



# **Preparing for Community Right to Challenge**

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# Community right to challenge

The Act gives communities a right of challenge to run local authority services. The Coalition Government believes that this means local communities will be able to get *'more involved in the delivery of public services and shape them in a way that will meet local preferences'*.

Results in procurement exercise!

*Is it CCT by another name?*

# Statutory Guidance/Regulations



- The Community Right to challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012 – 27<sup>th</sup> June 2012
- The Community Right to Challenge (Fire and Rescue Authorities and Rejection of Expressions of Interest) (England) Regulations 2012 - 27 June 2012
- Community Right to Challenge: Statutory Guidance - Published 21 May 2012. In force for 27 June 2012

# Terminology



RA = relevant authority

Eol = expression of interest

RB = relevant body

RS = relevant service



# Who can make an expression of interest?

A 'Relevant body' can express interest in providing or assisting in providing a service

- provided by or on behalf of authority in the exercise of any of its functions
- Whole or part?
- Existing contract?

Regulations may exclude services

# What is a relevant body?



- Voluntary group – activities are not carried out for profit but can generate a surplus if used for the purposes of that activity or invested in the community
- Community groups – activities for the benefit of the community
- Charities
- Parish councils
- 2 or more employees of the local authority
- Anyone specified by regulations

# What should be included in an Expression of Interest?



- 27 June 2012
- EoI Requirements
  - For each member of the Consortium or sub-contractors (where relevant)
  - Financial resources
  - Capability to provide/assist in providing (at time of procurement)
  - Relevant service identity/geographical area
  - Outcomes to be achieved by RB/Consortium including promotion of Improvement of social, economic, environmental well being and meet the needs of the users of the relevant Service
  - Where Council employees – how they propose to engage with other employees affected by EoI

# Community Right to Challenge - Timings of EoI?



- A relevant body may submit E.O.I. at any time
- Authority may refuse to consider E.O.I. submitted outside a specified period
  - Authority may specify periods during which expressions of interest may be submitted
    - Generally or
    - Specific service
  - Authority must specify minimum and maximum periods
  - Authority must publish details of periods specified including on its website



# Making your decision



- Authority must specify time limit for decision
- Must notify relevant body of decision in writing
  - Give reason for modification or rejection
- Publish decision
  - Including on web site



# What if you accept an EOI?

## Must carry out a procurement exercise!

- as appropriate having regard to the value and nature of the contract
  - consider how it might promote or improve the social, economic or environmental well-being of the authority's area by means of that procurement
    - So far as consistent with procurement law

# Will the relevant body win?

The logo for APSE (Association of Professional Surveyors in Europe) is a magenta oval containing the word "apse" in white lowercase letters.

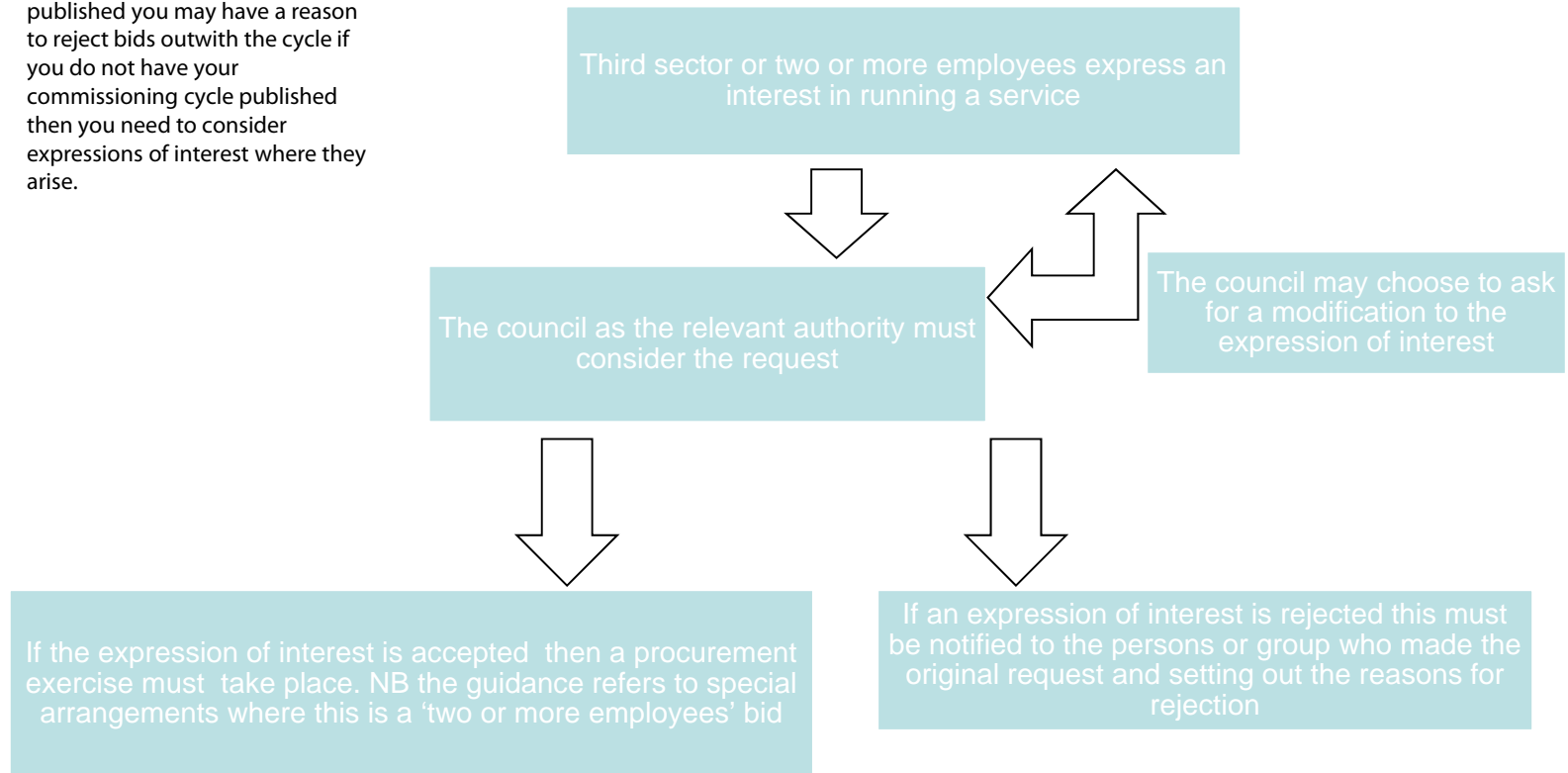
What must they demonstrate?

- Professional and technical ability?
- Financial and economic standing?
- Award criteria?

# CRC flowchart



There needs to be a regard for the commissioning cycle – if one is published you may have a reason to reject bids outwith the cycle if you do not have your commissioning cycle published then you need to consider expressions of interest where they arise.





# Rejection of Expressions of Interest - reason 1

Set out in the Schedule to the Regulations 10 reasons available as follows:

- Does not comply with the Section 81(1) or Section 81(1) regulations, so:
  - submitted to the authority by a relevant body
  - made in writing and complies with EoI Regs (from time to time)



## Rejection of Expressions of Interest – reason 2

- The information **in the opinion of the relevant authority**, is in a material particular inadequate or inaccurate.
  - Sufficiency and accuracy based on the information the RA may require e.g. financial, resource, meeting service user needs
  - Ask for further information if not?  
Yes v No?



## Rejection of Expressions of Interest - reason 3

- The RA based on the Eol consider that the RB or any member of the Consortium, or any sub-contractor is not suitable to provide/assist in providing the Relevant Service
  - must be based on information in Eol e.g. finance/suitability of staff/resources



## Rejection of Expressions of Interest – reason 4

- Relates to a RS where decision evidenced in writing has been taken by RA to stop providing the service
  - if consideration only has been given but no decision yet this would not be a rejection ground
  - timing issues
  - evidence will vary





# Rejection of Expressions of Interest - reason 5

- RS is provided whole/part by/on behalf of RA to persons who are also in receipt of a service provided or arranged by an NHS body which is integrated with the RS and continued integration **in the opinion of the RA** is critical to well being of those persons
  - Day care examples
  - seek advice/consult with/inform NHS body



## Rejection of Expressions of Interest – reason 6

- Already the subject of a procurement exercise
  - Unclear around timing
  - Does a notice have to have been issued or is it wider than that?
  - Definition of procurement ?



## Rejection of Expressions of Interest- reason 7

- RA and a third party have entered negotiation for provision of RS and in part conducted in writing
  - e.g. grant agreement
  - merely considering options is not sufficient

# Rejection of Expressions of Interest – reason 8



- RS published intention to consider provision of RS by body (to be) established by two or more employees
  - called mutualisation in the guidance!
  - publication may vary
  - This appears to give priority to employee mutuals

# Rejection of Expressions of Interest – reason 9



- Frivolous or vexatious EoI
  - e.g. causes distress or irritation without justification aimed at disrupting work of authority or harassing individuals in it. Not a genuine offer, lacks serious purpose. It's a complaint not an offer to compete to deliver the service



## Rejection of Expressions of Interest – reason 10

- Acceptance is likely to lead to contravention of enactment/rule of law/breach of statutory duty
  - **best value duty**
  - Safe guarding vulnerable groups

# Process



- Where will a CRC expression of interest go to in your authority
- Who will make a decision to accept or reject a bid to run a service?
- Will there be technical input from frontline service providers
- Who will assess risk?
- Who will be involved from a **procurement** route?

# Engaging with voluntary and Third Sector



- Promote other ideas/avenues for groups to come forwards
- Funding/sustainability issues
- Procurement criteria
- Public Services (Social Value) Act 2012



# Form of “Staff Mutuals”



- What do we mean by ‘Mutual’?  
“An organisation established primarily to provide service to its members and is usually owned by its members”

But it can simply be a company limited by shares or guarantee

- Options?
  - Worker co-operative/IPS
  - Company with employee benefit trust
  - Credit unions
- Co-operatives Bill

# Trojan horse?



# Implications for leisure



- Impact on strategic decisions?
- Incentive for creating trusts?
- Potential for service fragmentation?
- Incentive to integrate with third sector?

# Potential for Administrative Chaos



- No way to control who challenges and when
- Not all community groups will share the Council's strategic priorities
- Staff bids could come from unexpected quarters
- No way to prevent or control *competing* staff bids

# Potential for fragmentation



- Community likely to focus on very local services
- Staff will focus on what they do
- Impact on packaging decisions for procurement
- Impact on overhead recovery ratios
- Impact on levels of service delivery
- Cost of running unplanned procurements

# Potential for other unintended consequences



- Community groups rarely represent the whole community
  - Scope for competing bidders
  - Danger of community fragmentation – or worse
- The Trojan horse scenario
- Via the JV route
- Via merger and acquisition
- Loss of strategic control over operational priorities – and budget

# These are all risks to be assessed – for each service area



- Impact and likelihood
- Continued compliance with key strategic duties
  - Fiduciary duty
  - Best value
  - Statutory services
- Control of make or buy decision making
  - Whether or not to let a contract
  - When to let a contract
- Control of service packaging decisions
  - Service mix
  - Volume of work
  - Value of contract
- Loss of future flexibility and ability to set priorities
  - Tying up budgets
  - Locking in to some community priorities

# Points to a need to avoid (unwanted) challenges



- Are bids likely ?
  - Cost of bidding
  - Prospects of success
- Who from?
  - Community
  - Staff
- Why?
  - Extreme dissatisfaction
    - Perceived or actual cost
    - Service standard or quality of delivery
  - Pound signs in the eyes
    - Staff bids only
  - Trojan horse
    - JV type bids
    - Can we protect assets for the future



# Tackling the cause not the symptom



- Extreme dissatisfaction
  - Service design
  - Community engagement
- Pound signs in the eyes
  - How would a management buy out actually work?
- Trojan horse
  - Service design
  - Community engagement

# But what if challenges still come?



- At least try to control the timetable
  - Procurement cycle?
- And maybe even packaging
  - Procurement cycle?
- Otherwise
  - Making an in-house bid
    - Tender or Public Sector Comparator

**LOCAL SERVICES**

**LOCAL SOLUTIONS**



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