



**Executive**  
22 April 2013

**Report from the Director of Legal and  
Procurement and  
Director of Strategy, Partnerships and  
Improvement**

Wards affected:  
ALL

**Community Right to Challenge**

**1. Introduction**

- 1.1 The Localism Act 2011 introduced legislation that enables community groups and other relevant bodies to submit an expression of interest in relation to providing Council services. The local authority must consider the expression of interest in accordance with sections 81, 83 and 84 of the Localism Act 2011 and a set of regulations set out in the Community Right to Challenge (expressions of interest and excluded services)(England) Regulations 2012 and Community Right to Challenge (fire and rescue authorities and rejection of expressions of interest)(England) Regulations 2012 and accompanying Guidance on the Community Right to Challenge from the Secretary of State.
- 1.2 This paper summarises the requirements of the legislation and makes proposals concerning the necessary processes and procedure that the Council should have in place to be compliant with the provisions of the Act with respect to the right to challenge. The community right to challenge does not automatically provide groups with the right to provide a service, it enables them to express an interest. However if the expression of interest meets the criteria set out within the act and the guidance it can trigger the requirement for the council to run an open competitive tendering process for these services.

**2. Recommendations**

The Executive is asked to agree to the following recommendations:-

- 2.1 To note the requirements of the Localism Act 2011 and the Statutory Guidance on the Community Right to challenge from the Secretary of State.

- 2.2 For the financial year 2013/14, to set a bidding window for the period between 1 May 2013 and 30 June 2013 for community groups to submit expressions of interest to the Council under the community right to challenge.
- 2.3 For subsequent financial years after 2013/14, to set an annual bidding window for the period between 1 April and 30 May for community groups to submit expressions of interest to the Council under the community right to challenge.
- 2.4 To authorise officers to produce and publish a list of services due to be the subject of contracting processes in the following financial year in conjunction with the annual bidding window, starting from May 2013 for the financial year 2013/14.
- 2.5 To delegate authority to Directors for the relevant service areas to be responsible for assessing the expressions of interest against the criteria within the statutory guidance relating to the community right to challenge and deciding whether to accept or reject the expressions of interest.
- 2.6 To note the decision of the Director of Regeneration and Major Projects to accept the expression of interest made by Brent Tenants Rights Group regarding the Council's Tenancy Relations Service as set out in paragraph 3.33 of this report.

### **3. Detailed Considerations**

#### Relevant Bodies in the Localism Act 2011

- 3.1 Brent Council is covered by the community right to challenge provisions introduced by the Localism Act 2011. The relevant groups and bodies who can submit an expression of interest to provide council services are set out within the Act 2011. This states that only the following are "relevant bodies" which can make an expression of interest :
  - (a) A voluntary or community body
  - (b) A body of persons or a trust which is established for charitable purposes only;
  - (c) A parish council
  - (d) Two or more employees of the relevant authority
  - (e) Any other person or body specified by the Secretary of State in regulations
- 3.2 Further details of these "relevant bodies" are set out in the Secretary of State's Guidance on the Community Right to Challenge. The Guidance states that whilst only relevant bodies are eligible to submit expressions of interest, they may do so in partnership with other relevant bodies and/or non-relevant bodies but in such circumstances, certain information must be provided in the expression of interest in respect of all partners. These are detailed in the Expression of Interest Requirements section below.
- 3.3 In relation to expressions of interest from employees of the local authority, specific guidance covers these arrangements and employees are expected to form an employee-led structure to take on running services under the right. Employees using the Right are not expected to have finalised all of their arrangements before submitting an expression of interest but will probably

need to form a separate legal entity in order to bid in a procurement exercise so that management and contractual relationships are clear.

#### Relevant services

- 3.4 The community right to challenge only applies to the provision of services and applies to all “relevant services”, which are services provided by or on behalf of the authority in the exercise of its functions. Services which are excluded from the right to challenge in secondary legislation are as follows.
- (i) Until 1 April 2014, a relevant service commissioned in conjunction with one or more health services by a relevant authority or by a Primary Care Trust, NHS Trust or NHS foundation trust under a partnership arrangement or by a relevant authority and an NHS body or a Strategic Health Authority, acting jointly.
  - (ii) Until 1 April 2014, a relevant service commissioned by an NHS body on behalf of a relevant authority.
  - (iii) A relevant service commissioned or provided by a relevant authority in respect of a named person with complex individual health or social care needs.

#### Submitting expressions of interest and specified periods

- 3.5 Local authorities can consider expressions of interest on a case by case basis whereby expressions of interest can be submitted at any time during the year. However, they can also choose to specify periods during which expressions of interest can be submitted in relation to a particular service or collection of services. This can be a specified two or three month period during the year when expressions of interest can be received. The council can also specify those services, aligned to contracts expiring where these are in place, that will be the subject of future bidding processes. A number of other authorities have already indicated that they will be adopting this approach. Details of any specified periods and services must be published, including on the authority's website. A relevant body may submit an expression of interest at any time if the local authority has not specified a window in which to submit an expression of interest.
- 3.6 In specifying periods for submissions of interest, local authorities should have regard to the following factors:
- (a) The need to provide relevant bodies with sufficient time to prepare and submit expressions of interest.
  - (b) The nature, scale and complexity of the relevant service for which a period is being specified.
  - (c) The timescale for any existing commissioning cycle relevant to the service for which a period is being specified, or any other relevant local authority processes (including Executive and budget setting processes).
- 3.7 The Secretary of State's Guidance encourages local authorities, when opting to specify periods, to consider where such periods can be aligned to allow expressions of interest relating to two or more services to be submitted. The Guidance acknowledges that specifying periods will help local authorities to

manage the flow of expressions of interest and allow this to be synchronised with any existing commissioning cycles for services.

#### Expression of interest requirements

- 3.8 The following information is required from any group when submitting an expression of interest:
1. Where the relevant body proposes to deliver the service as part of a consortium or to use a sub-contractor for delivery of any part of the service, the information in paragraphs 2 and 3 below must be given in respect of each member of the consortium and each sub-contractor as appropriate.
  2. Information about the financial resources of the group submitting the expression of interest.
  3. Evidence that demonstrates that by the time of any procurement exercise the group submitting the expression of interest will be capable of providing or assisting in providing the relevant service.
  4. Information about the service that is the subject of the expression of interest sufficient to identify it and the geographical area to which the expression of interest relates.
  5. Information about the outcomes to be achieved by the relevant body or, where appropriate, the consortium of which it is part, in providing or assisting in the provision of the particular service, in particular:
    - (a) How the provision or 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 service.
  6. Where the group making the expression of interest consists of employees of the relevant authority, details of how that group proposes to engage other employees of the relevant authority who are affected by the expression of interest.

#### Notifying decisions on expression of interest

- 3.9 The local authority must specify the maximum period that it will take to notify the group making the challenge of its decision on an expression of interest and publish details of the specification, including on its website. Different periods may be specified for different cases.
- 3.10 The local authority must also notify a relevant body that has submitted an expression of interest of the timescale within which the authority will notify the body of its decision. The local authority must make such a notification of its decision in writing. This must be done within 30 days after the close of any period specified by the authority for submitting expressions of interest or, if no such period has been specified, within 30 days of the relevant authority receiving the expression of interest.
- 3.11 In specifying periods for notifying relevant bodies of decisions on expressions of interest, local authorities should have regard to the following factors:

- (a) The need to notify relevant bodies of a decision within a reasonable period;
- (b) The nature, scale and complexity of the service to which expressions of interest relate (eg is the service shared with one or more other relevant authorities, or jointly commissioned with one or more other public bodies?);
- (c) The complexity of the expressions of interest received (eg do they propose radical change to the way a service is provided?);
- (d) The likely need to agree modifications to expressions of interest in order to accept them; and
- (e) The timescales for any existing commissioning cycle relevant to the service which an expression of interest relates to, or any other relevant authority processes, including Executive decision making and budget setting processes.

#### Grounds on which an expression of interest may be rejected

3.12 The grounds on which an expression of interest can be rejected are as follows:

- 1. The expression of interest does not comply with any of the requirements of the Localism Act 2011 or in regulations.
- 2. The relevant body provides information in the expression of interest which in the opinion of the council 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 interest is not suitable to provide or assist in providing the relevant service.
- 4. The expression relates to a 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 integrated with the relevant service; and
  - (b) The continued integration of such services is, in the opinion of the local authority, critical to the well-being of those persons.
- 6. The relevant service is already the subject of a procurement exercise.
- 7. The local 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 local authority has published its intention to consider the provision of the relevant service by a body that two or more specified employees of that authority propose to establish.
- 9. The local authority considers that the expression of interest is frivolous or vexatious.
- 10. The local 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 expression of interest must be submitted to the local authority by the relevant body in writing.

#### Modifying an expression of interest

- 3.13 If a local authority believes it would otherwise reject an expression of interest, it may seek instead to agree to it being modified. Any modification must be agreed with the relevant body. If an agreement cannot be reached, the local authority may reject the expression of interest.

#### Period between an expression of interest being accepted and a procurement exercise starting.

- 3.14 Local authorities must specify periods between an expression of interest being accepted in a particular matter and a procurement exercise starting. Depending on local circumstances, this aims to allow relevant bodies the time they need to prepare to complete in the procurement exercise.

In specifying these periods, local authorities should have regard to:

- (a) The need to provide employees of the local authority, and other relevant bodies, with a fair, reasonable and realisable opportunity to bid in the procurement exercise for the service;
  - (b) The nature, scale and complexity of the service being procured (eg it may take relevant bodies longer to prepare to bid for larger, complex services than smaller more straightforward ones); and
  - (c) The timescales for any existing commissioning cycle relevant to the service being provided, or any other relevant authority processes, which may include Executive decision making and budget setting processes.
- 3.15 The Guidance of the Secretary of State states the following: “The relevant authority may well have a contract with a third party to provide that service. It is for the relevant authority to set the period between accepting an expression of interest and starting a procurement exercise”. The local authority will need to take into account its contractual obligations and commissioning cycle. The Guidance adds the following: “It would be undesirable if an expression of interest was accepted and there was a lengthy period before a procurement exercise could be started”.

#### The procurement exercise

- 3.16 When a local authority accepts one or more expressions of interest for a relevant service, it must carry out a procurement exercise for the service. The procurement exercise must be appropriate having regard to the value and nature of the contract that may be awarded as a result of the exercise. Local authorities will need to comply with procurement law, including the Public Procurement Regulations 2006. Where the Public Procurement Regulations do not apply, it is for the local authority to decide how to procure the service.
- 3.17 Local authorities must consider how both expressions of interest and procurement exercises triggered by one or more expressions of interest being accepted would promote or improve the economic, social or environmental well-being of the authority's area. This must be consistent with the law

applying to the awarding of contracts. The Secretary of State's Guidance suggests that local authorities may include social clauses in contracts provided they comply with the relevant requirements, which are explained in the European Commission's publication "Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement". The Guidance also states that local authorities should have regard to the DCLG's Code of Recommended Practice on publishing new contracts and tenders information as part of the government's transparency agenda.

#### Proposed Process for adoption in Brent

- 3.18 The Government's stated intention for the community right to bid legislation is to encourage the provision of public services by a diverse range of organisations and increase competition, innovation and value for money through the challenge process. The expectation is that expressions of interest from local community groups or employees will be forthcoming for services currently provided directly by the local authority hence triggering a competitive market testing process.
- 3.19 However discussions with the voluntary sector and CVS Brent have indicated concerns that the local voluntary sector will still find it difficult to compete with larger, national charities or private sector organisations in any such procurement process. Large, multi-authority or lengthy contracts already entered into will not be immediately affected and, as increasingly local authorities look to shared service options to deliver the necessary financial savings, the scope for local organisations to compete could be limited.
- 3.20 The Corporate Procurement Team and the Strategy, Partnerships & Improvement Department ("SP&I") of the Council have conducted a number of workshops with the voluntary sector outlining the council's procurement processes and requirements, including the provisions within the Localism Act 2011. The voluntary sector in Brent is keen to be an effective provider of local services and have identified a number of steps that would assist them. The most significant of these is adequate prior knowledge of the council's commissioning and procurement intentions. This would enable them to be better prepared, able to form consortium to bid where necessary and improve the quality of the bids submitted. The other main barrier experienced is in relation to financial assessments with many groups holding insufficient reserves to be considered viable as contractors.
- 3.21 SP&I are working with CVS Brent to develop capacity building and support programmes for the voluntary sector which will address these issues. The proposal within this report to define an annual two month bidding window for expressions of interest and a list of the council's future commissioning intentions will be beneficial in providing clarity and transparency for the local community and voluntary sector.
- 3.22 A number of local authorities have decided not to put in place a specific process for receiving or deciding on expression of interest under the community right to challenge. They have taken the view that depending on the level and complexity of expressions received, they will judge them on a case by case basis and not specify a period during the year. This is an option that is open to the council.
- 3.23 Brent has been participating in an officer group considering models for responding to the Localism Act which includes Ealing, Barnet, Harrow,

Waltham Forest, Haringey and Enfield. The legislation in relation to the Community Right to Challenge came into force in June 2012 and to date very few expressions of interest have been received by other London boroughs, some have had one or two, most have not received any. They have typically been for very small areas of activity and from local voluntary groups. Brent has so far received one expression of interest for a small function within housing relating to the Council's Tenancy Relations Service within the Council's Housing Needs Service. It may well be the case that the level of demand remains very low. However for reasons of transparency, consistency and effective use of officer time it is proposed that Brent adopts a bidding window for receiving expressions of interest under the community right to challenge. It is considered that this would be beneficial in providing clarity for potential bidders from the voluntary sector and enable service areas to publish details of those services which would be commissioned in the coming cycle. The legislation gives Councils the choice to set window periods for community groups to submit bids which can help them to manage the flow of expressions of interest.

- 3.24 The proposals set out below have been developed by an officer group composed of senior service commissioners and Assistant Directors, legal, procurement and Strategy, Partnerships and Improvement. There was a general consensus to adopt a specified period for receiving expressions of interest although there was a request for some flexibility for each service area to define the frequency.
- 3.25 There are essentially three stages to the proposed process for responding to the community right to challenge:-
1. Receiving expressions of interest.
  2. Deciding on expressions of interest
  3. The procurement exercise.

#### Receiving Expressions of interest.

- 3.26 It is proposed that expressions of interest will be received by the council during a specified window of two months during May 2013 and June 2013 for the 2013/14 financial year and during a specified annual bidding window of April and May for subsequent financial years. They will be received at a single point of contact (SP&I) via a dedicated email address. Officers are establishing a specific web page setting out the guidance for submitting an expression of interest, necessary documentation and any additional information required. Each bidding period will also have a list of the contracts and services that are due to be re-commissioned in the coming procurement cycle.
- 3.27 In order to apply the necessary time frames set out within the guidance and the appropriate procurement processes the two month bidding window, the Council would be seeking expressions of interest for services that would be procured to commence the following financial year. Each service department would be responsible, in collaboration with colleagues in the Procurement Team, for producing an annual list of the services due for re-commissioning. This would include services that are currently provided under contracts which are due to expire and any new services to be commissioned externally. Expressions of interest to provide services currently provided directly by the



authority would also be received during this window although there is not an expectation that these should be specified on the list, unless there is a specific intent to seek external provision of the function.

- 3.28 Departments initially requested some flexibility on the frequency with which their services are included within the annual bidding window but after careful consideration, officers are agreed that an annual two month bidding window would be the best way in administering and processing the receipt of expressions of interest under the community right to challenge.

#### Deciding on expressions of interest

- 3.29 Deciding on whether the expression of interest meets the criteria set out within the legislation and guidance will be undertaken by each relevant service area, with advice from Legal Services and the Corporate Procurement Team. SP&I will co-ordinate the process and ensure that the relevant deadlines are adhered to, but technical assessment of any expressions of interest will be with the relevant Director or Assistant Director for the service. The Directors, with assistance from officers in S&PI, will set up working groups to consider the expressions of interest that relate to their own service areas and make recommendations to the Directors who will make the final decision whether to accept or reject the relevant expression of interest. It is expected that such groups and the Directors will have access to advice from officers in the Legal and Procurement Department and the relevant Heads of Service. Accordingly, as set out in paragraph 2.5 above, Members are requested to delegate authority to Directors for the relevant service areas to be responsible for assessing the expressions of interest against the criteria within the statutory guidance relating to the community right to challenge and deciding whether to accept or reject the expressions of interest.
- 3.30 A report setting out the results of the assessments of the expressions of interest will be taken to the Corporate Management Team setting out the implications for future procurement activity where bids have triggered tendering processes. In some instances expressions of interest could have significant strategic or political implications. In these circumstances, decisions will be referred initially to the Council's Policy Co-ordination Group and subsequently to the Executive where authority to tender a specific service is required.

#### Procurement Exercise

- 3.31 Where an expression of interest meets all the relevant criteria and is accepted the council must, within an acceptable period of time, commence an open tendering exercise for provision of the service. The relevant body who made the expression of interest is required to compete in this process along side any other would be provider. The guidance suggests that the period between accepting the expression of interest and starting a procurement process should not be unduly long. One benefit of specifying a window and defining a list of services due for re-tendering is that it will more effectively manage expectations. It is likely that we will receive expressions of interest for services that are already the subject of contracts not due to expire for a number of years. Being clear on the commissioning cycle for services will support the voluntary sector to bid more effectively.

- 3.32 In other respects the procurement process would be conducted according to existing legal requirements and with due regard to cost, quality and social value.

#### Current Expression of Interest

- 3.33 As set out in paragraph 3.23 above, the Council has only received one expression of interest to date which was from Brent Tenants Rights Group in relation to the Council's Tenancy Relations Service, which is a small function within the Council's Housing Needs Service. After careful consideration of the expression's compliance with the statutory requirements of the Localism Act 2011 and relevant regulations, a letter was sent on 18 March 2013 notifying Brent Tenants Rights Group of the decision of the Director of Regeneration and Major Projects on behalf of the Council that their expression of interest has been accepted and that a procurement exercise in relation to the Council's Tenancy Relations Service will commence by no later than 30 September 2013.

### **4. Financial Implications**

- 4.1 There are no financial implications arising directly from this report. The staff resources required to administer the community right to challenge process will be contained within existing resources.

### **5. Legal Implications**

- 5.1 The statutory requirements of the Community Right to Challenge on Councils are set out in sections 81 to 86 of the Localism Act 2011 and two sets of regulations, namely - (1) Community Right to Challenge (expressions of interest and excluded services)(England) Regulations 2012 and (2) Community right to challenge (fire and rescue authorities and rejection of expressions of interest)(England) Regulations 2012. Furthermore, the Secretary of State for Communities and Local Government issued Statutory Guidance on the Community Right to Challenge in June 2012. The content of the legislation and Statutory Guidance and the Council's statutory duties in relation to the Community Right to Challenge have been summarised in section 3 of this report above. Failure to administer the Community Right to Challenge in accordance with the legislation will leave the Council open to challenge for being in breach of its statutory duties under the Localism Act 2011.
- 5.2 Officers will seek legal advice as and where appropriate to ensure that the Council does not breach the domestic and EU law in relation to procurement and employment when dealing with expressions of interest under the Community Right to Challenge and any subsequent procurement exercises that may take place following consideration and acceptance of expressions of interest.

### **6. Equalities Implications**

- 6.1 Officers have carried out a partial predictive Equality Impact Assessment of the proposal to set a two month annual window for community groups to submit expressions under the community right to challenge. A copy of the partial Equalities Impact Assessment is set out in Appendix 1 to this report. At this stage, no adverse impacts are envisaged. However, where expressions of interest are accepted and procurement exercises are carried out, an

equality impact assessment would need to be carried out in any event on a case by case basis. At the end of the first two month annual window, the process will be reviewed and the equality impacts will be considered and the process will be reviewed on an annual basis.

- 6.2 As the Community Right to Challenge concerns functions to potentially be carried out on behalf of the council, all expressions of interest must also be considered in relation to the Public Sector Equality Duty and due regard given in line with Brent's Equality Analysis guidance.

#### *Public Sector Equality Duty*

- 6.3 The Equality Act 2010 S149 sets out the public sector equality duty which requires the Council, when exercising its functions (including those as an employer) to have 'due regard' to the need to eliminate discrimination (both direct and indirect discrimination), harassment and victimization and other conduct prohibited under the Act, and to advance equality of opportunity and foster good relations between those who share a 'protected characteristic' and those who do not share that protected characteristic.
- 6.4 Direct discrimination occurs if, because of a protected characteristic, a local authority treats a person less favourably than it treats or would treat others. Indirect discrimination occurs if a local authority applies the same provision, criterion or practice to everyone, but it puts those in a certain protected group at a "particular disadvantage" when compared with persons who are not in that protected group. Even if a "particular disadvantage" arises, indirect discrimination does not arise if the provision, criterion or practice can be justified – i.e. if it is a proportionate means of achieving a legitimate aim.
- 6.5 The Council must pay due regard to any obvious risk of such discrimination arising in respect of the decision before them. At Brent, these matters are examined in the Equality Analysis.

A 'protected characteristic' is defined in the Act as:

- age;
- disability;
- gender reassignment;
- pregnancy and maternity;
- race;(including ethnic or national origins, colour or nationality)
- religion or belief;
- sex;
- sexual orientation.

Marriage and civil partnership are also a protected characteristic for the purposes of the duty to eliminate discrimination.

- 6.6 Having due regard to the need to 'advance equality of opportunity' between those who share a protected characteristic and those who do not, includes having due regard to the need to remove or minimize disadvantages suffered by them. Due regard must also be had to the need to take steps to meet the needs of such persons where those needs are different from persons who do not have that characteristic, and encourage those who have a protected characteristic to participate in public life. The steps involved in meeting the needs of disabled persons include steps to take account of the persons' disabilities. Complying with the duty may involve treating some people better than others, as far as that is allowed by the discrimination law.

- 6.7 Due regard to the need to eliminate discrimination, advance equality, and foster good relations must form an integral part of the decision making process. The Council must consider the effect that implementing a particular policy will have in relation to equality before making a decision.
- 6.8 There is no prescribed manner in which the equality duty must be exercised. However, the council must have an adequate evidence base for its decision making. This can be achieved by gathering details and statistics on who uses the service. A careful consideration of this assessment is one of the key ways in which the Council can show “due regard” to the relevant matters. Where it is apparent from the analysis of the information that the proposals would have an adverse effect on equality then adjustments should be made to avoid that effect (mitigation).
- 6.9 The duty is not to achieve the objectives or take the steps set out in s.149. Rather, the duty on public authorities is to bring these important objectives relating to discrimination into consideration when carrying out its functions. “Due regard” means the regard that is appropriate in all the particular circumstances in which the authority is carrying out its functions.
- 6.10 There must be a proper regard for the goals set out in s.149. At the same time, the council must also pay regard to any countervailing factors, which it is proper and reasonable for them to consider. Budgetary pressures, economics and practical factors will often be important, which are brought together in the Equality Analysis form. The weight of these countervailing factors in the decision making process is a matter for the Council in the first instance.

## **Appendix 1**

### **Partial Equality Impact Assessment**

#### **Background Papers**

Community Right to Challenge – Statutory Guidance  
Department for Communities and Local Government – June 2012

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