

PART 2 – CONFIDENTIAL FACTS AND ADVICE

MD2494

Title: Procurement and delivery of the Mayor’s RE:FIT programme 2019-2022

Information may have to be disclosed in the event of a request under the Freedom of Information Act 2000. In the event of a request for confidential facts and advice, please consult the Information Governance team for advice.

This information is not suitable for publication until the stated date because:

The information contained in this Part 2 supports the decision to be taken but is not suitable for publication at this time because its content is subject to legal professional privilege.

Date at which Part 2 will cease to be sensitive or when this information should be reviewed with a view to publication: The latter of 31 March 2020 or date by which the new PDU services contract has been awarded and commenced.

Legal adviser recommendation on the grounds for not publishing information at this time:

In the event the information contained in this Part 2 is the subject of a request for information under section 1 of the Freedom of Information Act 2000 (the “Act”), it is considered that access can be denied on the basis that such information constitutes exempt information under section 42 of the Act on the basis that part of the information contained in this Part 2 is legally privileged.

Section 1 of the Act creates the general right of access, which provides that any person making a request for information to a public authority is entitled:

- to be informed in writing by the public authority whether it holds information of the description specified in the request; and
- if that is the case, to have that information communicated to him/her.

Part II of the Act contains a number of exemptions from disclosure for certain classes of information. Section 42 of the Act provides that information is exempt information if it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

The 42 exemption under the Act is a qualified exemption and its use is therefore, subject to a public interest assessment.

Public Interest Assessment

At present, on balance, it is considered that the public interest may be best served if the information is not disclosed. The purpose of legal professional privilege is to enable openness in all communications between client and lawyer to ensure access to full and frank legal advice.

The content of this Part 2 records the provision of such advice provided in order that the decision sought may be considered fully in light of risks of proceeding as proposed and the continuing delivery of RE:FIT PDU services. We are instructed that the proposals to extend the current PDU services for a relatively short interim period pending their re-procurement are of critical importance to secure continuity of services which are designed to enable the improvement of the environment in Greater London.

The eligibility of the exemption should be reassessed in the event of an FOI request for this information as the level of sensitivity will change over time and different circumstances may alter the arguments in favour of non-disclosure. **NB:** Whilst the later of 31 March 2020 or the date by which the new PDU services contract has been awarded and commenced is entered as the date for such reassessment of the eligibility of the exemption, given the nature of the advice contained herein it is not envisaged that release would be advisable at that point.

Legal Adviser - I make the above recommendations that this information is not suitable for publication at this time.

Name: Stephen Fernandes-Owen, TfL Legal

Date: 22 July 2019

Once this form is fully authorised, it should be circulated with Part 1.

Decision and/or advice:

Summary

1. It should be noted that, following an On The Spot Verification (OTSV) audit of the RE:FIT programme in March 2017, undertaken by the GLA's European Programmes Management Unit (EPMU) on behalf of the Ministry of Housing Communities and Local Government (MHCLG), claims to ERDF for the RE:FIT programme are subject to a 10% correction.
2. The correction was made by EPMU which were of the opinion that there was a shortcoming in the publication of a corrigendum notice relating to the framework agreement under which the PDU service provider was procured (summary set out at paragraphs 5 to 8 (incl.) below). The correction applies only to the 50% of costs claimed to ERDF. This means that on the current programme, this would amount to a maximum of £200,000.
3. The programme has been absorbing that correction and will continue to do the same for the length of the proposed contract extension, by adjusting slightly the services delivered by the PDU to come about 5% under the original fee/cost profile so as not to incur any overspend at the end of the programme. This can be done without impacting on the level of delivery from the PDU through efficiencies and restructuring the delivery team slightly.
4. This 10% correction will continue to be applied on any claim to ERDF in relation to the exercise of the GLA's contractual right to extend its current PDU services contract with Turner and Townsend post August 2019. There is a risk however, given the outcome of EPMU's previous audit that the extension of the same contract may give rise to further corrections should another audit take place. GLA officers are however of the opinion that this risk is outweighed by the risks associated with not exercising the GLA's right to extend its current PDU contract (see paragraph 9 below).

Background

5. TfL Commercial in providing procurement assistance to the GLA under shared service arrangements were engaged by the GLA, in 2015, to assist with the procurement of PDU services. The estimated contract value (£3.4m) exceeded the EU procurement threshold and was being funded, in part (50%), using ERDF. It was necessary therefore, to procure the services competitively in accordance with the Public Contracts Regulations 2015. The procurement strategy was agreed by TfL Commercial and the GLA - the services to be procured by conducting a mini-competition exercise under a pre-existing TfL framework agreement for project & programme management consultancy services (PPMCS Framework).
6. The mini-competition process was managed via TfL's e-tendering portal (European Dynamics) in accordance with the PPMCS Framework and completed with the resulting Call-Off Contract awarded in

March 2016 to Turner and Townsend Project Management Ltd on the basis of having submitted the most economically advantageous tender.

7. EPMU (acting for MHCLG) initiated an OTSV (audit), requesting access to all PPMCS Framework and mini-competition documents and systems. EPMU provided the GLA with an initial audit report indicating that corrections would be applied in relation to the mini-competition, Call-Off Contract and the overarching PPMCS Framework unless satisfactory explanation could be provided.
8. TfL provided evidence to EPMU which resulted in the majority of the issues raised by EPMU being resolved and the corrections being removed. EPMU were unwilling however, to withdraw a 10% correction concerning the procurement of the overarching PPMCS Framework, asserting that the supply market was potentially disadvantaged due to a lack of awareness of an extension to the tender return date for the Projects and Programme requirement. In summary:
 - (a) the procurement of the PPMCS Framework Agreement was conducted as a single procurement but due to system challenges, two call for competition notices (1. Project and Programme Management and 2. Commercial Services) were published via the e-tendering portal.
 - (b) a seven day extension to the tender submission date was granted and notified to the market by means of the publication of a Corrigendum notice in the Official Journal of the European Union (OJEU) and on the e-tendering portal.
 - (c) TfL Commercial provided evidence that the contract documents and clarifications released via European Dynamics in respect of both competition notices (see 6(a) above) indicated that there was an extension of the submission deadline for the overall PPMCS framework and therefore no prospective bidders were disadvantaged.
 - (d) Having considered all the evidence, EPMU's assessment is that, because the Corrigendum notice only referenced the Commercial Services requirement, with no reference to the Project and Programme Management requirement, this was not sufficiently clear to avoid a potential disadvantage to prospective bidders who may have submitted a bid had the extension of the deadline for both the project and programme management and commercial services elements been made more clear.
 - (e) As such EPMU have advised that the 10% correction should apply as the Corrigendum notice published referred to one but not both requirements.

Recommendation

9. GLA officers acknowledge the risk of further corrections being applied relating to the extension of contract proposed but are of the opinion that this risk is outweighed by the risks associated with not exercising the GLA's right to extend its current PDU contract. This is because:
 - (a) Re-procuring a new PDU will take about seven months, it is highly recommended that the provision of the PDU services by Turner & Townsend is extended to March 2020 to cover that procurement period and ensure continuity of delivery for the RE:FIT programme. This is despite incurring a 10% correction on any claim made to ERDF for this service and risks of further corrections being applied should a further audit on the programme take place and look at this procurement again. It has been evaluated that this penalty would equate to a maximum shortfall of £30,000 for the seven months of the contract's extension. This can easily be absorbed through fee profiling.
 - (b) There are only two options on what to do once Turner & Townsend's contract ends on 31 August 2019:
 - (i) do nothing and end the provision of PDU support for RE:FIT until a new PDU is appointed (estimated to be April 2020); or

(ii) extend Turner & Townsend's contract for seven months to March 2020 to provide continuity of support on the RE:FIT programme until a new PDU is procured and appointed.

Option (i) would lead to a detrimental impact on the RE:FIT programme with:

- users (about 30 of them) currently going through the RE:FIT process being left without any support and most probably resulting in them either cancelling their RE:FIT project or delaying delivery until a new PDU is appointed, negatively impacting on the programme KPIs by delaying or even annulling up to 60% of the KPIs;
- reputational damage to the programme with a programme experiencing a gap in delivery; and
- no PDU in place to start recruiting and acquiring new clients on time to then meet the 2020 ERDF KPIs, increasing the risk of non-delivery of the 2022 ERDF KPIs.

(c) All of this would result in a failure to meet the ERDF and programme's KPIs, resulting in greater penalties (could be as high as 25%) imposed on the programme from ERDF.

(d) Option (ii) would provide continuity of delivery on the programme, building up of a pipeline of clients and conversion of current opportunities into KPIs. Whilst this contract with Turner & Townsend will continue to bear a 10% penalty on claims made to ERDF, the impact of that penalty (estimated at £30,000 maximum) is much less than that of having no programme delivery team in place for seven months. Whilst there is also a risk that upon any other audit further corrections may be applied, officers are of the opinion that this risk is again outweighed by the risks associated with the impact of not having PDU services in place continuously.