

# Hastings Borough Council Community Right to Challenge

## Detailed Guidance

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# 1. Definitions Used in the Scheme and Regulations

## Expression of Interest (EOI)

- An expression of interest in providing or assisting in providing a relevant service on behalf of an authority (made by a relevant body, submitted to a relevant authority).

## Relevant Authority

- A county council;
- A district council (i.e. Hastings Borough Council)
- A London borough council; or
- Any other person or body carrying out a function of a public nature specified by the Secretary of State in regulations.

## Relevant Body

- A voluntary or community body;
- A body of persons or a trust which is established for charitable purposes only;
- A parish/town council;
- Two or more employees of the relevant authority; or
- Any other person or body specified by the Secretary of State by regulations.

## Voluntary or Community Body

- *Voluntary body*: means a body, other than a public or local authority, the activities of which are not carried on for profit. It can generate a surplus provided it is used for the purposes of its activities or invested in the community.
- *Community body*: means a body, other than a public or local authority, that carries on activities primarily for the benefit of the community.
- The definitions of voluntary and community body are intended to cover a wide range of civil society organisations. They reflect the required characteristics of such bodies rather than referring to types of organisational structure. This allows for flexibility to accommodate future forms of civil society organisation. The Government expects the definition of voluntary and community body to include but not be limited to the following types of organisation:
  - Community benefit societies (a type of industrial and provident society);

- Co-operatives whose activities are primarily for the benefit of the community (another type of industrial and provident society);
  - Community interest companies;
  - Charitable incorporated organisations; and
  - Other incorporated forms of body such as companies limited by guarantee or shares where the company's Memorandum and/or Articles of Association state that the company's objects are in the interest of the community, rather than to make a profit for shareholders.
- Some voluntary and community bodies may be unincorporated associations. Bodies that will be delivering contracts for local authorities and other public bodies would usually be expected to be incorporated with limited liability, to limit the risk to individual members. If a relevant body identifies a need to incorporate in order to be capable of providing a relevant service in its EOI, the period between an EOI being accepted and a procurement exercise starting will provide an opportunity for this.
  - Whilst only relevant bodies are eligible to submit an EOI, they may do so in partnership with other relevant bodies and/or non-relevant bodies or as a joint venture. Certain information must be provided in the EOI in respect of all partners.

Further information is available at pages 6-8 of the Statutory Guidance: May 2012:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/5990/2168126.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/5990/2168126.pdf)

### **Relevant service**

- A service provided in the exercise of any of the **Borough Council's** functions, either by using its own workforce, or provided on its behalf under a service contract or some other arrangement, unless such a service is excluded from the community right to challenge (see details below for exclusions).
- *Functions and Services:* The right only applies to the provision of services. It does not provide for delegation of the 'functions' of **the Council**. Previous consultation documents suggested that "a function is a duty or power that requires decision-making by the responsible person or body, whereas a service does not". For example it suggests that determination of planning applications is a function whilst waste collection is not. Therefore some activities undertaken requiring decisions may fall outside

the scope of this legislation. Definitions of decisions and functions may become tested over time.

Further information is available at pages 9-10 of the [Statutory Guidance: May 2012](#)

- *Jointly commissioned/provided services and shared services:* Some services are shared, jointly **commissioned, or jointly provided by two or more relevant authorities, for example the HBC/Rother Joint Fraud Investigation Service**. Both authorities will agree the relevant timescales and arrangements for considering and responding to any expression of interest and, where necessary, carrying out a procurement exercise for this service.

There are some cases (**but not currently in Hastings**) where services will be shared, jointly commissioned or jointly provided by one or more relevant authority and one or more non-relevant authority, for example, a local authority working with an NHS body. Here the application of the right will depend on:

- Whether the service is excluded. Certain services are excluded from the Right until 1 April 2014 (see below); and
- Where responsibility for the function lies. Only relevant services (i.e. those provided by or on behalf of a relevant authority in the exercise of its functions) are within the scope of the right; and only the relevant authority is required to consider and act on expressions of interest, though others are not prevented from doing so.

Services commissioned by a relevant authority on behalf of an NHS body (i.e. an NHS service) fall outside the scope of the right.

### **Excluded services (including temporary and permanent exclusions)**

- The following services (none of which are provided by HBC, but information is included for completeness) are excluded from the community right to challenge, either for a limited period or permanently:
  - 1) 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 (an NHS body) under a partnership arrangement or by a relevant authority and an NHS body or a Strategic Health Authority, acting jointly.

- 2) Until 1 April 2014, a relevant service commissioned by an NHS body on behalf of a relevant authority. (Services under bullets 1 and 2 are excluded temporarily to enable the NHS commissioners established by the Health and Social Care Act 2012, to have sufficient time to become fully operational, consider the contractual arrangements they have inherited from their predecessor NHS commissioners and develop new commissioning relationships with relevant authorities in the period up to April 2014. A relevant authority should advise relevant bodies if the service they wish to challenge is covered by this time limited exemption).
- 3) A relevant service commissioned or provided by a relevant authority in respect of a named person with complex individual health or social care needs.
- 4) Sure Start Children's Centres deliver both local authority and health services. There are many different delivery models for children's centre services across the country. Exclusions do not prevent relevant bodies from expressing an interest in running children's centre services that are delivered directly by local authority employees or commissioned by a local authority acting alone (i.e. not jointly with an NHS body).
- 5) Direct payments: Services which are commissioned and managed by individuals or their representatives using direct payments do not fall within the scope of the community right to challenge as the individuals or their representatives, as opposed to the relevant authority, commission the services.

Further information is available at pages 9-12 Statutory Guidance: May 2012

## 2. Scheme Criteria

### Expression of Interest Submission

The Borough Council must consider an EOI submitted by a relevant body which is in writing and meets other requirements (as specified in the guidance).

### EOI requirements

The Council may specify periods during which EOI, or expressions of interest in respect of a particular relevant service, may be submitted. ***The proposal is to specify 1<sup>st</sup> April – 31<sup>st</sup> May inclusive.*** The Borough Council may refuse to consider an expression of interest submitted outside of this specified period.

Information required in an EOI:

- 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 points 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 relevant body submitting the EOI.
- 3) Evidence that demonstrates that by the time of any procurement exercise the relevant body submitting the EOI 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 EOI 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 **Borough Council's** area (this could include creating local jobs, improving local skills, increasing local volunteering opportunities, or improving environmental conditions); and
  - b) How it will meet the needs of the users of the relevant service (relevant bodies may refer to evidence such as needs assessments prepared by the Council, or other sources).
- 6) Where the relevant body consists of employees of the Borough Council, details of how that relevant body proposes to engage other employees of the Borough Council who are affected by the expression of interest.

Further information is available at pages 14-16 Statutory Guidance: May 2012

### **Considering an EOI**

- The Borough Council must:
  - Accept the expression of interest, or
  - Reject the expression of interest.
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However this is subject to section 84(1) of the Localism Act (modification of expression of interest).

- The Borough Council must, in considering an EOI, consider whether acceptance of the EOI would promote or improve the social, economic or environmental wellbeing of the authority's area.

- The Borough Council may request further information from relevant bodies but we cannot make inclusion of such information a requirement in order for the EOI to be considered.
- Information outside the scope of requirements in the Regulations may not be used as a ground on which to reject an EOI.
- A relevant body may withdraw an EOI after submitting it to the Borough Council (whether before or after a decision has been made by the authority in respect of the EOI). The withdrawal of an EOI, or the refusal of a relevant body to agree to modification of an EOI, does not prevent the Borough Council from proceeding with a procurement exercise if it thinks that it is appropriate to do so.

### **Reasons to reject**

- The Borough Council may only reject an EOI on one or more of the following specified reasons:
  - 1) The expression of interest does not meet the statutory requirements, e.g. because it is not from a relevant body or is not for a relevant service.
  - 2) The Council considers the information provided in the EOI is inadequate or incorrect.
  - 3) Any member of the body making the bid, or of their consortium, based on the information in the bid, is not suitable to provide or assist in providing the service. This would cover absence of a necessary qualification, or past conduct.
  - 4) The Council 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) 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. (not relevant for HBC services)
  - 6) The service is already the subject of a procurement exercise.
  - 7) The Council is already in negotiations (in writing) with a third party for the provision of the service.
  - 8) The Council has already published its intention to consider the provision of the service by a body to be set up by two or more employees.

- 9) The Council considers that the expression of interest is vexatious or trivial.
- 10) 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.

Further information available at pages 18-22 Statutory Guidance: May 2012

- Taking into account guidance for rejecting EOIs, the following table summarises the appropriate approach to be taken at various stages of a service 'life cycle' in relation to an EOI that has been submitted:

<b>Status of the relevant service</b>	<b>Can EOI be considered?</b>
Service not subject to a contract	Yes – continue EOI assessment process
Service subject to an existing contract	Please contact us to discuss further
Re-provision/re-tendering of service due	Yes – continue EOI assessment process
Negotiations have been entered with a third party for provision of the service (at least partly in writing)	No – reject EOI
Provision of a service subject to procurement process	No – reject EOI
A decision has been taken to stop or decommission a service	No – reject EOI

### **Reasons to modify**

- If the Borough Council 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 Borough Council may reject the expression of interest. Some illustrative examples of where a modification may lead to successful submission are given below.

*Example 1: Part of a service not subject to challenge:* A relevant body submits an expression of interest to run all 20 library services in the area. The authority has taken a decision to stop one of these services, meaning it is no longer a relevant service. The authority proposes modifying the expression of interest to relate instead to the 19 remaining libraries.



*Example 2: Inadequate information:* A relevant body submits an expression of interest to run the waste collection services. It does not complete the financial information section. The relevant body proposes modifying the expression of interest to include this information.

*Example 3: Suitable body:* relevant body submits an expression of interest to run a local youth club. It sets out how the outcomes it proposes to achieve will meet the needs of service users, but bases this on a survey of 3 out of the 250 young people who use the club. The relevant authority proposes modifying the expression of interest to include sufficient information on which it can base its decision to accept or reject.

Further information is available at page 23 of the [Statutory Guidance: May 2012](#)

### 3. Procurement

- If the Borough Council accepts the EOI, it must carry out a procurement exercise relating to the provision on behalf of the authority of the relevant service to which the EOI relates.
- The procurement exercise must be such as is appropriate having regard to the value and nature of the contract that may be awarded as a result of the exercise.
- The Borough Council must comply with minimum and maximum dates (specified by the Borough Council) between the date of the decision to accept an expression of interest, and the date on which it will begin the procurement exercise. **It is proposed that this be a minimum of 3 months and maximum of 6 months, with the timescale being dependent on each individual case.**
- The Borough Council must, in carrying out the procurement exercise, consider how it might promote or improve the social, economic or environmental well-being of the authority's area by means of that exercise.
- This exercise must be consistent with the law applying to the awarding of contracts.

Further information available at pages 24-26 of the [Statutory Guidance: May 2012](#)