

## PUBLIC CONTRACTS REVIEW BOARD

### Case 1879 – SPD3/2022/57 – Supplies - Tender for the Supply, Delivery, Installation, Testing and Commissioning of Lifts for Ministry for Gozo

8<sup>th</sup> June 2023

The Board,

Having noted the letter of objection filed by Dr Georgine Grech acting for and on behalf of Topserv (Gozo) Limited, (hereinafter referred to as the appellant) filed on the 20<sup>th</sup> March 2023;

Having also noted the letter of reply filed by Dr Rachael Aquilina on behalf of the Office of the State Advocate acting for Ministry for Gozo (hereinafter referred to as the Contracting Authority) filed on the 28<sup>th</sup> March 2023;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 6<sup>th</sup> June 2023 hereunder-reproduced.

#### Minutes

Case 1879 – SPD3/2022/057 – Supplies – Tender for the Supply, Delivery, Installation, Testing and Commissioning of Lifts for the Ministry for Gozo

The tender was issued on the 1<sup>st</sup> October 2022 and the closing date was the 6<sup>th</sup> December 2022. The estimated value of the tender, excluding VAT, was € 290,100.

On the 20<sup>th</sup> March 2023 Topserv (Gozo) Ltd filed an appeal against the Ministry for Gozo as the Contracting Authority on the grounds that their bid was rejected as it was deemed to be technically non-compliant and against the cancellation of the tender.

A deposit of € 1,451 was paid.

There were four (4) bids.

On the 6<sup>th</sup> June 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

#### Appellant – Topserv (Gozo) Ltd

Mr John Cefai

Representative

Eng Ray Spiteri

Representative

#### Contracting Authority – Ministry for Gozo

Dr Tatiane Scicluna	Legal Representative
Mr Marnol Sultana	Representative
Eng Daniela Attard	Representative
Eng Matthew Borg	Representative
Ms Claire Xuereb	Representative
Mr Angel Camilleri	Representative

### **Department of Contracts**

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Mr John Cefai Representative for Topserv (Gozo) Ltd said that he accepts that Appellant had not submitted the technical offer questionnaire required in the tender but had instead provided certain complementary documentation which provided more detailed information than that requested. He had no legal arguments to put forward on behalf of Appellant.

Dr Tatiane Scicluna Legal Representative for the Ministry for Gozo said that there was an admission by Appellant that the technical offer had not been submitted – this form which ran into several pages was mandatory as was the Gantt Chart which was also missing. It appears that Appellant expected the Contracting Authority to go chasing him to submit the correct documents. This would have ignored the principles of transparency and equal treatment. The *Fremond* case dealt precisely with the point that it was up to the bidder to ensure that the correct documents were submitted. There was no alternative to the cancellation of the tender as no bid was compliant. The Evaluation Committee made the right decision and the appeal should be rejected.

The Chairman thanked the parties for their submissions and declared the hearing closed.

End of Minutes

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### **Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 6<sup>th</sup> June 2023.

Having noted the objection filed by Topserv (Gozo) Limited (hereinafter referred to as the Appellant) on 20<sup>th</sup> March 2023, refers to the claims made by the same Appellant with regard to the tender of reference SPD3/2022/57 listed as case No. 1879 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Mr John Cefai
Appearing for the Contracting Authority:	Dr Tatiane Scicluna

Whereby, the Appellant contends that:

- a) It submitted an offer in the acts of the above-mentioned tender. In virtue of a decision communicated to it by the Ministry of Finance and Employment dated 10th March 2023, it was informed that the tender was going to be cancelled, and further that its offer was considered as 'Technically Non-compliant' since the Technical Offer Questionnaire and Declaration were not submitted'.
- b) In fact it is technically compliant in all aspects with respect to the requirements of this tender.
- c) Topserv (Gozo) Ltd. is an established lift installation company with more than 25 years' experience and it has a record of hundreds of successful lift installations.
- d) Clients of Topserv (Gozo) Ltd. include the Government of Malta and other Governmental entities.
- e) Furthermore, it is wholly based in Gozo as per tender requirement.
- f) If it failed to provide documentation that that (sic) the Ministry was well aware that could be provided and complied with, these could have easily been requested from the appellant. In this case these would have promptly been provided and the process would not be stultified.
- g) It does not believe that its failure to provide these documents merits the cancellation of a tender.
- h) They are not of substantial importance and could have been easily provided upon demand.
- i) Additionally, the re-issuing of the same tender would bring substantial financial damage to the appellant, whose tender prices have already been made public and which could be used by potential bidders to quote at lower prices.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 28<sup>th</sup> March 2023 and its verbal submission during the virtual hearing held on 6<sup>th</sup> June 2023, in that:

- a) The Appellant's objection can be simplified as follows: That in the Appellant's opinion, the Appellant's bid is technically compliant.
- b) The Appellant contends that the Contracting Authority should have requested that the missing documents required (i.e. the Technical Offer Questionnaire and Declaration as well as a Graphic Work Schedule (Gantt Chart)) are presented at a later stage.
- c) First and Foremost, Clause 5(C)(i) of the tender document is marked as Note 3, that is: "*No rectifications shall be allowed. Only clarifications on the submitted information may be requested. Tenderers will be requested to clarify the submitted information within five (5) working days from notification.*" Therefore the Contracting Authority could never have requested the Appellant to submit documents/information which were missing. The Contracting Authority could only request a clarification upon the documents and/or information submitted. In this case, since the Appellant failed to submit the Technical Offer Questionnaire and Declaration as well as a Graphic Work Schedule in the form of a Gantt Chart for Vertical Platform Lift A, the Contracting Authority was precluded from requesting the required documents.

- d) Secondly this Board as well as the Maltese Courts and the European Court of Justice have frequently held that Evaluation Committees must act in line with the principle of level-playing field and self-limitation. Thus the Evaluation Committee is bound to act in accordance with the Tender Document and has no leeway to act otherwise. The Tender Document is loud and clear; that is, the submission of the Technical Offer Questionnaire and Declaration as well as a Graphic Work Schedule in the form of a Gantt chart were a must and in the absence of such, no rectification can be made. The Appellant could never expect to be technically compliant when the required documents were not submitted.
- e) Thirdly, the Tender Document is there to be adhered to by the bidders and the Appellant should not expect that Evaluation Committee should chase the bidder for the required documents to be submitted. Afterall, when the Tender Document is clear and requires certain documents, like the case at hand, the bidders are expected to submit them until the requested date.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will now consider Appellant's grievances.

- a) Reference is made to the minutes of this hearing, whereby the appellant, immediately and on an *ex admisissis* basis, declared that the Technical Offer Questionnaire was not submitted as part of his bid. Even though, this Board appreciates the argumentation provided that other 'certain complementary documentation' were in fact submitted, it nonetheless notes that the Technical Offer Questionnaire is a vital document which was mandatorily required in the submission process. Moreover, this document also falls under the remit of Note 3, where no rectifications are possible.
- b) Had the Evaluation Committee proceeded as is being requested to do by the appellant, it would be breaching the principles of transparency, equal treatment and of achieving a level playing field, in a flagrant manner.

Hence, this Board does not uphold the Appellant's grievances.

**The Board,**

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision to cancel the tender as per General Rules Governing Tenders article 18.3(a),
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Dr Charles Cassar**  
Member

**Mr Lawrence Ancilleri**  
Member