

10 JSC Belgrade Nikola Tesla Airport
Public Procurement Commission 8/2013
Reference number: 1164
Date: 24. 07. 2014
Belgrade

Subject: Additional information and clarifications for public procurement in open procedure
"BAGGAGE RECONCILIATION SYSTEM - BRS" No.8/2013

Acting upon request of the Tenderer in line with the article 63 of the Public Procurement Law ("Official Gazette of the Republic of Serbia" no. 124/12), we are forwarding a clarification of the tender documentation for the public procurement in open procedure "BAGGAGE RECONCILIATION SYSTEM - BRS" No.8/2013.

Question:

This document sets out Tenderer's observations on the Draft Contract included in the above tender for a Baggage Reconciliation System ("the **Tender**"). Such observations include: (a) comments requesting clarification; and (b) Tenderer's feedback on the Draft Contract, including suggested changes.

I SUBJECT OF THE CONTRACT

Art. 1

Art. 1 states that both the "*Tender of the Supplier*" and the "*Tender Dossier*" are "*integral parts of this Contract*". Two issues here:

- (a) Please clarify what these two documents are. Is the "*Tender of the Supplier*" the bid response document that will be submitted by Tenderer (and other potential Suppliers)? Is the "*Tender Dossier*" the Tender Documentation pack provided by the Purchaser?
- (b) If these documents are to be incorporated into the Contract, the Contract must include a statement to clarify that in the case of conflict between those documents, the terms and conditions of the main contract document will take precedence. This will avoid confusion.

Tenderer would suggest:

"In the event of any conflict between the documents comprising this Contract, the following order of precedence shall apply: (i) these terms and conditions; (ii) the Service Schedule for BagManager (ii) the Tender of the Supplier; and (iii) the Tender Dossier."

Please see "*Manner of Provision of Service*" below regarding the suggested inclusion of the Service Schedule for BagManager.

Clarification a):

"*Tender of the Supplier*" is the bid response document that must be submitted until 28 January 2014. "*Tender Dossier*" is the Tender Documentation provided by the Purchaser.

Clarification b):

The Purchaser does not agree with the proposed changes.

Question:

II MANNER OF PROVISION OF SERVICE

Art. 2

- (a) A description of the services to be provided by the Supplier should be set out in a Schedule to the Contract. This allows the Purchaser to see exactly what services it will receive. This will supplement the basic outline of services current set out in this section. Furthermore, this Contract does not currently reference the Project Plan that will be agreed. Tenderer would respectfully suggest the following wording is added:
“The Supplier shall perform the services described in the document entitled “Service Schedule for BagManager” in accordance with the Project Plan, each of which are attached to, and form part of, this Contract.”

Clarification a):

The Purchaser does not agree with the proposed changes.

Question:

III PRICE

Art. 3

- (a) Tenderer requests the ability to increase the charges payable by the Customer on an annual basis in order to reflect changes in CPI. Accordingly, Tenderer would respectfully suggest that the following wording is included as a new paragraph at the end of Art. 3:

*“With effect from the first anniversary of the date of commencement of the services, the Supplier may, on one-month’s prior written notice to the Customer, increase the charges relating to the services once in each period of twelve (12) months in line with the percentage increase in the **Relevant CPI** (being the published and generally accepted consumer price index (or equivalent) in the Republic of Serbia).”*

Clarification a):

The Purchaser does not agree with the proposed changes.

Question:

IV MANNER AND TERM OF PAYMENT

Art. 3

- (a) Tenderer will not charge any advance payment to the Purchaser. Charges will be payable on a monthly basis only and no lump sum is payable upon setup of the Information System. All references to advance payment should be removed from the Draft Contract.
- (b) For the above reason, the Advance Payment Guarantee is not relevant. All references to the Advance Payment Guarantee should be removed.
- (c) Please clarify the effect of the references to the “*Business Plan for 2014*”. Does this wording mean that payment to the Supplier is conditional on the Purchaser’s Business Plan for 2014 allowing such payments to be made? Has that business plan now been finalised?
- (d) What does the wording “*notice of termination does not release the Parties (i.e. the Supplier and Purchaser) from the proper performance of the Contract*” actually mean? Tenderer does not understand this paragraph.

Clarification a) and b):

The Purchaser does not agree with the proposed changes.

Clarification c):

All financial obligations of the Purchaser are conditioned by the adoption of the Business Plan for a particular budgetary year. The Purchaser has predicted funds in the Business Plan for 2014. for the public procurement that is the subject of this tender.

Clarification d):

The above contractual provision means that contract termination does not relieve any of the parties in the implementation, of previously initiated obligations.

Question:

V TIME AND PLACE OF PROVISION OF SERVICE

Art. 5

- (a) The Supplier's ability to meet the deadlines set out in the first and second paragraphs of Art. 5 is dependent upon the Purchaser complying with its obligations under the Contract (such as ensuring that the site is properly prepared for installation). Most of these obligations will be set out in the Project Plan.

Tenderer would suggest that the first paragraph of Art. 5 is amended to read:

"Subject to the Purchaser complying with its obligations under this Contract, including (but not limited to) those set out in the Project Plan, the delivery time for hardware is...."

Additionally, Tenderer would suggest that the second paragraph of Art. 5 is amended to read:

"Subject to the Purchaser complying with its obligations under this Contract, including (but not limited to) those set out in the Project Plan, the deadline for completion of service Initial Setup...."

Clarification a):

The Purchaser does not agree with the proposed changes.

Question:

VI SCHEDULE OF PROVISION OF SERVICE

Art. 6

- (a) Tenderer would suggest that a very minor amendment is made to Art.6 so that it expressly references the Project Plan that will be agreed.

Tenderer would suggest the following amendment to the first sentence of Art.6 only:

"The provision of service from Article 1 of this Contract shall be made in accordance with the Project Plan, being a schedule set by the Supplier with the consent of the Purchaser."

Clarification a):

The Purchaser does not agree with the proposed changes.

Question:

VII QUANTITATIVE AND QUALITY ACCEPTANCE

Art. 7

- (a) Although the Tender indicates that there will be an evaluation period, the Contract does not contain a detailed acceptance testing mechanism (or acceptance testing plan) for the formal acceptance of the Information System. What does the Customer require here?

Tenderer would recommend that a flexible approach be adopted whereby an acceptance testing plan is agreed between the parties. Accordingly, Tenderer would suggest that the following new paragraph is added at the end of this section:

"A jointly agreed Acceptance Testing plan and criteria will be used for the acceptance testing of the Information System".

- (b) Art. 7 also refers to the Information System complying with "the technical specification". Where is that technical specification? The technical specification that applies here should be the one set out in the Service Schedule for BagManager (which Tenderer has suggested be added to the Contract as described under "II MANNER OF PROVISION OF SERVICE" above).

On that basis, the wording in the fifth paragraph of Art. 7 should read:

"Quantitative and qualitative acceptance will be done by comparing the quantity and quality of the elements of delivered Information System and rendered service of Initial Setup of Information System with the elements and requirements set out in the Service Schedule for BagManager."

And the sixth paragraph of Art.7 should read:

Clarification a):

This matter has been addressed in the section Evaluation - test period in Template 3 and also in paragraph Quantitative and qualitative acceptance, Article 7 in Template 7 of the tender documentation.

Clarification b): Technical specification is the template 3 of the tender documentation (Technical characteristics (specifications)). The Purchaser does not agree with the proposed changes.

Question:

VIII QUALITY, WARRANTY AND LIABILITY

Art.8

- (a) Tenderer respectfully requests that the reference to "technical specification" in the first paragraph of Art. 8 expressly refer to the Service Schedule for BagManager, as follows:

"The Supplier shall deliver goods and provide services under Article 1 of this Contract in accordance with the attached Service Schedule for BagManager and with due professional care."

Clarification a):

The Purchaser does not agree with the proposed changes.

Question:

Art. 9

- (a) The fourth paragraph of Art. 9 deals with the determination of disputes regarding the “shortcomings in quality and quantity”, which, as drafted, are to be determined by expert assessment.

Tenderer would respectfully request that any such expert be appointed mutually by the parties and that the costs relating to such expert should be shared equally between the parties. The following wording could be used:

“In the case that the contracting parties disagree on the degree of damage, it will be determined by an expert mutually appointed by the parties, the costs of which shall be shared equally between the parties.”

Clarification a):

The Purchaser does not agree with the proposed changes.

Question:

Art. 10

- (a) Tenderer respectfully requests that the contractual penalties set out in Art. 10 are removed. Contractual penalties are not appropriate in this Contract. Tenderer’s internal policies dictate that any contractual penalties must be approved by its Business Approval Board, which will only permit the use of penalties if absolutely necessary. Such approval is not guaranteed, and could take some time. Tenderer’s obligation is clear, to deliver the Information System on time in accordance with the Project Plan. Tenderer will comfortably achieve the required 60 day deadline for setup of the Information Service, the agreed deadline for the delivery of hardware and the service availability target of 99.6% measured on an annual basis.
- (b) If the Purchaser is unable to remove the requirement of a contractual penalty, Art. 10 needs to be tweaked slightly to make it clear that the contractual penalty relates to the failure to achieve the deadline set out in Art. 5. Tenderer would suggest that Art. 5 is expressly referred to as follows in the first paragraph of Art. 10:

“In case the deadline for Initial Setup of Information System set out in Art.5 is exceeded, the Supplier undertakes to pay to the Purchaser...”

- (c) Please clarify the meaning of the words “The Supplier is not entitled to pay damages and waive the Contract” in the fourth paragraph of Art. 10. Tenderer does not understand this wording.

Clarification a) and b):

The Purchaser does not agree with the proposed changes.

Clarification c):

The above contract provision is in accordance with the Obligations Law of Republic of Serbia and it means that the Supplier, in case of the situation set forth in Article 10 Contract, cannot be

released of its obligations by only paying the damage but is bound to perform its contractual obligations.

Question:

Art. 11

- (a) As drafted, Art. 11 provides that the Purchaser may terminate the Contract unilaterally and/or reduce the contract price payable by the Purchaser if the Supplier fails to perform any contractual obligation – even the most minor obligation.

Tenderer respectfully requests that this Art. 11 be reworded to provide that only “material” breaches of the contract give rise to a right to terminate the Contract:

“Each party may, on notice in writing to the other party, terminate this Contract, if:

1. *the other party commits a material breach of this Contract (or breaches a material provision of this Contract) that is not capable of remedy; or*
2. *the other party commits a material breach of this Contract (or breaches a material provision of this Contract) and, if the breach is capable of remedy, the other party does not remedy the breach within 30 days of its receipt of a notice from the first party requiring the other party to rectify that breach; or*
3. *the other party is insolvent.*

Each party may terminate this Contract on thirty (30) days written notice to the other party, when the service periods of all services have expired.

On termination of this Contract, the Customer must immediately cease its use of the services and, at its own costs, promptly return all equipment to the Supplier.

All licenses granted to the Customer under this Contract will immediately end on termination of this Contract. The Customer must pay to the Supplier all charges that apply in respect of the provision of the service up to the termination date without any deductions or set off of any kind.”

Furthermore, as currently drafted, it is not clear exactly what a “proportional reduction of price” would be. How is this to be calculated? Tenderer respectfully requests that the ability for the Purchaser to reduce the contract price be removed.

Clarification a):

The Purchaser does not agree with the proposed changes.

Question:

X PROPERTY RIGHTS AND CONFIDENTIALITY

Art.13

- (a) Tenderer would respectfully suggest that the first paragraph of Art. 13 is amended to clarify that Tenderer either (a) owns; or (b) licenses, the intellectual property in the Information System and to confirm that there will be no transfer of those rights. Technically, it is not the case that Tenderer both licenses and owns the application software – it either licenses it, or owns it:

“All intellectual property rights in the service and the materials are either licensed to or are the property of the Supplier and other than as expressly provided in this Contract, this Contract does not convey to the Customer any right, title or interest in them”.

- (b) Furthermore, the nature of this service requires that the Customer must be granted a licence to use the things provided. Tenderer would suggest that the following wording is added to clarify this:

“The Supplier hereby grants to the Customer a non-transferable, non-exclusive licence to use the materials, equipment and software provided by the Supplier solely for the purposes of this Contract for the duration of this Contract. The Customer undertakes not to use, or authorise any third party to use, such materials for a purpose outside the scope of this Contract.”

Clarification a) and b):

The Purchaser does not agree with the proposed changes.

Question:

XI TRANSITIONAL AND FINAL PROVISIONS

Art.14

- (a) Art.14 clearly states when the Contract comes into force, but does not specify the duration of the Contract, or when the services shall begin. Tenderer would respectfully suggest that the following wording should be added to clarify the position:

*“This Contract comes into force on the date it is signed by authorized representatives of the contractual parties (the ‘**Contract Signature Date**’).*

“This Contract may be terminated in accordance with its terms or shall otherwise expire following a period of three (3) years from the Contract Signature Date.”

Clarification a):

The Purchaser does not agree with the proposed changes.

Question:

Arts..15 and 16

- (a) Tenderer respectfully requests that this Contract be governed by English law and that any dispute be heard in London, England. This is dictated by the Tenderer Contracting Policy.

Clarification a): The Purchaser does not agree with the proposed changes.

Question:

Art. 17

- (a) Please confirm whether any stamp duty or other tax is payable upon the execution of this Contract in Serbia. If so, what is the likely cost of such tax? Tenderer would expect the Customer to meet any such cost.

Clarification a):

There is no stamp duty or other tax payable upon the execution of this Contract in Serbia.

Question:

Additional Provisions

Tenderer's legal representatives have advised that there are a number of provisions that should be added to the Contract to ensure that the interests of the parties are properly represented and protected. Tenderer therefore respectfully requests that the following provisions are added to the Contract.

Limitation of Liability

Tenderer's corporate policy dictates that it must limit its liability in all contracts that it enters into. This is standard commercial practice. Tenderer uses standard wording in its contracts for this. Tenderer would suggest that its standard wording, which also limits the liability of the Customer, is inserted into the Contract as a new Art. 18:

Art. 18 (Limitation of Liability)

18.1 *Subject to Art. 18.3 below:*

18.1.1 *Neither party will be liable to the other party or its affiliates for any:*

18.1.1.1 *Loss of anticipated business opportunities, contracts, revenues, profits or savings;*

18.1.1.2 *Damage to goodwill or reputation; or*

18.1.1.3 *Indirect, special or consequential loss or damage, arising out of or in connection with this Contract, whether for breach of contract, in tort (including negligence), under statute or any other law.*

18.1.2 *Subject to Art. 18.1.3 below, the Supplier's liability to the Customer and its affiliates with respect to a single claim arising out of or in connection with this Contract, whether for breach of contract, in tort (including negligence), under statute or any other law, is limited to an amount equal to all charges paid under this Contract for the relevant service in the two months preceding the date of the event or the first event in a series of related events giving rise to the claim.*

18.1.3 *The Supplier's liability to the Customer and its affiliates with respect to all claims, arising out of or in connection with all services provided by the Supplier under this Contract in each relevant year, whether for breach of contract, in tort (including negligence), under statute or any other law, is limited to the greater of:*

18.1.3.1 *€100,000 (one hundred thousand Euros); and*

18.1.3.2 *an amount equal to all charges paid under this Contract in respect of all services provided by the Supplier under this Contract in that year.*

For the purpose of this Art. 18, the relevant year is the year in which the event or the first event in a series of related events giving rise to the claim occurred.

18.2 *Notwithstanding anything else in this Contract, the Supplier's liability will be reduced to the extent the loss or damage is caused by the Customer or its representatives.*

18.3 *Nothing in this Contract operates to limit or exclude a party's liability for:*

18.3.1 *death or personal injury caused by its negligence;*

18.3.2 *fraudulent misrepresentation;*

18.3.3 *any other liability which cannot be excluded or limited under applicable law; or*

18.3.4 *save for the limitation contained in Art. 18.3, any of the indemnities given in this Contract.*

18.4 *This Contract sets out the full extent of the parties' obligations and liabilities arising out of or in connection with this contract and there are no conditions, warranties, representations or terms, express or implied that are binding on the parties except as specifically stated or contemplated in this Contract. Any condition, warranty, representation or other term which might otherwise be implied into or incorporated in this Contract, whether by statute, common law or otherwise, is hereby expressly excluded.*

Art. 19 (Indemnities)

The Purchaser is in a position where it may permit users of the airports (including airlines or baggage handlers) to also use the services. Accordingly, Tenderer respectfully requests that the following wording be added as a new Art. 19:

Art. 19

"The Customer may make the service available for use to any 'Airport User' (meaning any person that has entered into an agreement (either actual or implied) with the Customer for the provision of services at the airport that are the same as or similar to the services provided by the Supplier to the Customer under this Contract).

The Customer shall ensure that any claim that an Airport User may have against the Supplier or its affiliates in respect of the service shall be brought by the Customer (and not by the Airport User itself). Furthermore, the Customer shall indemnify the Supplier and its affiliates from all losses, damages, costs and expenses (including reasonable legal expenses) arising out of or in connection with any claim in respect of the service brought by such Airport User directly against the Supplier and/or its affiliates."

Art. 20 (Use of Service)

When contracting for services of this type, Tenderer insists that the following wording is included:

Art. 20

"The Customer acknowledges and agrees that the Supplier has no control over the Customer's use of the service, including the content of data transmitted through the service by the Customer or third parties, and agrees that the Customer is solely responsible for the content of any data or information which it sends or receives using the service. The Customer undertakes not to use the service in a manner that, in the reasonable opinion of the Supplier, may adversely affect the efficiency, security or use of the service by other Supplier customers or for an illegal purpose or in a manner that would cause Tenderer to be in breach of any law, local, national or international regulation."

Art. 21 (Suspension)

The nature of this service means that the Supplier may, in certain circumstances (such as emergencies), be required to suspend the service. Accordingly, Tenderer respectfully requests that the following clause be included as a new Art. 21:

"The Supplier may limit, suspend or cancel the service at any time with or without prior notice to the Customer if, in Tenderer's sole opinion:

- *there is an event of emergency;*
- *the supply or use of the service is or will become unlawful;*
- *any permit or approval required to deliver the service is or will be withdrawn;*
- *there is an actual or threatened intellectual property claim, as referred to above; or*

- *the provision of the service is liable to cause or result in death or personal injury or damage to property.”*

Clarification: The Purchaser does not agree with the proposed changes suggested in Additional Provisions.



**Committee president
Nenad Sakić**

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