

INFORMATION NOTE FROM THE EUROPEAN COMMISSION

ON

Contact with economic operators or their representatives regarding matters pertaining to the Joint Procurement Procedure(s) to procure common auction platforms and an auction monitor

1 Background

The European Union ("EU") represented by the European Commission ("Commission") and Member States of the EU have entered into a Joint Procurement Agreement to appoint common auction platforms and a Joint Procurement Agreement to appoint an auction monitor pursuant to Article 26(1) and (2) and Article 24(1), respectively, of Commission Regulation No 1031/2010/EU on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community ("Auctioning Regulation").¹

The Joint Procurement Agreement to procure common auction platforms and the Joint Procurement Agreement to procure an auction monitor entered into force on 23 November 2011 (together referred to as the "Joint Procurement Agreements").

The second subparagraph of Article 24(1) of the Joint Procurement Agreements requires the Commission to adopt and publish on its website² arrangements for contact with economic operators or their representatives.

2 Implementation by the participating Member States

The first subparagraph of Article 24(1) of the Joint Procurement Agreements provides that the Commission is the sole point of contact between the Contracting Parties³ to the Joint Procurement Agreements and economic operators, candidates, tenderers, or their representatives,⁴ concerning any matter pertaining to the joint procurement procedures, following the entry into force of the Joint Procurement Agreements.

It therefore follows that, no contact is allowed between economic operators or their representatives and participating Member States, concerning any matter pertaining to the joint procurement procedures following the entry into force of the Joint Procurement Agreements on 23 November 2011, notwithstanding whether or not the joint procurement procedures are under way.

In addition, Article 24(2) of the Joint Procurement Agreements provides that when persons working in connection with the Joint Procurement Agreements for any participating Member State are approached by an economic operator, candidate, tenderer,

¹ OJ L 302, 18.11.2010, p. 1, as amended by the Commission Regulation (EU) No 1210/2011 of 23 November 2011, OJ L 308, 24.11.2011.

² The relevant hyperlink is: http://ec.europa.eu/clima/policies/ets/cap/auctioning/index_en.htm.

³ The term "Contracting Parties" refers to the participating Member States and the Commission.

⁴ According to Article 121(5) of the Rules of Application, the terms 'work contractor', 'supplier' and 'service provider' covers any natural or legal person or public entity or consortium of such persons and/or bodies which offers to execute works, supply products and provide services. The term 'economic operator' shall mean 'work contractors', 'suppliers' and 'service providers'. 'Tenderers' shall mean economic operators who have submitted a tender. 'Candidates' shall mean those who have asked to be allowed to take part in a restricted procedure, a competitive dialogue, or a negotiated procedure.

or their representative concerning any matter pertaining to the joint procurement procedures, they will indicate that the Commission is the sole contact point, refer the said economic operator, candidate, tenderer, or their representative to the Commission and simultaneously inform the Commission of the details of the approach and the referral.

3 Implementation by the Commission

3.1 Contacts while a joint procurement procedure is not under way

While a joint procurement procedure is not under way, general information on the procedure or draft tender documents may be published by the Commission at: http://ec.europa.eu/clima/policies/ets/cap/auctioning/index_en.htm. Any economic operator or its representative wishing to contact the Commission or submit comments on any draft tender documents may do so through the functional mailbox CLIMA-ETS-JOINT-PROCUREMENTS@ec.europa.eu.

If, following an enquiry from an economic operator or its representative, the Commission decides to provide further information regarding the joint procurement procedure concerned, such information will be made public on the web-site cited above.

3.2 Contacts while a joint procurement procedure is under way

Article 112 of the Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) NO 1605/2002⁵ (the "Financial Regulation") requires that, while a joint procurement procedure is under way, all contacts between the Commission and candidates or tenderers or their representatives, satisfy the principles of transparency and equal treatment.

The third subparagraph of Article 24(1) of the Joint Procurement Agreements provides that after the launch of a joint procurement procedure, contact between economic operators, candidates, tenderers, or their representatives, and the Commission may only take place, by way of exception, under the conditions set out in Article 160 of Commission Delegated Regulation (EU) No 1268/2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union⁶ (the "Rules of Application"). The foregoing is without prejudice to any other specific provisions on contact with economic operators, such as those set out in Article 132(3) and (4), Article 138(2)(d) or Article 158(3) and (4) of the Rules of Application or in the tender documents. For ease of reference, the aforementioned Articles of the Rules of Application are provided in the Annex to this Information Note.

⁵ OJ L 298, 26.10.2012, p. 1.

⁶ OJ L 362, 31.12.2012, p. 1.

Excerpt of Article 132 of the Rules of Application (Article 104 of the Financial Regulation)

Competitive dialogue

[...]

3. Contracting authorities shall open a dialogue with the candidates satisfying the selection criteria set out in Article 146 in order to identify and define the means best suited to satisfying their needs.

During the dialogue, contracting authorities shall ensure equality of treatment among all tenderers and confidentiality of the solutions proposed or other information communicated by a candidate participating in the dialogue unless the candidate agrees to its disclosure.

Contracting authorities may provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document if provision is made for this possibility in the contract notice or the descriptive document.

4. After informing the participants that the dialogue is concluded, contracting authorities shall ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. These tenders shall contain all the elements required and necessary for the performance of the project.

At the request of the contracting authority, these tenders may be clarified, specified and fine-tuned provided this does not have the effect of changing basic aspects of the tender or of the invitation to tender, variations in which could distort competition or have a discriminatory effect.

At the request of the contracting authority, the tenderer identified as having submitted the tender offering best value for money may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tenders and does not risk distorting competition or causing discrimination.

Excerpt of Article 138 of the Rules of Application (Article 105 of the Financial Regulation)

Tender documents

[...]

2. The invitation to tender or to negotiate or to take part in the dialogue shall at least:

- a) specify the rules governing the lodging and presentation of tenders, including in particular the closing date and time for submission, any requirement as to the use of a standard reply form, the documents to be attached, including those in evidence of financial, economic, technical and professional capacity referred to in Article 146 if they are not specified in the contract notice, and the address to which they must be sent;

- b) state that submission of a tender implies acceptance of the specification referred to in paragraph 1 to which the tender relates and that this submission binds the contractor to whom the contract is awarded during performance of the contract;
- c) specify the period during which a tender will remain valid and may not be varied in any respect;
- d) forbid any contact between the contracting authority and the tenderer during the procedure, save, exceptionally, under the conditions laid down in Article 160, and, where provision is made for an on-the-spot visit, specify the arrangements for such a visit;
- e) specify, in the case of a competitive dialogue, the date set and the address for the start of the consultation phase.

Excerpt of Article 158 of the Rules of Application (Article 111(5) of the Financial Regulation)

Committee for the evaluation of tenders and requests to participate

[...]

3. Requests to participate and tenders which do not satisfy all the essential requirements set out in the tender documents shall be eliminated.

However, the evaluation committee or the contracting authority may ask candidates or tenderers to supply additional material or to clarify the supporting documents submitted in connection with the exclusion and selection criteria, within the time limit it specifies.

Requests to participate and tenders which are not excluded and which meet the selection criteria shall be considered admissible.

4. In the case of abnormally low tenders as referred to in Article 151, the evaluation committee shall request any relevant information concerning the composition of the tender.

Article 160 of the Rules of Application (Article 112 of the Financial Regulation)

Contacts between contracting authorities and tenderers

1. Contact between the contracting authority and tenderers during the contract award procedure may take place, by way of exception, under the conditions set out in paragraphs 2 and 3.

2. Before the closing date for the submission of tenders, in respect of the additional documents and information referred to in Article 153, the contracting authority may:

- a) at the instance of tenderers, communicate additional information solely for the purpose of clarifying the nature of the contract, such information to be communicated on the same date to all tenderers who have asked for the specifications;
- b) at its own instance, if it discovers an error, a lack of precision, an omission or any other type of clerical defect in the text of the contract notice, invitation to tender or specifications, inform the persons concerned on the same date and in a manner identical with that applicable in respect of the original invitation to tender.

3. If, after the tenders have been opened, some clarification is required in connection with a tender, or if obvious clerical errors in the tender must be corrected, the contracting authority may contact the tenderer, although such contact may not lead to any alteration of the terms of the tender.

4. In every case where contact has been made, and in the duly justified cases where contact has not been made as referred to in Article 96 of the Financial Regulation, a record shall be kept in the procurement file.