

**COMMUNITY RIGHT TO CHALLENGE**  
**Report by the Head of Legal and Democratic Services**

**1. INTRODUCTION**

1.1 From 27th June 2012, the Localism Act 2011 introduced a right for defined organisations and persons to submit an Expression of Interest in taking over the provision of a service on behalf of the Council. Where a valid expression of interest is received, the Council is required to undertake a procurement exercise for that service, which may lead to the Council awarding a contract for the provision of that service. This report recommends the arrangements which the Council should adopt in order to operate the new Community Right to Challenge.

**2. WHO CAN SUBMIT AN EXPRESSION OF INTEREST?**

2.1 An expression of interests can be submitted by a “relevant body”, comprising –

- ◆ a Parish Council, but not limited to services or facilities within its area;
- ◆ a Voluntary Body – a body, other than a local authority, the activities of which are not carried on for a profit;
- ◆ a Community Body – a body, other than a local authority, which carries on activities primarily for the benefit of the community;
- ◆ a body or trust established for charitable purposes;
- ◆ two or more employees of the Council, whether or not they have formed themselves into a body for this purpose, or
- ◆ such other persons or bodies as may be specified by the Secretary of State by regulations.

2.2 There is no requirement for a Voluntary or Community Body to have any local connection and any of these bodies can submit an expression of interest in partnership with any other organisation, including a commercial organisation, or propose to sub-contract the work to a commercial organisation. Providing that this is done, there is no requirement for the relevant body to undertake the majority of, or any particular share of the work.

**3. WHAT SERVICES CAN AN EXPRESSION OF INTEREST RELATE TO?**

3.1 The expression of interest must relate to the provision of, or assisting in the provision of, a “relevant service”, which means any service which is currently provided by or on behalf of the Council. However, the following services are “excluded services” which cannot be the subject of an expression of interest –

- ◆ services provided in partnership with NHS bodies, or by an NHS body on behalf of the Council;
- ◆ a service provided to a named person with complex individual health or social care needs; or
- ◆ a service which includes the exercise of a statutory power which cannot be delegated. So, the setting of Council Tax or the determination of a planning application is not legally capable of being undertaken by anyone other than the local authority, and so cannot be the subject of an expression of interest.

3.2 So, an expression of interest can relate to services such as management and maintenance of playing fields or parks, refuse collection and re-cycling, running a leisure centre, the operation of off-street car parks, or the provision of a back office activity.

#### **4. THE EXPRESSION OF INTEREST**

4.1 The Expression of Interest must be in writing and meet certain requirements. These include the provision of -

- (a) information about the financial resources of the relevant body which is 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. This is particularly important when dealing with an emergent staff mutual or voluntary body, which may not be fully operational at the date of submitting an expression of interest;
- (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; and
- (e) where the relevant body consists of two or more employees, details of how they propose to engage other employees of the relevant authority who are affected by the expression of interest.

## 5. VALIDATION OF EXPRESSIONS OF INTEREST

- 5.1 When an expression of interest is received, the Council needs to check that it is submitted by a “relevant body” for a “relevant service” which is not an “excluded service”. If it fails to meet these requirements, the Council notifies the person who submitted the expression of interest that it is not a valid expression of interest, but need take no further action.
- 5.2 There are ten grounds on which the Council may reject a valid expression of interest –
- (i) that the expression of interest does not meet the statutory requirements, because it is not from a relevant body or is not for a relevant service;
  - (ii) that the supporting information is inadequate or incorrect;
  - (iii) that any member of the body making the bid, or of their consortium, is not suitable to provide the service. This would cover absence of a necessary qualification, or past conduct;
  - (iv) that the Council has already taken a formal decision to cease to provide the service. So an expression of interest cannot be used as a means to challenge an authority’s decision to close a facility or cease a service;
  - (v) that taking this service in isolation would result in a loss of integration with NHS services to the detriment of users of the integrated service;
  - (vi) that the service is already the subject of a procurement exercise;
  - (vii) that the Council is already in negotiations in writing with a third party for the provision of the service;
  - (viii) that the Council has already published its intention to consider the provision of the service by a body to be set up by 2 or more employees;
  - (ix) that the expression of interest is vexatious or trivial; and
  - (x) that the acceptance of the expression of interest is likely to lead to a breach of law or statutory duty. This would cover an expression of interest which would require delegation of statutory powers which cannot be delegated.
- 5.3 In addition, the Localism Act provides that a Council may define services and set periods during which expressions of interest may be submitted for those services, and may then refuse to consider an expression of interest which is submitted at the wrong time. This enables the Council to ensure that, for example, it receives any expressions of interest for different parts of the waste collection and disposal and recycling services at the same time so that it can deal

with them in a co-ordinated manner. Consequently the Procurement Manager, where appropriate and after consultation with appropriate officers, will propose to Cabinet timescales for consideration of expressions of interest in specific services.

5.4 The Act also requires the Council, in considering an expression of interest, to consider whether the acceptance of the expression of interest would promote or improve the social, economic or environmental well-being of the area, over and above the provision of the service, e.g. creating local jobs, improving local skills or improving environmental conditions.

#### 5.5 **Acceptance or rejection of an Expression of Interest**

Once an expression has been validated, it is necessary for the proper officer to conduct a review of the expression of interest to determine whether it falls within any of these criteria. This is partly a matter of fact and law, and partly a question of collecting information from the officer currently responsible for the running of the service. It is also a question of policy, because, where an expression of interest falls within one of these grounds for rejection, the Council still has a discretion and may decide to accept the expression of interest anyway. It must then notify the persons or body who submitted the expression of interest of its decision and of the reasons for that decision.

5.6 If the Council acts unreasonably in rejecting an expression of interest, that decision would be open to judicial review.

### 6. **THE PROCUREMENT EXERCISE**

6.1 Once a valid expression of interest has been accepted, the Council must conduct an appropriate procurement exercise, complying with the relevant statutory or Code of Procurement requirements, dependent upon the nature and value of the service concerned. The relevant Head of Service will be the project lead for any procurement exercise, but in close consultation with the Procurement Manager.

#### 6.2 **Specifying the service**

The range of the service (in terms of the service and the geographical area) to be subject to a procurement exercise will be set by the expression of interest. The Council may only vary the range of services with the agreement of the body or persons who submitted it. But the specification to which the service is to be provided, the contract terms and conditions, and the criteria for evaluation of tenders are for the Council to determine.

#### 6.3 **Tenders**

Although an expression of interest may be submitted by a genuine community or voluntary organisation, and the Council may wish to encourage such community involvement in service provision, once the Council goes out to open tender, it cannot prevent tenders being

submitted by purely commercial organisations, and will be required to evaluate all tenders received on the same evaluation criteria.

#### **6.4 In-house bids**

There is nothing in the legislation to prevent the Council submitting an in-house “tender” for the provision of the service, on the basis of its own employees. Such an in-house “tender” would not be a part of the statutory procurement exercise, but should be evaluated on exactly the same criteria as any third party bids, and can lead to the Council determining on best value grounds not to accept any of the third party tenders. However, it will be necessary for reasons of propriety to ensure that the team preparing any in-house “tender” are treated in exactly the same way as external tenderers and, as far as possible, do not improperly influence the manner in which the procurement exercise is conducted and do not receive any information which is not made available to all other bidders and which might give the in-house bid team an unfair advantage in the preparation of their bid. Where it is decided, therefore, that an in-house bid will be prepared and submitted, the relevant Head of Service must agree with the relevant Managing Director arrangements for the identification of separate commissioning and bid preparation teams.

#### **6.5 Timescale**

The Council must set a minimum and a maximum time from the acceptance of an expression of interest to the start of the procurement exercise. This allows time for the preparation of a specification for the service and for the invitation to bidders. Where the expression of interest comes from two or more staff, it could allow time for them to form a staff mutual as a separate legal entity to prepare and submit the bid. Consequently, the Procurement Manager, after consultation with appropriate officers, will propose to Cabinet timescales for the period between acceptance of an expression of interest and start of the procurement exercise.

#### **6.6 Acceptance of Tenders**

This phase of the process is essentially a procurement exercise which will be led by the appropriate Head of Service (or Managing Director where the Head of Service will head up an in-house or staff mutual bid team), assisted by the procurement Manager and with appropriate legal, financial, HR and other support.

#### **6.7 Resources**

It is uncertain at present as to the amount of time and resources that will be involved in dealing with the ‘community right to challenge’. If expressions of interest are few, then it is likely they can be handled within existing resources. If, however, there are a larger number or they involve major services, then additional resource is likely to be required, as a procurement process is a significant exercise. The need for any additional resource will only become apparent in the light of experience and may be the subject of an MTP bid.

## 7. RECOMMENDATIONS

It is RECOMMENDED that –

- (i) the Managing Directors be authorised, after consultation with appropriate Head(s) of Service (and the relevant Cabinet Member if considered necessary), to accept or reject an expression of interest on behalf of the Council.

## BACKGROUND PAPERS

- ◆ Sections 81 - 86 of the Localism Act 2011
- ◆ The Community Right to Challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012 [SI 2012 No. 1313]
- ◆ The Community Right to Challenge (Fire Services and Rejection of Expressions of Interest) (England) Regulations 2012 [SI 2012 No. 1647 -
- ◆ DCLG Statutory Guidance

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