

Approval to award a new contract under Regulation 32(2)(b)(ii) of the Public Contracts Regulations 2015 - Use of the negotiated procedure without prior publication - for the provision of the Council's Accounts Payable Audit Solution

Date: 06th March 2024

Report of: Lead Product Manager, Core Business Systems

Report to: Chief Digital and Information Officer

Will the decision be open for call in? Yes No

Does the report contain confidential or exempt information? Yes No

Brief summary

Approval to direct award a new contract to Fiscal Technologies Ltd. under Regulation 32(2)(b)(ii) of the Public Contracts Regulations (PCR) 2015 - Use of the negotiated procedure without prior publication for the provision of the Council's Accounts Payable Audit Solution.

Recommendations

- a) The Chief Digital and Information Officer is recommended to approve the direct award of a new contract to Fiscal Technologies Ltd. for the provision of the Council's Accounts Payable Audit Solution utilising Regulation 32(2)(b)(ii) PCR 2015 - Use of the negotiated procedure without prior publication , from 1st April 2024 to 31st March 2027 at a total cost of £134,232.00. The proposed new contract represents a 12.0% RPI increase on last year's annual cost, however the new annual price will remain fixed for the duration of the new contract term proposed. For the avoidance of doubt the total cost for 1st April 2024 to 31st March 2027 is £134,232.00.

What is this report about?

- The Council's Business Support Centre (BSC) uses the Accounts Payable Audit Solution to provide pre-payment quality assurance checks on all the payments being made by the Council and to highlight potential duplicate payments, anomalies that could lead payment errors and to detected potential fraud.
- The Council is currently undertaking a full review of its core Finance and HR systems under the Core Business Transformation (CBT) Programme.
- A key element of the CBT Programme is the replacement of the internally-developed, locally-hosted Financial Management system of over 20 years standing with a Microsoft Dynamics Finance & Operations (F&O) cloud-hosted solution.
- Fiscal Technologies Ltd. provide a hosted Accounts Payable Audit solution which, alongside other technologies, including the core system, uses several features which assist in the avoidance of the duplicate payment of invoices.
- The software carries out a series of checks in conjunction with the core Finance system including creditor reference, invoice number and amount, and matches against both payment requisitions and invoices to identify potential discrepancies which can be manually investigated and appropriate action, thereby negating the need for expensive recovery action to be undertaken.
- The software was upgraded to Fiscal Technologies Ltd.'s new NXG product in October 2023 as their previous AP Forensics software became End of Life. The upgrade involved updating the solution but the transactional history and payment profile built up during the lifespan of the Council's instance of the product was retained.
- This transactional history and payment profile provides a level of assurance against which to gauge performance, integrity, and accuracy during the replacement of the Council's Core Finance system.
- Hence the risk of changing products at this stage is too high alongside the replacement of the core Finance system.
- However, it is recognised that there are potentially other suppliers and a review of the technology in this space is in scope for the CBT Programme and this element will be picked up as part of the continual improvement element of the Source to Pay workstream following the Microsoft Dynamics F&O go-live which is scheduled for Autumn 2024. The intention is to undertake a competitive exercise in advance of the expiration of this contract in March 2027.
- Awarding a new contract for the period 1st April 2024 to 31st March 2027 will ensure the Council can continue to use the current Account Payable Audit Solution during the implementation period and will allow familiarity to ensure integrity and provide assurance during the transition.
- The Council's current contract (DN393230 - ITS190126) for the provision of the Accounts Payable Audit Solution has been in place since 1st April 2019 and expires on 31st March 2024 with no options to extend, hence the need to award a new contract with the current provider.
- The new contract has an increase of 12.0% RPI on last year's annual cost of £39,950.00. Total cost for 1st April 2024 to 31st March 2027 is now a total of £134,232.00.
- The award of the contract for the Accounts Payable Audit solution contract will support and contribute to the Council's value of Spending Money Wisely through continuing to contribute to efficient and productive working arrangements and providing resilience and continuity to business processes.

What impact will this proposal have?

- 1 No wards will be impacted by this proposal

How does this proposal impact the three pillars of the Best City Ambition?

- Health and Wellbeing Inclusive Growth Zero Carbon

2

What consultation and engagement has taken place?

Wards affected:

Have ward members been consulted? Yes No

- 3 Consultation was undertaken at the time of the original key decision to purchase the software

What are the resource implications?

- 4 There are no resource implications associated with the award of a new contract for the Accounts Payable Audit Solution.
- 5 The work needed to integrate and test the existing solution with Microsoft Dynamics is part of the CBT Programme of works and is currently underway.

What are the key risks and how are they being managed?

- 6 There are minimal risks associated with awarding a new contract to Fiscal Technologies Ltd. for the Accounts Payable Audit System as it is only a continuation of a product which has been used by the Council for a number of years. Procurement challenge risk is being managed in accordance with paragraph 10 of this report.

The decision to award a new contract will ensure that the Council will continue to utilise software which has provided significant cost-savings benefits since its implementation, as well as receiving on-going developments and updates.

If a new contract is not awarded, the Council would not have the assurance of the integrity and provide assurance during the transition to the new core Microsoft Dynamics F&O system.

Any risks which are highlighted during the term of the new contract will be managed and mitigated through regular account management/supplier review meetings.

What are the legal implications?

- 7 The decision to direct award a new contract for the Accounts Payable Audit Solution for the period 1st April 2024 to 31st March 2027 at a cost of £134,232.00 is a Significant Operational Decision, but is not subject to call in. There are no grounds for keeping the contents of this report confidential under the Council's Access to Information Rules.
- 8 In accordance, with the Council's Contract Procedure Rules (CPR) the value of the proposed direct award is deemed to be a High Value Procurement, as it is over £100,000. CPR 9.1,

states that in the absence of an internal service provider, an existing provider or relevant Third-Party framework, then competition is required. CPR 9.2 specifies competition as obtaining at least four written tenders being invited. It should be noted that CPR 9.1 and 9.2 are subject at all times to CPR 10.2, which states:

“Where the relevant Director in consultation with PACS agree that the negotiated procedure without publication of a contract notice applies there is no requirement to obtain a waiver of CPRs 9.1 and 9.2.”

- 9 As previously stated in this report, the proposed direct contract award to Fiscal Technologies Ltd. would be made by utilising the provisions of Regulation 32 PCR 2015 – Use of the negotiated procedure without prior publication. Therefore, in these circumstances, a waiver of CPR 9.1 and CPR 9.2 is not required. Importantly, where the estimated contract value exceeds the PCR 2015 relevant threshold (as would be applicable here), CPR 9.3 cannot be waived, meaning the provisions of CPR 10 in its entirety would apply, primarily that the contract would be subject to the Public Contract Regulations.
- 10 The Council proposes that the decision to award a new contract to Fiscal Technologies Ltd. for the Accounts Payable Audit Solution is permitted pursuant to Regulation 32(2)(b)(ii) of the Public Contracts Regulations 2015 which states:

“32. -(1) In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated procedure without prior publication.

(2) The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases: -

(b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons: -

(ii) competition is absent for technical reasons, ...

but only, in the case of paragraph (ii) ..., where no reasonable alternative or substitute exists, and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;”

Where, Paragraph 2 of this report has set the technical reasons why competition is absent and the reasons why no reasonable alternative or substitute exists, as required by Regulation 32(2)(b)(ii) PCR 2015 that the Council would rely on to justify its decision.

- 11 Notwithstanding the above, there is the potential risk of challenge that there are no real reasons justifying the use of Regulation 32(2)(b)(ii) PCR 2015, and that the Council is simply seeking to circumvent the application of the rules. However, due to the reasons set out in paragraph 2 of this report the risk of such challenge is low.
- 12 In addition, these risks can be further mitigated by the publication of a voluntary transparency notice on Find a Tender immediately after the decision to award the contract has been taken and then waiting 10 days to see if any challenges are made. If no challenges are made the chances of a claim for ineffectiveness being brought are significantly reduced and would only be successful if the Council had used the negotiated procedure without publication of a notice incorrectly. Further, publishing such a notice will also start time running for any other potential claim for breach of the Regulations, which must be brought within 30 days of the date that an aggrieved party knew or ought to have known that a breach had occurred.
- 13 However, it should be noted that voluntary transparency notices themselves can be challenged. Although we have now left the European Union, the case of *Italian Interior Ministry v Fastweb SpA (Case C-19/13)* is still persuasive and highlights the limited protection that the

voluntary transparency notice route can offer to contracting authorities wishing to make direct awards without following a fully transparent process for above threshold public procurements in accordance with the Public Contracts Regulations 2015. A grey area remains around whether the protection of a voluntary transparency notice will be available where the contracting authority genuinely, but mistakenly, considers it was entitled to award the contract without notice. It shows that the safe harbour will only be 'safe' to the extent that the justification for the direct award is in itself sound and ready to stand up to the increased scrutiny that the publication of the voluntary transparency notice may well invite.

14 These comments should be noted by the Chief Digital & Information Officer and in making the final decision should be satisfied that doing so represents best value for the Council.

Options, timescales and measuring success

What other options were considered?

15 No other options have been considered at this time. The Council is currently undertaking a full review of its core systems under the Core Business Transformation (CBT) Programme, including the replacement of its core Financial Management System. Due to the reasons outlined above in relation to compromising the transactional history and payment profile which the current system affords and by providing a level of assurance against which to gauge performance, integrity, and accuracy during the replacement of the Council's Core Finance system, the risk of changing products at this stage is too high. The intention is therefore to undertake a competitive exercise in advance of the expiration of this contract in March 2027.

How will success be measured?

16 Success will be measured by the Council's ability to continue efficient and productive working arrangements, providing resilience and continuity to business processes.

What is the timetable and who will be responsible for implementation?

17 The new contract for the Accounts Payable Audit Solution will be awarded as soon as is practicable and allowable after approval by Chief Digital and Information Officer, with a commencement date of 1st April 2024.

Appendices

18 None

Background papers

19 None