

EMSA/OP/05/2014

Multiple framework contracts in cascade for the supply of oil dispersant

Questions and Answers

Question 01 (dated 23 May 2014, 14:24):

"(...)

We have noticed a recent Invitation to Tender No. EMSA/OP/05/2014 as detailed on the EMSA website.

Having read the tender documentation, the scope of work orientates around the purchase of the dispersant. We would unfortunately not be in a position to retail dispersant but would look to offer a hire service of the dispersant.

Would a hire agreement for the dispersant be of interest and would it be considered against this Invitation to Tender? (...)"

Answer to question 01:

EMSA's current procurement procedure (EMSA/OP/05/2014) only refers to purchase of dispersant and does not cover hiring/renting of dispersant. Therefore, a bid offering the hiring of dispersant would be considered out of the scope of the procurement procedure and would not be evaluated.

Question 02 (dated 25 June 2014, 08:38):

"We have three major concerns about EMSA requirement detailed in appendix IV. These are about:

- 1) Guarantee: Product conformity is determined in the light of XXXX (*name of testing centre*) efficiency test.
- 2) Responsibility (article II.3): Supplier is required to protect EMSA against third party claim. This is exact opposite throughout the world with all customers. Especially with large Oil Spill Response Organization. It is standard business practice further to the Macondo crisis.
- 3) Effect of termination (article II.13.3): It is not acceptable that EMSA can claim against supplier as a result of the termination of the contract.

Beside these major points we would have question regarding following article:

article I.9.1 > points c, d et e seem not to have relation with Marine Dispersant. We probably should delete these.

article II.1.1.b > Delivery: Surprising not to see any mention about each country regulation and Dispersant Approvals.

article II.1.7.a > Packaging: We do not understand the kind of required packaging. Market standards are IBC or drums. Can these packaging not be use?

article II.14.6 > 60 days Payment terms after conformity check (which can take several weeks) would lead to a much too long term

article II.17 > this article linked to intellectual property seem have not on line with Marine Dispersant.

Finally, we think that some critical point are missing and should be added such as:

Definition of required quantity and quality

Local regulation linked to the country where the product should be delivered or stored.

Fiscal information.

Also, we would need to understand what is the ESMA strategy in case of use for Marine Dispersant.

Will EMSA keep the ownership of the product where the product will be stored?

Will EMSA take in charge the responsibility of the operation in case of use?

Will EMSA use its own equipment of will you ask for third party service organization?

We definitely need to talk about these above issues and mainly about the three first concerns."

Answer to question 02:

First of all please note that, within the context of an open procurement procedure, no changes shall be introduced neither in the terms set in the draft Framework Contract (FWC) (Annex IV) nor in the Tender Specifications (Annex I). In this regard, point 8 of the Tender Specifications indicates that: "In drawing up a bid, the tenderer should bear in mind the terms of the draft multiple framework supply contract (Annex IV to the invitation to tender)". Besides, point 8 of the Invitation to tender specifies that: "submission of the tender implies acceptance of all the terms and conditions set out in this invitation to tender, in the tender specification and in the draft contract (...)".

Please find below the answers to the different parts of your question regarding Annex IV (Draft Multiple Framework Supply Contract):

- 1) EMSA understands that you base your guarantee of the quality of the product on the test results of the center you chose. EMSA does not understand at this stage that this might mean any incompatibility with the general conditions on guarantee established in particular in Article II.1.7 of the draft FWC.
In order to comply with the efficiency requirement set in point 2.2. d) of the Tender Specifications, tenderers have to submit evidence that the type of dispersant offered was tested for dispersal efficiency by using a method *recognized and approved by nationally recognized/accredited testing laboratories within EU/EFTA countries [...]*. Accordingly, any evidence to prove the compatibility of your product with the specifications of the center you use for testing and certification should be submitted as part of your tender documentation and will be part of the supply contract in case of award.
- 2) EMSA takes note of your concern regarding responsibility laying with the dispersant supplier in the draft Framework contract, but please note that no change of these conditions nor limitation of responsibility is admissible in the context of this procurement procedure. Accordingly, as per article II.3, the contractor is responsible for any loss or damage sustained by EMSA in relation to the implementation of the

Framework Contract, up to three times the total amount of the Contract, except if the damage or loss is caused by the gross negligence or wilful misconduct of the contractor or of its personnel. The contractor will be responsible to ensure that the dispersant is compliant with the quality offered and tested by the recognized organization as documented in the accompanying Material Safety Data Sheet and that the instruction for use does not lead to any damage or loss.

- 3) Regarding to your question on the effect of termination as per article II.13.3 of the draft FWC it must be clarified that this article is part of the general provisions set for all EMSA contracts, and foresees the possibility that the special conditions set different clauses. All the general conditions set in the FWC are applicable unless it is stated differently in the special conditions (see the hierarchical order between the relevant documents set in the preamble of the Framework Contract). This objective of this clause is to ensure a minimum continuity of the contract and the services that require an important effort in time and resources for tenderers and EMSA to be established.

As for the questions regarding the specific articles:

- Regarding article I.9.1 > points c, d et e (installing, retrieving, copying, reproducing...) on IPR rights, you are right in indicating that they are not related to Marine Dispersant as they are general articles of the EMSA FWC. They could apply nevertheless to manuals or documentation produced in the context of the contract and accompanying the dispersants that need to be shared by EMSA with the final users (Member States).
- Regarding article II.1.1.b > Delivery: Please note that, as set in point 2.3 d) of the Tender Specifications "*the dispersant may be delivered to any destination within the coastal EU/EFTA countries*". A list of approved dispersants in each of the coastal EU/EFTA countries is attached as appendix to the Tender Specifications and will be in Annex to the FWC.
- Regarding article II.1.7.a > Packaging: Please note that these are general conditions established in the EMSA supply contracts but that in this case are overruled by special conditions established in point 2.3 b) of the Tender Specifications. The specifications indeed refer to IBCs.
- Regarding article II.14.6 > Payment of the balance: note that the 60 days mentioned in this article is the limit for the contractor to submit the invoice. In accordance with Article I.4.3 the deadline for payment of the balance by EMSA is 30 days from receipt of the invoice and proof of conformity of the delivery (consignment note).
- Regarding article II.17 > Intellectual and Industrial Property Rights (IPR): you are right to note that they do not fully apply to the dispersants. Please note that again these are general standard clauses of the EMSA Supply Framework contract which intention is to protect pre-existing IPR for the supplier but also to guarantee that no additional cost for licensing of any IPR is to be charged on EMSA later on. In any case the terms set in article I.9 prevail over those set in article II.17.

Regarding the "critical points" you consider are "missing" please note the following:

- Definition of required quantity and quality

The quantity of dispersant to be ordered is not exactly predictable at this stage. However this will be within the maximum budget set in Tender Specifications (EUR 5,000,000 excluding VAT) and will be conditioned to the price offered and the needs of the Agency that might arise during the duration of the contract. The exact quantity will be established in each order form.

The quality conditions must be specified in the offer in accordance with the requirements set in the Tender Specifications. These will be fixed for the duration of the FWC.

- Local regulation linked to the country where the product should be delivered or stored.

As clarified above, dispersant will be delivered and stored in any destination within the coastal EU/EFTA countries.

- Fiscal information.

As indicated in point 12 of the Tender Specifications, *EMSA is exempt from all duties, taxes and other charges, including VAT. This applies to EMSA pursuant to the Regulation 1406/2002/EC. These duties, taxes and other charges can therefore not enter into the calculation included in the bid. The amount of VAT must be shown separately.*

Regarding ESMA strategy in case of use for Marine Dispersant we can clarify the following:

- Yes, EMSA will maintain the ownership of the dispersant purchased through the FWC;
- EMSA will not be responsible for the "operation in case of use", the operation will be under the command of an EU Member State and EMSA's contractors for aerial spraying services or spraying services from ships will be responsible for the operation of the spraying systems.
- EMSA will not use its own equipment. It will contract more than one service provider responsible for the performance of spray dispersants activities with its equipment.

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Requests for additional information regarding this tender should be sent by e-mail to the following address OPEN052014@emsa.europa.eu

Requests for additional information received less than five working days before the closing date for submission of tenders will not be processed.

The deadline for submission of the bids of this tender is 11 July 2014.

Responsibility for monitoring the Agency's website for replies to queries and/or further information remains with potential applicants.