

EXECUTIVE DECISION RECORD SHEET

Name of decision maker:	Cllr Brian Ayling
Portfolio:	Performance Improvement & Transformation
Date of Portfolio Holder Decision:	

Title of Decision: To award a contract for the Microsoft Enterprise Agreement to Microsoft administered through the Gold Partnership accredited scheme via Ultima Business Solutions.
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Decision made and reasons:

Decision

To procure the existing Microsoft Enterprise agreement for a further 3 years from April 2011; and

To make funds through Capital of £118,000 per annum available for the procurement of the Microsoft Enterprise agreement.

Reason

Since April 2008 the Council has licensed its Microsoft products through the Microsoft Enterprise Agreement. This can only be purchased through Microsoft using a Microsoft Gold Partnership Agent.

This is a retrospective decision as the Council has already entered into an agreement with Microsoft for the provision of the Microsoft Enterprise agreement. This new agreement commenced in April 2011.

Reports considered: (here reference can be made to specific documents)

Executive Decision Record Sheet PH/022/08

Officers/Councillors/Ward Councillors/Stakeholders Consulted:

Louise Miller – Corporate Director Performance, Improvement and Transformation
Janice Milsom – Assistant Director Strategy and Transformation, Community and Organisation

Steve Baker – Assistant Director Legal and Governance

Chris Gordon – Group Manager Performance, Transformation and Projects

Ben Hosier – Group Manager Procurement and Commissioning

EXECUTIVE DECISION RECORD SHEET

Monitoring Officer comments:	In circumstances where the Council has entered into a contract in breach of the Public Contracts Regulations there is no perfect remedy available to the Council and it becomes a matter of damage limitation. The Regulations themselves provide that the awarding authority should still proceed to publish a contract award notice albeit that, as in this case, such notice will inevitably disclose that the awarding authority has not complied with the Regulations. However, this indicates that the non-compliance was not deliberate and is therefore less likely to attract an adverse response from the EU Commission.
Deputy S151 Officer comments:	The Deputy S151 Officer's comments have been incorporated into the report.
Implications:	
Risk:	There is a risk that should this retrospective decision not be made then the Council would continue to be in breach of contract potentially resulting in financial penalties, as well as a risk to the Council's reputation.
Value for Money:	A Microsoft Enterprise agreement is the most cost effective way of procuring licenses for desktop and server products.
Options Considered and reasons for rejection:	
Not to sign this decision - This was rejected as it is against the Council's and National transparency agenda.	
Portfolio Holders Signature:	
Date:	
Details of any interests declared and any dispensations given by the Standards Committee:	

EXECUTIVE DECISION RECORD SHEET

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Date Decision Record Sheet received from portfolio holder: 24/04/2012	
Date Decision Published: 25/04/2012	Decision No: PH/12/023
Date of Expiry of Call-In Period: 02/05/2012	
Date any Call-In received or decision implemented:	

EXECUTIVE DECISION RECORD SHEET

BACKGROUND

This contract has been awarded to Microsoft without undertaking a competitive tendering process.

Ultima Business Solutions, the current providers, took the view that they were authorised to renew the contract to the Council under the Public Sector Agreement 2009 (PSA09) which is part of the Buying Solutions Framework agreement.

In compliance with the Council's Procurement Standing Orders and the Public Contract Regulations 2006, the Council should normally have undertaken a competitive tendering exercise. However, it was understood that PSA09 was sufficient authorisation for the contract to be renewed.

PSA09 is a Memorandum of Understanding between the Government Procurement Service (formerly the OGC) and Microsoft for providing preferential discounts for public sector organisations for Enterprise Agreements. It is not an official procurement vehicle and therefore any licenses that are required must be purchased through an EU compliant procurement route. For example Buying Solutions' Commoditised IT Hardware and Software framework agreement. During March 2011 advice provided by the Group Manager Commissioning, Procurement & Compliance made it clear that a competitive tendering process was necessary..

The Government Procurement Service (GPS) Commoditised IT Hardware & Software framework agreement is a fully EU compliant procurement vehicle for the purchase of Enterprise Agreements with 10 suppliers on it. Each contracting authority would need to undertake a further competition (mini tender) asking all ten of the suppliers to tender for the requirement. A contract could only be awarded to one of the bidders on the framework agreement. Ultima Business Solutions are not one of the ten suppliers on this framework agreement.

Following the award of the contract to Microsoft via Ultima Business Solutions, therefore, the Council is currently in breach of the Public Contract Regulations 2006. There are two options that are open to the Council.

Option 1

To ensure that the Council ceases to be in breach of the Public Contract Regulations 2006, the Council could end the contract with Microsoft purchased via Ultima Business

EXECUTIVE DECISION RECORD SHEET

Solutions. This would then allow the Council to undertake a mini tender from the GPS framework agreement RM 721/L3 and award a contract that would be fully compliant. However, the Council has entered into a commercial contract with Microsoft and if a decision is made by the Council to end this contract, then Microsoft may seek damages.

Option 2

The Council accepts that it has awarded this contract in breach of the Public Contract Regulations 2006 and publishes a contract award notice stating that it has awarded this contract to Microsoft via Ultima Business Solutions Ltd.

There is a risk that the Council could be challenged on the award of this contract by suppliers that were not given the opportunity to tender. There is also a risk that the EU Commission may show an interest in the breach of the regulations.

Suppliers have 30 days to submit a challenge on this contract award from the publication date. Once the 30 days has passed they are no longer able to challenge the decision.

Informal independent advice has been sought from external legal advisers Trowers & Hamlin in respect of these proposals. The advice has been to acknowledge the breach in the Public Contract Regulations 2006 and to publish the contract award notice.

It is felt that the risk of challenge is relatively low on option 2, whereas the risk of Microsoft seeking damages is more likely under option 1.

It is therefore recommended that the Council select option 2.