

REPORT TO EXECUTIVE BOARD OF THE WELLAND PARTNERSHIP

SHARED SERVICES PROJECT: LEGAL ISSUES

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1. Introduction

- 1.1 On 6 February 2006, representatives of the Welland Partnership covering the key services, Procurement and Internal Audit held a brainstorming meeting to discuss the legal issues surrounding the Welland Partnership's Shared Services project. The meeting was held at the Nottingham office of Eversheds LLP ("Eversheds") and John Bennett, Consultant and Judith Barnes, Partner from Eversheds LLP advised on legal issues at that meeting. The meeting provided a useful opportunity to discuss the issues involved and to explore the options for the way forward initially in respect of Internal Audit and Procurement.
- 1.2 All Councils save South Kesteven were represented. However, a briefing session with representatives of SKDC was held soon after.

2. Structure Options discussed at brainstorming meeting

- 2.1 The brainstorming meeting considered four types of service delivery model:
- a collaborative model;
 - a contractual model;
 - a new administrative body; and
 - a new corporate body
- 2.2 A **collaborative** model would be an administrative arrangement, in which the authorities involved in the Welland Partnership would agree arrangements for co-operation, which fell short of a contractual commitment to each other. It is also likely to involve some delegation of functions under section 101 of the Local Government Act 1972 ie an officer of one authority performs functions on behalf of the other authority. In the past, such an arrangement might have been thought the easiest option from the point of view of public procurement because this would not amount to the award of a contract and so would not be regulated by public procurement legislation.
- 2.3 A **contractual** model would involve a contract between local authorities. They would have the power to enter into such arrangements under the provisions of section 1 of the Local Authorities (Goods and Services) Act 1970. However, this would involve the award of a public services contract, which would be regulated by European legislation on public procurement and in particular in this country the Public Contracts Regulations 2006. In the light of recent case law which suggests that even "below threshold" contracts may be publicly advertised, a contractual solution is not recommended.

- 2.4 If it were determined to set up a new body to firm up the intention to collaborate, option would be to set this up as an **administrative** body. An **administrative** body would take the form of a joint committee established under sections 101 and 102 of the Local Government Act 1972 and sections 19 and 20 of the Local Government Act 2000. This would have the advantage of being a well known administrative structure, for which the legal powers are clear. It would allow member involvement in decisions relating to the shared services but the decision making processes could be streamlined so that there would not be a need for each individual authority to take separate decisions on the functions for which the joint committee took responsibility. Staff involved in the arrangement would remain local authority employees, and could be employed by the lead authority or seconded to another authority. Joint committees have been used for collaborative relationships between authorities, for example as purchasing consortia. One major difficulty with a joint committee is that the actual committee does not have legal capacity in its own right. It would therefore need to act through a lead authority (or different lead authorities taking different roles).
- 2.5 Alternatively, if it were wished that the joint body had its own independent legal status, there are a range of different types of **corporate** body which could be established. The advantage of this type of arrangement would be that there would be the flexibility of different corporate models; the corporate body could have limited liability, and it could acquire assets. However, the legal powers for local authorities to set up some types of corporate entities has sometimes been questioned (though wellbeing and other powers should cover these requirements). In addition, there are limits on what can be delegated to companies. Staffing arrangements can be complicated, requiring the secondment or transfer of employees. Also, since such a body would be separate from the local authorities involved, it would usually need to compete with other applicants to win contracts from them if such contracts are covered by European legislation on public procurement. At the brainstorming meeting, there was some discussion on the "Teckal" exemption, which has established that "in-house" arrangements and arrangements equivalent to this are not subject to public procurement legislation. However, this is very rigidly interpreted, and requires a contracting authority to exercise a similar level of control over an "in-house" company as it does over its own departments and the company to perform the essential part of its activities for the authority. In a situation such as that of the Welland Partnership, where a number of authorities will be involved in the arrangement, there would be potential for uncertainty as to whether it would be possible for any of the authorities to exercise the required level of control.
- 2.6 The brainstorming meeting included a detailed discussion on the differences between a contractual arrangement and a collaboration agreement which is founded in administrative law and the risks associated with procuring services, from other local authorities, without going through a competitive process. Eversheds highlighted the need to consider carefully the provisions which would

be contained within a collaboration agreement so that it was more likely to be construed as collaboration under administrative law, rather than procuring a contract for services. Eversheds also highlighted the potential risks of challenge under the procurement rules to administrative arrangements which could be regarded as contractual in nature following the case of *Commission v Spain* (case C84/03). In that case, it was held that Spain had incorrectly transposed directives relating to public procurement by putting in place legislation which excluded co-operation agreements between bodies governed by public law. Such agreements could amount to contracts between two legally distinct persons which would not be outside the scope of public procurement directives unless the "Teckal" exemption applied.

3. **Joint Committee Option**

- 3.1 At the brainstorming meeting, it was felt that a Welland Partnership collaborative option was likely to offer the best way forward in terms of delivery and that it should be supported by a Joint Committee to assist in governance arrangements. The Joint Committee would permit appropriate member level input, to provide strategic direction, monitoring and accountability for the Shared Services project. The Joint Committee would be an administrative vehicle which would exercise relevant functions on behalf of the partners involved in each project, being an administrative body formed pursuant to public law. Each of the councils would delegate their relevant functions to the Joint Committee and then authority for delivering each of the Shared Services partnerships would be delegated to a Project Board and then there would be further delegations to the relevant Head of Service, employed by the relevant lead authority for that Service.
- 3.2 There would also be a Chief Executive Group, providing a similar role to that which already exists, to support the Joint Committee; to assist in ensuring relevant outcomes are delivered; and resolving any disputes. The broad structure is shown in diagrammatic form as an appendix to this report. Only those authorities which participate in a particular Shared Service would have representatives on the Project Board for that Service and these representatives would be key Chief Executives and Chief Officers, ie Section 151 officers in respect of internal audit.

4. **Delegation to officers**

- 4.1 Alternatively an officer delegation arrangement could be introduced instead. This would essentially authorise one Council to perform functions on behalf of another.

- 4.2 The power for local authorities to delegate functions is contained in section 101 of the Local Government Act 1972. This says at 101(1): "Subject to any express provision contained in this Act or any other Act passed after this Act, a local authority may arrange for the discharge of any of their functions - (a) by a committee, a sub-committee or an officer of the authority; or (b) by any other local authority". (There were provisions to exclude the power to delegate functions to another authority in respect of authorities with executive arrangements but section 19 of the Local Government Act 2000 and the Local Authorities (Arrangements for the Discharge of Functions) England 2000 have empowered local authorities with executive arrangements to make arrangements under section 101 of the Local Government Act 1972.)
- 4.3 Section 101(3) of the Local Government Act 1972 says: "where arrangements are in force under this section for the discharge of any functions of a local authority by another local authority, then, subject to the terms of the arrangements, that other authority may arrange for discharge of those functions by a committee, sub-committee or officer of theirs and subsection (2) above shall apply in relation to those functions as it applies in relation to the functions of that other authority". This means the Council receiving the delegation would assume responsibility as if the function "was their own" and could arrange for a committee, sub-committee or officer to discharge it. Staff may be authorised to exercise functions on behalf of another authority or maybe seconded to another authority, or transferred under TUPE (see 112/113 Local Government Act 1972 and the wellbeing powers).
- 4.4 There is therefore power for the local authorities within the Welland Partnership to delegate functions between themselves and an authority to which a function is delegated may further delegate the function to an officer or to a committee or sub-committee.
- 4.5 As with the Joint Committee described above, this would be an administrative arrangement. It would be a well known type of arrangement, for which the legal powers are clear. There would be streamlining of decisions, since this would be the responsibility of the local authority to which the relevant functions were delegated. However, there would not be the same potential for members to make an input on an ongoing basis, only those members of the Council receiving the delegation of the function would have that role.

5. The Agreement

- 5.1 If the Welland Partnership goes ahead with the idea of developing a collaborative administrative arrangement, there will need to be an agreement between the local authorities involved. Eversheds was therefore instructed to develop an agreement to take effect as an administrative collaboration agreement relying principally on the powers of the authorities to delegate functions under sections

APPENDIX A

101 and 102 of the Local Government Act 1972 and sections 19 and 20 of the Local Government Act 2000. The intention is that this will not therefore be construed as a contract for services which triggers the EU Public Procurement regime; although all parties accept that there is no way of fully eliminating this risk.

- 5.2 Eversheds has used a framework style of drafting supported by Schedules to assist in updating and change as the Partnership develops. The Agreement commences with a set of guiding principles and objectives for the Partnership. It then contains clauses relating to the establishment of the Joint Committee or other form of delegation (the "Welland Partnership") and its constitution and functions; then provisions relating to the individual Project Boards (currently to be Procurement and Internal Audit; but with provision for more).
- 5.3 The Agreement sets out the rights and obligations of a Commissioning Authority (our working term for an authority which receives services from the Partnership); and similarly for the Delivery Authority (our working term for an authority which provides services).
- 5.4 The Agreement also deals with liabilities, dispute resolution and withdrawal/expulsion. The whole is supported by "boiler-plate" clauses, such as severance, waiver and notice provisions.
- 5.5 Eversheds has provided a first draft and sent this to officers for comments. These have been supplied and a second working draft will be received shortly. It is expected that a more detailed supplemental agreement will be prepared and then tailored for each service, starting with Procurement and Internal Audit.

Eversheds LLP

30 March 2006

Appendix



