

## Community Right to Challenge

### Report of the Clerk and Monitoring Officer

For further information about this report please contact the Clerk and Monitoring Officer, Jonathan Eatough on 01952 383200.

#### 1 Purpose of Report

This report recommends the arrangements, which the Fire Authority should adopt, in order to operate the new Community Right to Challenge.

#### 2 Recommendations

The Fire Authority is asked to agree:

- a) To appoint the Monitoring Officer to be the proper officer for the receipt, validation and acceptance or rejection of expressions of interest;
- b) That the proper officer bring forward for approval a timetable for the acceptance or rejection of expressions of interest;
- c) That the proper officer be authorised to determine whether grounds exist to reject an expression of interest, and after agreement with the Chief Fire Officer or Deputy Chief Fire Officer, subject to prior consultation with the Chair of the Authority, to accept or reject an expression of interest on behalf of the Authority;
- d) That the proper officer report quarterly to the Authority on any expressions of interest received;
- e) To appoint the Deputy Monitoring Officer to be a deputy for the proper officer to act in situation where the proper officer is absent or if a conflict situation exists between the proper officer and the expression of interest submitted;
- f) That discussion take place with the authorities with whom the Authority has joint arrangements with decisions about how these are to be handled;

- g) That the Authority would designate a Procurement Officer to act as the project lead for any procurement exercises;
- h) That the Procurement Officer be instructed to propose to the Authority timescales for the period between acceptance of an expression of interest and start of the procurement exercise;
- i) That the Proper Officer (or Deputy) be responsible for managing each procurement exercise, subject to agreement of the specification for the service and the evaluation of tenders being joint with the Chief Fire Officer or Deputy Chief Fire Officer;
- j) That the Procurement Officer be instructed, after consultation with appropriate officers, to propose a timetable of periods within which expressions of interest for specified services will be received;
- k) That where the Chief Fire Officer or Deputy Chief Fire Officer, after consultation with the Chair, decides that an in-house bid will be prepared and submitted, he /she must put in place arrangements for the identification of separate commissioning and bid preparation teams; and
- l) That the Authority take a policy decision on whether it wishes to support community and voluntary participation, and/or staff mutual participation, in the provision of services, once an expression of interest has been submitted.

### **3 Background**

From 27 June 2012, the Localism Act 2011 introduced a right for parish councils, community and voluntary bodies, charitable trusts and two or more local authority employees to submit an expression of interest in taking over the provision of a service on behalf of the authority. Where a valid expression of interest is received, the authority is required to undertake a procurement exercise for that service, which may lead to the authority awarding a contract for the provision of that service. This report recommends the arrangements which the Fire Authority should adopt in order to operate the new Community Right to Challenge.

### **4 Who can submit an Expression of Interest?**

An expression of interest can be submitted by a “relevant body”, comprising:

- A Parish Council, but not limited to services or facilities within its area;
- A Voluntary Body – a body, other than a local authority, the activities of which are not carried on for a profit;
- A Community Body – a body, other than a local authority, which carries on activities primarily for the benefit of the community;
- A body or trust established for charitable purposes;

- Two or more employees of the authority, whether or not they have formed themselves into a body for this purpose; or
- Such other persons or bodies as may be specified by the Secretary of State by regulations. To date, no such regulations have been made.

There is no requirement for a Voluntary or Community Body to have any local connection and any of these bodies can submit an expression of interest in partnership with any other organisation, including a commercial organisation, or propose to sub-contract the work to a commercial organisation. Providing that this is done, there is no requirement for the relevant body to undertake the majority, or any particular share, of the work.

## **5 To What Services can an Expression of Interest Relate?**

The expression of interest must relate to the provision, or assisting in the provision, of a “relevant service”, which means any service, which is currently provided by, or on behalf of, the authority. The following services are, however, “excluded services”, which cannot be the subject of an expression of interest:

- Services provided in partnership with National Health Service (NHS) bodies, or by an NHS body on behalf of the authority;
- Children’s centre services commissioned with the NHS;
- A service provided to a named person with complex individual health or social care needs; or
- A service, which includes the exercise of a statutory power, which cannot be delegated. The setting of Council Tax or the determination of a planning application, for example, are not legally capable of being undertaken by anyone other than the local authority and cannot, therefore, be the subject of an expression of interest.

## **6 The Expression of Interest**

The Expression of Interest must be in writing and meet certain requirements, which include the provision of:

- Information about the financial resources of the body, which is submitting the expression of interest;
- Evidence that demonstrates that, by the time of any procurement exercise, the body submitting the expression of interest will be capable of providing, or assisting in providing, the relevant service. This is particularly important, when dealing with an emergent staff mutual or voluntary body, which may not be fully operational at the date of submitting an expression of interest;
- Information about the relevant service sufficient to identify it and the geographical area, to which the expression of interest relates;
- Information about the outcomes to be achieved by the body or, where appropriate, the consortium, of which it is a part, in providing or assisting in the provision of the relevant service, in particular:

- How the provision or assistance will promote or improve the social, economic or environmental well-being of the authority's area; and
- How it will meet the needs of the users of the service; and
- Where the body consists of employees of the authority, details of how that body proposes to engage other employees of the authority, who are affected by the expression of interest.

Under Section 82 of the Act, the authority may specify periods when expressions of interest may be submitted, and must publish details of any specified periods. If no period is specified, expressions of interest may be submitted by relevant bodies at any time.

## **7 Validation of Expressions of Interest**

The first stages comprise the validation and acceptance or rejection of each expression of interests.

### **7.1 What happens when an expression of interest is received?**

When an expression of interest is received, the authority needs to check that it is submitted by a "relevant body" for a "relevant service", which is not an "excluded service". If it fails to meet these requirements, the authority notifies the person, who submitted the expression of interest, that it is not a valid expression of interest, but need take no further action.

### **7.2 Can the authority reject a valid expression of interest?**

There are 10 grounds, on which the authority may reject a valid expression of interest:

- The expression of interest does not meet the statutory requirements, because it is not from a relevant body or is not for a relevant service;
- The supporting information is inadequate or incorrect;
- Any member of the body making the bid, or of their consortium, is not suitable to provide the service. This would cover absence of a necessary qualification, or past conduct;
- The authority has already taken a formal decision to cease to provide the service. An expression of interest cannot, therefore, be used as a means to challenge an authority's decision to close a facility or cease a service;
- Taking this service in isolation would result in a loss of integration with NHS services to the detriment of users of the integrated service;
- The service is already the subject of a procurement exercise;
- The authority is already in negotiations in writing with a third party for the provision of the service;

- The authority has already published its intention to consider the provision of the service by a body to be set up by two or more employees;
- The expression of interest is vexatious or frivolous;
- The acceptance of the expression of interest is likely to lead to a breach of law or statutory duty. This would cover an expression of interest, which would require delegation of statutory powers, which cannot be delegated, or where it would lead to a breach of the authority's duty to secure best value, for example by causing greater cost by the break-up of shared service arrangement or where it would lead to a negative impact on the strategic emergency cover provided for the whole of the Shropshire and Telford & Wrekin areas.

In addition, the Localism Act provides that an authority may define services and set periods, during which expressions of interest may be submitted for those services, and may then refuse to consider an expression of interest, which is submitted at the wrong time.

The Act also requires the authority, in considering an expression of interest, to consider whether the acceptance of the expression of interest would promote or improve the social, economic or environmental well-being of the area, but this does not form a separate ground for rejecting an expression of interest.

### **7.3 Acceptance or rejection of an expression of interest**

Once an expression of interest has been validated, it is necessary for the proper officer to conduct a review to determine whether it falls within any of these criteria. This is partly a matter of fact and law, and partly a question of collecting information from the officer currently responsible for the running of the service. It is also a question of policy, because, where an expression of interest falls within one of these grounds for rejection, the authority still has a discretion and may decide to accept the expression of interest anyway. It must then notify the persons or body, who submitted the expression of interest, of its decision and of the reasons for that decision.

If the authority were to act unreasonably in rejecting an expression of interest, that decision would be open to judicial review.

### **7.4 Shared services**

Particular attention needs to be given to how the authority will deal with expressions of interest for services, which are provided on a joint arrangement with other authorities. Where this would result in the loss of efficiencies, it may justify rejection of the expression of interest on best value grounds. It is possible, however, that expressions of interest for the relevant parts of the service have been submitted to each participating authority, so there may be a need to co-ordinate with the other participating authorities.

## **7.5 Timescale**

The authority must set and publish the maximum period, which will elapse between receipt of an expression of interest and the authority notifying the body, which submitted the expression of interest, of its acceptance or rejection of that expression of interest, but may set different maximum periods for different cases.

## **8 Procurement Exercise**

Once a valid expression of interest has been accepted, the authority moves into procurement mode, and must conduct an appropriate procurement exercise.

### **8.1 The Scale of the Procurement Exercise**

The scale of the procurement exercise will be dictated by the nature and value of the service concerned. A Part A service, which exceeds the procurement thresholds (currently £173,934), will require a formal OJEU procurement under the Public Contracts Regulations. For Part B services, the Regulations still apply but prescribe lower levels of formality. The Fire Authority will also need to comply with its own Standing Orders relating to Contracts.

### **8.2 Timescale**

The authority is required to adopt and publish minimum and maximum periods between the acceptance of the expression of interest and the start of the procurement exercise, but may set different periods for different cases having regard to:

- a) The need to provide employees of the relevant authority, and other relevant bodies, with a fair, reasonable and realisable opportunity to bid in the procurement exercise for the service;
- b) The nature, scale and complexity of the service being procured. For example, it may take relevant bodies longer to bid for larger, complex services than smaller more straightforward ones; and
- c) The timescale of any existing commissioning cycle relevant to the service being procured, or any of other relevant authority processes. These may include the Authority's decision-making or budget-setting processes.

### **8.3 Specifying the service**

The range of the service (in terms of the service and the geographical area) to be subject to a procurement exercise will be set by the expression of interest. The authority may only vary the range of services with the agreement of the body or persons, who submitted it, but the specification, to which the service is to be provided, the contract terms and conditions, and the criteria for evaluation of tenders are for the authority to determine.

## **8.4 Tenders**

Although an expression of interest may be submitted by a genuine community or voluntary organisation, and the authority may wish to encourage such community involvement in service provision, once the authority goes out to open tender, it cannot prevent tenders being submitted by purely commercial organisations, and will be required to evaluate all tenders received on the same evaluation criteria.

## **8.5 In-house bids**

There is nothing in the legislation to prevent the authority submitting an in-house “tender” for the provision of the service, on the basis of its own employees. However, the draft statutory guidance warns against relevant authorities considering in-house bids in community right to challenge procurement exercises. Paragraph 9.5 of the guidance states:

“It is unlikely to be possible for an in-house team to submit a formal bid as part of a tender process because an in-house team will not be a separate legal entity that could submit a tender and contract with the relevant authority. An in-house team may in certain situations submit a proposal that could be considered alongside the tender process, but evaluating an in-house bid that makes use of authority premises, assets and employees against tenders submitted from external organisations is extremely difficult and any attempt to do so risks being challenged by an unsuccessful provider. As the community right to challenge requires that acceptance of an expression of interest will lead to a procurement exercise, relevant authorities should consider very carefully the consequences of considering an in-house bid at that time”.

## **8.6 Timescale**

The authority must set a minimum and a maximum time from the acceptance of an expression of interest to the start of the procurement exercise. This allows time for the preparation of a specification for the service and for the invitation to bidders. Where the expression of interest comes from two or more staff, it could allow time for them to form a staff mutual as a separate legal entity to prepare and submit the bid.

## **8.7 Acceptance of tenders**

The Fire Authority’s Standing Orders relating to Contracts set out requirements relating to the acceptance of a tender.

This phase of the process is essentially a procurement exercise, so it requires that there be a Procurement Officer designated to run the process, but with the appropriate officer taking a leading role in agreeing the service specification and in the evaluation of tenders, with appropriate legal, financial, human resources and other support.

## **9 Encouraging Voluntary Participation in Service Provision**

### **9.1 Supporting community and voluntary bodies**

As set out above, once the statutory process is activated, there is no guarantee that the community or voluntary organisation, which initiated the process, will be successful in the procurement exercise. Indeed, such a local community or voluntary body will normally be at a considerable disadvantage by reason of its smaller size, limited track record of service provision and lack of funds for bid preparation. The formal procurement process also leads to a formality of service contract, which may work against a genuine partnership for local service delivery.

If the authority wishes to support community involvement in service provision, it may be preferable to encourage direct negotiation with community and voluntary bodies, instead of a formal procurement exercise. For example, the authority has the ability to enter an agency arrangement with a Parish Council, or to grant a lease of local community facilities to such a community or voluntary body, and to enter a grant agreement, without having to undertake a competitive procurement. This will only be possible where the grant agreement does no more than cover costs, and where there is no developed commercial market for the services. It must still be satisfied that such an arrangement provides best value for the authority, but such a voluntary arrangement can avoid the costs to the authority and to bidders of a formal competitive procurement.

### **9.2 Encouraging the development of staff mutuals**

Equally, the authority can provide support for staff to establish mutuals (co-operatives and other employee-owned bodies) and to take on service provision.

The authority can, therefore, agree to allow staff time within their employment to prepare such proposals and can provide financial assistance for consultancy in the preparation of a business case, the establishment of the mutual as a separate legal entity and dealing with the consequential issues, such as staff transfer and leasing of premises.

Again, there is scope for a lease of premises and a grant agreement in appropriate cases without competitive procurement, where the authority is satisfied that this provides best value, where the grant agreement is for no more than costs and there is not a developed commercial market for the services.

Once the mutual is in existence and preparing its bid in competition, further assistance would constitute State Aid.

## **10 Financial Implications**

There are no financial implications arising directly from this report.



## **11 Legal Comment**

Legal comment is provided within the body of the report.

## **12 Equality Impact Assessment**

This report sets out the arrangements, which the Fire Authority should adopt, in order to operate the new Community Right to Challenge. As such, it does not have a differential impact upon specific groups and an initial Equality Impact Assessment is not, therefore, required.

## **13 Appendices**

There are no appendices attached to this report.

## **14 Background Papers**

Sections 81 - 86 of the Localism Act 2011

The Community Right to Challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012 (SI 2012/1313), available at

<http://www.legislation.gov.uk/uksi/2012/1313/contents/made>

The Community Right to Challenge (Fire Services and Rejection of Expressions of Interest) (England) Regulations 2012 (SI 2012/1647), available at

<http://www.legislation.gov.uk/uksi/2012/1647/contents/made>

DCLG Statutory Guidance, available at

<http://www.communities.gov.uk/publications/communities/righttochallengestatguide>