

TERMS OF PARTICIPATION

Managed Learning Service

REFERENCE NUMBER

RM3822

ATTACHMENT 6

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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 Potential Provider and the Authority throughout the Procurement. These terms also grant the Authority 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/uksi/2015/102/pdfs/uksi_20150102_en.pdf) and the Public Contracts (Scotland) Regulations 2015;
- “**Response**” means a submission prepared by a Potential Provider in response to a pre-qualification questionnaire or an invitation to tender (as the context requires); and
- “**Procurement Documentation**” means the selection questionnaire and/or the invitation to tender documentation (as the context requires) together with any related documents issued by the Authority 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 Potential Provider 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, subcontractors, consortium members and advisers involved or connected with the Procurement abide by the same.

2.1 Contact during the Procurement exercise and canvassing

The Potential Provider must not directly or indirectly canvass any Minister, officer, public sector employee, member or agent 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 Potential Provider's disqualification from this Procurement.

2.2 Involvement in multiple tenders

If a Potential Provider 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 subcontractor and/or as member of a consortium in a separate Response, then the Authority 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 Potential Providers in the Procurement and/or among Suppliers

who are competing for the award of a Call-off Contract. The Authority may require the Potential Provider to amend or withdraw all or part of the Response in which it is involved if, in the Authority's reasonable opinion, any of the above issues have arisen or may arise.

2.3 Collusive Behaviour

- 2.3.1 A Potential Provider must not (and shall ensure that its directors, employees, subcontractors, 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 Authority (or the relevant Contracting Body) 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 Potential Providers' Response, such as subcontractors, 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 a Potential Provider breaches paragraph 2.3.1, the Authority may (without prejudice to any other criminal or civil remedies available to it) disqualify the Potential Provider from further participation in the Procurement.
- 2.3.3 The Authority may require a Potential Provider to put in place any procedures or undertake any such action(s) that the Authority in its sole discretion considers necessary to prevent or curtail any collusive behaviour.

3. RIGHT TO VERIFY INFORMATION

- 3.1 The Authority may contact (or may require the Potential Provider to contact on its behalf) any of the customers, subcontractors 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 Authority reserves the right to seek third party independent advice or assistance to validate information submitted by a Potential Provider and/or to assist in the Response evaluation process.
- 3.3 The Authority reserves the right to conduct site visits and/or audits at any time during this Procurement process.
- 3.4 The Authority may require the Potential Provider 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 Authority 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 Potential Providers accept and acknowledge that the Authority is not (in accordance with the Regulations) bound to accept any Response or obliged to conclude a Framework Agreement or Call-Off contract with any Potential Provider at all.
- 4.3 If the Authority 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 Authority may exclude and/or disqualify a Response from this Procurement if a Potential Provider fails to provide to the Authority:
 - 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 Authority's query(ies), within any specified timescales;
 - 5.1.5 a compliant Response.
- 5.2 The Authority may exclude a Potential Provider from any participation in this Procurement at any stage, if:
 - 5.2.1 the Potential Provider fails to comply fully with the requirements of this Procurement;
 - 5.2.2 it becomes aware that the Potential Provider has breached these Terms of Participation; or
 - 5.2.3 it becomes aware of a wilful omission or misrepresentation in a Potential Provider's Response.

- 5.3 If the Authority has the right to exclude or disqualify a Potential Provider 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 Potential Provider to participate as a consortium member or subcontractor in another Response; or
 - 5.3.2 completely exclude the Potential Provider from any involvement in this Procurement in its own name or as a subcontractor or consortium member in another Response.
- 5.4 The Authority may exclude a Potential Provider 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 Potential Provider.

6. STATUS OF THE PROCUREMENT DOCUMENTATION

- 6.1 No information contained in the Procurement Documentation or in any communication made between the Authority and the Potential Provider in connection with the Procurement shall be relied upon as constituting a contract, agreement or representation that any contract shall be offered in accordance with the Response or at all.
- 6.2 The Authority 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 Potential Providers or their representatives, agents or advisers in respect of this Procurement; or
 - 6.2.3 any other communications between Potential Providers, the Authority and/or any relevant Contracting Body (whether directly or by their agents 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 Authority nor its advisers, directors, offices, members, employees or other staff or agents:
- 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 Potential Provider should form its own conclusions and make its own independent assessment of the Framework Agreement and Call-Off Contract requirements and should seek its own financial and legal advice about the methods and resources needed to meet the Authority's requirements.
- 6.5 The Authority and its advisers do not accept responsibility for the Potential Providers' assessment of the requirements of this Procurement.
- 6.6 The Potential Provider 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 Authority.

7. CONCLUDING THE FRAMEWORK AGREEMENT

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

8. COSTS

- 8.1 The Authority will not reimburse any costs incurred by a Potential Provider (including the costs or expenses of any subcontractors, 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 a Potential Provider 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 Authority on the condition that the Potential Provider:
 - 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 A Potential Provider may disclose, distribute or pass any of the Information to its advisers, subcontractors, 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 Authority'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 Potential Provider is legally required to make such a disclosure; or
 - 9.2.5 the Information has been published in accordance with paragraphs 10 and 11 (Freedom of Information and Transparency respectively). 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 Authority may disclose information submitted by Potential Providers during the Procurement to its officers, employees, agents or advisers or other government departments who are stakeholders in this Procurement exercise.
- 9.4 The Authority may disseminate information provided by a Potential Provider that is materially relevant to the Procurement to other Potential Providers 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 Authority may be disclosed in response to a request for information made pursuant to the FoIA and the EIR.
- 10.2 The Potential Providers 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 Potential Provider considers any part of its Response or any other information it submits to be confidential or commercially sensitive, the Potential Provider 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 Potential Provider identifies that part of its Response or other information it submits is confidential or commercially sensitive, the Authority will consider in its sole discretion withholding it from publication. The Potential Providers should note that, even where information is identified as

confidential or commercially sensitive, the Authority may be required to disclose such information in accordance with the FoIA or the EIR.

- 10.5 The Authority 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 Authority cannot guarantee that any information indicated as being “confidential” or “commercially sensitive” by the Potential Provider will be withheld from publication.
- 10.6 If the Potential Provider receives a request for information under the FoIA or the EIR during the Procurement process, it should be immediately referred to the Authority.

11. TRANSPARENCY

- 11.1 In accordance with the Government's policy on transparency, the Authority reserves the right to make all or part of the Information (which for the avoidance of doubt includes the Framework Agreement and Call-Off Contract) publicly available (subject to any redactions made at the discretion of the Authority 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 Potential Providers should note that the terms of the proposed Framework Agreement and Call-Off Contract will permit:
 - 11.3.1 the Authority to publish the full text of such Framework Agreement concluded with the Potential Provider; and
 - 11.3.2 a Contracting Body (awarding a Call-Off Contract under the Framework Agreement) to publish the full text of the Call-Off Contract concluded with the Potential Provider, after considering (at the Authority's or the Contracting Body's sole discretion) any representations made by the Potential Provider regarding the application of any relevant FoIA or EIR exemptions.
- 11.4 The Potential Provider acknowledges and agrees that information contained within its Response may be incorporated by the Authority into any contract awarded to it and as a result, it may be published in accordance with this paragraph 11.

12. INTELLECTUAL PROPERTY RIGHTS (IPR)

- 12.1 All Procurement Documentation issued in connection with this procurement shall remain the property of the Authority and shall be used by the Potential Provider only for the purposes of this Procurement.
- 12.2 The Potential Providers grant the Authority 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 Authority's usual business activities. This licence shall also permit the Authority to sublicense the use of the Response to its advisors or subcontractors or other Contracting Bodies for the same purposes.

13. NO INDUCEMENT OR INCENTIVE

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

a Potential Provider to submit a response or enter into the Framework Agreement or any other 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).