

THE COMMUNITY RIGHT TO CHALLENGE:

A guide for social enterprises & third sector organisations



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IN A NUTSHELL...

The community right to challenge is a legal right that allows any 'relevant bodies' to express an interest in providing relevant public services on behalf of a public authority. 'Relevant bodies' refers to

- Voluntary or community organisations.
- A body of persons or a trust which is established for charitable purposes only.
- Parish councils.
- Two or more employees of the relevant authority.
- Any other person or body specified by the Secretary of State by regulations

This briefing is aimed specifically at social enterprises and third sector organisations.

WHERE DOES THE RIGHT TO CHALLENGE COME FROM?

The Community Right to Challenge is part of the government's Open Public Services (OPS) agenda. OPS aims to open delivery of local public services to a more competitive market. The Right to Challenge was introduced through the Localism Act 2011 and came into force in June 2012. It applies to all county, district, unitary, metropolitan, and London borough councils and fire authorities in England.

HOW DOES IT WORK?

Voluntary and community sector organisations can express an interest to take over delivery of a public service (within an allotted time period specified by the public authority). The public authority is obliged to review the expression of interest (as long as it meets minimum requirements). If the expression of interest is accepted then the service will be put out to public tender by the authority.

Before reading the rest of this guide we recommend you take a moment to check whether the right to challenge is relevant for you and your organisation...

ARE WE THE KIND OF ORGANISATION THAT MIGHT WANT TO USE THE RIGHT TO CHALLENGE?

That depends...the Right to Challenge is particularly suited to those who think they'd be in with a chance of competitively tendering to take over a service (big or small) from their local authority. The Right to Challenge hasn't been around very long, but see <http://mycommunityrights.org.uk/> for emerging examples of what services might look like under such arrangements. Examples of types of services include:

- FRESH HORIZONS Runs a library service in Huddersfield, combining this with advice and credit union services and in the future a cinema.¹
- HIMMAT Delivers services for young people in Halifax and has been awarded contracts to run probation services and a Youth Offending Team dealing with kids most at risk.²

¹ <http://www.freshhorizons.org.uk/>

² <http://www.himmat.org/>

Here are some questions to help you think through whether the right to challenge is right for you:

- Do you think you could deliver a particular service in a better way than the authority? Y/N
- Do you have the necessary skills, resources, and time to commit to the procurement process and delivery of the service? Y/N
- Do you think you could demonstrate that your approach would be more suited to local needs or have improved social, economic, or environmental impact? Y/N
- Would your approach to delivery be cheaper or better value for money? Y/N
- Do you think you have the capacity on your own, or in partnership with other organisations, to tender for and deliver the service in question? Y/N

If you answered yes to some or all of these questions then the Right to Challenge may be right for you. Read on to learn more about how the right to challenge works in practice...

THE COMMUNITY RIGHT TO CHALLENGE — HOW DOES IT WORK?

An authority will announce a period within which expressions of interest can be submitted (you'll have to look out for these since they will be timed to fit in with existing planning and commissioning cycles).

As long as expressions of interest provide the minimum levels of information required and are sent within the specified period they have to be considered by the authority.

If the expressions are accepted, the authority can then tender the services in any way it chooses (subject to public procurement law). So, **if you have an expression of interest accepted you won't necessarily win the contract**. You will still need to take part in a competitive tendering process, which can also be open to the private sector or the public authority team already providing the service.

WHAT DOES RIGHT TO CHALLENGE COVER?

Most services provided by a local authority or fire and rescue services are subject to the Right to Challenge. The service doesn't have to be on a 'list' of services the authority is already planning to commission – 'challengers' can also suggest that certain services provided by the authority are put up for tender. However there are some exceptions. These include:

- Relevant services (including children’s centre services) commissioned by or in conjunction with an NHS body. These do not become subject to Right to Challenge until 1 April 2014.
- Services commissioned by an authority which provide support to a named person with complex individual health or social care needs.
- Services commissioned and managed by individuals or their representatives using direct payments.

The right can only be used to challenge delivery of services. Statutory functions of an authority **cannot** be delegated. For example, an organisation could take over delivery of the administration of planning applications (a ‘service’), but decisions *about* planning (a statutory ‘function’ of local authorities) would remain a statutory duty of the authority.

SOME TIPS FOR EXPRESSING AN INTEREST

See *My Community Rights* for useful guidance covering all stages of the process – from deciding whether using the Right to Challenge is a good idea right through to submitting the expression of interest and preparing to deliver.³

Should your organisation use the right to challenge?

Use the questions outlined on page 3 as a starting point. The authority will make an assessment of your capabilities, skills, and internal systems when assessing the expression of interest to make sure you could deliver the contract.

It’s important to get a sense of whether you think you could jump these hurdles and, if you can’t, how much you’d need to do to get to that point. *Locality*, the leading network for community-based organisations, has developed a ‘contract readiness’ tool that can help you check this.⁴

Building your case

It’s really important to get in touch with the public authority to understand as much as you can about the service you’re interested in challenging (e.g. does the Council see the service as relevant/eligible for challenge and do they already have plans to put the service out to tender? how is the service delivered at the moment? where is it delivered? what are the expected outcomes of the service?)

You may want to talk to potential partners who you could deliver the service with.

Gather relevant data (e.g. needs of user groups from a range of sources) to help you put together your business plan.

³ My Community Rights <http://mycommunityrights.org.uk/community-right-to-challenge/>

⁴ Locality <http://tinyurl.com/contractreadiness>

Below we outline how Birmingham City Council is approaching the procurement process under Right to Challenge. The Birmingham City Council website has a section devoted to the Right to Challenge – see <http://tinyurl.com/birminghamspecific>.

Some of the main issues to bear in mind include:

<p>Time to submit Expressions of Interest</p>	<p>If you want to express an interest in delivering services that are currently delivered directly by the Council then expressions of interest have to be submitted between April-June 2013.</p> <p>If you want to express an interest in delivering services that are currently delivered by another organisation through a contract with the Council then you'll need to find out when that contract ends: expressions of interest must be received for a three-month period from 12 months before the contract expiry date.</p>
<p>Information required for EOI</p>	<p>The EOI form is 11 pages along and requires some time to complete. Details required include:</p> <ul style="list-style-type: none"> • Details of the organisation (to check they meet definition of a relevant body) • The service that they are interested in providing • The financial resources available to them • Evidence which shows that they will be able to provide or assist in providing the proposed service • The outcomes that they expect to deliver by providing the service, for example how it will promote or improve social, economic or environmental well-being of the area and how the needs of the service users will be met

Understanding the process

There are some minimum requirements that have to be met if an EOI is to be considered by the authority and the authority can turn down your EOI for a range of reasons. For example the authority may consider that...

- You don't meet criteria of a 'relevant' organisation.
- You haven't supplied sufficient information.
- Your organisation isn't suitable to deliver the service in terms of capacity or financial standing. For the Birmingham process social enterprises and third sector organisations should note that the Council expects organisations to be able to document their organisation's financial circumstances and planning in some way (they suggest a business plan as one way of doing this).

In addition, the service itself may not be suitable for challenge if...

- The authority has already decided to stop delivering the service.
- The service is already being commissioned in another way.
- The service is linked with other services through the NHS.

Procurement and tendering

A wide range of tools and guidance exist to help organisations prepare for tendering processes (see useful links section). The public authority will be required by law to follow a particular procurement process and you will need to pay attention to the (sometimes quite lengthy) rules and processes for bidding for the work.

Preparing to run the service

If you receive the contract it may require you to work in quite different ways than before. For example, the scale of your operations may increase and you may need to recruit more staff, or you may need to improve your financial and monitoring systems to meet the contractual requirements.

AND FINALLY...

So, is the Right to Challenge a good idea? Well, on the one hand the Right to Challenge at least provides a new method for social enterprises and third sector organisations to influence what are sometimes seen as impenetrable public service commissioning processes. In addition, there are some funds and support available for organisations interesting in pursuing the Right to Challenge (see useful links section).

There are some caveats to this, though. Firstly, there's nothing to prevent private sector and larger voluntary organisations from other parts of the country competing for services too. Experience from other public service tendering exercises indicates that larger providers tend to get the contracts – the Work Programme being a recent example of this.

In addition, we have to be aware of the requirements authorities are going to place on organisations wanting to deliver services as part of the procurement process. If an authority sets high minimum levels of financial standing or technical ability, for example, it may rule out many smaller, local organisations.

Secondly, we have to bear in mind the scope of the powers. Having an expression of interest accepted does **not** mean that the challenger can directly influence the specification of the service. **This is an important limitation.** The Right to Challenge does **not** necessarily mean that better or more effective public services are commissioned as a consequence. In addition, the right to challenge only refers to 'existing' provision: communities cannot challenge to create new services.

So, the Right to Challenge comes with a health warning. Although the spirit of the law aims to empower local people and civil society, smaller organisations with less track

record and financial capacity could still be prevented from using these powers. The Right to Challenge is likely to work well for third sector organisations operating in places where the local council and other public bodies already have commissioning approaches that allow them to 'get a foot in the door' and to shine. It will also be as important as ever for those organisations to think long and hard about why and how they would be best placed to deliver better and more cost-effective services compared to the competition.

USEFUL LINKS

Overview of the suite of community rights brought in through the Localism Act 2011 and a useful source of guidance/ case studies

<http://mycommunityrights.org.uk/>

Information about grants and support available to help prepare for the right to challenge

<http://mycommunityrights.org.uk/community-right-to-challenge/grants/>

Copy of the legislation

<http://www.legislation.gov.uk/ukxi/2012/1313/contents/made>

Statutory Guidance on the right to challenge

<https://www.gov.uk/government/publications/community-right-to-challenge-statutory-guidance>

Introduction to procurement and commissioning

<http://www.acevo.org.uk/document.doc?id=51>

Specific details about Birmingham city council's process for the right to challenge

<http://tinyurl.com/birminghamspecific>

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