

SLOUGH BOROUGH COUNCIL

REPORT TO: Cabinet **DATE:** 23 January 2017
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PORTFOLIO(S): Commissioner for Transport and Highways
Cllr Fiza Matloob

PART I **KEY DECISION**

SET UP AND GOVERNANCE OF LOCAL AUTHORITY CONTROLLED COMPANY (LACC) FOR ENVIRONMENTAL SERVICES

1. Purpose of Report

To update members that following a review of commercial considerations for the Council to insource services through the composition of a Local Authority Controlled Company (LACC) of updates regarding demobilisation of the current contract and how the Council should undertake its duty to consider.

To request that following its consideration of this report, that Cabinet resolve and instruct officers to commence the set-up of the new LACC.

To request that following its consideration of this report that Cabinet approve the headline proposed governance arrangements and organisational structure and responsibilities for management of the LACC and recruitment and / or secondment into these roles that have been identified and enclosed for review and approval within this report.

To request that following its consideration of this report that the Council delivery vehicle is confirmed as a company limited by shares with the Council as the sole shareholder to be covered through a Shareholder Agreement.

To request that following Cabinet approval of the headline proposed governance arrangements and structure for management of the LACC that the Company be activated no later than April 1 2017 so that it can begin preparatory steps to undertake and deliver statutory duties for the waste collection authority and litter control authority via a Teckal exemption from 1 December 2017.

2. Proposed Action

The Cabinet is requested to resolve:

(a) That officers be instructed to commence the set-up of the new LACC.

- (b) That the proposed governance arrangements and responsibilities for management of the LACC and proposed organisational structure both for the Council and LACC be approved.
- (c) That the recruitment and / or secondment into the roles identified through the headline proposed governance arrangements and structure for management of the LACC be approved.
- (d) That the LACC corporate structure is confirmed as a company limited by shares (CLS).

3. The Slough Joint Wellbeing Strategy, the JSNA and the Five Year Plan

3.1 Slough Joint Wellbeing Strategy Priorities

Slough Borough Council has stated through the Sustainable Community Strategy in the Environment and Regeneration section that it will pursue steps to:

- move up the waste hierarchy and increase the amount of waste recycled;
- reduce the overall amount of waste produced; and
- reduce dependency on landfill for final waste disposal.

The primary environmental commitment and statement made by the Council through the Slough Sustainable Community Strategy is that the council has set itself the target of recycling 60% of its waste by 2028. This is a core driver behind the Waste Strategy and defines the strategic horizon period.

3.2 Five Year Plan Outcomes

The Five Year Plan's outcomes the proposal will help to deliver are:

- ***Slough will be the premier location in the south east for businesses of all sizes to locate, start, grow, and stay***

Ensure that the gateways to the town, prominent places and green spaces are clean and well maintained

A fully functioning and dedicated public realm service is a key deliverable working towards keeping the gateways to the town, prominent places, parks, memorial gardens, cemeteries, roads and pavements clean. It improves the visual amenity of the town, prevents additional waste being flytipped and is a fundamental component of civic pride in the area.

The Highways infrastructure including maintenance of the asset and ongoing repairs together with winter maintenance is critical to ensure a fit for business transport infrastructure.

- ***The Council's income and the value of its assets will be maximised***

Ensure that a revolutionised approach to household waste collection is in place

The Environmental Services contract is key to the provision of collection of materials collected via a dedicated waste collection service that provides a

residual waste, recycling and green waste kerbside service and to the provision of an ad hoc clinical waste disposal from the kerbside collection and the provision of the services from the Household Waste Recycling Centre.

4. **Other Implications**

(a) Financial

Local Authority Controlled Company for Environmental Services

Section 1 of the Localism Act 2011 (the 2011 Act) provides local authorities with the power to do anything an individual may do, subject to a number of limitations. This is referred to as the general power of competence. A local authority may exercise the "general power of competence" for its own purpose, for a commercial purpose and/or for the benefit of others.

Section 2 of the 2011 Act limits the exercise of the general power of competence where it "overlaps" with a power which pre-dates it. This includes the Council's trading powers under Section 95 of the Local Government Act 2003 (the 2003 Act). When a Council relies on the general power of competence and/or the power in Section 95 of the 2003 Act to trade, it is prudent for it to comply with the requirements and limitations to which Section 95 is subject. These are set out in Regulation 2 of the Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009 (the 2009 Order) which effectively requires a business case to be prepared and approved by the Council before a company starts trading.

The Council will confirm the sources of funding for Local Authority Controlled Company for Environmental Services. These could include equity (share capital), unsecured loan notes and senior debt as well as revenue arising for the provision of services to the Council and third parties.

The Council will ensure that any proposed funding for Local Authority Controlled Company for Environmental Services is within its strategic budgets. The development of Local Authority Controlled Company for Environmental Services business plan will need to be co-ordinated with the Council's budget process to ensure that items the Council is expected to fund/lend are included within the Council's budget process.

Section 1 of the 2003 Act gives a council power to borrow for any of its functions. The use of the general power of competence is a function. The 2003 Act only permits a local authority to borrow for capital expenditure and not revenue expenditure.

Therefore, in advance of the company starting trading then the proposed budget envelope, proposed lending (if required) and headline business case will be prepared and approved by Cabinet before the company starts trading. This is anticipated around March. The cost of setting up Local Authority Controlled Company for the delivery of Waste Management, Highways and Public Realm cleansing services is estimated to be around £15,000 as it is purely a legal exercise.

(b) Risk Management

Risk	Mitigating action	Opportunities
Community Support	N/A	N/A
Community Safety	N/A	N/A
Communications – residents	Voice of the Customer Plan is currently being delayed pending the appointment of Head of the Customer. The Voice of the Customer Plan will deliver sessions with residents to understand what their engagement and communication priorities are for services.	Opportunity to use these focus groups to undertake Councils 'duty to consider'.
Communications – Unions	Dedicated Union engagement programme will be introduced led by the Strategic Director, Customer & Community Services.	Will be linked to Communications workstream.
Equalities Issues	N/A	N/A
Health and Safety –the governance structure defines greater Health and Safety accountability for Council and Company Board.		Fully engage Health and Safety department to ensure full scale viability and support into Insource programme.
Legal - Under s20 of the Landlord and Tenant Act 1985 the landlord of any premises is under a duty to undertake a process of statutory consultation before undertaking "qualifying works" or entering into a "qualifying long term agreement".	The Local Authority Controlled Company for Environmental Services will constitute a qualifying long term agreement and the obligations to undertake s20 consultation will apply.	Will be undertaken by Neighbourhood Services.
Legal – Under Best Value Duty under the 1999 Act there is a requirement to consult about major changes in service provision under the 1999 Act.	The Council will ensure and deliver required consultation as outlined under the Act using the following headings: (a) the proposal to transfer environmental functions/services to NewCo; (b) establishing NewCo as a wholly owned	Dedicated briefing note outlining potential activities to be undertaken currently in composition. Communications to coordinate.

	<p>company for delivering the Environmental Services which does not include private sector ownership;</p> <p>(c) the services to be transferred to NewCo and any proposed reconfiguration of them.</p> <p>(d) the detail of any division of functions between the Council and NewCo.</p>	
<p>Legal - Regulation 2 of the Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009 states that before exercising the power, the Council is required to prepare a business case in support of the proposed exercise of the power which must be approved by the Council.</p>	<p>Composition and sign off of Business Plan in advance of the LACC commencement of trading.</p>	<p>A Business plan should also cover section 3(2) of the LGA 1999 that states '<i>A best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness</i>'.</p>
<p>Legal - The Public Services (Social Value) Act 2012 places a duty upon the Council that it must demonstrate how it anticipates to undertake its 'duty to consider' for social value.</p>	<p>Composition of a 'Social Return of Investment' programme coordinated internally within the Council.</p>	
<p>Legal - The Public Services (Social Value) Act 2012 places a duty upon the Council that it must undertake consultation on its procurement proposals</p>		<p>As the Council must also demonstrate it is to consult in accordance with its Best Value duties under section 3(2) LGA 1999 it will be useful to undertake one dedicated consultation on these issues at the same time.</p>
<p>Procurement / Contract Management</p>	<p>Governance structure will challenge the way in which it an internal delivery vehicle provides its services.</p>	<p>Use of refined 'Ethics wall' for contract / client management of Company through dedicated 'Highways and Transport' and 'Waste & Environment' Service Leads.</p>

(c) Human Rights Act Implications

It is not considered that there are any Human Rights Act Implications.

(d) Equalities Impact Assessment

N/A

5. **Supporting Information**

- 5.1 As a Unitary Council Slough Borough Council is responsible for collection, management and disposal of all municipal waste generated within the borough and all street cleaning, gully and channel sweeping, litter picking and detritus sweeping operations within the borough, grounds maintenance in public spaces including parks, cemeteries and open spaces and highway maintenance including winter maintenance. These statutory service functions are delivered by Amey under the Environmental Services contract which runs until 30 November 2017.
- 5.2 In September 2016, Cabinet approved the insourcing of the services currently undertaken via the Environmental Services Contract to deliver these statutory services through a Local Authority Controlled Company via a Teckal exemption from 1 December 2017.
- 5.3 Since this approval the Council has begun facilitation of mobilisation to form the company, commencing engagement with the contractor, the workforce and have set up a dedicated project management team to lead this transition which is overseen by the Programme Board with interim Chief Executive as sponsor. Amey has been responsive and supportive in the decision by the Council and have written to the Council to offer support in the areas of transition currently under consideration. The Council have responded to Amey stating that while they do not intend to extend the contract that they would like to discuss provisions for this proposal to extend. It is expected that any such decision to request extension would first be approved by Cabinet.
- 5.4 A 'Memorandum of Understanding' is currently being prepared to reinforce the commercial process for demobilisation of the contract agreed between Slough Borough Council and Amey.
- 5.5 The Public Services (Social Value) Act 2012 places a duty upon the Council that it must undertake consultation on its procurement proposals and under Best Value duties under section 3(2) LGA 1999 there is a requirement to consult about major changes in service provision. Therefore, a single consultation will be undertaken and coordinated by the Council to ensure that these duties are covered. Neighbourhood Services will undertake their duty to undertake a process of statutory consultation under s20 of the Landlord and Tenant Act 1985.
- 5.6 The Council would like to request that based on the Councils ambitious commercial aspirations and outlining financial objectives for the LACC that Cabinet approve a company limited by shares to be set up as the most appropriate delivery vehicle for NewCo. This options appraisal is further outlined in Appendix B. A company limited by shares would be established using an 'off the shelf' articles of association, with the Council as its sole shareholder. The articles will then be tailored to reflect the Council's requirements in due course including the

composition of the Shareholder Agreement (see 5.10) to reflect the necessary governance arrangements.

- 5.7 In order to satisfy the Teckal exemption, the Council must demonstrate it controls NewCo as it would a Council department. The Teckal exemption allows the Council to directly award contracts to NewCo without the requirement to run a competitive tendering process under the EU procurement rules. The Council would like to request that Cabinet approve the commencement of the set-up of the company according to the governance structure outlined in Appendix A.
- 5.8 The Shareholder Role is the Council acting as the shareholder (owner of NewCo) and that NewCo delivers according to its adopted business plan. The Commissioner Role ensures that NewCo delivers both value for money and quality services and complies with the services contract(s) between NewCo and the Council; and The Funder Role which is the Council acting as a funder would in determining whether to lend to NewCo – including assessing the risks for the Council. It has been identified that the Commissioner Role will be undertaken by the Chief Executive, the Funder Role will be undertaken by the Councils S151 Officer role and the shareholder role will be undertaken by the Councils executive elected members (i.e. Cabinet).
- 5.9 The Council's Human Resources (HR) department have identified that it will be possible for the Chief Executive and the s151 Officer to take up an additional appointment to their main duties with the express consent of the Council. The contractual duties of the Chief Executive and s151 Officer will need to be extended to include these new responsibilities and the employees concerned need to understand the scope of the additional duties they are to perform and agree to them. Cabinet is requested that following its consideration of this report that Cabinet approve the allocation of the roles of Commissioner, Funder and Shareholder to the positions identified.
- 5.10 The shareholder role will be subject to a Shareholder Agreement to regulate the relationship between the Council and NewCo. Ordinarily, other than where legislation and/or a company's articles reserve decisions for shareholders, a company's Board of Directors is its main decision making body, and is free to act as it thinks is in the best interests of that company. However, in this context a Shareholder Agreement will seek to support this approach by stipulating that NewCo's Board of Directors is responsible for running the company. Such an Agreement will provide the Council as the sole shareholder with a limited number of reserved rights. These reserved rights as outlined in Appendix A – Section 1.7.
- 5.11 NewCo is to be classified as a local authority controlled company, and therefore subject to the following propriety controls to specific rules and restrictions with regard to their management and governance. Through the composition of this company Cabinet are to be made aware of the legal framework governing local authority controlled companies and the implications of the Council establishing NewCo as outlined in Appendix B – Section 2 and also an understanding of the governance arrangements they are requested to resolve in Appendix A.
- 5.12 Two director roles are requested for the set up of the company to operate during the shadow period (the period when the company is set up but is not undertaking statutory duties discharged unto it from the Council) and these have been identified as the 'Operational Director' and the 'Financial Director'. It is anticipated

that the 'Financial Director' role will be covered by one of Councils Head of Financial Services roles.

- 5.13 For potential internal staff who might be required to undertake the role of a Teckal company nominated director(s) so that they understand their role, where conflicts of interests may arise and that directors abide by the protocol for managing those conflicts a report outlining clear mandate on conflicts of interest and decision making arrangements has been composed. In simple terms, this duty requires them to act reasonably, in the public interest, lawfully, ensuring that the Council is not brought into disrepute, maintaining confidentiality of information where appropriate and to ensure that no improper advantage is conferred or secured for that Council officer.
- 5.14 The employment of the current Managing Director of Slough Amey will automatically transfer to NewCo under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) when the existing Environmental Services Contract expires and become the 'Operational Director' for NewCo. The terms on which the managing director may be seconded to NewCo to assist with the project will be a matter for Amey Slough (as his current employer) to determine. This initial discussion and subsequent negotiation will form part of the 'Memorandum of Understanding' currently being prepared as referred to in Section 5.4.
- 5.15 The 'Memorandum of Understanding' will identify the scope of works that the Managing Director may be able to assist with as there will be conflicts of interest in decision making arrangements while still under the employ of Amey. The Report on conflicts of interest and decision making arrangements also has guidance for management, identification and mitigation of conflict(s) of interest for both Council officers and the third party Directors. This guidance and draft protocol is provided in Appendix C - Code of conduct and Conflict of Interest protocol (draft).
- 5.16 The two Service Leads who have their key statutory services discharged into the Teckal will hold responsibility for the management of their respective client and contract management functions and they are deemed principle lead /contract administrators for the Authority and hold responsibility for overall client oversight, service performance, both financial and contract management of the Council client function and any future commissioning.
- 5.17 The dedicated Service Lead will also be responsible for managing, overseeing and integrating the various interfaces between the Teckal company and other key business and service critical contracts such as waste treatment (currently in procurement).
- 5.18 A draft Business Plan and financial summary of the company will be presented to Cabinet in March ahead of the final inauguration of the new company for April 1 2017.
- 5.19 A summary of the wider Health and Safety considerations that Cabinet and the Corporate Management team will need to consider and be aware of will also be presented to Cabinet in March ahead of the final inauguration of the new company for April 1 2017.

6. **Comments of Other Committees**

The procurement of the Environmental Services contract was presented to 'Overview & Scrutiny' on the 12 January 2017. Comments received are included in a supplementary update to this report as due to publication constraints could not be included in this report. However, a verbal summation shall be presented to Cabinet and any subsequent changes made to respective areas shall be presented to ensure coverage of these areas

7. **Conclusion**

Marked progress is being made regarding the commercial composition and governance of the proposed Local Authority Controlled Company and Cabinet is requested to resolve and confirm the following actions:

The Cabinet is requested to resolve and instruct officers to commence the set-up of the new LACC.

The Cabinet is requested to approve the proposed governance arrangements and responsibilities for management of the LACC and proposed organisational structure both for the Council and LACC.

The Cabinet is requested to approve the recruitment and / or secondment into the roles identified through the headline proposed governance arrangements and structure for management of the LACC.

The Cabinet is requested to approve that the LACC corporate structure is confirmed as a company limited by shares (CLS).

The financial and commercial business plans for the company are critical to ensure formation of the LACC and the Council will seek Cabinet approval of the draft headline Business Plan to ensure company 'inauguration' (i.e. to operate in shadow form) from April 1 2017 at March Cabinet.

Following approval then will ensure the company can be activated no later than April 1 2017 so that it can begin preparatory steps to undertake and deliver statutory duties via a Teckal exemption from 1 December 2017 with the minimum board requirements as outlined in section 5.12.

8. **Appendices Attached**

- 'A' - Proposed Governance Structure for Council and Company
- 'B' - Company Limited by Shares vs Company Limited by Guarantee Options Appraisal
- 'C' - Code of conduct and Conflict of Interest protocol (draft)

9. **Background Papers**

None.