

Item No.	Classification: Open	Date: 17 November 2015	Meeting Name: Cabinet Member for Finance, Modernisation and Performance
Report title:		Gateway 1 Procurement Strategy Approval - Lambeth and Southwark Barrister Framework	
Ward(s) or groups affected:		All wards	
From:		Strategic Director of Finance and Governance	

RECOMMENDATION

1. That the cabinet member for finance, modernisation and performance approves the procurement strategy outlined in this report for a barrister framework serving Lambeth and Southwark (and other boroughs) for a period of 4 years from 1 May 2016 at an estimated cost (for Southwark) of £6m for the 4 year period.

BACKGROUND INFORMATION

2. Legal services instruct barristers on behalf of client departments for a range of litigation work including housing and general litigation, planning litigation and child care proceedings. In 2011, Lambeth and Southwark jointly procured a barristers framework which has been in operation since 2012 and will expire on 8 April 2016. The framework is made up of 8 panels which cover the range of legal areas where advice is required.
3. Throughout the current framework term, a joint project steering group (led by the legal directors for each borough) has met quarterly to monitor and manage the framework, and have more recently considered options for re-procurement of this service.
4. The current framework allows other local authorities to join the framework and make use of the barrister services. To date, 2 other local authorities (Croydon and Newham) have joined the framework. Total spend for Southwark for years 2012/13, 2013/14, 2014/15 and the first quarter of 2015 has been £5.2m, and is noted in detail in appendix 1. This covers spend in the 8 framework panels (with the majority of spend being for litigation and child protection), and exceptional off panel spend.
5. On 19 October 2015 the Leader of the council delegated the approval of the procurement strategy for this framework to the cabinet member for finance, modernisation and performance.
6. As noted in paragraph 27 below, a joint project manager has been appointed by Lambeth and Southwark to assist the councils with this procurement.

Summary of the business case/justification for the procurement

7. The aim of this exercise is to procure an inter borough framework in order to continue to receive benefits of economies of scale and a more streamline and efficient process for instructing barristers. Good practice and areas for improvement have been captured as part of the steering group's monitoring of the current framework which will be incorporated into the new process.
8. It is anticipated that the new framework arrangements will:
 - Provide a wide range of barristers with the required expertise to choose from
 - Provide certainty as to the cost of instructing barristers
 - Secure cost savings through economies of scale, both in terms of shared procurement costs and potentially lower prices due to the increased volume of work
 - Provide the means for monitoring and controlling expenditure
 - Provide a small shared income for the 2 lead boroughs from other councils wishing to join the arrangements.

Market considerations

9. The market for barristers in London is very developed, and the councils expect a healthy response to this procurement exercise.

KEY ISSUES FOR CONSIDERATION

Options for procurement route including procurement approach

10. Several options were considered when identifying a preferred procurement approach. These were:
 - Do nothing – the council requires legal expertise to respond to legal action being taken against it, and to initiate legal proceedings to protect its position. This approach is therefore not recommended.
 - Provide in-house – due to the often ad-hoc nature and specialism for which the services of barristers is required, this approach is not recommended. The barrister framework will support the in-house function.
 - Join a pre-existing framework agreement – the council considered alternative frameworks operated by both the London Borough Legal Alliance and Essex. Whilst the council is an associate member of the LBLA and uses its Solicitors framework, the LBLA barrister framework is due to end in 2016. The councils considered that their own framework which is bespoke and therefore aligned to Lambeth and Southwark's requirements was a preferable arrangement.
 - Instruct barristers on an ad-hoc basis – this was the route followed before the barrister framework was established in 2011 and was less efficient in terms of management of spend and efficiency of service. The provision of legal services is now also subject to the procurement requirements of the Public Contract Regulations 2015. This approach is therefore not recommended.

Proposed procurement route

11. The proposed procurement route is a joint framework agreement with 2 lead boroughs (Lambeth and Southwark), and the ability of other boroughs (who will be detailed in the OJEU notice) to join the framework with the consent of the lead boroughs. Other boroughs have been made aware of the proposed framework and are considering whether to join. The procurement will take the form of a 2 stage restricted process.

Identified risks for the procurement

12. The following risks have been identified for this project:

Risk	Category	Mitigating action
Whilst representing good practice, a shared procurement exercise between 2 authorities can be complex and delays in the procurement process may result	Low	Establishment of strong governance structures between the 2 authorities, robust project controls and escalation of slippage with senior management for key deadlines. A project manager who has previously worked with both authorities has been procured.
Barristers chambers not bidding because process is considered arduous	Low	Documents to be kept succinct. Lessons learnt from previous framework to be built into new process. Chambers to be contacted (and co-ordinated with the Bar Council) in advance to ensure they are aware of the opportunity.
The pricing document is not sufficiently robust	Low	Review and update pricing documents following consultation with current users to ensure that documents reflect operational requirements
The framework does not cover all areas of the council's work, or has sufficient expertise	Low	Current framework panels to be reviewed with existing users. Quality evaluation to be developed prior to advert to ensure that evaluation of quality is sufficient.

Key /Non Key decisions

13. This report deals with a key decision based on the estimated annual cost of the framework for Southwark of £1.5m per annum, making an estimated contract value of £6m. As the estimated contract value exceeds £4m, this procurement is classed as strategic and therefore is a key decision.

Policy implications

14. The procurement of a joint barrister framework will ensure that the council fulfils parts of its fairer future promises by ensuring that the barristers instructed deliver value of money across the legal function.

Procurement project plan (Key decisions)

Activity	Complete by:
DCRB Review Gateway 1:	22/10/2015
CCRB Review Gateway 1:	05/11/2015
Notification of forthcoming decision - IDM	13/11/2015
Approval of Gateway 1: Procurement strategy report	20/11/2015
Scrutiny Call-in period and notification of implementation of Gateway 1 decision	30/11/2015
Completion of tender documentation	18/12/2015
Publication of OJEU Notice	05/01/2016
Publication of Opportunity on Contracts Finder	07/01/2016
Closing date for receipt of expressions of interest	08/02/2016
Completion of short-listing of applicants	26/02/2016
Invitation to tender	29/02/2016
Closing date for return of tenders	31/03/2016
Completion of clarification meetings/presentations/evaluation interviews	22/04/2016
Completion of evaluation of tenders	25/04/2016
Forward Plan	January 2016
DCRB Review Gateway 2: Contract award report	28/04/2016
CCRB Review Gateway 2: Contract award report	12/05/2016
Notification of forthcoming decision - IDM	18/05/2016
Approval of Gateway 2: Contract Award Report	26/05/2016
End of scrutiny Call-in period and notification of implementation of Gateway 2 decision (If GW2 is key decision)	03/06/2016
Debrief Notice and Standstill Period (if applicable)	06/06/2016
Contract award	07/06/2016
Add to Contract Register	17/06/2016
Place award notice in Official Journal of European (OJEU)	17/06/2016
Place award notice on Contracts Finder	20/06/2016
Contract start	08/06/2016
Initial Contract completion date	07/06/2020

Note – the dates given in the procurement plan are the minimum periods required. The project steering group is currently considering resources for the key activities, and the time line will be finalised before the OJEU process commences. Lambeth and Southwark have worked closely to align their approval and decision making processes.

TUPE/Pensions implications

15. The nature of services and how barristers are instructed means that TUPE will not be applicable on a retender of the framework.

Development of the tender documentation

16. The bespoke tender documents prepared for the current framework will be used as a starting point for the new process and refined taking into account comments made by the in-house legal teams in both boroughs.
17. The current framework includes 8 panels (being adult community care, childcare, corporate, employment, general litigation (civil) and (crime), housing litigation and planning). The project steering group are currently reviewing each panel and current spend to determine if this remains the optimum number and specialism for each panel, and the number of chambers to be included for each panel. The final panel arrangement will be approved by the project steering group before the OJEU process commences.

Advertising the contract

18. This procurement is required to be advertised in OJEU, and the opportunity noted in Contracts Finder. The councils will notify all existing barristers and other known chambers of the new procurement and will notify the Bar Council to ensure the procurement is widely known. Lambeth's e-supply system will be used so that expressions of interest and tenders can be submitted electronically.

Evaluation

19. Tender evaluation teams will be structured around the panels to be established, to ensure that those who work most closely in that area of law are involved in the evaluation. The evaluation methodology including criteria, weighting and sub-weightings will be agreed by the project steering group, and will include the quality of barrister resource, the back office support and soft benefits. The price:quality split to be used for this procurement is 60 (price):40 (quality) to ensure that the required level of expertise/specialism is achieved at costs which are acceptable to the councils.

Community impact statement

20. This decision is judged to have minimal impact on local people and communities. However scope will be included for soft benefits to be realised as part of the procurement, such as training and secondment of legal services staff. All providers are regulated by the Bar Council Code on Equalities and are therefore actively encouraged and involved in promoting diversity and will be required to comply with all equalities legislation. Appropriate questions will be developed into the tender documents to test this approach.

Sustainability considerations

21. The Public Services (Social Value) Act 2012 requires the council to consider a number of issues including how what is proposed to be procured may improve the economic, social and environmental well-being of the local area. These issues are considered in the following paragraphs which set out economic, social and environmental considerations.

Economic, social value and environmental considerations

22. It is intended that one of the areas for evaluation will be in respect of social value to meet Lambeth and Southwark's 'Cooperative Council' and 'providing a fairer future for all' commitments respectively. This will include environmental and sustainability issues, offers in respect of pro-bono work to assist residents in the boroughs, and possible community activities, and placements for Southwark students.
23. The council is an officially accredited London Living Wage (LLW) Employer and is committed to ensuring that, where appropriate, providers engaged by the council to provide services within Southwark pay their staff at a minimum rate equivalent to the LLW rate. It is expected that all barristers and office staff will already be paid in excess of the LLW.

Plans for the monitoring and management of the contract

24. A framework protocol will be in operation which will govern the operation of calling off services from each of the framework panels. The project steering group will continue to operate and will meet quarterly to monitor panel performance, and the steering group will be composed of senior legal representatives from both Lambeth and Southwark legal services, and be chaired by one of the 2 directors of legal services. Day to day management and performance monitoring will be undertaken by the internal business manager (who acts for both councils) and this will be the first point of contact for chambers and staff.
25. The councils have in place an electronic system (Zyppha) which is currently used for instructing barristers. This will continue to operate under the new framework, and allows those instructing barristers to determine the relevant barrister to be instructed and the fee to be paid. It also includes a prompt for users to provide feedback on the performance of the instructed barrister. Where concerns are raised this allows issues to be discussed at the contract monitoring meetings held with each chamber annually, or if required an ad-hoc meeting can be arranged.
26. As noted in appendix 1, there has been some off panel spend for each year of the current framework. This is expected, as the nature of work is such that it is not possible for a framework to cover every speciality required. There are also some chambers who advise on particularly complex matters who at the time of undertaking the last procurement made clear that they did not tender for frameworks. All off panel spend must be approved by the head of team for the relevant panel before instructions are issued. The project steering group has monitored off panel spend, and will seek (where possible) to extend the panels to ensure that areas which have been subject to a higher level of spend are captured as part of the new framework.

Staffing/procurement implications

27. A high level of resource will be required from the legal services team during the tender process to prepare the tender documentation, undertake evaluation and mobilise the new framework. Assistance will also be required of the procurement advice team. Whilst this can be undertaken by the in-house teams, the councils have appointed a joint project manager to assist with the tender process.

Financial implications

28. There will be a direct cost for the project manager required to co-ordinate the delivery of the framework which is estimated to be £30,000. This payment will be met from the legal services budget. It is expected that this fee will be mitigated by the joining fee required from other authorities who wish to use the framework.
29. The total cost associated with the barrister framework over the 4 year period for Southwark is estimated to be £6m. The cost for any instructions given under the framework will be agreed and met by the service departments at the time advice is required.
30. Lambeth expect to also spend an estimated £6m over the 4 year period. Estimated spend for other interested authorities is being obtained to include within the OJEU and tender documents.
31. Spend, and particularly off panel spend, is closely monitored at the quarterly project steering group. Under the current framework off panel spend for Southwark has been approximately 5% of the total spend for each year, with the exception of year 1 where off panel spend was higher but reflected the transition into the framework arrangements.

Legal implications

32. Please see concurrent from the director of law and democracy

Consultation

33. Development of the procurement to date has included consultation with senior legal personnel in other interested boroughs. A questionnaire on the existing framework has been developed and circulated to all legal staff in Southwark and Lambeth, and responses received are informing the new process. Comments on the use of the existing framework have also been sought from existing panel providers. Legal staff routinely consult with departmental users of this service, as officers from departments are usually at the court hearings and feedback to legal staff on barrister performance.

Other implications or issues

34. The current framework expires on 8 April 2016. The timetable for the new procurement indicates that the earliest award date for the new framework will be early June 2016. A separate approval will therefore be sought to continue use of the existing framework for this short interim period (once the full timetable has

been agreed). The nature of instructions given to panel chambers is such that any instruction given pre 8 April would continue to be undertaken under the existing framework (to ensure continuity of advice).

SUPPLEMENTARY ADVICE FROM OTHER OFFICERS

Head of Procurement

35. This report seeks approval from the cabinet for the procurement strategy for a replacement of the inter-authority barristers' framework agreement for the period of 4 years. The proposed procurement route is in line with the councils contract standing orders (CSO's) and compliant with the Public Contract Regulations 2015 requirements for these services, set out in Chapter 3, Section 7 (Social and other services), known as the 'light touch' regime.
36. The recommended strategy is for the framework to be re-procured following the success of the original framework, established in 2011, which was developed with neighbouring borough, Lambeth in order to secure greater efficiencies through increasing buying power.
37. The current inter-borough arrangement has proven value for money and has a continuing business case for this replacement arrangement. The report details how lessons learnt and improvements from the current arrangement have been incorporated into the new procurement process.
38. The report makes clear that the project steering group will ensure that procurement process is clearly defined, with tender documentation and evaluation criteria and methodology agreed before the publication of the contract notice. They will also ensure that the timeline for gaining internal approvals within each of the organisations are aligned.
39. Paragraphs 24 and 25 set out the governance arrangements for the on-going use, monitoring and management of the framework agreement.

Director of Law and Democracy

40. As these services are classed as 'light touch' services estimated to exceed the relevant EU threshold, they must be tendered in accordance with the 'light touch' regime under the new Public Contracts Regulation 2015 (PCR 2015).
41. As a 'light touch' procurement, there is some flexibility in the tender process which can be adopted provided that (a) a contract notice is published, (b) the award procedure complies with principles of equal treatment and transparency, (c) the contract is awarded in line with the advertised procedure and (d) time limits are reasonable and proportionate.
42. This procurement will be conducted using a 2 stage restricted process, where initial expressions of interest are invited following the OJEU contract notice and then those applications shortlisted are invited to tender.
43. As this report is prepared on behalf of the director of law and democracy, all other comments are included in the body of the report.

Strategic Director of Finance and Governance (F&G15/013)

44. The strategic director of finance and governance notes the recommendation in this report for the procurement of a barrister services framework.
45. The costs of the project manager will be met from existing budgets and may be mitigated by the joining fee required from other authorities who wish to use the framework.
46. The total cost associated with the barrister framework over the 4 year period for Southwark is estimated to be £6m. The cost for any instructions given under the framework will be agreed and met by the service departments at the time advice is required. Departments are expected to manage their services within budget. Government grant to the general fund is expected to decline over the period covered by the contract, so it is important that spend is closely monitored by those with budget responsibility.

BACKGROUND DOCUMENTS

Background Documents	Held At	Contact
None		

APPENDICES

No	Title
Appendix 1	Existing panel spend

AUDIT TRAIL

Lead Officer	Doreen Forrester-Brown – Director of Law and Democracy	
Report Author	Karen Moore – specialist lawyer	
Version	Final	
Dated	12 November 2015	
Key Decision?	Yes	
CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / CABINET MEMBER		
Officer Title	Comments sought	Comments included
Head of Procurement	Yes	Yes
Director of Law and Democracy	Yes	Yes
Strategic Director of Finance and Governance	Yes	Yes
Cabinet Member	Yes	Yes
Contract Review Boards		
Departmental Contract Review Board	Yes	Yes
Corporate Contract Review Board	Yes	Yes
Cabinet Member	Yes	Yes
Date final report sent to Constitutional Team		16 November 2015