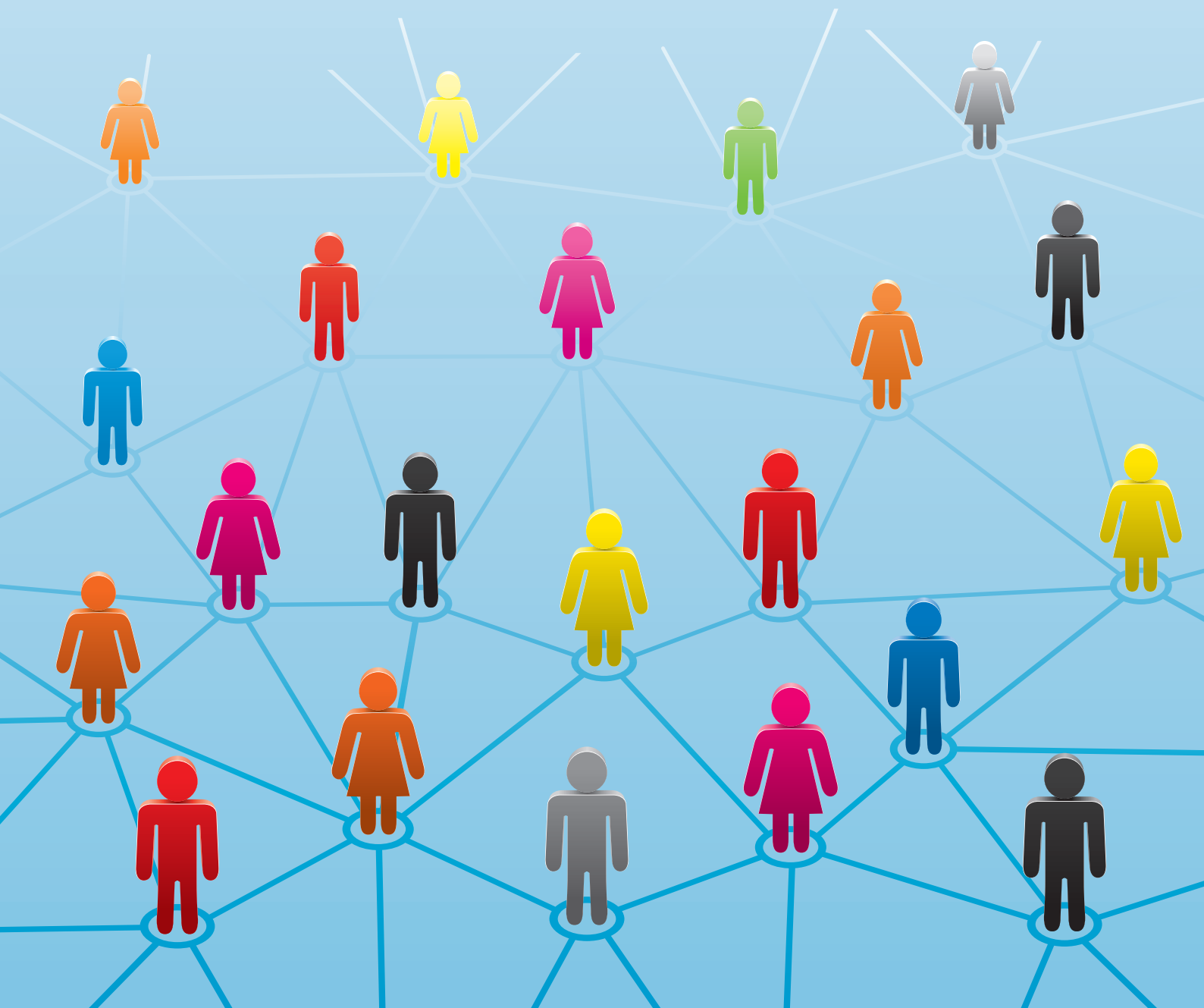


Branch guide to the community right to challenge



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The Community Right to Challenge came into effect on 27 June 2012 impacting local authorities and fire authorities in England. This revised guide focuses on local authorities, but the principles are the same for fire authorities. The guide includes details of where councils in England have received expressions of interest and what they did with those requests.

This guide has four sections:

- 1. The Community Right to Challenge - in brief**
- 2. The Community Right to Challenge - in detail**
- 3. Combating the Right to Challenge**
- 4. Freedom of information data**

1. The Community Right to Challenge – in brief

The Community Right to Challenge ('the right') came out of the Localism Act 2011. The purpose of the right is to open up public service delivery to others such as 'community organisations'. UNISON's view is that the right is a Trojan Horse for privatisation, eroding public services by the back door. It endangers in-house provision of services by removing a council's ability to control its own service provision. Any challenge by a community group represents the breakdown of the relationship between the local authority and the community it serves. Fixing that relationship requires alternative solutions.

The right covers almost all council services except individual care (e.g. direct payments) which are exempt from the regulations.

The right allows a community organisation, or council staff, to 'express an interest' in running a service. This includes the right for consortia of community groups and private companies to put in an expression of interest, providing it goes in the name of the community group.

The local authority must then consider the expression of interest. It can modify an expression of interest and can reject it only on certain grounds. If the expression of interest is accepted a procurement exercise must then be run (except for the smallest of contracts which ordinarily fall outside procurement requirements). Any organisation - community or private sector - can then take part in the procurement exercise.

The procurement process must follow the usual procurement laws and regulations. Nothing in the right changes this. Therefore, each bid will be considered against the criteria set out.

Local authorities must publish on their website:

- The periods during which an expression of interest can be submitted in relation to a particular service (failure to do so means any service can be challenged at any time)
- The maximum time it will take to make a decision as to whether to accept an expression of interest or not
- Notification of modifications or rejections of expressions of interest.

The Government is keen to persuade local authorities to encourage employees to bid to 'spin out' services as 'employee-led mutuals' – commonly known as Public Service Mutuals (PSMs). Two or more council employees can put in an expression of interest to spin-out a service. If those employees then successfully bid for the service, it would be spun out of the local authority under any legal structure the two-or-more former employees decide. There is no legal requirement as to which structure they choose, meaning a private-for-profit-company-limited-by-shares could be used.

Nothing in the right changes the duty of best value, with which local authorities must still comply.

2. The Community Right to Challenge – in detail

The Localism Act 2011¹ created the ‘Community Right to Challenge’ (‘the right’). The right applies only to local authorities and fire authorities in England. It applies to all English local authorities. It is supplemented by statutory guidance².

The right can be broken down into the following components:

- Services covered
- Who can submit an expression of interest
- Expressing an interest
- Modifying and rejecting expressions of interest
- Local authority obligations

Services covered

The right applies only to local authority services. Local authority functions are excluded from the right. Functions are things the local authority must do, for example deciding whether to grant or refuse planning permission. A service is something that helps the local authority deliver that function, for example, processing (but not deciding on) the planning application.

The Secretary of State can, through regulations, decide which services are included and excluded from the right. Currently, the regulations³ exclude the services commissioned or provided by a local authority for a named person

with complex individual health or social care needs. This will cover services such as those with personal budgets/ direct payments. This exclusion exists indefinitely.

Who can submit an expression of interest?

Those who can express an interest are⁴

- Voluntary or community organisations (whether incorporated or unincorporated), which will include:
 - Community Interest Company (CIC) whether limited by shares or by guarantee
 - Charitable companies (including the new Charitable Incorporated Organisation when this legal form eventually becomes available)
 - Social enterprises (providing any profit, or ‘surplus’, is used for running the service or invested in the community)
 - Community Benefit Societies (a type of co-operative)
 - Co-operative societies whose activities are for the benefit of the community (providing they don’t allow profit distribution)
- Parish councils
- Charitable trusts
- Two or more employees employed by the local authority

1 Sections 81 to 86

2 Community Right to Challenge, Statutory Guidance

3 The Community Right to Challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012

4 s81 Localism Act 2011

Limited Liability Partnerships (LLPs) are not mentioned in this list. It is not clear whether this legal entity has been omitted deliberately. Nonetheless, on the basis of the statutory guidance, it seems unlikely LLPs will be able to submit an expression of interest.

Though the Government is keen to see an “employee-led structure”⁵ where two or more employees wish to spin out a service, there is no requirement to form that type of structure. The local authority can require that the staff form a legal entity. However, the service would eventually be spun out of the local authority under any legal structure the two or more former employees decide on. There is no legal requirement as to which structure they choose, meaning a private-for-profit-company-limited-by-shares could be used.

The Statutory Guidance encourages partnerships⁶. A consortium of community organisations and private companies could express an interest in a service by submitting the expression in the name of the community organisation. The guidance also encourages the establishment of joint ventures. Any incorporated joint venture (as in a joint venture company that is a legal entity in its own right) would have to meet the criteria set out

on page 4. If the joint venture is purely a contractual relationship then at least one of the organisations party to the contractual relationship must meet the above criteria.

Expressing an interest

The default position is that an expression of interest can be made at any time on any relevant service⁷. However, this position can be departed from where the local authority chooses to specify periods of time during which expressions of interest in respect of particular services may be submitted⁸. Most local authorities are choosing to specify such periods. Where they do so, they must publish this information on their website⁹.

The Statutory Instrument¹⁰ sets out the requirements of what must be included in an expression of interest. The following information must be in an expression of interest:

- **Financial suitability**

“Information about the financial resources of the relevant body submitting the expression of interest”

- **Delivery capability**

“Evidence that demonstrates that by the time of any procurement exercise the relevant body

5 Para 1.13 Statutory Guidance

6 Para 1.14 Ibid

7 s82(1) Localism Act 2011

8 s82(2) Ibid

9 s82(3) Ibid

10 The Community Right to Challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012.

submitting the expression of interest will be capable of providing or assisting in providing the relevant service.”

● **Challenged service**

“Information about the relevant service sufficient to identify it and the geographical area to which the expression of interest relates.”

● **Promised outcomes**

“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:

- how the provision or assistance will promote or improve the social, economic or environmental well-being of the relevant authority’s area; and
- how it will meet the needs of the users of the relevant service.”

● **Employee engagement**

An additional requirement exists when, and only when, two or more local authority employees are seeking to spin out the service. Where this is the case the employees must include details of how that relevant body proposes to engage with other employees of the relevant authority who are affected by the expression of interest.

The Government make the point that any consultation should be ‘proportionate to the size and nature of

the service and number of employees directly affected’ and goes on to clarify that there is no requirement for a ballot.

Where the relevant body proposes to deliver the service as part of a consortium or to use a sub-contractor, then the information detailed in the first two bullet points above (financial suitability and delivery capability) must be provided for each member of the consortium and each sub-contractor as applicable.

A body that has submitted an expression of interest can withdraw it at any time¹¹, however this withdrawal doesn’t prevent the local authority from carrying on as if the expression of interest is still there¹². Once the expression of interest has been submitted- no matter how quickly it is withdrawn- the process is triggered.

Consideration of the expression of interest

Once an expression of interest is received, the local authority must then accept or reject the expression of interest. This is an operational, not a political, exercise. Before accepting or rejecting an expression of interest the local authority can suggest that it be modified. This is dealt with in more detail in the next section.

The statutory guidance requires the local authority to specify the maximum period of time it will take to notify the relevant body of its decision on an

11 s84(10) Localism Act 2011

12 S84(11) Ibid

expression of interest¹³. They must include this information on their website. This period of time can vary from service to service. This requirement appears in the Statutory Guidance, but not in the Act or Statutory Instruments. Enforceability of this requirement is therefore limited.

Once an expression of interest is received the local authority must then write to the relevant body submitting the expression of interest and set out the timescale within which the local authority will decide whether to accept or reject the expression of interest. This must be done within 30 days of the maximum period of time detailed on the local authority's website. Or, if no period of time is specified, within 30 days of receipt of the expression of interest.

Whilst the time periods specified are within the gift of the local authority, they are required to have regard to¹⁴:

- the need to notify the relevant body of a decision within a reasonable period;
- the nature, scale and complexity of the service to which expressions of interest relate, for example, is the service shared with one or more other relevant authorities, or jointly commissioned with one or more public bodies?;
- the complexity of the expressions of interest received, for example, do

they propose a radical change to the way a service is delivered?;

- the likely need to agree modifications to expressions of interest in order to accept them; and
- the timescales for any existing commissioning cycle relevant to the service which an expression of interest relates to, or any other relevant authority processes. These may include council cabinet or committee decision making or budget setting processes.

It is therefore likely that a local authority will look at its existing procurement cycle and contract expiration dates before specifying response times.

The local authority must publish on its website the minimum and maximum periods that will elapse between accepting an expression of interest and the date on which a procurement exercise will begin¹⁵. These periods of time can differ for different services.

The Statutory Guidance states the aim of this requirement to be to “allow relevant bodies the time they need to prepare to compete in the procurement exercise”. Nevertheless, those organisations which currently struggle to engage in procurement exercises - such as small businesses - will continue to struggle.

When assessing the expression of interest, the local authority must

13 Para 5.1 Statutory Guidance

14 Section 5, Statutory Guidance

15 s83(4) Localism Act 2011

consider whether acceptance of the expression of interest would promote or improve the social, economic or environmental well-being of the authority's area¹⁶.

Accepting an expression of interest

Once an expression of interest is accepted, the Community Right to Challenge process ends.

For contracts above the procurement value threshold, where an expression of interest is accepted, the local authority should then start a procurement exercise. The procurement exercise, subject to the procurement regulations, would be open to anybody to compete in and is not restricted to the body that submitted the expression of interest.

The Act requires local authorities when procuring services, to "consider how it might promote or improve the social, economic or environmental well-being of the authority's area"¹⁷. However, this is subject to procurement law¹⁸ and as such is limited in its effect.

The right, therefore, is merely a gateway to procurement. It offers the organisation which expressed an interest no greater chance or ability to run the service than if they had simply

taken part in a local authority-led procurement exercise.

Modifying an expression of interest

A local authority can modify an expression of interest where it thinks the expression would not otherwise be capable of acceptance, or where the body submitting the expression agrees to the modification¹⁹. Therefore, if a local authority is actively encouraging expressions of interest or encouraging an organisation to submit an interest, it can lawfully assist by modifying the expression of interest.

Rejecting expressions of interest

Local authorities can only reject an expression of interest on 10 grounds, specified by regulations²⁰. These regulations can be changed at any time by the Secretary of State for Housing, Communities and Local Government. The 10 grounds are:

1. **Non-compliance with the Act.**
The expression of interest doesn't comply with requirements of the Act or the regulations.
2. **Inadequate or inaccurate information** in the expression of interest.

16 s83(8) Ibid

17 s83(9) Ibid

18 s83(10) Ibid

19 s84(1)&(2) Localism Act 2011

20 The Community Right to Challenge (Fire and Rescue Authorities and Rejection of Expressions of Interest) (England) Regulations 2012

3. **Unsuitability of the relevant body.** The body submitting the expression of interest, or a member of a consortium submitting the expression of interest, or any sub-contractor referred to in the expression of interest, is, in the opinion of the local authority, unsuitable to provide or assist in providing the service.
4. **Service to be stopped.** The expression of interest relates to a service that the local authority has made a decision to stop providing. This must be evidenced in writing.
5. **Continued integration with NHS critical.** Where a service is integrated with an NHS service and the continued integration is critical to the well-being of those persons affected. E.g. a day centre for individuals with complex needs.
6. **Already in a procurement exercise.** Where the service is already the subject of a procurement exercise.
7. **Ongoing negotiations with a third party.** The local authority is in negotiations with a third party for the provision of the service when an expression of interest was submitted, and those negotiations are at least in part conducted in writing.
8. **Published intention to spin-out.** The local authority has published its intention to consider two or more employees spinning out the service. The publication need not necessarily be a statement on the local authority website. It may be in the minutes of a cabinet or committee meeting.
9. **Frivolous or vexatious request.** The local authority considers the request to be frivolous or vexatious - for instance, if the request would cause distress or irritation without justification or is apparently not a genuine offer to provide a service and lacks any serious purpose.
10. **Breach of a rule of law or statutory duty.** If acceptance of the expression of interest is likely to lead to contravention of an enactment or other rule of law or a breach of a statutory duty. This includes the duty of Best Value²¹.

The local authority may use one or more of the above grounds. Ground 10 is arguably the most important, and useful, ground for rejecting an expression of interest.

Miscellaneous

Much of the regulation around the Community Right to Challenge is created through Statutory Instruments. These are not subject to the same level of parliamentary scrutiny as a Bill. They can be changed by the Secretary of State. Furthermore, the Act itself contains various 'Henry VIII clauses' which mean that the Act gives powers to the Secretary of State to change

21 Para 6.15 Statutory Guidance

parts of the Act without further Parliamentary scrutiny²². The Secretary of State has power over the following:

- Creating requirements by regulations that must be complied with
- Specifying by regulations the 'relevant authorities' which includes adding, amending, or repealing categories of 'relevant authorities'
- Amendment or repeal of the definitions of 'relevant body;' and the accompanying list
- Adding new 'relevant bodies' to the list through regulations
- Amendment or repeal of the definition of 'voluntary body'
- Amendments to any part of the act in consequence of the above
- Specifying by regulations the services covered by the right
- Specifying the grounds for rejecting expressions of interest
- Making further provisions around consideration of expressions of interest (anything in section 84 of the Act) which includes: modification, time period specifications, withdrawal of expressions of interest.
- Amending or issuing new Statutory Guidance, which local authorities must 'have regard to'.

Furthermore, the Secretary of State is able to give advice, financial support, and training, amongst other things, to any relevant body or anyone else.

The Government have created the following site:

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

to encourage and assist groups who want to use the Community Right to Challenge. Much of the information is misleading in its over-simplification. Examples listed on the website such as Fresh Horizons did not actually arise out of the Community Right to Challenge, instead arising out of a very different sequence of events.

3. Combating the right to challenge

The draft statutory guidance demonstrated the Government's intentions behind this legislation when it sought to rule out in-house provision of public services. UNISON was involved in a successful lobby to change that guidance. References seeking to deter in-house provision were deleted. However, the intention still remains.

There is a series of things branches should do to understand how the Community Right to Challenge is operating in their local authority.

Find the details of the Community Right to Challenge on your local authority's website.

All local authorities should have a page on their website dedicated to this. If it isn't obvious to find, try searching for "community right to challenge".

Analyse the information on the website so you are able to answer the following:

- Has your local authority specified periods of time for expressions of interest?
- Can expressions of interest be submitted at any time?
- Which services are up for grabs and when?
- What information have councillors been provided with?

You may find it useful to map out the information about which services are open to challenge and when, to allow

you to plan ahead. If your local authority is not specifying periods of time for services, you could encourage them to do so.

Many local authorities issued guidance to councillors and others based on the draft statutory guidance, not the final statutory guidance. There is a crucial difference between the two. The deletion of paragraphs seeking to deter in-house provision clearly demonstrates that in-house provision of services is possible. It is important to check the advice the local authority has given to ensure it is up to date and accurate.

Collect any information on 'staff mutuals'

- Has your local authority circulated any guidance to staff on 'staff mutuals' or 'employee led expressions of interest'?
- How much support are local authorities looking to give?
- Does the financial assistance breach EU state aid rules?²³

Please forward any information about this to **servicedelivery@unison.co.uk**

23 http://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html

Best Value

Best Value is crucial in combating the Community Right to Challenge. The local authority in-house teams most often provide value for money or 'Best Value'. Before a decision is made to simply accept an expression of interest in running a service the council should provide the opportunity, within its processes, for allowing the in-house team to demonstrate value for money or 'Best Value'. This can be done by exploring customer satisfaction, cost and quality of a service including the use of performance data or information. In-house teams will have much more operational knowledge about the impact on a service if an expression of interest is accepted, and should therefore, be involved in the decision-making process.

Whenever you think a service is under the threat of outsourcing or an expression of interest ask about compliance with the Best Value duty. You should check whether the local authority has considered the cost of the procurement exercise (in this round and future renewals) and contract management costs when considering whether it is better value to accept an expression of interest or not.

Use the information you gathered to plan ahead to think about which services may be under threat and when. You may want to persuade a councillor to ask a question about this; submit the question formally to the Chief Executive or submit a Freedom of Information request for any information on this.

If the local authority considers that it is better value to keep the service in-house, it can reject an expression of interest on ground 10, on the basis accepting the expression of interest would lead to a breach of the Best Value duty.

Collecting performance data is important in demonstrating whether in-house services are best value or not. You should check whether your local authority still collects performance data. Where they don't, you should encourage them to do so.

Public Sector Equality Duty

Local authorities must continue to comply with the Public Sector Equality Duty. An expression of interest can be rejected where acceptance would lead to a breach of this duty. You should ask the local authority to provide evidence of how it would be complying with this duty if it accepted an expression of interest. Furthermore, you could request equality impact assessments prior to the local authority making any changes to service delivery.

Local authority owned companies?

Be careful about this being seen as a solution. The companies are often known as 'Teckal' companies but can also be known as 's.95 companies' or 'trading companies'. These are companies set up by the local authority. Contracts can then be awarded to that company, sometimes

without going through a procurement exercise. Private providers can challenge these contract awards under EU state aid rules.

Advice

For advice on the Community Right to Challenge please contact Paul Bell, National Officer, at **p.bell@unison.co.uk** or on 0207 121 5708. If you have any information on the Community Right to Challenge that is not otherwise publicly available, please send it to **servicedelivery@unison.co.uk**

4. Freedom of information data

In October and November 2018 UNISON issued a Freedom of Information request to every English local authority, asking the following questions:

1. How many expressions of interest have you received since the Localism Act 2011 came into force?
2. How many expressions of interest have you accepted since the Localism Act came into force?
3. How many of the accepted expressions of interest have resulted in the original person or persons (who made the expression) being awarded the contract since the Localism Act came into force?
4. What type of services have been involved in the accepted expressions of interest?
5. How many expressions of interest have been modified by your local authority to enable acceptance?

Key Findings

- We received 294 responses to the FOI out of 353 English local authorities
- 36 councils received expressions of interest, 9 councils did not hold the information
- 16 councils accepted the submitted expressions of interest, though 1 was later withdrawn

- 6 councils modified the expressions of interest before acceptance
- 91 expressions of interest were received in total (by 36 councils) 28 were accepted, 63 were rejected
- Out of the 28 accepted expressions of interest, 21 were given to the original requestor.

Types of services that have been requested and accepted **(in bold)** under the Community Right to Challenge²⁴

- Children's Centres
- **Emergency planning**
- **Homeless prevention**
- **Learning disability service**
- **Leisure, sports and sports development**
- Libraries and library services
- **Markets**
- **Museums**
- **Pupil and family support services**
- Refuse collection and disposal
- Tenancy relations service
- **Translation and interpretation**

²⁴ This list is not exhaustive. Not every local authority responded or answered the question.

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