

**Invitation to tender no. ACER/OP/ADMIN/12/2012**

**Web applications development services and IT consultancy services for the implementation of REMIT Information System (ARIS) for the Agency for the Cooperation of Energy Regulators**

**Answers to questions 45 to 58**

**Question no. 45:**

**Order of Precedence**

- According to the Order of Precedence the Service Level Agreement shall take precedence over those in the Contract. However, the Service Level Agreements are part of the Contract. Can you please specify over which document the Service Level Agreements take precedence?
- It is our understanding that the Specific Contracts shall describe the project specific scope of services and conditions. Is it correct that if project specific requirements deviating from the framework service contract take precedence over the conditions of the framework service contract?

**Answer no. 45:**

The wording of the sentence was incomplete and, in its current wording, devoid of any meaning. The phrase has to be understood as meaning "The Terms set out in the Service Level Agreement (Annex IV) shall take precedence over those in the Contractor's Tender (Annex III)".

Project specific requirements can be laid down in the Specific Contracts. However, in case of conflict, the terms of the Framework Service Contract shall take precedence over those in the specific contracts.

Further, please note that specific contracts based on framework contracts can only be awarded in accordance with the terms of the framework contract. No substantial changes can be made to the terms laid down in the framework contract.

**Question no. 46:**

**Contract Details**

- We assume that clarifications or additional information that is given by the agency during the tender phase or after opening of the tender according to Art 9 of the Invitation to Tender will become part of the contract documents? Will they be incorporated in the draft contract documents that have to be signed or will they be summarized in a separate document which will become prevailing part to Framework Service Contract?

**Answer no. 46:**

All contracts, awarded following a public procurement procedure, must comply with the general principles of transparency, proportionality, equal treatment, non-discrimination and genuine competition. Clarifications or additional information related to the contract could be incorporated into the contract, provided that sufficient time was provided to all tenderers to acquaint themselves with the information concerned and no substantial changes are made to the terms laid down in the draft contract.

**Question no. 47:**

**Art. II.1.9 Framework Service Contract**

According to this Article the Customer has a right to reduce payment in case of non-performance of the contract. Is it correct that this right refers to a breach of the warranty obligations? If not in which cases does this right apply and how will the proportion be calculated in these cases?

**Answer no. 47:**

This right refers to the possible actions open to the Agency in case it is confronted with a failure of the contractor to perform its contractual obligations, including amongst other things a breach of the warranty obligations.

In case of a contractor's failure, the Agency could decide to reduce its payments in proportion to the scale of the failure. The precise reduction of payments will have to be assessed on a case-by-case basis, depending on the scale of the failure at hand.

**Question no. 48:**

**Art. II.4.2 Framework Service Contract**

Is it correct that the undertaking according to this Article has to be obtained from the respective members of staff, board and directors involved in performance of the Contract?

**Answer no. 48:**

Article II.4 of the General Conditions of the Framework Service Contract obliges the Contractor to respect and safeguard the confidential nature of any information that it receives from the Agency in the context of the contract.

From the above, it follows that the Contractor has to request an undertaking from any member of staff, board and director who may, directly or indirectly, have access to the information concerned.

If, due to the above, not all staff of the Contractor is requested to sign the undertaking, the undertaking should be worded in such way that, for the member signing the undertaking, it is made clear that his/her colleagues who have not signed the undertaking shall also be considered third parties to whom the information may not be divulged to.

**Question no. 49:**

**Art I.9.2, I.9.3, II.10.4 Framework Service Contract, Art. 10.2 Tender Specifications**

In Art.10.2 of the Tender Specifications it is regulated that where Copyrights and other intellectual or industrial property rights belong to a third party there is also the possibility to grant a license to the Agency instead of fully transferring the unconditional rights to the Agency. Is it correct that in case third parties deliverables, results, works or software components are used the license terms of the third party shall apply and prevail as far as the Contractor points out these deliverables, results, works or software components in his offer?

**Answer no. 49:**

This reading is correct.

**Question no. 50:**

**Art. II.14.4 Framework Service Contract**

Is it correct that the liability for damages and costs specified in this Art. is subject to the limitation set forth in Art. II.2.2?

**Answer no. 50:**

The possibility of the Agency to claim compensation for damage suffered and recover sums paid to the Contractor under the Contract is subject to the limitation set forth in Article II.2.2 of the General Conditions of the Framework Service Contract.

The Agency's right to claim from the Contractor all extra costs incurred in executing or completing the services by engaging any other contractor can be exercised without prejudice to any other rights or guarantees it has under the Contract (including said Article II.2).

**Question no. 51:**

**Tender Specification 4.2 (last paragraph)**

How should this paragraph be applied to software (sub) modules delivered by the Contractor? How this is related to agreed SLA's? How this will be applied for consulting services (LOT2)?

**Answer no. 51:**

In case of software modules or sub modules involved in a complete or intermittent system failure the last paragraph of ANNEX I at point 4.2 must be interpreted as the contractor is

requested to provide a bug fix or a workaround to re-establish the correct functionality of the system. The contractor can also provide hardware and software with the aim to recover from complete or intermittent system failure and to comply with the before mentioned conditions. The relationship between the Tender Specification 4.2 and the Service Level Agreement is specified in ANNEX I A - Technical Specifications for Lot 1 at point 6.3 in the section "Applicable only to *Software maintenance* specific contracts"

By analogy the same principle should apply to consulting services under LOT 2, when the contractor's consultants are performing a task requested in a specific contract by the Agency which causes a general or intermitting failure of the system. In this case the contractor is requested to take any action to recover the complete or intermitting system failure within 24 hours.

**Question no. 52:**

**Tender Specification 4.4**

- a) What are the (quantitative) KPI's to measure the performance of replaced previously approved products?
- b) Is it correct that each delivered product has to pass through an acceptance test and finally approved by the Agency?
- c) Is it correct that incompatibilities mentioned in the third paragraph of 4.4 have to be identified during these tests?

**Answer no. 52:**

Quantitative Key Performance Indicators to allow the replacement of an existing approved product, will be provided in the relevant requests for services.

The statement is correct; each deliverable will need to pass an acceptance test set by the Agency. The Agency will then approve the deliverable.

The statement is correct; incompatibilities, if not identified in an early development and/or deployment stage, will need to be identified at test phase based on the test plan set by the Agency.

**Question no. 53:**

**Tender Specification 9.2 (Conflict of Interest)**

- a) Is it correct that the Contractor will be informed in advance of the first request regarding the possibility of an upcoming conflict of interest regarding the scope of this specific request?
- b) What are the criteria for the Agency to exclude a Contractor from a specific request based on this "Conflict of interest" clause ?

**Answer no. 53:**

The contractor will be informed in writing of any conflict of interest which would rise during the preparation of a request for services, as stated in Point 9.2 of the Tender Specifications under "Conflict of interest" section, in the last paragraph. In this case, the Agency shall not send him a request for service, regardless his ranking.

The conflict of interest criteria which may exclude a contractor from a specific request are mentioned in Article II.3 of the General Conditions of the Framework Service Contract. In

particular, a conflict of interest can arise from economic interests, political or national affinity, family or emotional ties or any other relations or shared interest detected by the Agency.

**Question no. 54:**

From tender documentation it is obvious that ACER is seeking for:

- . DW solution for storing all market data nad reference data
- . Data integration solution for gathering all necessary data
- . Master Data management solution for keepin all master data under control and to enforce data governance among all participants
- . Reporting solution for standard reporting
- . Data Mining solution for market monitoring.

All above mentioned solutions can base on standard commercial software all integrated in one large solution covering all requests. Minor modifications and development should be requested on Portal, API and business logic, which is much more less than developing complete solution from scratch. Solution can therefore be much faster implemented, with substantial lower price and less implementation risks.

Answer 17 on contrary favourize extensive programming & development solutions versus standard commercial based solutions.

Including all costs as mentioned in Answer 17 will reflect in very high price/hour which put tenderers with extensive development approach in much better position than tenderers with solutions based on standard commercial SW, penalizing later with lower number of points.

What will ACER do to equalize chances of both approaches?

**Answer no. 54:**

As expressed in the title of this tender, the main scope of this tender is “Web applications development services and IT consultancy services for the implementation of REMIT Information System (ARIS) for the Agency for the Cooperation of Energy Regulators”.

In this order of ideas, the main scope of this tender is to identify economic operators interested in cooperating with ACER in the development of custom software with the aim to implement the REMIT Regulation, once the Implementing acts will be adopted by the European Commission.

Basic principles to balance adoption of existing commercial software are set at point “2.3 General principles for writing software” of Annex\_I\_A - Technical specifications Lot 1.

In this view, ACER will provide information about standard commercial software which must be used as pre-requirement for the development of a deliverable in the relevant requests for services.

**Question no. 55:**

Document “Tender specifications” ,Page 29, Chapter 20.2.1, Text passage:”

Price for LOT 1”, Question: “Table 1: Is in the value of 2000 FPs already the VAF of 1,22 included.

The textual description implies this. But according to the Function Point CPM 4.3 the AFP does not include this VAF, rather the aAFP (adjusted AFP) includes the VAF. If AFP means the former unadjusted FPs (CPM 4.2), then the adjusted FP value will be 2440 FPs.”

**Answer no. 55:**

In ANNEX I - Tender specifications at page 29, Chapter 20.2.1 under text passage:” Price for LOT 1” the “AFP: application function point count” must read “AFP: Adjusted function point count” with the same meaning reported in IFPUG - CPM 4.2 - Part 4 under section “Glossary”

“**Adjusted function point count (AFP).** The function point count based on the unadjusted function point count multiplied by the value adjustment factor. The adjusted function point count is calculated using a specific formula for development project, enhancement project, and application. The adjusted function point count is commonly called the function point count.”

The referred value is than calculated as expressed in IFPUG - CPM 4.2 - Part 1 at Page 9-17

$$AFP = ADD * VAF$$

Where:

AFP is the initial application function point count.

ADD is the unadjusted function point count of those functions that were installed by the development project.

VAF is the value adjustment factor of the application.

**Question no. 56:**

Document “Annex\_I\_C\_Case Study for Lot 1” ,Page 4, Chapter 2.1, Text passage:”information from national register”, Question: Please explain "triggers the publication of non disclosed information regarding the market participant in question"

**Answer no. 56:**

“Non disclosed information” are information available to public with no confidential content or with content which can be made publicly available. In this context, the phrase must be interpreted as “once the National Register sends to ACER a set of information (containing disclosed and non disclosed information) as a Market Participant registration file, the CEREMP system will automatically extract non disclosed information, and make them available for the presentation layer, so that the before mentioned information will be available for publication and for search purposes to the public, in the way mentioned at the last paragraph at page 5 of the Annex\_I\_C\_Case Study for Lot 1 document.”

**Question no. 57:**

Document “Annex\_I\_C\_Case Study for Lot 1” ,Page 18, Chapter 6.1, Text passage:” Database schema”, Question: Is it possible to get the ER-diagramm in a better resolution

**Answer no. 57:**

The Agency cannot provide the same diagram in a better resolution.

**Question no. 58:**

- Section 19.2 states that the tenderer should provide an evidence of financial and economic capacity by means generally defined in Article 31 of the Council Directive 92/50/EEC.

Could you please clarify/specify what should the bank confirm (cash-flow statements, liquidity, possible funds blocked in previous month(s), etc. ? ) or possibly provide a unique form for all tenderers.

Could you also please clarify/specify an acceptable professional risk indemnity insurance (possible minimum acceptable insurance sum, duration, insurable risks, etc.

**Answer no. 58:**

The documents requested in section 19.2 of the Tender Specifications should prove the economic and financial capacity of the company. The Contracting Authority therefore requests, in addition to balance sheet and overall turnover requirements, appropriate bank statements / declaration, *or* evidence of professional risk indemnity insurance.

There is no special template for either the bank statement or the professional risk indemnity insurance. A bank statement means that the bank will have to issue a statement of financial capacity. Banks normally use a standard clause depending on the country. Supporting evidence of the necessary financial capacity may cover cash-flow statements, liquidity problems (and if so, when and how long for), the customer rating of your company at the bank, etc.

As an alternative to the bank statement, a copy of your professional risk indemnity insurance could be provided. Tenderers submitting a professional risk indemnity insurance should describe in brief what this insurance is covering and for which amount. The evidence provided should give enough information to enable the Contracting Authority to judge on the company's financial and economic capacity.