

REPORT FOR DECISION

Agenda Item	
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DECISION OF:	Cabinet
DATE:	28 November 2012
SUBJECT:	Community Right to Challenge - Governance Issues
REPORT FROM:	Cabinet Member for Community Development – Cllr Sandra Walmsley
CONTACT OFFICER:	Mike Owen, Executive Director of Resources Jayne Hammond, Assistant Director Legal & Democratic Services
TYPE OF DECISION:	CABINET (NON KEY DECISION)
FREEDOM OF INFORMATION/STATUS:	This paper is within the public domain
SUMMARY:	This report sets out the provisions of the Community Right to Challenge Services and a process for dealing with these.
OPTIONS & RECOMMENDED OPTION	<p>Cabinet is asked to approve the following recommendations:</p> <ol style="list-style-type: none"> 1. That the Cabinet appoint the Executive Director of Resources to be the proper officer for the receipt and validation of expressions of interest; 2. That the proper officer be authorised to determine a timetable for the acceptance or rejection of expressions of interest, after consultation with appropriate Heads of Service; 3. That Cabinet consider whether grounds exist to accept or reject an expression of interest ; 4. That the proper officer be delegated approval to designate a procurement officer to act as the project lead for any procurement exercises;

	<p>5. That the procurement officer determine timescales for the period between acceptance of an expression of interest and start of the procurement exercise;</p> <p>6. That the proper officer (or a Deputy) be responsible for managing each procurement exercise, subject to the settlement of the specification for the service with the appropriate Head of Service;</p> <p>7. That Cabinet consider the evaluation of any tenders jointly with the proper officer and Procurement Officer.</p>
IMPLICATIONS:	
Corporate Aims/Policy Framework:	Do the proposals accord with the Policy Framework? Yes
Statement by the S151 Officer: Financial Implications and Risk Considerations:	<p>“Community Right to Challenge” presents risks to the Council, and it is essential that a robust approach is adopted to deal with any expressions of interest received.</p> <p>The report outlines the respective roles of the Proper Officer, Procurement Officer and Cabinet in this process.</p>
Statement by Executive Director of Resources:	There are no direct resource implications arising from the report. However the extent to which costs of procurement and in-house bidding can be met from within existing resources will depend on the amount of interest generated by the right to challenge.
Equality/Diversity implications:	The recommendations do not raise any Equality or Diversity implications (although application of the process in individual cases where the right to challenge is used may).
Considered by Monitoring Officer:	<p>Yes</p> <p>The legal implications are set out in the report.</p>

 JH

Wards Affected:	All
Scrutiny Interest:	Overview and Scrutiny Committee

TRACKING/PROCESS

DIRECTOR:

Executive Director of Resources

Chief Executive/ Strategic Leadership Team	Executive Member/Chair	Ward Members	Partners
Scrutiny Committee	Committee	Council	

1.0 SUMMARY

From June of this year, the Localism Act 2011 introduced a right for community and voluntary bodies, charitable trusts and 2 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 arrangements which the authority could adopt in order to operate the new Community Right to Challenge. This is an Executive Function.

2.0 ISSUES

2.1 Who can submit an Expression of Interest?

An expression of interests can be submitted by a "relevant body", comprising –

- i. A Voluntary Body – a body, other than a local authority, the activities of which are not carried on for a profit;
- ii. A Community Body – a body, other than a local authority, which carries on activities primarily for the benefit of the community;
- iii. A body or trust established for charitable purposes;
- iv. 2 or more employees of the authority, whether or not they have formed themselves into a body for this purpose, or
- v. Such other persons or bodies as may be specified by the Secretary of State by regulations. To date, no such regulations have been made.

(Note - there is no requirement for a Voluntary or Community Body to have any local connection),

2.2 What services can an Expression of Interest relate to?

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 authority. However, the following services are "excluded services" which cannot be the subject of an expression of interest –

- i. Services provided in partnership with NHS bodies, or by an NHS body on behalf of the authority;
- ii. A service provided to a named person with complex individual health or social care needs; or
- iii. A service which includes the exercise of a statutory power which cannot be delegated. (for example 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 authority, and so cannot be the subject of an expression of interest).

An expression of interest can therefore relate to services such as management and maintenance of playing fields or parks, refuse collection and re-cycling, running a branch library or a leisure centre, or operation of off-street car parks.

2.3 The Expression of Interest.

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

- i. Information about the financial resources of the relevant body which is submitting the expression of interest;
- ii. 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.
- iii. Information about the relevant service sufficient to identify it and the geographical area to which the expression of interest relates;
- iv. 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 authority's area; and
 - how it will meet the needs of the users of the relevant service; and

2.4 Validation of Expressions of Interest

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

2.4.2 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.

2.4.3 Can the authority reject a valid Expression of Interest?

There are 10 grounds on which the authority 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 authority 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 an authority’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 authority is already in negotiations in writing with a third party for the provision of the service;
8. That the authority 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 authority’s duty to secure best value, for example by causing greater cost by the break-up of shared service arrangements).

The Act also requires the authority looking at 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.

2.4.4 Acceptance or rejection of an Expression of Interest

Once an expression has been validated, it is necessary 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 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 acted unreasonably in rejecting an expression of interest, that decision would be open to judicial review.

2.4.5 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.

2.5 A Procurement Exercise

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

2.5.2 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. 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.

2.5.3 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. 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 authority 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, as far as possible, 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 and which might give the in-house bid team an unfair advantage in the preparation of their bid.

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 Head of Service (or Director where the Head of Service will head up an in-house or staff mutual bid team) taking a leading role in settling the service specification and in the evaluation of tenders, with appropriate legal, financial, HR and other support.

3.0 RECOMMENDATIONS

Cabinet are asked to approve the recommendations set out to establish arrangements to deal with the Community Right to Challenge.

List of Background Papers:-

None

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