

EAST HERTS COUNCIL

EXECUTIVE - 4 DECEMBER 2012

REPORT BY LEADER OF THE COUNCIL

COMMUNITY RIGHT TO CHALLENGE - GOVERNANCE ISSUES

WARD(S) AFFECTED: ALL

Purpose/Summary of Report

- This report recommends the arrangements which the Council should adopt in order to operate the new Community Right to Challenge.

<u>RECOMMENDATIONS FOR EXECUTIVE</u> That:	
(A)	the Council appoint the Director of Neighbourhood Services to be the proper officer for the receipt, validation and acceptance or rejection of expressions of interest;
(B)	the proper officer bring forward for approval by the Executive a timetable for the acceptance or rejection of expressions of interest;
(C)	the proper officer be authorised, after consultation with appropriate Heads of Service, to determine whether grounds exist to reject an expression of interest, and, subject to prior consultation with the appropriate Portfolio Holder, to accept or reject an expression of interest on behalf of the Council, with an instruction to refer sensitive expressions of interest to the Executive for consideration;
(D)	the proper officer report quarterly to the Executive on any expressions of interest received;
(E)	the Chief Executive Officer is appointed deputy for the proper officer to act in the situation where the proper officer is absent or if a conflict situation exists between the proper officer and the expression of interest submitted;

(F)	discussions take place with the authorities with whom the Council has joint arrangements about how expressions of interest are to be handled;
(G)	the Executive designate a procurement officer to act as the project lead for any procurement exercises;
(H)	the procurement officer be instructed to propose to the Executive timescales for the period between acceptance of an expression of interest and start of the procurement exercise;
(I)	the proper officer (or deputy) be responsible for managing each procurement exercise, subject to the settlement of the specification for the service and the evaluation of tenders being joint with the appropriate Head of Service or Director;
(J)	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)	where a Head of Service, after consultation with the relevant Portfolio Holder, decides that an in-house bid will be prepared and submitted, he must agree with his Director arrangements for the identification of separate commissioning and bid preparation teams;
(L)	the Executive take a policy decision on whether it wishes to encourage community and voluntary participation, and/or staff mutual participation, in the provision of services; and
(M)	if so, that officers be instructed to report to the Executive on how such participation may be encouraged.

1.0 Background

1.1 From 27th June 2012, the Localism Act 2011 introduced a right for Parish Councils, community and voluntary bodies, charitable trusts and 2 or more local Council employees to submit an Expression of Interest in taking over the provision of a service on behalf of the Council. Where a valid expression of interest is

received, the Council is required to undertake a procurement exercise for that service, which may lead to the Council awarding a contract for the provision of that service. This report recommends the arrangements which the Council should adopt in order to operate the new Community Right to Challenge. This is an Executive Function.

2.0 Report

2.1 Who can submit an Expression of Interest?

2.1.1 An expression of interests can be submitted by a “relevant body”, comprising –

- (a) A Parish Council, but not limited to services or facilities within its area;
- (b) A Voluntary Body – a body, other than a local Council, the activities of which are not carried on for a profit;
- (c) A Community Body – a body, other than a local Council, which carries on activities primarily for the benefit of the community;
- (d) A body or trust established for charitable purposes;
- (e) 2 or more employees of the Council, whether or not they have formed themselves into a body for this purpose, or
- (f) Such other persons or bodies as may be specified by the Secretary of State by regulations.

2.1.2 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 of, or any particular share of the work.

3.0 What services can an Expression of Interest relate to?

3.1 The expression of interest must relate to the provision of, or assisting in the provision of, a “relevant service”, which means any service which is currently provided by or on behalf of the

Council. However, the following services are “excluded services” which cannot be the subject of an expression of interest –

- (a) Services provided in partnership with NHS bodies, or by an NHS body on behalf of the Council;
- (b) A service provided to a named person with complex individual health or social care needs; or
- (c) A service which includes the exercise of a statutory power which cannot be delegated. So, the setting of Council Tax or the determination of a planning application is not legally capable of being undertaken by anyone other than the local Council, and so cannot be the subject of an expression of interest.

3.2 An expression of interest can relate to services such as management and maintenance of playing fields or parks, refuse collection and re-cycling, running a leisure centre, or operation of off-street car parks. Equally, a team of Council staff might consider taking on a back office activity.

4.0 **The Expression of Interest**

4.1 The Expression of Interest must be in writing and meet certain requirements. These include the provision of -

- (a) Information about the financial resources of the relevant body which is submitting the expression of interest;
- (b) Evidence that demonstrates that by the time of any procurement exercise the relevant 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;
- (c) Information about the relevant service sufficient to identify it and the geographical area to which the expression of interest relates;
- (d) Information about the outcomes to be achieved by the relevant 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 relevant Council's area; and
 - how it will meet the needs of the users of the relevant service; and
- (e) Where the relevant body consists of employees, details of how that relevant body proposes to engage other employees of the relevant Council who are affected by the expression of interest.

5.0 **Validation of Expressions of Interest**

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

5.2 What happens when an Expression of Interest is received.

5.2.1 When an expression of interest is received, the Council 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 Council notifies the person who submitted the expression of interest that it is not a valid expression of interest, but need take no further action.

5.3 Can the Council reject a valid Expression of Interest ?

5.3.1 There are 10 grounds on which the Council may reject a valid expression of interest –

1. That 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;
2. That the supporting information is inadequate or incorrect;
3. That 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;

4. That the Council has already taken a formal decision to cease to provide the service. So an expression of interest cannot be used as a means to challenge the Council's decision to close a facility or cease a service;
5. That taking this service in isolation would result in a loss of integration with NHS services to the detriment of users of the integrated service;
6. That the service is already the subject of a procurement exercise.
7. That the Council is already in negotiations in writing with a third party for the provision of the service;
8. That the Council has already published its intention to consider the provision of the service by a body to be set up by 2 or more employees;
9. That the expression of interest is vexatious or trivial; and
10. That 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 Council's duty to secure best value, for example by causing greater cost by the break-up of shared service arrangements.

5.3.2 In addition, the Localism Act provides that the Council 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. This enables the Council to ensure that, for example, it receives any expressions of interest for different parts of the waste collection and recycling services at the same time so that it can deal with them in a co-ordinated manner.

5.3.4 The Act also requires the Council, 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.

5.4 Acceptance or rejection of an Expression of Interest

5.4.1 Once an expression has been validated, it is necessary for the proper officer to conduct a review of the expression of interest 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 Council 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.

5.4.2 If the Council acted unreasonably in rejecting an expression of interest, that decision would be open to judicial review.

5.3 Shared services

5.3.1 Particular attention needs to be given to how the Council 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. However, it is possible that expressions of interest for the relevant parts of the service have been submitted to each participating Council, so there may be a need to co-ordinate with the other participating authorities.

5.4 Timescale

5.4.1 The Council must set and publish the maximum period which will elapse between receipt of an expression of interest and the Council 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.

6.0 **A Procurement Exercise**

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

6.2 The Scale of the Procurement Exercise

6.2.1 The scale of the procurement exercise will be dictated by the nature and value of the service concerned. So, for a service which exceeds the procurement thresholds (currently £173,934), the Public Contracts Regulations will require a formal OJEU procurement. The Procurement Regulations will need to be followed.

6.3 Timescale

6.3.1 The Council 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.

6.4 Specifying the service

6.4.1 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 Council may only vary the range of services with the agreement of the body or persons who submitted it. The specification for the service to be provided, the contract terms and conditions, and the criteria for evaluation of tenders are for the Council to determine.

6.5 Tenders

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

6.6 In-house bids

6.6.1 There is nothing in the legislation to prevent the Council submitting an in-house "tender" for the provision of the service, on the basis of its own employees. Such an in-house "tender" would not be a part of the statutory procurement exercise, but should be evaluated on exactly the same criteria as any third party bids, and can lead to the Council determining on best value grounds not to

accept any of the third party tenders. However, it will be necessary for reasons of propriety to ensure that the team preparing any in-house “tender” are treated in exactly the same way as external tenderers and do not improperly influence the manner in which the procurement exercise is conducted and do not receive any information which is not made available to all other bidders which might give the in-house bid team an unfair advantage in the preparation of their bid.

6.7 Timescale

6.7.1 The Council 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 2 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.

6.8 Acceptance of Tenders

6.8.1 The Council’s Procurement Regulations set out how a tender may be accepted.

6.8.2 This phase of the process is essentially a procurement exercise, requiring a procurement officer designated to run the process, but with the appropriate Head of Service or Director taking a leading role in settling the service specification and in the evaluation of tenders, with appropriate legal, financial, human resources and other support.

7.0 Encouraging Voluntary Participation in Service Provision

7.1 Encouraging Community and Voluntary Bodies

7.1.1 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.

7.1.2 If the Council wishes to encourage community involvement in service provision, it may be preferable to encourage direct negotiation with community and voluntary bodies instead of a formal procurement exercise. So, for example, the Council 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 Council, but such a voluntary arrangement can avoid the costs to the Council and to bidders of a formal competitive procurement.

7.2 Encouraging the development of staff mutuals

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

7.2.2 So, the Council can 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.

7.2.3 Again, there is scope for a lease of premises and a grant agreement in appropriate cases without competitive procurement, where the Council 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.

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

8.0 Conclusion

8.1 This report recommends the arrangements which the Council should adopt in order to operate the new Community Right to Challenge.

9.0 Implications/Consultations

9.1 Information on any corporate issues and consultation associated with this report can be found within **Essential Reference Paper 'A'**.

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 No. 1313] - <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 No. 1647 - <http://www.legislation.gov.uk/uksi/2012/1647/contents/made>
- DCLG Statutory Guidance - <http://www.communities.gov.uk/publications/communities/righttochallenge/allengestatguide>

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