

Committee:	Executive	Agenda Item No.:	6.
Date:	22 <sup>nd</sup> October 2012	Status	Open
Category	Decision within the functions of Executive		
Subject:	Community Right to Challenge		
Report by:	Solicitor to the Council and Monitoring Officer		
Other Officers Involved	Deputy Monitoring Officer		
Director	Chief Executive Officer		
Relevant Portfolio Holder	N/A		

### **RELEVANT CORPORATE AIMS**

COMMUNITY SAFETY – Ensuring that communities are safe and secure  
CUSTOMER FOCUSED SERVICES – Providing excellent customer focused services  
ENVIRONMENT – Promoting and enhancing a clear and sustainable environment  
REGENERATION – Developing healthy, prosperous and sustainable communities  
SOCIAL INCLUSION – Promoting fairness, equality and lifelong learning.  
STRATEGIC ORGANISATIONAL DEVELOPMENT – Continually improving our organisation.

This community right relates to all services provided by the Council and therefore relates to all the Council's aims.

### **TARGETS**

The subject matter does not directly relate to any targets specified in any approved plans.

### **VALUE FOR MONEY**

There are no direct value for money issues from the report, however should a service be subject to a successful community right to challenge this would be an issue at the procurement stage.

### **THE REPORT**

This report sets out provisions contained within the Localism Act, known as the Community Right to Challenge, to enable relevant bodies to take over the running of Council services. The report contains details of relevant bodies that can submit an expression of interest to run a service, those services

exempt from the Right, grounds on which expressions of interest may be declined and the process for dealing with expressions of interest and subsequent procurement exercises.

The Council's Strategic Alliance Management Team has already suggested the Monitoring Officer as the proper officer for the Community Right to Challenge.

The Community Right to Challenge is different from the Community Right to Bid which allows people to bid to take over assets that are of value to their local community such as a village shop, pub, community centre or library (also known as Assets of Community Value) and the Community Right to Build which is linked to neighbourhood planning.

### **ISSUES/OPTIONS FOR CONSIDERATION**

The Localism Act 2011 introduced a right for "relevant bodies" to submit an expression of interest to take over the provision of a service on behalf of the Authority. Where a valid expression of interest is received, the Authority is required to undertake a procurement exercise for that service, which may lead to the Authority awarding a contract for the provision of that service.

"Relevant bodies" are defined in the Act as –

- A parish council;
- A voluntary body;
- A community body;
- A body or trust established for charitable purposes;
- Two or more employees of the authority, 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.

There is no requirement for a voluntary or community body to have any local connection and any of the above 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.

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 Authority. Services provided in partnership with North East Derbyshire District Council as part of the Strategic Alliance

would also count as relevant services. 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 Authority;
- 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.

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 branch library or a leisure centre or operation of off-street car parks. Equally, a team of Council staff might consider taking on a back office activity.

The Act provides that an authority 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.

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;
- 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.

- e) Where the relevant body consists of employees, details of how that relevant body proposes to engage other employees of the relevant authority who are affected by the expression of interest.

The first stage comprises the validation and acceptance or rejection of the expression of interest.

When an expression of interest is received, the Authority 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 Authority notifies the person who submitted the expression of interest that it is not a valid expression of interest, but need take no further action.

Once an expression of interest has been validated, the Council will acknowledge it within a set time period and advise the relevant body of the timescales in which a decision on whether to accept or reject it will be made. The Authority must set and publish the maximum period which will elapse between receipt of an expression of interest and the Authority notifying the body which submitted the expression of interest of its acceptance or rejection of that expression of interest, but the Council may set different maximum periods for different cases.

It will then be necessary for the proper officer to conduct a review of the expression of interest to determine whether it should be accepted. This will involve collecting information from the relevant Assistant Director currently responsible for the running of the service. Where an expression of interest falls within one of the grounds for rejection, the Council may still decide to accept it.

Following the outcome of this review it is proposed that the proper officer take a report to Executive at the earliest opportunity for members to decide whether or not to accept or reject the expression of interest. Decisions to reject an expression of interest must be supported by at least one of the statutory grounds for rejection set out below. The Council must then notify the persons or body who submitted the expression of interest of its decision and of the reasons for that decision.

There are 10 grounds on which an authority may reject an expression of interest –

- 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;
- The supporting information is inadequate or incorrect;
- 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;

- The authority 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;
- Taking this service in isolation would result in a loss of integration with NHS services to the detriment of users of the integrated service.
- The service is already the subject of a procurement exercise.
- The authority is already in negotiations in writing with a third party for the provision of the service;
- The authority has already published its intention to consider the provision of the service by a body to be set up by two or more employees;
- The expression of interest is vexatious or trivial; and
- 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 or where it would lead to a breach of the authority's duty to secure best value, for example by causing greater cost by the break-up of shared service arrangements.

The Act also requires the Authority, 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, but this does not form a ground for rejecting an expression of interest.

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

Where a valid expression of interest is accepted, the Authority moves into procurement mode and must conduct an appropriate procurement exercise. The scale of the procurement exercise will be dictated by the nature and value of the service concerned. So, for a Part A service which exceeds the procurement thresholds (currently £173,934), the Public Contracts Regulations will require a formal Official Journal of the European Union procurement. For Part B services, the Regulations still apply but prescribe lower levels of formality.

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 Authority may only vary the range of services with the agreement of the body or persons who submitted the expression of interest. However, 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 Authority to determine.

Although an expression of interest may be submitted by a genuine community or voluntary organisation and the Authority may wish to encourage such community involvement in service provision, once the Authority goes out to open tender, it cannot prevent tenders being submitted by private commercial organisations and will be required to evaluate all tenders received on the same evaluation criteria.

The Authority 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.

The final phase of the process is essentially a procurement exercise, so it requires the Shared Procurement Unit to run the process with the appropriate Assistant Director taking a leading role in settling the service specification and in the evaluation of tenders, with appropriate legal, financial, HR and other support.

The proper officer would be responsible for managing each procurement exercise, subject to the settlement of the specification for the service and the evaluation of tenders with the appropriate Assistant Director.

In relation to existing contracts with third parties, notification will appear on the Council's website 6 months before the end of the contract on the contracts register on the website. This should be designated as the official period for these contracts.

### **Other Supporting Information**

Guidance on the Community Right to Challenge is available to download at:  
<http://www.communities.gov.uk/publications/communities/righttochallenge/gestatguide>

The Government have also set up a dedicated website for community rights including the Community Right to Challenge. This can be found here:  
<http://communityrights.communities.gov.uk/what-are-community-rights/community-right-to-challenge/>

### **IMPLICATIONS**

Financial: None, although any procurement exercise which result may provide financial consequences.

Legal: As in the report

Human Resources: As in the report

## **RECOMMENDATIONS**

1. That the Executive designate 1–21 August of each year as the time period during which the Council will receive expressions of interest for Council services other than those provided jointly with other authorities.
2. That the Executive appoint the Monitoring Officer as proper officer for the purposes of the Community Right to Challenge and recommend to Standards Committee the inclusion of this in the Delegation Scheme in the Constitution.
3. That the Executive authorise the Monitoring Officer to acknowledge expressions of interest for Council services other than those provided jointly with other authorities by 31 August of the year in which the expression of interest is made and advise the relevant body that a decision on whether to accept or reject their expression of interest will be made between 1 September and 31 October of the same year.
4. That, once the Monitoring Officer, as proper officer, has undertaken a review of an expression of interest, a report be brought to the Executive at the earliest opportunity for members to decide whether or not to accept or reject the expression of interest. Where the decision is to reject the expression of interest this will include at least one of the statutory grounds for refusal set out in paragraph 3.13 of the original the Executive report. Where the decision is to approve the expression of interest the procurement exercise will commence between 1 and 30 November of the year in which the expression of interest is made.
5. That, for the purposes of the legislation, the minimum period to elapse between the date of the Council's decision to accept an expression of interest and the date on which the procurement exercise will start be two days and the maximum period be 91 days. The maximum period to elapse between the date on which the Council receives an expression of interest submitted by a relevant body and the date on which it notifies the relevant body of its decision in respect of the expression of interest be 92 days.
6. That a report setting out timescales for those Council services currently provided jointly with other authorities be brought back to a future meeting of Executive.
7. That current contracts with third parties be advertised for the purposes of the Community Right to Challenge 6 months before the end of the contract on the Council's website.
8. That the Monitoring Officer be delegated authority to vary the timescales in paragraphs 1 to 5 above, following consultation with the Leader of the Council.

9. That the timescales given in paragraphs 1 to 4 be publicised on the Council's website and be subject to review in 12 months' time.

**REASON FOR DECISION TO BE GIVEN IN ACCORDANCE WITH THE CONSTITUTION**

*This is new legislation which needs to be implemented and a process put in place.*

ATTACHMENTS: **N**

FILE REFERENCE: **None**

SOURCE DOCUMENT: The Community Right to Challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012