

KNOWLEDGE CENTRE

Disqualification

DQ:2

Relevant Facts or Questions Asked

A Procuring Entity (PE) sought guidance as follows:

- I. Whether there is an established policy or procedure concerning the exclusion of suppliers who had a previously terminated contract due to non-performance; and
- II. Whether there is an allowable timeframe for exclusion suppliers from future procurement proceedings.

Issues Arising

Whether a bidder may be disqualified from a procurement proceeding on mandatory grounds where the bidder's past performance has been unsatisfactory.

Advice

1. Pursuant to Regulation 19 of the Public Procurement Regulations, 2018 ("the Regulations"), a procuring entity may disqualify a bidder on any of the grounds set out in paragraph 19(1)(a)-(e) therein. These grounds touch and concern several attributes of a bidder that if present, would imply into the ensuing contractual relationship, significant financial, reputational, and legal risks to government.

2. Regulation 19 (1)(e)(ii) of The Public Procurement Regulations 2018 (“the Regulations”) which has been set out below is arguably pertinent to the question of supplier disqualification on the grounds of poor past performance:

-(1) A supplier shall not be qualified to bid if-

(e) in the opinion of the procuring entity the supplier, is not a person-

(i) of sound probity; or

(ii) able to exercise competence, diligence and sound judgment in fulfilling the supplier’s responsibilities in relation to a public procurement

3. By virtue of this regulation, a procuring entity may disqualify a supplier on mandatory grounds, where the supplier’s poor past performance of its substantive obligations under a contract would strongly suggest that the supplier does not have the ability to properly fulfil its responsibilities in the contemplated contract.

4. Note however that the mandatory disqualification of any supplier on any ground(s) must not be frivolous or arbitrary as this would be unfair and anti-competitive. Moreover, such frivolous action would violate the constitutional guarantee of equitable treatment of suppliers.

5. Consequently, the PE is advised that it should disqualify the bidder on this basis, *only* where:-

- i. The bidder’s past conduct objectively amounted to grave professional misconduct, or where the bidder has breached clear conditions of the contract, such that the contract would be terminated by any reasonable counterpart. Grave professional misconduct includes those circumstances in which the bidder’s conduct has fallen short of, or



infringed standards of the profession to which it belongs, and may also include conduct that has an impact on the bidder's professional credibility;

- ii. The contract terms and conditions were clear and precise, and unquestionably imputed upon the bidder those obligations that form the basis of the procuring entity's complaints; and
- iii. The procuring entity has retained strong evidence of the supplier's poor performance, such that should any legal challenge ensue, the procuring entity may easily prove its claims.

6. In the foregoing regard, the PE is therefore advised: -

- a. Where a contractor has breached a contract, the PE should always act swiftly to exert its contractual rights against the contractor, including if necessary, terminating the contract, claiming any liquidated damages or other remedies that are allowed, and/or instituting court proceedings against the contractor;
- b. To document all its efforts to secure a successful conclusion of the contract, including any measures it has taken in mitigation of the consequences of the supplier's poor performance; and
- c. To carefully evaluate all circumstances connected with the contract with a view to identifying any internal issues at the PE that may have affected the contractor's performance, prior to instituting any relevant court or arbitral proceedings.

7. In relation to the duration for the exclusion of suppliers disqualified in accordance with Regulation 19, please note, there is currently no established timeframes in the Government of Jamaica's procurement system. Thus, the PE is advised to seek the advice of its internal legal counsel as it determines an appropriate



timeframe for exclusions. The PE may also want to consider consulting case law from other jurisdictions to get an idea of how similar offences are treated.

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