WHEEL PROFILE MEASURING SYSTEM PILOT

between
ProRail and […]

Regarding the leasing of a wheel profile measuring system with option to purchase
2024 - 2025

dated …..

CONCEPT

The parties**:**

The private limited company **ProRail B.V.**, with its registered office and principal place of business at Moreelsepark 3, Utrecht, Chamber of Commerce number 30124359, duly represented by Mr J.J.M.J. Cayet, Technical Innovation Director and Mr B. el Hammadi, Asset Management Director, hereinafter called "**ProRail**",

and

[name Contractor], a [legal form Contractor] with its registered office in [place of registered office] and maintaining offices at [address] [place], [Chamber of Commerce number], duly represented by [name and position], hereinafter called "**Contractor"**,

hereinafter jointly called the "**Parties**",

Whereas:

a. ProRail implements the 'Wheel Profile Measurement System' pilot in collaboration with NS;
b. this pilot will test a new system at one location on one track that will carry out wheel profile measurements that will frequently measure the cross-sectional profile of the wheels and thus enable early or abnormal wear to be detected;
c. by carrying out the above pilot, incidents such as unstable running of NS double-deck trains and damage to points can be prevented in the future and maintenance or replacement of wheels can be better predicted;
d. ProRail has a need in that context for the use of a measurement system consisting of sensors (hereinafter called a wheel profile measurement system) and providing data to a predetermined data platform, as described in more detail in the Requirements (Annex 3 of the Tendering Guidelines);
e. to meet this need, ProRail wishes to lease the wheel profile measurement system from Contractor;
f. to this end, ProRail wishes to enter into an operational lease agreement, in which arrangements regarding the related service provision by Contractor will also be laid down;
g. ProRail wishes to obtain an Option to Purchase, enabling ProRail to acquire ownership of the Product, specifically the Wheel Profile Measurement System along with all peripheral equipment, at the end of the lease period;
h. ProRail has organised a national tendering procedure in accordance with Part II of the ARN2016 for this purpose and, on the basis of Contractor's offer in that tendering procedure, ProRail has decided to award the assignment to Contractor;
i. a "waiting room agreement" has been concluded with the tenderer that finished second, which will come into effect if this present agreement ends on the grounds of termination by ProRail due to a breach by Contractor;
j. the Parties to give effect to this need enter into this operational lease agreement with option to purchase and wish to set out herein rights and obligations between them.

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The Parties enter into an agreement subject to the conditions below.

1. Definitions

1.1 In addition to the definitions in the Purchasing Conditions, the following capitalised terms have the following meanings in the Contract Documents:

Tender Procedure	:	The tendering procedure as referred to in recital g of this Contract Document.
Tender	:	The tender as submitted by Contractor, consisting of its entire submission to the Tendering Procedure.
All-in	:	Note to an amount expressing that the amounts to which this note applies include all (additional) costs to perform the agreed assignment.
Contract Documents	:	The documents referred to in Article 4.1 of this document.
Third Party	:	A market party contracted by ProRail.
Service	:	The service as referred to in Article 2.1 of this Contract Document.
Document	:	This document
Purchasing Conditions	:	The Purchasing Conditions 2017 of ProRail B.V. (version V2.3 dated 7 September 2023)
Milestone Date	:	The date designated as such in the Agreement and intended to be a deadline by which a particular product or service must be delivered by Contractor.
Assignment	:	The assignment as referred to in Article 2 of this Document and as it appears from the documents in the Tendering Procedure.
Option	:	The right of ProRail to unilaterally establish a purchase agreement regarding the Product through a declaration
Agreement	:	The entirety of agreements between the Parties as set out in the Contract Documents.
Product	:	The system and all peripheral equipment as defined in the Requirements.
Requirements	:	The Tender Specifications called 'Requirements' from the Tendering Procedure with appendices, including the Schedule of Requirements.
Verification	:	The demonstration by Contractor to ProRail that the Product to be supplied by it meets the Requirements in accordance with the provisions of Article 8 of this Document.

2. Nature and subject matter of the Agreement and scope

2.1 The Parties have agreed that ProRail will temporarily lease the Product from Contractor, including service and maintenance, whereby Contractor will temporarily lease the Product to ProRail, as well as that Contractor will support ProRail in the installation and removal of the Product. The assignment is described in more detail in the Requirements (Annex 1 of the tendering guidelines), which assignment the Contractor hereby accepts, to the extent not deviated from in this Agreement. For that purpose, the Parties conclude this Agreement, to which the provisions regarding the lease of movable property in Sections 7:201 to 7:230 Dutch Civil Code apply, to the exclusion of the other provisions of Title 4, Book 7 of the Dutch Civil Code. The Parties hereby envisage the model of operational lease.

2.2 The purpose of this Agreement is to provide ProRail with the right to use the Product. Contractor remains the owner of the Product. ProRail is prohibited from disposing of, pledging or otherwise

CONCEPT

encumbering, leasing or using the Product for any purpose other than that for which it is intended. Contractor will make the Product available to ProRail and by signing the Contract declares that the Product complies with the conditions of the Requirements.

2.3 The scope of the Agreement thus broadly consists of the following components, which are detailed in the Requirements attached to the Agreement:
a. delivery of the measurement system consisting of sensors;
b. data delivery from the sensors to a predetermined data platform;
c. service, maintenance and repair or replacement of the measuring system during the term of the Agreement.

2.4 Contractor agrees to be accompanied by ProRail personnel during the installation, removal, repair and replacement of the Product by Contractor.

2.5 Contractor will carry out the installation, calibration and disconnection of the Product also during repair and any replacement, thereby providing support to ProRail or the Third Party to be appointed by ProRail so that the Product is properly installed and functions properly in order to perform the Agreement. Contractor will also provide explanations of the system's operating instructions and regulations. ProRail or a Third Party to be designated by ProRail will return the Product to the Contractor in reasonable condition after disconnection by the Contractor.

2.6 Contractor remains at all times responsible and/or liable for the functioning of the Product and the performance of the Agreement, unless the non-functioning of the Product is a direct consequence of intent and/or gross negligence on the part of ProRail. The functioning of the Product will be monitored by Contractor. If the Product no longer functions as intended in the Agreement, Contractor will immediately report this to ProRail and provide an appropriate solution.

3. Ownership, operation, maintenance, repair and option to purchase.

3.1 The Product is and will remain the property of Contractor. ProRail is not entitled to change the nature, purpose or design of the Product, unless otherwise agreed in writing.

3.2 The Product is intended for ProRail's own use. ProRail will, as a good lessee, take care of the Product in accordance with its designated use and will not surrender it to third parties for (joint) use, under any name whatsoever, with the exception of third parties to be deployed for installation and de-installation and data science, as notified to Contractor in good time, in order to enable the use envisaged for ProRail at the time of entering into this Agreement.

3.3 ProRail will maintain the Product in a good condition. Contractor will provide ProRail with all necessary information and support to properly maintain the Product.

3.4 All repairs, periodic inspections and replacement of parts will be at Contractor's expense. ProRail will not be obliged to carry out or have carried out repairs to the Product itself, unless otherwise agreed in writing.

3.5 Regardless of the nature of the damage or defect, the Parties are mutually obliged to inform each other immediately upon discovery thereof. Contractor will repair the damage or defects discovered or reported to it within a reasonable period, appropriate to the nature of the damage or defect, in order to minimise the impact of the damage or defect on ProRail's intended use.

3.6 If, as a result of damage, defects and/or due to or in connection with repairs as mentioned in Article 3.5 of this Document, the Product is not fully available for more than 10% of the initial term referred to in Article 5.1 of this Document, the term of this Agreement will be extended by the duration of the repairs less 10% of the aforementioned initial term, without the Contractor being entitled to additional compensation for the extension.

3.7 ProRail reserves the right to unilaterally invoke an Option during the term specified in Article 5.1, whereby the Product will be purchased and acquired in ownership by ProRail at the end of the lease period. The Parties agree that if ProRail invokes the Option at the end of the lease period:

CONCEPT

- the Product will not be removed by the Contractor;
- the Contractor shall unconditionally transfer ownership of the Product and all rights and licenses associated with the use of the Product, including any warranty claims and other rights for defect remediation, free from third-party rights, to ProRail.

3.8 If ProRail wishes to exercise the (option) right mentioned in Article 3.7, ProRail will inform the Contractor of this in writing at least three months before the end of the term specified in Article 5.1, or the end of the relevant extension period.

4. Contract Documents, ranking and conditions

4.1 The following Contract Documents form part of the Agreement:

1. Summary of Additional Information and Changes **(Annex 1**);
2. This Document;
3. Requirements and all accompanying appendices **(Annex 3**);
4. Purchasing Conditions **(Annex 2**);
5. Tender **(Annex 4**).

4.2 If and to the extent that the Contract Documents contradict each other, the provisions of the Contract Document that it mentions earlier in the enumeration of Article 4.1 of this Document will always prevail.

4.3 Contrary to the provisions of Article 4.2 of this Document, if and insofar as the quality of what is offered in the Tender exceeds the quality demanded in the other Contract Documents, ProRail may lay claim to that higher quality of the Tender. The appendices to the Contract Documents do not affect the above ranking of the Contract Documents as stipulated in the relevant Contract Document.

4.4 The Agreement is subject to ProRail B.V.'s Purchasing Conditions. The general terms and conditions of Contractor do not apply to the Agreement.

4.5 In case of conflict between versions of this Agreement in different languages, the Dutch version will prevail.

4.6 With regard to the Purchasing Conditions, the following deviations will apply to the Agreement:

1. The provisions of Article 16.6 of the Purchasing Conditions are replaced by:

"If Contractor realises less on (parts of) quality or performance criteria set in the context of the tendering of the Agreement (assessment on the basis of best price-quality ratio ("BPQR")) than in accordance with the Tender and is in default, a BPQR penalty will be imposed. This BPQR penalty is a deduction from the price in the amount of one and a half (1.5) times the difference between the quality value achieved in the BPQR assessment and the realised quality value, calculated in accordance with the BPQR assessment methodology."

5. Term and interim termination

5.1 The Agreement commences on [date] and has a term of three (3) months for the installation and calibration of the Product by Contractor and thereafter of one (1) year, plus any extension in accordance with Article 3.6 of this Document. After the expiry of this term, the Agreement will terminate without further legal action being required.

5.2 In addition to the date specified in Article 5.1 of this Document, Contractor will adhere to the schedule offered by it in its Tender.

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5.3 ProRail is entitled to terminate the Agreement in the interim at any time without giving notice. In the event of early termination, Contractor will be entitled to reimbursement of the costs it has already incurred for the performance of the Agreement up to the time of termination, as well as reimbursement of the lease for the duration up to the time of termination and reimbursement of the costs for removal of the Product.

6. Return

6.1 Immediately after termination or cancellation of the Agreement, ProRail will deliver the Product in good condition - taking normal wear and tear into account - to Contractor or a person designated by Contractor at the time and address indicated by Contractor. Any items fitted to/on the object by ProRail with Contractor's consent will be removed by ProRail on return.

7. Liability

7.1 Supplementary to Article 30 of the Purchasing Conditions, the Parties agree as follows:
a. The risk of the Product, including the risk of theft or misappropriation or loss, will be borne by Contractor until such time as Contractor has transferred the Product and it has been established by the Parties through Verification that it complies with the provisions of the Requirements.
b. During the lease term, the risk of the Product, including the risk of theft or misappropriation or loss, will in principle be borne by ProRail.

8. Verification

8.1 Contractor will have demonstrated to ProRail by [date] and in accordance with the relevant provisions of the Requirements that the products and services to be provided by it comply with the provisions of the Requirements.

8.2 Without prejudice to ProRail's other rights in that case due to Contractor's failure to comply with its obligations under the Agreement, ProRail will be entitled to terminate the Agreement if Contractor fails to comply with the provisions of Article 8.1 of this Document. ProRail will not owe any compensation to the Contractor on account of such termination.

8.3 Verification does not imply acceptance (in advance) of the Delivery. Contractor cannot derive any rights from Verification.

9. Price and payment

9.1 The price for performance of the Agreement (whether fixed price, cost-plus or a combination thereof) is fixed in the budget accompanying the Tender.

9.2 All prices set out in the Contract Documents are All-in prices and are exclusive of Value Added Tax (VAT).

9.3 Payment of the price referred to in Article 9.1 of this Document for the Agreement will be made in two instalments following receipt of an invoice, after Acceptance by ProRail of the relevant result, whereby 50% of the price referred to in Article 9.1 of this Document will be invoiced after delivery of the Product on site and 50% after installation and calibration by Contractor and Acceptance of the Product as an operational system by ProRail.

CONCEPT

9.4 The invoice including any attachments will be sent in PDF format to: crediteurenadministratie@prorail.nl.

The invoice will state:

- Name of Agreement to which the invoice relates;
- Indication of the assignment with the corresponding amount to which the invoice relates;
- Order number, see engagement letter
- Line number, see engagement letter
- Order date, see order letter
- Creditor number, see assignment letter
- ProRail VAT number: 804170009 B01

10. Changes to the Agreement

10.1 Contractor will notify ProRail in writing if, due to circumstances for the risk and account of ProRail, changes to the assignment occur and as a result the Contractor's work is reduced or increased.

10.2 Contractor will, in the event that a situation as referred to in Article 10.1 of this Document arises and insofar as there are financial consequences, submit a supplementary offer to ProRail as soon as possible. The supplementary offer will also include all costs required directly or indirectly for performance. When calculating the financial consequences of the reduction or increase of the work, Contractor will adhere to the prices of the budget accompanying the Tender.

10.3 In the event that a situation as referred to in Article 10.1 of this Document arises, Contractor will notify ProRail whether the increase or decrease in the work has consequences for the agreed dates mentioned and referred to, whereby maintenance of the final deadlines for Contractor will be the starting point.

10.4 Contractor is required to have received a written instruction from ProRail to this effect before commencing the reduction or increase of the work. This instruction will specify not only any price consequences but also any changes to the term sheet (insofar as it must be submitted for acceptance) and schedules. Work performed for which Contractor has not received a prior written instruction from ProRail will not be reimbursed.

11. Tenderer's Statement Russia Sanctions Package

11.1 Contractor has submitted the "Tenderer's Statement Russia Sanctions Package" with its Tender. Contractor will act in accordance with this statement during the term of this agreement.

11.2 In the event of breach of the provisions of the first paragraph, ProRail will be entitled to annul this Agreement in whole or in part pursuant to Section 6:228(1)(a) Dutch Civil Code, unless Contractor as yet fully complies with its obligations under the first paragraph within seven days after ProRail has given written notice of its intention to annul the Agreement.

CONCEPT

Thus drawn up in duplicate and signed by the Parties,

On behalf of ProRail
ProRail B.V.

_____
Name: J.J.M.J. Cayet
Date:
Place:

On behalf of Contractor
……

_____
Name:
Date:
Place:

_____
Name: B. el Hammadi
Date:
Place:

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