

To according to the list

Rīga, 7 August 2017

No 6.1/2017-404

**Answers to the questions from the interested suppliers
in open competition "Legal Services" ID. No RBR 2017/20**

RB Rail AS presents the following answers to the questions received until 7 August 2017 from the interested suppliers:

No	Questions	Answers
1.	<p>Section 7.5 reflects the regulation of Article 41 (3) of Public Procurement Law of Latvia: <i>"Statements and other documents, which are issued by competent authorities of Latvia in the cases referred to in this Law, shall be accepted and recognised by the commissioning authority if they have been issued not earlier than one month prior to the day of submission, but statements and other documents, which are issued by competent foreign authorities shall be accepted and recognised by the commissioning authority if they have been issued not earlier than six months prior to the day of submission, unless the issuer of the statement or document has not specified a shorter period of validity."</i></p> <p>We would like to pay your attention to two aspects of this provision, which are explained also in the Section 38 of the Explanatory Note of the Procurement Monitoring Bureau "About the most substantial and common non-compliances in the documentation and conduct of procurement procedures"¹ (hereinafter Explanatory Note).</p> <ol style="list-style-type: none"> 1. The date of reference of these documents is the submission date of the relevant documents, not the date of submission of tender or opening of the proposals. 2. These limitations refer to the statements and documents referred to in Public Procurement Law (e.g., Article 42 about exclusion grounds), and not the 	<p>The Procurement Commission will ensure a period of validity on the submission date of the proposals – in cases if statements and other documents after the proposal submission date will not be valid, procurement commission will ask the Tenderer to prolong the validity term of the statements or submit new statement.</p>

¹ Updated 11 July 2017. Available at:
https://www.iub.gov.lv/sites/default/files/upload/Biezak_konstat_kludas-072017.pdf

	<p>documents that, for example, certify the qualification or economic standing of the tenderer. Therefore their application is limited and shall not be unjustifiably extended to other documents, for example, to the copy of decision of registration required in Section 7.2. (1) of the Regulation (for most of the tenderers it will be issued earlier than 1 month prior to the date of opening of the Proposals).</p> <p>Considering abovementioned, we invite you to clarify the regulation of Section 7.5.</p>	
2.	<p>17.6. In case several Tenderers will obtain equal number of points, the procurement commission shall award the right to conclude the Framework agreement to the Tenderer which will obtain higher score for its financial proposal. If also this score will be equal then the procurement commission shall award the right to conclude the Framework Agreement to the Tenderer which submitted its Proposal first.</p> <p>17.8. In case several Tenderers has equal financial proposal, the procurement commission shall award the right to conclude the Contract to the Tenderer which submitted its Proposal first.</p> <p>According to the Section 19 of the Explanatory Note Procurement Monitoring Bureau considers that the choice of tenders based on their submission time could not be regarded as an objective and non-discriminating criterion.</p> <p>Tenderer agrees with that view. This criterion is not connected with the performance of the contract which is one of the overriding principles governing the contract award and also set in Article 51 (2) 2) of the Public Procurement Law. It also does not allow the Contracting Authority to obtain the best offer based on objective considerations.</p> <p>Therefore, we kindly ask you to correct these sections to make them compatible with Public Procurement Law and public procurement principles.</p>	<p>According to the Clause 17.6. of the Regulations, the Procurement Commission has not defined the proposal submission time as the first decisive factor. As the Procurement Commission shall choose the most suitable offer, in case several Tenderers will obtain equal number of points, firstly the Procurement Commission will award the right to conclude the Framework agreement to the Tenderer which will obtain higher score for its financial proposal. The Procurement Commission will choose the Tenderer which has submitted its proposal first only if several Tenderers will have equal financial proposals.</p> <p>According to the Clause 17.8. of the Regulations, the Procurement Commission has chosen to award the right to conclude the Contract to the Tenderer which will obtain higher score for its financial proposal as for Procurement Part 2 the only contract award criteria is the lowest price. The Procurement Commission will choose the Tenderer which has submitted its proposal first only if several Tenderers will have equal financial proposal.</p>
3.	<p>17.9.1. The procurement commission shall award the Proposal with one step lower sum of points, if some of mentioned criteria in one criterium is not fulfilled.</p> <p>17.10.1. The procurement commission shall award the case study analysis with one step</p>	<p>The maximum points of the Criteria "Case study" are 10 and the maximum points of the criteria "The proposals for effectiveness of legal service provisions to the Contracting authority" are 20.</p> <p>Thus, evaluating of both criteria do not play decisive (sole) role in the Tenderer's</p>

<p>lower sum of points, if some of mentioned criteria in one criterium is not fulfilled.</p> <p>According to the last paragraph of Section 14 of the Explanatory Note, in cases where the range of evaluation criteria is set with significant amplitude, Procurement Monitoring Bureau asks the contracting authorities to correct procurement documentation and to either divide the range in smaller divisions and describe them in more detail or set additional intermediate values and describe them.</p> <p>In the view of Tenderer, the evaluation criteria described in Section 17.9 of Regulation meets the conditions of a case where the description should be corrected to make it more clear, because now the tenderers are not able to apprise how the commission will evaluate the sub-criteria listed in each criterion and, for example, how many unfulfilled sub-criteria will result in one step lower sum, since it is said that <i>"if <u>some</u> of mentioned criteria is not fulfilled"</i>. This formulation is too vague to draw useful conclusions or for the tenderer to be able to evaluate the compliance of the award procedure later on.</p> <p>As the Supreme Court has concluded, all the conditions that the contracting authority takes into account choosing the most advantageous tender, and, if possible, their relative importance shall be known to the potential tenderers at the moment when the tender is prepared; the requirement for clarity and as much accuracy as possible in the defined criteria is of utmost importance especially in case if the weight of the criterion in the overall number of points could have decisive importance in the awarding of contract; therefore, the more weight a criterion has, the more precisely it has to be defined (judgement of 22 February 2016 in case SKA-365/2016 of Supreme Court of Republic of Latvia).</p> <p>Therefore, we kindly ask you to provide an explanation on how the sub-criteria will be evaluated and the points will be awarded.</p>	<p>proposal. Therefore, according to the judgment of 22 February 2016 of the Supreme Court of the Republic of Latvia in case SKA-365/2016, there is no need for more clarified explanation of these criterias.</p> <p>Procurement Commission explains that the Section 17.9 of the Regulations means that if any of the mentioned criteria are not fulfilled Tenderer will receive the lowest score.</p>
<p>4. Annex No 3: Terms of reference</p> <p>3.1. Minimal qualification requirements for the experts [...] Project experience: 3 large scale projects within last 5 years</p> <p>Footnote No 16 "Large-scale project" should meet one of the following criteria: (i) the Tenderer has provided daily services [...] (ii) the Tenderer has provided cross-border services [...]"</p> <p>Footnote No 17 ""Large-scale projects" should meet one of the following criteria: (i) the</p>	<p>According to the Section 7.3 and 7.4 of the Regulations these are experience requirements set for the expert and not for the Tenderer itself. Also, Section 3.1 of the Terms of Reference clearly states the project experience is required for the expert and not for the Tenderer itself. Thus, by interpretation of Section 7.3 and 7.4 of the Regulations together with Section 3.1 of the Terms of Reference the term "Tenderer" in the Footnotes No 16, No 17 and No 19 of the Term of Reference shall be acknowledged</p>

	<p>Tenderer has provided daily employment law advice [...] or (ii) the Tenderer has provided legal services [...]"</p> <p>Footnote No 19 ""Large-scale projects" should meet one of the following criteria: (ii) the Tenderer has represented the client [...]"</p> <p>From the Section 6.1.1. that states "a supplier, who is a law firm or legal person (hereinafter – Tenderer)" and the use of the term "Tenderer" in the Regulation, as well as from the procurement practice it can be concluded that tenderer is a person submitting the tender and expert is a natural person that is delivering the services practically, therefore these terms are not used interchangeably.</p> <p>According to the Section 7.3 and 7.4 of the Regulation there are no experience requirements set for the Tenderer itself, but the Section 3.1 of the Terms of Reference (Annex No 3) clearly states the project experience requirements for each expert. Nevertheless, footnotes No 16, 17 and 19 containing the definition of the "Large scale projects" use the term "Tenderer" to describe the person that has provided the services.</p> <p>In our view such requirement is unfounded since the expert could have worked in other workplaces within last 5 years and obtained the necessary experience, but this experience cannot be used according to this definition. This requirement unjustifiably links the experience of an expert with the experience of an entity (tenderer) and by doing so restricts the competition, discriminating the tenderers that do have the necessary experts to provide but who have gained the experience working elsewhere.</p>	<p>as clear and unequivocal clerical error and shall be interpreted as "expert".</p>
5.	<p>If the expert is sworn advocate and himself has ascertained that Project value complies with the requirements set forth by Regulation, would the statement that Project value is sufficient, satisfy the requirements of the Regulation?</p>	<p>Yes, the statement that Project value is sufficient would satisfy the requirements of the Regulation. In this case the Procurement Commission has the right to verify this information by asking the contact person for the reference.</p>
6.	<p>If information regarding monetary value of the legal advice constitutes commercial secret of the third party (client), would the statement by the expert that Project value is sufficient, satisfy the requirements of the Regulation?</p>	<p>If the value of the Project is a trade secret, Tenderer can indicate, if the Project value complies with the requirements set forth by Regulation. In this case the Procurement Commission has the right to verify this information by asking the contact person for the reference.</p>
7.	<p>Please describe how the Project's monetary value should be determined, if the Project was completed by an in-house counsel.</p>	<p>Project's monetary value for Project which is completed by an in-house counsel shall be determined as employee's bruto income (salary) received for provided services. The</p>

		The Procurement Commission reserves the right to require from the expert evidences of the justification of the calculation of the Project's monetary value.
8.	Clause 8.1.1. of the Regulations – does this point refers also to the experts involved? What documents should be submitted in this case?	Yes, this point also refers to the experts involved – according to the Clause 8.1.1. of the Regulations “the Tenderer indicates in the Proposal all persons upon whose capabilities it relies by filling in the table in the Tender application (Annex No 1) and proves to the Contracting authority that the Tenderer shall have available all the necessary resources for the fulfilment of the contracts under the Framework agreement or Contract, <u>by submitting a signed confirmation or agreement on cooperation and/or passing of resources to the Tenderer between such persons and the Tenderer.</u> The confirmations and agreements on cooperation and passing of resources can be replaced by the Tenderer with any other type of documents with which the Tenderer is able to prove that the necessary resources will be available to the Tenderer and will be used during the term of fulfilment of the contracts under the Framework agreement or Contract.”

Procurement Commission Vice-Chairperson

Baiba Zauere