

Memorandum of Information European Tender 'Geological desk study for various sites'

Date: August 18, 2022

LEGAL QUESTIONS

In this Memorandum of Information, the department inviting tenders provides answers to the legal questions asked and remarks posted in the context of the above-mentioned European Tender. This Memorandum of Information forms an integral part of Tender Document (with reference **TN364253**).

No	Question	Answer
1	We prefer not to guarantee confidentiality as a perpetual obligation and therefore propose that the confidentiality provision has a limited duration, for example 5 years. We therefore propose an addition to Article 2 of the Draft Service Agreement, as follows Article 2.3: "The confidentiality obligations shall survive any termination of the Contract for a period of five (5) years after the termination date."	Not agreed. RVO will share the related data with the tenderers for the tendering procedure for wind farms at the time of the relevant data. See also article 1.3 of the draft agreement. After disclosure of the information contained in Article 1.3, the Contractor's duty of confidentiality with regard to the underlying is also linked, after all, it concerns information that has been made public.
2	We would like to be able to publish on the results of the research. In case of contract award we would like to discuss the possibility for Deltares to publish on the research results and propose to amend the Draft Public Service Agreement (ARVODI 2018) contract with a clause on Publishing. We suggest the following text: "The Contracting Authority acknowledges the Contractor's interest in publishing the results of its research in order to obtain recognition within the scientific community and to advance the state of scientific knowledge. Each Party also recognizes the mutual interest in protecting confidential information and/or obtaining valid patent protection. Consequently, if the Contractor wishes to publish with respect to the contracted research, the Contractor will send a draft of the publication to the Contracting Authority. The Contracting Authority will inform the Contractor within two (2) weeks of receipt of the draft publication whether the Contracting Authority has objections to the publication. The Contracting Authority shall not unreasonably object to such a request from the Contractor. In the event of objections, the Parties will consult in a constructive manner to adjust the publication in such a way that the objections are removed. If the Contractor has not received a response from the Contracting Authority within four (4) weeks, the Contractor can publish the draft publication."	Publishing is only permitted after it has already been published by RVO
3	Could you confirm that Article 13.4 pertains to information received from the Contracting Authority. The official Explanatory notes on the ARVODI 2018 Article 13: mentions "return information that it has in its possession" and "demand return", which implies that it is information received from the Contracting Authority.	Yes, we confirm that.

No	Question	Answer
4	In the Draft Public Service Agreement (ARVODI 2018) for the Geological Desktop Studies for Various Sites does not contain a penalty clause. Could you confirm that there is no penalty applicable based on article 13.5 for this Public Service Agreement?	Yes, that's right, this contract does not include a penalty for breach of confidentiality."
5	Please confirm no bank guarantee is applicable for this Public Service Agreement as mentioned in Article 19.	Yes, that's right, no bank guarantee will be requested within the meaning of Article 19 ARVODI-2018.
6	We propose to limit liability completely. Contractor therefore proposes to limit the liability re. Article 21.3 in the Draft Public Service Agreement (ARVODI 2018) as follows: "The Party that imputably fails to fulfil its obligations shall be liable to the other Party for the damage suffered or to be suffered by the other Party, with the proviso that the liability is limited to an amount equal to three (3) times the total value of the contract, but in no case will exceed the value of € 1 million"	Proposal not accepted.
7	After providing the results, the Contractor is not able to influence the future use of the documents, while third parties could base decisions upon the results that could lead to liabilities. We therefore propose that the following new provision for the Public Service Agree	Proposal not accepted.
8	Article 26.2 ARVODI-2018 states that, at the request of the Contracting Authority, the Contractor will immediately provide (a certified copy of) the policies and the proof of premium payment with regard to the insurance policies or a statement from the insurer regarding the existence of these insurance policies and the payment of the premium must be submitted. We do not provide access to our policies for competitive reasons. Copies of insurance certificates are available, demonstrating compliance with insurance requirements. Is it sufficient to submit a copy of an insurance certificate?	Proposal accepted.
9	Article 21 ARVODI-2018 does not contain an expiry or limitation period of the liability, which means that we fall back on the statutory limitation period (Article 3:310 of the Dutch Civil Code). The liability can therefore continue up to 20 years after the event that caused the damage. However, our advice is based on current reality and this reality is constantly subject to change. As a result, it may happen that after a number of years the actual situation deviates from our advice to such an extent that our advice no longer fits the new situation. After all, the applicability of the advice depends on changes in the actual situation that arise over time and that is precisely why it is not logical and we also consider it disproportionate to align with the statutory limitation period of 20 years. We therefore kindly request you to comply with the regulations that are customary within the	Not accepted.

No	Question	Answer
	engineering/consultancy industry (such as the DNR 2011). We would like to see that the liability expires if 5 years have elapsed after the completion of the work pursuant to the Contract. Is it possible to add such a provision?	
10	Article 21.3 ARVODI-2018 provides that liability is limited per event, whereby the number of events is not limited. We kindly request you to observe what is customary in the engineering/consultancy industry, in accordance with the advice of the 'Commissie van Aanbestedingsexperts' (number 154, see, among other things, consideration 6.2.14). Is the Contracting Authority willing to limit the number of events per Contract to a maximum of five?	Proposal not accepted.
11	In accordance with Article 19 ARVODI-2018, the Contracting Authority can request a bank guarantee 'on demand', which entails additional costs for the Contractor and must therefore be included in the pricing. Is the Contracting Authority planning on demanding a bank guarantee with regard to this Contract?	RVO will not request a bank guarantee within the meaning of Article 19 ARVODI. See also the answer to question 33"
12	Article 15.2 ARVODI-2018 states that the Contracting Authority may require the Contractor to provide certificates of conduct for the Contractor's Staff. Since requesting and obtaining these certificates may take some time, we would like to take this into account. Is the Contracting Authority planning on requesting certificates of conduct for the performance of this Contract?	VOG's within the meaning of article 15 paragraph 2 ARVODI 2018 are not requested for this assignment
13	""Paragraph 3.4.5 of the Tender Document states that 'variations or replacements of personnel to those proposed in the bid after commencing the contract are subject to approval by RVO. Any variation must as a minimum provide the same or better qualification as proposed in the Offer. Assessment of the variation according to the relevant award criteria in Chapter 5 must be compliant with the awarded score of the original Offer.' Can the Contracting Authority confirm that article 6 ARVODI-2018, more specifically the sentence "The Contracting Authority will not withhold its consent without good reason and may attach conditions to its consent" is still applicable?	Not agreed. The specific requirements from the tender document take precedence. The contracting authority does not want to prejudice this in this case

No	Question	Answer
14	In clause 3.4.4 it states "The project delivery team will not contain more than four (4) experts (including the project manager and possible backup). If more than four (4) experts are provided, the Tender will be disqualified. The tasks performed of all these experts should be described in detail to understand their role in the project." Please confirm that this maximum of 4 personnel in the project delivery team is not inclusive of any personnel undertaking subcontracted works for the project.	RVO considers the four (4) experts as the core project team, performing at least 75% of the work. The remaining maximum 25% of the work can be performed by others. It is up to the Tenderer to propose, including personnel from a subcontractor, who will be part of the core project team and who will not.
15	Please amend this clause as such details are private and confidential with our insurers and as such we cannot agree to this requirement. As an alternative, we can offer to provide an 'Evidence of Cover' document to demonstrate that the required insurance is in place.	Proposal accepted.
16	Please remove clause 24.4 in its entirety, as we cannot agree to provide you with the authorisation to sign legally binding documentation on our behalf. If not please motivate why and how you would use this.	Proposal accepted.
17	"Please revise 22.1 and insert the wording below to ensure that both parties must give the other reasonable notice: Without prejudice to the other provisions of the Contract, either Party may cancel the Contract in full or in part by registered letter by giving 30 days written notice, without recourse to the courts, if the other Party is in default or compliance is permanently or temporarily impossible, unless the breach does not warrant cancellation in view of its exceptional nature or limited importance."""	Proposal not accepted.
18	Please remove clauses 21.3 to 21.6 and replace this with the following wording so that the cap operates on an aggregate basis. If not please motivate; Notwithstanding anything to the contrary in this Contract, the liability of the Contractor under or in connection with this Contract whether in contract or in tort, in negligence, for breach of statutory duty or otherwise (other than in respect of personal injury or death) shall not exceed in aggregate the sum of the total fees paid to the Contractor by the Contracting Authority.	Proposal not accepted.
19	Please revise 20.1 as per the changes below as it is unlikely that notice can be provided immediately. We assure you we will always provide the notification as soon as practically possible: If there is any risk of the performance of the Services being delayed, the Contractor will notify the Contracting Authority as soon as practically possible, explaining the reasons for and the consequences of the potential delay. The Contractor will also propose measures to avoid further delay.	Proposal not accepted.

No	Question	Answer
20	A Bank Guarantee is highly unusual for this kind of services, could you please remove this clause?	Agreed
21	A Bank Guarantee is highly unusual for this kind of work. Could you remove this clause. If not, could you motivate why this would be needed?	Agreed
22	Please remove this whole clause as it imposes undue penalties on the contractor and is not in relation to any costs that that RVO may have incurred. If not, could you motivate why this is relevant to the designated work?	No fines will be imposed as referred to in Article 13.5 ARVODI 2018. We will maintain the article because damage can still be claimed in the event of violation of the duty of confidentiality as described in Article 13.5 ARVODI 2018.
23	Please insert the following clause as 8, as no Force Majeure provision is included in the contract: The Contractor may upon the occurrence of any circumstances beyond the control of the Contractor (which for the avoidance of doubt includes any pandemic and/or epidemic) ("Force Majeure") which prevents or significantly impedes the performance of the Services, without prejudice to any other remedy and upon the giving of not less than four weeks' Notice, suspend for a period of up to twenty-six weeks the performance of the Services in respect of all or part of the Services affected. For the avoidance of doubt, the Contractor shall not be in breach of this Contract and shall have no liability under or in connection with this Contract as a result of i) any act, omission, or default ii) any failure to perform the Services in accordance with this Contract and/or iii) any prolongation or delay to the Services, to the extent it is caused or contributed to by any Force Majeure	Proposal not accepted.
24	Please insert the following clause as 6.3. This restriction benefits both parties to the Agreement by reducing the scope of damages that either party can make a claim for. The clause is designed to exclude liability for loss of profit, loss of business or anticipated saving or special, indirect or consequential damage Neither Party shall under any circumstances whatsoever be liable to the other for any direct or indirect loss of profit, loss of business or anticipated saving or special, indirect or consequential damage suffered by the other Party that arises under or in connection with this Contract.	Proposal not accepted.
25	To ensure a reasonable limitation of liability is included please insert the following clause as 6.2: Notwithstanding anything to the contrary in this Contract, the liability of the Contractor under or in connection with this Contract whether in contract	Proposal not accepted.

No	Question	Answer
	or in tort, in negligence, for breach of statutory duty or otherwise (other than in respect of personal injury or death) shall not exceed in aggregate the sum of the total fees paid to the Contractor by the Contracting Authority.	
26	Could you please provide a copy of Annex 5 – Section IV Arvodi 2018 (General Government Terms and Conditions) as it was not included. Our other questions relating to this contract were based on a copy provided by you in another recent tender. We would also like to request a second round of questions regarding the ARVODI 2018.	Contractor will add a copy of Annex 5.
27	We propose to declare Article 21.4 (aansprakelijkheid zaken van Opdrachtgever) not-applicable, this specific liability is not relevant in the current situation.	Proposal not accepted.
28	Please add to Article 24.1 the grant of a free, a non-exclusive and irrevocable right of use for an indefinite period to the Contractor. This is to ensure that TNO is still able to use the results after the end of the services	After RVO has made the documents/data, as referred to in Article 1.3 Concept Agreement, public, the Contractor will obtain a free, non-exclusive and irrevocable right of use for an indefinite period of time about the documents/data referred to in 1.3.
29	Please add to Article 24.2 the grant of a free, a non-exclusive and irrevocable right of use for an indefinite period to the Contractor. This is to ensure that TNO is still able to use the results after the end of the services.	See the answer to question 28
30	Please replace Article 24.3 with: "In so far as the results of the Services performed are achieved partly or wholly using existing intellectual property rights that do not accrue to the Contracting Authority, the Contractor grants the Contracting Authority, insofar as needed for the exploitation of the results of the Services, a non-exclusive and irrevocable right of use for an indefinite period. In such an event, the Contractor guarantees that it is entitled to grant the aforesaid right of use.". This is to ensure that a license is only granted when this is needed for the exploitation of the results of the Services.	Agree with due observance of the Client's right as described in Article 1.3 of the draft agreement, whereby the tenderers for the concession granting of the wind farms a free, non-exclusive and obtain irrevocable right of use for an indefinite period to use the information referred to in Article 1.3 of the draft agreement