

Question 1

Would it be possible for a US-based company to participate at this tender process?

Answer

The EUI can accept offers from and sign contracts with tenderers from any country which has an international agreement with the EU in the field of public procurement as well as from countries which have ratified the Multilateral Agreement on Government Procurement ("GPA"). The USA is part of the GPA (please check the link: https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm), so the answer is yes.

Question 2

Request for clarification point 30.

"Provide a list of the principal services provided and/or supplies delivered to European academic and research libraries in the past 5 (five) years with the object, duration, and recipients, public or private".

Please specify what exactly is meant by "services" ? Do you mean the service/s which are the specific object of this tender?

Answer

As stated in the Tender Specifications, the subject of the tender is "[...] the provision of a Cloud-based Library Automation and Services Platform [...]".

For this specific question, while we of course expect proposals to include details about implementation and migration projects of this type of platforms (the specific object of this tender), "services" can also refer to projects or works related to them and that you consider of remarkable or outstanding value. Examples of these projects or works could include custom developments, integrations with third-party systems, implementation of additional functionality to existing systems, or data-related projects (this list is non-exhaustive).

Question 3

In Article I.7 of the Special Conditions EUI states as follows:

I.7.1 The contract shall be governed by the EUI's relevant regulatory acts (e.g. the EUI's regulation on Public Procurement & the EUI's Financial Rules), complemented, where necessary by the law of Italy.

We read this provision as meaning that the main rules applicable to the public tender at hand are the ones contained in the EUI's regulation on Public Procurement and, residually, Italian law.

Article 41.2 of the EUI's regulation on Public Procurement provides that "Contractors who have been found in serious breach of their contractual obligations may be subject to financial penalties representing 2% to 10% of the total value of the contract in question" and "That rate may be increased to 4% to 20% in the event of a repeat infringement within five years from the date on which the infringement is established as confirmed following a contradictory procedure with the candidate, tenderer or contractor".

With reference to Italian law, Legislative Decree 50/2016 (the "Italian Public Procurement Law") provides for a 10% cap for penalties concerning delays. However, Article 16 of the Italian Public Procurement Law provides that the Italian Public Procurement Law does not apply to international organisations, such as EUI.

Question to EUI: Could you confirm that the applicable penalties as stated in the tender documentation are subject to a cap as stated the EUI's regulation on Public Procurement or Italian Public Procurement laws or both?

Answer

Since the EUI is an international organization to which the Italian Procurement Law does not apply, the mechanism of sanctions and penalties, Article I.10 of the Draft contract, shall apply according the EUI's regulation on Public Procurement & the EUI's Financial Rules, complemented, where necessary by the law of Italy.

However, the only penalties that may be applied with regard to this contract are those included in Article 11 of Annex I Tender specifications in accordance with the modalities indicated in the same Article.

Question 4

Further, Article II.13 of the EUI Contract provides for “liquidated damages” in case of delays.

Question to EUI: could you confirm whether liquidated damages in Art. II.13 apply in addition to the penalties set forth in Article 11 of the Tender Specifications, or whether the latter prevail (in line with the interpretation rules contained at pages 1 and 2 of the Contract).

Answer

Since a specific mechanism of sanctions and penalties is foreseen by Article 11 of Annex I Tender specifications as referred to by Article I.10 from the special conditions of the draft contract, then it prevails on Article II.13 – Liquidated damages from the general conditions.

Question 5

Question to EUI: Could you specify the maximum amount or percentage (in relation to the value of the contract), of the penalties and liquidated damages in the aggregate, that is applicable to the provision of services under this tender?

Answer

The only penalties that may apply and their modalities of application are those foreseen by Article 11 of Annex I Tender specifications. No maximum amount or percentage can be foreseen in advance since it depends on the actual cases triggering the application of penalties that may occur during the performance of the contract.

Question 6

Regarding the following clauses of the Special Conditions, please see below the clauses and corresponding questions:

Article I.10 of the Special Conditions - Mechanism of sanctions and penalties The carrying out of the service by non-regular or unsatisfactory means in the opinion of the EUI, shall incur the application of penalties pursuant to Article 11 of the tender specifications.

Question to EUI: Should the non-regularity or unsatisfactory service mentioned in the clause be understood as a ‘material breach’ of the contract? If that is not the case, could you please clarify on the basis of which objective criteria will the non-regularity be

determined, and how much discretion EUI will have in its determination.

Answer

In case the non-regularity or unsatisfactory service is recurring over the duration of the contract, then it will be deemed to fit letter c of II.16.1 Grounds for termination from the general conditions ("if the contractor does not perform the contract as established in the tender specifications or fails to fulfil any other substantial contractual obligation").

While, in case non-regularity or unsatisfactory service is occasional then Article 11 of Annex I Tender specifications shall apply taking into consideration the standards set up in Article 7. Description of the technical specifications of Annex I Tender specifications.

Question 7

II.2.9 of the General Conditions Should the contractor fail to perform its obligations under the contract, the EUI may -without prejudice to its right to terminate the contract - reduce or recover payments in proportion to the scale of the unperformed obligations. In addition, the EUI may claim compensation or impose liquidated damages in accordance with Article II.13 and/or any penalties indicated in the tender specifications.

Question to EUI: When it comes to reduction or recovery of payments in proportion to the scale of the unperformed obligations. How does this proportion will be determined? How much discretion does EUI have and what means of contesting this decision does a tenderer have.

Answer

Any reduction or recovery of payments will be applied in accordance with Article II.14 – Reduction in price from the general conditions of the draft contract. As indicated in such Article, the reduction or recovery will be determined proportionally to the seriousness of the unperformed obligations or low quality delivery compared to the standards set up in Article 7. Description of the technical specifications and the sanctions and penalties mechanism described in Article 11. Sanctions and penalties mechanism included in the Annex I Tender specifications. As indicated in Article II.14 – Reduction in price, the contractor has 30 (thirty) days to submit observations following the date of receipt of the notification from the EUI of its intention to reduce or recover payment and the corresponding calculated amount.

Question 8

II.4.5 of the General Conditions The contractor shall indemnify and hold the EUI harmless for all damages and costs incurred due to any claim. The contractor shall provide compensation in the event of any action, claim or proceeding brought against the EUI by a third party as a result of damage caused by the contractor during the performance of the contract. In the event of any action brought by a third party against the EUI in connection with the performance of the contract, the contractor shall assist the EUI.

Question to EUI: Does the indemnity specified in Article II.4.5. limited to the same amount as the total liability of II.4.3, specifically three times the total amount of contract? If not, what limitation/cap applies to this indemnity?

Answer

The indemnity specified in Article II.4.5 is limited to the same amount as the total liability of II.4.3, specifically three times the total amount of contract.

Question 9

Article II.14 – Reduction in price II.14.1 Quality standards If the contractor fails to provide the service in accordance with the contract ('unperformed obligations') or if it fails to provide the service in accordance with the expected quality levels specified in the tender specifications ('low quality delivery'), the EUI may reduce or recover payments proportionally to the seriousness of the unperformed obligations or low quality delivery. This includes in particular cases where the EUI cannot approve a result, report or deliverable as defined in Article I.4 after the contractor has submitted the required additional information, correction or new version.

Question to EUI: Should the non-regularity or 'unperformed obligations' mentioned in the clause be understood as a 'material breach' of the contract? If that is not the case, could you please clarify on the basis of which objective criteria will the non-regularity be determined, and how much discretion EUI will have in tis determination.

Answer

In case the non-regularity or 'unperformed obligations' is recurring over the duration of the contract, then it will be deemed to fit letter c of II.16.1 Grounds for termination from the general conditions ("if the contractor does not perform the contract as established in the tender specifications or fails to fulfil any other substantial contractual obligation").

While, in case non-regularity or 'unperformed obligations' is occasional then Article II.14 – Reduction in price from the general conditions of the draft contract will apply. As

indicated in such Article, the reduction or recovery will be determined proportionally to the seriousness of the unperformed obligations or low quality delivery compared to the standards set up in Article 7. Description of the technical specifications and the sanctions and penalties mechanism described in Article 11. Sanctions and penalties mechanism included in the Annex I Tender specifications.

Question 10

SaaS/Cloud-based offerings provide only a right to use the SaaS solution for the period of the contract. No transfer of Intellectual Property Rights needs to take place. The Services Contract includes Articles mentioning the transfer of Intellectual Property Rights and ownership of IP-Rights by the EUI. We do not foresee that this will be necessary with a standard SaaS/Cloud-based offering. Can the specific Articles of the General Conditions that deal with the ownership of results and IP-Rights by EUI be declared as not applicable? These articles are II.11.1 and II.11.3 para (a), (h), and (l)..

Answer

In case the successful tenderer is providing a standard Cloud-based offering, then the Articles in the draft contract that deal with ownership of results and IP-Rights by the EUI (II.11.1 and II.11.3 para (a), (h), and (l)) can be considered as not applicable and will be added to Article I.13 (Other special conditions) in the contract.

Question 11

Would the EUI agree to provide a limited license for shared data as required for the provision of the services under this contract?

Answer

In case the successful tenderer is requesting in its tender for the EUI to grant a limited license for shared data for the purposes of the services under this contract, then the EUI will follow up on such request with the successful tenderer before signing the contract.

Question 12

With reference to point f) of “economic and financial capacity” in Annex I – Tender Specifications (having generated a minimum annual turnover in the last 3 (three) financial years for which accounts have been closed (2019-2020-2021) of at least EUR 100,000 (one hundred thousand/00) our request is the following:

Is a self-declaration sufficient? Also, Euro 100.000 amount is the full "company turnover" or does it mean the services required by the tender?

Answer

With regard to the minimum annual turnover, we confirm that it refers to the company's annual turnover as a whole.

With reference to the evidence we asked in the tender specifications for a document attesting the minimum annual turnover generated by the company, since we do not specify what type of document, it can be a self-certification whose validity and reliability will be evaluated in accordance with the financial statements that will have to be provided by the tenderer.

Question 13

We have received the notification of the extension of the deadline 27/02/2023, 12:00 (Italian time). Can I ask whether the Invitation Letter published on the tender website will be updated to reflect this change?.

Answer

The documents already published, including the Invitation Letter, remain unchanged. The notification sent by the EUI on 31/01/2023 and the tender notice in our website (<https://www.eui.eu/About/Tenders>) with the updated dates are valid proof of the extension of the deadline.

Question 14

Please advise on whether any further documentation we wish to include to support our offer to the EUI should be included in the relevant envelope e.g. Envelope 2 - Technical offer or should they be included in a separate envelope e.g. Envelope 4 - Further documentation?

Answer

Supporting documentation shall be included in the relevant envelope. Please be advised that the term envelope is used as a convention and that other containers, such as boxes, may be used instead of envelopes if the size or weight of the tender so requires.

Question 15

Please could we ask for clarification of the following instruction from Section 3. Submission of tenders from the Invitation to Tender letter:

Tenders must be submitted to:

a) either by post or by courier service not later than 12.00 (Italian time) on 20/02/2023, to the address indicated below, in which case the evidence of the date of dispatch shall be constituted by the date of dispatch, the postmark or by the date of the deposit slip;

We understand this to mean that the tender must be either posted or picked up by the courier service by the submission deadline with appropriate evidence being sent to the EUI and not that the tender must be received by EUI by the submission deadline, is this correct?

Answer

That is correct. The deadline applies to the date and time of delivery, not of receipt. Please be advised that Section 4 of the Invitation Letter states that "All tenderers are required to notify the EUI that they have submitted a tender by writing to the e-mail address: LibraryTender@eui.eu."

Question 16

On a related note, the EUI have granted an extension to the submission deadline. The EUI tenders website includes the following information "EXTENDED until 27/02/2023, 12:00 am (Italian Time)". Please can you confirm whether this is 00:00 or 12:00 Italian time.

Answer

The time of the deadlines for submission of proposals and queries in the EUI tenders website included the "am" notation, which was not correct. The correct deadline time in both cases is 12:00 Italian time (that is, 12:00 noon).

Question 17

In question 5A of Annex-II-B-Technical-offer-form – What does EUI mean by international standards? Are you asking about security standards or data standards?

Answer

By international standards we mean standards, formal or de facto, the system proposed is built on, whether as a whole or any of its parts. These standards can be of any nature or purpose: data, security, procedure, etc.

Question 18

In the Contract for Services, Articles II.11.1 and II.11.3 – What do you mean by “results” in these sections?

Answer

As indicated in Article II.1 – Definitions from the general conditions of the draft service contract, please acknowledge the following definition: ‘Result’: any intended outcome of the implementation of the contract, whatever its form or nature. A result may be further defined in this contract as a deliverable. A result may, in addition to newly created materials produced specifically for the EUI by the contractor or at its request, also include pre-existing materials.

Please refer to the answer to question 10 in this document as well.

Question 19

One of the technical and professional requirements for this tender is as follows:

j) managing and transferring EUI data only and exclusively within the European Union or within the countries offering an adequate level of data protection (https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-dataprotection/adequacy-decisions_en).

Question to EUI: Under the requirement that the EUI data is managed and transferred exclusively within the EU or countries offering an adequate level of protection, can EUI agree that the set-up of service provision and incidental data access from other countries complies with the required definition of ‘management and transfer’?

Answer

The EUI agrees with the proposal. Describe the specific cases of set-up of service provision and incidental data access from other countries in the documentation that provides evidence that EUI data will be managed and transferred within the EU or within countries offering an adequate level of data protection.

Question 20

In 11.I, it is asked: "Further to point 5.K, describe how library staff can interact with results and specific records obtained in reports."

5K is in relation to record lists.

What is the functionality you are looking for in regards to interacting with specific records obtained in reports?

Answer

In this context, interaction with results or records is expected to provide additional information or features related to a given record or set of results, beyond what is available as part of the report.

Question 21

With reference Annex I – Tender Specifications – Article 3 Estimated Value of the Contract, could you please specify if the additional services, up to a maximum of 50% of the initial contract value, has or could to be described in the tender technical response or it will be request later?

Answer

Additional services are those services (or products, functionality, etc.) not offered as part of a proposal and, therefore, they can only be requested after the tender has been awarded. Please be advised that, as stated in the Technical Offer Form (Annex II B), "Any functionality or feature described is automatically intended as part of the proposal. If any functionality or feature is included for other purposes, it should be clearly indicated that it will not be part of the proposal".

Question 22

Please confirm that the following documents: ISO certificate, certificate of Chamber of Commerce, GDPR compliance and financial statements of last three years can be sent in Italian language.

Answer

Yes, those documents can be submitted in Italian language.

Question 23

Is it possible to negotiate the Special Conditions and General Conditions for Service Contracts after selection? What is EUI's process for that?

Answer

It depends on which special and general conditions you would like to negotiate. For instance, some conditions as those concerning IPR's can be negotiated, in the interest of both parties, by the contracting authority and the successful tenderer before signing the contract while others like those concerning dispute settlement cannot be negotiated since they cannot be changed. Please send specific questions indicating which conditions you deem should be negotiated and why.

Question 24

Is it possible to include terms and conditions from a software specific contract due to the highly specialized and proprietary nature of the software and hardware products and technical services proposed herein?

Answer

In case the terms and conditions you are referring to are aimed at regulating the functionalities of a specific software, hardware, technical services and they do not clash with the special and general conditions of the draft service contract, then the latter can include a specific provision referring to those terms and conditions specifying their scope of application. However, the Special and General conditions of the service contract will prevail in case of any conflict.

Question 25

With regard to “Evidence to be submitted with the tender as part of Envelope n.1 – Administrative Documents” in particular “2 (two) bank references;”

a) We interpret the bank reference to be a letter from our bank with an indication of the time we have been a customer and our standing as a customer. We only have one bank with three currency accounts and a reserve account, therefore we can only provide one letter of reference from rather than two. Are two references required in these circumstances?

Answer

As indicated in Annex I – Tender specifications, Art. 9 Selection criteria, point e), the EUI can accept only one bank reference as long as the tenderer will include a brief explanation (e.g. the one you pointed out seems reasonable).

Question 26

With regard to “Evidence to be submitted with the tender as part of Envelope n.1 – Administrative Documents” in particular “2 (two) bank references;”

b) Must the letter be addressed to a particular name and address or may it say ‘to Whom it may concern’?

Answer

It can be either addressed to “to Whom it may concern” or “to the EUI”.

Question 27

With regard to “Evidence to be submitted with the tender as part of Envelope n.1 – Administrative Documents” in particular “2 (two) bank references;”

c) In order to confirm our standing with the bank, should the letter contain the amount of the contract?

Answer

As indicated in Annex I – Tender specifications, Art. 9 Selection criteria, point e), the letter must confirm that the economic operator has always met its commitments with regularity and punctuality and to be in possession of the economic and financial capacity to perform the services forming the subject of the tender. In view of that, the EUI welcome any information included in the bank reference assessing that the economic operator is in possession of the economic and financial capacity to perform the services forming the subject of the tender.

Question 28

With reference to requirements requested, (“Provide a list of the principal services provided and/or supplies delivered to European academic and research libraries in the past 5 (five) years with the object, duration and recipients, public or private”), can European institution references be listed even if services have been provided by a different local office of the same company (branch)?

Answer

References can be provided for services supplied by the company as a whole or by any of its branches or regional offices.

Question 29

Reference Article 11 of the Technical Specifications. Noting previous questions published by EUI regarding penalties and liquidated damages under Article 11 of the Technical Specifications and that the applicable EUI regulations would allow and even contemplates caps on penalties/liquidated damages, can the EUI please include in the Technical Specification/Contract an aggregate cap on all penalties and liquidated damages that may be applied against contractor’s performance under the Contract? Similar contracts for these types of cloud-based services would typically include an aggregate cap on contractual penalties/liquidated damages of 10% of total implementation fees, for implementation-related penalties, and 10% of annual fees for other penalties in each year.

Answer

Regarding a cap on implementation, the EUI can set the cap on the total amount of the implementation fee, given that potential problems during this phase may have important financial implications. Regarding a cap on annual fees, the EUI can accept to set it at 25%.

Question 30

Reference Article I.9 of the Special Conditions of the Contract. In light of the significant infrastructure investment to be made by contractor and the elaborate implementation phase necessary to achieve productive use of complex cloud-based SaaS services, can a minimum initial subscription commitment of at least 3 years be included in the contract, during which the right to terminate for convenience on 12 months' notice under Article I.9 would not apply?

Answer

The EUI can accept to rephrase the first part of Article I.9 - Termination by either party as follows: *"Either party may, unilaterally and without being required to pay compensation, terminate the contract by formally notifying the other party by giving 24 (twenty-four) months' notice"*

Question 31

We note that the draft Contract does not include an exclusion of consequential damages, which is an accepted cloud and software industry standard provision in subscription and services agreements and required by vendors in the industry. Can EUI please clarify if it is amenable to including a provision stating that in no event shall either party be liable under the Contract for indirect, incidental, special, punitive, or consequential damages or lost profits?

Answer

The EUI can accept to include in the contract a provision stating that in no event shall either party be liable under the Contract for indirect, incidental, special, punitive, or consequential damages or lost profits.

Question 32

Reference draft Contract Article II.11. We note EUI's published answer that a "standard Cloud-based offering" would be excluded from specified provisions of Article II.11. In order to avoid any confusion or the notion that EUI (or any individual customer) would have or acquire any ownership or exclusive use rights in a contractor's proprietary cloud services provided to its many other customers, can EUI please confirm that with respect to offers of subscriptions to use a proprietary cloud-based offering, the entirety of Article II.11 would be replaced with a customary confirmation of contractor's exclusive ownership of all intellectual property rights in software, documentation, services and third party data provided as part of the services and EUI's ownership of its data provided for processing in the system?

Answer

Please see answer to question 10.

Question 33

Reference Contract Article II.4.5. Vendors of cloud-based services of the type described in EUI's tender provide defense and indemnity protection against claims alleging that its services infringe the IP rights of third parties and not the general indemnity reflected in this Article ("due to any claim"). Can EUI please adjust this provision to exclusively cover contractor's obligation to defend EUI against claims due to the infringement by the Services of the IP rights of third parties and to indemnify EUI from awards and contractor-agreed settlements resulting from such claims?

Answer

The EUI cannot accept to adjust Article II.4.5 on Liability from the general conditions of the draft service contract as requested in the above question.

Question 34

Contractual indemnity provisions in the Cloud, software and other industries include customary procedures, conditions and exclusions and are typically required by vendors, which provides, among other things, contractor's right to control the defense. Can the EUI include such standard conditions and restrictions for the contractual indemnities (see draft Contract, Article II.4.5), including: acknowledging contractor's exclusive right to control the defense or settlement of the claim; obligations of the customer to provide timely notice of the claim and to cooperate with the contractor's defense (at contractor's expense); and excluding claims caused by customer's data, default or breach?

Answer

The EUI cannot accept to adjust Article II.4.5 on Liability from the general conditions of the draft service contract as requested in the above question.

Question 35

Reference Contract Article II.4.3. In the global cloud/SaaS industry in which services are provided against payment of annual subscription fees, it is accepted industry practice for the cap on liability to be equal to the amount of SaaS subscription fees paid over a 12-month period, rather than the total amount of the contract. Can EUI please clarify if it is amenable to a limitation of liability regime with an aggregate cap based on annual fees paid over 12 months, by replacing "three times the total amount of the contract" in Article II.4.3 with "three times the annual subscription fees"?

Answer

The EUI can accept to replace the following part of Article II.4.3 on Liability "*three times the total amount of the contract*" with "*the total amount of the contract*".

Question 36

We are planning to use DocuSign to sign all the documents. Using DocuSign means that we can simply copy all the electronic versions of the signed documents to the pendrive (as required by the EUI) and print all the signed documents with signature included. Whereas a manual signature would require us to print out all the documents, then sign and then scan (for electronic version for the pendrive) and print all the documents again. This would increase the time it would take as well as being against our environmental commitments. Please can you confirm that this is acceptable to the EUI?

Answer

The EUI has no objections about it as long as a printed copy is included in the tender.