

REPORT TO: Mersey Gateway Executive Board

DATE: 29 November 2012

REPORTING OFFICER: Chief Executive

PORTFOLIO: Leader

SUBJECT: Governance Arrangements for Mersey Gateway

WARDS: All

1.0 PURPOSE OF THE REPORT

1.1 To outline proposals for the operational governance arrangements relating to the Mersey Gateway Project

2.0 RECOMMENDATION: That the Board approve in principle the governance arrangements as described in this paper and more particularly detailed in the draft Governance Agreement at Appendix 1 and delegate to the Chief Executive, in consultation with the Leader of the Council, the Operational Director, Legal and Democratic Services and the Operational Director, Finance, the finalisation of this Governance Agreement.

3.0 SUPPORTING INFORMATION

3.1 Introduction

The approaching appointment of a preferred bidder for the Mersey Gateway Bridge Project (the "Project") requires the creation of a body to operationally manage the Project over its lifetime (upwards of 60 years). The Mersey Gateway Crossings Board ("MGCB") will be a special purpose vehicle created for this and will act as agent for Halton Borough Council ("HBC"). Together with HBC, it will be a counterparty to both the Project Agreement (the contract for the construction and operation of the crossing) and the Demand Management Participation Agreement (the "DMPA") (the contract relating to the tolling).

3.2 Reasons for MGCB

MGCB is required in order to

- Comply with the DfT Funding Letter
- give transparency and ensure income streams and costs can be kept separate from the rest of the Council's day to day business
- allow suitably skilled and experienced persons to manage the day to day running of the project in an efficient and effective manner,

giving HBC, funders and stakeholders confidence prior to sign off and financial close (including discussions on procurement savings required by the DfT)

- participate in the Grant Review Procedures (initially after 5 years and then 3 yearly)
- provide a focal point for local and national stakeholder engagement

3.3 MGCB Aims and Objectives

MGCB will be a separate legal entity, independently staffed, thus ensuring it has expertise dedicated to managing the Project and its advisers and with the right skill sets and experience at appropriate stages over the life of the Project. It will operate as a commercial (though not for profit) organisation on an arms length basis with HBC. It will manage the Project as HBC's agent in an efficient and effective way to ensure at all times that it assists HBC in meeting HBC's financial and operational responsibilities pursuant to the terms of all the Project Documents.

In carrying out its obligations MGCB shall have regard to HBC's objectives which seek to increase the connectivity between Widnes and Runcorn and the Region and the resilience of the road network, improving the quality of life for people living and businesses located in Halton by encouraging growth and regeneration and applying the minimum tolls and road user charges possible to achieve this.

3.4 MGCB set up

MGCB will be a company limited by shares, 100% owned by HBC. The special purpose vehicle will be formed in accordance with HBC's constitution and any relevant rules for setting up subsidiaries. Changes to the way MGCB operates under its memorandum and articles may be proposed from time to time but any material changes or alterations to the Governance Agreement will in addition to agreement by HBC have to be agreed by DfT and - during the period of the Project Agreement and the DMPA - not without the consent of the counterparties to those agreements (the "Project Company" and the "DMPA Co").

Users of the Mersey Crossing will still identify HBC as the owner of the bridge.

MGCB will be HBC's agent, effectively providing the main link and focal point for local and national stakeholder engagement. To HBC, central government and the private sector contractor and its funders, MGCB will be an informed and expert client, managing the Project on behalf of HBC.

A detailed Governance Agreement will be entered into between HBC and MGCB once MGCB is incorporated towards the middle part of

2013. The Governance Agreement will set out all the governance arrangements put in place between HBC and MGCB.

A draft Governance Agreement is attached at Appendix 1.

3.5 Powers and Delegations

HBC may delegate to MGCB, to the extent required for the performance of MGCB's obligations under the Governance Agreement, the Project Agreement and the DMPA, relevant powers, right and obligations that HBC has under the River Mersey (Mersey Gateway Bridge) Order 2011. In practice this list of delegations is likely to be small.

In addition, to the extent required under the Project Agreement or the DMPA, HBC may delegate relevant powers to the Project Company or the DMPA Co. Should it be necessary and the counterparties to the various agreements change due to termination or assignment HBC will also agree that HBC may also delegate to any successor company. These proposed delegations (to the Project Company and DMPA Co) are the subject of current on going discussions and **do not** form part of this paper.

The powers granted under the Order include powers granted under the Transport Works Act, powers of compulsory purchase, powers to operate use and maintain the new crossing and the power to charge and collect tolls (and the power to enforce collection if the tolls are not paid). Some of these powers may be fully delegated and others may be subject to restrictions.

As sole shareholder of MGCB, HBC will retain control over decisions outside the delegations it may provide to MGCB.

The Governance Agreement will include a list of "Restricted Matters". These are items which for ease of reference are colour coded

- Red Matters which MGCB may not undertake without obtaining the consent of HBC,
- Orange which require consultation; and
- Green which are matters that MGCB may undertake but must notify HBC.

The (Red) Restricted Matters which require HBC consent include varying tolls by more than the pre-agreed parameters or providing advice to other toll operators for profit.

MGCB will be required to enter in to

- the Project Agreement with the Project Company
- the DMPA agreement with the DMPA Co [or his nominated supplier]
- The Governance Agreement with HBC

HBC will be required to give a counterparty guarantee to the Project Company and the DMPA Co so that should MGCB fail to comply with its obligations under either the Project Agreement or the DMPA, HBC would arrange for their performance.

Ultimately should MGCB continually breach the Project agreements HBC will be able to step in to these agreements and take over the role of MGCB.

3.6 Tolling and payment streams

MGCB will act as agent and not principal in matters relating to tolling of both the Mersey Gateway Bridge and Silver Jubilee Bridge. As HBC's agent, however it will be able to set and vary tolls, including providing for local discounts, within pre agreed parameters based on the levels shown under the Base Case financial model. (Note - The maximum amount MGCB can increase tolls would be by 20% more than the average weighted standard toll fares as shown in the Base Case financial model.)

MGCB may recommend the levels of tolls to be set outside these agreed parameters but these will be Restricted Matters and require consent from HBC.

HBC will have obligations to renew or replace any tolling or enforcement orders which expire, as required during the life of the Project for both the Mersey Crossing and the Silver Jubilee Bridge.

The DMPA Co will provide a detailed business plan as part of its bid. This plan will be enshrined in the DMPA and allow the DMPA Co to operate without interference provided the plan is being followed and the revenues are as anticipated (being between the Base Case and Band 1). Should traffic volumes and therefore toll income fall below this level, the DMPA Co will be the first to take action to rectify this including recommending to MGCB alternative marketing and promotion plans, economic discounts aimed at increasing revenues (such as discounts for frequent users or discounts at different times of the day) and if the other measures have failed to increase revenues, recommending the raising of tolls within the levels agreed (though not changing the local area discounts). Details of this are set out in the DMPA and also the commercial guidance provided to the bidders. If the DMPA Co actions should not be sufficient and revenues continue to drop below the Base Case, MGCB and ultimately HBC will have to take remedial action to ensure that the Project remains a financially viable one.

All income from tolls, monthly subscriptions and allowable charges will be paid in to an HBC account. DfT Funding and Prudential Borrowing will also be paid in to this or another designated HBC account. To the extent possible this income will be kept separate from other HBC

monies. From this account MGCB will identify the unitary charge payments to be made to the Project Company and the DMPA Co and payments to MGCB sufficient to pay agreed service fees due to itself and other costs such as staff or accommodation costs. Surplus income will be retained by HBC.

HBC shall provide support services to MGCB such as administrative staff providing payroll, IT support and seconded staff initially for the first 3 years. After that period MGCB may chose to go elsewhere if more competitive providers can be sourced. HBC shall be entitled to charge for any services it provides.

3.7 Shadow Running and TUPE

MGCB will not be formally incorporated until sometime between the announcement of Preferred Bidder and Financial Close but it will exist as a “Shadow Running” entity with an executive team drawn in part from the current Project team from the [end of] of 2012. Additional members of the team may be recruited or seconded as required. This team will be given authority, subject to terms agreed with HBC and the oversight arrangements described below, to appoint a Preferred Bidder, to negotiate the documents with the Preferred Bidder including the funding arrangements and to finalise the governance arrangements with HBC. The team will also take over responsibility for the work relating to the Land Assembly (the compulsory purchase of land required for the Project) and any Advance Works required prior to the Project Agreement being entered into using the staff currently employed on this.

At a point a few months before Financial Close recruitment for the permanent executives for MGCB will commence allowing sufficient time for them to be appointed and be in position prior to Financial Close.

It is not anticipated that TUPE will apply at the beginning of the Project as it is a new undertaking but on termination of the arrangements between HBC and MGCB for managing the Project if the Project remains ongoing TUPE may apply to staff who are still employed by MGCB. The Governance Agreement deals with this requiring MGCB to provide adequate information for HBC or any subsequent provider of services to be able to assess the staffing costs. MGCB and any of its subcontractors may not increase the staff costs in the 6 months prior to termination without the consent of HBC and also provide the usual sort of indemnities against any TUPE claims.

3.8 Oversight arrangements

Up to Financial Close

HBC, DfT and Treasury will all have oversight on the Project. Up to Financial Close the Officer Project Board (OPB) will continue to meet

on a periodic basis and receive regular reports on progress from MGCB.

In order for there to be sufficient advice and challenge to the MGCB project team (or the Shadow Running team) during receipt of bids, negotiations with the bidders and especially the preferred bidder, and the Treasury Approval Point, a subcommittee of the OPB will be formed in autumn 2012 with responsibility to meet as often as necessary to perform this role. The OPB subcommittee members will consist of David Parr, Stephen Dance and Nick Joyce with other members of OPB called upon as necessary.

From Financial Close

MGCB will operate the Project as envisaged under the delegations given by the Governance Agreement and the Project Agreement and DMPA. It will supervise the building of the crossing and once construction is completed the collection of the tolls. From Financial Close onwards MGCB will produce annually a business plan (the Annual Business Plan) showing the next year's projected income and expenditure in detail and the following 5 years income and expenditure with less detail. It will show clearly how the "Liquidity Reserve" required by the DfT funding letter will be established prior to the introduction of tolls.

MGCB will provide reports to HBC on construction progress and cost and other agreed KPIs on a six monthly basis. There will be trigger points for HBC to take action should certain KPI's not be met or if progress falls behind programme or any material breaches of the Governance Agreement or the Project Documents has occurred or is likely to occur.

From Financial Close the oversight arrangements required by DfT will be as set out in the DfT funding letter and MGCB will provide quarterly reports in the form required by DfT. The Availability Support Grant will be adjusted as set out in the DfT funding letter, first at the 5 year review point depending on the financial performance of the crossings, MGCB and the future agreed forecasts and thereafter adjusted every 3 years.

During operation, HBC will have increasing additional rights of audit, requirements for rectification plans and eventual step in or termination should if revenues are not in accordance with predicted levels or if MGCB fails repeatedly to meet KPIs or commits material breaches of the Governance Agreement that are not capable of rectification.

If at any point HBC believes that, on the information they have been given by MGCB, it would not be possible for MGCB to meet MGCB's objectives then HBC will advise MGCB of its concerns and MGCB will seek prompt resolution of these concerns.

3.9 Board of Directors for the Mersey Gateway Crossings Board

The Board of Directors of MGCB will be made up of the 3 members of the Executive team (the Chief Executive, the Finance Director and one other Director – these directors will not be councillors) and [4] non executives one of whom would be appointed as Chair. 2 of the non-executives would be councillors and 2 would be independent (including independent of HBC) The Chairmanship would rotate between the 2 non-executive groups on a 2 yearly basis with HBC having the right to appoint the first Chair. The non-executive positions will be unremunerated but there will be a meeting allowance.

All the non executive membership on the Board would be able to be flexed (each appointing running for a [3] year period) through the long lifetime of the project to ensure that there was suitable experience for oversight at different times (e.g. finance, construction or tolling) but all directors would need to meet a key set of competencies. The Board would meet monthly.

The Board could decide on whether to delegate business to subcommittees but it would need an Audit Committee which met quarterly. Chaired by a financially qualified director it would need to have 3 or 4 directors in total. The Board would also have an Appointments Committee made up of the non executive directors. HBC will make the first Board appointments including the Chief Executive but subsequently the Appointments Committee would approve the hiring of any subsequent Chief Executive and any new non-executive director. These appointments would also be subject to HBC approval.

The current Officer Project Board would remain in place until Financial Close. During the run up to Financial Close, the process to bring together the Board of Directors, including the appointment of the Chair and inviting applications for the positions of directors, would commence so that the Board is in place at Financial Close.

3.10 Stakeholders

Continued involvement of stakeholders other than HBC and Government is critical. HBC has already instigated extended consultation through The Mersey Gateway Group (“MGG”). This key group has come together as an informal group of potential user and local authority stakeholders including the three LEPs closest to Halton (Liverpool City Regions, Cheshire & Warrington and Greater Manchester). Subject to the agreement of MGG, it should be invited to supply a minimum of one non-executive director to the MGCB Board.

In addition MGCB should continue to consult with MGG particularly as the operational phase of the Project is reached. The Chief Executive of MGCB should meet with members of MGG on a [six] monthly basis.

Members of the current MGG include the adjacent local authorities, LEPs, Mersey Travel, Jaguar Landrover, Tesco's, Eddie Stobbart, Peel Holdings, LJLA and local chamber of small businesses.

4.0 POLICY IMPLICATIONS

- 4.1 The Project is a key priority for HBC which will deliver benefits locally and across the wider region.

5.0 OTHER IMPLICATIONS

- 5.1 All substantive implications are reported above and in the report annex.

6.0 IMPLICATIONS FOR THE COUNCIL'S PRIORITIES

6.1 Children and Young People in Halton

The Project provides an opportunity to improve accessibility to services, education and employment for all.

6.2 Employment, Learning and Skills in Halton

Over 500 construction jobs will be required for the Project and matters are in hand designed to ensure the local community has access to these job opportunities. In the longer term, several thousand jobs are forecast to be created in the sub-region due to the wider economic impact of the Project.

6.3 A Healthy Halton

The Project provides an opportunity to improve accessibility to services, education and employment for all, including improved cycling and walking facilities.

6.4 A Safer Halton

The Project will produce road safety benefits for road users including improved cycling and walking facilities.

6.5 Halton's Urban Renewal

The Project is a priority project in the Urban Renewal Programme.

7.0 RISK ANALYSIS

The creation of MGCB is specifically to ensure that the Project is managed by specialists who understand and are best placed to manage the risks associated with the Project.

8.0 EQUALITY AND DIVERSITY ISSUES

The Project provides an opportunity to improve accessibility to services, education and employment for all.

9.0 KEY DECISION

This report does not feature in the Forward Plan. Given that the recommendations, if approved will be Key Decisions, the following information is presented to the Board as context for its consideration of the recommendations:-

9.1 REASONS FOR DECISION

These are set out in paragraphs 3.1 and 3.2 of the report.

9.2 ALTERNATIVE OPTIONS CONSIDERED AND REJECTED

Direct management by the Council is precluded by the Government's consent letter which is the basis for the financial approval. The proposed format of the Crossings Board is as a company limited by shares. This is judged to be the most favourable arrangement from the Council's perspective. Alternatives examined and not put forward include a company limited by guarantee and a limited liability partnership.

9.3 IMPLEMENTATION DATE

Company is planned to be incorporated mid-2013. Of necessity it will operate in accountable shadow form before that.

10.0 LIST OF BACKGROUND PAPERS UNDER SECTION 100D OF THE LOCAL GOVERNMENT ACT 1972

None under the meaning of the Act.

Appendix 1
Governance Agreement