

Operational Decision Record

Publication Date 28.01.2022	Decision Reference Number 4515
Decision Title	
Subsidy Control advice for Sustainable Warmth Competition delivery	
Decision Value	
Up to a maximum £55k+VAT	
Revenue or Capital Spend?	
Revenue	
Department	
Carbon Reduction, Energy and Sustainability Division	
Contact Officer (Name, job title, and contact details)	
Ellen Cooper-Tydeman Fuel Poverty Project Manager Midlands Energy Hub email: Ellen.Cooper-Tydeman@nottinghamcity.gov.uk mob: 07895212603	
Decision Taken	
<ul style="list-style-type: none">• Approve an extension to the existing appointment of Browne Jacobson through the EM Law Share Framework as a continuation of previous instruction, to the, with respect to advice for the LAD 2 Project.• Approve the spend to instruct Browne Jacobson to review of regional LAD 3/ HUG Project development plans on an agreed 'fixed fee per review' basis and any further clarifications to ensure subsidy control and procurement compliance.	
Reasons for Decision and Background Information	
<p>The Sustainable Warmth Competition is a single funding opportunity which brings together two fuel poverty schemes. The Sustainable Warmth Competition has awarded £82.4m to Midlands Energy Hub (MEH) and consortium members to upgrade energy inefficient homes in low income households across the region.</p> <p>To minimise the risk of any challenge with respect to the allocation of the Competition funding and to ensure the use of the funding complies with the new Subsidy Control Regime, the Council requires specific Subsidy Control Advice on the proposed use of the funding.</p> <p>Local Authorities who will apply to receive the funding from the Council will be</p>	

required to be compliant with the relevant Subsidy Control obligations and any subsequent legislation for any specific projects undertaken. It is ultimately the responsibility of the Council (acting in its capacity as the MEH) in administering the funding to ensure it is used correctly. The Local Authority delivery partners will be required to work with their legal teams to assess the projects in line with the Subsidy Control regime. This assessment will need to be provided to the Council as part of their development plan applications.

Browne Jacobson, on behalf of the Council, will then review the procurement and subsidy control elements of the development plans for each regional project from the Local Authorities and produce a table which categorises the applications on a RAG basis and sets out any requested clarifications, including a formal legal opinion if required.

Guidance on subsidy control for LAD 2 was created and shared with applicants/partners. The content and level of detail in the confirmations will depend on the roles of the different partners under this LAD3/HUG scheme and will depend on how specific each partner's role is. Some may carry no risk of subsidy whereas other may carry a high risk.

Due to the value of funding, the complex nature of Subsidy Control advice, the quantity of potential applications and the role as accountable body the Council require legal assurance the projects comply.

Other Options Considered and why these were rejected

Use internal legal support - this was rejected due to the volume of project plans (50+), complexity of the schemes and limited guidance available on the new legislation.

No legal review undertaken - this was rejected due to the risk to Council if a project was non complainant and the potential of funding clawback.

Reasons why this decision is classified as operational

This decision falls within the approved funding for Sustainable Warmth competition, DD 4484.

Additional Information

Advice from:

Legal

There are no legal issues arising from the proposals in this report. The Council acting as Accountable Body for the Midlands Energy Hub has received money to deliver the Sustainable Warmth Project.

The Council in its role in administering the fund is responsible for ensuring that it is used in accordance with the terms of the funding including the new Subsidy Control Regime (the old State Aid) to ensure allocated funding is not unlawful subsidy. The grant includes funding to the Council to support the requirement for

specialist support if required.

As detailed within the report, due to the complex nature and high value of the projects, the potential quantity of applications and the potential risks associated with incorrect application of the funds including risk of clawback, it is deemed appropriate for external legal advice to be obtained to assess the applications for subsidy control compliance.

Browne Jacobson were appointed for the initial piece of work with respect to the LAD 2 Project under the EM Law Share Framework. This additional instruction will be an extension to the existing appointment under that Framework.

Legal services will continue to work closely with the report author to manage the relationship with external advisors in order to control the associated costs.

Advice provided by Dionne Scream, Senior Solicitor, Contracts and Commercial
19th January 2022

Finance

Initial DD4484 did not specifically cover this type of legal advice expenditure regarding utilising the EM law share framework and the named supplier within Table 2; Sustainable Warmth NCC Financial Summary.

The subsidy control advice sought is specific and there is not thought to be the expertise in-house or the capacity to deliver in the grant period. The advice sought will reduce the risk of grant non-compliance and the risk of grant clawback.

There is time and flexibility to account for this estimated additional cost of £0.055m within the administration and ancillary element of the grant of £3.583m.

The service will need to flex spend profiling in order to accommodate the additional cost of £0.055m in order to remain within the grant budgetary constraints.

Tania Clayton Pérez-Senior Commercial Business Partner-Jan 22

Procurement

There are no procurement concerns with the decision being sought. EM LawShare is considered a compliant route to appoint legal advisers, and Browne Jacobson LLP would be an appropriate company to use given their involvement in earlier parts of the scheme. Advice given by Jonathan Whitmarsh, Lead Procurement Officer, 18th January 2022.

Decision Maker (Name and Job Title)

Michael Wayne Bexton

Director of Carbon Reduction, Energy and Sustainability

email: wayne.bexton@nottinghamcity.gov.uk

Scheme of Delegation Reference Number

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Date Decision Taken

26.01.2022