

Report to:	QSMTM
Report by:	Margaret Keyse
Meeting Date:	7 November 2019
Subject/ Title: (and VC no)	Legal services tendering: update (VC125724)
Attached Papers (title and VC no)	n/a

Purpose of report

1. To update SMT on the plans for the delayed tendering for the legal services contract and to seek re-approval of the business case.

Recommendation and actions

2. I recommend that:
 - (i) SMT re-approve the business case for this tendering exercise
 - (ii) SMT agree to using the open competition procedure and
 - (iii) this committee report be published in full.

Executive summary

Business case

3. The business case for this tendering exercise was approved by SMT on 28 March 2018. The tendering exercise has been delayed as a result of a mixture of staff absence, finalisation of procedures (tendering and GDPR-related) and lack of resources due to other work.
4. HOCS has prepared a revised timetable for proceeding with the tendering exercise (the Scottish Government Procurement Unit have been asked to comment on the revised timetable as assistance is likely to be required from them during the exercise). The aim is to issue the tender on 29 November 2019 and have a contract start date of 1 April 2020.
5. In the circumstances, SMT are asked to re-approve the Business Case. An extract of the report considered by SMT is attached as an Appendix to this report.

Framework agreement

6. The Scottish Government has a framework agreement for the provision of legal services. As a body established under an Act of the Scottish Parliament, we are able to use the framework agreement to contract for legal services.
7. Version 1.4 of the Framework Agreement was issued by the Scottish Government on 17 September 2019 and has been considered by HOCS and by HOE. We agree that, while using the Framework Agreement would simplify the tendering procedure, we should not proceed in this way for the following reasons:

- (i) None of the lots available under the Framework Agreement is suitable for our needs. Lot 3 is the closest fit, but is aimed at the handling of reparation claims; general commercial litigation; arbitrations; fatal accident inquiries; public local inquiries; construction disputes and adjudications; health and safety investigations and Employment Law services
 - (ii) The fact that using the Scottish Government Framework Agreement could lead to claims of conflict of interest in the event that we are defending (or are considering raising) legal proceedings against the Scottish Ministers.
8. It is therefore recommended that, as previously agreed, we follow the open competition procedure.

Risk impact

9. The Operational Risk Register 2019/20 recognises that, if the Commissioner does not make robust defensible decisions, we may be subject to an increased number of appeals/judicial reviews which will undermine our reputation and strategic aims.
10. Any decision not to proceed with this tendering exercise would raise to unacceptable levels both the impact and likelihood of this risk.

Equalities impact

11. It is difficult to see which, if any, of the protected characteristics would be affected by this committee report. However, the tendering exercise will comply with equalities legislation.

Privacy impact

12. A pre-DPIA assessment (VC125707) was prepared and considered by the GDPR Working Group on 30 October 2019. Advice from the Working Group was that a DPIA did not need to be carried out.
13. The pre-DPIA assessment sets out the steps which will mitigate risks to personal data. These include:
 - (i) our contract with the successful tenderer will require them to comply with Art 28 of the GDPR
 - (ii) as agents for the Commissioner, the successful tenderer will be subject to s45 of FOISA, meaning that it will be a criminal offence for them to disclose information obtained by or furnished to the Commissioner for the purposes of FOISA/the EIRs without lawful authority (e.g. if disclosure is necessary for criminal or civil proceedings) – this will be made clear as part of the tendering process
 - (iii) the inherent confidentiality of communications between solicitor and client significantly reduces the likelihood of information being disclosed.

Resources impact

14. Work on the tendering exercise will have an impact, if short lived one, on the work of this office. However, if the tendering exercise is not carried out, there will be longer term negative effects on the office.

Operational/ strategic plan impact

15. The tendering exercise forms part of the 2019/20 Operational Plan.

Records management impact (including any key documents actions)

16. None.

Consultation and Communication

17. HOCS was consulted during the preparation of this report.

Publication

18. I recommend that this committee report is published in full.

Appendix: Extract from business case (VC87934)

There are a number of reasons why it is considered necessary to instruct external solicitors to act on behalf of the Commissioner:

- As noted above, this is a small office and we do not have, for example, a legal team or a legal department. The vast majority of legal advice is given internally either by the Head of Enforcement or the legally qualified Deputy Head of Enforcement. However, it is important that “cover” is available in the event that they are unavailable for whatever reason.
- Appeals against the decisions of the Commissioner are heard in the Inner House of the Court of Session. Although the Head of Enforcement and Deputy Head of Enforcement are members of the Law Society of Scotland, neither have rights of audience in the Court of Session (this is restricted to advocates and solicitor advocates).
- While it is possible for the Commissioner to instruct solicitor advocates or advocates direct, the successful solicitors firms will already have good relationships with advocates and advocates clerks and will be able to suggest appropriate counsel for the matter advice is needed on. This is particularly important where the matter is urgent or is not related directly to FOI legislation.
- Similarly, while the Head or Deputy Head of Enforcement *could* carry out the preparatory work for any Court of Session actions, the rules (for example surrounding the production of papers, etc.) are complex. The ability to instruct a firm of solicitors reduces the risk that the Head or Deputy Head of Enforcement are diverted from other essential functions. Using external firms of solicitors who have more experience of working with the rules of court also increases the likelihood of success.
- While the Commissioner has daily access to legal advice, there are occasions, particularly when the advice does not relate directly to FOI legislation, but to the relationship between FOI and other legislation, when it is necessary to have access to external solicitors with appropriate specialisms.