

Legal Advice – LOCAL ENERGY CAPACITY SUPPORT SECTION 31 GRANT DETERMINATION (2022/23): No. 31/6547 - Project Funding - First Variation

Suggested amendment to the wording of the Decisions to be Taken as follows for clarity:

- 1) To accept £250,000 of core & additional grant funding from the Department for Energy Security and Net Zero (ESNZ) for the delivery the objectives of the Local Energy Capacity Support Memorandum of Understanding ("the Original MoU");
- 2) To delegate authority to the Director for Energy and Sustainability (ES) to enter into [Grant Determination \(2022/23\) No.31/6547](#); and
- 2) To delegate authority to the Head of Midlands Net Zero Hub, in consultation with the Director for ES, to utilise the grant funding towards the following projects outlined in Appendix 1 (E-cargo, Hartlebury Energy from Waste Plant, Oakengates Leisure Centre, Cool Shropshire & Telford Business Support, Leicestershire Leisure Centres, Impact Tool Update) to [Grant Determination \(2022/23\) No.31/6547](#).

Substantive Legal Advice:

Acceptance of the funding requires the Council to enter into a Memorandum of Understanding (MOU) under s.31 of the Local Government Act 2003 with the Department for Energy Security and Net Zero (ESNZ formerly BEIS). This amounts to a variation (the First Variation") of the original MOU entered into under authorisation of DDM 4791 in December 2022. NCC is the responsible and accountable body under the MOU as varied and will receive the funding on behalf of Council colleagues working under the banner of the Midlands Net Zero Hub ("the Hub").

Under the MOU the Council must commit to eligible expenditure within the Funding Period for the purposes of delivering the Local Net Zero Programme which must comply in all respects with the rules set out in paragraph 12 (Scope) of the original MOU. The First Variation provides the MNZH with core and additional funding for the projects specified in Appendix 1 which must also be used in line with the objectives specified at paragraph 12. Therefore, the Council is expected to have made commitments by 31st of March 2023 to spend all the Grant, including the additional £250,000 specified in the First variation. Any underspend will be addressed through the provisions at paragraph 47 of the original MoU. The original MOU detailed commitments by the Authority to deliver against the Scope and commitments in relation to the administration of the Grant, which are otherwise unaffected by the First Variation.

Where the Authority provides any funding to third parties for activities undertaken during the Funding Period, (e.g. where the Authority is not directly responsible for delivery and instead chooses to provide funding to other public bodies (e.g. local authorities),) it must ensure that the relevant provisions within the MoU are included in any arrangement with these third parties, such as under a grant agreement, to ensure the Council's position is protected as much as possible. Nevertheless, the Council must be cognisant of the risk that where a grant agreement is utilised, there is no 'legal' obligation to the grantor, to actually carry out the purpose the grant is

provided for, although this is generally mitigated by ensuring appropriate claw back is possible for grant monies which have not been spent or are misapplied.

It is understood that external legal support will assist with the preparation of any such agreements.

The council will need to ensure that funding provided is deliverable within the timescales set out, that the Council considers value for money with regard to the costs which will be borne by the third party and identifies any additional value-adding elements which are aligned to the overall objectives of the Local Net Zero Programme. These will also help ensure the Best Value duty under section 3 of the the Local Government Act 1999 is complied with in practice, demonstrating that our arrangements are economic, efficient, and effective, and fully consider the outcomes for citizens and service users.

The authority will need to ensure that its use of the grant and by others does not breach subsidy control regime principles (if the Council gives financial assistance that amounts to a subsidy in any given instance) unless an exemption applies. If for example, the Minimal Financial Assistance (MFA) exemption were to apply to the value of a subsidy award, the Council must comply with procedural requirements such as provision of the MFA notification and MFA Confirmation. Please refer to paragraphs 7.11 – 7.20 inclusive of the Statutory guidance https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1117122/uk-subsidy-control-statutory-guidance.pdf, for further detail.

The Council must complete its own Subsidy Control Principles assessment (where they apply) and retain all declarations and information as may be required to enable both the Authority and the Secretary of State to comply with any applicable subsidy control regime, and to provide copies of such declarations and information to the Secretary of State when required to do so. This will apply to each of the identified projects specified in the First Variation Appendix 1 if money is given in the form of onward grants.

The aforementioned Government statutory guidance published on 11.11.2022 regarding subsidy control compliance must be referred to and utilised by the Council. The Council must assure themselves that they are meeting the obligations under the Subsidy Control Act 2022 and/or their use of an exception is robust and will withstand scrutiny or challenge; this process must be led and signed off by colleagues who work in this area, as they will have the required knowledge and understanding of the relevant market and what impact the proposal will have, and need to ensure decisions in relation to subsidy are recorded in an auditable manner.

When using the funding to procuring goods or services, to meet the original MOU objectives the authority still must comply with all relevant requirements of the Public Contract Regulations as well as obligations under the Equality Act 2010 and its associated Public Sector Equality Duty and its own Contract Procedure Rules. This position is unaffected by the First Variation. When managing its supply chain the Council should expect its suppliers and subcontractors to meet the standards set out in the Government Supplier Code of Conduct published by the HM Government on

best practice expectations referenced below:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779660/20190220-Supplier Code of Conduct.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779660/20190220-Supplier_Code_of_Conduct.pdf).

The Authority cannot use the grant, or any asset financed wholly or partly by it, to generate revenue or make a capital gain, except to the extent agreed as part of the grant. The grant will be subject to clawback in any of the circumstances set out in the MOU (paragraphs 37-43), and in particular if the Authority's use of it, contravenes any requirement of law, in particular (but without limitation) law relating to subsidy control.

The MOU requires the Council (through its MNZH) to have a Board made up of local representatives as well as other stakeholders such as regional leaders and third parties, which will be responsible for ensuring supported projects are in line with wider Net Zero goals and signing off on resource/funding decisions. This position applies to the First Variation projects. This will continue to be the case under the MOU as varied by the First Variation. BEIS (now ESNZ) representatives will sit on each Board which will meet quarterly (at minimum) and sign off quarterly reports to BEIS. The Board will be led by a Chair - as agreed between the Hub, the Board and BEIS - and will be responsible for identifying and escalating appropriately any risks and issues to Hub delivery. In addition, BEIS will establish bi-yearly meetings between Hub board representatives (one from each Board), preferably chosen on a rotating basis, to discuss the strategic direction of the Local Net Zero Programme and any challenges facing the programme as well as to ensure a shared approach to governance and decision making.

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