



Clarification Note #2

GSA internal reference: 257339

Procurement procedure: GSA/OP/25/19 "Galileo Reference High Accuracy Service (HAS) User Algorithm and User Terminal"

Question #4: As per the tender specifications (section 4.5.4), tenderers shall deliver together with their offers a number of additional documents, including in particular a Detailed Processing Model for the proposed Galileo Reference HAS User Algorithm. Since the documentation required with the tender could be proprietary, the tendering process should ensure adequate protection and non-disclosing of commercially sensitive information.

In relation to that, please note that:

- The NDU signed with GSA represent an obligation for bidders to protect the proprietary information provided by the GSA, but does not oblige the GSA to protect any proprietary information received from tenderers.
- Even though bidders' proprietary information is declared as a BIPRs in the submitted offer (by means of a duly filled-in and signed Annex I.J - BIPR declaration), as indicated in section 1.3 of the Tender Specifications, "the GSA's contractual relationship commences only upon signature of the Contract with the successful tenderer" and therefore the submitted Annex I.J is not obliging the GSA to treat the information as a BIPR.

All in all, a clarification from GSA would be very much appreciated regarding which measures or commitments bidders can expect from GSA for the protection of proprietary, commercially sensitive information that bidders may need to release with their proposals in order to fully comply with the Tender Specifications.

Answer #4: As an Agency of the European Union, the role of GSA is to ensure that all information submitted by tenderers in the frame of a procurement procedure remain confidential. The treatment of the tenders received in the frame of a procurement procedure enjoy special regime of confidentiality, obliging each individual member of of the opening board and the evaluation committee, having access to the offers to sign individual non-disclosure undertakings. During the execution of the contract, the protection of the contractor's commercially sensitive information is regulated by the contractual provisions on IPR.

Question #5: If in response to this tender procedure, a potential bidders need to make use of pre-existing knowledge:

In accordance to the draft contract, it is left up to bidders to declare this pre-existing knowledge as BIPR by filling-in the BIPR declaration provided in Annex I.J to the Tender Specifications. However, as per article 1.8 laid down in the draft contract, the BIPR declaration does not actually place any restriction on EC/GSA to:

- (a) reproduce the BIPRs
- (b) communicate to the public information in relation to the BIPRs
- (c) distribute results of the contract incorporating the BIPRs, including sales



- (d) rent results of the contract incorporating the BIPRs
- (e) adapt the BIPRs
- (h)(i) register BIPRs as a patent or trademark the BIPRs or any part of it
- (j) use the know-how associated to the BIPRs

Please clarify would GSA:

- 1) Allow tenderers to license pre-existing knowledge as COTS license. Note that this is not currently allowed by the draft contract, as COTS licenses are allowed only from 3rd Parties and not from Tenderers.
- 2) Allow tenderers to propose ESCROW agreements to make accessible the source code of the licensed COTS in situations where bidders cannot longer ensure product maintainability.
- 3) Restrict BIPRs licensing rights to maintenance of the results and ensure that future maintainers (should they are different from the Tenderer) make proper use of the licensed BIPRs, and respect the licensing conditions.

Answer #5: Please note that Article 1.8.2 paragraph 3 of the Draft Contract refers to “Results” as defined in Article 1.8.1 (5). Please refer to Article 1.8.2 paragraph 5 addressing Background IPR is inserted in the Results.

With regard to the listed questions:

- 1) The provisions of Art. 1.8.5 and 1.8.6 related to the COTS BIPRs aim to provide flexibility to the Contractor when ensuring a license to the EU, Agency (and/or its licensees and assignees) for such party BIPRs, needed for the utilisation of the Result produced under the Contract. **This regime may apply to any COTS BIPR (owned by a third party or the Contractor), providing it ensures the right to use such BIPRs under the modalities identified in Contract. The Tenderer should indicate in its proposal, whether such / similar approach is proposed and provide details of the licensing / transfer regime it proposes, explaining how the use-rights of the EU, Agency (and/or its licensees and assignees).**
- 2) The tenderers may propose an ESCROW agreement as part of their tender, as far as it is not contradicting the use-rights defined in the Draft Contract.
- 3) Restriction of BIPR licencing to maintenance of the Results is not possible as specified in Article 1.8.6 of the Draft Contract, in relation to Background IPRs associated with the Galileo Reference HAS User Algorithm, the Contractor shall provide to the European Union/GSA *“a cost-free, non-exclusive, world-wide perpetual licence with the right to grant sub-licenses for institutional and commercial purposes. Such right shall include, but shall not be limited to the right to use, publish, distribute, modify the subject-matter of such IPR.”*

The observation of the licensing conditions by the Agency’s sub-licensee shall be ensured by the means of the formal licensing agreement and the mechanism of enforcement foreseen in it.

End of document