

**From: John Burr, Director of Highways, Transportation & Waste
David Brazier, Cabinet Member of Environment & Transport**

To: Trading Activities Sub - Committee – 20 November 2014

**Subject: Establishment of a Transport Related Local Authority Trading
Company**

For assurance

Classification: Unrestricted

Past Pathway of Paper: E&T Cabinet Committee 17 September 2014

Future Pathway of Paper: N/A

Electoral Division: All electoral divisions

Summary:

Kent County Council, together with a consortium of five other County Councils (Surrey CC, Dorset CC, Hampshire CC, East Sussex CC and West Sussex CC), owns a transport trip rate database known as TRICS (Trip Rate Information Computer System). The data base is widely used by the transport and planning profession.

The consortium has considered options for the management of the database in the longer term. The preferred option is to create a Local Authority Trading Company (LATC), to be owned equally by the consortium members, in order to retain control and exploit the commercial potential of the database.

The following report sets out the background, the Company Structure and Governance arrangements for the establishment of the TRICS LATC. This report was presented to the E&T Cabinet Committee and endorsed by members on 17 September 2014, the decision was subsequently signed off by the Cabinet member on 10 October 2014. Confidential aspects of this report have been deleted.

Recommendation(s):

The Trading Activities Sub-Committee is recommended to approve the governance arrangements as set out in the report

APPENDIX 1
Redacted version of Exempt report

From: John Burr, Director of Highways, Transportation & Waste
David Brazier, Cabinet Member of Environment & Transport

To: Environment & Transport Cabinet Committee – 17 September 2014

Subject: Establishment of a Transport Related Local Authority Trading Company

Non-Key decision:

Classification: **Restricted**

Past Pathway of Paper: N/A

Future Pathway of Paper: N/A

Electoral Division: All electoral divisions

Summary:

Kent County Council, together with a consortium of five other County Councils (Surrey CC, Dorset CC, Hampshire CC, East Sussex CC and West Sussex CC), owns a transport trip rate database known as TRICS (Trip Rate Information Computer System). The data base is widely used by the transport and planning profession.

[REDACTED] the consortium have considered options for the management of the database in the longer term. The preferred option is to create a Local Authority Trading Company, to be owned equally by the consortium members, in order to retain control and exploit the commercial potential of the database.

Recommendation(s):

1. The Cabinet Member for Environment and Transport approve the business case for the creation of a Local Authority Trading Company to be owned by Kent County Council and five other local authorities.
2. The Cabinet Member for Environment and Transport approve the governance arrangements for the Company, as set out in paragraphs 4.3.7 to 4.3.10, and as described in memorandum of terms form in a Shareholders Agreement between the local authorities and the Articles of Association for the company.
3. The Cabinet Member for Environment and Transport approve the provision of equity finance to the Company as described in paragraphs 2.1 to 2.2.

4. The Cabinet Member for Environment and Transport agree appropriate contractual arrangements on behalf of the County Council following completion of appropriate due diligence.
5. Authorise the Director of Highways, Transportation and Waste to appoint a LATC Director on behalf of KCC.

1. Introduction

- 1.1 The purpose of the report is to seek approval to set up a Local Authority Trading Company in partnership with Surrey CC, Dorset CC, Hampshire CC, East Sussex CC and West Sussex CC. The creation of a Local Authority Trading Company, to be owned by the six local authorities, will ensure that the commercial activities of the consortium are delivered in an appropriate manner and will enable the growth potential of the database to be fully exploited. Subject to the company being able to declare a dividend, the recommended delivery model will produce an ongoing income for the council to support future service provision.

2. Financial Implications

- 2.1 The TRICS Company will be incorporated with equity funds of £225,000. The six members of the consortium will each subscribe for 375 shares, an equity of £37,500 each. The amount of equity required has been determined in order to provide the company with sufficient funds and cash flow to cover the initial set-up costs and to provide for the payment of essential expenses for at least the first three months of trading. These arrangements will be subject to further review as part of the required financial and legal due-diligence.
- 2.2 The equity will be provided from the funds currently held in the consortium account as a result of the settlement achieved with the existing supplier in January 2014 of £363,600. The surplus funds of £138,600, and any further funds settled upon the exit from the current supplier will be returned to the consortium members in equal proportion.
- 2.3 The Business Plan appended to this report as Annex 2 demonstrates that the creation of the TRICS Company is a commercially viable proposition based upon prudent assumptions. The Shareholders can therefore have a reasonable expectation that the company will be able to declare a dividend within a short-timeframe.
- 2.4 As each shareholding authority will each hold a minority of the shares, the assets and associated liabilities of the TRICS Company will not be required to be consolidated in each council's balance sheet. However the company will be under local authority control and will therefore have to comply with the Local Government & Housing Act 1989 that requires that companies that are controlled or influenced by a Local Authority make a declaration statement of this in formal papers & documents.

3. Policy Framework

- 3.1 The database is used by the development industry to assess the impact of developments on the highway network. This is a key consideration in negotiating developer contribution for highway infrastructure provisions / improvements that are necessary to support growth as set out in "Bold Steps for Kent" and Corporate Objectives

4. The Report

4.1 Relevant History

- 4.1.1 The TRICS database was created in 1989 by a consortium of County Councils consisting of Hampshire, Dorset, East Sussex, Kent, Berkshire, Surrey and West Sussex. The database was originally named "Trip Rate Information Computer System" but quickly became known by its acronym. Following the departure of Berkshire County Council in 1996, the remaining six consortium members have continued to manage and grow the database.
- 4.1.2 The TRICS database is now the UK and Ireland's only nationally recognised system of trip generation analysis. The database is recognised in National Planning Policy and is cited by the Department of Transport in its good practice guide on transport assessments. The product is widely used by the transportation planning profession and has been given due weight by Inspectors at Planning Inquiries. The TRICS database is the only database of its kind that provides the data and analytical capability that covers the whole of the United Kingdom and is thought to be the largest database of its kind worldwide. The Consortium owns the Intellectual Property Rights (IPR) to the database, the registered trademark and associated website domain name.
- 4.1.3 The development of the database has been overseen by representatives of the Consortium who meet on a quarterly basis, the TRICS consortium management team. Each of the six Consortium representatives takes turns to undertake the role of Chair, Deputy and Secretary over a two year rolling programme. Each of the six representatives also takes on a lead role covering areas such as Treasurer, Data Collection, Event Management and System Development. Surrey County Council currently undertakes the role of Chair and Treasurer to the consortium. The consortium operates under an agreed Memorandum of Understanding.
- 4.1.4 The day to day operational management of the database is provided by an external supplier. The supplier is responsible for sales of the product to the user community (primarily from annual licence fees), maintenance of the database, management of the website providing the user interface, data collection activities and related third party contracts. The provider receives a management fee for this service and holds any surplus funds after the deduction of the fee on account on behalf of the consortium.
- 4.1.5 The current provider, JMP Consultants Ltd, a firm of transport consultants was awarded the contract to operate the database following a competitive public procurement exercise in 2012. JMP Consultants were the previous incumbent. The contract was awarded for a period of five years commencing on 1st April 2012.
- 4.1.6 During the due-diligence phase of contract award, JMP Consultants Ltd went into voluntary administration and was subsequently acquired by another company Volvere PLC in May 2013. The new business continues to operate as JMP Consultants Ltd with all the staff and business transferred to the new company.
- 4.1.7 The consortium sought legal advice which stated that the contract could not simply be novated across to the new owner. Based upon this advice the consortium requested that the new company continue to provide the contracted services on an interim basis pending a further procurement exercise. The new owners responded formally to the proposals of the consortium in July 2013 and requested changes to the terms of the contract and an increase in the management fee in return for a continuation of the service on an interim basis through to December 2014. The proposed revised arrangements were not acceptable to the consortium and further negotiations and

requests for clarification have been discussed, however the parties have failed to reach a mutually acceptable position.

4.1.8 Despite these difficulties the new JMP Company has worked on behalf of the Consortium to secure the release of funds owing to the Consortium from the administrators, KPMG. Following an extended period of negotiation between the consortium, JMP and the administrators, the cumulative funds owed to the date of administration of £363,600 were returned to the consortium on 28th January 2014. These funds are being held on behalf of the consortium on Surrey County Council's balance sheet in accordance with the current Treasurer responsibilities.

4.1.9 As a result of the failure to reach agreement and prior to undertaking a further procurement exercise, the consortium have taken the opportunity to consider the options available to secure the longer term future of the database taking into account three key priorities;

- Achieve a managed exit from the current provider,
- Maintain ownership of the database,
- Create a structure or delivery mechanism that is legally permissible to progress the commercial potential of the database.

4.2 *Local Authority Trading Company*

4.2.1 The Consortium's preferred option is to take full control of the database and exploit the commercial potential of the product by creating a Local Authority Trading Company (LATC) to be owned equally by the Consortium members.

4.2.2 The most appropriate legal structure under the Companies Act 2006 for the Consortium to achieve the stated key priorities is a company limited by shares. The company will be owned in equal proportion by the six consortium authorities with each taking an equal part in the decision-making and oversight of the company.

4.2.3 The Consortium will transfer the IPR, the trademark, brand identity and associated website domain names to the company, which will be known as "TRICS Consortium Ltd". Similar names already registered at Companies House prevent the company being incorporated as TRICS Limited.

4.2.4 Each consortium authority will have the option to appoint a director to the Board of the Company to represent their interest and will enter into a shareholders' agreement which will set out the appropriate terms between the authorities for managing the Company and will agree the Articles of Association for the Company. The key provisions for these contractual documents are outlined in the Memorandum of Terms document (Annex 1).

4.2.5 The TRICS Company will be responsible for the cost of preparing for the commencement of trade, including the proposed contractual documents and all other arrangements necessary for the creation of the company, including the appropriate arrangements in relation to the IPR.

4.2.6 The Business Plan appended to this report as Annex 2 demonstrates that the creation of the TRICS Company is a commercially viable proposition. Full and complete financial analysis will be subject to further due-diligence and in particular will rely upon the release of updated information from the current supplier arrangement. The initial financial analysis is based upon information currently available to the consortium. The estimated financial statements have been prepared using a prudent approach, assuming no growth in sales and are inclusive of contingency sums.

- 4.2.7 Each consortium authority will require approval for the creation of the Company in accordance with their own governance procedures. The decision will be made by each authority based upon shared documentation and information. This includes the business case provided in this Cabinet Report, the Memorandum of Terms listing the key clauses of the Shareholders Agreement and the outline of reserved matters to be included in the Articles of Association for the Company and the Business Plan for the Company.
- 4.2.8 The Kent County Council (KCC) Cabinet Member for Environment & Transport will be responsible for the consideration of decisions reserved for the shareholders as outlined in the Articles of Association for the Company and for ensuring compliance with the agreed terms of the Shareholders Agreement. The KCC Director of Highways, Transportation and Waste will be responsible for appointing a Director to the Company to represent KCC's interest.

4.3 *Legal Implications / Risk Management*

4.3.1 [Redacted]

[Redacted]

4.3.2 [Redacted]

4.3.4 The TRICS trademark, website domain name and associated media are currently registered by the existing supplier on behalf of the Consortium. The termination letter sent to the supplier will confirm the expectation that these will be transferred to the Company upon the termination of the contract.

4.3.5 The current supplier uses a customer database system which holds customer records, invoicing scheduling information, user names and password maintenance. This system is owned by the supplier and does not form part of the Consortium's assets. A replacement system will need to be purchased or built to continue to provide this essential functionally. The consortium will engage with an appropriate

provider to specify the system requirements and build the appropriate solution in preparation for commencement of trade. Due to the expected lead-time required, this process will commence as soon as the majority of the consortium councils have approved the proposal to create the company.

- 4.3.6 There is a risk that the current supplier does not promptly return the funds accrued and owed to the Consortium since the date of the last settlement in January 2014. These funds are due to each of the Consortium members and do not impact upon the creation of the Company.
 - 4.3.7 The success of the Company will rely heavily upon the accumulated knowledge of the current consortium management team. In addition new commercial skills will be required to supplement existing skills to ensure that the company is a success and is able to deliver the growth potential of the database. Each consortium authority will be responsible for determining their own directors appointment to represent their shareholding and due consideration will need to be given to achieve a balance between continuity of knowledge and the skills necessary to fulfil the duties of a director. Where practical the authorities may wish to work together in determining the appointment to achieve a good mix of skills on the Board of the Company.
 - 4.3.8 There is a high risk of challenge from the existing supplier, JMP Consultants Ltd on the grounds of breach of contract, a breach against the implied current contractual relationship or regarding the creation of the company. The consortium have a right to terminate the contract with 3 months' notice and legal advice is being taken by the consortium to structure the planned arrangements to minimise the risk.
 - 4.3.9 Each consortium authority will require approval for the creation of the company in accordance with their own governance procedures. There is a risk that not all authorities agree to proceed with the recommended option or that the terms of the Shareholder Agreement are not acceptable to all parties.
 - 4.3.10 The Shareholders Agreement ensures that all of the consortium authorities have an equal role in the decision-making required and that each representative Director is appointed with the same responsibilities and delegated authority.
 - 4.3.11 The agreed Memorandum of Understanding between the Consortium members contains provisions enabling a decision to be progressed with the agreement of the majority. If a member does not wish to proceed with the agreed decision, then that member may leave the consortium and is deemed to forgo their ownership rights to the database. This would also apply in respect of the recommendation to create a Company. The authorities that do not wish to participate in the creation of the company would receive their share of the all consortium funds due to date and would have no further involvement.
 - 4.3.12 The Company will be responsible for costs incurred in preparation for the commencement of trade. The Consortium have agreed that, should the proposal not gain the approval of the majority of authorities, that all abortive expenditure incurred will be funded from the balances held by Surrey County Council on behalf of the Consortium. This is in accordance with the existing practice of the consortium as established under the agreed Memorandum of Understanding.
- 4.4 The Director of Highways, Transportation and Waste will inherit the main delegations via the Officer Scheme of Delegation

5. Conclusions

The creation of a Local Authority Trading Company, to be owned by six local authorities, will ensure that the commercial activities of the Consortium are delivered in an appropriate manner and will enable the growth potential of the database to be fully exploited. Subject to the company being able to declare a dividend, the recommended delivery model will produce an ongoing income for the Council to support future service provision.

6. Recommendation(s):

1. The Cabinet Member for Environment and Transport approve the business case or the creation of a Local Authority Trading Company to be owned by Kent County Council and five other local authorities.
2. The Cabinet Member for Environment and Transport approve the governance arrangements for the Company, as set out in paragraphs 4.3.7 to 4.3.10, and as described in memorandum of terms form in a Shareholders Agreement between the local authorities and the Articles of Association for the company.
3. The Cabinet Member for Environment and Transport approve the provision of equity finance to the Company as described in paragraphs 2.1 to 2.2.
4. The Cabinet Member for Environment and Transport agree appropriate contractual arrangements on behalf of the County Council following completion of appropriate due diligence.
5. Authorise the Director of Highways, Transportation and Waste to appoint a LATC Director on behalf of KCC.

7. Background Documents

Annex 1 - Memorandum of Terms: Shareholders Agreement and Articles of Association

Annex 2 - Company Business Plan

8. Contact details:

Report Author:

Tim Read, Head of Transportation

03000 411662

Tim.read@kent.gov.uk

Relevant Director:

John Burr, Director of Highways, Transportation and Waste

03000 411626

John.Burr@kent.gov.uk