

Riga

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Our Ref: 1.13p/LV-2023-404

Electronic Procurement System

***An answer to the question from the interested supplier
in the open competition
"Mobile communications services in Latvia,
Lithuania and Estonia",
identification number RBR 2023/10***

RB Rail AS presents following answer to the question received from the interested supplier until 29th September 2023:

Nr.	Question	Answer
1.	Please see the question received in the Annex.	The Procurement commission has assessed the recommendations submitted by the interested supplier regarding the proposal evaluation criteria of the open competition "Mobile communication services in Latvia, Lithuania and Estonia", ID No RBR 2023/10, (hereinafter – Procurement), but decided not to change the criteria included in the Procurement regulations. The Procurement commission kindly indicates that these criteria have been carefully selected, considering the needs of the Contracting authority and following the guidelines "Desirable requirements/criteria to be included in the procurement of mobile and fixed communications" ¹ recommended by the Procurement Monitoring Bureau, as well as the case law available.

Sincerely,

Procurement commission chairperson

E. Saule

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¹ Please see here: <https://www.iub.gov.lv/lv/media/5262/download?attachment>

ANNEX

of the letter No 1.13p/LV-2023-404 dated 29th September 2023

QUESTION RECEIVED FROM THE INTERESTED SUPPLIER

[..] has reviewed the RB Rail AS (hereinafter – Customer) open procurement „*Mobile communications services in Latvia, Lithuania and Estonia*“ (hereinafter – Procurement) procedure regulations project (hereinafter – Regulations). Upon review, [..] suggests that the Regulations are amended and the criteria listed from point 1.1. to 1.9. be removed due to the considerations listed below.

1. The information on the quality indicators for mobile communications is published on the website of the Public Utilities Commission (hereinafter – Regulator) and is known in advance to the Customer and the tenderers. The evaluation of the procurement shall depend on the information provided by the tenderer only in those criteria for which no publicly available information is used or in which the offer made by all tenderers in a given criterion will not be predictably equal. The specifications for the Procurement contain evaluation of criteria for which the tenderers' tenders are predictably equal or for which information is publicly available so that tenderers have no real possibility of influencing their overall evaluation score with their offer. This indicates the formal nature of including this criterion in the Regulations and the favoring of a particular tenderer in the Procurement by selectively setting quality criteria.

2. The Procurement procedure is aimed at concluding an electronic communications services agreement, thus clause 20.1 of the Regulator's [Electronic Communications Subscription Agreement Terms](#)² is to be taken into account. This clause states that the merchant providing internet access service over a mobile electronic communications network shall specify the maximum (advertised) connection speed, which is the maximum connection speed actually available to the end-user. However, the Regulations do not provide a control mechanism and requirements for the selected tenderer to ensure the quality of mobile communications during the performance of the agreement in accordance with the quality indicators set out in the Procurement. The absence of sanctions in the Regulations for failure to maintain these indicators (termination of the agreement, significant penalties) indicates that ensuring the quality of service indicators in line with the Procurement requirements is in fact irrelevant to the Customer, and that their inclusion in the Regulations is merely a formality to give an advantage to a particular tenderer.

3. Section 9 of the [Rules on Quality Requirements for Electronic Communications Services](#)³ states that a merchant submitting a quality of service statement shall ensure that the service complies with the parameter values set out in the quality statement. The Regulations include an assessment of 4G download and upload speeds based on the quality of service values published on the Regulator's website, however the declared quality values do not specify in which mobile technology generation (2G, 3G, 4G, or 5G) the declared speed is to be achievable. This requirement is absurd and unlawful, as upload speeds of 300 Mbit/s to 1 Gbit/s on a 4G network are not realistically achievable.

It should be noted that publicly available measurements (such as [Speedtest](#)⁴) are not objective and cannot be used in the Procurement to assess quality of service parameters, as these measurements can be directly influenced by the electronic communications service providers themselves, by carrying out a large number of measurements at electronic communications network connection points of their choice, where the quality of service indicators are particularly good. The overall quality measurement results are thus affected and no longer reflect the actual experience of the users.

4. We note that [..] closely follows the current case law and guidelines of the competent authorities in the field of mobile communications, as well as carefully monitor that they are followed in public procurements. The provision of obvious advantages to a particular tenderer, as well as the evaluation of publicly available information, is contrary to case law. It is important for [..] that public procurement in the mobile communications sector is conducted in accordance with the fundamental principles of non-discrimination and openness, and that competition is not distorted, and [..] will continue to ensure that its legal interests are safeguarded.

Considering the above, please amend the Regulations by removing the criteria indicated from point 1.1. to point 1.9.

² <https://likumi.lv/ta/id/335942-elektronisko-sakaru-pakalpojumu-liguma-noteikumi>

³ <https://likumi.lv/ta/id/335935-elektronisko-sakaru-pakalpojumu-kvalitates-prasibu-noteikumi>

⁴ <https://www.speedtest.net/>