



S2R.19.OP.01: Railway operators, staff and passengers expertise

QUESTIONS AND ANSWERS

Open Procedure - S2R.19.OP.01

11/09/2019 (version 8)

NB: in order to respect the confidentiality between the interested parties, questions submitted and answers provided must be written down in an anonymous way. Therefore, the S2R JU reserve the right to modify the question submitted by the interested parties or delete the parts are not consider to be written in an anonymous way.

QUESTION	ANSWER
1. As concerns the tender in subject, we kindly ask you whether the participation as partners of RUs and IMs is possible and/or recommended, or not.	The question is understood to refer to Lot 1. In this respect, Lot 1 requires to demonstrate the ability to involve “representatives from entities operating the railway systems”: this means representatives of RUs and/or IMs of different railway segments including urban. This has been left broad to allow tenderers submitting tenders which can combine representatives coming from different entities, though direct tenders or consortia, including making use of subcontracting under the conditions defined in the tender specifications. It is up to the tenderers to decide to involve the RUs and/or IMs or only their representatives or a combination of them.



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<p>2. In section 6.5.1 (Evaluation of the quality of the offer), page 27, the quality criteria are set forth. However, it is not clear to us what the technical proposal should describe. How will the ‘feasibility, relevance and effectiveness of the proposed approach’ be evaluated in quality criteria 1 (Quality and appropriateness of the tender)? Should there not be a hypothetical request for services to respond to, or how should the approach be developed?</p>	<p>Please note that this is a tender for a single framework contract (FWC). The FWC sets out the main elements such as the technical characteristics of the services and the criteria (exclusion, selection and award) for choosing the contractor. When the need will arise, the FWC will be implemented through specific contracts concluded with the same contractor and based on the direct application of the terms of the FWC. Therefore, the same criteria above mentioned will apply during the whole implementation of the FWC. In particular, as stated in the tender specifications (section 5.5.1), the quality criteria 1 (“Quality and appropriateness of the tender”) will be evaluated on the basis of the feasibility, relevance and effectiveness of the proposed approach to provide expert knowledge to the S2R JU and its Programme (e.g. how strong is the tender regarding the provision of expertise, dealing with problems, covering specific request for services etc.) during the execution of the tasks described in section 3 (technical specifications) the contractor must perform under specific contracts and within a given period.</p> <p>As the framework contract does not entail specific request for services to be provided directly (exact tasks and delivery times cannot be indicated in advance) but rather the basic terms for a series of specific contracts to be concluded over a given period, the technical tender should not describe a specific service but rather the tender’s general approach, plan, envisioned procedure etc. to</p>
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		<p>provide the high quality expertise (i.e. personnel with expertise in the area of the respective Lot) according to the tasks indicated in the respective Lot (e.g. project advice, reporting etc.).</p>
<p>3.</p>	<p>On page 13 of the Tender Specifications, paragraph 5.1 "Participation", you state "<i>...Therefore this procurement procedure is not open to economic operators established in GPA countries.</i>" As all member states of the EU are included in the GPA, the above would imply that economic operators based in one of the EU member states would not be allowed to participate. We therefore believe the above phrase to be incorrect. Can you please confirm?</p>	<p>The Agreement on Government Procurement (GPA) is a plurilateral agreement within the framework of the World Trade Organisation (WTO), meaning that not all WTO members are parties to the Agreement. As indicated in the Appendix I to the WTO GPA, any EU institution or body other than the Commission, the EEAS and the Council cannot open their procurement procedures to economic operators established in GPA countries. The S2R JU, as a body of the European Union other than the Commission, the EEAS or the Council can therefore not open this procurement procedure to economic operators established in GPA countries. According to the tender specifications, section 5.1, "participation in this procurement procedure is open on equal terms to all natural and legal persons coming within the scope of the Treaties, as well as to international organisations". This includes all legal entities registered in the EU and all natural persons having their domicile in</p>



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	<p>the EU, i.e. in one of the 28 EU Member States as listed in Art. 52 of the TEU. In addition, the procedure is open to all natural and legal persons established in Overseas Countries and Territories (OCT) as listed in the Annex II of the TFEU and to all natural and legal persons established in Iceland, Norway and Lichtenstein, as per the EEA Agreement.</p> <p>As per the Treaties, the procedure is therefore open to natural and legal persons in the 28 EU Member States, Iceland, Norway and Lichtenstein even if these countries are parties to the GPA. Thus, Appendix I to the WTO GPA shall be understood in the sense that the S2R JU cannot open this procurement procedure to economic operators established in GPA countries other than the 28 EU Member States, Iceland, Norway or Lichtenstein. Summing up, this procurement procedure is open to:</p> <ul style="list-style-type: none">• All legal entities registered in the EU and all natural persons having their domicile in the EU;• international organisations• natural and legal persons established in Overseas Countries and Territories (OCT) and• natural and legal persons established in Iceland, Norway and Lichtenstein.
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<p>4. - Are subcontractors entitled to subcontract themselves?</p> <p>- All subcontractors, as well as the tenderer, need to sign several documents. Is it necessary to provide originals of all signed documents for all subcontractors, or can we provide copies?</p>	<p>1. The principle is that tenderers are free to submit tenders as they see fit to ensure they fulfil the published criteria, meaning that subcontracting is not excluded from the outset and any level of subcontracting is possible.</p> <p>However, consideration must be given to the provisions of the framework contract for services S2R.OP.01 LOT 1 (provision II.10.1.) according to which <u>“The contractor must not subcontract and have the FWC implemented by third parties beyond the third parties already mentioned in its tender without prior written authorisation from the contracting authority”.</u></p> <p>In addition, provision II.10.2 states that <u>“even if the contracting authority authorises subcontracting, the contractor remains bound by its contractual obligations and is solely responsible for the implementation of the FWC”.</u> Accordingly, the contractor cannot avoid liability towards the contracting authority on the grounds that the subcontractor is at fault.</p> <p>Furthermore, the framework contract stipulates that “The contractor must ensure that the subcontract does not affect the rights of the contracting authority under this contract, particularly those under Articles II.8, II.13 and II.24.”; and “The contracting authority may request the contractor to</p>
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	<p>replace a subcontractor found to be in a situation provided for in points (d) and (e) of Article II.18.1.”</p> <p>Please note in addition the requirements regarding subcontracting as indicated in section 5.6 of the tender specifications.</p> <p>All subcontracting must be approved by the contracting authority, either by accepting the tender, or, if proposed by the Contractor after Framework Contract signature, by prior agreement of the contracting authority. In the latter case, the modification may be accepted only in exceptional circumstances when the contracting authority considers sub-contracting to be necessary to complete the project and when it does not lead to distortion of competition. Where no sub-contracting is indicated in the tender the work will be assumed to be carried out directly by the tender</p> <p>2. As per the tender specifications (Section 7.1), one signed original version of documents listed 1 to 9 in page 32 must be provided with exception of the declaration of honour on exclusion and selection criteria (Annex II) of the subcontractors, which may be electronic copies. Concretely:</p> <p>a. The tender submission form (Annex I) is only to be signed by the authorised representative of the</p>
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	<p>tenderer (original version in original tender), not by the subcontractors. Subcontractors are only to be identified here by the tenderer.</p> <ul style="list-style-type: none">b. The Legal Entity Form and the Financial Identification Form are only to be signed by the tenderer(s) (original version in original tender).c. The declaration of honour on exclusion and selection criteria (Annex II) of the tenderer must be a signed original. Those of the subcontractors may be electronic copies.d. The Letter of intent for identified subcontractors should be duly signed and dated by each subcontractor. Original version to be provided in the original tender.e. The declaration on economic and financial capacity (Annex IV.a) is only to be signed by the tenderer (original version in original tender), providing the requested information separately for each subcontractor (supporting documents to be provided only on request).
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		<p>f. The declaration on the tenderer’s technical and professional experience in the field of the contract (Annex IV.b) is only to be signed by the tenderer (original version in original tender. Supporting documents to be provided only on request).</p> <p>g. The declaration on the technical and professional experience of the team proposed by the tenderer/delivering the service (Annex IV.c) is only to be signed by the tenderer (original version in original tender), providing the requested information separately for each subcontractor (supporting documents to be provided only on request).</p>
5.	<p>1. We are not subject to VAT. I hope this is not a problem?</p> <p>2. Financial aspect: do we need to provide pay slips, proof of travel costs... or is it enough to provide you with the fixed amount for the expert fees?</p> <p>3. Letters of intent: we have the confirmation of two organizations that they are willing to support us with their expertise, but are not</p>	<p>1. Tenderers must provide a declaration on their honour (Annex II) stating that they are not in one of the situations referred to in Article 136 of the Financial Regulation. Regarding this, successful tenderers will have to submit documents providing proof of payment of all taxes and social security contributions <i>for which the person is liable</i>, including <i>for example, VAT, income tax (natural persons only), company tax (legal persons only) and social security contributions</i>. Where any document described above is not issued in the country concerned, it <i>may be replaced</i> by a sworn statement made before a judicial authority or a notary or, failing that, by a solemn statement</p>

<p>going to be an 'official partner' or subcontractor. In Annex III we can find a Letter of Intent for 'identified sub-contractors'. Is there a template available for non-official partners?</p>	<p>made before an administrative authority or a qualified professional body in its country of establishment.</p> <p>Please refer to the following web page for additional information regarding the relevant requirements and model documents under national laws of the EU Member States: https://ec.europa.eu/growth/tools-databases/ecertis/ The obligation to submit supporting evidence does not apply to international organisations, but applies to public bodies.</p> <p>Regarding the legal and regulatory capacity, evidence is to be provided only upon request of a LEF and associated supporting documentation: http://ec.europa.eu/budget/contracts_grants/info_contracts/legal_entities/legalentities_en.cfm#en – If required under applicable law, this can include entry in the VAT register, but if not applicable, also evidence of inclusion in a trade or professional register, or a sworn declaration or certificate, membership of a specific organisation, express authorisation, etc.</p> <p>2. No supporting documents are required for the financial offer (Annex V) since travel and subsistence expenses are not refundable separately. The quoted price must be a fixed amount, which includes all tasks included in the technical specifications and all charges (including travel and subsistence).</p>
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	<p>3. Please note that no templates are foreseen for non-official partners. The tenderer must fill-in all the information requested in the Tender Submission Form (Annex I), presenting the name of the tenderer (including all entities in case of consortia or joint tender) and identified subcontractors (if applicable), and the name of the single contact point (leader) in relation to this procedure. The group must provide the data requested in the Tender Submission Form (Annex I), stating clearly the identity and the separation of tasks among the members of the group. Moreover, tenderers are required to identify subcontractors whose share of the contract is above 10% (in value or in tasks to be subcontracted). For each identified sub-contractor, the tenderer must submit a “Letter of intent” using the template provided in Annex III. Where no sub-contracting is indicated in the tender the work will be assumed to be carried out directly by the tender.</p> <p>Please note that the selection criteria apply to the tenderer as a whole (including all members of a joint tender, subcontractors and third parties) and that in the case of a consortia or joint tender, all the members of the group are jointly and severally liable for the performance of the contract</p>
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<p>6. Dear Madam/Sir,</p> <p>At the moment we are preparing a bid for the call for tenders “Railway Operators, Staff and Passengers Expertise”, LOT 1: Expertise in European Railway operations (Open Procedure - S2R.19.OP.01). Due to the legal complexity of the tender and the need to submit originally signed documents by the tenderer as well as all subcontractors in combination with the current vacation period, it is not feasible to complete a full bid before 28 August 2019. We therefore kindly request you to consider a suspension of the time limit for receipt of the tender</p>	<p>We agree to extend the deadline for submission from 28 August 2019 to 17 September 2019.</p> <p>The official deadline for submission for this tender is therefore postponed to 17 September 2019.</p>
<p>7. Hereby I would like to kindly request clarification concerning the following questions:</p> <ul style="list-style-type: none"> • According to paragraph 5.6 of the Tender Specifications, for subcontractors whose share of the contract is above 10%, the tenderer must i.a.: <ul style="list-style-type: none"> ○ Indicate which parts of the work are to be subcontracted & the proportion in %. ○ Submit evidence required as specified in section 6.3.3. – i.e. Annex IV-b and Annex IV-c. <p>Q1: Concerning the parts of the work and proportion in %: the tender documents for this</p>	<p>In response to your first question, the contracting authority may request a statement by the tenderer providing the volume/proportion (usually a % of the total value of the contract) that the tenderer intends to subcontract for each subcontractor. The contracting authority may also request a statement by the tenderer specifying clearly the identity, roles, activities and responsibilities of the main subcontractors (above a certain proportion only). Last but not least, the contracting authority must specify in the tender documents whether the declaration of non-exclusion will be requested in case the share of the contract to be executed by a given subcontractor exceeds a specific threshold or where subcontractors help fulfil the selection criteria.</p>

<p>framework contract do not specify the work that will be requested in case of successful tender. Therefore at this stage it seems not possible to specify & quantify the (share of) the work carried out by subcontractors. Therefore, in what way should par. 5.6 of the Tender Specifications be interpreted at this point?</p> <p>Q2: Concerning Annex IV-b for subcontractors: subcontractors for this framework contract may include railway sector operators (such as RUs, interest groupings, IMs, etc.) rather than consultants. Such subcontractors typically do not work on project / contract basis – therefore, Annex IV-b cannot be completely filled out. How should this matter be addressed?</p> <ul style="list-style-type: none"> • Also, Annex IV-b states: <i>“The tenderer (in case of a consortia or joint tender the combined capacity of all members of the group and identified subcontractors) must comply with the criteria set out in section 6.3.3 of the tender specifications and provide the requested evidence (supporting documents)”</i>. <p>Q3: However, section 6.3.3.1 of the Tender Specifications states (p. 21):</p>	<p>Taking into consideration the subject of this tender (expertise services), the contracting authority has considered that in case the share of the contract to be executed by a given subcontractor exceeds 10% of the services requested to be performed by the contractor, this proportion of the contract represents an essential part of the contract and therefore the intended subcontractor must be identified. Therefore, only “identified subcontractors”, i.e. subcontractors that the tenderer considers will perform a substantial part of the contract (more than 10% in this case) and whose capacity will be necessary to fulfil any of the selection criteria announced in the tender specifications must be included in the tender (by indicating the lead tenderer in Annex I which parts of the work will subcontract), signed and dated by each subcontractor-the Declaration on the honour on exclusion and selection criteria (Annex II) and well as the Letter of intent (Annex III) and, if requested, submit the required evidence for economic, financial technical and professional capacity and filling Annex IV.a, IV.b and IV.c) by the lead tender.</p> <p>In response to your second question, annex IV.b ‘s aim is to provide information on the tenderer’s experience in the field of the contract, through provision of information of <i>projects, contracts, services in certain relevant fields</i>, with indication of the time period</p>
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		<p>Nevertheless, tenderers can decide to provide, at this stage of the procedure, the evidence for selection criteria requested and include them in ENVELOPE A – ADMINISTRATIVE DATA (one signed original and an USB KEY as requested in section 7.1 of the tender specifications).</p>
8.	<p>In sections 6.3.1, 6.3.2 and 6.3.3 of the tender specifications, the sentence “<i>Evidence (to be provided only on request)</i>” is mentioned. It is not clear which documents (with evidence) have to be part of the tender and which documents need to be provided on request after submitting the tender. In this paragraph, the impression is given that some documents need to be part of the tender and submitted within the deadline for submission. In section 6.3.3.1 it is not clear where the sentence “and provide the supporting documents indicated above” refers to.</p>	<p>See answer provided to the third question in n° 6 above. We confirm that, as stated in section 6.3 of the tender specifications, “<i>the Contracting Authority will evaluate the selection criteria on the basis of the declaration on honour (annex II). After contract award, the successful tenderer will be required to provide the evidence mentioned below (i.e.: under “evidence to be provided only on request”) before signature of the contract and within a short deadline given by the contracting authority (i.e.: 2-3 working days).</i>”</p> <p>Therefore, for the assessment of both the exclusion criteria (section 6.2 of the tender specifications) and selection criteria (section 6.3 of the tender specifications), the only evidence (i.e.: supporting documents) that the tenderer must include in the tender- within the deadline for submission- is the declaration of honour on exclusion and selection criteria (Annex II of the tender</p>



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	<p>specifications). This requirement applies to each member of the group (in case of joint tender) and to identified subcontractors (see detailed explanation in question 6 above). After contract award, only the successful tenderer will be required to provide the evidence mentioned in the tender specifications (i.e.: under “evidence to be provided only on request”) before signature of the contract and within a short deadline given by the contracting authority (i.e.: 2-3 working days). Nevertheless, tenderers may decide (i.e.: no mandatory) to include in the tender- within the deadline for submission-the evidence for selection criteria requested in section 6.3 of the tender specifications and include the supporting documents in ENVELOPE A – ADMINISTRATIVE DATA (one signed original and an USB KEY as requested in section 7.1 of the tender specifications).</p> <p>To summarize, as stated in section 7.1 of the tender specifications, the mandatory supporting documents that the tenderer must include in the tender- <u>within the deadline for submission</u>, are the following:</p> <ul style="list-style-type: none">• ENVELOPE A – ADMINISTRATIVE DATA. Administrative Offer. Only documents listed n° 1 to 6• ENVELOPE B – TECHNICAL DOCUMENTS. Technical Offer• ENVELOPE C - FINANCIAL DOCUMENTS.
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		Financial Offer
9.	<p>Some partners (i.e.: consortia members) of a S2R JU Member would like to submit a tender for this Call for tenders. Would it be possible that one or more S2R JU members to submit a join tender (i.e.: in consortium) with other partners who are not S2R JU members? If this is not possible, would it be possible that a S2R JU member participate in this tender as a subcontractor?</p>	<p>As stated in section 5.1 of the tender specifications (“Notice for S2R JU Members): <i>“Participation in this tender procedure is not open to any S2R JU Founding or Associated member acting either as a single tenderer or as leaders or consortia members (in case of joint tender); this does not apply to subcontractors”</i>.</p> <p>Therefore, neither S2R JU Founding, nor Associated Members (in the sense of Article 1 of the S2R JU Statutes annexed to the S2R establishing Regulation), nor constituent entities of S2R JU Members in the form of consortia or groupings, nor their affiliated entities, may submit a tender, either as a sole tenderer or in consortium with other tenderers (i.e.: joint tender). Thus, independently whether the other members of the group are not S2R JU members.</p>



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		<p>This rule does not apply for subcontractors. Nevertheless, as stated in section 5.6 of the tender specifications, <i>“All subcontracting must be approved by the contracting authority, either by accepting the tender, or, if proposed by the Contractor after Framework Contract signature, by prior agreement of the contracting authority”</i>. For more details about subcontracting obligations, please refer to section .5.6 of the tender specifications</p>
10	<p>In ANNEX II of the tender specifications, (DECLARATION OF HONOUR ON EXCLUSION AND SELECTION CRITERIA) several documents are mentioned which need to be provided as evidence upon request. In particular ANNEX IV.a (SELECTION CRITERIA – ECONOMIC & FINANCIAL CAPACITY) under ‘Statement of Average Annual Turnover’ a copy of the profit and loss account or the balance sheets or extracts from balance sheets are requested. Can all the documents mentioned above be provided in the native language of the tenderer/subcontractor or need all documents to be translated in English?</p>	<p>As regards the exact meaning of the <i>“evidence to be provided only on request”</i> please refer to explanation provided in questions 6 and 8 above.</p> <p>Regarding the language regime of the documents to be provided under this tender procedure, in point 2 of the invitation to tender is mentioned <i>“you should submit a tender in one of the official languages of the European Union, preferably in English”</i>.</p> <p>Section 7.2 of the tender specifications also states <i>“tenders must be drafted in one of the official languages of the European Union, preferably in English”</i>.</p> <p>The reason to indicate English as a preferred contracting authority language is to facilitate the work of the evaluation committee when assessing the tenders received, whose members may not</p>



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		<p>understand and covered all the EU languages. In addition, translation of tender documents received may take several weeks and consequently may delay the outcome of the procurement procedure. Nonetheless, the choice of the EU language will be not play any role in the consideration of the tender received.</p>
11	<p>Concerning LOT 1: Expertise in European Railway operations, we kindly ask you to answer the following questions:</p> <p>Tenderer refers to Articles I.4.3 (Implementation of single FWC), I.10 (Exploitation of the results of the FWC), II.13 (Intellectual Property Rights) and II.18.1 (Grounds for termination by the contracting authority) of the Framework contract for services (FWC).</p> <p>According to Article I.10.1 the contracting authority acquires ownership of the results. Article I.10.2 stipulates that all <i>pre-existing rights</i> incorporated in the results, if any, are licensed to the contracting authority. Tenderer indicates that the situation may occur that the information requested by the contracting authority in a specific contract includes <i>pre-existing material</i> with <i>pre-existing rights</i>.</p> <ul style="list-style-type: none"> • Can the contracting authority confirm that contractor is not obliged to accept a specific contract if accepting this specific contract (i.e. 	<p>The contracting authority irrevocably acquires worldwide ownership of the <i>results</i> and of all intellectual property rights on the newly created materials produced specifically for the contracting authority under the FWC and incorporated in the <i>results</i>, without prejudice however to the rules applying to <i>pre-existing rights</i> on <i>pre-existing materials</i>, as per Article II.13.2. All <i>pre-existing rights</i> incorporated in the <i>results</i>, if any, are <i>licensed</i> to the contracting authority as set out in Article II.13.2. The contractor must provide the contracting authority with a list of <i>pre-existing rights</i> as set out in Article II.13.4 together with the invoice for payment of the balance at the latest.</p> <p>The contractor warrants that the exclusive rights and the modes of exploitation may be exercised by the contracting authority on all parts of the <i>results</i>, be it via a transfer of ownership of the rights, on those parts which were specifically created by the contractor, or via a licence of the pre-existing rights, on those parts consisting of <i>pre-existing materials</i>.</p> <p>The contractor licenses the <i>pre-existing rights</i> on a royalty-free, non-exclusive and irrevocable basis to the contracting authority,</p>



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<p>delivery of results under the specific contract) requires contractor to an infringement on <i>pre-existing rights</i> of himself or of a third party and he or the third party will not or cannot license the <i>pre-existing rights</i> to the contracting authority? The same applies to trade secrets as defined in Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.</p> <ul style="list-style-type: none">• If the contracting authority cannot confirm the above, what alternative solution does the contracting authority propose? <p>Kind regards,</p>	<p>which may use the <i>pre-existing materials</i> for all the modes of exploitation set out in this FWC or in specific contracts.</p> <p>When delivering the <i>results</i>, the contractor must warrant that, for any use that the contracting authority may envisage within the limits set in this FWC, the newly created parts and the <i>pre-existing material</i> incorporated in the <i>results</i> are free of claims from <i>creators</i> or from any third parties and all the necessary <i>pre-existing rights</i> have been obtained or licensed. Furthermore, according to II.13.5, upon request by the contracting authority, the contractor must, in addition to the list mentioned under Article II.13.4., provide evidence that it has the ownership or the right to use all the listed <i>pre-existing rights</i>, except for the rights owned or licensed by the contracting authority. The contracting authority may request this evidence even after the end of this FWC</p> <p>According to II.13.3, the contracting authority acquires exclusive rights, <i>inter alia</i>, when the <i>results</i> include know-how: the right to use such know-how as is necessary to make use of the <i>results</i> to the full extent provided for by this FWC, and the right to make it available to contractors or subcontractors acting on behalf of the contracting authority, subject to their signing of adequate confidentiality undertakings where necessary;</p> <p>Where <i>pre-existing materials</i> are inserted in the <i>results</i>, the contracting authority may accept reasonable restrictions, provided that the said materials are easily identifiable and</p>
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		<p>separable from the rest, that they do not correspond to substantial elements of the <i>results</i>, and that, should the need arise, satisfactory replacement solutions exist, at no additional costs to the contracting authority. In such case, the contractor will have to clearly inform the contracting authority before making such choice and the contracting authority has the right to refuse it.</p>
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