

ITEM 8c

Somerset Rivers Authority Board Paper

Title: Risk allocation for SRA commissioned activities

RECOMMENDATION

The SRA Board is asked to:

1. Endorse and approve the agreement between the SRA member organisations of an appropriate distribution, allocation and ownership of operational and financial risk to the entity(s) which are best placed to hold them and, as a result, mitigate these risks in the most appropriate way. This approach is to include formalisation of the agreed ownership of Risk through an amendment to the Strategic Grant Agreement.
2. Endorse and approve the allocation of the risks contained within Table 1 being held by the Accountable Body (currently Somerset County Council) and Table 2 being held by the Delivery Partner for the specific project.
3. Endorse and approve the approach to general risk management for all risks, primarily those contained within Table 3, which shall include the formation of an appropriately empowered Risk Management Group to collectively determine the apportionment of the remaining risks to be held by the members of the SRA, in the absence of the SRA having a legal identity in its own right. The Board is asked to recognise the immediacy of this requirement, in particular, and to sponsor the approach to ensure that the Risk Management Group is operational, and working to its remit, as soon as possible.

Purpose of the item:

This item is presented to the Board in order for it to be informed as to the nuance of the circumstances in relation to financial and operational risk, where these risks lie and agree a mechanism for agreeing how they should be owned and apportioned. This matter is presented at this time to assist in the continued progress of the Board's vision and commissioning of the programme of works and services in order to ensure that the available funding is spent in an appropriate and timely manner so as not to jeopardise current or future funding.

This paper seeks to explore the options available in formalising contractual arrangements with members of the Somerset Rivers Authority for the distribution, and

associated conditions, of (Local Enterprise Partnership and other) funding with a view to the Board endorsing a clear direction of travel in these matters to allow all member organisations to work in a clear and consistent way.

Background and context

At the SRA Board meeting in February (2017), Barry James presented a paper in relation to financial and operational Risk Management in which the Board was asked to note that a paper would be forthcoming which would explain these matters in more detail.

Throughout 2015 and 2016 Somerset County Council, acting in its position as the Accountable Body for all funding made available to the Somerset Rivers Authority (SRA), and in particular its dealings with the Local Enterprise Partnership Funding Body (LEP), has facilitated the contractual arrangements for the delivery of the SRA Board's agreed projects in relation to the SRA's objectives.

It has been an ongoing focus to ensure that the SRA objectives are able to be facilitated while, at the same time, finding a mechanism to appropriately allocate the risks which have been identified (or that may arise).

Up to this point, acting on behalf of the SRA and all of the Partners, Somerset County Council has needed to create bespoke Agreements dependant on the requirement and funding source, which are time consuming, inefficient and duplicative to do so, to ensure delivery of funded projects (be that LEP funding or another funding source for which Somerset County Council has accountability).

Initial progress in these discussions was slower than anticipated, and it was for this reason that the first of the Growth Deal funded projects was completed using bespoke suites of documents, sometimes including 'letters of comfort' to the Delivery Partners, though included within the letter of comfort was a provision for the Delivery Partners to continue to work on more sustainable and forward looking contractual working solution.

Following the aforementioned SRA Board meeting, contact was made with each of the Partner's Monitoring Officers in order to ascertain feedback from this group of important stakeholders. Following this period for feedback, helpful feedback was forthcoming and has helped to frame any concerns that members (through the Monitoring Officers) have.

The feedback provided context, as to the views of the member organisations, which made it clear that the concerns were primarily around those risks contained within Table 3 and centred around requiring assurance as to the apportionment mechanism that will be put in place to ensure that members are treated in a proportionate way. This papers seeks to move forward this matter by agreeing the allocation of the risks in Tables 1

and 2 and ensuring that there is a plan in place to formalise the governance required to allow the most appropriately positioned individuals in each member organisation to agree the apportionment of the risks outlined in Table 3, through the creation of a Risk Management Group. The Risk Management Group will also be empowered to deal with the allocation of new risks that may arise in the future.

Latest status

The objective has always been to make this process more efficient and agile for all member organisations, but with that desire there needs to be an active participation from everyone to do so. This paper is presented to ensure that a long term solution can be created and agreed that would adequately ensure that risks are correctly allocated and that external conditions (such as that of the LEP funding), for which all of these Projects are reliant upon, are met.

Somerset County Council is currently the vehicle by which LEP funds are to be distributed, ensuring compliance with regulatory standards and practices as well as the LEP terms and conditions which must be adhered to. As a result, Somerset County Council has sought advice from internal and external legal services who have advised that the most appropriate way to proceed, in these most unique circumstances, is via the creation and execution of a multi-lateral overarching agreement (to be signed by each partner). This document proposes that the most appropriate contractual mechanism by which to formalise the apportionment of financial, operational and partnership risks between Somerset County Council, Delivery Partners and the SRA is via an amendment to the Strategic Grant Agreement, which is reaching the point of sign off, currently, between all member organisations. In any event, the Strategic Grant Agreement will require sign off from all Partners and so this is an expedient mechanism to facilitate the documenting of risk holding between all.

The tables contained within Appendix A lists examples of risks which will need to be owned.

Somerset County Council, in its role as the Accountable Body and funding vessel, is best placed to own the risks identified where shown as such in Table 1 below, but it cannot singularly own all of the identified risks as this undermines the ethos of the SRA, and the actuality of how the risk will need to be owned, managed and influenced. Similarly, the Delivery Partner may not always be the most appropriately placed to accept and own a particular risk (those that the Delivery Partner will hold are contained within Table 2) – but the risks do need to be owned. This paper therefore proposes a three tier risk table that identifies and manages the ownership of the stated risks. This will mean that that:

- the County Council will own and be liable for the risks which are directly attributable to its role as the Accountable Body for the SRA. These will be immediately incorporated into the drafting of the Strategic Grant Agreement.
- the Delivery Partner will own and be liable for normal project risks (relating to such elements as relates to the timescale, delivery and cost of such projects). These will be immediately incorporated into the drafting of the Strategic Grant Agreement.
- the member organisations of the SRA will individually appoint the appropriately empowered representative(s) to sit on the Risk Management Group with the mandate to agree the joint ownership and apportionment of the risks contained within Table 3 (also to include anything that has not yet been identified within this paper) Such risks will be apportioned wholly between all member organisations of the SRA at the level that the Risk Management Group, following feedback to the Board, has determined to be appropriate.
- The Risk Management Group will be made up of such individuals from each member organisation who have the knowledge and seniority to effect the required agreement in this matter. Such individuals may be the member organisation's Section 151 Officer; Monitoring Officer; Risk or Insurance Specialists; and/or any other person(s) empowered with the appropriate (designated) authority. The Risk Management Group will assess the risks, the likely financial magnitude should the risk materialise, and ensure that there is multi-lateral agreement between the member organisations to hold the proportion of the risk that the Risk Management Group has collectively agreed. This will then be incorporated as an amendment into the Strategic Grant Agreement.

With this approach, the benefits of being able to wholly assign these risks will mean that, over all, the burden on each member is proportionate, and while the nature of working this way means that member organisations will have an accountability (under their status within the SRA) for elements of projects which they may not be directly involved in the delivery of, it will ensure that projects can progress within the overarching vision of the SRA having an overriding sense of ownership in the delivery of all the schemes which have been signed off and approved by the Board to collectively benefit the entire County of Somerset..

This ethos and buy in from the Board and all member organisations is vital to ensuring that the extent of LEP (and non-LEP) funding can be maximised and fully utilised in an efficient and streamlined way and this proposal is a vital step in ensuring that this happens as swiftly as possible.

Recommendation:

The SRA Board is asked to:

1. Endorse and approve the agreement between the SRA member organisations of an appropriate distribution, allocation and ownership of operational and financial risk to the entity(s) who are best placed to hold them and, as a result, mitigate these risks in the most appropriate way. This approach is to include formalisation of the agreed ownership of risk through an amendment to the Strategic Grant Agreement.
2. Endorse and approve the allocation of the risks contained within Table 1 being held by the Accountable Body (currently Somerset County Council) and Table 2 being held by the Delivery Partner for the specific project.
3. Endorse and approve the approach to general risk management for all risks, primarily those contained within Table 3, which shall include the formation of an appropriately empowered Risk Management Group to collectively determine the apportionment of the remaining risks to be held by the members of the SRA, in the absence of the SRA having a legal identity in its own right. The Board is asked to recognise the immediacy of this requirement, in particular, and to sponsor the approach to ensure that the Risk Management Group is operational, and working to its remit, as soon as possible.

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APPENDIX 1: RISK ALLOCATION TABLES

The following identified risks, as well as any required mitigation, are proposed to be owned by the Council in its role as the Accountable Body for the funding sources:

Table 1	Risk
1.1	Overpayment (by the LEP, or funding provider to which the Council is the Accountable Body) above the agreed total grant amount resulting in clawback of funding.
1.2	Mistaken payment (by the LEP, or funding provider to which the Council is the Accountable Body), outside of agreed total grant amount resulting in clawback of funding.
1.3	SCC attempts to assign the agreement with the LEP to another party (e.g. if another entity is going to take over as accountable body for the SRA, or if the SRA achieves its own legal personality) without informing the LEP.
1.4	SCC has inappropriately provided authorisation to use the funding
1.5	The SRA fails to make payments due (to the LEP or funding provider to which the Council is the Accountable Body), under the Agreement or undergoes a change of control

The following identified risks, as well as any required mitigation, will be owned by the Delivery Partner:

Table 2	Risk
2.1	Any information provided in or with an invoice for money payable under the LEP agreement (including supporting correspondence) is significantly incorrect or incomplete resulting in non-payment of a claim or claw back of funding
2.2	The Project not having been carried out: Materially in accordance with Consents or Statutory Requirements - In a timely, good and workmanlike manner (in so far as the requirements placed upon it to effectively manage any Contractors and/or carry out works in its own right to facilitate delivery) and in accordance with the Project Implementation Plan and the Monitoring and Evaluation Plan. Note that other risks and decisions relating to the project delivery (such as adverse ground conditions that could not have reasonably been foreseen) will not be held at the risk of the Delivery Partner., - In accordance with the obligations in the LEP agreement.
2.3	If the Delivery Partner uses the money for something else or something contrary to the act
2.4	The Project does not commence by the Project Longstop Commencement Date due to delays attributable to the Delivery Partner.
2.5	A Delivery Partner (i) Commits a Prohibited Act (an act of bribery/inducement/fraud etc) (ii) Acts dishonestly or negligently to the detriment of the Project Takes actions which bring into disrepute or are likely to adversely affect the name or reputation of SCC, SRA or the HotSW LEP.

The following have been extensively researched and external subject matter experts have also been consulted. Apportioning these risks appropriately between the (member organisations of the) SRA will be part of the initial mandate of the Risk Management Group. In researching this matter it has been confirmed by multiple sources (Towergate Insurance & Somerset County Council's in-house Insurance Service) that there is no identifiable insurance policy by which these risks can be mitigated) o

Table 3	Risk
3.1	The SRA uses the Funding for any purpose other than those set out in the Agreement or any purpose contrary to regulations under s.11 of the Local Government Act 2003
3.2	The Project does not commence by the Project Longstop Commencement Date by agreement between members of the SRA that the project should be delayed
3.3	The SRA ceases, or threatens to cease, carrying on its business/a substantial part of its business
3.4	The Delivery Partner incurs any liability to pay statutory compensation in connection with Grant Funded Work and is not able to fund such liability (in whole or in part) using Grant paid or payable to the Delivery Partner under the

Table 3	Risk
	terms of the Agreement and any relevant Grant Agreement. Such risks could be statutory compensation under the Water Resources Act 1991 or the Land Drainage Act 1991.
3.5	Any person other than the Parties brings any legal proceedings, action or claim (in whatever court, tribunal or other forum and including pursuant to any arbitration, adjudication or other alternative dispute resolution process) against one or both of the Parties in respect of any matter, event, decision, damage or loss arising out of or in connection with any Grant Funded Work.
3.6	LEP, or funding provider, clawback previous successful claims because the project is not delivered. This could result in either or both of a) the LEP outputs not being delivered and or b) the previous claims are not capitalisable. This then would mean the previous successful claims become ineligible in retrospect.
3.7	LEP do not pay out on a claim that SCC submit, for works that the Delivery Partner has paid for (whether or not SCC have already reimbursed the Delivery Partner), on the basis that that we believe the expenditure is eligible expenditure (e.g., but not exhaustive, legal fees, in project compensation, archaeological services advice etc.), but the LEP decide that it isn't eligible expenditure.

Other risks:

The risks identified in this Table 4 are 'outliers' that shall be included within the Strategic Grant Agreement in a miscellaneous category at the same time that those risks highlighted in Tables 1 and 2.

Table 4	Risk	Owner
4.1	The SRA makes an incorrect representation or warranty, or provides the LEP with materially misleading or inaccurate information	Whoever first provided the information either to the LEP or the SRA i.e. a 'down-the-line mechanism'
4.2	The SRA obtains funding from a third party for the Project without the LEP's consent	Whoever obtains the additional funding is at risk for the claw-back
4.3	The Delivery Partner incurs costs, expenses, loss or damage in connection with the carrying out of any Grant Funded Work the amount of which exceeds the amount of the Grant paid or payable to the Delivery Partner in respect of such Grant Funded Work under the terms of this Agreement and any relevant Grant Agreement (other than clause 5.5).	The Delivery Partner (unless there is evidence that the Delivery Partner has communicated these elements to the SRA and this has been signed off as part of the amended project forecast).