



Executive
19 September 2011

**Report from the Director of
Legal and Procurement**

Wards Affected:
[ALL]

**Authority to exempt the procurement of a multi-borough framework
for on- line legal resources from tendering**

1.0 Summary

1.1 This report concerns purchase of on-line legal resources for use by Legal Services. It describes a proposal to procure a framework or frameworks for use by an association of London Boroughs known as the London Boroughs Legal Alliance (LBLA). It is proposed that Brent take the lead in the procurement. The report then requests approval for an exemption from the usual Brent tendering requirements for the reasons set out in the report.

2.0 Recommendations

2.1 The Executive to note the proposal for Brent to act as lead authority for a collaborative procurement (with other members of the London Boroughs Legal Alliance) of a framework or frameworks for the procurement of on-line legal resources.

2.2 The Executive to agree that tenders need not be sought for the collaborative procurement described in paragraph 2.1 for reasons connected with the protection of exclusive rights, as described in paragraphs 3.6 – 3.10 of the report, in accordance with Contract Standing order 86(e)(i).

3.0 Detail

3.1 The provision of on-line legal resources encompasses a range of reference material and sources that are used by local authority lawyers in preparing legal advice. Access to up to date case law, precedents and information of a legal nature is a necessity for lawyers and is acknowledged as a large expenditure item in both law firms and in house legal departments. These resources include but are not limited to:

- UK and EU case law;
- Authoritative commentary from leading legal authors on key areas of law such as housing, social services and planning;
- Full text of primary and secondary legislation;

- Guidance on practical application of the law;
 - Leading journals with articles on emerging legal issues or complex legal problems;
 - Standard forms and precedents (eg court forms or industry standard leases);
 - Updating services that notify users of changes to legislation or significant developments in case law.
- 3.2 Discussions between the Heads of Legal Services in the London Boroughs Legal Alliance authorities revealed the fact that each borough spent a large amount of money on the procurement of hard copy law books and/or on line legal knowledge management systems from a handful of specialist companies. Some hard copy books are still required, for lawyers to use in court, however the main trend is to online resources. These services are currently provided to Brent and other London Boroughs by a mixture of publishers - LexisNexis, Thomson Reuters and other smaller organisations such as the Practical Law Company. It is a small and specialised market.
- 3.3 As many of these contracts will be expiring later this year or early next it is the intention through the London Boroughs Legal Alliance, of which Brent is a member, to develop an on-line legal resources framework to enable the Boroughs collectively to leverage their combined purchasing power to receive a high quality service at a lower overall cost. The estimated value of the proposed procurement is between £729,553 and £1,024,908 over a 4-year term.
- 3.4 A bench-marking exercise of current provision was carried out, and concerns expressed by the Heads of Legal primarily related to the following:
- Wide variation in the amounts of money being spent by boroughs for what should be a similar service
 - Lack of availability of comparative prices offered to other boroughs when negotiating subscription prices
 - Lack of adequate identifiable audit trail to demonstrate the achievement of value for money
 - Difficulties in negotiating significant cost reductions due to the specialist nature of the information and consequent limited number of suppliers.
- 3.5 Consideration was given to the best means of addressing these concerns. The LBLA members were aware that attempts by some individual boroughs to streamline the resources needed (including Brent) had already yielded significant savings. However a tender process leading to the establishment of a framework with agreed rates and an agreed standard level of knowledge provision across all participating boroughs was seen as being the most effective means of addressing the concerns in paragraph 3.4.

Proposed Procurement Process

- 3.6 The London Borough of Brent is leading on the collaborative procurement project in conjunction with Kennedy Cater Ltd, the company providing administrative help to the LBLA. It is considered that the most straightforward and cost effective means of procuring a framework agreement for the London Boroughs Legal Alliance is for a combined procurement exercise where one borough's Standing Orders are used. Therefore the procurement will be as provided for within Brent's Standing Orders and Financial Regulations.
- 3.7 Once a detailed analysis of the market and of the LBLA boroughs different requirements had been undertaken, it was agreed by the LBLA Heads of Legal that use of a standard tender process would be difficult. This is because the majority of the on-line resources required by the boroughs are published exclusively by one of the legal publishers already referred to, and therefore are only available from that publisher. Even where there are equivalent resources eg an on-line database of up-to-date legislation, it was found that each publisher then bundles this with its exclusive copyright material, such that it would not be possible to tender only the non-exclusive material. As a result the LBLA Heads of Legal have decided that a negotiated approach would be better.
- 3.8 Therefore the proposal is to approach the three suppliers referred to in paragraph 3.2 and ask them to quote for a place on the proposed framework(s) based on various configurations of exclusive material. These different configurations will then be subject to evaluation using evaluation criteria similar to those that would apply for a tendered process. It is proposed that this exercise will focus mainly on price, but with information being sought on the quality side about training, customer care etc.
- 3.9 The proposed approach is lawful if it is done in compliance with both EU public procurement law and Brent's Contract Standing Orders. Under EU procurement law, the type of services required are electronic information services which are part A services. This requires the following of a fully compliant tender process under the relevant regulations, unless one of the exemptions applies as set out in the regulations. However, there is an exemption that allows use of a negotiated procedure in these circumstances. This exemption applies where for "for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the... contract may only be awarded to a particular economic operator" (reg 14(1)(a)(iii) of the Public Contracts Regulations 2006). This exemption is most often relied upon in the context of intellectual property rights such as copyright.
- 3.10 Turning to the position under Brent Standing Orders, the standard procurement approach for a contract or framework of this value is tendering. Contract Standing Order 86(e)(i) provides that tenders need not be invited where for reasons connected with the protection of exclusive rights, the services may only be provided by a particular provider. Although the exact configuration of the framework(s) is still to be negotiated, it will be the case that each framework will only be awardable to that particular provider because of copyright restrictions and therefore the exemption applies.

4. Establishment of Proposed Framework

- 4.1 The evaluation of bids for inclusion on the proposed framework(s) would be evaluated and awarded on the basis of most economically advantageous offer(s) to the participating boroughs. At this stage it is not clear whether this will result in the establishment of only one single-provider framework, or whether there could be more than one single-provider framework. The fact that nearly all content is exclusively available only from one provider means that multi-provider frameworks cannot be established.
- 4.2 The Heads of Legal from the different boroughs will be represented on the evaluation panel in the selection of the provider(s) to be appointed to the framework(s). This Council will then seek approval from the Executive in December 2011 to make this appointment, such that the framework will then be in use for the other boroughs to call off.
- 4.3 The framework will set out the standard terms upon which individual boroughs can 'call off' a contract for their own use, at the price tendered by the company. It is proposed that the framework would be for 3 years with provision for a one-year extension, with call-off contracts having to be co-terminous with the framework. Once a company is appointed to a framework, the participating authorities would expect to 'call off' a subscription to the company on the framework to achieve the benefits of agreed rates and service standards. The boroughs would not however be obliged to use the company in all circumstances and could depart from the use of the framework if, for example, the company on the framework did not have a publication or other resource required for a specific legal speciality outside of the 'core basket' eg data protection.
- 4.4 The framework approach will enable individual Boroughs to buy-in to the service as and when existing contracts terminate with the option of also allowing other London Boroughs to join at a future date to secure greater savings through increased numbers of users.
- 4.5 The negotiation process will also be used to secure significant discounts on any residual hardcopy text materials that are still required by individual Boroughs eg textbooks required to be taken to court. This analysis will be carried out once the main negotiation process is complete.

5.0 Financial Implications

- 5.1 The Council's Contract Standing Orders state that contracts for supplies and services exceeding £500k or works contracts exceeding £1million shall be referred to the Executive as High Value contracts.
- 5.2 The estimated value of this service framework is a minimum of £729,553.
- 5.3 It is anticipated that the cost of this contract will be funded from existing resources across individual London Borough Legal Alliance members. Brent's current expenditure is £41,945 per annum (including hardcopy text requirements), against which it is anticipated this framework will deliver savings.

6.0 Staffing Implications

This service is currently provided by an external contractor and there are no implications for Council staff arising from establishing this framework agreement.

7.0 Legal Implications

7.1 The majority of legal issues surrounding the proposed procurement are set out in the body of this report.

7.2 There is a risk to Brent in leading the procurement. This is because if an unsuccessful bidder is unhappy with any aspect of the process then it would make a challenge against Brent, which Brent alone would be responsible for defending. The most likely ground for challenge would be the adoption of a negotiated procedure rather than a tendered process as described in the body of the report. Officers are currently investigating the use of insurance to cover the proposed risk, either through the Council's existing insurance or through a specially-arranged policy. Alternatively there is the possibility of seeking an indemnity from the other boroughs in relation to the legal costs of defending such a challenge.

8.0 Diversity Implications

The proposals in this report have been subject to screening and officers believe that there are no diversity implications.

9.0 Background Papers

Procurement File (save for legally privileged papers)

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