

## Legal Comments –

On the 1<sup>st</sup> April 2020 Nottingham City Council, together with Nottingham Revenues and Benefits Ltd ( a Teckal Company of the Council) entered into a call-off contract (“the Contract”) for enforcement agency services with Bristow & Sutor, Equita and Marstons Recovery (Formally Rossendales) (“**the Providers**”), following a min-competition utilising the YPO Dynamic Purchasing System (DPS) ref 953.

The Contract was extended in accordance with its provisions and was due to expire on the 31<sup>st</sup> March 2024, which coincided with the expiry of the existing YPO Dynamic Purchasing System. It is understood that following this date and because of continuing operational requirements of the Council the contracts continued through the parties conduct in that the services continued to be provided to the Council by the providers.

It should be noted that during the life of the existing contract, the Teckal company, Nottingham Revenues and Benefits Ltd’s functions were transferred back in-house to the Council, such that existing contractual rights and obligation of NRB Ltd under the contract were transferred to the Council, leaving the Council and the existing providers as the remaining parties to the contract and any future variations.

A further extension is now considered necessary to cover the period to 31<sup>st</sup> March 2025 to permit sufficient time for conclusion of the complex re-tender of the services, under the new Procurement Act 2023 regime.

It should be considered that in general there is a prohibition on calling-off using a DPS or framework if it is done in a manner that artificially distorts competition. However, procurement officers have assessed the contract and in accordance with Public Contract Regulations (PCR) 2015 Reg 72 1(b) principles, (as a public services contact procured under a PCR’s DPS framework) to ensure the principles of equal treatment, transparency and proportionality can be complied with, it is understood a further extension (modification) would be possible under this regulation.

It is understood an immediate change of provider (in effect a concessionaire) cannot be made for economic and technical reasons as requirements of interchangeability with existing (concessionaire) services would cause significant inconvenience and duplication of cost to the Contracting Authority and the increase in value for the continued provision of the services in the extension period does not exceed 50% of the value of the original contract/ concession value of the contract. Officers need to complete the re-tender process for the existing services to ensure best value is achieved, having re-tested the market, to be sure of the interchangeability of new providers/ concessionaire’s services and systems with those of the existing providers and that any future procurement occurs under the new Procurement Act 2023 in a legally compliant manner, as the new procurement regime contract is key to involve both special regime (concession) and standard service elements. The officers with responsibility for the service must retain the auditable record of their conclusions in this regard to evidence their reliance on regulation 72 at this stage. 12 further months is seen as a reasonable period in which to achieve completion of the re-tender and would be at a value which is less than the threshold in regulation 72 at which a modification is seen as substantial and needing a new full procurement procedure. Subject to regulation 72 being complied with, the proposal would comprise a lawful variation and therefore reduces the risk of the extension being challenged by a market operator of the basis of an artificial narrowing of competition. Officers must comply with the duty to provide the market with notification of the variation for reasons of transparency in compliance with regulation 72(3).

The proposed variation must additionally comply with the Council’s Contract Procedure Rules. This would be achieved in this instance subject to compliance with the Public Procurement Regulation 2015 principles as outlined above, and the general expectation that the Council is acting in a transparent and proportionate manner, without discrimination and ensuring economic operators are being treated equally. In this instance compliance with regulation 72 framework means that the proposed modification is not considered substantial and could occur in compliance with the Contract Procedure Rules without a new procurement procedure being immediately required.

To give formal effect to a modification/ extension, officers will need to follow the prescribed variation procedure within the existing call-off contract. Under the call-off contract, 3 months written notice of a desire to extend the term should be given to the provider. Therefore, if the variation is acceptable to the providers, the modification needs to reflect agreement to a shorted notice period. The contract

variation recitals should also reflect the continuation of the contract by conduct beyond the 31<sup>st</sup> March 2024 , while clearly recording the intended contract extension expiry period of 31.03.2025.

Although, the YPO DPS ref 953 framework has now expired, as no 'new' contract is being called-off from the DPS it is lawfully permissible for the modified contract to be in place and extend beyond the expiry of the DPS it was called-off from.

Procurement and the Contract and Commercial Team have collaborated with the relevant Officers with responsibility for the contract to prepare a suitable contract variation agreement. The relevant contract officer will nevertheless need to satisfy themselves that the incumbent provider remains registered as an appropriate enforcement organisation and acts in compliance with the Taking Control of Goods Regulation 2013, Taking Control of Goods (Fees) Regulations 2014 and the Certification of Enforcement Agents Regulations 2014 (including any relevant amendments).

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