

# KNOWLEDGE CENTRE

## Unfair Competitive Advantage

## UCA:1

### Relevant Facts or Questions Asked

- I. A PE previously deployed the Single-source procurement method to contract three individual (3) consultants/firms to provide architectural, civil/structural and mechanical, electrical and plumbing (MEP) services;
- II. These services culminated in the design drawings for a major project and ended thereafter;
- III. The project is at the construction phase and the PE intends to proceed to market to secure a works contractor to execute the associated works;
- IV. Towards instituting proper management of the project and industry best practice, the PE intends to execute tender processes to secure contract administration services before that of the main works contractor ;
- V. The decision to contract these services by way of individual competitive processes instead of the Single-source route previously utilised arose from a concern about possible perceptions of abuse of the Single-source method;
- VI. A possible counter-position to the decision to go competitive for the aforementioned specific services is that from the standpoint of the learning curve savings, possible adjustments to designs, implementation progress, and location of professional liability, there is obvious advantage to use the same team;
- VII. Annex CS5-Procurement of Consulting Service-National Competitive Bidding is the proposed bidding document to engage the market for contract administration services. However there are concerns that some specific clauses may prohibit the original consultants from participating;
- VIII. Under ITC 2.5 the procuring entity will provide inputs and relevant project data and reports required for the preparation of the consultant/Firm proposal, which will be modified within the Data Sheet (DS) to reflect that specifications, drawings, blank Bill of Quantities will be provided by the PE;
- IX. MNS regards ITB 3. Conflict of Interest, and more specifically 3.1(a) as a threat but is of the view that ITC 3.1(a)(i) provides an exception if the above mentioned inputs are not supplied under DS ITC 2.5;
- X. ITC 4. Unfair Competitive Advantage and more specifically 4.1 presents similar concerns since the language thereunder, is interpreted to mean that the firms in question may not participate in the upcoming competitive process.



- XI. In consideration of the cited clauses within Annex CS5, the PE questions and seeks guidance whether the original consultants may be excluded or included from the new tender opportunity.

### Issues Arising

- I. Whether the three (3) firms in question are in a potential conflict of interest (COI) or unfair competitive advantage position by virtue of their previous contract, that is likely to impair the integrity of the new procurement proceedings for follow-on/contract administration services, such that the PE must by law exclude them should they opt to participate;
- II. The DS of the tender document can be edited to permit the participation of the three (3) consultants/firms in the tender proceedings to provide contract administration services.

### Advice

#### Preliminary- Integrity in Public Procurement

1. Public procurement involves high volumes of taxpayer dollars and is regulated to ensure prudent or appropriate use of those funds. "Prudent use" is resolved towards the objectives of the procurement system that are set out in legislative texts or otherwise.
2. The fundamental understanding and objective of integrity in public procurement systems is often regarded as an overarching objective, not only in view of its direct impact on the attainment of value for money, but also because governments should seek to follow the highest standards of conduct for its own sake, and must discourage corruption and anti-competitive behaviour for the sake of the functioning of internal economic markets. However, the Government must also ensure that it strikes an appropriate balance between its pursuit of integrity and the need to maintain high levels of competition in procurement.
3. For its part, the Government of Jamaica requires mandatory exclusion of bidders where there is an actual threat to the integrity of the procurement proceedings. These threats arise where a bidder is in a conflict of interest position, or where the bidder has an unfair competitive advantage. The Public Procurement Act, 2015 more specifically section 42-(1)(a) and (b) provides in pertinent part:- 42-(1)- A procuring entity shall exclude a person, firm or entity



from procurement proceedings if- (a) (b)the person, firm or entity has an unfair competitive advantage or conflict of interest that is likely to impair the integrity of those procurement proceedings. Conflicts of interest

4. A conflict of interest arises where a person firm or entity:-
  - I. Is actually or potentially unable to render impartial advice or assistance to the government as a result of its - prior affiliations, associations with or agency of firms whose interests are at variance with the interests of the government; or 2.1.1.1 - current affiliations with or agency of firms whose interests are at variance with the interests of the government.
  - II. Is in a position where it cannot act in the best interests of government because its objectivity is impaired by reason of its own corporate or internal interests Unfair Competitive Advantage An unfair competitive position arises if one supplier in procurement proceedings is or may be in possession of more information than other suppliers, and may exploit that information asymmetry by providing a more advantageous offer.

**Issue 1 – Whether the three (3) consultants/firms will possibly have an unfair competitive advantage**

5. An argument for there being a potential unfair competitive advantage situation can undoubtedly be made, should all or any of the three (3) consultant/firms in question decide to tender for the upcoming contract administration services. This rests on the fact of their previous engagement to the PE to create the design drawings which equips them with vital information/intimate aspects of the project, and can in fact be exploited for the contract administration services tender opportunity.
6. By virtue of the information asymmetry dynamics, these consultants/firms will be at a clear competitive advantage over other suppliers thus enabling them to tender with a more advantageous offer. The principles of competition, fairness and equity are breached under such a setting.
7. An additional ground to prohibit same team/consultants/firms from tendering is that to permit them will likely impair competition should their prior connectedness/familiarity to the design stage be ascertained by other interested bidders.
8. Undoubtedly, aspects of ITB 3.1 more directly ITB3.1(a)(i) together with all of ITB 4 will pose a threat to the participation of the consultants/firms in question on the basis of foregoing factors outlined. Issue 2- Whether the DS tender



document can be so edited to permit the participation of the consultants/firms in the new tender proceedings to provide contract management services.

9. The seeming omission within ITC 4.1 is regretted. We are working assiduously to amend and publish a revised suite of tender documents.
10. That being said, while we welcome the suggested adjustment thereto, we urge that the current language be not disturbed.
11. Permissible edits within a tender document and that of the DS must on a whole conform to dictates of the law, more specifically section 34 of The Public Procurement Act, 2018 and corresponding regulations 16 of The Public Procurement Regulations, 2018. Suppliers must be provided with sufficient, accurate and appropriate information including where necessary crucial documentation to enable proper preparation of bids.
12. Within the context of the facts presented a decision to edit the DS, by withholding a requirement from suppliers in the hope that it will expand the pool of participants to include the previous team and as a remedy to the quandary being faced, is not supported.
13. Further, to take such an action and the high probability that process may result in a recommended award to any or all of the consultants/firms in question, the prospect of a challenge looms large under the reasons outlined under paragraph 7 above. Conclusions/Recommendations
14. While there are concerns that to deploy the Single-source procurement method to re-engage the consultants/team may be viewed as an abuse of the method, the PE must properly weigh the benefits/advantages and risks to do otherwise, bearing in mind the value for money objective.
15. If PE is satisfied that the consultants/firms had executed their previous contract for the design drawings satisfactorily, serious thought can be given to re-engaging them under the appropriate Single-source provisions of the Act.
16. Whatever the decision, the procurement records must bear all the factors that led to such.

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