LOCALISM ACT – COMMUNITY RIGHT TO CHALLENGE

SUMMARY

1. This report provides the Fire Authority with a further update in respect to the Community Right to Challenge under the Localism Act 2011. The report also proposes a policy position, which the Fire Authority should review in due course, as a minimum annually.

2. The proposed policy and procedure sets out how the Fire Authority may respond to community right to challenge expressions of interest and enquiries, in line with the statutory guidance and those Regulations.

3. Members should note that these Regulations have been recently introduced and, as yet, many Fire & Rescue Services have yet to respond and set out a policy position. In addition, as highlighted below, there remains some greyness as to the scope of the right to challenge.

RECOMMENDATIONS

4. Members are asked to:-
   (a) consider this report;
   (b) agree to the policy and procedure outlined in Appendix A;
   (c) agree that the policy and procedure will be reviewed within 12 months.

BACKGROUND

5. Sections 81 to 86 (inclusive) of the Localism Act 2011 contain obligations on the part of an Authority to consider expressions of interest from “relevant bodies”. Such expressions of interest are those in providing, or assisting in providing, a relevant service on behalf of the Authority.

6. In carrying out this obligation, the Authority must have regard to guidance from the Secretary of State. As previously reported to the Fire Authority, following a period of consultation, the Secretary of State published draft guidance and regulations on 17 May 2012, in readiness for the community right to challenge provisions coming into effect on 27 June 2012.

Relevant bodies

7. A relevant body under the Act is:
   • a voluntary or community body;
   • a body of persons or a trust which is established for charitable purposes only;
   • a parish council;
   • in relation to a relevant authority, two or more employees of that authority; or
• such other person or body as may be specified by the Secretary of State by Regulations.

**Relevant service**

8. A relevant service under the Act is any service or part of a service provided by, or on behalf of the Authority, other than:

   (a) statutory functions;

   (b) specific exempted services, which relate mainly to:

      i. services commissioned with or by the NHS (exempted until 2014 to allow the new clinical commissioning group arrangements to bed in);

      ii. children’s centre services commissioned with the NHS (again exempted until 2014);

      iii. services that relate to named individuals with complex needs and services managed through direct payments.

9. **Note**

   One of the issues which still needs some clarification is what services are statutory functions and which are not, i.e. which services could be subject to the community right of challenge.

   Under the Fire & Rescue Services Act 2004, the Authority is to ‘make provision’ for:

   - Firefighting (for extinguishing fires and protecting life and property);
   - RTC response (for rescue and protection);
   - Fire Safety (for promoting fire safety).

   However, legally there is a distinction between making provision for the function (i.e. rests with the Authority) and the actual carrying out of the service/activity involved. The statutory function, i.e. accountability, must remain with the Fire Authority. The carrying out of a service is distinct, unless there is a precise requirement that a service must be delivered by an ‘employee’ of the Authority.

   A particular concern is whether any relevant body could legitimately express an interest in carrying out frontline fire fighting activity on that basis. While the then Fire Minister gave assurances that the Regulations were not intended to cover such activity, this remains not as clear as it should be. For example, in cases of industrial action, some services have contracted with the private sector (and indeed there was a national fireguard project in 2009 which was around national resilience). There are related issues, for example, in respect to the right of entry and fire investigation (which are curtailed to employees of Services, although these are common law rights relating to the former). The best view at present is that frontline fire fighting is not intended to be included, but the position is not absolute as it should be. While this is a complex issue, it is important that Members are aware broadly of the issue. In terms of the right to challenge, then the Authority should not at this time, until there is some clarity, accept a challenge to frontline fire fighting and RTC response.

   In terms of other activity, then much of the non-frontline fire fighting functions, particularly community safety, may be subject to the right of challenge.
How an expression may be made – Information required

10. Under Section 81 of the Act, expressions of interest must include the following information and demonstrate that they meet the definition of a relevant body (see paragraph 8 above).

11. Where the relevant body proposes to deliver the relevant service as part of a consortium or to use a sub-contractor for delivery of any part of the relevant service, information must be provided in respect of each member of the consortium and each sub-contractor as appropriate.

(a) Information about the financial resources of the relevant body 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.

(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:

i. How the provision or assistance will promote or improve the social, economic or environmental well-being of the relevant authority’s area; and

ii. How it will meet the needs of the users of the relevant service.

iii. Where the relevant body consists of employees of the relevant authority, details of how that relevant body proposes to engage other employees of the relevant authority who are affected by the expression of interest.

12. The Authority can request further information from relevant bodies but cannot make inclusion of such information a requirement in order for an expression of interest to be considered (although it should make it clear that provision of the further information is optional). Information outside the scope of requirements in the regulations may not be used as a ground on which to reject an expression of interest.

Submission periods

13. 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. It should be noted that some authorities have left this open ended, i.e. no time period, while others have created a ‘window’ on an annual basis to be able to express an interest. This appears to be a month in most cases. Members are asked whether they consider a ‘window’ to be beneficial, which is included within Appendix 1.

Consideration of expressions of interest

14. Under Sections 83 and 84, when (if) the Authority receives an expression of interest, it may:

- accept the expression of interest;
- reject the expression of interest; or
- modify the expression of interest.
15. The Authority must consider if acceptance would promote or improve social, economic or environmental wellbeing.

16. The Authority may reject expressions only on the following grounds specified by the Secretary of State in the Regulations 2012:

(a) The expression of interest does not comply with one or more of the requirements specified in section 81(1) or in regulations made by the Secretary of State (duty to consider expressions of interest).

(b) The information provided is inadequate or inaccurate, in the opinion of the Authority.

(c) The Authority considers that any member of the consortium or any subcontractor is not suitable to provide or assist in providing the relevant service.

(d) The expression of interest relates to a service that the Authority has made a decision, evidenced in writing, to stop providing.

(e) The expression of interest relates to a service integrated with the NHS or the continued integration of such services is critical to the well-being of the people who receive the service.

(f) The service is already the subject of a procurement exercise.

(g) The Authority has already entered into negotiations for provision of the relevant service with a third party.

(h) The Authority has already published its intention to consider the provision of the service by a proposed body to be established by two or more specified employees of the Authority.

(i) The Authority considers that the expression of interest is frivolous or vexatious.

(j) The Authority considers that acceptance of the expression of interest is likely to contravene other enactments, rule of law or breach statutory duties.

17. If the Authority accepts the expression, it must:

• carry out a procurement exercise;
• specify the minimum and maximum time between acceptance and the start of the procurement; and
• so far as compliant with procurement law, consider how it might promote or improve wellbeing.

18. The Authority may modify the expression of interest if it thinks that it is otherwise not capable of being accepted and the body submitting the expression of interest agrees.

**Decision-making periods**

19. The Authority must specify the maximum period between receipt of an expression and notification of the decision and publish details of such specification. Different periods can be specified for different cases.

20. On receipt of an expression of interest, the Authority must notify the relevant body of the period within which it expects to inform it of its decision.
21. It must inform the relevant body of its decision within 30 days of:

- the end of the period specified by the Authority for receipt of expressions (see paragraph 12 above); or
- receipt of expression, if it has not specified a period.

**Period between an expression of interest being accepted and a procurement exercise starting**

22. The Authority must specify the period between acceptance of an expression of interest and the commencement of a procurement exercise. The Authority is free to decide how long that period might be and is expected to have 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.

**Relevant authorities competing in their own procurement exercises**

23. Although the Act permits and encourages expressions of interest from employees of a relevant authority who wish to establish a mutual organisation to provide a service, the statutory guidance warns against relevant authorities considering in-house bids in community right to challenge procurement exercises. Paragraph 9.5 of the guidance states:

24. “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 on-house bid at that time.”

**Issues for consideration**

25. The community right to challenge is being implemented earlier than first anticipated, therefore a process needs to be agreed and put in place immediately.

26. It is proposed that periods are specified during which expressions of interest will be considered. This will allow the process to be managed in a controlled way and will allow any contract renewals or service review outcomes to be taken into account in advance of the specified period.

27. A policy and procedure is attached at Appendix A. Subject to agreement, this policy and procedure will be put in place and reviewed after 12 months, when final regulations have been put in place. This will also enable the policy and procedure to be reviewed in light of experience and to take account of policy and practice elsewhere within the Fire and Rescue and local government sector.
28. Key issues for consideration in implementing the policy is to consider roles and responsibilities in respect of:

- handling enquiries and providing administrative support;
- appraising expressions of interest against the agreed criteria;
- make the decision as to whether to accept or reject an expression of interest.

29. In this regard, it is proposed that enquiries will be referred to the Secretary & Director of People.

STRATEGIC PLAN COMPATIBILITY

30. Not directly relevant.

FINANCIAL/RESOURCES/VALUE FOR MONEY IMPLICATIONS

31. None arising directly at this time. Members should note that the resourcing of this could be significant, particularly if a bid was to be accepted.

LEGAL IMPLICATIONS

32. As outlined above.

EQUALITY IMPACT ASSESSMENT/HR IMPLICATIONS

33. None arising directly. However, there could be significant HR implications arising from a challenge in terms of staff employed to deliver a particular function.

CORPORATE RISK MANAGEMENT IMPLICATIONS

34. The range of services that may be considered following the introduction of the Community Right to Challenge statutory guidance and the local policy is quite specific. Each challenge received will be appropriately considered from a legal and procurement perspective. Subject to “the challenge” being compliant it will then be considered from an organisational risk perspective – this will ensure that the alternative service provider(s) can consistently and effectively meet the needs of the Service. Corporate risks and business continuity issues will be considered as part of the evaluation and procurement process.

HEALTH AND SAFETY IMPLICATIONS

35. None arising.

COMMUNICATION ACTIONS ARISING

36. As outlined above.

DETAILS OF CONSULTATION

37. None arising.

BACKGROUND PAPERS AVAILABLE FOR ACCESS

38. CLG ‘Community Right to Challenge’ Statutory Guidance
   The Community Right to Challenge (Fire and Rescue Authorities and Rejection of Expressions of Interest) (England) Regulations 2012
RECOMMENDATIONS RESTATED

39. Members are asked to:–

(a) consider this report;

(b) agree to the policy and procedure outlined in Appendix A;

(c) agree that the policy and procedure will be reviewed within 12 months.

R GRAHAM
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RG/SJ
14 September 2012
Draft Community Right to Challenge Policy

1. Policy Outline

1.1 What is the policy about?

This policy is about the Community Right to Challenge, which has been introduced under Sections 81 to 86 of the Localism Act 2011 to enable community and voluntary groups, town and parish councils and mutual organisations formed by the Authority’s employees to express an interest in running a service or part of a service on behalf of the Authority, and the Authority’s obligations to consider such expressions of interest and undertake a procurement exercise for the service concerned, where an expression is accepted.

The Community Right to Challenge is part of the government’s Open Public Services agenda to open up public services to more diverse patterns of provision and to empower communities to take on and run public services themselves.

1.2 Who does the policy apply to?

This policy applies to all local authority services and arm’s length organisations or partnerships that provide services on behalf of an authority. Local Authority fire services fall within the scope of the original regulations as part of the local government service.

1.3 Responsibility

The Chief Fire Officer/Chief Executive, advised by the Secretary and S.151 Officer to the Authority is responsible for the efficient and effective handling of Community Right to Challenge expressions of interest submitted to the Authority.

The Secretary and S.151 Officer are responsible for deciding whether to accept or reject a Community Right to Challenge expression of interest, feedback to the submitting body and any further procurement actions arising from the decision.

1.4 Monitoring

A central database of all expressions of interest made under the Community Right to Challenge will be maintained by the Secretary and will be published on the Authority’s website, with details of when expressions of interest will be considered, the outcome and a summary of the reasons for the decision to accept or reject an expression of interest.

1.5 Support

Groups and organisations interested in the Community Right to Challenge will be signposted to sources of information and advice on the Community Right to Challenge and to organisations funded by the government to provide such support.

1.6 Confidentiality

All information provided in Community Right to Challenge expressions of interest will be handled sensitively and used only for its proper purpose.
Under the Data Protection Act 1998 individuals have the right to see their own personal data held subject to the rights of confidentiality of any third parties involved in that information.

1.7 Publicising/distribution of the policy

A copy of this policy is available from the Secretary and will be made available to employees and interested parties on request.

1.8 Reviewing the policy

The operation of this policy will be kept under review and such changes will be made to the policy as deemed appropriate.

1.9 Equality and Diversity

The Authority is committed to including equalities in everything that it does. This includes the elimination of unlawful discrimination, promoting diversity as a positive force and valuing and celebrating a diverse workforce and community.

If necessary, an equality impact assessment will be carried out in the preparation of this policy and the assessment will be reviewed on an on-going basis.

2. Procedure – Seeking expressions of interest

2.1 The Authority recognises its legal obligations under the Localism Act 2011 and welcomes the opportunity that the Community Right to Challenge provides to involve local communities in the provision of services and to improve the economic, social and environmental wellbeing of communities in Humberside.

2.2 The Authority in order to have a planned approach to the community right of challenge will provide an annual ‘window’ during April of each year throughout which expressions of interest may be received from Relevant Bodies.

3. Relevant bodies

3.1 In line with regulations issued by the Secretary of State, the Authority will consider expressions of interest from the following relevant bodies:

a) a voluntary or community body;

b) a body of persons or a trust which is established for charitable purposes only;

c) a parish council;

d) two or more employees of the council; or

e) such other person or body as may be specified by the Secretary of State by regulations.
4. Relevant services

4.1 In line with regulations, the Authority will consider expressions of interest under the Community Right to Challenge scheme in relation to any service or part of a service, other than:

a) statutory functions of the authority;

b) services which have specifically been exempted from Community Right to Challenge by the Secretary of State (mainly services integrated with the NHS, personal services for named individuals and personalised services supported by the Direct Payments scheme where the individual concerned decides which services they receive);

c) services which the Authority has decided to stop providing;

d) services that are already subject to planned review, re-commissioning and/or procurement. This includes services which:

i. will be subject to review and potential re-commissioning at a planned future date (Community Right to Challenge expressions of interest will be considered at that point);

ii. are already the subject of a procurement exercise;

iii. are already subject to contract negotiations with other parties;

iv. the Authority has already decided to consider provision by a proposed mutual organisation to be established by two or more employees of the Authority;

5. Initial screening

5.1 In handling expressions of interest, the Authority will first seek to determine whether the interested party is a “relevant body” and the service concerned is a “relevant service”, before asking for all of the detailed information required for a Community Right to Challenge expression of interest. This is intended to avoid unnecessary and abortive work on the part of interested parties.

5.2 On receiving a written request for a Community Right to Challenge, the Authority will send the interested party an initial expression of interest form to identify whether:

a) the person or group making the enquiry is a relevant body under the Act; and

b) the service or part of a service concerned is relevant and can be considered under the Community Right to Challenge scheme.

5.3 Upon receipt of a completed initial expression of interest form, the Secretary and S.151 Officer will determine whether the group and organisation and the service concerned can be considered under the Community Right to Challenge scheme.

5.4 Where the initial expression of interest is rejected, written feedback will be given to the interested party outlining the reasons why the request is ineligible to be considered under the Community Right to Challenge scheme.
5.6 In instances where the Authority plans to review and/or re-commission the service or part of a service concerned at a planned date in the future, the Authority will inform the interested party of that date and invite them to re-submit an expression of interest at that time, during a submission period.

5.7 Where the initial expression of interest is accepted, a detailed expression of interest form will be issued, requesting all of the information required to consider an expression of interest.

6. Handling of detailed expressions of interest

6.1 Upon receipt of a completed detailed expression of interest form, the Secretary and S.151 Officer will review the form for completeness and request any omitted information.

6.2 The Secretary and S.151 Officer will write to the interested party to acknowledge that the expression of interest has been received, setting out details of when the expression of interest will be considered and when the interested party can expect to be informed of the outcome.

6.3 It is important to specify a date when the expression of interest will be considered, otherwise the Authority will be required to notify the interested party of the outcome of their expression of interest within 30 days of receipt by the authority.

6.4 Where the detailed expression of interest is rejected, written feedback will be provided to the interested party, outlining the reasons why the request has been rejected.

6.5 In some instances, the Secretary and S.151 Officer may determine that an expression of interest could be accepted, if it was modified. In such cases he will write to the interested party to outline the modifications required and to seek their agreement to the changes concerned.

6.6 Where the Authority plans to review and or re-commission the service or part of a service concerned at a planned date in the future, the Authority will inform the interested party of that date and invite them to re-submit an expression of interest at that time, during a submission period.

6.7 If the interested party agrees, then the expression of interest will be accepted subject to the modifications. This will be confirmed in writing by the Secretary and S.151 Officer.

6.8 Where a detailed expression of interest is accepted, the Secretary and S.151 Officer will write to the interested party to confirm acceptance and to notify them of when the Authority expects to conduct the procurement exercise and how they can participate in the competition.

6.9 The interested party will be provided with information on the procurement exercise and with details of how to register and participate in the competition.