

CABINET

15 SEPTEMBER 2010

PARTNERSHIP FOR URBAN SOUTH HAMPSHIRE – REVISIONS TO
CONSTITUTION

REPORT OF HEAD OF LEGAL SERVICES

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RECENT REFERENCES:

[CAB 1539](#) - Establishment of a Joint Committee: Partnership For Urban South Hampshire and Joint Overview and Scrutiny Committee – 17 October 2007

EXECUTIVE SUMMARY:

The purpose of this report is to seek approval for a change in the Constitutional arrangements relating to the Partnership for Urban South Hampshire (PUSH). This change has already been considered by the PUSH Joint Committee on 23 June 2010 where it was approved. Each of the constituent local authorities will now be considering a report recommending that they support this change. The proposed change concerns the role of the lead authority when entering into contractual arrangements on behalf of the partnership as a whole.

RECOMMENDATIONS:

That the Head of Legal Services be authorised to enter into a supplementary legal agreement to amend the existing joint arrangements in accordance with the Appendix to the report.

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DETAIL:

1 Introduction

- 1.1 The Council entered into joint arrangements with other councils in the South Hampshire area in 2008, to promote a sub-regional strategy for sustainable economic growth in urban South Hampshire, covering in particular economic development, transport and other infrastructure ([CAB 1539](#) refers). These arrangements formally constituted the Partnership for Urban South Hampshire (“PUSH”).
- 1.2 The organisational structure of PUSH has developed further over time, in the light of experience in operating the Partnership, and evolving needs. PUSH governance arrangements were approved by the Joint Committee on 18 November 2008 and revised Financial Protocols have improved the governance of budget and financial management and transactions.
- 1.3 As the aims of PUSH develop and extend from policy making to delivery, an increasing need to enter into contracts arises. Such contracts will normally set out responsibility for the receipt of funding, and for the distribution or investment of this in accordance with the prescribed terms of the contract. As PUSH is not a legal entity with ability to enter into contracts, one of the Partner authorities acts as “lead authority” in this regard. The lead authority would be selected by deciding which of the partner authorities would be best placed to deal with the project in question. The lead authority incurs primary contractual responsibility to the funding agency for the use and application of the funds in accordance with the contract’s terms. However, the lead authority will often be in a position where the use and application of the funds is not under its control, but that of another PUSH local authority. It is important, therefore, that should the lead authority incur any liability to the funding agency as a result of another authority’s failure to comply with the contractual terms, the lead authority has recourse to a contractual indemnity from that authority.
- 1.4 The PUSH Joint Agreement acknowledges the principle that, in general, liabilities should be shared pro rata to the budget formulation. However, the current absence of a clear contractual indemnity to a lead authority, is an inhibitor to a partner authority taking on that role, as it gives rise to an element of risk exposure that is unnecessary.

2 Potential Risks to Lead Authority

- 2.1 The risk arising from a lead authority contracting on behalf of the Partnership without an indemnity from its PUSH partners is that the lead authority alone is exposed to financial liability. This may be particularly onerous where the contract is to secure external funding for which the terms and conditions invariably contain stringent clawback arrangements. The lead authority could be faced with the liability to repay substantial sums without the legal right to recover contributions from the other authorities under a contractual indemnity.
- 2.2 It is also important that the lead authority's legal services team is involved from the outset in any new Partnership initiative that could result in the lead authority being asked to enter into contractual obligations on behalf of PUSH. Otherwise, unascertained risks may arise for the lead authority if it enters into contracts which have been negotiated or approved by others within PUSH, but which may be on terms where its interests, as the primary party to the contract, are not sufficiently protected.

3 Options

- 3.1 The Joint Agreement is working well and there is no need for any fundamental revision of it. The issue highlighted is one of a technical legal nature, but which nevertheless has an important impact in practice upon the delivery of business objectives through the securing of funds via contractual agreements.
- 3.2 It is proposed that the authorities in PUSH enter into a short supplementary legal agreement embodying the following principles:
- the lead authority is indemnified against all liability it incurs in the course of performing its role by the other PUSH authorities on a pro rata basis according to the proportions of their respective financial obligations; and
 - the lead authority indemnifies the other PUSH authorities in respect of liabilities arising out of its own negligence.
- 3.3 Consideration has been given to inclusion of the above in the Partnership's financial protocols. However, as this would not have the legal status of a supplementary agreement, it would not address the risk exposure of the lead authority. To be legally enforceable, an indemnity needs to be by deed and a deed needs to be executed by all partner authorities.

4 PUSH JOINT COMMITTEE

- 4.1 The Joint Committee met on 23 June 2010. The Joint Committee is constituted of the Leaders of all the local authorities constituting PUSH, and they considered a report in identical terms to this report and endorsed and supported the proposed constitutional changes set out in this report. However, the constitution of PUSH requires that each of the individual local

authorities give their approval to any change in the constitution before it can be given effect to.

- 4.2 The Partnership for Urban South Hampshire is constituted under the Local Government Act 1972 and 2000. The joint arrangements entered into, which include the Terms of Reference for the Joint Committee as well as the Overview and Scrutiny Joint Committee, will require proposed amendment by virtue of this report, if it is endorsed by the City Council and all the other Constituent Local Authorities comprising PUSH. That will be dealt with by a simple supplementary legal agreement which will be dealt with by the Head of Legal Services.

.OTHER CONSIDERATIONS:

5 SUSTAINABLE COMMUNITY STRATEGY AND CORPORATE BUSINESS PLAN (RELEVANCE TO):

- 5.1 The joint arrangements primarily relate to the varied economy and housing aspects of the Sustainable Community Strategy.

6 RESOURCE IMPLICATIONS:

- 6.1 The proposed changes will require the City Council to indemnify the relevant lead authority where it is incurring costs on behalf of the Council and other PUSH partners, and this will be taken into account before the Council agrees to participate in any PUSH projects as part of the Annual PUSH Business Plan process. Once all the authorities in PUSH have approved the Business Plan and the budget, the costs of a project included in the approved business plan would be apportioned in accordance with the formula which is laid out in the Agreement (Winchester's contribution being 1%). Similarly, the City Council will have to indemnify the lead authority if that authority suffers loss due to the City Council's negligence.

7 RISK MANAGEMENT ISSUES

- 7.1 The proposed changes would protect the City Council where it was acting as lead authority. In other situations, the financial risks for the Council which the changes would give rise to would generally be covered by general management practice (e.g. a loss of grant due to failure by the Council to submit an application in time would be avoided by ensuring that officers properly managed the application process, as these losses would not be covered by insurance). The Council's insurance policies would cover the limited cases such as losses due to the City Council's negligence or fraud of an employee. Provision for all other payments required to be made by the Council under the revised agreement would be covered by the requirement for all authorities to approve the annual PUSH budget, and therefore appropriate budgetary provision within the City Council could be made for these other payments.

BACKGROUND DOCUMENTS:

None

APPENDICES:

Additional Provisions to be included in the PUSH agreement

Additional Clauses to be Added to PUSH Agreement

- 16.1 Whilst the Parties shall make all reasonable attempts to mitigate loss, each Party (“the indemnifying Party”) shall be liable for and indemnify the others against any expense, liability, loss, claim or proceeding whatsoever arising under any statute or at common law in respect of personal injury to or death of any person whomsoever arising out of or in the course of or caused by any act or omission of that indemnifying Party in respect of its role in the activities of the Joint Committee and/or under this Agreement and /or where acting as Lead Authority .
- 16.2 Whilst the Parties shall make all reasonable attempts to mitigate loss, each Party (“the indemnifying Party”) shall be liable for and shall indemnify the others against any reasonable expense, liability, loss, claim or proceeding in respect of any injury or damage whatsoever to any property real or personal in so far as such injury or damage arises out of or in the course of or is caused by any act or omission of that indemnifying Party in respect of its role in the activities of the Joint Committee and/or under this Agreement and/or where acting as Lead Authority .
- 16.3 Whilst the Parties shall make all reasonable attempts to mitigate loss, each Party (“the indemnifying Party”) shall indemnify the others in respect of any reasonable loss caused to each of the other Parties as a direct result of that indemnifying Party’s negligence, wilful default or fraud or that of any of the indemnifying Party’s employees in respect of its role in the activities of the Joint Committee and/or under this Agreement and/or where acting as Lead Authority.
- 16.4 Where a Party is appointed the Lead Authority under the terms of clause 12 of this Agreement, the other Parties shall each indemnify the Lead Authority on pro rata basis according to the proportions of their respective financial commitments as set out in Clause 10 of this Agreement with the intent that the Lead Authority shall itself be responsible for its own pro-rata share.