

Report of Head of Strategy and Solutions, DIS

Report to Chief Digital & Information Officer

Date: 10th September 2020

Subject: Approval to award a contract to Microsoft Ltd for their Unified Premier Support on an annual renewal basis for 1 year using the Negotiated Procedure without prior publication of a contract notice.

Are specific electoral wards affected? If relevant, name(s) of ward(s):	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Are there implications for equality and diversity and cohesion and integration?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Is the decision eligible for call-in?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Does the report contain confidential or exempt information? If relevant, access to information procedure rule number: Appendix number:	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

Summary of main issues

1. The Council has in place a contract with Microsoft for the provision of Microsoft Enterprise Unified Support Services (MS Premier), which expires 30th September 2020.
2. There is a requirement to continue the provision of a service to provide support services for all utilised/deployed Microsoft products across the Council (as defined in the contract for the LCC Microsoft Enterprise Agreement).
3. The current service has been in place since the original Microsoft EA agreement in 2007 and the widespread adoption of Microsoft software.

Recommendations

4. The Chief Digital and Information Officer approves the award of a contract to Microsoft for their Premier Support on an annual renewal basis for a period of 1 year from October 1st 2020 to September 30th 2021 using the Negotiated Procedure without prior publication.

1 Purpose of this report

- 1.1. The Chief Digital and Information Officer approves the award of a contract to Microsoft for their Unified Premier Support on an annual renewal basis for a period of 1 year from 1st October 2020 to 30th September 2021 using the Negotiated Procedure without prior publication.

2 Background information

- 2.1 There is a requirement to continue to provide the Enterprise Support service. This consists of Problem resolution and support for MS Software products
- 2.2 The value of the contract is £275k for a 12 month contract
- 2.3 The subject-matter relates to Microsoft software The Council has deployed a range of systems and applications from Microsoft within the current service. For example, this includes (but is not limited to) Windows 10 (for desktop equipment), Exchange (for Email & calendar), SharePoint (for Collaboration & Records Management), Windows Server (for delivery/hosting of corporate & line of business applications), SQL Server (for structured Databases) and Lync / Skype (for conferencing and collaboration services). Similar cloud based products for Office 365 and Azure are also currently being deployed.
- 2.4 The Microsoft products are proprietary and therefore this support service can only be provided by Microsoft who retains the IPR to their products source code.
- 2.5 The Public Contracts Regulations 2015 provides that an award of a public contract using the negotiated procedure without publishing a contract notice where the services can only be provided by a single provider due to the protection of intellectual property rights. Microsoft is the only provider legally capable of providing the service based on their exclusive ownership in the IPR to the software source code.

3 Main considerations and reasons for contract award

3.1 Options Appraisal.

Option 1 Do Nothing

Should a contract not be awarded, the Council would be unable to provide any SLA service guarantee to directorates on both failure / incident resolution relating to any MS software or on assurance, adoption recommendations on MS software and MS best practise guidelines not publically available. This directly supports both Front Line Council service provision and all other back office users across the Council.

Option 2 Award contract using Negotiated Procedure without prior publication of a contract notice

The selected candidate is Microsoft Ltd

The Microsoft products are proprietary and therefore this support service can only be provided by Microsoft who retains the IPR to their products source code. No other Option exists due to the proprietary IPR for source code.

Only Microsoft can provide this level of support on their product and it is impractical to change the underlying product as the Council's ICT infrastructure is substantially built on that platform. It is not expected that any of the contract is intended to be subcontracted to third parties.

4 Corporate considerations

4.1 Consultation and engagement

4.1.1 The Head of DIS Operational Services (Service owner) and Head of City Strategy and Solutions (Stakeholder) has been consulted and this report reflects the continuing requirements of an Enterprise Support service. In addition, consultation has taken place with DIS Strategic Sourcing for advice on appropriate sourcing routes.

4.2 Equality and diversity/cohesion and integration

4.2.1 There are no Equality and Diversity / Cohesion and Integration issues associated with this decision.

4.3 Council policies and best council plan

4.3.1 The service underpins cross cutting Council requirements to provide a range of essential services and functionality to all connected employees of the Council. This directly supports the Best Council objectives relating to the Better Lives programme and dealing effectively with the City's waster

4.3.2 Becoming a more efficient and enterprising Council – the software directly supports the achievement of this best Council plan objective. This includes improving customer satisfaction (from resolving issues in a timely manner based on SLAs), creating flexibility within our workforce (software supports Changing the Workplace objectives for new ways of working), as well as supporting the generation of additional income (which requires contractual SLA support defined services) and becoming more enterprising (introduction of new applications and services based on the software).

4.3.3 Promoting sustainable and inclusive economic growth - the software directly supports the achievement of this best Council plan objective. Specifically the software is used to enable the full role in the City region and making the most of devolution opportunities.

4.4 Resources and value for money

4.4.1 The total financial cost is provisioned into existing Council budgets in line with the costs outlined in Section 2.2.

4.4.2 Evidence of value for money can be measured historically. For example, with 97% of reactive cases being resolved within the contract SLA. This enabled recovery of incident's that would otherwise have had significant operational impact across the Council. Examples of these cases include application servers failing to boot, Web / SharePoint servers unavailable and requiring deep level diagnostics (on occasions provided from the USA)

4.4.3 The recommendation is to award a contract to Microsoft for their Unified Premier Support on an annual renewal basis for a period of 1 year. Agreeing a longer term multi-year agreement is not recommended due to the continued shift to Microsoft subscription based services from started in 2020. When full transition to online subscriptions are then in place, the Premier Support service agreement changes to a service / outcomes based contract (where Microsoft would be providing these services) as distinct from the current contract which is partially support based and partially service based.

4.5 Legal implications, access to information and call-in

4.5.1 The award is a significant operational decision taken by the Chief Digital and Information Officer and is not subject to call in.

4.5.2 The value of this service does fall within the scope of the Public Contracts Regulations 2015. The contract will be awarded using the Negotiated Procedure without prior publication of a contract notice under regulation 32 (2) (b) (iii) where the services can only be provided by a single provider due to the protection of intellectual property rights.

4.5.3 The Microsoft products are proprietary and therefore this support service can only be provided by Microsoft who retains the IPR to their products source code. No other Option exists due to

the proprietary IPR for source code.

- 4.5.4 Regarding the use of the negotiated procedure without the publication of a notice, it must be noted that there is the potential risk of challenge that there is no need to protect exclusive rights (including IPR) and as such justifying the use of the negotiated procedure without publication of a notice under regulation 32 (2) (b) (iii) in accordance with the Public Contracts Regulations 2015, and that the Council is simply seeking to circumvent the application of the procurement rules. The reasons set out in this report are the justifications the Council would rely on to defend the decision.
- 4.5.5 In addition, this risk can be further mitigated by the publication of a Voluntary Transparency Notice (VTN) in the Official Journal of the European Union (OJEU) in accordance with the Public Contracts Regulations 2015, immediately after the decision to enter into negotiation has been taken and 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 Public Contracts Regulations 2015, 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
- 4.5.6 It should be noted that voluntary transparency notices themselves can be challenged. The recent case of Italian Interior Ministry v Fastweb SpA (Case C-19/13) highlights the limited protection that the voluntary transparency notice route can offer to contracting authorities wishing to make direct awards without following an OJEU process. 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.

4.5.7 There is a risk of challenge from other providers who may argue that they are in a position to supply the services, however this risk is considered to be very low due to the fact that the Microsoft products are proprietary and the support service can only be provided by Microsoft who retain the IPR to their products source code.

4.6 Risk management

4.6.2 If no contract is awarded, key critical systems will have no guaranteed, external operational support. This will pose significant reputational and financial risk and possible interruption to Operational Service.

4.6.3 If contract award is approved, this provides full access to the global resources of Microsoft and its subject matter experts in the event of any system failure and the associated mitigation of the risks outlined.

4.6.4 The contract will be managed in accordance with the contract Microsoft Service Delivery management plan.

5 Conclusions

5.1 To ensure the continued provision of a MS Enterprise Support services, the contract should be awarded to Microsoft Ltd.

6 Recommendations

6.1 The Chief Digital and Information Officer approves the award of a contract to Microsoft for their Premier Support on an annual renewal for a period of 1 year from 1st October 2020 to 30th September 2021 using the Negotiated Procedure without prior publication.