

Smartmatic UK Ltd. - Complainant

Vs.

Electoral Commission of Ghana - Respondent

Tender:

Tender: Procurement of Biometric Voters Register for the Republic of Ghana

Petition by Complainant –Smartmatic UK Ltd dated 24th November, 2011 for administrative review against the Electoral Commission for purported irregularities in the bidding process to select a company to produce a Biometric Voters Register for the Republic of Ghana.

BACKGROUND

The Complainant (Smartmatic UK Ltd.) participated in a tender by the Respondent (the Electoral Commission) to produce a biometric voters' register for Ghana. The tender was opened on 24th June 2011 with validity period up to 11th September, 2011.

By a letter dated 14th October, 2011 Complainant petitioned the Authority to compel the Respondent's to observe and comply with the terms and conditions of the tender document as well as the provisions of the Public Procurement Act, 2003 (Act 663).

According to the Complainant, a key requirement for the tender as indicated in the Respondent's Expression of Interest (EOI) was for bidders to include a "*Description of Similar Assignment* handled within the past five years and show experience in a country with similar conditions as Ghana. It was the Complainant's case that Superlock Technologies Ltd. ("STL") which was awarded the contract, did not qualify in terms of the aforementioned requirement and therefore, did not satisfy the minimum requirement of the bidding process.

Secondly, the Complainant argued that though Sections 54(1) and 54(2) of Act 663 required that a request be made to all tenderers to extend the validity period of tenderers, STL's tender had been considered and accepted by the Respondent without such requirement.

Thirdly, according to the Complainant, the tender documents required the Respondent to visit the manufacturing and software development facilities of the bidders but the Respondent, without due reference to Complainant, went ahead to visit its local office in lieu of its overseas company manufacturing site visit, which in Complainant's view was a deviation from the tender requirements and operated to its disadvantage.

Other grievances included the following:-

- i. That in accordance with Section 51(3) & (4) of Act 663, the only way to alter the bidding documents was to issue an addendum, but this was not done. These deviations therefore rendered the selection of STL void and of no effect.
- ii. That Respondent selected a winner of the tender without formally communicating same to the other shortlisted bidders.
- iii. That a complaint about these irregularities lodged with Respondent by letter dated 6th October, 2011 drawing its attention to the probable breach of the tender procedures had received no response from the Respondent.

Complainant petitioned the Authority for administrative review of the following:-

- i. To resolve the matter raised on extension of the validity period of tenders; and

- ii. Non-communication of Respondent's tender decision to the other shortlisted tenderers.

The Complainant accordingly requested for the following reliefs:-

- 1) An order to reverse or quash the decision of the Respondent to award the contract for the production of a biometric voter's register for Ghana to STL since STL did not have a valid tender before the EC.
- 2) An order to reverse or quash the decision of the Respondent to award the contract for the production of a biometric voters' register made in breach of the applicable rules, particularly regarding the site visit of tenderers.
- 3) An order reversing or quashing the decision of the EC to award the contract for the production of a biometric voters' register to STL, which did not have the requisite qualifying experience (as laid down by the procurement entity) for entering and participating in the tender.
- 4) An order directed at the EC to revisit the decision-making process of the tender to comply with all terms and conditions of the process, the rules of natural justice, provisions of Act 663, and the 1992 Constitution of the Republic of Ghana.

Complainant further indicated (via letter dated 19th December, 2011) that the permission given on its behalf in September, purportedly agreeing to suspension of inspection of the overseas production sites of tenderers had been obtained by the Respondent from an officer of a company not authorized to represent Smartmatic Ltd. in the proceedings.

Electoral Commission (Respondent)

The Respondent, by later dated 19th December, 2011 responded as follows:-

- 1) That site visits to the manufacturing and software facilities of tenderers, outside Ghana had to be suspended due to delays in the procurement process, which decision had been taken in consultation with both STL and the Complainant.
- 2) That upon completion of the administrative steps leading to contract award, the results of the tender were by letter dated 15th December, 2011 duly communicated to the shortlisted tenderers, including the Complainant.
- 3) On the issue of tender validity, Respondent clarified that an extension had not been necessary in its estimation, because the winning tenderer (STL) had in its acceptance letter, confirmed and agreed to hold the tender prices prior to contract signature. The contract was awarded on the 30th of September, 2011 and duly accepted on the 3rd of October, 2011.

ISSUES

- Whether the Respondent was obliged to extend the validity period for the tender security.
- Whether the Complainant had a good case.

FINDINGS

In ascertaining the issues raised, the Authority considered the tender documents, evaluation reports, minutes of the Entity Tender Committee as well as arguments presented by both parties, finding as follows:-

- i. On the issue of the extension of the validity period, it was clarified that a tender is extended to ensure that the supplier holds or continues to stand by its tender prices. Respondent was therefore not bound to extend the validity period, having secured confirmation of the tender price; moreover, in the evaluation report, STL scored the highest on all stated criteria.
- ii. In relation to whether STL had done work of similar nature, it was noted that Complainant had failed to provide evidence to support its assertion that STL was not competent in this field and lacked local experience. This argument was not strong enough to warrant an order to set aside the decision reached by the Respondent. Allegations made by the Complainant were not borne out by any supporting documentation presented.
- iii. The technical evaluation showed that the Complainant did not have a good case and STL had won on all fronts, including the criteria on similar country experience.
- iv. Minutes of the opening of financial submissions indicated that the Complainant was satisfied with the process up to that stage (borne out by the financial report)
- v. Though late, Respondent fulfilled its obligation to notify the Complainant (by letter dated 15th December, 2011) that it had not been successful. Respondent should have communicated the decision of award much earlier to the shortlisted tenderers.
- vi. A tenderer cannot point the direction in which the purchaser should proceed; the reason for validity extension is to hold tenderers to prices quoted. In the Authority's view, so long as the Respondent had locked in on price with the winning tenderer, there was no need to extend validity.
- vii. Respondent should have issued an addendum to reflect the changed decision regarding planned site visits. It was noted that the fact that the Respondent visited Complainant's local company was not an indication of Complainant's capability or otherwise; this was not prejudicial because the award of 100 points for site visits was not factored into the weightings at evaluation.
- viii. With regard to reactions to the Technical Score at page 4 of the Minutes of the Opening of Financial Submissions of 29th September, 2011, it appeared the Complainant was satisfied with the process.

DECISION

1. The Authority, mindful of the sensitive and volatile nature of elections, was of the view that it was too late in the day to order the Respondent to cancel and re-launch the procurement process. This remedy was accordingly declined.
2. From the foregoing, the Authority was unable to endorse the reliefs sought by the Complainant.
3. The petition is decided in favour of the Respondent.
4. Respondent was however cautioned to comply with public procurement rules, especially regarding the timely communication of award decisions, to avoid future recurrence of such petitions.