

Birmingham City Council

Report to Cabinet

13 December 2022



Subject: Covid Recovery Support for Sport & Leisure Contracts (S0034A)

Report of: Rob James – Strategic Director City Operations

Relevant Cabinet Member: Councillor Mariam Khan - Cabinet Member for Health and Social Care
Councillor Yvonne Mosquito - Cabinet Member for Finance and Resources

Relevant O & S Chair(s): Councillor Jack Deakin - Commonwealth Games Culture and Physical Activity
Councillor Akhlaq Ahmed - Resources

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Are specific wards affected?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No – All wards affected
If yes, name(s) of ward(s): Acocks Green, Billesley, Brandwood & King's Heath, Erdington, Ladywood, Northfield, Perry Barr, Sutton Trinity, Yardley West & Stechford.		
Is this a key decision?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If relevant, add Forward Plan Reference: 010624/2022		
Is the decision eligible for call-in?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Does the report contain confidential or exempt information?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If relevant, provide exempt information paragraph number or reason if confidential :		

1 Executive Summary

- 1.1 With the health and wellbeing of the City at the forefront of Council priorities the services delivered by the authority's external leisure operators play a vital role in this both now and in the future. The impact of Covid-19, including long periods of

closure and operational restrictions on income generating services has been significant, and previous financial support via the Councils supplier relief programme has been essential to sustaining this provision.

- 1.2 It has been established that under the Council's contracts, following the repeal of The Health Protection (Coronavirus, Restrictions) Regulations 2021 by Government on 18th July 2021, our leisure operators are entitled to request changes to the agreements to take account of the effect of Covid-19. Now that facilities have recovered and the cost implication for recovery is fully understood, it is necessary to reconcile the outstanding support with our external leisure operators to avoid protracted and costly contractual renegotiations with far greater financial ramifications.
- 1.3 This report is being presented to Cabinet for a decision because the level of support sought exceeds delegated limits.

2 Recommendations

- 2.1 Cabinet notes that the strategy to externalise part of the service has significantly decreased the financial pressures on the Council since 2015 and addressed issues at 9 key facilities that had reached or were approaching the end of their lifespan, delivering 4 new leisure centres and 5 refurbishments.
- 2.2 Cabinet notes that the impact of Covid-19 has had a crippling impact on leisure providers across the country with financial pressures only likely to worsen again because of rising energy prices and inflation.
- 2.3 That Cabinet agrees not to receive £0.515m of management fee income and approves modification of the contract to reflect support of the no better/no worse position of £1.092m from December 2021 through to September 2022 for all 9 leisure centres operated by Birmingham Community Leisure Trust.
- 2.4 That Cabinet approve use of the Finance Resilience Reserve to fund the balance remaining after cost mitigations delivered by the service. This will be no greater than £1.607m.
- 2.5 That Cabinet authorise the City Solicitor and Monitoring Officer (or their delegate) to agree and complete all necessary documents to give effect to the above recommendations.

3 Background

- 3.1 In 2010/11 the City Council was facing unprecedented financial challenges in the years ahead, and a contributing factor to this was significant overspends within its Sports Service. The number of leisure centres in the (then) Districts Sport portfolio totalled 41 with 16 having swimming pools. In 2012 a Future Operating Model developed at that time proposed a reduction in the portfolio bringing the total to 28 sites against a 33% reduction in service budget.

- 3.2 A total of 4 contracts were approved by Cabinet over several years following competitive tender processes assessed on construction (where appropriate), service delivery, social value, and price. The key outcomes being a partnership approach to managing leisure services, the delivery of quality services via a proven track record, exemplary Health and Safety performance, and a significant reduction in the Councils operating costs while at the same time delivering a significant capital build & refurbishment programme.
- 3.3 By 2015/16, 11 of the Councils largest leisure centres, including 10 of its swimming pools, were being delivered externally via 2 external operating partners under 4 separate contracts.
- 3.4 The 2 largest contracts were awarded to Birmingham Community Leisure Trust (BCLT) and its managing agent Serco Leisure Operating Limited (SLOL) on 16th March 2015. The 15-year contracts incorporated the management and operation of 9 leisure facilities under the Council's Sports and Leisure facilities Framework Agreement at the time.
- 3.5 The contracts were based on a financial plan that would provide savings to the Council of £21.2m when compared to continuing to manage the operation in-house, including management fee income to the Council of £6.5m over the life of the contract. In addition to this the contracts have delivered more than £39.8m of capital improvement works that has brought about 5 significant refurbishments and 4 brand new leisure centres, 2 of which have received national recognition.
- 3.6 On 20th March 2020, the Government announced the temporary closure of all gyms and leisure centres as part of its Covid-19 response to stop the spread of infection. Facilities reopened on 25th July 2020 with strict operational restrictions in place in line with government and governing body guidelines. A further temporary period of closure came during the coronavirus lockdown period from 5th November 2020 through to 2nd December 2020. Following a brief period of reopening a further lockdown occurred on 5th January 2021. From 12th April 2021 all facilities were permitted to reopen to the public once again but with significant Covid-19 operational restrictions still in place. On 18th July 2021 the Government moved to step 4 of its roadmap to recovery, a new phase of continued caution whilst managing the risks of Covid-19 with many of the legal restrictions that the Government had imposed through the pandemic being lifted.
- 3.7 The result of multiple periods of closure and various operational restrictions were such that both the number of service users and the services available had to cease or be severely limited on numerous occasions, which in turn impacted on the ability of the service to generate income that was vital to its sustainability. Feedback from BCLT at the time aligned with industry guidance from 4global consultants, working with UKActive, that it would likely take operators until the summer of 2022 to recover to Pre-Covid-19 (March 2020) trading positions.
- 3.8 In March 2020, at the start of the pandemic, Government issued a Procurement Policy Note 02/20 (PPN) for all public sector bodies advising of the measures it

expected organisations to take to support suppliers and contractors suffering from the adverse impacts from Covid-19. While the PPN did not account for the income arrangements between Councils and its leisure providers, an internal guidance note was prepared and circulated which set out criteria for eligibility.

- 3.9 If Birmingham's leisure provision was not sustained throughout the pandemic to recovery, the public leisure provision would have been significantly affected, with facilities unable to open and clubs and voluntary organisations unable to provide activities for communities. There would have been substantial additional costs to the public purse through re-procurement, TUPEing staff, or establishing new delivery mechanisms. There would also have been a significant impact on the social and health benefits to communities at a time when these were most in need.
- 3.10 BCLT operate approximately 43% of all Council owned sports facilities including 53% of all BCC swimming pools. Prior to March 2020 the Trust had grown health and fitness membership to over 16,500 members, enrolled more than 11,300 children on Learn to swim programmes, and were facilitating more than 1 million more visits annually than before the contract commenced. However, by March 2021, 1 year after the pandemic began, health and fitness memberships were down 47% to less than 8,700 members and less than 6,900 children remained on learn to swim programmes, a reduction of 39%.
- 3.11 Despite excellent performance prior to the outbreak of Covid-19, the delivery model for BCLT was such that there was little scope for the operator to do anything but seek support to avoid a position where it was no longer commercially viable to continue to operate the business:
- Due to the contractual requirements to invest profits back into the leisure services they provide in Birmingham, margins are extremely low, in the case of BCLT these are less than 5% of income relative to contracts.
 - BCLT are wholly reliant on income from customers.
 - Reserves are low because of the necessity to invest into facilities.
 - Management fees paid to and from BCLT are a balance figure between income and expenditure. Therefore, with no income a significant financial gap was created.
 - There is an ongoing net subsidy requirement even when facilities are closed, and mitigations are in place.
 - Up until the impact of Covid-19, under normal business the Council benefited from the Trust and private operator model which provided significant reductions in the cost of running facilities.
- 3.12 It was also highlighted that should BCLT begin to fail the Council would face a very difficult choice. It could either allow the operator to fail, potentially bringing all facilities back in-house as a means of keeping them open, or it could choose to support the operator. Either approach was likely to involve significant costs to

the Council. However, the cost of supporting BCLT was determined to be the most economical in comparison to bringing the service back in-house given that the current gross costs from the Trusts operational business plan was circa £13.7m alone.

3.13 Following a review by officers BCLT was judged to be a contractor 'at risk' and consequently they requested support from the Council under the terms of its Supplier Relief programme. SLOL, acting as managing agent for and on behalf of BCLT agreed to operate on an Open Book basis, and make cost/account data available on request to allow the Council to verify compliance with the criteria and ensure that payments were being used as intended.

3.14 The Council worked in partnership with BCLT throughout the pandemic and during recovery to identify what would work best for both parties and, more importantly for the citizens of Birmingham in support of the Council's public health and economic strategies recognising the significance that the services play in ensuring the mental and physical wellbeing and social connectedness of communities. The following actions were agreed and adopted where practical/possible:

- Working through the recommendations and approach recommended in PPN 02/20.
- Seek support of a net subsidy position utilising the Open Book approach recommended in PPN 02/20.
- Implement practical ways to mitigate costs as much as possible without dramatically impacting on front line services.
- Hold regular review meetings to monitor and manage a joint response to the crisis.
- Take steps to understand the potential cost to the Council in present and future budgets should BCLT be unable to continue.
- Note that within the contract under the 'Qualifying Change In Law' provisions, the Council could be fully responsible for all the costs of hibernation and supporting the ramp back up to normal working.

3.15 To minimise the levels of subsidy required from the Council BCLT have taken proactive steps to review all areas of the business with the aim of maximising efficiencies while protecting front line services. The actions they have taken include:

- Opening hours – The principle followed during all three reopening phases was to open as many activities as possible in a safe and customer friendly manner. Opening hours were reduced following the first lockdown to support a safe return and to allow operators to assess demand, ensuring the facilities were operating as efficiently as possible. Following the second and third periods of lockdown operators extended opening hours to near that of pre-Covid-19, opening to the maximum time to cater for the public demand whilst

ensuring the sites operated efficiently. While opening hours have since returned to levels that are like that of pre-Covid-19 any scope to reduce excess has been implemented.

- Plant Equipment – During each of the lockdown periods much of the plant that powers the pool circulation, heating, lighting, air handling, etc was all turned down or in some cases off. This was done to reduce utilities expenditure as the facilities were not in use. Statutory servicing and compliance maintenance took place throughout all periods. Since the return from Covid-19 processes to reduce and turn off plant during off peak and during periods of closure remain in place to ensure efficiency maximisation.
- Control of service provision costs – During each of the closure periods and the pre-opening phases each site took a number of measures to control costs with many services such as waste collections and cash collections being brought back in stages in line with business need. While these have all returned post Covid-19 they have been extensively reviewed to ensure that they are at the bare minimum required.
- Control of Utility Costs – As well as controlling the costs of service provision during lockdown operators also reduced several high-cost areas of the business, of which utilities are second only to salary costs. To achieve savings plant equipment was either switched off or down. The winter savings were not as high as the summer savings, as throughout this period there was still a requirement to heat the building and have a certain amount of air circulation to protect the building fabric from condensation, unlike in the summer months. Utilities continue to be monitored daily across all sites with an aim of minimising consumption, again limiting any opportunity to further reduce costs as the price per unit rises.

3.16 While BCLT provides its services through its managing agent SLOL and its parent company Serco Group PLC (who provide a Parent Company Guarantee), with the potential to sustain the impact of Covid-19 unlike BCLT, the Health Protection (Coronavirus Business Closure) Regulations 2020 and subsequent related legislation were interpreted by leisure operators as an effective 'Qualifying Change In Law' (QCIL) in contractual terms, with all resulting liabilities falling to the Council.

3.17 Prior to legal advice provided in December 2021, the Council's primary concern was that leisure operators would seek to hold the Authority accountable for the losses/damages incurred because of the QCIL event as per the relevant clause within the leisure management agreements. However, following the repeal of The Health Protection (Coronavirus, Restrictions) Regulations 2021 by Government on 18th July 2021 the most up to date legal advice set out that operators would be entitled to request contractual changes to take into account the effect of Covid-19 regarding, amongst other things, a reduction in income.

- 3.18 In line with the approach taken to date, and to minimise the risk of the leisure operator seeking to significantly renegotiate the contract to its own financial advantage for the remainder of the contract, a position has been adopted to ensure that the contractor is supported to a no better/no worse position up until the point of recovery in August 2022.
- 3.19 While this proposal seeks to settle the Covid-19 recovery position with the operator and mitigate further financial risk in this respect, it is recognised that rising energy prices and inflation are likely to worsen the financial pressures and leave operators with no choice but to invoke formal contractual clauses such as utility benchmarking in the future. Such matters will be picked up and progressed separately with Cabinet approvals sought accordingly.

4 Options considered and Recommended Proposal

- 4.1 **To do nothing and stop all further funding** – This option was discounted as it would leave the operator with no choice but to pursue legal action against the Council, potentially resulting in high legal costs and reputational damage from facility closures. Furthermore, it would be highly likely that the contractor would seek a complete rebase of the contract resulting in no further management fee income at all to the Council for the remainder of the contract.
- 4.2 **To retender the contracts** – This option was discounted as market knowledge indicates that the contracts with BCLT remains unattractive in the current climate. Despite the additional costs incurred because of the pandemic, a similar return to the Council would not be achieved if these contracts were to be re-tendered.
- 4.3 **To run the facilities in-house** – This option was discounted as the in-house preferred test was undertaken and demonstrated that this service is not suitable for delivery in-house. A direct comparison between the cost of running the facilities in-house or by BCLT was undertaken at the contract award stage and identified that the contract would deliver savings to the Council of £21.2m over 15 years when compared to continuing to manage the operation in-house, excluding the impacts of Covid-19 and any other unforeseen events. While these unforeseen additional pressures have considerably reduced that figure the contract remains financially advantageous to the Council in comparison.
- 4.4 **Recommended Proposal – To subsidise the current no better/no worse position of £1.092m and not receive £0.515m of management fee income up to Sept 2022** – this is the recommended option based on a balance of the risks of legal challenge, reputational risk, and a reasonable financial outcome for the Council under the circumstances. Market knowledge indicates that the contract with BCLT was and still is economically advantageous to BCC. The Local Authority leisure centre operation market is no longer as attractive and in recent years as contracts in other Local Authorities for the operation of leisure centres have involved Authorities paying the third-party provider an income rather than the operator paying the Council. The impact of Covid-19 has been significant on all leisure facilities and industry advice aligns with recovery to Pre-Covid-19

(March 2020) trading positions by August 2022 which is reflective of the financial support proposed.

5 Consultation

- 5.1 Sport England and Sport England framework consultants Continuum Sport & Leisure Ltd have been fully engaged and have assisted in the review the Council's Post Covid Options.

6 Risk Management

- 6.1 Supporting BCLT to fully recover from the impacts of Covid-19 will mitigate the risk of contractor failure and/or any associated facility/service closures. It will help to ensure that the contracts remain sustainable and deliver quality accessible leisure services for citizens of Birmingham.

7 Compliance Issues:

- 7.1 **How are the recommended decisions consistent with the City Council's priorities, plans and strategies?**
- 7.2 **Outcome 4 – Birmingham is a Great City to Live in:** Through its Sports Service Birmingham City Council strives to raise the quality of life and health of its citizens and to enhance its reputation as one of the UK's leading sporting cities. The city wants to work with organisations that support its vision for an excellent leisure service, by increasing participation, succeeding economically, and improving the health and wellbeing of the local communities that it serves.
- 7.3 **Outcome 5 – Birmingham residents gain the maximum benefit from hosting the Commonwealth Games:** Through its Sports Service Birmingham City Council encourages citizens of all abilities and ages to engage in physical activity and improve their health and wellbeing. The city delivers high-quality sporting facilities for the benefit of our citizens.
- 7.4 **Birmingham Business Charter for Social Responsibility (BBC4SR) –** BCLT are signed up to the principles of the BBC4SR and have an action plan of activities as part of their contract management plan. This will not be impacted by these proposals.

8 Legal Implications

- 8.1 Under Section 19 of the Local Government Act (Miscellaneous Provisions) 1976 the Council has the power to provide such recreational facilities as it thinks fit in its area and under Section 111 of the Local Government Act 1972 the Council may do anything which is incidental to the discharge of its functions

9 Financial Implications

- 9.1 The report relates to the final claim for financial support submitted by BCLT for a total of £1.607m. This includes £1.092m contractor claim for period Quarter 4

2021/22 to Quarter 2 2022/23 and the council forgoing £0.515m of management fee income receivable in 2022/23. This concludes financial support provided throughout the pandemic period and the return to pre-covid performance levels.

9.2 Over the pandemic period the council has provided total financial support of £9.757m to BCLT, agreeing the recommendations in this report brings the total to £11.364m as set out in the table below. The council has received Covid-19 grant funding over this period to fund the support provided. The amount of £1.607m contained within this report is in excess of covid grant received and will be funded within the service through cost mitigations and underspends with any residual funded through the Finance Resilience Reserve. BCLT have operated on an Open Book basis throughout the pandemic and associated recovery period, making all cost and account data available to the Council.

9.3 The table below summarises the total support provided to and sought by BCLT:

	Total 2020/21	Total 2021/22	Total 2022/23	Total support
	£m's	£m's	£m's	£m's
Contractor supplier relief payments	5.372	2.493	0	7.865
Final claim to achieve pre-Covid performance.		0.602	0.490	1.092
Management fee income not received	0.891	1.001	0.515	2.384
Total	6.263	4.096	1.005	11.364

10 Procurement Implications (if required)

10.1 The procurement implications are detailed throughout this report regarding options appraisal and recommendation to modify the existing contract in accordance with PCR15 72.1(c): *“(i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen; (ii) the modification does not alter the overall nature of the contract; (iii) any increase in price does not exceed 50% of the value of the original contract or framework agreement.”* The need for modification has been brought about as a result of the COVID 19 pandemic and is detailed throughout this Report and background documents.

10.2 **Contract & Performance Management** – The Contract will continue to be managed operationally and strategically by the Sports Service Contracts Team, in line with the terms of the contracts.

11 Human Resources Implications (if required)

11.1 There are no Human Resources implications by extending these contracts.

12 Public Sector Equality Duty

- 12.1 There are not considered to be any adverse impacts associated with the recommendations in this report, as the contract variations are not expected to have any material impact on the services already delivered.

13 Environment & Sustainability Assessment

- 13.1 An ESA has not been deemed necessary as this is a financial report with no sustainability/environmental implications.

14 Background Documents

- 14.1 4Global - The C19 impact study in the UK
14.2 BCLT - April Reopening and Covid-19 Recovery

List of appendices accompanying this report:

Appendix 1 EIA