

For General Release

REPORT TO:	CABINET 24 JANUARY 2022
SUBJECT:	Covid-19 Recovery for BH Live
LEAD OFFICER:	Sarah Hayward, Acting Corporate Director for Sustainable Communities, Regeneration & Economic Recovery Kristian Aspinall, Interim Director of Culture & Community Safety
CABINET MEMBER:	Councillor Oliver Lewis, Cabinet Member for Culture & Regeneration
WARDS:	All
COUNCIL PRIORITIES 2020-2024 <p>The Council is committed to living within our means, balancing our books and providing value for money for our residents. This paper will ensure that an operator for Fairfield Halls can deliver cultural events and activities to residents, without the Council becoming liable for business rate payments, and providing value for money for our investment.</p>	
FINANCIAL IMPACT <p>Financial support has been provided to BH Live through the Additional Restrictions Grant (ARG) Town Centre Recovery Grant in 2021/22. BH Live have had an application approved for £250,000 in November 2021 and envisage applying for a further £200,000 in January 2022 (total £450,000) to support initial recovery from Covid. This is a government grant and is at no cost to Croydon. The ARG is subject to a separate decision making process.</p> <p>A management fee of £193,000 in 2022/23 and £74,000 in 2023/24 is required to provide continued support, as the venue and cultural sector recover and audiences regain confidence in a post-Covid cultural environment. These costs are not in current budgets but are significantly lower than the cost of potentially paying the business rate liability should BH Live cease trading.</p> <p>A contract variation will establish a profit sharing arrangement between Croydon and BH Live for the next two years. At the end of this period any profit will be split 90% Croydon: 10% BH Live. The operator will be liable for all losses.</p> <p>Croydon will also purchase physical assets necessary for the running of the venue from BH Live at the depreciated rate, to safeguard future venue operations. This is valued at £574,000. BH Live will be given permission to use these assets for the duration of the contract.</p> <p>Providing a short term management fee and purchasing key operating assets is a cheaper alternative to taking on responsibility for paying business rates (circa £700,000/year) and hibernating the building (circa £25,000/month). This option provides better value for money to residents.</p>	

FORWARD PLAN KEY DECISION REFERENCE NO.: 4921CAB

The notice of the decision will specify that the decision may not be implemented until after 13.00 hours on the 6th working day following the day on which the decision was taken unless referred to the Scrutiny and Overview Committee.

The Leader of the Council has delegated to the Cabinet the power to make the decisions set out in the recommendations below:

1. RECOMMENDATIONS

Cabinet is recommended to:

- 1.1 Agree, in accordance with Regulation 30.3 of the Council's Tenders and Contracts Regulations, to vary the existing contract with the operator of Fairfield Halls, BH Live, to a value of £841,000 (resulting in a total aggregated variation value of £1,291,000 and a total maximum aggregated contract value of £181,291,000) by:
 - (i) Agreeing to include a management fee arrangement of £193,000 in 2022/23 and £74,000 in 2023/24, with a profit sharing arrangement of 90% Croydon : 10% BH Live; and
 - (ii) Agreeing to the early purchase of physical assets within Fairfield Halls from BH Live, to the value of £574,000 (subject to a confirmed valuation), which could have otherwise occurred at the exit of the contract.

2. EXECUTIVE SUMMARY

- 2.1 A concessions contract was awarded to BH Live to operate Fairfield Halls for a period of ten years, with the option to extend by a further five (decision reference CCB1215/16-17). The contract commenced in July 2019.
- 2.2 The cultural sector has been significantly impacted by the Covid pandemic and national lock downs. Fairfield Halls was forced to close between March 2020 and March 2021. The flagship venue requires financial support to ensure continued operation while the cultural sector recovers.
- 2.3 A management fee in 2022/23 and 2023/24 will support the operator, BH Live, in their recovery. It will also provide a venue around which the evening and night time economy can regrow.
- 2.4 The purchase of assets from BH Live that are key for operating the venue will positively impact the operating position of the contract, while providing the Council with essential equipment to continue operations should the contract end. Owning these assets will strengthen the Council's procurement position should it need to source a new operator. Due diligence has been undertaken to confirm the ownership of the assets, the original purchase value, and the Net Book Value as per the terms of the contract.

- 2.5 Providing a short term management fee and purchasing key operating assets is a cheaper alternative to taking on responsibility for paying business rates (circa £700,000/year) and hibernating the building (circa £25,000/month). This option provides better value for money to residents.

3. BACKGROUND

- 3.1 BHLive is a registered Charity, limited by guarantee and independent of any local authority. They have long term contracts with Bournemouth, Christchurch & Poole Council, Portsmouth City Council and London Borough of Croydon.

BH Live re-opened the refurbished Fairfield Halls in September 2019. The venue was operational for six months before the impact of the Covid pandemic forced all entertainment and leisure venues to close in March 2020. Supplier relief of £200,000 was provided by the Council for losses incurred from March 2020 to June 2020 (endorsed by GOLD group 18/05/2020). A decision was taken by GOLD group, an officer led group chaired by the Chief Executive, to hibernate the building until March 2021, with the Council covering maintenance costs during this time at a cost of £250,000.

- 3.2 Fairfield Halls reopened in April 2021 following the easing of government social distancing guidelines. Events and activities have been held in the venue from June 2021, rebuilding audience and promoter confidence. The resident companies (TALAWA, Savvy, and London Mozart Players) have returned to Fairfield Halls to rehearse and perform shows, and deliver workshops.
- 3.3 The cultural sector, however, is still struggling following the impact of the Covid pandemic. It will take time to rebuild audience and supply chain confidence, however, there are signs of recovery. Fairfield Halls hosted a sold out performance by Nick Cave in September 2021. In December, Stormzy hosted A Very Merky Christmas, a free event for young people in the borough which was well received and gained local and national press. Fairfield Halls also hosted the Beauty & the Beast pantomime with Dick & Dom during December and early January. This forms part of a full and varied programme of events taking place in the venue.
- 3.4 Despite these early signs of growth there is still a risk of a deficit in the financial forecast due to the impact of Covid. The financial forecast is included in Part B. It is anticipated that financial support will be needed for three financial years to get the venue back to a self-sustaining operating model.
- 3.5 BH Live have applied for the Additional Restrictions Grant (ARG) Town Centre Recover Grant to support the business in Croydon in 2021/22. This grant is to support anchor organisations within the town centre to recover from the impact of the Covid pandemic, and to provide economic benefit to other organisations and business in the borough. As a flagship cultural venue, a successful Fairfield Halls will support the cultural sector, evening and night time economy, and wider economy of the borough. The decisions in respect of ARG applications are subject to a separate governance process, in accordance with the Cabinet decision of 16th August 2021 for the Corporate Director of Sustainable Communities, Regeneration and Economic Recovery to agree grants with

delegated authority, and will need to be in accordance with the guidance issued by the Department for Business, Energy and Industrial Strategy. BH Live have successfully applied for £250,000 of the ARG Town Centre Recovery grant in November 2021, with a further application for £200,000 envisaged in January 2022. The awarding of this grant does not lessen the need for a management fee in 2022/23 and 2023/24.

- 3.6 The financial model forecasts that there will be a decreasing financial gap in 2022/23 and 2023/24. Support of £193,000 is estimated for 2022/23, and £74,000 for 2023/24. This will ensure that the venue is able to continue operating, providing cultural events and activities ranging from international artists to local community group performances. These forecasts are based on BH Live receiving £450,000 of the ARG, should their application be unsuccessful or partially unsuccessful, and the level of support would need to be increased accordingly.
- 3.7 To support the operator during the period of recovery from Covid, a management fee is being proposed for 2022/23 and 2023/24. A fee of £193,000 in 2022/23 and £74,000 in 2023/24 is suggested to cover 90% of the forecasted operating deficit in each year. The remaining 10% will need to be covered from increased income or efficiencies made by the operator.
- 3.8 If a surplus is generated over this period then a profit sharing arrangement will be in place, with open book accounting to ensure financial transparency. Profit will be shared at the end of the two year period on a 90% Council: 10% Operator basis. The profit would be split at the end of 2023/24, being held in trust until that time to mitigate against unforeseen losses. The operator will be liable for any losses incurred at the end of the period.

A profit sharing arrangement will compensate the Council for the financial support provided through the management fee, should there be a surplus. The 10% proportion for BH Live allows the operator to rebuild their reserves and incentivises good performance.

- 3.9 It is forecast that there will be sufficient recovery in the cultural sector by 2024/25 that no management fee arrangement will be necessary.
- 3.10 Without financial support through a short term management fee arrangement it is likely that the operator will not be able to generate sufficient income to cover costs. As a charitable organisation they cannot operate in a deficit and would have to terminate the contract.
- 3.11 If the contract were to be terminated by BH Live, the Council would be liable for the payment of circa £700,000 business rates per year whether the building was open or closed, plus ongoing maintenance and hibernation costs. During lock down these costs averaged £25,000 per month. The payment of the management fee is a cheaper alternative to taking back responsibility for the venue, avoiding higher costs for the Council.
- 3.12 It is also recommended that the Council purchase essential operational assets from BH Live, should the operator terminate the contract, recognising that recovery in this sector is still uncertain. This will enable the Council to continue

operations while a new operator is procured, and make the tender more appealing to prospective operators. In addition, purchasing these assets will reduce the budget line for depreciated assets on the operator's budget forecast. This decreases the likelihood of an operational deficit in year.

- 3.13 The assets selected for purchase include ICT infrastructure, point of sales equipment, furniture and lighting at a value of £574,000, details available in Part B. Due diligence has been undertaken to ensure that the Council have not previously purchased the assets, that receipts are available for proof of purchase, and that depreciation rates have been applied as per the terms of the contract.
- 3.14 A further contract variation will be agreed to amend the contract to reflect the purchase of the assets in 2021/22, rather than the original transfer at the end of the contract. BH Live will be licenced to use the assets to the end of the contract.

The current terms of the operator agreement specify that upon termination of the contract the operator must return any equipment that belongs to the authority. This equipment is recorded on the Asset Register. In addition, the authority has the option to purchase Transferrable Assets at the Net Book Value at the end of the contract. The Net Book Value anticipates a straight line depreciation rate over 10 years, and so the transfer value would be zero at the planned end of the contract. If the contract was terminated early then a proportionate amount of the Net Book Value would be paid for the Transferrable Assets.

- 3.15 External legal advice has been sought from Browne Jacobson to assure the Council that the contract variations implementing the asset purchase and management fee arrangements are within subsidy control (previously state aid) rules and procurement regulations. Further details are provided in Part B.
- 3.16 The advice received confirms that the Council could rely on the market economy operator principle (MEOP) on the basis that an "ordinary" market operator in the same position as the Council would enter into the proposed variation arrangements in similar circumstances. Only private considerations (which will primarily focus on financial considerations, but it is also possible to include long term strategic considerations) are taken into consideration. There are a number of "commercial" reasons for the Council to amend the contract as recommended, such as taxation benefits through national non-domestic rates return available to BH Live as operator.
- 3.17 Given the genuine commercial benefits explained in this report (against the disadvantages the Contract being terminated), the Council considers that a market operator in similar circumstances would decide that a variation to the Contract as proposed would be more economically sensible than the alternative consequences and so there would be no specific economic advantage to BH Live and thus no subsidy to BH Live.
- 3.18 The consideration of changes to the contract with BH Live for the operation of Fairfield Halls have also been reviewed from a procurement and tendering perspective following advice received from Browne Jacobson.

- 3.19 The Contract was awarded under an open procurement process, and above the minimum threshold and was therefore procured and established under the Concession Contract Regulations 2016 (“CCR”).
- 3.20 The proposal presented before Cabinet is to seek approval for a contract variation permitted under Regulation 43(1)(c)- Unforeseen Circumstances of the CCR.

Regulation 43(1)(c)- Unforeseen Circumstances:

A modification will be permitted under Regulation 43(1)(c) when it could not have been foreseen by a reasonably diligent contracting authority and it does not alter the overall nature of the concession contract. In addition, the increase in value must not exceed 50% of the value of the original concession contract.

- 3.21 The Council is seeking to rely on this regulation to permit the proposed modification because of the direct impact COVID-19 has had, and continues to have, on the performance of this contract. There was no indication that COVID-19 would occur and the effects of COVID-19 across the arts sector, and therefore BH Live’s financial standing, was not known. The proposed amendments do not exceed 50% of the value of the original concessions contract.

4. CONSULTATION

- 4.1 Significant consultation has been undertaken with BH Live. In the immediate aftermath of the Covid pandemic, conversations between the Council and BH Live focused upon the immediate issues faced with the closing down of the building for the first national lock down, immediate financial support and longer term hibernation of Fairfield Halls.
- 4.2 Conversations commenced on the short and medium term implications of the Covid pandemic once clarity was provided by Government on the relaxing of the third national lockdown and the re-opening of cultural and entertainment venues from June 2021. At this stage the venue was passed back to BH Live to commence remobilisation.
- 4.3 Financial forecasts provided by BH Live identified that there would be a medium term impact on the performance of the contract brought about as a direct impact of the Covid pandemic. The whole cultural sector was significantly impacted by the loss of economic activity over the 15 months of enforced closure.

- 4.4 Initial conversations discussed opportunities to mutually terminate the contract over a protracted period to limit the impact on both the Council and BH Live. In this scenario there would be no opportunity for BH Live to recover sunk costs. The Council would be liable for the payment of business rate at the venue at a value of circa £700,000 per annum plus hibernation costs of £25,000 per month until a new operator could be procured. It was recognised that in the current economic climate that another suitable operator may not be found.
- 4.5 Through discussion it was realised that both parties believed that continuing the contract with a management fee arrangement over the medium term would provide best value for both parties. This would also ensure no loss of provision to the residents of Croydon in the build up to London Borough of Culture 2023.

5 PRE-DECISION SCRUTINY

- 5.1 This recommendation has not been to pre-decision Scrutiny.

6 FINANCIAL AND RISK ASSESSMENT CONSIDERATIONS

- 6.1 The introduction of a management fee arrangement and the purchase of assets meets the following essential spend criteria:
- expenditure necessary to achieve value for money and / or mitigate additional in year costs.
 - To prevent the situation that led to the report being issued from getting worse
- 6.2 There is no existing budget allocation for the management of Fairfield Halls. The arrangement with BH Live is a concessions contract and was envisaged to be at no cost to the Council. However, the impact of Covid on the cultural sector has put the future of the contract in jeopardy.
- 6.3 A growth request, as part of the Medium Term Financial Strategy, has been submitted to increase the budget for 2022/23 by £193,000 and 2023/24 by £74,000. This growth request is included in the 2022/23 and 2023/24 budget proposal to be approved separately by Council.
- 6.4 A capital request has been submitted for the purchase of physical assets of £574,000, described above, which will reduce the depreciation value in the financial forecast. This creates a small contingency in the bottom line, which will be used to protect the Council against in-year losses.

Due diligence is has been undertaken to ensure that all assets have been fully receipted, and that correct depreciation rates have been calculated. The valuation has been undertaken in accordance with the purchase option (at exit) within the existing concessions contract with BH Live and shall represent the Net Book Value. These assets are the property of BH Live and have not been paid for previously by the Council.

6.5 Revenue and Capital consequences of report recommendations

	Current year	Medium Term Financial Strategy – 3 year forecast		
	2021/22	2022/23	2023/24	2024/25
	£'000	£'000	£'000	£'000
Revenue Budget available	£0	£0	£0	£0
Expenditure	£0	£0	£0	£0
Income	£0	£0	£0	£0
Effect of decision from report	£0	-£193	-£74	£0
Expenditure	£0	-£193	-£74	£0
Income	£0	£0	£0	£0
Remaining budget	£0	-£193	-£74	£0
Capital Budget available	£0	£0	£0	£0
Expenditure	£574	£0	£0	£0
Effect of decision from report	-£574	£0	£0	£0
Expenditure	£574	£0	£0	£0
Remaining budget	-£574	£0	£0	£0

6.6 The effect of the decision

The capital investment and a revenue management fee will support the operator through the post-Covid recovery period. This will keep the venue open, supporting the wider local economy, safeguard the councils liability to pay business rates and providing jobs to residents.

This is a cheaper alternative to terminating the contract and hibernating the building, as detailed above, and provides better value for money to residents.

6.7 Risks

- 6.7.1 If no support was provided then it is likely that BH Live will not be able to generate sufficient income to cover costs. As a registered charity BH Live are unable to operate in a financial deficit and so will be forced to terminate the contract.
- 6.7.2 If the contract was terminated then the Council would be liable to pay the annual business rates of circa £700,000. In addition, the building maintenance and hibernation costs would be taken on by the Council. During the recent hibernation period during lock down this was circa £25,000/month.
- 6.7.3 Due to the difficult situation faced within the cultural sector post-Covid there is no guarantee that a suitable operator would be found to take on management of the venue, and unlikely to be found without a level of management fee from the Council.

- 6.7.4 There is likely to be significant reputational damage to the Council if Fairfield Halls was to remain in hibernation for a significant period of time, especially leading up to and including London Borough of Culture.
- 6.7.5 There is a small risk of legal challenge regarding the proposals, however the Council has taken external legal advice and is satisfied that there are reasonable grounds to rely on the MEOP principles and to rely on the permitted modification Regulation 43 of the CCR.
- 6.7.5 There is a risk that BH Live's application to receive the ARG (total £450,000) could be unsuccessful. Given BH Live's financial forecasts are based on the ARG being provided, there is a risk that further additional contract variations would be required accordingly. This risk is considered to be low but is the subject of separate decision making.

6.8 Options

- Do nothing – no financial support to the operator via a management fee or asset purchase. It is likely that this will prove to be financially unviable for the operator, who will terminate the contract.
- Management fee only – support the operator via a management fee in 2022/23 and 2023/24, totalling £267,000. There would be no purchase of assets, reducing contingency in the profit/loss account.
- Asset purchase only – support the operator via the purchase of the physical assets, totaling £574,000, but no management fee. It is likely that this will prove to be financially unviable for the operator, who will terminate the contract.
- Management fee and asset purchase – support the operator via a management fee, totaling £267,000, and asset purchase, totaling £574,000.

6.9 Future savings/efficiencies

- 6.9.1 The management fee is a short term solution to ensure the longer term viability of the Fairfield Halls venue. There are no plans for financial support in 2024/25 or beyond.
- 6.9.2 A thriving cultural and entertainment venue will attract footfall, new business and jobs to the town centre, aiding economic recovery.

Approved by Matt Davis, Interim Director of Finance (Deputy S151)

7. LEGAL CONSIDERATIONS

- 7.1 The Interim Head of Commercial & Property Law comments on behalf of the Interim Director of Legal Services that external legal advice has been sought and the legal considerations in respect of both procurement risks and subsidy control are set out within this report and within the Part B report.

- 7.2 In accordance with Regulation 30.3 of the Council's Tenders and Contracts Regulations, Cabinet is empowered to make the decisions set out in this report.

Approved by Nigel Channer, Interim Head of Commercial & Property Law on behalf of the Interim Director of Legal Services & Deputy Monitoring Officer

8. HUMAN RESOURCES IMPACT

- 8.1 There is no human resources impact from this decision. If any should arise these will be managed under the Council's policies and procedures.

Approved by Jennifer Sankar, Head of HR Place & Housing for and on behalf of the Human Resources Department

9. EQUALITIES IMPACT

- 9.1 Fairfield Hall have historically provided cultural entertainment to the diverse communities in Croydon supporting the Council in fulfilling the requirements of S149 Equality Act 2010. The continuance of the venue providing diverse entertainment will support the Council in addressing inequality and fostering good community relations between groups.

- 9.2 The operator BH Live may offer local employment to the diverse residents in the Borough, thus helping to tackle inequality in employment.

- 9.3 The operator BH Live should be requested to sign up to forthcoming Equality Pledges /standards of the Council.

Approved by Denise McCausland, Equality Programme Manager

10. ENVIRONMENT AND CLIMATE CHANGE IMPACT

- 10.1 There is no environmental impact from this decision.

11. CRIME AND DISORDER REDUCTION IMPACT

- 11.1 There is no crime and disorder impact from this report.

12. REASONS FOR RECOMMENDATIONS/PROPOSED DECISION

- 12.1 It is recommended that the option to support the operator with a management fee in 2022/23 and 2023/24, and the purchase of assets, is approved by Cabinet.

- 12.2 This will ensure the medium term viability of Fairfield Halls to recover from the impact of the Covid pandemic. This time will allow the operator to rebuild the

audience numbers, increasing cash flow, and to generate a profit, which will be shared with the Council.

- 12.3 A successful Fairfield Halls will contribute to local economic recovery, particularly in the town centre and evening and night time economies. It will also support the local cultural supply chain, small and medium cultural organisations, and create permanent and casual jobs in the venue.
- 12.4 This option avoids higher costs that the council would be liable for should the operator terminate the contract.

13. OPTIONS CONSIDERED AND REJECTED

- 13.1 Do nothing – no financial support to the operator via a management fee or asset purchase. It is likely that this will prove to be financially unviable for the operator, who will terminate the contract.
- 13.2 Management fee only – support the operator via a management fee in 2022/23 and 2023/24, totalling £267,000. There would be no purchase of assets, reducing contingency in the profit/loss account.
- 13.3 Asset purchase only – support the operator via the purchase of the physical assets, totaling £574,000, but no management fee. It is likely that this will prove to be financially unviable for the operator, who will terminate the contract.

14. DATA PROTECTION IMPLICATIONS

14.1 WILL THE SUBJECT OF THE REPORT INVOLVE THE PROCESSING OF 'PERSONAL DATA'?

NO

14.2 HAS A DATA PROTECTION IMPACT ASSESSMENT (DPIA) BEEN COMPLETED?

NO

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BACKGROUND PAPERS:

Included in Part B