

January 2013

COMMUNITY RIGHT TO CHALLENGE (England)

Introduction

1. The Community Right to Challenge allows parish councils (amongst others) to declare an interest in running a service normally provided by a principal authority. The result of such a declaration of interest is that the principal authority has to decide whether the service can feasibly be run by the challenging body and, if so, to identify the best organisation to provide that service.
2. The Community Right to Challenge is created by sections 81 – 86 of the Localism Act 2011 ('the 2011 Act'). All references to sections are to the 2011 Act unless otherwise stated. The relevant sections are set out in Annex A to this Legal Topic Note. The detail is set out in the Community Right to Challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012 ('the 2012 Regulations').
3. Under the 2011 Act there are several stages to the process. First a relevant body (which includes a parish council) must submit a written expression of interest in running a service on behalf of a principal authority. Second, the principal authority must consider that expression of interest to decide whether or not to accept it. Finally the principal authority must, if it accepts the expression of interest, run a procurement process for the service. As the process is complicated a flowchart for it can be found in Annex B at the end of this LTN.
4. It is important to note that the principal authority's acceptance of a valid expression of interest from a parish council does not mean that it will provide the service. At that stage others (including any part of the principal authority) can bid for the service.
5. It is also important to note that a principal authority's decision to permit a relevant body such as a parish council to provide a service will not result in the transfer of the function but merely the service delivery. Thus if a parish council's bid to run a library is successful the principal authority will remain the Library Authority but the parish council

provide the particular library service on behalf of that Library Authority. The 2012 Regulations exclude health and social care services from the right to challenge.

Expression of interest

6. A principal authority (which includes a county, district, or London Borough council) is under a duty under section 81(1) to consider any “expression of interest” to run any of its services. “Expression of interest” means a written statement by a “relevant body” wishing to provide or assist in providing a service on behalf of the principal authority in the exercise of any of its functions. The statement must comply with the 2012 Regulations.
7. A “relevant body” which may express an interest in running a service is defined by section 81(6) as a voluntary or community body; a body of persons or a trust which is established for charitable purposes only; a parish council; or two or more employees of the principal authority (defined in paragraph 6 above). The definition of a relevant body allows the Secretary of State to specify additional bodies but none have yet been added.
8. Under the 2011 Act, “voluntary body” means a body, other than a public or local authority, the activities of which are not carried on for profit. The fact that a body’s activities generate a surplus does not prevent it from being a voluntary body, so long as that surplus is used for the purposes of those activities or invested in the community. “Community body” means a body that carries on activities primarily for the benefit of the community.

The definitions of voluntary and community body enable a range of civil society organisations to exercise the right to submit an expression of interest. A parish council may, of course, work in a consortium with a voluntary or community body in delivering a service which is the subject of the expression of interest. Alternatively an expression of interest may propose a sub-contractor (such as a parish council, a voluntary body or a community body) for delivery of the service

Timing of an expression of interest

9. An expression of interest may be made at any time unless the principal authority specifies a period of time for expressions of interest in a particular service (section 82).

Therefore if a principal authority has recently contracted out the supply of a service it may require that expressions of interest are submitted only towards the end of that contract.

10. Where a period is specified by the principal authority it must publicise that fact and can refuse to consider any expression of interest submitted outside that period.
11. Whenever a principal authority is required to publicise any information in relation to a challenge it must do so on its website and other ways as it thinks fit.

Content of an expression of interest

12. The expression of interest must be in writing (section 81(1) (b)). The minimum information to be included in an expression of interest is specified in Schedule 1 to the 2012 Regulations as:
 - a. Information about the financial resources of the relevant body submitting the expression of interest and if the proposal includes delivery of the service as part of a consortium or using a sub- contractor, information about the financial resources of each member of the consortium or the sub-contractor.
 - b. Evidence that demonstrates that by the time of any procurement exercise the relevant body will be capable of providing or assisting in providing the relevant service. If the proposal includes delivery of the service as part of a consortium or using a sub- contractor, information about the financial resources of each member of the consortium or the sub-contractor
 - c. Information about the relevant service sufficient to identify it and the geographical area to which the expression of interest relates.
 - d. Information about the outcomes to be achieved by the relevant body or the consortium of which it is a part, in providing or assisting in the provision of the relevant service, in particular—
 - (a) how the provision or assistance will promote or improve the social, economic or environmental well-being of the relevant authority's area; and
 - (b) how it will meet the needs of the users of the relevant service.

Consideration of an expression of interest

13. A principal authority that has received an expression of interest must consider it and either accept or reject it (section 83). Before accepting it the principal authority can modify the expression of interest. In considering an expression of interest, the principal authority must consider whether acceptance of the expression of interest would promote or improve the social, economic or environmental well-being of its area. Any modification can only be made where the original expression of interest would not be able to be accepted and the modification is agreed by the body that submitted the expression of interest (section 84).
14. A principal authority must take two steps to identify the timescale for dealing with an expression of interest. First it must publish on its website the maximum period between receiving an expression of interest and notifying the relevant body of its decision. There can be different periods for different services. The notification of the decision must be given within this period (section 84).
15. Secondly the principal authority must notify the relevant body in writing of the *actual* period within which it *expects* to notify it of the decision. This must clearly be within the maximum period specified above. This second notification must be given within 30 days of receipt of the expression of interest, or if a period for submitting expressions has been specified, the notification must be given within 30 days of the end of that period. Both the maximum period and the expected period must be publicised (section 84).
16. A principal authority must provide written notification to the relevant body that submitted the expression of interest of the reasons that it rejects or modifies the expression of interest. This information must also be publicised on its website (section 84).
17. In accepting an expression of interest the principal authority must carry out a procurement exercise relating to the provision of the service on behalf of the authority and in doing so must consider how the procurement exercise might promote or improve the social, economic or environmental well-being of its area (section 83).
18. As referred to in paragraph 12(d) above, an expression of interest should demonstrate how the proposal might offer social, economic or environmental benefits to the community and take into account considerations over and above the provision of the service or the quality of the service. This could include utilising local or specialist

knowledge, creating local jobs, increasing local volunteering opportunities, or improving environmental conditions.

19. The proposal also has to show how it will meet the needs of the users of the service. Therefore it is important that an expression of interest demonstrates how it will do this. A parish council may wish to refer to needs assessments prepared by the principal authority or other sources such as its own survey of the users of the service in question.
20. An expression of interest can be withdrawn at any time. However, even if it is withdrawn the principal authority can still hold a procurement process in respect of the relevant service (section 84).

Expression of interest accepted

21. After accepting an expression of interest, the principal authority must carry out a procurement exercise for the provision of the relevant service. That procurement exercise must be appropriate having regard to the value and nature of the contract that may be awarded as a result of the exercise (section 83). Thus the EU Procurement rules may be appropriate in some circumstances.
22. A principal authority must publicise on its website the minimum and maximum periods between the date of the decision to accept an expression of interest, and the date on which it will begin the procurement exercise. Different periods can be specified for different cases and the principal authority must publicise details of the periods. The principal authority must comply with the timescales specified, but there is currently no sanction for failure to do so (section 83).
23. It should be remembered that the procurement exercise triggered by the expression of interest will not be limited to the body or bodies expressing interest. Thus once the principal authority accepts an expression of interest, other (perhaps commercial) organisations or those with expertise or a track record of delivery of the relevant service will be able to join the tendering process.

Expression of interest rejected

24. If the principal authority decides to reject an expression of interest it can only do so for one of the reasons set out in the Community Right to Challenge (Fire and Rescue Authorities and Rejection of Expressions of Interest) (England) Regulations 2012. The reasons are:
- (i) The expression of interest does not comply with the requirements of section 81(1) and which includes a need for the expression of interest to be in writing and to comply with the 2012 Regulations;
 - (ii) The relevant body provides information in the expression of interest which is, in the opinion of the principal authority, inadequate or inaccurate in a material particular;
 - (iii) The principal authority considers, **based on the information in the expression of interest**, that the relevant body or, where applicable, any member of the consortium of which it is a part or a sub-contractor, is not suitable to provide or assist in providing the relevant service or that part to which the expression of interest relates;
 - (iv) The expression of interest relates to a relevant service where a decision, evidenced in writing, has been taken by the principal authority to stop providing that service or that part to which the expression of interest relates;
 - (v) The expression of interest relates to a relevant service:
 - (a) provided, in whole or in part, by or on behalf of the principal authority to persons who are also in receipt of a service provided or arranged by an NHS body which is integrated with the relevant service, and
 - (b) the continued integration of such services is, in the opinion of the principal authority, critical to the well-being of those persons;
 - (vi) The relevant service, or such part of it to which the expression of interest relates, is already the subject of a procurement exercise;
 - (vii) The principal authority and a third party have entered into formal negotiations for provision of the service, which negotiations are at least in part conducted in writing;

- (viii) The principal authority has published its intention to consider the provision of the relevant service by a body that 2 or more specified employees of that authority propose to establish;
 - (ix) The principal authority considers that the expression of interest is frivolous or vexatious;
 - (x) The principal authority considers that acceptance of the expression of interest is likely to lead to contravention of an enactment or a rule of law or a breach of statutory duty.
25. The important requirements from a parish council's point of view are (i) to (iv). The first three mean that it is very important that the parish council gives comprehensive information as part of the expression of interest to avoid the principal authority being able to reject it on these grounds. The fourth means that a parish council cannot use the Right to Challenge to take over a service that the principal authority has already decided to close (e.g. a library).

Government assistance

26. The Secretary of State can provide advice and assistance in relation to the community right to challenge, either directly or through others. This could include financial assistance to a relevant body, such as a grant or loan, or education and training to allow it to put forward a viable expression of interest (section 83).

WHAT SERVICES MIGHT A PARISH COUNCIL WISH TO PERFORM?

27. Parish councils may wish to express an interest in a wide range of services. However, it is not envisaged that a parish council would wish to take on a service such as refuse collection or fire and rescue as that would create a significant organisational and resources burden for it unless subcontracted and such sub-contracts were properly managed. However, services such as street cleaning; libraries; and provision of some social housing may be ones that a parish council would wish to perform in its area on behalf of the principal authority.

28. Many of the services that a parish council might wish to provide will relate to continuing specific services in its area. Thus when there is a possibility of the closure of, say, a library in a parish that may be the trigger for a parish council to express interest in running that service. However, note above that one of the grounds for rejecting an expression of interest is that the principal authority has decided to terminate the service. To avoid this problem a parish council would need to submit an expression of interest before the principal authority makes the actual decision to cease a service.
29. One facility that a parish council may wish to become involved in is that of planning. However, it is important to remember that only a service can be challenged not a function. Thus section 70(1) of the Town and Country Planning Act 1990 gives powers to local planning authorities to grant or refuse planning permission where a planning application is made to the authority. The community right to challenge will not result in the function of determining planning applications to be transferred. The delivery of services for planning functions, for example the processing of a planning application (not the decision), may be carried out by the local planning authority itself, or by a third party on behalf of the authority. Therefore a parish council would only be able to provide services for the administrative processing of the planning application, not for the making of the decision.
30. Parish councils may also wish to consider grouping together to provide a service across several areas to achieve economies of scale.

Consequences for a parish council

31. A parish council which takes over the running of a service from a principal authority will take on all the obligations and responsibilities in relation to that service.
32. Any staff associated with the provision of that service by the principal authority may be transferred to the parish council as a result of the TUPE Regulations. In that case the parish council may suddenly have a substantial increase in staff with the need to increase its budget and revise its staff management structure.
33. The costs of providing the service would fall upon the parish council and thus there would need to be an increase in the precept. Whilst the concept of avoiding double taxation may mean that there is a decrease in the principal authority's council tax for the parish council area, it may not be sufficient to outweigh the increased precept.

34. There may be additional legal liabilities whether as a result of managing additional premises and staff or from the undertaking of the service itself. Therefore there is likely to be an increase in costs such as public liability and employer's liability insurance premiums and audit fees. There is also likely to be increased public scrutiny of the parish council as a result of the broadening of activities, many of which will impact locally and may have a high profile.

Government Guidance

35. Further information can be found in the statutory guidance to be found at [DCLG Statutory Guidance on Community Right to Challenge](#)

ANNEX A

LOCALISM ACT 2011

81 Duty to consider expression of interest

(1) A relevant authority must consider an expression of interest in accordance with this Chapter if—

- (a) it is submitted to the authority by a relevant body, and
- (b) it is made in writing and complies with such other requirements for expressions of interest as the Secretary of State may specify by regulations.

This is subject to section 82 (timing of expressions of interest).

(2) In this Chapter “relevant authority” means—

- (a) a county council in England,
- (b) a district council,
- (c) a London borough council, or
- (d) such other person or body carrying on functions of a public nature as the Secretary of State may specify by regulations.

(3) The persons or bodies who may be specified by regulations under subsection (2)(d) include a Minister of the Crown or a government department.

(4) In this Chapter “expression of interest”, in relation to a relevant authority, means an expression of interest in providing or assisting in providing a relevant service on behalf of the authority.

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

(6) In this Chapter “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.

(7) For the purposes of subsection (6) “voluntary body” means a body, other than a public or local authority, the activities of which are not carried on for profit.

(8) The fact that a body's activities generate a surplus does not prevent it from being a voluntary body for the purposes of subsection (6) so long as that surplus is used for the purposes of those activities or invested in the community.

(9) For the purposes of subsection (6) “community body” means a body, other than a public or local authority, that carries on activities primarily for the benefit of the community.

(10) The Secretary of State may by regulations—

(a) amend or repeal any of paragraphs (a) to (d) of subsection (6);

(b) amend or repeal any of subsections (7) to (9);

(c) make other amendments to this Chapter (including amendments to any power to make regulations) in consequence of provision made under subsection (2)(d) or (6)(e) or paragraph (a) or (b) of this subsection.

82 Timing of expressions of interest

(1) Subject as follows, a relevant body may submit an expression of interest to a relevant authority at any time.

(2) A relevant authority may specify periods during which expressions of interest, or expressions of interest in respect of a particular relevant service, may be submitted to the authority.

(3) The relevant authority must publish details of each specification under subsection (2) in such manner as it thinks fit (which must include publication on the authority's website).

(4) The relevant authority may refuse to consider an expression of interest submitted outside a period specified under subsection (2).

83 Consideration of expression of interest

(1) The relevant authority must—

(a) accept the expression of interest, or

(b) reject the expression of interest.

This is subject to section 84(1) (modification of expression of interest).

(2) If the relevant authority accepts the expression of interest it must carry out a procurement exercise relating to the provision on behalf of the authority of the relevant service to which the expression of interest relates.

(3) The exercise required by subsection (2) must be such as is appropriate having regard to the value and nature of the contract that may be awarded as a result of the exercise.

(4) A relevant authority must specify—

(a) the minimum period that will elapse between—

(i) the date of the relevant authority's decision to accept an expression of interest, and

(ii) the date on which it will begin the procurement exercise required by subsection (2) as a result of that acceptance, and

(b) the maximum period that will elapse between those dates.

(5) The relevant authority may specify different periods for different cases.

- (6) The relevant authority must publish details of a specification under subsection (4) in such manner as it thinks fit (which must include publication on the authority's website).
- (7) The relevant authority must comply with a specification under subsection (4).
- (8) A relevant authority must, in considering an expression of interest, consider whether acceptance of the expression of interest would promote or improve the social, economic or environmental well-being of the authority's area.
- (9) A relevant authority must, in carrying out the exercise referred to in subsection (2), consider how it might promote or improve the social, economic or environmental well-being of the authority's area by means of that exercise.
- (10) Subsection (9) applies only so far as is consistent with the law applying to the awarding of contracts for the provision on behalf of the authority of the relevant service in question.
- (11) The relevant authority may reject the expression of interest only on one or more grounds specified by the Secretary of State by regulations.

84 Consideration of expression of interest: further provisions

- (1) A relevant authority that is considering an expression of interest from a relevant body may modify the expression of interest.
- (2) A relevant authority may exercise the power in subsection (1) only if—
 - (a) the authority thinks that the expression of interest would not otherwise be capable of acceptance, and
 - (b) the relevant body agrees to the modification.
- (3) A relevant authority must specify the maximum period that will elapse between—
 - (a) the date on which it receives an expression of interest submitted by a relevant body, and
 - (b) the date on which it notifies the relevant body of its decision in respect of the expression of interest.
- (4) The relevant authority may specify different periods for different cases.
- (5) The relevant authority must publish details of a specification under subsection (3) in such manner as it thinks fit (which must include publication on the authority's website).
- (6) A relevant authority that receives an expression of interest from a relevant body in accordance with this Chapter must notify the relevant body in writing of the period within which it expects to notify the relevant body of its decision in respect of the expression of interest.
- (7) The relevant authority must give the notification under subsection (6) —
 - (a) where the expression of interest is one to which a specification under section 82(2) relates and is made within a period so specified, within the period of 30 days beginning immediately after the end of the period so specified, or
 - (b) otherwise, within the period of 30 days beginning with the day on which the relevant authority receives the expression of interest.

(8) The relevant authority must—

(a) notify the relevant body in writing of its decision in respect of the expression of interest within the period specified by it under subsection (3), and

(b) if the authority's decision is to modify or reject the expression of interest, give reasons for that decision in the notification.

(9) The relevant authority must publish the notification in such manner as it thinks fit (which must include publication on the authority's website).

(10) A relevant body may withdraw an expression of interest after submitting it to a relevant authority (whether before or after a decision has been made by the authority in respect of the expression of interest).

(11) The withdrawal of an expression of interest, or the refusal of a relevant body to agree to modification of an expression of interest, does not prevent the relevant authority from proceeding as described in section 83(2) if the relevant authority thinks that it is appropriate to do so.

85 Supplementary

(1) The Secretary of State may by regulations make further provision about the consideration by a relevant authority of an expression of interest submitted by a relevant body.

(2) A relevant authority must, in exercising its functions under or by virtue of this Chapter, have regard to guidance issued by the Secretary of State.

86 Provision of advice and assistance

(1) The Secretary of State may do anything that the Secretary of State considers appropriate for the purpose of giving advice or assistance to a relevant body in relation to—

(a) the preparation of an expression of interest for submission to a relevant authority and its submission to a relevant authority,

(b) participation in a procurement exercise carried out by a relevant authority in response to an expression of interest, or

(c) the provision of a relevant service on behalf of a relevant authority following such a procurement exercise.

(2) The Secretary of State may do anything that the Secretary of State considers appropriate for the purpose of giving advice or assistance about the operation of this Chapter to a body or person other than a relevant body.

(3) The things that the Secretary of State may do under this section include, in particular—

(a) the provision of financial assistance to a relevant body;

(b) the making of arrangements with a body or person (whether or not a relevant body), including arrangements for things that may be done by the Secretary of State under this section to be done by that body or person;

(c) the provision of financial assistance to a body or person other than a relevant body in connection with arrangements under paragraph (b).

(4) In this section references to a relevant body include a body that the Secretary of State considers was formed wholly or partly by employees or former employees of the relevant authority for the purposes of, or for purposes including—

(a) participating in a procurement exercise carried out by the authority, or

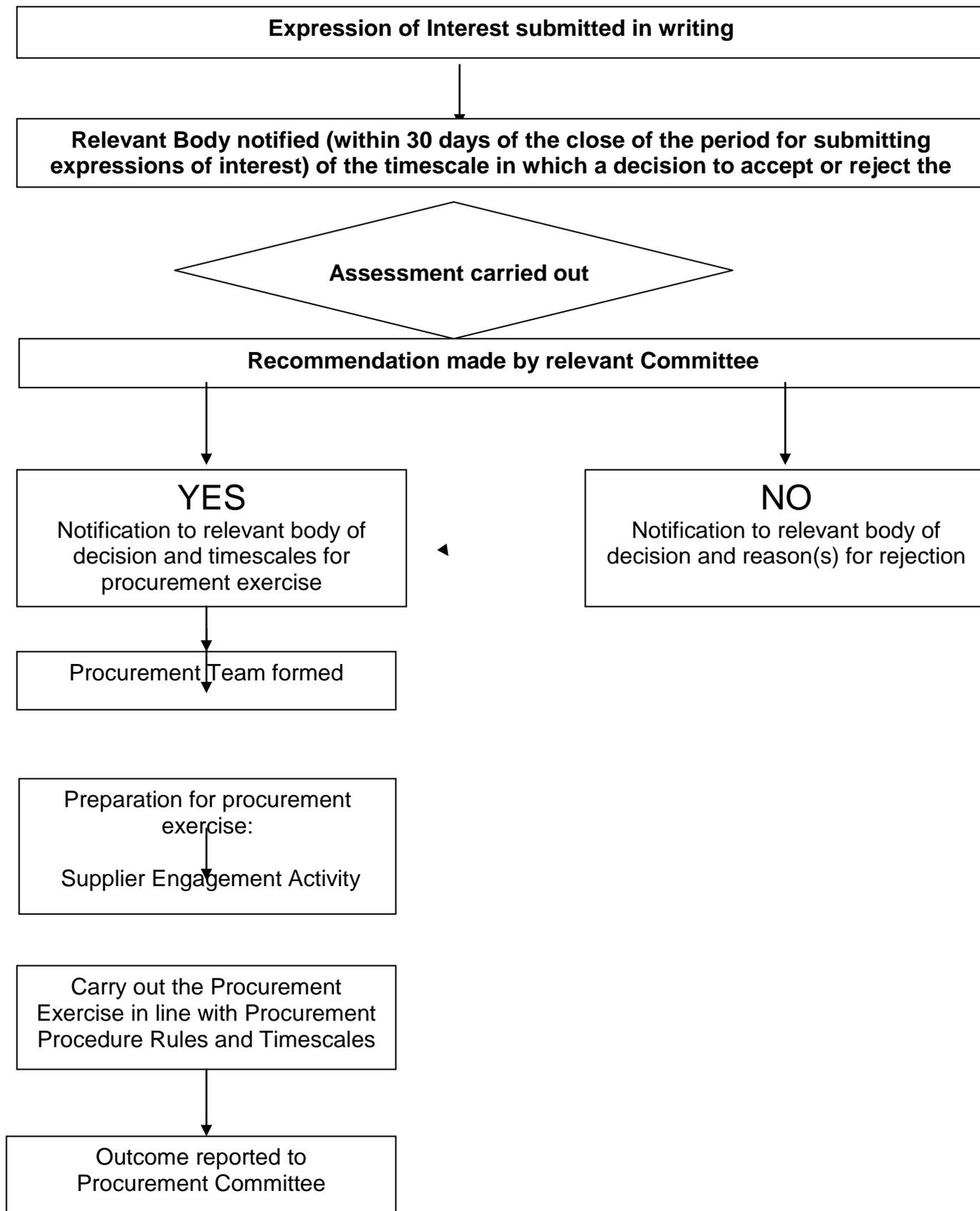
(b) providing a relevant service on the authority's behalf.

(5) In this section—

(a) the reference to giving advice or assistance includes providing training or education, and

(b) any reference to the provision of financial assistance is to the provision of financial assistance by any means (including the making of a loan and the giving of a guarantee or indemnity).

ANNEX B



Other Legal Topic Notes (LTNs) relevant to this subject:

LTN	Title	Relevance
1	Councils' Powers to Discharge their Functions	Explains how local councils can lawfully undertake activities.
23	Health and Safety	Sets out local council's health and safety obligations to employees and others.
35	Contracts	Explains the components which create a contract.
37	Freedom of Information	Sets out the information councils are obliged to disclose.
40	Local Councils' Documents and Records	Sets out the documentation councils should retain for legal and other purposes.
68	Negligence	Confirms the need for tenants and occupiers of premises to have sufficient insurance cover in place.
85	The Community Right to Nominate and Bid for Assets of Community Value (England).	Sets out the law and procedure aimed to protect community assets.