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Electronic Procurement System

Answers to questions from interested suppliers 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 interested suppliers until 24 August 2021:

Nr.	Question	Answer
1.	Agreement. Refers to article 4.6 [..] must provide Rail Baltica with certain personal data of the employees involved who will be working on the project. One of those data is a 'personal identification code (or equivalent personal identification information)'. It seems as if this refers to the citizen service number of the employees involved. However, [..] is not allowed to provide such personal data because of the GDPR. Could you clarify what Rail Baltica means with 'personal identification code (or equivalent personal identification information)'?	The Procurement commission indicates that depending on the country the national identification number of a natural person allows a third party to clearly identify a natural person, for example, national personal code/number or national insurance number. Considering that Rail Baltica has been granted the status of critical infrastructure, Principal (RB Rail AS) is entitled to obtain the relevant personal data and will process data in accordance with national laws and regulations. However, the Supplier must ensure that such personal data is transferred to Principal in accordance with the GDPR, i.e. obtaining the consent of the data subject to disclose the relevant data, etc. The legal basis for the transfer of data is the responsibility of the Supplier itself.
2.	Agreement. Refers to article 5.1 If [..] is unable to deliver its service (in time) ('impeded or delayed') due to Rail Baltica or a third party engaged by Rail	The Procurement commission indicates that, if the delay in the performance of the service will be caused by the act or omission of the Principal, the term of the Agreement will be

	Baltica, [..] must extend the service. However, there is no provision to pass on the costs for that extension to Rail Baltica. We suggest that [..] may pass on the costs of any extension to Rail Baltica, in the light of art. 5.1.	extended and the Supplier will not be subject to contractual penalties for delay, however compensation of any costs, if such would ever occur, occurring due to the impediment and delay of the service by the Principal or any third party engaged by the Principal is not foreseen.
3.	Agreement. Refers to article 6.2 Our billing system is based on monthly payment in arrears, both for consultancy services as for license costs. For licenses, it counts that our customers pay per active user per month. By an active user, we mean a user who has logged in at least once in a month in its [..] Environment and has opened a project Workspace. The price per active user depends on the customer's subscription. The customer can choose the level of your subscription himself according to the available tiers. These tiers consist of a minimum number of users that the customer is willing to pay for monthly. The higher the tier of his subscription and thus the minimum number of users, the lower the price per user. The monthly invoice consists of the minimum number of users that corresponds with the customer subscription. It is possible that, during a month, more users were active than this minimum number. In that case, these extra users are additionally charged (that month) at the price per user that corresponds with the customer's subscription tier. Are we allowed to invoice the licensing costs monthly in arrears?	The Procurement commission draws potential supplier's attention that the Principal has no intention and the draft Agreement does not envisage tying the Principal to the minimum number of licences and therefore the Principal does not guarantee the purchase of a minimum number of licenses. Additionally, considering the possible administrative burden for the management of the monthly invoices, the Procurement commission has decided not to amend the terms of the Agreement related the billing and payments.
4.	Agreement. Refers to article 12 There is no contractual limitation of liability for [..]. Liability for damage could therefore in theory be unlimited. In these kind of contracts, a (fair) limitation of liability is common. [..] is also obliged to limit liability as much as possible because of its own professional and business liability insurance. Is Rail Baltica willing to accept a fair limitation of liability, in addition to art. 12?	Considering the impact of possible breaches of the Agreement on the whole Rail Baltica project, it is not intended to introduce any specific limitation of the Suppliers liability.
5.	Agreement. Refers to article 12.1	The Procurement commission indicates that the Agreement currently provides a fixed

	If [..] violates material obligations, [..] must pay Rail Baltica a penalty of €5,000 per violation. This is not customary to include in a contract and may pose a significant risk for [..]. Is Rail Baltica willing to amend this article to: *"For violation of any material terms or deadlines provided in the Agreement, the violation of which was not due wholly or partially to the Principal's action or inaction, the Supplier pays a contractual penalty to the Principal in the amount of EUR 5 000 (five thousand euro) on case by case basis, up to an aggregate maximum of EUR 50.000 (fifty thousand euro) during the term of the Agreement."*?	amount for each material breach of the Agreement. The penalty is not increasing over time and is only applied once for each event of a breach.
6.	Agreement. Refers to article 16.4 [..] must pass on the *same* confidentiality clause to third parties involved in the execution of the agreement. Any parties involved are already bound by confidentiality, but not by *exactly the same* confidentiality clause. Is Rail Baltica willing to amend this article to: *"Whenever disclosure is permitted to be made pursuant to Clauses 16.3.1 or 16.3.3, the Supplier shall require that the recipient of Confidential Information be subject to an equivalent obligation of confidentiality as that contained in this Agreement."*?	The Procurement commission confirms that following Clause 16.4 of the Agreement the Supplier shall ensure that in any permitted disclosure event the recipient of the confidential information shall be subject to obligation of confidentiality equivalent to the obligation of confidentiality within the scope of the Agreement. However, terms of the Agreement will not be amended.
7.	Agreement. Refers to article 18.2 Rail Baltica has the right to have an audit carried out at [..]. However, it remains unclear whether [..] may charge the costs it incurs to Rail Baltica. May [..], pursuant to art. 18.2, charge the costs of an audit to Rail Baltica?	The Procurement commission indicates that the possibility that such audit would ever be carried out is very low, however compensation of such costs, if they would even arise, is not foreseen. Such risk should be included in the prosed contract price and covered by the Supplier itself.
8.	Data processing agreement (Annex No 2). Refers to article 6.2 Under this provision, [..] has the obligation to 'assist' Rail Baltica in fulfilling its obligations under the GDPR. We find this remarkable, because Rail Baltica itself, as the controller, has an obligation to ensure that it acts in accordance with the GDPR. We can however imagine that Rail Baltica needs help to set up the [..] Software correctly.	The Procurement commission indicates that Clause 6.2 of the Agreement requires for the Supplier to provide assistance, if such assistance would be reasonably requested by the Principal from time to time on separate occasions. This is normal market practice and as it does not require a regular and ongoing resource from the Supplier, the proposed amendments will not be included in the Agreement.

	But that should not mean that [..] also takes responsibility. Is Rail Baltica willing to amend this article to: *"If the Principal requires assistance to comply with its obligations in accordance with the GDPR, the Principal will provide such assistance at first request of the Principal. Such obligations may concern data security, notifications of data security incidents, data protection impact assessment and prior consultations. The Supplier must assist the Principal only to the extent that the privacy legislation sets requirements for the processor of personal data."?*	
9.	Data processing agreement (Annex No 2). Refers to article 12.1 This provision is not entirely clear to us. The reasonable solution would be that [..] is only liable to the extent that damage suffered by Rail Baltica is attributable to the fact that [..] does not comply with the GDPR. Is Rail Baltica willing to amend this article to: *"Principal shall be liable for the damage caused by processing which infringes the GDPR. Supplier shall be liable for the damage caused by processing only where it has not complied with obligations of the GDPR specifically directed to processors or where it has acted outside or contrary to lawful instructions of the Principal. For clarity: Supplier shall not be liable for damages (in whole or in part) related to acts or omissions of the Principal."*?	The Procurement commission indicates that the Agreement and Clause 12.1 of Annex 2 of the Agreement in its current wording does not apply any responsibility for the Principals actions (including responsibility for damages) to the Supplier. Therefore, the proposed amendments will not be included in the Agreement.
10.	We, [..], are kindly asking for an extension to your public tender request for Requirements Management Tool supply, implementation and maintenance, RBR 2021/19. Unfortunately it appears that [..] were not informed of the new release date of the tender. Because of ongoing European summer holiday period we unfortunately don't have all of the involved resources necessary for this process to deliver before September. Therefore we request for a few weeks extension allow us sufficient time to	The Procurement commission has evaluated the request for an extension of the deadline for the submission of proposals and has made a decision to extend the proposal submission deadline. Please pay attention that **new proposal submission deadline is 17 September 2021 till 15:00 (Riga time).** The specific Sections of the open competition regulations will be amended accordingly.

	provide an adequate response, could I suggest September 17th?	

Sincerely,

Procurement commission chairperson / secretary V. Ezergaile

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