

# The Highland Council

## HC/D&I/TS/2019 – Provision of Trades Services Framework Agreement 2019

### Responses to Questions and Areas of Clarification – Form 08 - 22/08/2019

Question/Clarification		Date Received	Response
1	<p>The Conditions of Contract purport to govern both the Trades Services Framework Agreement and any Call-Off Contract/Works Order issued under the framework.</p> <p>Notwithstanding the above, we are concerned that the terms would not operate effectively for the Lot 16 works that we are interested in; being Principal Contractor for general contracting works upto £2m.</p>	22/08/2019	<p>The terms and conditions are standard Council terms and conditions. Call off Contracts of value in excess of £50,000 will be subject to mini competition. Mini competitions may have additional special conditions depending on the nature of the Works Order.</p> <p>It is very rare that projects with a value as high as £2m will go through the framework.</p>
2.	A review of the drafting highlights numerous capitalised terms which have no definition, some defined terms not used and some erroneous cross-references to Conditions`;		<p>This is a drafting error. Where there is a capitalised term and no definition, there should be no capitalised term.</p> <p>Cross referencing errors:            At Paragraph 18.2, Condition 48.6 should refer to 49            At Paragraph 52.3 – Condition 55 should refer to 54            At Paragraph 53.2- Condition 57.1(a) should refer to 53            At Paragraph 57.4 xi) - Condition 53 should refer to 52.</p>
3.	Much of the legislation referred to has been repealed/replaced and would require updating in the Conditions;		Where the legislation has been repealed or replaced the up-to-date and existing legislation will take precedence.
4	Condition 3 talks about Services set out in the Specification but there are also other references to Goods and Works, the works being un-defined.		<p>There is a definition of Goods contained at Section 1. Interpretation.</p> <p>Works largely refers to a Works Order and involves the activities to be performed by the Supplier. There are a number of variations of Works definitions. These are contained at section 2 Condition 60.</p>
5.	The 'Contract Period' is defined as commencing on 02 December 2019		This is a drafting error. This should refer to 4.2.

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	<p>for 36 months, subject to extension under Condition 4.12, we assume this should read 4.2?</p> <p>This specifies the length of the Framework Agreement. This would differ from any contract periods for the Works Order set out in the Specification;</p>		<p>The length of the Framework is 36 months with the option to extend for a further period of up to 12 months.</p> <p>A call off or a mini-competition can be issued at any point during this time. The call-off contract shall expire when the Contract is complete or fulfilled save for warranty periods and guarantees etc. The nature of a repairs, maintenance and minor works framework is that Works Orders will commonly be small.</p> <p>Please refer to the definition of Call off Contract for more information contained at Section 1. Interpretation.</p>
6.	<p>Clarification required on how Condition 5 'Commencement of Full Operations' is meant to work and whether this refers to a portion of advanced works (Setting Up Operations) prior to the Council authorising Commencement of Full Operations. The drafting suggests the Contractor is liable for costs and losses etc in the Setting Up Operations phase</p>		<p>The Council have made the decision that Commencement of Full Operations shall be the first day of the framework. Given the nature of the work to be undertaken and that there is no guaranteed work under this framework agreement, it has been agreed that a setting up of operations shall be minimal. If a requirement is called off of the Framework, the Council shall adopt the methodology outlined in the Invitation to tender at paragraph 21 and the supplier has the option to accept the Works Order or reject it. The Council shall not be liable for any costs of setting up.</p> <p>The Council also expect suppliers on the Framework to be able to use Total Mobile App and a website portal. However this is intended to be rolled out gradually and suppliers shall be sent help guides. The Council are still working on the exact details of this programme and supplier will be notified in plenty of time.</p>
7.	<p>Condition 6 'Conditions Affecting Provision of Services' states the Contractor is to satisfy themselves as to</p>		<p>The supplier is required to satisfy themselves that the Property is in a condition in which is safe and Works can begin. If there</p>

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	<p>'the suitability of Council's Property'</p> <p>,</p> <p>'ownership, functionality...of the Council's assets' and 'existing contracts which may be novated, assigned to or managed by the Contractor'.</p> <p>Clarification required on how the contractor can do this?</p>		<p>are any issues, the Responsible Premises Officer and the Instructing Officer should be notified.</p> <p>As above, where the Contractor is required to use Council assets the supplier should ensure that these are in safe working order and the asset is a Council owned asset.</p>
8.	Condition 7 and 30, Contractor to fully indemnify the Council for any losses;		These are standard Highland Council Terms and shall not be amended.
9.	Condition 16.4 permits the Council to obtain the goods, services or work elsewhere and recover its costs/losses from the Contractor. Is this limited to be only in the event that the Contractor breaches its obligations and does not rectify. Can the wording be reviewed?		Where Condition applies within the Context of Conditions 16.1, 16.2 and 16.3 of Inspection Rejection and Guarantee. It would be the Council's preference to allow the Contractor to remedy their error. However it shall be at the Council's discretion whether to action condition 16.4. The decision shall depend on the level of the breach the assessment of the Contractor's negligence, the urgency of remedial works and the Council's confidence in the Contractor.
10.	Condition 16.6 provides for a guarantee period of 60 months applicable to the Contract. It is unclear as to whether this refers to the Framework Agreement, any Call-Off Contractor Works Order etc;		This shall apply to any Call-off Contract whether made through direct award or mini-competition. However the Contract states this is subject to any guarantee arrangements agreed in writing between Council and Contractor. Required Warranties specific to this framework agreement are listed at 64.5 Warranty of Materials/Services. This shall take precedence.
11.	No clear provision to operate interim payments or final accounting. Clarity required on what provisions will be in place?		Works Orders up to £50,000 are considered reactive in nature and would be unlikely to require an interim payment and final payment. Contractors would submit their invoice and the Council would pay within 30 days.

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			Works Orders where a phased payment plan would be appropriate, detail of this plan would be outlined in the mini-competition documents.
12.	No specific extension of time provisions, although could be captured under Condition 44 'Variation'. Clarity required on what provisions will be in place?		<p>Condition 4.2 states that The Council may extend the Contract Period by up to a further twelve months in total, by issuing a covering Variation no later than one month before the contract would otherwise expire.</p> <p>Exact details of the extension will not be established until an extension is to be considered. This could range anywhere between 1 month and 12 months</p>
13.	Condition 31 'Limits on Liability' are unclear. There is reference to 'Service Credits' which is not defined. Clarity required on the limits of liability and what is defined as Service Credits?		<p>Limit of liabilities are clearly identified at paragraph 31.1 and 31.2</p> <p>A Service Credit may be awarded to the Council where the degree of the Service Level failure and frequency of failures over consecutive Measurement Periods. This shall be measured in line with KPI performance – See section 65 Performance Requirements on the Contract Document for more on KPIs.</p>
14.	Condition 51 'Rectification Plan' is reference to a form of plan to rectify situations pursuant to a Default having occurred but there is no defined terms. Also, references 'Notifiable Defect' which is not defined. Clarification required on Default terms and also what is defined as a Notifiable Defect?		<p>Definition of a default is contained in Section 1 – Interpretation.</p> <p>The rectification plan is described in Condition 51.</p>
15	Condition 52 'Liquidated Damages and Delay Payments' sets out a method of calculating amounts due to the Council for failure to meet standards or for contractor delay and which relates to applying percentages of value. Failure to meet standards = 5% of the value of the goods or fixed price service until the failure is rectified. Not clear if this is per failure or a total.		<p>Liquidated damages clause relates to a maximum figure for liquidated damages and represents a pre-estimate of the potential damage to the Council. This will take into consideration each failure where the Council has suffered a loss as a result of 1 action.</p> <p>Whether this clause is enforced will depend on the individual</p>

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	<p>Clarification required?</p> <p>In the case of delay, damages calculated as either 2%/day of the value of the specific goods/service or 0.1%/day of the total value of goods/service for whole contract delay. The latter would be 0.7% per week which is a high percentage in comparison to the works specified within the proposed scope of works. Clarity required on implementation of delay damages and also if a review can be carried out on the proposed percentage per day/week.</p>		<p>circumstances. It is not viewed as default position.</p>
16.	<p>Conditions 55 'Break' and 56 'Consequences of Termination' appear to be heavily weighted in the Employers favour; Highland Council has the right to terminate at will by giving 3 months' notice but can then arrange for completion of the Services by other and recover losses from the Contractor?</p>		<p>The Council will only enforce this clause where it considers that there is no value in proceeding with the Framework Agreement. If this is a Council decision through no fault of the Contractor, the Contractor would not be responsible for losses. The Contractor would only be liable for losses to the Council where the loss is a direct consequence of the Contractor's negligence or refusal to perform the Contract as agreed.</p>
17.	<p>Condition 57 'Dispute Resolution' is initially by way of good faith negotiation and then, if no agreement reached, by Arbitration (not defined) with the award being binding by way of the Arbitration (Scotland) Act 1894. Current legislation is based on the 2010 Act</p>		<p>Please refer to question 2.</p>
18.	<p>Condition 59 'Law and Jurisdiction' provides for potential Variation in respect of a 'Specific Change in Law' but not for a 'General Change in Law', neither of the terms are defined. Clarity required on defined terms under this provision?</p>		<p>The Council are seeking further clarification on this query</p>
19.	<p>The contract appears to amalgamate both a framework and underlying individual contracts within one document which is difficult to achieve. Is there a possibility to use a more benign framework covering only the usual</p>		<p>The Council have created a specification based on the information available and the experience of working on Planned and Reactive works. It is not possible for the Council to pre-empt every repair or reactive</p>

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<p>framework matters with standard forms of contract selected dependent upon complexity of the project and whether there is likely to be any design work required?</p>		<p>work required. The Council have therefore included as comprehensive a specification as possible. In a situation where there are special conditions as part of a mini-competition, this will be issued along with the mini-competition and Contractors can decide whether to bid or not. Any factors required to be considered otherwise will be highlighted at the time of award. The Contractor can choose not to accept the award.</p> <p>In reference to design work, if there is any required under the framework, it is likely that this will be procured through mini-competition where more specific special terms and condition may apply.</p>