

## Review of Scrap Metal Removal Contract





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## TABLE OF CONTENTS

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Introduction .....	1
Analysis of the contract .....	2
Government’s tendering process .....	2
Tender process and award on this contract .....	4
Performance of the contract .....	12
Conclusion.....	15
Appendix A – Tender document extract regarding the qualification statement.....	17
Appendix B: Comparative framework – The Public Contracts Regulation 2015 .....	19
Appendix C – Extracts from The Public Contracts Regulation 2015 .....	24



# INTRODUCTION

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1. Hurricane Ivan in September 2004 caused widespread damage to the Cayman Islands, generating a large amount of scrap metal. The scrap metal was then deposited at a landfill site in George Town and two landfill sites in Cayman Brac and Little Cayman.
2. Since 2004, the Department of Environmental Health has tendered a number of contracts for removing scrap metal from the Islands, none of which has fully succeeded in achieving the desired objectives. In particular, a contract awarded to Matrix International Inc. in 2008 was the subject of an audit by the Office of the Auditor General that found significant failures in the tender process and the awarding of the contract. In 2010, the Office of the Auditor General reviewed the Government's procurement function and found significant weaknesses, including a lack of leadership, organization, policies, and standardized practices. In 2015, the Government hired a director of procurement. Since then, there have been several developments in the procurement function, including the drafting of legislation.
3. The contract we reviewed for this report was awarded in 2013 to Cardinal D Limited for the removal of scrap metal from the George Town landfill. The contract did not meet its objectives. Given this and other concerns about the awarding and management of the contract, in 2014 the Office of the Auditor General decided that there was a public interest in the OAG reporting on this project to the Legislative Assembly. Exhibit 1 describes the nature of public interest reporting.

## **Exhibit 1: Public Interest Reporting**

Public interest reports address issues that have been identified or on which a report has been requested during the year. They are used when there is a matter in the public interest that should be reported to the Legislative Assembly but where a full audit is not necessarily required. In general, these reviews are reactive and cover single issues at an individual entity. To an extent, these issues have been identified through our normal financial audit work. A public interest report should add value for decision-making and accountability. The nature of the work conducted is more about reporting information than following the auditing standards required for the conduct of a performance audit.

As the Public Accounts Committee may consider only reports that have been presented to the Legislative Assembly, the OAG uses a public interest report as a vehicle to make the information available for the Committee's consideration. The OAG has identified certain circumstances in which a public interest report may be produced. Note that these circumstances are not intended to represent an exhaustive list and that judgment will be exercised in individual cases:

- where the audit of the financial statements raises an issue that needs to be publicly drawn to the attention of the Legislative Assembly through a separate report;
- where the Auditor General believes that an issue related to an entity merits public disclosure or emphasis through a public interest report; and
- where a statutory requirement has been breached, contrary to the intent of the Legislative Assembly.

4. In respect of the sale of scrap metal, this report considers two specific areas:
  - the methods used by the Government to award the contract, and
  - the decisions made by officials once the contract was awarded.
5. Although we obtained information regarding certain aspects of the wider project to provide the relevant context, we have restricted our reporting to these two specific areas.
6. The objective of our review was to determine whether certain activities were carried out in accordance with the *Public Management and Finance Law (PMFL)* and whether there were reasonable management practices in place for the type of expenditures incurred. In carrying out this review, we interviewed key individuals involved in the project and reviewed relevant documents. The work was carried out by consultants working for our Office.

## ANALYSIS OF THE CONTRACT

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### GOVERNMENT'S TENDERING PROCESS

7. The Government's current tender process comprises five stages: requirement, tendering, evaluation, contract award and post contract award. The process involves both a government department wishing to put a contract up for tender and the Central Tenders Committee (CTC). The CTC is an oversight committee required to review the process for contracts above \$250,000. A department requiring that a contract be put up for tender creates its own committee, called the Departmental Tenders Committee (DTC), which carries out the five stages.
  - a. **Requirement:** The department wishing to put a contract up for tender must first establish a need for supplies or services, clearly defining the requirement. It must then create a business case that evaluates the need and analyses any alternatives to ensure best value for money. The department must then seek approval to put a contract to tender, including financial authorization.
  - b. **Tendering:** The department must create a tender plan with a timetable that considers the time needed to prepare, approve and issue the tender document. The plan must also consider time for advertising, preparing the tender, receiving proposals, and opening the bidding process.
  - c. **Evaluation:** The department's DTC determines the eligibility of each bid received and evaluates each bid. The DTC then produces an Evaluation Summary and Tender Award Recommendation report (ESTAR), which is submitted to the CTC. The CTC evaluates the ESTAR and advises the DTC of its decision. The DTC then notifies the bidders.

- d. **Contract award:** The department is responsible for preparing and issuing a contract to the successful bidder. The department will provide a copy of the final signed contract to the CTC, highlighting any differences between the contract costs and the bid cost.
  - e. **Post contract award:** The department is responsible for completing a post implementation report assessing whether value for money has been achieved and sharing information and lessons learned within the Government. The CTC is responsible for disseminating this information.
8. A document called the Open Tender Process serves as the guidance that the CTC uses to oversee the tender process.
9. This guidance states that all contracts below \$250,000 shall be evaluated by a DTC and anything above this value shall also be evaluated by the CTC. The guidelines state that the DTC is “...responsible and held accountable for ensuring that the process of bid evaluation is carried out in an ethical, fair, consistent and transparent manner”. No guidance is provided for a DTC on what constitutes an ethical, fair, consistent and transparent manner. Nor, at present, is there a formal framework in place to guide how a DTC in the manner in which it should be formed and its duties carried out.
10. We focused on three areas of the Open Tender Process document: Bid Opening, Bid Evaluation, Tender Recommendation and Award.
- a. **Bid opening.** The CTC is solely responsible for this stage in the process. The CTC opens all bids received in the period following the advertisement of the contract. It then meets to identify the bids and sort them by number. Before the meeting, the CTC Chairman will confirm that CTC members have no perceived or actual conflicts of interest with any bid. If a conflict is present, the individual concerned is instructed to leave the room while the bids are discussed.

As each bid is discussed, the Chairman of the CTC will invite a procurement officer (PO) from the relevant department to join the meeting. The PO gives an overview of the tender requirements, number of bidders, and method of evaluating the criteria, and then identifies the members of the DTC. The Secretary will confirm with the PO that he has signed a declaration of interests, and that no conflict or perceived conflict exists in his or her involvement in the process and the evaluation methods. We have not seen any evidence that members of the DTC are required to sign a declaration.

- b. **Bid evaluation.** This process primarily involves the DTC and the department’s Chief Officer (CO). The DTC checks each bid against the eligibility criteria stated in the tender document; bids that do not meet the criteria are rejected. They then check each bid for “responsiveness” to both the contract terms and conditions and the mandatory submission requirements; bids that are not substantially responsive are not considered further. Each responsive bid is then evaluated by the DTC against the scorecard and checked for any errors. The DTC then creates an ESTAR, which details the bids, their evaluation, and a summary ranking each bid. The CO will then approve the report and it is submitted to the CTC.
  
- c. **Tender recommendation and award.** The CTC meets with the department’s PO to review the ESTAR report. The PO’s role is to demonstrate that the tender process was carried out fairly, ethically, consistently and transparently. The PO is also required to provide evidence that the tender process was carried out in the correct manner. The CTC has no obligation to validate any of this information, and additional information is provided only when specifically requested by the CTC.

Following the meeting with the PO, the CTC will vote and advise the PO of the outcome.

## TENDER PROCESS AND AWARD ON THIS CONTRACT

11. On 16 April 2013, a Request for Proposals (RFP) for the contract was made available to the public through the local press, the CTC website and the Waste Age website. The RFP set a deadline of noon 1 May 2013 to receive all proposals. It detailed a number of items that a proposal would need to incorporate to be valid. These included a completed tender form; qualification statement; proof of required insurance; and a signed copy of a joint venture partnership where applicable.
  
12. The RFP stated that the objective of the contract was to sell all remaining scrap metal at best value and ensure its prompt and timely removal. We were also advised by Mr Roydell Carter of the Department that the key objective of the contract was the successful and timely removal of scrap metal from the three sites and that the price was a secondary factor.
  
13. Tender applications were received from two parties prior to the deadline of 1 May 2013:
  - Cardinal D, and
  - Islands Builders Limited.
  
14. No other applications were received.



15. A document titled “Chronological Order of Activities: Scrap Metal Tender” provided to us by government officials indicates that a cheque for \$250,000 dated 30 May 2013 was paid by Cardinal D before the contract was awarded.
16. On 3 June 2013 the ESTAR report was completed by the DTC and sent to the CTC. It recommended that the contract be awarded to Cardinal D. The ESTAR stated the following assessment and evaluation criteria:
  - a. Financial viability – Pass (10)/Fail (No further consideration)
  - b. Experience with similar projects – Max 20 points
  - c. Price offered – Max 40 points
  - d. Timeframe to complete – Max 25 points
  - e. Availability of equipment – Max 15 points
17. While the primary objective of the work to be performed was to remove the scrap metal from the Islands, the Director of DEH confirmed this was not reflected in the evaluation criteria where price was awarded the most points.
18. The ESTAR noted that the panel had agreed to use the quoted price per metric ton as the basis to award points in relation to price offered. It stated that when reviewing the tenders, the panel noted that Cardinal D had failed to submit the following:
  - a letter from a local bank confirming ability to obtain a line of credit (financial viability criterion above), and
  - a list of available equipment to be used (availability of equipment criterion above).
19. The panel wrote to Cardinal D after the tender deadline had passed, restating the requirement for these items. Cardinal D responded that it had provided a cheque for \$250,000 to the Ministry for safekeeping and that should it be awarded the contract, the Government would deposit the cheque. This cheque was based on the lower end (5,000 tons) of the quoted range in the tender document. Cardinal D stated that it would pay for any additional tonnage removed over and above 5,000 tons. No document was provided from a local bank confirming that measures would be in place to make any further payments. As for the missing list of equipment, the ESTAR noted that an acceptable letter dated 30 May 2013 was received detailing the equipment that could be used on the project. Having received the above comments from Cardinal D, albeit after the tender deadline had passed, the panel determined that both bids passed and would be admitted for evaluation.
20. The panel asked Island Builders to provide a certified letter of credit or a bond from a local bank for evidence that it could finance the project. This was provided as requested.

**Exhibit 2: Evaluation criteria – Score by the panel**

<b>Criteria</b>	<b>Cardinal D</b>	<b>Island Builders</b>
1) Financial viability (Pass/Fail)	Pass – 10	Pass – 10
2) Experience (5+ 20 points, 3-4 15 points, 2- 10 points)	10	10
3) Price offered (40 points max, other ratio determined)	40	21.3
4) Timeframe (8-months 25 points, 9-11 months 15 points, 11+ months 10 points)	25	25
5) Availability of equipment (All 15 points, most 10 points, few/no 0 points)	15	15
<b>Total</b>	<b>100</b>	<b>81.3</b>

21. The panel completed the evaluation process and awarded Cardinal D 100 points and Island Builders 81.3 points. The panel stated that while the two bids scored equally in all areas other than pricing, Cardinal D exceeded Island Builders based on price per ton. However, as indicated previously, Roydell Carter advised that this pricing element of the evaluation criteria was not critical for the purpose of this contract and Island Builders demonstrated a line of credit for a total of \$400,000.
  
22. The panel noted that Cardinal D had worked on previous scrap metal contracts with the Government, and the Department noted that performance on these contracts had been good. However, members of the panel were apparently informed by the Assistant Director who was at the time a member of the panel that Cardinal D had performed well on previous contracts. We found no evidence on the file to support this note in the report. The panel made a unanimous decision to award the contract to Cardinal D.
  
23. We have been advised by Roydell Carter, Director DEH, that previous scrap metal contracts issued by the Department to Cardinal D had not achieved their objectives, although we were not provided with any documentary evidence to support this statement.
  
24. On 19 June 2013 the CTC approved the recommendation stated in the ESTAR, and letters were sent out on 24 June 2013 to Cardinal D and Island Builders informing them of the decision to award the contract to Cardinal D. The contract was signed effective from 9 August 2013.

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## TENDER OUTCOME ANALYSIS

25. We were provided with both tender bids from Cardinal D and Island Builders, together with the RFP and ESTAR. Using this information, we evaluated both of the tender bids in accordance with the RFP and evaluation criteria stated in the ESTAR.

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## ELIGIBILITY CRITERIA

26. Both bids met the eligibility criteria, as they complied with applicable local laws and regulations; bids were inclusive of costs necessary to conduct business in the Cayman Islands; they had proof they had the finances to fulfil contractual obligations; and the bids were received before the deadline. It was noted that Cardinal D provided a range of estimated tonnage to be retrieved from the landfill sites, and its ability to finance the project covered only the bottom range of its estimate. Island Builders provided an estimated tonnage to be retrieved from the landfill sites, which was greater than that provided by Cardinal D, and provided evidence of its ability to finance this estimate.

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## QUALIFICATION STATEMENT

27. Attached at Appendix A is an extract from the invitation to tender document detailing the requirements of the qualification statement for the contract. How each bid responded to the requirements is discussed below.
28. Past experience and indication of past and current contracts:
- i. The Assistant Director, a member of the tender panel, advised the panel that Cardinal D was successful on previous contracts with Government. In the documentation, Cardinal D noted that it had worked on the previous scrap metal contract, a contract that we understand was deemed not to have achieved its objectives, and one relevant job in Jamaica. As noted in paragraph 22 above, the DTC had no evidence to support the Assistant Director's statements to the panel that the company had been successful on previous contracts.
  - ii. Island Builders provided a comprehensive list of experience in relevant sector contracts that included scrap metal removal, transportation, and export. In this section it also provided a high-level plan of how they would achieve the contract's objectives. The DTC, however, considered much of the experience less relevant since it did not directly involve removal of scrap metal from the landfill. We did not agree with this evaluation.

29. Provision of safety record and measures at similar operations:

- i. Cardinal D included a very brief plan of safety procedures to be followed in respect to clothing and supervisors, but provided no further information on safety measures.
- ii. Island Builders provided details of the owner's qualifications in relation to health and safety, demonstrating knowledge and ability. It provided a list of sub-contractors who would assist in establishing safety records and provided a safety manual that it was using.

30. Technical qualifications:

- i. Cardinal D did not provide technical qualifications.
- ii. Island Builders listed employees that would be working on the contract and the technical qualifications of each individual.

31. Equipment:

- i. Cardinal D did not provide details of access to the required equipment, evidence of ownership, or any documentation of leased equipment. It is noted that Cardinal D attempted to lease equipment from Island Builders after the commencement of the contract and also leased equipment from the Government. This agreement was not in place at the time the tender bid was provided.
- ii. Island Builders provided lease agreements for two vehicles and provided pictures of vehicles to which it had access in order to carry out the requirements of the contract.

32. Provide financial profile:

- i. Cardinal D provided a brief note stating that it was solvent. There was no evidence to support this.
- ii. Island Builders confirmed that it was solvent and provided a copy of its balance sheet, which confirmed that it had assets in excess of the contract amount. In addition, it provided cash balances of various accounts and a letter of good standing from Caledonian Bank Limited. Island Builders also provided numerous letters of intent from entities abroad that had agreed to purchase scrap metal.

33. Confirmation of line of credit to contract amount:

- i. Cardinal D provided a copy of a \$250,000 cheque, but no correspondence from a bank confirming a line of credit. We noted that the cheque covered only the lower end of Cardinal D's estimate; we were not provided with evidence that if it reached the higher range it would be able to finance such payments.

- ii. Island Builders provided a letter from Cayman National Bank that confirmed a bond to the value of \$400,000, the amount quoted on the bid.

34. Tender form stating price per ton:

- i. Cardinal D quoted CI\$50 per ton at each of the three sites. We noted that its tender bid stated that the scrap metal at both Cayman Brac and Little Cayman had virtually no value.
- ii. Island Builders quoted CI\$30.75 per ton at the George Town site and CI\$6.25 at both Cayman Brac and Little Cayman.

35. Insurance:

- i. Cardinal D provided a letter from British Caymanian that confirmed coverage for Workmen's Compensation and Public Liability up to the required amounts. The broker was within the Cayman Islands as required.
- ii. Island Builders provided its policy demonstrating that Workmen's Compensation and Public Liability insurance were in place to the required amounts. The broker was within the Cayman Islands as required.

36. Joint Venture/Alliance:

Neither company was participating in a joint venture or alliance.

37. Valid trade and business licence:

- i. Cardinal D provided a valid trade and business licence.
- ii. Island Builders provided a valid trade and business licence.

38. Compliance with pension laws:

- i. Cardinal D did not provide a letter of compliance in relation to pension law.
- ii. Island Builders did provide a letter of compliance in relation to pension law.

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## EVALUATION CRITERIA

39. Based on our review of the documentation provided and the appropriate guidance, we re-performed the ESTA process. The re-performance of the process was carried out by an independent consultant who was experienced in assessments of this nature. The results are below:

<b>Criteria</b>	<b>Cardinal D</b>	<b>Island Builders</b>
a. Financial viability (Pass/Fail)	Pass	Pass
b. Experience (5+ 20 points, 3-4 15 points, 2- 10 points)	10	20
c. Price offered (40 points max, other ratio determined)	25	40
d. Timeframe (8-months 25 points, 9-11 months 15 points, 11+ months 10 points)	25	25
e. Availability of equipment (All 15 points, most 10 points, few/no 0 points)	10	15
<b>Total</b>	<b>70</b>	<b>100</b>

- a. Financial viability:
  - i. Cardinal D provided a cheque from Cayman National Bank of \$250,000 that appears to be a bank draft. We note that the cheque was cashed and cleared.
  - ii. Island Builders provided a financial statement showing solvency and a line of credit from Cayman National Bank.
- b. Experience:
  - i. Cardinal D listed experience in two contracts—one a previous scrap metal contract for the Government and another for transporting road building material in Jamaica.
  - ii. Island Builders provided a comprehensive list of over five previous jobs, and contracts in both the private and public sector that we deemed were more than relevant to the contract.
  - iii. It appears that no evidence of the accuracy of the claims of either party was sought, nor is it routinely sought as part of this process.
- c. Price offered:
  - i. As noted in our review of the tender documents, there was a lack of clarity acknowledged by the panel in its understanding about how it would evaluate the price offered by the two companies; whether it was the total amount it could pay or the price per ton.

- ii. Cardinal D offered a cheque for \$250,000 and stated that it would pay more if it removed more scrap metal than the amount indicated in its lowest bid. However, this claim was not supported by any documentation showing ability to pay.
  - iii. Island Builders was able to pay the \$400,000 it had quoted on its proposal.
  - iv. We noted that Cardinal D stated it would pay a higher price per ton than Island Builders. Although the panel noted that it would use this to determine the price score, we adhered to the ESTAR, which stated that the price offered was the appropriate criterion. The panel elected to use price per ton as the basis for scoring this criterion. This suggests that, had it not done so, the total price offered would have formed the basis for scoring price.
- d. Timeframe:
- i. Cardinal D estimated removal would take four to six months. We noted that it had not achieved removal in 17 months.
  - ii. Island Builders estimated it would take eight months.
- e. Availability of equipment:
- i. Cardinal D provided no evidence of its access to equipment required to complete the contract.
  - ii. Island Builders provided lease agreements and pictures of numerous machines to which it had access.
  - iii. We were not provided with a full list of the machinery required for this contract.
  - iv. We requested, but did not see, the acceptable letter from Cardinal D mentioned in the ESTAR that indicated the availability of required equipment.
40. Having completed our own analysis of this tender, we arrived at different scores from those of the DTC. On the basis of our analysis, the contract should have been awarded to Island Builders, as they scored 100 points to Cardinal D's 70 points. Based on the information made available to us, Island Builders had included in its proposal all of the information required in the RFP, whereas Cardinal D did not provide all required information, particularly the qualification statement. As the qualification statement was considered a Pass/Fail item, our analysis indicated that Cardinal D also failed this requirement at the time bids were initially reviewed.

41. We are not suggesting that the DTC incorrectly completed the ESTAR either by error or by design. The ESTAR in its current form can lead to inconsistent results, given the subjective criteria and a lack of emphasis on key objectives. Further guidance and improvement to make the ESTAR more objective and more focussed on key criteria would improve the process.

## PERFORMANCE OF THE CONTRACT

### CONTRACT EXTENSIONS

42. Cardinal D requested contract extensions on two occasions, first extending the contract to 9 July 2014 and then further to 30 December 2014.
43. The basis for which the contract was extended to 9 July 2014 was that the metal baler that was leased by Cardinal D from the Government had suffered multiple failures, which caused disruption to the baling and processing of scrap metal.
44. The rationale for extending the contract to 30 December 2014 related to further failures with the metal baler leased by Cardinal D from the Government; fires that occurred at the George Town landfill site; and excessive rainfall, which prevented the use and repair of machinery.
45. Nothing has come to our attention from the documentation and information provided to us that indicates that the contract extensions provided were not appropriate.
46. We note, however, that the primary reasons for the contract delays as cited by Cardinal D were the baler's mechanical problems and failure. Cardinal D leased the bailer from the Government. While we recognize that this lease agreement and the contract are separate, Cardinal D was able to link and associate the two. The result is that, in effect, Cardinal D could attribute to the Government the blame for its non-performance on the contract. Had Cardinal D leased a third party's baler this argument against the Government would not have been effective.
47. We note that the outcome of the contract should have been dependent upon Cardinal D's ability to perform its contractual obligations.



48. We are not aware that the Department undertook a formal review of Cardinal D's performance on the contract. However, we were provided with a document from the Department to the Chief Officer of Ministry, Health and Culture that responds to allegations made by Cardinal D, implicating the Department as an obstacle to completing the objectives of the contract.
49. The document sets out each allegation that Cardinal D made in respect of the Department's performance, ranging from lack of communication to baler breakdowns, to all of which the Department responded by either providing rebuttals or identifying where it had moved to rectify any issues as promptly as possible.
50. The document concludes that Cardinal D failed to meet its contractual obligations and also that Cardinal D had failed to take steps that would have allowed it to continue the contract had another extension been awarded. For example, it did not have a valid baler rental agreement in place or valid IDs for its employees. The document provides a review of the various issues that beset the contract and Cardinal D's ability to perform its duties under it. It concludes that the contract did not meet its objectives.
51. We are aware that the objectives of the Contract were not met despite two contract extensions being granted. Cardinal D committed to removing a minimum of 5,000 tonnes of scrap metal from George Town, Little Cayman and Cayman Brac landfill sites. We have been advised that Cardinal D removed less than 3,000 tonnes of scrap metal solely from the George Town landfill site. As well, we were informed that Cardinal D was awarded a contract spanning 2011-12 to remove scrap metal which also did not meet its objectives.
52. As a result it appears that Cardinal D has failed to perform on two separate scrap metal removal contracts. With regard to the Contract, they failed to deliver the minimum level of scrap metal removal despite being afforded two contract extensions.
53. We have reviewed the current tender process and framework; performed benchmarking of Cayman Islands procurement policy and legislation against that which is present in the United Kingdom (see Appendix B); reviewed and re-performed the tender process undertaken to award the contract; and conducted a review of the emails to identify any suspicious activity.
54. Due to the lack of procedures and practices that we had identified in the 2010 audit and that continued to the date of this review, we looked to some form of standard practice to assess whether the action taken by Government officials was reasonable. Attached at Appendix C are extracts taken from *The Public Contracts Regulation 2015 (TPCR2015)*, which forms part of procurement legislation in the United Kingdom.

55. We have identified both the Cayman Islands legislation on procurement, including *Public Management and Finance Law (2013 Revision)* and *Financial Regulations (2010 Revision)*. We have also considered CTC policy documents surrounding procurement and the Open Tender Process (together, CTC Policy).
56. We have provided a summary comparison of the key procurement areas identified in TPCR2015; the Legislation and CTC Policy currently in place in the Cayman Islands.

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## SUMMARY COMPARISON

57. The United Kingdom's TPCR2015 provides extensive guidelines surrounding the entire procurement process and how it should be managed. The Legislation in place during the period this contract was processed made only limited reference to the procurement process, set out at Part IX of *Financial Regulations (2010 Revision)* and part of Schedule 6 to the *Public Management and Finance Law (2013 Revision)*. Just prior to the issuance of this report, the Legislative Assembly passed separate procurement legislation.
58. CTC Policy provides the framework for managing procurement and the Open Tender Process. CTC Policy is not extensive and is not precise when prescribing the standards to which policy is aligned, whereas TPCR2015 provides clear and explicit guidance to government departments.
59. The comparison between TPCR2015, the Legislation and CTC Policy indicates there is significant room for expanding procurement policy which would give government departments much more clarity when undertaking procurement. Greater clarity and guidance should result in an improved procurement function, delivering better results in terms of contract completion, achievement of objectives, quality and price.

# CONCLUSION

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## POLICY AND LEGISLATION

60. We have concluded that there is room to improve the Cayman Islands Government procurement policy and legislation. The policy and legislation in place when this contract was awarded did not provide the level of clarity, guidance and rules that are present in the United Kingdom. The procurement policy of the Cayman Islands would be more effective if it provided greater clarity to those who are required to use it.
61. The substantial difference in detail between the procurement policy and legislation in the Cayman Islands and the United Kingdom contributed to the issues discussed in this report. The United Kingdom provides detail around a large variety of procurement aspects, whereas the Cayman Islands provides detail on specific procurement aspects but does not address a large range of areas, leaving a lack of guidance or clarity in many areas.

## CONTRACT AWARD

62. In this engagement, with the information made available to us, we have seen no evidence that suggests that members of the Department or the DTC acted in an unethical manner when undertaking the tender and award process for the Contract.
63. Having conducted our own tender process, based on the information available to us, we believe that the information contained in the bid submissions should have led to a different conclusion than arrived at by the DTC. We used the same methodology as that prescribed in the Open Tender Process to complete the scoring system used to evaluate tender proposals and from the information provided to us, the tender proposal submitted by Cardinal D was not complete and failed a number of 'pass/fail' criteria that are identified in the tender requirements. Furthermore, the information provided by Island Builders appeared far more comprehensive and professional than that provided by Cardinal D in their tender proposal.
64. As previously stated, none of the information we have witnessed suggests any error or non-adherence to the process.
65. We do not believe that the scoring methodology for evaluating tender proposals used for the contract was appropriate. We were advised that the primary objective of the contract was to remove scrap metal from the Cayman Islands, yet the scoring methodology focused on price as

opposed to ability to execute. We do note that both Cardinal D and Island Builders scored equally in this category in the ESTAR report completed by the DTC.

66. Our primary view is that, to increase the effectiveness of procurement, improvements to policy need to be made to provide departments and individuals that undertake a procurement process with the appropriate clarity and guidance at all stages.



*Sue Winspear, CPFA  
Auditor General  
George Town, Grand Cayman  
Cayman Islands*

*10 November 2016*

## APENDIX A – TENDER DOCUMENT EXTRACT REGARDING THE QUALIFICATION STATEMENT

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All Qualification Statements submitted by the Tenderers must address each of the following mandatory requirements below:

1. A narrative description of past experiences, particularly experience directly or indirectly related to the removal, receiving, processing, transport and shipping outside the Cayman Islands or from a similar geographical terrain and in general the ability to undertake this project. This shall include the names and experience of all key employees working on the said project.
2. An indication of past and current contracts that would illustrate the ability of the Tenderer to perform and deliver the services required herein.
3. The Tenderer should provide a record of safety measures at similar operations. The successful Tenderer will need to provide a site-specific safety plan for approval by the Supervising Officer five (5) days before commencement of the Works.
4. Technical qualifications, including description of process, work force and equipment, including vehicles for transport both in the Cayman Islands and overseas as well as plans for loading and shipping. The information should provide sufficient details of ownership and title or a lease or purchase agreement guaranteeing the availability of all necessary equipment.
5. Provide a financial profile and capability to fully finance the proposal such as, but not limited to certified bank statements, copies of audited financial statements for at least the last year, certified to be true and correct, by an authorized representative of the Tenderer.
6. Confirmation of a certified line of credit or a bond from a local bank demonstrating the Tenderer's ability to finance the Works to completion. This includes the Tenderer's ability to provide a deposit or secured line of credit equal to the amount tendered per metric ton multiplied by an agreed total estimated quantity of Scrap Metals being purchased. This deposit or line of credit will be 'drawn down' for the estimated amount to be shipped. Each load of Scrap Metals are weighed and taken from the site.
7. A tender form completed in full by stating the per metric ton price, the proposed payment plan and projected completion date.

8. A Letter of Intent to provide Workmen's Compensation and Public Liability insurance coverage from a Cayman Islands Broker must be provided with the bid submission.
9. A signed copy of the joint venture or alliance/sale agreement must be submitted with the proposal, if such a joint venture partnership or alliance forms part of this tender. At least a company director and the secretary of each company will be required to sign the contract, upon successful award of the tender. If there is no joint venture, a copy of the sale agreement must be provided.
10. A copy of a valid Trade and Business Licence and a letter of compliance with the pensions laws from the relevant pensions agency.

## APPENDIX B: COMPARATIVE FRAMEWORK – THE PUBLIC CONTRACTS REGULATION 2015

Comparison Policy area	PCR2015	The Legislation	CTC Policy
Principles	<p>Authorities will treat economic operators equally and shall act in a transparent manner.</p> <p>Authorities will not try to artificially narrow the competition.</p>	<p>Procurement processes will be open, transparent and competitive.</p>	<p>12 principles governing public procurement are;</p> <ul style="list-style-type: none"> <li>• accountability</li> <li>• competitive supply</li> <li>• consistency</li> <li>• effectiveness</li> <li>• value for money</li> <li>• fair-dealing</li> <li>• integration</li> <li>• integrity</li> <li>• informed decision making</li> <li>• legality</li> <li>• responsiveness and</li> <li>• transparency</li> </ul>
Conflict of interest	<p>Authorities will take appropriate measures to prevent, identify and remedy conflicts of interest arising during the procurement process to ensure equal treatment of all operators.</p> <p>Conflict of interest arises when relevant staff members have, directly or indirectly, an economic or personal interest which</p>	<p>The Legislation does not contain items relating to conflicts of interest.</p>	<p>The CTC must declare if there is, or is a perceived, conflict of interest before bid opening, the individual must leave the room.</p> <p>The PO of a DTC must present a declaration of interests and confirm there is no conflict or perceived conflict.</p>

Comparison Policy area	PCR2015	The Legislation	CTC Policy
	<p>may be perceived to affect their impartiality.</p>		<p>The CTC will not circulate the ESTAR report to any member with a conflict or perceived conflict.</p>
<p>Technical specifications</p>	<p>The procurement documents must state the characteristics of the required works, services or supplies.</p> <p>The specifications shall define characteristics required of material, product or supply so it may fulfil the required use. Specifications include, but not limited to, environmental performance, performance, safety and quality assurance.</p> <p>They shall afford equal access of economic operators.</p> <p>Specifications shall be formulated by performance of functional requirements or by reference to relevant standards.</p> <p>The tenderer shall prove by appropriate means that the work, supply or service is in compliance with standards and requirements.</p>	<p>The Legislation does not specifically provide for how technical specifications should be defined or formulated.</p> <p>The Legislation refers to manuals published by the CTC.</p>	<p>CTC Policy states that the PO must define the specification and functional requirements of the tender.</p> <p>CTC Policy states that the tender document shall include the specifications and requirements for the bid.</p> <p>CTC policy does not state how specifications or requirements should be formulated.</p>



Comparison Policy area	PCR2015	The Legislation	CTC Policy
Exclusion of parties	<p>Authorities shall exclude an economic operator on the basis it has been convicted of a number of offences. Authorities may exclude economic operators for a number of discretionary reasons, most notably, where it has shown significant or persistent deficiencies in performance of a prior public contract.</p> <p>Authorities only exclude economic operators convicted of a criminal offence listed for 5 years and 3 years for discretionary reasons.</p>	<p>The Legislation does not reference the grounds on which economic operators should/may be excluded from the process.</p>	<p>CTC Policy does not reference the grounds on which economic operators should/may be excluded from the process other than failing to meet requirements of the tender document.</p>
Awarding contracts	<p>Authorities shall verify that an economic operator should not be excluded on any grounds mentioned above, before or after examining the tender document.</p> <p>Authorities will ensure the tenderer meets all the tender requirements.</p> <p>Where information is incomplete or erroneous, authorities may request the economic operator to supply or clarify the information.</p> <p>Authorities shall award the contract which is the most economically advantageous.</p>	<p>The Legislation does not reference how contracts should be awarded.</p>	<p>CTC Policy states that each bid will be checked for eligibility against the criteria, and that further information can be requested if necessary.</p> <p>CTC Policy states that each bid will be checked for responsiveness and shall not contain material deviations from the specifications, requirements or terms and conditions.</p> <p>CTC Policy states the weighting and scoring of the evaluation criteria will be carried out as advised to the CTC.</p>

Comparison Policy area	PCR2015	The Legislation	CTC Policy
	<p>This does not mean a contract will be awarded on a price basis alone.</p> <p>Authorities shall verify the information provided if there is any doubt.</p> <p>The process of awarding the contract shall, at least, ensure compliance with transparency and equal treatment</p> <p>The process will use selection criteria and its designated weightings to determine the most economically advantageous tenderer.</p>		<p>The DTC will produce an ESTAR report providing their recommendation, which will then be submitted to the CTC for approval.</p> <p>The PO shall demonstrate the process was carried out fairly to the CTC and in compliance with the Legislation.</p>
Selection criteria	<p>The selection criterion is formed based upon the procurement requirement.</p> <p>Authorities shall limit requirements to those that will ensure legal and financial capability as well as their technical and professional ability to perform the contract.</p> <p>Authorities may choose to impose requirements ensuring operators have the resources to complete a contract to appropriate quality standards and ensure appropriate levels of past experience.</p> <p>Authorities will establish whether the economic operator has any conflict that</p>	<p>The Legislation states a preference for domestic bidders.</p> <p>The Legislation states that a report prepared in a way which is consistent with CTC Policy and the specified criteria.</p> <p>The Legislation states that the CTC may make further enquiries to ensure evaluation criteria is used in accordance with previously approved criteria.</p>	<p>CTC Policy states that eligibility criteria and conditions which deem a bid to be responsive must be met.</p> <p>CTC Policy states the evaluation criteria will be applied as communicated to the CTC when selecting the bidder.</p>

Comparison	PCR2015	The Legislation	CTC Policy
Policy area	<p>will negatively affect the performance of the contract.</p> <p>Authorities shall indicate the requirements for participation which may express minimum levels of ability along with appropriate means of proof.</p>		

## **APPENDIX C – EXTRACTS FROM THE PUBLIC CONTRACTS REGULATION 2015**

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### Principles of Procurement (18)

- (1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.
- (2) The design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition.
- (3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

### Conflicts of Interest (24)

- (1) Contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.
- (2) For the purposes of paragraph (1), the concept of conflicts of interest shall at least cover any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.
- (3) In paragraph (2)  
“relevant staff members” means staff members of the contracting authority, or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure; and  
“procurement service provider” means a public or private body which offers ancillary purchasing activities on the market.

### Open Procedure (27)

- (1) In open procedures, any interested economic operator may submit a tender in response to a contract notice.
- (2) The minimum time limit for the receipt of tenders shall, subject to paragraphs (4) to (6), be 35 days from the date on which the contract notice is sent.
- (3) The tender shall be accompanied by the information for qualitative selection that is requested by the contracting authority.
- (4) Where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders as laid down in

paragraph (2) may be shortened to 15 days, provided that both of the following conditions are fulfilled:—

(a) the prior information notice included all the information required for the contract notice in section I of part B of Annex V to the Public Contracts Directive insofar as that information was available at the time the prior information notice was published;

(b) the prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

(5) Where a state of urgency duly substantiated by the contracting authority renders impracticable the time limit laid down in paragraph (2), it may fix a time limit which shall be not less than 15 days from the date on which the contract notice is sent.

(6) The contracting authority may reduce by 5 days the time limit for receipt of tenders set out in paragraph (2) where it accepts that tenders may be submitted by electronic means in accordance with regulation 22.

#### Technical Specifications (42)

(1) The technical specifications shall be set out in the procurement documents.

Scope of the technical specifications

(2) The technical specifications shall lay down the characteristics required of works, services or supplies.

(3) In the case of a public works contract, the technical specifications shall define any characteristics required of a material, product or supply so that it fulfils the use for which it is intended by the contracting authority.

(4) The characteristics referred to in paragraph (3) may include—

(a) levels of environmental and climate performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and production processes and methods at any stage of the life cycle of the works;

(b) rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.

(5) In the case of public supply or service contracts, the required characteristics may include quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedures.

(6) In the case of any public contract, the required characteristics may also refer to—

(a) the specific process or method of production or provision of the requested works, supplies or services, or

(b) a specific process for another stage of its life cycle, even where such factors do not form part of the characteristics' material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

(7) The technical specifications may also specify whether the transfer of intellectual property rights will be required.

#### Formulating the technical specifications

(8) For all procurement which is intended for use by natural persons, whether the general public or staff of the contracting authority, the technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for disabled persons or design for all users.

(9) Where mandatory accessibility requirements are adopted by a legal act of the EU, technical specifications shall, as far as accessibility criteria for disabled persons or design for all users are concerned, be defined by reference thereto.

(10) Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

(11) Without prejudice to mandatory national technical rules, to the extent that they are compatible with EU law, the technical specifications shall be formulated in one of the following ways:—

(a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;

(b) by reference to technical specifications and, in order of preference, to—

(i) national standards transposing European standards,

(ii) European Technical Assessments,

(iii) common technical specifications,

(iv) international standards,

(v) other technical reference systems established by the European standardization bodies, or

(vi) when none of the above exist, national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies, but each reference shall be accompanied by the words 'or equivalent';

(c) in terms of performance or functional requirements as referred to in sub-paragraph (a), with reference to the technical specifications referred to in sub-paragraph (b) as a means of presuming conformity with such performance or functional requirements;

(d) by reference to the technical specifications referred to in sub-paragraph (b) for certain characteristics, and by reference to the performance or functional requirements referred to in sub-paragraph (a) for other characteristics.

(12) Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process which characterises the products or services provided by

a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.

(13) But such reference is permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract in accordance with paragraph (11) is not possible, in which case the reference shall be accompanied by the words “or equivalent”.

#### Applying the technical specifications

(14) Where a contracting authority uses the option of referring to the technical specifications referred to in paragraph (11)(b), it shall not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender by any appropriate means, including the means of proof referred to in regulation 44, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

(15) Where a contracting authority uses the option laid down in paragraph (11)(a) to formulate technical specifications in terms of performance or functional requirements, it shall not reject a tender for works, supplies or services which comply with a national standard transposing a European standard, a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, where those address the performance or functional requirements which it has laid down.

(16) In its tender, the tenderer shall prove by any appropriate means, including those referred to in regulation 44, that the work, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority.

#### Test reports, certificates and other means of proof (44)

(1) Contracting authorities may require that economic operators provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

(2) Where contracting authorities require the submission of certificates drawn up by a specific conformity assessment body, certificates from equivalent other conformity assessment bodies shall also be accepted by the contracting authorities.

(3) In paragraphs (1) and (2), “conformity assessment body” means a body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council(1).

(4) Contracting authorities shall accept appropriate means of proof other than those referred to in paragraphs (1) and (2), such as a technical dossier of the manufacturer, where the economic operator concerned had no access to the certificates or test reports referred to in paragraphs (1) and (2), or no possibility of obtaining them within the relevant time limits, provided that:

(a) the lack of access is not attributable to the economic operator concerned, and

(b) the economic operator concerned thereby proves that the works, supplies or services provided by it meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

### Prior information notices (48)

- (1) Contracting authorities may make known their intentions of planned procurements through the publication of a prior information notice.
- (2) Such notices shall contain the information set out in section I of part B of Annex V to the Public Contracts Directive.
- (3) A contracting authority wishing to publish a prior information notice shall—
  - (a) send it for publication in accordance with regulation 51; or
  - (b) publish it on the contracting authority's buyer profile in accordance with regulation 52.
- (4) Where the prior information notice is published by the contracting authority on its buyer profile
  - (a) the prior information notice shall contain the information set out in part A of Annex V to the Public Contracts Directive, and
  - (b) the contracting authority shall send for publication, in accordance with regulation 51, a notice of the publication on its buyer profile.
- (5) Where sub-central contracting authorities use a prior information notice as a call for competition in accordance with regulation 26(9), the notice shall fulfil all of the following conditions:
  - (a) it refers specifically to the supplies, works or services that will be the subject-matter of the contract to be awarded;
  - (b) it indicates that the contract will be awarded by restricted procedure or competitive procedure with negotiation without further publication of a call for competition and invites interested economic operators to express their interest;
  - (c) it contains, in addition to the information set out in section 1 of part B of Annex V to the Public Contracts Directive, the information set out in section 2 of that part;
  - (d) it has been sent for publication between 35 days and 12 months prior to the date on which an invitation is sent for the purposes of regulation 54(1) or (2).
- (6) Where paragraph (5) applies, paragraph (3)(b) shall not apply to the notice, but additional publication at national level under regulation 52, if any, may be made on a buyer profile.
- (7) The period covered by the prior information notice shall be a maximum of 12 months from the date on which the notice is transmitted for publication.
- (8) In the case of public contracts for social and other specific services, the prior information notice referred to in regulation 75(1)(b) may cover a period which is longer than 12 months.

### General Principles in Awarding Contracts etc.(56)

- (1) Contracts shall be awarded on the basis of criteria laid down in accordance with regulations 67 to 69, provided that the contracting authority has verified in accordance with regulations 59 to 61 that all of the following conditions are fulfilled:
  - (a) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account, where applicable, regulation 45;
  - (b) the tender comes from a tenderer that—
    - (i) is not excluded in accordance with regulation 57, and



(ii) meets—

(aa) the selection criteria, and

(bb) where applicable, the non-discriminatory rules and criteria referred to in regulation 65.

(2) Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with applicable obligations in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to the Public Contracts

Directive as amended from time to time.

(3) In open procedures—

(a) contracting authorities may decide to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria in accordance with regulations 57 to 64; and

(b) where contracting authorities make use of that possibility, they shall ensure that the verification of absence of grounds for exclusion and of fulfilment of the selection criteria is carried out in an impartial and transparent manner so that no contract is awarded to a tenderer that—

(i) should have been excluded under regulation 57, or

(ii) does not meet the selection criteria set out by the contracting authority.

(4) Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, or where specific documents are missing, contracting authorities may request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

#### Exclusion Grounds (57)

(1) Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with regulations 59, 60 and 61, or are otherwise aware, that that economic operator has been convicted of any of the following offences:—

(a) conspiracy within the meaning of section 1 or 1A of the Criminal Law Act 1977(1) or article 9 or 9A of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983(2) where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA on the fight against organized crime(3);

(b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889(4) or section 1 of the Prevention of Corruption Act 1906(5);

(c) the common law offence of bribery;

(d) bribery within the meaning of sections 1, 2 or 6 of the Bribery Act 2010(6), or section 113 of the Representation of the People Act 1983(7);

(e) where the offence relates to fraud affecting the European Communities' financial interests as defined by Article 1 of the Convention on the protection of the financial interests of the European Communities(8):—

- (i) the common law offence of cheating the Revenue;
- (ii) the common law offence of conspiracy to defraud;
- (iii) fraud or theft within the meaning of the Theft Act 1968(9), the Theft Act (Northern Ireland) 1969(10), the Theft Act 1978(11) or the Theft (Northern Ireland) Order 1978(12);
- (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985(13), article 451 of the Companies (Northern Ireland) Order 1986(14) or section 993 of the Companies Act 2006(15);
- (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979(16) or section 72 of the Value Added Tax Act 1994(17);
- (vi) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993(18);
- (vii) destroying, defacing or concealing of documents or procuring the execution of a valuable security within the meaning of section 20 of the Theft Act 1968(19) or section 19 of the Theft Act (Northern Ireland) 1969(20);
- (viii) fraud within the meaning of section 2, 3 or 4 of the Fraud Act 2006(21); or
- (ix) the possession of articles for use in frauds within the meaning of section 6 of the Fraud Act 2006, or the making, adapting, supplying or offering to supply articles for use in frauds within the meaning of section 7 of that Act;

(f) any offence listed—

- (i) in section 41 of the Counter Terrorism Act 2008(22); or
- (ii) in Schedule 2 to that Act where the court has determined that there is a terrorist connection;

(g) any offence under sections 44 to 46 of the Serious Crime Act 2007(23) which relates to an offence covered by subparagraph (f);

(h) money laundering within the meaning of sections 340(11) and 415 of the Proceeds of Crime Act 2002(24);

(i) an offence in connection with the proceeds of criminal conduct within the meaning of section 93A, 93B or 93C of the Criminal Justice Act 1988(25) or article 45, 46 or 47 of the Proceeds of Crime (Northern Ireland) Order 1996(26);

(j) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004(27);

(k) an offence under section 59A of the Sexual Offences Act 2003(28);

(l) an offence under section 71 of the Coroners and Justice Act 2009(29);

(m) an offence in connection with the proceeds of drug trafficking within the meaning of section 49, 50 or 51 of the Drug Trafficking Act 1994(30); or

- (n) any other offence within the meaning of Article 57(1) of the Public Contracts Directive—
  - (i) as defined by the law of any jurisdiction outside England and Wales and Northern Ireland; or
  - (ii) created, after the day on which these Regulations were made, in the law of England and Wales or Northern Ireland.

(2) The obligation to exclude an economic operator also applies where the person convicted is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control in the economic operator.

#### Mandatory and discretionary exclusions for non-payment of taxes etc

- (3) An economic operator shall be excluded from participation in a procurement procedure where—
  - (a) the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions; and
  - (b) the breach has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of any of the jurisdictions of the United Kingdom.

(4) Contracting authorities may exclude an economic operator from participation in a procurement procedure where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

(5) Paragraphs (3) and (4) cease to apply when the economic operator has fulfilled its obligations by paying, or entering into a binding arrangement with a view to paying, the taxes or social security contributions due, including, where applicable, any interest accrued or fines.

#### Exceptions to mandatory exclusion

(6) A contracting authority may disregard any of the prohibitions imposed by paragraphs (1) to (3), on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.

(7) A contracting authority may also disregard the prohibition imposed by paragraph (3) where an exclusion would be clearly disproportionate, in particular—

- (a) where only minor amounts of taxes or social security contributions are unpaid; or
- (b) where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of fulfilling its obligations in a manner described in paragraph (5) before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender.

#### Discretionary exclusions

(8) Contracting authorities may exclude from participation in a procurement procedure any economic operator in any of the following situations:—

- (a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in regulation 56(2);
- (b) where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under the laws and regulations of any State;
- (c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;
- (d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
- (e) where a conflict of interest within the meaning of regulation 24 cannot be effectively remedied by other, less intrusive, measures;
- (f) where a distortion of competition from the prior involvement of the economic operator in the preparation of the procurement procedure, as referred to in regulation 41, cannot be remedied by other, less intrusive, measures;
- (g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity, or a prior concession contract, which led to early termination of that prior contract, damages or other comparable sanctions;
- (h) where the economic operator—
  - (i) has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria; or
  - (ii) has withheld such information or is not able to submit supporting documents required under regulation 59; or
- (j) where the economic operator has—
  - (i) undertaken to—
    - (aa) unduly influence the decision-making process of the contracting authority, or
    - (bb) obtain confidential information that may confer upon it undue advantages in the procurement procedure; or
  - (ii) negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award.

#### Exclusion during procedure

(9) Contracting authorities shall exclude an economic operator where they become aware, at any time during a procurement procedure, that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs (1) to (3).

(10) Contracting authorities may exclude an economic operator where they become aware, at any time during a procurement procedure, that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs (4) or (8).

#### Duration of exclusion

(11) In the cases referred to in paragraphs (1) to (3), the period during which the economic operator shall (subject to paragraphs (6), (7) and (14)) be excluded is 5 years from the date of the conviction.

(12) In the cases referred to in paragraphs (4) and (8), the period during which the economic operator may (subject to paragraph (14)) be excluded is 3 years from the date of the relevant event.

#### Self-cleaning

(13) Any economic operator that is in one of the situations referred to in paragraph (1) or (8) may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.

(14) If the contracting authority considers such evidence to be sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

(15) For that purpose, the economic operator shall prove that it has—

(a) paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;

(b) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; an

(c) taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

(16) The measures taken by the economic operator shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct.

(17) Where the contracting authority considers such measures to be insufficient, the contracting authority shall give the economic operator a statement of the reasons for that decision.

#### Selection Criteria (58)

(1) — Selection criteria may relate to—

(a) suitability to pursue a professional activity;

(b) economic and financial standing;

(c) technical and professional ability.

(2) Contracting authorities may impose on economic operators as requirements for participation only the criteria referred to in paragraphs (5) to (18).

(3) Contracting authorities shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded.

(4) All requirements shall be related and proportionate to the subject-matter of the contract.

(5) With regard to suitability to pursue a professional activity, contracting authorities may require economic operators to be enrolled in one of the professional or trade registers kept in their member

State of establishment, as described in Schedule 5, or to comply with any other request set out in that Schedule.

(6) In procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, contracting authorities may require them to prove that they hold such authorisation or membership.

#### Economic and financial standing

(7) With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract.

(8) In particular, contracting authorities may require that economic operators—

(a) have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract;

(b) provide information on their annual accounts showing the ratios, for example, between assets and liabilities; and

(c) have an appropriate level of professional risk indemnity insurance.

(9) The minimum yearly turnover that economic operators are required to have shall not exceed twice the estimated contract value, except in duly justified cases, such as by reference to special risks attached to the nature of the works, services or supplies, in which case the contracting authority shall indicate their main reasons in the procurement documents or in the report referred to in regulation 84(1).

(10) Ratios, for example that between assets and liabilities, may be taken into consideration where the contracting authority specifies the methods and criteria for such consideration in the procurement documents, but such methods and criteria shall be transparent, objective and nondiscriminatory.

#### Application to lots, framework agreements and dynamic purchasing systems

(11) Where a contract is divided into lots this regulation shall apply in relation to each individual lot.

(12) But the contracting authority may set the minimum yearly turnover that economic operators are required to have by reference to groups of lots in the event that the successful tenderer is awarded several lots to be executed at the same time.

(13) Where contracts based on a framework agreement are to be awarded following a reopening of competition, the maximum yearly turnover requirement referred to in paragraph (9) shall be calculated on the basis of the expected maximum size of specific contracts that will be performed at the same time, or, where it is not known, on the basis of the estimated value of the framework agreement.

(14) In the case of a dynamic purchasing system, the maximum yearly turnover requirement referred to in paragraph (9) shall be calculated on the basis of the expected maximum size of specific contracts to be awarded under that system.

#### Technical and professional ability

(15) With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

(16) Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past.

(17) A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract.

(18) In procurement procedures for supplies requiring siting or installation work, or for services or works, the professional ability of economic operators to provide the service or to execute the installation or the work may be evaluated with regard to their skills, efficiency, experience and reliability.

Indicating requirements for participation

(19) Contracting authorities shall indicate the requirements for participation, which may be expressed as minimum levels of ability, together with the appropriate means of proof, in the contract notice or in the invitation to confirm interest.

### Contract Award Criteria (67)

(1) Contracting authorities shall base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority.

(2) That tender shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with regulation 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, such as qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.

(3) Such criteria may comprise, for example—

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;

(b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or

(c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

(4) The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

(5) Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in—

(a) the specific process of production, provision or trading of those works, supplies or services, or

(b) a specific process for another stage of their life cycle, even where those factors do not form part of their material substance.

(6) Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority.

(7) Award criteria shall—

- (a) ensure the possibility of effective competition; and
- (b) be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.

(8) In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.

Weighting

(9) The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.

(10) Those weightings may be expressed by providing for a range with an appropriate maximum spread.

(11) Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

#### Principles of Awarding Contracts (76)

1) Contracting authorities shall determine the procedures that are to be applied in connection with the award of contracts subject to this Section, and may take into account the specificities of the services in question.

(2) Those procedures shall be at least sufficient to ensure compliance with the principles of transparency and equal treatment of economic operators.

(3) In particular, where, in accordance with regulation 75, a contract notice or prior information notice has been published in relation to a given procurement, the contracting authority shall, except in the circumstances mentioned in paragraph (4), conduct the procurement, and award any resulting contract, in conformity with the information contained in the notice about—

- (a) conditions for participation,
- (b) time limits for contacting the contracting authority, and
- (c) the award procedure to be applied.

(4) The contracting authority may, however, conduct the procurement, and award any resulting contract, in a way which is not in conformity with that information, but only if all the following conditions are met:—

- (a) the failure to conform does not, in the particular circumstances, amount to a breach of the principles of transparency and equal treatment of economic operators;
- (b) the contracting authority has, before proceeding in reliance on sub-paragraph (a)—
  - (i) given due consideration to the matter,
  - (ii) concluded that sub-paragraph (a) is applicable,
  - (iii) documented that conclusion and the reasons for it in accordance with regulation 84(7) and (8), and



(iv) informed the participants of the respects in which the contracting authority intends to proceed in a way which is not in conformity with the information contained in the notice.

(5) In paragraph (4)(b)(iv), “participants” means any economic operators which have responded to the notice and have not been informed by the contracting authority that they are no longer under consideration for the award of a contract within the scope of the procurement concerned.

(6) All time limits imposed on economic operators for the purposes of this regulation, whether for responding to a contract notice or taking any other steps in the relevant procedure, shall be reasonable and proportionate.

(7) Without prejudice to the generality of paragraph (1), and subject to the other requirements of this Chapter, contracting authorities may apply procedures for the purposes of this regulation which correspond (with or without variations) to procedures, techniques or other features provided for in Chapter 2, as well as procedures which do not.

(8) In relation to the award of contracts subject to this Section, contracting authorities may take into account any relevant considerations, including —

- (a) the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services;
- (b) the specific needs of different categories of users, including disadvantaged and vulnerable groups;
- (c) the involvement and empowerment of users; and
- (d) innovation.

## **Contact us**

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