

Cheltenham Borough Council

Cabinet – 24 June 2014

Cheltenham Leisure and Culture Trust – Intention to award contract and update on admittance to Local Government Pensions Scheme and on TUPE

Accountable member	Councillor Rowena Hay, Cabinet Member for Healthy Lifestyles
Accountable officer	Pat Pratley, Deputy Chief Executive
Ward(s) affected	All
Key Decision	No
Executive summary	<p>In December 2012 Cabinet endorsed recommendations to create a charitable trust to operate the leisure and culture services currently provided by the Council. Cabinet also recommended that the trust should have broad objects to advance health, arts, sports and education.</p> <p>Subsequently trustees were appointed in December 2013 and, in March this year, Cabinet received a report on the Memorandum and Articles of Association for the new trust which enabled the company, Cheltenham Leisure and Culture Trust to be registered in May. The trust is a company limited by guarantee.</p> <p>Progress on a range of topics required to allow the Trust to take on the services on 1st October 2014 has continued satisfactorily and it is recommended that Cabinet now notes its intention to award a contract to the Trust.</p> <p>Cabinet should be aware of the TUPE and Pensions implications of the transfer of services and an update is included on these topics.</p> <p>A further report will be brought to Cabinet to confirm the transfer of services once the Council's due diligence process is complete and before the contract is formally awarded.</p>
Recommendations	<p>1. Cabinet notes the Council will award a contract to Cheltenham Leisure and Culture Trust (Cheltenham LCT) from 1 October 2014 to operate the following council services:</p> <ul style="list-style-type: none">• Leisure@• Prince of Wales Stadium• Town Hall• Pittville Pump Room• The Wilson (Cheltenham Art Gallery and Museum)• Tourism service and the Tourist Information Centre <p>Sport, Play and Healthy Lifestyles</p>

2. **Cabinet notes the intention to transfer staff, as appropriate, from the Council to Cheltenham LCT under the Transfer of Undertaking (Protection of Employment) legislation and that consultation with staff will be initiated.**
3. **Cabinet notes the admittance of Cheltenham LCT to the Local Government Pension Scheme (LGPS).**
4. **Cabinet notes that the Council will act as guarantor for LGPS liabilities arising from those staff who transfer to Cheltenham LCT.**

<p>Financial implications</p>	<p>Employees pay contributions to the LGPS, with the employer making contributions to pay the balance of the cost of providing employee benefits after taking into account investment returns. Every three years, an independent actuary calculates how much the employer should contribute to the scheme. The amount will vary and the proposal to address the funding of future 'potential' liabilities will be set out in the contract between the Trust and the Council.</p> <p>At the point of TUPE transfer, an actuarial assessment will be made to ensure that the proposed contribution rates are enough to pay for benefits accrued which should mitigate, as far as is practicable, future liabilities.</p> <p>The administering authority (Gloucestershire County Council) will require the Council to act as guarantor for any pension fund deficit which might accrue over the contract period. It should be noted that this is also the case for any deficits that are held by Cheltenham Borough Council as an employer within the LGPS. Further explanation is detailed in Section 4.</p> <p>Contact officer: Paul Jones, GO Shared Services Head of Finance Paul.Jones@cheltenham.gov.uk, 01242 775154</p>
<p>Legal implications</p>	<p>The Council intends to award a contract for the provision of its Leisure and Cultural facilities based upon those premises indicated in the recommendations to the Cheltenham Leisure and Culture Trust a Trust limited by guarantee which is in the process of being registered as a charity. There is no requirement to go through a procurement process, as indicated within the report, however, the Council did run a PQQ process to see if there was a developed market for the services and the outcome is covered in the report.</p> <p>The staff will transfer under the TUPE legislation as detailed in the report and the Trust is to be an admitted body within the Local Government Pension Scheme again as detailed below.</p> <p>All the appropriate documentation is currently being considered and will be formally entered into in advance of the "go live" date of the 1st October 2014. A further report will be brought to Cabinet before the contract commencement date to update on progress.</p> <p>Contact officer: Gary Spencer, One Legal Gary.Spencer@tewkesbury.gov.uk; 01684 272691</p>

HR implications (including learning and organisational development)	<p>HR implications are identified in sections 3 and 4 of this report.</p> <p>Contact officer: Julie McCarthy, HR Manager GO Shared Services (West) Julie.McCarthy@cheltenham.gov.uk, 01242 264355</p>
Key risks	<ol style="list-style-type: none"> 1. If the contract is not awarded or if award is delayed then the Council may not realise the intended benefits of the creation of the Trust or benefits may be delayed. 2. If the Council fails to follow TUPE legislation then it may be exposed to compensation claims. 3. If the Council does not act as pension guarantor then the trust will not be granted admitted body status to the LGPS
Corporate and community plan Implications	<p>The creation of the new trust for leisure and culture services supports the following Council's strategic objectives;</p> <ol style="list-style-type: none"> 1. Enhancing the provision of arts and culture; and 2. People are able to lead healthy lifestyles.
Environmental and climate change implications	<p>This report does not have direct environmental and climate change implications. However, the contract the Council will enter into with the Trust will require the Trust to develop and deliver an environmental management strategy to ensure environmental and climate change impacts are considered in service delivery and in business planning.</p> <p>Contact officer: Gill Morris, Climate Change & Sustainability Officer gill.morris@cheltenham.gov.uk; 01242 264229</p>
Property/Asset Implications	<p>This report does not have any property implications but the subsequent transfer and management of the properties will be subject to formal leases.</p> <p>Contact officer: David Roberts, Head of Property Services David.Roberts@cheltenham.gov.uk; 01242 264151</p>

1. Background

- 1.1 In December 2012 Cabinet endorsed recommendations to create a charitable trust to operate the leisure and culture services currently provided by the Council. Cabinet also recommended that the trust should have broad objects to advance health, arts, sports and education.
- 1.2 As members will be aware, the project has progressed such that trustees were appointed in December 2013. In March this year, Cabinet received a report regarding the creation of the Memorandum and Articles of Association which were required in order for company registration to take place. The trust is now a company limited by guarantee being registered in May this year.
- 1.3 In the same March report, Cabinet was also advised that Gloucestershire County Council Pensions Committee were due to meet in May and would be considering granting admitted body status to the new trust. The report also outlined the fact that staff who transfer under TUPE (Transfer Undertakings Protection of Employment) Regulations 2014 would do so on the terms and conditions of employment that they enjoyed at the point of transfer.
- 1.4 Progress on a range of topics required to allow the Trust to take on the services on 1st October 2014 has continued satisfactorily and it is recommended that Cabinet now notes its intention to award a contract to the Trust. Cabinet is also being asked to note the current position with regard to pensions and TUPE matters.
- 1.5 A further report will be brought to Cabinet to confirm the transfer of services once the Council's due diligence process is complete and before the contract is formally awarded.

2. Intention to award contract

- 2.1 The Council completed its market testing and commissioning review in May 2013 and all the companies and bodies which had expressed an interest in the provision of leisure and cultural services as had been identified in the PQQ (Pre-Qualification Questionnaire) were informed of its outcome. The Council considered, after careful evaluation of all the expressions of interest, that there was no developed market for the services proposed and no EU procurement process was applicable.
- 2.2 The "in-house team" that provide the services currently had expressed an interest in the future provision of the services, by way of a leisure and culture trust. In view of the undeveloped market the Council entered into discussions with them to work up an acceptable proposal that would allow the services to be run outside of the Council.
- 2.3 The Cheltenham Leisure and Culture Trust was formed as a legal entity and has expressed a willingness to take a contract for the provision of the services.
- 2.4 Discussions have been proceeding and a contract has been drafted under which the new Cheltenham Leisure and Culture Trust will provide the services as detailed in the Schedule thereto and which were included in the original PQQ. The contract will be awarded to the Trust and current discussions are continuing on the precise wording of the contract.

3. TUPE

- 3.1 The TUPE Regulations 2014, are envisaged to apply to the creation of the new Trust, as part of the council's business or undertaking will transfer as a going concern to the Trust. The contract will be based upon the wellbeing powers in section 2 Local Government Act 2000 and section 19 Local Government (Miscellaneous Provisions) Act 1976.
- 3.2 On 1st October 2014, all Cheltenham Borough Council employees within the affected service areas will transfer to the employment of the Trust under the above legislation.

- 3.3** TUPE legislation requires that employees' main terms and conditions of employment are protected at the date of transfer. Where employees are members of, or were eligible to join, an occupational pension scheme before the transfer they are entitled to have a scheme provided for them after the transfer. The Local Authority Pension Schemes can allow existing members who are subject to TUPE transfer to remain in the LGPS under a facility called "admitted body status" (see section 4 below).
- 3.4** Under TUPE all the employees in the affected service areas who spend more than (as a guide) 50% of their work time on work transferring to the Trust will, unless they object, automatically transfer to the employment of the Trust under their existing terms and conditions of employment, along with continuity of service.
- 3.5** If any employees object to the transfer then they do not transfer, but equally they do not stay - instead the transfer itself terminates their employment and they usually have no rights against anyone in consequence. A refusal to transfer will usually mean that the employee has in effect resigned, i.e. no entitlement to redundancy.
- 3.6** Work will need to commence to comply with TUPE regulations. Key steps to be taken are as follows: (see also **Appendix 2**, Cheltenham LCT – key steps and timeline for TUPE transfer by CBC)
- (a) Identify which employees will be affected by the transfer.
 - (b) There is a statutory requirement for full and proper consultation with employees and any recognised trade unions. Consultation with representatives and employees impacted directly and indirectly needs to take place regarding the TUPE transfer. Formal consultation must take place in good time before the transfer, and is planned to commence 1st July 2014 through to 30 September 2014.
 - (c) Due diligence in passing employee information to the new employer (the Trust) must take place; any failure to carry out this step could cost Cheltenham Borough Council up to 13 weeks' gross pay per affected employee. Note that it is no defence that full information or consultation would make no difference to the end result, or that the staff suffered no loss as a result. There is no specified minimum period over which consultations must be conducted prior to a transfer taking place and it is important to note that there is no link between TUPE and redundancy provisions.
 - (d) Cheltenham Borough Council will need to give the Trust certain employee liability information about the transferring employees, essentially detailing the financial, legal and contractual information that comes with each. The information must be given no later than 28 days before the transfer and must include:
 - each transferring employee's name, age, terms and conditions;
 - information on any grievances they have lodged;
 - any claims they have brought or disciplinary action taken against them.

This is legally required by TUPE (to ensure all possible cost liabilities are known pre-transfer) therefore there are no data protection issues as it is covered by the legal obligation exemption in respect of the disclosure of this information (see The Employment Practices Data Protection Code). Wherever practicable information handed over to the new employer (the Trust) will be anonymised.

Employees will be advised that their employment records are to be disclosed to the new employer before transfer. Cheltenham Borough Council will need to obtain formal assurances regarding the use and safekeeping of the information and its return if the transfer does not in the event proceed.

There is a penalty of a minimum of £500 in respect of each employee for whom the required information was not provided or was defective, in addition to which the new employer (the Trust) can bring proceedings to recover any loss arising from its reliance on poor or incomplete information.

- (e) It is worth noting that if any employee is dismissed for reasons connected to the transfer, this dismissal may be automatically unfair. The new employer (the Trust) may, however, dismiss them post transfer from some other reason not connected with the transfer (e.g. for economic, technical or organisational reasons entailing a change in the workforce).
- (f) All relevant employees will transfer into the Trust with effect from 1 October 2014, the date that it is envisaged that the TUPE transfer will take effect, and will fall under the Trust management arrangements. No immediate staffing changes are envisaged before this date, nor on transfer. Any variations to operational arrangements post 1 October 2014 will be subject to separate discussions and consultation and be the responsibility of the Trust.

3.7 A significant piece of work has been scoped and will be carried out to set in place the relevant employment policy framework (including Health and Safety) and pensions arrangements (e.g. stakeholder pension for new employees) for the Trust to operate effectively as an employer in its own right.

3.8 There are significant employee relations implications, as detailed above and informal consultation has already commenced with the two recognised Trade Unions.

3.9 Human Resources including Payroll service provision to the trust will continue to be provided from the GO Shared Services with effect from 1 October 2014. A service level agreement has been drafted together with costs for the service provision.

4. Local Government Pension Scheme

4.1 With effect from 1 October 2012, the LGPS 2012 Miscellaneous Regulations introduced mandatory new requirements for all Admission Bodies brought into the Fund from that date.

4.2 Under these Regulations, all new Admission Bodies will be required to provide some form of security, such as a guarantee from the letting employer, an indemnity or a bond. The security is required to cover some or all of the following:

- The strain cost of any redundancy early retirements resulting from the premature termination of the contract;
- allowance for the risk of asset underperformance;
- allowance for the risk of a fall in gilt yields;
- allowance for the possible non-payment of employer and member contributions to the Fund;
- the current deficit.

4.3 For all new Transferee Admission Bodies, the security must be to the satisfaction of the Administering Authority as well as the letting employer, and will be reassessed on an annual basis. The Administering Authority and the LGPS 2012 Miscellaneous Regulations require all the Pension Fund liabilities of the Transferee Admission Body to be guaranteed by the letting Scheduled Body (i.e. Cheltenham Borough Council).

4.4 The Pensions Committee have agreed the admission request for Cheltenham LCT to join the Gloucestershire LGPS subject to the admission agreement being properly completed, a redundancy bond in place and pension liabilities being guaranteed by the transferring employer (Cheltenham Borough Council).

5. Reasons for recommendations

5.1 As detailed above.

6. Alternative options considered

6.1 As per the main body of the report

7. Consultation and feedback

7.1 The project team HR representatives have maintained ongoing and positive liaison with CBC employee representatives as the project has progressed and will continue to do so as the TUPE process progresses.

8. Performance management – monitoring and review

8.1 As reported previously, with specific regard to pension matters, the trust will be required to operate within the terms of its contract with the Council in particular with regard to matters relating to the LGPS and any admitted body status. The trust, as a charitable company will be regulated by both Companies House and the Charity Commission and will operate under a contract with the Council.

Report author	Contact officer: Pat Pratley, Deputy Chief Executive <i>pat.pratley@cheltenham.gov.uk; 01242 775175</i>
Appendices	1. Risk Assessment 2. Cheltenham LCT – Key steps and timeline for TUPE transfer by CBC
Background information	1. Cabinet Report 11 December 2012 2. Cabinet Report 18 March 2014

Risk Assessment

Appendix 1

The risk				Original risk score (impact x likelihood)			Managing risk				
Risk ref.	Risk description	Risk Owner	Date raised	Impact 1-5	Likelihood 1-6	Score	Control	Action	Deadline	Responsible officer	Transferred to risk register
1	If the contract is not awarded or if award is delayed then the Council may not realise the intended benefits of the creation of the Trust or benefits may be delayed.	Pat Pratley	14/05/14	3	4	12	Reduce	Gain alignment to the heads of terms from all key stakeholders. Gain agreement to the full contract terms from the Council and the Trust	End July 2014 End September 2014	Pat Pratley Pat Pratley	
2	If the Council fails to follow TUPE legislation then it may be exposed to compensation claims	Julie McCarthy	14/05/14	3	2	6	Reduce	Ensure proven TUPE procedures are followed	October 2014	Donna Sheffield	
3	If the Council does not act as pension guarantor then the trust will not be granted admitted body status to the LGPS	Pat Pratley	14/05/14	3	2	6	Reduce	Ensure that liabilities are understood. Confirm Council willingness to act as guarantor	June 2014	Pat Pratley	
Explanatory notes											
<p>Impact – an assessment of the impact if the risk occurs on a scale of 1-5 (1 being least impact and 5 being major or critical)</p> <p>Likelihood – how likely is it that the risk will occur on a scale of 1-6 (1 being almost impossible, 2 is very low, 3 is low, 4 significant, 5 high and 6 a very high probability)</p> <p>Control - Either: Reduce / Accept / Transfer to 3rd party / Close</p>											

Guidance

Types of risks could include the following:

- Potential reputation risks from the decision in terms of bad publicity, impact on the community or on partners;
- Financial risks associated with the decision;
- Political risks that the decision might not have cross-party support;
- Environmental risks associated with the decision;
- Potential adverse equality impacts from the decision;
- Capacity risks in terms of the ability of the organisation to ensure the effective delivery of the decision
- Legal risks arising from the decision

Remember to highlight risks which may impact on the strategy and actions which are being followed to deliver the objectives, so that members can identify the need to review objectives, options and decisions on a timely basis should these risks arise.

Risk ref

If the risk is already recorded, note either the corporate risk register or TEN reference

Risk Description

Please use “If xx happens then xx will be the consequence” (cause and effect). For example “If the council’s business continuity planning does not deliver effective responses to the predicted flu pandemic then council services will be significantly impacted.”

Risk owner

Please identify the lead officer who has identified the risk and will be responsible for it.

Risk score

Impact on a scale from 1 to 5 multiplied by likelihood on a scale from 1 to 6. Please see risk [scorecard](#) for more information on how to score a risk

Control

Either: Reduce / Accept / Transfer to 3rd party / Close

Action

There are usually things the council can do to reduce either the likelihood or impact of the risk. Controls may already be in place, such as budget monitoring or new controls or actions may also be needed.

Responsible officer

Please identify the lead officer who will be responsible for the action to control the risk.

For further guidance, please refer to the [risk management policy](#)

Transferred to risk register

Please ensure that the risk is transferred to a live risk register. This could be a team, divisional or corporate risk register depending on the nature of the risk and what level of objective it is impacting on.

