

Approval to award a new contract under Regulation 32(2)(b)(ii) of the Public Contract Regulations 2015 - use the Negotiated Procedure without prior publication of a contract notice – to Cornerstone on Demand Ltd for the provision of Licensing, Development & Support and Maintenance of the Council's Performance and Learning and e-Recruitment System (PALS).

Date: 23<sup>rd</sup> July 2021

Report of: Applications Manager

Report to: Chief Officer Human Resources

Will the decision be open for call in?  Yes  No

Does the report contain confidential or exempt information?  Yes  No

## **What is this report about?**

### **Including how it contributes to the city's and council's ambitions**

- The Council awarded a three (3) year contract (DN356320 – ITS201351) to Cornerstone on Demand Ltd on 14<sup>th</sup> October 2018 for the provision of Licensing, Development & Support and Maintenance of the Council's Performance and Learning and e-Recruitment System (PALS). This contract is due to end on 13<sup>th</sup> October 2021 with no options to extend.
- This report sets out the reasons for seeking approval to award a new contract to Cornerstone on Demand Ltd under Regulation 32(2)(b)(ii) of the Public Contract Regulations 2015 - use the Negotiated Procedure without prior publication of a contract notice – for the provision of Licensing, Development & Support and Maintenance of the Council's Performance and Learning and e-Recruitment System (PALS) for a maximum period of three (3) years from 14<sup>th</sup> October 2021 to 13<sup>th</sup> October 2024.

## **Recommendations**

- a) Chief Officer Human Resources is recommended to approve the award of a new contract under Regulation 32(2)(b)(ii) of the Public Contract Regulations 2015 - use the Negotiated Procedure without prior publication of a contract notice – to Cornerstone on Demand Ltd for the provision of Licensing, Development & Support and Maintenance of the Council's Performance and Learning and e-Recruitment System (PALS).
- b) The new contract will be awarded for a maximum three (3) year period, from 14<sup>th</sup> October 2021 to 13<sup>th</sup> October 2024 and will include an option to terminate the contract after two (2) years.
- c) The total value of the new contract for the full three (3) year term will be £778,336. If the contract is terminated after two (2) years, the value would be £558,675.

## Why is the proposal being put forward?

- 1 The Council's current contract for the provision of Licensing, Development & Support and Maintenance of the Council's Performance and Learning and e-Recruitment System (PALS) expires on 13<sup>th</sup> October 2021 with no options to extend.
- 2 PALS is used by both the Council and its City partners to manage all employee performance, learning and development activities. It also supports the Council's recruitment activities, playing a vital role in the recruitment and onboarding of new employees. It supports similar activities for partner organisations across the city, which generates income of circa £175k per year for the Council.
- 3 Approval to award a new contract to Cornerstone on Demand Ltd is recommended on the following grounds:  
Technical – PALS is heavily embedded within the Council's infrastructure and has been used for a number of years by both the Council and its city partners to manage all employee performance, learning and development and recruitment activities. PALS is a proprietary system, owned by Cornerstone on Demand Ltd, and as such only they can provide the necessary licensing, development & support and maintenance services for the system. To ensure that the Council can continue to use PALS, it is necessary to award a new contract to Cornerstone on Demand Ltd.

Financial - The Council is currently undertaking a Core Business Transformation (CBT) programme which includes a procurement and implementation exercise for a single integrated Finance, HR and Payroll solution. The business case supporting this work includes the budget and current services supplied by Cornerstone on Demand Ltd.

Awarding a new contract to Cornerstone on Demand for a maximum period of three (3) years will allow this work to be completed enabling continuation of this essential service whilst implementation of any replacement is carried out.

## What impact will this proposal have?

### Wards affected:

Have ward members been consulted?

Yes

No

## What consultation and engagement has taken place?

- 4 Key stakeholders within the Council's Human Resources and Digital and Information Service have been consulted and support the decision to award a new contract to Cornerstone on Demand Ltd.

## What are the resource implications?

- 5 There are no resource implications associated with the award of a new contract to Cornerstone on Demand Ltd as it only continues the provision of Licensing, Development & Support and Maintenance services provided under the current expiring contract for which budget exists currently.

## What are the legal implications?

- 6 The award of a new contract at this value is a Key Decision and is subject to call in. There are no grounds for keeping the contents of this report confidential under the Access to Information Rules.
- 7 The Council believes that the decision to award a new contract to Cornerstone on Demand Ltd for the provision of Licensing, Development & Support and Maintenance of the Council's Performance and Learning and e-Recruitment System (PALS) 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;"  
Paragraph 3 of this report sets out the technical reasons required by Regulation 32(2)(b)(ii) that the Council would rely on to justify its decision.
- 8 There is the potential risk of challenge that there are no real technical reasons justifying the use of the negotiated procedure without publication of a notice in accordance with the Public Contracts Regulations 2015, and that the Council is simply seeking to circumvent the application of the procurement rules. However, due to the reasons set out in in this report this risk is perceived to be low.
- 9 In addition, risks can be diminished somewhat 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.
- 10 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 an above threshold procurement process 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.
- 11 These comments should be noted by Chief Officer Human Resources and in making the final decision should be satisfied that doing so represents best value for the Council.

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

- 12 There are minimal risks associated with awarding a new contract to Cornerstone on Demand Ltd. PALS is a mature system and has been used by the Council and its city partners for a number of years.
- 13 Any risks which are highlighted during the term of the varied contract will be managed and mitigated through regular account management/supplier review meetings.
- 14 If approval to award a new contract to Cornerstone on Demand Ltd is not given, this will leave the Council and its city partners without a system capable of supporting their learning management, performance, and recruitment activities. This would severely impact on the Council's ability to carry out its statutory duties.

## Does this proposal support the council's three Key Pillars?

- Inclusive Growth       Health and Wellbeing       Climate Emergency

- 15 The award of a new contract for the provision of Licensing, Development & Support and Maintenance of the Council's Performance and Learning and e-Recruitment System (PALS) directly supports the Council's People Strategy 2020 to 2025, which aims to make Leeds City Council the Best Place to Work and helps to Deliver the Best Council Plan 2020 to 2025. The award of a new contract facilitates this through underpinning the provision and access to recruitment, learning and development, and the continued and improved performance of both the Council's workforce and the workforce of its city partners. In doing so, it plays a critical role in the successful delivery of the Council's three Key Pillars.

## Options, timescales and measuring success

### a) What other options were considered?

- 16 The Council has reviewed and considered the following options:
  - i) Do nothing. As the current contract expires on 13<sup>th</sup> October 2021, this would leave the Council and its city partners without a system capable of supporting learning management, performance, and recruitment activities. This would place the Council at unnecessary risk in terms of compliance with certain learning and personal development activities. It would also mean the loss of an income to the Council as it would not be able to offer performance and learning services to city partners.
  - ii) Carry out a procurement exercise for an alternative Performance and Learning System. The Council is currently carrying out a review of its core systems requirements, which also includes a review of requirements and functionality provided by the current Performance and Learning System, with the intent of carrying out a procurement exercise in the near future, therefore to carry out a separate procurement exercise at this point in time would not represent best use of Council funds or resources.
- 17 As neither option is considered acceptable, the recommendation is that awarding a new contract to Cornerstone on Demand Ltd is the most appropriate and cost-effective use of Council funds and resources at this time.

### iii) How will success be measured?

18 The contract will include specific measurable KPI's and SLA's to enable Cornerstone on Demand Ltd performance to be measured.

**iv) What is the timetable for implementation?**

19 The new contract for the provision of Licensing, Development & Support and Maintenance of the Council's Performance and Learning and e-Recruitment System (PALS) will be awarded as soon as is practicable and allowable after approval by Chief Officer Human Resources, with a commencement date of 14<sup>th</sup> October 2021.

**Appendices**

20 None

**Background papers**

21 None