

KNOWLEDGE CENTRE

Responsiveness of Bids

RB:3

Relevant Facts or Questions Asked

It is generally stated in the bidding document that “bidders must possess a valid Tax Compliance Certificate/Tax Compliance Letter at the “time of bid submission” in order to participate”.

The question posed was:-

If, say, December 31, 2021 was the Bid Submission Date for a procurement opportunity and a bidder whose TCC expired on December 30, 2021 submitted a bid on December 30, 2021. The bidder’s TCC remains expired on December 31, 2021.

Is this a valid bid?

Issues Arising

- I. Whether in view of applicable GoJ procurement law, the inclusion of expired eligibility documents is a material deviation; and
- II. Whether the confirmation of bidders eligibility can be sought where expired eligibility documents are submitted.



Advice

Issue 1- Expired mandatory eligibility documents

1. The standard of compliance required in Jamaican procurement law is the “substantial compliance” or “substantial responsiveness” standard. This is set out in Section 36 of The Public Procurement Act 2015 (“the Act”).
2. By this standard, latitude is given to procuring entities to regard a bid as responsive even if it contains minor deviations and/or omissions that do not materially alter or depart from the requirements set out in the bidding documents, or immaterial errors or oversights that could be corrected without materially altering the substance of the bid.
3. Current policy holds that a material deviation, reservation or omission is one that:-
 - a. Affects in any substantial way the scope, quality, or performance of the subject matter of the contract;
 - b. Limits in any substantial way, inconsistent with the bidding documents, the procuring entity’s rights or the bidder’s obligations under the contract; or
 - c. If rectified would unfairly affect the competitive position of other bidders presenting substantially responsive bids.
4. The foregoing makes clear that
 - a. the substantial compliance standard does not confer upon the procuring entity unfettered freedom to accept or condone all deviations. However, in its analysis of the impact of accepting/condoning a deviation, the procuring entity should conscientiously account for the actual or potential detriment to the government, the prejudice to other bidders, or to other objectives of procurement, and then exercise its discretion in a reasonable and transparent manner to the benefit of government; and
 - b. a deviation/omission that does not meet any of the criteria for materiality must be considered immaterial. It is therefore useful for the procuring entity to consider the deviation under the heads given above and draw reasonable conclusions therefrom.
5. In this instance, the bidder’s error or omission in submitting the required TCL does not appear to meet the criteria of material deviation, reservation or



omission. This is so, because it is the government that decides whether or not a bidder is eligible.

6. A procuring entity (PE) that is therefore faced with an error or omission of the type under consideration is free to undertake an independent enquiry into the fact of the bidder's tax compliance by contacting the TAJ directly.
7. In this regard, the PE is advised that a bid submitted by a bidder that is in fact tax compliant at the time of submission, should not be deemed "non-responsive" and therefore could be accepted subject to verification/validation.

Issue 2- Accepting updated TCL

8. As indicated herein, tax compliance is confirmed by direct contact with the TAJ, and requiring the submission of documents to prove compliance is formality.
9. It follows that consistent with Regulation 18(6) of The Public Procurement Regulations 2018, which allows a procuring entity to request corrections to defective qualification information; the PE could verify the bidder's compliance via the Tax Administration portal and ask the bidder to promptly supply its updated Tax Compliance Letter.

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