

AD Belgrade Nikola Tesla Airport
Public Procurement Commission 48/2013

10 Reference number: *7207*

Date: 25. 12. 2013

Belgrade

Subject: Additional information and clarifications for public procurement in open procedure "BAG MESSAGE SERVICE – BMS" no. 48/ 2013

Acting upon request of the Tenderer in line with the article 63 of the Public Procurement Law, we are forwarding a clarification of the tender documentation for the public procurement in open procedure no. 48/2013 "BAG MESSAGE SERVICE – BMS".

Question:

Preventative Maintenance.

The Tenderer shall carry out Preventative Maintenance on the components of its delivered system. The Tenderer shall not be responsible for the information system from the demarcation point from its system to the Purchasers baggage systems.

Tenderer does not understand the relevance of the text to the heading.

Clarification:

The wording of that paragraph is not the one defined in your question but the following one:

"3.4.1 PREVENTIVE SUPPORT AND MAINTENANCE

The Tenderer is required to provide to the Purchaser all the necessary technical support to enable optimum operation of the system and to ensure the required availability of information system of a minimum of 99,9% cumulative per annum, excluding the time for planned system downtime.

Tenderer must provide contact center (phone and/or e-mail) that will provide answers to questions of the Purchaser and all information necessary for the optimal functioning of the system, during standard business hours."

Question:

3.4.2. refers to a Table of Corrective Maintenance. Please clarify which table this is.

Clarification:

Purchaser will make Tender documentation change.

Question:

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 SITA (and other potential Suppliers) on or before 20 January 2014? 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.

SITA 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 BagMessage (ii) the Tender of the Supplier; and (iii) the Tender Dossier."

Please see "Manner of Service" below regarding the suggested inclusion of the Service Schedule for BagMessage.

Clarification a): "Tender of the Supplier" is the bid response document that must be submitted until 20 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 SERVICE

- (a) 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. SITA would respectfully suggest the following wording is added:

"The Supplier shall perform the services described in the document entitled "Service Schedule for BagMessage" in accordance with the Project Plan, each of which are attached to, and form part of, this Contract."

Clarification a): The Purchaser shall amend the Tender documentation.

Question:

III PRICE

Art. 2

- (a) SITA requires the ability to increase the charges payable by the Customer on an annual basis in order to reflect changes in CPI. Accordingly, SITA would respectfully suggest that the following wording is included as a new paragraph at the end of Art. 2:

"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 OF PAYMENT

Art. 3

- (a) SITA 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) Please clarify the meaning of the fifth paragraph of Art.3. In what circumstances could the Contract terminate without compensation under this paragraph? SITA does not understand this paragraph.
- (e) 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? SITA does not understand this paragraph.

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

Clarification c), d) and e): The Purchaser shall amend the Tender documentation.

Question:

V TIME AND PLACE OF DELIVERY

Art. 4

- (a) The Supplier's ability to meet the deadline set out in the first paragraph of Art. 4 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.

SITA would suggest that the first paragraph of Art. 4 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..."

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

Question:

VI DELIVERY SCHEDULE

Art. 5

- (a) Please clarify the meaning of the following sentence: *"The Supplier is obligated to within a Presets Information System contract authority a schedule of activities, which is all respects offered term of service."* SITA does not understand this wording.

Clarification a): Due to translation errors, Purchaser will amend English version of Tender documentation.

Question:

VII QUANTITATIVE AND QUALITY ACCEPTANCE

Art. 6

- (a) SITA would suggest that the wording in this Art. 6 tidied up a little to ensure that there is no misunderstanding between the parties. As drafted, there are a few typo errors and the wording could be "tightened up" here and there to make it clearer. Would the Purchaser be willing to allow SITA to make those minor changes?
- (b) Although the Tender indicates that there will be an evaluation period, the Contract does not contain an acceptance testing mechanism for the formal acceptance of the

Information System. SITA recommends that acceptance tests be attached to the response as part of the Project Plan.

SITA would recommend that a flexible approach be adopted whereby an acceptance testing plan is agreed between the parties. Accordingly, SITA 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".

- (c) Art. 6 also refers to the Information System complying with *"the technical specification"*. Where is that technical specification? The technical specification should be set out in the Service Schedule for BagMessage (which SITA has suggested be added to the Contract as described under "II MANNER OF SERVICE" above).

On that basis, the wording in the fifth paragraph of Art. 6 should read:

"If the quantitative and qualitative receipt states that the quantity and quality of the supplied Information System and services rendered Information System differ from the elements set out in the Service Schedule for BagMessage..."

Clarification a) and b): This matter has been addressed in the section Evaluation - test period in Template 3 and also in paragraph Quantitative and qualitative acceptance, Article 6 in Template 7 of the tender documentation.

Clarification c): Template 3 in Tender documentation is the Technical specification. Due to translation errors, Purchaser will amend English version of Tender documentation.

Question:

VIII QUALITY AND WARRANTY

Art.7

- (a) This section is written in the Serbian language. SITA has translated this section as follows:

"Supplier is obliged to deliver goods and provide services under Article 1 of this Agreement in all the requested technical specifications and professional care.

Supplier is obliged to conclude contracts and to provide to purchaser bank guarantee of performance bond in the amount of 10 % of the total value of the information system and the initial setting of the information system. If the supplier is based in a foreign country, is obliged to submit a bank guarantee by sending SWIFT message addressed to a commercial bank to the purchaser within three (3) working days as from the date of conclusion of the contract , otherwise the contract will be considered as not valid . The bank guarantee must be irrevocable, unconditional, without objection and payable on the

first call. Bank Guarantee for good performance bond should be valid for at least 15 days longer than anticipated period for initial setup of a system.

Supplier is obliged, at the conclusion of the contract and sign, to provide to purchaser bank guarantee for return of advance payment of the required amount of advance. Bank guarantee for return of advance payment shall be irrevocable, unconditional and payable on the first call with a term of validity of 15 days longer than anticipated period for initial setup of a system."

Does the Purchaser agree that this translation is correct? If not, please provide a translation that SITA can review.

Clarification a): Due to translation errors, Purchaser will amend English version of Tender documentation.

Art. 8

- (a) The second paragraph of Art. 8 deals with the determination of disputes regarding the "degree of damage". Please can the Purchaser clarify what the words "degree of damage" actually means in this context? What disputes will be determined by an expert?

SITA 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):

- Due to translation errors, Purchaser will amend English version of Tender documentation.
- The Purchaser does not agree with the proposed changes of wording.

Art. 9

- (a) SITA respectfully requests that the contractual penalties set out in Art.9 be removed. Contractual penalties are not appropriate in this Contract. SITA'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. SITA's obligation is clear, to deliver the Information System on time in accordance with the Project Plan. SITA will comfortably achieve the required 45 day deadline for setup of the Information Service.

- (b) If the Purchaser is unable to remove the requirement of a contractual penalty, Art. 9 needs to be amended slightly to make it clear that the contractual penalty relates to the failure to achieve the deadline set out in Art. 4. SITA would suggest that Art. 4 is expressly referred to.
- (c) In any event, the second contractual penalty "for delivery of goods" should be removed. In this project, all goods are delivered at the beginning, during setup of the Information System. There is no continued delivery. Therefore, this second contractual penalty is not necessary.
- (d) Please clarify the meaning of the words "*The Supplier is not entitled to pay damages and waive the Contract*". SITA does not understand this wording.

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

Clarification c) and d): Due to translation errors, Purchaser will amend English version of Tender documentation.

Art. 10

- (a) Please clarify the meaning of the words "*In case the Supplier fails to perform its obligations under this Treaty, the contracting authority has the right to his choice in proportion to the price reduction and the right-sided Rasid Agreement.*" SITA does not understand this wording.
- (b) Please clarify the meaning of the words "*In the case of unilateral termination of the contract the contracting authority is obliged to leave the Supplier an additional 30 days to meet contractual obligations.*" SITA does not understand this wording.
- (c) In order to deal with the above and ensure that the termination rights in this Contract are clearly defined, SITA would respectfully suggest that Art. 10 be removed and replaced with the following:

"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."

Clarification a) and b): Due to translation errors, Purchaser will amend English version of Tender documentation.

Clarification c) and d): The Purchaser does not agree with the proposed changes.

Question:

X INTELLECTUAL PROPERTY RIGHTS AND CONFIDENTIALITY

Art.12

- (a) SITA would respectfully suggest that the first paragraph of Art. 12 be amended to clarify that SITA either (a) owns; or (b) licences, the intellectual property in the Information System and to confirm that there will be no transfer of those rights:

"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:

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

Clarification b): The Purchaser shall amend the Tender documentation.

Question:

XI TRANSITIONAL AND FINAL PROVISIONS

Art.12

(a) There is a numbering error. This should be Art. 13.

(b) Art.12 clearly states when the Contract comes into force, but does not specify the duration of the Contract, or when the services shall begin. SITA 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 '**Commencement Date**')."*

*The performance of the services shall commence on the date set out in the Project Plan, or such other date as may be mutually agreed between the parties (the '**Service Start Date**')."*

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

Clarification a): The Purchaser shall amend the English version of Tender documentation.

Clarification b): The Purchaser shall amend the Tender documentation.

Arts.13 and 14

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

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

Art. 15

(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? SITA 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.

Additional Provisions

SITA'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. SITA therefore respectfully requests that the following provisions are added to the Contract.

Limitation of Liability

SITA's corporate policy dictates that it must limit its liability in all contracts that it enters into. This is standard commercial practice. SITA uses standard wording in its contracts for this. SITA would suggest that its standard wording, which also limits the liability of the Customer, is inserted into the Contract as a new Art. 16:

Art. 16 (Limitation of Liability)

16.1.1 *Subject to Art. 16.3 below:*

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

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

16.1.2.2 *Damage to goodwill or reputation; or*

16.1.2.3 *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.

16.1.3 *Subject to Art. 16.1.3 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.*

16.1.4 *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:*

16.1.4.1 *€100,000 (one hundred thousand Euros); and*

16.1.4.2 *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. 16, 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.

16.2 *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.*

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

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

16.3.2 *fraudulent misrepresentation;*

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

16.3.4 *save for the limitation contained in Art. 16.3, any of the indemnities given in this Contract.*

16.4 *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.*

Clarification: The Purchaser does not agree with the proposed changes. All issues, not being covered by this Contract, are governed by provisions of the Law of obligations of the Republic of Serbia.

Art. 17 (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, SITA respectfully requests that the following wording be added as a new Art. 17:

Art. 17

"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. 18 (Use of Service)

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

Art. 18

"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 SITA to be in breach of any law, local, national or international regulation."

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

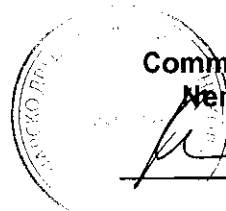
Art. 19 (Suspension)

The nature of this service means that the Supplier may, in certain circumstances (such as emergencies), be required to suspend the service. Accordingly, SITA respectfully requests that the following clause be included as a new Art. 19:

"The Supplier may limit, suspend or cancel the service at any time with or without prior notice to the Customer if, in SITA'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. All issues, not being covered by this Contract, are governed by provisions of the Law of obligations of the Republic of Serbia.



**Committee president
Nenad Sakić**

A handwritten signature in black ink, written over a horizontal line. The signature is stylized and appears to be "N. Sakić".