

N-14070/01/2016-PPPAU
NITI Aayog
PPP Vertical

Dated: 27th March 2019

CORRIGENDUM III

Subject: Request for Proposals for Empanelment of Law Firms (RFP) – Amendments to RFP – regarding

1. This Corrigendum forms an integral part of the RFP.

2. Pursuant to the release of the RFP for Empanelment of Law Firms issued by NITI Aayog on 13th February 2019, following are the modifications in the RFP. The deletions in the earlier text of the RFP are indicated as strikethrough and the additions are underlined:

S. No.	Clause No.	Provision in the RFP
(i)	Clause 1, it is proposed to empanel Law Firms for drafting of model concession documents— agreements, RFQs (Requests for Qualification), RFPs (Requests for Proposal); review of concession documents received from Ministries / Government Departments and providing comments thereon,.....
(ii)	Clause 7(A) the Applicant shall have, over the past 3 (three) <u>5 (five)</u> years preceding the Proposal Due Date, undertaken a minimum of 15 (fifteen) Eligible Assignments
(iii)	Clause 1.8.2 of the Agreement for Empanelment (at Appendix II)	The Law Firm shall, as and when requested by NITI Aayog, make available its Personnel/Key Personnel, at no additional fees, for conferences and meetings in connection with the Services at the office of NITI Aayog or elsewhere <u>within National Capital Region (NCR)</u> .
(iv)	Clause 3.4.4 of the Agreement for Empanelment (at Appendix II)	The limitation of liability specified in clause 3.4.3 shall not affect the Law Firm’s liability, if any, for damage to Third Parties caused by the Law Firm or any person or firm acting on behalf of the Law Firm in carrying out the Services <u>subject, however, to a limit equal to 3 (three) times the concerned assignment value.</u>

3. All the other terms and conditions of the RFP shall remain unaffected.

**Responses to Pre-bid Queries regarding RFP dated 13th February 2019 for
Empanelment of Law Firms**

S.No.	Section/ Clause	Provision in the RFP	Query Submitted	NITI Aayog's Response
1.	7 (A) of the RFP - Conditions of Eligibility (Technical Capacity)	Applicant to have undertaken a minimum of 15 Eligible Assignments in the period preceding 3 (three) years from the Proposal Due Date.	Allow submission of past transactions as well to fulfil this eligibility criteria	Please refer to Corrigendum III.
2.	7A (iii) – Conditions of eligibility: eligible assignments	Professional fee received by firm for infrastructure projects in India (Other Projects)	Our firm is currently handling matters that qualify as eligible assignments and as per our terms of engagement we are due to receive professional fees that would exceed INR 5 lakh. However, some of these matters are ongoing and we have either received no professional fees yet or have received less than INR 5 lakh. Please clarify if these matters may be included as eligible assignments as per the request for proposal criterion and how they would be treated for the purposes of the certificate required from the auditor.	Clause is clear and self-explanatory. No change contemplated.
3.	Clause 7 B of the Conditions of Eligibility of the RFP document	Financial Capacity: The Applicant should have minimum annual average turnover of Rs. 25 (twenty five) Crores during the last three financial years preceding the Proposal Due Date. For the avoidance of doubt, professional fees hereunder refers to fees received by the Applicant for providing legal advisory or consultancy services to its clients and shall not	The turnover criteria presently contained in the RFP document is restrictive and hence the same should be relaxed for wider participation, particularly boutique law firms specializing in infrastructure developmental/ regulatory work. Should have average annual turnover of at least Rs.2.50 crores in the last three preceding financial years.	No change contemplated.

		include any amounts received by way of reimbursement or fee for payment to external counsels, senior advocates or external professional retained by the Applicant for its clients.		
4.	8 of the RFP – Duration	Term of the agreement may be extended for a further period of 2 years in the sole discretion of NITI Aayog.	In the event of the aforesaid extension, whether or not the amounts prescribed (for provision of legal services) under Schedule II of the RFP and Annex 3 of the draft Agreement will be revised for the period of such extension.	Please refer to clause 7 (E), it is clear and self-explanatory.
5.	Clause 12 - Criteria for Evaluation of Conditions of Eligibility	60% of the maximum marks shall be awarded for the number of Eligible Assignments undertaken by the Applicant and remaining 40% shall be awarded for (i) the comparative size and quality of Eligible Assignments; (ii) annual turnover, experience and capacity of the Applicant; and (iii) other similar work in the infrastructure sectors.	Applicant is required to furnish its eligibility with respect to Eligible Assignments in form and manner as set out in Form 4 and with respect to other relevant assignment forming part of the Eligible Assignments in the form and manner as set out in Form 6. However, please clarify the form and manner of submission of <i>‘other similar work in the infrastructure sectors’</i> which contains 10% marks for evaluation of condition of eligibility.	For the ‘Other similar works in the infrastructure sector’, information can be submitted in the format annexed at Form-6.
6.	14 of the RFP - Submission of proposal	Proposal to be signed by the Managing Partner of the applicant firm	If the proposal may instead be signed by a Senior Partner or a Senior member of the firm, in the event of possible non availability of the Managing Partner at the time of submission.	Proposal may be signed by the Senior Partner or a Senior member of the firm provided they are so authorized in writing. A copy of the authorization to be annexed with the proposal.
7.	40 of the RFP – Liquidated Damages	In case of delay in completion of an assignment, liquidated damages not exceeding an amount equal to 5%	If the terms relating to liquidated damages set out in this Clause are open to discussion and negotiation at any point of the process.	No change contemplated

		(five per cent) of the fees for the concerned assignment per day for each day of delay, subject to a maximum of 20% (twenty per cent) of the fees amount for the concerned assignment, shall be recovered from the payment due to the Law Firm for that assignment. In case of such delay, NITI Aayog may, in its sole discretion, decide to cancel the work order for the particular assignment without any liability to the Law Firm. However, in case of delay due to reasons beyond the control of the Law Firm, suitable extension of time may be granted.	In our prior experience (including experience of working with various ministries, departments and public sector enterprises of the Government of India), we have typically not seen provisions with respect to liquidated damages for delay being included in contracts for provision of legal services. While we always endeavour to provide legal services to clients in the most time efficient manner, timelines for deliverables are mutually discussed and finalised with clients depending on the nature and complexity of the assignment. Therefore, we request you to kindly delete Clause 40 of the RFP.	
8.	Paragraph 7 - Schedule-I Terms of Reference	The law firm (empaneled with NITI Aayog pursuant to the bid process) will be required to advise on specific issues referred to them by NITI Aayog	We understand that such advise sought by NITI Aayog from time to time shall be in relation to the concession agreement only. In the event, such advise sought by NITI Aayog is note in relation to the concession agreement, then what will be the fee component of such advise not in relation to concession agreement, since the same is not covered under Schedule II (Approved Fee). Please clarify.	Clause is clear and self-explanatory. No change contemplated.
9.	Paragraph 8 of Schedule I of the RFP – Terms of Reference	The Law Firm shall be deemed to have given an undertaking to NITI Aayog declaring that it shall have no conflict of interests in advising on each assignment.	Clause 51 of the RFP states, <i>inter alia</i> , that the law firm shall not accept or engage in any assignment from NITI Aayog that would be in conflict with its prior or current obligations to other clients, or that may place it in a position of not being able to carry out the assignment in the best	The referred clauses are self-explanatory. Clause 51 read with clause 52 (e) and paragraph 8 of Schedule I require the firm to ensure there is no conflict with respect to “each assignment” i.e. on case-to-case basis.

			<p>interest of NITI Aayog. Further, Clause 52(e) of the RFP provides, <i>inter alia</i>, that the duties of the applicant will depend on the circumstances of each case and while providing services to NITI Aayog, the law firm shall not take up any assignment that by its nature will result in conflict with the services to be provided to NITI Aayog.</p> <p>There appears to be a contradiction between the provisions of Paragraph 8 of Schedule I of the RFP and Clause 51 read with Clause 52(e) of the RFP as conflict of interest can be determined only on a case to case basis.</p> <p>Please note that our firm also represents private sector concessionaires/developers, EPC contractors, investors, banks, financial institutions etc. on numerous aspects of law across various infrastructure sectors, and therefore, at this stage it may be extremely difficult to ascertain whether or not a conflict of interest may arise.</p> <p>In light of the above, we request you to kindly amend the RFP accordingly to provide an opportunity to the law firm to undertake an internal conflict check prior to each assignment.</p>	<p>To that end, the law firm will undertake an internal conflict check prior to accepting each assignment.</p> <p>No change contemplated.</p>
10.	Schedule II of the RFP – Approved Fee		Confirm if the amounts prescribed as Approved Fee prescribed under Schedule II would be open to	Please refer to Schedule I (Terms of Reference) and Schedule II

		<p>discussions and negotiations at any point. Separate to the amounts prescribed, and in light of the wide variety of tasks proposed to be undertaken by the Applicant, we request the authority to consider inclusions of appropriate assumptions relating to fees such as consideration to the complexity of task involved, number of hours of work undertaken, etc. In our past experience of working with the government sector clients on drafting of bid documents and concession agreements, we have had to spend (at least) between 500-1000 hours depending on the nature and complexity of the transaction. The aforesaid range of hours includes time spent on attending several meetings and stakeholder/pre-bid conferences, preparing presentations etc. Please note that in consideration of the level of time and effort required to complete such assignments, the amounts prescribed under Schedule II are not financially viable. Therefore, request you to kindly consider revising the prescribed amounts in accordance with the market standards for reputed law firms in India.</p> <p>Also, in addition to the work related to drafting of concession agreements as set out in the RFP, the scope of work set out in Clause 1 of the RFP read with the terms of reference set out in Schedule I of the</p>	<p>(Approved Fees), which are clear and self-explanatory.</p>
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			<p>RFP, requires the empanelled law firm to, <i>inter alia</i>, undertake to following work:</p> <p>(a) Drafting of bid/tender documents including request for qualification (RFQ) and request for proposal (RFP);</p> <p>(b) Review of concession agreements received from various ministries, departments, states and statutory entities;</p> <p>(c) Provision of legal advice on specific issues referred to by NITI Aayog; and</p> <p>(d) Provision of other related legal services as may be required by NITI Aayog.</p> <p>However, under Schedule II, pre-determined fees for none of the above works have been provided. Please clarify how will the fees for the aforesaid activities be determined.</p> <p>Further, as the scope of work does not set out include review of bid/tender documents (RFQ and/or RFP) received from ministries, departments, states, statutory entities etc., please confirm that the law firm will not be required to review such documents. In case the such documents are required to be reviewed, request you to please clarify as to how will the fees for such review of documents be determined.</p>	
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11.	Appendix – 1 of the RFP, Form – 4 and Form – 6		<p>We note that the Authority has required details of <i>Estimated Capital Cost of Project</i>.</p> <p>Details of several of our past assignments are subject to non-disclosure agreements and we may be disabled legally from sharing such details.</p> <p>We request confirmation of the authority if the above disclosure may be dispensable in some cases.</p>	<p>The details necessary for evaluation of the proposal need to be submitted for the Authority to assess/evaluate the proposal.</p>
12.	Form-4 - Eligible Assignments of Applicants	Eligible Assignments covers (a) PPP Projects; (b) Disinvestment Projects; (c) Other Projects; (d) Regulatory Projects; and (e) Other relevant assignments.	<p><i>Form-4 (Eligible Assignments of Applicants)</i> stipulates '<i>Nature of Assignment (PPP/Regulatory/Public Funded Project)</i>' which only covers (a) PPP Projects; (b) Regulatory Projects; (c) Other Projects (public funded) and a separate <i>Form-6 (Other relevant assignments of Applicant)</i> is provided for other relevant assignment which already forms part of Eligible Assignment in terms of Clause 7 (A) of the RFP.</p> <p>Please confirm, whether <i>Form- 4 (Eligible Assignment of Applicants)</i> would be filled for only (a) PPP Projects; (b) Regulatory Projects; (c) Other Projects (public funded) and <i>Form-6</i> only for <i>other relevant assignment</i> of the Applicant.</p> <p>Further, please provide the form and manner of submission of Disinvestment Projects as it is neither cover in <i>Form-4</i></p>	<p>Please refer to clause 7 (A)(ii); details of Disinvestment Projects qualifying as Eligible Assignments to be submitted in the format annexed at <i>Form-4</i>.</p>

			nor in Form-6.	
13.	Form-5 - Appendix-I Abstract of other relevant experience of the Applicant	Applicant is required to furnish the abstracts of other relevant experience of the Applicant in the form and manner as set out in Form-5	- what will constitute as the 'other relevant experience' of the Applicant - whether Form-5 Appendix-I (Abstract of other relevant experience of the Applicant) would constitute one of the criteria for evaluation of conditions of eligibility in terms of Clause 12 of the RFP	Please refer to clause 12 for the criteria of evaluation and their respective weightage.
14.	1.8.2 of the draft Agreement - Location	The Law Firm shall, as and when requested by NITI Aayog, make available its Personnel/Key Personnel, at no additional fees, for conferences and meetings in connection with the Services at the office of NITI Aayog or elsewhere.	Please confirm that the empanelled law firm will not be required to attend any conference and/or meeting(s) outside New Delhi.	Please refer to Corrigendum III.
15.	1.10 of the draft Agreement - Taxes and duties	Unless otherwise specified in the Agreement, the Law Firm shall pay all such taxes, duties, fees and other impositions as may be levied under the Applicable Laws and NITI Aayog shall perform such duties in regard to the deduction of such taxes as may be lawfully imposed on it.	Request you to please amend the clause as follows: The amounts prescribed under Annex - 3 are exclusive of taxes including Goods and Services Tax ("GST"). Currently as per law, legal services are covered under the reverse charge mechanism. The service recipient shall be required to pay GST as applicable. The invoice(s) raised by the Law Firm will specifically highlight the Service Accounting Code (SAC) as required under GST. Further, if NITI Aayog is required by law to deduct tax from the payment towards Law Firm's invoice under Indian income tax	Please refer to Government of India Ministry of Finance (Department of Revenue) Notification No. 12/2017- Central Tax (Rate) 'Exemptions under GST' dated 28th June, 2017, at s. no. 45(b)(ii). (Available at: http://www.gstcouncil.gov.in/sites/default/files/NOTIFICATION%20PDF/Notification12-CGST.pdf)

			law, then NITI Aayog may withhold tax, deposit the same into the Government Treasury, file the withholding tax return and provide a copy of the withholding tax certificate within the prescribed time period to the Law Firm.	
16.	2.2 of the draft agreement – Provision of services	The Law Firm shall provide Services under this Agreement as and when it receives a work order from NITI Aayog, or as is otherwise required by NITI Aayog.	Please refer to our query specified in S No. 5 above. In light of the same we request you to kindly amend the draft agreement accordingly to provide an opportunity to the law firm to undertake an internal conflict check prior to each assignment.	May refer to response under point 9 hereinabove.
17.	2.8.5 of the draft agreement – Payment upon termination	Upon expiry or termination of this Agreement, NITI Aayog shall, after offsetting any amount that may be due from the Law Firm to NITI Aayog, pay to the Law Firm its fees pursuant to clause 6 hereof for Services satisfactorily performed prior to the date of termination.	Request you to please amend the clause as follows: Upon expiry or termination of this Agreement, NITI Aayog shall, after offsetting any amount that may be due from the Law Firm to NITI Aayog, pay to the Law Firm its fees pursuant to clause 6 hereof for Services rendered prior to the date of termination.	No change contemplated
18.	3.3 of the draft agreement - Confidentiality		Request you to please include a new sub-clause 3.3.5 as follows: Notwithstanding anything to the contrary contained in this Agreement, the Law Firm shall be permitted to disclose its engagement in connection with the assignment as part of its experience statement.	Clause is clear and self-explanatory.
19.	3.4.4 of the draft agreement – Limitation of liability of the	The limitation of liability specified in clause 3.4.3 shall not affect the Law Firm's liability, if any, for damage to Third Parties	Request you to please delete this clause as the same is ambiguous and completely onerous for any legal practitioner / firm. A legal	Please refer to Corrigendum III.

	Firm	caused by the Law Firm or any person or firm acting on behalf of the Law Firm in carrying out the Services.	service provider is required to provide advice on the law and representation before courts and tribunals, not to ensure pre-agreed results. While giving legal advice, advocates are supposed to provide advice based on the law and its interpretation. If any person (including a third party) is entitled to seek damages based on whether or not the advice is in line with its vested interest, this will incentivize the advocate to give advice which such person likes to hear, as opposed to giving the correct legal advice. In our view, this would not be to the best interest of NITI Aayog, whom we will be duty bound and committed to represent and protect (if selected).	
20.	3.5(b) of the draft agreement – Accounting, inspection and auditing	The Law Firm shall permit NITI Aayog or its designated representative periodically, and up to one year from the expiration or termination of this Agreement, to inspect the same and make copies thereof as well as to have them audited by auditors appointed by NITI Aayog.	Request you to please delete clause 3.5(b). Please note that advocates in India are governed by the provisions of the Advocates Act, 1961 and the rules of the Bar Council of India, which set out, <i>inter alia</i> , the code of conduct and compliances for advocates. Also, the books of accounts of the firm (being a partnership firm as opposed to a company) are confidential in nature and are not required to be disclosed to any person except where required to be disclosed under applicable law. Further, since the fee payable under the agreement (as currently set out in the RFP and the draft Agreement) is lump-sum fixed fee (as opposed to	Refer to Clause 3.5 (b) of the draft agreement read with clause 3.5(a) thereof. The clause refers to “Accounting, inspection and auditing” in respect of Services provided under the agreement. No change contemplated.

			hourly fees), there does not appear to be any requirement for NITI Aayog to inspect the accounts and relevant time and cost sheets of the law firms, as irrespective of the time and costs incurred by the Law Firm, the fees payable for provision of services would remain unchanged.	
21.	3.8 of the draft agreement – Providing access to office and personnel	The Law Firm shall ensure that NITI Aayog, and officials of NITI Aayog having authorisation from NITI Aayog, are provided unrestricted access to the office of the Law Firm and to all Personnel during office hours. The official, who has been authorised by NITI Aayog in this behalf, shall have the right to inspect the Services in progress, interact with Personnel of the Law Firm and verify the records relating to the Services for his satisfaction.	Request you to please delete this Clause. Please note that typically the office of any legal practitioner / firm possesses extremely sensitive and confidential data and documents, which are bound to remain privileged and confidential. In the event that any person outside of the Law Firm is provided unrestricted access to the office of the Law Firm, such person may become privy to the data, information and documents of other clients which will lead to the violation of the Law Firm's confidentiality obligations (towards other clients) and may lead to a breach of the client-attorney privileges provided under law.	Clause 3.8 of the draft agreement is with respect to the Services provided under the agreement. No change contemplated.
22.	6.3.4 of the draft agreement – Mode of billing and payment	Any amount which NITI Aayog has paid or caused to be paid in excess of the amounts actually payable in accordance with the provisions of this Agreement shall be reimbursed by the Law Firm to NITI Aayog within 30 (thirty) days after receipt by the Law Firm of notice thereof. Any such claim by NITI Aayog for reimbursement must be made within 1 (one)	Request you to please delete the simple interest component chargeable under this Clause as the same is penal in nature, while at the same time there is no interest component chargeable to NITI Aayog under Clause 6.3.1 in the event that there is a delay (by NITI Aayog) in making the payment of fees to the Law Firm.	No change contemplated

		year after receipt by NITI Aayog of the final deliverable of the Law Firm. Any delay by the Law Firm in reimbursement by the due date shall attract simple interest @ 10% (ten per cent) per annum.		
23.	7.2 of the draft Agreement – Penalty for deficiency in services	In addition to the liquidated damages not amounting to penalty, as specified in clause 7.1, warning may be issued to the Law Firm for minor deficiencies on its part. In the case of significant deficiencies in Services causing adverse effect on the assignments or on the reputation of NITI Aayog, other penal action including debaring for a specified period may also be initiated as per policy of NITI Aayog.	We request the Authority if it (i) may provide more clarity on its policy and; (ii) be amenable to deletion of the following: <i>other penal action including debaring for a specified period may also be initiated as per policy of NITI Aayog and Applicable Laws.</i>	Clause is clear and self-explanatory.
24.	Liability of the Firm		As a matter of internal policies of our firm, the firm typically caps its overall liability to the extent of the fees received for the said assignment. We request confirmation if the authority would be amenable to inclusion of such a provision.	Please refer to clause 7 and Corrigendum III.
25.	Forms – Appendix I	Auditor’s Certificates	If the certificates to be issued by the auditors may be issued by two different auditors.	Clause is clear and self-explanatory.