

# KNOWLEDGE CENTRE

Conflict of Interest

COI:1

## Relevant Facts or Questions Asked

A Procuring Entity (PE) sought guidance as follows:

- I. The PE initiated procurement proceedings for consultancy services for Customer Relationship Management System (CRM). The successful consultant is required to produce a TOR for the implementation of the CRM;
- II. During a bidders' conference, prospective bidders queried whether they would be permitted to participate in the downstream tender exercise for the implementation of the CRM.
- III. The procuring entity is of the opinion that the successful bidder would not be permitted to participate due to there being a conflict.

## Issues Arising

- I. Whether a consultant who designed a solution may participate in the downstream tender exercise for the implementation of the CRM; and
- II. Whether the unsuccessful bidders from the consultancy services for the CRM procurement process are permitted to participate in the downstream tender exercise for the implementation of the CRM, with the successful bidder being excluded.

## Advice

1. The Government of Jamaica (GoJ) 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. Section 42-(1)(b) of the Public Procurement Act, 2015 (Act) 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 a conflict of interest that would be likely to impair the integrity of the procurement proceedings.*

### ***Conflicts of interest***

2. 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
    - 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 the government because its objectivity is impaired by reason of its own corporate or internal interests.
3. Additionally, GoJ procurement policy requires that consultants provide professional, objective, and impartial advice, and at all times, hold the procuring entity's interest paramount, without consideration of future engagement.
4. In this instance, the downstream tender process for the implementation of CRM is based directly on the Terms of Reference (TOR) developed by the successful bidder in the current procurement process for consultancy services for CRM. This situation poses a risk to the bidder's objectivity if a conflict arises between their interests and those of the procuring entity.

5. For example, if the same bidder is awarded the contract for implementation, but has made an error in the TOR that is only discovered during the implementation activities, the bidder may not accept fault or liability, and may seek to obfuscate or otherwise hide its indiscretions, thereby passing the risk to the procuring entity. The government's interests would not be given priority over the interests of the bidder.
6. These conflicts are also exemplified in that, given its responsibility for the complete design of the solution, the bidder is likely to craft a solution that could only be implemented by it, even if that solution is not the best for the procuring entity.

***Unfair Competitive Advantage***

7. 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.
8. It is self-evident that the successful bidder from the current procurement process would have an unfair competitive advantage should it participate in the procurement process for the implementation of CRM given that the output of the current consultancy is directly related to the implementation activities.

***Whether the unsuccessful bidders from the CRM consultancy procurement process may be permitted to participate in the downstream implementation tender exercise.***

9. This Ministry is of the opinion that participation in the current procurement process would not be grounds for the exclusion of the unsuccessful bidders from participating in the implementation of CRM tender exercise. This is on the basis that it is the successful bidder from the current process who would be ultimately responsible for the development of the TOR for the implementation tender activity, and not the unsuccessful bidders.

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