

Call for tenders' details

Title: Contract for the joint procurement of an auction monitor.

Start date: 06/08/2013

Time limit for receipt of tenders: 25/09/2013

Contracting authority: European Commission, DG ENV+CLIMA

Status: Closed

Call for tenders question list

#	Submission date	Publication date	Question subject	Question	Answer
1	06/08/2013 15:12	06/08/2013 15:15	Terms of Reference	I should be very grateful if you could please upload the Terms of reference for this procedure. The following documents are already uploaded: 'Invitation to tender', 'Draft contract' and 'Information Note', but the Terms of references seem to be missing. Thank you very much in advance.	06/08/2013 The tender specifications will be uploaded shortly.
2	14/08/2013 17:18	20/08/2013 10:03	Deadline	Given that the contract notice was published in the EU Official Journal Supplement on 6th August, and that the tender submission deadline is on 18th September, we would hereby request an extension to the deadline to enable tenderers to prepare responses, also taking into account that August is a vacation period in many European countries during which there are also public holidays.	20/08/2013 The deadline for submitting tenders is extended until 25 September 2013. The opening of tenders is scheduled for 7 October 2013. To this end, a corrigendum to the Contract Notice will be published in the Official Journal in the upcoming days.

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#	Submission date	Publication date	Question subject	Question	Answer
3	14/08/2013 17:21	21/08/2013 14:54	Liability	<p>We are trying to understand the applicable contractual conditions surrounding liability linked to the performance of the contract. Even though we take note of the different sections that provide guidance, could you please confirm whether there is any cap on liability or if it is unlimited? As this novel procedure of Joint Procurement also involves Member States, we would like to check whether special conditions will apply for this contract regarding liability of the contractor. During the Information Day a question was posed regarding cases where fraud goes undetected, whether the contractor will systematically be held liable when this occurs and the answer from the EC inferred that this would indeed apply. Given the significant volumes of currency involved on the trading platforms, we would have concerns about the possible implications for the contractor.</p>	<p>21/08/2013</p> <p>As indicated in the second paragraph of point 6) and the second paragraph of point 7) of Section 3.1.2 of the Tender Specifications, the role of the auction monitor will not supersede the role of national competent authorities. The auction monitor will not be required to detect or investigate occurrences of anti-competitive behaviour, market abuse, money laundering, terrorist financing or criminal activity. Instead, the auction monitor will have the duty to inform the Commission, the auction platform and the national competent authorities concerned when it has suspicions, on likely occurrences of these instances of fraudulent behaviour. Since the auction monitor will not have an active role in detecting instances of market abuse, money laundering, terrorist financing, or criminal activity, its liability cannot be triggered where fraud goes undetected. However, the general provisions on liability will apply, in conformity with Article II.3.3 of the draft Model Contract, for any loss or damage sustained by the contracting authorities in the performance of the contract. According to point 3) of section 3.4.1 of the Tender Specifications, the liability of the</p>

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					Specifications, the liability of the contractor may be engaged in case of non-compliance with the minimum requirements: allocation of resources, prohibition to participate in auctions, avoidance of conflicts of interests and of market abuse, confidentiality, obligation to communicate the persons having inside information, and language.
4	20/08/2013 09:49	21/08/2013 14:55	Auction Monitoring Entity: Eligibility	Could you please clarify if the appointed Auctioneers as well as other related entities are prohibited to participate either individually or jointly in the Tender?	21/08/2013 As specified in the first paragraph of Article 34 of the Regulation no 1031/2010 (Auctioning Regulation), the requirements for appointing the auction monitor will take account of candidates with the least risk of conflicts of interests or market abuse having regard, in particular, to their activities on the secondary market. According to point 1) of section 2.2 and related Annex 6 of the Tender Specifications, the conflicts of interests constitute an exclusion criterion. Therefore, an auctioneer and any related entity are prohibited to participate in the tender, either individually or jointly.

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5	14/08/2013 17:25	21/08/2013 14:56	Liability	As certain trading platforms operate according to different legal bases, is it expected that the contractor is responsible for interpreting the applicable legislation ("in the spirit of the law") or will specific guidance be offered in the terms of reference? It is not clear to us how the different laws applicable to each platform might impact the conditions of the applicable legislation to the work performed by the contractor.	<p>21/08/2013</p> <p>As indicated in the first paragraph of point 6) of section 3.1.2 and in section 3.1.3 of the Tender Specifications, the auction monitor must be familiar with the legislative framework in place, at European Union and national level. Therefore no further specific guidance will be offered. Nevertheless, as indicated in point 9) of section 3.1.2 of the Tender Specifications, the auctioneers, auction platforms and the national competent authorities will assist the auction monitor in fulfilling its functions by actively cooperating with it.</p> <p>According to paragraph b) of point 1) of section 3.2.1.1 and points 1)-3) of section 4.2.2.1 of the Tender Specifications, the work-plan which will identify, among other aspects, the auction monitor's approach, organisation of the work and the proposed methodologies, will be discussed and agreed with the Commission. For drafting the vertical part of the work-plan which will identify, in consideration of the applicable framework, the specific monitoring needs and modalities per auction platform, the auction monitor will liaise with the auction platforms and the national competent authorities concerned.</p>

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6	14/08/2013 18:38	21/08/2013 14:58	Budget	<p>We take note vis-à-vis the previous information available that the overall budget is reduced from € 25m to € 5m. We would like to check firstly if the budget of € 5m is intended to cover only the first 24 months of the contract of a potential 48? As we also do not detect so far any significant changes with regard to the scope of work and intended level of activity, we'd be grateful to be able to understand if possible what changes in the scope explain this significant reduction in budget.</p>	<p>21/08/2013</p> <p>The previous estimated budget was designed for a 4-year framework contract. In the meantime, the tasks of the auction monitor have been defined in a more precise manner. Furthermore, a direct contract as currently foreseen does not require signature of specific contracts under it, which would entail more uncertainty for the contractor. The current indicative budget is proportionate to the envisaged role of the auction monitor.</p> <p>In the previous tender documents (i.e. the request to participate in the first phase of the restricted procedure, launched in 2012), the scope of work and the intended level of activity were not defined, only a mere reference to the duties of the auction monitor, as identified in Article 25 of the Auctioning Regulation, being made. The current Tender Specifications explain in detail the role and the framework in which the auction monitor will perform its tasks (for instance, no active role in detecting instances of market abuse, money laundering, terrorist financing, or criminal activity). Furthermore, the contracting authorities have adjusted the required expertise and the level of experience of the tenderers, in line with the envisaged role of the auction</p>

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					with the envisaged role of the auction monitor.
7	14/08/2013 17:22	21/08/2013 14:59	Liability	Given that there are potential cases where new forms of fraudulent activities or market manipulation could be exercised, or that key information that would otherwise permit fraud to be detected may not be immediately made available to the contractor, we would propose that specific safeguards are included to the contractual terms and conditions to cater for such instances. There are also for instance existing procedures for audit engagements acting in the public interest where liability is aligned to a defined threshold. We could elaborate further on these if required. Given the implications of an unlimited liability, we would like to propose that IFAC rules which are commonly used for other monitoring and auditing tasks in public interest are of application here.	21/08/2013 In the light of the previous answer, the liability of the auction monitor will not be triggered where instances of market abuse, money laundering, terrorist financing, or criminal activity go undetected. Therefore, reference in the contract to rules applicable to auditing tasks, such as IFAC (note: International Federation of Accountants) rules, is not deemed necessary.

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8	22/08/2013 16:45	29/08/2013 08:39	Conflicts of Interest	<p>The requirements set forth in the Tender Specification sections 2.3.2.2. "Criteria relating to the team" and 3.4.1.3. "Avoidance of conflicts of interest and market abuse" appear to mutually exclude each other. The qualifications requested from the team require having worked for and continuing to work for financial institutions, energy firms and industrial companies – all of which will likely participate in the auctioning process. Hence any expert firm or person in the field of regulated financial or energy market would not in principle be able to meet both criteria, if our understanding is correct. Therefore we would be able to propose the following solution for the mitigation of conflicts of interest:</p> <p>(1) we can demonstrate that our firm is fully accustomed and experienced in providing services for clients which are in direct competition with each other. This requires the most strict adherence to procedures and policies which prevent providing any of the clients with information that could be disadvantageous to another client. Those procedures have been successfully in practice within our firm since many decades and should prove sufficient for fulfilling the task of the auction</p>	<p>29/08/2013</p> <p>The Commission does not consider the provisions of sections 2.3.2.2 and 3.4.1.3 to be mutually exclusive. Note that the requirements in section 2.3.2.2 relate to experience in the past, whereas the requirements described in paragraphs a) and b) of point 1) of section 3.4.1.3 of the Tender Specifications apply as of the entry into force of the contract and until a period of one year after the expiry or termination of the contract has elapsed. It is in the first place for potential tenderers themselves to determine whether the risk of conflict of interest may arise, if such existing or potential conflicts can be satisfactorily addressed and whether, as a result, the potential tenderer concerned is in position to submit an offer.</p>

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				<p>fulfilling the task of the auction monitor.</p> <p>(2) We can consent in addition that no person of the chosen team for the duration of the monitoring would directly work with any participant of the auction process in the field of trading or procurement of emission certificates.</p> <p>Please let us know whether such an approach is acceptable in your view and whether, if explained adequately, it will positively influence the following in the evaluation of bids: "the requirements for appointing the auction monitor will take account of candidates with the least risk of conflicts of interests or market abuse having regard, in particular, to their activities on the secondary market"?</p>	

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#	Submission date	Publication date	Question subject	Question	Answer
9	22/08/2013 16:43	29/08/2013 08:41	Gross Negligence	<p>Within the draft contract Articles I.9 on Confidentiality and I.10 on Conflicts of Interest and Market abuse certain situations are stated in absolute terms to constitute Gross negligence or wilful misconduct. Whilst we fully understand the nature of these infringements and the importance of avoiding them, the reference “any situation of Conflicts of Interests [...] shall irrefutably be presumed to constitute gross negligence or wilful misconduct of the Contractor” could be interpreted as overriding the notion that the Contractor should take necessary measures to mitigate potential Conflicts of Interest that may arise. Our assumption is that the latter is consistent with the responsibility of the chosen contractor but we would still appreciate your assurance that the text highlighted is only with regard to retrospective events. In addition, further guidance you may offer, for instance possible scenarios that would be interpreted as gross negligence, would be much appreciated as it is still not fully clear to us where the distinction lies between internal mitigation actions that the Contractor has to take and external factors that lie outside the sphere of influence of the Contractor.</p>	<p>29/08/2013</p> <p>The Contractor will be obliged to prevent and avoid any situations of conflicts of interests and market abuse, and protect confidentiality of information in accordance with Articles I.9, I.10 and II.4 of the Model Contract and section 3.4 of the Tender Specification.</p> <p>Article I.9 and Article I.10 of the draft Model Contract qualify breaches of confidentiality and any situations of conflicts of interests and market abuse as gross negligence or wilful misconduct for the application of Article II.3.3 of the draft Model Contract (emphasis added), related to liability for loss and damage; in case the Contractor causes a loss or damage by the gross negligence or wilful misconduct of the Contractor or of its personnel or Subcontractors, the Contractor shall have unlimited liability for the amount of the damage or loss. This is an exception to the otherwise limited liability as specified in the first sentence of Article II.3.3.</p> <p>The proposed security organisation, including the quality of the evaluation of the internal risks of market abuse, conflicts of interests and breaches of confidentiality, and the quality of the specific measures and procedures proposed for avoiding these, will be</p>

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				Contractor.	proposed for avoiding these, will be assessed during the award phase (section 2.4.1.3 of the Tender Specifications).

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10	22/08/2013 16:44	29/08/2013 08:42	Conflicts of Interest	If a potential contractor is the auditor of a current or potential future auction platform, will this in itself create a situation of conflict or can the potential contractor explain how to mitigate this situation?	<p>29/08/2013</p> <p>It is in the first place for potential tenderers themselves to determine whether the risk of conflict of interest may arise, if such existing or potential conflicts can be satisfactorily addressed and whether, as a result, the potential tenderer concerned is in position to submit an offer. Here we would like to recall the provisions of Article 34(1) of Regulation 1031/2010 (Auctioning Regulation). Furthermore, according to section 3.4.1.3 of the Tender Specifications, the Contractor is required to put in place methods to avoid conflicts of interests (and market abuse) and this may be achieved in one of the ways indicated in paragraphs a) and b) of point 1) of the above-mentioned section. Moreover, since, according to section 2.4.1.3 of the Tender Specifications, the proposed security organisation, including the quality of the evaluation of the internal risks of conflicts of interests, and the quality of the specific measures and procedures proposed for avoiding these, will be assessed during the award phase, it is incumbent to the tenderer, in consideration of its activities and internal organisation, to identify possible situations of conflicts of interests and the necessary approach for mitigating them.</p>

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					for mitigating them.

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#	Submission date	Publication date	Question subject	Question	Answer
11	23/08/2013 17:25	05/09/2013 16:56	Questions to DG CLIMA on Auction Monitor role1) Conflict of Interest:	<p>At the information meeting on 21st November 2012, the Commission indicated that the auction monitor function would have a dedicated core team, supported by rare experts (who specialised in energy markets, auction design or IT security etc). In order for the core team to have access to this rare expertise, it was implied that the rare experts would not work full time for the auction monitor role and that they would not be subject to the same restrictions for the avoidance of conflict of interest.</p> <p>Section 3.4.1.3 of the tender specifications states the following:</p> <p>“... the members of the team performing the contract (including the project manager) as well as any other person employed by the contractor who is involved in the performance of the contract refrain from, and stop working directly or indirectly for persons eligible to apply for admission to bid as of the entry into force of the contract and until a period of one year after the expiry or termination of the contract has elapsed. In that case, the contractor sets up appropriate Chinese walls between the team members performing the contract</p>	<p>05/09/2013</p> <p>Please note that during the Information Day held on 21st November 2012 DG Climate Action presented only preliminary and non-binding information (see link: http://ec.europa.eu/clima/events/0060/index_en.htm). Please note as well that the Auction Monitor's tasks as described in the present Tender Specifications differ significantly from what was discussed at the Information Day. For instance, the present tender documents do not foresee an active role in detecting instances of market abuse, money laundering, terrorist financing, or criminal activity, and the levels of required expertise and experience of the tenderers have been lowered. In addition, the present Tender Specifications do not distinguish between rare experts and other experts.</p> <p>The minimum requirements in terms of avoidance of conflicts of interests and market abuse set out in section 3.4.1.3 of the Tender Specifications apply to all experts involved in or contributing to the performance of the Auction Monitor's tasks be it on a permanent or on an ad hoc basis. Working “indirectly” for persons eligible to apply for admission to bid comprises notably situations where a person is working for subsidiaries,</p>

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				<p>members performing the contract ensuring that no inside information is communicated to the remainder of its organisation (e.g. protected intranet workspaces, personal commitment signed by each team member)."</p> <p>If the above clause applies to rare experts, it would limit the ability of the auction monitor core team to access their rare expertise as the restrictions are onerous for a rare expert who is only working on an ad hoc basis for a limited amount of their time. Please can you confirm whether the clause above also applies to the rare experts, or whether potential conflicts can be managed, through the application of appropriate safeguards, on a case by case basis in advance of the performance of the tasks.</p> <p>Please could you also explain what is meant by working "indirectly" for persons eligible to apply for admission to bid.</p>	<p>person is working for subsidiaries, parent companies or affiliates of such eligible persons and situations where a person is performing tasks within the contractor's organisation (e.g. data collection, analyses, provision of opinions or advice) which will be used in the delivery of a service to persons eligible to apply for admission to bid.</p>

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12	23/08/2013 17:26	05/09/2013 16:58	Conflict of Intererest - Section 3.4.1.3	How will section 3.4.1.3 (on conflict of interest) be applied to team members that also work with other government departments – especially if other government departments are eligible to bid for the allowances in support of the compliance of their installations (e.g. heat/power generation assets at defence facilities, hospitals or universities)? The auction monitor will by default be working for a (government) 'person' which is eligible to bid, is this what is intended?	05/09/2013 Section 3.4.1.3 of the Tender Specifications stipulates that the contractor is required to put in place methods to avoid conflicts of interests and market abuse. This section also applies when the contractor has been providing services to persons eligible to apply for admission to bid that are government departments of a Member State that is one of the contracting authorities under this joint procurement procedure. It further indicates two options in which this requirement may be satisfied. If the contractor finds itself in a situation of potential conflict of interest described in point 1) of that section (contractor works directly or indirectly for persons eligible to apply for admission to bid), it must use one of the options listed there. In particular, according to paragraph b) of point 1) of that section the contractor may put in place a strict separation of the team performing the contract (including the project manager) as well as any other person employed by the contractor who is involved in the performance of the contract from the rest of the contractor's organisation. Persons within the team (as well as other persons involved in the performance of the contract) should in such case

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					<p>of the contract) should in such case refrain from / stop working directly or indirectly for persons eligible to apply for admission to bid as of the entry into force of the contract and until a period of one year after the expiry or termination of the contract has elapsed. Chinese walls also need to be established.</p> <p>Furthermore, please note that pursuant to Article 33(2) of the Joint Procurement Agreement to Procure an Auction Monitor, Member States are expected to have in place appropriate measures to prevent, detect and eliminate conflicts of interests that may arise in the joint procurement and during the life of the contract.</p>

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13	23/08/2013 17:26	05/09/2013 16:59	Level of assurance	What level of assurance are you looking to obtain? Would an assurance report in accordance with ISAE 3000 be appropriate? If so, have you considered whether limited or reasonable assurance would be more useful to you?	<p>05/09/2013</p> <p>The tender documentation makes no reference to ISAE 3000. It is for the tenderer to assess, when preparing its tender, whether and to what extent ISAE 3000 can be useful for the performance of Auction Monitor's tasks.</p> <p>Please note that ISAE 3000 assurance standards you are referring to are not necessarily (fully) in line with the specific role and responsibilities of the Auction Monitor as described in the tender documents and the Auctioning Regulation. For example, paragraph c) of point 2) in Section 3.2.1.2 of the Tender Specifications on monthly monitoring and reporting specifies the level of assurance expected with regard to that concrete task: "(...)The contractor should give particular attention to patterns, trends and deviations thereof which cannot be identified by individual auction platforms considering their lack of full information on the entire EU primary market. When the contractor becomes aware of any such deviations, it should give any reasonable explanations. If any such deviations give rise to suspicions of market abuse, money laundering, terrorist financing or criminal activity, the contractor should alert without delay</p>

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					contractor should alert without delay the Commission, the national competent authorities and, if applicable, the auction platform concerned, in accordance with the modalities agreed in the work plan (see subparagraph iii) of the following paragraph d)). The requested monitoring of individual bidding behaviour is without prejudice to point 6) of section 3.1.2. Accordingly, the contractor will not be held liable in case it fails to identify any such wrong-doing or suspicions thereof, since this remains the primary responsibility of the auction platforms. (...)"
14	23/08/2013 17:28	05/09/2013 17:00	3rd party assurance reports	Will the Auction Monitor be able to place reliance on any 3rd party assurance reports by independent auditors of the exchanges (if these are available and the Auction Monitor is able to place reliance on them then this could reduce the level of duplication of work)	05/09/2013 The degree to which any available reports and analyses of 3rd parties (including any assurance reports by independent auditors) may be relied upon will have to be determined on a case-by-case basis. Please also note that, according to point 2 of section 3.3.1.1. of the Tender Specifications, the contractor cannot request information from any entity other than the entities listed in Article 53(1) of the Regulation 1031/2010 (Auctioning Regulation).

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15	23/08/2013 17:28	05/09/2013 17:02	Presence of Auction Monitor at auctions	Do you expect the Auction Monitor to be physically present at all auctions (as this may impact the degree of assurance you are able to obtain)?	<p>05/09/2013</p> <p>Although the Auction Monitor will be requested to perform its monitoring and reporting functions with regard to each individual auction (see paragraph b) of point 6 in Section 3.1.1 of the Tender Specifications), it will not need to be physically present at each auction. The auction platforms will be required to make information on the auction results available to the Auction Monitor as part of the standard data input (see point 3 of Annex 13 of the Tender Specifications). It is for the tenderer to clarify in its technical proposal its approach to physical presence at auctions. This will be relevant for the assessment under award criterion (in particular those in letters a) and b) of point 1 of Section 2.4.1 of the Tender Specifications). The Contractor and the Commission will agree the approach to physical presence at auctions as part of the work plan, which will be determined pursuant to paragraph a) of point 1) of section 4.2.2.1 of the Tender Specifications. In addition, physical presence at one or more auctions may be required in specific circumstances (e.g. production of an ad hoc report on breach(-es) as per Section 3.2.1.4 of the Tender Specifications).</p>

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16	10/09/2013 11:41	13/09/2013 11:22	Conflict of interests	Does the answer to question 11 imply that any person employed full time or part time in the task or monitoring the auctions will not be allowed to work for a person eligible to participate in an auction of emission allowances on any subject? i.e. the prohibition is not limited to work in connection with the purchase, sale or trading of emission allowances but likewise applies to work with regard to other functions including purchasing, selling or trading of energy or financial instruments?	13/09/2013 Indeed. According to Section 3.4.1.3 of the Tender Specifications, the members of the team of the Auction Monitor will not be allowed to work on any subject for a person eligible to participate in auctions as of the entry into force of the contract and until a period of one year after the expiry or termination of the contract has elapsed.

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