

Warsaw, 16.01.2018

**To all participants in the proceeding,**

In relation to the request to clarify the content of the Tender Rules applicable to the proceeding for the Study on capacity improvement of the EEIG "North-Sea – Baltic Rail Freight Corridor" EZIG, I explain the following:

**Question 1:**

**Annex 4 Draft Contract § 11 "Contractual Penalties"**

In the Draft Contract the total amount of contractual penalties is set at 30% of the net remuneration. The resulting risks of the contractors is inadequate compared to the estimated contract value. We ask the contracting party therefore to lower the total amount of contractual penalties to 10% of the net remuneration in order to limit the resulting risks for the contractor to an adequate level.

**Answer 1:**

The Contracting party maintains the provisions specified in § 11 "Contractual Penalties" of the Draft Contract. A penalty of 30% of the net remuneration is charged in case of contract termination due to reasons attributable to the Contractor.

As stated in the Draft Contract: The Contracting Party will have the right to withdraw from the unexecuted part of the Contract in the following circumstances:

- seizure of the Contractor's property, which makes execution of the Contract impossible;
- when the total sum of the contractual penalties exceeds 29% of the net remuneration.

The maximum limit of contractual penalties is according to the above provisions not higher than 30% of net remuneration.

Please note that in accordance with § 6 para. 4 the Contractor will have received 50% of the remuneration already upon delivery of the intermediate report, which is to happen approximately in the middle of the timeline of the assignment.

**Question 2:**

**Annex 4 Draft Contract § 13 "Warranty"**

In the Draft Contract the liability of the contractor is not limited. The resulting risks of the contractors is inadequate compared to the estimated contract value. We ask the contracting party therefore to limit the liability of the contractor to 10 times of the net remuneration in order to limit the resulting risks for the contractor to an adequate level.

**Answer 2:**

The warranty refers to defects arisen in the documentation after the Final Acceptance Report. The Contracting Party, in exercising the rights under the warranty, may demand removal of defects within a specified time limit, within the net remuneration received by the Contractor.

In case of delay in the removal of faults in the warranty period the Contracting Party shall charge 0,02% of the net remuneration per each commenced day of delay, within the indicated warranty period of 36 months from the date of Final Acceptance Report. In the worst case scenario this results in a maximum level of these contractual penalties of 21,9% (365x3x0,02%).

In reference to art. 13 point 6 of the Draft Contract the Contracting party agrees to limit the Contractor's liability for damages incurred by the Contracting party to the proposed 10 times of the net remuneration.

**Question 3:**

**Annex 4 Draft Contract § 11 and 13**

It is not specified in the draft contract if potential contractual penalties will be credited to the liability. We ask the contracting party to specify in the draft contract that potential contract penalties are credited to the maximum liability of the contractor.

**Answer 3:**

Due to the fact that the Contracting party does not require the Contractor to provide the policy for the conclusion of the insurance contract, the maximum liability of the Contractor shall not be limited to maximum amount of their respective insurance coverage.

**Question 4:**

**Tender Rules 14 "Place, Date, and Method of Bid Submission"**

As the tender is not only governed by European law, but also by Polish law, we need further time to evaluate the legal conditions of the tender and therefore ask the contracting party to extend the deadline of bid submission by two weeks until 16.02.2018.

**Answer 4:**

The Contracting party agrees to extend the deadline of bid submission by two weeks until 16.02.2018. till 4:00 p.m. local time. Bids must be submitted in printed format to the Contracting party. Bids in electronic format will not be received.

**Question 5:**

**Annex 4 Draft Contract Annex No. 6 to the Contract "Excerpts of the Grant Agreement"**

In Annex 6 it is specified that "other relevant provisions of the Grant Agreement that are necessary for implementation of the Action may also apply". As these provisions are not provided in the tender documents the contractors would need to accept provisions unknown to them which is an inadequate risk for contractors. We ask the contracting party therefore to confirm that all relevant provisions for the execution of the tendered contract are provided in the tender documents and eliminate the said sentence.

**Answer 5:**

The Contracting party confirms that only provisions listed in Annex No. 6 to the Draft Contract will apply to the Contractor. The sentence will be eliminated in Annex 6 to the Contract. Please be aware that paragraph II.7 VISIBILITY OF UNION FUNDING has been added.

**The Contracting party makes the following changes to the content of the Tender Rules in this proceeding:**

1. The following provisions of the Tender Rules shall change:

**Article 14 Place, date and method of bid submission**

Point 1 is replaced by the following:

14.1. The bid must be submitted at the seat of the Contracting party EEIG "North Sea - Baltic Rail Freight Corridor" EZIG 03-734 Warsaw, 74 Targowa Str., within the deadline:

by 16.02.2018. until 04:00 p.m. local time

Point 3 is replaced by the following:

14.3 The bid should be submitted in a non-transparent envelope secured against opening to the following address:

**Weronika Karbowskiak  
EEIG "North Sea – Baltic Rail Freight Corridor" EZIG  
03-734 Warsaw, 74 Targowa Str.  
and described as follows:**

**"Request for proposal for  
a study on capacity improvement  
of the EEIG "North Sea – Baltic Rail Freight Corridor" EZIG"**

**Opening of proposals: 19.02.2018 at 10:00 a.m. local time**

2. The following provisions of the Draft Contract shall change:

**Article 13 Warranty**

Point 6 is replaced by the following:

13.6 Independent of the entitlements set forth in § 13.4-5, the Contracting Party is entitled to demand redressing the damage incurred which will be limited to 10 times of the net remuneration.

**Annex No. 6 to the Contract - Experts from the Grant Agreement**

Annex No. 6 is replaced by the following:

**Excerpts of the Grant Agreement**

INEA is referred to as "Agency" and the EEIG is referred to as "beneficiary".

**§ II.3 – LIABILITY FOR DAMAGES**

- II.3.1** The Agency shall not be held liable for any damage caused or sustained by any of the beneficiaries, including any damage caused to third parties as a consequence of or during the implementation of the action.
- II.3.2** Except in cases of force majeure, the beneficiaries shall compensate the Agency for any damage sustained by it as a result of the implementation of the action or because the action was not implemented or implemented poorly, partially or late.

**§ II.4 - CONFLICT OF INTERESTS**

- II.4.1** The beneficiaries shall take all necessary measures to prevent any situation where the impartial and objective implementation of the Agreement is compromised for reasons involving economic interest, political or national affinity, family or emotional ties or any other shared interest ("conflict of interests").
- II.4.2** Any situation constituting or likely to lead to a conflict of interests during the implementation of the Agreement shall be notified to the Agency, in writing, without delay. The beneficiaries shall immediately take all the necessary steps to rectify this situation. The Agency reserves the right to verify that the measures taken are appropriate and may require additional measures to be taken within a specified deadline.

## **§ II.5 – CONFIDENTIALITY**

- II.5.1** The Agency and the beneficiaries shall preserve the confidentiality of any information and documents, in any form, which are disclosed in writing or orally in relation to the implementation of the Agreement and which are explicitly indicated in writing as confidential.
- II.5.2** The beneficiaries shall not use confidential information and documents for any reason other than fulfilling their obligations under the Agreement, unless otherwise agreed with the Agency in writing.
- II.5.3** The Agency and the beneficiaries shall be bound by the obligations referred to in § s II.5.1 and II.5.2 during the implementation of the Agreement and for a period of five years starting from the payment of the balance, unless:
- (a) the party concerned agrees to release the other party from the confidentiality obligations earlier;
  - (b) the confidential information becomes public through other means than in breach of the confidentiality obligation through disclosure by the party bound by that obligation;
  - (c) the disclosure of the confidential information is required by law.

## **§ II.7 – VISIBILITY OF UNION FUNDING**

### **II.7.1 Information on Union funding and use of European Union emblem**

Unless the Agency requests or agrees otherwise, any communication or publication related to the action, made by the beneficiaries jointly or individually, including at conferences, seminars or in any information or promotional materials (such as brochures, leaflets, posters, presentations, etc.), shall indicate that the action has received funding from the Union and shall display the European Union emblem.

When displayed in association with another logo, the European Union emblem must have appropriate prominence.

The obligation to display the European Union emblem does not confer to the beneficiaries a right of exclusive use. The beneficiaries shall not appropriate the European Union emblem or any similar trademark or logo, either by registration or by any other means.

For the purposes of the first, second and third subparagraphs and under the conditions specified therein, the beneficiaries are exempted from the obligation to obtain prior permission from the Agency to use the European Union emblem.

### **II.7.2 Disclaimers excluding Agency responsibility**

Any communication or publication related to the action, made by the beneficiaries jointly or individually in any form and using any means, shall indicate that it reflects only the author's view and that the Agency is not responsible for any use that may be made of the information it contains.

## **§ II.8 – PRE-EXISTING RIGHTS AND OWNERSHIP AND USE OF THE RESULTS (INCLUDING INTELLECTUAL AND INDUSTRIAL PROPERTY RIGHTS)**

### **II.8.1 Ownership of the results by the beneficiaries**

Unless stipulated otherwise in the Agreement, ownership of the results of the action, including industrial and intellectual property rights, and of the reports and other documents relating to it, shall be vested in the beneficiaries.

### **II.8.2 Pre-existing industrial and intellectual property rights**

Where industrial and intellectual property rights, including rights of third parties, exist prior to the conclusion of the Agreement, the beneficiaries shall establish a list which shall specify all rights of ownership and use of the pre-existing industrial and intellectual property rights and disclose it to the Agency at the latest before the commencement of implementation.

The beneficiaries shall ensure that they or their affiliated entities have all the rights to use any pre-existing industrial and intellectual property rights during the implementation of the Agreement.

### **II.8.3 Rights of use of the results and of pre-existing rights by the Agency**

Without prejudice to § s II.1.1, II.3 and II.8.1, the beneficiaries grant the Agency the right to use the results of the action for the following purposes:

- (a) use for its own purposes, and in particular, making available to persons working for the Agency, Union institutions, other Union agencies and bodies and to Member States' institutions, as well as copying and reproducing in whole or in part and in unlimited number of copies;
- (b) distribution to the public, and in particular, publication in hard copies and in electronic or digital format, publication on the internet, including on the Europa website, as a downloadable or non-downloadable file, broadcasting by any kind of technique of transmission, public display or presentation, communication through press information services, inclusion in widely accessible databases or indexes;
- (c) translation;
- (d) giving access upon individual requests without the right to reproduce or exploit, as provided for by Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents;
- (e) storage in paper, electronic or other format;
- (f) archiving in line with the document management rules applicable to the Agency;
- (g) rights to authorise or sub-licence the modes of exploitation set out in points (b) and (c) to third parties.

Additional rights of use for the Agency may be provided for in the Special Conditions.

The beneficiaries shall warrant that the Agency has the right to use any pre-existing industrial and intellectual property rights, which have been included in the results of the action. Unless specified otherwise in the Special Conditions, those pre-existing rights shall be used for the same purposes and under the same conditions applicable to the rights of use of the results of the action.

Information about the copyright owner shall be inserted when the result is divulged by the Agency. The copyright information shall read: "© – [year] – [name of the copyright owner]. All rights reserved. Licensed to the Innovation and Networks Executive Agency under conditions."

## **§ II.9 – AWARD OF CONTRACTS NECESSARY FOR THE IMPLEMENTATION OF THE ACTION**

**II.9.1** Where the implementation of the action requires the procurement of goods, works or services, the beneficiaries shall award the contract to the tender offering best value for money or, as appropriate, to the tender offering the lowest price. In doing so, they shall avoid any conflict of interests.

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 § II.27 also towards the contractor.

**II.9.2** Beneficiaries acting in their capacity of contracting authorities within the meaning of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts or contracting entities within the meaning of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors shall abide by the applicable national public procurement rules.

**II.9.3** The beneficiaries shall retain sole responsibility for carrying out the action and for compliance with the provisions of the Agreement. The beneficiaries shall ensure that any procurement contract contains provisions stipulating that the contractor has no rights vis-à-vis the Agency under the Agreement.

**II.9.4** The beneficiaries shall ensure that the conditions applicable to them under § s II.3, II.4, II.5 and II.8 are also applicable to the contractor.

**II.9.5** Where, in accordance with § 3(a), the grant takes the form of the reimbursement of eligible costs:

- If a beneficiary breaches any of its obligations under § II.9.1, the costs related to the contract concerned shall be ineligible;
- If a beneficiary breaches any of its obligations under § II.9.2, II.9.3 or II.9.4, the grant may be reduced in proportion to the seriousness of the breach of obligations.

Where, in accordance with § 3(b), (c) or (d) the grant takes the form of a unit, lump sum or flat-rate contribution, if a beneficiary breaches any of its obligations under § II.9.1, II.9.2, II.9.3 or II.9.4, the grant may be reduced in proportion to the seriousness of the breach of obligations.

## **§ II.27 – CHECKS, AUDITS AND EVALUATION**

### **II.27.1 Technical and financial checks, audits, interim and final evaluations**

The Commission or the Agency may carry out technical and financial checks and audits in relation to the use of the grant. It may also check the statutory records of the beneficiaries for the purpose of periodic assessments of lump sum, unit cost or flat-rate amounts.

Information and documents provided in the framework of checks or audits shall be treated on a confidential basis.

In addition, the Commission or the Agency may carry out interim or final evaluation of the impact of the action measured against the objective of the Union programme concerned, in order to assess whether the objectives, including those relating to environmental protection, have been attained.

Checks, audits or evaluations made by the Commission or the Agency may be carried out either directly by its own staff or by any other outside body authorized to do so on its behalf.

Such checks, audits or evaluations may be initiated during the implementation of the Agreement and for a period of five years starting from the date of payment of the balance. This period shall be limited to three years if the maximum amount specified in § 3 is not more than EUR 60 000.

The check, audit or evaluation procedure shall be deemed to be initiated on the date of receipt of the letter of the Commission or the Agency announcing it.

### **II.27.2 Duty to keep documents**

The beneficiaries shall keep all original documents, especially accounting and tax records, stored on any appropriate medium, including digitalized originals when they are authorized by their respective national law and under the conditions laid down therein, for a period of five years starting from the date of payment of the balance.

This period shall be limited to three years if the maximum amount specified in § 3 is not more than EUR 60 000.

The periods set out in the first and second subparagraphs shall be longer if there are on-going audits, appeals, litigation or pursuit of claims concerning the grant, including in the case referred to in § II.27.7. In such cases, the beneficiaries shall keep the documents until such audits, appeals, litigation or pursuit of claims are closed.

### **II.27.3 Obligation to provide information**

The beneficiaries shall provide any information, including information in electronic format, requested by the Commission or the Agency or by any other outside body authorized by it in the framework of a check, audit or evaluation.

In case a beneficiary does not comply with the obligations set out in the first subparagraph, the Commission or the Agency may consider:



- (a) any cost insufficiently substantiated by information provided by the beneficiary as ineligible;
- (b) any unit, lump sum or flat-rate contribution insufficiently substantiated by information provided by the beneficiary as undue.

#### **II.27.4 On-the-spot visits**

During an on-the-spot visit, the beneficiaries shall allow Commission or Agency staff and outside personnel authorized by the Commission or the Agency to have access to the sites and premises where the action is or was carried out, and to all the necessary information, including information in electronic format.

They shall ensure that the information is readily available at the moment of the on-the-spot visit and that information requested is handed over in an appropriate form.

In case a beneficiary refuses to provide access to the sites, premises and information in accordance with the first and second subparagraphs, the Commission or the Agency may consider:

- (a) any cost insufficiently substantiated by information provided by the beneficiary as ineligible;
- (b) any unit, lump sum or flat-rate contribution insufficiently substantiated by information provided by the beneficiary as undue.

#### **II.27.5 Contradictory audit procedure**

On the basis of the findings made during the audit, a provisional report (“draft audit report”) shall be drawn up. It shall be sent by the Commission or the Agency or its authorized representative to the beneficiary concerned, which shall have 30 days from the date of receipt to submit observations. The final report (“final audit report”) shall be sent to the beneficiary concerned within 60 days of expiry of the time limit for submission of observations.

#### **II.27.8 Checks and inspections by OLAF**

The European Anti-Fraud Office (OLAF) shall have the same rights as the Commission and the Agency, notably right of access, for the purpose of checks and investigations.

By virtue of Council Regulation (Euratom, EC) No 2185/96<sup>1</sup> of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities and Regulation (EU) No 883/2013<sup>2</sup> of the European Parliament and the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OLAF may also carry out on-the-spot checks and inspections in accordance with the procedures laid down by Union law for the protection of the financial interests of the Union against fraud and other irregularities.

<sup>1</sup> OJL 292, 15.11.1996, p.2

<sup>2</sup> OJL 248, 18.09.2013, p.1

Where appropriate, OLAF findings may lead to recovery by the Agency. They may also lead to criminal prosecution under national law.

#### **II.27.9 Checks and audits by the European Court of Auditors**

The European Court of Auditors shall have the same rights as the Agency and the Commission, notably right of access, for the purpose of checks and audits".

**The remaining provisions of the Tender Rules and Annexes do not change, and the changes introduced above should be treated as only binding.**

*Włodzisław Kombrat*