

# Community Right to Challenge Policy

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## **1. Purpose**

This policy sets out how Cheshire East Council will administer the Community Right to Challenge process, from acceptance of expressions of interest through to procurement.

## **2. Background and Scope**

From 27 June 2012, the Localism Act 2011 introduced a right for Parish Councils, community and voluntary bodies, charitable trusts and 2 or more local authority employees to submit an Expression of Interest in taking over the provision of a service on behalf of an Authority.

Therefore, where a valid expression of interest is received, Cheshire East 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 Policy is based on the Community Right to Challenge Statutory Guidance June 2012, which provides an explanation of the legislative framework as contained in Part 5, Chapter 2 of the Localism Act 2011.

## **3. Who can submit an Expression of Interest?**

An expression of interest 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 out for a profit;
- A Community Body – a body, other than a local authority, which carries out activities primarily for the benefit of the community;
- A body or trust established for charitable purposes;
- 2 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
- A body responsible for the implementation of Business Improvement District arrangements

Relevant bodies that deliver contracts for the Council would be expected to be incorporated with limited liability. Relevant bodies that need to incorporate for this reason will be able to do so in the period between their EOI being accepted and the procurement exercise starting.

#### **4. What services can an Expression of Interest relate to?**

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.

The following services are “excluded services” which cannot be the subject of an expression of interest –

- 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.

#### **5. Specifying the period for submissions and list of services**

The Council has set a 30 day period each year for accepting expressions of interest on Community Right to Challenge. The first opportunity in Cheshire East is from the 1st September 2016 closing on the 30th September 2016.

It is proposed that a list of services, which are open to challenge, will be prepared and publicised on an annual basis.

The creation of such a list will: -

- Allow Cheshire East Council to manage and define what services we are prepared to accept challenge against (this could be aligned to service reviews or planned changes)
- Enable the authority to have best value comparators prepared in order to effectively benchmark any tenders that are received
- Require preparatory work to be done to define specifically what is open for challenge, and identify at what scale. (Need to be very clear on what is delivered by the service, how its resources are spent, any statutory requirements etc.)
- Require the programming of an approach that ensures every service area is accounted for.

## **6. Notifying decisions on expressions of interest**

If the Council receives expressions of interest during the 30 day period, it then has up to 30 days from the 30<sup>th</sup> September to give the bidder a date, in writing, when they will receive an answer as to when the proposal will be accepted or rejected.

The council must specify the maximum period that it will take to come to a decision, and publish details of the specification including on the council website. Different periods may be specified for different cases based on the following factors: -

- Need to notify relevant bodies of a decision within a reasonable period
- The nature, scale and complexity of the service to which EOI relate
- The complexity of EOI's received
- The likely need to agree modifications to the EOI in order to accept them
- The timescales for any existing commissioning cycle relevant to the service which and EOI relates to, or any other relevant authority processes. These may include Cabinet decision making or budget setting processes

## **7. The Expression of Interest**

The Head of Governance and Democratic Services is appointed for the receipt and validation of expressions of interest.

The Head of Communities will undertake to endorse validation and either accept, ask for modification or reject the EOI. The Head of Legal Services, and the Principal Manager Communities and Partnerships, are appointed to act as Deputies for the Head of Communities in situations where a conflict of interest exists

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) Sufficient information about the relevant service 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 employees as described in section 81(6)(d), details of how that relevant body proposes to engage other employees of the relevant authority who are affected by the expression of interest.

The Council has set a period – from 1<sup>st</sup> September to 30<sup>th</sup> September - to accept expressions of interest. This is in order to manage the process via our commissioning cycle and to deal with EOIs for different parts of the service in a co-ordinated manner.

## **8. Validation of Expressions of Interest**

When an expression of interest (EOI) 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 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.

The Head of Governance and Democratic Services will be authorised to carry out the initial validation of expressions of interest and to reject any that are not valid. Valid expressions of interest will then be considered by the Head of Communities in consultation with the relevant Cabinet Member and the appropriate Head of Service and a recommendation made whether to accept or reject expressions of interest. This recommendation will be taken to Cabinet for a final decision to accept or reject the EOI. The Council's formal response will be provided to the relevant body by the Head of Communities.

The Council may only reject an EOI on one or more of the grounds specified below: -

- 1) 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;
- 2) That the supporting information is inadequate or incorrect;
- 3) That any member of the body making the bid, or of their consortium, is not suitable to provide the service. This would, for example, include consideration of absence of a necessary qualification, or past conduct;
- 4) That 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;
- 5) 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.

(This prevents expressions of interest un-picking integrated Section 75 Arrangements)

- 6) That the service is already the subject of a procurement exercise;
- 7) That the Authority is already in negotiations in writing with a third party for the provision of the service;
- 8) That the Authority has already published its intention to consider the provision of the service by a body to be set up by 2 or more employees;
- 9) That the expression of interest is vexatious or trivial; and
- 10) 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 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.

Cheshire East Council must then notify the persons or body who submitted the EOI of its decision and of the reasons for that decision.

The Council has discretion and may decide to accept the expression of interest. If the Council believes that it would otherwise reject an expression of interest, it may seek instead to agree with the relevant body to it being modified e.g., in cases where a part of a service is subject to challenge; where inadequate information has been received or where more information/evidence is required to make a decision.

### **Social Value**

The Localism Act 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, but this does not form a separate ground for rejecting an expression of interest.

The Council 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. However, it may set different maximum periods for different cases

## **9. The Procurement Process**

Once a valid expression of interest has been accepted, the Council must conduct an appropriate procurement exercise.

It may be necessary for the Chief Operating Officer to agree to make resources available and designate a Procurement Officer to act as the project lead for any procurement exercise. The Procurement Officer will bring forward, for Cabinet

approval, timescales for the period between acceptance of an expression of interest and the start of the procurement exercise.

The scale of the procurement exercise will be dictated by the nature and value of the service concerned. So, for services which exceed the procurement thresholds within Public Contracts Regulations 2015 will require a formal OJEU procurement. For services that fall under the 'light touch' regime, the Regulations still apply but prescribe lower levels of formality. The Council also needs to comply with the Finance and Contract Procedure Rules, which may define higher levels of formality and which also apply below the tender thresholds.

The Council is required to adopt and publish minimum and maximum periods between the acceptance of the expression of interest and the start of the procurement exercise, but may set different periods for different cases.

**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 (e.g. waste collection within a specified area, the operation of a leisure centre or maintenance of a local park). The Authority may only vary the range of services with the agreement of the body or persons who submitted it. 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.

**Tenders and evaluation** - 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 Service goes out to open tender, the Council cannot prevent tenders being submitted by purely commercial organisations and will be required to evaluate all tenders received on the same evaluation criteria.

**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" is treated in exactly the same way as external tenderers and, as far as possible, does not improperly influence the manner in which the procurement exercise is conducted and does 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 its bid.

**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 2 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.

**Acceptance of Tenders** - The Council's Finance and Contract Procedure Rules set out when a tender may be accepted by officers and when it must be reported to Members for acceptance. This phase of the process is essentially a procurement exercise, so it requires that there be a Procurement Officer designated to run the process, but with the appropriate Head of Service (or Director where the Head of Service will head up an in-house or staff mutual bid team) taking a leading role in settling the service specification and in the evaluation of tenders, with appropriate legal, financial, HR and other support.

## **10. Encouraging Voluntary Participation in Service Provision**

Once the statutory process is activated, there is no guarantee that the community or voluntary organisation which initiated the process will be successful in the procurement exercise.

As a Commissioning Council we want to actively source the right service from the right provider at the right price for the taxpayer. We will work with social enterprises, and the voluntary, community and faith sectors to secure the best option for service provision for our local communities that will ensure that social, economic or environmental benefits are offered to the community

We will promote the opportunity for the VCF sector to speak to the Council at any time about any ideas that they have in relation to how services could be run on the website. This opportunity will not be restricted to the September period in which challenge will be opened and should encourage a more positive, open dialogue with the sector.

This Policy will therefore also direct and inform our approach to transfer and devolution of services. The outcomes are similar and a collaborative approach will avoid duplication and confusion for potential providers.

## **11. Encouraging the development of Staff Mutuals**

The Council can provide support and encouragement for staff to establish mutuals (co-operatives and other employee-owned bodies) and to take on service provision.

The Authority can agree to allow staff time, within their employment, to prepare such proposals and can provide financial assistance for consultancy in the preparation of a business case, the establishment of the mutual as a separate legal entity and dealing with the consequential issues such as staff transfer and leasing of premises.

There is scope for a lease of premises and a grant agreement in appropriate cases without competitive procurement, where the Authority is satisfied that this provides best value, where the grant agreement is for no more than costs and there is not a developed commercial market for the services.

Once the mutual is in existence and preparing its bid in competition, any further assistance from the Council would constitute State Aid.

## Appendix A - Community Right to Challenge – Decision Process Map



