

PART 2 – CONFIDENTIAL FACTS AND ADVICE

MD2635

Title: New Year's Eve 2020

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 confidential legal advice, which is subject to legal professional privilege.

Date at which Part 2 will cease to be sensitive

or when this information should be reviewed with a view to publication: 7 July, 2021

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

Part II of the Freedom of Information Act 2000 (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, if it is information in respect of which a claim to legal professional privilege could be maintained.

Legal professional privilege attaches to confidential communications between lawyers and their clients, which communications are made for the purpose of seeking or giving legal advice. To that end, the contents of this part 2 may be viewed as exempt from publication pursuant to section 42 of the Act.

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

Name: John Benson

Date: 7 July, 2020

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

Decision and/or advice:

Further background

- 1.1 Whilst the event is changing from the established fireworks display, it remains a NYE display in the sky above our city and the process for scrutinising, assuring and permitting the operational delivery plans remains the same. Therefore, regardless of the change to the event content, the high level of engagement and securing the agreement of key agency stakeholders (both existing and new stakeholders) remains critical to the safe, secure and successful delivery of this project. Without the strong understanding of agency planning for a NYE event and the positive relationships JMW has developed over the previous NYE events, it would be challenging and present unacceptable operational risk to the event for any other contractor even to deliver a new concept, whilst ensuring all agency concerns are addressed.

- 1.2 In addition, with the continuing changing circumstances and impact of COVID-19 response and restrictions, the agency stakeholder relationships will be more complicated than ever. Therefore, in order to address and overcome concerns about crowd management functions, whilst ensuring a safe event, it is essential to the project that JMW be in place to draw on their knowledge, experience, reputation and relationships from many years of NYE delivery. JMW is the only service provider to have delivered London's NYE event before and after the ticketing process, and as such is unique in its understanding of the very particular impacts and risks around crowd management and city operations on New Year's Eve in central London.
- 1.3 When considering procurement options there was careful consideration given to ascertaining the right approach. As part of reviewing the procurement framework for events, our procurement officers held a series of meetings at the end of 2019 and early 2020, which identified that the eligible agencies were only interested in tendering for New Year's Eve where they had more than 12 months' notice and were offered the chance for more than a single year contract.
- 1.4 The time available to deliver the project is very short, which has been unavoidable due to the impacts of the COVID-19 pandemic. If the Authority were to run a tender process through the Framework suppliers, there would need to be a very short turnaround, asking the supplier to submit their tenders within a period of approximately 10 days. It is conceivable that this timeframe would be likely to provoke challenges from other suppliers on the grounds of lack of fairness due to the short turnaround time where the incumbent supplier has more advantage.
- 1.5 Whilst acknowledging the risks outlined by the Legal comments below, the benefits of delivering a New Year's Eve event for London and the importance of ensuring that we have the right expertise and experience to support this event, in a condensed timeframe, during a pandemic, are vital considerations for the delivery of a safe and successful London NYE event and provide a strong operational justification for this single source approach.
- 1.6 Therefore, on the balance of considerations, if any event is to be delivered for London on 31 December 2020, the only viable route is to appoint Jack Morton Worldwide as the delivery partner by way of a direct award.

Legal Comments

The following is a continuation of the legal comments which appeared in part 1 of the decision form

- 6.7 Section 9 of the Contracts and Funding Code provides that procurements for services above £150,000 must be undertaken via a call-off from an accessible framework agreement or via a procurement, which is compliant with the requirements of the Public Contracts Regulations 2015 (the "Regulations").
- 6.8 The Authority's events services framework agreement (the "Framework") allows for the direct award of low value contracts only. In the instant case, the value of the proposed contract with Jack Morton Worldwide Limited ("JMW") is £1.25m. In view of this, the Authority would have to undertake a mini competition between the five participants (including JMW) of lot 4 (major events) of the Framework, before it could award a contract under the Framework.
- 6.9 Regulation 32 of the Regulations provides that the Authority may award a contract without first undertaking a competitive procurement, where competition is absent from the market due to technical reasons so long as no reasonable substitute exists and the absence of competition is not artificially contrived.
- 6.10 As set out at paragraphs 1.11 to 1.17 of part 1 of this decision form, by dint of its prior experience delivering event management services in relation to London's New Year's Eve celebrations (the "Event"), JMW has unique, London-specific experience, which has led the officers to the conclusion that JMW is the only service provider capable of undertaking the said services.

- 6.11 Furthermore, the officers have noted at paragraph 1.11 that other public service stakeholders – including the Metropolitan Police Service – have indicated a strong preference for dealing with JMW for the Event. The officers go on to explain that JMW’s understanding of the Event is essential to formulate and present viable mitigating plans within the complex stakeholder environment, including inter-agency and event manager cooperation and communication, and to ensure that the event be delivered safely in light of the impact to agencies caused by the COVID-19 pandemic.
- 6.12 Whilst it is open to the Authority to argue that, in view of the circumstances described above, regulation 32 may be relied upon as the basis for the direct award to JMW of the contract to manage the Event, it is not certain that such an argument would be successful. The events management sector is extremely competitive. Whilst JMW has a wealth of experience in delivering past versions of the Event, this year’s version of the Event will be different from historical versions. To that end, arguments that JMW is the only service provider capable of undertaking the services can be made both ways; namely that JMW is uniquely qualified to undertake the services and, on the other hand that, given there is to be neither the historical fireworks display nor a mass participation by an audience, the Event is so different from previous versions as to render JMW’s experience less relevant than it might have been had the Event followed its traditional programme.
- 6.13 Competitors to JMW may also seek to argue that, extensive though it may be, JMW’s experience is not so unique as to make it the only provider, who is capable of performing the required event management services. To support such an argument, competitors might point to the fact that JMW does not have any exclusive rights to equipment, computer programmes or other devices required to perform the said services.
- 6.14 In the event of a successful challenge, the aggrieved third party could seek damages and/or a declaration of ineffectiveness. In the event of a declaration of ineffectiveness, the Authority’s contract with JMW would be rendered null and void. For that reason, the officers are strongly advised to ensure that the Authority’s standard declaration-of-ineffectiveness clause be inserted into the Authority’s contract with JMW. That clause provides a process, which a court may choose to follow when making orders in relation to a declaration of ineffectiveness.
- 6.15 In summation, while officers have made sensible practical arguments for the direct award of this work to JMW, there is no certainty that the Authority could successfully defend a claim brought by an aggrieved third party – for instance one of the four other participants of lot 4 of the Framework – alleging a breach by the Authority of the requirements of the Regulations to run a fair and transparent procurement process, before awarding the relevant contract. Furthermore, it is possible that in the event of a successful challenge, that the court could award the aggrieved party damages and set aside the Authority’s contract with JMW.