

Decision Pathway – Report Template



PURPOSE: Key decision

MEETING: Cabinet

DATE: 01 September 2020

TITLE	Hengrove Leisure centre		
Ward(s)	Hengrove and Whitchurch Park		
Author: Guy Fishbourne	Job title: Sport & Physical Activity Development Manager		
Cabinet lead: Mayor	Executive Director lead: Jacqui Jensen		
Proposal origin: BCC Staff			
Decision maker: Cabinet Member Decision forum: Cabinet			
Timescales: : An immediate decision is required to approve the relevant ongoing financial adjustments required on the Hengrove PFI Leisure Centre Contract, which form part of the Council's contractual obligations (as part of the decision reached in 2008) in order to cover the deficits being forecast now Hengrove Leisure Centre has reopened.			
Purpose of Report: <ol style="list-style-type: none">As a result of COVID-19 and facility closures, the Council's PFI Contractor, Bristol Active Limited (BAL) have a legitimate claim and request a financial adjustment through the Qualifying Change in Law (QCIL) mechanism (which is included in the PFI contract approved in 2008) to cover the recovery period now the facility has reopened.This report highlights the Council's contractual obligations to provide relief and seeks approval to make the necessary variations to achieve this.			
Evidence Base: Background <ol style="list-style-type: none">Following the Government's COVID-19 lockdown announcement on 20/03/2020, all of Bristol's sport and leisure centres and swimming pools were closed to the public. The Council owns nine leisure centres and swimming pools located across the city.Hengrove Leisure Centre was built under a Private Finance Initiative (PFI) and the QCIL mechanism is a standard contractual mechanism used in this form of PFI contract. A decision to endorse the Hengrove Leisure Centre PFI Contract was approved by cabinet in 2008 (the "2008 Decision").			
Current situation <ol style="list-style-type: none">BAL has re-opened Hengrove Leisure Centre. However, as a result of COVID-19, expenditure is forecast to be disproportionately higher than income. The furlough scheme will continue to operate through until October 31st and operators will take advantage of this to help mitigate costs related to staffing where they can.			
Financial adjustment required under the terms of the contract <ol style="list-style-type: none">As a result of the projected reduced income, it is forecast there will be an estimated additional cost to the Council of c.£675,541 between July 20 and March 21 (Appendix A). Under the QCIL mechanism (which is			

included as standard in the form of contract agreed under the 2008 Decision and signed in 2010), the council is required to compensate BAL for “Estimated Changes in Project Costs”, and in turn BAL compensates Parkwood (their leisure sub-contractor) under a similar mechanism. However, negotiations are required to determine the approach to applying the mechanism in such novel circumstances as the current pandemic, i.e. calculating varying financial adjustments on a monthly basis (rather than a single one off adjustment), when to end such adjustments and review of such assistance (including on an open book basis), as part of the phased reopening of Services at the facility and in a fast changing and uncertain environment.

5. At the time of writing the report 2021-2022 forecasts have not yet been provided and it is believed payments under QCIL could be required until March 2022. Total financial adjustments required could therefore be higher than those forecasts. The financial adjustments will be subject to an open book arrangement.
6. To date, covering the period from March 22nd – May 31st Financial Adjustments of £177,643.04 have already been processed and a further payment remains outstanding for June estimated to be £60,000.

Options

7. To mitigate the large deficits being forecast the following options have been considered in relation to re-opening:
 - **Option 1** – Do nothing further. This is not a realistic option as the Council would be in breach of the QCIL provisions of the contract (which it accepts deal with the impact of the QCIL event in relation to Covid-19) and likely bigger financial and operational challenges.
 - **Option 2** – Negotiate a pragmatic solution with BAL in order to implement the QCIL mechanism, which specifies a financial commitment from the Council is required. **Preferred option**- subject to Finance carrying out a review of the claimed costs.
 - **Option 3** – Delay re-opening, which is contrary to what the contract requires under QCIL (i.e. keeping the facility closed in the absence of a legal requirement goes beyond what is necessary to mitigate the effects of Covid-19 legislation on the Services etc), and would have to be mutually agreed.

Risks / Impacts

Financial and Legal

8. In respect of this PFI Contract the legal position of the contractor and leisure operator are clear with regards to its request for financial adjustments and other contractual relief resulting from the QCIL.
9. Subject to the outcome of the negotiated position and recovery period there's a risk that there will be an impact on the Council's ongoing revenue position though a permanent (subject to income benchmarking) increase in the Annual Unitary Charge payment required under the terms of the contract. The risk of income benchmarking adjustments to the Unitary Charge was identified in the 2008 Decision.
10. Use of Hengrove Reserves to support the necessary financial adjustments could result in additional funding being required to cover the end of life (2037) project costs.

Cabinet Member / Officer Recommendations:

That Cabinet

1. Notes this is a legitimate claim under the terms of the PFI agreement approved by cabinet in 2008.
2. Agrees to provide the required financial assistance and contractual relief in accordance with the Qualifying

Change in Law mechanism and the satisfactory outcome of commercial negotiations, subject to assessment and approval of the claimed costs by the Chief Finance Officer.

3. Notes and approves the financial adjustments made from March - June 2020 of approximately £237,643.03.
4. Authorises the Executive Director People in consultation with the Executive Member for Finance and the Chief Finance Officer to negotiate and approve the relevant financial adjustments required in accordance with the PFI contract and the necessary variations ('Change') to achieve this.
5. Notes that the situation will be kept under careful review and further reports will be brought to Cabinet if needed,

Corporate Strategy alignment:

1. Wellbeing: is one of four themes in the corporate strategy and based upon creating healthier and more resilient communities where life expectancy is not determined by wealth or background.
2. One of the Mayor's seven key commitments in the corporate plan is that Bristol will be a leading cultural city, making culture and sport accessible to all.
3. Embed health in all our policies to improve physical & mental health and wellbeing and reduce health inequalities reducing future demand pressures on health and social care services and helping to reduce costs.
4. Supporting preventative interventions and opportunities for physical activity amongst children and adults and creating a resilient, sustainable, clean and healthy city.
5. Promoting opportunity, attracting funding and protecting investment in culture while also facilitating others
6. Continue to offer good quality services which attract visitors.

City Benefits:

1. Working in partnership with BAL to secure Bristol's leisure services across its leisure centres and swimming pools.
2. The intended outcome will be continued service provision that is operated as cost effectively and efficiently as possible, whilst providing for the needs of the local community and contributing towards the city's strategic outcomes.
3. The Council will work with BAL to mitigate the impact of COVID-19 and continue to work in partnership to increase participation and realise maximum health and social benefits for local residents: increased family and community connectedness, improved community networks and social capital, reduced sense of isolation and loneliness, enhanced social skills and self-esteem.
4. Supporting people to be more physically active will impact on a range of public health and adult social care outcomes such as:
 - Obesity levels in adults and children
 - Social and health inequalities, increased healthy life expectancy
 - The number of falls and injuries in over 65s
5. Early death from cardiovascular diseases, cancer and respiratory diseases.

Consultation Details: NA

Background Documents:

Bristol: Sport and Physical Activity Strategy 2020-2025

<https://www.bristolactivecity.org.uk/wp-content/uploads/2020/01/BD12440-Bristol-Sports-Strategy-2020-25-1.pdf>

Cabinet Report 2008 (the 2008 Decision): Hengrove Healthplex: Selection of Preferred Bidder and Authority to Enter into Contracts

https://democracy.bristol.gov.uk/Data/Cabinet/200807311600/Agenda/0731_5.pdf

Revenue Cost	£913,184	Source of Revenue Funding	Hengrove Reserve
Capital Cost	£ NA	Source of Capital Funding	NA
One off cost <input type="checkbox"/>	Ongoing cost <input type="checkbox"/>	Saving Proposal <input type="checkbox"/>	Income generation proposal <input type="checkbox"/>

Required information to be completed by Financial/Legal/ICT/ HR partners:

1. Finance Advice: As the report explains, an ongoing financial adjustment is required by the Council in relation to the Unitary Charge. To date, covering the period from March 22nd – May 31st financial adjustments of £0.178m have already been paid and a further payment for June estimated to be £60,000. This charge could be required for 12 months after the reopening and potentially beyond. Whilst costs are currently estimated to be £0.676m between July 20 and March 21 they could be higher than this forecast. Provision needs to be made to address this risk, which will need to be funded from Hengrove reserves (currently £1.6m). The use of Hengrove reserves to support the necessary financial adjustment, should be seen as a temporary measure and these reserves may need to be replaced as part of the MTFP process and future budget setting, to cover the end of life Hengrove project costs.

Finance Business Partner: Denise Hunt 19/8/20

2. Legal Advice: It's accepted that a Qualifying Change in Law (QCIL) has occurred for the purposes of clause 58 of the PFI contract. The challenges arise in relation to agreeing the specifics of the Change required under QCIL in relation to the "effects" of changes in law due to Covid-19, which are the subject of on-going negotiations. Issues include the extent of the relief and method for calculating variable and ongoing financial adjustments (rather than a fixed adjustment), in light of changing legal restrictions and market conditions relating to Covid-19, together with the need for greater transparency and an open book approach, which is not typical of circumstances that clause 58 was drafted to address.

It should be noted that the contract does not distinguish between closure and re-opening periods, but rather in terms of relief and mitigations from service obligations that can't or would be unreasonable to perform due to the effects of QCIL, together with a financial adjustment to the Unitary Charge to cover "Estimated Change in Project Costs", i.e. increases in SPV / Leisure Operator actual costs, the decrease in Leisure Operator (including its sub-contractor / NPDO), actual revenues less costs saving mitigations associated with such variations and cost mitigations.

A key issue to agree concerns the point at which QCIL related financial adjustments to the Unitary Charge will cease and the approach to normalising Unitary Charge payments, including through the use of the contractual income benchmarking mechanism, adapted to the impact of Covid-19.

Negotiations are ongoing and in line with guidance and regulations and the parties are seeking to find a pragmatic solution to these complicated and unusual circumstances. Given the timescales, it has and may continue to be necessary to advance some agreed payments to BAL / Parkwood in advance of signing the Change agreement. Such payments would be captured in the agreement.

The Public Sector Equality duty requires Cabinet to consider the need to promote equality for persons with "protected characteristics" and to have due regard to the need to i) eliminate discrimination, harassment, and victimisation; ii) advance equality of opportunity; and iii) foster good relations between persons who share a relevant protected characteristic and those who do not share it. The Equalities Impact Check (appended) is designed to help assess whether there are any barriers in place that may prevent people with a protected characteristic using a service or benefiting from a policy. The decision maker must take into consideration the information in the assessment when reaching their decision.

Legal Team Leader: Eric Andrews 14/08/20		
3. Implications on IT: No anticipated impact on IT services		
IT Team Leader: Simon Oliver 12/08/20		
4. HR Advice: As the report is currently set out there are no HR implications for Bristol City Council employees.		
HR Partner: Lorna Laing 20/07/20		
<p>4. Procurement Advice: The report sets out the issue raised under the contract and implications around additional expenditure as a result of COVID-19 which the supplier is seeking to apply contract clause to offset anticipated losses. If the recommendation is accepted then it will be important that in engaging with the supplier the Council plans the negotiation including assembling an appropriate negotiation team to mitigate implications on the Council.</p> <p>It will also be important to ensure that suitable due diligence / benchmark assessment work is carried out on the claim and where possible use the process as an opportunity to secure the most appropriate outcomes. It would be advisable that Strategic Procurement and Supplier Relations Service are engaged in these discussions.</p>		
Category Manager: Steve Sandercock - Interim Head of Strategic Procurement and Supplier Relations – 13/08/20		
EDM Sign-off	Jacqui Jensen	[date]
Cabinet Member sign-off	Councillor Craig Cheney	03/07/20
For Key Decisions - Mayor's Office sign-off	Mayor's Office	03/08/20

Appendix A – Further essential background / detail on the proposal	NO
Appendix B – Details of consultation carried out - internal and external	NO
Appendix C – Summary of any engagement with scrutiny	NO
Appendix D – Risk assessment	NO
Appendix E – Equalities screening / impact assessment of proposal	YES
Appendix F – Eco-impact screening/ impact assessment of proposal	NO
Appendix G – Financial Advice	NO
Appendix H – Legal Advice	NO
Appendix I – Exempt Information	YES
Appendix J – HR advice	NO
Appendix K – ICT	NO
Appendix L – Procurement	NO