

Forward Plan reference number: Not applicable

Report title: 0460 Software, Hosting and Associated Services Framework Novation and Extension	
Report to: Nicole Wood, Executive Director for Finance and Technology	
Report author: Tracey Kelsbie, Director for Technology Services	
Date: 22 July 2020	For: Decision
Enquiries to: Tracey Kelsbie, Director for Technology Services	
County Divisions affected: All Essex	

1. Purpose of Report

- 1.1 This report seeks to agree to novate the current Software, Hosting and Associated Services Framework Agreement (the “Framework Agreement”) from Comparex UK Ltd to SoftwareONE UK Ltd who legally acquired Comparex UK Ltd during an exchange of assets which took place on 1 January 2020.
- 1.2 This report also seeks approval for Essex County Council (“ECC”) to extend the Framework for a further one (1) year period.

2. Recommendations

- 2.1 Agree ECC can novate the Framework Agreement to the new contractual entity SoftwareONE UK Ltd.
- 2.2 Agree ECC can extend the Framework Agreement for a further one (1) year period.

3. Summary of issue

- 3.1 The Framework Agreement for the provision of Software, Hosting and Associated Services with Comparex UK Ltd has been in place since 2016. The contract commenced 14 November 2016 for a period of 4 years. The Framework Agreement provides a non-committal opportunity for ECC to procure services including:
 - 3.1.1 Source and manage software licences, including support and maintenance and implementation;
 - 3.1.2 Market analysis including pre-market engagement, market intelligence and benchmarking; and
 - 3.1.3 Contract and supplier management of third part suppliers.
- 3.2 At the point of contract award, the current contract was placed with Comparex UK Ltd. On 25 April 2019, ECC were informed of a change of control relating to Comparex UK Ltd. SoftwareOne acquired 100% of shares in Comparex AG, the parent company of Comparex UK Ltd. Comparex UK Ltd would continue to operate and fulfil customer requirements as usual while the merger process is

undertaken. A further notification was received on 18 December 2019 that SoftwareONE UK Ltd had legally acquired Comparex UK Ltd during an exchange of assets as of 1 January 2020. As part of the business transfer, Comparex UK Ltd assigned all rights, title, interest and benefit in and to all contracts to SoftwareONE UK Ltd with effect from that date.

- 3.3 There are provisions under the Framework Agreement, that enable the parties to assign or novate the contract provided the Parties consent.
- 3.4 Comparex UK Ltd is no longer a trading legal entity and all activities are now carried out under SoftwareONE UK Ltd. This means that existing contracts and business relationships are now under the responsibility of SoftwareONE UK Ltd. The commitments made by Comparex UK Ltd under existing contracts and previous offers will be maintained based on the original terms as applicable.
- 3.5 To formalise the acquisition of Comparex UK to SoftwareONE and in line with the contract, a Deed of Novation is required to confirm that all responsibilities, obligations and liabilities have been novated to SoftwareONE UK Ltd.
- 3.6 The current Framework Agreement is due to expire on 13 November 2020. ECC staff are diverted by procuring urgent requirements to deal with COVID-19 consequences and therefore are not available to re-procure this framework and implement a new solution before it's expiry in November 2020. The value of the variation is estimated to be below £2,000,000.
- 3.7 Given the current circumstances with COVID-19 and staffing issues raised above, consideration has been given to extend the current Framework Agreement for a further year, although no extension provisions under the Framework itself, relying on Regulation 72 and justified as follows:

3.7.1 The need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;

ECC staff, both within Procurement and the service area are diverted by procuring urgent requirements to deal with COVID-19 consequences and therefore are not available to re-procure this framework and implement a new solution before it's expiry in November 2020. A number of software licence, support and maintenance agreements are sourced through this agreement with existing supply chain in place for our current needs.

3.7.2 The modification does not alter the overall nature of the contract;

The nature of the contract remains the same. It is proposed to extend the framework agreement in line with the current specification and terms and conditions.

3.7.3 Any increase in price does not exceed 50% of the value of the original contract or framework agreement.

The Framework Agreement was originally let for 48 months for £50,000,000 (as published in the Contract Award Notice). The spend to date for ECC under this Framework Agreement is £12,656,080 up to the 16 March 2020. Although the average spend over the 4 year period is £3,164,020 per annum, spend for Microsoft Licensing and Adobe Licensing is no longer procured via this route. It is therefore expected the spend for the 1 year extension to be up to be below £2,000,000 therefore falls below the 50% threshold.

- 3.8 Purchases under this Framework Agreement are fixed at 2% mark-up and within the expected mark-up for this sector of the market. Similar frameworks offer similar mark-ups:

3.8.1 Brunel University POISE Framework – 3% mark-up

3.8.2 HealthTrust Europe ICT Solutions Framework – 1% mark-up

3.8.3 Crown Commercial Services gCloud 11 Framework – 1% mark-up

- 3.9 There are no notable performance issues with this Framework Agreement and no service changes are proposed.

- 3.10 In response to the current Coronavirus outbreak (COVID-19) ECC needs to ensure the supply of goods, services and works to provide and maintain support Essex residents.

- 3.11 An exercise has been undertaken, using ECC's contract liquidity data, to identify those contracts that deliver essential goods, works and services that will need to be extended or re-procured within the next few months to ensure continuity of supply, and this contract has been identified.

4. Options

4.1 Option 1 – Novation of Framework Agreement to SoftwareONE UK Ltd and extend Framework Agreement

ECC needs to formalise the novation of contract to SoftwareONE UK Ltd to ensure the new company takes on all the liabilities and obligations under the Framework Agreement. An extension of the current Framework Agreement is needed for a further 12 months until 14 November 2021 to ensure it meets the immediate need to ensure the supply of goods in response to the current COVID 19 epidemic by providing ECC an option to purchase software, hosting and associated services without the need for further competition.

Option 1 is the preferred option.

4.2 Option 2 – Do Nothing

If we do nothing and allow the current Framework Agreement expire without an extension, although this would not have an effect on the choice of suppliers or solutions available to ECC, each requirement would need to follow its own procurement process which in the current circumstances will be difficult to resource.

4.3 Option 3 – Procure for a new Framework Agreement

One option is to carry out a procurement process for a new framework agreement and award a framework contract to supplier(s) for the provision of software, hosting and associated services for the next 4 years. This option cannot be currently resourced during the current Coronavirus outbreak with resources focussing on maintaining the technology infrastructure with the majority of staff working from home.

4.4 Option 4 – Call off an existing software framework already in place.

These frameworks can be used straight away and can attract economies of scale to offer competitive pricing. However, products are refined only to the scope of the framework and there is not much flexibility of contract terms, as they are not permitted to be materially altered.

4.5 The preferred and recommended option following this report will be to novate the Framework Agreement to SoftwareONE UK Ltd and extend the current Framework Agreement (Option 1).

5. Issues for consideration

5.1 Financial implications

- 5.1.1 The extension of this framework has no direct financial implications. Use of the framework by the Council will require, however, individual decisions to procure the relevant services from the framework, which will need to include demonstration that sufficient funding is available to support any costs associated with those decisions.
- 5.1.2 Total spend under this framework to March 2020 is £12,656,080. The spend on the contract for the 1 year extension is expected to be less than £2m based on the annual average spend under the contract. If spend needs to exceed this amount, further governance will be required.
- 5.1.3 Benchmarking of the 2% percentage mark-up on this contract has identified alternatives that could be used with a lower mark-up. Assuming spend of £2m, using an alternative framework with a 1% mark-up would offer a saving of £20,000. This saving, however, would be offset by the resource costs associated with undertaking a full procurement for a new framework.
- 5.1.4 The expectation is that this framework will be subject to a new procurement exercise in 12 months; this process will seek opportunities

for a lower mark-up where this can be demonstrated to be value for money.

5.2 Legal implications

- 5.2.1 As an acquisition of Comparex UK Ltd has been undertaken by SoftwareONE UK Ltd this needs to be formalised under the current Framework Agreement by way of a Deed of Novation to ensure all obligations and liabilities are adopted by SoftwareONE UK Ltd to protect ECC and the services provided.
- 5.2.2 Due to the COVID-19 pandemic and the issues faced with trying to re-procure a new framework agreement due to the current one expiring it is intended to extend the current Framework Agreement under Regulation 72 of the Public Contract Regulations 2015 ("PCR") which enable variations to contracts if the following applies:-
 - a) Modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;
 - b) The modification does not alter the overall nature of the contract and
 - c) The increase in price does not exceed 50% of the value of the original Framework Agreement
- 5.2.3 Although ECC can rely on Regulation 72 of PCR there may be a risk of challenge by other providers and if found to be in breach the Framework Agreement may be set aside and ECC ordered to pay costs.

6. Equality and Diversity implications

- 6.1 The Public Sector Equality Duty applies to the Council when it makes decisions. The duty requires us to have regard to the need to:
 - (a) Eliminate unlawful discrimination, harassment and victimisation and other behaviour prohibited by the Act. In summary, the Act makes discrimination etc. on the grounds of a protected characteristic unlawful
 - (b) Advance equality of opportunity between people who share a protected characteristic and those who do not.
 - (c) Foster good relations between people who share a protected characteristic and those who do not including tackling prejudice and promoting understanding.
- 6.2 The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, marriage and civil partnership, race, religion or belief, gender, and sexual orientation. The Act states that 'marriage and civil partnership' is not a relevant protected characteristic for (b) or (c) although it is relevant for (a).

- 6.3 The equality impact assessment indicates that the proposals in this report will not have a disproportionately adverse impact on any people with a particular characteristic.

7. List of appendices

Equality Impact Assessment

I approve the above recommendations set out above for the reasons set out in the report.	Date
Executive Director for Finance and Technology (S151 Officer)	27/07/2020
Nicole Wood	

In consultation with:

Role	Date
Cabinet Member for Customer, Corporate, Culture and Communities	03/08/2020
Councillor Susan Barker	
Executive Director for Finance and Technology (S151 Officer)	
Peter Shakespear, Head of Finance (Corporate & Strategic Partnerships)	29/06/2020