

IT Project, Future State Assessment. Appendix H.

Cabinet- 05/03/2019

Legal Advice

Whenever the council procures goods works or services over certain financial thresholds, it must comply with the council's Procurement Rules and the Public Contracts Regulations 2015 (PCR 2015), unless an exemption is available. The recommendation of the FSA Delivery Board is to procure a delivery partner using the established Crown Commercial Service (CCS) G-Cloud 10 framework i.e. a fast track / low cost direct award only (without further competition) procurement route for standardised cloud services via the 'Digital Marketplace', including cloud transition and deployment support services. The framework allows limited flexibility around customising the scope and delivery of services (depending on the nature of the services), payment profiles, caps on liability and insurance requirements, and includes an option to terminate early for convenience on giving 30 days written notice (or less where agreed). G-Cloud 10 call-off contracts incorporate the supplier's standard G-Cloud terms, although the call-off terms override the supplier terms in cases of conflict.

It is understood that extensive market testing has been conducted by the FSA project team with a target group of suppliers, to develop a set of supplier neutral service requirements, including outline deliverables / work packages, that can be used to procure a delivery partner from among a pool of potential suppliers on G-Cloud. Use of G-Cloud is therefore in preference to a more costly and time consuming "full" competitive procurement process, such as the negotiated procedure without notice, which in theory could be used to deliver a more bespoke solution against a less certain requirement, but where the current position is that negotiation may not add any additional value, and may not be justifiable under PCR 2015.

It is also understood that the council requires a reasonably flexible approach to service delivery, with the implementation of digital transformation services ('cloud support' services under G-Cloud) expected to take around 18 months, but with flexibility to deliver the services over 12 to 24 months. Within these timescales, the council is seeking a fixed fee arrangement, with payment against pre-agreed milestones, where the workstreams, milestones (including deliverables), milestone payments, and detailed plans are agreed during the first 7 weeks of the programme. The council is also considering whether to procure additional ongoing consultancy and support services from the delivery partner (under the same call-off contract), which could run for 2 years from the completion of the implementation work. (Any additional cloud software licences required as part of the transformation and other 'out of scope' transformation services (e.g. on premise data recovery, WAN design and infrastructure etc) would need to be separately procured / delivered.)

In relation to the use of G-Cloud, there are a number of points that will need to be addressed, including the following:

- The service requirements will need to be developed into a list of 'must-haves' and 'wants' that will be used to decide which search categories, keywords and filters to use as part of the G-Cloud 'best fit' buying process. Some analysis may be required of the scope of the relevant suppliers' service descriptions, to ensure that the range of 'must-have' requirements are deliverable under a single call-off contract and are not unduly / unfairly restrictive.

- It is likely, given the range and nature of the cloud support services required, that some suppliers (if not all) will use third parties to deliver aspects of the programme under sub-contracts. This is provided for under G-Cloud (where the main supplier assumes the risk of any sub-contracted services), but the nature of any sub-contracting would need to be clarified prior to awarding a contract (if not apparent in the service descriptions), and in particular the nature of any data processing, including processing outside of the EEA. Any processing of data by the main supplier or its sub-contractors will need to be captured within the call-off contract's data processing schedule.
- The total pricing under G-Cloud will need to be determined through questions to suppliers based on standard G-Cloud pricing, and the council will need to avoid any negotiations or raising questions on points falling outside of the supplier's standard G-Cloud service descriptions.
- The right to terminate for convenience is linked to a buyer indemnity in relation to unavoidable losses the supplier can't mitigate or reduce by way of insurance. The approach to workstreams and payment milestones should help to reduce the council's exposure in such circumstances, but the position under the call-off contract could be clarified in relation to unperformed services and the fixed fee. The council's liability (and the supplier's exposure to losses) should be mitigated as far as possible to services and payments due in relation to specific milestones.
- The maximum duration of a G-Cloud call-off contract is typically a 2 year initial terms with further extensions of up to 2 years. This is sufficient to cover the services required of the delivery partner, although minor amendments will be needed in relation to the additional support services, which could also be described as a contractual option.

Subject to the council's requirements falling within the supplier's standard service offerings, and provided the council adheres closely and fairly to the G-Cloud buying process, including the requirement for a well audited and transparent search process, G-Cloud provides a compliant route to market under PCR 2015 and the council's procurement rules.

Legal advice should be sought in relation to capturing the council's requirements in the call-off contract, particularly in relation to any deviations from the standard terms and conditions and descriptions of additional services and contract deliverables. Consideration should also be given to the risk profile under the contract, and separate advice may be required on appropriate caps on liability and insurance requirements under the call-off contract (within the permitted scope of G-Cloud).

There are no particular equalities issues arising from the proposals in this report.

There are no public consultation issues associated with this proposal.