

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