

**PROVISION OF LEGAL SERVICES IN APPEAL CASES TO THE BOARD OF
APPEAL OF THE AGENCY FOR THE COOPERATION OF ENERGY
REGULATORS**

MULTIPLE FRAMEWORK CONTRACTS IN CASCADE

TENDER SPECIFICATIONS

OPEN CALL FOR TENDERS
ACER/OP/ADMIN/08/2016

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1. TITLE OF THE INVITATION TO TENDER

Provision of legal services in appeal cases to the Board of Appeal of the Agency for the Cooperation of Energy Regulators, tender no. ACER/OP/ADMIN/08/2016.

This tender is not divided into lots.

2. BACKGROUND INFORMATION

2.1 The Agency

The Agency for the Cooperation of Energy Regulators (the 'Agency') is a European Union ('EU') body, established in 2009 by Regulation (EC) No 713/2009¹ (the 'Regulation') and operational since 2010. Based in Ljubljana, Slovenia, the Agency is central in the liberalisation of the EU's electricity and natural gas markets.

The Agency works towards a competitive, sustainable, secure and transparent Internal Energy Market for the benefit of all consumers in the Union. Its overall mission is to assist National Regulatory Authorities ('NRAs') to perform their duties at Union level and to coordinate their actions whenever necessary. The Agency thus cooperates closely with NRAs, but also with EU institutions, European associations of stakeholders and market participants, especially the European Networks of Transmission System Operators ('ENTSOs'), to deliver a series of instruments for the completion of the internal energy market.

The main areas on which the Agency's activities focus are:

- supporting European market integration: this is mainly done through the development of common network and market rules, as well as through the coordination of regional initiatives which are concrete efforts from market participants to work towards greater integration;
- advising the EU institutions on trans-European energy infrastructure issues: the Agency issues opinions on ten-year network development plans with a view to making sure that these are in line with priorities set at EU level. Additional tasks in this area have been assigned to the Agency by Regulation (EU) No 347/2013² on guidelines for trans-European energy infrastructure;
- energy market monitoring: the Agency has a general mission in terms of market monitoring at the EU level and has, since the end of 2011, a very specific responsibility when it comes to oversight of the wholesale energy trading under Regulation (EU) No 1227/2011³ on wholesale energy market integrity and transparency ('REMIT').

2.2 The Board of Appeal

According to Article 18(1) of the Regulation, members of the Board of Appeal and their alternates are selected from among current or former senior staff of the NRAs, competition authorities or other national or EU institutions with relevant experience in the energy sector.

¹ Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211, 14.8.2009, p.1.

² Regulation (EC) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009, OJ L 115, 25.04.2013, p.39.

³ Regulation (EU) No 1227/2011 of the European Parliament and the Council on wholesale energy market integrity and transparency, OJ L 326, 08.12.2011, p.1

According to Article 19(1) of Regulation, any natural or legal person, including national regulatory authorities, may appeal against a decision referred to in Articles 7, 8 or 9 of the Regulation which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person. Moreover, Article 12(6) of Regulation (EU) No 347/2013 provides for the possibility of lodging appeals in front of the Board of Appeal against the cost allocation decisions adopted by the Agency.

Therefore, the Agency's Board of Appeal is competent for deciding on appeals against:

- Individual decisions on technical issues where those decisions are provided for in Directive 2009/72/EC⁴, Directive 2009/73/EC⁵, Regulation (EC) No 714/2009⁶ or Regulation (EC) No 715/2009⁷, pursuant to Article 7(1) of the Regulation;
- Decisions on cross-border infrastructures, which may include the terms and conditions for access to and operational security of electricity and gas infrastructures connecting or that might connect at least two Member States, pursuant to Article 7(7) and Article 8 of the Regulation. Such decisions shall be adopted by the Agency only if the conditions provided for in Article 8 of the Regulation are satisfied;
- Decisions on exemptions for new cross-border electricity interconnectors as provided for in Article 17(5) of Regulation (EC) No 714/2009 and for new cross-border major gas infrastructures as provided for in Article 36(4) of Directive 2009/73/EC, pursuant to Article 9 of the Regulation.
- Decisions on the investment request including cross-border cost allocation where the NRAs have not reached an agreement on the investment request within six months of the date on which the request was received by the last NRA concerned or upon a joint request from the NRAs concerned, pursuant to Article 12(6) of Regulation (EC) No 347/2013. Decisions in other areas where the Agency has been empowered to take individual decisions.

The Board of Appeal shall adopt its final decision within two (2) months of the lodging of the appeal. Additionally, the Board of Appeal may decide to suspend the effects of the contested decision at any time during the appeal proceedings. However, the Regulation does not allow any suspension of the two-month period in which the Board of Appeal has to adopt its decision. Any procedural measure, including the evaluation of the admissibility, the hearing of parties, or the drafting of the decision, has to be taken within the two-month period.

When taking its decision, the Board of Appeal may exercise any power which lies within the competence of the Agency, or it may remit the case to the competent body of the Agency, which shall be bound by the decision of the Board of Appeal⁸. The decisions of the Board of Appeal may themselves be subject to appeal before the Court of Justice of the European Union (CJEU).

⁴ Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211, 14.8.2009, p.55.

⁵ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211, 14.8.2009, p.94.

⁶ Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ L 211, 14.8.2009, p.15.

⁷ Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, OJ L 211, 14.8.2009, p.36.

⁸ See Article 19 of Regulation (EC) No 713/2009.

The Board of Appeal has adopted its Rules of Procedures⁹ and other procedural documents (Practice Directions, Instructions to the Registrar, templates for submissions)¹⁰. The Board of Appeal is assisted in the exercise of its duties by the Registry headed by a Registrar (see the Administrative arrangement for ensuring the support by the Agency for the Agency's Board of Appeal dated 6 July 2016¹¹).

3. OBJECTIVES OF THE CONTRACT

The Agency wishes to enter into a Framework Contract(s) (hereinafter referred as the 'FWC') according to which the Contractor(s) shall provide legal services to the Board of Appeal in appeal procedures.

4. SUBJECT OF THE CONTRACT

The selected Contractor(s) (hereinafter referred as the 'Contractor') shall support the Board of Appeal with legal advice during the appeal procedure.

The provision of legal support services to be provided by the Contractor to the Board of Appeal may cover the following areas:

- Analysis of admissibility;
- Draft of an inadmissibility decision;
- Analysis of application(s) to suspend the application of the contested decision;
- Draft of an order on the application to suspend the application of the contested decision;
- Analysis of application(s) to intervene;
- Draft of order(s) on application(s) to intervene;
- Provision of legal support services to the Board of Appeal related to the merits of the appeal.

The Board of Appeal may decide to call for one or more of the services identified above, either simultaneously or in consecutive order.

Based on the information at the disposal of the Agency at the time when the present invitation to tender is launched, the Agency estimates the number of appeal procedures to be from one (1) to three (3) per year. This number is, however, purely indicative.

⁹http://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/BoA_Public_Docs/Rules%20of%20Procedure.pdf

¹⁰ http://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Pages/Procedural-Documents.aspx

¹¹http://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/BoA_Public_Docs/Administrative%20Arrangement%20ACER%20BoA%20160706%20final_Signed_Redacted.pdf

4.1 Analysis of admissibility

In accordance with Article 19(4) of the Regulation, the Board of Appeal examines the nature of the appeals, to assess whether they are well-founded, only if they prove to be admissible. Therefore, the Board of Appeal is supposed to examine first the admissibility of each appeal. This phase in the appeal procedure is expected to take place within the first two (2) weeks after the submission of an appeal. However, the Board of Appeal may make a decision on admissibility also at a later point in time.

The legal support services to the Board of Appeal regarding the analysis of admissibility of the appeal are as specified below:

- Discuss the arguments related to admissibility with the Rapporteur. The Chairman may decide to participate in the discussion and may decide to invite the Vice-Chairman or other members as well. In this case, the Registrar coordinates the discussion.
- Provide a legal opinion on the admissibility of the appeal.

The Contractor is expected to submit the final opinion on admissibility to the Board of Appeal within six (6) working days following the entry into force of the specific contract, in conformity with point 13.2 of these tender specifications. Under exceptional circumstances, the Board of Appeal may extend this deadline.

The Agency expects that the provision of these services requires twenty-five (25) working hours. However, a flat rate for the provision of these services shall be applied.

4.2 Draft of an inadmissibility decision

If the Board of Appeal considers the appeal inadmissible, the Contractor will be required to provide a draft decision in line with the instructions of the Board of Appeal.

The final draft decision should be prepared within four (4) working days following the entry into force of the specific contract, in conformity with point 13.2 of these tender specifications. Under exceptional circumstances, the Board of Appeal may extend this deadline.

The Agency expects that the provision of these services requires ten (10) working hours. However, a flat rate for the provision of these services shall be applied.

4.3 Analysis of application(s) to suspend the application of the contested decision

In accordance with Article 19(3) of the Regulation, the Board of Appeal may suspend the application of the contested decision, if it considers that circumstances so require. The suspension order is expected to be taken within a short time-limit after the receipt of the application(s) to suspend the application of the contested decision.

The legal support services to the Board of Appeal regarding the application(s) to suspend the application of the contested decision are as specified below:

- Discuss the arguments related to the suspension application(s) with the Rapporteur. The Chairman may decide to participate in the discussion and may decide to invite the Vice-Chairman or other members as well. In this case the Registrar coordinates the discussion; and

- Provide a legal opinion on the application(s) to suspend the application of the contested decision.

The Contractor is expected to submit the final opinion on the application to suspend the application of the contested decision to the Board of Appeal within five (5) working days following the entry into force of the specific contract, in conformity with point 13.2 of these tender specifications. Under exceptional circumstances, the Board of Appeal may extend this deadline.

The Agency expects that the provision of these services requires fifteen (15) working hours. However, a flat rate for the provision of these services shall be applied.

4.4 Draft of an order on application(s) to suspend the application of the contested decision

On the basis of the previous analysis of the application(s) to suspend the application of the contested decision, and in line with the instructions of the Board of Appeal, the Contractor may be requested to prepare a draft order.

The Contractor is expected to prepare the final draft order on the application(s) to suspend the application of the contested decision within eight (8) working days following the entry into force of the specific contract, in conformity with point 13.2 of these tender specifications. Under exceptional circumstances, the Board of Appeal may extend this deadline.

The Agency expects that the provision of these services requires five (5) working hours. However, a flat rate for the provision of these services shall be applied.

4.5 Analysis of application(s) to intervene

In accordance with Article 11 of the Rules of Procedure of the Board of Appeal, any person having an interest in the result of a case submitted to the Board of Appeal may intervene in the proceedings before the Board of Appeal. Pursuant to Article 11(7) of the Rules of Procedure, the Board of Appeal shall decide whether or not the applicant is allowed to intervene.

The legal support services to the Board of Appeal regarding the application(s) to intervene are as specified below:

- Discuss the arguments related to the application(s) to intervene with the Rapporteur. The Chairman may decide to participate in the discussion and may decide to invite the Vice-Chairman and other members as well. In this case the Registrar coordinates the discussion; and
- Provide a legal opinion on the application(s) to intervene.

The Contractor is expected to submit the final opinion on the application(s) to intervene to the Board of Appeal within two (2) working days following the entry into force of the specific contract, in conformity with point 13.2 of these tender specifications. Under exceptional circumstances, the Board of Appeal may extend this deadline.

In light of the previous appeals, both before the Board of Appeal or the CJEU, an average of two applications to intervene per appeal should be taken into account, although this should only be considered as indicative. The Agency expects that the total provision of services

requires ten (10) working hours. However, a flat rate for the provision of these services shall be applied.

4.6 Draft of order(s) on the application(s) to intervene

On the basis of the previous analysis on the application(s) to intervene, and in line with the instructions of the Board of Appeal, the Contractor may be requested to provide draft order(s) on the application(s) to intervene.

The final draft order(s) on the application(s) to intervene should be prepared within three (3) working days following the entry into force of the specific contract, in conformity with point 13.2 of these tender specifications. Under exceptional circumstances, the Board of Appeal may extend this deadline.

In light of the previous appeals, both before the Board of Appeal or CJEU, an average of two order(s) on the applications to intervene per appeal should be taken into account, although this should only be considered as indicative. The Agency expects that the provision of these services requires five (5) working hours. However, a flat rate for the provision of these services shall be applied.

4.7 Legal services to the Board of Appeal related to the merits of the appeal

If the appeal is considered admissible, the Board of Appeal examines the merits of the case.

Following the instructions of the Board of Appeal who will take into account the complexity of the case, the Contractor may be requested to provide one of the below mentioned services:

4.7.1 Legal services to the Board of Appeal concerning less complex merit-related questions as specified below:

- Discuss the arguments related to the merits of the appeal particularly but not exclusively with the respective Rapporteur(s) of the given appeal case(s). If more Board of Appeal members wish to participate in the discussion, the Registrar shall coordinate;
- Provide a legal opinion; and
- Prepare a draft decision related to the merits of the appeal, in line with the instructions of the Board of Appeal.

The Contractor is expected to submit the final legal opinion related to the merits of the appeal within ten (10) working days following the entry into force of the specific contract, in conformity with point 13.2 of these tender specifications. Under exceptional circumstances, the Board of Appeal may extend this deadline. The final draft decision should be prepared within fifteen (15) working days following the entry into force of the specific contract in conformity with point 13.2 of these tender specifications, but at the latest one (1) calendar week before the expiry of the statutory deadline of two (2) calendar months for deciding on the appeal. Under exceptional circumstances, the Board of Appeal may extend this deadline.

The Agency expects that the provision of these services requires forty-five (45) working hours. However, a flat rate for the provision of these services shall be applied.

4.7.2 Legal services to the Board of Appeal concerning more complex merit-related questions as specified below:

- Discuss the cases particularly but not exclusively with the respective Rapporteur(s) of the given appeal case(s) under the coordination of the Registrar. If more Board of Appeal members wish to participate in the discussion, the Registrar shall coordinate;
- Provide a legal opinion; and
- Prepare a draft decision related to the merits of the appeal, in line with the instructions of the Board of Appeal.

The Contractor is expected to submit the final legal opinion related to the merits of the appeal within ten (10) working days following the entry into force of the specific contract, in conformity with point 13.2 of these tender specifications. Under exceptional circumstances, the Board of Appeal may extend this deadline.

The final draft decision should be prepared within fifteen (15) working days following the entry into force of the specific contract but at the latest one (1) calendar week before the expiry of the statutory deadline of two (2) calendar months for deciding on the appeal, in conformity with point 13.2 of these tender specifications. Under exceptional circumstances, the Board of Appeal may extend this deadline.

The Agency expects that the provision of these services requires ninety (90) working hours. However, a flat rate for the provision of these services shall be applied.

5. PARTICIPATION IN THE CALL FOR TENDER

Participation in the Agency's procurement procedure is open on equal terms to all natural and legal persons or groupings of such persons (consortia) falling within the scope of the Treaties. It includes all economic operators registered in the EU and all EU citizens.

Pursuant to Article 119 of the Financial Regulation¹², the participation is also open to all natural and legal persons from non-EU countries that have a ratified agreement with the European Union in the field of public procurement on the conditions laid down in that agreement. The Agency can therefore accept offers from and sign contracts with tenderers from 36 countries, namely: the 28 EU Member States, 3 European Economic Area (EEA) Countries (Lichtenstein, Norway, Iceland) and 5 Stabilisation and Associations Agreements (SAA) Countries (the Former Yugoslav Republic of Macedonia, Albania, Montenegro Serbia and Bosnia and Herzegovina). The Agency's procurement procedures are not open to tenderers from countries covered by the Agreement on Government Procurement (GPA).

6. VARIANTS

No variants are permitted.

¹² Regulation (EU, Euratom) No 1929/2015 of the European Parliament and of the Council of 30 October 2015 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 2462/2015 (OJ L 342, 29.12.2015, p. 1).

7. DURATION AND SIZE OF THE FRAMEWORK CONTRACT

The FWC(s) shall have an initial duration of one (1) year as from date of signature and may be renewed up to three (3) times, each time for an additional period of one (1) year. The total duration of the FWC(s) shall not exceed four (4) years. The Agency reserves the right to cancel the FWC(s) with the Contractor(s) whose services are deemed to be of a quality below the required standards.

The total maximum value of the services for the total duration of the FWC(s) (up to four /4/ years) is EUR 400,000.00 (four hundred thousand euros), excluding VAT.

Specific contracts will not be signed once the budget is consumed.

The estimated date for signature of the FWC(s) is December 2016.

8. DOCUMENTS AVAILABLE TO THE TENDERER

- Contract notice published in the Official Journal of the European Union (OJ EU) 2016/S 204-367923 on 21.10.2016.
- Invitation to tender and annexes.
- Other documents, as mentioned in these tender specifications.

9. CONTRACTUAL FRAMEWORK

9.1 Type of contract

The services described above, i.e. legal services in appeal cases to the Board of Appeal, will be the subject of multiple Framework Contracts (FWC) in cascade (cascade system is described in point 9.2 of these tender specifications).

The FWC shall lay down the legal, financial, administrative and technical conditions applicable throughout its period of validity.

The draft FWC is attached in Annex III to the invitation to tender.

Signature of the FWC does not commit the Agency to placing orders and does not give the Contractor any exclusive rights regarding the services covered by the FWC. In any case, the Agency reserves the right, at any time during the validity of the FWC, to cease placing orders, without the Contractor having the right to any compensation.

9.2 Modus Operandi

The FWC will be awarded to a maximum of five (5) economic operators submitting the most economically advantageous tenders in response to this invitation to tender, provided that a sufficient number of tenders that satisfy the award criteria are presented. These operators will be ranked in priority based on the value-for-money ratio t on the basis of the award criteria.

Within one (1) working day of a request for services being sent by the Agency to the first ranked Contractor, the Agency shall receive a notification from the Contractor confirming that the request has been received and is readable.

Within two (2) working days of a request for services being sent by the Agency to the Contractor, the Agency shall receive an offer which shall include all the details as specified in

the request for services, including a description of the working method, timetable and deliverables. Should the Contractor be unavailable or be in a situation of a conflict of interest described in point 16.2 of these tender specifications, he shall give reasons for refusal within the same period of time.

Within two (2) working days of receiving the offer, the Agency shall evaluate the compliance of the submitted offer and inform the Contractor whether the offer: (a) is accepted, (b) needs to be revised or (c) is rejected, providing details for options (b) and (c).

In case the offer needs to be revised, the Contractor shall have two (2) working days to revise the offer according to the Agency's guidelines and re-submit it to the Agency. The Agency shall inform the Contractor within two (2) working days after receiving the revised offer whether the offer is accepted or rejected, providing reasons for the decision.

In the event of failure to observe any of the above-mentioned deadlines or disagreements on the allocation of resources the Contractor shall be considered unavailable and the Agency shall be entitled to send the request to the next Contractor on the list.

If the Agency sends a request to the second-ranked or third-ranked Contractor in the list, the same procedure as described in the preceding sub-paragraphs will apply *mutatis mutandi*.

Once the offer is accepted by the Agency, the Agency shall forward the Specific Contract to the Contractor.

Performance of the tasks starts from the date on which the Specific Contract is signed by the last contracting party.

The Contractor works under its own capacity and responsibility and does not represent the Agency. The Contractor's staff works under the instructions of the Contractor.

9.3 Changes in the team

For specific contracts, changes or additions to the team initially proposed must be notified to the Agency in writing. The Agency will have the right to object to any changes of members of the team from those initially proposed. In case the original team is no longer available, the Agency will have the right to cancel a specific contract.

9.4 Joint tender

A joint tender is a situation where a tender is submitted by a group of economic operators (natural or legal persons). Each legal entity of the group will be required to sign the FWC in case of award, and shall assume joint and several liability towards the contracting authority for the fulfilment of the terms and conditions of the FWC.

Any change in the composition of the group during the procurement procedure may lead to the rejection of the tender. Any change in the composition of the group after the signature of the FWC may lead to the termination of the FWC.

The group shall nominate one legal entity ('the leader') who will have full authority to bind the group and each of its members, and will be responsible for the administrative management of the FWC (invoicing, receiving payments, etc.) on behalf of all other entities.

9.5 Subcontracting

Special attention will be paid to the approach proposed by the Contractor for managing its subcontractors.

In case of subcontracting the Contractor shall retain full liability towards the contracting authority for implementation of the FWC.

Any change in subcontracting during the procurement procedure may lead to the rejection of the tender.

Any change in subcontracting after the signature of the FWC is permitted only with the prior written consent of the Agency and may lead to the termination of the FWC and/or specific contract(s).

10. CONTRACTOR'S OBLIGATIONS

As specified in point 16.2 of these tender specifications, the FWC may not be awarded to tenderers who, at the time of the procurement procedure, are subject to a conflict of interest.

If the Contractor is an entity in which lawyers practise in association, the obligation related to a conflict of interest applies to all its members, employees or related undertakings.

The Contractor shall notify the Agency, without delay, whether a situation that may be considered prejudicial to the independence of its position arises during the execution of the FWC and/or specific contract(s).

The Agency shall evaluate whether such situation gives rise to a conflict of interest and will be entitled to refuse to order legal services from the Contractor concerning the specific contract in question if a conflict of interest is found. If the Contractor fails to notify immediately the Agency about a situation resulting in a conflict of interest, the Agency will have the right to terminate the FWC in case it finds that the integrity or independence of the Contractor are at risk.

10.1 Employment law applicable to transfers of undertakings

Tenderers are reminded that their offer must be established in conformity with the applicable national and European employment legislation regarding the transfer of undertakings, and specifically Directive 2001/23/EC¹³ and its national implementing measures. In particular, the Contractor should take note of the provisions on safeguarding employees' rights in the event of a change of employer as a result of a legal transfer.

10.2 Copyright and other intellectual property rights

Copyright and other intellectual or industrial property rights and any other right of ownership related to the products provided and services performed by the Contractor will be vested in the Agency, except where one or more of these rights already exists.

¹³ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or part of undertakings or businesses, OJ L 82 of 22.03.2001, p. 16.

The Contractor must specify any parts of the products provided and services performed that are covered by copyright or any other rights of ownership prior to the execution of each specific contract. The Contractor must confirm that it has obtained the authorisation of the holder of these rights to use these parts. Any costs arising from obtaining this authorisation will be borne by the Contractor and clearly identified on his invoice.

Any results or rights thereon, including copyright and other intellectual or industrial property rights, obtained in performance of the FWC and specific contracts, shall be owned solely by the Agency, which may use, publish, assign or transfer them as it sees fit, without geographical or other limitation, except where industrial or intellectual property rights exist prior to the FWC being entered into force.

Should the title of the copyright or intellectual property rights belong to a third party, the Contractor shall guarantee that it has requested and obtained those third parties' written authorisation to grant a license or assign to the Agency their copyright or intellectual property rights to the extent necessary for performing the services under the FWC and the specific contracts, and to the extent where the results/works obtained under the FWC are to be re-used in the context of another Agency's project/programme with another Contractor(s) working under a FWC or specific contracts. Costs will be covered by the Contractor.

This applies to all products, documentation, distribution media and methods.

If subcontractors are used, the Contractor will be required to obtain a guarantee from them on this point.

10.3 Confidentiality – personal data

While implementing the services, and especially when data is electronically processed, the Contractor shall respect the applicable legislation concerning data protection as stated in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data¹⁴.

11. PLACE OF PERFORMANCE OF THE SERVICES

The principle place of performance of the FWC shall be at the Contractor's premises.

The Board of Appeal will organise meetings with the Contractor by means of telephone or video conference.

12. LANGUAGE

All communication and all the required services must be provided in English.

All documentation (e.g. opinions, draft orders or decisions) must be provided in English in the highest drafting quality.

¹⁴ OJ L 8/1, 12.1.2001

13. PAYMENT METHODS

Except where the specific contracts provides for otherwise, provisions related to payment are laid down in the draft FWC (Annex III to the Invitation to Tender). Payments will be made exclusive of VAT, as the Agency is exempt from all duties and taxes, including value added tax (VAT), under Articles 3 and 4 of the Protocol on the Privileges and Immunities of the European Union. Invoice(s) presented by the Contractor must specify the amount(s) exclusive of VAT.

14. PRICES

- Prices must be quoted in euro.
- The unit prices quoted must be firm and not subject to revision for the first year of the FWC. From the beginning of the second year prices may be revised upwards or downwards according to monetary union index of consumer prices (MUICP index) for Eurozone and the method laid down in the FWC.
- The prices quoted shall include all services as described in these tender specifications, as provided in Section 3 above and shall include any travel and/or subsistence expenses.
- Under Article 3 and 4 of the Protocol on the privileges and immunities of the European Union, the Agency is exempt from all duties and taxes, including value added tax (VAT). VAT should be indicated separately and will not be taken into account when considering prices.
- No expenses incurred in relation to the preparation of the offer will be reimbursed.

15. SUBMISSION OF TENDERS

The tenderer's offer should include:

- A. **A dated cover letter signed by the tenderer.**
- B. **A duly completed reference table** related to the exclusion and selection criteria (see Annex I.A of these tender specifications).
- C. **A duly filled in, signed and dated declaration on honour on exclusion criteria** listed in Section 16 of these tender specifications (form provided in Annex I.C to these tender specifications).
- D. All **documents relating to the selection criteria** listed in Section 17 of these tender specifications.
- E. **The technical tender**, as described in Section 18 of these tender specifications;
- F. **The financial offer** based on the model in Annex II to the invitation to tender, signed and dated by the tenderer.

Tenders may be drafted in any of the official languages of the European Union.

The working language of the Agency is English.

In case the offer involves subcontracting or the tender is submitted by a consortium or grouping of service providers, the tender must contain additional information as specified in Sections 16 and 17 of these tender specifications.

16. EXCLUSION CRITERIA

Tenderers must prove that they are not in one of the situations giving rise to exclusion as described below, by providing the following information, evidence and documents with their offer.

16.1 Exclusion from participation

Tenderers shall be excluded from participation in this procurement procedure if:

- (a) they are bankrupt or being wound up, are having their affairs administered by the courts, have entered into an arrangement with creditors, have suspended business activities, are the subject of proceedings concerning those matters, or are in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
- (b) they or persons having powers of representation, decision-making or control over them have been convicted of an offence concerning their professional conduct by a judgment of a competent authority of a Member State which has the force of *res judicata*;
- (c) they have been guilty of grave professional misconduct proven by any means which the contracting authority can justify including by decisions of the EIB and international organisations;
- (d) they are not in compliance with their obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which they are established or with those of the country of the contracting authority or those of the country where the contract is to be performed;
- (e) they or persons having powers of representation, decision-making or control over them have been the subject of a judgment which has the force of *res judicata* for fraud, corruption, involvement in a criminal organisation, money laundering or any other illegal activity, where such illegal activity is detrimental to the Union's financial interests;
- (f) they are subject to an administrative penalty.

16.2 Exclusion from award of contracts

The FWC shall not be awarded to tenderers who, during the procurement procedure for this FWC:

- (a) are subject to a conflict of interest.
- (b) are guilty of misrepresentation in supplying the information required by the Contracting Authority as a condition of participation in the procurement procedure, or fail to supply that information.

Evidence

1. Tenderers shall provide a declaration on their honour, **duly signed** and **dated**, stating that they are not in one of the situations referred to in points 16.1 and 16.2 of the present tender specifications using the form provided in Annex I.C to these tender specifications.
2. The tenderer to whom the FWC is to be awarded shall provide, within a time-limit specified by the Contracting Authority and prior to the signature of the FWC, the following evidence in support of their declarations:

The contracting authority shall accept as satisfactory evidence that the tenderer to whom the contract is to be awarded is not in one of the situations described in points (a), (b) or (e) of point 16.1, a **recent extract from the judicial record** or, failing that, an equivalent document recently issued by a judicial or administrative authority in the country of origin or provenance showing that those requirements are satisfied. The contracting authority shall accept, as satisfactory evidence that the tenderer is not in the situation described in point (a) or (d) of point 16.1 a **recent certificate issued by the competent authority of the State concerned**.

The extract from the judicial record and administrative certificates can be regarded as recent if they are not more than one (1) year old starting from their issuing date and are still valid at the date of their request by the contracting authority.

Where the document or certificate referred to in the paragraph above is not issued in the country concerned and for the other cases of exclusion, it may be replaced by a sworn or, failing that, a solemn statement made by the interested party before a judicial or administrative authority, a notary or a qualified professional body in his country of origin or provenance.

3. Depending on the national legislation of the country in which the tenderer is established, the documents referred to in the paragraph above shall relate to legal persons and/or natural persons including, where considered necessary by the contracting authority, company directors or any person with powers of representation, decision-making or control in relation to the tenderer.

The Agency reserves the right to check the information provided by tenderers.

16.3 Tenders submitted by consortia or groups of service providers, tenders involving subcontracting

In the case of tenders submitted by consortia or groups of service providers, each of the economic operators involved in the tender must provide a dated and signed declaration on honour, based on the model provided in Annex I.C to these tender specifications, confirming that none of the exclusion criteria for participation in or award of the FWC apply to them.

The tenderers proposed for award of the FWC must furnish, within the time-limit specified by the awarding authority and prior to the signature of the FWC, the evidence listed above, corroborating the declaration on their honour, in respect of each economic operator forming part of their consortium or group of service providers.

In the case of tenders involving subcontracting, the tenderer proposed for award of the FWC must furnish, within the time-limit specified by the awarding authority and prior to the signature of the FWC, the declaration on their honour and/or the evidence listed above regarding exclusion criteria for participation in or award of the FWC, in respect of each of the subcontractors in respect of whom the Agency requests such evidence.

The Agency reserves the right to check the information provided by tenderers.

17. SELECTION CRITERIA

Tenderers must demonstrate that they have the necessary economic, financial, technical and professional capacity to perform the tasks described in these tender specifications in accordance with the payment schedule specified in the draft FWC in Annex III to the Invitation to Tender.

Where the offer is submitted by a consortium or group of service-providers, the economic and financial capacity must be ascertained at the level of each economic operator forming part of the consortium or group. Technical and professional capacity may be ascertained at consortium or group level, or at the level of each member of the consortium or group.

Where the offer is submitted by a tenderer who intends to subcontract part of the tasks or entrust them to another economic operator, the subcontractors or economic operators involved must demonstrate that they have the requisite economic, financial, technical and professional capacity.

An economic operator may, if necessary and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links he has with them. He must, in this case, prove to the awarding authority that he will have at its disposal the resources necessary for performance of the contract, for example by producing an undertaking on the part of those entities to place those resources at its disposal.

Tenderers must provide proof of their professional, economic, financial, and technical capacity by enclosing with their tender the following information and documents, accompanied by the reference table shown in Annex I.A to these tender specifications:

17.1 Legal capacity

- Duly completed and signed identification form (see Annex I.B to these tender specifications).
- Duly completed and signed financial identification form (see Annex I.D to these tender specifications). The form can be downloaded from:
http://ec.europa.eu/budget/contracts_grants/info_contracts/financial_id/financial_id_en.cfm
- Duly completed and signed legal entity form (see Annex I.E to these tender specifications). The form can be downloaded from:
http://ec.europa.eu/budget/contracts_grants/info_contracts/legal_entities/legal_entities_en.cfm
- Certificate of enrolment on the professional trade registers in accordance with the legislation of the Member State in which the tenderer is established.

17.2 Economic capacity

Evidence of financial and economic capacity must be provided by means of the following documents:

- Evidence of valid professional risk insurance cover(s) concerning the services covered by the FWC with a detailed description of the covers and restrictions in English. The

professional risk insurance cover shall have a limitation of **at least EUR 60,000 per claim**. The Contractor's professional risk insurance cover(s) shall remain valid for a period of six (6) months after the FWC expires or after the FWC is terminated.

- A statement of overall turnover and turnover concerning the services covered by the FWC during the last two (2) financial years. The turnover concerning the services covered by the FWC should amount to **at least EUR 200,000.00 per year** for the last two (2) financial years.

17.3 Technical and professional capacity

Proof of the technical and professional capacity of the tenderers shall be furnished on the basis of the documents listed below (for joint applications, the capacities of all members of the joint application, including subcontractors, shall be taken into account).

The tenderer must prove that he/she fulfils the following criteria:

- Evidence of employing directly or being capable of constituting a team of legal experts able to carry out in a professional and timely manner the tasks requested under the Framework Contract.

Evidence to be provided: A statement the tenderer is able to employ directly and/or is capable of constituting a team of legal experts able to carry out in a professional and timely manner the tasks requested under the Framework Contract.

- The tenderer shall have or, if the tenderer is represented by lawyers practising in association, the association shall have, as a minimum **at least two (2) senior legal experts and at least two (2) legal experts**. Each of the proposed legal experts must fulfil the minimum levels of qualifications and professional experience applicable for a respective profile as described below.

Minimum levels of qualification and professional experience for **Senior Legal Expert**:

- Completed university studies of at least three (3) years' duration attested by a diploma in law or equivalent.
- At least eight (8) years of law practice in EU law, with a focus on judicial proceedings before CJEU and/or on administrative proceedings related to appeals before the European Commission or any EU institution (the professional experience had to be gained after obtaining the required qualification).
- Out of the eight (8) years of law practice referred to above, at least three (3) years must be related to EU energy law, with particular regard to proceedings related to the application of the third EU energy package.
- At least three (3) publications (e.g. articles etc.) published within the last five (5) years concerning general principles of Union law, in particular the case-law of CJEU and EU energy law.
- Excellent knowledge of the English language (at least C2 level according to the Common European Framework of Reference for Languages).
- Excellent legal writing and communication skills.

Minimum levels of qualification and professional experience for **Legal Expert**:

- Completed university studies of at least three (3) years' duration attested by a diploma in law or equivalent.
- At least five (5) years of law practice in EU law, with a focus on judicial proceedings before CJEU and/or on administrative proceedings related to appeals before the

European Commission or any EU institution (the professional experience had to be gained after obtaining the required qualification).

- Out of the five (5) years of law practice referred to above, at least two (2) years must be related to EU energy law, in particular on legal proceedings following the third EU energy package.
- Excellent knowledge of the English language (at least C2 level according to the Common European Framework of Reference for Languages¹⁵).
- Excellent legal writing and communication skills.

Evidence to be provided: The tenderer shall include Curricula Vitae (CVs)¹⁶ showing clearly their qualifications and professional experience within the relevant business area. The tenderer shall provide at least two (2) CVs for each profile as described below, clearly indicating the profile on each CV.

- Provision of services of the type requested in this tender for a total amount of **at least EUR 1,000,000.00 for the last five (5) years combined**.

Evidence to be provided: A list of the principal services provided by the tenderer in the past five (5) years, which are relevant to this tender, together with the indication of the period of work and of the name of the company or public administration body to which the service was rendered. In the event of lawyer/client confidential issue, the tenderer shall note this circumstance and, instead of naming the client, shall indicate the nature of the service performed and the value of the service rendered.

- At least twenty (20) litigation or administrative review processes assisting a party or the decision-making body, panel or committee in the past five (5) years and relevant to this tender.

Evidence to be provided: A list of principal litigation or quasi-litigation cases in which the tenderer assisted a party or the decision-making body, panel or committee in the past five (5) years and relevant to this tender. This information shall be submitted together with the indication of the period of work and of the name of the company or public administration body to which the service was rendered. In the event of lawyer/client confidential issue, the tenderer shall note this circumstance and, instead of naming the client, shall indicate the nature of the service performed and the value of the claim (if relevant).

17.4 Subcontracting

For those tenders including subcontracting, the tenderer must submit:

- A declaration of the tenderer, duly signed and dated, stating clearly the identity and roles of the subcontractor(s) as well as the description of the quality control measures the tenderer intends to apply on the tasks to be carried out by (each of) the subcontractor(s).
- A letter of intent by (each of) the subcontractor(s), duly signed and dated, stating the unambiguous undertaking to collaborate with the tenderer if the latter wins the FWC and the extent of the resources that it will put at the tenderer's disposal for the performance of the FWC.

In the absence of subcontracting:

¹⁵ <http://europass.cedefop.europa.eu/resources/european-language-levels-cefr>

¹⁶ Preferably, in accordance with the European CV format:

<http://europass.cedefop.europa.eu/en/documents/curriculum-vitae/templates-instructions>

- A declaration of the tenderer, **duly signed and dated**, stating that he does not intend to subcontract and that he will inform the Agency about any change in this situation. The Agency reserves the right to judge if such change would be acceptable.

Offers involving subcontracting will be assessed as follows:

- Where the tenderer relies on the economic, financial, technical and professional capacity of the subcontractor(s) to meet the selection criteria, subcontractors shall be treated as if they were partners in a consortium or a group of companies for the purposes of the evaluation of the selection criteria, and therefore, they shall provide proof of economic, financial, technical and professional capacity as well.

17.5 Tenders submitted by a consortium or grouping of service providers

For those tenders submitted by a consortium or grouping of service providers, the tenderer must contain:

- A document stating clearly the composition and constitution of the grouping or similar entity (company/temporary association/...), or the legal form their cooperation will take, should they be awarded the FWC.
- A letter **dated and signed** by each member stating its commitment to execute the services in the tender clearly indicating its role, qualifications and experience;
- A document **dated and signed** by all members specifying the lead of the consortium or grouping of service providers and authorising the appointed lead of the consortium or grouping of service providers to submit the offer.

Joint tenders will be assessed as follows:

- The exclusion criteria will be assessed in relation to each company individually. The declaration on honour on exclusion criteria included in Annex I.C, duly signed and dated, stating that the tenderer is not in one of the exclusion situations, must be provided by each member of the consortium or the group.
- The selection criteria for professional and technical capacity will be assessed in relation to the consortium or group of companies as a whole.

Tenders which do not meet the exclusion/selection criteria will not be considered.

Tenderers who do not provide the documents required in these tender specifications with regard to the exclusion and/or selection criteria might be excluded from further evaluation.

The Agency will decide whether the substantiating documents provided constitute compliance with the exclusion and/or selection criteria.

18. TECHNICAL TENDER

Tenderers should include in their offer a technical tender detailing how they intend to perform the tasks covered by the FWC, in compliance with all the requirements of these tender specifications. Tenders that fail to comply with this requirement may be rejected.

The technical tender should not include any of the documents referred to under the exclusion and/or selection criteria, nor should it refer to matters already covered by the exclusion and/or selection criteria.

- A. A detailed description of methodology for the provision of the legal support services to the Board of Appeal as described in section 3 of these tender specifications (proposed approach for the content of the service, use of experience, case law and academic literature).
- B. A detailed description of the organisation of the work for delivery of the service, with special regard to the tight deadlines of the procedure.
- C. A detailed description of the balance of profiles and breakdown of tasks (i.e. which profile is going to do which task, and how much time each profile will spend on each task).
- D. A detailed description of the quality assurance and risk management plan.

19. AWARD CRITERIA

The tenders will be evaluated on the basis of the criteria set out below.

19.1 Technical quality with 60% weighting

- A. Relevance, comprehensiveness and effectiveness of the proposed methodology. *A maximum of 30 points are assigned for this criterion.*
- B. Relevance, comprehensiveness and effectiveness of the organisation of the work for delivery of the service according to the deadlines set in these tender specifications. *A maximum of 30 points are assigned for this criterion.*
- C. Relevance and adequacy of the use of the human resources to provide the service. *A maximum of 30 points are assigned for this criterion.*
- D. Relevance and comprehensiveness of the quality assurance and risk management plan. *A maximum of 10 points are assigned for this criterion.*

Tenders scoring less than 60% of the points awarded on any of the above four (4) criteria will be excluded from further evaluation.

19.2 Price with 40% weighting

In order to evaluate the offers, the Agency will calculate a total reference price, based on the financial offer submitted by the tenderer in Annex II to the invitation to tender.

The total reference price has no contractual value and will be used solely for the purpose of this evaluation.

The formula for calculating the total reference price:

	Services	UNIT	All-inclusive price per unit in EUR without VAT	Quantity	VALUE
A	B	C	D	E	F=D x E
1.	Legal services to the Board of Appeal related to the analysis of admissibility. <i>Including all services as described in 4.1 of these tender specifications.</i>	total		1	
2.	Legal services to the Board of Appeal related to the drafting of an inadmissibility decision. <i>Including all services as described in 4.2 of these tender specifications.</i>	total		1	
3.	Legal services to the Board of Appeal related to the analysis of application to suspend the application of the contested decision <i>Including all services as described in 4.3 of these tender specifications</i>	total		1	
4.	Legal services to the Board of Appeal related to the drafting of an order on application to suspend the application of the contested decision <i>Including all services as described in 4.4 of these tender specifications</i>	total		1	
5.	Legal services to the Board of Appeal related to the analysis of application(s) to intervene <i>Including all services as described in 4.5 of these tender specifications</i>	total		1	
6.	Legal services to the Board of Appeal related to the drafting of order(s) on the application(s) to intervene <i>Including all services as described in 4.6 of these tender specifications</i>	total		1	
7.	Legal services to the Board of Appeal related to the merits of the case (less complex merits related questions) <i>Including all services as described in 4.7.1 of these tender specifications.</i>	total		1	
8.	Legal services to the Board of Appeal related to the merits of the case (more complex merits related questions) <i>Including all services as described in 4.7.2 of these tender specifications.</i>	total		1	
9.	Legal services to the Board of Appeal related to the analysis of admissibility and the drafting of an inadmissibility decision. <i>Including all services as described in 4.1 and 4.2 of these tender specifications</i>	total		3	
10.	Legal services to the Board of Appeal related to the analysis of admissibility and related to the merits of the case (less complex merits related questions). <i>Including all services as described in 4.1 and 4.7.1 of these tender specifications</i>	total		3	
11.	Legal services to the Board of Appeal related to the analysis of admissibility and related to the merits of the case (more complex merits related questions). <i>Including all services as described in 4.1 and 4.7.2 of these tender specifications</i>	total		3	
TOTAL REFERENCE PRICE = VALUES 1 + 2 + 3 + 4 + 5 + 6 + 7 + 8 + 9 + 10 + 11					

19.3 Final evaluation

The formula to calculate economically the most advantageous offer is:

$$\text{Final score for tender X} = \frac{\text{Cheapest total reference price}}{\text{Total reference price of tender X}} * 40 + \frac{\text{Total technical quality of tenderer X}}{100} * 60$$

Provided that there is a sufficient number (at least two (2)) of economic operators who satisfy the admissibility and selection criteria, the Framework Contract(s) will be awarded to up to five (5) tenderers having obtained the highest final scores. These operators will be ranked in priority based on the value-for-money ratio (the tenderer with the highest mark for the final score will be ranked first, the tenderer with the second highest mark for the final score will be ranked second, the tenderer with the third highest mark for the final score will be ranked third, etc.) and will thus thereafter be entitled to be consulted for each specific action, via the cascade tendering mechanism (see point 8.2).

In the event of receiving only one (1) tender which satisfies all minimum requirements, the Agency may decide to sign a Framework Contract with this suitable tenderer or cancel the procedure.

Regardless of the above, the Agency may, as stipulated in Section 11 'Invitation letter', up to the point of signature of a Framework Contract, cancel the procurement procedure without the tenderers being entitled to claim any compensation. This decision must be substantiated and the tenderers notified.