



REPUBLIC OF NAMIBIA

MINISTRY OF FINANCE

PUBLIC PROCUREMENT REVIEW PANEL

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IN THE PUBLIC PROCUREMENT REVIEW

HELD ON 02 & 12 SEPTEMBER 2022

IN THE MATTER BETWEEN

**JACK MUTUA ARCHITECS INCORPORATED
AND**

APPLICANT

**MINISTRY OF EDUCATION, ARTS AND CULTURE
EXECUTIVE DIRECTOR OF MINISTRY OF
EDUCATION, ARTS AND CULTURE
KAMAU ARCHITECTS AND ASSOCIATES**

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

IN A REVIEW APPLICATION MADE IN TERMS OF SECTION 59 OF THE PUBLIC PROCUREMENT ACT, 2015 (ACT NO. 15 OF 2015)

BID NO: CS/RFQ/010-01/2021-22: CONSULTING SERVICES FOR PHASE 2, THE CONSTRUCTION AND REHABILITATION OF HOSTEL FACILITIES AND OTHER BUILDINGS AT ASHIPALA SENIOR SECONDARY SCHOOL IN OMUSATI REGION FOR THE MINISTRY OF EDUCATION, ARTS AND CULTURE

Present: Ehnrefried Honga (Chairperson) with Michael Gaweseb, Gilbert Habimana, Tulimeyo Kaapanda, Mekondjo Katunga, with Gilbert Habimana dissenting from the majority.

1 Heard : 02 September 2022
2 Decided : 12 September 2022

REVIEW PANEL ORDER

The meeting took both physical and virtual modes.

Having heard **Ms. Lovisa Ihalwa** for the 1st Applicant, **Mr. John Kaatana** on behalf of the 1st Respondent, and other interested parties to the hearing and having read the application for review in terms of Section 59(1) of the Public Procurement Act, 2015 (Act No. 15 of 2015) (hereinafter referred to as the "Act"), read with Regulation 42 of the Public Procurement Regulations: Public Procurement Act, 2015, (hereinafter referred to as the "Regulations"), and other documents filed as part of the records, the Public Procurement Review Panel made the following findings and subsequently, made the following order towards the end.

1. GROUNDS OF THE REVIEW APPLICATION

1.1 APPLICANT

The Applicant stated that the challenge is only against the selection in respect of the architectural part of the project; and its narrowed down to the financial aspect of the award. The Applicant claimed that the 1st Respondent and 2nd Respondent have made an irregularity in the selection of the 3rd Respondent. The reason for this irregularity is that the price of the 3rd Respondent does not constitute price that was computed in accordance with the prescribed fees for professional discipline architecture - the rate that an Architect may charge on a cost base project are regulated in the relevant Acts.

The Applicant further stated that it is unfair and unreasonable for the Ministry to then select that particular bidder without considering the requirement of this profession.

In addition, the Applicant stated that they did not have an opportunity to look or go through the Replying Affidavit which they only got at the time of the review hearing. It should be noted here though, that this replying affidavit was submitted by the Minister and not the Accounting Officer, as per the Act requirement (section 25 (1) (b), "*An Accounting Officer is accountable for the full compliance with this Act and directives and instructions made under this Act.*")

Furtheron, the Applicant stated that the 1st Respondent admitted to the cancellation action and the matter being referred back for the cancellation to be effected. However, the wishes of the Applicant were not for the bid cancellation.

2. 1ST RESPONDENT

2.1 At the time of the hearing the 1st Respondent did not delegate her/his authority as per section 74, subsection 2 (a) – the delegation and assignment of the Accounting Officer was not in writing. However, the Review Panel allowed the proceedings to continue in anticipation of a letter before the end of the hearing or by latest, before the end of the business day.

Nevertheless, the submission by the 1st Respondent representative claimant were as follows:

2.2 That an error was done during the evaluation process; the process was supposed to be a two stage bidding exercise whereafter, only the highest most responsive technical bid, in was supposed to be considered.

2.3 That it was only during the standstill period that they realized that Financial proposals for all bids that were technically compliant were opened instead of the highest technically scored bid which was not supposed to be the case.

2.4 That the Honourable Minister stated that in answering the Applicant's allegations they do submit that an error was done by opening all financial proposals for all the bidders that were technically qualified.

2.5 That they acknowledged that an error was done and realized that after the Notice for Selection of Award was issued, and therefore could not cancel the bid because of *Functus Officio*.

3. FINDINGS OF THE REVIEW PANEL

From the documents presented to the Review Panel and the review hearing proceeding, the following findings are deduced:

3.1 The Review Panel established that there was no Replying Affidavit from the 1st Respondent; the Replying Affidavit that was received by the Review Panel is not from the Accounting Officer, thus the application was unopposed.

3.2 The Review Panel also established that there was no delegation letter from the Public Entity, thus the Public Entity was not represented accordingly.

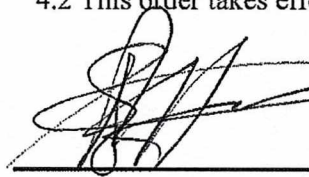
4. DECISIONS OF THE REVIEW PANEL

Based on the above findings, the Review Panel makes the following order:

4.1 In terms of section 60 (c) of the Act, the Review Panel hereby refer the matter back to the Public Entity for reconsideration, with the following instructions:

- (i) The award of this tender to Kamau Architects and Associates must be suspended;
- (ii) The Public Entity must evaluate the bids for architectural part again, but only for stage 4: the financial evaluation;
- (iii) During this evaluation it must be ensured that all quoted prices are as regulated in the relevant Acts.

4.2 This order takes effect as from 12 September 2022.


EHNREFRIED HONGA
CHAIRPERSON: REVIEW PANEL (i.r.o. this matter)

