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COMMON PROCUREMENT STANDARDS AND GUIDELINES FOR THE RAIL BALTICA PROJECT



Co-financed by the European Union
Connecting Europe Facility

Policy Holder: Chief Procurement Officer
Responsible department: Procurement Department

APPENDIX 4: CONTRACTING AUTHORITY CODE OF CONDUCT

The Beneficiaries and Implementing Bodies are committed to engaging with their stakeholders

1. Legality:

- (a) Contracting Authorities shall abide by the national public procurement rules in all cases when they act in their capacity as contracting authorities within the meaning of national legislation where provisions of Article 2 of Directive 2014/24/EU Of The European Parliament And Of The Council Of 26 February 2014 On Public Procurement And Repealing Directive 2004/18/EC are transposed or contracting entities within the meaning national legislation where provisions of Article 3 of Directive 2014/25/EU Of The European Parliament And Of The Council Of 26 February 2014 On Procurement By Entities Operating In The Water, Energy, Transport And Postal Services Sectors And Repealing Directive 2004/17/EC are transposed.
- (b) Additionally, in the Inter-Beneficiary Agreement Between RB Rail AS, Ministry Of Economic Affairs And Communications Of The Republic Of Estonia, Ministry Of Transport Of The Republic Of Latvia And Ministry Of Transport And Communications Of The Republic Of Lithuania, dated 16 June 2016, the Beneficiaries have agreed that in those rare cases when national public procurement rules will not oblige Beneficiaries to procure goods, services or works in accordance with a regulated procedure, as well as those Implementing Bodies which are not contracting authorities, and if the anticipated value of a procurement exercise is equal to or exceeds EUR 40,000, excluding VAT, they shall procure supplies, services or works in accordance with the agreed procedure stated and/or referred to herein. The agreed procedure, minor adjustments to which may be required due to the particularities of the respective national laws, is based on the following principles (and appropriate applicable legal regulation):
 - (i) For performing procurement exercises, the relevant Contracting Authority establishes a procurement commission consisting of at least three members, ensuring that this commission is competent in the field of the procurement regarding which a contract is being entered into. The procurement commission, in fulfilling the duties thereof, is entitled to invite experts who are bound with the non-disclosure obligations and shall abide to the non-disclosure obligations and principles and obligations stemming from the applicable legislation and the Guidelines. Experts are internal staff members of Contracting Authorities, and where no such internal staff members are available due to time or resource constraints or other reasons, outsourcing is possible.
 - (ii) In case the procurement exercise to be performed is an exception from the regulated procedure under the respective national procurement law applicable to it, or based on such applicable national procurement law there is no requirement to form a procurement commission, the Contracting Authority shall form the procurement commission in the capacity of these regulations and the respective Contracting Authority's procurement policy. For the purpose of clarity, a procurement commission does not have to be formed for framework mini-tenders, central purchasing system e-catalogue purchases or procedures below 40 000 EUR, unless the applicable national procurement legislation stipulates otherwise.

- (iii) Contracting Authority must not be in a conflict of interest situation. Members of the procurement commission, experts and other persons who draft the procurement documentation must not be in a conflict of interest situation. The concept of conflict of interest is explained below in this document.
- (iv) The procurement commission determines justified and objective requirements in relation to the candidates, tenderers and the subject-matter of the procurement, ensuring that the requirements do not cause unjustified restrictions for competition in the procurement exercise. The procurement commission also determines the criteria to be taken into account in order to select the economically most advantageous tender. As a standard, the tender evaluation criteria shall not consider evaluation based on price only and any such instance must be objectively substantiated (such reasoning shall be recorded on file for audit purposes).
- (v) The relevant Contracting Authority publishes a notice regarding the planned contract to be procured on its website (and in appropriate informational system if required by applicable laws), specifying a reasonable deadline for the submission of tenders which is not less than 5 (five) days for simplified procedures and 10 (ten) days for anything above the national threshold from the day when the notice was published (the specified deadline must not be less than required by the applicable laws), unless the procurement exercise is an exception from regulated procedure according to the respective applicable national procurement law and/or a case of emergency as stipulated in the respective applicable national procurement law. The relevant Contracting Authority publishes the determined requirements together with publishing the respective notice regarding the planned contract to be procured and ensures free and direct access thereto.
- (vi) Unless prohibited or limited by the mandatory provisions of the national law, the relevant Contracting Authority excludes the candidate or the tenderer from participation in the procurement in any of the cases stipulated in the national public procurement legislation of the country of residence of the respective contracting authority.
- (vii) After the expiry of the deadline for the submission of tenders the procurement commission evaluates the submitted tenders and selects one or several tenders on the basis of the requirements set out by respective procurement exercise documentation. The procurement commission recognises that tenderer as the winner in the procurement exercise that was selected in conformity with the published requirements and criteria and was not excluded from the participation in the procurement process. In addition, the decision of the procurement commission about determining the winner in the procurement exercise includes information about all rejected candidates and tenderers and the reasons for rejection thereof, the tender prices submitted by all tenderers and the comparative advantages of the tenderer determined as the winner, to the extent to which such information formed the basis of the evaluation of the tenders. The process and requirements are more specifically stated in the relevant applicable national procurement law.
- (viii) The procurement contract may be amended taking into account the rules set in the respective applicable procurement law under which the contract was procured,

2. Best value for money:

- (a) The main contract award criterion shall be the most economically advantageous tender comprising of both the price or cost together with a mix of qualitative, environmental and/or social criteria, linked to the subject matter of the procurement. The award criteria of “lowest price” shall not automatically mean best value for money, as other elements must also be considered, such as, for example, quality of services or the service life of equipment.
 - (b) Price only will be used as a contract award criterion only as an exception in those cases when the technical specifications are clear and other award criteria are of no significance. All such exceptions must be objectively substantiated and such reasoning shall be recorded on file for audit purposes.
3. Socially and environmentally sustainable procurement:
- (a) Whenever the subject-matter of the procurement exercise allows so and where it would be beneficial to do so, insofar it is not prohibited by national legislation, Beneficiaries and Implementing Bodies should invoke social, environmental and sustainability aspects into discretionary exclusion grounds, award criteria and contract performance conditions in order to facilitate socially and environmentally sustainable procurement, including, *inter alia*, the incentivisation of applying recycled supplies/materials, re-use of supplies/materials/components, reduction of carbon footprint from construction waste, logistics, construction site management, or other valid sustainability and environmental requirements.
4. Free competition:
- (a) Contracting Authorities must ensure fair, equal and transparent competition of economic operators without discrimination due to the nationality or country of origin of the economic operators, without preference to a specific brand or trademark. The Contracting Authorities must ensure equal participation of economic operators from the Member States of the European Union and Member States to the Agreement on Government Procurement or other international agreements which are binding to the European Union and require it to ensure access to the procurements on par with suppliers from its Member States.
 - (b) Nevertheless, when local knowledge and experience is material to the subject-matter of the procurement exercise, Contracting Authorities may use criteria for qualitative selection of tenderers and award criteria which provide advantage to tenderers with specific local knowledge and experience.
 - (c) Whenever feasible and/or required by the applicable national procurement law, Contracting Authorities must conduct market research in order to determine whether the intended procurement requirements do not unduly restrict the competition.
 - (d) Contracting Authorities shall refrain from defining the level of requirements or characteristics of the subject-matter of a procurement exercise to the extent that may prejudice fair competition among the Tenderers.
5. Transparency:

- (a) Contracting Authorities shall strive to ensure that information about every procurement exercise within the Rail Baltica project is publicised in all States where the Rail Baltica project is being implemented, as a minimum by publishing relevant information on the web-page of the Contracting Authority respectively and the web-page of RB Rail AS.
- (b) Contracting Authorities shall draft the procurement documents, including the contract, in English and, if so required by the national legal acts, in their national languages. .
- (c) Contracting Authorities shall publish and make freely available to economic operators their annual procurement plans within 1 (one) month of their approval, as well as update the plans as needed. However, such annual procurement plans shall not preclude Beneficiaries and Implementing Bodies from announcing procurement exercises which are not included in the annual procurement plan if a need for such procurement arose unexpectedly and a Beneficiary or Implementing Body did not have time to update the annual procurement plan.
- (d) For the avoidance of doubt, transparency requirements shall not be interpreted in a way that could cause a business risk by making public confidential / business sensitive / public safety related information.

6. Absence of conflicts of interest:

- (a) Contracting Authorities shall take all necessary measures to prevent any situation where the impartial and objective implementation of the agreements with the Innovation and Networks Executive Agency (INEA) may be compromised. Contracting Authorities have undertaken not to procure goods, works and services from suppliers with which they have any conflict of interests, and to avoid to the maximum extent possible taking decisions on awarding of contracts for procurement of goods, works or services by persons who are in a conflict of interest situation.
- (b) The Contracting Authorities shall be in a conflict of interest situation with a supplier in any situation where a Contracting Authorities, their shareholder, member, member of the Management Board or Supervisory Board, or a person having the right to represent the candidate or tenderer in activities related to a subsidiary, a blood relative to the second degree or spouse or the first degree relative through marriage of any of the mentioned persons, or procurator or authorised person is:
 - (i) the supplier or the supplier's sub-contractor;
 - (ii) the beneficial owner, shareholder, member, member of the Management Board or the Supervisory Board, procurator or authorised person of the supplier or the supplier's sub-contractor;
- (c) The decision-shaping and decision-making persons shall be in a conflict of interest situation with a supplier in any situation where staff members of the Contracting Authority, or of a procurement service provider acting on behalf of the Contracting Authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of a procurement procedure.

- (d) The Contracting Authority shall not procure goods, works or services from suppliers with which they are in a conflict of interest situation, unless:
- (iii) The particular supplier provides the respective services on the basis of exclusive rights which derive from a law;
 - (iv) The contract is for procurement or lease of a land plot, existing building or structure or another immovable property or procurement of other rights in respect to such immovable property;
 - (v) It is a public contract between entities within the public sector in the meaning of national legislation where provisions of Article 12 of Directive 2014/24/EU Of The European Parliament And Of The Council Of 26 February 2014 On Public Procurement And Repealing Directive 2004/18/EC are transposed or a contract between contracting authorities in the meaning of Article 28, contract awarded to an affiliated undertaking in the meaning of Article 29 or a contract awarded to a joint venture or to a contracting entity forming part of a joint venture in the meaning of Article 30 of Directive 2014/25/EU Of The European Parliament And Of The Council Of 26 February 2014 On Procurement By Entities Operating In The Water, Energy, Transport And Postal Services Sectors And Repealing Directive 2004/17/EC are transposed.
- (e) The Parties shall ensure at least that members of the procurement commissions, experts and persons who draft procurement documentation are not:
- (i) The current or former beneficial owner, employee, member of the Management Board or Supervisory Board, shareholder, member, procurator or authorised representative of a legal person – candidate, tenderer or sub-contractor, and if this connection with the legal person has terminated within the last 24 months;
 - (ii) The father, mother, grandmother, grandfather, child, grandchild, adoptee, adopter, brother, sister, half-brother, half-sister or spouse (hereinafter – relative) of a beneficial owner, a shareholder who owns at least 10 per cent of shares, shareholder in a limited liability company, member of the Management Board or Supervisory Board, a person having the right to represent in activities related to a subsidiary, of a legal person – candidate, tenderer or sub-contractor; or
 - (iii) A relative of a natural person – candidate, tenderer or subcontractor.
- (f) The connection with a candidate or tenderer also shall apply to cases when the candidate or tenderer is an association of persons, members of which are natural persons or legal persons, with which the member of the commission, the expert or person who drafts the procurement documentation has the connection referred to above.
- (g) Contracting Authorities must evaluate whether a supplier has gained undue competitive advantage and therefore should be excluded from participation in a procurement procedure due to prior involvement of the respective supplier in the preparation of the procurement procedure due to participation in preliminary market consultations with the respective Contracting Authority, or otherwise. For the purpose of clarity, Contracting Authorities shall also evaluate any information that becomes known to them in relation with potential collusion or connection between

suppliers which may result in any particular supplier or group of suppliers gaining undue competitive advantage and the Contracting Authority shall assess whether the situation is possible to be remedied or whether the supplier(s) in question must be excluded from participation.

- (h) Contracting Authorities have a “zero tolerance” policy and do not accept any type of gift or any offer of hospitality. The Contracting Authorities will not accept any invitations to sporting or cultural events, offers of holidays or other recreational trips, transportation, or invitations to lunches or dinners at the cost of suppliers.
- (i) Contracting Authorities shall ensure that each member and invited expert of the relevant procurement committee signs a declaration on absence of conflict of interests upon taking up the responsibilities with respect to the particular procurement and re-confirms the absence of conflict of interests at the moment when all tenderers in the particular procurement exercise become known.
- (j) Additionally, Contracting Authorities must ensure that each person involved in the procurement procedure has an obligation at all times to immediately declare a conflict of interests situation once he/she realises such situation and any proceedings started against such person on the grounds of corruption or exerting illegal influence.
- (k) As a general rule, Contracting Authorities must terminate the relevant procurement procedure if it becomes known that a conflict of interests situation occurred or proceedings on the grounds of corruption or exerting illegal influence were started related to the particular procurement procedure and doubts about the objectivity of the tender documentation or decisions by the procurement committee cannot be eliminated by other means.
- (l) Any member of a procurement committee or an expert involved by the procurement committee shall be removed from his participation in the particular procurement exercise immediately with all access to such procurement exercise specific confidential and/or business sensitive information restricted.

7. Use of experts and preliminary market consultations:

- (a) The Contracting Authorities should to the maximum extent possible involve in the preparation of procurement documents appropriate experts, in particular – technical experts. Experts are internal staff members of Contracting Authorities, and where no such internal staff members are available due to time or resource constraints or other reasons, outsourcing is possible. Experts shall provide their knowledge and input in an independent manner, abiding by the non-disclosure obligations and principles and obligations stemming from the Guidelines.
- (b) Additionally, with the view of preparing the procurement and informing the economic operators, Contracting Authorities should as much as possible conduct preliminary market consultations with economic operators. In order to ensure that none of the economic operators receives undue competitive advantage due to such preliminary market consultations, Contracting Authorities must produce a written summary of such preliminary market consultations and make it publicly freely accessible.