



HELLENIC REPUBLIC ASSET
DEVELOPMENT FUND

Project: Privatization of National Ports

Tender: 67% participation in the share capital of the Piraeus Port Authority SA

Phase: First Phase (pre-qualification phase)

Date: April 4th 2014

Subject: Answers to Requests for Clarifications

Number: 1

Question 1

(Technical Expert Member and Third Party Supporter for technical eligibility (Borrowed Experience))

"1. In para.5.4 of the Invitation for EoI, it is provided that "5.4 For the purposes of this Section 5, an Interested Party (whether acting singly or as a Member of a Consortium) may rely on the financial capacities of an Affiliate (as defined below) (a "Third Party Supporter") in order to demonstrate fulfillment of the Financial Eligibility Criterion, but only if that Interested Party is able to demonstrate to the Fund that it will have at its disposal the resources necessary by producing an express and appropriately unqualified undertaking by the Third Party Supporter to that effect. In such case, the Interested Party must procure the delivery to the Fund and in connection with the Third Party Supporter of all Supporting Documents as would have been applicable to it had the Third Party Supporter been an Interested Party (or member thereof), in the same form and at the same times as applicable to an Interested Party and provided at all times that the Third Party Supporter is a person that would be entitled to participate in the Process in accordance with Section 3 (Right to Participate-Individuals, Legal Entities & Consortia). The financial resources of a person or entity identified as a Third Party Supporter, as verified in accordance with Sections 5.1, 5.2 and 5.3 (as applicable to that Third Party Supporter's status and circumstances), may be allocated partly in support of its own participation in the Process (if it is an Interested Party, whether individually or as Member of a Consortium) and/or partly in support of another participant invoking the Third Party Supporter's financial strength, provided that such financial resources may not be taken into consideration in duplicative manner. For purposes of this Section 5.4 an "Affiliate" means in relation to an Interested Party or Consortium member, any other person which, directly or indirectly, is in control of, or controlled by, or is



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under common control with, the Interested Party or Consortium member (and for the purposes of this definition, “**control**” means the power: (i) to vote or direct the voting of more than 50% of the voting rights of such person; and/or (ii) to direct or cause the direction of the management of such person, whether by contract or otherwise).”.

2. In section 6.2, it is provided that:

“6.2 Section 5.4 shall apply mutatis mutandis in respect of the Interested Party’s (or, in the case of a Consortium, the Technical Expert Member’s) ability to rely on a Third Party Supporter’s technical expertise in order to demonstrate compliance with the Technical Eligibility Criteria; provided however that, for purposes of this Section 6.2:

6.2.1 A single Third Party Supporter must demonstrate satisfaction of all Technical Eligibility Criteria; and

6.2.2 The Third Party Supporter must be an Affiliate of the Interested Party or, if the Interested Party is a Consortium, an Affiliate of the Technical Expert Member. For the avoidance of doubt, a Third Party Supporter pursuant to Section 5.4 and a Third Party Supporter pursuant to this Section 6.2 may be different persons”.

3. From the above provisions, it follows that there is different treatment between the case of financial eligibility (§ 5.4) and the case of technical eligibility (§ 6.1.3), notwithstanding that section 6.1 refers also to section 5.4. In particular, with regards to technical eligibility, the Third Party Supporter should only be a single entity which meets the entirety of the technical eligibility criteria and moreover should be an undertaking related to the Interested Party or, if the Interested Party is a Consortium, an undertaking related to the Technical Expert Member.

4. By interpretation, it could also be argued, contrary to the established case law of the European Courts having taken the exact opposite view, that the technical eligibility criterion required under section 6 of the Invitation for EoI would not be satisfied by a company which, as a parent company, does not itself execute the works or services required, but such (works or services) are performed by its subsidiaries, as separate legal entities, provided that it is specifically evidenced that the means of such subsidiaries are made available to the parent company.

5. Based on the above, it is necessary that the Invitation for EoI be clarified – supplemented, and in particular:

(a) Regarding section 6.2.2 of the Invitation for EoI and given the requirements of section 6.1.1, according to which, in order for the condition of technical eligibility to be met, the activities mentioned therein should refer to two container terminals in two different



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countries, an almost total inability to meet the requirements is created for companies which are globally active in the management of port facilities, given that, consistently with the relevant market practice worldwide, such companies employ, for their international business activities, special purpose entities (SPE), which are established and operated under the laws of the country in which they develop their activities, as normally required by the terms of procurement for the management of port facilities by the competent authorities of each country. For example, according to the Invitation for EoI of 2008 for the concession of the port facilities of Piers II and III of the Container Terminal of PPA S.A., PPA required that COSCO Pacific Limited (CPL) establish a Special Purpose Company to be founded and operated in accordance with the laws of Greece. The exactly similar arrangements apply to all activities of CPL in China and several other countries. It becomes evidently clear from the above, which constitutes the norm for the relevant international practices, that most probably no company has direct activity of operating itself container terminals in two different countries, but only through related special purpose entities. From the text of the Invitation for EoI, it appears that the company, of which a special purpose entity is an affiliate, would not be considered to meet the required technical eligibility criteria.

(b) The above issue has been repeatedly addressed by the Court of Justice of the European Union (CJEU, formerly ECJ). In response to a request for a preliminary ruling by the Italian courts in Case C-94/12 (28.2.2013), it is stated in recital (20) of the Opinion of the Advocate General that “[t]he wording of Articles 47(2), 48(3) and 52 of Directive 2004/18 codify settled case-law of the Court relating to earlier public procurement directives. In *Ballast Nedam Groep I*, the Court concluded that a holding company which does not itself execute works may not, because its subsidiaries which carry out works are separate legal persons, be precluded on that ground from participation in public works contract procedures if it could establish that it actually has available to it the resources of the subsidiaries necessary for carrying out the contract”. The Court accepted the Advocate General’s Opinion in its related Judgment on 10.10.2013 and ruled that a national legislation provision (let alone a tender notice provision) restricting the number of persons on the capacities of which an economic operator may rely in accordance with articles 47 and 48 of Directive 2004/18, is contrary to such Directive and Community law in general.

(c) The CJEU has reached a similar conclusion in examining the same issue in Case 389/92 (14.4.1994), in connection with which it has held that a parent company, which does not itself execute any works, may not be disqualified on the ground that its subsidiaries are separate legal persons. The possible argument that the present tender relates to a transfer (sale) of shares and, thus, the EU and national public procurement rules are not applicable, is not accurate because such matter is associated with the aim of achieving a higher degree of competition and, therefore, in accordance with the principles which are *mutatis mutandis* applicable to all kinds of public tenders. Moreover, the fact that the present tender relates



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to sale and purchase of shares is consistent with the flexibilization of the conditions of technical eligibility of the purchaser, as it should be accepted that the company under acquisition possesses in itself the technical expertise for the execution of works being the object of such company. (footnote: In the Invitation to Submit an Expression of Interest for the sale of 100% of shares of TRAINOSE S.A., no technical eligibility criteria are required for purposes of the prequalification.)

6. In view of the above, and for the avoidance of any problems during the process of expression of interest, and given the little time remaining for the preparation of the dossiers, a clarifying – supplementary notice (Invitation for EoI) should be issued, by which it will be clarified that: a company shall be deemed to meet the required technical eligibility criteria in itself when two at least of its affiliates fulfill the required conditions; in addition, that a Third Party Supporter for technical eligibility may act complementary to the Technical Expert Member of a Consortium, and may be more than one, complementary one to another; and, finally, that it may rely on the capacities of, by contracting with, a third party having the requisite skills, which shall be deemed to be the Third Party Supporter for purposes of the technical eligibility criteria.”

Answer 1

In response to this query, we clarify that an Interested Party, a Technical Expert Member (or, in the case of a joint venture, a member of the Technical Expert Member) may each rely on and invoke the combined technical capacities of respective Affiliates for the purpose of evidencing satisfaction of the Technical Eligibility Criteria pursuant to Section 6 of the Invitation for the Expression of Interest (the “IEoI”). For the avoidance of doubt, each of the foregoing entities, as well as (if applicable) a Third Party Supporter may, in turn, rely on the technical capacities of its respective subsidiaries. The IEoI states, that, amongst other, an entity over which a person has “control”, as construed in accordance with Section 5.4 of the IEoI, will qualify as a subsidiary (and consequently, also as an Affiliate). By way of contrast, technical expertise that is made available solely on a contractual basis is not sufficient.

Question 2

(Technical Expert Member / Joint venture of two port operators)

“According to para.6.1.3 of the Invitation for EoI “[...] In case of a Consortium, the Technical Eligibility Criteria must be fulfilled at least by one Member that has a participation of over 20% in the Consortium (a “Technical Expert Member”). The Technical Expert Member can either be an individual Member or a joint venture of two operators, provided that each such operator forming a joint venture fulfils one of the Technical Eligibility Criteria referred to in Section 6.1.1 and further provided that such operators provide a joint declaration



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satisfactory to the Fund stating that for the purposes of the Process, they are acting in concert as if they were one single party”.

In relation to the above term of the Invitation for EoI, it is noted from a literal interpretation thereof that in case of a Joint Venture of two port operators for the constitution of the Technical Expert Member of a Consortium, it is necessary that each of such two members **fully** meet one of the criteria of para. 6.1.1, i.e., that each of the two members have operated, for instance, for the last three (3) years at least two (2) terminals in at least two countries with a combined annual traffic of at least one and a half (1.5) million TEU for all terminals and at least one container terminal with an annual traffic of 750,000 TEU or more. In other words, in such case double technical expertise is required compared to the case where the Technical Expert is an individual Member and not a Joint Venture of two operators.

By reason of the fact that we consider that from the purposive interpretation of the said EoI term, no intention of distinct treatment arises in respect of the two cases, but, obviously, it is a matter of typographical error, we kindly request that it be clarified that, in the event the Technical Expert Member constitutes a joint venture of two port operators, such port operators must meet **jointly and cumulatively** one of the criteria of paragraph 6.1.1, both with regard to the geographical criterion and the qualitative criterion (throughput volume).”

Answer 2

As regards Section 6.1.3, we can clarify that if, in respect of a Consortium, the Technical Expert Member is a joint venture of two operators, then each such operator is required to demonstrate that it satisfies singly and in full the technical capacity requirements corresponding to the activity relevant to it.

Exceptionally, if: (i) both such operators propose to invoke technical capacity deriving from the same type of activity amongst those envisaged in any one of paragraphs (a), (b) or (c) of Section 6.1.1; and (ii) such operators are Affiliates by reference to one another, then such two operators are required to fulfill jointly, the technical capacity requirements corresponding to their single common activity. In such latter case, each of the operators that are Affiliates and engage in the same type of activity must operate at least one of the minimum of two terminals required to operate in two different countries pursuant to Section 6.1.1 in order to jointly fulfill the requirements of paragraph (a), (b), or (c), as the case may be.

Question 3

Section 9.1.4 (i) (bottom page 14) makes reference to a "confirmation of accreditation in respect of the standard / norm envisaged in Section 6.1.5 . . . ". I cannot find the referred Section 6.1.5 anywhere in the Invitation document. Could you please clarify for me if this is a



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typo and / or point me to location of the relevant section referred?

Answer 3

The cross-reference made in Section 9.1.4 (i) of the Invitation for the Expression of Interest ("IEoI") to Section 6.1.5 of the IEoI should be read as a cross-reference to Section 6.1.3 of the IEoI instead.

Question 4

Section 9 makes a distinction between the authorized representative of the Interested Party (or Interested Party's Representative) AND the "Procedure Agent appointed by the Interested Party". Could this "procedure agent" role be conducted by our Interested Party's representative? Or is it required that these two roles are conducted by two different persons?

Answer 4

The same individual may be appointed to act in the capacity of representative of an Interest Party under Section 3.4 of the IEoI and as procedure agent under Section 9.1.1 (viii) of the IEoI, provided that he/she is required to be appropriately authorized to discharge the duties of both roles.

Question 5

Who do we need to certify the documents?

Answer 5

Documents must be certified in accordance with the rules of the jurisdiction in which such documents are produced. Copies of the above documents may be certified in accordance with the rules of either the jurisdiction in which such documents are produced or the Hellenic Republic.

Question 6

Regarding section 9.7 – we are assuming we do not need to convert our audit financial statements into € euros as currently in GBP.

Answer 6

Audited financial statements need not be converted into Euro (€). However when stating figures of "equity", as defined in the IEoI, these should be provided in their original currency and in Euro (€), together with an indication of the exchange rate applied. For the avoidance of doubt, a similar approach may be used for "active and un-invested/uncommitted funds or



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the sum of assets under management” and “available, liquid and unencumbered financial assets”, as defined in the IEoI.

Capitalized terms have the meaning ascribed to them in the Invitation for the Expression of Interest, unless the context indicates otherwise.