



COUNCIL

13TH JUNE 2017

AGENDA ITEM (11)

VIRES AUDIT AND DELEGATION

Accountable Member	Councillor Mark F Annett Leader of the Council
Accountable Officer	David Neudegg 2020 Partnership Managing Director 01285 623000 david.neudegg@2020partnership.uk

Purpose of Report	To note the need for changes to the Constitution in respect of those services that will be delivered by the local authority-owned companies on behalf of the 2020 Partnership partner Councils; and to determine the way forward to enable such changes to be agreed and implemented.
Recommendation(s)	<p>(a) That the Council notes that changes to the Council's Constitution will be necessary to enable the formal delivery of Council services by the Council-owned and controlled Teckal companies;</p> <p>(b) that, following completion of the vires audit, the Head of Paid Service, in consultation with the Leader of the Council, the relevant Cabinet Member, the Leader of the Liberal Democrat Group and the Chairman of the Overview and Scrutiny Committee, be authorised to agree the necessary changes;</p> <p>(c) that, in due course, the Head of Democratic Services be authorised to incorporate the necessary changes within the Council's Constitution.</p>
Reason(s) for Recommendation(s)	Following completion of the vires audit, which will ensure that the methods for future delivery are permitted by statute both in terms of a local authority's general ability to act in a certain way and in terms of specific statutory requirements for each service, there will be the need for these methods to be reflected in the Council's Constitution.
Key Decision	Not applicable
Recommendation to Council	Not applicable

Financial Implications	None specifically arising from this report
Legal and Human Rights Implications	Detailed legal advice has been sought to assist with the vires audit, including from external sources.

Environmental and Sustainability Implications	Not applicable
Human Resource Implications	The establishment of companies will result in an alternative employment model and a significant reduction in the number of directly employed Council employees. Where services cannot be delegated, then the Council will use joint employment contracts to ensure they remain intra vires.

Key Risks	Any potential risks should be addressed through the vires audit.
Equalities Analysis	The formation of companies and the contracting out of services is unlikely to affect protected groups.

Related Decisions	Council - 27 th September 2016 - Approval to form local authority-owned Companies with 2020 Partner Councils - Minute CL.16
Background Documents	2020 Partnership Joint Committee Minutes
Appendices	None

Performance Management Follow Up	Implement Council decision(s)
Options for Joint Working	The 2020 Partnership Company option provides for the provision of services through joint working.

Background Information	
1.	<u>Introduction</u> Cotswold District Council, Forest of Dean District Council, and West Oxfordshire District Council have established three Teckal companies limited by guarantee (CLGs) - Publica Group Ltd., Publica (Services) Ltd. and Publica (Support) Ltd. - to provide all services currently provided by the Councils (subject to some exceptions). As a consequence of this decision, it is necessary to review the Council's Constitution relative to those services that will be delivered by these Council-owned companies.
2.	<u>Vires Requirements</u>
2.1	Local authorities, as creatures of statute, have to act within the express and reasonably implicit powers granted to them by Parliament. If they do not do so, then their act(s) can be deemed to be ultra vires and therefore vulnerable to challenge by way of judicial review or auditor challenge.
2.2	In restructuring any local authority provided service, it is therefore necessary to ensure that the methods for future delivery are permitted by statute both in terms of a local authority's general ability to act in a certain way and in terms of specific statutory requirements for each service.
2.3	To provide this assurance, the Council is undertaking a "vires audit" to ensure all anticipated services can be delegated to the Teckal companies limited by guarantee. Where delegation is not permitted, the vires audit will identify which parts of the relevant functions must be carried out by relevant Council's employees. This will be used to determine the scope of joint employment arrangements and the allocation of tasks carried out by an employee between the joint employers.

3. Delegable v Non-Delegable Functions

3.1 Statutory functions are duties or powers given to a local authority to do something or provide something. These functions will always lie with the local authority, and cannot be delegated or contracted out unless otherwise expressly provided for in law. This is due to the presumption against delegation, resulting in the starting position when conducting the vires audit to be that of the statutory power being non-delegable.

3.2 Unless there is an Act or Order permitting delegation (or the relevant statute itself expressly allows the functions to be exercised/contracted out to a third party), then the exercise of relevant functions cannot be delegated or contracted out.

4. The Deregulation and Contracting Out Act 1994

4.1 The Deregulation and Contracting Out Act 1994 provides (that where a relevant Order has been made) for a function of a local authority to be exercised by such a person as the local authority authorises.

4.2 Under Section 70 of the Deregulation and Contracting Out Act 1994, specific Orders have been made relating to different local authority functions. These include (but are not limited to) the:

- Contracting Out (Functions of Local Authorities: Income Related Benefits) Order 2002; and
- Contracting Out (Functions relating to Social Security) Order 2000.

4.3 The vires audit will check whether the statutory functions (as contained in the relevant legislation) of the local authority are (by way of the Deregulation and Contracting Out Act 1994) permitted to be contracted out.

5. Power/Capacity for Local Authorities to Contract

5.1 Section 111 of the Local Government Act 1972 provides that a local authority may do anything that is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions. It provides local authorities with the general power to enter into contracts for the discharge of any of their functions.

5.2 Section 1 of the Localism Act 2011 further provides a general power of competence that reserves the presumption that local authorities can only do what is authorised by statute. The power authorises a local authority to do anything that an individual may do unless expressly limited.

6. Contracting Out : Functions of Local Authorities

6.1 It is important that the Council notes, for contracted out functions, the inclusion of a checking requirement when making decisions on claims and authorisation given (in relation to any function).

6.2 Pursuant to the Deregulation and Contracting Out Act 1994, the Council may be able to contract out the exercise of certain functions and powers approved by an Order subject to complying with the checking requirement to provide a random sample of at least 10% of decisions made on claims and take all reasonable steps to prevent any errors identified by the Council.

7. Vires Audit

7.1 The Council is undertaking a vires audit, reviewing the functions in scope for each service type, and identifying the relevant underlying legislative basis for the service type and whether the relevant function can be delegated as set out above.

7.2 Where services cannot be delegated, then the Council will use joint employment contracts to ensure they remain intra vires (for example, regulatory services).

7.3 The current Council Constitution is generally written on the presumption of direct employment with named individuals or roles having delegated responsibility. The Council's Constitution will therefore require amending to take account of the outcome of the vires audit, insofar as the formal delivery of Council services by the Council-owned and controlled Teckal companies is concerned.

7.4 It was originally hoped that the vires audit would have been concluded in time for a full report to be presented to this Meeting, detailing the necessary changes. However, that has not proved possible, primarily due to the thoroughness of audit process. In order to avoid undue delay, it is therefore recommended that, following completion of the vires audit, the Head of Paid Service, in consultation with the Leader of the Council, the relevant Cabinet Member, the Leader of the Liberal Democrat Group and the Chairman of the Overview and Scrutiny Committee, be authorised to agree the necessary changes; and then for the Head of Democratic Services to incorporate the necessary changes within the Council's Constitution.

7.5 These proposed actions flow from, and form a necessary step to implementing, the Council's previous decision to approve the formation of local authority-owned Companies with the 2020 Partner Councils to deliver services.

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