



GA.24 16/17

Governance and Audit
Committee

15 September 2016

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Subject: Report on the Governance arrangements for managing the risks of a wholly owned limited company subsidiary.

Report by:

Director of Resources

Contact Officer:

Ian Knowles
Director of Resources
01427 675183
ian.knowles@west-lindsey.gov.uk

Purpose / Summary:

The purpose of this report is to provide assurance to members of Governance and Audit Committee that appropriate arrangements are being put in place to manage the risks of a wholly owned limited company subsidiary.

RECOMMENDATION(S):

Members are asked to review the governance arrangements in the attached report, seek assurance that appropriate governance is in place and make comments that may be raised by the Chair at Full Council.

IMPLICATIONS

Legal: none arising from this report

Financial : none arising from this report

Staffing : none arising from this report

Equality and Diversity including Human Rights :
NB: Please explain how you have considered the policy's impact on different groups (for example: young people, elderly, ethnic minorities, LGBT community, rural residents, disabled, others). none arising from this report

Risk Assessment : none arising from this report

Climate Related Risks and Opportunities : none arising from this report

Title and Location of any Background Papers used in the preparation of this report:
*Wherever possible please provide a hyperlink to the background paper/s
If a document is confidential and not for public viewing it should not be listed.*

Call in and Urgency:

Is the decision one which Rule 14.7 of the Scrutiny Procedure Rules apply?

i.e. is the report exempt from being called in due to urgency (in consultation with C&I chairman)

Yes

No

Key Decision:

A matter which affects two or more wards, or has significant financial implications

Yes

No

1 Introduction

- 1.1 In June of this year WLDC acquired local business operating as a staff agency in the district and surrounding area. This company will continue to operate as an independent limited company that is wholly owned by the Authority. In addition, a second subsidiary will be created to act as a TECKAL company for supply of the same services to public bodies. The TECKAL status currently allows Authorities to give work to such companies without an open tender process.
- 1.2 At its meeting in July Corporate Policy and Resources Committee agreed a governance structure for recommendation to Full Council.
- 1.3 That same report is presented today for members of Governance and Audit Committee to review the arrangements, seek assurance that appropriate governance is in place and make comments that may be raised by the Chair of this committee at the meeting of Full Council.



APPENDIX A TO GA.24 16/17 CPR.18 16/17
Corporate Policy and Resources Committee
Date: 28 July 2016

Establishing a Group Trading Company for West Lindsey District Council

Report by:	Commercial Director
Contact Officer:	Penny Sharp Commercial Director Landline: 01427 675185 Mobile: 07810 658324
Purpose / Summary:	The purpose of this report is to consider establishment of a group of trading companies to support the Council's commercial activities.

RECOMMENDATION(S):

- (1) That Corporate Policy and Resources Committee recommends to Council approval the proposed group structure for trading companies (the trading arm) to facilitate the return of profits to the Council which can be used to ensure the sustainable delivery of front line services.**
- (2) That Corporate Policy and Resources Committee recommends that Council delegates authority to the Committee for approval of annual business plans and accounts for the Group Holding Company and its individual subsidiaries.**
- (3) That Corporate Policy and Resources Committee recommends to Council that it approves the Shareholder Agreement for the Group Holding Company and its associated subsidiaries.**

- (4) That Corporate Policy and Resources Committee recommends to Council that it approves the Articles of Association for the Group Holding Company and its associated subsidiaries.
- (5) That Corporate Policy and Resources Committee recommends to Council the nomination of the Commercial Director as Company Director and Chief Executive as Non-Executive Director for the Group Holding Company (WLDC Trading Ltd) and its Sure Staff subsidiaries (Sure Staff Lincs Ltd and WLDC Staffing Services Ltd).
- (6) That Corporate Policy and Resources Committee recommends to Council the nomination of the S151 Officer, (the Director of Resources) as the Council's Shareholder representative.
- (7) The members delegate authority to the Council's Section 151 Officer and the appointed Director of the SureStaff subsidiaries to agree the format and content of a Resourcing Agreement for the supply of services by the Council.

IMPLICATIONS

Legal:

The Council has the legal power to establish and operate trading companies. These can be wholly owned by West Lindsey District Council in order to enable the Council to take advantage of the powers to trade for profit introduced under the Local Government Act 2003, where opportunities to do so arise and it is appropriate to use the company as a vehicle for the trading activity proposed.

In addition, under the "general power of competence" introduced by Section 1 of the Localism Act 2011 local authorities now have a general power that enables them to do anything that a private individual is entitled to do, subject to certain statutory limitations.

It should be noted that things done for a commercial purpose even under the Localism Act 2011 must be done through a company.

Financial: FIN/58/17

A business case has been produced (and will be produced) for each company which forms part of the trading arm. These forecast the potential cost and revenue implications for the Council of developing and operating each specific commercial activity.

The establishment of the trading arm, including the costs of specialist advice (legal, taxation) and company incorporation will be met from existing Invest to Earn funds. Any working capital requirements and/or cashflow subsidies will be provided to each company by the Council on commercial terms.

Each company within the trading arm will operate as a separate legal and commercial entity and distributable profits will be returned to the Council by way of dividend payments. The Council may also benefit from ownership of these companies by way of payments under a Resourcing Agreement and via interest charges on loans.

Staffing:

In most cases, the creation of the trading arm will represent the commercialisation of existing Council activities. Where this is the case, it is anticipated that existing staff will be used to deliver the service.

In the case of other commercial activity where the Council does not currently have an offer, the business plan includes provision for the creation of an appropriate staffing structure.

The acquisition of SureStaff Lincs Ltd has created the requirement to recruit a qualified professional to operate the company. Provision for this is again included in the specific business case.

Equality and Diversity including Human Rights:

There are no equality and diversity issues arising directly from this report

Risk Assessment:

The development of a trading arm represents a significant step forward for WLDC as it develops a range of commercial activities. Although this course of action presents opportunities, there are a number of potential risks.

In summary, the key risks are:

Failure to comply with legislation or trade *ultra vires* – the Council has engaged commercial support on an interim basis and is also commissioning legal advice (from specialists Bevan Brittan LLP) to guide it through the process of establishing a trading arm.

Possibility of State Aid challenge – Council support for any trading entities will be provided under a Resourcing Agreement and a set of Service Level Agreements that will ensure that market rates are used to set the relevant fees and payments.

Failure to comply with prevailing taxation laws/regulations – specialist advice has been commissioned from KPMG to provide guidance in relation to meeting the requirements in respect of both Corporation Tax and VAT.

Failure to trade successfully – each ‘business’ will be/has been developed using a market driven business plan which identifies and evaluates the market opportunity alongside the commercial and competitive landscape. In addition, the business plans identify relevant performance targets and the indicators for success/failure. Each reports monthly to Commercial Board in this respect, as well as holding their own monthly Board meetings to review activity and performance.

Poor investment/acquisition – the Council has developed a comprehensive due diligence checklist for a range of investment/acquisition scenarios; from property and land purchases to company acquisitions and market lending.

Conflict of interest with Council priorities and resources – each business case evaluates the resourcing requirements needed to trade in the context of the Council’s statutory duties. Where a conflict occurs, the business plan will need to support any additional resources that are needed.

Climate Related Risks and Opportunities:

There are no direct climate related risks arising from this report

Title and Location of any Background Papers used in the preparation of this report:

None

Call in and Urgency:

Is the decision one which Rule 14.7 of the Scrutiny Procedure Rules apply?

i.e. is the report exempt from being called in due to urgency (in consultation with C&I chairman)

Yes

No

Key Decision:

A matter which affects two or more wards, or has significant financial implications

Yes

No

1 Background

1.1 A number of local authorities have identified that setting up a trading company – wholly owned by the Council, but operated as a separate legal entity – offers a way to develop services beyond their existing focus.

According to Localis, 58% of local authorities had trading companies in 2015¹ - based on a survey of 150 leaders in local government (e.g. chief executives, council leaders, finance). If representative of the sector as a whole, this would translate to around 189 English local authorities at the district/unitary level, indicating that the concept of the council-owned/run trading company is widely accepted. There is also significant evidence to suggest that trading companies are either under consideration or in active development by many other local authorities

1.2. West Lindsey District Council is developing a portfolio of commercial propositions based on both existing and new activities. Currently these activities are generating a modest level of income, but there is an ambition to build a number into significant revenue generating operations.

1.3 The Council has identified the need to establish a trading vehicle and has reviewed the options available to provide support for anticipated future activities by providing:

- Strategic direction
- Business opportunity development
- Support services

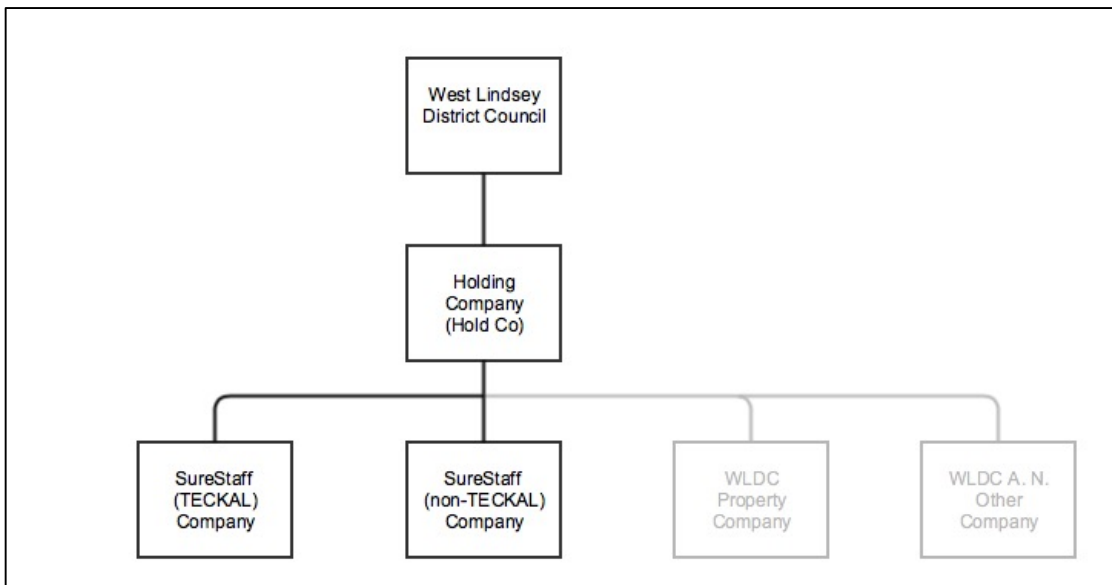
- Governance arrangements
- Financial planning

1.4 As well as establishing a vehicle to allow a range of trading activities, setting up a trading arm will support a number of WLDC’s wider objectives:

- Service Quality
- Customer Focus
- Workforce Quality
- Innovation
- Cultural
- Sustainability
- Reputation.
- Retention of control and benefits

2 Group structure

2.1 It is likely that the Council will want to consider establishing a series of Companies Limited by Shares for those operations which have a commercial character. It is believed that a group structure, similar to the example shown in the diagram below, would be the most appropriate to support the Council’s commercial ambitions.



2.2 A group structure of this type will offer WLDC a number of advantages:

- Assets – usually property and intellectual property - can be ring-fenced to protect against claim if the trading company is subject to litigation.
- The operation of separate companies for different areas of the business of the company can be helpful if one part of a business is regulated or has a higher risk profile.

- To allow the operation of employee share schemes which are limited to the business in which the particular employees work.
- If there is potential to sell the business avoiding some of the legal issues that can arise with a sale of assets.
- A group company structure can be tax efficient.

2.3 Initially one the companies in this group structure will be configured as a 'Teckal' company (WLDC Staffing Services Ltd). This enables the company to trade directly with the council, and potentially other public sector bodies. A Teckal company will provide:

Services to the Council and other legal persons controlled by the Council (within the meaning of regulation 12 of the Public Contracts Regulations 2015) in accordance with any business plan then in force and on terms agreed between the Teckal Co and the Council

2.4 Once a group holding company is established with approved Articles of Association and Shareholder agreement, any future subsidiaries that the Council be created through a 'Deed of Adherence'. In essence, this means that any subsidiary companies will be bound by the approved Articles and Shareholder agreement. This does not preclude the Council from establishing other companies or Special Purpose Vehicles outside this structure.

3 Shareholding

3.1 The Council will be the sole (100%) member of a group holding company which in turn will be the sole member of each of the subsidiaries, thereby creating a "flat" subsidiary structure underneath the holding company.

The Council will be named as the sole member of each subsidiary, but will exercise its rights (as owner or contract counterparty) through one or more authorised representatives.

4 Governance

4.1 As the sole owner of the Group Holding Company and its subsidiaries, the Council will ultimately govern the operations of the companies.

The Shareholders Agreement (Appendix 1) is a legally binding document that sets out the Council's expectations of its companies. The Council must approve the annual business plan and accounts for the Group Holding Company and its subsidiaries. The Shareholder Agreement also details a list of *Reserved Matters*, issues that must revert to the Council, as sole Shareholder, for decision-making.

4.2 The Articles of Association (Appendix 2) set out the purpose and operational requirements of the Group Holding Company and its individual subsidiaries. These govern the way that the individual companies must operate.

- 4.3 Apart from the reserved matters, decisions which the Council (as member) is required to approve under the Companies Act 2006, and any matters which the Council directs a company's board to undertake (or not undertake), the day to day running of each subsidiary will be left to the company directors.

5 Council appointments:

- 5.1 The Council will appoint one or more directors to each subsidiary Board and, depending on the composition, may appoint a majority of directors. Legal advice recommends that the Council's nominated directors should be officers rather than elected members to avoid potential conflicts of interest and given that it is the Council (ie all elected members) which is the shareholder and owner.
- 5.2 It is recommended that the Commercial Director is appointed as Director and Manjeet Gill as Non-Executive Director for WLDC Staffing Services Ltd, SureStaff Lincs Ltd and the Group Holding Company (WLDC Trading Ltd).
- 5.3 It is recommended that the Council's Section 151 officer, the Director of Resources be nominated as the Council's shareholder representative.

6 Tax Implications

- 6.1 The Council commissioned specialist advice from KPMG, the Council's external auditors, in relation to both Corporation Tax and VAT. The advice focused on high level considerations in relation to Local Authority Trading Companies (LATC) and also provided detailed analysis in relation to SureStaff Lincs Ltd.
- 6.2 KPMG advised that it is common for local authorities to establish a group company structure:
"Often a company is incorporated which sits between the Local Authority and the Local Authority Trading Company. This is commonly referred to as a holding company. There are various reasons why a holding company structure is utilised however a major reason includes; facilitating management charges for services and mitigating tax on a future sale by way of substantial shareholding exemption relief" KPMG April 2016.
- 6.3 It is proposed that any profits generated by subsidiary companies will be returned to the Council through a dividend payment and will only be distributed in accordance with approved business plans and with Council approval.
- 6.4 It may be necessary to obtain more detailed advice about tax implications for each specific subsidiary. This advice will be commissioned as and when required.

6. Update on Sure Staff

- 6.1 The acquisition of SureStaff was completed on 30th May 2016. The company, now formally owned by West Lindsey District Council, has moved into a start-up office in The Plough Business Hub. The company held its first formal Board meeting on 7th June.
- 6.2 Under the terms of the acquisition the previous owner has been working full-time in the business and will continue to do so until 31 July 2016. He has successfully set up the office and configured all the systems to operate as before. In addition, he has made a number of calls to both worker suppliers (Job Centre, employment services) and former clients with promising outcomes.
- 6.3 The business has successfully recruited and appointed a Manager who is now in place and is rapidly gaining knowledge of Sure Staff. The Manager has previous staffing agency experience and is ambitious to develop the business. The Council's Finance team member has also been trained and are now provides the payroll administration service under the Resourcing Agreement.
- 6.4 Preparations to transfer the Council's Operational Services contract (Garden Waste) over to SureStaff are progressing well. A reduced handover period has been negotiated with the incumbent agency supplier (Essential Recruitment) and this contract will 'go live' with SureStaff at the end of July. This will produce revenue for the business one month earlier than projected in the business plan. In addition, the Council has placed additional requirements with Sure Staff after only two weeks of operation, generating non-forecast revenue in June and July.

7 Conclusions

- 7.1 The creation of a trading arm, configured as described above, offers the Council the opportunity to develop a suite of commercial activities and optimise its financial position in order to help fund front line services.
- 7.2 It is proposed that members approve and recommend to Council the establishment of a Group Holding Company, the proposed Articles of Association and Shareholder agreement. In addition, it is recommended that the Council's nominated representatives are approved and recommended to Council.