

Public Report with Exempt Appendices  
Cabinet

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**Committee Name and Date of Committee Meeting**

Cabinet – 20 January 2020

**Report Title**

Yorkshire Purchasing Organisation - Investment Opportunity

**Is this a Key Decision and has it been included on the Forward Plan?**

Yes

**Strategic Director Approving Submission of the Report**

Judith Badger, Strategic Director of Finance and Customer Services

**Report Author(s)**

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**Ward(s) Affected**

Borough-Wide

**Report Summary**

Yorkshire Purchasing Organisation (YPO) has agreed to purchase Findel Education Ltd (subject to Competition and Markets Authority approval). YPO will fund the acquisition via a loan provided by Wakefield Council, underwritten by the 13 local government member authorities. As one of thirteen local government member authorities who wholly own YPO (a Founder Member), the Council needs to determine whether to enter into a Supplemental Agreement which underwrites, alongside other Founder Members, the loan for the acquisition and in doing so also secure its status as a Founder Member with preferential dividend returns.

The Supplemental Agreement safeguards the position of the Founder Members by effectively amending the Management Agreement in that any Authority serving notice to leave YPO during the ten year loan period accepts a contingent liability for an equal share of the loan outstanding at that time to be paid if YPO is later wound up and assets are insufficient to cover the liability. In return, the Supplemental Agreement ring fences an additional element of the dividends to be paid to Founder Members annually, over and above the existing dividend, providing that the venture is successful.

The other twelve Founder Member Authorities have formally approved the signing of the Supplemental Agreement and as such the decision of the YPO Management Committee to purchase Findel Education Ltd legally amends the Management Agreement to include all Founder Members in the financial risk of the acquisition. Should the Council not wish to share in underwriting the loan and the benefits from the investment, it may choose to revert to Associate Member status and still receive dividends but at a significantly reduced level.

### **Recommendations**

1. That Cabinet agrees that Rotherham MBC remain as a Founder Member of YPO, and in doing so agrees to underwrite the loan through entering into the Supplemental Agreement.
2. That Cabinet delegates authority to the Strategic Director of Finance and Customer Services to approve and sign the Supplemental Agreement set out at Appendix 4.

### **List of Appendices Included**

Appendix 1 Initial Equality Screening Assessment  
Appendix 2 Report to YPO Management Committee - 13<sup>th</sup> December, 2019  
Appendix 3 Business Case, Risk Report and Financial Model  
Appendix 4 Supplemental Agreement  
Appendix 5 Summary of Key Financial Implications

### **Background Papers**

No

### **Consideration by any other Council Committee, Scrutiny or Advisory Panel**

N/A

### **Council Approval Required**

No

### **Exempt from the Press and Public**

An exemption is sought for Appendices 2 to 5 under Paragraph 3 (Information relating to the financial or business affairs of any particular person (including the authority holding that information)) of Part I of Schedule 12A of the Local Government Act 1972 is requested, as this report contains detailed information in relation to a commercial investment.

It is considered that the public interest in maintaining the exemption would outweigh the public interest in disclosing the information because disclosure of financial information in relation to a commercial organisation could adversely affect its ability to trade effectively in a competitive environment.

## **Yorkshire Purchasing Organisation - Investment Opportunity**

### **1. Background**

- 1.1 The YPO was founded in 1974 and is a joint local government service for procurement of goods and services. The membership has changed over the years but currently comprises 13 'Founder Member' local authorities; Barnsley, Bolton, Bradford, Calderdale, Doncaster, Kirklees, Knowsley, North Yorkshire, Rotherham, St Helens, Wakefield, Wigan and York.

Wakefield Council currently acts as the 'Lead Authority' providing a range of services to YPO including employing YPO's staff, providing internal audit and s151 and Monitoring Officer functions.

- 1.2 The YPO does not have a legal personality separate to that of its Members. In practical terms this means for example that it cannot directly enter into contracts, employ staff or own property. It is subject to local government legislation in terms of its powers and governance on the same basis as its member local authorities.

The YPO is currently governed by a management agreement dated September 2011 which designates as Founder Members the 13 Authorities who participate in YPO under a Joint Committee arrangement established under sections 101 and 102 of the Local Government Act 1972 and The Local Authorities (Arrangements for the Discharge of Functions)(England) Regulations 2000. Under the Management Agreement each Founder Member has one vote at the Management Committee and these votes are of equal standing. No single local authority/Founder has a controlling interest. Founder members are entitled to dividends and to vote on how the dividends are allocated amongst YPO members. The Management Committee is supported by an advisory strategic officer group which includes relevant officers from each Founder Member Council.

- 1.3 In addition, there are two further categories of 'membership', 'Associate Membership' and 'Ordinary Membership'. Neither category has a substantive role in the governance but as customers of YPO are also eligible to a 'dividend' paid from any surplus accumulated by YPO in a financial year. Associate Members (and Founder Members) receive a dividend in cash. Ordinary members receive their dividend in the form of discounts on future purchases. In addition to achieving a range of non-financial benefits, the YPO has also been successful in delivering financial benefits to the Members and the dividend distribution for Rotherham Council for 2018 operating year was £437,659.

- 1.4 A combination of increasing operating costs and an increasingly competitive market environment has meant that the YPO has been considering for some time the opportunity for new business strategies and diversification in order to safeguard and promote its strategic objectives. The YPO Management Team considers that the majority of the opportunities to cut costs have now been taken. Some further investment in the business will be needed in the medium term and the growth into new markets, whilst positive, will be a protracted process. Thus, it will become increasingly difficult to keep dividends at current levels. This has led to the investment decision described more fully in the exempt appendices.

## **2. Key Issues**

- 2.1 During 2019 a proposed investment through the purchase of Findel Education Ltd was discussed with YPO Strategic Officers from each Founder Members including their s151 and Monitoring Officers (or their representatives). It was also considered by elected members at the YPO Management Committee who resolved to take the proposal to the next stage and commission external financial and legal advisors to undertake due diligence.
- 2.2 Following this due diligence being reported and considered, the Management Committee took the decision on 13<sup>th</sup> December 2019 to proceed with the acquisition. The report that was considered and approved on 13<sup>th</sup> December is attached as Appendix 2.
- 2.3 The agreed proposal is that the Lead Authority provides the funding and makes the acquisition on behalf of all of the Founder Members. Founder Members have been asked to stand behind the Lead Authority's position through a Supplemental Agreement which outlines the position should a Founder member wish to withdraw during the loan period, or the Joint Committee terminate with liabilities in excess of assets.
- 2.4 In order to safeguard the position of Founder Members who will be carrying the risk of the investment it is recommended that each Founder Member enter into a Supplemental Agreement, which amends the Management Agreement. This will require any Authority serving notice to leave YPO during the ten year loan period to accept a contingent liability for an equal share of the loan outstanding at that time (principal sum and interest) to be paid if YPO is later wound up and assets are insufficient to cover the liability.
- The Agreement ring fences an element of the dividends to be paid to Founder Members along with a specific requirement for the management committee to have regard to the risk carried by the Founder Members when setting the split of dividends between Founder and Associate Members. If all 13 Founder Members wish to proceed and accept this Supplemental Agreement the risk to each is a 1/13<sup>th</sup> share of the loan. Should any Founder Members choose to withdraw before the acquisition, it was suggested that as long as 10 Founder Members remain and enter into the Supplemental Agreement, the rise in risk level is acceptable given the potential benefits.
- 2.5 At the time of writing this report the other 12 of the 13 Founder Members have considered and approved the acquisition and agreed to enter into the Supplemental Agreement subject to due diligence. Due diligence was concluded in early December and relevant officers met with the external advisors to receive the outcome. The 12 councils have subsequently confirmed that they wish to proceed having considered the outcome from the due diligence.

- 2.6 The YPO Management Committee met on 13<sup>th</sup> December 2019 to consider whether to enter into the investment and agreed to do so. Rotherham now needs to decide whether to remain as a Founder Member of YPO carrying both risk and reward of the investment or whether to withdraw as a Founder Member to avoid the risk but also forgo the potential reward of ring fenced dividend distributions in recognition of the risk taken and the other benefits of Founder Member status through the existing enhanced dividend distributions.

### **3. Options considered and recommended proposal**

- 3.1 The Council may remain as a Founder Member of YPO by agreeing to underwrite the risk of the investment through signing the Supplemental Agreement. As such it will continue to benefit from the enhanced level of annual distribution of dividends enjoyed by Founder Members and will also benefit from an additional share of the further dividends expected to result from the investment.
- 3.2 The Council may withdraw from being a Founder Member and revert to Associate Member status. This would mean it is not liable for a share of the outstanding loan nor would it receive any additional dividends from the investment. It would also lose the enhanced current annual dividend distribution enjoyed by Founder members.

### **4. Consultation on proposal**

- 4.1 Discussion on the investment proposal and the proposal to enter into a Supplemental Agreement has taken place with the YPO Strategic Officers Group. Also, the Independent Director, who is the Chief Financial Officer of Asda is supportive of the investment. On 13<sup>th</sup> December 2019 the YPO Management Committee resolved to proceed with the investment.

### **5. Timetable and Accountability for Implementing this Decision**

- 5.1 The decision has been taken by the Management Committee to progress with the investment subject to Competition and Markets Authority approval. It is likely to take a number of weeks to receive a response.
- 5.2 There is likely to be a period of at least 2 months between exchange and completion of contracts.
- 5.3 The transition and integration of Findel Education Ltd into YPO is planned to take place over a 2 year period.

### **6. Financial and Procurement Advice and Implications**

- 6.1 The investment is set out in detail in the confidential appendices to this report. The strategic business case (Appendix 3), which models the forecast income and expenditure over a ten-year period, outlines potentially significant financial and non-financial benefits to the YPO, its customers, the Founder Members and the wider public sector.

- 6.2 External financial advice was commissioned to undertake due diligence which was completed in early December. There is a financial risk arising from the investment. To help mitigate this the business case has been based on a prudent set of assumptions and has been risk-assessed and stress-tested to financially model different scenarios. In addition, there will be a dedicated project management resource deployed to support transitional arrangements and strengthened senior management capacity at board level. A full risk assessment and potential mitigation is set out within Appendix 3.
- 6.3 Wakefield Council, as Lead Authority, will provide the funding and will carry out the transaction on behalf of all of the founder Members. Founder Members are being asked to stand behind the Lead Authority's position through a Supplemental Agreement to the Management Agreement (Appendix 4) which outlines the position should a Founder Member wish to withdraw during the loan period or the Joint Committee terminates with liabilities in excess of assets.
- 6.4 The dividend distribution for Rotherham Council for 2018 operating year was £437,659. Whilst the dividend varies from year to year it is consistently in the region of £400k. Should the Council not wish to underwrite the loan and choose to withdraw as a Founder Member it will forgo the current value of dividend distribution which supports the Council's budget and MTFS. The key financial implications are set out in Appendix 5.

## **7. Legal Advice and Implications**

- 7.1 YPO is a public sector procurement organisation operated through a Joint Committee structure. The approval of the proposed transaction has been taken at YPO Management Committee in light of decisions on matters set out in this report. External legal advice has been taken on the powers of Founder Members to undertake this investment.
- 7.2 The business of the YPO primarily relies on the powers under s111 Local Government Act 1972 and the Local Authority (Goods and Services) Act 1970. However, where YPO wishes to trade with organisations that are not covered by such legislation it can rely on the General Powers of Competence ("GPOC") under Section 1 of the Localism Act 2011. Section 4 of the Localism Act 2011 enables the local authority to do for a commercial purpose anything that it is empowered to do under GPOC. The section 4 trading powers prescribe which company structures may be used. In short, given the trading mix of the target company and commercial scale the more resilient basis of reliance in powers is GPOC and the acquisition of the shares in the existing target company satisfies the requirement that such powers be exercised through a company.

7.3 Additional reliance can be placed on Section 95 of the Local Government Act 2003 that enables relevant authorities “to do for a commercial purpose anything which they are authorised to do for the purpose of carrying on any of their ordinary functions” i.e. anything which they are empowered to do in legislation. The section 95 power can be limited by order and authorities exercising it must have regard to the guidance issued by the Secretary of State. To adhere to the requirements under this legislation the local authority must prepare a business case supporting the exercise of the section 95 power, which the authority must approve (Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009). In the event that YPO Proceed with the transaction and subsequently trade through a company for a period of time, then the business case appended to this report satisfies the requirements of the Local Government Power to Trade Order for Wakefield as the Lead Authority holding the assets in Trust.

7.4 Once acquired, YPO can reorganise the business of the target to achieve the most cost effective delivery of service which will allow trading with designated public bodies to be done other than through the Company.

## **8. Human Resources Advice and Implications**

8.1 None

## **9. Implications for Children and Young People and Vulnerable Adults**

9.1 None

## **10. Equalities and Human Rights Advice and Implications**

10.1 None

## **11. Implications for Ward Priorities**

11.1 None

## **12. Implications for Partners**

12.1 None

## **13. Risks and Mitigation**

13.1. External financial advice was commissioned to undertake due diligence which was completed in early December. There is a financial risk arising from the investment.

13.2 To help mitigate this the business case has been based on a prudent set of assumptions and has been risk-assessed and stress-tested to financially model different scenarios. In addition, there will be a dedicated project management resource deployed to support transitional arrangements and strengthened senior management capacity at board level. A full risk assessment and potential mitigation is set out in the appendices.

**14. Accountable Officers**

Judith Badger, Strategic Director Finance and Customer Services

Approvals obtained on behalf of Statutory Officers:-

	<b>Named Officer</b>	<b>Date</b>
Chief Executive	Sharon Kemp	06/01/20
Strategic Director, Finance & Customer Services (S.151 Officer)	Judith Badger	03/01/20
Head of Legal Services (Monitoring Officer)	Bal Nahal	03/01/20

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