



# Community Right to Challenge Protocol

## 1. Introduction

The Localism Act 2011 introduces 'The Community Right to Challenge' which enables relevant bodies<sup>1</sup> (see paragraph 3 definition) to express an interest in running a local authority service<sup>2</sup>. This protocol outlines the process for those relevant bodies to exercise the Community Right to Challenge by submitting an expression of interest (EoI) in providing or assisting in providing a service on behalf of East Cambridgeshire District Council (ECDC).

### Key Terms:

- LA 2011 means Localism Act 2011
- Open Public Services White Paper means Community Right to Challenge, Department for Communities and Local Government, September 11 found at <http://files.openpublicservices.cabinetoffice.gov.uk/OpenPublicServices-WhitePaper.pdf>
- Statutory Guidance means Community Right to Challenge Statutory Guidance June 2012 paragraph 1.5-1.8 found at <http://www.communities.gov.uk/documents/localgovernment/pdf/2168126.pdf>
- EoI Regulations means The Community Right to Challenge (Expressions of Interest and Excluded Services)(England) Regulations 2012
- Rejection Regulations means The Community Right to Challenge (Fire and Rescue Authorities and Rejection of Expressions of Interest) (England) Regulations 2012

## 2. Purpose of delegating services

The Government sets out the core principles of opening up the commissioning process and decentralisation in the Open Public Services White Paper<sup>3</sup>. A key objective is to break down barriers which prevent Councils, charities, social enterprises and voluntary groups working together and sharing responsibilities and budgets for the overall benefits of the community. The provisions in the LA 2011 are designed to encourage new ways of providing or transforming public services that are more effective and cost less to run.

ECDC acknowledges that parish councils are the grass-roots level of local government. They offer a means of decentralising the provision of certain services and of revitalising local communities. Similarly, the voluntary and community sector already play a vital role in identifying needs and delivering services for the benefit of the local community.

## 3. Who can ask to run or help to run services

Any relevant body can approach ECDC to run or help to run a service it provides. A "relevant body" are those bodies entitled to submit an EoI to ECDC and include:

- 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,

---

<sup>1</sup> Section 81(6)(a)-(e) LA 2011

<sup>2</sup> Open Public Services White Paper.

<sup>3</sup> Open Public Services White Paper

- d) in relation to a relevant authority, two or more employees of that authority, or
- e) such other person or body as may be specified by the Secretary of State by regulations.

A **voluntary body**<sup>4</sup> means a body, other than a public or local authority, the activities of which are not carried on for profit. However, the making of a surplus does not in itself preclude a body from applying, so long as that surplus is used for the purpose of those activities or invested in the community. This therefore includes organisations such as industrial and provident societies (co-operatives and community benefit companies) and community interest companies<sup>5</sup>.

A **community body**<sup>6</sup> means a body, other than a public or local authority, that carries on activities primarily for the benefit of the community.

Section 86(4) also allows for former employees in addition to a body formed wholly or partly by **employees of the relevant authority** to provide a relevant service on the authority's behalf. Employees are expected to form an employee-led structure to take on the running of services but are not expected to have finalised all of their arrangements before submitting an EoI<sup>7</sup>.

The term **Parish Council** includes town councils.

Relevant bodies may submit an EoI in partnership with other relevant bodies and non-relevant bodies. Incorporated joint ventures (the joint venture is a body in its own right) will need to meet the definition of a relevant body to submit an EoI. In the case of a contractual joint venture (co-operative arrangements between two parties that keep their separate identities), one or more bodies must meet the definition of a relevant body.

There is no requirement for a relevant body to have a local connection.

#### **4.0 Services eligible for delegation under this Protocol**

ECDC will consider a request to run or help run any 'relevant service', which it currently delivers (or is delivered by another party on its behalf) alone or in partnership with other relevant authorities. A "relevant service"<sup>8</sup> is a service provided by or on behalf of that authority in the exercise of any of its functions in relation to England, other than a service of a kind specified in regulations made by the Secretary of State.

The right only applies to the provision of services. It does not provide for delegation of the functions of ECDC. For example Section 70(1) of the Town and Country Planning Act 1990 gives powers to local planning authorities to grant or refuse planning permission where a planning application is made to the authority. The right does not allow for the function of determining planning applications to be provided by a third party, but it would allow for the processing of the application (not the decision) to be carried out by a third party.

If any services that are currently shared, jointly commissioned or jointly provided by ECDC and other relevant authorities, ECDC will agree with its partners the timescales and arrangements for considering and responding to an EoI and carrying out a procurement exercise for services. These details will be provided in writing upon receipt of an EoI, and may necessarily be longer than the timescales outlined in the process chart.

---

<sup>4</sup> Section 81(7) and (8) LA 2011

<sup>5</sup> Statutory Guidance paragraph 1.5-1.8

<sup>6</sup> Section 81(9) LA 2011

<sup>7</sup> Statutory Guidance paragraph 1.12

<sup>8</sup> Section 81(5) LA 2011

## **5.0 Excluded services**

A relevant service commissioned or provided by a relevant authority in respect of a named person with complex individual or social care needs are excluded.<sup>9</sup>

A relevant service provided by a relevant authority in exercise of the Secretary of State's functions under sections 2A and 2B of the National Health Service Act 2006, in so far as it consists of the provision of such information and advice to a clinical commissioning group as the authority considers necessary or appropriate, with a view to protecting and improving the health of the people in the authority's area are also excluded<sup>10</sup>.

From 1<sup>st</sup> April 2015 until 1<sup>st</sup> April 2016, a relevant service provided by or on behalf of a relevant authority in respect of children under five years, in so far as it consists of the provision of health visiting services for the purpose of reviewing the development of the children concerned and for the promotion of their health and welfare, or the provision of other health services for that purpose is excluded.<sup>11</sup>

## **6.0 Eol requirements**

ECDC will accept an Eol under the Community Right to Challenge annually between 1<sup>st</sup> September and 30<sup>th</sup> November.

Whilst ECDC will aim to avoid a disproportionate burden on relevant bodies, a sufficient level of information is required to ensure that an Eol complies with the requirements specified in section 81 (1) of the LA and Schedule 1 of the Eol regulations<sup>12</sup>.

ECDC will request additional information if it feels there is not enough detail provided to enable it to make a decision. The provision of the additional information is **optional** and if not provided does not mean the Eol will not be considered. In this case ECDC will consider the Eol on the information provided. It should be noted that ECDC has a right to refuse applications where it considers the Eol "is in a material particular inadequate or inaccurate"<sup>13</sup>.

An Eol must be submitted in writing<sup>14</sup> and ECDC requires the Eol to be submitted on the 'Eol' form provided (at Appendix A).

The Eol must contain<sup>15</sup>:-

**1. Where the relevant body proposes to deliver the relevant service as part of a consortium or to use a sub-contractor for delivery of any part of the relevant service, the information in paragraphs 2 and 3 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 relevant body submitting the expression of interest.**

---

<sup>9</sup> Eol Regulations

<sup>10</sup> Eol Regulations

<sup>11</sup> Eol Regulations

<sup>12</sup> Eol Regulations Schedule 1

<sup>13</sup> Rejection Regulations Schedule Paragraph 2

<sup>14</sup> Section 81(1)(b) LA 2011

<sup>15</sup> Eol Regulations Schedule 1

**3. 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.**

**4. Information about the relevant service 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 a part, in providing or assisting in the provision of the relevant 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<sup>16</sup>; and**

**(b) How it will meet the needs of the users of the relevant service.**

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

The ECDC 'Eol' form covers all of these points and requires the signature of the Chair or the Authorised person of the relevant body on a copy of the minutes of the meeting at which the decision was taken to submit an Eol.

## **7.0 Consideration of an Eol**

When ECDC receives an Eol for service delegation from a relevant body it will acknowledge the Eol and then:

- a) accept the Eol, or
- b) reject the Eol, or
- c) modify the Eol if it is felt that it would not otherwise be capable of acceptance and the relevant body agrees to the modification.

Determination of the Eol will under normal circumstances take no more than ten months and will be considered in the first instance by the Council's Committee(s) to which the service reports with a final recommendation for a decision to Corporate Governance & Finance Committee, following the process outlined in Appendix B.

If ECDC believes an Eol has the potential to be accepted (i.e. it meets all of the requirements and none of the grounds to be rejected), the relevant body will be provided with a 'Service Specification' for the service under consideration. This could include details such as current staffing levels, the service standards and the cost of providing the service.

Upon receipt of the 'Service Specification', the relevant body has 6 weeks to consider whether they still wish their Eol to be considered. During this time the relevant body may wish to contact the Council for further clarification regarding the Eol for example, whether TUPE legislation applies and/ or whether there are any pension implications of transfer.

By the end of the 6 weeks the relevant body must confirm in writing, their continued interest in exercising their Community Right to Challenge. Failure to do so will be regarded as a

---

<sup>16</sup> The Statutory Guidance gives examples such as creating local jobs / improving local skills and volunteering opportunities / or improving environmental conditions.

withdrawal of the EoI. Any future EoI submissions will then be considered during the next window of opportunity (i.e. the following September - November).

If the relevant body wishes to continue with the application, the District Council may consult with service users and the wider community. This is to ensure that the potential changes to service provision would have the support of those most likely to be affected and to assess the level of impact that the changes could have on differential groups, as per the Equality Act 2010 and the Equality Standard for Local Government. Any consultation process would be expected to take no more than 6 weeks.

ECDC will notify the applicant of the period of time it will take to make a decision on the EoI in writing within 30 days after the close of the period within which EoI applications are invited (i.e. before 31<sup>st</sup> December), as detailed at Appendix B. If the decision is to refuse the application, ECDC will specify the reasons for the decision and publish the decision on the Councils website<sup>17</sup>.

If ECDC accepts the EoI it will carry out a procurement exercise relating to the provision of that service in accordance with the Council's Constitution and Contract Procedure Rules. The body expressing the interest is not guaranteed to take over the service and whilst only "not for profit" bodies can be the lead body to submit an EoI, any subsequent procurement process is open to anyone, including private companies and/ or existing contractors.

The procurement process resulting from the acceptance of any expression will start no sooner than three months and no later than six months following acceptance of the EoI. The length of this period reflects the varying nature, scale and complexity of the services that may be procured and aims to allow relevant bodies the time they need to prepare to compete in the procurement exercise.

ECDC will have to consider:

- whether the EoI meets the requirements at 6.0 above.
- Whether there are grounds for an EoI to be rejected as detailed at 8.0 below.

### **8.0 Grounds whereby an EoI may be rejected**

ECDC can reject an EoI if any of the following grounds apply:<sup>18</sup>

1. The EoI is not submitted by a relevant body and is not in writing.
2. The relevant body provides information in the EoI, which in the opinion of ECDC, is in a material particular inadequate or inaccurate.
3. ECDC considers, based on the information in the EoI, 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 EoI,is not suitable to provide or assist in providing the relevant service.
4. The expression of interest relates to a relevant service where a decision, evidenced in writing, has been taken by the relevant authority to stop providing that service.
5. The EoI relates to a relevant service -

---

<sup>17</sup> Section 6, Statutory Guidance

<sup>18</sup> Rejection Regulations 2012.

- (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 is integrated with the relevant service; and
- (b) the continued integration of such services is, in the opinion of the relevant authority, critical to the well-being of those persons.
6. The relevant service is already the subject of a procurement exercise.
  7. ECDC and a third party have entered into negotiations for provision of the service, which negotiations are at least in part conducted in writing.
  8. ECDC has published its intention to consider the provision of the relevant service by a body that 2 or more specified employees of that authority propose to establish.
  9. ECDC considers that the expression of interest is frivolous or vexatious.
  10. ECDC 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.

## **9.0 Modifying an Eol**

If ECDC believes it would otherwise reject an Eol, the Council may seek instead to agree to it being modified. If an agreement cannot be reached, the Eol may be rejected.

## **10.0 The Procurement exercise**

If ECDC accepts an Eol it will carry out a procurement exercise for the service<sup>19</sup>. This exercise will have regard to the value and nature of the contract that may be awarded. ECDC will need to comply with procurement law and the exercise will be carried out in accordance with Part 4, Section 5 of the Councils Constitution 'Contract Procedure Rules'.

Eols for services already the subject of a procurement exercise can be refused.

Eol's will be considered where ECDC already has a contract with a third party to provide that service. However, it should be noted that the Council has an obligation to consider whether it would be 'best value' to re-tender for a service that is mid-way through a contract. This is because ending the contract early may incur financial penalties in addition to the considerable resource required to run a tender exercise.

The economic benefits of re-tendering a service or going out to tender for the first time must be considered by ECDC. The Council has an obligation to consider whether both expressions of interest and procurement exercises would promote or improve the economic, social or environmental well-being<sup>20</sup> of the District.

ECDC will seek to assess this through specific questions within the Eol and may also include social clauses in contracts, provided they comply with the law applying to the awarding of contracts.

---

<sup>19</sup> It is anticipated that the standard contract term would be for a period of 3 years, however the contract term may vary depending on the nature of the service. The value of the delegated service should therefore be based on 3 years delegation for procurement (Contract Procedure Rule) purposes, or the length of the proposed term. Officers should then follow the required procurement process for the relevant aggregate value of the delegated contract/ agreement.

<sup>20</sup> Under the Public Service (Social Value) Act 2012, the Council has to consider how the area will be improved by the procurement of a service and how the authority might act to secure that improvement on contracts for services or the provision of services at OJEU level and above.

ECDC publishes details of all upcoming tenders and contracts awarded on the Council's website <http://www.eastcambs.gov.uk/east-cambs-district-council/doing-business-council>. This will include all of those procurement exercises carried out as a result of an EoI being accepted.

ECDC will follow the Contract Procedure Rules set out in Part 4, Section 5 of the Constitution with regards to advertising for tenders and quotations. Where the law allows, the tender and contract details will be circulated to the voluntary and community sector so that they are aware of the opportunities to participate in the procurement process.