

## PART 2 – CONFIDENTIAL FACTS AND ADVICE

**DMFD221**

**Title: Occupational Health Services Provision**

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**This information is not for publication until the stated date, because:**

The report contains information which is commercially sensitive and legally privileged advice.

**Date** at which Part 2 will cease to be confidential or when confidentiality should be reviewed:

1 March 2025

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

In the event the information contained in this Part 2 is the subject of a request for information under section 1 of the Freedom of Information Act 2000 (the Act), it is considered that access can be denied on the basis that such information constitutes exempt information under section 43(2) of the Act, on the basis that part of the information includes contract costs to be negotiated with the current service provider, and the disclosure of such information would have, or would be likely to have, an adverse impact on the London Fire Commissioner's (LFC's) position and related commercial interest in awarding the current occupational health service contract. Section 42 of the Act also applies, on the basis that legal 'advice privilege' is contained in this Part 2 report covering confidential legal advice and communications for the purpose of giving legal advice to the LFC, the GLA and the Deputy Mayor for Fire and Resilience (Deputy Mayor), who must consider the request for the decision sought on a fully informed basis.

### **Public interest assessment**

At present, on balance, it is considered that the public interest is best served if the information is not disclosed at this point. Disclosure by the LFC or the GLA would be likely to have a detrimental effect on the LFC's position in ongoing contract negotiations; and would have the effect of waiving legal professional privilege (LPP) upon which the LFC, the GLA and the Deputy Mayor are entitled to rely in making fully informed decisions. The general public interest in maintaining this LPP exemption will always be strong due to the importance of the principle of safeguarding openness in all communications; and ensuring access to full and frank legal advice, which in turn is fundamental to the administration of justice. Therefore, absent of any countervailing factors, the public interest weighs in favour of maintaining the privilege.

The eligibility of these exemptions should be reassessed in the event of an Freedom of Information 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.

The recommended period for non- publication of Part 2 is until such time a contract notice is published in accordance with regulation 51 of the Public Contracts Regulations 2015. The legal advice will remain privileged.

**Legal Adviser** – I make the above recommendations that this information should be considered confidential at this time.

**Name:** TfL Legal

**Date:** 23 November 2023

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

## **Confidential decision and/or advice:**

### **Background information:**

The amount of expenditure required for approval by the Deputy Mayor for Fire and Resilience (Deputy Mayor) is £2,347,804 for one year from March 2024.

This matter relates to the provision of occupational health (OH) services to the London Fire Commissioner (LFC). The current contract expires in March 2024, and there are no further extension periods available. A new tender exercise for a seven-year provision, as detailed in DMFD170, had commenced; but as a result of human error leading to inadvertent disclosures on the procurement portal available to bidders, the integrity of the procurement process was undermined and had to be abandoned. More background details are set out in Part 1, so it is not intended to repeat them here.

Options considered include legal advice from an external firm of solicitors appointed to advise the LFC.

### **Recommended option: LFC Direct award to Health Management Limited (HML)/Medigold for one year and run an open-tender procedure, in parallel, for the longer-term provision**

It is recommended to award directly to the incumbent for one year on the basis of regulation 32 (urgency and technical grounds). This proposal takes LFC over the agreed annual budget provided in the earlier LFC decision, and Deputy Mayor approval, by £317,804.

The HML/Medigold proposal for one-year from March 2024 is **£2,347,804**.

The DMFD170 budget allowed for £2.03m annually, resulting in requiring an additional £317,804 budget if the one-year direct award is made to HML.

Due to the change of circumstances and increased annual value, approval is being sought through the LFC and the GLA.

HML/Medigold have advised they need contracts to be signed early December so they can make arrangements for the new clinic space to be set up in time for 5 March 2024. HML/Medigold have assessed the current location of the service and found it to be in unsatisfactory condition; they consider the associated cost of £400,000+ per annum to be excessive and not commercially viable. HML/Medigold need time to invest in the lease and fit-out of a new clinic location dedicated to the service.

Due to the need to decommission the integration of the current OH system from the London Fire Brigade (LFB) systems, any new system will need between 42 and 52 weeks for implementation. This is evidenced by the latest bidder feedback. As such, it is necessary that LFB retain the services of HML, as current timescales will not allow for the mobilisation of a new OH IT system. Whilst there are clear requirements set out in the tender documentation as to how LFB needs to manage the data and resources around the service offering, the setup of any new system is unknown.

### **Other alternatives considered and discounted:**

The LFC has considered several options, as set out in report LFC-23-092. The only viable one is for the LFC to directly award to HML/Medigold for one year and run an open tender procedure in parallel for the longer-term provision.

### **Financial comments**

This report sets out a recommendation for the provision of the LFC's current contract for OH services,

which is due to cease on 4 March 2024.

The option considered proposes that the LFC agrees to a one-year contract with HML from 4 March 2024; and commit expenditure of the £2,347,804 over this 12-month period.

An annual budget of £2,037,533 for the OH contract is included in the budgets for 2023-24 and 2024-25. The financial impact for the recommended option is therefore an additional funding requirement of £25,856 for 2023-24; and £284,415 for 2024-25. It is proposed that the £25,856 for 2023-24 be funded from the Budget flexibility reserve, with the £284,415 for 2024-25 taken forward as growth through the budget process. If this growth is not forthcoming, when the Assembly ultimately approves the Mayor's Final Draft Budget 2024-25 in February 2024, either compensatory savings will need to be found and/or an additional drawdown from reserves will be required as the decision to enter into this one-year contract must be taken in advance of the Assembly's budget approval. The Budget Flexibility Reserve has a forecast balance of £9.458m as at the end of 2023-24, reflecting the forecast as at LFC Quarter 2 2023-24 Financial Position Summary.

The LFC notes the new tender exercise for a longer-term contract will be undertaken immediately and in parallel as intended in DMFD170.

It is assumed that from 4 March 2025 the LFC will enter into a new long-term contract with the budget envelope of £14,262,730m over seven years, as approved in DMFD170.

### Legal comments

Please see legal comments contained in Part 1 in respect of the proposed option, and the consideration of other options above. Further external legal advice, in addition to that provided by external solicitors was obtained from a King's Counsel at 11KBW, an expert in procurement law and public body decision-making. This advice is set out below:

*"I consider that option 1 (described above as the recommended option) can lawfully be pursued by LFC. In my view, in the particular circumstances here the authority would be entitled to rely on reg. 32(c) and/or (b)(ii), PCR 2015 to effect a short (c 1 year) direct award in order to ensure service continuity while conducting a fresh, lawful process for the award of a more long-term contract. If LFC pursues this course then it should also issue a VEAT [Voluntary Ex Ante Transparency] notice or contract award notice in order to seek to establish limitation etc. defences against any potential legal challenges. While a disappointed potential bidder may contend that the requirements of reg. 32 are not satisfied in the circumstances of the present case – in particular because the abandonment of the previous competitive procurement was a result of LFB's own 'fault' – in my view a Court is more likely than not to reject such arguments in the circumstances of the present case and hold that the approach taken by LFC is necessary and proportionate. Further, any potential bidder seeking to challenge the direct award would also be likely to face significant difficulties in respect of causation. Based on the information before me, I would put LFC's prospects of successfully defending a legal challenge to this approach at better than 50 per cent. Finally, provided that LFC makes clear to the market **before** concluding the direct award that it will shortly be commencing a new, competitive procurement for a long-term contract it is difficult to see that there will be a strong incentive for a disappointed potential bidder to seek to legally challenge the direct award.*

*"Options 2 and 3 (use of the 'Bloom' framework) would in my opinion be unlawful. The 'Bloom' framework comprises a relatively obvious form of avoidance mechanism that is contrary to a number of provisions of the PCR 2015. If LFB used the 'Bloom' framework in the manner suggested and was subject to a legal challenge, I would put the prospects of such a challenge succeeding at better than 70%. LFB may wish to note that there have previously been a number of legal challenges to similar framework structures. None of these have gone to trial because the defendant has always felt required to concede the claim."*

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Appendix 1 – LFC-23-092 – Occupational Health Services Provision Part 2.