

Report

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Report to:	Executive Committee
Date of Meeting:	6 July 2011
Report by:	Executive Director (Housing and Technical Resources)

Subject:	Proposals for the South West Area Hubco
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1. Purpose of Report

1.1 The purpose of the report is to:-

- ◆ update Executive Committee on proposals for the development of the Hubco for the South West of Scotland and to recommend the extent of South Lanarkshire Council's involvement.

2. Recommendation(s)

2.1 The Committee is asked to approve the following recommendation(s):-

- (1) that South Lanarkshire Council confirms its agreement to being named within the Official Journal Of the European Union (OJEU) Notice for the procurement of a private partner for the South West area Hubco.
- (2) that the Council declines the opportunity to become a shareholder in Hubco or to sign the Letter of Intent and Memorandum of Understanding.
- (3) that the Council will not offer any capital projects for the project pipeline.

3. Background

3.1 The Hub Initiative is a new shared approach to procuring community facilities (schools, GP surgeries, emergency service facilities, neighbour offices, etc.) by making use of a Joint Venture delivery vehicle. The Scottish Futures Trust (SFT) will deliver a £2.5billion Revenue Financed Infrastructure pipeline in conjunction with the Scottish Government, Local Government, NHS Boards and other public bodies as announced in the 2011-2012 Budget. This pipeline of projects includes £200m of Design, Build, Finance and Maintain Health projects which will be delivered through the Joint Venture delivery vehicle.

3.2 The Hub initiative was originally developed by the previous Scottish Executive and was intended to be a Private Finance Initiative (PFI) driven delivery vehicle for Shared Services projects. The proposal was for five Hub Territories across Scotland to provide sufficient scale in each area to sustain the private sector interest in a long-term arrangement over 20 years.

The five Territory areas within Scotland are:-

- South East Scotland
- East Central Scotland
- Northern Scotland
- West of Scotland
- South West Scotland

South Lanarkshire comes within the South West Territory.

3.3 The Scottish Government has confirmed the basic principles with the exception of the PFI element and the Scottish Futures Trust (SFT) has been given the remit to role out the initiative in all five areas. The current position with the programme is:-

- South East Territory has procured a Private Sector Partner is fully operational and currently delivering its first project.
- Northern Scotland now has its Hubco formed and is fully operational.
- East Central is currently at the tender stage with an anticipated Hubco being formed by the end of the calendar year.
- West Territory has issued an Official Journal Of the European Union (OJEU) Notice with pre-qualification submissions now being assessed.
- South West Territory had an original programme to issue its OJEU Notice in May 2011, however, this is likely to be moved to July 2011.

4. Hubco Model

4.1 The ethos of Hub is that as many Public Sector organisations within the Hub Territory will become shareholders in the Public Liability Company, Hubco together with Scottish Futures Trust and the private sector partner, which will be procured through a full OJEU tender process. The shareholding of the Hubco is 60% private partner, 10% Scottish Futures Trust and 30% split between the public sector partners. Hubco will have a five member Board of Directors which will be formed 3 private partner directors, 1 SFT and 1 public sector director. Scottish Government has provided a £5M fund to set up the South West Territory and to part fund early projects.

4.2 Hubco will operate as a framework contractor which will allow projects to be procured without the requirement to go through a formal tender process. Key Performance Indicators (KPIs) will be used to ensure continued competitiveness and this may include periodic tendering within the supply companies, however the effectiveness and ability of Hubco to demonstrate best value is untested and will only become apparent through experience. Projects will range from simple build or refurbishment contracts to Design and Build and Design, Build, Finance and Maintain projects.

4.3 A Programme Board has been formed to oversee the procurement of the private partner for the South West territory. The remit of the Scottish Futures Trust is to implement Hubco with as many public sector partners as possible but there is no minimum participation level required. Health Boards are required to participate however participation for Local Authorities is voluntary. Each organisation's position has to be confirmed ahead of the OJEU notice being served as only named organisations will be able to participate. There is no provision for late entry into Hubco. Potential partners in the South West Territory are:-

- South Lanarkshire Council
- North Lanarkshire Council
- North Ayrshire Council
- East Ayrshire Council
- South Ayrshire Council
- Dumfries and Galloway Council
- Strathclyde Police
- Strathclyde Fire and Rescue
- NHS Lanarkshire
- NHS Ayrshire and Arran
- NHS Dumfries and Galloway

- Scottish Futures Trust
- Private Sector Partner
- Others such as Universities or Housing Associations

5. Current Position

- 5.1 It is understood that all named parties above will participate in Hubco and most are likely to be shareholders, however a number have yet to confirm. North Lanarkshire will participate as a non shareholder.
- 5.2 Scottish Futures Trust is now requesting organisations to commit in principle to the proposals through signing a Letter of Intent and a Memorandum of Understanding. Scottish Futures Trust has indicated that this does not obligate the Council in any way.

6. Legal Implications

- 6.1 The Head of Legal Services has reviewed all relevant documentation and has provided an overview of the legal implications and the legal standing of the Letter of Intent and the Memorandum of Understanding. The legal position and the potential liabilities on the Council being a shareholder in Hubco are set out in Appendix 1.
- 6.2 Councils which do not sign the Letter of Intent and the Memorandum of Understanding will continue to be involved in the process but will have no formal position on the Programme Board. They will be allowed to be named in the OJEU notice. The advantages in being a shareholder are limited and it is considered that effective participation can be achieved by being named in the procurement OJEU notice. This is considered to only have negligible risk to the Council.

7. Options and Advantages for Hubco Participation

- 7.1 The following section provides a brief summary of options and potential advantages/disadvantages for participation:-
- South Lanarkshire Council currently procures major capital investment through framework partnership arrangements therefore the use of Hubco would not be seen as advantageous in the short to medium term. It is proposed, therefore, that South Lanarkshire Council does not offer any potential projects for the projects pipeline which will provide an indication of future work as part of the procurement process.
 - In future, however, if the Council does not have a framework agreement in place, there would be the potential to procure projects which are required to be delivered in a tight timescale through this route. This potential advantage however requires to be balanced against potential liabilities. It is also possible that some specific future Scottish Government money may be linked to delivery through this model however this is not confirmed.
 - The legal implications of being a shareholder in Hubco are being established. Until this is clear it is not recommended that South Lanarkshire Council participates as a shareholder or signs up to the Letter of Intent and Memorandum of Understanding. The Council, however can be named on the OJEU notice and potentially take advantage of Hubco in future as a potential procurement route.
 - If Executive Committee is in favour of the principle of potentially using Hubco in future confirmation is required ahead of the OJEU notice being served, which is scheduled for later in July.

8. Employee Implications

- 8.1 There are no Employee Implications at this stage however these should be fully established before the Council commits to any further involvement or procuring projects through this route.

9. Financial Implications

- 9.1 These require to be fully established and some implications are discussed in Appendix 1. The full financial implications should be understood before the Council commits to further involvement in the initiative or procures projects through this route.

10. Other Implications

- 10.1 At present there are no other implications, however, this may change as the legal opinion develops currently the key risks associated with the proposals have dealt with in the legal overview provided in the appendix attached.

There are no significant issues in terms of sustainability relating to the recommendations contained in this report

11. Equality Impact Assessment and Consultation Arrangements

- 11.1 Consultation has taken place with the Head of Legal Services.
- 11.2 This report does not introduce a new policy, function or strategy or recommend a change to an existing policy, function or strategy and, therefore, no impact assessment is required.

Lindsay Freeland
Executive Director (Housing and Technical Resources)

14 June 2011

Link(s) to Council Objectives/Improvement Themes/Values

- ◆ Accountable, effective and efficient

Previous References

None

List of Background Papers

None

Contact for Further Information

If you would like to inspect the background papers or want further information, please

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Appendix 1 – Legal Overview

Risk of Procurement Challenge

Scottish Futures Trust has stated there is little/ no risk of cost to Council's in becoming participants in the Hub initiative. The concept of creating a private company which will have the right to carry out capital works of varying value, not all of which will be specified in advance, for public authorities who decide to participate in it, but who do not control it, over a 20 year period has not been tested in court.

SFT have obtained an (English) Counsel's opinion which suggests the concept will be lawful particularly because the initial procurement of the private sector partner is chosen by tender and the costs of the initial projects will be market tested. There are 4 other territories in Scotland which have already been out to OJEU with their initial advert and to date there have been no challenges. Although this provides some comfort it does not guarantee there is no liability. However if a challenge was received to the principle of the proposal then the main liability, if such an action was successful, would be court costs which would be shared by the all participants.

The second time in which a challenge would be possible is if and when SLC have a project they wish to have Hub Co develop. The potential liability, then, could be greater as not only would it suspend or stop SLC's project but there could be significant costs and expenses which would then be SLC's main liability. However, SLC has no initial or potential project for the Hubco and over the next few years all the Hub Cos will have been in operation for some time and their success and any case law pertaining to any challenges, can be considered and the risk if any can be reassessed and each project would be carefully considered to see if it meets the criteria set out in the initial advertisement to minimise any risk of challenge.

Best Value

Apart from any costs which are elicited in the initial competitive dialogue process it is envisaged that costs will be benchmarked regularly over the 20 year period. SFT are confident that benchmarking against KPIs will provide a robust method of ensuring best value. Again this is not as openly transparent as competitive tendering but it would be up to each department to decide whether such costs provide best value based on the available data at the relevant time.

Control and Shareholding

SLC is only one of 13 possible public sector partners who will use and participate in Hubco. As stated above voting rights will be limited for the public sector partners. In addition being a shareholder means that the shareholders are liable to pay the subscription price for its shareholding in the event the company is wound up and owes money i.e. if it holds 100 shares of £1 each the total liability is £100. It is intended that the subscription price is low but the exact amount is unknown at this time. The company could seek additional capital by asking shareholders to lend to the company – which could meant the Council would become a creditor and therefore entitled to interest on any debt or the company could seek to raise additional capital from its shareholders by issuing more shares. If the Company makes a profit this would be shared between any shareholders if not reinvested in the Company. All of these activities could involve potential conflicts of interest between the interests of the Council and promoting the interests of Company as such it is strongly recommended that SLC do not participate as a shareholder in the new company.

Memorandum of Understanding and Letter of intent and Costs

The Minute of Understanding (MoU) says that all parties are obliged to share costs and work involved in achieving the implementation. Although initial costs are to be provided by the SFT there is no actual amount stated in the MoU. . It has been suggested that SFT are providing initial revenue costs of £1.4M. but there will be no further monies available if costs exceed this amount and this amount is not specified in any document. Although stated not to be legally binding the Memorandum of Understanding will be signed by all parties.

It would be difficult to argue afterwards that SLC would not be bound by what it has signed up to. The Committee should be aware of this. The Council will have a final opportunity to enter or refuse to enter into this arrangement when the private sector partner is chosen and the Council is asked to become a shareholder or enter into the partnership agreement with the new company but by signing the MoU the Council is declaring its commitment to this venture.