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AGENDA

Pwyllgor PWYLLGOR CRAFFU'R ECONOMI A DIWYLLIANT

Dyddiad ac amser y cyfarfod DYDD IAU, 3 AWST 2023, 5.15 PM

Lleoliad YB 4, NEUADD Y SIR, CYFARFOD AML-LEOLIAD

Aelodaeth Cynghorydd Wong (Cadeirydd)
Y Cynghorwyr Berman, Brown-Reckless, Henshaw, Jenkins, Jones, Lloyd Jones, Shimmin a/ac Thomson

Tua
Amser.

1 Ymddiheuriadau am Absenoldeb

Derbyn ymddiheuriadau am absenoldeb.

2 Datgan Buddiannau

I'w wneud ar ddechrau'r eitem agenda dan sylw, yn unol â Chod Ymddygiad yr Aelodau.

3 **Galw i Mewn - Penderfyniad Swyddog SGC2327 - Awdurdodiad I Gyhoeddi'r Gwahoddiad I Dendro Am Reoli Caffi'r Ardd Gudd** 5.15 pm
(*Tudalennau 3 - 20*)

4 Materion Brys (os o gwbl)

5 Dyddiad y cyfarfod nesaf.

19 Medi 2023, 4.30pm

Davina Fiore

Cyfarwyddwr Llywodraethu a Gwasanaethau Cyfreithiol

Dyddiad: Dydd Gwener, 28 Gorffennaf 2023

Cyswllt: Andrea Redmond, 02920 872434, a.redmond@caerdydd.gov.uk

GWE-DARLLEDU

Caiff y cyfarfod hwn ei ffilmio i'w ddarlluedu'n fyw a/neu yn olynol trwy wefan y Cyngor. Caiff yr holl gyfarfod ei ffilmio, heblaw am eitemau eithriedig neu gyfrinachol, a bydd y ffilm ar gael ar y wefan am 12 mis. Cedwir copi o'r recordiad yn unol â pholisi cadw data'r Cyngor.

Gall aelodau'r wasg a'r cyhoedd hefyd ffilmio neu recordio'r cyfarfod hwn

Os ydych yn ymddangos gerbron y pwyllgor ystyrir eich bod wedi cydsynio i gael eich ffilmio. Trwy fynd i mewn i gorff y Siambr neu'r ystafell gyfarfod rydych hefyd yn cydsynio i gael eich ffilmio ac i ddefnydd posibl o'r delweddau a'r recordiadau sain hynny ar gyfer gwe-ddarlluedu, gwybodaeth gyhoeddus, sylw i'r wasg a/neu ddibenion hyfforddi.

Os oes gennych gwestiynau ynghylch gwe-ddarlluedu cyfarfodydd, cysylltwch â'r Gwasanaethau Democrataidd ar 02920 872020 neu e-bost [Gwasanethau Democrataidd](#)

CYNGOR CAERDYDD
CARDIFF COUNCIL

ECONOMY & CULTURE SCRUTINY COMMITTEE

03 August 2023

CALL IN: OFFICER DECISION SGC2327- Authorisation To Issue The Invitation To Tender For The Management Of The Secret Garden Café

Purpose of Report

1. To provide Committee Members with background information on the Council's Call-In procedure; the decision being called-in at this meeting; and the scope, process and structure of Call-In scrutiny.

Call-In Procedure

2. The Council's Constitution contains a Call-In Procedure¹ which provides that any non-Cabinet Member may call-in a decision of which notice has been given, via publication on a Decision Register, by writing to the Head of Democratic Services (HDS) within the Call-In Period (within seven clear working days after publication of the decision). The HDS shall then notify the Cabinet Business Office and call a meeting of the relevant Scrutiny Committee, where possible after consultation with the Chairperson of the Committee, and in any case within five clear working days of the decision to call-in.
3. Officer Decisions, for purposes of the Call-In Procedure, are those made by the Chief Executive, a Corporate Director or Director; these must be published on the Council's Officer Decision Register.
4. Point 12 (f) of the Scrutiny Procedure Rules sets out that the role of Scrutiny Committees calling-in a decision is:
 - To test the merits of the decision;
 - To consider the process by which the decision has been formulated;
 - To make recommendations (to support the decision, change aspects of

¹ [Scrutiny Procedure Rules.pdf \(moderngov.co.uk\)](#) – Point 12

- the decision or to invite the decision-making body to reconsider);
- To suggest further steps before a decision is made (but not to try to carry out those steps in place of the decision-making body);
 - To come to a view in a relatively short time scale, so as not to compromise the speed and efficiency of the decision-making process.
5. The scope of the scrutiny is limited to exploring the reasons stated for the Call-In, set out at point 8. If questions are judged as probing areas not within the remit of the Call-in, the Chair will deem it necessary to disallow the line of inquiry.
6. The Constitution sets out the process for Call-In scrutiny as follows:
- a. The Scrutiny Committee decides whether to consider the Call-In or whether to refer the Call-In to Full Council
 - b. If the Scrutiny Committee chooses to consider the Decision, it may refer the Decision back to the decision maker for reconsideration, setting out in writing the nature of its concerns. The decision maker shall then reconsider the matter before adopting a final decision or formally deferring the matter for further consideration. The relevant Scrutiny Committee would be advised of the outcome at its next meeting.
 - c. If the Scrutiny Committee chooses to consider the Decision, it may decide not to refer the matter back to the decision maker, in which case the decision shall take effect on the date of the relevant Scrutiny Committee meeting which considers the issue, or the expiry of the Scrutiny Period or the Council Scrutiny Period as appropriate, whichever is the later.
7. Whether or not the Scrutiny Committee decides to refer the matter back to the decision maker, the Scrutiny Committee may agree to forward any comments, observations, or recommendations to the Decision-maker in writing, for their consideration.

Decision Being Called-In - OFFICER DECISION SGC2327- Authorisation To Issue The Invitation To Tender For The Management Of The Secret Garden Café

8. On 19 June 2023, the above officer decision resolved:

- *that the commencement of a procurement process (including issuing of tender documents) be approved in respect of the Management of the Secret Garden Cafe on a concessionary basis and the use of evaluation criteria and weightings as set out in the body of the report.*

9. This Decision, known as **Officer Decision SGC2327** was published on 21 June 2023 in the Officer Decision Register², with a proposed implementation date of 01 July 2023. The purpose of taking this Decision was:

- *To ensure continuity of service provision for the benefit and enjoyment of users to Bute Park and its Visitor Centre.*

Reasons given for Calling-In Officer Decision SGC2327

10. During the Call-In period after publication of the Officer decision on 21 June 2023, a non-Cabinet councillor submitted a request to call-in **Officer Decision SGC2327**.

11. The reasons set out by the non-Cabinet councillor for calling in the decision are set out in the following extract taken from the written request to the Head of Democratic Services, dated 30 June 2023:

1. ***The process does not represent value for money for the council or public purse.***

It does not represent value to the public purse to end a lease of a sitting tenant who is open to negotiation on the terms of their lease, including increasing their rent obligations. The willingness of the tenant to do this is a matter of public record. The council engaged with the current tenant to renegotiate the lease in June/July 2022, only to reject the options appraisal presented by the tenant in December 2022, on request of the council. In February 2023 the council determined that it would no longer be able to re-

² [Decision - Authorisation To Issue The Invitation To Tender For The Management Of The Secret Garden Café : Cardiff Council \(modern.gov.co.uk\)](https://modern.gov.co.uk)

negotiate the lease and was required to go out to public tender in July 2023. The rationale for doing this is open to question.

2. The council progressed the current process (public tender) on the basis of incomplete or inaccurate information.

The council's position in February 2023 that it could not progress on the basis of a re-negotiation with the sitting tenant because it was progressing a Management Agreement - rather than a lease with an accompanying Management Agreement - was incorrect. Advice presented to officers subsequent to the decision to opt for a Management Agreement (and therefore public tender) stated that the council is not able to solely offer a Management Agreement, and must use a lease as the primary vehicle. Had proper advice been sought at the outset, the protracted and costly process could have been avoided. In addition, the initial lease negotiations – and decision to adopt a new approach in February 2023 – was led by officers who with neither legal nor lease expertise. As such, the process has been flawed from the outset.

3. The process has undermined a successful, independent business which council policy (including Procurement Policy) wishes to promote.

The council's refusal to formally extend the end point for the tenants lease, opting rather for a Tenancy At Will, stripped the business of legal rights and protections, and has put significant financial pressures on the business. With only a 24 hour notice period to end the tenancy, the decision to move to a Tenancy At Will has needlessly put huge pressures on a successful, popular independent business. There has been a lack of scrutiny around the decision to move from a lease to a management agreement and subsequently to move the tenant on to a Tenancy At Will. Furthermore, the lack of complete and accurate advice on the terms of which the council was able and should re-shape the lease has undermined the business and council policy.

4. The rationale and decision making around entering a public procurement process, rather than lease negotiation, is not clear.

The council has stated that this process is being undertaken for the benefit of users of Bute Park, but has failed to set out what the current offer from the current tenant fails to deliver. In addition, there is a large petition and responses to a visitor survey which suggest that users are overwhelmingly supportive and appreciative of the offer of the current tenant. The decision making to date has not taken that public view into account. I would suggest that engaging the New Friends of Bute Park group to gauge public opinion on what the offer from the café should be, just weeks before issuing the tender, suggests that the council was not itself sure what the current gaps in the current offer are, or what it intends to deliver through a public procurement process. Furthermore, it is a matter of record that the sitting tenant was open to re-negotiating the terms of their lease, including increasing their rent obligation. As such, the decision to end the lease deserves full scrutiny.

12. The Call-In request has been deemed valid by the Head of Democratic Services, in consultation with the Monitoring Officer.

Structure of the Papers

13. The papers for this meeting consist of:
 - Appendix A** - Officer Decision Report – Secret Garden Café
 - Appendix B** - Officer Decision Report - Authorisation
 - Appendix C** – Officer Response to Reasons given for Calling-In Decision SGC2327

Structure of Scrutiny

14. This decision has been called in by Councillor Rhys Taylor. As such, Councillor Taylor will commence the Call-In meeting by presenting to the Committee his reasons for calling in the decision.
15. To assist Members, Neil Hanratty, (Director of Economic Development), Jon Maidment (Head of Parks and Harbour Authority) and Richard Crane (Legal Services) have been invited to respond to the Call-In and answer Committee Members' questions.
16. Following Members' questions, Councillor Rhys Taylor will have an opportunity to make final, closing comments, as will Neil Hanratty, Jon Maidment and Richard Crane.
17. Committee Members will then discuss the evidence received and decide whether or not to refer the decision back, and whether they have any recommendations, observations and/ or comments they wish to send to the decision takers.

Legal Implications

18. The Scrutiny Committee is empowered to enquire, consider, review, and recommend but not to make policy decisions. As the recommendations in this report are to consider and review matters, there are no direct legal implications. However, legal implications may arise if, and when, the matters under review are

implemented with or without any modifications. Any report with recommendations for decision that goes to Cabinet/Council will set out any legal implications arising from those recommendations. All decisions taken by or on behalf of the Council must (a) be within the legal powers of the Council; (b) comply with any procedural requirement imposed by law; (c) be within the powers of the body or person exercising powers on behalf of the Council; (d) be undertaken in accordance with the procedural requirements imposed by the Council e.g. Scrutiny Procedure Rules; (e) be fully and properly informed; (f) be properly motivated; (g) be taken having regard to the Council's fiduciary duty to its taxpayers; and (h) be reasonable and proper in all the circumstances.

Financial Implications

19. The Scrutiny Committee is empowered to enquire, consider, review, and recommend but not to make policy decisions. As the recommendations in this report are to consider and review matters, there are no direct financial implications at this stage.

RECOMMENDATION

The Committee is recommended to:

- Consider Officer Decision **SGC2327** in accordance with the Call-In Procedure;
- Determine whether to refer the matter to the Decision-maker or not;
- Agree whether it wishes to forward any comments, observations or recommendations to the Decision-maker in writing.

DAVINA FIORE

Director of Governance & Legal Services

28 July 2023

OFFICER DECISION : REPORT

ADDRESSED TO : Neil Hanratty - Director Economic Development

PREPARED BY : Jon Maidment – Head of Parks & Cardiff Harbour Authority

The delegation to be exercised is numbered CD3 in the Council Scheme of Delegations

TITLE OF REPORT : Authorisation to issue the Invitation to Tender for the Management of the Secret Garden Cafe

PROPOSAL:

The recommended decision is to approve the commencement of a procurement process (including issuing of tender documents) in respect of the Management of the Secret Garden Cafe on a concessionary basis and the use of evaluation criteria and weightings as set out in the body of the report.

The reason for the recommended decision is:

To ensure continuity of service provision for the benefit and enjoyment of users to Bute Park and its Visitor Centre.

PURPOSE

This report is to ensure that a proper and reasonable decision can be taken on the above proposal and

- (a) contains and/or appends all the information necessary to make a proper decision;
- (b) contains or appends all the advice given in relation to the proposal; and
- (c) has been prepared in accordance with the Council/Executive (*delete as appropriate*) Scheme of Delegations

BACKGROUND

1. The Secret Garden Café located within the walled garden of Bute Park Nursery and Visitor Centre was constructed as part of the Bute Park Restoration & Development Project supported through the National Heritage Lottery Fund and opened in 2011.
2. Since opening there have been three lease agreements with three separate tenants and the most recent agreement came to an end on 24th March 2023.
3. A Prior Information Notice was published on 4th May 2023, via Sell To Wales and was posted on the Council's Bute Park website on the same date. As a consequence, nine expressions of interest have been received to date.

ISSUES

4. To date, property lease agreements have been entered into. However, in light of operational experience, and additional obligations imposed which would be in addition to a typical landlord and tenant relationship, it has been determined that a management agreement and associated lease (concession agreement with lease) may be the most effective way forward from a customer, Council and tenant perspective. It is anticipated that the new agreement will be given for a five year period.
5. A Contract Notice advertising the opportunity to the market is scheduled to be published in July 2023, via Sell 2 Wales and through the Proactis Procurement Portal on the basis of an open procedure.
6. The rental income to the Council is estimated to be £75k over the five year term of the agreement. The value of the agreement to the successful bidder is estimated to be circa £1.125m over the five year term of the agreement.
7. It is proposed that a price / quality weighting of 40% price and 60% quality will be used. It is proposed that the quality criteria are assessed under the headings of, unique selling points, statement of intent, standards and values, added value proposals, financial forecasts, understanding of site specific requirements, investment, management and staff structure, menu, sustainability, branding and marketing strategy and references .
8. The evaluation process will be undertaken by a cross functional team of officers from the Parks, Legal, Procurement, Strategic Estates and Finance services.

RESOURCE REQUIREMENTS

8. The tender documents have been prepared by a cross functional team from the Parks, Legal, Procurement, Strategic Estates and Finance services and within existing resources.

CONSULTATION REQUIREMENT

9. The proposal does not require the carrying out of consultation under statute or at law or by reason of some promise or undertaking previously given by or on behalf of the Authority. Notwithstanding this the New Friends of Bute Park have been consulted on the specification document and evaluation criteria to be used.

CONSULTATION EXERCISE AND OUTCOME

10. The New Friends of Bute Park have been consulted in order to inform the development of the specification document and evaluation criteria and from a customer perspective.

ADVICE

11. The following advice has been sought on the proposal

Nature of advice: Finance

Council currently receives £17,500 annual rental income from the existing arrangements at Secret Garden Café within Bute Park. As this contractual arrangement is due to come to an end, this ODR seeks approval to commence a procurement process with a view to securing a tenant to continue the management and operation of the Secret Garden Café for the next 5 years.

The level of income to be generated by this opportunity will be determined by bids received as part of the procurement process. However, due to additional requirements and obligations being placed on the proposed tenant regards keeping toilet facilities open and cleaned on a daily basis, it is anticipated this improvement in provisions might result in a slight reduction of annual income to the Council (to circa £15,000 p/a). The Directorate will need to manage any income variances within existing budgets.

Responding officer : Kyle Godfrey

Date given: 16/6/23

Nature of advice : Legal

Legal Implications

The report seeks approval to commence a procurement exercise to appoint a contractor to operate the Secret Garden Café located in Bute Park and undertake ancillary obligations relating to the management of the public toilets.

Legal Services are instructed that agreement shall be concession type agreement with associated lease and which is expected to last for a period of five years. It is understood that the operator will undertake obligations relating to the Café and also Council's retained property in addition to would be usually expected of a tenant. Legal Services are further instructed that the Council will receive an estimated rental income of £75,000 over the five year term whereas the value to the successful bidder i.e. the potential income that café may generate is estimated to be circa £1.125M.

Legal Services are instructed that the opportunity shall be advertised to the open market via Sell2Wales and via the Council's Proactis Portal. The report provides details on the price/quality weighting and some details on the quality criteria which may be used to assess bidders.

Detailed legal advice should be obtained throughout the procurement process with regard to i) the drafting of all the relevant procurement documentation

(including the draft terms and conditions of contract) and ii) the procurement process in general.

The contractor will be required to enter into a lease of the café to allow the operator to exclusively occupy the café premises to perform the obligations required under the agreement. The Council has power to grant a lease pursuant to section 123 of the Local Government 1972. The decision maker should have regard to advice from a qualified valuer in so far as the rental element of the transaction comprises the total value of the contract. It is anticipated the lease, being granted along a management/concession agreement that the lease will be contracted out of the security of tenure provision of the Landlord and Tenant Act 1954 part II, to ensure the premises are returned to the Landlord at the end of the agreement and lease.

General Legal Advice

In considering this matter the decision maker must have regard to the Council's duties under the Equality Act 2010. Pursuant to these legal duties Councils must, in making decisions, have due regard to the need to (1) eliminate unlawful discrimination, (2) advance equality of opportunity and (3) foster good relations on the basis of protected characteristics. Protected characteristics are: (a) Age, (b) Gender reassignment (c) Sex (d) Race – including ethnic or national origin, colour or nationality, (e) Disability, (f) Pregnancy and maternity, (g) Marriage and civil partnership, (h) Sexual orientation (i) Religion or belief – including lack of belief.

Well Being of Future Generations (Wales) Act 2015 - Standard legal imps

The Well-Being of Future Generations (Wales) Act 2015 ('the Act') places a 'well-being duty' on public bodies aimed at achieving 7 national well-being goals for Wales - a Wales that is prosperous, resilient, healthier, more equal, has cohesive communities, a vibrant culture and thriving Welsh language, and is globally responsible.

In discharging its duties under the Act, the Council has set and published well-being objectives designed to maximise its contribution to achieving the national well-being goals. The well-being objectives are set out in Cardiff's Corporate Plan 2023-26. When exercising its functions, the Council is required to take all reasonable steps to meet its well-being objectives. This means that the decision makers should consider how the proposed decision will contribute towards meeting the well-being objectives and must be satisfied that all reasonable steps have been taken to meet those objectives.

The well-being duty also requires the Council to act in accordance with a 'sustainable development principle'. This principle requires the Council to act in a way which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs. Put simply, this means that Council decision makers must take account of the impact of their decisions on people living their lives in Wales in the future. In doing so, the Council must:

- Look to the long term
- Focus on prevention by understanding the root causes of problems
- Deliver an integrated approach to achieving the 7 national well-being goals

- Work in collaboration with others to find shared sustainable solutions
- Involve people from all sections of the community in the decisions which affect them

The decision maker must be satisfied that the proposed decision accords with the principles above; and due regard must be given to the Statutory Guidance issued by the Welsh Ministers, which is accessible using the link below: <http://gov.wales/topics/people-and-communities/people/future-generations-act/statutory-guidance/?lang=en>

The decision maker should be satisfied that the procurement is in accordance within the financial and budgetary policy and represents value for money for the council.

The report mentions a consultation with the New Friends of Bute Park. The carrying out of a consultation gives rise to a legitimate expectation that the outcome of the consultation will be considered as part of the decision making process.

The decision maker should also have regard to, when making its decision, to the Council's wider obligations under the Welsh Language (Wales) Measure 2011 and the Welsh Language Standards.

Responding Officer : Mansoor Ali & Richard Crane

Date given: 16/6/23 & 19/6/23

Nature of advice: Finance : Procurement

A Prior Information Notice was issued in May 2023 for suppliers to express an interest in this opportunity, which has confirmed that there is interest from the market in delivering the service required. The requirement will be best met via a concessions agreement. Based on the number of responses and timescales to delivery an open procedure procurement exercise is the most appropriate option, to be advertised through a Contract Notice published on Sell2Wales and through the Proactis Procurement Portal in line with the Council's Contract Standing Orders and Procedure Rules.

Responding officer: Lucy Williams

Date given: 16/6/23

BACKGROUND PAPERS

13. There are no background papers.

Signature:

A handwritten signature in dark ink, appearing to be 'J. M. Lee', written over a faint horizontal line.

Designation: Head of Parks & Harbour Authority

Report Reference: SGC2327

Report date: 19/6/23

OFFICER DECISION

DECISION UNDER THE COUNCIL SCHEME OF DELEGATIONS

Delegation Reference No: CD3

TITLE OF REPORT: Authorisation to issue the Invitation to Tender for the Management of the Secret Garden Cafe

Report date: 19th June 2023

Report reference: SGC2327

DECISION:

The recommended decision is to approve the commencement of a procurement process (including issuing of tender documents) in respect of the Management of the Secret Garden Cafe on a concessionary basis and the use of evaluation criteria and weightings as set out in the body of the Officer Decision Report.

REASON FOR DECISION:

The reason for the recommended decision is:

To ensure continuity of service provision for the benefit and enjoyment of users to Bute Park and its Visitor Centre.

- (a) The answer is "Yes" to each and every question in the current Report Verification Rules.
- (b) I have read and taken into account the attached report (bearing reference ***and dated 19th), the documents appended to it and all other material considerations; and
- (c) I have made the decision set out above for the reason(s) stated in exercise of powers delegated made to me under and in accordance with the Council/Executive (*delete as appropriate*) Scheme of Delegations

Signed: Neil Hanratty 

Designation: Director - Economic Development

Date: 19/6/23

A copy of this decision must be sent as follows:

- (a) in the case of an Executive decision by the Chief Executive or a Corporate Director to the Head of Executive Business

- (b) in the case of a Council decision by the Chief Executive or a Corporate Director to the Clerk to the Council
- (c) in the case of a decision by any other officer to the person designated in accordance with the procedure of the relevant service area
- (d) where there are budgetary implications to the Chief Financial Services Officer

For Executive Business Office use:

Received on..... (date).

Decision allocated reference:

Call In : OFFICER DECISION SGC2327 – Authorisation To Issue the Invitation To Tender For The Management of The Secret Garden Café - OFFICER RESPONSE

1. The process does not represent value for money for the council or public purse.

It does not represent value to the public purse to end a lease of a sitting tenant who is open to negotiation on the terms of their lease, including increasing their rent obligations. The willingness of the tenant to do this is a matter of public record. The council engaged with the current tenant to renegotiate the lease in June/July 2022, only to reject the options appraisal presented by the tenant in December 2022, on request of the council. In February 2023 the council determined that it would no longer be able to re-negotiate the lease and was required to go out to public tender in July 2023. The rationale for doing this is open to question.

Response :

- (a) The decision maker should be satisfied that the procurement is in accordance with the financial and budgetary policy and represents value for money for the Council.*
- (b) The Council estimates the rental income generated by the opportunity to be in the region of £75k over the five-year term of the agreement. The value of the agreement to the successful bidder is estimated to be in the region £1.125m over the same period.*
- (c) A Prior Information Notice was issued in May 2023, for suppliers to express an interest in the opportunity. The PIN confirmed that there is interest from the market in delivering the service required, with nine suppliers expressing such.*
- (d) There are no direct or additional costs associated with the procurement exercise / work undertaken to date and future work proposed. Staff time incurred by officers in Parks, Strategic Estates, Finance, Legal Services and Procurement is accommodated within existing departmental budgets. There were no direct costs or additional costs associated with the publishing of the PIN and will be no direct costs for the advertisement planned to take the opportunity to the market and evaluation process.*
- (e) As the transaction as a whole is intended to contain elements of services being provided to the Council, or on behalf of the Council in addition to occupation of Council premises it is being treated as a public concession to be dealt with under the Council's processes for public concession contracts. The requirement for a lease also remains since the successful bidder will have exclusive occupation of premises and the tenant will need to contract out of the security of tenure provisions under the Landlord and Tenant Act 1954. The agreement and lease will be entered into together, will be mutually exclusive and co-terminated.*
- (f) Property leases are outside the scope of public procurement and concession contract regulations provided they are genuine lease transactions that do not contain obligations to provide works or services to on behalf the Council. Even a genuine lease does not permit a tenant to hold an indefinite right to occupy or trade from premises beyond expiry of the lease term. When considering any renewal, it is a statutory requirement to obtain the best consideration reasonably obtainable. That may be sole negotiation subjected by valuation or a market exercise if appropriate.*

- (g) Discussions with the tenant commenced in the summer of 2022 with a view to renegotiating the Property Lease Agreement, in good faith.**
 - (h) On 22nd December 2022, the Council wrote to the tenant's representative and invited a rent offer based on two proposals as "Option 1" and "Option 2". The Council requested the tenant submit a rent offer based on which option the tenant proposed to proceed with. This offer was to be received no later than 16th January 2023. During this process, the tenant requested further information which was provided by the Council.**
 - (i) The tenant chose to submit separate rental offers for each option, and these were received on 20th January 2023. In considering the offers, advice was sought from Legal Services, Strategic Estates and Procurement.**
 - (j) Following the above, a meeting with the tenant's representative was held on 6th February 2023 who was advised that in light of operational experience and given consideration to the needs of customers, tenant and Council the offers would not be accepted, and it was considered that the most appropriate vehicle for taking provision forward was a service type contract in the form of Management Agreement and Associated Lease.**
 - (k) The decision made to take the opportunity to the market and through an open procedure procurement exercise is in line with the Council's Contract Standing Orders and Procedure Rules which are governed by the Council's Constitution.**
2. The Council progressed the current process (public tender) on the basis of incomplete or inaccurate information.

The council's position in February 2023 that it could not progress on the basis of a re-negotiation with the sitting tenant because it was progressing a Management Agreement - rather than a lease with an accompanying Management Agreement - was incorrect. Advice presented to officers subsequent to the decision to opt for a Management Agreement (and therefore public tender) stated that the council is not able to solely offer a Management Agreement and must use a lease as the primary vehicle. Had proper advice been sought at the outset, the protracted and costly process could have been avoided. In addition, the initial lease negotiations – and decision to adopt a new approach in February 2023 – was led by officers who with neither legal nor lease expertise. As such, the process has been flawed from the outset.

Response :

- (a) The Property Lease Agreement could have been renewed with the current tenant, however and as set out in 1.(j), in light of operational experience and given consideration to the needs of customers, tenant and Council it was considered that the most appropriate vehicle for taking provision forward was a service type contract in the form of Management Agreement and Associated Lease.**
- (b) As set out in 1.(g), the discussions that commenced in the summer of 2022, with a view to renegotiating the Property Lease Agreement with the current tenant, were undertaken in good faith.**
- (c) Departmental advice from officers in Strategic Estates, Procurement, Finance and Legal Services has been continuous from the point of discussions relating to the opportunity to**

renegotiate the current Property Lease Agreement, through to the publishing of the Officer Decision to take the opportunity to the market through a service type contract in the form of a Management Agreement with Associated Lease.

- (d) As set out in 1.(d) there are no direct or additional costs associated with the procurement exercise / work undertaken to date and future work proposed.*
 - (e) The initial lease re-negotiation discussions and proposal to introduce a new type of agreement took place and were put forward with input / advice from departmental officers with legal and lease expertise. This approach is consistent with Council decisions made for such agreements in parks and green spaces.*
3. The process has undermined a successful, independent business which council policy (including Procurement Policy) wishes to promote.

The council's refusal to formally extend the end point for the tenant's lease, opting rather for a Tenancy At Will, stripped the business of legal rights and protections, and has put significant financial pressures on the business. With only a 24-hour notice period to end the tenancy, the decision to move to a Tenancy At Will has needlessly put huge pressures on a successful, popular independent business. There has been a lack of scrutiny around the decision to move from a lease to a management agreement and subsequently to move the tenant on to a Tenancy At Will. Furthermore, the lack of complete and accurate advice on the terms of which the council was able and should re-shape the lease has undermined the business and council policy.

Response :

- (a) The Council recognises the uncertainty that the current position causes the business, and when agreements come to an end.*
- (b) The Tenant was granted a five-year lease, with no automatic right to an extension or renewal. The Tenant was obliged to vacate the premises in accordance with the lease terms. The Council offered a tenancy at will to protect its position and ensure that by allowing the tenant to continue to occupy beyond expiry it did not inadvertently create an implied protected business tenancy which would have implications for the Council in negotiating any future leases.*
- (c) By its nature, a tenancy at Will is determinable at the will of either party and cannot contain a fixed period. Notwithstanding this, the Council gave an informal assurance to the tenant that it had no intention to withdraw the Tenancy at Will for a period of 3 months which originally coincided with plans to procure the new arrangements. The procurement process has become delayed and so the Council has agreed with the tenant for occupation to continue on a tenancy at will basis for the time being.*
- (d) Complete and accurate advice has been received by departmental officers and the terms on which the proposed new agreement, a service type contract in the form of a Management Agreement and Associated Lease has been informed by such.*
- (e) In 2018 the Council published a Socially Responsible Procurement Policy which looks to ensure opportunities are advertised and accessible to local small businesses. Competition remains key to the principles of being open, fair and transparent.*

4. The rationale and decision making around entering a public procurement process, rather than lease negotiation, is not clear.

The council has stated that this process is being undertaken for the benefit of users of Bute Park, but has failed to set out what the current offer from the current tenant fails to deliver. In addition, there is a large petition and responses to a visitor survey which suggest that users are overwhelmingly supportive and appreciative of the offer of the current tenant. The decision making to date has not taken that public view into account. I would suggest that engaging the New Friends of Bute Park group to gauge public opinion on what the offer from the café should be, just weeks before issuing the tender, suggests that the council was not itself sure what the current gaps in the current offer are, or what it intends to deliver through a public procurement process. Furthermore, it is a matter of record that the sitting tenant was open to re-negotiating the terms of their lease, including increasing their rent obligation. As such, the decision to end the lease deserves full scrutiny.

Response :

- (a)** *The Council is proposing to market the opportunity using a service type contract in the form of a Management Agreement with Associated lease as opposed to the renewal of the existing Property Lease Agreement as this is considered to be the appropriate vehicle for service provision not only for the benefit of users of Bute Park but also the tenant and Council. Leases that contain service obligations to the Council, for example the requirement to maintain the public toilets that do not form part of the leased cafe premises, falls outside a normal landlord and tenant relations and should be procured in accordance with public procurement rules.*
- (b)** *As the agreement with the current tenant has come to an end, the Council has been focussed on determining the type of agreement required to take service provision forward.*
- (c)** *There is no requirement for the Council to carry out public consultation in respect of the decision to take the opportunity to market.*
- (d)** *The New Friends of Bute Park approached the Council, expressing an interest in informing the specification document and evaluation criteria that the Council has prepared, from a customer and service provision perspective. The Council deemed it important to listen to the group on their views.*
- (e)** *The Property Lease Agreement, with the current tenant ended on 24th March 2023, the lease was not terminated by the Council. Notwithstanding the tenant's willingness to re-negotiate the terms of this lease including their rent obligation, as set out in 1.(j), in light of operational experience and given consideration to the needs of customers, tenant and Council it is considered that the appropriate vehicle for taking provision forward is a service type contract in the form of Management Agreement and Associated Lease. Similarly, as set out in 1.(k), the decision made to take the opportunity to the market and through an open procedure procurement exercise is in line with the Council's Contract Standing Orders and Procedure Rules which are governed by the Council's Constitution.*

Jon Maidment
Head of Parks & Harbour Authority
28th July 2023