

KNOWLEDGE CENTRE

Approval of Contract Award

AP:1

Relevant Facts or Questions Asked

A Procuring Entity (PE) sought guidance as follows:

1. The PE highlights section 44 (5)(b) of the Public Procurement Act 2015 (as amended) ("the Act") in part, which states:

"... the notice of acceptance... shall constitute the award of contract"

The PE is of the view that this section appears to permit contract award following the issuance of the notice of acceptance, and thus requires guidance as to the veracity of this position;

2. The PE further posits that they have always awaited all requisite approvals prior to the execution of a contract, in keeping with sections 43(5) and 44(6) and (7);
3. However, guidance is required as to whether the execution of a procurement contract without the prior approval of Cabinet would constitute a breach of GoJ procurement rules;
4. The PE further states that they are in possession of the PPC's endorsement and it is expected that a Cabinet Submission will be made before the end of the month.

Issues Arising

Whether prior approval as outlined in the Second Schedule of the Public Procurement Regulations, 2018 (Regulations) is required before the execution of a procurement contract.



Advice

1. The PE is advised that prior approval is a condition precedent to the formation of a binding procurement contract. Please see section 43(1) of the Act which has been set out below:

43.-(1) Subject to subsections (2) and (3), where the contract price of the successful bid exceeds the relevant procurement contract approval limit, the procuring entity shall not award the procurement contract, in the case of-

- (a) the Tier 3 Limit, without the prior approval of the head of the procuring entity, the Commission and the Cabinet;*
- (b) the Tier 2 Limit, without the prior approval of the Commission and the head of the procuring entity;*
- (c) the Tier 1 Limit, without the prior approval of the head of the procuring entity.*

(2) The prior approval of the Cabinet or the Commission under subsection (1)(a) or the Commission under subsection (1)(b) shall be deemed to be a condition precedent to the formation of a binding procurement contract.

(3) In respect of subsection (1)(a), the head of the procuring entity shall ensure that the procuring entity does not take any action to obtain the prior approval of the Commission and the Cabinet before expiry of the standstill period.

2. Hence, the PE would be in breach of the GoJ procurement law should it award a procurement contract without the requisite approvals being sought and received.
3. In relation to the interpretation of section 44(5)(b) which has been set out below:

(5) -(b) promptly, where there is no standstill period, dispatch the notice of acceptance of the successful bid to the successful bidder and the dispatch of this notice shall constitute the award of contract.

Indeed, the dispatch of the notice of acceptance of the successful bid does constitute the award of contract. This notice follows the expiration of the standstill period, and the requisite approvals being sought.

4. In conclusion the requisite prior approval is a condition precedent to the formation of a binding procurement contract.

-End-

