

The Commission for Standards in Public Life

Honourable Marco Archer
Minister for Finance & Economic Development
P.O. Box 106
Government Administration Building
Grand Cayman KY1-9000
CAYMAN ISLANDS

Via E-mail: marco.archer@gov.ky

11 October 2016

Dear Honourable Minister,

I write regarding the Procurement Bill 2016 (the "Bill") which was gazetted on 2 September 2016.

As you are aware, the Commission is mandated by s.117(9)(d) of the Cayman Islands Constitution Order, 2009 "to review and establish procedures for awarding public contracts". As a result, the Commission has met and corresponded with the Procurement Team over the last year regarding the content of the Bill.

Upon review of the gazetted Bill the Commission noted that its requests and suggestions do not appear to have been considered and included in the drafting of the Bill.

Specifically, the Commission considers that:

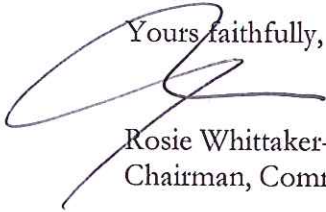
- a. reference should be made in the Bill to the constitutional remit of the Commission regarding the award of public contracts; and
- b. the Bill should contain a statutory requirement for a member of the Commission to be appointed to the Public Procurement Committee under Schedule 3 of the Bill.

In addition, the Commission wishes to draw your attention to its recommendations as they relate to the drafting of the necessary Regulations for this Bill, specifically the inclusion of a timeframe in Regulation 16 (Acceptance of Bids).

Enclosed is the Commission's latest correspondence to the Procurement Team dated 2 September 2016 for your information.

The Commission looks forward to continuing a dialogue on these issues as the Bill proceeds through the House.

Yours faithfully,



Rosie Whittaker-Myles
Chairman, Commission for Standards in Public Life

Encl.

The Commission for Standards in Public Life

Peter Gough
Strategic Advisor to the Deputy Governor
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Grand Cayman KY1-9000
CAYMAN ISLANDS

Via Email: peter.gough@gov.ky

2 September 2016

Dear Mr. Gough,

Thank you for your response of 2 March 2016 which the Commission has considered and discussed. It would appear that there has been some misunderstanding in relation to whether the Commission's reference in its correspondence of 3 December 2015 was to the Bill or to the Regulations. In addition, the Commission continues to have some concerns regarding some of the content of the Procurement Bill and Regulations and therefore seek to clarify and emphasize those in this follow-up response.

Bill

- **Section 4(1)**

CSPL Initial Comment: Was the word "competitive" intended to be used here?

Response of Procurement Team: This actually refers to the Regulations. Yes.

CSPL Follow-Up Comment: The Commission is aware this is discussed in the same section of the Regulations; however, the Commission was, in fact referring to the Bill. Currently s.4(1) of the Bill reads: "This law applies to all procurement by all entities, however there are certain exceptions to the **completive** process for the following...". The Commission believes this word was meant to be competitive.

- **Overall**

CSPL Initial Comment: Having regard to previous meetings, discussions, etc. particularly involving the previous Commission, Members remain of the view that the Law should make reference to the fact that the CSPL has been given constitutional responsibility to "review and establish procedures" for the awarding of public contracts.

Response of Procurement Team: We did not think it was necessary to repeat what was in the Constitution, but if the CSPL require it we can insert a line in the introduction to the Law.

CSPL Follow-Up Comment: The Commission feels this is sufficiently important to do.

Regulations

- Regulation 3(2)(a) and (b)

CSPL Initial Comment: Should a timeline be included as to when the decision from the Chief Executive Officer/Central Procurement Office/Cabinet would be handed down? (This is probably not possible where Cabinet is concerned but maybe the movement of the information from the CEO/CPO office to Cabinet could be specified?)

Response of Procurement Team: This actually refers to the Regulations. There is no decision from CPO here. CEO and Cabinet only, we do not see any need to set a timeline.

CSPL Follow-Up Comment: Agreed, this refers to the Regulations. Please see response below under Regulation 16.

- From Regulation 7 onwards

CSPL Initial Comment: There are a number of references throughout the Regulations to "policy and procedure established by the Central Procurement Office". Will these be forwarded to the Commission for review when in draft form?

Response of Procurement Team: No, once the strategic policy direction and the principles are established in law and regulations, these will be purely detailed operational procedures.

CSPL Follow-Up Comment: The Commission does not agree with your intended approach in this regard and reminds the Procurement Team of the Commission's constitutional mandate found in s.117(8)(d) of the 2009 Constitution "to review and establish procedures for awarding public contracts".

- Regulation 15

CSPL Initial Comment: Is the decision to exclude an entity SOLELY up to the CO or CEO? Should it be?

Response of Procurement Team: This actually refers to the Regulations. Yes.

CSPL Follow-Up Comment: Agreed, this refers to the Regulations.

Upon further review, the Commission notes that there is a lack of clarity in this provision. Regulation 15(1) indicates that "A Chief Officer or Chief Executive Officer of an entity shall exclude...under the following conditions:

- (a) If the entity finds...
- (b) If the person or supplier offers...
- (c) If the person or supplier has an unfair advantage...
- (d) If the person or supplier engages..."

The Commission queries the process through which the CO/CEO will come to these conclusions. If it is based on the research/feedback of other persons within the entity then the Commission is content for the CO/CEO to solely make the decision. If the

CO/CEO receives no advice from others, the Commission would wish to highlight at this juncture, the potential for corruption.

In comparison, we note that Regulation 15(2) provides that "*an entity may disqualify...*". Having reviewed the definition of "entity" the Commission is unsure whether the decision to disqualify a party is to be taken solely by the CO/CEO as in Regulation 15(1) or whether there will be involvement by other persons. Could the Team please clarify this?

- **Regulation 15(3)**

CSPL Initial Comment: Is there recourse for a person/entity who/which is excluded? Is there provision for a 'hearing'?

Response of Procurement Team: No there is no provision for a hearing; if the excluded party is aggrieved they can make a complaint through the Office of the Complaints Commissioner.

CSPL Follow-Up Comment: The Commission recognises that all parties have the right to make a complaint to numerous other entities such as the Office of the Complaints Commissioner in circumstances where they believe maladministration has taken place; the Anti-Corruption Commission where they believe corruption offences have taken place, etc. However, the Commission also feels the right of appeal is a fundamental component of the principles of natural justice and most legislation provides for such a mechanism. In addition, as the decision being taken is by a Chief Officer would provisions not be made for the aggrieved parties to initially appeal/complain to the Deputy Governor as their Appointing Officer?

- **Regulation 16**

CSPL Initial Comment: Doesn't mention how long it takes to reach an acceptance decision.

Response of Procurement Team: That's correct, this could depend on a number of factors and we did not want to tie the hands of the entities involved.

CSPL Follow-Up Comment: Whilst the Commission understands the rationale for this, the Commission continues to have concerns about the lack of a timeframe in this section. The importance of a timeframe in this regard can be highlighted in various ways. One obvious example would be a situation where a party is successful in its bid but an 'acceptance decision' is not arrived at/communicated until 6-8 months following submission by which time the successful bidder would have undertaken other work with the result that it is unable to carry out the work on which the successful bid was made. Other examples include the change in prices, quotes, etc. that have been provided by the party. If the party has to import materials or sub-contract work and these quotes expire, then the submission may no longer be feasible. Some of these delays may simply be due to a Chief Officer (or other public official) not completing the process, not just unavoidable delays. The Commission

believes there are more reasons for a timeframe to be included than not, and again recommends the Team insert a fair and reasonable timeframe along with a discretion for the CO/CEO to extend if necessary.

- **Regulation 16(6)(a)**

CSPL Initial Comment: What is “..a reasonable period of time..” Should this be more specific? Otherwise, could Section 16(8) be invoked potentially in a premature or unfair fashion?

Response of Procurement Team: Setting a timeframe could cause issues that are beyond the control of either parties. Section 16(8) is designed for supplier who will not sign or cannot sign security of performance, this is not going to be invoked for delay in signing.

CSPL Follow-Up Comment: Please see response above under Regulation 16.

We look forward to hearing further from you.

Kind regards,



Rosie Whittaker-Myles
Chairman