

Contract notice: OJEU S 132-201609

Invitation to tender No. ENER/C1/504-2009 concerning

"Renewable Energy Best Practice and Implementation of National Action Plans in the 27 EU Member States"

Time-limit for receipt of tenders: 23/08/2010

FREQUENTLY ASKED QUESTIONS

Updated 13/08/2010

Question 1. We are a well-established publisher of news and information on EU environmental policy. We've been operating since 1997 and have extensive knowledge and understanding of EU energy policy.

We were wondering whether we would be eligible to participate as a contractor in this tender, by putting together a consortium comprising all the relevant competencies, especially energy lawyers with language skills, or whether our participation could only be as a sub-contractor offering the skills indicated under points 2, 4 and 5.

Answer 1. **The tender specifications provide exclusion and selection criteria to verify inter alia the economic and financial capacity of the tenderers (Chapter IV.2.2). Only tenders satisfying these criteria are eligible. However, it is possible to form a consortium that satisfies all criteria with a lead partner that signs the contract with the Commission. The details are set out in point III.1.3 of the contract notice.**

Question 2. Regarding Task 2 (Translation of the national legislative measures transposing the provisions of the Renewable Energy Directive):

Shall the complete legal texts (i.e. including all details of the provisions transposing the directive) or only specific parts be translated? If only specific parts shall be translated, according to which criteria shall these be selected and can you roughly indicate a likely number of pages per Member State that will be required to be translated? Background for this question: Related to the directive transposition a dozen of legal texts per Member State with each up to 50 pages or more might be relevant, and translating all of these might not be possible within the indicated number of days available.

Answer 2. **Task 2 on page 5 requires the contractor to provide the Commission with the translation into English of those national legal provisions which are transposing the provisions of the Renewable Energy Directive. The**

translation should not be limited to those parts of the legislation that are transposing the articles of the Directive, it should also include the translation of those articles that are relevant or have an impact on the articles transposing the Directive mentioned before, for a complete and correct picture of the Member States' legal framework on RES.

Question 3. Regarding the technical and professional capacity required (IV.2.2 - point 1 and 3):

The text mentions that "the team should consist of legal analysts with sound legal expertise in renewable energy law" and "the team of legal analysts must have the language capabilities necessary". Is it correct to assume that this requirement can be fulfilled by a team of renewable energy policy experts with in-depth knowledge / long experience with the renewable energy regulation and language skills of the Member States they cover (but usually not being legal experts) which is guided/supervised by legal experts experienced in renewable energy law (but not having in-depth knowledge of all Member States)?

Answer 3. Technical and professional capacity requirements at points 1&3 can also be read as being fulfilled by a team such as the one presented in the question.

Question 4. Regarding point I.2 – Purpose of the contract:
"The objective of this contract is to obtain technical, scientific and legal support on the evaluation of the viability and consistency of the provisions of the NREAPs with the national legislative measures transposing the Renewable Energy Directive."

Is the aim to evaluate "the viability and consistency of the provisions of the NREAPs" in all EU Member states, or is the option of choosing sample of representative states and providing deep and detailed analysis viable?

Answer 4. The aim of this tender is to obtain technical, scientific and legal support on the evaluation of the viability and consistency of the provisions of the NREAPs with the national legislative measures transposing the Renewable Energy Directive in all 27 EU Member States. Section I.3 of tender specifications clearly states that this assessment looks at all 27 Member States.

Question 5. Regarding the technical and professional capacity required (IV.2.2 - point 3):
Full knowledge of the official languages of the Member States for which they are carrying out conformity assessment studies. The team of legal analysts must have the language capabilities necessary to carry out conformity checking for all Member States of the European Union. The curricula vitae of the legal analysts must demonstrate language capabilities.

Does this mean the team has to be able to understand the official language of each of the EU Member States?

Answer 5. Yes, since this tender aims at all 27 Member States, the team must be able to understand the official languages of all 27 Member States.

Question 6. Is there any definition of the qualification requirements for the legal analyst?

Answer 6. A legal analyst must have a law degree and to comply with the technical and professional capacity criteria in Section IV.2.2. (particularly the 5 years of experience related to Energy law).

Question 7. The tender identification number is ENER/C1/504-2009 while in the Annex 1, the number for call for tender is ENER/C1/181-2009. We consider that Annex 1 should also contain the number ENER/C1/504-2009. Please confirm.

Answer 7. We thank you for pointing out this error. It has now been corrected and the updated tender specifications are on-line above.

Question 8. Task 2- Translation of the national legislative measures transposing the provisions of the Renewable Energy Directive (Page 5 of the Tender specifications) Do you have any estimation of the volume of translations to be carried out as part of this contract?

Answer 8. No, at this moment we do not have an estimation of the volume of the translations to be carried out as part of the contract. It depends on the number of legal acts the 27 Member States will choose in order to transpose the provisions of the Renewable Energy Directive.

Question 9. The translation of national legislative measures (mentioned as Task 2, page 5) should be official or unofficial translations of the legal acts? While we understand that Consultant shall propose technical and legal experts with proven language capabilities of all EU Member states, being able to work in all EU Member states languages, in case of official translations of the legal acts, we consider that such services should be provided by authorized translators; hence the services should be sub-contracted. Please clarify.

Answer 9. The translation should be official. The tender specifications in Section II.3 provides the possibility for the Contractor to sub-contract parts of this contract. However, the Contractor's team must comply with the Technical and professional capacity criteria in section IV.2.2 and he/she must ensure that the team has full knowledge of official languages of the 27 EU Member States.

Question 10. Section 3 –Financial proposal (page 11 of the Tender Specifications). We understand that the financial offer should be a fixed amount covering the experts fees, travel expenses, daily allowances and other categories of costs. However, this section does not make any provision for the translation services which should be covered within the contract. Can we include a specific budget for translations in the “other categories of costs” (which depends whether official or unofficial translations are required)? In order to quantify the cost for translation, we need an indication of pages to be translated within the contract (see question 2 above) or indicative number of legal acts.

Answer 10. **It is appropriate to include translation costs in "other categories of costs" category. However, official translations are required (see question 9) and the tenderer must comply with the requirements in Section III.2.3 on the content of the financial proposal. In particular, the prices must be fixed amounts and include all expenses. Bids involving more than one service provider (consortium) must specify the amounts indicated above for each provider.**

Question 11. A company that has been involved in the preparation of the National NREAP of its country wishes to join our consortium as a member. Please confirm the eligibility of that company to participate in our consortium (does their involvement in NREAP preparation constitute a conflict of interest case?).

Answer 11. **The objective of the contract is to obtain technical, scientific and legal support on the evaluation of the viability and consistency of the provisions of the NREAPs with the national legislative measures transposing the Renewable Energy Directive. It is not required in the contract to evaluate the NREAP content. This evaluation is under the responsibility of the European Commission. The contract is focused on national measures to transpose the Directive and on their conformity and consistency with the NREAP content. If a company has been involved in one / several NREAP(s) preparation, it does not constitute a conflict of interest as long as the consortium takes into account and integrates in its work all comments / remarks that may be made by the Commission to Member States following the evaluation of their NREAP.**

Question 12. My question regards the uncertainty on the effort required to prepare the technical notes in the context of complaints or infringement procedures. On page 5 the tender indicates that “...the contractor should plan to handle 15 to 30 requests [for such technical notes]. On average each request for technical assessment will involve between 3 to 5 person-days”. Thus, the effort involved may be anywhere in a range of 45 to 150 person-days. This is a very considerable range, and any given assumption on the number of person-days spent on this task will imply a risk of either submitting a non-competitive bid, or taking a considerable loss in this project.

Therefore, is it possible to submit a bid in which the budget for the infringement notes is made contingent on the number of requests that will be handled eventually?

Answer 12. The number of requests that will be handled by the tenderer may not be limited in the offer. The tenderer will thus have to handle a maximum of 30 requests to provide technical, scientific and legal support in the context of complaints or infringement procedures.

Question 13. We wish to submit a proposal for the above mentioned tender. However, some of the contract terms in the "draft service contract" do not comply with our internal rules regarding risk management. The points in question are the unlimited liability (Article II.2.2) and the liability against third parties (II.2.3). The latter point is especially relevant since reports can be distributed and published freely by the Commission (II.10.1).

The tender specifications say that "any limitation, amendment or denial of the terms of contract will lead to automatic exclusion from the procurement procedures".

Our question is how strict this rule is. If we submit a proposal under the condition that some of the terms of contract are adjusted (e.g. limitation of liability to a certain amount), will our proposal still be considered?

Answer 13. The draft contract may not be modified at all. As stated under point II of the tender specifications, "any limitation, amendment or denial of the terms of contract will lead to automatic exclusion from the procurement procedure".

Question 14. With reference to Answer 9 above, we would like to know the exact definition of 'official translation'. *Background: in some countries only a few or only one institution is entitled to issue official translations. If the Commission accepts only that kind of official translations, Contractor has to outsource the whole Task (2) to the authorized institution. The role of the contractor would be only identification of the relevant paragraphs.*

Moreover, since we don't know the volume of the pages to be translated, it is hard to estimate the cost of the translation to be paid for the external company authorized to prepare official translations - do you have any recommendation on this issue?

Answer 14. An official translation is a translation which is performed by a translator who is empowered to translate for legal equivalence, meaning that the resulting translations are acceptable by a legal jurisdiction.

For the purpose of this contract, the Commission needs to receive accurate and certified translations of the Member States legal acts transposing the Renewable Energy Directive, in order to have a correct view of the renewable energy legal framework in the 27 Member States. The translation is required to be official/certified in order to ensure its accuracy, adequacy, correctness.

The tenderer can subcontract part of the service, with respect to the provisions of the tender specifications. As for any recommendation, the Commission can not provide such recommendations.

Question 15. With reference to the Description of task 1 f) "the viability of the national legislative measures in terms of reaching the 2020 mandatory national renewable energy targets" - does this mean that the contractor will provide in-depth quantitative analyses of the effects of the national legislative measures with an input data on the renewable energy potential and costs within all EU countries?

"also from the perspective of the NREAPs provision" What does this exactly mean? Shall the contractor evaluate only the effects of the national legislative measures or also the NREAPs provisions which are not yet implemented into the national legislative measures?

Answer 15. Yes, the contractor should provide, without being limited to this, in-depth quantitative analyses of the effects of the national legislative measures with an input data on the renewable energy potential and costs within all EU countries. The viability aspect should be seen from the perspective of the potential/capacity of the new national renewable energy legal measures to deliver the 2020 target in the respective Member State under assessment.

The Renewable Energy Directive clearly provides the relation between the NREAP and each Member State's legal framework implementing the provisions of this directive, particularly Art. 4 and Art. 27. The NREAP measures and the legal framework transposing the directive must be consistent. The tenderers are invited to read carefully the Renewable Energy Directive 2009/28/EC.

Question 16. Under IV.2.2. Tender and professional capacity – criteria and references required, Tender ENER/C1/504-2009 requires as a proof of technical and professional capacity “2) Drafting and editing high quality documents, proven by samples of previous works carried out, that are relevant for the assessment studies and reports to be delivered within the tasks of this contract;” (page 17).

Could you please clarify what type of ‘high quality documents’ is referred to? Are these legal texts, glossy folders, excellent reports, very well written policy notes?

Answer 16. The "high quality documents" required to prove the quality of the previous work can consist, among other types of documents, in legal texts, legal analysis reports, various policy analysis reports etc, all of excellent quality in terms of content (e.g. depth of analysis) and presentation (lay-out). Basically, the tenderer is expected to submit its best work done so far that is relevant for this tender.

Question 17. If we submit the bid by forming a grouping led by our firm, do all other members of this grouping provide with their balance sheets and statements of turnovers mentioned in III.2.2) or is it enough from just our firm?

Answer 17. Point III.1.3 of the contract notice states that "each member must provide all the necessary documents for assessing the bid as a whole with regard to the exclusion criteria, selection criteria (in their entirety) and award criteria".

Point IV.2.1. of the tender specification states: "Tenderers must provide proof of their financial and economic capacity by means of the following documents: the balance sheets or extracts from balance sheets for the last three financial years, and a statement of overall turnover and turnover relating to the relevant services for the last three financial years.

This rule applies to all service providers, regardless of the percentage of tasks they intend to execute, once they have chosen to submit a tender. However, if the tender includes subcontractors whose tasks represent less than 20% of the contract, those subcontractors are not obliged to provide evidence of their economic and financial capacity".

Question 18. In order to proceed with our participation in the above tender, we would need some clarification regarding the criteria and references required for demonstrating our economic and financial capacity. As a law firm we need to avoid any conflict with our obligations of confidentiality towards our clients. We therefore need to know if we can provide the extracts from the balance sheets to the Commission in a way that their content is only viewable to the Commission and not to the other members of the consortium? Would it be possible that these documents are sent directly to the Commission by the respective partner of the consortium and do not need to pass via the coordinator in order to exclude any risk of breach of confidentiality? Would this be also applicable to the requirement of submitting the statement of the overall turnover? Please indicate which way of confidential submission for these kind of sensitive documents is allowed.

Answer 18. According to point IV.2.1.of the tender specifications, "tenderers must provide proof of their financial and economic capacity by means of the following documents: the balance sheets or extracts from balance sheets for the last three financial years, and a statement of overall turnover and turnover relating to the relevant services for the last three financial years". These documents are part of the tender that have to be submitted in the form specified in the invitation to tender by the company or person heading the project. Any direct submission of documents by other members of the group is not possible.

If necessary for these documents, agreements of confidentiality may be concluded among the members of the group and the company or person heading the project."

Question 19. In an earlier mail I asked a question which has been included and answered as Q12 in the FAQ. The answer provided however is not an answer to the question. I asked: “[...] *Therefore, is it possible to submit a bid in which the budget for the infringement notes is made contingent on the number of requests that will be handled eventually?*”

The answer was: “*The number of requests that will be handled by the tenderer may not be limited in the offer. The tenderer will thus have to handle a maximum of 30 requests to provide technical, scientific and legal support in the context of complaints or infringement procedures.*”

What we would like to know however is whether the Commission would except an offer in which the overall sum is not fixed, but rather a range, e.g.:

$A + x \cdot B$, in which

A equals total cost excluding infringement requests,

x equals the number of requests (max 30), and

B equals the cost per request.

Total cost of the project would thus be between $A+15B$ and $A+30B$.

Would this be acceptable?

Answer 19. A tender with an overall sum that is not fixed is not possible. According to point III.2.3 of the tender specifications "prices must be fixed amounts and include all expenses, such as travel expenses and daily allowances".

Question 20. Our Group is facing problems as regards the disclosure of balance sheets or extracts from balance sheets that are required from every service provider submitting a bid. As it is, in various countries of the European Union there is no obligation on law firms to publish annual accounts. Furthermore, various Bar Associations do not in fact allow for the disclosure of the turnover of law firms. It follows that many of the service providers within our Group are not able to disclose the requested financial information.

Accordingly, and as representative of all the members of the Group, we are currently considering submitting our own firms' balance sheets for the last three financial years, as well as a statement of our firm's overall turnover and the turnover relating to our firm's energy and natural resources department for the last three financial years.

If we proceed in this manner, please advise whether this will present any problems in the context of the bid that we are going to make.

Answer 20. Point IV.2.1 of the tender specifications state that " Tenderers must provide proof of their financial and economic capacity by means of the following documents: the balance sheets or extracts from balance sheets for the last three financial years, and a statement of overall turnover and turnover relating to the relevant services for the last three financial years. This rule applies to all service providers, regardless of the percentage of tasks they intend to execute, once they have chosen to submit a tender. However, if the tender includes subcontractors whose tasks represent less

than 20% of the contract, those subcontractors are not obliged to provide evidence of their economic and financial capacity".

It is not possible to derogate from this rule for law firms that participate as subcontractors, but it goes without saying that the Commission will treat the required documents confidentially. As regards the submission of the required documents, please refer to question 18 above.

Question 21 Is it allowed to work with experts who work in government institutions and/or who have been involved in the implementation of the Renewable Energy Directive?

Answer 21. Experts who are working in government institutions responsible for the implementation of Directive 2009/28/EC and/or have been previously involved in the implementation of Directive 2009/28/EC in a Member State fall under the provisions of Section IV.1.2 of the tender specifications (*Other cases of exclusion*). Therefore, these experts would have a conflict of interest as they would be assessing their own work.

Question 22. Our firm intends to involve subcontractors in the execution of the assignment, however, all subcontractors' task represents less than 20% of the contract. Please advise, whether all the subcontractors are obliged to fill in the Identification form (Annex 1) and the Declaration on their honour (Annex 4), or it is enough if only the lead firm fills in and provides the above mentioned documents.

Answer 22. Section III.2.1 of the tender specifications (page 10) clearly provides that subcontractors covering less than 20% of the contract are not required to fill in the Identification form (Annex 1). As for the Declaration on their honour (Annex 4), Section IV.1.3 of tender specifications (page 15), at point 1, requires each tenderer (including subcontractor(s) or any member of a consortium or grouping) to provide a declaration on their honour, duly signed and dated, stating that they are not in one of the situations mentioned in Sections IV.1.1 and VI.1.2 of the tender specifications.

Therefore, in the case raised by the question, the subcontractors covering less than 20% of the contract would have to submit the Declaration on their honour (Annex 4), but not the Identification form (Annex 1).