

PART 2 – CONFIDENTIAL FACTS AND ADVICE

MD2371

Title: Adult Education Budget Procured Provision Delivery Arrangements

Information may have to be disclosed in the event of a request under the Freedom of Information Act 2000. In the event of a request for confidential facts and advice, please consult the Information Governance team for advice.

This information is not suitable for publication until the stated date because:

It contains legal advice on the proposal in respect of which decisions are sought which is subject to legal professional privilege. Disclosure of such advice would impede the GLA's ability to consider fully the decisions sought and associated risks.

Date at which Part 2 will cease to be sensitive or when this information should be reviewed with a view to publication: **1 August 2019**

Legal adviser recommendation on the grounds for not publishing information at this time:

In the event of any request for access to the information contained in this document under section 1 of the Freedom of Information Act 2000 ("the Act"), it is considered that such access can be denied on the basis that legal professional privilege applies to that information and therefore, is covered by the exemption under section 42 of the Act.

Section 1 of the Act creates the general right of access, which provides that any person making a request for information to a public authority is entitled:

- . to be informed in writing by the public authority whether it holds information of the description specified in the request; and
- . if that is the case, to have that information communicated to him/her.

Part II of the Act contains a number of exemptions from disclosure for certain classes of information. In particular, section 42 of the Act provides that information is exempt information where it is subject to legal professional privilege. The paragraph above states that the information is subject to legal professional privilege. This is because the content of this report is a communication between TfL Legal as legal advisor made for the purpose of providing legal advice to the GLA as its client.

The section 42 exemption is a qualified exemption and its use is therefore, subject to a public interest assessment.

Public Interest Assessment

At present, on balance, it is considered that the public interest may be best served if the information is not disclosed. The purpose of legal professional privilege is to enable openness in all communications between client and lawyer to ensure access to full and frank legal advice.

The content of this report records the provision of such advice provided in order that the decision sought may be considered fully in light of risks of proceeding as proposed previously. The new approach

proposed seeks to address those risks in order to ensure the more efficient and effective procurement of AEB services of benefit to London and Londoners.

The eligibility of the exemption should be reassessed in the event of an FOI request for this information as the level of sensitivity will change over time and different circumstances may alter the arguments in favour of non-disclosure. **NB:** Whilst 1 August 2019 is entered as the date for such reassessment of the eligibility of the exemption, given the nature of the advice contained herein it is not envisaged that release would be advisable at that point.

Legal Adviser - I make the above recommendations that this information is not suitable for publication at this time.

Name: Emma Brookman

Date: 17 October 2018

Once this form is fully authorised, it should be circulated with Part 1.

Decision and/or advice:

MD2371: Appendix B

Table of changes to the approach to AEB Procurement arising from the finalisation of documentation

- 1 As part of the finalisation of procurement documents, and following legal and procurement advice, it was necessary to update the proposed approach previously endorsed by the AEB Mayoral Board in two specific areas following legal and procurement advice.
- 2 The changes in approach are set out in the table below.

Previously proposed approach	Updated approach	Reason for change
<p>That the GLA would rely on the Register of Training Organisations (RoTO) and the ESFA financial health check.</p> <p>If the organisation is on RoTO and has a financial health rating of above "satisfactory" GLA Finance will rely on this and will not carry out full due diligence.</p> <p>If the organisation is "satisfactory" or below Finance will undertake full due diligence.</p> <p>Any providers not on RoTO need to undergo full due diligence.</p>	<p>GLA will not rely on RoTO. GLA finance will apply the same financial criteria used in the ESFA financial health check.</p> <p>This means that GLA Finance will compute a set of financial ratios for each applicant, and will carry out full financial due diligence. The three financial ratios will then be used to assign a financial health rating.</p> <p>If the provider is assigned a rating of Good or Outstanding rating through this finance assessment, the provider will be recommended for contract award. If assigned a rating of Satisfactory, the provider will be recommended a contract award with some project management controls e.g. regular monitoring. If assigned a rating of Inadequate the provider will not be offered a contract.</p>	<p>The GLA was advised by lawyers that the previously proposed approach to due diligence was open to challenge on the grounds that it did not treat all applicants in the same way: ESFA and RoTO financial health checks include a review of additional documents which are not available to the GLA. Our previous proposed approach, whereby those that had already passed ESFA/ROTO due diligence would not be subject to GLA due diligence, was interpreted as violating the principle of fairness because an organisation undergoing ESFA/ROTO checks would not be subject to exactly the same checks as an organisation undergoing GLA checks and vice versa.</p> <p>The updated approach applies the same GLA assessment of financial health to all providers regardless of whether they have passed ESFA/RoTO financial health checks or not.</p>

		<p>The GLA was advised by lawyers that the previously proposed approach to due diligence was open to challenge on the grounds that it did not treat all applicants in the same way: ESFA financial health checks include a review of additional documents which are not available to the GLA.</p>
<p>That subject to confirmation from TfL Procurement and external legal advisors, as part of the procurement process applicants will be requested to indicate the maximum and minimum contract value that it would be viable for them to deliver (which may exceed the maximum and minimum bid threshold).</p> <p>Subject to consideration and approval by the relevant GLA project manager and budget being available, additional funding up to this maximum contract value may be awarded to organisations that evidence good performance against contracted delivery targets, following contract management project reviews.</p>	<p>Subject to consideration and approval by the relevant GLA project manager and budget being available, additional funding up to a maximum of 10% of the original contract value may be awarded to organisations that evidence good performance against contracted delivery targets, following contract management project reviews. This additional funding may take the total of an award over the maximum lifetime contract value of £10 million.</p> <p>Underperformance will be managed through the GLA's performance management process and may lead to reductions in contract values. Reductions up to a maximum of 10% of the contract value may be permitted where the circumstances resulting in underperformance are unavoidable and could not reasonably have been foreseen by the provider. These reductions may take the total of an award below the minimum lifetime contract value of £400,000.</p>	<p>Underspend on some of the AEB contracts is likely, particularly because payments are in arrears based on actual delivery (as opposed to the AEB grant payments which are paid in advance). The ESFA payments system and methodology restricts the GLA from allowing providers to carry forward underspend and balance it against over-performance in the next financial year.</p> <p>The flexibility to capture these anticipated underspends by reducing contract values for under-performing projects and reallocating the funding to reward high-performing providers through increased contract values is important for effective programme management. The GLA will aim to set out clear criteria to underpin decisions regarding increases or decreases to contract values, however, GLA officers have received legal and procurement advice that significant changes in the contract value after contract award may be considered as 'unfair' to unsuccessful bidders and carry a risk of challenge even where the criteria for increases or decreases have been published during procurement.</p> <p>Setting the maximum increase and decrease at 10% of contract value, whilst it limits flexibility somewhat, minimises this risk.</p>