

REPORT TO THE MEETING OF THE EXECUTIVE 7 NOVEMBER 2012

PORTFOLIO: OVERALL STRATEGY AND POLICY DIRECTION

REPORT FROM HEAD OF LEGAL, ESTATES AND MEMBER SERVICES

SUBJECT: COMMUNITY RIGHT TO CHALLENGE

1 DECISION BEING RECOMMENDED

- 1.1 That the Head of Legal, Estates and Member Services be the designated officer for the receipt, validation and acceptance or rejection of expressions of interest;
- 1.2 That the timetable for the acceptance or rejection of expressions of interest, as set out in Appendix 1 be approved;
- 1.3 That the Head of Legal, Estates and Member Services be authorised, after consultation with appropriate Heads of Service, to determine whether grounds exist to reject an expression of interest, and, following consultation with the appropriate Executive Member, to accept or reject an expression of interest on behalf of the authority.
- 1.4 That information on any expressions of interest received be included in the Members Bulletin.

2 REASON FOR RECOMMENDATION

- 2.1 So that arrangements are introduced to accord with statutory guidance

3 SALIENT INFORMATION

- 3.1 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.

Who can submit an Expression of Interest?

- 3.2 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.
- 3.3 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.

What services can an Expression of Interest relate to?

- 3.4 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. “Excluded services” cannot be the subject of an Expression of Interest and are those which include the exercise of a statutory power which cannot be delegated. The setting of Council Tax or the determination of a planning application cannot legally be taken by anyone other than the local authority, and so cannot be the subject of an expression of interest.

The Expression of Interest

- 3.5 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 demonstrating that by the time of any procurement exercise, the relevant body will be capable of providing or assisting in providing the relevant service;
 - (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 authority’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 as described in the Act, details of how that relevant body proposes to engage other employees of the relevant authority who are affected by the Expression of Interest.

Validation of Expressions of Interest

- 3.6 The first stages comprise the validation and acceptance or rejection of each expression of Interest.

What happens when an Expression of Interest is received?

- 3.7 When an expression of interest is received, the Council must 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 person who submitted the expression of interest is notified that it is not a valid expression of interest and no further action is required. If the Expression of Interest is valid, because it is submitted by a relevant body and relates to a relevant service of the Council, it could still be rejected if one of the grounds below exist.

Can the Council reject a valid Expression of Interest?

- 3.8 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 (this is not relevant to Rochford);
 - (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 two 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.
- 3.9 In addition, the Localism Act provides that an authority may 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 outside of these periods. This enables the authority to ensure that it can deal with them in a co-ordinated manner.
- 3.10 The Act also requires the authority 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.

Acceptance or rejection of an Expression of Interest

- 3.11 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.

Shared services

- 3.12 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. However, it is possible 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.

Timescale

- 3.13 The authority must set and publish the maximum period which will elapse between receipt of an Expression of Interest and notification to the body which submitted the Expression of Interest of its acceptance or rejection but may set different maximum periods for different cases. A proposed timetable is set out at Appendix 1.

A Procurement Exercise

- 3.14 Once a valid expression of interest has been accepted, the Council must move into procurement mode and conduct an appropriate procurement exercise. The Council does not have the power to simply award the service to the body expressing interest.

The Scale of the Procurement Exercise

- 3.15 The scale of the procurement exercise will be dictated by the nature and value of the service concerned. For a Part A service which exceeds the procurement thresholds (currently £173,934), the Public Contracts Regulations will require a formal procurement to be undertaken in accordance with the Regulations. For Part B services, the Regulations apply only to a limited extent. The Council will also need to comply with its own Contract Procedure Rules, which define different internal requirements which also set out procedures that need to be followed apply below the Regulations' tender thresholds.

Specifying the service

- 3.16 The Expression of Interest will set out the range of the service (in terms of the service and the geographical area) to be the subject to a procurement exercise. The Council may only vary the range of services with the agreement of the body or persons who submitted the expression. 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.

Tenders

- 3.17 Although 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 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.

In-house bids

- 3.18 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 would 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 team an unfair advantage in the preparation of their bid.

Timescale

- 3.19 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.

4 ALTERNATIVE OPTIONS CONSIDERED

- 4.1 The Council must comply with the statutory guidance, albeit that there is some discretion in how it is implemented.

5 RISK IMPLICATIONS

- 5.1 There could be implications for service areas such as the easiest to provide or most profitable being subject to procurement, the introduction of some uncertainty when an expression of interest is made and the possibility of service fragmentation.

6 COMMUNITY RIGHT TO BID

- 6.1 There will be a report to the next meeting of the Executive on the ‘Community Right to Bid’, also provided for within the Localism Act 2011 relating to community assets.

I confirm that the above recommendation does not depart from Council policy and that appropriate consideration has been given to any budgetary and legal implications.

SMT Lead Officer Signature: _____

Head of Legal, Estates and Member Services

Background Papers:-

None.

For further information please contact Albert Bugeja (Head of Legal, Estates and Member Services) on:-

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If you would like this report in large print, Braille or another language please contact 01702 318111.

Timescales for Responding to Community Right to Challenge

Expressions of Interest

- Expressions of interest may be submitted under the Community Right to Challenge provisions of the Localism Act 2011 from 1 September to 31 December in each calendar year;
- This period is to ensure that the Council can respond to the Expressions of Interest in a co-ordinated approach and align with the Council's business planning process;
- Expressions of Interest received outside of this 3 month period will not be considered;
- When an Expression of Interest is received it will be acknowledged within 10 working days;
- Within 28 days of the Expression of Interest being received the Council will notify the relevant body whether it regards the expression of interest as valid;
- Within a further 28 days the relevant body will be notified whether the Expression of Interest is accepted or rejected;
- An accepted Expression of Interest will trigger a procurement exercise, the appropriate route, scale and commencement date will be confirmed within 3 months of the Expression of Interest being accepted. The time period will allow the Council to prepare for the tender process and ensure the service requirements are properly considered and consulted upon;
- The procurement process will commence within 6 months of the procurement route being confirmed.