

THE OVERVIEW & SCRUTINY COMMITTEE

27 October 2014

RIVER PARK LEISURE CENTRE: PUBLIC REPRESENTATION

REPORT OF CHIEF EXECUTIVE

Contact Officer: Simon Eden Tel No: 01962 848313

RECENT REFERENCES:

OS95: River Park Leisure Centre: Public Request for an Investigation into Contractual Matters, 17 February 2014

EXECUTIVE SUMMARY:

The Overview & Scrutiny Committee received public representations from Mr Martin Wilson at its meetings on 20 January and 17 February 2014. Mr Wilson alleged maladministration in various aspects of the management of the Council's contract with DC Leisure (including its subsidiary and successor companies) for the management of River Park Leisure Centre.

The Committee asked the Chief Executive to investigate these matters. My report summarising the conclusions of that investigation is below.

Subsequent to this the Leader of the Council has been handed a paper prepared by a Member which makes similar allegations. The matters raised there are also covered in this report.

RECOMMENDATIONS:

- 1 That Committee note the conclusions of this investigation and consider whether they wish to raise any further matters with the Chief Executive.
- 2 That a separate report be brought to Audit Committee and The Overview & Scrutiny Committee outlining actions in response to a recent Internal Audit review of the Council's role as client in respect of the management of the contract for the operation of its leisure centres.

THE OVERVIEW & SCRUTINY COMMITTEE

27 October 2014

RIVER PARK LEISURE CENTRE: PUBLIC REPRESENTATION

REPORT OF CHIEF EXECUTIVE

DETAIL:

1 Introduction

1.1 The Overview & Scrutiny Committee received public representations from Mr Martin Wilson at its meetings on 20 January and 17 February 2014. Mr Wilson alleged maladministration in various aspects of the management of the Council's contract with DC Leisure for the management of River Park Leisure Centre (RPLC). In accordance with our normal practice, the Committee asked the Chief Executive to investigate the matters raised.

1.2 The text of Mr Wilson's representations is at Appendices 1 and 2. In summary, he is concerned about:

- a) The basis on which the Council's contract was extended for 3.25 years from January 2008;
- b) The basis on which that contract was further extended for 12.5 years from April 2011.

He also raises a number of related matters, together with concerns about any plans the Council may have for the award of a future contract to replace RPLC.

1.3 Mr Wilson considers the arrangements put in place have "potentially defrauded WCC and therefore Winchester taxpayers of significant amounts of money" and that the Council has been "committed to a position which is to the benefit of an individual organisation but to the detriment of the taxpayer".

1.4 Mr Wilson has also made a number of requests for documents from the Council under Freedom of Information legislation. One Member has asked that the Committee consider information about income from the contract which was not supplied to Mr Wilson on the grounds of commercial confidentiality. This will be provided separately to the Committee.

1.5 More recently, the Leader has been handed by another Member a paper which makes serious allegations about the conduct of officers. That paper is attached at exempt Appendix 8, and is treated as confidential because it names individual officers. That paper raises similar issues to the original representation, and draws on papers provided under the Freedom of Information requests, and so was considered alongside the public representations in my investigation.

- 1.6 The matters raised by Mr Wilson have also been referred by him to Ernst & Young, the Council's external auditors. Having considered information provided to them to date they have determined these matters are not for their consideration, but should be investigated by the Council.

2 Background

- 2.1 River Park Leisure Centre (RPLC) is the District's main indoor recreation facility. Since 1992 it has been managed under contract, awarded following competitive tender, by DC Leisure (nb. the managing company has had several different legal identities since the contract was first let, however for the purposes of this report I shall use the term DCL to cover all those entities). The original contract provided for the Council to pay DCL a management fee which amounted to c.£92,000 in 2010/11, and included an arrangement for income sharing above a threshold.
- 2.2 RPLC is over 40 years old, and underwent major refurbishment in the late 1980s after a fire. In April 2004 Cabinet were advised (CAB858) that the Centre required significant investment to continue to function effectively. In January 2005 (CAB1004), Cabinet were advised of the likely nature of the works and in March 2005 gave authority for consultants to be appointed to draw up detailed specifications (CAB1042). It was noted that these works were likely to require closure for a period of up to 13 weeks.
- 2.3 An exempt appendix to CAB1042 noted that the period of closure was longer than had been anticipated when the original contract was let, and therefore it was likely that compensation would be due to DCL for loss of income. The report recommended, and Members agreed, that, rather than pay compensation, the contract with DCL be extended for a period of 3.25 years, to March 2011, allowing them to absorb the loss.
- 2.4 In 2008 the City Council discussed with DCL whether sharp rises in operating costs, largely due to increased energy costs, could be offset by savings on NNDR contributions if the company were to set up a 'not for profit' body to operate the centre. The resultant savings to both DCL (or, in practice, the new body – termed a Leisure and Community Partnership, LCP) and the City Council, were taken to meet energy costs, in effect increasing the management fee by the Council's share of Business Rates savings. In October 2008 Cabinet agreed this arrangement (CAB1717). The arrangement took effect from that date.
- 2.5 The next change to RPLC management arrangements came in 2009. With the contract due to end in 2011, the Council were considering re-tendering, and the possibility of procuring a new leisure centre. DCL formally approached the Council (letter at Appendix 3) to suggest that their contract be extended for a further period. In return, they proposed to invest in enhancements to the Centre, complementing those thought necessary by the City Council. They also proposed taking on the management of the Council-run Meadowside Leisure Centre in Whiteley, and reducing the overall management fee under the contract to zero. This was reported to Cabinet in May 2009 (CAB1801).

- 2.6 The Council took advice from external consultants – Capita Symonds - on whether, in the market then pertaining, the offer of investment was likely to outweigh potential savings from a re-tender and market test of the management contract. They also sought legal advice from solicitors and Counsel on whether procurement law required the contract to be re-tendered. In December 2009 Cabinet approved the further extension of the contract with DCL for a period of 12 years to March 2023 (CAB1861). That report contained advice from Capita Symonds and external legal advice.
- 2.7 The most recent change came about in November 2012 when DCL wrote advising that the share capital of their holding company was being acquired by Places for People, a larger company with a background in housing provision. This required formal approval by the City Council, which was given by a consent deed dated 11 December 2012. This had no operational impact for the contract. However, the Council took the opportunity to agree specific provisions about continuation of management arrangements to 2023 in the event of a new facility replacing RPLC.
- 2.8 It is worth noting that throughout this process the Council's Officer Lead in these matters has rested with experienced professionals, notably the Corporate Director – who has a professional background in leisure and sports management - and Head of Sport & Physical Activity, supported by legal, financial, surveying and other colleagues.

3 The Representation

- 3.1 Mr Wilson's representation of 20 January set out four specific questions before making the wider points outlined in 1.3 above. His subsequent representation essentially expanded on these points, whilst also alluding to the more recent debates on the options for refurbishing or replacing RPLC – which I shall also deal with.
- 3.2 Taking first Mr Wilson's questions in chronological order of the events he refers to, my investigation has concluded as follows:
- a) ***“Why was an additional 3.25 year extension agreed in 2005 to compensate for 3 months of building disruption when the Council was not obliged to provide any compensation?”***

The circumstances surrounding this extension were put before Members in exempt appendix 3 to CAB 1112 in October 2005. It is normal to make provision for some short periods of closure for maintenance during the life of any such contract, and the contract originally agreed with DCL provided for that closure and subsequent loss of income, which was reflected in the overall financial arrangements agreed.

However, officers considered, on the basis of internal legal advice, that there was a contractual requirement to compensate for the loss of income from pool-related activities over a longer closure period, since such a closure had not been anticipated during contractual

negotiations. Members were presented with three options, and it was recommended that DCL be asked to absorb income loss estimated at £166,000 and to cover the cost of capital works totalling £50,000 which would otherwise fall to be paid by the Council. To compensate, DCL sought an extension to the contract of “3+ years”.

There was clear professional advice from the City Secretary & Solicitor that this contract was not then subject to EU procurement provisions, and that it was open to Cabinet to waive its Contract Procedure Rules and not re-tender if it was content the offer represented value for money. The Council’s Procurement Officer, an experienced professional in the field, advised that the option of a contract extension be supported as offering value for money. This advice supported the recommendation of the Director of Communities that an extension to March 2011 be agreed.

In response to this first question, I conclude that Cabinet took a decision to extend the contract as an alternative to meeting compensation costs which were legitimately due. In doing so they had regard to appropriate and well founded professional advice.

- b) ***“Why was a twelve year contract with significant penal clauses entered into when it was general knowledge that the building was falling down?”***

Members first considered how to take forward management of RPLC in May 2009, as the contract (which had been extended in 2005 to end in March 2011, as noted in (a) above) with DCL drew near to its end. The report (CAB1801) explored options and made clear that “a full scale retendering exercise testing the market is the obvious option and can be pursued, and is the preferred choice of the Corporate Management Team to ensure value for money”.

However, it was also noted that DCL had formally written to the Chief Executive proposing a further extension of the existing contract. That letter (at Appendix 3) suggested several advantages in terms of cost savings, and also proposed DCL would be willing to invest in facilities and improvement in RPLC if they had a longer contract over which to recoup investment. It was also proposed that Meadowside Leisure Centre, then managed by the City Council, be included in the RPLC contract to achieve better value for money.

Officers advised, and Members agreed, that independent advice should be sought on the value for money the arrangement proposed by DCL would offer, and whether a further extension was likely to be acceptable under European Procurement law. The former was commissioned from Capita Symonds (Appendix 4). They gave a thorough analysis of market conditions, considered other examples of contract extension – showing what was suggested was not out of the ordinary – and considered value for money. Their conclusions include, at 6.1.7 the following:

“having regard to the advantages in 6.1.3 and the disadvantages in 6.1.4 Capita Symonds considers the Council commencing procurement of the new contract with solo-negotiation to offer the most advantageous approach, provided that sufficiently qualified expertise and resource is dedicated to the negotiation process by the Council”

One further aspect of the CAB1861 is relevant in considering value for money. The report recommends DCL be invited to manage Meadowside Leisure Centre, which until then the Council had run, at a cost of some £200,000 per annum. It was proposed that, should DCL take on the two facilities under an extended contract, then they would do so at a management fee of zero. This, as Capita Symonds acknowledge, offers savings to the Council of both the then current management fee payable by the Council for RPLC, £92,000, and ending the subsidy to Meadowside.

Turning to legal aspects of the proposed extension, independent legal advice (exempt Appendix 9) was also sought. That advice considered the full EU Procurement Regulations then relevant did not apply as the intended contract amounted to a service concession. It went on to advise that it would be required to address certain wider principles of EU competition law, and that to do so it would need to be demonstrated that the proposed changes were in the nature of variations, and that there was a genuine business case which supported a solo negotiated approach. Counsel advised that the proposed extension and other terms did lawfully constitute a variation of the existing contract.

Having considered the advice brought forward for Members in CAB1861, and the external advice which underpinned that report, I have concluded that the advice offered by Council Officers to Cabinet, and on which they based their decision, drew directly and accurately on robust independent assessment of the DCL proposal for an extension of their contract.

Having considered the contract entered into with DCL to facilitate the extension, I see no evidence that there are unduly penal clauses. Rather, it contains the normal provisions one would expect to protect the Council's position regarding non-performance, and the contractor's position in the event of a failure by the Council to fulfil its obligations. Importantly, there was no clause which provided for a sum to be paid to DCL in compensation for loss of income due to planned extended closure in 2011. Instead, that was a consideration in agreeing the basis for a contract extension, thus avoiding a direct cost to the Council.

Mr Wilson has also queried why the extended contract was agreed *“when it was general knowledge that the building was falling down”*. As section 2 of this report makes clear, RPLC is now beginning to approach the end of its useful life, both because of growing

maintenance needs and because the leisure offer does not easily meet current expectations. However, in 2009 it was clear that there were options for refurbishment which would extend its operational life over the period under discussion. As the chronology above makes clear, there have been several periods of major refurbishment, including in 2011 shortly after the contract extension was agreed.

A report to Cabinet in May 2009 had anticipated further refurbishment, and a series of reports, beginning with CAB1965 in February 2010 sought authority and finance for that refurbishment. CAB1861, which recommended the contract extension, itself noted that works would be done to refurbish RPLC, including those to be funded – if an extension was agreed – by DCL. There had at the time been informal discussions amongst officers and Members to consider whether the facility should be replaced. However, it is clear that Members had finally opted to undertake significant investment in refurbishment to extend RPLC's operational lifetime. The proposals for investment from DCL was clearly part of the case for refurbishment.

I do not consider that there was a consensus that “the building was falling down”. Whilst it clearly required major works, it is apparent that the decision to extend the management contract with DCL was taken with the full knowledge that plans would be put in place to extend its life through a major refurbishment.

c) ***“Why was there inappropriate correspondence between DC Leisure and Council Officers prior to the award of the contract, suggesting how to avoid a tender?”***

As noted above, the discussions that led to the agreement to an extension of the contract with DCL until March 2023 began with an approach to the Council by DCL. They put forward a proposal that such an extension be agreed in return for capital investment in RPLC by DCL. Key letters from DCL, sent in October 2008 and March 2009, outline and then formalise an offer. A final proposal, which follows discussions between Officers and DCL, is made in October 2009. All letters are at Appendix 5.

These letters explain why DCL consider an extension with re-tender would be beneficial to WCC, and acknowledge it would also benefit DCL. It is fair to say they suggest how to avoid a tender, but are careful to set out what, in DCL's view, is the legal basis for this. They also give examples of similar extension agreements with other Councils. They do not advocate illegality.

Council Officers' responses are largely in the form of short e-mails, and discussion which took place in a number of meetings. None of the material I have seen strikes me as inappropriate in that it proposes or encourages breaking of EU requirements on procurement of such contracts. Nor does it show anything other than the proper conduct of a discussion following DCL's initial and subsequent formal offer.

What is important is that the final decision on DCL's proposal was taken by Members, and taken with the benefit of full independent advice on matters of legality and value for money, as I outline above. That to me indicates that care was taken to ensure that matters were conducted properly and that the final decision would be robust. I have not found any evidence of inappropriate correspondence from any party, nor any suggestion that the decision was influenced by any such inappropriate correspondence.

d) ***“Why was the contract not put out for tender when the terms are materially different to anything that existed before?”***

There is no doubt that the extended contract agreed in 2009 to run to 2023 is different from that which then existed. The question is whether, in legal terms, it is 'materially different' – a phrase which has a very specific meaning in law relating to nature and magnitude of differences and, in procurement terms, whether the differences could have led to the arrangement being open to a wider or different market of providers. This was specifically addressed in the legal advice sought to inform the decision taken by Cabinet in December 2009. That advice was reported in CAB1861, and attached at Appendix 9.

Counsel's advice, and that of external Solicitors consulted, is very clear on this matter. He does not consider that changes to the contract as proposed, and including the addition of Meadowside Leisure Centre and the length of the contract extension, constitute 'material differences'. In the light of that, Cabinet was at liberty to consider the steps put before then and not require the contract be retendered.

- 3.3 As noted above, Mr Wilson's representation argues that, because, in his view, the contract was wrongly extended, the changes agreed have "potentially defrauded WCC and therefore Winchester taxpayers of significant amounts of money" and that the Council has been "committed to a position which is to the benefit of an individual organisation but to the detriment of the taxpayer".
- 3.4 I have found no evidence to suggest there has been a financial loss to the Council, or that there was any fraud perpetrated. There was a risk that, in not seeking to retender the contract the Council missed out on the benefits a competitive bidding process could offer. However, this question was specifically addressed in the Capita Symonds report, which acknowledged the potential benefits of competition, but also drew attention to the opportunities for improving the then existing management fee paid to DCL, and benefitting from an income share. Section 5 of this report considers further financial matters arising from these representations and my investigation.
- 3.5 Section 6 of their report (at Appendix 4) summarises Capita Symonds' views. They conclude that the Council was able to save significant resources by not retendering the contract, and noted a benefit to the offer of capital investment, which itself offered a way of securing enhancement at no cost to the Council.

They also drew attention to the importance of renegotiating an appropriate arrangement for the management fee and profit share.

- 3.6 The final agreement negotiated reduced the management fee payable by the Council to DCL from £92,000 to zero, and also led to DCL taking on management of Meadowside Leisure Centre at zero fee, thus saving the Council an annual subsidy of around £200,000 (the approximate cost in 2009.10) – although the Council still bears some costs. Whilst it is, of course, impossible to tell whether a full tendering process would have led to a better outcome, the Council was clearly in possession of independent advice which suggested the option of an extension, if well negotiated, did offer value for money. The negotiations for the Council were led by experienced leisure and legal professionals, so I am confident they were undertaken robustly, and that the outcomes are in line with what Capita Symonds expected. This is explored more in Section 5 below.
- 3.7 I thus conclude that there is no evidence the taxpayer lost financially from these arrangements, and indeed there is every likelihood that the arrangements are better than any alternative arrangement might have achieved through competitive tendering. I certainly do not agree that the evidence points to the taxpayer being “defrauded” as Mr Wilson suggests.
- 3.8 Mr Wilson also argues that the Council has been “committed to a position which is to the benefit of an individual organisation but to the detriment of the taxpayer”. The conclusions of my investigations on the two contract extensions outlined above do not point to the arrangements being to the detriment of either party. Rather, the driver for reaching those agreements was that they were to the benefit of both, including the Council, and therefore the taxpayer.

4 Other Matters

- 4.1 A series of related matters have been raised by either Mr Wilson or in the paper handed to the Leader by another Member. I have considered these matters as follows (nb. the précis into topics is mine, having read representations submitted):
- a) *An agreement has been entered into between WCC and DCL for a DBOM (a contract to design, build operate and manage) a replacement leisure centre.*

There is no such agreement between WCC and DCL. The suggestion there may be seems to be based on a misunderstanding. In 2012 DCL wrote to WCC advising that the share capital of their holding company was being acquired by Places for People, a larger company with a background in housing provision. Formally this required approval by the City Council, and, at the request of the then Leader that approval was given alongside an agreement concerning the contract with DCL to manage RPLC should the facility be replaced before 2023.

It was agreed that, should a new facility be built, WCC would enter into

negotiations with DCL to provide for them to manage that facility until the expiry of their existing contract – March 2023. Those negotiations should proceed in good faith, but if agreement cannot be reached then WCC would be free to go to the market for an alternative provider.

It is clear this is no more than providing the Council with some flexibility over the remainder of the contract with DCL should a new facility be built, whilst also respecting DCL's contractual position. It does not amount to any commitment for the longer term, or indeed agreement to enter a DBOM arrangement.

The paper from the Elected Member also highlights a number of quotes taken from e-mail exchanges between WCC Officers and DCL concerning exploratory work undertaken in 2013/14 to consider the business case for a new leisure facility. The inference drawn is that DCL have been given preferential status as possible providers and were part of a team developing proposals.

In fact those exchanges, when read in full, show that DCL had been asked by the then Council Leader to contribute their professional knowledge to discussions about a new facility, drawing in particular on their experience of the activity mix which might meet modern demands. They, Officers and Members were careful to draw the line in ensuring that no commitments were made by any party.

- b) *Documents or information shared with Elected Members have been interpreted or manipulated because of an inappropriately close relationship between DCL and WCC Officers.*

Elected Members are being steered as a result of compromised advice.

- (i) In reading the relevant reports put to Members on RPLC over a number of years, it is clear that advice is often based on reports prepared or advice given by third parties. Usually these reports are shared with senior Members, generally the relevant Portfolio Holder or project lead, informally but are not always appended to formal Committee reports. Instead, that external advice will be drawn upon to construct advice presented by officers to Committee.

The accurate representation of that advice depends on the professionalism of Officers. Having read both relevant Committee reports and third party advice I see no evidence that the latter has been distorted or misrepresented when presented to Members. Nor could I find any instances where understanding of that advice risked being swayed through partial presentation of information.

The Council's own processes and procedures provide further assurance that the advice presented to Members is accurate. All

reports are reviewed by senior officers, including the Chief Finance Officer, Monitoring Officer (who is also the Council's most senior Solicitor) and, in the case of many of the reports relevant to RPLC, Head of Estates and Head of Contract Services, both qualified Surveyors. They will have access to, and often consult, relevant third party advice. Both the extension of the contract with DCL and procurement of a new leisure facility were also discussed at the Council's Corporate Management Team. Finally, it is also worth noting that the Capita Symonds report was available to any Member on request.

In my judgement, that breadth of professional scrutiny, along, of course, with scrutiny by Elected Members, provides assurance that advice is presented clearly and accurately, and is tested robustly. It is certainly sufficient to minimise the risk of partial, compromised or misinterpreted advice being given to Members.

- (ii) Mention is made of amendments to third party reports before they were finalised, again suggesting this had been done to distort their recommendations. It is normal practice for the clients for any such report to provide comment on early drafts, checking for accuracy and that the matters raised are properly addressed. However, it is very unlikely that any third party professional would be willing to compromise their professional advice by accepting any amendment they were not comfortable with. I found no evidence of any such attempt to distort the conclusions of those external reports.
- (iii) As regards the closeness of the relationship between certain Council Officers with responsibilities for the RPLC contract or advising on aspects of it and staff at DCL, the paper from the Elected Member quotes from a number of e-mails to illustrate what they regard as too close a relationship.

Whilst these quotes are taken in isolation, and so need to be treated with caution, there is no doubt that the language used is friendly, sometimes informal. However, a full reading of all e-mails does show that the relationship continues to be professional.

In one example quoted, a senior manager from DCL thanks an officer for the work done to take through Cabinet a report relating to contract extension. Taken at face value that may well seem inappropriate. However, the e-mail goes on to say "*I know that it was for the ultimate reason that it was best for the service and would not have been considered without the great job done by [DCL staff in delivering the service]*". When turning to the report in question it is clear the approach recommended by Officers is backed up by evidence, and that Members were able to take an informed decision.

It is important for Officers to take care in the language they use in all communications to avoid giving an impression of undue partiality or support, and it would be timely to remind all Council staff of that. However, I found no evidence that the language used reflected an unduly close relationship.

- c) *The Council's rules on acceptance of gifts or hospitality have been broken.*

In March 2011 a senior manager at DCL invited Council officers to a 'celebration meal', "[to] let us thank you for all the hard work that went into the contract process...". The purpose was, as the invitation said, to say thank you, and the invitation was clearly issued after papers relating to the contract extension were signed. It was not, therefore, a direct inducement to officers.

The Council's Contracts Procedure Rules advise that "*all officers engaged in a procurement process shall comply with any applicable code of conduct and must not invite or accept any gift or reward in respect of the award or performance of a contract*". The Council's Employee Code of Conduct says "*employees should only accept offers of hospitality if there is a genuine need to impart information or represent the local authority in the community.... acceptances of hospitality should be authorised by management and recorded with the Chief Operating Officer*".

The Employee Code of Conduct does not specify financial thresholds for hospitality, but it is worth noting the Code of Conduct for Members advised at the time a threshold of £25, above which it is generally advisable to make a declaration.

The proposed meal took place in a pub in Hyde, the area in which RPLC is situated. It was clearly hospitality rather than a gift and, from the recollection of officers present, is likely to have cost no more than £15 per head – and one officer I spoke to recalls that they may have contributed to costs. It happened some time after the decision to extend the contract was made, and the necessary documents to give effect to this signed. It has not been recorded on the Council's register of hospitality.

It is clear from the nature of the exchanges this was seen by DCL as a way of inviting colleagues from the Council who they worked closely with to mark a significant point in their relationship with the City Council. It was not an attempt to influence a decision on the contract. The sums involved were small, and there is a recollection, but no evidence, that costs may have been shared.

It is not unusual for officers to accept modest hospitality from partner organisations without it impairing their ability to give objective advice. That might take the form of a drinks reception or modest meal. Whilst

such relationships can be conducted entirely appropriately, it is important to remember that public perception may not always see such hospitality in a neutral light. Officers are therefore always wise to consider whether it is appropriate.

In this instance, whilst the term 'celebration meal' (used by DCL, not Officers) is unfortunate, I do not consider this amounts to a breach of the Council's Code of Conduct for Employees. Nor do I consider that acceptance of modest hospitality some time after the contract extension was agreed is in breach of the Contracts Procedure Rules. It would, however, be appropriate to remind Officers to consider carefully public perception before accepting any such offer, and to remember the importance of making a formal declaration of an acceptance.

- d) *The Council has purchased the Garrison Ground from Tesco without formal authority.*

This is incorrect. On 3 January 2013 the Council signed a lease with Tesco to extend their right to use the Tesco owned land as sports pitches for ten years (commencing March 2012). This was designed to maintain existing use. It does not represent a purchase and was entered into in full accordance with the provisions of the Council's constitution as regards authority delegated to officers.

5 Financial Arrangements

- 5.1 The representations made argue that the City Council has received a poor deal from the extension of the contract. Mr Wilson goes so far as to suggest the arrangements have "potentially defrauded the Winchester City Council and therefore Winchester taxpayers of significant amounts of money". This seems to me to relate in particular to the suggestion that the contract extension did not offer value for money. That is considered in some detail in section 3 above.
- 5.2 The award of the contract was originally through competitive tender. The City Council paid a management fee to DCL and took on responsibility for maintenance of the external fabric of the building. Certain other costs fell to the Council, notably rates and insurance. There is also a cost as a result of the need to maintain a client team to monitor the contract and contractor's performance, and of some projects and activities associated with and provided at RPLC. There is a contractual arrangement whereby the Council receives a share of income above a defined threshold.
- 5.3 The position changed in October 2008 when the operation of RPLC was taken on a by non-profit making Leisure and Community Partnership (LCP - see 2.4 above). That body was exempt from business rates, and the City Council was able to reclaim rates, with its share of the amount recovered paid by agreement to the LCP to cover increased energy costs. In December 2009 it was agreed the contract for the management of RPLC be extended (which was done in April 2011), that DCL take on management of Meadowside (from

April 2010) and the management fee payable was reduced from £92,000 to zero.

- 5.4 All these changes are reflected in Appendix 6, which shows annual costs to the City Council of the management and operation of RPLC and Meadowside Leisure Centre. It is difficult to compare “before” and “after” figures to ascertain benefit from the changes made because each heading of expenditure may vary from year to year for legitimate reasons. However, looking at the ‘private contractors’ line in Appendix 6, and excluding the £101,000 free swimming grant paid by Government in 2009/10, it is clear that payment by the Council to DCL dropped by c.£100,000 in 2011/12, when the contract extension took effect, by comparison with the previous year. Moreover, the payments from that date took into account payments of business rates rebates from the Council to DCL, agreed to cover increased energy costs – so like-for-like savings will exceed that figure. Whilst these figures will vary depending on comparisons made and costs arising, it is clear there has been a significant saving.
- 5.5 Meadowside Leisure Centre became part of the contract with DCL in April 2010, when they were also able to take advantage of the business rate rebate. The payments made to DCL, reflected under the ‘private contractors’ line of the appropriate part of Appendix 6, consist of those rate rebates. Again comparisons are difficult, but it’s reasonable to estimate that, overall costs to the City Council reduced by about £80-100,000 when DCL took over the operation of Meadowside. Once again, whilst these figures will vary depending on comparisons made and costs arising, it is clear there has been a significant saving.
- 5.6 The contract with DCL provides for WCC to take a 10% share of any income above a defined threshold, which is updated by RPI annually. That income share is often presented alongside other minor income items related to RPLC, and so it can be difficult to determine precise figures. In some years, the Council has agreed with DCL that its share should be reinvested, for example in additional temporary staff. In broad terms, the Council’s share has varied since the start of the contract between c.£6,000 to c.£18,000 – the average being c.£11,000. The Capita Symonds report estimates a profitable facility such as RPLC could, after the operator’s legitimate costs and profit are taken into account, generate for the Council’s benefit some £40,000 per annum. Clearly the income share achieved is lower than this.
- 5.7 It has been argued Winchester has received a poor deal in that greater savings may have been available through an open market re-tender. The Capita Symonds report addressed the level of savings which may be available, and indeed their conclusions informed Officer advice and Member decisions on the contract extension. Their analysis took into account the reduction in the management fee payable, the savings available through DCL taking on management of Meadowside and an estimate of possible income share.
- 5.8 Capita Symonds suggested that the changes proposed, including contract extension “would provide an upper order of savings of £195,000 (achievable

through extension negotiations or open market tendering), with a lower end of c.£100,000". Savings of that order of magnitude have been achieved, largely through the reduction of the management fee and passing on operating costs of Meadowside. Whilst the income share achieved is disappointing, there is no reason to suggest that overall the Council or local taxpayers have lost out through the arrangements made.

- 5.9 One other matter which has arisen during the course of my investigation is the arrangements made for scrutinising financial returns from DCL. Maintaining an oversight of these returns is part of the client role in monitoring contracts, and provides, *inter alia* a basis for determining income share. A recent Internal Audit review, which will be separately reported to Members, has raised some issues concerning the strength and effectiveness of the monitoring of the contract and its performance by the Council in its role as client. This includes financial monitoring. Officers will recommend and report separately on how these issues will be responded to. Whilst I consider none of the matters raised by Internal Audit affect the overall conclusions of this investigation, an effective response will provide greater reassurance for the Council on all aspects of the contract.

6 Freedom of Information Requests

- 6.1 Mr Wilson has made a number of requests for information under Freedom of Information Regulations. These include requests for financial information, details of contracts and exchanges of letters, exempt appendices from Council reports and e-mail exchanges between officers and with DCL managers. Most have been provided, with some having elements redacted in accordance with provisions in the legislation allowing the protection of commercially sensitive information. In one instance Mr Wilson exercised his right to appeal to myself as Chief Executive to overturn decisions to redact information. As a result of this a version of papers requested was sent with fewer redactions.
- 6.2 In his most recent requests of 9 May and 11 June Mr Wilson sought information on a number of matters, including gross annual revenue earned by RPLC and Meadowside Leisure Centre. This was refused on the basis it constituted commercial information, an exclusion permitted under legislation (letter at Appendix 7). Once again, Mr Wilson has exercised his right to seek a review of that decision, which I shall undertake shortly. In the meantime, Members had asked to review this information, which will be provided separately.
- 6.3 Mr Wilson has drawn attention to the Council's obligations under the Freedom of Information Act 2000, and says the Information Commissioner has written to me as Chief Executive. Following a complaint about delays in the provision of information, the Commissioner wrote to Howard Bone, encouraging a response within 20 working days. The Council always seeks to provide a full and accurate response, but on occasion complexity and other work pressures may give rise to delays, a position common to many authorities dealing with substantial Fol requests which the Information Commissioner accepts. However, Mr Wilson has been provided with information sought, except where

it is a judged this is exempt. In those circumstances it has been made clear he can request a review of that decision by myself as Chief Executive and, if he remains dissatisfied, the Information Commissioner.

7 Conclusions

- 7.1 The representations made by Mr Wilson focus on the way in which the Council's contract with DCL was extended in its duration without competitive tender in 2006 and again in 2011. He considers this offered poor value for money, and was done at significant financial disadvantage to the City Council and local taxpayers. He believes the actions taken constitute maladministration. He goes on to suggest that the Council have also made a commitment to DCL, suggesting they would build and operate any new facility which the Council approved.
- 7.2 I did not find any evidence from Council reports, the professional advice sought or the correspondence (by letter and e-mail) which supported the suggestion there was any maladministration or other inappropriate actions. All decisions on how to proceed were taken by Members at Cabinet, and were fully supported by professional advice, either from officers or third party professionals. That advice was clearly and accurately presented to support recommendations made and inform decisions taken.
- 7.3 That said, it is accepted that our own Internal Audit service have raised a number of pertinent questions about aspects of contract management. Their comments do not suggest maladministration or, worse still, inappropriate behaviour. However, they do require a tightening up of our procedures, and the points raised will be addressed and reported to Members separately.
- 7.4 The paper prepared by an Elected Member is, in some respects, more serious in that it alleges that Members are being misled by Officers, and that the advice Officers were providing was compromised. I found no evidence to support such an allegation. I did find it disappointing that, having made such allegations, the paper presented contained little more than a chronology of actions and a series of quotes lifted largely from e-mails obtained under Fol legislation, often presented out of context. A number of statements it contained were simply inaccurate. The case made based on these offered little more than inference.
- 7.5 It is also clear that that paper is informed by the concerns of those who are challenging the Council's approach to the possible replacement of RPLC. By misinterpreting the basis on which the Council gave agreement to a change of ownership of DCL, it makes an incorrect assumption that a promise has been made to DCL regarding provision of a new facility. The Council has always been clear that no decisions have been taken on this matter, and successive Leaders have said that the decision on how to proceed would sit with Council. There is certainly no agreement that the procurement route would be through a DBOM approach, never mind that the Council would award such a contract to DCL without competitive tender. It is a shame the Member in question did not choose the clear up the confusion with Officers or Senior Members, rather

than base their accusations solely on discussions with “concerned local residents and their legal advisors”.

- 7.6 If the professionalism of officers is to be called into question, a much higher standard of evidence than was offered must be provided. For a Member to do so threatens the trust which must exist between Officers and the Councillors they support, and I suggest the Member in question either provides more robust evidence to back up claims presented as fact or makes a full apology for the upset caused.

OTHER CONSIDERATIONS:

8 COMMUNITY STRATEGY AND PORTFOLIO PLANS (RELEVANCE TO):

- 8.1 The efficient operation of the Council is a key objective, and one of our priority themes. We also aim to adopt the highest standards of integrity. These representations go to the heart of that.

9 RESOURCE IMPLICATIONS:

- 9.1 None directly arising from this investigation.

10 RISK MANAGEMENT ISSUES

- 10.1 Proper award and management of contracts minimises the risk of financial loss to the Council, of poor performance of services to the public and of legal challenge.

BACKGROUND DOCUMENTS:

CAB858: Major Refurbishment Works River Park Leisure Centre – April 2004

CAB1004: River Park Leisure Centre - Refurbishment – January 2005

CAB1042: River Park Leisure Centre Refurbishment – March 2005

CAB1112: River Park Leisure Centre – Refurbishment – October 2005

CAB1717: River Park Leisure Centre – Rate Relief and Contract Variation – October 2008

CAB1801: River Park and Meadowside Leisure Centres – Management and Maintenance Arrangements – May 2009

CAB1861: River Park and Meadowside Leisure Centre Management Contract – December 2009

CAB1965: River Park Leisure Centre – Refurbishment Proposals – February 2010

APPENDICES:

1: Representation from Mr Wilson to Overview & Scrutiny Committee – 20 January 2014

2: Representation from Mr Wilson to Overview & Scrutiny Committee – 17 February 2014

3: Letter from DCL to the Chief Executive – March 2009

4: Capita Symonds Report: Leisure Management Contract Procurement Advice – August 2009 (Redacted)

5: Letters from DCL to Officers regarding proposed contract extension

6: Costs to WCC for the management and operation of a) River Park Leisure Centre and b) Meadowside Leisure Centre

7: Letter from Head of Legal & Democratic Services to Martin Wilson re- FoI request – September 2014

8(Exempt): Paper from Elected Member submitted to the Leader

9(Exempt): Legal advice on contract procurement from Veale Wasbrough and Counsel

10(Exempt): Extracts from Capita Symonds Report (Section 4) showing information redacted in Appendix 4