



**dated January 2020**

**Sevenoaks District Council**

## **Report on the draft Leisure Management Contract**

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The following is a high level summary for the key provisions of the Leisure Operating Contract which will be entered into between the Council and the Preferred Bidder (the Contractor) in respect of the new White Oak Leisure Centre (the facility).

## **1 Commencement and duration and extension**

The agreement will be entered into shortly after the contract award with a commencement date to coincide with the expected operation date of the newly built facility in 2021. The agreement will end (subject to any earlier termination because of default) on the 15<sup>th</sup> anniversary of the commencement date. There is also an ability to extend the contract by agreement for up to an additional 5 year period.

## **2 Defects**

The Council will be required to provide Collateral Warranties from the building contractor and the relevant professional team to the Contractor. The Contractor will accept responsibility for defects in the facility except where they are caused by the Council, or where the defect liability period has not expired, or where the Contract has used reasonable endeavours (without success) to enforce the terms of Collateral Warranties.

## **3 Head Lease**

The Council will grant the Contractor a Head Lease of the facility which will be coterminous with the Leisure Operating Contract. The Head Lease will provide the Contractor/Leisure Operator with the necessary occupation rights in order to claim NNDR relief. The lease will be a bare lease tying back to the repair, maintenance and improvement obligations on the Contractor set out in the Leisure Operating Contract (see clause 5 below). The rent will be a nominal rent as the Management Fee will be paid by the Contractor to the Council in accordance with the calculations within the payment and performance mechanism will be set out as a schedule to the Leisure Operating Contract.

## **4 Mobilisation**

4.1 The Council acknowledges that the Contractor has tendered on the basis of a facility that has not yet been constructed and therefore any changes to design or specification prior to handover will require consultation with the Contractor with an opportunity for the contractor to comment. If the Contractor believes additional costs will arise or changes to the services are required it will notify the Council and the Change Protocol (small, medium and high value changes as set out in schedule 24) shall apply. This will ultimately (if the change does genuinely impact on costs) result in the Contractor being no better or no worse off than if the change had not occurred.

4.2 The Council must give not less than 12 weeks' notice of the anticipated handover of the facility and allow the Contractor to attend meetings and comment on snagging items and other practical completion issues which will nonetheless remain the Council's responsibility.

4.3 Any delay to the target opening date (1 December 2021) will be an Authority Change and the Contractor shall be put in a no better and no worse position by any delayed opening.

4.4 The existing facility is expected to continue to trade until a short time before the opening of the new facility and if it doesn't or fewer members transfer than anticipated, this is also an

Authority Change. The Contractor can be requested by the Council to step in to the existing facility if the current operator ceases to provide service there and the Contractor cannot object to the step in request.

## **5 Services**

- 5.1 The Contractor is required to ensure that at all times that the services meet the requirements of the Agreement and the Services Specification.
- 5.2 The Contractor must ensure that the maintenance and operating procedures are sufficient to ensure the Facilities are available and are kept in good structural and decorative order and shall undertake the schedule of programmed maintenance in order to ensure the service specification is met. The Contractor shall also ensure that it carries out the replacement of lifecycle items in accordance with the agreed maintenance plan and schedule of programmed maintenance.

The monitoring of the performance is by the Contractor in accordance with the provisions of the Payment Mechanism. However the Authority is entitled at its own cost to carry out its own additional performance monitoring.

## **6 TUPE and Employee**

- 6.1 The transfer of the leisure service at the facility to the Contractor is treated as a TUPE transfer. There is no relationship between the new contractor and the current contractor and therefore as between the Council and the (new) Contractor the Council will accept responsibility for all remuneration and other payment (including employer pension contributions) to the transferring employees up to the commencement date. The Council will also indemnify the Contractor in respect of any employment related claims that arise prior to the commencement date. The Council accepts no responsibility for any staff related payments after the commencement date.
- 6.2 The Council is obliged to procure that it provides the Contractor with accurate information regarding the transferring employees and adjustments to the management fee could result if the information about the employees transferring is inaccurate. Provisions are made in relation to TUPE applying at expiry and termination of the agreement with the Contractor being responsible for all staff costs etc up to the Return Date being the date when the service comes back to the Council or it goes out to another provider.
- 6.3 Disclosure and barring checks are contractually required with the Contractor not being allowed to employ any person in connection with the services who has a conviction or an ASBO (Anti-Social Behaviour Order) without the Council's consent.

## **7 Pensions**

The Contractor is obliged to provide eligible employees (essentially those current employees who are members of an LGPS scheme) continued membership of the LGPS (or an equivalent scheme).

## **8 Payment Provisions**

The payment provisions essentially cross refers to the Payment Mechanism which will be set out in Schedule 6. The Management Fee is payable by the Contractor to the Council on a monthly basis.

## 9 **Termination**

The Council is able to voluntarily terminate the Agreement without cause (Clause 39.1) by giving 20 business days' notice.

9.1 The Contractor is entitled to terminate the agreement if there is an Council Default which is defined to include a breach of the obligations under the Agreement which substantially frustrates the performance of the agreement for a continuous period of three months.

9.2 The Council can terminate for Contractor Default, subject to rectification. Contractor Default is defined to include, amongst other things, a breach of the obligations which materially and adversely affects the performance of the services, is a Persistent Breach or where various Performance and Unavailability Deductions have been levied against the Contractor over a certain period. A Persistent Breach is defined as a breach where a Final Warning Notice has been served and the breach has continued for more than fourteen days or has recurred in three or more months over the next six months after the date of service of the Final Warning Notice.

## 10 **Compensation on Termination**

In relation to voluntary termination by the Council and termination on Council default and the Contractor will be entitled to compensation amounting to: subcontractor breakage costs and other Capital costs it may have incurred together with 36 months' worth of anticipated profits but subject to a cap of £279,784.

Compensation is payable to the Council on termination for Contractor Default. The Contractor will be required to pay to the Council the administration and legal fees associated with terminating the agreement and any costs and expenses incurred in arranging for the service to be re-provided together with an amount which represents the difference between what the management fee would have been if the contract continued and what the management fee actually is on a retendered contract (for a 36 month period).

## 11 **Step-in**

The Council has a right to step in and perform the Services in the event that there is serious risk to health or safety, the need to discharge a statutory duty or because of an Emergency. If the step in is precipitated by breach by the Contractor then the Management Fee is suspended and the Council will account to the Contractor for the revenues received, less the Council costs in taking the action during the step-in period.

## 12 **Insurance**

The Council has agreed to be responsible for building insurance during the life of the contract with the Contractor required to maintain property damage insurance, business interruption insurance and third party public and products liability insurance.

## 13 **Benchmarking**

As the contract will be entered into sometime before the anticipated commencement of the services at the newly built facility, the Contractor will be entitled to adjust the Management Fee following a benchmarking exercise in the event that the opening of a competing facility has a proven impact on the Contractor's income projections. This benchmarking exercise will take place in the event that a competing facility commences operation between the date of the entry into the contract and a date which is 6 months after the commencement of the leisure services at the White Oak Leisure centre. A competing facility includes sport and leisure activities at new facilities constructed, improvements made to existing facilities or new leisure activities at existing facilities all within a 2 mile radius of the facility. Improvements to a local School Hall are to be specifically excluded from such consideration. The Contractor will take responsibility for the first 5% of any loss of income.

**Trowers & Hamlins LLP**

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