



# **Community Right to Challenge**

## **Process, Policy and Guidance in Respect of Expressions of Interest**

Author: Denise Bann/Jason Swann  
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## Section 1 - Introduction

### ***1.1 What is the Community Right to Challenge?***

The Localism Act 2011 created a number of additional powers for voluntary and community sector groups and charities. These powers relate to planning, the management of community based assets and the delivery of community based services.

The Community Right to Challenge relates to the last of these powers - the delivery of community based services.

In short the Community Right to Challenge gives “relevant bodies” the right to express an interest in the running of local “relevant services” to a “relevant authority”

“Relevant authorities” are defined as:

- County councils
- District councils
- London borough councils
- Some fire and rescue authorities

“Relevant bodies” are defined as:

- Voluntary or community groups
- An organisation or trust formed for charitable purposes
- Parish councils
- Two or more employees of the relevant authority

“Relevant services” are the services delivered by the relevant authority to the public.

It is important to note here the distinction between services and functions. An example is the granting of planning permission, which is a function of a local authority, but processing the planning application is a service. More guidance on services and what is and isn't included under the provisions of the Act can be found in Section 6.2.

If a body is interested in delivering services for the Council then it can submit an “Expression of Interest”. The Act defines what format the Expression of Interest must take and the tests the Council can use to decide if the Expression of Interest is valid.

If the Council decides the Expression of Interest is valid then it must undertake a procurement exercise that complies with EU/UK procurement regulations and the Council Standing Orders if it is going to charge for the service and there are other potential providers

Accepting an Expression of Interest as valid does NOT mean the Council will automatically contract for those services from the body submitting the Expression of Interest.

## **1.2 What does this document cover?**

This document covers the way in which the Council will receive, check and deal with Expressions of Interest submitted by relevant bodies under the Right to Challenge.

If you are a community or voluntary sector group this document will help you to understand the legal framework that governs the Right to Challenge, how you submit an Expression of Interest, what information the Council needs to make a judgement on whether you have the capability to deliver the service, who in the Council is responsible for dealing with Expressions of Interest and the process they will go through to make that decision. It also describes what will happen if your Expression of Interest is accepted.

If you work for the Council this document will help you to deal with some of the issues that might arise out of a Right to Challenge, such as service disintegration, TUPE and the types of procurement process.

## **1.3 What to consider before going any further**

If you are thinking about submitting an Expression of Interest there are a few things you need to take into account before doing so.

### **1.3.1 Has the Council set time periods for the submission of Expressions of Interest for the service you are interested in delivering?**

The Act allows the Council to set time periods for the receipt of expressions of interest (see Section 2). Expressions of Interest received outside of these dates do not need to be considered by the Council. Where the Council has set time periods these will be published on the Council website and it is recommended you check the website before submitting an Expression of Interest.

The Council's Community Right to Challenge website can be found here:

<https://www.sheffield.gov.uk/business-economy/contracts/community-right-to-challenge.html>

### **1.3.2 Does the Council currently have a contract or commercial arrangement in place to deliver the services?**

If the Council has a contract or other commercial arrangement in place to deliver the services it will be unable to accept Expressions of Interest until just before the contract or arrangement expires. Please note that some two thirds of Council activity is subject to commercial arrangements.

The time period is likely to be no shorter than 6 months prior to the end of the contract to allow the Council to review any EOIs and factor these into any subsequent procurement process. The Council will use the time periods referred to above and in Section 2 of this guidance to restrict accepting Expressions of Interest

where current contracts or commercial arrangements already exist. A list of the current Council contracts can be found on the Council website and it is recommended you check this to see if a contract or arrangement already exists for the service you are interested in.

A list of the Council's contracts can be found at:

<https://www.sheffield.gov.uk/business-economy/contracts/current.html>

### **1.3.3 Having an Expression of Interest accepted does NOT guarantee the Council will ask you to deliver the service.**

**If the Council accepts your Expression of Interest then it must run a procurement exercise that complies with procurement law and Council rules and regulations. This procurement process will need to give everyone that could deliver the service a chance to bid for the work - this means not just the organisation that submitted the expression of interest but other Voluntary and Community sector bodies, charities and private sector companies.**

### **1.3.4 TUPE Implications**

Under current TUPE legislation in the UK, if you are successful in the procurement exercise you will be required to do the following and have priced this in your bid:

- Receive all staff from the Council involved within the defined scope of the service or who spend the majority of their time on the activity.
- In addition receive any support staff from the Council who are allocated to support the defined service area, or again spend the majority of their time supporting the activity.
- All staff to be received with full Council employment terms and conditions (pay scales, holiday entitlement etc.)

Pensions are covered by separate Government Regulations but currently all staff transferring from the Council must maintain their current pension scheme (Local Government Pension Scheme) or be provided one that is broadly comparable.

### **1.3.5. Discuss your proposal with the Council**

**An organisation planning to submit an expression of interest should contact the Council to discuss your intentions BEFORE submitting the EOI. This will give the organisation a chance to discuss their proposals with the service area beforehand and allow the Council to provide a registration number that will be used to track an EOI through the process.**

## ***1.4 Where to find further information***

General Information on the Localism Act and Community Right to Challenge can be found at the Community Rights website:

<http://communityrights.communities.gov.uk/>

The Council's Commercial Services Department is responsible for dealing with Expressions of Interest. Their role is ensure the provisions of the Act are applied in a consistent and transparent way to ensure Expressions of Interest received from relevant bodies are given a fair appraisal.

This document and the process and guidance are owned by Commercial Services. If you have any questions on how the Council is implementing the Right to Challenge that are not answered here then please refer to the Council's website which will have up todate information on the Council's approach to the Right and a frequently asked questions section:

<https://www.sheffield.gov.uk/business-economy/contracts/community-right-to-challenge.html>

Or alternatively please contact:

Commercial Manager (Projects)  
Commercial Services  
Sheffield City Council  
Floor 3 East & West  
Moorfoot  
Sheffield

Tel: 0114 205 3186

Email: [commercialprojectsteam@sheffield.gov.uk](mailto:commercialprojectsteam@sheffield.gov.uk)

Reference Material:

Localism Act (2011) and associated Regulations (May 2012)

Communities and Local Government – Community Right to Challenge, Statutory Guidance (May 2012)

## Section 2 – Time Periods

### 2.1 Policy:

Unless appropriately time restricted or the subject of an existing contract (see below) the Council will not restrict the submission of Expressions of Interest.

### 2.2 Restricted time periods

The Act allows the Council to set time periods during which it will consider Expressions of Interest in respect of particular relevant services. If the Council decides to do this it will advertise the periods and services affected on the Council website.

If time periods are set for relevant services it gives the Council the right to refuse to consider the Expressions of Interest submitted outside of the published dates. If no restricted dates are published then the Council will consider the Expression of Interest against the tests in Section 6 below.

If the Expression of Interest is received outside of the time period and the Council refuses to consider it then the relevant body will be informed and invited to resubmit the Expression of Interest when the time period will allow the Council to review it.

When considering if a restricted time period should be introduced for a specific service the Council will consider the following:

1. The need to give relevant bodies enough time to prepare and submit Expressions of Interest. If little or no notification is given in advance of the period then the time period should be long enough to allow relevant bodies time to prepare Expressions of Interest.
2. The nature, scale and complexity of the service for which the period is being set. Again this will be decided on a case by case basis but generally the more complex the service the longer the time period for the receipt of Expressions of Interest.
3. The timescales for existing commissioning/business planning cycle. Time periods should be used to align the receipt of Expressions of Interest to the Council commissioning cycle. This will ensure input at the most appropriate part of the cycle (most likely to be during the service scoping and stakeholder engagement). For more information on the Council commissioning process can be found at

<https://www.sheffield.gov.uk/dms/scc/management/corporate-communications/documents/communications/information/The-Commissioning-Process-In-Sheffield-City-Council-Word-540KB.doc>

In all circumstances the decision to set time periods should be made on a case by case basis and agreed between the relevant Service Area and Commercial Services.

## 2.3 Impact on Service Areas

The impact on service areas of allowing organisations to submit EOIs whenever they like unless a restriction has been put in place is that it places great importance on service areas having robust forward commissioning plans. These plans should factor in appropriate consultation not only with end users but also with potential community based service providers. This will ensure that organisations that may wish to submit an EOI know where a service area is in its commissioning cycle and any decision to restrict the submission of EOIs (say for example to allow for an options appraisal) does not come as a surprise to potential providers.

## 2.4 Existing Contracts:

There is no explicit provision in the Act to cover Expressions of Interest received where a contract currently exists with a third party provider.

The Council will therefore restrict the submission of Expressions of Interest for all relevant services where a current contract exists. This restriction will remain in place up until a period just prior to when the contract is due to expire. This period is likely to be around 6 months prior to the end of the contract and will allow for Expressions of Interest to be received and considered prior to the contract expiring. Any future procurement exercise would therefore reflect the nature of the expression of interest received. For larger contracts covering complex services the period may be earlier to allow for appropriate consultation as part of the commissioning process.

The expiry date of current contracts can be identified through the contracts database which can be found on the Council website at the following address:

<https://www.sheffield.gov.uk/business-economy/contracts/current.html>

In all circumstances the decision to set time periods in respect of current and future contracts should be made on a case by case basis and agreed between the relevant Service Area and Commercial Services.

## 2.5 The Council's Approach to Setting Periods

The Council's agreed approach to setting time periods is as follows:

- The Council will accept EOIs at any time
- The Council however reserves the right to restrict the submission of EOIs for specific services at specific times for example:
  - When a procurement process starts
  - In a commissioning process during the options appraisal following stakeholder engagement.

Any restrictions will be published on the Council website:

<https://www.sheffield.gov.uk/business-economy/contracts/community-right-to-challenge.html>



## **Section 3 - Employee Submitted Expressions of Interest**

### 3.1 Guidance

Generally the same tests will be used to validate an employee submitted Expressions of Interest as are used for externally submitted EOIs.

There is one additional test for employee submitted EOIs and this relates to how the staff submitting the EOI have or will interface with other effected staff through the EOI and any subsequent procurement process. This is additional to any statutory TUPE and Union consultation that would be covered as part of any procurement/tender process.

In practice staff submitted EOIs will affect service areas in different ways depending on the nature of the service, the number of staff involved and whether management are involved in the staff group submitting the EOI. These issues have an implication for the consideration of the EOI, the ongoing delivery of the service, and the fairness of any subsequent procurement process. Therefore Commercial Services will discuss with the service area/director on a case by case basis the most appropriate action to take bearing in mind the following issues.

### 3.2 Practical and Operational Issues

There are a number of practical and operational issues that may affect a service area that is subject to an employee submitted EOI. These can be split into two broad categories:

#### 3.2.1 Managing staff and ongoing service delivery:

The Council has an obligation to advertise the receipt of all EOIs, including those received from staff. EOIs therefore will be public and other staff members affected by the EOI will eventually know about them. Therefore all staff involved in the delivery of a service subject to an EOI should be made immediately aware of its receipt and updated on the validation and eventual outcome. Commercial Service and HR will advise on what information can be released to staff.

The involvement of senior management in the staff group submitting the EOI will have an impact on how the EOI is considered. Commercial Services will need to consult with the service area during the evaluation of the EOI and if the responsible manager is part of the staff EOI then an alternative independent manager will need to be found. This may be a more senior manager or a manager in an associated service area.

It is not currently intended that staff submitting an EOI will need to be temporarily removed from delivering the service while the EOI is being considered. However where it is possible the staff will have access to information that could provide them with a significant competitive advantage in any future procurement process then Commercial

Services in consultation with the service area/director and HR will advise if the staff should be temporarily relocated until the outcome of the EOI is known.

EOIs should be developed and submitted by staff in their own time. Senior management must not allow the use of work time or Council assets in the development of an EOI nor should they provide any form of financial support or assurances of future business or workload. Managers in consultation with HR should use the current Staff Code of Conduct to deal with such a situation should it arise. This also applies where it is suspected confidential information may have been removed from the Council or used in an inappropriate manner.

### 3.2.2 Defining the Procurement Process

If an EOI is accepted then the outcome will be a procurement process. In line with Council Standing Orders and UK/EU Procurement Regulations. It could therefore take a number of forms, for example a full compliant tender process or in exceptional circumstances a direct negotiation with the body submitting the EOI.

In almost all cases it is clear the staff involved in the affected service area will have wide access to information therefore to ensure a fair and transparent process service areas in consultation with Commercial Services should ensure that this information is also made available to everyone involved in a procurement process, including external bidders where necessary.

In addition in a similar manner to the involvement of staff in the consideration of a staff submitted EOI care will need to be exercised in any procurement process where the staff or management are required to evaluate a procurement process. It is clear that staff involved in an EOI that has led to procurement process cannot be involved in any subsequent evaluation. Commercial Services in consultation with the service area will need to agree the most appropriate level of involvement in the evaluation process to ensure this is fair and transparent. As stated earlier this could be by involving a more senior manager or one from an associated service area with no direct interest in outcome of the process.

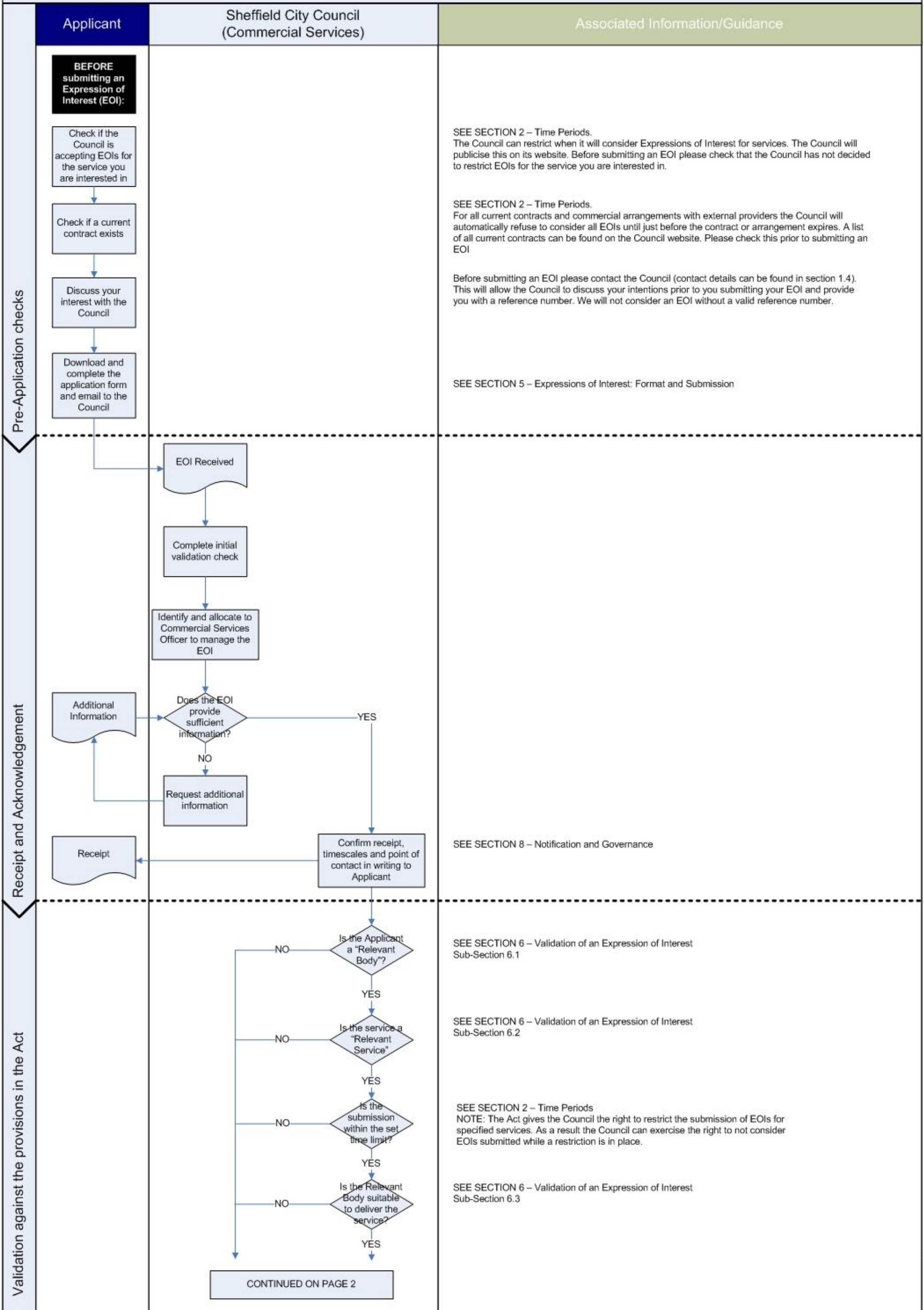
### 3.3 Management Involvement:

Senior managers who are aware of a potential staff EOI must be careful how they respond to it. They must stay independent at all times. Amongst other things they should not:

- Offer to fund any part of the EOI. That includes helping to fund the creation of any company that would submit the EOI or be potentially involved in the delivery of the services or providing any cash assistance to help with the drafting of the EOI.

- Provide any other assets including Council premises/facilities and equipment for the purposes of drafting/submitting the EOI
- Guarantee that a staff submitted EOI will result in the staff being offered the services or that the EOI will be treated in any way differently from an EOI submitted by an external organisation.

## Section 4 - Process Diagram



Applicant	Sheffield City Council (Commercial Services)	Associated Information/Guidance
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Validation against the provisions in the Act</p>	<p style="text-align: center;">Page 1</p>	<p>SEE SECTION 6 – Validation of an Expression of Interest Sub-Section 6.4</p> <p>SEE SECTION 6 – Validation of an Expression of Interest Sub-Section 6.5</p> <p>SEE SECTION 6 – Validation of an Expression of Interest Sub-Section 6.6</p> <p>SEE SECTION 6 – Validation of an Expression of Interest Sub-Section 6.7</p>
	<p style="text-align: center;"><b>REJECT CASE TO CHALLENGE</b>      <b>ACCEPT CASE TO CHALLENGE</b></p>	
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Outcome</p>	<p>Notification</p> <p>Notify Applicant of Rejection of EOI. To include details of which part of the Act has been applied</p>	<p>SEE SECTION 8 – Notification and Governance</p>
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Notification</p>		<p>SEE SECTION 3 – Employee Submitted Expressions of Interest</p> <p>SEE SECTION 7 – Expression of Interest Assessment</p>



Applicant	Sheffield City Council (Commercial Services)	Associated Information/Guidance
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Expression of Interest assessment</p>	<p style="text-align: center;">Page 2</p> <pre> graph TD     Start[Page 2] --&gt; Opt1[OPTION 1 Give service away (no income for the Council)]     Start --&gt; Opt2[OPTION 2 Pay provider of Service]     Opt1 --&gt; EQ{Are there others that could claim an equal right?}     Opt2 --&gt; EQ     EQ -- YES --&gt; EQYes[Determine fair and open process to give others the chance to express an interest]     EQ -- NO --&gt; EQNo[Determine timescales for commencing quote or tender process]     EQYes --&gt; EQYesNext[Determine timescales for process to consider other interested parties]     EQNo --&gt; EQNoNext[Determine timescales for direct negotiation with the Applicant]     EQYesNext --&gt; EQNoNext     EQNoNext --&gt; EOIR[Produce EOI Assessment Report (Business Case)]     EOIR --&gt; EA[Assessment approval (Cabinet Member level)]     EA --&gt; NA[Notify Applicant of acceptance of EOI Confirm nature and timescales for the Procurement Process]     NA --&gt; N[Notification]     NA --&gt; I[Implement Assessment Report recommendations if approved]             </pre>	<p>SEE SECTION 7 – Expression of Interest Assessment</p>
	<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Notification</p>	<p>Notification</p>
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Implementation</p>		<p>Implement Assessment Report recommendations if approved</p>

## Section 5 - Expressions of Interest: Format and Submission

### 5.1 Requirements for expression of interest

*Localism Act Regulations Extract:*

*Requirements for expression of interest*

- 1. An expression of interest must include the following information and, 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 and evidence referred to 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.*
- 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 the social, economic or environmental well-being of the relevant authority's area; and*
  - (b) how it will meet the needs of the users of the relevant service.*
- 6. Where the relevant body consists of employees as described in (the Act) details of how that relevant body proposes to engage other employees of the relevant authority who are affected by the expression of interest.*

#### 5.1.1 What should be considered BEFORE submitting an Expression of Interest

Organisations should check/consider the following before submitting an EOI:

- Check on the Council website whether the Council has restricted the submission of EOIs.
- Check on the Council website if a current external contract already exists. The Council will not consider EOIs for services already covered by a contract.



- Contact the Council to obtain a reference number and discuss the proposed EOI.
- Where applicable any staff currently employed in delivering a service subject to an EOI and procurement process are likely to be eligible for TUPE. This means they would transfer to any new provider on their current terms and conditions.

### 5.1.2 Submission of Expressions of Interest

All Expressions of Interest should be submitted through the Council's Community Right to Challenge website.

<https://www.sheffield.gov.uk/business-economy/contracts/community-right-to-challenge.html>

The form on the Council website will help structure the submission to ensure the Council receives the right information to make a fair assessment of the Expression of Interest. It will also point the applicant in the direction of useful information such as the list of current Council contracts or where the Council has restricted the dates for submissions.

#### *Service Area Involvement:*

The relevant service area and relevant Cabinet Member will be informed immediately upon receipt of an Expression of Interest by Commercial Services.

The service area and Cabinet member will be kept informed of the progress of the expression of interest throughout the review process and will be involved in any decisions on the EOI.

### 5.1.3 General Guidance

The information allowed in the Expression of Interest is similar to the information requested in the pre-qualification exercise of a two stage tender process.

#### *Financial Resources:*

The Council will require enough financial information to make a judgement on the capacity of the relevant body to deliver the services based on the size and complexity of the services to which the EOI relates. This is likely to include bank references and/or copies of annual accounts.

The standard requirement will be three years of audited accounts and a bank reference however the Council acknowledges that in certain circumstance this may not be appropriate.

For example for small self contained services the Council may accept current accounts and a bank reference particularly if the applicant is a small community group or has been set up with the specific purpose of delivering the service (and therefore does not have a financial history).

The decision on how much information is required will be made by Commercial Services based on the nature of the EOI and in consultation with Corporate Finance.

It is possible the Council will request additional information from the relevant body once the expression of interest has been received to make sure it has enough information to make an informed judgement.

*Suitability to provide the service:*

As with financial resources the Council will require enough information to make a judgement on the suitability of the relevant body to delivery the services based on evidence of the type and size of services the body currently delivers or that they will be able to do so by the time of any procurement process.

Again it is possible the Council will request additional information from the relevant body once the expression of interest has been received to make sure it has enough information to make an informed judgement.

*Promotion of social, economic or environmental well-being:*

Expressions of Interest should demonstrate how the proposal might offer social, economic or environmental benefits to the community and take into account social considerations over and above the provision of the service. This could include creating jobs, improving local skills, increasing local volunteering opportunities, or improving environmental conditions.

*Employee engagement:*

For employee submitted Expressions of Interest how the relevant body engages with the other employees that deliver the service will be determined by the size and nature of the service and the number of employees involved on a case by case basis. But the relevant body should make clear in the Expression of Interest how they intend to consult and engage the other employees. (See Section 3 for more guidance on employee submitted Expressions of Interest).

*Modifying Expressions of Interest:*

If the Council is contemplating rejecting an Expression of Interest for whatever reason it can go back to the relevant body and ask them to consider amending and resubmitting it. This would be particularly useful where information is missing from an expression of interest that would technically result in its rejection.

## Section 6 - Validation of an Expression of Interest against the Localism Act 2011

### 6.1 Is the applicant a Relevant Body?

*Localism Act Extract:*

*In this Section “relevant body” means –*

- (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,*
- (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.*

#### 6.1.1 Process:

Test the organisational structure of the applicant to ensure they meet one of the above definitions.

#### 6.1.2 General Guidance:

*Voluntary and Community Organisations:*

A voluntary body is an organisation that carries out activities on a not for profit basis. If it does make a profit it invests these in its activities or back into the community, whereas a community body carries out its activities for the benefit of the community. Examples of voluntary and community bodies are:

- Community benefit societies
- Cooperatives whose activities benefit the community
- Community interest companies
- Charitable incorporated organisations

It's not necessary that the voluntary or community body is an incorporated limited liability company when submitting an Expression of Interest, although it is likely that for them to contract with the Council they will need to be. As a result it will be necessary to allow additional time between accepting an Expression of Interest from an unincorporated body and starting the procurement process to allow them to become incorporated or meet the requirements of contracting with the Council. The Expression of Interest should include details of the proposed legal entity that the Council would be expected to contract with. (See Timescales in Section 2).

*Employees:*

In respect of employees the intention would be that the employees form an employee-led structure to take on delivery of the services. As with voluntary and community bodies this is expected to be a limited liability company. It is not a

requirement that this is finalised prior to the employees submitting the Expression of Interest and again it is expected that enough time will be allowed between accepting the Expression of Interest and the start of the procurement process to allow the employees to meet the requirements needed to contract with the Council. The Expression of Interest should include details of the proposed legal entity that the Council would be expected to contract with. (See Timescales in Section 2)

*Partnerships:*

While only relevant bodies can submit an Expression of Interest, they may want and can to do so with other relevant and/or non-relevant bodies. Where this occurs the Council would need information on all the organisations involved in the Expression of Interest (see Section 5 on Expressions of Interest) to determine if it has come from a relevant body.

Where two or more bodies join together in a contractual joint venture for the purposes of submitting the Expression of Interest the joint venture company must meet the definition of a relevant body.

**NEXT STEP:**

Does the applicant meet the definition of relevant body?

Yes – Go to Section 6.2

No – Reject the EOI as it is not a valid EOI under the provisions of the Act

## **6.2 Is the service stated in the Expression of Interest a Relevant Service?**

### *Localism Act Extract:*

*In this Section “relevant service”, in relation to a relevant authority, means a service provided by or on behalf of that authority in the exercise of its functions in relation to England, other than a service of a kind specified in regulations made by the Secretary of State*

### *Localism Act Regulations Extract:*

#### *Excluded Services –*

*(Until 1 April 2014), a relevant service commissioned in conjunction with one or more health services -*

*(a) by a relevant authority or by an NHS body under a partnership arrangement made in accordance with the NHS Bodies and Local Partnership Arrangements Regulations 2000, or  
(b) by a relevant authority and an NHS body or a Strategic Health Authority, acting jointly.*

*(Until 1 April 2014), a relevant service commissioned by an NHS body on behalf of a relevant authority.*

*A relevant service commissioned or provided by a relevant authority in respect of a named person with complex individual health or social care needs.*

### **6.2.1 Process:**

Test the service detailed in the Expression of Interest meets the above criteria.

### **6.2.1 General Guidance:**

#### *Services and Functions:*

The Community Right to Challenge only applies to services. The functions of the Council are not covered by the Act e.g. –

- Granting of planning permission is a function of the Council and is not covered by the Community Right to challenge
- Processing of planning applications is a service and is covered by the Community Right to Challenge

#### *Delegated Functions:*

It is possible the Council may have delegated some functions to other local authorities, or named committees or officers. Where this has happened the ultimate

responsibility for the function remains with the Council and therefore any services related to those functions are still covered by the Community Right to Challenge.

*Jointly Commissioned Services with other Relevant Authorities:*

Where services are shared between or provided by the Council and other relevant authorities (e.g. another local authority) then those services are still covered by the Community Right to Challenge. In this case the Council will need to discuss with the other authorities the arrangements for reviewing and responding to an Expression of Interest and if accepted the nature of, and timescales for the procurement process.

*Jointly commissioned or shared NHS related services:*

Where services are commissioned or shared with the NHS the application of the right will depend on

- whether the service is excluded (see below)
- where the responsibility for the function lies. As said earlier only services that relate to the functions of the Council are covered by the Community Right to Challenge. If the function lies with the NHS then the related services are not relevant services as defined by the act. However it is recommended that the appropriate NHS body is consulted before a decision is made on an Expression of Interest particularly if the intention is to accept the Expression of Interest.

*Excluded Services:*

As shown in the extract above the following services are excluded until 1 April 2014.

- A relevant service commissioned in conjunction with one or more health services by a relevant authority or a NHS body under a partnership arrangement or by a relevant authority and an NHS body or Strategic Health Authority, acting jointly.
- A relevant service commissioned by an NHS body on behalf of a relevant authority.

The intention behind this is to allow time for the new local commissioning groups established under the Social Care Act 2012 to have sufficient time to become fully operational and consider their contractual arrangements.

The following services are permanently excluded:

- A relevant service commissioned or provided by a relevant authority in respect of a named person with complex individual health or social care needs.

The intention behind this is to prevent the disruption of care packages to individuals that could result in social or clinical disadvantage for that individual. Consideration of this must be made when deciding on care related Expressions of Interest.

*Service Area Involvement:*

Commercial Services will ensure that any decision on whether a service meets the definition of a relevant service is made in consultation with the appropriate Council service area.

It may be that an Expression of Interest makes reference to a group of interlinked services, an individual service that is part of a range of services or part of a service (e.g. delivery of a service in one geographical location).

If the services stated in the Expression of Interest are made up of more than one service then it is possible some of these would be relevant services and some would not. In this case the Council can seek to agree with the relevant body a modification to the Expression of Interest rather than reject it outright. (See Section 5.1.3 on modifying expression of interest).

The service area will also need to consider in consultation with Commercial Services the impact of the Expression of Interest on any interlinked services or where it relates to part of a service those elements of the service that remain outside of the Expression of Interest. Issue to consider are for example:

- Interface issues
- Stakeholder engagement
- Quality assurance
- Economic viability of remaining services

**NEXT STEP:**

Does the service described in the Expression of Interest meet the definition of a relevant service?

Yes – Go to Section 6.3

No – Reject the EOI as it is not a valid EOI under the provisions of the Act

## **6.3 Is the applicant suitable to deliver the service?**

*Localism Act Regulations Extract:*

*Grounds for Rejection of expression of interest:*

*The relevant authority considers based on the information in the expression of interest, 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 expression of interest,*

*is not suitable to provide or assist in providing the relevant service.*

### **6.3.1 Process:**

Test the information provided in the Expression of Interest to establish if the relevant body, consortium members or sub-contractors are suitable to deliver the service.

### **6.3.2 General Guidance:**

*Expression of Interest:*

The judgement of the suitability of the relevant body to deliver the services can only be based on the information in the Expression of Interest (see Section 5). For example this could be based on the financial strength, ability to partake in a procurement process or membership of professional bodies or organisations that is a statutory requirement to deliver the service.

*Service Area Involvement:*

Commercial Services will involve the service area in any decision on the suitability of the relevant body to be involved in the procurement exercise or deliver the service.

*Evaluation of suitability:*

The Council via Commercial Services will use a similar process in deciding on the suitability of the relevant body as it does for testing the technical and financial suitability of bidders when considering the pre-qualification questionnaire (PQQ) provided under a restricted (two stage) tender process.

In the case of an Expression of Interest the information required under the Act is less than for a PQQ as the Community Right to Challenge allows relevant bodies to submit evidence that demonstrates they will have the future capacity to join in a procurement exercise. They do not need to demonstrate they have the capacity at the time of submitting the Expression of Interest.



### *Evaluation of Social Outcomes:*

Some of the information submitted in the Expression of Interest will relate to outcomes for service users and the local community. Examples of this would be creating local jobs, improving skills, increasing local volunteering or improving environmental conditions. These social outcomes should be evaluated along side the capability of the relevant body to determine if they offer social benefits over and above the current service provision.

Likewise relevant bodies should demonstrate they are meeting local needs. This could be done through referring to reports or surveys produced by the Council or undertaking their own surveys.

The table below describes how suitability, financial standing and social outcomes will be judged to determine whether the evidence is acceptable or not.

<b>Expression of Interest Evidence</b>	
Completely unsatisfactory evidence (applicant has provided no evidence of suitable experience or demonstrated they would be in a position to comply with a procurement process).	Unacceptable evidence
Evidence indicating that the applicant does not meet or has shown they will meet by the time of a procurement exercise the minimum requirements of general eligibility, technical capability/suitability and financial standing.	Unacceptable evidence
Evidence indicating that the applicant meets the minimum requirements or has demonstrated they will meet the minimum requirements of general eligibility, technical capability/ suitability and financial standing.	Acceptable evidence
Good evidence clearly indicating that the applicant has full experience and meets all the current requirements of general eligibility, technical capability/suitability and financial standing.	Acceptable evidence

**NEXT STEP:**

Does the relevant body provide suitable evidence that it can or will be able to be involved in a procurement exercise and deliver the services?

Yes – Go to Section 6.4

No – Reject the EOI as it is not a valid EOI under the provisions of the Act

## **6.4 Has the decision been made to stop the service?**

*Localism Act Regulations Extract:*

*Grounds for Rejection of expression of interest:*

*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 the service.*

### **6.4.1 Process:**

Check if a decision has been made in writing to stop the service.

### **6.4.2 General Guidance:**

The Community Right to Challenge is not a mechanism to get the Council to provide services it has stopped providing or has made the decision to stop providing.

For the purposes of the Act the decision to stop providing a service is considered to have been taken once it has been approved or endorsed by the Council in accordance with the appropriate delegated authority – for example senior officer or Cabinet decision.

### **NEXT STEP:**

Is the service no longer provided or has a decision been made to stop the service?

No – Go to Section 6.5

Yes – Reject the EOI as it is not a valid EOI under the provisions of the Act

## **6.5 Is the service currently subject to a procurement exercise, negotiation or mutualisation?**

*Localism Act Regulations Extract:*

*Grounds for Rejection of expression of interest:*

*The relevant service is already the subject of a procurement exercise.*

*The relevant authority and a third party have entered into negotiations for provision of the relevant service, which negotiations are at least in part concluded in writing.*

*The relevant authority has published its intentions to consider the provision of the relevant service by a body that 2 or more specified employees of that authority propose to establish.*

### **6.5.1 Process:**

Determine if the relevant service is subject of a procurement exercise, negotiation for delivery or discussions on mutualisation. An Expression of Interest will be rejected if the service is already part of an external contract but the applicant will be informed when this contract will be due for review or re-tender.

### **6.5.2 General Guidance:**

*Procurement Exercise:*

For the purposes of applying this test a procurement exercise is considered to have started when an advert has been placed (for example via OJEU, local or trade press, or on the Council website) inviting tenders for the services. The procurement process is considered to have been completed when a contract is signed for the delivery of the services.

The programme of procurement exercises will be published annually on the Council website but will be subject to change.

*Negotiations with a third party:*

A balance needs to be achieved between allowing negotiations on such things as grant agreements that are well progressed to proceed and allowing Expressions of Interest. To reject the an Expression of Interest on this basis would require the negotiations to have been appropriately approved in accordance with Council Standing Orders and the negotiations need to have been recorded at least in part in writing. Verbal discussions with an organisation about the possibility of providing a service are not considered grounds for rejecting an Expression of Interest.

*Mutualisation:*

The Government is encouraging public sector employees to establish public sector mutuals (more information can be found at <http://mutuals.cabinetoffice.gov.uk>) and as such are keen that negotiations on this are allowed to proceed unhindered by Expressions of Interest.

However in a similar manner to the point above about negotiations, relevant bodies should be able to submit Expressions of interest prior to the Council publishing its intention to consider service provision by an employee led organisation.

To allow the rejection of an expression of interest on this ground the Council will need to have published its intention to negotiate with an employee led organisation. This could include a statement on the Council's website, minutes of a Cabinet meeting or an announcement in a speech. The publication must be easily accessible to organisations that may wish to submit an Expression of Interest and appropriate to the service in question.

**NEXT STEP:**

Is the service subject of a procurement exercise or appropriately evidenced negotiations with a third party or employee led organisation?

No – Go to Section 6.6

Yes – Reject the EOI as it is not a valid EOI under the provisions of the Act

## **6.6 Is the Expression of Interest frivolous or vexatious?**

*Localism Act Regulations Extract:*

*Grounds for Rejection of expression of interest:*

*The relevant authority considers that the expression of interest is frivolous or vexatious.*

### **6.6.1 Process:**

Test if the Expression of Interest is frivolous or vexatious.

### **6.6.2 General Guidance:**

*Frivolous:*

An Expression of Interest is considered frivolous if it clear that it is not a genuine offer to provide the service and lacks any serious purpose.

*Vexatious:*

An Expression of Interest is considered vexatious if it is designed to cause distress or irritation without justification. Expressions of Interest that are received that are vexatious will be handled in accordance with the Council's Unreasonable Complainant Behaviour policy.

**NEXT STEP:**

Is the Expression of Interest Vexatious or Frivolous?

No – Go to Section 6.7

Yes – Reject the EOI as it is not a valid EOI under the provisions of the Act

## **6.7 Would acceptance of the Expression of Interest contravene an enactment or rule of law?**

*Localism Act Regulations Extract:*

*Grounds for Rejection of expression of interest:*

*The relevant authority considers that the expression of interest is likely to lead to contravention of an enactment or other rule of law or breach of statutory duty.*

### **6.7.1 Process:**

Test if accepting the Expression of Interest would contravene a rule of law or breach statutory duty.

### **6.7.2 General Guidance:**

This provision is designed to ensure the Council is not required to accept an Expression of Interest that would put it in breach of law.

#### **NEXT STEP:**

Will accepting the Expression of Interest put the Council in breach of law?

No – Go to Section 7

Yes – Reject the EOI as it is not a valid EOI under the provisions of the Act

## Section 7 - Expression of Interest Assessment

If the Council accepts an Expression of Interest as valid then it will carry out an assessment exercise. This exercise will be appropriate to the nature and complexity of the services to which the Expression of Interest relates.

Submitting an Expression of Interest does **not** give the relevant body an automatic right to deliver the services.

### 7.1 Process:

The Council will need to satisfy itself that a change in the method of service delivery will benefit end users, the citizens of Sheffield and offer value for money.

Therefore the Council will undertake a commissioning exercise to assess the proposed service delivery. The outcome of this exercise will be a business case that assesses the viability of the EOI.

This business case will define and consider the options available to the Council. These options could be, for example, running a full tender exercise, or entering direct negotiations with the relevant body that submitted the EOI. It should consider whether the Council would expect to pay for the service or whether assets could be transferred for little or no value. The business case would need to consider the following:

- A review of the service scope and the assets covered
- An evaluation of:
  - The financial impacts
  - Risks
  - Stakeholder impacts, including end users and staff
  - The effect on the overall Council commissioning strategy
  - An Equalities Impact Assessment
- Next steps/an implement plan and if approved, details of the procurement process with appropriate timescales

It could be that once the options have been defined and considered the service delivery set out in the EOI does not meet the needs of the citizens of Sheffield or offer value for money. In this case the Council would not refuse to take the EOI further.

The recommendations of this business case will need to be signed off by the appropriate Head of Service/Director, in consultation with the Director of Commercial Services, with support from Finance and HR.

The business case will need to be approved in accordance with the Leaders Scheme of Delegation. Depending on the size and complexity of the proposed service change this could require a Cabinet report.



If the business case supports a procurement exercise, this will need to comply with Council standing orders and EU/UK procurement law.

For services above the EU threshold which are not excluded (Part B) services this will mean an EU compliant OJEU advertised tender.

For services below the threshold or excluded (Part B) services this will be a procurement that complies with the general EU principle of transparency and Council standing orders

The decision on which type of procurement process to use will be determined by Commercial Services based on a number of factors:

- Will any assets transfer with the service?
- What is the nature, value and complexity of the service
- What are the financial, reputational, HR/TUPE risks involved in the service?
- Is there a market for this type of service or is the relevant body the only one that could deliver it?
- Does the Council want to pay for the outcomes of the service or are the Council prepared to release the service and any associated assets?

The procurement process should be determined by Commercial Services in consultation with the service area and Legal Services and approved through the process described in the Council's One Best Way for Procurement.

### 7.2 Service Specification:

While the Expression of Interest defines the service area the Council retains the right to determine the service specification and the method of delivery. The Council cannot add additional service areas to the expression of interest without requesting and agreeing amendments with the relevant body.

Commercial Services and the Service area should agree and discuss with the relevant body the service specification before commencing the procurement process.

### 7.3 Consideration of In-house Bids:

It is not possible for an in-house team to submit a formal bid as part of a tender process because it is considered they have an unfair competitive advantage through having access to resources and information that the other bidders may not have access to. In certain situations it may be possible for an in-house team to submit a proposal that could be evaluated along side the tenders and in any event the tenders will need to be benchmarked against the current provision to ensure the Council is achieving best value.

Advice should be sought from Commercial Services on how in-house provision should be considered alongside a tender process.

## Section 8 - Notification timescales and Governance

### 8.1 Process:

#### *Expression of Interest Timescales:*

The Council has set an overarching maximum period that it will take to notify a relevant body of its decision on an Expression of Interest. This period is published on the Council website and is currently set at 12 months

Other than this maximum period there are three other notification periods relating to Expressions of Interest:

- a) The time within which the Council will validate an EOI as acceptable
- b) The time within which the Council will have expected to complete an assessment/evaluation of the EOI (and when this will be approved or not)

These first two time periods will be specified in the acknowledgement of receipt of an EOI. This acknowledgement of receipt will be issued in writing no later than 30 days after the receipt of an EOI

- c) The time within which a procurement process will start following completion of the assessment/evaluation of the EOI

This time period will be specified in the notification to the applicant of the successful assessment/evaluation of the EOI. This notification will be issued as soon as possible following the formal approval of the business case.

Generally the Council will need to determine timescales based on the number of EOIs it receives and the impact this will have on Commercial Services and service areas. Therefore the Council may need to prioritise EOIs and their assessment to fit in with service needs and capacity while managing the expectations of the applicant and ensuring the EOI gets fully considered and a complete response.

When considering timescales for notifying relevant bodies the Council will consider:

- The need for relevant bodies to have a decision within a reasonable period.
- The nature and complexity of the service to which the Expression of Interest relates.
- The complexity of the Expression of Interest and the composition of the relevant body
- The possible need to agree modifications to the Expression of Interest
- How the Expressions of Interest relates to current commissioning cycles or other relevant Council process (e.g. service planning).

When considering the timescales for beginning the procurement process the Council will consider:

- The need to provide Council employees with a fair opportunity to take part in the procurement exercise
- The nature and complexity of the service to which the procurement process relates.
- How the procurement process relates to current commissioning cycles or other relevant Council process (e.g. service planning).

*Governance:*

Accepting or rejecting an Expression of Interest must be approved in accordance with the Council Leader's Scheme of Delegation. More details can be found here:

<https://www.sheffield.gov.uk/your-city-council/constitution-and-governance.html>

Authority to accept or reject Expressions of Interest as being valid is delegated to the Director of Commercial Services in consultation with the Executive Director and the Individual Cabinet Member for the service area to which the Expression of Interest relates.

Any subsequent procurement exercise and contract award must be also approved in accordance with the Council Leader's Scheme of Delegation and Standing Orders.

## Glossary

<i>Business Case</i>	The document produced following the receipt of a valid Expression of Interest that defines and considers the options for taking the EOI further
<i>Expression of Interest</i>	The document submitted by the Relevant Body to a Relevant Authority that describes the Service and the suitability of the body to deliver the service
<i>Pre Qualification Questionnaire</i>	A stage in the procurement process used to shortlist organisations to be invited to tender. The questionnaire assesses the suitability of organisations' commercial, technical and financial capabilities.
<i>Relevant authority</i>	Public body listed in the Act and the Regulations whose services can be challenged under the community right to challenge. The Act lists district, county and London borough councils as relevant authorities. Certain fire and rescue authorities are added as relevant authorities in the Regulations.
<i>Relevant body</i>	A body listed in the Act which can express an interest in providing a relevant service. The Act lists voluntary and community bodies, bodies of persons or trusts established for charitable purposes only, parish councils and two or more employees of the relevant authority as relevant bodies. Other persons or bodies can be specified as relevant bodies by regulations.
<i>Relevant service</i>	A service provided in the exercise of any of a relevant authority's functions, either by the relevant authority 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 in the regulations.
<i>The Act</i>	The Localism Act 2011
<i>The Regulations</i>	The Community Right to Challenge (Relevant Authorities and Rejection of Expressions of Interest) (England) Regulations 2012 and the Community Right to Challenge (Requirements for Expressions of Interest)