



APSE briefing 12-31

July 2012

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

Final regulations on statutory guidance and 'The Community Right to Challenge'

Key Issues

- APSE [briefing 12-26](#) highlighted issues that related to the draft regulations and draft statutory guidance on the new Community Right to Challenge
- 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 briefing updates APSE member authorities on the now final regulations and statutory guidance including the permissibility of in-house bids.

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 came into force fully on 27th June 2012 as regulations were laid before Parliament alongside statutory guidance on 21st May 2012. This briefing highlights a substantial change in the draft statutory guidance compared to the now final guidance.

2. What are the main legislative provisions

- **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 came into force on 27th June 2012.

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

This guidance sets out matters which local authorities should have regard to in respect of a Community Right to Challenge.

3. What elements have changed between the draft guidance and the final statutory guidance?

In APSE briefing 12-26 we highlighted the following paragraph which was of concern to APSE.

At paragraph 9.5 of the draft guidance it stated: -

'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.'

The draft guidance was very problematic because it appeared 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. APSE therefore highlighted its concerns to CLG and we are pleased to report that in the final statutory guidance paragraph 9.5 has been deleted leaving the position quite clear in that in-house bid **ARE** permissible and indeed consistent with statutory duties such as Best Value.

APSE welcomes this move as a sensible reflection of the position, both in terms of procurement matters and in terms of the public policy basis, which clearly allows authorities to be in a position to take a 'make or buy' decision on service delivery for themselves.

One further helpful amendment to the final statutory guidance compared to the draft guidance is that at paragraph 1.13 it includes additional wording following the words 'Employees are not expected to have finalised all of their arrangements before submitting an expression of interest' to add that *[they] **but will probably need to form a separate legal entity in order to bid in a procurement exercise***

This clarifies that employee led bids are treated as a form of outsourced arrangement and are quite distinct of course from in-house (direct) bids. APSE was again concerned by perceptions that employee led coops or mutual arrangements are treated in the same manner as 'public sector' when clearly they are in fact simply a different form of an outsourced arrangement. The fact that there will be an almost certain requirement to form a legal entity on which to bid should help to manage risk to the public sector (such as the local authority or fire authority) in exploring expressions of interest from employees. This will ensure a lessening of risk on matters such as financial capability, risk of challenge in procurement terms and the likely sustainability aspects of employee led bids.

APSE continues to assist its member authorities on matters relating to the Community Right to Challenge and welcomes feedback from member authorities on how they are preparing to meet the new obligations to consider expressions of interest which have now taken effect as of the 27 June 2012.

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

For details about the Localism Act Masterclass training please see email [Jan Kennedy](#).

For other enquiries relating to this matter please email [Mo Baines](#). Your comments are always welcome.

Mo Baines
Principal Advisor.