

**JSC BELGRADE NIKOLA TESLA AIRPORT
PUBLIC PROCUREMENT COMMITTEE No. 90/2015**

05
No.: 8947
Date: 27.11.2015
Belgrade

Dear Sirs,

Acting on the request of the Tenderer who has taken over the tender dossier in accordance with Article 63 of the Public Procurement Law ("Official Gazette of the Republic of Serbia" No. 124/12, 14/15), we forward further clarification of the tender dossier for the public procurement „MANAGEMENT CONSULTANCY SERVICES – MANAGEMENT CONSULTING SERVICES (GENERAL MANAGEMENT CONSULTANCY) AIMED TOWARD SELECTING A CONSULTANT TO ASSIST THE PROCESS OF THE STRATEGIC DEVELOPMENT OF JSC AIRPORT NIKOLA TESLA" No. 90/2015

Question 1: Concerning the language in which the bid and the bid supporting documents need to be submitted

Under item 5.1 of the Tender Documents, it is indicated that the bid shall be "in Serbian or in Serbian and English". However, under the same item, it is also stated that any bid "not written in Serbian or English" will be rejected.

Therefore, can a bid be solely submitted in English as this would be customary in an international tender process?

On the opposite, in case the bid must be submitted in Serbian, please confirm that this requirement only applies to the draft contract and the non-disclosure agreement but not to the other documents submitted by the bidders.

Clarification 1: The parts of the Bid that must be submitted in Serbian are stated in the Form 5.2 Instructions to Bidders of the Tender Documents. Apart from these documents, the Bidder is also responsible for providing other mandatory documents (for example, Attachments from Form 12 of the Tender Documents...) in Serbian language.

Question 2: Concerning the Bidder's Statement on page 18 of the Tender Documents

We understand that the Model Bidder's Statement on page 18 is intended for cases where certain documents required under the Serbian Public Procurement Law are not available in the country where the bidder is based.

On this form, what does "Verification of the Bidder's authorized person" entail? What action is expected from the bidder if a document is not available?

Clarification 2: The authorized representative of the Bidder confirms with his signature next to the name of the document (which he circles) that this document cannot be issued in the Bidder's registered country.

Question 3: Concerning the submission of Form 11, Form 12 Attachment 1, Form 12 Attachment 1A, Form 12 Attachment 1B, and Form on page 69 of the Tender Documents.

The list provided under item 5.2 of the Tender Documents concerning the mandatory bid content does not contain or make any reference to Form 11, Form 12 Attachment 1, Form 12 Attachment 1A, Form 12 Attachment 1B, and Form on page 69 of the Tender Documents. Do these documents need to be filled in and submitted as part of the bid? Please kindly indicate if such is the case for each of the documents separately. If these documents need to be submitted as part of the bid content, do any of them need to be certified?

Clarification 3: Documents that must be submitted in Serbian are stated in the Form 5.2 Instructions to Bidders of the Tender Documents. Apart from these documents, the Bidder is also responsible for providing other mandatory documents (for example, Attachments from Form 12 of the Tender Documents...) in Serbian language. The way to fill out, certify and submit each of these documents is defined in the Tender Documents.

Question 4: Concerning Question 1 of clarification document n°8701 published on November 19, 2015

We understand question n°1 in clarification document n°8701 from November 19, 2015 to be as follows: Can a bidder submit the consolidated accounts (i.e. accounts of the company group in which the bidder is integrated) as proof of fulfillment of sufficient financial capacity, under point 6 of page 17/69 of the English-language version of the Tender Documents?

More specifically, if the Advisor is a subsidiary of a listed company and in case the subsidiary's accounts are not publicly disclosed, is it possible to submit the consolidated accounts of the listed entity?

Clarification 4: The Bidder cannot submit the financial accounts of the company group in which the Bidder is integrated, given that the Group does not have the status of the Bidder. The accounts of the Bidder do not have to be publically disclosed, but the Bidder must submit those documents that are in the Bidder's possession.

Question 5: Concerning Form 9: Price Structure

According to item 5.2 concerning the mandatory bid content, Form 9 has to be submitted in the tender. However, as opposed to all other required documents listed under item 5.2, there is no indication as to whether Form 9 needs to be signed or certified.

Can you please confirm whether Form 9 needs to be executed or certified?

Clarification 5: Form 9 of Tender Documents must be filled out, certified and signed by the authorized person of the Bidder.

Question 6: Concerning subcontractors and joint bidders

If a person is a subcontractor in one bid, can that same person be a subcontractor for another bid submitted by a different bidder?

Clarification 6: If the person is a subcontractor in one bid, they can appear in one other Bid in the capacity of a subcontractor.

Question 7: Concerning the differences between the amendments of the English-language version of the Tender Documents.

You have indicated that the English-language version of the Tender Documents will be corrected and amended. Can you please kindly indicate when the correct, amended, documents will be available on your company's website?

Clarification 7: The English version of the Tender documents will be amended and published in due time.

Question 8: Concerning Article 11 of the draft contract

Prohibition of conflicting activities: The exclusivity provisions contained in the model contract are drafted much too broadly and vaguely, both in terms of scope and duration, and are not acceptable by any international advisor.

As a consequence, article 11 should be redrafted as follows: "During the term of this Contract, the chosen Advisor(s) and its Affiliates as defined in Article 62 of the Company Law and in Article 3 of the Public Procurement Law shall not represent or advise any other party in relation with the scope of the Contract, without the prior written consent of the Client."

Clarification 8: The Client will consider the suggestion to amend Tender Documents.

Question 9: Concerning Article 20 of the draft contract

Contract penalty: The language provided for at the end of Article 20 is written too broadly (the Client may for instance have the services executed by a third party and the Advisor would have to bear the related uncapped costs) and further is not acceptable from an indemnification perspective.

As a consequence, it should be redrafted as follows: "Should the Advisor fail to perform his obligations in all respects in accordance with the Contract, or should provide low quality or late services under this Contract, the Client shall have the right, at his discretion, to a proportionate reduction of price, the right to activate the bank guarantee mentioned in Article 19 of this Contract or the right to terminate this Contract without just cause or termination notice."

Clarification 9: The example given is not realizable in practice. We are referring to provisions of articles 273, 274, 275, 276 of the Law of Contracts and Torts of the Republic of Serbia concerning contract penalty:

Article 273.
Creditor's Rights

(1) Should liquidated damages be stipulated for breach of obligation, the creditor may request either the performance of obligation or liquidated damages.

(2) He shall lose the right to claim performance of obligation if he requests payment of liquidated damages.

(3) Should liquidated damages be stipulated for breach of contract, the debtor shall not be entitled to pay liquidated damages and repudiate the contract, unless this was the intent of the parties at the moment of stipulating the liquidated damages.

(4) Should liquidated damages be stipulated for the debtor's delay in performance, the creditor shall be entitled to demand both the fulfillment of obligation and the liquidated damages.

(5) The creditor shall not demand liquidated damages due to delay after accepting performance of the obligation and failing to notify the debtor immediately on his reserving the right to liquidated damages.

Article 274.

Reducing the Amount of Liquidated Damages

At the debtor's request the court shall reduce the amount of liquidated damages if it finds that they are excessively high compared to the value and significance of the subject of obligation. 86
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Article 275.

Liquidated Damages and Compensation for Loss

(1) A creditor shall be entitled to request liquidated damages even should their amount exceed that of the loss sustained by him, as well as if he does not sustain any loss at all.

(2) Should the loss sustained by the creditor be higher than the amount of liquidated damages, he shall be entitled to demand the difference to cover the entire loss.

Article 276.

Compensation Determined by Statute and Liquidated Damages

Should there be a statutory provision specifying the amount of compensation for breach of obligation or delay in performance under the terms: penalty, liquidated damages, compensation and the like, while the contracting parties have stipulated liquidated damages, the creditor shall have no right to request both liquidated damages and compensation provided by the statute, unless this was allowed by the statute itself.

Question 10: Concerning Article 28 of the draft contract

Indemnification: The indemnity language currently provided for is not acceptable as, inter alia:

- the Advisor is held harmless by the Client in case of third party claims only if such claims are caused by the negligence or intent of the Client
- the Advisor benefits from no exculpation from the Client
- the cases in which the Client is not obliged to indemnify the Advisor are unclear ("acting to the Client's detriment")
- the affiliates and the staff of the Advisor are not covered
- the handling of third party claims is unclear

As a consequence, article 28 should be redrafted as follows:

"The Client agrees to indemnify and hold harmless the Advisor and all other members of the Advisor's Group and each of their members, partners, directors, officers, employees and agents (each an "Indemnified Party"), to the full extent lawful, from and against any losses, claims, liabilities related to or arising out of this Contract, or the Advisor's role in connection therewith,

brought by any third party, and will reimburse any Indemnified Party for all reasonable expenses (including reasonable legal fees) as they are incurred by the Advisor or any such other Indemnified Party in connection with investigating, preparing or defending any such action or claim; provided, however, that the provisions of this paragraph will not apply to any claims, liabilities, losses, damages or expenses which have resulted primarily from the bad faith or gross negligence of any Indemnified Party hereunder.

The Client also agrees that no Indemnified Party shall have any liability to the Client related to, arising out of or in connection with the Advisor's engagement hereunder except to the extent that any loss, claim damage or liability is found by a court of competent jurisdiction in a judgment which has become final (in that it is no longer subject to appeal or review) to have resulted primarily from such Indemnified Party's bad faith or gross negligence.

The Advisor or any other Indemnified Party shall give written notice as promptly as reasonably practicable to the Client of any claim made against it in respect of which indemnity may be sought hereunder together with reasonable details of the nature of such claim. The Client may participate at its own expense in the defense of such claim in which case such Indemnified Party shall supply the Client with appropriate information and consult with the Client and its advisers in relation to the conduct of such defense although any decision as regards the conduct of such claim is at the sole discretion of the Indemnified Party."

Clarification 10: The Client will not amend provisions of Article 28 of Draft Contract.

Question 11: Concerning Article 21 of the draft contract

Staff_requirements: The indemnification related provisions should all be regrouped in Article 28 so as to avoid any contradiction within the agreement.

As a consequence the fourth paragraph should read as follows: "The Advisor is fully liable to the Client for all actions undertaken by the Staff in Attachment B of the Contract." The following current language should be removed.

Clarification 11: The Client will not amend Draft Contract in this section.

Question 12: Concerning Article 30 of the draft contract

Governing law: In line with international as well as Serbian practice in cases where international advisors are selected, the engagement letter should refer to a governing law commonly used by the international business practice such as English law.

Clarification 12: JSC Nikola Tesla Airport is an entity whose business solely relies on the laws and by-laws of the Republic of Serbia, therefore the Client will not change their reference.

Question 13: Concerning Article 4 of the non-disclosure agreement

Return of confidential information: Along with international business practice, the following sentence shall be added at the end of article 4:

"This shall not prevent any Receiving Party to keep (but not use) Confidential Information to the extent necessary to comply with any applicable laws, regulations or internal compliance rules or as part of an electronic back-up system, being specified that such information shall remain subject to the terms hereof."

Clarification 13: The Client will consider amending Tender Documents in this section.

Question 14: Concerning Article 6 of the non-disclosure agreement

The duration of the Agreement should be limited. We suggest a maximum duration of three years.

Clarification 14: The Client will consider amending Tender Documents in this section.

Question 15: Concerning Governing law & applicable jurisdiction of the non-disclosure agreement

The confidentiality agreement should refer to a governing law and applicable jurisdiction in line with the draft contract.

Clarification 15: The Client is pointing out that the Tender Documents (including the NDA) is an integral part of the Contract on public procurement. Given this fact, contract law is same for the Contract on public procurement and the NDA.

 **COMMITTEE PRESIDENT**
Raša Ristivojević
