

# **SOUTH THAMES GATEWAY BUILDING CONTROL JOINT COMMITTEE**

**9 JUNE 2009**

## **TRADING THROUGH A LOCAL AUTHORITY COMPANY**

Report from: Tony Van Veghel, Director, South Thames Gateway  
Building Control Partnership

### **Summary**

This report sets out the proposals to investigate a business case for transferring the consultancy service to a Local Authority Company.

### **1. Budget and Policy Framework**

- 1.1 The 2009/10 Business Plan requires that a separate business plan be produced and agreed by Joint Committee and the three partner authorities to consider the viability of transferring the whole partnership or its consultancy arm into a commercial Local Authority Company.

### **2. Background**

- 2.1 Under 2008/09 Business Plan the Joint Committee approved the formation of a consultancy to provide ancillary services to the building control function for the benefit of the community under the Local Government Act 2000.
- 2.2 Although in its infancy, the consultancy is able to provide advice and detailed calculations for clients preparing submissions for the code for sustainable homes and requiring Standard Assessment Procedure (SAP) ratings. Whilst the affects of the recession are still impacting on the construction industry demand for this type of information is growing and will increase as the housing sector in particular improves.
- 2.3 One of the aims identified in the Business Plan 2009/10 was to investigate a business case for both the partnership and/or the consultancy becoming a Local Authority Company.

### **3. Director's Comments**

- 3.1 An initial legal overview has been sought from Kent County Council which has a wide range of experience in setting up Local Authority companies via their commercial arm.
- 3.2 Before the enactment of the Local Government Act 2003, local authorities were permitted only to informally trade with other local authorities and in the private sector using up to 5% of their (spare) capacity.
  - 3.2.1 The Local Authority Act 2003 has included procedures whereby local authorities can charge for discretionary services or trade in discretionary services where those local authorities are "Best Value Authorities".
  - 3.2.2 The powers are confirmed by Sections 93 and 95 of the Local Government Act 2003. Section 93 confers power on all Best Value Authorities to charge for discretionary services. These are defined as services which the local authority is not mandatorily bound to provide. The provisions authorising charging do not apply where charges are authorised by provisions elsewhere, and nor do they displace a prohibition on charging where one exists.
  - 3.2.3 The authority at Section 93 for charging is dependent upon the purchaser of the discretionary services communicating a willingness to receive those services and a willingness to pay charges. The power does not confer more than the ability for the local authority to recover costs.
  - 3.2.4 Section 95 Local Government Act confers wider powers in the form of a power to trade through a company.
  - 3.2.5 The facility to take advantage of the Section 95 power is only available for Best Value Authorities which have met the criteria for being designated as "Excellent", "Good", or "Fair" in a Comprehensive Performance Assessment (CPA). This facility is not available to authorities branded "Poor" or "Weak" in a CPA. However, it is noted that the CPA has now been replaced by the Comprehensive Area Assessment (CAA) and investigations will be carried out to ascertain whether the same advantages apply to the forthcoming CAA ratings.
- 3.3 It is important to realise that there is a distinction between what is meant by charging for the purposes of Section 93 Local Government Act 2003 and what is meant by trading for the purposes of Section 95 Local Government 2003. In its simplest and most general terms the distinction can be expressed as follows:

- 3.3.1 Charging is the activity whereby a local authority seeks to recover costs from a customer. The costs recovered are based on the costs incurred by the local authority and no more. There is a prohibition on the local authority making any profit over and above its costs although these costs can be measured on a year on year basis to cope with the practical difficulties of monitoring costs on a job by job or on a day to day basis.
- 3.3.2 Trading is an activity undertaken by a private sector company. That company may be owned by the local authority concerned. The company is able to recover on a cost plus basis – i.e. it is able to trade for profit.
- 3.3.3 Both charging and trading are in relation to discretionary services and include, since the enactment of the Local Government Act 2003, those discretionary services generating or enhancing the well being of the community in general.
- 3.4 The criteria for trading and charging have certain factors in common. In particular the criteria for charging dictate that:
  - 3.4.1 The local authority must have the power to provide the service.
  - 3.4.2 The charge must not apply to any service which the authority is mandated to or has a duty to provide.
  - 3.4.3 The power to charge or trade cannot override any existing legislation which either confers a power to charge for a discretionary service or expressly prohibits an authority from charging for a discretionary service.
  - 3.4.4 For practical purposes at this point the criteria for charging and trading diverge. For charging purposes, the local authority is not allowed to charge on a cost plus basis. For trading via a company additional requirements are set out in the Statutory Instrument as follows:
  - 3.4.5 Before exercising its power to trade via a company the local authority needs to prepare a business case in support of the exercise of the power and have that business case approved by the local authority.
- 3.5 Our legal advisors conclude that the provision of the building control service is a duty for the local authority and not a discretionary service and therefore the general administration and enforcement of the building regulations would have to be excluded from consideration of being formed into a Local Authority Company. This view is backed up by a consultation paper from Communities and Local Government on proposed changes to the Local Authority Building Control Charging Regime in which it states “There was a broader suggestion that LA Building Control departments should be given the same commercial freedoms and opportunities as Approved Inspectors and thus should

be made subject to the same controls that apply to private trading companies. Notwithstanding the arguments above regarding the need to ensure that LA Building Control remains affordable it is our opinion that LA's are not empowered to arrange for the discharge of their statutory building control functions via a LA company and we do not propose to alter this position." (paragraph 18, Appendix 1).

- 3.6 However, this restriction would not apply to the consultancy service which is not provided as a duty but as a discretionary service.
- 3.7 Within the Memorandum of Agreement for the partnership under discretionary services we have listed "consultancy and other services as agreed by the Joint Committee related to the building control service."
- 3.8 It is therefore proposed to examine the possibilities of moving the current consultancy into a Local Authority Company and be in a position to trade as a commercial enterprise.
- 3.9 There is at present no budget for investigating this process, it is therefore suggested that a way forward would be to approach KCC commercial arm for a short meeting to discuss the viability of such a project. A business case would then have to be drawn up to include all necessary costs including legal and HR advice. Market research would have to be carried out to determine the level and range of services that we could offer. This would then have to be presented to Joint Committee for approval to develop a business plan.

#### **4. Risk Management**

- 4.1 As there is no current budget the investigation into the viability of the consultancy becoming a Local Authority Company. Initial research will have to be funded from the current budget which would add an additional pressure unless a funding stream can be provided from the three partner authorities.
- 4.2 Market research may reveal insufficient demand at the present time due to the economic climate.
- 4.3 Research may reveal further training needs for staff in order to deliver the full range of services demanded from the consultancy, this in itself will have cost implications.
- 4.4 Although CAA has replaced CPA it is not clear if the same advantages which applied to local authorities who were designated excellent, good or fair continues under the new provisions, The issue has been raised with the Audit Commission who are investigating the situation and who will advise accordingly.

## **5. Financial Implications**

5.1 This is set out within the report.

## **6. Legal Implications**

6.1 This is set out within the report. Further research into setting up a Local Authority company will be necessary.

## **7. Recommendations**

7.1 The Joint Committee is asked to approve the investigation into the setting up of the consultancy as a Local Authority Company and the presentation of a business case, if appropriate, to the next Joint Committee.

## **8. Suggested Reasons for Decision**

8.1 The Joint Committee has a key role in developing the potential of the partnership and monitoring its progress.

### **Lead officer contact**

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### **Background papers**

Proposed Changes to the Local Authority Building Control Charging Regime  
Consultation paper (April 2009)