

RETURN BIDS TO:
RETOURNER LES SOUMISSIONS À:
Regional Manager/Real Property
Contracting/PWGSC
Ontario Region, Tendering Office
12th Floor, 4900 Yonge Street
Toronto, Ontario
M2N 6A6
Ontario

SOLICITATION AMENDMENT
MODIFICATION DE L'INVITATION

The referenced document is hereby revised; unless otherwise indicated, all other terms and conditions of the Solicitation remain the same.

Ce document est par la présente révisé; sauf indication contraire, les modalités de l'invitation demeurent les mêmes.

Comments - Commentaires
THIS DOCUMENT CONTAINS A SECURITY
REQUIREMENT

Vendor/Firm Name and Address
Raison sociale et adresse du
fournisseur/de l'entrepreneur

Issuing Office - Bureau de distribution
Regional Manager/Real Property Contracting/PWGSC
Ontario Region, Tendering Office
12th Floor, 4900 Yonge Street
Toronto, Ontario
M2N 6A6
Ontario

Title - Sujet Port Granby - Long Term Waste Mgt.	
Solicitation No. - N° de l'invitation EQ986-133623/A	Amendment No. - N° modif. 016
Client Reference No. - N° de référence du client R.023276.217	Date 2014-12-09
GETS Reference No. - N° de référence de SEAG PW-\$PWL-035-1957	
File No. - N° de dossier PWL-4-37020 (035)	CCC No./N° CCC - FMS No./N° VME
Solicitation Closes - L'invitation prend fin at - à 02:00 PM on - le 2015-01-15	
Time Zone Fuseau horaire Eastern Standard Time EST	
F.O.B. - F.A.B. Plant-Usine: <input type="checkbox"/> Destination: <input checked="" type="checkbox"/> Other-Autre: <input type="checkbox"/>	
Address Enquiries to: - Adresser toutes questions à: Woodhall, Lauren	Buyer Id - Id de l'acheteur pwl035
Telephone No. - N° de téléphone (416) 512-5873 ()	FAX No. - N° de FAX (416) 512-5862
Destination - of Goods, Services, and Construction: Destination - des biens, services et construction: PWGSC Port Hope Area Initiative - PHAI 115 Toronto Road Port Hope, ON L1A 3S4	

Instructions: See Herein

Instructions: Voir aux présentes

Delivery Required - Livraison exigée	Delivery Offered - Livraison proposée
Vendor/Firm Name and Address Raison sociale et adresse du fournisseur/de l'entrepreneur	
Telephone No. - N° de téléphone Facsimile No. - N° de télécopieur	
Name and title of person authorized to sign on behalf of Vendor/Firm (type or print) Nom et titre de la personne autorisée à signer au nom du fournisseur/ de l'entrepreneur (taper ou écrire en caractères d'imprimerie)	
Signature	Date

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Solicitation Amendment No. 016 is raised to:

- 1) respond to questions related to this Request for Proposal.
- 2) amend the Request for Proposal.

SECTION A - QUESTIONS AND ANSWERS

Q150. SC14 (GC1.21) Limitation of Liability and Waiver of Consequential Damages

GC1.21.2 states that the "Contractor's aggregate liability in any manner connected with the Contract shall not exceed one hundred percent (100%) of the Contract Amount," yet there are several exceptions noted throughout this contract provision.

As currently written under SC14 GC 1.21.4, Contractors would have unlimited liability for:

Third party claims;

- Claims arising as a result of willful misconduct, bad faith, gross negligence or fraud;
- Breach of confidentiality obligations or intellectual property infringement; and
- Proceeds of any insurance policy provided under this contract.

In addition, the contract does not provide Contractor protection against third party claims (which may include claims for environmental damage) and requires Contractors to indemnify the Owner from third party claims arising out of or attributable to Contractor's activities (whether negligent or not) undertaken in the performance of services. High profile projects such as these that are under intense media and public scrutiny and include hazardous work are particularly vulnerable to third party claims. Contractors should not be required to accept the burden of risk associated with environmental damage or other potential issues that could arise as a result of pre-existing site conditions and the performance of hazardous and nuclear work not tied to Contractor negligence.

In respect of claims, losses, or damages as a result of risks defined as unusually hazardous or nuclear, our experience managing projects of similar size, scope, and complexity to LTWMF suggests that the client may create value for themselves through the selection of appropriate indemnification clauses.

We recommend a reasonable, clearly defined aggregate liability cap with few/any exceptions, as well as a sub-cap limiting liability on a per occurrence basis. We would consider a liability cap that is a proportion/percentage of the contract value (such as \$25 million per occurrence subject to an overall cap of 25% of the contract price), but we request that the limit be firm and, most notably, include protection against third party claims.

While we accept the terms related to claims arising as a result of willful misconduct, gross negligence, or fraud; breach of confidentiality obligations; or intellectual property infringement provided under this contract, we recommend the following:

1. Insurance proceeds and liability arising for bad faith should be subject to the aggregate cap;
2. Liability for gross negligence and willful misconduct be limited to acts of senior supervisory personnel; and
3. Liability for consequential damages be completely waived.

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We recommend that Contractors' indemnification obligations for third party claims be limited solely to the extent any claim arises due to Contractor's negligence. The inclusion of Contractor indemnification against third party lawsuits encourages the participation of large businesses such as us that offer the most experience and represent the highest probability of project success.

In addition, we recommend that Contractors not be held liable for any contamination caused by pre-existing pollutants on or in the site and that Contractors be indemnified from any injury or damage caused due to the pre-existing pollutants. Obligations to indemnify the Government for pollution damage should be limited to the release of any substance, waste, or material emanating from equipment brought on site by Contractors.

A150. We have carefully reviewed this request. The requirements in the RFP remain unchanged.

Q151. SC24 Notice of Claim; GC6 Delays and Changes in the Work

Environmental cleanup projects frequently encounter uncertainties ranging from unexpected site conditions to evolving regulatory requirements, stakeholder concerns, and many other issues that cannot be identified prior to project start. Under PWGSC's proposed lump sum environment, Contractors would require a robust change management mechanism that balances risk acceptance, protects the interests of all parties, and prevents significant impacts to the project schedule. Further, a fixed price/lump sum environment for a project scope with uncertainty and schedule exceeding five years in length may attract unacceptably high levels of contractor contingency.

The contract documents do not provide a specific process or procedure for change management. GC6.2.5, states that if Canada determines a claim is justified, Contractors are entitled to additional fee for changes to work that are either ordered by Canada or that arise due to changes in subsurface conditions. However, in the latter case, according to GC6.2 of R2865D Changes in Subsurface Conditions, Canada will approve payment of any additional fee only if, in its sole discretion, Canada believes that payment of such additional fee is justified. Additionally, as interpreted from GC6.2 of R2865D, if the Contractor fails to notify Canada of such change in subsurface conditions within 10 days from being aware of such change, the Contractor will lose its right to claim for extra expense, loss, or damage.

With the Contractor not having ownership of the construction documents along with the high probability of encountering changes in subsurface conditions, we recommend that GC6.1 be modified to provide for a contractor-initiated change management procedure that would, if necessary, ultimately be subject to an equitable dispute resolution procedure settled by a third party or Ontario courts.

The conditions of GC6 of R2865D state that if Contractor's cost of completing the work is reduced due to change in any circumstance, the Government will reduce the total contract value by a similar amount. We also recommend that Contractors be entitled to retain any savings that relate to the execution of its services, howsoever caused.

Based on our experience with similar environmental cleanup efforts and the fixed price nature of this project relative to certain scope elements, there is a high probability of major subcontractor claims on the LTWMF. However, the contract terms do not provide sufficient Contractor protection from the cost and time associated with resolving such disputes/claims. Currently, if parties are unable to resolve a dispute by mutual agreement, Canada would provide the Contractor its written decision and the Contractor would have deemed to waive its right to challenge the decision within 15 working days after

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its receipt. Notwithstanding Contractors disputing Canada's decision, Contractors would be required to comply with such a decision with no recourse outside of formal negotiations, mediation (if not resolved within 40 days from the date of commencement of negotiations), and ultimately a court of law. Contractors would typically be prepared to support such provisions only if it was clear that Canada agrees to pay the Contractor at least a fixed percentage of the documented cost of any work performed during the dispute even though payment for such work might itself be the issue in dispute.

We recommend that the GC be revised to include the following:

1. Either party should be entitled to initiate a change request.
2. Any impact of the change which requires adjustment of contract price and schedule should be mutually agreed upon and recorded in a change order.
3. Contractor should not be obligated to perform any change until both parties have signed the change order.
4. If there is a dispute regarding the impact of a change on the contract price and schedule and Canada requires contractor to execute such change, Canada shall pay all documented costs incurred by the contractor in executing such change.
5. Any amounts paid by Canada under point 4 shall be adjusted upon resolution of the dispute.

A151. We have reviewed this request. GC6 and SC24, and the processes that exist as a result, are standardized provisions, agreed to (along with other standardized provisions) in consultation with industry. They will not be changed for this requirement.

Q152. GC 5 Payment Terms

SC20 of the RFP amends GC5.4.3 of R2850D to state that the Contractor would be paid 90% of its invoices and such payments would be linked to progress of the work. Provisions of this nature may have the unintentional effect of ensuring that the project runs "cost negative," which is not likely the intended outcome. We recommend that Canada consider negotiating alternative payment terms upon contract award including some sort of cap on the amount to be withheld and/or a robust mobilization payment following project award or in accordance with specific milestones.

A152. We have reviewed the request and the requirements in the RFP remain unchanged.

Q153. Will PWGSC update the Unit Price Table to reflect changes to quantities as a result of Addenda?

A153. No. The minor nature of the changes to the estimated units (as a result of the Addenda) do not warrant a change to the Unit Price Tables at this time.

Q154. Will PWGSC provide a copy of the Unit Price Table in Word or Excel format, or equivalent?

A154. No - a copy of the Unit Price tables in Microsoft Word or Excel will not be provided.

Q155. SC14 GC 1.21.1 Nuclear Liability Act

- Based on the definition of the terms "nuclear installation" and "nuclear material" in the Nuclear Liability Act, we are unclear if the Port Granby Facility and the low level radioactive waste (LLRW) generated from the radium and uranium refinery facility at Port Hope (referred to as „Historic Waste“) falls outside the purview of the NLA. Does the NLA apply to this procurement?

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- We wish to note that SC14 as written in the RFP references subsection 5R ID R2890D (Contract Security). We assume that the intent was to reference R2810D (General Provisions).

A155. • The Port Granby LTWMF is not subject to the Nuclear Liability Act (NLA). It is not a designated nuclear installation as required by the NLA. GC 1.21.1, as replaced by SC 14, will be amended to end at the words "...limited by applicable laws".

- The Bidder is correct. The RFP document will be amended to reflect that SC14 will reference R2810D and not R2890D.

SECTION B - MODIFICATIONS TO THE REQUEST FOR PROPOSAL

In SC14 Limitation of Liability and Waiver of Consequential Damages:

DELETE:

Add new GC 1.21 "Limit of Liability and Waiver of Consequential Damages" to R2890D as follows:

"GC 1.21.1 Notwithstanding anything to the contrary, the Owner's obligations and liabilities under the Contract are also subject to and limited by applicable laws including, without limitation, the *Nuclear Liability Act* (Canada) and its associated regulations thereunder.

INSERT:

Add new GC 1.21 "Limit of Liability and Waiver of Consequential Damages" to R2810D as follows:

"GC 1.21.1 Notwithstanding anything to the contrary, the Owner's obligations and liabilities under the Contract are also subject to and limited by applicable laws.