

# How to do Business with ESA

## THE PROCUREMENT PROCESS

The ESA procurement process is designed to achieve the best possible trade-off between the objectives of technical excellence, economy and industrial policy as defined in the Convention and in the Contracts Regulations.

It is also implemented so as to give tenderers the guarantee, that the competitive procedure will be conducted in complete fairness, and that their offers will be evaluated with the greatest care and total impartiality.

The implementation of the procurement procedure is a joint task of technical initiating services and the Contracts Department. A major task of representatives of the Contracts Department is to ensure that the rules and procedures, established in order to achieve the objectives stated above, are strictly observed.

The parts (1), (2) and (3) below describe the ESA-internal part of the procurement procedure, and although some of its features are of no direct concern to potential tenderers or contractors, understanding these procedures may be useful.

### **(1) The Planning and Preparatory Phase**

The key person in ESA's procurement procedure, on the technical side, is the initiator who is nominated by his hierarchical superior (Director, Head of Department, Head of Division or Head of Section). He/she has the responsibility, and the budget, to handle one (or more) procurement(s).

The initiators are supported by other Agency services, in particular the Contracts Department.

Before initiating a procurement action, an initiator must verify that there is a corresponding approved programme and budget, and certify this to the Contracts Department.

At that stage the initiator, together with the contracts officer nominated for the action, establishes the planning for the preparation and implementation of all the phases of the procurement cycle and prepares a Procurement Proposal.

For medium and large procurements, they prepare a Procurement Plan which sets out the overall approach, and identifies the main procurements which are the subject of individual Procurement Proposals.

Depending upon the costs and the nature of the procurement, the procurement proposal must be submitted for approval to the Industrial Policy Committee or to an internal Adjudication Committee for approval. The main purpose of this procedure is to obtain early approval of the intended procurement approach competitive or non-competitive tender; price range and type of contract; planning and phasing; industrial policy requirements if any.

## **(2) The Initiation Phase**

The initiator starts a procurement action by transmitting to Contracts Department a 'Request for Contracts Action' (the 'Cor-1). This request bears the signatures confirming all the necessary prior approvals and is accompanied by the technical/management requirements (technical specifications, work-statement, management plan, written in English and French for competitive actions).

These will have been prepared by the technical service concerned, in co-operation with the contracts officer. They will constitute the main part of the Invitation to Tender /Request for Quotation(ITT/RFQ).

In ESA terminology 'ITT' (AO ='Appel d'offres'in French )is normally used for competitive actions. whereas 'RFQ' is used for non-competitive invitation to tender.

### **(3) Preparation of the Invitation to Tender I Request for Quotation (ITT / RFQ)**

Although the ITT is signed by and formally issued under the responsibility of Contracts Department, the preparation of the ITT documentation is a joint effort of the technical and the contracts officers. The procedure is as follows.

The contracts officer, working in close co-operation with the initiator, will complete the preparation of the ITT documentation by preparing and adding to the technical and management requirements a Cover Letter, Special Conditions of Tender (SCT) and a Draft Contract.

The Cover Letter contains a number of essential features of the ITT/RFQ namely:

- the reference to the programme/activity concerned (item number in the list of ESA intended Invitations to Tender for the year concerned),
- the name of the contracts officer who will be the only point of contact during the whole tendering procedure,
- an outline of the main conditions of the ITT/RFQ : subject and type of procurement, type of contract/price, planning, geographical distribution requirements,
- the formal conditions of submissions: tendering date and time of delivery of the tender.

Some ITTs/RFQs, and most of them in the field of technology and research, mention an amount which corresponds either to a guideline for the preparation of the price submission, or to an absolute budgetary limit of the funding available. This latter element represents a substantive requirement of the ITT/RFQ, and tenderers should never exceed it if they do not want to see their offer rejected ab initio.

Attached to the letter is also the Evaluation Areas/Criteria which are pre-established as shown in (8) below.

The General Conditions of Tender for ESA contracts (GCT) were distributed to all firms registered at the time, under letter reference ER/SK/ms/84-150 of 25 May 1984, and are available on EMITS.

They contain a number of very important formal and substantive conditions for the preparation of tenders: general standards of presentation, nature of the commitments and undertakings to be given in the tender, planning and costing requirements (standard forms to be completed and delivered with the offer), conditions relating to intellectual property rights, conditions relating to subcontracts, amendments to documents, communications with ESA during the tendering period, dispatch and receipt conditions. They are not attached to the ITT/RFQ documentation.

The Special Conditions of Tender (SCT) specify and complete the various points of the GCT concerned: number of copies, planning and costing forms selected from the standard package to be used and other specific requirements.

ESA ITTs/RFQs always contain a draft contract (or several in the case of a multi-phase procurement). Tenderers are invited to accept the terms, but may comment on them within certain boundaries indicated in the GCTs. This approach enables tenderers to know the 'rules of the game' when they prepare their offers, and minimises or avoids the subsequent effort of negotiation of the contract terms.

Apart from this standard 'tendering package', there is a wide variety in the amount and level of documentation and information required, depending on the nature, the importance and the complexity of the procurement concerned.

Knowledge of all the documentation described here, and compliance with the requirements, are important preconditions when preparing an offer in reply to an ESA ITT/RFQ, and significantly increase the chance of being awarded a contract.

As from the ITT/RFQ preparation phase, the procurement process is governed by the provisions of the ESA Tender Evaluation Manual and falls under the exclusive authority and responsibility of the Tender Evaluation Board.

This Board is an independent committee made up, on a parity basis, of staff directly in charge of the procurement and other staff external to the team (including Contracts Department).

The chairperson is selected at a level of Director, Head of Department, or of Head of Division, reflecting the importance of the procurement.

The aim of this procedure is obviously to ensure complete fairness and objectivity of the evaluation and recommendation. While the body finally authorised to take the decision is free to follow or not the TEB recommendation, experience has shown that divergence is very rare, and based on additional considerations.

The first task of the TEB is to review the ITT documents and to ensure that they constitute a proper basis for a fair and equitable competitive ITT, and that they meet all requirements and instructions. The Board has also to approve the evaluation areas and criteria and to appoint evaluation panels in the case of large projects. ESA typically applies the following criteria in the evaluation of proposals:

The evaluation criteria includes:

- Background and experience of the company and staff (general and related to the particular field concerned)
- Understanding of the technical requirements
- Quality of the technical proposal
- Adequacy of the management approach
- Compliance with the tender requirements (in particular costing and planning) and acceptance of contracts conditions.

The TEB also establishes the weighting factors, which determine the relative importance of the various evaluation areas and criteria in the final marking (see below).

This is done not more than 48 hours before receipt of offers, in order to avoid creating an unbalance of emphasis in the preparation of the offers. For the same reason, these weighting factors will be kept in a sealed envelope which will only be opened at the very end of the evaluation, after all the individual markings have been extensively discussed and agreed on.

#### **(4) Distribution of ITTs/RFQs**

The complete ITT / RFQ documentation is then put on line and accessible to all the EMITS registered users.

At the same time a copy is sent to the National Delegations (normally delegates to the Industrial Policy Committee), whose task is, inter alia, to assist the Agency in finding qualified and suitable potential tenderers in their State who might not be EMITS registered users.

EMITS is also the only information tool for providing the following type of information:

- All news of relevance for the current ITTs (Change of closing dates, clarifications, convocation to briefing meetings, etc.)
- News announcing the organisation by industry, within major ESA programmes, of competition at subcontractor level.
- General news of relevance for industry on policy issues
- ESA Standard contractual texts and applicable documents
  - General Conditions of Tender
  - General Clauses and Conditions for ESA contracts
  - Specifications for the production of ESA study contract reports
  - PSS documents( ESA Procedures, Specifications and standards)

#### **(5) The Tendering Phase: Preparation and Submission of an Offer**

In a normal open competitive situation, tenderers are given a minimum of six weeks to prepare their offer, although ESA tries as far as possible, subject to programmatic constraints, to extend this period to at least eight weeks.

Depending on circumstances, the period for non-competitive tenders is normally shorter. On the other hand, much longer periods (many months) are given for preparing offers for major projects.

It is very important, particularly in the case of major projects, that potential tenderers do not wait until the issue of the formal ITTs/ RFQs to decide whether or not to present an offer, to start preparation, and to establish preliminary contacts with industrial partners (EMITS).

Tenderers should also read carefully, and observe, the part of the General Conditions to Tender (par. B/4) which relates to the period for tender preparation', and to the very strict and exceptional conditions under which an extension of the tendering period may be granted.

The same document (GCT) also describes in detail (par.F) the very strict procedure to be followed in the exchange of information / communications during this period.

The main element of this procedure is that no personal, direct and informal contact with ESA staff is permitted. This ensures fair and equal treatment of all potential tenderers in what is frequently a highly competitive environment. Any question, any request for clarification, has to be addressed in writing to the appropriate channel, the contracts officer. The received questions and their replies will be distributed on EMITS.

For major projects, the Agency holds industrial briefings to inform industry of what the Agency expects. These briefings are announced either by mail or via EMITS to potential bidders or in the ITT and they are organised following a strict procedure in order to achieve the same objectives of fair and equal treatment.

## **(6) Admission and Evaluation of Offers**

As already stated, the responsibility for the proper conduct of the tendering and evaluation phase is under the authority of the Tender Evaluation Board, the organisation and role of which have already been described above (3).

The first formal step to be taken, upon receipt and registration of the offer by the central mail office of the ESA establishment concerned, is for the Tender Opening Board to verify, on the closing date, that the offers received constitute valid offers

which contain all the fundamental elements stipulated (see GCT) and that they have been prepared, sent and received in accordance with the GCT requirements.

Normally, in the case of open competition, at least two offers are required. If fewer are received, the first decision to be taken by the initiating department concerned and the Contracts Department, in consultation with the TEB, is, whether to continue with the evaluation or to re-open the competition.

The evaluation proper will then start and can take from a few days to a number of weeks, or even months for large projects.

The first round of evaluation by the specialised panels in case of major actions, often results in a number of requests of clarification from tenderers before proceeding further with the evaluation.

The preparation and approval of these requests, which are strictly limited to clarification, and potential improvement, is carried out under the authority of the TEB. Dispatch, as well as receipt of replies are handled by the Contracts Department following the same strict written procedure as during the bidding phase.

The ESA procurement rules forbid any other kind of contact, discussion or negotiation with tenderers during that phase.

Negotiation with tenderers before the formal evaluation process under the authority of the Tender Evaluation Board (TEB) has been completed, are only permitted in very special circumstances, and under very strict conditions. The only two cases are if 'the result of the evaluation is that no tender is acceptable, but the Tender Evaluation Board considers that one or more tenders might be rendered acceptable by minor changes not affecting the specification' or 'if the result of the evaluation is that some tenders are equally acceptable, but the Tender Evaluation Board is not able to make a

recommendation for the award of the contract, and therefore recommends negotiation'.

It does happen exceptionally, in the case of particularly complex projects, that the Agency announces in the ITT, and then implements, a procedure of phased evaluation, whereby tenderers are debriefed on the weaknesses of their offer after a first phase of evaluation, and then invited to update and re-submit.

Such a procedure has the obvious advantage of establishing a less formal communication between ESA and tenderers, and of providing the possibility of improving offers and refining requirements. However, it may also cause problems, and therefore has to be implemented with extreme caution following strict rules.

Evaluations may occasionally also involve experts and/or observers from outside ESA. Their participation, however, is subject to very strict rules, in particular to ensure confidentiality.

At the end of this procedure, a final Tender Evaluation Board discusses and endorses (or corrects) the various evaluation-panel reports, establishes the final total marking of each offer, applies the weighting factors, and formulates a recommendation. The recommendation is made at that stage on the exclusive basis of the managerial, technical, contractual, and price aspects as evaluated by the Board.

Geographical distribution requirements, which may justify restricted competition or direct negotiation procedures, do not, at this stage, play a role in a fully competitive environment. They may play a certain role in the subsequent decision process (see below) but only in very special circumstances. For example, if the ITT contained specific provisions in this respect in general for subcontracting part of the work and if two or three offers of almost identical technical quality can only be differentiated by taking this criterion into account.

## **(7) Award and Placing of Contracts**

In conformity with the principles of the Contracts Regulations, the Agency awards its contracts, following competition, to the tenderer(s) offering the best technical quality for an acceptable price.

On completion of the evaluation process described in the previous paragraph, the final TEB recommendation is transmitted to the appropriate authority for making the final decision (see below) i.e to award one contract, or in some cases to award several contracts, or even (exceptionally) not to place any contract at all.

Depending on the nature and importance of the procurement, this final decision may be taken either at the level of the Head of the Technical/Project Department concerned and the local Head of Contracts Division/Unit, or by a specialised internal committee for the awarding of contracts known as the Adjudication Committee or, for major procurements, by the Industrial Policy Committee already mentioned.

It is extremely rare - for very good reasons - that the final decision on awarding a contract diverges from the TEB recommendation, which is always based on objective and totally impartial, programmatic, technical and economical considerations.

ESA decisions on the awarding of contracts are final and may not be appealed against.

This final approval is internally formalised (within the Agency) by the signature of a standard form known as the Coa2 (Contract Approval Form) This marks the second essential phase of the whole procurement cycle, confirming that the award is the result of a fully correct procedure, and that there is sufficient budgetary funding for the proposed contract. Coa 2.

In most cases, even after the end of the complete tendering, evaluation and award process, there remain a certain number of technical, financial or contractual points to be finalised.

The authorisation to start work can only take place after full agreement has been reached on all aspects of the complete contract documentation. In current practice the two events can usually be combined in a single negotiation and 'kick-off' meeting.

Based on the experience of many years of good co-operation between ESA and industry, it has become the practice that the date of the kick-off constitutes the start of the industrial activities, even if the agreements have not been fully formalised.

It must be realised, however, that the Agency is only legally and formally bound to its contractual obligations, and in particular to make payments, after the contract (or a formal authorisation to proceed pending contract finalisation and signature) has been signed by both parties, the Agency signing after industry has done so.

Immediately prior to the dispatch of the contract, or preliminary authorisation to proceed, Financial Approval has to be obtained internally and a Financial Commitment made.

This is the registration of the actual commitment made in the Agency's accounting system (AWARDS). At this stage, the corresponding geographical distribution data is also entered into the Industrial Policy accounting system (SYSTRI).

## **(8) Debriefing of unsuccessful Tenderers**

The Agency is always prepared to debrief unsuccessful tenderers. Such a debrief has proven useful, especially to newcomers, as it helps to improve the quality of their tendering and to increase their chances of success in subsequent actions. In particular, it may prevent firms from losing evaluation marks through unnecessary and formal non-compliance's.

Normally, unsuccessful tenderers are informed immediately after the decision of awarding a contract has been taken (signature of COA2), but occasionally, when there is doubt as to the success of the final round of negotiation, the Agency prefers to delay the notification. This delay is kept to a minimum to avoid long periods of uncertainty for tenderers.

Debriefs can be made, either by phone or at a meeting. Requests should be addressed to the Contracts Officer (in writing if a formal meeting is wanted). The Contracts Officer will involve the responsible Technical Officer in the debrief, where appropriate, and he/she is, for obvious reasons, only authorised to debrief individual tenderers on their own offer and not to comment on the contents of other bids.

To avoid uncontrolled and/or endless discussion and/or arguments on the content of internal evaluation reports, the Agency do not provide written debriefs on the evaluation of offers.