

PUBLIC CONTRACTS REVIEW BOARD

Case No. 535

LGA/REG04/2012

Framework Contract for the Provision of System and Financial Auditing

This call for tender was published on the 4th November 2012 with a closing date on the 26th November 2012. Since this was a Framework Contract and all costs related to this service were paid by the applicants to the Lotteries and Gaming Authority, no estimated value was included in the call.

Quinel SA lodged an objection on the 4th March 2013 against the decision of the Lotteries and Gaming Authority not to consider its (Quinel SA) tender submission since the tender document was not inserted in the tender box by the closing date/time for the receipt of offers.

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

Present at the hearing:

Quinel SA

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 Quinel SA, the appellant, made the following submissions:

- i. by email dated 27th February 2013 the contracting authority had informed his client that the reason for his exclusion was that his tender submission was not found in the tender box by noon of the 27th November 2012 as requested in the tender document;
- ii. this tender submission was delivered by courier service at the offices of the LGA on Friday 23rd November 2012 at about 3:15pm however it was not inserted in the tender box and consequently at tender opening stage on the following Monday at noon his client's tender submission was not found in the tender box;
- iii. his client's tender submission was traced by the LGA about an hour after the closing time for the receipt of tenders since it had been handled as normal mail rather than as a tender submission;
- iv. his client was requesting that his tender submission be included in the tendering process for consideration in the light of the facts that this was not a competitive tendering procedure but it involved the selection of competent contractors to carry out system and financial auditing at an established rate, in this case at €2,330 per audit.

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

- a. following enquiries by the LGA it transpired that (i) three tender submissions made by Quinel SA bearing reference nos. LGA/REG02, 03 and 04 of 2012 had been delivered by TNT courier on Friday 23rd November 2012 at 3.18pm, (ii) the TNT envelopes displayed special instructions to the courier in the sense that he/she had to insert the envelopes in the Tender Box; and (iii) the courier/deliveryman failed to insert these tender submissions in the tender box but instead simply handed them over to the receptionist without drawing attention that they were tender submissions with the consequence that the envelopes were handled by the LGA as normal mail and the LGA learned that these were in fact tender submissions on Monday 27th November 2012 at 1:30pm, i.e. 1hr 30 mins after the closing date/time for the receipt of tenders;
- b. these events were recorded on CCTV cameras and in respective files;
- c. LGA's receptionist could not be held responsible for the non insertion of the tender submissions in the tender box because that responsibility rested with the courier; and

- d. in an effort to integrate the appellant in the tendering process, the LGA sought the advice of the Departmental Contracts Committee (DCC) and subsequently that of the Department of Contracts however these two bodies advised the LGA to comply with and stick to the tender conditions – emails dated 15th and 21st January 2013 referred.

Mr Damian Xuereb, member of the evaluation board, explained that:-

- a. the LGA regretted this incident because Quinel SA was one of its current contractors and the LGA was satisfied with the services provided; however, on the other hand, the conditions of tender were very clear, namely, clauses 1.2 and 1.6; and
- b. the management of TNT courier service had conceded that once the courier had clear instructions on the envelope to insert it in the tender box then it was his responsibility to do so.

Dr Zammit acknowledged that this incident was attributable to the courier charged with the delivery of the envelope in question however he could not fail to point out that (a) there was concrete evidence that the tender submission had reached the LGA on Friday whereas the closing date was the following Monday and (b) that this was not a competitive tender but its purpose was to select compliant bidders to provide an audit service at an established rate.

Dr Zammit stated that should his client's request to be integrated in this tendering process be turned down then, reluctantly, he would have to 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 on behalf of LGA explained that:-

- i. the LGA was not obliged to publish the estimated contract value because this was a framework contract and Reg. 16 (11) laid out how the framework contract value had to be arrived at;
- ii. in this case the price per audit was fixed at €2,330 however the LGA could not fix the total contract because that depended on the number of current and future licensees that 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 contract value but to publish the rate per audit since the LGA could not guarantee the number of such audits, all this was fully explained in file; and
- iv. as a result of this framework contract, the LGA charged the cost of the audit to the licensee and then the LGA passed 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/s 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 Quinel SA by letter dated 4th March 2013 had objected to the LGA's decision to exclude them from the tendering procedure since the tender documents were not posted in the tender box;
- having noted that the fact that the documents were delivered to the contracting authority in good time before the closing date for their submission was not in dispute;
- having noted the contracting authority's claim that it was the tenderer's responsibility to ensure that the documents were posted in the tender box as laid down in the tender document; having also noted that once this was a Framework Contract and any fees collected from applicants were passed on by the contracting authority to the contractor and since the number of audits could not be foreseen the authority was not in a position to establish the tender value;

came to the following conclusions:

1. the Board understands that this was an unfortunate incident which led to the tender documents not being deposited in the tender box as per tender conditions;
2. the Board may not ignore the fact that it was the appellant's duty to ensure that any condition laid down in the tender document was strictly adhered to and that the contracting authority could not be held responsible for any shortcoming by the appellant and/or third parties.

In view of the above this Board finds against the appellant and recommends that the deposit lodged for the appeal to be heard be forfeited.

Joseph Croker
A/Chairman

Carmel Esposito
Member

Paul Mifsud
Member

2nd May 2013