

FAIR TRADING COMMISSION

STRENGTHENING THE INSTITUTIONAL FRAMEWORK FOR COMPETITION ADVOCACY

COMPETITION LAW TECHNICAL ASSISTANCE AND REGULATORY DRAFTING CONSULTANT

TERMS OF REFERENCE

BACKGROUND

The Fair Trading Commission (FTC), an agency of the Ministry of Industry Investment & Commerce has received assistance from the World Bank Group (WBG) for the purpose of enhancing the Competition Policy framework and level of competition in the Jamaican economy. The purpose is to (a) ensure that a pro-competition approach is taken in the regulatory reforms; (b) increase the FTC's capacity for implementing successful competition advocacy in collaboration with the WBG Competition Policy Team; (c) support the FTC to implement its mandate in enforcing the Fair Competition Act (FCA); and (d) advocate for a regulatory framework that promotes well-functioning markets in the economy.

Competition policy has become an increasingly important issue for Jamaica as it moves towards a fully liberalized market economy. The privatization of state entities, the liberalization of previously monopolized sectors and the reduction in trade barriers are all facets of this evolution. Competition is a critical element of this process. It lies at the heart of any successful market economy and is crucial to the protection of consumers' interests and the efficient allocation of resources. Accordingly, competition is now an integral part of Jamaica's trade policy.

The FTC, Jamaica's competition agency, was established in 1993 under the Fair Competition Act (FCA). The FCA provides for protection against anti-competitive practices as well as specified unfair competition offences. With regard to the former, the FCA prohibits the abuse of a dominant position as well as agreements that substantially lessen competition. In terms of unfair competition, the FCA speaks to matters such as misleading advertising, sale above advertised price and double ticketing. Essentially, the objective of the FCA is to ensure that the benefits of the competitive process in Jamaica are unhindered by anti-competitive activity and unfair competition.

CONSULTANCY OBJECTIVES

To provide the FTC with technical assistance in FTC's drafting of provisions for its Competition Law, the FCA, to help FTC ensure that the law (a) speaks directly to the operation of a merger review regime which is appropriate for Jamaica; and (b) explicitly states the competition advocacy functions of the FTC.

CHARACTERISTICS OF THE CONSULTANCY

Type of Consultancy — Individual

Duration — The duration of the Consultancy will be from February 2015 to May 2015.

Place of Work — The Consultant shall make himself/herself available by way of the telephone, e-mail and/or via the Internet and/or via video conferences; and will be required to visit the Offices of the FAIR TRADING COMMISSION on no more than two occasions.

Qualifications — Masters of Laws (minimum). Fluency in English (written and spoken) is required. Knowledge of the existing Jamaican statute as well as statutes of other jurisdictions such as United States, Canada, UK, Australia and New Zealand, is a critical requirement.

Experience — A minimum of five years (5) years experience in competition law enforcement and legislative review in a Competition Agency. Expertise in prosecuting competition related cases, drafting of competition law statutes; and publication of competition related article(s).

ACTIVITIES

The Consultant will be required to:

- Develop a list of topics that the statute should address as well as draft provisions that should be included in the FCA, based on proper appreciation of the fundamental principles of Competition Law with respect to the functioning of a merger review regime as well as competition advocacy. Topics would include:
 - a. The scope of the Act – identifying the entities and type of activities to which the Act should apply (including definitions and exemption clauses).
 - b. Extent of powers and duties of the Agency: investigation, prosecution, imposition of final and interim remedies.
 - c. Procedures to be followed by the Agency in exercising its powers, including timelines, confidentiality issues, allocation of power and separation of functions, transparency.
 - d. The interface between the Agency and other Government Ministries, Agencies and regulatory bodies.
 - e. The relationship with the regional Competition authority as well as other Competition Agencies.
 - f. The role of the judiciary in Agency proceedings and regarding review of Agency decisions.
 - g. The role and legal rights of Respondents.
 - h. The role and legal rights of private party Informants, including private right of action.
 - i. Treatment of State/Government enterprises under the Act.
 - j. The institutional, legal and administrative construct of a voluntary notification merger regime.

- k. The most appropriate and effective design, type and form of remedies.
 - l. The need to have a separation of adjudicative and investigative functions.
 - m. The recognition of intellectual property rights in the assessment of merger review.
 - n. The need to remove exemptions that exclude certain sectors or industries.
 - o. The need for more effective procedural enforcement remedies.
 - p. The importance of providing for harmonization of merger provisions in CARICOM.
 - q. The mode of implementation of appropriate remedies.
 - r. Provisions for cooperation agreements.
- Prepare a list of options for each topic, briefly describing the pros and cons of each option for consideration, having made the draft available for consultation.
 - Liaise with the Counterpart as well as representatives of the Ministry of Industry Investment & Commerce and the Chief Parliamentary Counsel, to finalize the Law.

The FTC will be required to:

- Provide suitably qualified personnel to function as counterpart with the Consultant.
- Instruct the Consultant on how it would want the Commission to be structured and this would determine the legal framework within which the Law will be drafted.
- Satisfy all reasonable requests for information, by the Consultant.
- Provide the Consultant with feedback on the documents that are developed.

Deliverables

An Inception Report which examines the FCA (1993) to identify weaknesses and/or gaps, and provide an overview of what measures are to be taken to address those weaknesses. Report should be submitted within fourteen (14) calendar days of signing of the Contract.

Develop in consultation with the Counterpart, the optimal structure for the institution with respect to the functioning of a merger review regime. Provide a Report briefly outlining how the structure will be articulated in the Law as well as the role and functions of the various arms of the structure, together with the nature of the regulations that will be required to give effect to that structure.

Draft provisions and recommend amendments, for discussion with the Counterpart. Final document to be approved by the FTC and will be issued to relevant stakeholders for comments.

Upon receiving comments from the various stakeholders, provide a document containing written responses as appropriate addressing all comments.

Prepare final draft provisions based on determinations made by the FTC out of the consultation process; and recommend amendments to the FCA that will be necessary, to ensure that the provisions yield the desired outcomes.

Prior to submission to Cabinet prepare a commentary which would accompany the Draft, and develop and make presentations (as and where appropriate) at meetings with relevant Government officials; including the Chief Parliamentary Counsel.

Prepare implementing procedural regulations and/or enforcement policy guidelines.

TIMELINE & PAYMENT SCHEDULE

Deliverables must be executed within the time set out in the following table:

Activity	Due date	Payment
Inception report	February 15, 2015 (2 weeks)	10%
Report on the Structure	February 28, 2015 (2 weeks)	20%
Draft Provisions	March 31, 2015 (4 weeks)	10%
Responses to Comments	April 15, 2015 (2 weeks)	10%
Final Draft Bill	April 30, 2015 (2 weeks)	20%
Implementing Procedural Regulations/Enforcement Policy Guidelines	May 15, 2015 (2 weeks)	20%
Commentary to accompany Draft	May 31, 2015 (2 weeks)	10%

ADDITIONAL WORK

Any additional work to that specified in this Terms of Reference must be clearly identified and accepted by all parties.

SUPERVISION AND COORDINATION

Day to day monitoring will be done by the Executive Director and the Project Manager. Assessment of all final documents will be approved by the Commissioners.

August 26, 2014