

Post-Qualifications in Public Procurement in Ghana

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Abstract

There has been little public discourse on the subject matter of post-qualification even though, it remains a very critical aspect in the evaluation of Tenders/Proposals/Quotations under Ghana's public procurement regime. It is therefore pertinent to carry out some expository analysis of what it entails, its relevance and how it can be used to mitigate procurement related risks in public procurement in Ghana. However, before we delve a bit further, it is appropriate to explore some working definition of what post-qualification is. Note that the Public Procurement Act, 2003 (Act 663) as amended by The Public Procurement (Amendment) Act, 2016 (Act 914), and the Subsidiary Legislations do not provide any definition of post-qualification. We shall therefore proceed to adopt the definition provided by the African Development Bank (AfDB).

Keywords: Post-Qualifications, Public Procurement

1.0 INTRODCUTION

According to the Guidelines for Post-qualification developed by the AfDB “*post-qualification is a process of verifying, validating and ascertaining the genuineness of the statements made and information provided by the bidder(s)*”. From the above definition, post-qualification incorporates some aspects of Due Diligence (DD) at a high level. The process could include verification of the Tenderer's tax clearance certificate, SNNIT certificate, business registration certificate, audited accounts, direct and indirect shareholders; beneficial ownership; corporate history and activities; litigation history; criminal, civil and regulatory background; debarment; technical capacity, experience and performance track record on previous contracts, financial history (including liquidity, debt and profitability; conflict of interests and securities. Such an exercise, could unearth any possible risks to the Procurement Entity. For example, a basic calculation of solvency ratios (current ratio (current assets /current liabilities) or acid test ratio (current assets-stock/current liabilities)) will provide details of the solvency position of a particular Tenderer. At a minimum, an acceptable ratio should be 1. From the writer's experience and dealings with Procurement Entities who per the provisions of Section 22 request for Financials (audited accounts) to be submitted as part of a Tender/Proposal/Quotation, majority of such Entities do not carry out any analysis on the Financials submitted by Tenderers except to state “Comply”. Without an analysis, there is the propensity of awarding a contract to a Tenderer who is already heavily indebted and thereby, putting the performance of the contract at risk. Drawing from the above limitation of Act 663 as amended on post-qualification, it is revealing to know that no detailed guidelines regarding how post-qualification should be conducted exist. The closest provisions are under Section 22(9) which states “*the procurement entity may require the authentication of a foreign document provided by a tenderer to demonstrate the qualification of the tenderer*”. Similarly Section 24(5) states “*the procurement entity may require a supplier or contractor who has been prequalified to demonstrate its qualification again in accordance with the same criteria used to prequalify the supplier or contractor*”. Of course, this provision pertains to the prequalification procedure (Sections 23-24) which is mandatory for the procurement of Goods (above GHS 10m) Works (above GHS 15m) and Technical Services (above GHS 5m) as spelt out under the Fifth Schedule of Act 663 as amended. Similarly, section 4.14.5 of the Manual to the Act 663 (yet to be amended), also provides some limited information on post-qualification (Repeat Tender Qualifications). It is therefore relevant for Procurement Entities to integrate the process of post-qualification into evaluation processes so as to mitigate any possibly procurement related risks.

2.0 RELEVANCE OF POST-QUALIFICATION

It protects the reputation of Procurement Entities against the possibility of a Tenderer's failure to perform its contractual obligations. Thus, a Contractor's poor performance could largely be attributable to a failure of the Procurement Entity in conducting post-qualification. It provides a sound basis to validate, confirm and authenticate the reliability and validity of documents submitted as part of a Tender, Proposal or Quotation.

It provides assurance to a Procurement Entity that a recommended Tenderer is competent and capable of performing the intended contract. It reduces risks to Procurement Entities particularly as the process of post-qualification is able to reveal from the outset, any red or yellow flags including misrepresentations. From a legal perspective, misrepresentations or mistakes have the potential to vitiate a validly executed contract, thereby causing

further delays to the completion of an activity or project. Serves as a further check to screen and eliminate unreliable Tenderers.

3.0 WHAT SHOULD POST-QUALIFICATION ENTAIL?

The process of post-qualification entails the following critical steps: In the first place, the Procurement Entity should make a conscious decision, to conduct post-qualification on specific procurements under consideration. This decision should inform the criteria for qualification and evaluation (Sections 22 and 59 respectively). Thus, during the course of conducting post-qualification, the focus at a minimum should be, a verification of the tenderer's compliance with the set criteria. Remember that, as part of the process of promoting transparency, Tenderers have a right to verify whether or not criteria set have been evaluated. Thus, Procurement Entities have an obligation to evaluate any criteria they set.

Secondly, the process of post-qualification should be limited to the criteria already established prior to the solicitation document being issued. Failure to do this, would be in violation of the provisions under Section 59(5) of Act 663 as amended. This provision clearly states that "*A Procurement Entity shall use only the criteria and procedures in the tender documents and shall apply criteria and procedures in the manner disclosed in the tender document*". This provision is of crucial important because, some Procurement Entities in an attempt to eliminate some Tenderers end up introducing additional criteria during the post-qualification phase of the evaluation process. For example, if a tender document for the procurement of vehicles did not state that Tenderers should provide information on the availability of Service Centres across Ghana, the Procurement Entity **cannot** request to undertake a post-qualification visit on such Service Centres. This is without prejudice to the importance of such a requirement in the procurement of vehicles.

Thirdly, though it is customary for administrative checks to be conducted at the start of an evaluation process, the process of post-qualification should commence after technical (at a minimum) and financial evaluations have been concluded. In this case, the post-qualification process should be completed prior to a recommendation to negotiate (if required) and award a contract is approved.

Fourthly, the process of post-qualification should be limited to documentary evidence or other information submitted by a Tenderer. Whilst clarifications could be sought by Procurement Entities during the evaluation process, the provision under Section 57 (2) of Act 633 as amended, should be reckoned with. This provision states that "*No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted*".

Fifthly, due to potential delays to the conclusion of an evaluation process as a result of a post-qualification exercise, it is imperative and prudent for Procurement Entities to factor the time required to complete post-qualification. The validity periods of Tenders/Proposals/Quotations and Tender Securities should be taken into consideration so as to avert awarding a contract on an expired Tender/Proposal.

Lastly, the outcome of a post-qualification exercise should be documented in line with the provisions under Section 28. If the exercise includes a site visit; the names of individuals, date of the visit(s), purpose of visit(s), what was observed/discussed, and any issues to be considered material with respect to whether or not a Tenderer will be compliant or not, etc should be noted.

4.0 CONCLUSIONS

It is important to develop a checklist for such a purpose so as to ensure that, all required details are covered from the outset. Also, in order to maintain the confidentiality of the evaluation process, it is recommended that only Members of the Evaluation Panel should conduct a post-qualification including visits.

From the above, it can be concluded that, the process of post-qualification if properly planned, could minimise public procurement process related risks and ultimately enhance the overall achievement of value for money. It is therefore suggested that future amendments to Act 663 as amended and the Subsidiary Legislations should provide a detailed approach to conducting post-qualification.

Reference

- i. Manual- Public Procurement Act, 2003 (Act 663)
- ii. Post – Qualification Guidelines, for Corporate Procurement Activities of the African Development Bank Group, April 2007
- iii. Public Procurement Act, 2003 (Act 663)
- iv. The Public Procurement (Amendment) Act, 2016 (Act 914)