

POST QUALIFICATION OR DUE DILLIGENCE IS IT MANDATORY?

INTRODUCTION

Post qualification is the term used in the procurement industry instead of due diligence in other disciplines. Post-qualification shares all traits, objectives, goals and purpose with what is commonly known as due diligence. Due diligence is a protection which the purchaser of either goods or services uses against misrepresentation, fraud and negligence, in this kind of protection the purchaser finds all the necessary information including the legal compliance, all risks involved and liabilities about what he wants to purchase before he enters into the purchase contract¹. Due diligence takes diverse forms according to the matter at issue, in environmental management the term environmental impact assessment is used in the place of due diligence. In procurement, the semantic term for due diligence is post qualification.

After completion of evaluation of bids and before negotiation is conducted there comes post qualification of the lowest evaluated bidder for procurement of goods as well as services or of the highest evaluated bidder for disposals of assets. During post qualification the tenderer scoring the highest is directly and or indirectly visited by the Procurement Entity to confirm, verify, validate and ascertain the worthiness of all the statements made and documents submitted. This process focuses at compliances to legal requirements, technical requirements and financial requirements.

Legal Requirements involves the verification, validation and ascertaining of the ownership of the company, credibility and integrity of shareholders and directors, incorporation of the company, compliance to tax obligations and whether the required licenses are in place and properly procured.

Technical Requirements involves validation, verification and ascertaining the correctness of the documents submitted by a bidder to prove the quality of the goods and services offered This involves: (a) verification and validation of the bidder's stated competence and experience; (b) verification and or inspection and testing of the products, after sales maintenance convenience and affordability and capabilities. In applicable cases physical inspection of plants, sites or places of business to determine production capacity is conducted as well; and (c) ascertainment of the authenticity of the bid security and the tender validity period.

Financial Requirements involves verification, validation and ascertaining the bid price proposal of the bidder, its financial contracting capacity, the required bank commitment to provide a credit line to the bidder. This is to ensure that the bidder can sustain the operating cash flow of the transactionⁱⁱ.

Procurements involving large sums of fund, post qualification is inevitable. There are several good reasons for that but the main ones being to avoid entering into contracts with briefcase companies or unscrupulous persons thereby avoiding the pain of being defrauded and also to avoid entering into contracts with companies which do not have capacity to perform the contract.

In the majority of cases during post qualification the tenderer at stake is informally informed that verification of all that which appears in the bidding documents is done so that formal negotiation can be conducted and thereafter enter into the contract. During this stage at least the tenderer knows that his bid ranks first and that only one hurdle is left for him to win the tender. It is very tempting time to both post qualification team members on one hand and the tenderer to be post qualified on the other hand, in the sense that at this stage the bidder feels that he has won the tender already and he cannot let it go at any cost. The temptations, transparency, checks and balance in post qualification to both the team of post qualification and the tenderer is what has prompted me to author this article.

REQUIREMENT OF THE LAW

Post qualification is a legal requirement expressly provided under the Public Procurement Act, 2004. Section 3ⁱⁱⁱ defines Post qualification as a “ *formal procedure applied after tenders have been evaluated prior to award of contract , to determine whether or not the lowest evaluated tenderer has the experience, capability and resources to carry out the contract effectively*”. From this definition post qualification is done after evaluation but before the award of tender and its main goal is to verify experience, capability and resources of the prospective bidder. Once the post qualification team confirms that the bidder is worth the criteria, the procuring entity, without much ado, invites the bidder into negotiations and upon successful negotiation it leads to award of contract.

Section 48(3) and (5)^{iv} reads:

(3) A procuring entity and tender board may require a tenderer which submitted a lowest evaluated tender in case of procurement or highest evaluated tender in the case of disposal of by tender to demonstrate again its qualification before the award of contract is confirmed.

(5) If tenderer with the lowest or highest evaluated tender fails to post qualify, the procuring entity and the tender board shall reject its tender and shall select the next lowest or highest evaluated tender from the remaining tenders, subject to the right of the procuring entity to reject all the remaining tenders

These two subsection imposes a duty to tenderer whose bid is the lowest evaluated in case of procurements or the highest evaluated in case of the disposal by tender to demonstrate again its qualification before the award of the contract is confirmed. The provision of the law uses the word “demonstrate”. To demonstrate means to show something clearly by giving proof or evidence or to show and explain how something works or a way of doing something ^v. Literary the law tasks the tenderer to give empirical and tangible proof that all the qualities in the tender documents submitted are correct and true.

The law goes further to entitle the procuring entity to reject the tender if the lowest tenderer or highest evaluated tenderer fails to post qualify itself. It means that the role of the procuring entity is just to inform the lowest or highest tenderer to demonstrate all the qualities in the bidding documents. It’s the role of the tenderer to invite the Procuring Entity to its offices, to visit sites or branches, to show the man power, to show the legal compliance and other criteria. To the contrary, procuring entities, do not use this provision of the law properly instead of requiring the tenderer to demonstrate the qualities the procuring entities form teams to investigate the qualities and sometimes even confidentially.

The requirement of the prospecting bidder showing/demonstrating its worthiness, leaves no doubts that at this stage the bidder is at least informed of the post qualification process being done and obviously his being ranking the highest of all the bidders in the competition is also communicated to it.

Goods, Works, Non-Consultant Services and Disposal of Public Assets

Regulation 94^{vi} sets out among the would be post qualification criteria that includes experience and past performance on similar contracts, knowledge of local working conditions, capabilities with respect to personnel, equipment and construction or manufacturing facilities, financial capabilities to perform the contract, current commitments, litigation record, or any other relevant criteria. In post qualifying the Procurement Entity may seek independent reference of the tenderer’s information. Where the

tenderer does not meet the set up criteria its tender will be rejected, and the procuring entity will be at liberty to reject all the remaining tenders or go for the second ranking evaluated bidder again for post qualification. In the event the bidder is successful at the stage of post qualification, it will soon be invited for negotiations and upon consensus a contract is entered. Needless to say each level of authority, particularly the tender Board and the Procurement Management Unit shall have to perform and observe their powers.

Selection and Employment of Consultants

Selection and employment of consultants is a two-staged process where it starts with the invitation for expression of interest, during which level bidders are required to prove that they meet the essential requirements, and those who will pass that stage will be supplied with terms of reference thereby inviting bidders to submit their technical and financial proposals. The evaluation will be done starting with the technical proposal and those bidders whose technical proposals will meet the minimum score will be invited for opening of their financial proposals and evaluation for the financial proposal will be done as well. Finally the lowest evaluated bidder will be invited for negotiations and once successful a contract will be entered^{vii}.

The regulations governing the selection and employment of consultants are silent on at what stage and how the post qualification has to be done. The regulations stand as if no post qualification is done. However, as long as, the parent law which is the Public Procurement Act 2004, provides for post qualification, then it is obvious that post qualification applies to the selection and employment of consultants as well, and section 48 is relevant.

FORMS OF POST QUALIFICATION

Post qualification can take diverse ways to be accomplished provided that the end result is getting correct information confirming the criteria of the prospecting bidder. Criteria for post qualification will be confined to those in the bidding documents supplied to bidders. There are mainly two common forms of post qualification.

Visiting the Bidder's Business

This is the place where most resources of the bidder including the human resources, offices, equipments, tracks are expected to be found. Visiting will establish whether the bidder is a brief case

company or a company with offices. Also the resources will be seen and assessed. The visiting can also be to bidders sites or places of business. The visit can be at the tenderer's incidence having being requested to demonstrate his qualities or at the incidence of the procuring entity if they take the initiative to verify themselves.

Independent Reference

This entails seeking comments, observations, reference from other organizations which also had similar transactions with the bidder. This is done by the Procurement Entity writing straight to those organizations inquiring for some particulars of the bidder. In all these two forms, the main agenda is to let the bidder demonstrate again and much more practically that he is worth the criteria for the tender.

WHO TO CONDUCT POST-QUALIFICATION

The law does not point out who has to do post qualification. At most the law says it is done after evaluation, but in a way this is still a form of evaluation because it is confirmation of the criteria of the tenderer. From the practice it is the evaluation committee that evaluates the tender at issue, that conducts post-qualification. Immediately after evaluation, the evaluation committee members know exactly the bidder whom they will have to post-qualify.

At least the tender board and the accounting officer of a particular institution are not expected at any rate to engage in post qualification. Reasons are many but suffice it to say that because these authorities are required to make decisions somewhere, the tender board to approve the post qualification report and using it to make a decision of awarding a tender and the chief executive has to award the contract. These two authorities need to act with impartiality, openly, transparently and without bias which can be achieved only when they do not participate in the post qualification.

At this stage of post-qualification, tendering process becomes very sensitive, because it only requires the word "yes" from the team doing post qualification for the tender to move to the next stage of negotiation and contract award. The team doing post qualification requires people of very high integrity because they are vulnerable to be bribed by the unqualified bidder. On the other hand the bidder is also vulnerable to being requested for some bribe by the team doing post qualification. It is pertinent to note that if the team doing post qualification says no the criteria are not meet, the bidder will be rejected without even being consulted to the correctness of the post-qualification report, and the

second ranking bidder in term of score will be selected or all rejected as it appears appropriate to the tender board.

It is my thoughts that the team doing post qualification should bear a form with all the criteria and all criteria have to be confirmed in the presence of the bidder and the team and the bidder have to sign that form and retain a copy of what happened during post qualification for his records. This is in line with the transparency and accountability which are among the key objectives of the Public Procurement Act Of 2004. For now, the team doing post qualification does not show its report to the bidder hence leaving the bidder in dilemma and also puts the tender board in another dilemma because the tender board do not visit the bidder yet there is no evidence from the bidder that it has been visited.

At this juncture, the issue is whether the objectives of the Public procurement Act of 2004, as stated at section 6 which includes among others transparency, fairness, competitiveness and value for money is achieved.

Transparency and Openness

The question is can a bidder challenge the post qualification report ? Well the answer is not hard to find. The bidder cannot properly challenge what he does not know at all. There is no openness in post qualification because what is written down by the post qualification team is not disclosed to the tenderer. One wonders why can't the criteria for post qualification be recorded openly and signed by the team and the bidder on the other hand. Where does the fear to keep the report open come from. Why does the procuring entity fear to be transparent. Lack of transparency leaves a lot to be desired by the team of post qualification, the tender board and ultimately the procuring entity.

Transparency is a fundamental element of an open and honest public procurement and it has to be done and be seen in both solicitation and selection^{viii}. The procurement process has to be transparent on one hand and open on the other hand. Transparency refers to the state of being able to see through. Glass is transparent but not open. Openness does not mean transparency, but it refers to the state of no obstruction whether opaque type or glass type.

In light on the distinction between transparency and openness, the post qualification process where the post qualification team pays informed visits to the tenderer is transparent, but as far as the post

qualification report which the tenderer cannot access, cannot see, cannot sign and cannot challenge, this scenario is not open hence no openness. While the post qualification is transparent on one hand it is not open on the other hand.

Checks and Balance

Of interest, is how can the tender board monitor the conducts of the post qualification team in such way that if the team abuses its powers the tender board would immediately know and hold it accountable. One of the ways could be to have the post qualification report signed by both the team and the tenderer. In the event the post qualification team has given misleading information for reasons better known to themselves, how can that misleading information be taped before awarding the tender to the bidder. At some point, where serious project are at issue it might be important to have more than one teams of post qualification and the teams should not know each other. In other instances, the tenders boards take the initiatives to visit the bidders themselves, of course that contravenes impartiality and bias because you cannot evaluate yourselves and take the evaluation report to yourself for approval at the same time.

WAY FORWARD

In order to enhance the spirit and key objectives of the Public Procurement Act of 2004, which is based on transparency, openness, competition, accountability and achieving value for money, I am of the view that the following need to be done:-

The post qualification report be signed by the post qualification team of the procuring entity and counter signed by the tenderer and the tenderer be availed with a copy.

Post qualification should not only be transparent but also open

Tender Board should not engage in conducting post qualification because it compromises their impartiality and biases itself in making a decision.

CONCLUSION

Implementation of and compliance to the Public Procurement Act of 2004 and its subsidiary legislations, like any other Act of parliament, is perfected by practices and continued improvement.

The transparency, openness as well as checks and balances in post qualification alarmed by this piece of writing is my effort to join hands with the Public Procurement Regulatory Authority in perfecting procurements in Tanzania.

It is with no dispute that the coming into operation of the Public Procurement Act of 2004, has really marked another paradigm of accountability, openness, transparency as well as checks and balances in Procurement Entities in Tanzania.

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- ⁱ David Berthram and Darryl J Cooke, *Due Diligence: A Practical Guide*, FT law & Tax, London, 1997
- ⁱⁱ <http://ppra.forumotions.com/procurement-of-goods-works-and-non-consultancy-services-f8/post-qualification-vs-due-diligence-t19.htm> visited on 8.05.2010; and <http://www.icrawl.org/604834619-post-qualification-vs-due-diligence> visited on 12.05.2010.
- ⁱⁱⁱ Public Procurement Act No. 21 of 2004.
- ^{iv} Ibid
- ^v Oxford Advanced Learner's Dictionary 5th Ed., 1995.
- ^{vi} Public Procurement (goods, works, non-consultant services and disposal of public assets by tender) GN No. 97 of 2005.
- ^{vii} Regulations 51, 52, 53 and 54 of the Public Procurement (Selection and employment of Consultants) Regulations GN No. 98 of 2005.
- ^{viii} Dr. Ramadhani Mlinga, Public Procurement Act and the Built Environment Professionals, www.ppra.go.tz