

## Legal Advice – HDSTC – 2023/24 - MOU and DDM

The grant of £ 9,500,000 is to be paid and accepted under a Section 31 Local Government Act 2003. Although it is paid under a MOU which is not intended to be legally binding, and no legal obligations or legal rights shall arise between the Parties from this MOU, in signing the MOU the Parties do, however, enter into the MOU intending to honour all their commitments under it.

The Grant is to be used to design and launch the Competition and provide grant awards up to £1,000,000 to successful recipients in England which will provide appropriate training and support to installers operating across the different DESNZ retrofit schemes. This is to include installer training that is understood to lead to a recognised qualification NVQ L2, L3 or L5 (or equivalent) and CPD style short courses, which will expand and bring in additional tradespeople to carry out work under various DESNZ retrofit schemes.

It is recognised within the scope of the grant that staff with a range of skills and expertise will be needed to achieve the objective of helping build capacity and resilience for home energy retrofit delivery more widely and scale up delivery further as Government works towards meeting its 2030 and 2050 decarbonisation targets. The funding provided must be utilised to these ends, in accordance with the obligation under the MOU entered into by the Council with the Department.

NCC, is being engaged to support the Department with the design, launch, management, monitoring and evaluation of the Competition. The work carried out by the Council will facilitate the development of the Competition, leading to: a grant competition being issued in a timely and proper manner; the subsequent assessment and proper selection of projects; and successful delivery of such projects.

The Council has the power to undertake this role in accordance with the Localism Act 2011 pursuant to the general power of competence.

Good knowledge of the energy and retrofit markets, as well as experience of working in developing and running grant competitions is essential. Project management experience of large complex programmes is also essential. Any creation of new internal posts/ extensions to existing posts must be in accordance with the Council's Constitutional requirements and associated HR policies and procedures. Subject to approval of the required staffing budget (as an executive decision) the creation the post from within that budget would be a non-executive decision under Delegation 16 of the constitution. This will need to be fully costed to ensure the administration costs of running the grant competition can be covered by the maximum of £650,000 (7% of funding) that may be used by the Council for this purpose, or that there is fully budgeted fund availability to cover any additional spend.

Whilst it is understood the Council has in-house experience in the design and running of the earlier round of the HDSTC it again needs to ensure grants are awarded, rather than contracts for the provision of services in the delivery of this project. Legal Services can support with this element to ensure the award is consistent with the principles of a grant, although it is understood that the MNZH have experience in ensuring awards comply with these in the last HDSTC in 2022/23 and will follow a similar process.

An assessment of any grants to be made to third parties will need to be undertaken to ensure compliance with the new Subsidy Control Regime. In each instance there will need to be an assessment as to whether there is a subsidy, if so whether an exemption applies and if not,

compliance with the subsidy control principles. It is recommended that as the Accountable Authority, the Council adheres to the UK Government Subsidy Control Guidance, liaises and agrees a suitable subsidy assessment approach with DESNZ, to minimise risk of non-compliance with the Subsidy Control Act regime obligations and of clawback of the grant.

The Council must ensure that it passes through/ cascades down to any recipients of grant funding, all relevant obligations in any subsequent grant agreement/ award letters with recipient providers, to ensure the Council is able to meet its primary obligations under its grant agreement with the Department.

It is noted the Council needs to separately procure external contractors to conduct an evaluation, to meet the conditions set under the MOU in this regard. In so far as the procurement of a consultant for evaluation is concerned the Council will need to comply with the Public Contracts Regulation 2015 and the Council's own Contract Procedure Rules, whilst also agreeing key documents such as weighting of factors in the evaluation process with the Department. The MOU contains additional obligations as to reporting to the Department on how the funding is used in line with the scope of the grant and the Council will need to ensure that where external providers (consultants) are secured, agreements with them ensure the Council be able to meet its objective and contain provisions to enable the Council to recover its costs if the Consultants are unable/do not deliver on the grant objectives, without reasonable justification.

In so far as it is possible to do so, in accordance with the General Data Protection Regulation ("GDPR") and the Data Protection Act 2018 the Market Research Society Code regarding the collection and use of personal data for research and statistical purposes and all other law, the Council would be agreeing under the MOU to collect information for evaluation and reporting purposes (referred to as "the Information" in the MOU) in a way which:

- o Allows it to share the Information with the Department;
- o Allows the Department to share the Information with any of its research or evaluation partners; and
- o Allows the Department to use the Information for research and statistical purposes provided always that the Department complies with the provisions of the Data Protection Act 2018. This may therefore necessitate the parties to enter into a Data Sharing Agreement. The advice of our Information Governance department should be obtained to ensure data sharing agreements and GDPR compliance can be achieved.

The Council will be expected to work together with the Department to agree how the Authority will spend any unspent Grant funding in line with the Scope of the Grant; and if they are unable to reach an agreement the Authority has to agree to repay the unspent Grant.

Overall the Council must ensure it complies with the duty under Local Government Act 1999, (referred to as the best value duty) to make arrangements to secure continuous improvement in the way in which their functions are exercised, having regard to a combination of economy, efficiency and effectiveness.

The decision is presented as a Leaders Key decision, and so the Leader needs to ensure the exceptional circumstances test in article 10.21 of the Council's constitution is met and the justification is sufficiently robust so that he is satisfied it is not possible to take the decision to the next scheduled meeting of the Executive Board. The Notice requirements in Article 13 - Access to Information Procedure Rules of the Council's constitution will need to be complied with.

Richard Bines – Solicitor – Contracts and Commercial Team – 27.06.2023