This document provides a clarification on section 123 and 124 of GWB (German act against restraint of competition). Same shall be integral part of grid for assessing the eligibility of firms (GAEF)

Section 123 of GWB – The assessment grid refers to section 123 of GWB as the mandatory grounds for exclusion of a bidder from the procurement process.

Section 123 of GWB primarily refers to involvement in a criminal offence as a ground for exclusion of the bid participant and criminal offences listed in section 123 of GWB inter alia include engagement in formation of criminal organization or terrorist organization, terrorism financing, money laundering, fraudulent activities, taking or giving bribes, human trafficking etc.

In addition, section 123(4) of GWB further states that an undertaking shall also be excluded from the procurement procedure if such undertaking has not fulfilled its obligations relating to payment of taxes, charges or social security contributions.

"Mandatory grounds of exclusion – i.e., the bidder and/or its management has been involved in and convicted of an offence under:

a. the Indian Penal Code, 1860
b. the Prevention of Corruption Act, 1988
c. the Prevention of Money Laundering Act, 2002
d. the Unlawful Activities (Prevention) Act, 1967
e. the Immoral Traffic (Prevention) Act, 1956 or
f. any other applicable legislation in this regard

In addition, the bidder is also debarred from the procurement process, if the bidder has committed any fiscal offence including but not limited to the following legislations, which offence/contravention has been established by judicial or administrative decision having final and binding effect:

a. default in payment of tax under the Income Tax Act, 1961
b. default in payment of goods and service tax in compliance with the GST laws
c. default in payment of any tax in compliance with the applicable national, state or local legislation
d. default in payment of employee benefits under the labour and employee legislations such as provident fund, professional tax, labour welfare cess etc.
e. default in compliance with the Foreign Contribution (Regulation) Act, 2010

Sub-point (a) and (b) above (concerning the Indian Penal Code, 1860 and the Prevention of Corruption Act, 1988) have been prescribed as grounds for debarment of a bidder, under rule 151(1) of the General Financial Rules, 2017 as well.

Assessment grid refers to section 124(1) and 124(2) of GWB as the optional grounds for exclusion of a bidder from the procurement process.

Section 124(1) of GWB prescribes facultative grounds for exclusion which may be considered for excluding any undertaking from the procurement process. The said facultative grounds of exclusion inter alia include breach of applicable environmental, social or labour obligations in carrying out public contracts, undertaking being a part of insolvency

proceedings, commitment of grave professional misconduct which renders the integrity of the undertaking as questionable, involvement in any anti-competitive trade practices, existence of any conflict of interest, termination of contract or any damages or sanctions being imposed on the undertaking on account of deficient performance under a public procurement contract or concession contract or the undertaking being engaged in any misrepresentation or misleading acts.

“Optional grounds of exclusion – i.e., the bidder and/or its management is found to be engaged in or subject to any of the following:

a. breach of applicable environmental, social or labour and employee legislations in undertaking its operations or business activities.
b. insolvency or liquidation proceedings.
c. any collusion, bid-rigging or anti-competitive behaviour that may impair the transparency, fairness and progress of the procurement process.
d. any conflict of interest in case of bidder being selected for the proposed contract/tender.
e. termination of contract or imposition of any damages or sanctions for any prior public contract or concession contract.
f. any financial or business transaction between the bidder and any official of the procuring entity related to tender or execution process of contract, which can affect the decision of the procuring entity, either directly or indirectly.
g. any coercion or any threat to impair or harm, directly or indirectly, any party or its property to influence the procurement process.
h. making false declaration or providing false information or withholding relevant information for participation in a tender process or to secure a contract; or
i. bidder being debarred by any ministry, government department, public sector undertaking etc. pursuant to the General Financial Rules, 2017 or any procurement guidelines of any such ministry, government department, public sector undertaking etc.

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