

KNOWLEDGE CENTRE

Price Adjustment

PA:1

Relevant Facts or Questions Asked

A Procuring Entity (PE) sought guidance as follows:

- I. Increasingly, the PE has been encountering challenges in the procurement of goods, especially those supplied from overseas markets.
- II. In particular, several bidders have advised of their inability to guarantee bid prices at various points in respective tender proceedings, as a result of global increases in the prices of raw materials to other market uncertainties attributable to the Covid-19 pandemic.
- III. There are also instances where the PE was presented with requests for or notifications of price revisions simultaneously with the Acceptance Letter as well as, after the Purchase Order has been issued.
- IV. These developments have placed the PE in a precarious position, and the PE is desirous of guidance on the treatment of these eventualities within a procurement process.

Issues Arising

In view of the public procurement legislation now in force, the issues for consideration are whether a procuring entity may:

- a) accept a bidder's price adjustment/modification during a tender proceeding- after the submission of a bid, but prior to contract award;*
- b) at the stage of contract formation; and*
- c) after contract formation*

Advice

Price Adjustment After Tender Submission and Prior to Contract Award

1. It is settled procurement law and practice that a bidder's offer (bid) for a fixed-priced contract constitutes its full and final offer, and no change in price is allowed, unless for the correction of arithmetic errors.
2. For this reason, governing legislation requires bid prices to be valid for the duration of the bid validity period specified in the bidding document. Failure on the part of a bidder to observe this requirement results in forfeiture of bid security where applicable, and the rejection of the bid as non-responsive. Ref Regulation 28(1) of The Public Procurement Regulations, 2018.
3. It follows that a procuring entity that allows a price revision after the deadline for bids, and during the period of bid validity, would act contrary to the principles of transparency, equity and competition underlying GOJ procurement law.

Price Adjustment at Contract Formation Stage

4. At the point of contract formation, while minor amendments to the original offer may be allowed, an amendment that promises to be material would be disallowed.
5. For present purposes, a material amendment is one that would:
 - a. Change who bid for or who won the contract;
 - b. Extend the scope considerably to encompass services not initially covered; or
 - c. Change the economic balance of the contract in favour of the contractor, in a manner not provided for in the original contract.
6. In the foregoing regard, price adjustments at this stage could change the economic balance of the contract and introduce public financial management and competition risks and are therefore normally disallowed.
7. Extra-territorial judgments on the point have suggested that where a mechanism for the amendment is disclosed in the bidding documents, then procuring entities can rely on such clauses without more.

Price adjustment after contract formation

8. Public procurement practice recognises circumstances in which price adjustments during the period of contract performance are practical or necessary.
9. Such price adjustments made to the overall price of a contract may take account of legitimate changes in the costs of performing the contract, such as fluctuations in prices owing to volatility in certain markets, prolongation, extensions and other compensatory events, and must be set out in the contract.
10. In this regard, procuring entities may carefully embed price adjustment/escalation provisions within contract documents in order to preserve the contractual relationship and escape difficulties wrought by external and unpredictable forces.

Conclusions and Recommendations

11. This Ministry encourages the PE to remind bidders to research and acquaint themselves with global market conditions in the preparation of their respective bids in order to craft the most practical prices for the goods, works or services they intend to sell.
12. Similarly, the PE as part of its planning and market research activities must also acquaint itself with market conditions for desired goods and services which will enable the preparation of proper budgets and spend estimates, and aid in making the decision of when to approach the market for offers.
13. To ameliorate the effects of market forces, the PE should, with the assistance of technical and legal personnel, outline procedures and formulae applicable for the treatment of price escalation situations in contracts in a manner that adequately protects the PE and the contractor from external shocks.

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