

**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 Procurement of Microsoft Unified Support**

Date: 14th February 2024

Report of: Programme Manager

Report to: Chief Digital Information Officer

Will the decision be open for call in?  Yes  No

Does the report contain confidential or exempt information?  Yes  No

## Brief summary

Integrated Digital Service (IDS) would like to renew with Microsoft the Microsoft Unified Support Agreement to ensure robust access to specialist support is in place across the LCC Microsoft product set.

This significant operational decision is a consequence of the key decision taken in 2023-24 covering the IDS Digital Scheme 2023-24 (ESP Programme – D56378) where the option to renew Microsoft Unified Support Agreement was to be considered.

## Recommendations

Request that the Director of Strategy and Resources gives authority to incur expenditure of £702,594 – profiled as follows:

- 24/25- £195,163
- 25/26- £234,185
- 26/27- £273,246

## What is this report about?

- 1 IDS has invested heavily in the Microsoft product suite which supports on premise and Cloud based software components which are critical to the provision of services to LCC and its partners.
- 2 Ensuring we have a Microsoft Unified Support Agreement in place will provide access to Microsoft support as and when needed including being able to escalate tickets to Priority 1 level. This element is key to resolving issues in a timely manner to minimise the likelihood of downtime and the significant disruption to services this would cause.
- 3 In addition to the support provision this agreement brings other benefits to IDS including access to specialist Microsoft onsite architects and other professionals including trainers, visioning, and dedicated CSAM to ensure LCC is able to fully maximise the value from the investment in Microsoft both via use of existing products and developing additional capabilities.

## What impact will this proposal have?

- 4 This agreement will ensure LCC has access to Microsoft advanced expertise both in supporting the resolution of incidents and exploiting the value of LCCs investing in this technology suite.

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

Health and Wellbeing

Inclusive Growth

Zero Carbon

- 5 This agreement will support the continued availability of the Microsoft product set that supports council staff, services and partners.

## What consultation and engagement has taken place?

Wards affected:

Have ward members been consulted?

Yes

No

## What are the resource implications?

- 6 None – this is a 3<sup>rd</sup> party support agreement.

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

- 7 Without access to Microsoft Unified Support IDS staff will not have access to specialist MS resources to support the timely resolution of issues. Given the significant reliance services have on Microsoft products any downtime is likely to have significant business continuity impact.

## What are the legal implications?

- 8 The decision to award a new contract for the provision of Microsoft Unified Support for the period 26<sup>th</sup> February 2024 to 25<sup>th</sup> February 2027 at a cost of £702,594 is a Significant Operational Decision as a direct result of a key decision ref (D56378) taken on 5/5/23. As such it is not open to call-in. There are no grounds for keeping the contents of this report confidential under the Council's Access to Information Rules.
- 9 The Council believes that the decision to award a new contract to Microsoft Limited for the Unified Support of Microsoft products 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 2 of this report sets out 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) that the Council would rely on to justify its decision.

- 10 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), 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.
- 11 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.
- 12 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.
- 13 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?**

- 14 IDS has a legal requirement to ensure the council's network, infrastructure, hardware and software is safe, secure, compliant and fit for purpose and as such has to procure and implement solutions that support this requirement.

### **How will success be measured?**

- 15 Having access to specialist MS Support should ensure issues are dealt with in a timely manner to increase the likelihood of downtime and the impact this will cause.

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

16 The Microsoft Unified Agreement will be for 3 years – from 26/02/2024 – 25/02/2027.

### **Appendices**

- None

### **Background papers**

- [Council and democracy \(leeds.gov.uk\)](https://leeds.gov.uk/council-and-democracy)