

## APPENDIX B – TERMS OF PARTICIPATION

### 1. DEFINITIONS AND INTERPRETATION

- 1.1 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 Invitation to Tender 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;

**“Invitation to Tender Documentation”** means the Invitation to Tender including Appendices A, B, C and D thereto, and all other documents issued or to be issued by The National Archives (TNA) in connection with the Procurement Process, including online documentation made available via TNA’s online data room;

**“Tender Response”** means a Tender Response at Stage 1 or Stage 2 of the Procurement Process;

**“Service”** means the Service to be provided pursuant to the proposed UK Government Web Archive (UKGWA) Contract.

- 1.2 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. INSTRUCTIONS

- 2.1 Potential Suppliers should read carefully all of the documentation provided before completing their Stage 1 and/or Stage 2 Tender Responses. Failure to comply with these requirements for completion and submission of Tender Responses may result in Tender Responses not being taken forward further. Potential Suppliers are advised to fully acquaint themselves with the extent and nature of the Contractual obligations under which the Service is to be provided. These instructions and information, and this appendix, constitute conditions which will apply to Potential Suppliers’ participation in the Procurement Process. Participation in the Procurement Process will be deemed to constitute the Potential Supplier’s acceptance of these conditions.
- 2.2 The Potential Supplier’s employees who are involved in this Procurement Process shall not knowingly make contact with any employee, agent or consultant of TNA who is in any way connected with this Procurement Process during the period of this Procurement Process, except as set out in this documentation or as instructed otherwise by TNA.
- 2.3 TNA is not bound to enter into any Contract as a result of this Procurement Process.
- 2.4 The information contained in this documentation and any related documents, together with all subsequent information disclosed to Potential Suppliers by TNA in relation to this Procurement Process, is provided on a commercial-in-confidence basis. It falls within the scope of this written confidentiality agreement made with TNA.

### **3. TERMS OF PARTICIPATION**

- 3.1 These Terms of Participation should be read in conjunction with the Invitation to Tender documentation which Potential Suppliers have received.
- 3.2 These Terms of Participation regulate the conduct of the Potential Supplier and TNA throughout the Procurement Process. These terms also grant TNA specific rights and limit its liability.

### **4. CONDUCT**

The Potential Supplier agrees to abide by these Terms of Participation and any instructions given in the Invitation to Tender documentation and agrees to ensure that any of its directors, office holders, staff, Suppliers, sub-suppliers, consortium members and advisers involved or connected with the Procurement Process abide by the same.

#### **4.1 Contact during the Procurement Process for the UKGWA Service Contract and canvassing**

The Potential Supplier must not directly or indirectly canvass any Minister, officer, public sector employee, member or agent regarding the Procurement Process or attempt to procure any information from the same regarding the Procurement Process (except where permitted by the Invitation to Tender Documentation). Any attempt to do so may result in the Potential Supplier's disqualification from the Procurement Process.

#### **4.2 Involvement in multiple tenders**

If a Potential Supplier is connected with the submission of multiple Tender Responses including (without limit) where it submits a Tender Response in its own name and as a sub-supplier and/or as member of a consortium in a separate Tender Response, then TNA retains the right to make further enquiries regarding each Tender 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 Suppliers in the Procurement Process. TNA may require the Potential Supplier to amend or withdraw all or part of the Tender Response in which it is involved if, in TNA's reasonable opinion, any of the above issues have arisen or may arise.

#### **4.3 Collusive Behaviour**

- 4.3.1 A Potential Supplier must not (and shall ensure that its directors, employees, sub-suppliers, consortium members, advisors or companies within its group do not):
  - 4.3.1.1 fix or adjust any element of the Tender Response by agreement or arrangement with any other person;
  - 4.3.1.2 communicate with any person other than TNA the value, price or rates set out in the Tender Response or information which would enable the precise or approximate value, price or rates to be calculated by any other person;
  - 4.3.1.3 enter into any agreement or arrangement with any other person, so that person refrains from submitting a Tender Response;

- 4.3.1.4 share, permit or disclose to another person, any information relating to the Tender Response (or another Tender Response to which it is party) with any other person; or
  - 4.3.1.5 pay or give (or offer or agree to 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 Tender Response any other Tender Response or proposed Tender Response, any act or omission, except where such prohibited acts are undertaken with persons who are also participants in the Potential Supplier's Tender Response, such as sub-suppliers, 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 Tender Response or obtain any necessary security.
- 4.3.2 If a Potential Supplier breaches paragraph 4.3.1, TNA may (without prejudice to any other criminal or civil remedies available to it) disqualify the Potential Supplier from further participation in the Procurement Process.
- 4.3.3 TNA may require a Potential Supplier to put in place any procedures or undertake any such action(s) that TNA in its sole discretion considers necessary to prevent or curtail any collusive behaviour.

## **5. RIGHT TO VERIFY INFORMATION**

- 5.1 TNA may contact (or may require the Potential Supplier to contact on its behalf) any of the customers, sub-suppliers or consortium members to whom information relates in a Tender Response, to ask that they testify that the information is accurate and true.
- 5.2 TNA reserves the right to seek third party independent advice or assistance to validate information submitted by a Potential Supplier and/or to assist in the Tender Response evaluation process.
- 5.3 TNA reserves the right to conduct site visits and/or audits at any time during this Procurement Process.
- 5.4 TNA may require the Potential Supplier to clarify aspects of its Tender Response in writing and/or provide additional information. Failure to respond adequately may result in the rejection of the Tender Response and elimination from further participation in all or part of the Procurement Process.

## **6. RIGHT TO CANCEL OR VARY THE TENDER PROCESS**

- 6.1 TNA reserves the right, subject to the principles in the Treaty for the Functioning of the European Union:
  - 6.1.1 to, without notice, change the basis of or the procedures for the Procurement Process at any time;
  - 6.1.2 to amend, clarify, add to or withdraw all or any part of the Invitation to Tender documentation at any time during the Procurement Process;
  - 6.1.3 to vary any timetable or deadlines set out in the Invitation to Tender documentation;

- 6.1.4 not to conclude a Contract for some or all of the Services for which Tender Responses are invited; and
  - 6.1.5 to cancel all or part of the Procurement Process at any stage at any time.
- 6.2 Potential Suppliers accept and acknowledge that TNA is not (in accordance with the Regulations) bound to accept any Tender Response or obliged to conclude a Contract with any Potential Supplier at all.
- 6.3 If TNA deems that none of the Tender Responses are satisfactory, it reserves the right to terminate all or part of the Procurement Process.
- 7. RIGHT TO DISQUALIFY OR EXCLUDE**
- 7.1 TNA may exclude and/or disqualify a Tender Response from the Procurement Process if a Potential Supplier fails to provide to TNA:
  - 7.1.1 the information requested;
  - 7.1.2 a full and satisfactory Tender Response to any question;
  - 7.1.3 documentation referred to in a Tender Response;
  - 7.1.4 a Tender Response, or respond to the TNA's query(ies), within any specified timescales;
  - 7.1.5 a compliant Tender Response.
- 7.2 TNA may exclude a Potential Supplier from any participation in the Procurement Process at any stage, if:
  - 7.2.1 the Potential Supplier fails to comply fully with the requirements of the Procurement Process;
  - 7.2.2 it becomes aware that the Potential Supplier has breached these Terms of Participation; or
  - 7.2.3 it becomes aware of a wilful omission or misrepresentation in a Potential Supplier's Tender Response.
- 7.3 If TNA has the right to exclude or disqualify a Potential Supplier under these Terms of Participation or any Invitation to Tender Documentation it may (in its sole discretion):
  - 7.3.1 disqualify only the affected Tender Response and allow the Potential Supplier to participate as a consortium member or sub-supplier in another Tender Response; or
  - 7.3.2 completely exclude the Potential Supplier from any involvement in the Procurement Process in its own name or as a sub-supplier or consortium member in another Tender Response.
- 7.4 TNA may exclude a Potential Supplier from participation in the Procurement Process where there is a change in identity, control, financial standing or other factor impacting on the selection and/or evaluation process affecting the Potential Supplier.

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

- 8.1 No information contained in the Invitation to Tender Documentation or in any communication made between TNA and the Potential Supplier in connection with the Procurement Process shall be relied upon as constituting a Contract, agreement or representation that any Contract shall be offered in accordance with the Tender Response or at all.
- 8.2 TNA shall not be committed to any course of action as a result of:
- 8.2.1 issuing any Invitation to Tender Documentation;
  - 8.2.2 communicating with Potential Suppliers or their representatives, agents or advisers in respect of the Procurement Process; or
  - 8.2.3 any other communications between Potential Suppliers, TNA (whether directly or by their agents or representatives) and any other party in respect of this Procurement Process.
- 8.3 The Invitation to Tender Documentation and any references have been prepared in good faith but do not purport to be a comprehensive statement of all matters relevant to the Procurement Process nor has it been independently verified. Neither TNA nor its advisers, directors, officers, members, employees or other staff or agents:
- 8.3.1 accept any liability or responsibility for the adequacy, accuracy or completeness of the Invitation to Tender Documentation,
  - 8.3.2 make any representation or warranty, express or implied, with respect to the information the Invitation to Tender 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.
- 8.4 The Potential Supplier should form its own conclusions and make its own independent assessment of TNA's requirements and should seek its own professional financial and legal advice about the methods and resources needed to meet them.
- 8.5 TNA and its advisers do not accept responsibility for the Potential Suppliers' assessment of the requirements of the Procurement Process.
- 8.6 The Potential Supplier is responsible for obtaining all information required to prepare its Tender 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 TNA.

## **9. COSTS**

TNA will not reimburse any costs incurred by a Potential Supplier (including the costs or expenses of any sub-suppliers, consortium members or advisors) in connection with preparation and/or submission of a Tender Response, including (without limit) where:

- 9.1 the Procurement Process is cancelled, shortened or delayed for any reason;
- 9.2 all or any part of the Invitation to Tender Documentation is at any time amended, clarified, added to or withdrawn for any reason;

- 9.3 a Contract for some or all of Services for which Tender Responses are invited is not concluded; or
- 9.4 a Potential Supplier and/or its Tender Response is disqualified from participation in the Procurement Process for any reason.

## **10. CONFIDENTIALITY**

- 10.1 Subject to the exceptions referred to in paragraph 10.1.4, the contents of the Invitation to Tender Documentation are being made available by TNA on the condition that the Potential Supplier:
  - 10.1.1 treats the Invitation to Tender Documentation as confidential at all times, unless it is already in the public domain;
  - 10.1.2 does not disclose, copy, reproduce, distribute or pass any of the Invitation to Tender Documentation to any other person at any time or allow any of these things to happen, except where, and to the extent that, it has been publicised in accordance paragraph 11 (Freedom of Information) or paragraph 12 (Transparency) ;
  - 10.1.3 only uses the Invitation to Tender Documentation for the purposes of preparing a Tender Response (or deciding whether to respond); and
  - 10.1.4 does not undertake any promotional or similar activity related to the Procurement Process within any section of the media during the Procurement Process. A Potential Supplier may disclose, distribute or pass any of the Invitation to Tender Documentation to its advisers, sub-suppliers, consortium members or to another person provided that:
    - 10.1.4.1 it is done for the sole purpose of enabling it to submit a Tender Response and the person receiving the Invitation to Tender Documentation undertakes in writing to keep it confidential on the same terms imposed by these Terms of Participation; or
    - 10.1.4.2 it obtains TNA's prior written consent in relation to such disclosure, distribution or passing of Information; or
    - 10.1.4.3 the disclosure is made for the sole purpose of obtaining legal advice from external lawyers in relation to the Procurement Process; or
    - 10.1.4.4 the Potential Supplier is legally required to make such a disclosure; or
    - 10.1.4.5 the Invitation to Tender Documentation has been published in accordance with paragraphs 11 and 12 (Transparency and Freedom of Information). Please note that in certain circumstances not all the Invitation to Tender Documentation will be published as some elements of it may remain sensitive or confidential.
- 10.2 TNA may disclose information submitted by Potential Suppliers during the Procurement Process to its officers, employees, agents or advisers, or other government departments who are stakeholders in this Procurement Process.

- 10.3 TNA may disseminate information provided by a Potential Supplier that is materially relevant to the Procurement Process to other Potential Suppliers subject to:
- 10.3.1 any procedures described in the Invitation to Tender Documentation for raising questions and/or clarifications; and
  - 10.3.2 any duty to protect commercial confidentiality in relation to the information contained within a Tender Response (unless such a duty is overridden by a requirement for disclosure under the **FoIA** as per paragraph 11 below, and the UK Government's requirements on transparency as per paragraph 12 below).

## **11. FREEDOM OF INFORMATION**

- 11.1 In accordance with the obligations and duties placed upon public authorities by the FoIA and in accordance with any government Code of Practices on the Discharge of the Functions of Public Authorities, all information submitted to TNA may be disclosed in response to a request for information made pursuant to the FoIA and the EIR.
- 11.2 Potential Suppliers 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 Tender Response (including any attachments or embedded documents) and/or any score or details of the evaluation of a Tender Response.
- 11.3 If a Potential Supplier considers any part of its Tender Response or any other information it submits to be confidential or commercially sensitive, the Potential Supplier should:
- 11.3.1 clearly identify such information as confidential or commercially sensitive;
  - 11.3.2 explain the potential implications of disclosure of such information; and
  - 11.3.3 provide an estimate of the period of time during which it believes that such information will remain confidential or commercially sensitive.
- 11.4 If a Potential Supplier identifies that part of its Tender Response or other information it submits is confidential or commercially sensitive, TNA will consider in its sole discretion withholding it from publication. Potential Suppliers should note that, even where information is identified as confidential or commercially sensitive, TNA may be required to disclose such information in accordance with the FoIA or the EIR.
- 11.5 TNA 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. TNA cannot guarantee that any information indicated as being "confidential" or "commercially sensitive" by a Potential Supplier will be withheld from publication.
- 11.6 If a Potential Supplier receives a request for information under the FoIA or the EIR during the Procurement Process, it should be immediately referred to the TNA.

## **12. TRANSPARENCY**

- 12.1 In accordance with the Government's policy on transparency, TNA reserves the right to make all or part of the Information publicly available (subject to any redactions

made at the discretion of TNA by considering and applying relevant exemptions under the FoIA).

- 12.2 A Tender Response will not be published unless such disclosure is required in accordance with paragraphs 11 or 12.
- 12.3 Potential Suppliers should note that the terms of the proposed Contract will permit TNA to publish the full text of such Contract after considering (at the TNA's sole discretion) any representations made by the Potential Supplier with whom the Contract has been entered into regarding the application of any relevant FoIA or EIR exemptions.
- 12.4 The Potential Supplier acknowledges and agrees that information contained within its Tender Response may be incorporated by the TNA into any Contract awarded to it and as a result, it may be published in accordance with this paragraph 12.

### **13. INTELLECTUAL PROPERTY RIGHTS**

- 13.1 All Invitation to Tender Documentation shall remain the property of TNA and shall be used by the Potential Supplier only for the purposes of the Procurement Process.
- 13.2 Potential Suppliers grant TNA an irrevocable, perpetual, non-exclusive licence to copy, amend and reproduce any intellectual property contained within the Tender Response for the purposes of carrying out the Procurement Process. This licence shall also permit TNA to sublicense the use of the Tender Response to its advisors or sub-suppliers for the same purposes.

### **14. NO INDUCEMENT OR INCENTIVE**

- 14.1 The Invitation to Tender 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 Supplier to submit a Tender Response.

### **15. CONSORTIUM PROPOSALS**

- 15.1 If a group of persons wish to act jointly to provide the UKGWA Service they may do so:
  - 15.1.1 with all parties signing the resultant Contract and assuming joint and several responsibility for performance of the Contract. However, TNA may require the consortium to form a single legal entity for the purpose of concluding the Contract; or
  - 15.1.2 using a separate entity (often referred to as a special purpose vehicle or "SPV") who will ultimately enter into a Contract with TNA. If the SPV does not yet exist or has a limited trading history it is likely that TNA will require the consortium members to nominate a guarantor for the SPV's performance of the Contract.
- 15.2 The consortium must nominate one of its members to lead the bidding process. If the SPV exists, then the SPV should lead and complete the Tender Response in its name and 'voice'. If the SPV does not yet exist or the consortium plans to collaborate on a joint and several basis, then it should nominate a lead consortium member. The lead member will be treated as the Potential Supplier by TNA for the purposes of the Procurement Process and to communicate with the consortium.



- 15.3 Where the Potential Supplier relies on one or more consortium members in its Tender Response to demonstrate the consortium's ability to provide the Service in accordance with the requirements of the Procurement Process, it must inform TNA in its Tender Response.
- 15.4 A Potential Supplier's Tender Response must clearly identify in response to any question, when it is relying on another consortium member, the name of the particular consortium member and explain the consortium member's role as the context of the question requires.

**16. LAW AND JURISDICTION**

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