

Report to:	EXECUTIVE CABINET
Date:	24 August 2022
Executive Member:	Cllr Jacqueline North - First Deputy (Finance, Resources & Transformation)
Reporting Officer:	Nick Fenwick, Interim Director for Place
Subject:	CONTRACT BETWEEN THE COUNCIL AND ACTIVE TAMESIDE
Report Summary:	This report presents the case for extending the existing contract between the Council and Active Tameside for a two - year period from 1 April 2024 to 31 March 2026.
Recommendations:	<p>That the following go forward for consideration by Executive Cabinet:</p> <ul style="list-style-type: none"> • The existing contract between the Council and Active Tameside is extended by way of a new contract for a period of two years to 31 March 2026 together with any ancillary agreements such as leases, which are also extended for a period of two years to 31 March 2026 (to be excluded from the provisions of the Landlord and Tenant Act 1954) to give effect to the extension. • A strategic service review of the options for the future financing, management and delivery of the service is carried out. • A report is submitted to Executive Cabinet with the review findings to include proposals for the future delivery of leisure services in Tameside.
Corporate Plan:	Healthy Tameside.
Policy Implications:	It is essential that any proposals relating to Active Tameside demonstrate value for money and make a clear contribution to Council priorities.
Financial Implications: (Authorised by the statutory Section 151 Officer & Chief Finance Officer)	<p>Active Tameside's financial stability and sustainability remains important to the Council. This is due to the organisation's role in the delivery of sport, leisure, health and social care outcomes cross the borough and the broader health and wellbeing benefits to the community.</p> <p>There is an outstanding loan of £3,809,000 from the Council, which Active Tameside is seeking to repay by the end of the contract. The prospect of this being achieved will be much improved if the contract is extended for two years.</p> <p>Active Tameside also continues to await the final outcome of its insurance claim for business interruption, although an initial claim of £2,500,000 has already been successful. Judgement remains pending on whether the claim cap of £2,500,000 is aggregated to the entire business, or relates to individual sites. If the latter, it is envisaged that Active Tameside will eventually recover a greater sum. A decision is expected during Autumn 2022.</p>

The Council's financial support in 2021/22 included the payment of the annual management fee of £927,000. This value has reduced by £150,000 in 2022/23 to £777,000. Alongside all sectors, Active Tameside is facing the next tranche of financial challenges, the most significant being utility cost inflation. It is estimated that when the Active Tameside utility contract is renegotiated in September of 2023, the increase from 2020 could be approximately £1,000,000 per year. This would result in utility costs equating to 20% of annual turnover. Utility costs are currently less than 10%. This will clearly be a key factor in the future sustainability of the organisation.

Section 5.1 of the report references the requirement for the procurement of new gym equipment to improve annual revenue generated. It is proposed that the equipment will be financed via a lease that will require a monthly repayment term until 31 March 2026 to be affordable to Active Tameside. A lease repayment term until the end of the existing contract (31 March 2024) would be unaffordable due to the increased monthly payments due over a shorter period.

It is recommended that a strategic service review is carried out to determine the options for the future financing and management of the service, with proposals reported to Members.

The annual management fee payable for the proposed two year contract extension will be subject to further due diligence by the Council and separate Member approval at a later date.

Legal Implications:
(Authorised by the Borough Solicitor)

The Council's leisure services were transferred in 1999 to Active Tameside, which is a separate legal entity to the Council and has charitable status.

The pandemic has led to significant financial challenges to the Trust, which will be exacerbated by the anticipated significant increase in utility costs.

As set out in the report the project officers are seeking to extend the current contract for a further 2 years beyond its expiry date of 2024. Advice has been sought from STaR procurement, set out in section 2 of this report.

This advice confirms that whilst no contract extension is without risk of challenge the risk in this case is low given the reasons for the extension and also the situation in the market generally.

This risk can be further mitigated by ensuring that the full procurement exercise engages with the market as a whole so that all relevant operators can consider the opportunity.

In addition to enabling the strategic review to be undertaken the 2 year extension will allow for the impact of the utility prices to be reflected in the future re-procurement and also afford the Trust an additional 2 years in which to pay back their borrowing which should benefit the overall financial position for both the Council and the Trust and improve the viability of the services and the appetite for the market to deliver them post 2024.

Risk Management:

The risks associated with this report are set out in section 6.

Background Information:

The background papers relating to this report can be inspected by contacting the Report Writer, Roger Greenwood Project Manager - Sport & Leisure Assets and Investment, by:



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1. BACKGROUND

- 1.1 In 1999, the Council established the Tameside Sports Trust now known as Active Tameside. The creation of Active Tameside was designed to take advantage of the then tax benefits and other financial savings realised by the establishment of a charitable entity, which was exempt from paying business rates on the properties it managed. The savings were used to invest in the facilities and services.
- 1.2 Tameside Council contracts with Active Tameside, a registered charity, to operate 9 sport and leisure facilities and a community physical activity and wellbeing programme. An annual management fee is paid to Active Tameside to deliver public benefit and health outcomes, in keeping with its charitable objectives, with all surplus revenues retained to support its reserves policy and/or reinvested into services and facilities. Active Tameside delivers a wide range of leisure facility and community-based services that generate participation in physical activity and sport to improve health and wellbeing, predominantly in the Tameside area but also with partners across Greater Manchester.
- 1.3 Active Tameside currently has a Board of 11 voluntary Directors, with two nominated by the Council. Active Tameside employs circa 350 people and has a turnover, which has grown to over £11 million. Income is generated from admissions income, subscriptions, contracted work, grants and an annual management fee.

2. EXISTING CONTRACT BETWEEN THE COUNCIL AND ACTIVE TAMESIDE

- 2.1 The Council's current contract with Active Tameside runs to the 31 March 2024 and is co terminus with a facility lease, which came into effect on the 1 April 1999. Active Tameside has requested a 2-year extension to their contract along with a 2-year extension to the facility lease.
- 2.2 The existing contract is an outcome based agreement with an overarching set of measures tied to the improvement of population wide health through the provision of sports and leisure services via the local leisure estate. Key elements of the outcomes required relate to:
 - Improvements in the levels of activity amongst the Tameside population;
 - Impact on the activity levels and health of the most deprived Tameside communities;
 - Impact relating to early years, long term conditions and older adults.
- 2.3 The existing portfolio of facilities is leased to Active Tameside at nil rent. Active Tameside is responsible for day to day repairs and maintenance with the Council responsible for structural repair and the replacement of major plant.
- 2.4 Active Tameside is required to submit performance reports and data to the Place Directorate as follows:
 - A quarterly overview of all Key Performance Indicator ("KPI") activity is submitted by 15 of the month following the quarter.
 - An annual report with all KPI activity and achievements against the delivery plan at the end of each financial year.
 - Quarterly performance meetings will review:
 - Significant variations against agreed targets.
 - Monitoring progress of the investment programme implementation.
 - Progress in implementing improvements identified in previous meetings.
 - Service improvement items.
 - Strategic and policy developments.
- 2.5 In addition, the performance of the contract is demonstrated through a combination of data and dashboard reporting – outcomes and output measures including:

- Case studies from across the service areas.
- Using digital technologies to record individual experiences and enable service users to self-report.
- A written report that summarizes the key achievements and the action points for the following reporting period.
- Annual reports (Calendar year) and new strategies are shared at the end of each reporting year.

2.6 Active Tameside was initially managed via a prescriptive framework of targets around the physical estate such as opening hours and pricing. Over time these targets were replaced by outcomes in the form of KPIs. Prior to the pandemic, quarterly performance reviews were orientated around an outcomes framework of KPIs, which reflected both 'core' aspirations in relation to swimming lessons for instance and the aspirations of TMBC commissioners with specific regard to the *starting well, living well and ageing well* model. The performance framework for 2021/22 is attached as **Appendix 1** along with the KPI targets for 2022/23. Active Tameside has generally performed well over the range of KPI's despite the restriction experienced during the early months of the year.

2.7 During the remainder of the contract period and the proposed extension Active Tameside will be faced with ongoing challenges:

- Active Tameside is now facing the challenge posed by heating and lighting inflationary price increases. It is entirely possible that when the Active Tameside utility contract is renegotiated in September of 2023, the uplift from 2020 could be approximately £1,000,000 per year, taking utility costs as a percentage of turnover to over 20% from less than 10%.
- **Cost of Living Crisis.** To date, revenue has not been unduly affected, however with inflation at 10% and the next domestic gas/electricity price cap increase due in *October*, there is a risk that gym memberships, however good the value, could be seen as a "luxury" item. The last time energy prices rose in 2008, Gym members valued their memberships and chose to give up other discretionary spend first but this time we are following on from years of austerity plus inflation. Active Tameside are monitoring the situation closely.

2.8 The funding agreement and facility lease between the Council and Active Tameside comes to an end on the 31 March 2024. In normal circumstances, the expiry of a 25-year contract would precipitate a procurement exercise, which would necessarily commence during the course of 2022.

2.9 Active Tameside has requested an extension from the Council to the management fee agreement and facility lease of two years ending on the 31 March 2026. Active Tameside's rationale for the extension is as follows:

- The absence of reserves and weak Balance Sheet.
- It should be noted that were a full procurement exercise to be undertaken today, it would be extremely complicated to distinguish between the "concession" and "commission" work Active Tameside undertakes for TMBC. This complexity may ease in 2 years as the Government has issued a green paper on post Brexit procurement, the indication is that the new rules will be designed to allow for a much more flexible procurement process which allows contracting authorities a bit more discretion in how they procure.
- A tender exercise would be significantly and negatively affected by the current conditions in the leisure contract market, which has suffered badly from the Covid Pandemic. A two year extension would enable both Active Tameside and the Council to fully understand the emerging financial pressures in relation to utility inflation and cost of living crisis.
- During this time it is anticipated that the market will have had time to re-establish normal trading conditions.

- 2.10 STaR Procurement has been consulted on the extension proposal put forward by Active Tameside. Their opinion on the proposal is as follows: Tameside Council and Active Tameside have had an arrangement in place for the provision of leisure services since 1999. The 2017 (current) contract with Active Tameside commenced on 1 April 2017 and expires on 31 March 2024. The current expiry date coincides with the leases associated with the contract. For the reasons set out in this report a 2 year extension to the current contract and ancillary agreements such as leases are being sought.
- 2.11 **Applicable legal regime** - Regulation 20 of the CCR 2016 sets out how to determine which legal regime applies where a mixed contract is awarded. Whether or not the PCR 2015 or the CCR 2016 applies will depend on whether the different parts of the contract are objectively separable, where they can be, the PCR 2015 would apply - Reg 20(3) (d) of the CCR. Where the different parts of the contract are not objectively separable, the legal regime will be determined based on the main subject matter of the contract. Based on the existing contract, the arrangement would point towards a concession contract. The current threshold applicable to concession contracts is £5,336,937 (inclusive of VAT) and regulation 9 of the CCR sets out the rules on how to calculate the value, and includes the total turnover of the concessionaire, payments or any other financial advantages in any form from the contracting authority. This is amongst other elements that must be incorporated to calculate total value. The option available for the extension period would therefore be to award a new contract by way of an exemption on the ground of exceptional circumstances for two years on the same or similar terms under the Council's Contract Procedure Rules, subject to the value falling below the CCR threshold. The value of the new contract, based on the current management fee level of £777,000 per annum, is calculated to be £1,554,000, which is well below the concession threshold.
- 2.12 If it is concluded that it is a concession and properly valued at less than £5,336,937 (inclusive of VAT), then it should minimise the risk of challenge substantially as a bidder would not be able to challenge under the concession regulations. They could bring a Judicial Review claim and contend that the exceptional circumstances ground relied upon is not justified, however the prospects of successfully challenging would be low, due to the fact that the Council's CPRs allow an award in such circumstances. There is no way of eliminating risk completely as this would depend on competition in the market for these services.
- 2.13 In order for a new contract to be considered and granted by the Council there needs to be a clear justification for this from a Council standpoint. The impact of the Covid pandemic on the leisure operator sector has been significant. It is very unlikely that a procurement process would result in a meaningful and competitive return from the market.
- 2.14 The volatility on the leisure market is significant with the cost of utilities rising significantly, the limited recover period post Covid for leisure trusts and financial pressure brought to bear by the rise in the cost of living means that it is not the time to seek to re-procure a new leisure operator. A new two year contract will give the Council the opportunity to revisit the extent of the current operational estate and explore options available to the Council either to retain or modify the delivery model from 2026 onwards.
- 2.15 In summary, during the course of the pandemic, transactional leisure procurement contracts were characterised by slow, limited reopening and huge claims for support/compensation by private sector operators in particular. Notwithstanding prudential borrowing relief, Active Tameside did not request any additional support due in large part to a significant insurance pay out. The pandemic precipitated a collapse within the leisure outsourcing market as the appetite for risk diminished on the back of full deployment of reserves with some operators borrowing heavily to stay afloat. The utilities crisis has exacerbated this collapse with most credible operators demanding tariff protection. Put simply, all risk is effectively with the commissioning client in this scenario whilst 'control' remains a function of the extent to which the core contract is prescriptive. The study, commissioned by the Council in October 2018 and undertaken by Max Associates concluded that the Council continues with the existing

operator. The main reasons for this are:

- Throughout the review and evaluation it has been evident that the centres are generally performing well and many of the benchmarks are in line with or above industry standards. A new operator for these facilities would not necessarily improve the revenue position, particularly in the short term.
- Active Tameside has demonstrated nationally success and ability in delivering commissioned services relating to increasing participation in physical activity and improving health. They are market leaders in this sector and therefore other operators are unlikely to match them in meeting some of the key local objectives.

2.16 Changing the contractor/supplier of the service from April 2024 would pose significant risk to the Council in terms of:

- Loss of control – The Council currently has 20% representation on the Active Tameside Board.
- Risk to outcomes – A lengthy transition between operators would impact on social value outcomes currently being delivered by the existing partnership.
- Default/claim for additional support through insufficient due diligence.

3. CONSEQUENCES OF COVID PANDEMIC FOR SPORT AND LEISURE PROVIDERS

3.1 The Local Government Association (LGA) produced a briefing note for Local Authorities in April 2022. The information, set out in **Appendix 2**, places into context the issues facing most if not all Leisure and Cultural Trusts operating currently in the UK including Active Tameside and is worthy of note. Key points include:

- The COVID-19 pandemic has had a devastating impact on public sport and leisure services and the economic, health and social value they generate.
- The loss of income from long periods of closure, combined with high monthly maintenance costs and systemic issues has significantly affected the viability of the sector.
- Leisure providers are being adversely and disproportionately affected because leisure centres have high energy demands, especially for those facilities with swimming pools. Energy costs are typically a leisure operator's second highest cost after staffing costs. Leisure providers are trying to mitigate the costs, but they are unable to budget forecast.

4. PROCESS TO COMMISSION A NEW CONTRACT POST MARCH 2024

4.1 The estimated time required to go out to market for the procurement of a new leisure operator is set out in **table 1**.

Table 1

Establish governance to proceed	Estimated Timescale
Approval to proceed	2 months
Procurement of project management support and scope/tender package development	6 months
Selective questionnaire stage	2 months
Tender stage (assuming competitive / dialogue procurement route)	4 months
Award and Council sign off	2 months
Mobilisation of new operator	3 months
Total Time required	19 months minimum

4.2 A procurement exercise resulting in the provision of a leisure operator from April 1 2026 is not the only option available to the Council. Options worthy of consideration may include:

- Go to market to procure a leisure operator from 1 April 2026.
- Merge with an existing local leisure trust.
- In-house delivery – bring the service back in house.
- New local trust (local authority controlled company).

- 4.3 It is proposed that the Council undertakes a strategic review to consider all the options available to the Council. In addition, the review will consider the following:
- The condition and viability of the existing leisure asset portfolio including proposals for investment and disinvestment.
 - What leisure facilities the Council wish to see provided taking into account the condition of the assets potentially available, and
 - The affordability/viability of the various options including social return on investment.
- 4.4 It is proposed that the strategic review will culminate in a report to Executive Cabinet. The scope of the review to be approved by the relevant Executive member in advance of the review. The review will take place, at an optimum time, when the financial position of the Council and Active Tameside will be better understood and the leisure contracts market should be better placed to submit realistic bids if the decision is taken to progress with procurement.

5. IMPLICATIONS FOR ACTIVE TAMESIDE & THE COUNCIL

- 5.1 The implications of not extending the existing contract for the Council are significant and worthy of note:
- Undertaking of a procurement exercise on the scale required would be require a significant resource input from the Council, both in terms of staff time and in monetary terms for external consultancy support. Based on industry standards a full procurement exercise would take at least 20 months to complete successfully.
 - Active Tameside would not tender for the new contract and would cease to operate from 31 March 2024. This could lead to significant service disruption during the contractor transition period.
 - A full strategic review is required as set out in section 4 of this report. A procurement process would not fully reflect the Council's longer term expectations for the service.
- 5.2 The implications of not extending the existing contract for Active Tameside are significant and worthy of note:
- Active Tameside has depleted its reserves due in part to the Covid pandemic. Their financial position would mean that they could not/would not tender for a contract.
 - Active Tameside needs to renew its fitness equipment in the very near future if it is to maintain or increase its market share of fitness memberships. In order to facilitate the funding for this they need a 2 year contract extension. Without this there is likely to be a fall-off in attendances resulting in further financial hardship.
 - The social value delivered by Active Tameside, as set out in **Appendix 3**, could be curtailed impacting on the health and wellbeing of Tameside residents.

6. RISK MANAGEMENT

- 6.1 The rapidly declining levels of disposable income particularly from deprived communities, is a significant challenge to Active Tameside's revenue streams. This, in combination with a significant increase in the cost base, poses major challenges to leisure contractors.
- 6.2 It is entirely possible that when the Active Tameside utility contract is renegotiated in September of 2023, the uplift from 2020 will be at least £3,000,000, £1,000,000 per year taking utility costs as a percentage of turnover to over 20% from less than 10%. Given that

Active Tameside works to a margin of circa 3%, the viability issue is clear and apparent.

- 6.4 The condition and viability of maintain the existing assets will affect the options, choices and location of facilities and services available.
- 6.3 Risk of Challenge to the proposed contract extension. This will be mitigated in consultation with STaR Legal.

7 CONCLUSIONS

- 7.1 The volatility on the leisure market is significant with the cost of utilities rising significantly, the limited recover period post Covid for leisure trusts and financial pressure brought to bear by the rise in the cost of living means that it is not the time to seek to re-procure a new leisure operator. A new two year contract will give the Council the opportunity to revisit the extent of the current operational estate and explore options available to the Council either to retain or modify the delivery model from 2026 onwards.
- 7.2 The impact of rising utility costs and cost of living generally makes the future financial landscape uncertain. By providing a new 2 year contract a better understanding of both the Council's and Active Tameside's financial position will be known.
- 7.3 A report on the proposed Strategic review will be reported to members on its completion.

8. RECOMMENDATIONS

- 8.1 As set out at the front of the report.