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REGULATIONS FOR PROCUREMENT OF ENGINEERING CONSULTANCY SERVICES

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By

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Abstracts: Regulation is a set of rules having the force of law, prescribed by a competent authority relating to the action under the control of such authority. Regulations are issued by the governments departments, statutory bodies,' other authorities under the delegated function of the higher legislations. "A consultants is a person, partnership, corporate body or any other legal entity which independently performs study, prepares reports, makes designs, supervises constructions or under takes any other similar advisory activities in Engineering disciplines and is registered as such by the Council" (Section 2(vi) of PEC Act, 1976 as amended up to 1st December, 2016). The objective of the regulations is to provide transparency, equitability; minimize malpractices, increase productivity, ensure quality and timely completion for selection of consultants and rendering of consultancy services.

In Pakistan, consultancy services are regulated by two statutory federal government bodies, namely; Public Procurement Regulatory Authority (PPRA) and Pakistan Engineering council (PEC); besides Provincial regulatory authorities which must be ceased to exist after 18th Constitutional amendments under Federal list; Item-6, Part-II, SCH-4 of Article 143 of the Constitution under which regulations are now the Federal subject. Both PEC and PPRA regulations are enforceable at its own domain. PPRA rules 2010 and the PEC regulatory frameworks are generally do not contradict with each other. However, many projects implementing agencies, due to their in ability to distinguish between procurement of works and procurement of consultancy services; ask for bid security, performance security and Liquidated Damages in case of consultancy services which are otherwise applicable to procurement of goods and works. PEC regulations facilitates transparent competition in award of consultancy projects; provides preference of domestic consultants in award of consultancy contract where foreign expertise are not required, mandatory joint venture requirement between the Pakistan and foreign consultants in case a foreign consultant intends to provide services in Pakistan which facilitates technology transfer into Pakistan. PEC also do not distinguish between public and private sectors in award of consultancy contract; provides quality based, and quality and cost based selections methods, professional liability of the consulting engineers in case of errors and emissions in design, imposition of punitive action in case of proven misconduct of a consultant. Due to non-implementations of the PEC regulations in its true intent, there several issues cropped up which are confronting the consulting engineers in Pakistan.

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In Pakistan there are over 1200 registered engineering consultants with Pakistan Engineering Council. Association of Consulting Engineers Pakistan (ACEP) is a representative body of the consultants to promote the consultancy profession in Pakistan and establish networking outside Pakistan for the growth of the Pakistani Consultants. Members of ACEP become member of FIDIC also due to such association. However, ACEP members are required to work under the PEC regulatory regime and ACEP is to monitor and get implemented relevant regulations.

1. Introduction:

This paper titled- "Regulation for Procurement of Engineering Consultancy Services" is to explain procurement system for *Engineering Consultants* in Pakistan who are to perform such services for projects in Pakistan whether individually or in Joint venture with Local and Foreign partners. Among the regulatory frameworks prevailing in Pakistan for consultancy services, all regulatory documents including important provisions are highlighted in this article, however, discussions have been made in several areas which are currently confronting implementation of the applicable regulations. Although relevant regulations of PEC and PPRA are applicable in its own domain, however, where there is conflict between PEC & PPRA regulations, PEC regulations shall prevail; as, under the PEC Act 1976 as amended up to 1st December, 2016 enacted by the Parliament of Pakistan, PEC was constituted "*for the regulation of engineering profession*". Rendering of such engineering services is a Professional Engineering Works as defined in Section 2(xxv) of the PEC ACT 1976 as amended up to 1st December, 2016. Several issues confronting the consulting engineers in Pakistan cropped up due to non-implementation of the PEC regulations in its true intent are discussed at the end of this Paper.

2. What is regulation:

The regulations are the rules having force of law framed and notified under delegated authority of a higher law. Generally, such regulations are issued by the Government Departments, statutory bodies and other authorities, relating to the action under the control of such authority. Purpose of regulations for regulating the construction & consultancy sector pertaining to Professional Engineering Works; are to provide transparency, equitability, minimize malpractices, increase productivity and ensuring quality and timely completion for selection of contractors / consultants and execution of the works/services. In Pakistan, Pakistan Engineering Council (PEC) and Public Procurement Regulatory Authorities (PPRA) are the two federal regulatory bodies which regulate; among others, engineering consultancy services sector. Two provinces namely Punjab & Sindh also maintain their own such regulations despite the fact that after the 18th constitutional amendment, the function of regulations has been vested with the federal government only after deleting such functions from the Concurrent List. As for the province of Balochistan, KPK and AJ & K, they have notified the PEC regulations in their respective provinces/ regions.

3. Who are consultants:

Under Section 2(vi) of the PEC Act 1976 as amended up to 1st December, 2016, "Consulting Engineer" means any person, partnership, corporate body or any other legal entity which independently performs study, prepares reports, makes design, supervises construction or undertakes any other similar advisory activities in engineering disciplines and is registered as such by the Council". Similar definition has also been given under Section 2 (aa) in "Conduct & Practice of Consulting Engineers Byelaws 1986". This statutory definition that a valid Consultant shall have to obtain mandatory registration of the PEC and he is to work independently i.e. the Consultant is to form his opinion according to the professional ethics, technical standards, national &International practices and without being influenced by the Client or any other entity which is contrary to the PEC regulations. Generally it has been observed that some Clients attempt to use the Consultant to cover their malpractices and/or deal them like a servant. This type of master and servant relation is against the norms of International practices and professional role of a Consultant. Unlike construction sector, minimum qualification for CEO of an Engineering Consultant is bachelor degree in any discipline of engineering. Consultants provide intellectual inputs for a small amount of fee which generally ranges from 2 to 7 % of construction cost of a project, depending upon the scope of services.

4. Regulatory Processes:

Comprise of (a) Publication of Notice, (b) Issuance of EOI documents, (c) Evaluation of EOI applications, (d) issuance of RFP (e) evaluation of proposals, (f) Notification of evaluation result, (g) Award notification, (h) signing of Contract Agreement (i) Administration of Contract, (j) Dispute Adjudication. PEC relevant regulation has provided rules for each of these stages of the regulatory processes.

5. Regulatory Documents:

The regulatory documents issued by PEC & PPRA for regulating the engineering consultancy services in Pakistan are (a) PEC Act 1976 as amended upto 1st December 2016, (b)PEC Conduct and Practice of Consulting Engineers Bye-laws, (c) 2 PEC guidelines & 3 form of contract documents, (d) PEC Rules of Conciliation & Arbitration, (e) PPRA Ordinance 2002, (f) PPRA Rules 2010, (g) PEC Code of Conducts, (h) PEC Code of Ethics, (i) PEC Standard Form of Joint Venture/Consortium/MoUs, (j) Punjab PPRA-2014 & Sind.

6. Salient Previsions in the PEC ACT:

Under the PEC Act 1976 as amended in 1st December, 2016, the following salient provisions can be highlighted which empowers PEC to regulate the whole of the Engineering Profession including Consultancy Services. (a)PEC is to regulate whole of the engineering profession when 1st sentence of the Preamble read with Section-8 of the Act, (b)Pursuant to section 27 (5) & (5A) professional engineering works can be carried out only by the professional engineer, (c) Section 25 when read in conjunction with Section 2(xii), 2(xiv) and 2(xxv) empowered PEC to regulate Engineering Procurements, (d) Section 2(xxv)(i) provides for standard bidding/contract documentation and Arbitration rules, (e) Section 8(s) stipulates PEC as forum for Arbitration, (f) Section 8(p) entrusted PEC for development of construction cost data

(schedule of rates), (g) Section 20(4) empowers PEC to take suo-moto action against any organization, (h) Section 27(1) stipulates punitive action against non-compliance of PEC regulation.

7. Salient Provisions in Consulting Bye-laws:

7.1 Ownership:

(a) 51 % shares should be owned by Professional Engineer having minimum 5 years' experience with master in engineering or 10 years' experience as graduate engineer. Other 49 % should be owned by the engineers / allied professionals having minimum 15 years' experience, (b) Chief Executive must be Professional Engineer with minimum 5 years' experience with masters or 10 year as graduate engineer, (c) In case Govt. owned firm having 100 % shares, above rule at item (a) is not applicable, (d) P.E and firm should work solely as an independent entity having no conflicting interests., (e) PE in Government and public organizations can under-take private practice with permission.

7.2 General Regulations:

Some of the salient points of the general regulations are as under:

(a) A consulting firm is responsible for professional conduct of his employees or others connected with service, (b) A consulting engineer or an Executive, Director, Partner, Sole Proprietor or MD shall have no conflicting financial interests, (c) A consulting engineer shall not injure the interests of other consulting engineers except for review, (d) Dignified advertisement by cards, sign boards, brochures etc, (e) Seeking professional work through agent or commission is prohibited, (f) Selection of a consulting engineer purely on financial bid is prohibited, (g) Two or more firms having common directors can bid only jointly and not in competition, (h) No team up with construction company except for specified work as consultant with clearly defined remuneration for services, either internally or jointly to a third party.

7.3 Professional Liability:

Important provisions vis-à-vis Professional Liabilities are as under:

(a) Twice the design fee for proven fault, (b) Liability expires after three years of design or one year of construction whichever is earlier, (c) Liability Insurance beyond the limit of 1% of total design cost is at the option of employer, (d) Consultant may procure PII beyond the limit set forth above to be borne by the employer, (e) Unlimited liability for misconduct in case employer suffered loss or damages, (f) No liability due for other designers or constructors, (g) Employment of employer's employees without prior consent is prohibited except as in the agreement, (h) Consultants are exempted from above provisions in overseas jobs but to adhere to the regulations of the country where working.

7.4 Selection Process:

Salient provisions of selection process are as under:

(a) Contract for rendering Engineering Services to only registered consultants, (b) foreign consultants can work in a joint venture with Local in the ratio of expertise not available in Pakistan, (c) Independent foreign consultants permissible with prior PEC approval for short assignment on Technology Transfer Agreements.

7.5 Selection Procedure:

Salient provisions for selection procedure are as under:

(a) Invitation of pre-qualification application except Technical Assistance, (b) Two envelope proposals from Pre-qualified consultants either in QCBS or QBS, (c) Qualified Committee to evaluate technical proposals for quality based ranking, (d) Open financial of technically top three and make weighted evaluation ranking for cost & quality basis, (e) Technically top ranking consultant will first be invited for negotiation in case of QBS, (f) For consultancy service contract relevant PEC form of contract shall be used.

7.6 Registration & Penalties:

Salient Provisions are as under:

(a) Renewal application by 1st December on the status as on 31st November every year, (b) Consulting Engineer may continue working after submitting renewal application unless refusal of renewal by PEC, for one month for the ongoing projects, thereafter, for new projects with old license (c) Infringement of these bye-laws will attract punitive action, (d) False information intentionally to the PEC to be considered misconduct, (e) Working, abetting or helping without registration is punishable.

7.7 Registration of Foreign Consultants:

(a) Two stage registration for foreign consultants (b) Pre-registration on Form No. 4B for bidding, (c) Registration for specific project on Form 4C, only on submission of J/V with description and share of work.

7.8 PEC Building Codes:

(a) Seismic provision-2007 for design, (b) Energy provisions-2011 for design having total connected load 125 KVA or more, (c) Non implementation of above codes shall be considered as violation of Section 2(XXV) of PEC Act 1976 as amended up to 1st December, 2016.

8. Overview of PPRA Rules 2010:

PPRA Rule 2010 was issued by PPRA exclusively to regulate consultancy services in Pakistan. Salient provisions are as under:

(a) Differentiated between Expression of Interest and Request for Proposals to be issued to pre-qualified consultants, (b) Specified components for RFP- Letter of Invitation, Instructions to consultants, TOR, Evaluation criteria, Type of contracts, (c) Introduced five methods of selection of consultants- Quality based (QBS), Quality and Cost based (QCBS), Least Cost, Single Source or direct selection, Fixed budget, - in contradictions with PEC specified two methods i.e.

QCBS and QBS only (d) Eligibility to avoid conflict of interest, (e) EOI requires 15 days' notice to National and 30 days for International, (f) Minimum Components for EOI- Name and address of procuring agency, Assignment descriptions & scope of services required, Deadline for submission of EOI doc, Evaluation criteria to be followed, (g) Short-listing of consultants except for Single Source, normally of minimum three(*if less than three received, it should be accepted*) but no upper limit, (h) Components for Short-listing- Qualification, Experience, Any other factor deemed appropriate not inconsistent with PPRA Rule-2004, All applicants shall be informed about result , (i) Selection Committee be formed composed of three relevant persons, (j) Negotiation is limited to clarification and no changes in rates, (k) Professional liability equal to not less than remunerations excluding out of pocket expenses but not more than twice the remunerations.

9. Issues Confronting Consultants:

In absence of true implementation of the relevant regulations and lack of understanding of the relevant regulatory provisions by the PEAs; many issues have been cropped up which is hindering transparency and quality of services. Some of the issues are discussed below:

9.1 EOI should be project to project basis:

Under section7 (1) & Section 7 (2) of PEC Consulting Byelaws, advertisement for EOI/ PQ should be published for project to project basis. However, it has been observed during last one year that some of the departments particularly in the province of KPK are publicizing name and addresses of around 23 consultants repeatedly for submission of the proposals for all projects. This practice is not only unlawful but also depriving the other 1200 registered Consultants in Pakistan to compete. This practice must be abundant by the concerned project implementing agencies as soon as possible. Association of Consulting Engineers Pakistan (ACEP) shall have to coordinate with PEC to enforce the relevant PEC Regulations in its true spirit in this regard.

9.2 EOI and Proposals mixed up:

On many occasions, Project Executing Agencies (PEAs) invite for Expression of Interest; however, in the same advertisement they also ask for Technical & Financial Proposals without issuing any EOI documents. Under the regulations, PEAs can invite the proposals directly by issuing the proper RFP in which pre-qualification criteria may also be built in for a project in urgency of such nature for which the expertise are not available with large number of consultants. Despite the fact that pre-qualification and proposals are two separate items, generally to be short in two stages by issuing an appropriate documents; however, the practice stated above is continuing very frequently particularly by the Government Department.

9.3 Irrelevant demands for securities:

Many PEAs in their advertisement or in their RFP are seeking to submit Bid Securities, Performance Securities; and also built in the provision of Liquidity

Damages in case of the project delayed. Such demands are primarily due to inability of some of the PEAs to differentiate applicability of the rules for procurement of goods and works; and procurement of engineering services. This is also due to the existence of PPRA Rule 2004 which has been publicized effectively during last 2 or 3 years. PEC has contended time and again that PPRA Rule 2004 is meant for procurement of goods & works, and in some cases related services associated with the works. This has been subsequently endorsed by PPRA itself by issuing PPRA Rule 2010 which is to provide rules for regulating the consultancy services. Neither in the PEC relevant regulations nor in the PPRA Rule 2010 there is such requirement of Bid Security, performance security and imposition of LDs for rendering consultancy services. This is not also required by the leading lending agencies like WB, ADB etc. PEC has time and again written letters in this regard to federal and provincial entities, however, such practices by many PEAs particularly by the Government Departments are still continuing which shall have to be addressed affectively by meeting with relevant higher authorities in the federal and provincial Governments.

9.4 Appointment of the Engineer:

Many PEAs some time notify The Engineer from among their employee (s) to act as The Engineer. This trend is depriving the aggrieved parties whether the Consultants or the Contractors for obtaining an independent & impartial opinion of the Engineer in case of disputes between the contracting parties. The intent of the Local Regulations and the International practices are that the engineer shall have to be appointed by employer/ client to a firm/ person who are not the part of either of the contracting parties and who does not have the conflicting interest with either of them.

9.5 Client's Interference:

Under the PEC Act as amended 1st December, 2016, a consultant is to render its services independently. However, many a times, it has been observed that the consultant works under the dictates of the Client violating the applicable regulations particularly in the area of preparing bidding documents, making bid evaluations, undertaking resident supervisions certifying contractor's payments etc. Presumably, such practices are continuing at alarming rate due to the connivance of the Consultants with the Clients; as, consultant believe that giving Regulation compliant and independent opinion will make the Clients annoyed which will hamper in receiving payments on regular basis and also possibility of further projects from the same clients.

9.6 Number of Prequalified Consultants:

In most of the cases, it has been observed that maximum number of consultants to be pre-qualified for a project is neither mentioned in the advertisement nor in the PQ documents. This keep the Client at their discretion to prequalify as many numbers of Consultants they will like. This practice is not only in contradiction with International practices but also attracts dispute and litigation subsequent to pre-qualification.

9.7 Engineering design by architectural firm:

Despite the provision in PEC Act & Byelaws that engineering design for structures, infra structures and other projects can only be undertaken by a firm registered with Pakistan Engineering Council (PEC) to be headed by a Professional Engineer; Architectural firms are undertaking the Professional Engineering Works. Such practice will render the PEAs under punitive actions pursuant to PEC ACT as amended up to 1st December, 2016 for assigning such projects to the architectural firms. PEC regulations do not prohibit undertaking such projects by an A/E firm.

9.8 Unequal competition:

Some of the PEAs assigning consultancy services to the firms; whether Sole Proprietors, Partnership, Private Limited or Public Limited without ensuring that they have registration with relevant tax authorities and filling the taxes regularly. At present, taxes to a consultant are approximately 24 % which are to be considered in any proposal by a tax payer consultant. Therefore, those firms not paying taxes regularly are getting undue advantage of at least 24 % while competing in submitting the proposals. This trend can be checked by ensuring that unlike previous practices; PEC is issuing registration to a consultant only after ascertaining that the consultant is registered with appropriate registered bodies and filing the taxes. The PEAs are always to ask for these requirements while inviting EOI & Proposals.

9.9 Advance payment:

The PEAs have the right to ask for advance payment security in case advance is paid to a consulting engineer. Due to the fact that such security from the banks not only require payment of premiums but also take a lot of time to arrange. Keeping in view the role and income of a consultant and the difficulties mentioned here above; a mechanism of Revolving fund has been introduced in the PEC form of Contracts. However, in most of the cases this is being ignored.

9.10 Extension in services:

Due to the misinterpretation of provisions for repeat order in PPRA rule 2004, occasionally PEAs contend that ongoing consultancy services cannot be extended due to the above provisions which limit the repeat orders up to minimum 15 % of the original Contract. This is due to the gross misunderstanding and failure to appreciate that PPRA Rule 2004 is not applicable for the consultancy services.

9.11 Professional Liabilities:

Section-5 of PEC Consulting Byelaws prescribes Professional Liabilities in case of errors and omissions; and in case of misconduct. The provision also provides that in case the consultants secure the Professional Liability Insurance, the client will pay the premium beyond 1 % which should be paid by the Consultant.

9.12 Top Supervision:

PEC in its latest amendment available in the PEC website introduced new definition for "Top Supervision:", "Supervision" and "Negotiations". Under Secition 2 (h), 2 (g) & 2 (f) respectively in PEC Consulting Byelaws. Whereas, Supervision has been defined as the "Resident Supervision", Top Supervision is defined as "Intermittent visit as and when needed"; however, the Consultant rendering Top Supervision has been barred verifying Contractors Payment Liability. Negotiations has been defined as joint deliberations to primarily clarify RFP & TOR provisions for the winning proposal but barred from seeking across the board cost cutting.

9.13 Track record of foreign firms:

The regulations do not bard to use the expertise and track record of the foreign firm in Joint Venture with a local firm. However, a few consulting firm of foreign origin has made their commercial presence in Pakistan and registered as a local form; and subsequently making joint venture with their parent foreign firm utilizing the foreign track record to promote the local partners business. This is a ploy to betray the rights of local consultants who cannot compete if such intrigues are continued. PEC must have to resolve this matter urgently.

9.14 Provincial PPRAs:

Although provincial PEAs would cease to exit after the 18th Constitutional amendment, however, conflicting regulations by the Government of Punjab and Sindh are still in practice. Recently, Punjab Government has issued an amended PPRA rules in 2014 in which the spirit of the regulations have been violated and discriminatory power has been introduced. For example Government can award a project to any public sector consultancy organization without going through the bidding process and entering into the competition, which is a clear violation of the PEC regulation under which no discrimination can be made in award of consultancy contract whether the consultant is in public sector or in private sector.

9.15 Consultants Role to implement:

It has been observed that sometimes consultants do not resist intention of the PEAs to violate the regulations just to get a project whether in compliance with the regulations or not. It is believed that consultants are most conversant persons regarding the applicable regulations for procurement of consultancy services and they will have to educate the PEAs about the requirements of regulations and consequences of violating such regulations, not limiting to the imprisonment and penalties by PEC. This role can be effectively played by the ACEP which is also ex-officio member in the PEC Governing Body and responsible to develop and promote the consultancy sector in Pakistan. In this regard, they can arrange frequent seminars, workshops in various places attracting the PEAs to participate for their capacity building. Funding for such exercises can also be obtained through an appropriate contact, from WB, ADB, USAID etc.

10. Conclusion:

In view of the forgoing, it is hoped that all stake holders particularly ACEP will play effective role to get implemented Country regulations for transparent and unbiased award and execution of procurement of consultancy services in Pakistan.