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Our Ref: 1.13p/LV-2021-304

Electronic Procurement System

**Answers to questions from the interested supplier
in the open competition "Requirements Management Tool
supply, implementation and maintenance",
identification number RBR 2021/19**

RB Rail AS presents following answers to questions received from the interested supplier until 10 September 2021:

Nr.	Question	Answer
1.	<p>LIABILITY</p> <p>Liability cap for contractual penalties: Section 12 of the Annex 10 Draft Contract sets forth a contractual penalty of EUR 5000 per breach, but does not contain a cumulative cap for penalties. To be in line with the existing agreement, Section 12.1 has to contain the following wording as well: <i>The cumulative amount of any and all penalties payable by the Supplier to the Customer under this Agreement shall not exceed 10% (ten percent) of the total project fee stipulated in the Agreement.</i> Was a partial change intentional <u>or</u> is it still possible to align this agreement with the existing agreement?</p>	<p>The Procurement commission kindly explains that each agreement is adapted to the specific procurement procedure thus the application of the fixed contractual penalty of EUR 5`000 per occurrence without applying a total cap for contractual penalties under the draft Agreement of the open competition "Requirements Management Tool supply, implementation and maintenance", ID No RBR 2021/19, (hereinafter – Procurement) is intentional.</p> <p>Development and perfection of the agreement templates are a part of RB Rail AS ongoing effort to ensure compliance with developing market and legal practices. Please note that the services throughout the Agreement (and the associated costs) are of increasing value, without a quantifiable and identifiable total project fee at any particular time. Moreover, in accordance with the local market practice and the regulatory requirements, the 10% limit on contractual penalties is usually applied only in the case of an increasing penalty, which is not applied herein.</p>

		At the same time, the application of the contractual penalties is not an end in itself, RB Rail AS always actively engages in contract management to ensure all necessary assistance to exclude the potential risk of the application of contractual penalties.
2.	<p>LIABILITY</p> <p>Liability cap for damages: Section 12 of the Annex 10 Draft Contract reads as if there is no liability cap for damages. As this is not industry standard, we assume that the liability cap for damages in [...] Agreement (Annex 5: License Agreement) will apply. Can you confirm this is also your understanding? If so, is it possible to a reference to Annex 5 so there is no possible confusion?</p>	The Procurement commission kindly informs that the terms of Annex 5: License Agreement applied directly only to the extent the Agreement does not provide otherwise and provided that Annex 5: License Agreement conforms with the general spirit and meaning of the Agreement. In case of any discrepancies or conflicting provisions between the Agreement and Annex 5: License Agreement the provisions of the Agreement shall prevail. For the sake of clarity, it is envisaged that the terms of the Annex 5: License Agreement are applied only for the licenses issued by the Supplier to the Principal and the technical support, not the entire scope of the Agreement which includes training.
3.	<p>LIABILITY</p> <p>Liability in Data Protection Issues: Section 12 of the Annex 2 Personal Data Processing Agreement reads as [...] is exposed to uncapped liability in relation to the assignment of fines issued by a competent authority. Would you consider rephrasing the clauses for the avoidance of doubt? We can gladly provide you with alternative wording.</p>	The Procurement commission kindly indicates that the current wording is in line with the market practice and legal requirements, therefore the Procurement commission does not support any further amendments herein.
4.	<p>AUDIT</p> <p>Annex 10 Draft Contract Section 18 and 19 and Annex 2 Personal Data Processing Agreement Section 9:</p> <p>The audit rights seem to be very broad. [...] is a global software company and onsite audits are not industry practice. In addition, our approach has recently been endorsed by the European Data Protection Board i.e. audit rights fulfilled by way of third party audit reports. Would you reconsider rephrasing the clause in light of the foregoing? We can gladly provide you with alternative wording.</p>	As indicated in the Procurement commission's answers to potential suppliers' questions published on the Electronic Procurement System on 24 August 2021 (please see here: https://www.eis.gov.lv/EKEIS/Supplier/Procurement/60659) the possibility that such audits or on-the-spot visits as mentioned in the draft Agreement would ever happen and would ever be carried out is not likely, however, kindly note that this is an external requirement which in accordance with grant agreements from the Innovation and Networks Executive Agency RB Rail AS has to ensure. Considering mentioned above, amending the mentioned Clause is not acceptable.
5.	<p>USAGE DATA</p> <p>Section 3.5 of the Annex 2 Personal Data Processing Agreement seems to be contradicting our [...] Agreement (Annex</p>	The Procurement commission kindly asks to note that the collection of data is permitted to the extent such collection of data is essential for the functionality of the Software. Further

	<p>5: License Agreement) in terms of collecting Usage Data. [...], such collection is essential for the functionality of our product. Is it possible to change the wording of Section 3.5 or implement a conflict clause so that Annex 5 prevails? We can gladly provide you with alternative wording. (FYI Usage Data definition in the [...] Agreement: Usage Data" means such data or information as [...] may collect relating to Subscriber's installation, access or use of Products, Product features and functionality, Cloud Offerings (as defined in Exhibit F, Section 1(d)), Passports, Online [...] and other [...] services)</p>	<p>particular matters of the collection of data can be clarified by a written guidance of the Principal in accordance with Clause 3.5 of the Personal Data Processing Agreement.</p>
<p>6.</p>	<p>LANGUAGE CLARIFICATION</p> <p>Section 7.1 of the Annex 10 Draft Contract refers to the transfer of the administration rights of the software. Would you be able to elaborate on what those rights may be?</p>	<p>The Procurement commission indicates that under the Section 4.3 of the Annex 1 "Technical specification" of the Procurement regulations (hereinafter – Regulations) there is indicated that Contracting authority will have the full administration rights over the users/accounts and their access rights to the Requirements Management Tool. Considering this and other requirements stipulated in the Annex 1 "Technical specification" of the Regulations regarding the administration of the software, the Procurement commission kindly explains that with administration rights mentioned in the Clause 7.1 of the draft Agreement it is understood everyday administrative tasks performed by RB Rail AS to provide software users with a full opportunity to operate in the software and perform the tasks provided therein, e.g. migration of data from folder to folder, assigning new rights, etc.</p> <p>The Procurement commission assures that with the Clause in question it is not intended to change or restrict the potential supplier's own system administration rights.</p>
<p>7.</p>	<p>Will it be acceptable to add in additional rows to illustrate the costs separately for years 2 to 5?</p>	<p>From the question received the Procurement commission assumes that it concerns the Table A in the Annex 9 "Financial proposal form" Regulations. As costs indicated in the Table A mentioned before are considered as financial proposal that will be evaluated in accordance with the procedure stipulated in the Section 20.6 of the Regulations, adding the separate rows in the Table A would not be recommended.</p>
<p>8.</p>	<p>"Annex 1 – Technical Specification" has been mentioned in Annex 9 – p.1 and p.2.</p>	<p>The Procurement commission kindly indicates that the Annex 1 "Technical specification" of the</p>

<p>and also in Annex 8 – Technical proposal but is not available in the updated pack of documents with the current release of the RFP. Since it was part of the previous release, could you please confirm whether it is indeed applicable with the current set of documents as well and if this is the case, could you please provide it again to make sure that we are working on the correct content.</p>	<p>Regulations can be found as part of Regulations (pages 26-38) on Electronic Procurement System (https://www.eis.gov.lv/EKEIS/Supplier/Procurement/60659) as PDF file named “Nolikums/Regulations” and on Contracting authority’s website (https://www.railbaltica.org/tenders/requirements-management-tool-supply-implementation-and-maintenance-2/) as PDF file named “Regulations with amendments dated 24 August 2021”. It was not attached to procurement documentation as a separate file intentionally, as it is not intended to be filled in with information by potential supplier.</p>
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Sincerely,

Procurement commission chairperson / secretary

V. Ezergaile

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AND CONTAINS A TIME STAMP*