

KNOWLEDGE CENTRE

Bid Security

BS:2

Relevant Facts or Questions Asked

A Procuring Entity (PE) sought guidance as follows:

- I. A Procuring Entity (PE) initiated procurement proceedings for the procurement of computers, where there was a requirement for the submission of a bid security in the form of a Manager's Cheque.
- II. Two companies deviated from this requirement;
- III. One company submitted a Tender Bond from an insurance agency, and the other submitted a bid guarantee from a bank in the required amount.
- IV. The PE advanced that it was specifically stated in the bid document that a bid security must be submitted in the form of a Manager's Cheque; and thus required guidance on how to proceed.

Issues Arising

Whether the submission of a form of bid security other than the form specified in the tender document is adequate grounds to deem a bidder non-responsive?

Advice

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. The PE was reminded that a bid security is a requirement used to guarantee compensation to the Government of Jamaica (GoJ) for the loss of time and money in the event that a successful bidder fails to honour their bid and its contractual obligations. Further, the bid security of unsuccessful bidders is returned upon the receipt of the successful bidder's signed contract agreement or performance security if required.

6. Therefore, the PE must make an assessment of whether the submitted forms of bid security are promptly payable upon written demand. It follows that there would be a material deviation where the PE is unable to call on the security in a prompt manner (Please see paragraph 3(b)).

7. Additionally, it should be noted that the requirement specified in the bidding document was contradictory. The Instruction to Bidders (ITB) section of the issued bidding

document outlines several acceptable forms of bid security, and does not provide grounds for bias towards a specific form of security, while the PE stated in the Bidding Data Sheet (BDS) a specific form of bid security.

8. In this instance, the bidders' deviation from the requirement specified in the solicitation document may not be regarded as a material deviation, reservation or omission. Hence, the PE was advised that the securities submitted by both bidders could be accepted; and the rejection of the bids for this reason may be found to be at odds with the GoJ procurement rules.

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