EXPLANATORY MEMORANDUM TO

THE COMMUNITY RIGHT TO CHALLENGE (FIRE AND RESCUE AUTHORITIES AND REJECTION OF EXPRESSIONS OF INTEREST) (ENGLAND) REGULATIONS 2012

S.I. 2012/1647

1. This Explanatory Memorandum has been prepared by the Department for Communities and Local Government and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

These Regulations set out the grounds on which an expression of interest, made under the community right to challenge contained in the Localism Act 2011, may be rejected by a relevant authority. It also adds certain fire and rescue authorities in England whose services may be the subject of an expression of interest.

3. Matters of special interest to the Joint Committee on Statutory Instruments

None.

4. Legislative Context

4.1 Chapter 2 of Part 5 of the Localism Act 2011 gives relevant bodies a right to challenge for the opportunity to provide relevant services that are provided by or on behalf of relevant authorities in the exercise of their functions in relation to England. Relevant bodies are defined as a body of persons or a trust which is established for charitable purposes only, a voluntary or community body, a parish council, two or more employees of the relevant authority, and such other person or body carrying on functions of a public nature as the Secretary of State may specify in regulations, The right to challenge is exercised by submitting a written expression of interest. Section 81(2) of the Act lists relevant authorities as a county council in England, a district council, a London borough council, and any other person or body carrying out functions of a public nature as the Secretary of State may specify by regulations. If a relevant authority accepts an expression of interest for a relevant service, it must carry out a procurement exercise for the service.

4.2 This instrument specifies certain fire and rescue authorities in England as relevant authorities, under the power in section 81(2)(d) of the Act. It also implements, in regulation 4 and the Schedule, the provision in section 83(11) of the Act, which provides that relevant authorities may only reject an expression of interest on one or more grounds specified by the Secretary of State in regulations.

4.3 Other provisions in Chapter 2 of Part 5 of the Act give more detail about the community right to challenge. In order fully to implement the right, a further statutory instrument, the Community Right to Challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012 has been prepared. Those regulations will specify, under the power in section 81(1)(b) of the Act, the information requirements for expressions of interest. They will also specify, under the power in section 81(5), which services are excluded from the community right to challenge. Those regulations are subject to the negative resolution procedure.

4.4 It is intended that these Regulations and the Community Right to Challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012 will come into force on the 27th June 2012.

5. Territorial Extent and Application

This instrument applies to England.

6. European Convention on Human Rights

The Secretary of State for Communities and Local Government has made the following statement regarding Human Rights:

In my view the provisions of the Community Right to Challenge (Fire and Rescue Authorities and Rejection of Expressions of Interest) (England) Regulations 2012 are compatible with the Convention rights.

7. Policy background

Policy

7.1 The Coalition Programme for Government committed to "give communities the right to bid to take over local state-run services."[1] The community right to challenge gives effect to this commitment.

7.2 Many local authorities already make good use of the talents of voluntary and community groups, charities, parish councils and former employees. These bodies successfully run a wide range of local services including in education, tackling worklessness, the environment and social care. The Government's intention in introducing a community right to challenge is to hand the initiative to communities and the bodies that represent them who have innovative ideas about how they could deliver services differently and better.

7.3 The community right to challenge enables these bodies to express an interest in running a relevant service. If an expression of interest is accepted, this will trigger a procurement exercise for the provision of the service on behalf of the authority. The community right to challenge will give groups more opportunities to shape and improve services. It will ensure groups with good

1 http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf

ideas get a fair hearing and those groups have time to organise themselves and develop their ideas to be able to bid to run services.

7.4 The community right to challenge also contributes to implementing the Open Public Services White Paper (July 2011).[2] It encourages greater diversity of service provision, has the potential to reduce costs of service provision for local public bodies, and embraces innovation and responsiveness.

7.5 The Modernising Commissioning Green Paper (December 2010) sets out the Government's intention to take further action to help level the playing field between those competing to deliver public sector contracts. In addition it discusses common barriers faced by voluntary and community bodies in bidding in procurement exercises.[3] In 2007/8 the voluntary and community sector received £12.8bn from statutory sources, £9.1bn of which was from contracts.[4] This represented just 2% of £582bn total public spending in that financial year.[5] So there is clearly potential for the sector to increase its role in public service delivery.

7.6 The community right to challenge requires that relevant authorities consider the social value of expressions of interest and bids in procurement exercises triggered by the Right. This is something the voluntary and community sector consider a particular strength of theirs.

7.7 The policy has attracted close interest from local government and relevant bodies. A consultation carried out between 4 February 2011 and 3 May 2011 on the detail of the community right to challenge attracted over 200 responses (see Section 8).

Fire and Rescue Authorities

7.8 Section 81(2) (d) of the Act gives power to the Secretary of State to specify in regulations other persons or bodies carrying on functions of a public nature as relevant authorities. These regulations add certain fire and rescue authorities as relevant authorities. Many fire and rescue authorities are already defined as a relevant authority by virtue of being a county council in England or a district council.

Grounds for rejection

7.9 Section 83(11) of the Act gives power to the Secretary of State to specify grounds on which a relevant authority may reject an expression of interest. Paragraphs 7.11 to 7.22 of this memorandum take each of these in turn, explaining the approach we have taken.

1) Not in compliance with requirements

[2] http://files.openpublicservices.cabinetoffice.gov.uk/OpenPublicServices-WhitePaper.pdf
[3] http://www.cabinetoffice.gov.uk/sites/default/files/resources/commissioning-green-paper.pdf
[4] NCVO Almanac (2010)
[5] http://www.hm-treasury.gov.uk/d/pesa_2011_complete.pdf

7.10 The Act requires that an expression of interest must be submitted in writing to the relevant authority by a relevant body. It must also comply with other such requirements for expressions of interest as the Secretary of State may specify by regulations. These requirements are set out in the Community Right to Challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012. Therefore an expression of interest may be rejected if it does not comply with these requirements.

2) Inadequate or inaccurate information

7.11 This ground is to ensure relevant authorities have sufficient information to reach a decision in respect of expressions of interest, and that the information must be accurate..

3) Suitability of relevant body, any member of the consortium of which it is a part or a sub-contractor

7.12 We are clear that the expression of interest stage does not form part of the procurement process, and should not be overly burdensome for relevant bodies. Our approach has balanced this consideration with the need for a relevant authority to have sufficient information on which to base its decision in respect of an expression of interest.

7.13 Relevant authorities may reject expressions of interest where they consider a relevant body, any member of the consortium of which the relevant body is a part or a sub-contractor, is not suitable to provide or assist in providing the relevant service. This ground may only be applied by reference to the information provided in the expression of interest. This balances the need for a relevant authority to have a role in assessing the suitability of the relevant body, given the authority's responsibility for the exercise of the function in respect of which the services are provided, against the need to ensure that such decision is based on quantifiable grounds.

4) Decision has been taken to stop a service

7.14 The community right to challenge should not override the function of a relevant authority to decide what services it will provide. Therefore a relevant authority may reject an expression of interest where a decision has been taken in writing by the relevant authority to stop providing that service.

5) Continued integration of services critical to well-being of persons

7.15 We have sought to protect the continued integration of relevant services and NHS services where this is critical to the well-being of persons in receipt of those services. Statutory guidance will give further explanation and examples of when such integration of services may be regarded as critical to the well-being of the recipient.

6) The relevant service is the subject of a procurement exercise

7.16 If a relevant authority accepts an expression of interest, a procurement exercise is triggered for the relevant service. However, if the service is already the subject of a procurement exercise this process should be allowed to continue without interference.

7) Formal negotiations for provision of the service

7.17 The relevant authority should have the ability to reject an expression of interest where it and a third party are in negotiations to provide a service. To provide otherwise could render the right to challenge unduly disruptive for relevant authorities.

8) Committed to mutualisation with two or more employees

7.18 Relevant authorities may be in the course of establishing with employees a mechanism for those employees to form a public service mutual to bid or request to take over the services they deliver. Where such a process has reached a stage where the intention to do so has been published by a relevant authority, it should be allowed to proceed without the possibility of a community right to challenge submission impeding that mutualisation process.

9) Frivolous or vexatious expressions of interest

7.19 We consider it appropriate to give this protection notwithstanding the grounds for rejection set out in paragraphs 7.11 - 7.14. We consider a request would be vexatious if it is likely to cause distress or irritation without justification or if it is aimed at disrupting the work of a relevant authority or harassing individuals in it. A request could be considered frivolous if it is apparent from the expression of interest that it is not a genuine offer to provide a service and lacks any serious purpose. This will allow relevant authorities to reject expressions of interest where, for example, a relevant body wishes to make a complaint about a service rather than wishing to compete to deliver it. This will be set out in statutory guidance.

10) Contravention of law or breach of statutory duty

7.20 The community right to challenge is designed to be subservient to other legislation. An example of where this ground could be applied would be where acceptance of the expression of interest is likely to breach the public sector equality duty under Part 11 of the Equality Act 2010 or the duty of best value under Part 1 of the Local Government Act 1999. There could be other examples in legislation where statute requires the service provided in exercise of a function to be supplied by a named body. Further information will be included in statutory guidance.

Consolidation

7. 21 This instrument does not consolidate any Regulations.

8. Consultation outcome

8.1 The Department for Communities and Local Government carried out a public consultation on the detail of the community right to challenge between 4 February 2011 and 3 May 2011.[6] This asked what issues should be addressed in secondary legislation and how, and what should be for individual relevant authorities to determine. A total of 206 organisations and individuals responded to the consultation, including relevant authorities, parish councils, fire and rescue authorities and voluntary and community bodies. The questions relevant to this statutory instrument that it asked are:

1) We are minded to extend the community right to challenge to apply to all fire and rescue authorities. Do you agree?
2) Do you agree with the proposed grounds whereby an expression of interest may be rejected?
3) Are there any other grounds whereby relevant authorities should be able to reject an expression of interest?

8.2 A summary of responses to the consultation was published on 2 August 2011.[7] A policy statement was published on 12 September 2011, setting out the proposed way forward on the issues addressed in the consultation exercise.[8]

Detail of the responses to the consultation

8.3 Details of consultation responses and the approach we have taken on the issues of excluded services and information requirements for expressions of interest will be set out in the explanatory memorandum which accompanies the Community Right to Challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012.

We are minded to extend the community right to challenge to apply to all fire and rescue authorities. Do you agree?

8.4 Of the 129 respondents who answered yes or no to this question, 75 (58%) said fire and rescue authorities should be added as relevant authorities. However, only 11 fire and rescue sector respondents answered yes or no to this question. Of these, 6 answered yes.

8.5 The majority of those who said the community right to challenge should apply to all fire and rescue authorities said that only some fire and rescue services should be subject to challenge. The most frequently made additional comments were:

a) Some elements of fire and rescue authority services should be challengeable and risk assessment and management are key;
b) All fire and rescue authority services should be challengeable as long as clear standards are in place; and

[6] http://www.communities.gov.uk/publications/localgovernment/righttochallengeconsultation
[7] http://www.communities.gov.uk/publications/localgovernment/righttochallengeresponses
[8] http://www.communities.gov.uk/publications/localgovernment/righttochallengestatement

c) Which fire and rescue authority services are challengeable should be decided by the individual authority.

8.6 The majority of respondents who said the community right to challenge should *not* apply to all fire and rescue authorities were from voluntary and community sector bodies and relevant authorities. The most frequently expressed concerns were:

a) The risks to people's safety;
b) The quality of service; and
c) Losing strategic overview.

8.7 In view of the relatively low number of fire sector responses, we discussed this with fire sector representatives. The Local Government Association was content that all fire and rescue authorities be relevant authorities. The Chief Fire Officers Association and the Department for Communities and Local Government's Fire Sector Partnership were broadly supportive. The main concerns were that many aspects of fire provision might be less efficient and more costly if they are treated as relevant services under the community right to challenge.

8.8 We have carefully considered the views of consultation respondents and views gathered from further discussions with fire sector bodies. Many aspects of fire provision are functions rather than services and are therefore outside the scope of the community right to challenge. Fire and rescue authorities will remain the body accountable for the discharge of their functions and will be able to make appropriate provision during the procurement exercise and in agreeing contractual arrangements to ensure relevant services are delivered to appropriate standards and quality. These regulations also make provision for a relevant authority to be able to reject an expression of interest if it considers the relevant body would not be a suitable body to deliver the service, or if the 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.

8.9 We do not agree that fire and rescue authorities should decide which services are subject to the community right to challenge. Representative bodies of voluntary and community groups expressed their view in a briefing paper prepared ahead of the Localism Bill being considered at Lords Report stage that, "Giving local authorities the choice whether or not to respond to an expression of interest with a procurement exercise would negate the right to challenge entirely, by effectively allowing local authorities to ignore expressions of interest."[9]

[9] Joint briefings for the House of Lords report stage on the Community Right to Challenge and Community Right to Buy from ACEVO, ACRE, CDF, Community Matters, Locality, NAVCA, NCVO, Plunkett Foundation, Social Enterprise UK and Urban Forum (August 2011), http://www.navca.org.uk/localism-bill-navca-briefings

Do you agree with the proposed grounds whereby an expression of interest may be rejected? Are there any other grounds whereby relevant authorities should be able to reject an expression of interest?

8.10 Of the 156 consultation respondents who answered yes or no to this question, 115 (74%) agreed with the proposed grounds. 135 respondents made additional comments and/or suggestions for grounds for rejection. The most frequent comments were:

a) Relevant authorities should decide the grounds for rejection;
b) The grounds for rejection should be more tightly defined; and
c) There should be an appeals process for rejection.

8.11 We do not agree that relevant authorities should decide the grounds for rejection. Setting out grounds for rejection in regulations ensures that relevant bodies across the country will know they are being assessed according to the same criteria. Many voluntary and community bodies support this approach. The briefing paper referred to in paragraph 8.9 said, "The grounds for rejection should be set out by the Secretary of State to ensure consistency and clarity across the country. It would be unacceptable if certain local areas were unable to benefit from the ideas and energy of community and voluntary groups due to overly broad grounds for rejection."[10]

8.12 We have taken on board suggestions that the grounds for rejection should be more tightly-defined. For example, we have provided that the assessment of a relevant body's suitability to provide a relevant service must be limited to the information provided in an expression of interest.

8.13 There is no appeals process when an expression of interest is rejected. The Act provides that relevant authorities must notify relevant bodies of decisions on expressions of interest in writing. If the decision is to modify or reject the expression of interest, the authority must give reasons for that decision in the notification and publish the notification in such a manner as it thinks fit, including on the authority's website. This will ensure transparency and accountability to local people for decisions on expressions of interest. We feel that it would be disproportionate at this stage to put in place specific measures to consider appeals in relation to the community right to challenge.. As the community right to challenge is implemented, we will keep this under review.

8.14 The most frequent suggestions for additional grounds for rejection were:

a) Where an expression of interest is not in accordance with the relevant authority's policy or strategy;
b) Where a relevant body being the service provider would be likely to put at risk the relevant authority's legal obligations, such as the public sector equality duty in the Equalities Act 2010;

[10] Joint briefings for the House of Lords report stage on the Community Right to Challenge and Community Right to Buy from ACEVO, ACRE, CDF, Community Matters, Locality, NAVCA, NCVO, Plunkett Foundation, Social Enterprise UK and Urban Forum (August 2011), http://www.navca.org.uk/localism-bill-navca-briefings

c) Where the local community is opposed to, or there is insufficient local support for the expression of interest and/ or a procurement exercise; and
d) Where a relevant authority would be left with a part of service/ package of services that is not viable or more costly.

8.15 We do not agree with the suggested additional ground where an expression of interest is not in accordance with the relevant authority's policy or strategy. This would risk relevant authorities being able to dismiss expressions of interest without giving them proper consideration and would undermine the community right to challenge policy intention. Policies should be based on meeting service user needs. Relevant bodies will need to evidence in expressions of interest how they will meet service user needs. Relevant bodies should be able to put forward new ideas for how services can be delivered as well as their case for being able to deliver those services. This should not be restricted by existing policies, provided proposals would not risk the authority breaching a statutory duty or rule of law.

8.16 The consultation document proposed a ground for rejection where accepting an expression of interest could mean the authority would not comply with the duty of best value contained in the Local Government Act 1999. We have broadened this to allow expressions of interest to be rejected where the 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.

8.17 We do not agree with the suggested ground for rejection where the local community is opposed to, or there is insufficient local support for, the expression of interest and/or a procurement exercise. Requiring relevant bodies to demonstrate that the majority of service users support a proposal is unrealistic and would put an unnecessary burden on relevant bodies, and could have the effect of excluding smaller and less well-resourced organisations. This could also be confusing for service users if they are approached by several different organisations about different proposals. Relevant bodies will need to say in their expression of interest how they propose to meet the needs of service users.

8.18 We do not agree with the suggested additional ground where a relevant authority would be left with a part of service/package of services that is unviable or more costly. Relevant authorities must comply with the duty of best value in the Local Government Act 1999. It will be for relevant authorities to determine whether accepting expressions of interest would risk breach of this duty. Cost is one of a number of factors to be considered in making decisions on best value.

9. Guidance

The Act requires relevant authorities to have regard to any guidance issued under section 85(2) by the Secretary of State. Statutory guidance on the community right to challenge will be published, in draft when these regulations are laid, and in final form when they are made.

10. Impact

10.1 The community right to challenge does not impact on business, charities or voluntary bodies.

10. 2 An assessment has been made of the new burdens on relevant authorities as a result of this policy. An Impact Assessment is attached to this Explanatory Memorandum and will be published alongside it on www.legislation.gov.uk. Details are included in the Impact Assessment and cover activities that relevant authorities will have to undertake, such as considering expressions of interest and carrying out procurement exercises triggered by the community right to challenge.

11 Regulating small business

The legislation does not apply to small business.

12. Monitoring & review

12.1 Success criteria for the community right to challenge are set out in the Impact Assessment.

12.2 The Department for Communities and Local Government intends to take a light-touch approach to monitoring and reviewing implementation of this policy. This may include asking representative groups of relevant bodies and relevant authorities about their experience of the community right to challenge and seeking opportunities to influence independent researchers to include partial or full evaluation of the Right when examining related topics. We believe this is a proportionate approach to reviewing this policy given its cost and the Government's commitment to reducing bureaucracy. Beyond this, and in line with a policy of decentralisation, it is for individual local authorities to monitor the operation of specific applications of this policy.

13. Contact

Angela Harrowing at the Department for Communities and Local Government Tel: 0303 444 1349 or email: angela.harrowing@communities.gsi.gov.uk can answer any queries regarding the instrument.