



United Kingdom
Debt Management
Office

TERMS OF PARTICIPATION FOR

DMO TRADING SYSTEMS REPLACEMENT

REFERENCE NUMBER

RM 3827

ATTACHMENT 5

CONTENTS

1.	INTRODUCTION.....	1
2.	CONDUCT	1
3.	RIGHT TO VERIFY INFORMATION.....	2
4.	RIGHT TO CANCEL OR VARY THE PROCUREMENT	3
5.	RIGHT TO DISQUALIFY OR EXCLUDE	3
6.	STATUS OF THE PROCUREMENT DOCUMENTATION	4
7.	CONCLUDING THE FRAMEWORK AGREEMENT.....	5
8.	COSTS.....	5
9.	CONFIDENTIALITY.....	5
10.	FREEDOM OF INFORMATION.....	6
11.	TRANSPARENCY	7
12.	INTELLECTUAL PROPERTY RIGHTS	7
13.	NO INDUCEMENT OR INCENTIVE	7
14.	LAW AND JURISDICTION	7

1. INTRODUCTION

- 1.1 These Terms of Participation should be read in conjunction with the Procurement Documentation.
- 1.2 These Terms of Participation regulate the conduct of the Applicant and the Customer throughout the Procurement. These terms also grant the Customer specific rights and limit its liability.
- 1.3 Except for the words and expressions set out below, the capitalised words and expressions used in these Terms of Participation shall have meanings given to them in the Procurement Documentation:
- “**FoIA**” means the Freedom of Information Act 2000 and any subordinate legislation made under such Act from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such legislation;
- “**EIR**” means the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such regulations;
- “**Regulation**” means the Public Contracts Regulations 2015, as amended (located at <http://www.legislation.gov.uk/ukxi/2015/102/contents/made> and the Public Contracts (Scotland) Regulations 2015;
- “**Response**” means a submission prepared by a Applicant in response to a pre-qualification questionnaire or an invitation to tender (as the context requires); and
- “**Procurement Documentation**” means the pre-qualification questionnaire and/or the invitation to tender documentation (as the context requires) together with any related documents issued by the Customer relating to the Procurement.
- 1.4 In these Terms of Participation any reference to 'person' includes, but is not limited to, any person, firm, body or association, corporate or incorporate.

2. CONDUCT

The Applicant agrees to abide by these Terms of Participation and any instructions given in the Procurement Documentation and agrees to ensure that any of its directors, office holders, staff, contractors, Sub-contractors, consortium members and advisers involved or connected with the Procurement abide by the same.

2.1 Contact during the Procurement exercise and canvassing

The Applicant must not directly or indirectly canvass any Minister, officer, public sector employee, or member regarding this Procurement or attempt to procure any information from the same regarding the Procurement (except where permitted by the Procurement Documentation). Any attempt to do so may result in the Applicant disqualification from this Procurement.

2.2 Involvement in multiple tenders

If an Applicant is connected with the submission of multiple Responses for the same requirement, including (without limit) where it submits a Response in its own name and as a Sub-contractor and/or as member of a consortium in a separate Response, then the Customer retains the right to make further enquiries regarding each Response to satisfy itself that such involvement does not cause potential or actual conflicts of interest, supplier capacity problems, restrictions or distortions in competition between

Applicants in the Procurement. The Customer may require the Applicant to amend or withdraw all or part of the Response in which it is involved if, in the Customer's reasonable opinion, any of the above issues have arisen or may arise.

2.3 Collusive Behaviour

- 2.3.1 An Applicant must not (and shall ensure that its directors, employees, Sub-contractors, consortium members, advisors or companies within its group do not):
 - 2.3.1.1 fix or adjust any element of the Response by agreement or arrangement with any other person;
 - 2.3.1.2 communicate with any person other than the Customer (or the Agent) the value, price or rates set out in the Response or information which would enable the precise or approximate value, price or rates to be calculated by any other person;
 - 2.3.1.3 enter into any agreement or arrangement with any other person, so that person refrains from submitting a Response;
 - 2.3.1.4 share, permit or disclose to another person, access to any information relating to the Response (or another Response to which it is party) with any other person; or
 - 2.3.1.5 offer or agree to pay or give or does pay or give any sum or sums of money, inducement or valuable consideration directly or indirectly to any other person for doing or having done or causing or having caused to be done in relation to the Response any other response or proposed response, any act or omission, except where such prohibited acts are undertaken with persons who are also participants in the Applicants response, such as Sub-contractors, consortium members, advisors or companies within its Group, or where disclosure to such person is made in confidence in order to obtain quotations necessary for the preparation of the Response or obtain any necessary security.
- 2.3.2 If an Applicant breaches paragraph 2.3.1, the Customer may (without prejudice to any other criminal or civil remedies available to it) disqualify the Applicant from further participation in the Procurement.
- 2.3.3 The Customer may require the Applicant to put in place any procedures or undertake any such action(s) that the Customer in its sole discretion considers necessary to prevent or curtail any collusive behaviour.

3. RIGHT TO VERIFY INFORMATION

- 3.1 The Customer may contact (or may require the Applicant to contact on its behalf) any of the customers, Sub-contractors or consortium members to whom information relates in a Response, to ask that they testify that the information is accurate and true.
- 3.2 The Customer reserves the right to seek third party independent advice or assistance to validate information submitted by the Applicant and/or to assist in the Response evaluation process.

- 3.3 The Customer reserves the right to conduct site visits and/or audits at any time during this Procurement process.
- 3.4 The Customer may require the Applicant to clarify aspects of its Response in writing and/or provide additional information. Failure to respond adequately may result in the rejection of the Response and elimination from further participation in all or part of the Procurement.

4. RIGHT TO CANCEL OR VARY THE PROCUREMENT

- 4.1 The Customer reserves the right, subject to the rules set out in the Regulations:
 - 4.1.1 to, without notice, change the basis of or the procedures for Procurement at any time;
 - 4.1.2 to amend, clarify, add to or withdraw all or any part of the Procurement Documentation at any time during the Procurement;
 - 4.1.3 to vary any timetable or deadlines set out in the Procurement Documentation;
 - 4.1.4 not to conclude a contract for some or all of the services for which Responses are invited; and
 - 4.1.5 to cancel all or part of the Procurement at any stage at any time.
- 4.2 Applicants accept and acknowledge that the Customer is not (in accordance with the Regulations) bound to accept any Response or obliged to conclude a Contract with any Applicant at all.
- 4.3 If the Customer deems that none of the Responses are satisfactory, it reserves the right to terminate all or part of the Procurement.

5. RIGHT TO DISQUALIFY OR EXCLUDE

- 5.1 The Customer may exclude and/or disqualify a Response from this Procurement if the Applicant fails to provide to the Customer:
 - 5.1.1 the information requested;
 - 5.1.2 a full and satisfactory response to any question;
 - 5.1.3 documentation referred to in a Response;
 - 5.1.4 a Response, or respond to the Customer's query(ies), within any specified timescales;
 - 5.1.5 a compliant Response.
- 5.2 The Customer may exclude the Applicant from any participation in this Procurement at any stage, if:
 - 5.2.1 the Applicant fails to comply fully with the requirements of this Procurement;
 - 5.2.2 it becomes aware that the Applicant has breached these Terms of Participation; or
 - 5.2.3 it becomes aware of a wilful omission or misrepresentation in the Applicants Response.
- 5.3 If the Customer has the right to exclude or disqualify the Applicant under these Terms of Participation or any Procurement Documentation it may (in its sole discretion):

- 5.3.1 disqualify only the affected Response and allow the Applicant to participate as a consortium member or Sub-contractor in another Response; or
- 5.3.2 completely exclude the Applicant from any involvement in this Procurement in its own name or as a Sub-contractor or consortium member in another Response.
- 5.4 The Customer may exclude the Applicant from participation in this Procurement where there is a change in identity, control, financial standing or other factor impacting on the selection and/or evaluation process affecting the Applicant.

6. STATUS OF THE PROCUREMENT DOCUMENTATION

- 6.1 No information contained in the Procurement Documentation or in any communication made between the Customer and the Applicant in connection with the Procurement shall be relied upon as constituting a Contract, or representation that any contract shall be offered in accordance with the Response or at all.
- 6.2 The Customer shall not be committed to any course of action as a result of:
 - 6.2.1 issuing any Procurement Documentation relating to the Procurement;
 - 6.2.2 communicating with the Applicant or their representatives, authorities or advisers in respect of this Procurement; or
 - 6.2.3 any other communications between the Applicant, the Customer (whether directly or by their Agent or representatives) and any other party in respect of this Procurement.
- 6.3 The Procurement Documentation and any attachments or references have been prepared in good faith but do not purport to be a comprehensive statement of all matters relevant to this Procurement exercise nor has it been independently verified. Neither the Customer nor its advisers, directors, offices, members, employees or other staff or authorities:
 - 6.3.1 accept any liability or responsibility for the adequacy, accuracy or completeness of the Procurement Documentation,
 - 6.3.2 make any representation or warranty, express or implied, with respect to the information the Procurement Documentation contains nor shall any of them be liable for any loss of damage (other than in respect of fraudulent misrepresentation) arising as a result of reliance on such information or any subsequent communication.
- 6.4 The Applicant should form its own conclusions and make its own independent assessment of the Contract requirements and should seek its own financial and legal advice about the methods and resources needed to meet the Customer's requirements.
- 6.5 The Customer and its advisers do not accept responsibility for the Applicants assessment of the requirements of this Procurement.
- 6.6 The Applicant is responsible for obtaining all information required to prepare its Response at its own expense. This exclusion does not apply to the extent of any deceit or fraudulent misrepresentation made by or on behalf of the Customer.

7. CONCLUDING THE CONTRACT

The Applicant undertakes that, in the event of the Response being accepted by the Customer and the Customer confirming in writing such acceptance to the Applicant, the Applicant will execute the Contract as amended to accommodate aspects of the Response within 30 calendar days of being called upon to do so by the Customer.

8. COSTS

- 8.1 The Customer will not reimburse any costs incurred by the Applicant (including the costs or expenses of any Sub-contractors, consortium members or advisors) in connection with preparation and/or submission of a Response, including (without limit) where:
- 8.2 this Procurement is cancelled, shortened or delayed for any reason (including where such action is necessary due to non-compliance or potential non-compliance with procurement rules and Regulations;
- 8.3 all or any part of the Procurement Documentation is at any time amended, clarified, added to or withdrawn for any reason;
- 8.4 a contract for some or all of the services for which Responses are invited is not concluded; or
- 8.5 The Applicant and/or its Response is disqualified from participation in the Procurement for any reason.

9. CONFIDENTIALITY

- 9.1 Subject to the exceptions referred to in paragraph 9.2, the contents of the Procurement Documentation are being made available by the Customer on the condition that the Applicant:
 - 9.1.1 treats the Procurement Documentation (together called the “**Information**”) as confidential at all times, unless it is already in the public domain;
 - 9.1.2 does not disclose, copy, reproduce, distribute or pass any of the Information to any other person at any time or allow any of these things to happen, except where, and to the extent that, the Information has been publicised in accordance paragraph 10 (Freedom of Information) or paragraph 11 (Transparency);
 - 9.1.3 only uses the Information for the purposes of preparing a Response (or deciding whether to respond); and
 - 9.1.4 does not undertake any promotional or similar activity related to the Procurement within any section of the media during the Procurement process.
- 9.2 The Applicant may disclose, distribute or pass any of the Information to its advisers, Sub-contractors, consortium members or to another person provided that:
 - 9.2.1 it is done for the sole purpose of enabling it to submit a Response and the person receiving the Information undertakes in writing to keep the Information confidential on the same terms imposed by these Terms of Participation; or
 - 9.2.2 it obtains the Customer’s prior written consent in relation to such disclosure, distribution or passing of Information; or

- 9.2.3 the disclosure is made for the sole purpose of obtaining legal advice from external lawyers in relation to the Procurement; or
- 9.2.4 the is legally required to make such a disclosure; or
- 9.2.5 the Information has been published in accordance with paragraphs 10 and 11 (Transparency and Freedom of Information). Please note that in certain circumstances not all information will be published as some elements of the Procurement Documents may remain sensitive or confidential.
- 9.3 The Customer may disclose information submitted by the Applicant during the Procurement to its officers, employees, authorities or advisers or other government departments who are stakeholders in this Procurement exercise.
- 9.4 The Customer may disseminate information provided by the Applicant that is materially relevant to the Procurement to other Applicants subject to:
 - 9.4.1 any procedures described in the Procurement Documentation for raising questions and/or clarifications; and
 - 9.4.2 any duty to protect commercial confidentiality in relation to the information contained within a Response (unless such a duty is overridden by a requirement for disclosure under the **FoIA** as per paragraph 10 below, or the UK Government's requirements on transparency as per paragraph 11 below).

10. FREEDOM OF INFORMATION

- 10.1 In accordance with the obligations and duties placed upon public authorities by the FoIA and the EIR and in accordance with any government Code of Practices on the Discharge of the Functions of Public Authorities, all information submitted to the Customer may be disclosed in response to a request for information made pursuant to the FoIA and the EIR.
- 10.2 The Applicant should note that the information disclosed in response to a FoIA or EIR request may include, but is not limited to, the disclosure of its Response (including any attachments or embedded documents) and/or any score or details of the evaluation of a Response.
- 10.3 If the Applicant considers any part of its Response or any other information it submits to be confidential or commercially sensitive, the Applicant should:
 - 10.3.1 clearly identify such information as confidential or commercially sensitive;
 - 10.3.2 explain the potential implications of disclosure of such information; and
 - 10.3.3 provide an estimate of the period of time during which it believes that such information will remain confidential or commercially sensitive.
- 10.4 If the Applicant identifies that part of its Response or other information it submits is confidential or commercially sensitive, the Customer will consider in its sole discretion withholding it from publication. The Applicant should note that, even where information is identified as confidential or commercially sensitive, the Customer may be required to disclose such information in accordance with the FoIA or the EIR.
- 10.5 The Customer is required to form an independent judgement upon whether the information is exempt from disclosure under the FoIA or the EIR and

whether the public interest favours disclosure or not. The Customer cannot guarantee that any information indicated as being “confidential” or “commercially sensitive” by the Applicant will be withheld from publication.

- 10.6 If the Applicant receives a request for information under the FoIA or the EIR during the Procurement process, it should be immediately referred to the Customer.

11. TRANSPARENCY

- 11.1 In accordance with the Government's policy on transparency, the Customer reserves the right to make all or part of the Information (which for the avoidance of doubt includes the Contract) publicly available (subject to any redactions made at the discretion of the Customer by considering and applying relevant exemptions under the FoIA).
- 11.2 A Response will not be published unless such disclosure is required in accordance with paragraphs 10.1 or 11.3.
- 11.3 Applicants should note that the terms of the proposed Contract will permit:
- 11.3.1 the Customer to publish the full text of such Contract concluded with the Applicant.
- 11.4 The Applicant acknowledges and agrees that information contained within its Response may be incorporated by the Customer into any contract awarded to it and as a result, it may be published in accordance with this paragraph 11.

12. INTELLECTUAL PROPERTY RIGHTS

- 12.1 All Procurement Documentation issued in connection with this procurement shall remain the property of the Customer and shall be used by the Potential Provider only for the purposes of this Procurement.
- 12.2 The Applicant grants the Customer an irrevocable, perpetual, non-exclusive licence to copy, amend and reproduce any intellectual property contained within the Response for the purposes of carrying out this Procurement and/or carrying out the Customer's usual business activities. This licence shall also permit the Customer to sublicense the use of the Response to its advisors or Sub-contractors or other Contracting Bodies for the same purposes.

13. NO INDUCEMENT OR INCENTIVE

- 13.1 The Procurement Documentation is issued on the basis that nothing contained in it shall constitute an inducement or incentive nor shall have in any other way persuaded the Applicant to submit a response or enter into the contractual agreement.

14. LAW AND JURISDICTION

- 14.1 Any dispute (including non-contractual disputes or claims) relating to this Procurement shall be governed by and construed in accordance with the laws of England and Wales.
- 14.2 The courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Procurement (including non-contractual disputes or claims).

