already paid in line with the LLW. The estimated cost of moving qualifying staff across to the LLW is £250k per annum, the cost of this has been included in the modelling assumptions undertaken to determine at what point recovery is reached by GLL.

3.18 The agreement reached with GLL is an 'in principle one', subject to a formal decision being made at Cabinet as part of any procurement approval process.

3.19 The basis of the agreement with GLL is as follows::

1. The £1.240m saving is backdated to the 1st April 2016
2. Recovery position for GLL is for the overall position to remain neutral. The modelling undertaken shows recovery of income loss as a result of the waiver is achievable within 3 years.
3. No increases to fee charges other than the annual inflation increases.
4. Commitment to pay the London Living Wage from April 2017
5. An open book accounting will take place regularly to identify the point when recovery is actually achieved. Once that point is reached, the following arrangement will then take effect:
    i. The first £300k of any surplus above the recovery position will on an annual basis be placed in a GLL provision, for the future pension liability costs at the end of the contract period.
    ii. Any further surplus achieved will be subject to current profit share arrangement.
    iii. The determination of the surplus will be through an 'Open Book Accounting' arrangement.
6. Contract performance with clear measurable outcomes
7. Capital funding of £2.3m will be made available to GLL. A total of just under £900k has been released through the Development pot held by GLL for investment into the facilities. A further sum of £1.4m from the relevant identified Section 106 resources is required to be approved. This decision will be made through the existing governance arrangements of the Infrastructure Delivery Steering Group making recommendations to the Infrastructure Delivery Board.

4. COMMENTS OF THE CHIEF FINANCE OFFICER

4.1 The agreement to the contract extension will achieve savings of £3.82m over the remaining years of the current contract, whilst the 3 year extension period will deliver a further £3.82m that achieves a total savings of £7.64m. In addition capital resources of £2.3m will be required to be invested in the facilities. A total of £0.9m has been made available through the shared development pot with GLL. The remaining balance of this investment of up to £1.4m will be made available from relevant Section 106 resources which will be reported through the Infrastructure Delivery Group and the Infrastructure Delivery Board. There is the possibility that the level of investment will help GLL achieve their recovery position much earlier and generate sufficient surplus at an earlier point during the period. At this point the surplus share arrangement will then be reinstated.

4.2 Provision is made in the accounts at the end of the financial year 2016-17 to reflect the Medium Term Financial Strategy savings of £1.2m. The achievement of the savings is subject to the approval by Cabinet to the terms of the waiver of the management fee and surplus share arrangements negotiated.

5. LEGAL COMMENTS

5.1 The Council has an overriding legal obligation under section 3 of the Local Government Act 1999 to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness. This is known as the Council's Best Value Duty

5.2 This contract is of its nature a concession contract as fundamentally GLL are granted the opportunity to exploit the Council's assets for reward. However, the contract was advertised in 2003 and therefore is outside the application of the Concession Contract Regulations 2016.

5.3 At the time of advertising the relevant European Law legislation was the Public Services Contracts Regulations 1993. However, the regulations only applied to Public Services Contracts. Contracts of the variety which is the subject matter of this report were specifically excluded under the definition of "Public Services Contract"

5.4 It is notable that brief consideration of the Public Contracts Regulations 2015 shows that they also do not apply to this situation.

5.5 However, this remains the case provided that the extension to the concession does not amount to a new award itself. The leading case is Pressetext which sets out three rules to determine whether amendments to an existing contract should be considered to be material and therefore amount to a new award. A new award would attract the application of the current European Law (notable the Concession Contracts Regulations) and would therefore require re-advertisement in Europe.

5.6 According to Pressetext an amendment should be considered material if it:

5.6.1 would have allowed others to participate in the tender or a different tender to be accepted;

5.6.2 extends the scope of the contract considerably to encompass services not initially covered; or

5.6.3 changes the economic balance of the contract in favour of the contractor in a manner not provided for in the terms of the initial contract.

5.7 Taking a reasonable view the first two tests appear to be not applicable as it is reasonably unlikely that the change in the pricing structure for the remainder of the contract and an increase in the contract length would have been unlikely to encourage different suppliers to participate in the original tender process and the actual services to be provided throughout the contract period remain the same.

5.8 As regards the third rule it would appear that the Council has gone to considerable lengths to ensure that the overall economic balance of the contract would not be more favourable to GLL following the application of the amendments having taken into account a reasonable judgement on population growth, centre capacity and fee levels. It would appear that the length of the extension to the contract is only that which is necessary in order for GLL to recover its original economic position.

5.9 The Council has a duty in accordance with section 3 of the Local Government Act 1999 to make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness. This is regarded as the Council's best value duty. The principle way in which the Council discharges this duty is to ensure that its contracts are subjected to competition. It is notable though that whilst the Council is not obligated under procurement law to subject this arrangement to competition care has been taken (as referred to above) to ensure that the Contractor is left in no better no worse a commercial position than was represented in the original tender. Therefore, the Best Value element of the original tender remains static in this arrangement.

5.10 It is notable also that the contract terms themselves also remain unchanged. The terms provided for methodologies for the continuing improvement of the facilities (both physical and service orientated) offered under the contract and the ability to work with the Council to improve the effectiveness of the services.

5.11 Therefore, it should be considered that the arrangement satisfies the Council's section 3 duty.

5.12 Given the fact that the nature of the service is not due to change it is unlikely that there will be an impact on people with protected characteristics for the purposes of the Equality Act 2010. However, the Council should still take such steps as are reasonable in order to assure itself of the position and to understand how such persons might be affected if at all.

6. ONE TOWER HAMLETS CONSIDERATIONS

6.1 The current Leisure Management Contract provision is consistent with the Council's duties to promote equality in all protected characteristics. Leisure Centres provide one of the main ways Tower Hamlets' residents can engage with healthier lifestyles and the impact of this service infrastructure on tackling health inequalities and community integration issues cannot be under estimated.

7. BEST VALUE (BV) IMPLICATIONS

7.1 The Leisure Centre Strategy forms an important investment prioritisation framework to help make the Council's network of leisure centres more operationally efficient while continuing to meet the needs of residents.

8. SUSTAINABLE ACTION FOR A GREENER ENVIRONMENT

8.1 There are no direct sustainable environment actions or environmental implications from the proposals in this report.

9. RISK MANAGEMENT IMPLICATIONS

9.1 The current contract is due to end 2nd May 2019, if a decision is not reached on the fee waiver negotiations, this will have an impact on the time table for retendering a new leisure management contract.

9.2 It is also important to note that with the development of Poplar Baths being pursued independently of existing leisure centre contracted arrangements there will be additional financial and performance complexities to consider going forward.

9.3 It is important to note that this contract was let in 2004, when many of the existing Tower Hamlets contractual requirements were not in place. So while GLL is required to meet all statutory legislative requirements for example the 2010 Equalities Act and HSE legislation, the operator is not contractually obliged to meet standards such as Fair Trade Goods and Products, the use of ethically and sustainably sourced goods and the London Living Wage.

9.4 However, despite this, the Council is working with GLL and following a range of discussions, work has taken place to continue to develop policies that support the Council's agenda such as carbon reduction and an equalities data review.

10. CRIME AND DISORDER REDUCTION IMPLICATIONS

10.1 There are no immediate risk management implications arising from this report. Leisure Centres and other community infrastructure are recognised to have a positive effect in improving rates of crime and anti-social behaviour,

11. SAFEGUARDING IMPLICATIONS

11.1 There are no safeguarding implications.

Linked Reports, Appendices and Background Documents

Linked Report
- NONE

Appendices

- Appendix 1 – Equalities analysis

Background Documents – Local Authorities (Executive Arrangements)(Access to Information)(England) Regulations 2012

- NONE.

Officer contact details for documents:
Or state N/A