

**ESPO Consortium Agreement**  
**Key Provisions**

## 1. Introduction

This paper summarises the key provisions of the new ESPO Consortium Agreement and explains how the ESPO governance model has been significantly strengthened.

## 2. Consortium Agreement

The overall objective of the Agreement is for the Authorities to continue to constitute the joint committee (the 'Management Committee') in order to act as a central purchasing body for the purposes of the Public Contracts Regulations 2006 with effect from the Commencement Date for the Term on all of the terms and conditions set out in the Agreement.

The key elements of the Agreement are summarised as follows:

- The Agreement contains all of the overarching terms.
- The **Recitals** set out the overall objectives of, and obligations on, the Member Authorities including that each shall be open and trusting in their dealings with each other, make information available to each other (including the sharing of procurement strategies) and maximise the effectiveness of joint working (Recital C).
- Under Recital D Member Authorities recognise that they are engaged in what could be a long term arrangement in relation to ESPO which may need to adapt and develop over time.
- The Agreement comes into force on the date of execution, may be reviewed by the Authorities at any time due to any circumstances (clause 28), may not be assigned to others other than due to statutory reorganisation (clause 29) and may be varied at any time through the mechanism set out in clause 24.3.
- Leicestershire continues to act as **Servicing Authority**. Clause 11 covers its appointment, resignation and replacement in certain circumstances. Schedule 3 of the Agreement itemises the functions of the Servicing Authority.
- Details are provided for the holding of **assets** by the Servicing Authority on trust for all Authorities (clause 9) and financial arrangements (clause 10) these essentially being that ESPO shall be self-financing and that, save as provided in the Agreement, no capital contribution shall be demanded from Authorities.
- **Indemnities and Liabilities** are covered in clause 14. In short, subject to the Servicing Authority properly fulfilling its obligations under the Agreement, it shall be fully indemnified by the Authorities in equal shares in respect of any claim brought against it in respect of its functions exercised (clause 14.1).
- **Termination** of Membership is covered in clause 15. Any Authority may terminate its membership of the Management Committee giving at least *12 months'* prior written notice expiring at the end of a Financial Year (or such other period as may be agreed unanimously by the Authorities).

- The **effects of Termination** are covered in clause 16. The Management Committee shall meet within one month of notice of termination being issued by one of more Authorities to agree an Implementation Plan for dealing with the consequences including the allocation of assets, staff and contractual issues, liabilities and payments. This may also include the dissolution of the Management Committee (provided that it shall always continue where there are a minimum of two Authorities who wish to continue ESPO).
- The cost consequences of one or more Authorities giving notice of termination are covered in clause 16.2. Such Authority or Authorities shall be liable to the other Authorities for all directly attributable costs arising out of their termination (or where there is more than one, in equal shares).
- In the event that ESPO is **dissolved**, all costs and deficits shall be apportioned in equal shares between the Authorities and all assets distributed likewise (after first being used to defray costs and liabilities) (clause 16.5).
- The Agreement provides for **dispute resolution** escalation from good faith negotiations between authorised officers, to the Director of ESPO and officer groups and then to mediation. Only in circumstances whereby these procedures are exhausted may the dispute proceed to litigation through the court system (clause 18).
- Details are provided on the arrangements for ensuring **confidentiality** and dealing with Information Requests (clause 19) which requires general co-operation between the Authorities.
- Standard **boilerplate provisions** include No Agency or Partnership (clause 17), Notices (clause 21), Waiver (clause 22), Prevention of Corruption and Bribery (clause 23), Governing Law and Jurisdiction (clause 25), Rights of Third Parties (clause 26), Severance (clause 27), Health and Safety (clause 30), Costs of Preparing the Agreement (clause 31) and No Fettering (clause 32).

### 3. **Schedule 1 to the Consortium Agreement: ESPO Constitution**

The Constitution sets out the governance structure, the functions of the Management Committee, scheme of delegation, financial regulations and financial standing orders, contract procedure rules and procedural standing orders of the Management Committee.

The salient points to take from the Constitution are:

- The Management Committee has overall strategic responsibility for the management, oversight and direction of ESPO. The Management Committee is the sole decision maker on ESPO and may exercise those functions (as described in Section 2 of the Constitution) subject to any delegations as it sees fit (Paragraph 1.1).
- The delegations to the Finance and Audit Committee, Director of ESPO, Consortium Secretary and Consortium Treasurer are clearly itemised within the Constitution to ensure transparency and to provide the necessary comfort to Members that a sub-committee, the Director of ESPO or any officer cannot act beyond those delegations.

- The ESPO Financial Regulations and Contract Procedure Rules should provide the degree of scrutiny and probity that Member Authorities would expect to be observed in their transactions.
- The procedural standing orders of the Management Committee reflect those in place at LCC but only to the extent as relevant to the joint committee set-up.

#### **4. Schedule 2 to the Consortium Agreement: ESPO Services**

This Schedule details the agreed ESPO Services that will be provided through ESPO to the Member Authorities and Customers (where applicable).

The proposed new structure for ESPO Services is a 'service menu approach' which will enable the Member Authorities and Customers to draw on ESPO's support in a manner that suits them rather than a 'one size fits all' approach. Three service types are identified:

- **'Existing Core Services'** being those that are guaranteed to be provided to Member Authorities and Customers (and are currently available) comprising (1) Catalogue, (2) Energy, and (3) Frameworks;
- **'Additional ESPO Services'** being those services that may be provided to Member Authorities and Customers (and which are currently available) at an additional cost agreed by the commissioning Authority or Customer comprising (1) Ongoing Support and (2) Specific Professional Support.
- **'Developing ESPO Services'** being those services that are not currently available to Authorities or Customers but are recognised as being desirable to be provided through ESPO to them at a later date (subject to agreement on delivery and funding) comprising (1) Training and Development, (2) Market Intelligence, and (3) Benchmarking.

#### **5. Functions of the Servicing Authority (Schedule 3)**

The Agreement ensures that the relationship between Leicestershire (as Servicing Authority) and the other Member Authorities is transparent. Clause 11 covers the Appointment and Resignation of the Servicing Authority. Schedule 3 of the Consortium Agreement ('Functions of the Servicing Authority') provides a clear and transparent agreed list of functions to be performed by the Servicing Authority covering (1) Staff, (2) Support Services, (3) Contracts and Property, (4) Insurance, (5) Performance Monitoring, and (5) Service Delivery.

#### **6. New ESPO Governance Model**

By reflecting the views of the Management Committee and the Chief Officers' Group, and incorporating the agreed recommendations of the Deloitte Phase 3 Report on Review of Business Strategy, the ESPO governance model has been significantly strengthened to ensure that there is:

- A minimum layer of decision making.
- Improved transparency of decision making;

- Improved rigour of risk management and financial control;

Within the new ESPO Constitution, the governance model has been strengthened and now comprises four key roles:

- Management Committee, which has overall strategic responsibility for the management oversight and direction of ESPO and comprises political membership. The Functions of the Management Committee are clearly itemised in clause 2 of the Constitution.
- Chief Officers' Group, acting as a forum for executive officer views, advising the Management Committee on the performance of ESPO, business strategy and overseeing the implementation of Management Committee decisions (Appendix 2).
- ESPO Director, who has the operational day-to-day responsibility of ESPO and staff engaged under ESPO who is responsible for implementing Management Committee decisions. The ESPO Director is responsible to the Management Committee who shall have overall responsibility for overseeing and scrutinising his/her activities, and is responsible to the Chief Executive of the Servicing Authority in the context of that employer/employee relationship. The functions of, and delegations to, the ESPO Director are clearly itemised in the Constitution (Appendix 4) to, again, ensure transparency.
- Member Scrutiny/Review boards (the Finance and Audit Committee, the Terms of Reference for which are at Appendix 1 of the Constitution) and other officer stakeholder groups (such as the Senior Officer Group) which can be established or continued from existing arrangements and reported to the appropriate level of the governance model.

#### **A. Performance Management**

The new Constitution provides that the overall performance of ESPO shall be overseen by the Management Committee which shall direct what performance monitoring that it wants in place (Clause 2.1.1(b) of the Constitution and Clause 5 of Schedule 3 (Functions of the Servicing Authority). The Management Committee shall be supported in this regard by the Chief Officers' Group and Finance and Audit sub-committee.

The Servicing Authority, the Director of ESPO and the Consortium Officers are under a duty to provide such proactive assistance and information to the Management Committee to enable it to monitor ESPO's performance including taking action to improve the performance of ESPO (Clause 2.1.1(b) of the Constitution and Clause 5 of Schedule 3 (Functions of the Servicing Authority).

The Director of ESPO is responsible for the operational day to day performance of ESPO, achieving the outcomes agreed with Members.

## B. Risk Management Framework

The new Constitution provides that the Management Committee is ultimately responsible for ensuring the overall management of risk (para. 2.1 of the Constitution). The following documentation has also been developed to ensure solid legal and risk management foundations:

- Consortium Agreement, setting out the Member Authority obligations, accountability for liabilities and indemnities and the responsibilities of the Servicing Authority (including an auditing function).
- Constitution, which defines the powers of the Management Committee, the scheme of delegation for decision making and risk escalation, Contract Procedure Rules and Financial Standing Orders. Specifically, there is a duty on the Director of ESPO to *'ensure that business risk is appropriately managed and maintain an appropriate risk framework for ESPO with reporting mechanisms to the Management Committee'* (para. 13 of Appendix 4), a role for the Chief Officers' Group to *'deal with any issue of concern or risk to the ESPO business referred to it by the Director of ESPO'* (para 2.14 of Appendix 2 to the Constitution).
- The suite of ESPO documentation including the Risk Management Strategy, Business Plan (including risk register) Customer Access Agreement, Terms and Conditions /Framework Agreements for Suppliers, Statement of Works, Business Continuity Plan should help place where liability rests.

The Management Committee is supported in this regard by the Servicing Authority which is under a duty to put in place arrangements to ensure that ESPO has policies and procedures to comply with the requirements identified by the Management Committee as being essential to the effective delivery and management of ESPO, including risk management, emergency management and business continuity, statements of corporate governance, audit arrangements, contract procedure rules and other corporate governance policies and procedures as may be necessary (Clause 5, Schedule 3 of the Consortium Agreement, Functions of the Servicing Authority).

## C. Transparency of Decision Making

The following mechanisms are now in place to ensure that ESPO's operations are effectively governed and transparent:

- The functions and obligations of the Authorities in the Consortium Agreement;
- The functions of the Servicing Authority in Schedule 3 of the Agreement;
- The functions of the Management Committee, and Finance and Audit Sub-Committee in the Constitution;
- The Scheme of Delegation in the Constitution, including delegations to the Consortium Secretary, Consortium Treasurer and Director of ESPO; and
- The process to decide what ESPO Services are provided to the Member Authorities and Customers where applicable (Schedule 2 to the Agreement).

The high level roles and decision making responsibilities are now as follows:

- **Individual Member Authorities:** Agree major changes to the Consortium Agreement and decisions as to the effect of such changes on individual Member Authorities' future involvement.
- **Management Committee:** Minor amendments to the ESPO Partnership Agreement, Appointment of the ESPO Director, Business Strategy, Annual business plan, high risk contracts, ESPO's statement of accounts, withdrawals from the consortium and the termination of the consortium.
- **Chief Officers' Group:** Reviewing and assessing risks/decisions escalated by the Director of ESPO and ensuring that the Management Committee is adequately briefed.
- **Director of ESPO:** Operational management of the ESPO business.

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