

Rīga

24.09.2019

Our Ref: 6.1p/310

**Answers to questions from the interested supplier
in open competition "Audit services for 2019 - 2021",
identification number RBR 2019/8**

RB Rail AS presents following answers to the questions received until 24 September 2019 from the interested supplier:

Nr.	Questions	Answers
1.	<p>Our view is that a number of agreed upon procedures, particularly those related to Beneficiaries' compliance with EU and national procurement laws and regulations, require involvement of legal expertise. Please comment if the contracting authority under this tender concurs with our view in the context of the engagement scope.</p> <p>Some procedures are worded in the way that the report users may expect exercise of judgement by the Contractor, i.a. in areas where the judgement would be overly high, subjective and undue. E.g. the Contractor is required to establish if amendment to a contract with supplier did not change economic balance in favor of the supplier in a manner which was not provided for in the terms of the initial procurement documents. Please comment if the Contractor has a right to request further clarifications and specifications of the procedures. Some further clarifications and specifications may also be necessary in certain circumstances related to Beneficiaries' operations. E.g. the agreed upon procedures require the Contractor:</p>	<p>Procurement commission indicates that in order to comply with signed Grant Agreements between European commission, in particular Innovation and Networks executive agency (INEA), Beneficiary (Contracting authority) is obliged to submit request for interim payments at least every two reporting periods as well final report within 12 month following the completion of the Grant Agreement (Article II 23.2 of the Grant agreement – template available here :https://ec.europa.eu/inea/en/connecting-europe-facility/cef-transport/beneficiaries-info-point/background-documents). In order to comply with above mentioned requirement there is also a mandatory requirement for submission to INEA for certificate on financial statements.</p> <p>Certificate on financial statements shall be produced by an approved auditor and drawn up in accordance with Grant Agreement Annex VII. Auditor shall certify that costs declared by beneficiary concerned are real, accurately recorded</p>

<ul style="list-style-type: none"> - to conclude whether the contracted tasks are relevant for the activities (or sub-activities) defined in the Agreement. - to conclude whether amendments to the contracts do not introduce changes which are materially different in character from the conditions of the original contract showing the intention to renegotiate essential terms of the contract. - to establish whether the Beneficiary provided adequate evidence that the services/ works were provided by the contractors, <p>Our view is that performing such procedures as regards to road construction contracts for a complex technical scope may imply high degree of judgement and/or judgement supported by construction expertise. Please comment if the contracting authority under this tender concurs with our view in the context of the engagement scope.</p>	<p>and eligible in accordance to the Grant Agreement.</p> <p>Grant Agreement Annex VII "MODEL TERMS OF REFERENCE FOR THE CERTIFICATE ON THE FINANCIAL STATEMENTS" set's technical conditions (Terms of Reference) for issue the certificate and work to be performed by an Auditor. It also sets the roles and responsibilities for beneficiary and auditor in performing particular task, set's the applicable Standards and reporting conditions.</p> <p>The aim as prescribed in the Annex VII states that process carried out is foreseen to solely assist the Agency in evaluating whether the beneficiaries/implementing bodies costs in the accompanying Financial Statement(s) were declared in accordance with the Agreement. It also states that the Agency draws its own conclusions from the Report and any additional information it may require. Thus, auditor has to provide detailed information to INEA for decision making on the costs eligibility.</p> <p>Annex VII also stipulates that, since the Procedures carried out constitute neither an audit nor a review made in accordance with International Standards on Auditing or International Standards on Review Engagements, the Auditor does not give a statement of assurance on the Financial Statements.</p> <p>As mentioned above, auditor has to provide full information to INEA for their decision making, which indeed may require high degree of judgement and/or judgement supported by construction expertise to cover complex technical scope. Procedure set by INEA require to establish if amendment to a contract with supplier did not change economic balance in favor of the supplier in a manner which was not provided for in the terms of the initial procurement documents. In order to do so there might be a need for technical knowledge of the complex construction contract to evaluate whether signed amendments comply with national and EU public procurement rules regarding the substantial modifications.</p>
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		<p>Grant Agreement Annex VII "MODEL TERMS OF REFERENCE FOR THE CERTIFICATE ON THE FINANCIAL STATEMENTS" has been set as a condition for all Connecting Europe Facility projects (CEF), thus there is a minor option to amend the set procedure and scope, however Contractor can request further clarifications and specifications of the procedures. In case of calcifications needed during the process of task execution Contracting authority can engage with INEA in order to provide necessary information and clarification to the contractor.</p>
2.	<p>As per the legal review of the Contract draft included in the Procurement regulations as Annex No 9, we have identified various terms and conditions that are either not applicable to audit services at all or contradict legislative acts of Republic of Latvia, the most significant of which are enclosed below. Please provide explanations whether amendments of this nature would be considered material in accordance with the Public Procurement Law in Latvia and, consequently, whether amendments of this nature could be made in the Contract draft after contract is awarded to the applicant. We draw attention that this is not complete list of amendments that might be proposed by the auditor.</p> <p>List of main comments/questions to the Contract draft:</p> <ul style="list-style-type: none"> - 3.1. <i>General Obligations</i> – the following sentence is not applicable to audit services, it arises from the nature/scope of the service. "The Service Provider shall develop and supplement the Scope of Service in consultation with the Principal with respect to identifying key dates, Deliverables, the underlying assumptions and any Necessary Consents." - 3.2. <i>Duty of care and Exercise of Authority</i> – c) is not applicable to audit service. Our compliance with the law already prescribed in sub clause d). Arises from the nature/scope of the service. - 3.3. <i>Maintenance of Records</i> and 3.4. <i>Access to Documentation</i> – Law on Audit Services stipulates the terms for keeping the records of audit files (Section 34 of law) – at least 5 years; and for Public Interest Entities – 6 years. 	<p>For detailed answer to each comment/question, please see the Annex of this document.</p> <p>Additionally, Procurement commission indicates that any amendments in the Contract draft (or signed Contract) can be done only in accordance with the Section 61, Paragraph one of Public Procurement Law of the Republic of Latvia where is stated that amendments to the procurement contract shall be permissible, if they do not alter the overall nature of the procurement contract (type and purpose specified in the procurement procedure documents) and meet one of the following instances:</p> <ol style="list-style-type: none"> 1) amendments are non-substantial; 2) amendments are substantial and are introduced only in the cases referred to in Paragraph three of this Section; 3) amendments are introduced in the case referred to in Paragraph five of this Section, irrespective of whether they are substantial or non-substantial. <p>Please see the Section 61 of Public Procurement Law of the Republic of Latvia for more detailed information about amendments to procurement contract.</p>

- 3.5. *Right to Sub-Contract and Staff* –
 - o d) is in conflict with Labour Law provisions on discrimination (Labour Law Section 10, 33).
 - o e) what is the reason behind submitting personal ID information about our employees engaged in the project? What is the legal basis for such data processing within context of Personal Data Processing Law and GDPR.
 - f) what is the ground for dismissal of natural persons from the project? What is the security clearance requirements and how do they refer to regulated audit services?
 - g) (ii) is not relevant to audit services arising from the nature/scope of the service.
- 3.7. *Property of Principal* – Audit documentation cannot be Principal’s property. According to Law on audit services (Section 1, 34) all the audit documentation is the property of the Auditor;
- 3.11. *Compliance with laws* – audit services are provided based on audit law regulation (Law on Audit Services (Section 25, 28)), not the supra-national requirements having jurisdiction over the project;
- 3.15. *Visibility Requirements* – auditors do not in our audit reports make any references to any logos regarding EU co-financing. Law on audit services regulates work of the auditor and what information shall be included in audit report.
- 8.4. *Delivery and Acceptance* + 10.9., 10.11, 18.2. and 18.3. – audit report cannot be subject to delivery-acceptance deed if it complies with the law regulation. There might be situation, when auditor issues negative report, which client refuses to accept. Such situations cannot be subject to refusal of agreed fee payment. It arises from the nature of audit services, provided that auditor may issue an opinion with modifications, adverse opinion or disclaimer of opinion as this is regulated service and its independence cannot be affected by third parties (Section 25 of Law on audit services);

<ul style="list-style-type: none"> - Section IX Intellectual property rights. Articles 9.1.-9.13. - contradictory to Law on audit services (Section 1, 34), which states that all audit documentation is the property of the auditor (as already mentioned above); - Section X <i>Termination and Suspension</i> – the audit contract may be terminated only based on provisions of Law on audit services (Section 29) in case there is substantial reason, by informing respective regulatory body of such termination and reason behind. - 11.2. <i>Contractual Penalty</i> – Only applicable if the delay or breach is due to auditor’s fault, and not due to Client’s failure to provide necessary documentation needed for audit. The latter is not included in contract. Law on Audit Services (Section 28). - 13.5. <i>Certain Obligations on Termination of Agreement</i> – we cannot return and destroy all the information, as we need to keep audit documentation and files necessary for audit service provision according to Law on audit services (Section 34) for certain period of time, subject to confidentiality obligations. - Section XIV <i>Right to Audit</i> and Section XV <i>On-The-Spot-Visits</i> – such clause cannot be accepted. Auditors are strictly regulated by law and only supervisory authorities can execute such rights to audit based on law regulation and conditions. Law on Audit Services (Section 35.1, Chapter VIII, Chapter VIII1, Chapter IX. - 17.2. <i>Assignability</i> – contract on audit services cannot be assigned to any third party. Due to the nature of the Audit Service, which is provided to the client and client has responsibility towards auditor, incl., based on Law on Audit Services, which cannot be transferred to other party. - 17.4. <i>Notices</i> – E-mail communication also advised. - We believe that Declaration of Service Provider needs to be adjusted accordingly referring it only to audit services, by excluding all unrelated parts regarding other types of services. 	
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	We believe that Contract need also to be supplemented with the Personal data processing clauses in compliance with the General Data Processing Regulation (GDPR) and local law on Personal Data Processing.	
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Procurement commission chairperson



A. Benfelde

Interested supplier's comment/question	Answer to comment/ question
<p>3.1. General Obligations – the following sentence is not applicable to audit services, it arises from the nature/scope of the service. "The Service Provider shall develop and supplement the Scope of Service in consultation with the Principal with respect to identifying key dates, Deliverables, the underlying assumptions and any Necessary Consents."</p>	<p>Procurement commission indicates that Procurement commission has taken a decision and Annex No 9 "Draft contract" (hereinafter – Draft contract) of Regulations for open competition "Audit services for 2019-2021", ID No RBR 2019/8 (hereinafter – Regulations), including the Clause 3.1, will be amended.</p> <p>Please follow the upcoming information regarding the amendments in the Regulations.</p>
<p>3.2. Duty of care and Exercise of Authority – c) is not applicable to audit service. Our compliance with the law already prescribed in sub clause d). Arises from the nature/scope of the service.</p>	<p>Procurement commission indicates that Clause 3.2 of the Draft contract will not be changed. These points (obligations) are material. "c" mentions also information, documents, files provided, which should be according to standard.</p>
<p>3.3. Maintenance of Records and 3.4. Access to Documentation – Law on Audit Services stipulates the terms for keeping the records of audit files (Section 34 of law) – at least 5 years; and for Public Interest Entities – 6 years.</p>	<p>Procurement commission indicates that Clauses 3.3 and 3.4 of the Draft contract will not be changed.</p> <p>Signed Grant Agreements (Article II 27.2) stipulate that the Beneficiary shall keep all original documents, especially accounting and tax records, stored on any appropriate medium, including digitalized originals when they are authorized by their representative national law and under the conditions laid down therein, for a period of five years starting from the date of payment of the balance. Payment of the balance will happen 1 year after submission of final project report. Therefore, Contracting authority proposes 10 years as the term, when this obligation may expire.</p>
<p>3.5. Right to Sub-Contract and Staff –</p> <p>d) is in conflict with Labour Law provisions on discrimination (Labour Law Section 10, 33).</p> <p>e) what is the reason behind submitting personal ID information about our employees engaged in the project? What is the legal basis for such data processing within context of Personal Data Processing Law and GDPR.</p>	<p>Procurement commission indicates that in accordance with the Order of the Cabinet of Ministers Republic of Latvia No 21/1051-IP of May 26, 2018 RB Rail AS office premises, address Krišjāņa Valdemāra iela 8-7, Rīga, Latvia (hereinafter – office) are included into the list of a critical infrastructure. The owner or legal possessor of critical infrastructure shall ensure planning and implementation of security measures (National Security Law,</p>

<p>f) what is the ground for dismissal of natural persons from the project? What is the security clearance requirements and how do they refer to regulated audit services?</p> <p>g) (ii) is not relevant to audit services arising from the nature/scope of the service.</p>	<p>Section 222). Mitigation of information security risks is one of the key security priorities for RB Rail. To ensure this, there are organized physical and logical security measures for information systems, office infrastructure protection, security measures of documented information (classification of information, circulation, Restricted List, etc.) as well as is carried out personnel (incl. contractors) risk mitigations measures. The processing of personal data at RB Rail is carried out in accordance with external regulations. The company has a personal data protection specialist. Due diligence is only performed and ID information from service providers is requested when the person (employee or person appointed to perform the contract) requires physical access to critical infrastructure or restricted information. The security clearance (due diligence) requirement is not applied to all procurement cases.</p>
<p>3.7. Property of Principal – Audit documentation cannot be Principal’s property. According to Law on audit services (Section 1, 34) all the audit documentation is the property of the Auditor.</p>	<p>Procurement commission indicates that Procurement commission has taken a decision and Draft contract, including the Clause 3.7, will be amended.</p> <p>Please follow the upcoming information regarding the amendments in the Regulations.</p>
<p>3.11. Compliance with laws – audit services are provided based on audit law regulation (Law on Audit Services (Section 25, 28)), not the supra-national requirements having jurisdiction over the project.</p>	<p>Procurement commission indicates that Procurement commission has taken a decision and Draft contract, including the Clause 3.11, will be amended.</p> <p>Please follow the upcoming information regarding the amendments in the Regulations.</p>
<p>3.15. Visibility Requirements – auditors do not in our audit reports make any references to any logos regarding EU co-financing. Law on audit services regulates work of the auditor and what information shall be included in audit report.</p>	<p>Procurement commission indicates that Clause 3.15 of the Draft contract will not be changed as visibility requirement comes from signed Grant Agreement (Article II.7.1).</p>
<p>8.4. Delivery and Acceptance + 10.9., 10.11, 18.2. and 18.3. – audit report cannot be subject to delivery-acceptance deed if it complies with the law regulation. There might be situation, when auditor issues negative report, which client refuses to accept. Such situations cannot be subject to refusal of agreed fee payment. It arises from the nature of audit services, provided that auditor may issue an opinion with modifications, adverse opinion or disclaimer of opinion as this is regulated</p>	<p>Procurement commission indicates that Procurement commission has taken a decision and Draft contract, including the Clauses 8.4, 10.9, 10.11, 18.2 and 18.3, will be amended.</p> <p>Please follow the upcoming information regarding the amendments in the Regulations.</p>

<p>service and its independence cannot be affected by third parties (Section 25 of Law on audit services);</p>	
<p>Section IX Intellectual property rights. Articles 9.1.-9.13. - contradictory to Law on audit services (Section 1, 34), which states that all audit documentation is the property of the auditor (as already mentioned above).</p>	<p>Procurement commission indicates that Procurement commission has taken a decision and Draft contract, including the Section IX, will be amended.</p> <p>Please follow the upcoming information regarding the amendments in the Regulations.</p>
<p>Section X Termination and Suspension – the audit contract may be terminated only based on provisions of Law on audit services (Section 29) in case there is substantial reason, by informing respective regulatory body of such termination and reason behind.</p>	<p>Procurement commission indicates that Procurement commission has taken a decision and Draft contract, including the Section X, will be amended.</p> <p>Please follow the upcoming information regarding the amendments in the Regulations.</p>
<p>11.2. Contractual Penalty – Only applicable if the delay or breach is due to auditor’s fault, and not due to Client’s failure to provide necessary documentation needed for audit. The latter is not included in contract. Law on Audit Services (Section 28).</p>	<p>Procurement commission indicates that Procurement commission has taken a decision and Draft contract, including the Clause 11.2, will be amended.</p> <p>Please follow the upcoming information regarding the amendments in the Regulations.</p>
<p>13.5. Certain Obligations on Termination of Agreement – we cannot return and destroy all the information, as we need to keep audit documentation and files necessary for audit service provision according to Law on audit services (Section 34) for certain period of time, subject to confidentiality obligations.</p>	<p>Procurement commission indicates that Procurement commission has taken a decision and Draft contract, including the Clause 13.5, will be amended.</p> <p>Please follow the upcoming information regarding the amendments in the Regulations.</p>
<p>Section XIV Right to Audit and Section XV On-The-Spot-Visits – such clause cannot be accepted. Auditors are strictly regulated by law and only supervisory authorities can execute such rights to audit based on law regulation and conditions. Law on Audit Services (Section 35.1, Chapter VIII, Chapter VIII1, Chapter IX).</p>	<p>Procurement commission indicates that Section XIV Right to Audit and Section XV On-The-Spot-Visits of the Draft contract will not be changed.</p> <p>Signed Grant Agreement (Article II 9.1) stipulates that the Beneficiaries shall ensure that the Agency, the Commission, the European Anti-Fraud Office (OLAF) and the European Court of Auditors may exercise their rights under Article II.27 also towards the contractor.</p> <p>Article II.27 stipulates CHECKS, AUDITS AND EVALUATION.</p>
<p>17.2. Assignability – contract on audit services cannot be assigned to any third party. Due to the nature of the Audit Service, which is provided to</p>	<p>Procurement commission indicates that Procurement commission has taken a</p>

<p>the client and client has responsibility towards auditor, incl., based on Law on Audit Services, which cannot be transferred to other party.</p>	<p>decision and Draft contract, including the Clause 17.2, will be amended.</p> <p>Please follow the upcoming information regarding the amendments in the Regulations.</p>
<p>17.4. Notices – E-mail communication also advised.</p>	<p>Procurement commission indicates that Procurement commission has taken a decision and Draft contract, including the Clause 17.4, will be amended.</p> <p>Please follow the upcoming information regarding the amendments in the Regulations.</p>
<p>We believe that Declaration of Service Provider needs to be adjusted accordingly referring it only to audit services, by excluding all unrelated parts regarding other types of services.</p>	<p>Procurement commission indicates that Declaration of Service Provider (Annex H of the Draft contract) will not be changed.</p> <p>This is a material requirement for all contractors. It is not clear, what is meant by other types of services and which exactly other services the same company can provide, for example, by using children work or when human rights abuse is there.</p>
<p>We believe that Contract need also to be supplemented with the Personal data processing clauses in compliance with the General Data Processing Regulation (GDPR) and local law on Personal Data Processing.</p>	<p>Procurement commission indicates that Procurement commission has taken a decision and Draft contract will be amended. Personal data processing clauses will be included in the Draft contract.</p> <p>Please follow the upcoming information regarding the amendments in the Regulations.</p>