



Warsaw, 14.01.2019

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 Rail Freight Corridor North Sea – Baltic, please find below the following explanations:

Question 1:

The RfP is specifically focused on the analysis for 740m long trains. Is this indeed the basis for the analysis or can the proposal include other suggestions to increase capacity?

Answer 1:

The focus of the study is on the analysis of long trains (740 m).

Question 2:

In WP3 you indicate that measures for 740m long trains have been identified in national studies by IM's. Can you give a further indication of the scope, extent and format (reports/drawings/GIS data) of these results that will be made available?

Answer 2:

In the Work Package 3 the Contractor should describe infrastructure or operational measures necessary to remove bottlenecks which are not covered by already decided or planned investment projects (those remaining bottlenecks should be known as a result of the analysis made in the Work Package 2).

If in the existing studies those measures have been already identified input will be delivered by IMs, therefore the consultant may expect to receive finalized list of identified bottlenecks/list of measures (identification of where best to extend sidings) + investment costs (not the raw data).

Question 3:

Can you change the payment conditions as follows:

- 50% after the kick off meeting
- 30% after the intermediate report
- 20% after the final report

Answer 3:

The Contracting party maintains the payment conditions as specified in Article 6 of the Draft Contract.

Question 4:

Client Reference letters tend to be relatively late and are not generally available for ongoing projects. Can you change the requirement with regard to evidence as follows:

- executing during the last five years before the deadline of submission of the bid, at least 2 (two) studies in the scope of rail operations with a description of the value, object, date of execution, and the entities for which the services were performed with the attachment of evidence that the service was executed properly.

Answer 4:

The Contracting party agrees to change the provisions specified in Article 6 of the Tender Rules regarding the requirement of studies executed from three to five years as suggested above.

Question 5:

With regard to Annex 5 to the Tender Rules:

- a. Can you confirm that a yes/no answer is adequate with regard to the question on experience in participating in at least 2 studies in rail operations? (answering this question with a number of years does not seem appropriate).
- b. Should "proficiency" be read as "proficient user"?
- c. Can we distinguish between categories C1 and C2 for proficient users? (In line with the Common European Framework of Reference for Languages)

Answer 5:

The Contracting party confirms as follows:

- a. yes/no answer is appropriate in Annex 5 table with regard to the question on experience in participating in at least 2 studies in rail operations; studies should be described in the CV of the team member in order to prove their relevancy;
- b. yes, "proficiency" will be read as "proficient user";
- c. yes, the Contractor may distinguish between C1 and C2 in line with the Common European Framework of Reference for Languages.

Question 6:

With regard to the draft contract can you make the following changes:

- a) § 9 item 2 - Documentation should be complete in terms of the objective as is described in the Contract.

Answer 6 a:

The Contracting party agrees to precise the provisions of § 9 item 2 of the Draft Contract by replacing phrase 'the objective which it is intended for' with 'the objective as described in the Contract', as the Terms of Reference which describes the objective of the study constitutes Annex to the Contract.

- b) § 11 item 2 - Please delete this clause

Answer 6 b:

The Contracting Party understands on the basis of the following questions where § 11 item 3 is indicated but § 11 item 1 subitem 3 is cited, that request refers to § 11 item 1 subitem 2:

In case of termination of the Contract for reasons attributable to the Contractor - 30% of the net remuneration specified in § 6.1.1 of the Contract.

The Contracting party maintains the provisions specified in § 11 item 1 subitem 2 of the Draft Contract.

If § 11 item 2 is meant:

The Contracting Party may pursue general damages exceeding the amount of the contractual penalty, when the damage incurred exceeds the amount of the accrued contractual penalties.

- the Contracting party also maintains the provisions specified in § 11 item 2 of the Draft Contract.

- c) § 11 item 3 - for delay in the removal of faults found in the warranty period - in the amount of 0.02% of the net remuneration specified in § 6.1.1 of the Contract, for each commenced day of delay, counted from the expiry of the between Parties agreed on time limit set for the removal of the fault;

Answer 6 c:

The Contracting party understands that § 11 item 1 subitem 3 is meant as quoted in request for clarifications. The Contracting party agrees to change the provisions specified in § 11 item 1 subitem 3 of the Draft Contract as suggested above by specifying that the time limit is agreed between the Parties.

- d) § 11 item 4 - Please delete this clause

Answer 6 d:

The Contracting party understands that § 11 item 1 subitem 4 is meant:

For delivering the electronic version of documentation that differs in any substantive respect from its counterparts in paper form - 0.2% of the net remuneration specified § 6.1.1 of the Contract, for each identified discrepancy.

The Contracting party maintains the provisions specified in § 11 item 1 subitem 4 of the Draft Contract.

If § 11 item 4 is meant::

The Contracting Party may withhold the enforcement of contractual penalties for the delay in the execution of the individual stages, referred to in § 11.1.1 if the Contractor submits to the Contracting Party a guarantee of payment of contractual penalties. The Contractor shall obtain the approval of the content of the guarantee by the Contracting Party prior to its submission. If the Contractor performs the subject matter of the Contract within the time limit specified in the Contract, then the Contracting Party may waive the enforcement of the contractual penalty.

- the Contracting party also maintains the provisions specified in § 11 item 4 of the Draft Contract.

- e) § 11 item 5 - Please delete this clause

Answer 6 e:

The Contracting party understands that § 11 item 1 subitem 5 is meant:

For any delay in the removal of defects in the documentation found at the time of receipt / indicated in the Minutes - 0.2% of the net remuneration for each part of the procurement, for each commenced date of delay in relation to the date indicated by the Contracting Party.

The Contracting party maintains the provisions specified in § 11 item 1 subitem 5 of the Draft Contract.

If § 11 item 5 is meant:

Contractual penalties may be charged independently of one another.

- the Contracting party also maintains the provisions specified in § 11 item 5 of the Draft Contract.

- f) § 11 item 6 - The total amount of the charged contractual penalties, specified in § 11.1, shall not exceed 10% of the net remuneration specified in § 6.1.1.

Answer 6 f:

The Contracting party maintains the provisions specified in § 11 item 6 of the Draft Contract.

As an explanation please note that a penalty of 30% of the net remuneration is the maximum limit of contractual penalties charged, as after reaching this threshold the Contract is to be terminated.

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.

- g) § 12 item 2 - Please delete subitem 2)

Answer 6 g:

The Contracting party maintains the provisions specified in § 12 item 2 subitem 2 of the Draft Contract describing the condition of withdrawal from the unexecuted part of the Contract.

- h) § 12 item 3 - Please delete this clause. The withdrawal should be submitted 30 days of the date of the contract.

Answer 6 h:

The Contracting Party maintains the provisions of § 12 item 3.

A statement of withdrawal referred to in § 12 item 2 may be submitted within 30 days from the date of becoming aware of the circumstances giving rise to withdrawal from the Contract.

Simultaneously, the Contracting party changes the provision of § 12 item 2: period of 30 days of the date of the Contract to withdraw from the unexecuted part is replaced with the 12 months period – the duration of the Contract performance.

Therefore a statement of withdrawal as indicated in § 12 item 3 may be submitted within 30 days from the date of becoming aware of the circumstance giving rise to withdrawal from the Contract; within 12 months duration of the Contract's performance.

- i) § 13 item 1 - The Contractor is liable towards the Contracting Party for defects in the documentation being the subject of the Contract reducing its value or usefulness in view of the purpose indicated in the Contract ~~and resulting from the purpose of the documentation.~~

Answer 6 i:

The Contracting party agrees to change the provisions specified in § 13 item 1 of the Draft Contract by deleting “and resulting from the purpose of the documentation”, as suggested above.

- j) § 13 item 2 - The Contractor provides warranty for defects in the documentation, which constitutes the whole subject of the Contract, for a period of 12 months from the date referred to in § 13 item 3.

Answer 6 j:

The Contracting party agrees to change the provisions specified in § 13 item 2 of the Draft Contract, regarding the period of warranty from 36 months to 12 months as suggested above.

- k) § 13 item 4 - In case of receiving incomplete or defective documentation, the Contracting Party, in exercising the rights under the warranty, may demand removal of defects within a time limit agreed on between the Parties set by him, irrespective of the amount of related costs, within the net remuneration.

Answer 6 k:

The Contracting party agrees to change the provisions specified in § 13 item 4 of the Draft Contract as suggested above, by specifying that the time limit is agreed between the Parties.

- l) § 13 item 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 3 times of the net remuneration.

Answer 6 l:

The Contracting party agrees to change the provisions specified in § 13 item 6 of the Draft Contract, regarding redressing damages from 10 times to 3 times of the net remuneration as suggested above.

Question 7:

§ 19 add:

- a) To the maximum extent permitted by law, the total liability of Contractor under or in connection with the Agreement, whether in contract, tort, negligence or for breach of statutory duty or otherwise, shall be limited to the total amount of three times the fee actually received by Contractor under the Agreement, provided always that the total liability of Contractor shall not exceed in aggregate € 1,000,000 (one million Euros).

Answer 7 a:

As stated in answers 6f and 6k, the total liability of the Contractor:

- is limited to 3 times of the net remuneration with regard to redressing damages;
- shall not exceed 30% of the net remuneration of contractual penalties.

In reference to the above mentioned provisions, total liability of the Contractor resulting from the Contract is lower than proposed amount of € 1,000,000 (one million Euros). For this reason, the Contracting party does not agree to add the provision proposed above.

- b) Neither party hereto shall have any liability to the other for any lost revenues, lost profits, cost of capital, or any special, indirect, consequential or punitive damages suffered, sustained, paid by the other party hereto or any third party.

Answer 7 b:

The Contracting party does not agree to add the provisions stated above.

- c) Where a sum due under the Agreement is not paid in full by the final date for payment and no effective notice to withhold payment has been given, Contractor shall, by giving seven (7) days written notice to the Contracting Party, be entitled to withhold delivery of any documents and reports it is required to deliver to the Contracting Party as part of the services and/or suspend the services until all outstanding payments have been made in full. Contractor reserves the right to refuse to exercise any (further) services at any time based upon an unfavorable client credit report, to be determined at Contractor’s sole and reasonable discretion.

Answer 7 c:

The Contracting party does not agree to add the provisions stated above. Payment conditions are described in the Contract and Tender Rules and are dependant on the approval of the documentation delivered. In case of any delay in payment, the Contractor has the right to charge interests in accordance with § 6 item 14 and § 6 item 15 of the Contract.

- d) Each party will have the right to early terminate the Agreement upon a thirty (30) days written notice if the other party materially breaches or defaults in its obligations under this Agreement unless before the end of the thirty (30) days period the breaching party has cured the default or breach and so notified the other party stating the manner of the cure. Termination of the Agreement shall not prejudice or affect the accrued rights or claims of either party to the Agreement.

Answer 7 d:

The Contracting party does not agree to add the provisions stated above as the rules of withdrawal from the Contract are strictly listed in the Contract. Regardless of the provisions of the Contract, on the basis of the national regulations in cases specified in the Public Procurement Act and the provisions of the Civil Code, the Contractor has the right to withdraw from the Contract.

Question 8:

With regard to Annex 5 to the contract can you make the following revision to § 3?:

1. The obligation of confidentiality shall not apply, or shall cease to apply, to Information which **the Contractor** can show to the **Contracting Parties’** reasonable satisfaction:
 - a. that it is, or becomes generally available to the public other than as a direct or indirect result of the Confidential Information being disclosed by the Recipient in breach of this Agreement; or
 - b. was already lawfully known to the Recipient before it was disclosed by the Discloser; or
 - c. has been received by the Recipient from a third Party source that is not connected with the Discloser and that such source was not under any obligation of confidence in respect of that Confidential Information.

2. The obligation of confidentiality of the Information does not apply to a situation where the obligation to make them available to third parties results from the applicable legal regulations and such persons request the **Contractor** to provide them.
3. **The Contractor** is obliged to promptly inform the **Contracting Party** of the request referred to in sec. 1 above, unless such disclosure is prohibited under applicable law or the decision of the authority requesting access to the Information.
4. Informing the **Contracting Party**, referred to in sec. 2 above, should be made as far as possible before the Information is made available to the person authorized to request access to it.

Answer 8:

The Contracting party agrees to change the provisions of § 3 of Annex 5 to the Draft Contract by adding item 1 a, b, c, as suggested above.

Question 9:

Can you share the Grant Agreement so that we may check the exceptions in Annex 6?

Answer 9:

All relevant provisions compulsory for the Contractor are indicated in Annex 6 to the Draft Contract. The Contracting party confirms that the remaining provisions of the Grant Agreement will not affect the Contractor.

Question 10:

Please specify the scope of analyzes for particular countries other than Poland and separately for Poland. In the tender documentation, it was stated that the Contracting party has data on the ability to run trains with a length of 740m for the countries BE, NL, DE, CZ and outsource such analysis only for Poland. Referring to the budget allocated by the Contracting party for the implementation of the task and the specificity of the work of the railway, different for each of these countries, we ask you to enter the provisions regarding the execution of analyzes only for Poland. Having experts in the railway industry separately for each country is difficult to meet, and only such a solution would enable the execution of the order at a high substantive level.

Answer 10:

The scope of the analysis is the same for each Infrastructure Manager and is described in the Terms of Reference. The only difference is the source of the data: for most of the IMs relevant studies have already been executed and the results will be shared; raw data regarding Polish infrastructure is to be analyzed by the Contractor. For the other countries the contractor only has to consolidate the received information (no analysis is needed). It is up to the Consultant to propose a common methodology for the study. In case additional data is needed it can be provided by the specific IM (BE, NL, DE, CZ).

The Contractor's role will be also to standardize the way of displaying the results for all the IMs. The division of costs among the Contractor and its subcontractors or with the Consortium is up to the Contractor.

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

The following provisions shall change:
Tender Rules

Article 6.3

Within the scope of the condition specified in 6.3, the Contractor is required to indicate:

- executing during the last three years before the deadline of submission of the bid, at least 2 (two) studies in the scope of rail operations with a description of the value, object, date of execution, and the entities for which the services were performed with the attachment of evidence that the service was executed properly.

For the description of the value of services expressed in currencies other than EUR, the average exchange rate published by the National Bank of Poland from the first working day of the month of the notice of the proceedings should be taken.

Evaluation of meeting the condition indicated in Article 6.3. will be based on documents submitted by the Contractor:

- a list of orders performed, including the subject matter of the order, the dates of execution and the recipients of the services, and the documents confirming that the services had been duly executed (prepared in accordance with Annex 4 to the Tender Rules).

is replaced by:

Within the scope of the condition specified in 6.3, the Contractor is required to indicate:

- executing during the last five years before the deadline of submission of the bid, at least 2 (two) studies in the scope of rail operations with a description of the value, object, date of execution, and the entities for which the services were performed with the attachment of evidence that the service was executed properly.

For the description of the value of services expressed in currencies other than EUR, the average exchange rate published by the National Bank of Poland from the first working day of the month of the notice of the proceedings should be taken.

Evaluation of meeting the condition indicated in Article 6.3. will be based on documents submitted by the Contractor:

- a list of orders performed, including the subject matter of the order, the dates of execution and the recipients of the services, and the documents confirming that the services had been duly executed (prepared in accordance with Annex 4 to the Tender Rules).

Draft Contract

§ 9 item 2

Documentation should be complete in terms of the objective which it is intended for.

is replaced by:

Documentation should be complete in terms of the objective as is described in the Contract.

§ 11 item 1 subitem 3

For delay in the removal of faults found in the warranty period - in the amount of 0.02% of the net remuneration specified in § 6.1.1 of the Contract, for each commenced day of delay, counted from the expiry of the time limit set for the removal of the fault.

is replaced by:

For delay in the removal of faults found in the warranty period - in the amount of 0.02% of the net remuneration specified in § 6.1.1 of the Contract, for each commenced day of delay, counted from the expiry of the time limit agreed between Parties set for the removal of the fault.

§ 12 item 2

The Contracting Party will, within 30 days of the date of this Contract, have the right to withdraw from the unexecuted part of the Contract in the following circumstances:

- 1) seizure of the Contractor's property, which makes execution of the Contract impossible;
- 2) when the total sum of the contractual penalties exceeds 29% of the net remuneration specified in § 6.1.1 of the Contract;

is replaced by:

The Contracting Party will, within 12 months of the date of this Contract, have the right to withdraw from the unexecuted part of the Contract in the following circumstances:

- 1) seizure of the Contractor's property, which makes execution of the Contract impossible;
- 2) when the total sum of the contractual penalties exceeds 29% of the net remuneration specified in § 6.1.1 of the Contract.

§ 13 item 1

The Contractor is liable towards the Contracting Party for defects in the documentation being the subject of the Contract reducing its value or usefulness in view of the purpose indicated in the Contract and resulting from the purpose of the documentation.

is replaced by:

The Contractor is liable towards the Contracting Party for defects in the documentation being the subject of the Contract reducing its value or usefulness in view of the purpose indicated in the Contract.

§ 13 item 2

The Contractor provides warranty for defects in the documentation, which constitutes the whole subject of the Contract, for a period of 36 months from the date referred to in § 13.3.

is replaced by:

The Contractor provides warranty for defects in the documentation, which constitutes the whole subject of the Contract, for a period of 12 months from the date referred to in § 13.3.

§ 13 item 4

In case of receiving incomplete or defective documentation, the Contracting Party, in exercising the rights under the warranty, may demand removal of defects within a time limit set by him, irrespective of the amount of related costs, within the net remuneration.

is replaced by:

In case of receiving incomplete or defective documentation, the Contracting Party, in exercising the rights under the warranty, may demand removal of defects within a time limit agreed on between the Parties, irrespective of the amount of related costs, within the net remuneration.

§ 13 item 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.
is replaced by:

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 3 times of the net remuneration.

Annex 5 to the Draft Contract, § 3

1. The obligation of confidentiality of the Information does not apply to a situation where the obligation to make them available to third parties results from the applicable legal regulations and such persons request the **Contractor** to provide them.
2. **The Contractor** is obliged to promptly inform the **Contracting Party** of the request referred to in sec. 1 above, unless such disclosure is prohibited under applicable law or the decision of the authority requesting access to the Information.
3. Informing the **Contracting Party**, referred to in sec. 2 above, should be made as far as possible before the Information is made available to the person authorized to request access to it.

is replaced by:

1. The obligation of confidentiality shall not apply, or shall cease to apply, to Information which **the Contractor** can show to the **Contracting Parties’** reasonable satisfaction:
 - a. that it is, or becomes generally available to the public other than as a direct or indirect result of the Confidential Information being disclosed by the Recipient in breach of this Agreement; or
 - b. was already lawfully known to the Recipient before it was disclosed by the Discloser; or
 - c. has been received by the Recipient from a third Party source that is not connected with the Discloser and that such source was not under any obligation of confidence in respect of that Confidential Information.
2. The obligation of confidentiality of the Information does not apply to a situation where the obligation to make them available to third parties results from the applicable legal regulations and such persons request the **Contractor** to provide them.
3. **The Contractor** is obliged to promptly inform the **Contracting Party** of the request referred to in sec. 1 above, unless such disclosure is prohibited under applicable law or the decision of the authority requesting access to the Information.
4. Informing the **Contracting Party**, referred to in sec. 2 above, should be made as far as possible before the Information is made available to the person authorized to request access to it.

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