



APSE briefing 12-26

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To all APSE main contacts in England and to Wales, Scotland and Northern Ireland for information only

The Community Right to Challenge

Key Issues

- The Community Right to Challenge is a process by which a defined 'relevant body' can challenge to provide a service of the local authority
- This new power provided under the Localism Act could have serious implication for service delivery planning, frontline service providers and elected members in the determination of local service delivery options.
- There is an attempt to debar in-house bids from procurement processes

1. Introduction

The Localism Act received Royal Assent on 15 November 2011. The Act is subject to commencement orders and regulations which bring into force certain provisions. Many provisions are also subject to statutory guidance. One main feature of the Localism Act is the so called 'Community Right to Challenge'. This particular new right will come into force fully on 27th June 2012 as regulations were laid before Parliament alongside statutory guidance on 21st May 2012.

2. What is the Community Right to Challenge?

The Community Right to Challenge is a process by which a 'relevant body' (which is defined as a charity or third sector organisation, parish councils and two or more employees of the local authority within the regulations) may submit an 'Expression of Interest' in providing a service or part of a service that is provided by or on behalf of a 'relevant authority' (which generally includes local authorities and fire and rescue authorities who are not already part of the local authority). The local authority may accept or reject the Community Right to Challenge based on matters set out in the regulations and the guidance. If a challenge is accepted then a procurement exercise must take place on the open market.

3. What are the relevant pieces of legislation, regulation and guidance?

The Localism Act 2011 is the primary piece of legislation and Community Right to Challenge is within Part 5, chapter 2, Sections 81-86 of the Act.

In addition to this the following are significant:-

- **The Community Right to challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012 – 27th June 2012. Statutory Instrument 1313**

These regulations set out what must be included in an Expression of Interest. They also set out which services are excluded from the 'Right to Challenge'. There are limited exclusions mainly in services where there are joint arrangements with the NHS but these exclusions end in April 2014. There is an on-going exclusion in the case of a relevant service commissioned or provided for a named person with complex individual health or social care needs which is, so far, not a time-limited exclusion.

- **The Community Right to Challenge (Fire and Rescue Authorities and Rejection of Expressions of Interest) (England) Regulations 2012**

These regulations set out the 'relevant authorities' for the purposes of the Community Right to Challenge and extend the application of the Community Right to Challenge to those fire and rescue authorities that are not already covered by virtue of the 'parent' local authority. These regulations also set out the grounds upon which a local authority may reject an expression of interest. These regulations are very important in shaping future service delivery and how an authority may treat an 'Expression of Interest'. The regulations were laid before Parliament in draft form but will become a Statutory Instrument on 27th June 2012.

- **Draft Community Right to Challenge: Statutory Guidance - Published 21 May 2012. In force for 27 June 2012**

Draft guidance which sets out matters which local authorities should have regard to in respect of a Community Right to Challenge has also been published. If the regulations as listed above come in to affect so too will the draft guidance, on the 27 June 2012. However there are numerous inconsistencies with the draft guidance which are referred to in this briefing which APSE suggests should be amended by CLG in advance of issue.

4. How will the Community Right to Challenge operate?

Local authorities need to consider a number of issues in respect of the Community Right to Challenge:-

Who can submit an Expression of Interest and to whom?

A relevant body, which for the purposes of the regulations is a

- voluntary group
- community group
- charity
- parish council or
- two or more employees of the local authority,
- or others which may be specified by regulation

A 'relevant body' is able to submit an Expression of Interest to the 'relevant authority'. Relevant authorities are defined as County Councils, District Councils, and London Borough Councils, including Unitary authorities, and also includes metropolitan county fire and rescue authorities, The London Fire and Emergency Planning Authority and a fire and rescue authority that is constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004(b) or a fire and rescue authority that is constituted by a scheme to which section 4 of that Act applies.

What must an 'Expression of Interest' include?

An Expression of Interest must be in writing and schedule 1 of SI 1313 sets out what must be included and where there is a consortium, or proposal to use a sub-contractor, the information must be supplied in respect of each member of the consortium or sub-contractor as appropriate and must include:-

- Information about financial resources:
- Evidence that by the time of any procurement exercise how the body making the expression of interest will be capable of providing or assisting to provide the service
- Information about the relevant service to which the Expression of Interest relates (including geographic information)
- Information about the outcomes to be achieved by the relevant body and in particular
 - (a) How the provision of assistance will promote or improve the social economic or environmental well-being of the relevant authority's area and
 - (b) How it will meet the needs of the users of the relevant services

When can an Expression of Interest be submitted?

An expression of interest can be submitted at any time unless the relevant authority has published specified periods on its websites to help manage the flow of expressions of interest, which relate to particular services. This is to help synchronise expressions of interest with existing commissioning cycles for services. Where there is not a specified period for submission then the authority is bound to consider expressions of interest at any time.

What happens when an Expression of Interest is received?

Once an expression of interest is received then the relevant authority must consider it. The relevant authority may refuse to consider an expression of interest submitted outside a specified period for submitting expressions of interest.

Relevant authorities may request further information from relevant bodies but they cannot make inclusion of such information a requirement in order for the expression of interest to be considered. They should make it clear in any such request 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. Relevant authorities should make this clear to relevant bodies.

It is interesting to note that according to the statutory guidance whilst only relevant bodies are eligible to submit an expression of interest, they may do so ***'in partnership with other relevant bodies and/or non-relevant bodies'***. In other words a third sector / for profit company collaboration is not only possible but in accordance with the guidance is seemingly encouraged by Government.

What happens if an expression of interest is accepted?

Where an expression of interest is accepted then the authority must then embark on a procurement exercise. The party making the expression of interest is not guaranteed to win the work in competition and, equally, is not obliged to bid in the form in which they made the original expression of interest nor obliged to bid at all.

Timescales for embarking on a procurement exercise, should according to the draft statutory guidance, be proportionate to the size and complexity of the contract having *'regard to the value and nature of the contract that may be awarded as a result of the exercise'* according to the draft statutory guidance. **As is already the case, authorities will need to comply with procurement law.**

What happens if an expression of interest is rejected?

An expression of interest may be rejected on grounds set out in the regulations and in the draft statutory guidance. The body making the expression of interests must be notified of the rejection.

Reasons for rejection include:-

1. The expression of interest does not comply with any of the requirements specified in the Act or in regulations.

2. The relevant body provides information in the expression of interest which, in the opinion of the relevant authority, is in a material particular inadequate or inaccurate.
3. The relevant authority considers, based on the information in the expression of interest, that the relevant body or, where applicable-
 - (a) any member of the consortium of which it is a part, or
 - b) any sub-contractor referred to in the expression of interestis not suitable to provide or assist in providing the relevant service.
4. The expression of interest relates to a relevant service where a decision, evidenced in writing, has been taken by the relevant authority to stop providing that service.
5. The expression of interest relates to a relevant service -
 - (a) provided, in whole or in part, by or on behalf of the relevant authority to persons who are also in receipt of a service provided or arranged by an NHS body which is integrated with the relevant service; and
 - (b) the continued integration of such services is, in the opinion of the relevant authority, critical to the well-being of those persons.
6. The relevant service is already the subject of a procurement exercise.
7. The relevant authority and a third party have entered into negotiations for provision of the service, which negotiations are, at least in part, conducted in writing.
8. The relevant authority has published its intention to consider the provision of the relevant service by a body that 2 or more specified employees of that authority propose to establish.
9. The relevant authority considers that the expression of interest is frivolous or vexatious.
10. The relevant authority considers that acceptance of the expression of interest is likely to lead to contravention of an enactment or other rule of law or a breach of statutory duty.

The reasons for rejection are in the main obvious and common-sense but there are two specific ones worthy of separate comment. One is that reason 8 (that the authority is already considering the provision of a relevant service by 2 or more employees of the authority, for example a staff mutual or cooperative), appears to 'ring-fence' this arrangement in a preferential way. This is not necessarily consistent with issues relating to procurement and transparency and may cut across state aid issues. Indeed in a recent challenge to a staff mutual arrangement within the NHS one of the arguments put forward was precisely this issue of preference.

A further reason for rejection worthy of note is that the expression of interest may lead to a contravention of an enactment or other rule of law. This clearly includes matters such as the Best Value duty that applies to local authorities and equalities duties. However for reasons set out below the inconsistency with this point of **regulation** as opposed to **guidance** which is not of itself law provides cause for concern.

2. Draft statutory guidance and in-house bids

Draft statutory guidance sets out a number of ammeters as detailed above but there are some specific matters worthy of note and comment. 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 in-house bid at the same time.'

This is a cause for concern and creates inconsistency with the cited 10th reason for rejection of a bid. Taking this paragraph for each point APSE would comment as follows.

'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'

Whilst technically an in-house team is not a separate legal entity local authorities have overarching powers to provide services directly for themselves. This is provided for by numerous pieces of primary legislation. It is quite inappropriate therefore to introduce in guidance, which does not have legislative effect, to suggest primary legal powers have been amended or altered in some way or to imply that this is the case. Moreover this element of 'guidance' does not relate to any matters outlined in the Localism Act itself or within the Regulations.

Moreover comparative public sector 'bids' are a recognised way of ensuring that any alternative models of delivery are based upon principles of value for money and are sustainable. Indeed they were a requirement under Compulsory Competitive Tendering (CCT) and in any event are provided for by the Public Contracts Regulations 2006, which, for example, require that in-house teams are treated the same way as external tenderers in tender evaluation.

The guidance goes on to say:

'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.'

Again this is inconsistent with good procurement practice. If, for example, a leisure centre were the subject of an expression of interest, that was then accepted, and followed by a procurement exercise consideration of the best treatment of staff and assets would be necessary – not only to secure the best value duty upon the local authority but to also ensure compliance with good practice in terms of asset management, and employment rights including TUPE and redundancy. Again EU directives allow for consideration on in-house bids stipulating how such offers are treated. The risk of challenge is of course a point of consideration but this is inflated in the context of the guidance. If authorities are open and transparent in their dealings it is perfectly appropriate for an authority to reject external bids – they are not obligated to accept any bids if they do not meet with their requirements.

3. APSE comment

The new legislation, regulation and draft statutory guidance (which is not for consultation but could still be amended) is a cause for concern. The draft guidance appears to take an unduly restrictive approach on the ability of local authorities to determine, for themselves, using the democratic mandate of locally elected councillors, how they would wish to shape future service delivery options.

Whilst the vast majority of councils are actively engaged with local community groups and third sector providers, helping to shape future service delivery, these options are developed through a collaborative framework. The process driven approach, provided for under the Community Right to Challenge, could undermine collaborative approaches and indeed provides for 'Trojan horse' or aggressive bidding processes which, far from engaging local delivery options, could undermine such options in favour of aggressive regional or sub-regional bids for services. The ability for bidders to be joined with for-profit companies as part of the Community Right to Challenge process appears to undermine the localist nature of the primary legislation itself and the 'community' element of the 'right to challenge'.

Considerable planning and resources will need to be put into dealing with Expressions of Interest. Councils will need to put resources into the development of local policies on whether to accept or reject bids. All matters will still need to comply with overarching procurement law and financial standing orders at a local level. Consideration will also need to be given to the on-going Best Value duty and how this is evidenced – for example through effective use of performance data. Many authorities are already looking at how they could use APSE performance networks reports to gauge matters of Best Value or 'value for money' to demonstrate these matters in comparative information or reports.

APSE solutions are already exploring the development of policy and practice formation workshops to help local authorities respond to the process of 'Community Right to Challenge'. APSE training has already developed and is currently delivering Masterclasses in the Localism Act and Community Right to Challenge. At a national level APSE will be asking CLG to reconsider elements of the draft Statutory Guidance and many APSE regions will be hosting bespoke discussion sessions for APSE members.

For details of [APSE solutions](#) work in this area please email [Davina Rai](#)

For details about the Localism Act training please see the course details on this link to [APSE training](#) or email [Jan Kennedy](#).

For other enquiries relating to APSE performance networks reports, this briefing or regional activity please email [Mo Baines](#). Your comments would also be welcome.

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