

**FLINTSHIRE COUNTY COUNCIL**

<b>Date of Meeting</b>	Thursday 24 <sup>th</sup> October 2024
<b>Report Subject</b>	To provide Members with information to assist, when considering the Notice of Motion relating to Aura Leisure and Library Services
<b>Cabinet Member</b>	Cabinet Member for Education, Welsh Language, Culture and Leisure
<b>Report Author</b>	Chief Executive and Chief Officer (Governance)
<b>Type of Report</b>	Operational

**EXECUTIVE SUMMARY**

Councillors have received several reports relating to arrangements for the delivery of leisure, library, play and museum services.

At its meeting on 9<sup>th</sup> September the Education, Youth and Culture Overview and Scrutiny Committee requested to see the grant funding document that was to be offered to Aura with a view to commenting on the terms of the agreement.

This report sets out Committees entitlement to see documents and the process for managing political and professional input into legal documents such as grant funding documents and contracts.

This report also provides further clarification and information in relation to the other matters relating to the transfer of services provided by Aura into a Local Authority Trading Company (LATC).

**RECOMMENDATIONS**

1	That Council confirms that it has received comprehensive reports on the key strategic elements to the proposed arrangements for the delivery of leisure, library, play, and museum services.
2	That Council acknowledges the differing roles of councillors/officers and the differing input that they will have into legal agreements as a consequence.

3	That Council recognise the work undertaken by officers to secure a longer-term agreement with Aura on reasonable terms.
4	That Council notes there is no time for further discussions with Aura and negotiations are not appropriate for the type of contractual arrangement that was being pursued.

## **REPORT DETAILS**

<b>1.00</b>	<b>EXPLAINING THE PROCESS FOR MANAGING POLITICAL AND PROFESSIONAL INPUT INTO LEGAL DOCUMENTS AND THE POSITION IN RELATION TO TRANSFER OF SERVICES PROVIDED BY AURA INTO THE LATC</b>
1.01	<p><b><u>The process for managing political and professional input into legal documents.</u></b></p> <p>As the Council will be aware the agreements with Aura are grant funding agreements. Whilst the precise legal nature of the agreement differs considerably from a contract for services, it also has some similarities in the sense that it includes amounts to be paid to Aura, duration, etc.</p> <p>Whilst, as a grant, it has not been necessary to conduct a competitive tendering exercise under the Public Contracts Regulation 2015, officers have nevertheless taken the same approach to reporting the agreement to councillors as would be adopted for contracts for services.</p>
1.02	<p>When preparing contracts, it is normal practice to consider the contract from two perspectives:</p> <ol style="list-style-type: none"> <li>1) Commercial terms – these are the key strategic issues such as what service is being contracted (or in the case of these grant funding agreements the outcomes to be achieved), duration, price, risk share etc</li> <li>2) Documentation/drafting – the precise wording in the agreement that implements the decisions on commercial terms.</li> </ol> <p>For contracts over £2m in value the commercial terms will be reported to Cabinet for approval so that councillors can decide the Council’s stance on the key strategic issues. The documentation/drafting is rarely, if ever reported, to councillors being not only an operational issue but also a matter for professional legal advice.</p>
1.03	<p>Having reviewed the reports to Education, Youth and Culture Overview and Scrutiny Committee of 10<sup>th</sup> May 2024, 28<sup>th</sup> May 2024, and 9<sup>th</sup> September 2024, it is clear that officers have already reported both comprehensively and in detail on the commercial elements of the agreement. Amongst other things those reports have explained:</p> <ul style="list-style-type: none"> <li>• Background/market analysis</li> <li>• Identity of the proposed beneficiary i.e. Aura</li> </ul>

	<ul style="list-style-type: none"> <li>• Extent/scope of the services to be included, noting that in this case the grant would be to deliver outcomes</li> <li>• Price and potential financial information</li> <li>• Duration/term of the agreement including possible extension periods</li> <li>• Different possible models for the delivery of the service with associated risks and implications of each</li> <li>• Level of control to be retained by the council</li> <li>• Procurement route</li> <li>• Subsidy control</li> </ul>
1.04	It would therefore appear that all the pertinent key issues have been reported to councillors.
1.05	<p>At its meeting on the 9<sup>th</sup> September the Education, Youth and Culture Overview and Scrutiny Committee resolved:</p> <p>(a) That a special meeting of the Education Youth &amp; Culture Overview and Scrutiny committee is held as soon as possible and prior to the next cabinet meeting;</p> <p>(b) That the committee requires that a copy of the contract offered to Aura be produced at that meeting or made available to committee members prior to the meeting and all other necessary documents; and</p> <p>(c) That pending this meeting the Education Youth &amp; Culture Overview and Scrutiny committee strongly recommends a new agreement on reasonable terms is signed with Aura.</p> <p>Furthermore, the Notice of Motion 'Save Aura's Services' seeks for a copy of all agreements offered to Aura to be provided to members.</p>
1.06	<p>The committee requested to see the proposed agreements themselves, i.e. the grant funding agreements. There are a number of reasons of principle (apart from practical issues such as timing and responsiveness to the negotiating process) why such documents are not reported to committee:</p> <ol style="list-style-type: none"> <li>1. Skills and experience</li> <li>2. Accountability</li> <li>3. Third party warranties</li> <li>4. Political process</li> </ol>
1.07	<p><b>Skills and Experience</b></p> <p>Councillors are lay persons and they come to the council with a range of skills and experience. Rarely are they practising lawyers with current, experience in the sort of contracts and agreements let by the council. It would be unimaginable for every committee to be wholly constituted from councillors who are specialist lawyers in procurement, subsidy control and the relevant subject matter of the contract. It is not tenable for the council to report some contracts to committee and not others based on the perception of whether councillors are appropriately skilled and</p>

	<p>experienced. Contract documentation is therefore drafted either by the relevant officers or, as in this case, specialist external lawyers.</p>
1.08	<p><b>Accountability</b>  Officers are employed by the Council. Should they make mistakes in their work then they may be subject to either capability or disciplinary investigation. By contrast councillors are answerable to their electorate. Whilst they are subject to the code of conduct, it does not include any provision about them exercising due care and skill and does not provide for them to be investigated because they gave poor advice or reached bad decisions. The council would therefore have no accountability mechanism if a contract were to be poorly drafted by councillors.</p>
1.09	<p><b>Third Party Warranties</b>  In this case, the council is employing specialist external solicitors to provide advice and undertake the drafting of the document. Whilst not subject to the Council's disciplinary/capability policies they are contractually obliged to use reasonable care and skill and, significantly, to carry insurance should their advice prove incorrect. Again, this represents an important accountability mechanism and (through their insurance) risk mitigation. That mechanism would be unenforceable if councillors were to amend the documentation thereby not only depriving the council of the value of the services purchased with public funds in the first place but also removing the risk mitigation.</p>
1.10	<p><b>Political Process</b>  Legal documents are important in ensuring that the council receives the services (or outcomes) for which it has paid, can terminate the agreement in appropriate circumstances, and for protecting the council from risk etc. It is imperative that such documents are drafted in a legally watertight manner. The political process can and does legitimately consider a wide range of issues not just professional advice. It cannot be appropriate that the wording/content, and thus enforceability, of a legal document might therefore depend on political rather than legal issues.</p>
1.11	<p>Another issue to consider is what information a councillor is entitled to see, which is a mix of statute and common law. Section 14 of the constitution records the entitlements, the relevant provision of which are the common law right to know and the entitlements of a scrutiny committee to information.</p>
1.12	<p><b>Common Law Right to Know</b>  A councillor is entitled to see any information if it is requested for a lawful local authority purpose and that they reasonably need it in order to undertake their role as a councillor. Councillors are not, (see above), responsible for drafting contract documentation or the implementation of committee decisions. So, whilst they need to see information pertaining to key strategic issues, they are not entitled to see the documentation itself.</p>
1.13	<p>Cabinet decided, at its meeting in May 2024, that a grant option should continue to be explored and that if satisfactory progress was not made a Local Authority Trading Company (LATC) model be progressed.</p> <p>The Council therefore set a deadline for Aura to sign the new longer-term funding agreements before the end of the current agreements with Aura to</p>

	<p>allow a small but necessary window to implement the LATC if needed, and ensure meaningful and statutory consultations, and enable transfer of services. Beyond that deadline date the Council was to proceed to set up a LATC. The Council is therefore no longer considering an agreement with Aura and so there is no lawful local authority purpose for disclosing the document.</p>
1.14	<p><b>Scrutiny Committee’s right to information</b>  The Constitution sets out the following entitlement to information (my emphasis added):</p> <p><b>14.17.1 Rights of Access</b>  Subject to paragraph 14.17.2 below an Overview and Scrutiny Committee (including its sub-committees) will be entitled to access to any document which is in the possession or control of the Cabinet or its committees and which contains material relating to:</p> <p>(a) any business transacted at a meeting of the Cabinet or its committees; or  (b) any decision taken by an individual member of the Cabinet.</p> <p><b>14.17.2 Limit on Rights</b>  An Overview and Scrutiny Committees will not be entitled to any part of a document that contains:</p> <p>(a) confidential or exempt information; or  (b) advice provided by a political advisor or assistant unless that information is relevant to an action or decision that is being reviewed or scrutinised or any review contained in a programme of work of the committee or sub-committee</p>
1.15	<p><b><u>An update in relation to matters relating to the transfer of Aura into a LATC</u></b></p> <p>Firstly, it is important to clarify what the grant funding agreement is and is not. The funding agreement as submitted to Aura for signing by the 16<sup>th</sup> September 2024, was not a contract extension and the Council had not refused to extend a contract with Aura. Nor was this matter about closing services or centres, or about the quality of services or service delivery. Council officers recognise that Aura employees provide valuable local services.</p> <p>The situation has occurred as the contractual arrangements between the Council and Aura are coming to an end and a new arrangement, compliant with subsidy control law needed to be put into place.</p>
1.16	<p>The Council offered Aura grant funding agreements and not a contract for services which would require a procurement exercise subject to competition under the Public Contracts Regulation 2015.</p> <p>Grant funding agreements have been explained in multiple reports this calendar year to Cabinet and the Education, Youth and Culture Overview and Scrutiny Committee (including the meetings which were open to all Members).</p> <p>In summary, grant funding agreements are:</p> <ul style="list-style-type: none"> <li>• Not intended for long periods of time</li> </ul>

	<ul style="list-style-type: none"> <li>• A 'gift' of funding for a specific purpose</li> <li>• May have outcomes within them (set by the funder) as to what the funding is to achieve</li> <li>• Written to include terms and conditions, and clauses such as the ability of the funder to recover of grant (clawback) in certain circumstances</li> <li>• Offered on a take it or leave it basis by the funder (although a funding model would need to be agreed by both parties, which in this case it was in June 2024)</li> </ul> <p>It is important to note that given the nature of the contractual arrangement (i.e. a grant), the conditions on which the funding is to be made available is not subject to 'contract negotiations', although clarifications or questions around wording may be undertaken.</p> <p>Nevertheless, the Council had already considered, and in many cases accommodated, Aura's requests for changes to the funding agreements for a longer-term arrangement, making clear where it could not do so with justification in accordance with subsidy control law, grant conditions and provision or operational requirements.</p>
1.17	<p>The funding agreements were drafted based on standard templates, which were amended to reflect the specifics of this matter. There was nothing within the funding agreements that was not consistent with terms and conditions the Council advised Aura would need to be contained within them. Those necessary conditions had already been shared with Members via Cabinet and the Education Youth and Culture Overview and Scrutiny Committee in the various reports presented on this matter during this calendar year.</p> <p>Those necessary conditions included but were not limited to: clauses to allow recovery of grant (clawback), options for break/termination, compliance with subsidy control legislation (including clauses for recovery above reasonable profit).</p> <p>It is of note that the longer-term funding agreements presented to Aura were drafted based on the Interim Funding Agreements which were signed by Aura in June 2024 following Aura receiving independent legal advice.</p>
1.18	<p>The Council left open the opportunity for Aura to raise any errors or seek clarification on matters within the submitted funding agreements.</p> <p>In the opinion of officers of the Council, with supporting legal advice, nothing contained within Aura's letter declining the agreements was incapable of clarification and/or allaying of concerns had Aura engaged with the Council during the four weeks that it had the draft funding agreements.</p>
1.19	<p>This is clearly a sensitive time for employees and customers. Council officers are working with Aura and the recognised Trade Unions to ensure Aura employees are appropriately consulted and it would be inappropriate for the Council to publicly comment further at this stage.</p>

	<p>The Council is very aware that the large amount of information in the public domain about this matter, much of which is factually inaccurate, will undoubtedly be having a negative impact on Aura employees. Council officers have made a conscious effort not to comment on matters that they consider should be being dealt with more sensitively.</p> <p>Contractual discussions should remain confidential to protect the position of each party and to ensure messaging to any affected stakeholders, such as employees, can be handled sensitively and appropriately.</p> <p>There were contractual clauses that sought to protect that status and specific terms for the treatment of confidential information. In addition, there had been informal agreement that any communications would be done jointly.</p>
1.20	<p>The Council has written to Aura’s Chief Executive to confirm that the services provided by Aura Leisure and Libraries Limited will transfer to Flintshire Libraries and Leisure Limited with effect from 1<sup>st</sup> November 2024, and that Flintshire Libraries and Leisure will be responsible for the transfer of 293 existing employees under The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) as amended.</p> <p>The employees will transfer in their existing roles with no changes to job title, duties, terms, and conditions, or reporting lines.</p> <p>To comply with the obligation to inform and consult affected employees, pursuant to the aforementioned regulations; based on the information provided to date, Flintshire Libraries and Leisure Limited have advised of the following measures, in connection with the transfer, in respect of the affected employees.</p> <ol style="list-style-type: none"> <li>1. Membership of the Clwyd Pension Fund will continue post transfer for existing members.</li> <li>2. Membership of the Peoples Pension will continue post transfer for existing members.</li> </ol> <p>It is the desire of the Council and the LATC, Flintshire Libraries and Leisure, that services transfer as seamlessly as is possible and with minimal disruption to customers. However, it is recognised that there may be a need for some interim arrangements post transfer given there will be a new model of delivery.</p>

<b>2.00</b>	<b>RESOURCE IMPLICATIONS</b>
2.01	<p>If contract documentation were to be considered (and possibly amended) at committee then contract lawyers would need to attend scrutiny meetings in order to provide advice.</p> <p>The internal Legal Service does not currently attend scrutiny meetings and is not resourced to do so. Additional resource would therefore be required to ensure that scrutiny committees received appropriate advice when</p>

	<p>considering legal documentation at a time when the council is seeking to reduce rather than increase costs.</p> <p>In this instance, the external lawyers would need to be paid to attend meetings at which contract documentation is to be considered, again increasing cost.</p> <p>Notwithstanding the above, please also note sections 1.06 – 1.14 inclusive</p>
2.02	<p>The resource implications of the proposed agreement with Aura were explained in the relevant reports.</p>
2.03	<p>An options appraisal was conducted which determined the LATC model to be the most cost-effective and efficient route with the time available if new grant funding agreements could not be reached.</p> <p>Whilst there will be some additional costs to a LATC model, such as being liable for non-domestic rates, there are also potential savings from operating under a new model which should offset these costs.</p> <p>It is not appropriate to go into detail in this report in the public domain, but Council officers are working through this and the potential savings that should mitigate the additional costs incurred.</p>
2.04	<p>The grant funding agreements with Aura, if they had progressed, would need to comply with subsidy control law.</p> <p>A subsidy is support that is deemed to give an economic advantage and is provided to an organisation that operates in an economic market.</p> <p>The Subsidy Control Regime allows UK local authorities (amongst others) to provide subsidies within defined parameters that aim to prevent detriment to investment and competition and/or distortion of markets. The Subsidy Control Act 2022 is the relevant legislation covering the Regime.</p> <p>The Council is required to comply with this legislation and the associated statutory guidance.</p> <p>There are many things the Council must consider when awarding subsidies, such as ensuring they are limited to what is necessary and are proportionate.</p> <p>The specifics in relation to subsidy control in relation to these grant funding agreements with Aura have been provided in previous reports to Cabinet and the Education, Youth and Culture Overview and Scrutiny Committee.</p>

<b>3.00</b>	<b>IMPACT ASSESSMENT AND RISK MANAGEMENT</b>
3.01	<p>Local government process works on a balance between political and professional input. In the process described councillors are responsible for key strategic issues, whilst engaging appropriate technical and professional skills for the operational role of implementing those decisions.</p>



	The risks associated with changing current practice, especially in relation to drafting legal documentation, is described within the body of the report.
3.02	The impact of the previously proposed agreement with Aura was set out in the relevant reports.
3.03	An Integrated Impact Assessment is being undertaken in relation to the change.

<b>4.00</b>	<b>CONSULTATIONS REQUIRED/CARRIED OUT</b>
4.01	<p>Meetings between officers of the Council and Aura were held on:</p> <ul style="list-style-type: none"> <li>• 7<sup>th</sup> May 2024</li> <li>• 15<sup>th</sup> May 2024</li> <li>• 22<sup>nd</sup> May 2024</li> <li>• 6<sup>th</sup> June 2024</li> <li>• 12<sup>th</sup> June 2024</li> <li>• 19<sup>th</sup> June 2024</li> <li>• 25<sup>th</sup> June 2024</li> </ul>
4.02	<p>In addition to the above, there have been many letters between the Council and Aura this calendar year, including:</p> <ul style="list-style-type: none"> <li>• Letter from Aura – 22<sup>nd</sup> January 2024</li> <li>• Letter from the Council – 30<sup>th</sup> January 2024</li> <li>• Letter from Aura – 26<sup>th</sup> February 2024</li> <li>• Letter from the Council – 15<sup>th</sup> March 2024</li> <li>• Letter from the Council – 22<sup>nd</sup> March 2024</li> <li>• Letter from Aura – 25<sup>th</sup> March 2024</li> <li>• Letter from the Council – 27<sup>th</sup> March 2024</li> <li>• Letter from Aura – 28<sup>th</sup> March 2024</li> <li>• Letter from Aura – 9<sup>th</sup> April 2024</li> <li>• Letter from the Council – 11<sup>th</sup> April 2024</li> <li>• Letter from Aura – 17<sup>th</sup> May 2024</li> <li>• Letter from Aura – 30<sup>th</sup> May 2024</li> <li>• Letter from the Council – 6<sup>th</sup> June 2024</li> <li>• Letter from Aura – 10<sup>th</sup> June 2024</li> <li>• Letter from the Council – 11<sup>th</sup> June 2024</li> <li>• Letter from Aura – 12<sup>th</sup> June 2024</li> <li>• Letter from the Council – 13<sup>th</sup> June 2024</li> <li>• Letter from Aura – 13<sup>th</sup> June 2024</li> <li>• Letter from the Council – 21<sup>st</sup> June 2024</li> <li>• Letter from Aura – 25<sup>th</sup> June 2024</li> <li>• Letter from Aura – 1<sup>st</sup> August 2024</li> <li>• Letter from the Council – 19<sup>th</sup> August 2024</li> <li>• Letter from Aura – 12<sup>th</sup> September 2024</li> <li>• Letter from the Council – 13<sup>th</sup> September 2024</li> <li>• Letter from Aura – 16<sup>th</sup> September 2024</li> <li>• Letter from the Council – 17<sup>th</sup> September 2024</li> </ul>

<b>5.00</b>	<b>APPENDICES</b>
5.01	None.

<b>6.00</b>	<b>LIST OF ACCESSIBLE BACKGROUND DOCUMENTS</b>
6.01	Cabinet report: Aura Leisure and Libraries Limited – Tuesday 21 <sup>st</sup> November 2023
6.02	Cabinet report: Future options: leisure, libraries, and museum services – Wednesday 24 <sup>th</sup> April 2024
6.03	Cabinet report: Future options: leisure, libraries, play, and museum services – Thursday 30 <sup>th</sup> May 2024
6.04	Cabinet report: Leisure, Libraries, Play and Museum Services – Wednesday 25 <sup>th</sup> September 2024
6.05	Education, Youth and Culture Overview and Scrutiny Committee (EYCOSC) report: Future options: leisure, libraries, and museum services – Friday 10 <sup>th</sup> May 2024
6.06	EYCOSC report: Future options: leisure, libraries, play, and museum services – Tuesday 28 <sup>th</sup> May 2024
6.07	EYCOSC report: Leisure, Libraries, Play and Museum Services – Monday 9 <sup>th</sup> September 2024

<b>7.00</b>	<b>CONTACT OFFICER DETAILS</b>
7.01	<p><b>Contact Officer:</b> Gareth Owens, Chief Officer Governance Kelly Oldham-Jones, Strategic Executive Officer</p> <p><b>Telephone:</b> 01352 702344 / 01352 702143 Cymraeg: 01267 224923</p> <p><b>E-mail:</b> <a href="mailto:gareth.legal@flintshire.gov.uk">gareth.legal@flintshire.gov.uk</a> <a href="mailto:kelly.oldham-jones@flintshire.gov.uk">kelly.oldham-jones@flintshire.gov.uk</a></p>

<b>8.00</b>	<b>GLOSSARY OF TERMS</b>
8.01	None