

PUBLIC CONTRACTS REVIEW BOARD

Case No. 534

LGA/REG04/2012

Framework Contract for the Provision of Compliance Auditing

This call for tender was published on the 4th November 2012 with a closing date of the 26th November 2012. Once this was a Framework Contract no estimated value was included in the tender since the Lotteries and Gaming Authority was not in a position to know beforehand the number of audits that will be required to be carried out. Moreover all fees collected from applicants were forwarded to the contractors.

GLI Europe filed an objection on the 4th March 2013 against the decision of the Lotteries and Gaming Authority to disqualify its offer on the grounds that the three reference letters requested in the tender were not submitted.

The Public Contracts Review Board composed of Mr Joseph Croker as A/Chairman and Messrs Carmel Esposito and Paul Mifsud as Members convened a hearing on the 26th April 2013 to discuss the objection.

Present for the sitting:

GLI Europe

Dr Robert Zammit	Legal Representative
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Capstone Group

Mr Nicholas Gouder	Director
Mr Bernard Farrugia	Representative

Kyte Consultants

Mr Trevor Axiaq	Representative
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FACT Group

Mr Andrew Galea	Representative
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Lotteries and Gaming Authority (LGA)

Evaluation Board

Mr Daniel Cilia	Chairman
Mr Damien Xuereb	Member
Mr Jason Farrugia	Member
Dr Corinne Gatt	Secretary

After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Robert Zammit, on behalf of GLI Europe, the appellant, made the following submissions:

- i. GLI Europe has been offering its services related to the regulation of the gaming industry in many countries for a number of years and it has also provided its services to the LGA since its setting up by assisting in the drafting of regulations and in carrying out audits on licensees;
- ii. in his tender submission his client had included a list of referees, which included various regulatory bodies and large firms operating in the gaming industry however through an oversight he failed to submit the three reference letters requested; and
- iii. given his good reputation locally and abroad and his long working relationship with the LGA itself, his client was requesting that the contracting authority be allowed to use a measure of discretion by either accepting the tender submission as presented or else to ask his client by way of clarification to provide the three reference letters.

Dr Corinne Gatt, on behalf of LGA, the contracting authority, submitted that:-

- a. as was informed by email dated 1st March 2013, the appellant had submitted references to companies or organisations which had made use of his services however he had failed to submit the three reference letters as requested in Section 4.2 (e) of the 'General Requirements' of the Framework Contract, besides the fact that the LGA could not form part of those references;
- b. clause 4.2 stated, among other things, that: *Absence of adherence to any one of the 'General Requirements' shall nullify the Offer* - the submission of the three reference letters was one of these requirements;
- c. although the appellant had indicated 'Yes' with regard to the submission of the three reference letters, no such letters were traced in his tender submission; and
- d. the LGA acknowledged that it has had a long and satisfactory working relationship with GLI Europe and it was regrettable to disqualify this firm from this tendering process however the tender conditions were very clear in that the appellant's tender as submitted was not compliant.

Mr Damian Xuereb, member of the evaluation board, remarked that with regard to LGA asking by way of clarification GLI Europe to submit these three reference letters, the advice given by the Departmental Contracts Committee (DCC) was to adhere to the tender conditions, in other words, that absence of adherence to the 'General Requirements' led to the disqualification of the offer as per clause 4.2.

Dr Gatt referred also to clause 1.10.3 which read as follows:-

The Evaluation Committee may, in writing and according to the correct legal procedure, require any of the interested parties to provide clarifications in regard to the submitted offer or any part thereof. This is permitted in the interest of transparency and the equal treatment of all interested parties. In such cases, the party requested to clarify shall not be permitted to modify the submitted offer but merely provide clarifications.

Dr Zammit held that in such circumstances the contracting authority should be afforded a measure of discretion especially once this was not a competitive procedure but its purpose was to identify competent contractors to render a service at an established price. He added that should the PCRB reject this line of reasoning on the part of his client, then he would have to reluctantly raise the issue as to whether it was regular for the contracting authority not to publish the estimated value of the tender as per Reg. 16 of the Public Procurement Regulations, which omission could render this tendering process null.

Dr Gatt explained that:-

- i. the LGA was not obliged to publish the total estimated contract value because this was a framework contract and Reg. 16 (11) laid out how the framework contract value had to be arrived;
- ii. in this case the price per audit was fixed at €2,750 however the total contract value depended on the number of current and future licensees who would be subjected to such an audit;
- iii. this issue was raised with the DCC prior to the issue of the tender and it was agreed not to publish the total estimated value of the contract but to publish the rate per audit since the LGA could not guarantee the number of such audits, this was fully explained in file; and
- iv. the LGA would charge the cost of the audit to the licensee and then the LGA would pass on the money to the contractor, which meant that these audits did not involve any income or expenditure on the part of the LGA.

Mr Xuereb remarked that if tenderers required clarification on any aspect of the tender, they had the opportunity to do so prior to the closing date of the tender.

At this point the hearing came to a close.

This Board,

- having noted that the GLI Europe had through a letter dated 4th March 2013 objected to their being excluded from the tendering procedure;
- having also noted that the tender required the submission of three reference letters with the tender document; having noted that appellant submitted a list of references but did not submit the requested letters;

- having noted that the contracting authority stated that the tender document required the submission of reference letters and not lists;
- having also noted that the fact that the mentioned letters were not submitted was not in dispute;

came to the following conclusions:

1. the Public Contracts Board while acknowledging the fact that the reference letters might not have been included with the tender document through an administrative mistake;
2. the Board is of the opinion that the submission of a list of referees does not satisfy the requirement for the submission of reference letters; and
3. the Board also notes that it is the tenderer's responsibility to ensure full adherence with the conditions laid down in the tender document, and that once the tender required the submission of reference letters, the fact that the appellant was already offering a service to the contracting authority should not to be understood as enabling the appellant to do away with this requirement.

In view of the above, the Board finds against the appellant and recommends that the deposit lodged to cover the appeal be forfeited.

Joseph Croker
A/Chairman

Carmel Esposito
Member

Paul Mifsud
Member

2nd May 2013