

KNOWLEDGE CENTRE

Contract Administration

CA:1

Relevant Facts or Questions Asked

A Procuring Entity (PE) sought guidance as follows:

- I. The PE completed a procurement exercise for the provision of Cloud Services Limited Cloud Service/Cloud Services Limited Cloud Infrastructure, and the GoJ standard contract, which was included in the solicitation document, was sent to the selected supplier, IT Supplier Limited, for review and signature.
- II. The supplier responded with a list of proposed changes to the contract and referred to Cloud Services Limited's Cloud Infrastructure Agreement, which the supplier indicates would take precedence over the standard contract issued by the PE, would, hence, govern the supplier's services and PE's use of and access to the infrastructure. The supplier also proposed reducing the contract duration from three years to one year. Cloud Services Limited's representative in Jamaica and the requested service is critical to the PE's operation.
- III. The PE met with the supplier and advised them of the following:-
 - a. The Procurement Act does not permit post-award changes that undermine the integrity of the procurement process; and
 - b. Including the Cloud Services Limited Agreement, and giving it precedence over the GoJ contract, would breach the Procurement Act because the terms of the Cloud Services Agreement are not minor deviations and would not have been included in the solicitation documents. The supplier maintains that the Cloud Services Limited agreement be considered.
- IV. The PE was advised that Cloud Services Limited and other major software developers typically require users, including public sector entities, to accept their standard global agreements, which override any conflicting terms found in local contracts.
- V. In considering of this development, the PE request advice regarding:

- a. Whether the PE can proceed with the signing of both the GoJ contract and the Cloud Services Limited Cloud Infrastructure Agreement
- b. If there are similar cases within Government and, if so, how were they managed.”

Advice

1. The Office notes that it is not uncommon for certain proprietary software and cloud service providers to require end users to accept standard licence, subscription, cloud services, or end-user agreements as a condition of accessing and utilising their platforms. The Office has, in previous instances, raised no objection to procuring entities entering into such agreements where the agreement is incorporated into the standard GOJ procurement contract and is necessary for the delivery or use of the services procured.
2. Notwithstanding the foregoing, the PE should exercise caution before accepting any supplier-proposed agreement or contractual amendment after contract award.
3. The Office advises that material post-award modification of procurement contracts is not permissible. However, any proposed post-award modification must be assessed with regards to the principles of transparency, fairness, and equal treatment that underpin the public procurement framework. In this regard, the principles articulated in the case of *Presstext v Republik Österreich (Bund)* [2008] EUECJ Case C-454/06 are instructive. The **Presstext case** makes clear that a modification may be regarded as material where it—
 - a. introduces conditions which, had they formed part of the original solicitation, could have affected competition or the outcome of the procurement process;
 - b. considerably extends or otherwise alters the scope of the contract beyond that which was originally competed; or
 - c. alters the economic or contractual balance of the arrangement in favour of the supplier in a manner not contemplated by the original procurement documents.
4. Based on the circumstances outlined, the inclusion of Cloud Services Limited's standard cloud services agreement would not, in and of itself, necessarily constitute an impermissible modification where the agreement represents a standard prerequisite for access to the proprietary services being procured and does not materially alter the rights, obligations, risks, or commercial arrangements that formed the basis of the procurement process. However, the PE should seek legal advice to carefully review the

agreement and satisfy itself that the agreement's incorporation would not override or substantially displace material provisions of the standard Government of Jamaica procurement contract, in a way that would materially prejudice the interest of the Government of Jamaica, transfer additional risk to the procuring entity, limit contractual remedies, or otherwise alter substantive requirements upon which suppliers were invited to compete.

5. Subject to the foregoing, and provided that the PE and its legal advisors are satisfied that Cloud Services Limited's standard agreement does not materially prejudice the interests of the Government of Jamaica and does not otherwise result in a material modification of the procurement requirement, the Office has no objection to the execution of Cloud Services Limited's standard cloud services agreement, where it is necessary to facilitate access to and use of the proprietary services procured.
6. On the other hand, the Office notes that the solicitation process expressly contemplated the provision of Cloud Services Limited Cloud Infrastructure licences and support services for a period of three (3) years. The duration of the contract therefore formed part of the procurement requirement disclosed to the market and upon which potential suppliers would have assessed whether to participate in the procurement process.
7. In this regard, the Office is of the view that the supplier's proposal to reduce the contract term from three (3) years to one (1) year constitutes a material modification of the procurement requirement. Although only one bid was ultimately submitted, it cannot be assumed that the same result would have been obtained had the procurement opportunity been advertised as a one-year requirement rather than a three-year requirement. The Office considers that the duration of the contract may have influenced the decision of potential suppliers whether to participate in the procurement process. Consequently, suppliers that elected not to submit bids in response to a three-year requirement may have made a different commercial decision had the opportunity been advertised as a one-year engagement. In the circumstances, acceptance of the supplier's proposal would alter a fundamental element of the procurement requirement upon which the market was invited to compete.
8. The Office therefore does not support the acceptance of a post-award amendment reducing the contract term from three (3) years to one (1) year. Acceptance of a one-year contract in place of the three-year contract contemplated by the solicitation

documents would constitute a material modification of the procurement requirement and would be inconsistent with the principles of transparency, fairness, and equal treatment that underpin the public procurement framework.

9. Accordingly, if the supplier is unwilling to enter into a contract for the three-year period contemplated by the solicitation documents and reflected in its bid submission, the PE should not proceed to award a contract on materially different terms. In such circumstances, the PE would need to terminate the procurement process and retender the procurement opportunity.
10. However, in undertaking any subsequent procurement process, the NHF should carefully assess the market and consider whether the original three-year contract duration may have affected supplier participation. Given that only one bid was received in response to the procurement opportunity and that bidder was only willing to accept a one year contract, the PE should consider whether a shorter contract duration, including a one-year arrangement, would be appropriate, likely to attract broader competition and increase supplier participation.

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