

KNOWLEDGE CENTRE

Advance Payment and Security

AA:2

Relevant Facts or Questions Asked

A Procuring Entity (PE) sought guidance as follows:

Whether a Bank Guarantee is required for all advance payments. Further querying whether it is needed for all deposits or deposits exceeding 50% of the stated contract price.

Issues Arising

The applicable treatment for advance payment securities.

Advice

1. A Bank Guarantee is just one form of a financial instrument that is open for acceptance by a procuring entity from a supplier as an advance payment security. Other forms of advance payment securities can be cash, a cheque or any other reputable financial instrument.
2. Procuring entities are required to stipulate within solicitation documents the acceptable forms of advance payment security and applicable terms and procedures thereto.
3. Advance payment security is a guarantee used to underpin a supplier's performance once the supplier has received an advance payment prior to the commencement of performance. The entity giving the advance payment may call on the security if the supplier has defaulted in its obligations under the agreement.
4. By virtue of Regulation 33 of the Public Procurement Regulations, 2018 (as amended) ("Regulation"), where a procuring entity gives an advance payment to a supplier, the following obligations arise –

- i. The procuring entity shall require the contractor to provide an advance payment security of an amount equal to the sum of the advance payment (Reg 33(3)); and
 - ii. The procuring entity shall forfeit the advance payment security in the case of the contractor's default in performance (Reg 33(5)).
5. The law is therefore clear in respect of the obligations of a procuring entity that gives an advance payment.
6. Regulation 33(4) allows a procuring entity to offer an advance payment in excess of 50%. However, where an advance payment is contemplated in excess of 50%, Regulation 33(4) sets out the following:

33-(4) A procuring entity shall not adjust the amount of the advance payment or make an advance payment in excess of 50% of the stated procurement contract price without obtaining, in the case of -

- a) the Tier 1 Limit specified in the Second Schedule, the prior approval of the head of the procuring entity;
- b) the Tier 2 Limit specified in the Second Schedule, the prior approval of the head of the procuring entity and the Commission, respectively;
- c) the Tier 3 Limit specified in the Second Schedule, the prior approval of the head of the procuring entity, the Commission and the Cabinet. There is an obligation on the part of the procuring entity to obtain an advance payment security, equal to the sum of the advance payment, regardless of the amount of the advance payment.

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