

By: Chief Executive

To: Kent and Medway Fire and Rescue Authority - 18 December 2012

Subject: COMMUNITY RIGHT TO CHALLENGE – DRAFT SERVICE ORDER

Classification: Unrestricted

FOR DECISION

SUMMARY

The Localism Act 2011 introduced four community rights. Of these, the most immediately important to fire and rescue authorities (FRAs) is the Community Right to Challenge. This gives communities the right to bid to run local council or FRA services where they think they can do it differently and better. In order to respond effectively to any submission made to the Authority in respect of this right, a Service Order has been developed based on those used by other FRAs across England. Members are therefore asked to consider and approve the draft Service Order.

RECOMMENDATIONS

Members are requested to:

1. Approve the Service Order related to the Community Right to Challenge (**Appendix 1** refers).

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BACKGROUND PAPERS: None

COMMENTS

Background

1. The Localism Act 2011 introduced four community rights. They are:
 - Community Right to Build – giving communities the right to build small-scale, site-specific projects without going through the normal planning application process. This came into effect in April 2012;
 - Neighbourhood planning – giving communities more say about what can be built in their area. This also came into effect in April 2012;
 - Community Right to Challenge - giving communities the right to bid to run local council or fire and rescue authority (FRA) services where they think they can do it differently and better. This came into effect in June 2012; and
 - Community Right to Bid – giving communities the right to bid to buy and take over the running of local assets that are important to them. This is expected to come into effect shortly.

2. The rights are intended to give local people and groups a greater say about what happens to local amenities; how local services are delivered; and how new development is planned. Of these, the most immediately important to FRAs is the Community Right to Challenge. In order to respond effectively to any submission made to the Authority in respect of this right, a Service Order has been developed based on those used by other FRAs across England.

Community Right to Challenge

3. The Localism Act 2011 introduced the Community Right to Challenge, which enables community groups, parish councils and local government employees to express an interest in providing a local authority service. FRAs are required to consider such expressions, and where they meet specified criteria, stage a procurement exercise for contracting out the relevant service. The body that submitted the initial expression of interest can then participate in the procurement.

4. Initially, it was anticipated that the Community Right to Challenge would come into effect in October 2012. However, the relevant Orders and Regulations were brought into force on 27 June 2012.

5. The Authority needs to agree a Service Order for how it should respond to any expressions of interest and enquiries under the Community Right to Challenge which it may receive. No such expression has been received by the Authority to date, nor, it

would appear, has there been significant interest in other local authority services either.

6. Sections 81 to 86 (inclusive) of the Localism Act 2011 contain obligations on the part of the Authority (as a “relevant 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. In carrying out this obligation, the Authority must have regard to guidance from the Secretary of State.

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:
 - services commissioned with or by the NHS (exempted until 2014 to allow the new clinical commissioning group arrangements to bed in);
 - children’s centre services commissioned with the NHS (again exempted until 2014);
 - services that relate to named individuals with complex needs and services managed through direct payments.

Information required

9. Under Section 81 of the Act, expressions of interest must include the following information and demonstrate that the body submitting the expression meets the definition of a “relevant body” (see paragraph 7 above). 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. The information required is:

- (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:
 - 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.
 - 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.
10. An 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

11. 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.

Consideration of Expressions of Interest

12. Under Sections 83 and 84, when the Authority receives an expression of interest, it may accept, reject or modify the expression of interest. The Authority must consider if acceptance would promote or improve social, economic or environmental wellbeing. The Authority may reject expressions only on the following grounds specified by the Secretary of State in Regulations:
- The expression of interest does not comply with Regulations made by the Secretary of State;

- The information provided is inadequate or inaccurate, in the opinion of the Authority;
 - The Authority considers that any member of the consortium or any sub-contractor is not suitable to provide or assist in providing the relevant service;
 - The expression of interest relates to a service that the Authority has made a decision to stop providing;
 - 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;
 - The service is already the subject of a procurement exercise;
 - The Authority has already entered into negotiations for provision of the relevant service with a third party;
 - 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;
 - The Authority considers that the expression of interest is frivolous or vexatious;
 - The Authority considers that acceptance of the expression of interest is likely to contravene other enactments, rule of law or breach statutory duties.
13. If the Authority accepts the expression, it must:
- stage 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.
14. The Authority may modify the expression or 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

15. 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.
16. 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. 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

17. The Authority must specify the period between acceptance of an expression of interest and the commencement of a procurement exercise.
18. The Authority is free to decide how long that period might be and is expected to have regard to:
 - 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;
 - 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
 - the timescale of any existing commissioning cycle relevant to the service being procured, or of any other relevant authority processes. These may include the Authority's decision-making or budget setting processes.

Relevant authorities competing in their own procurement exercises

19. 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 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 on-house bid at that time.”

IMPACT ASSESSMENT

20. A proposed Service Order is attached at **Appendix 1**. Subject to agreement, this policy and procedure will be put in place and reviewed after 24 months, when final regulations have been put in place and experience of the use of the process and levels of public interest will have been gained. This will also enable the Service Order

to be reviewed in light of experience and to take account of policy and practice elsewhere within the FRA and wider local government sector.

21. A key issue 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.
22. In this regard, it is proposed that enquiries will be referred to the Director, Finance and Corporate Services, for appraisal.
23. An equality impact assessment of the proposed Service Order has been completed to guide the development of the Service Order, and identified no significant impacts.

RECOMMENDATIONS

24. Members are requested to:
 - 24.1 Approve the Service Order related to the Community Right to Challenge (**Appendix 1** refers).