

REPORT TO THE OVERVIEW AND SCRUTINY COMMITTEE

LOCALISM ACT 2011

COMMUNITY RIGHT TO CHALLENGE

BACKGROUND

The statutory provisions of the Localism Act are supported by Regulations and statutory guidance from the Department of Communities and Local Government.

The foreword to the Guidance says that the Localism Act is intended to create a shift in power away from Whitehall to give local communities opportunities to take control. The new community rights in the Act are intended to help to create conditions to enable communities to play a bigger part in shaping the world around them.

It comments that communities rightly have high expectations of local services that offer excellent value for money over which Councils do not have a monopoly for service delivery nor do they, solely, have the best ideas. Innovative ideas from the community should be welcomed.

The community right to challenge is said to pave the way for more communities to shape and run excellent local services.

THE RIGHT TO CHALLENGE:

Summary

The process gives certain bodies a right to issue an expression of interest to the Council regarding the provision of services provided by or for the Council. If accepted, this triggers a procurement exercise.

The Services

Harrow Council is a relevant authority for the purposes of the Act. It must therefore consider any expressions of interest submitted to it in respect of a "relevant service" provided they are submitted by a "relevant body".

Relevant Services are any service provided by or on behalf of the Council. It does not however include the `functions` of the Council which may be delegated under other statutory provisions. Regulations may exclude services from being the subject of an expression of interest. The current regulations exclude

- (a) a service commissioned in conjunction with health services under a partnership arrangement
- (b) a relevant service commissioned by an NHS body for the Council

(Both of these exclusions only apply until April 2014)

- (c) a service commissioned (or provided) by the Council for a person with complex individual health or social care needs.

Who may challenge

The relevant bodies capable of giving an expression of interest are:

- (a) a voluntary or community body
- (b) persons or a trust established for charitable purposes
- (c) a parish council
- (d) 2 or more employees of the Council (the relevant body)
- (e) other persons or bodies specified by the Regulations

A Voluntary Body is one that is neither a public or local authority which is not run for profit though it may generate a surplus which is used for its activities or invested in the community. A Community Body is one that is neither a public or local authority which is run primarily for the benefit of the community. The way by which groups are able to demonstrate community benefit will vary.

Some voluntary and community bodies may not be incorporated. The Guidance says that it would normally be expected that they will become incorporated with limited liability before they may begin delivering contracts for local authorities thereby limiting risk to individual members. The Council will however have to consider such circumstances to evaluate related risk exposure of the Council.

In respect of expressions of interest from employees the Guidance again says that they will 'probably need to form a separate legal entity in order to bid in a procurement exercise'. The capacity of such employees to bid in such an exercise is quite separate and distinct from a bid from an in-house provider on behalf of the Authority. Such a bid would not need to be from a separate legal entity.

Although expressions of interest must be from defined 'relevant bodies'; this does not appear to prevent such a body from acting in collaboration with a non-relevant body to seek to initiate a procurement process.

Expressions of interest

All expressions of interest must include the following information and where the relevant body intends to deliver a service as part of a consortium or to use a sub-contractor for any part of the service the information required by (a) and (b) below must be given in respect of each of them.

- (a). Information of their financial resources.
- (b). Evidence that demonstrates that they will be capable of providing the service or assisting in providing it by the time of the procurement exercise.
- (c). Information sufficient to identify the relevant service and the geographical area to which the expression relates.

- (d). Information about the outcomes to be achieved by the relevant body (or consortium partners) in the provision of the service. In particular, how it will promote or improve the social, economic or environmental well-being of the area and how it will meet the needs of service users.
- (e). Where the relevant body consists of employees of the Council, details of how they propose to engage with other affected employees.

Although expressions of interest may be submitted at any time the Council can specify periods (the submission periods) of time when they can be submitted and by implication, periods during which they cannot be submitted. The Council can set different submission periods for different services. If an expression of interest is submitted outside a submission period then the Council can refuse to consider it.

In determining such periods the Council would be expected to take account of :

- (a). the need for Bodies to have sufficient time to prepare their submissions.
- (b). the nature, scale and complexity of the services concerned.
- (c). the timescale of any existing relevant commissioning cycles
- (d). the timescale of any relevant Council processes.
- (e). the relationship of services to each other.

These periods of time must be published in a manner determined by the Council but this must include the Council's website.

Processing of Expressions of Interest

The Council must specify and publish the maximum period(s) of time applicable between receipt of expressions of interest and a decision being made and these must be published as indicated above.

When considering setting these periods of time the Council is advised to take account of:

- (a). the need to provide notification within a reasonable time
- (b). the nature, scale and complexity of the service
- (c). the complexity of the expressions of interest
- (d). the likely need to agree modifications
- (e). timescale of any relevant commissioning cycles and/or Council processes.

After receipt of the expression of interest the Council must, in writing, inform the body that submitted it of the time period within which it expects to make its decision. This notification must be given either within 30 days following the end of a submission period or, in the alternative, within 30 days of receipt.

The Council may, with the agreement of the Body that submitted an expression of interest, modify it if it would otherwise not be capable of acceptance.

The Council may either accept or reject an expression of interest. In doing so it must consider if its acceptance would promote or improve the social, economic or environmental well-being of its area. But rejection is only permitted on the following grounds as prescribed by Regulations: (Guidance in italics)

- (a). the expression of interest is not made by a relevant body or in writing or otherwise fails to comply with the relevant requirements
- (b). information provided is, in the opinion of the Council, inadequate or inaccurate in a material part. *(In this respect it is only permissible to take account of the information that is required to be provided with the expression of interest).*
- (c). if, based on the information provided, the Council considers that the relevant person (consortium or sub-contractor) is not suitable to provide the service.
- (d). the Council has already decided to stop providing the service in question. *(The right to challenge does not enable people to require the Council to provide services it has stopped providing).*
- (e). the expression of interest relates to a service provided to persons who are also in receipt of a NHS services integrated with a Council service and the continued integration of the services is, in the opinion of the Council, critical to the well-being of the persons.
- (f). the service is already subject to a procurement exercise.
- (g). the Council has already entered into negotiations in writing with a Third Party for them to provide the service. *(If the Council is only considering future provision via a Third party this ground for refusal is not available.)*
- (h). the Council has published an intention to consider the provision of the service through a body that 2 or more employees intend to establish
- (i). the Council considers the expression of interest to be frivolous or vexatious. *(This means an expression of interest that is likely to cause distress or irritation without justification.)*
- (j). The Council considers that to accept the expression of interest is likely to lead to a contravention of law or breach of a statutory duty.

After reaching a decision this must be notified in writing to the Body that submitted the expression of interest. If the decision is to modify or reject the submission then reasons must be given. This notification must be published in the same manner as previously mentioned.

A relevant body may withdraw an expression of interest either before or after a decision on it has been made by the Council. Such withdrawal or the refusal to agree to modifications does not prevent the Council from deciding to initiate a procurement exercise relating to that service.

The Consequences of Acceptance

If the expression of interest is accepted then the Council must carry out a procurement exercise for the service specified in it. In this regard the exercise must be appropriate having regard to the value and nature of the contract that may be awarded as a result of it. Again, the Council must consider how that process will promote or improve the social, economic or environmental well-

being of the area but only so far as is consistent with the law applicable to the award of contracts for the provision of local authority services. The Council must comply with procurement law.

The Council is required to identify minimum and maximum periods of time that will elapse between the acceptance of an expression of interest and the commencement of the procurement process and these must be published in the manner mentioned above. There may be different periods for different cases.

The procurement exercise is not restricted to relevant bodies in general or to the relevant body that issued the expression of interest in particular. That Body can compete in the process with any other organisation that may wish to take part. The Council can also submit an in-house bid which is distinct from any expression of interest that may be submitted by two or more employees as a relevant body.