



Crown  
Commercial  
Service

## **TERMS OF PARTICIPATION**

### **DEMAND SIDE RESPONSE SERVICES**

#### **REFERENCE NUMBER**

**RM 3792**

#### **ATTACHMENT 6**

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## **1. INTRODUCTION**

- 1.1 These Terms of Participation should be read in conjunction with the Invitation to Tender descriptive document (Attachment 1) and Declaration of Compliance (Attachment 7).
- 1.2 These Terms of Participation set out the conditions of participation in this Procurement, including:
  - 1.2.1 rules in relation to the conduct of Potential Providers; and
  - 1.2.2 specific rights of the Authority and limits to the Authority's liability,which apply throughout this Procurement.

## **2. INTERPRETATION**

- 2.1 Except where specified or the context requires, capitalised expressions in these Terms of Participation shall have the meaning given to them in the glossary to the Invitation to Tender descriptive document (Attachment 1). In these Terms of Participation any reference to 'person' includes, but is not limited to, any person, firm, body or association, corporate or incorporate.

## **3. CONDUCT - GENERAL**

- 3.1 The Potential Provider shall abide by these Terms of Participation and any instructions given in the Invitation to Tender.
- 3.2 An obligation on the Potential Provider to do, or to refrain from doing, any act or thing under the Invitation to Tender including these Terms of Participation shall include an obligation upon the Potential Provider to procure that all its directors, office holders, staff, members of its Group of Economic Operators (if it acts as Lead Contact), companies within its Group, Sub-Contractors, advisers or Authorities involved or connected with this Procurement also do, or refrain from doing, such act or thing.

## **4. CONDUCT - SPECIFIC OBLIGATIONS**

- 4.1 Contact during this Procurement exercise and canvassing
  - 4.1.1 The Potential Provider must not directly or indirectly canvass any Minister, officer, public sector employee, member or Authority regarding this Procurement or attempt to obtain any information from the same regarding this Procurement (except where and as permitted by the Invitation to Tender). Any attempt by the Potential Provider to do so may result in the Potential Provider's disqualification from this Procurement.
- 4.2 Involvement in multiple tenders
  - 4.2.1 If a Potential Provider is connected with the submission of multiple tenders for the same requirement or Lot (as applicable), including (without limit) where:
    - 4.2.1.1 it submits a Tender in its own name and as a Sub-Contractor and/or a member of a Group of Economic Operators connected with a separate tender or
    - 4.2.1.2 it submits a Tender in its own name which is similar to a separate tender from another Potential Provider within its Group,then the Authority retains the right to make further enquiries regarding each tender 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 this 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 its Tender if, in the Authority's reasonable opinion and at its sole discretion, any of the above issues have arisen or may arise.

#### 4.3 Collusive Behaviour

##### 4.3.1 A Potential Provider must not:

4.3.1.1 fix or adjust any element of its Tender by agreement or arrangement with any other person, except where, but subject always to paragraph 4.2, such prohibited acts are undertaken with persons who are also participants in the Potential Providers' Tender, such as members of its Group of Economic Operators (if it acts as a Lead Contact), companies within its Group or Sub-Contractors, or where disclosure to such person is made in confidence in order to obtain quotations necessary for the preparation of its Tender or obtain any necessary security;

4.3.1.2 communicate with any person other than the Authority the value, price or rates set out in its Tender or information which would enable the precise or approximate value, price or rates to be calculated by any other person, except where such communication is undertaken with persons who are also participants in the Potential Providers' Tender, such as members of its Group of Economic Operators (if it acts as a Lead Contact), companies within its Group or Sub-Contractors, or where disclosure to such person is made in confidence in order to obtain quotations necessary for the preparation of its Tender or obtain any necessary security;

4.3.1.3 enter into any agreement or arrangement with any other person, so that person refrains from submitting a tender;

4.3.1.4 share, permit or disclose to another person, access to any information relating to its Tender (or another tender to which it is party); or

4.3.1.5 offer or agree to pay or give or do 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 its Tender, any other tender or proposed tender, any act or omission.

4.3.2 If a Potential Provider breaches paragraph 4.3.1, the Authority may (without prejudice to any other criminal or civil remedies available to it) exclude the Potential Provider from further participation in this Procurement.

4.3.3 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.

#### 5. RIGHT TO VERIFY INFORMATION

5.1 The Authority may contact (or may require the Potential Provider to contact on its behalf) any of the Potential Provider's customers, members of its Group of Economic Operators (if it acts as Lead Contact), Sub-Contractors or other third parties to whom information relates in the Potential Provider's Tender, to ask that they testify that such information is accurate and true.

- 5.2 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 tender evaluation process.
- 5.3 The Authority reserves the right to conduct site visits of any premises indicated by the Potential Provider to be used in connection with the Potential Provider's provision of the Goods and Services and/or audits at any time during this Procurement.
- 5.4 The Authority may require the Potential Provider to clarify aspects of its Tender in writing and/or provide additional information. Failure to respond adequately may result in the rejection of the Potential Provider's Tender and its elimination from further participation in all or part of this Procurement.

## **6. RIGHT TO CANCEL OR VARY THIS PROCUREMENT**

- 6.1 The Authority reserves the right, subject to the rules set out in the Regulations, to:
  - 6.1.1 change the basis of or the procedures for this Procurement at any time;
  - 6.1.2 amend, clarify, add to or withdraw all or any part of the Invitation to Tender at any time during this Procurement, including varying any timetable or deadlines set out in the Invitation to Tender; and
  - 6.1.3 cancel all or part of this Procurement at any stage at any time, including for the reason stated in paragraph 6.3 below; and
  - 6.1.4 not conclude a Framework Agreement or award a contract for some or all of the Goods and Services for which tenders are invited; and
- 6.2 Potential Providers accept and acknowledge that, and in accordance with the Regulations, the Authority is not bound to accept any Tender or obliged to conclude a Framework Agreement or award a contract with any Potential Provider at all.
- 6.3 If the Authority deems that none of the tenders received in response to the Invitation to Tender are satisfactory, it reserves the right to terminate all or part of this Procurement.

## **7. RIGHT TO EXCLUDE**

- 7.1 The Authority may exclude a Potential Provider's Tender from this Procurement if the Potential Provider fails to provide to the Authority:
  - 7.1.1 any information requested;
  - 7.1.2 a full and satisfactory response to any question or information request;
  - 7.1.3 a Tender, or response to the Authority's queries, within any specified timescales; and/or
  - 7.1.4 documentation referred to in its Tender.
- 7.2 The Authority may exclude a Potential Provider from any participation in this Procurement at any stage, if the Potential Provider:
  - 7.2.1 fails to comply fully with the requirements of this Procurement as set out in the Invitation to Tender;
  - 7.2.2 has breached these Terms of Participation; or
  - 7.2.3 has committed a wilful omission or misrepresentation in its Tender.
- 7.3 If the Authority has the right to exclude a Potential Provider under these Terms of Participation or the Invitation to Tender it may (in its sole discretion):

- 7.3.1 exclude the affected Tender but allow the Potential Provider to participate as member of a Group of Economic Operators or Sub-Contractor in another Tender; or
  - 7.3.2 completely exclude the Potential Provider from any involvement in this Procurement in its own name, or as member of a Group of Economic Operators or Sub-Contractor in another Tender.
- 7.4 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 award process, which would affect or would have affected the Authority's evaluation of the Potential Provider's Tender in accordance with the Regulations.

## **8. STATUS OF THE INVITATION TO TENDER**

- 8.1 No information contained in the Invitation to Tender or in any communication made between the Authority and a Potential Provider in connection with this Procurement shall be relied upon as constituting agreement or representation that a Framework Agreement shall be concluded or any contract be entered into in accordance with the Potential Provider's Tender or at all.
- 8.2 The Authority shall not be committed to any course of action as a result of:
- 8.2.1 issuing the Invitation to Tender relating to this Procurement;
  - 8.2.2 any communications with Potential Providers or their representatives, Authority's or advisers in respect of this Procurement; and/or
  - 8.2.3 any communications between Potential Providers, the Authority and/or any relevant Contracting Authority and any other party (whether directly or through their Authorities or representatives) in respect of this Procurement.
- 8.3 The Invitation to Tender have been prepared in good faith but do not purport to be a comprehensive statement of all matters relevant to this Procurement nor has it been independently verified. Neither the Authority nor its advisers, directors, officers, members, employees or other staff or Authorities:
- 8.3.1 accept any liability or responsibility for the adequacy, accuracy or completeness of the Invitation to Tender,
  - 8.3.2 make any representation or warranty, express or implied, with respect to the information the Invitation to Tender contains nor shall any of them be liable for any loss of damage arising as a result of reliance on such information or any subsequent communication.
- 8.4 The Potential Provider shall form its own conclusions and make its own independent assessment of the requirements of the terms and conditions of the draft Framework Agreement (Attachment 4) and Call Off Contract (Attachment 5) and should seek its own financial and legal advice about the methods and resources needed to meet the Authority's requirements.
- 8.5 The Authority does not accept responsibility for the Potential Providers' assessment of the requirements of this Procurement.
- 8.6 The Potential Provider is responsible at its own expense, for obtaining all information required to prepare its Tender.
- 8.7 Any exclusions of liability of the Authority in this paragraph 8 do not apply to the extent of any deceit or fraudulent misrepresentation made by or on behalf of the Authority.

## 9. CONCLUDING THE FRAMEWORK AGREEMENT

- 9.1 The Potential Provider undertakes that, in the event of a Potential Provider's Tender being accepted by the Authority and the Authority confirming in writing such acceptance to the Potential Provider, the Potential Provider shall execute the Framework Agreement as amended to accommodate aspects of the Tender within seven (7) calendar days, (or any other longer period of time as determined by the Authority at its sole discretion) of being called upon to do so by the Authority.

## 10. COSTS

- 10.1 The Authority will not reimburse any costs incurred by a Potential Provider (including the costs or expenses of any members of its Group of Economic Operators (if acting as a Lead Contact), Sub-Contractors or advisors) in connection with the preparation and/or submission of the Potential Provider's Tender, including (without limit) where:
- 10.1.1 this Procurement is cancelled, shortened or delayed for any reason (including, without limitation, where such action is necessary due to non-compliance or potential non-compliance with the law, including the Regulations);
  - 10.1.2 all or any part of the Invitation to Tender is at any time amended, clarified, added to or withdrawn for any reason;
  - 10.1.3 a Framework Agreement is not concluded or a contract is not awarded in respect of some or all of the Goods and Services for which tenders are invited; or
  - 10.1.4 the Potential Provider and/or its Tender is disqualified from participation in this Procurement for any reason, including breach of these Terms of Participation.

## 11. CONFIDENTIALITY

- 11.1 Subject to the exceptions referred to in paragraph 11.2, the contents of the Invitation to Tender are being made available by the Authority on the conditions that the Potential Provider:
- 11.1.1 treats the Invitation to Tender (the "**Information**") as confidential at all times, unless the Information is already in the public domain;
  - 11.1.2 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 with paragraph 12 (Freedom of Information) or paragraph 13 (Transparency);
  - 11.1.3 only uses the Information for the purposes of preparing a Tender (or deciding whether to respond); and
  - 11.1.4 does not undertake any promotional or similar activity related to this Procurement within any section of the media during this Procurement.
- 11.2 A Potential Provider may disclose, distribute or pass any of the Information to its members of its Group of Economic Operators (if acting as a Lead Contact), Sub-Contractors, advisers or to any other person provided that:
- 11.2.1 this is done for the sole purpose of enabling the Potential Provider to submit its Tender and the person receiving the Information undertakes in writing (such written undertaking to be made available to the Authority on the Authority's request) to keep the Information confidential on the same terms imposed by these Terms of Participation; or

- 11.2.2 it obtains the Authority's prior written consent in relation to such disclosure, distribution or passing of Information; or
  - 11.2.3 the disclosure is made for the sole purpose of obtaining legal advice from external lawyers in relation to this Procurement; or
  - 11.2.4 the Potential Provider is legally required to make such a disclosure; or
  - 11.2.5 the Information has been published in accordance with paragraph 12 (Freedom of Information) and paragraph 13 (Transparency).
- 11.3 The Authority may disclose information submitted by Potential Providers during this Procurement to its officers, employees, Authorities or advisers or other government departments who are stakeholders in this Procurement.
- 11.4 All Central Government Departments and their Executive Agencies and Non Departmental Public Bodies are subject to control and reporting within Government. In particular, they report to the Cabinet Office and HM Treasury for all expenditure. Further, the Cabinet Office has a cross Government role delivering overall Government Policy on public procurement – including ensuring value for money and related aspects of good procurement practice.
- 11.5 For these purposes, the Authority may disclose within HM Government any of the Potential Provider's documentation or information (including any that the Potential Provider considers to be confidential and/or commercially sensitive such as specific information in its Tender) submitted by the Potential Provider to the Authority during this Procurement. Potential Providers taking part in this competition consent to such disclosure as part of their participation in the competition process.

## **12. FREEDOM OF INFORMATION**

- 12.1 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 Practice on the discharge of public authorities' functions under the FoIA (as defined in the glossary in paragraph 17 of these Terms of Participation), all information submitted to the Authority may be disclosed under a request for information made pursuant to the FoIA and the EIR (as defined in the glossary in paragraph 17 of these Terms of Participation).
- 12.2 A Potential Provider should note that the information disclosed pursuant to a FoIA or EIR request may include, but is not limited to, the disclosure of its Tender (including any attachments or embedded documents) and/or any score or details of the evaluation of its Tender.
- 12.3 If the Potential Provider considers any part of its Tender or any other information it submits to be confidential or commercially sensitive, the Potential Provider should:
- 12.3.1 clearly identify such information as confidential or commercially sensitive;
  - 12.3.2 explain the potential implications of disclosure of such information taking into account and specifically addressing the public interest test as set out in the FoIA; and
  - 12.3.3 provide an estimate of the period of time during which it believes that such information will remain confidential or commercially sensitive.
- 12.4 If the Potential Provider identifies that part of its Tender or other information it submits is confidential or commercially sensitive, the Authority in its sole discretion will consider whether or not to withhold such information 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.

- 12.5 The Authority is required to form an independent judgement of whether the Potential Provider's information referred to in paragraph 12.4 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.
- 12.6 If the Potential Provider receives a request for information under the FoIA or the EIR during and in relation to this Procurement, it should be immediately referred to the Authority.

### **13. TRANSPARENCY**

- 13.1 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 draft Framework Agreement in Attachment 4 and Call Off Contract in Attachment 5) publicly available (subject to any redactions made at the discretion of the Authority by considering and applying relevant exemptions under the FoIA).
- 13.2 A Tender will not be published unless such disclosure is required in accordance with paragraph 12 or paragraph 13.
- 13.3 Potential Providers should note that the terms of the proposed Framework Agreement and Call-Off Contract will permit:
- 13.3.1 the Authority to publish the full text of such Framework Agreement concluded with the Potential Provider; and
  - 13.3.2 a Contracting Authorities (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 Authorities sole discretion respectively) any representations made by the Potential Provider regarding the application of any relevant FoIA or EIR exemptions.

- 13.4 The Potential Provider acknowledges and agrees that information contained within its Tender may be incorporated by the Authority into any contract awarded to or any Framework Agreement concluded with or contract awarded to the Potential Provider and as a result, it may be published in accordance with this paragraph 13.

### **14. INTELLECTUAL PROPERTY RIGHTS**

- 14.1 The Invitation to Tender 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.
- 14.2 The Potential Provider grants the Authority an irrevocable, perpetual, non-exclusive licence to copy, amend and reproduce any intellectual property contained within its Tender for the purposes of carrying out this Procurement; complying with the law and/or any government guidance; and/or carrying out the Authority's business activities. This licence shall also permit the Authority to sublicense the use of the Potential Provider's Tender to its advisers or sub-contractors or other Contracting Authorities for the same purposes.

**15. NO INDUCEMENT OR INCENTIVE**

The Potential Provider acknowledges and agrees that nothing contained within the Invitation to Tender shall constitute an inducement or incentive nor shall have in any other way persuaded a Potential Provider to submit a Tender or enter into the Framework Agreement or any other contractual agreement.

**16. LAW AND JURISDICTION**

16.1 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.

16.2 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).

**17. GLOSSARY**

FoIA	means the Freedom of Information Act 2000 as amended and any subordinate legislation made thereunder 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;