

Helsinki, 06/06/2012
D(2012)

CLARIFICATION 3

**Open call for tender ECHA/2011/150
Invitation to Tender No 2012/S 88-143630
Framework Service Contract for the Provision of Enterprise Content
Management (ECM) Services and Solutions**

Question 3.1

Have we understood correctly that entering into the proposed framework contract would not impose any obligation for the contractor to enter into Specific Contracts or to approve order forms, even if they would conform to the terms of the framework contract?

Answer

Entering the Framework Contract does not impose any legal obligation on the contractor to enter into Specific Contracts or to approve order forms, even if they would conform to the terms of the Framework Contract.

Please note, however, that ECHA intends to benefit from the expertise of the service provider and make extensive use of the services to be provided under the Framework Contract. In this regard, the Steering Group foreseen in the Specifications (Management Team in Section 5.1 of Annex 5.1.2.1) shall be the context for preliminary discussions prior to the request for services under Specific Contracts, within the terms and conditions established in the Framework Contract. Discussions may also follow the presentation by the Contractor of a quotation or an estimate of the resources to be allocated for its execution, with particulars in support, as provided by Article I.4.3 of the draft Framework Contract.

Question 3.2

Taking into account the cost of guarantees issued by banks and financial institutions, please confirm that parent company performance and pre-financing guarantees in favour of ECHA will be acceptable where such guarantees are requested.

Answer

A Contractor may use parent company guarantee as pre-financing or performance guarantee, provided that such parent company guarantee meets the requirements of such guarantees as laid down in Annex V and Annex VI of the draft Framework Contract (Annex 5.2 to the Specifications). Particular attention is drawn to the fact that the Parent Company shall stand as first call guarantor.

When the guarantee is provided by a third party, the reliability of this party may be checked by any means deemed appropriate by the Agency.

Question 3.3

Regarding liability for intellectual property rights infringements, please confirm that contractor shall in no circumstances be held liable for any infringements in third party software products

Answer

*As provided by the Specifications, page 12-13, "The Contractor will not be liable for any eventual infringement of the **EMC Documentum Software licences** at ECHA's premises. The Contractor bears responsibility, however, for the legally correct use of the EMC Documentum software licences at its premises, in accordance with Article I.12 of the draft Framework Contract, in particular.*

In case the Contractor would be in a situation of infringement of the EMC Documentum licences at its premises, he would have to report without delay this situation to ECHA (Article I.12.4 of Draft Framework Contract), and take immediate remedial actions (Article II.1.8 of Draft Framework Contract).

*The Contractor shall be liable in the terms laid down in Article I.11 of the draft Framework Contract for any infringements of **any other third party software products** that the Contractor uses in the provision of the services.*

Question 3.4

The liability proposed under Article II.2.2 is extremely high when compared to general Finnish market practice. Can you please confirm whether the Article can be amended in such way, that the maximum liability of the service provider for direct damages is the value of the contract which has been breached and indirect damages would only be payable in situations where damage or loss is caused by the gross negligence or willful misconduct, or by the breach of confidentiality obligations, of the Contractor or its employees?

Answer

ECHA does not consider modifying the provisions of the draft Framework Service Contract. As indicated in paragraph 7 of the Invitation to Tender the submission of a tender implies acceptance of the terms and conditions set out in the invitation to tender and in the specifications, including the technical documentation and the draft contract, and, where appropriate, waiver of the tenderer's own general or specific terms and conditions. It is binding on the tenderer to whom the contract is awarded for the duration of the contract.

The submission of a tender under any other terms than those set up by the Agency, or including a disclaimer with respect to that essential requirement of the procurement procedure, will determine the rejection of the tender.

Question 3.5

Please give a concrete example on what Article II.2.3 means. Also, please explain how the term "compensation" shall be interpreted, is this to be included into the earlier limitation of liability or shall it be understood as an unlimited liability to compensate?

Answer

In view of the particular nature of the services to be provided under the Framework Contract third-party claims from the customers of the Agency (i.e. claim for damages from chemical industry in case of leak of confidential information) represent foreseeable

damage for the Agency that may directly result from the breach of the Contract by the service provider.

The limitation of liability in Article II.2.2 of the draft Framework Contract also concern third-party claims.

Question 3.6

Under Article II.16 you have proposed unlimited liquidated damages to be paid for delay of the Contractor. Such unlimited liquidated damages deviate considerably from general Finnish market practice. Can you please confirm whether the Article II.16 can be amended in such way, that an upper limit (e.g. as a common market practise may be considered 10% of the value of the delayed part of the delivery) is set for liquidated damages under each contract?

Answer

Please see answer to Question 3.4

Question 3.7

Does Article 4.2.1 of the Open Procurement Procedure Specifications mean that ECHA will not negotiate or amend any of the provisions of the framework contract with the successful tenderer? If negotiations are possible, can the contractor without further liability refuse to enter into the framework contract if ECHA and the contractor cannot agree on the content of the framework contract?

Answer

ECHA will not negotiate the provisions of the draft Framework Service Contract with the successful tenderer. The Terms and Conditions of the draft Framework Contract as published in the Specifications (Annex 5.2) of the Call for Tenders are binding on the tenderer to whom the contract is awarded for the whole duration of the contract.

ECHA