



ADUR & WORTHING
COUNCILS

Joint Strategic Committee
9 July 2019
Agenda Item 14

Key Decision: Yes

Ward(s) Affected: All

Worthing Theatres & Museum - The Future of Culture for Worthing

Report by the Director for the Economy

Executive Summary

1. Purpose

1.1 The purpose of this report is to update Members on the procurement exercise for the provision of Cultural Services; to seek authority to make a direct award to the Council's in house team; and to update Members of the Committee on the successful contractual discussions that have taken place.

2. Recommendations

Joint Strategic Committee are recommended to:

2.1 Resolve to make a direct award to the Council's in-house team, subject to the finalisation of the contract price, with a feature of that award being the setting up of a new charitable organisation to deliver the service and contract with the Council.

2.2 Authorise the Director for Economy to enter into the contract on behalf of Worthing Borough Council.

2.3 In accordance with the Joint Strategic committee's earlier decision in March; approve the use of £100k from the Capacity Issues Reserve to support the in-house team setting up a Trust.

3. Background and Context

3.1 At their meeting of July 10th 2018, members of the Joint Strategic Committee agreed to lease some or all of the town's cultural venues to an independent trust or similar body offering a single focus on fostering and developing the cultural offer of Worthing and helping it to flourish over the longer term.

3.2 At the meeting of 5th March 2019, Members of the Joint Strategic Committee considered a report of the resultant procurement exercise and approved the award of the cultural services contract to the in house team; at the same time delegating responsibility to the Director for the Economy to approve and execute the contract.

3.4 For the purposes of the tender process, the in house team set up a company to be the contracting vehicle called "Chalk and Clay. It was clear to all parties throughout that it was the in-house team who were bidding. The effect of establishing this company, which was a separate legal entity, was that the one and only bid received in the process was from an independent Company (Chalk & Clay) which had no 'track record' – certainly in comparison with the in-house team's very significant track record of delivery. The legal implication is that despite a legally compliant procurement exercise, no award could be made as a result of the procurement process, as the only bid received was from Chalk and Clay, and therefore technically, no suitable bids were received.

3.4 Council officers are satisfied that the Council has tested the market properly and hence, in this report, recommends to Members of the Committee that a direct award is made under Regulation 32(2)(a) of the Public Contract Regulations 2015. The award would be to the in-house team with a feature of that award being that they establish an independent charitable organisation to contract with the Council and deliver the service.

4. Update on contractual discussions

4.1 Following the decision in March, the Council have been proactively working with the in-house team to meet all financial, business and governance arrangements to support establishment of the trust. This included the production of a detailed timeline, actions matrix and key dependencies awareness.

4.2 The work streams were broken down into key areas, with those having a priority, or significant, focus being formalised into working groups. These were finance, focusing on the business planning, and buildings, focusing on the boundaries and management responsibilities.

4.3 The headline working groups, and independent support functions, will continue to be refined in order for the final contract to be awarded to the in-house team.

5. Financial Implications

5.1 As part of the contractual discussions, the in-house team is working toward a contract price that reflects the council's requirement that the service is financially sustainable and able to invest and improve facilities for the future to be met from overall budget set aside.

5.2 As part of the recommissioning exercise, the Council has reviewed support costs in detail to identify where such costs can be reduced and over £160,000 of savings have been identified.

5.3 The Trust anticipate set-up costs of £145,000 and in accordance with the March Joint Strategic Committee decisions have now requested a contribution of £100,000 towards this cost with the residual amount being funded from external grants and contributions.

6. Legal Implications

6.1 This report provides the opportunity for Joint Strategic Committee to take the decision to make a direct award to the in-house team.

6.2 The report to the Joint Strategic Committee of 5th March 2019 informed Members that the one and only bid received was from the in-house

team. It further advised that a charitable organisation, to be known as 'Chalk and Clay' was to be established by the Council to deliver the service if the bid was successful. It had clearly been the intention of the in-house team to submit a bid but in actual fact they had already established a Company, known as Chalk and Clay, in December 2018. The bid received was from Chalk and Clay, an independent separate legal entity, rather than the in-house team.

Regulation 32(2)(a) of the Public Contract Regulations 2015 provides for a negotiated procedure, which allows the Council, having tested the market, to make a direct award without advertisement, on substantially the same terms that it went out to the market. It is proposed that the Council, in reliance of this provision, makes a direct award to its in-house team. It would be a feature of that award that the in-house team establishes a separate legal entity being a charitable organisation to deliver the service and contract with the Council.

The Council has taken independent legal advice from a Barrister who states:

"The Council can lawfully proceed with the in-house team and its establishment of an Independent Trust, and do so, given Regulations 32(2)(a) of the Public Contract Regulations, by use of the negotiated procedure without advertisement".

6.3 Section 145 Local Government Act 1972 empowers a local authority to provide entertainment, arts and crafts, theatres, concerts and other similar activities, and to either provide them itself, or arrange for the provision by a third party and then contribute towards the expenses of the third party, or to do anything necessary or expedient for the delivery of entertainment or the arts.

6.4 Section 12 Local Government Act 1964 relates to the local authority's powers in respect of museums and provides that they may do all such things as may be necessary or expedient for or in connection with the provision or maintenance of museums and further, may make contributions towards the expenses incurred by any person providing a museum or art gallery.

6.5 Cultural Services is an Executive Function under the Local Authorities (Functions and Responsibilities)(England) Regulations and therefore the Joint Strategic Committee has the power to make arrangements for the delivery of the function. The Worthing Borough Council constitution provides power for the Executive to delegate any of its functions to another body in

accordance with contractual arrangements. Section 111 Local Government Act 1972 provides that the Local Authority has the power to do anything which is incidental to the discharge of their functions.

6.6 Section 1 Local Government (Contracts) Act 1997 confers power on the local authority to enter into a contract for the provision of making available assets or services for the purposes of, or in connection with, the discharge of the function by the local authority.

6.7 Should the recommendations in this report be resolved by Members of the Joint Strategic Committee, the Transfer of Undertakings (Protection of Employment) Regulations 2006 will apply.

6.8 Any modifications to the in-house business case must not be in conflict with the Council's original tender specification and budget so as to uphold the requirements for transparency and equal treatment required under the Public Contract Regulations 2015. These provisions apply to the use of the negotiated procedure and Direct Awards.

Background Papers

- 10th July 2018 JSC meeting - [Worthing Theatres & Museum Strategic Future Options](#) (Agenda Item 17)
- 5th March 2019 JSC meeting - [The Future of Culture for Worthing](#) (Agenda Item 12)

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Sustainability & Risk Assessment

1. Economic

Culture is of vital significance to our local economy, employing a growing number of people across a range of skilled activities. A vibrant cultural offer is a significant consideration for businesses seeking to attract new employees and helps to support our visitor economy.

2. Social

The establishment of the new Trust is predicated on a formal expectation of extending the scope and range of work with our local communities. This includes working with our schools and colleges to support the development of new skills valued by the creative sector.

2.2 Equality Issues

The contract is awarded with a formal commitment to inclusive programming which will include youth theatre; signed and audio described screenings and autism and dementia friendly screenings.

2.3 Community Safety Issues (Section 17)

As is the case with any venue offering public performance and participative programming, careful attention will be paid to ensuring that safeguarding remains a priority and that the safety of customers/participants is paramount.

2.4 Human Rights Issues

Matter considered and none identified.

3. Environmental

The Trust is expected to embody a commitment to sustainable procurement and to pay close attention to minimising waste and its use of resources.

4. Governance

Subject to the award, there will be a change to the governance of cultural services that will result in the establishment of an independent trust; in effect, a charitable company limited by guarantee.