

KNOWLEDGE CENTRE

Cancelation of Procurement

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Relevant Facts or Questions Asked

A Procuring Entity (PE) sought guidance as follows:

- I. The PE issued an invitation to tender via the restricted bidding procurement method for the procurement of GPU Server, where the following was stated in the Terms of Reference (TOR) and was included in their evaluation criteria:

'The contractor shall also provide complete documentation of the equipment, configurations, IP addresses, and manufacturer's paraphernalia of the project.'
- II. At the close of tender, only one bid was received;
- III. During the evaluation process, it was advised by the technical personnel that it was the responsibility of the PE to provide the IP address and not the bidders.
- IV. Further, it was indicated that the GPU Server being procured is no longer available for purchase, due to it being reclassified to serve another purpose.
- V. The PE noted that the sole bidder proposed an alternative server, which the PE IT Division accepted as being suitable for the purpose intended.
- VI. The PE was concerned that any of the factors mentioned above would have resulted in exclusion of prospective bidders from participating in the tender exercise.

Issues Arising

Whether the procuring entity may proceed to contracting a bidder to provide an alternative product which was not previously included in the tender exercise.

Advice

1. In relation to the PE's invitation for offers on the basis of erroneous information, Section 35 (a) and (b) of the Public Procurement Act, 2015 are relevant. This Section is set out below:

35. In evaluating bids and determining the successful bid, the procuring entity shall-

- (a) use only those criteria and procedures set out in the bidding documents;*
- (b) apply those criteria and procedures in the manner disclosed in such documents.*

This requirement has been enacted to ensure that a procuring entity does not arbitrarily apply undisclosed criteria to the benefit of one supplier, and to the detriment of others. Notwithstanding, it also implies that a procuring entity is not permitted to disclose criteria that are not consistent with the law. It follows, therefore that the PE would be bound to follow the criterion set out the solicitation documents and evaluate the sole bid accordingly.

2. Therefore, it goes without saying that the PE would err irretrievably in the event that a bidder is awarded a contract for an item, which was not the item specified within the bidding document.
3. Hence, given that the item being procured is no longer available, it is recommended that the PE cancel the procurement in accordance with Section 41 of the Public Procurement Act, 2015 (as amended) and a new process be carried out, given that a new specified item is being procured. The PE should also ensure that for all future procurements, a proper market analysis is conducted prior to developing specifications and that the solicitation documents clearly outline circumstances where alternative solutions would be acceptable.

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