

Legal Implications of the Alternative Delivery Models

The key consideration for each of the options is the legal implications as these have a significant impact on the recommendations that can be made to Cabinet. The legal considerations fall under the following areas:

- Procurement
 - European procurement requirements
 - Part B (Public Contracts Regulations 2006, Schedule 3)
 - Service Concession Contracts
- 'Teckel'
- State Aid
- The duty upon the local authority to obtain best consideration, reasonably obtainable, in disposing of land unless the 'disposal' is a short tenancy (i.e. a tenancy lease for 7 years or less). The 'disposal', in this instance would be the grant of a 25 year lease of the Grangewaters Education Centre to an external body.
- The Public Services (Social Value) Act 2012.

The advice contained in this report was provided from the Legal Team and assumes that the 'contract value' will be above the relevant European threshold (£172,514) for service contracts.

European Procurement Rules – The Public Contracts Regulations 2006 (as amended)

Grangewaters is mainly educational with some elements of recreational use. The legal advice has been given on this basis.

A. **Part B Services:** Both 'educational' and 'recreational' services fall within Part B of Schedule 3 to the Public Contracts Regulations 2006. Part B services which are above the, relevant, threshold (£172,514) must comply with a number of the, individual, regulations. The ones which will need to be, particularly, taken into account, here, are:

- Regulation 4(3): "A contracting authority shall:
 - (a) treat economic operators equally and in a non-discriminatory way; and
 - (b) act in a transparent way. This means that the basic principles that underpin EU procurement law – equality of treatment, transparency and non-discrimination – apply to Part B services just as they apply to all other types of procurement
- Regulation 9: provisions on technical specifications must be sufficiently generic so as not to discriminate against suppliers in other countries or SMEs and do not put in place unjustified barriers to competition
- Regulation 31: requires the placing of a **Contract Award Notice** in the Official Journal of the European Union ("OJEU")

The effect of the requirement, identified in (b), is that all Part B, above threshold services, must be subject to a reasonable level of advertising/competition and the process for selecting the 'winner' must be transparent, fair and non-discriminatory as between member states. Needless to say, the Council's own Contract Procedure Rules require a competition to be carried out in respect of contracts for supplies and services with an individual value of £75,000 and above.

The effect of the requirement, contained in Regulation 31, is that all those who are interested will be alerted to the fact that a services contract has been awarded and may result in challenge(s).

B. Service Concession Contracts: This is a contract which is of the same type as a public service contract except for the fact that the consideration for the provision of services consists of, either: (i) the right to exploit the service; or (ii) the right to exploit the service and a payment. If there is, only, a payment, it will not be a concession contract. In addition:

a. The 'Operator' must:

- i. bear the risk involved in establishing and exploiting the service;
- ii. obtain revenue from the user(s), particularly by charging fees;
and

b. The Council must:

- iii. Transfer the responsibility of exploitation to the external 'Operator'

Service concession contracts are (presently) excluded from the Public Contracts Regulations 2006 but are subject to the principles of fairness, non-discrimination, transparency, proportionality and mutual obligation if the contract in question has 'cross-border' interest. Effectively, this means that if the contract has cross-border interest there must be a degree of advertising, sufficient to enable the services market to be opened up to competition and to, also, enable the impartiality of the procurement procedure used to be reviewed.

"Teckel"

This is included for completeness, only, as the information regarding Grangewaters indicates that the requirements of Teckel can be met such that the contract for the management and running of Grangewaters could be transferred to another organisation, without a competition process being carried out.

If (a) the Council were to exercise, over the external organisation, a control which is similar to that which it exercises over its own departments; and,
(b) the external organisation were to carry out the essential part of its activities for the Council, the management and running of Grangewaters could be transferred to another organisation without a competition process being carried out.

The tests are known as the Teckel 'control' and 'function' tests but legal advice indicates that these tests could not be satisfied.

State Aid

This is aid which:

- i. is granted by the State or through State resources
- ii. favours certain undertakings or production of certain goods
- iii. distorts or threatens to distort competition; and
- iv. affects trade between Member States, including potential effect on trade between Member States.

State Aid may not be given without the permission of the European Commission unless it is 'de minimis' aid or it falls within an exemption.

In the context of the considerations around Grangewaters, state aid may be involved in the giving of a grant (if relevant) and in the leasing of the Centre for 25 years at an 'undervalue' (a rental which is below market rent/no rental)

Best Consideration and Property/Lease

The Council has a duty to obtain the best consideration reasonably obtainable when disposing of land, unless it is a short tenancy (one which does not exceed 7 years). However, if the grant is for the improvement of the social, economic or environmental well-being of the Council's residents and the 'undervalue' does not exceed £2m, a lease could be granted at less than market rent.

The Public Services (Social Value) Act 2012

This Act imposes a duty upon the Council, where it proposes to procure or make arrangements for procuring:

- a. the provision of services; or
- b. the provision of services, together with the purchase or hire of goods; or
- c. the provision of services, together with the carrying out of works

to consider:

- a. how what is proposed to be procured might improve the economic, social and environmental well-being of the relevant area, and
- b. how, in conducting the process of procurement, it might act with a view to securing that improvement.

In giving the, requisite, consideration to (a) and (b), the Council may only consider matters that are relevant to what is proposed to be procured and must consider the extent to which it is proportionate, in all the circumstances, to take those matters into account.

The Council must, also, consider whether to undertake any consultation in respect of matters (a) and (b) to which it is required to give consideration.