



# REPUBLIC OF NAMIBIA

## MINISTRY OF FINANCE

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### PUBLIC PROCUREMENT REVIEW PANEL

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**IN THE PUBLIC PROCUREMENT REVIEW**

**HELD ON 26 OCTOBER 2022**

**IN THE MATTER BETWEEN**

**OMUNDJOMBA INVESTMENT CC**

**AND**

**COUNCIL FOR THE TOWN HELAO NAFIDI**

**APPLICANT**

**RESPONDENT**

**IN A REVIEW APPLICATION MADE IN TERMS OF SECTION 59 OF THE PUBLIC PROCUREMENT ACT, ACT 15 OF 2015**

**BID NO: NCS/ONB/HNTC-07/2021-22: PROVISION OF REFUSE REMOVAL FOR HELAO NAFIDI TOWN COUNCIL (OHKANGO SUBURB)**

**Present: Dr. Rainer Trede (Chairperson) with Kenandei Tjivikua, Lukas Kudumo Siremo, Tulimeyo Kaapanda, Hellen Amupolo concurring.**

**Heard : 26 October 2022**

**Decided : 26 October 2022**

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**REVIEW PANEL ORDER**

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Having heard **Mr. Nafimane Halweendo** on behalf of the Applicant, **Ms. Penehafo Vaita** on behalf of the Respondent, 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”) and having read the applications for Review and other documents filed as part of the record, the Review Panel made the following order hereunder towards the end.

**1. BACKGROUND**

- 1.1 On 11 April 2022, the Respondent advertised a bid for the provision of refuse removal for the Helao Nafidi Town Council, BID No NCS/ONB/HNTC-07/2021/22 as Open National Bidding.
- 1.2 The closing date for the submission of bids was 11 May 2022. The Applicant provided a bid in time.
- 1.3 The Respondent received 26 bids which were evaluated by the Bid Evaluation Committee (BEC). The BEC evaluated Respect Investment cc as the most substantially responsive bid and the Applicant as second substantially responsive bid.
- 1.4 The Procurement Committee (PC) recommended on 2 July 2022 to award the Refuse Removal in Helao Nafidi Town (Oshikango Suburb) to Respect Investment cc for an amount of N\$ 1 308 960.00 and to the Applicant for an amount of N\$ 1 393 524.00 for a period of 24 months.
- 1.5 On 6 June 2022 the Applicant and Respect Investment cc were informed by the Respondent they were selected for award and that in the absence of any application for

review of the selection for the award within 7 days, the accounting officer of Helao Nafidi Town Council will award the contract to them.

1.6 On 9 June 2022 the Respondent informed the bidders about the cancellation of the bidding process with reference to Section 54(1)(f) stating that it is economically not viable to proceed with the bid.

1.7 On 5 August 2022 the Respondent re-advertised the bid with the restriction that the work is reserved for companies within Ohangwena Region and preference will be given to companies with Helao Nafidi Town Council fitness certificate which should be attached as proof.

1.8 The re-bidding process is finalized but the award is still outstanding.

## **2. APPLICANT'S GROUNDS FOR REVIEW**

The Applicant stated in its affidavit and during the hearing the following grounds for review:

2.1 The Respondent violated Section 55(5) of the Act in that it failed to award the contract to the successful bidders within 7 days despite that the Applicant had accepted the selection of award and no application for review was filed within the 7 days period.

2.2 The Respondent cannot cancel the bid after the Applicant had already accepted it and further in the absence of any review being brought by the unsuccessful bid candidates. Section 54(1) of the Act states: *“The Board or a public entity may, at any time prior to the acceptance of a bid, reject all bids or cancel the bidding process.”*

2.3 The Respondent could only have cancelled the bid after it was already accepted by the Applicant in terms of Section 63(1) of the Act at any time, if

- (a) *the continuation of the contract is not or will not be in the public interest, or*
- (b) *any variation in a contract price causes the total contract amount to exceed by more than 15 per cent.*

The cancellation by the Respondent was not based on these grounds.

2.4 The Respondent violated Section 54(3) of the Act by re-advertising the same bid they cancelled on the same specifications and contract conditions.

2.5 The re-advertising with restriction to bidders located in Ohangwena Region (preferably in Helao Nafidi) contradicts the method of procurement selected by the Respondent (Open National Bidding) and is in contravention of Article 10 of the Namibian Constitution which states that everyone is equal before the law.

### **3. RESPONDENT'S RESPONSE TO THE APPLICANT'S GROUNDS**

The Respondent provided in its affidavit and during the hearing the following responses:

- 3.1 The cancellation of the bid was required since neither the BEC nor the PC were aware of the budget constraint, and the N\$ 1 900 000.00 were budgeted also for other refuse removal projects.
- 3.2 The Respondent could not have negotiated or made any special arrangement with the Applicant in the absence of sufficient fund because Section 55(2) of the Act prohibits negotiations.
- 3.3 The Applicant filed the review application late. It was supposed to file or apply for review within the 7 days standstill period. The Applicant has filed the review application about 3 months after the standstill period lapsed.

### **4. MAIN FINDINGS OF THE REVIEW PANEL**

Having heard the parties, the Review Panel observed the following:

- 4.1 The bidding documents clearly specify the requirements for tendering of waste collection and removal in Oshikango. Accordingly, the BEC recommended one bidder, namely Respect Investment cc as the most substantially responsive bidder, and the Applicant only as second option. In contrast to the BEC the PC recommended to award the bid to both, Respect Investment cc for N\$1 308 960.00 and the Applicant for N\$ 1 343 524.00. This duplication of award for only one bid without different lots was confirmed by the Notice for Selection but could not be clarified by the Respondent.
- 4.2 The Respondent violated Section 55(5) of the Act stating that in the absence of an application for review the accounting officer must award the contract to the successful bidder. The Applicant received on 6 June 2022 the Notice of Section of Award informing him to be one successful bidder.
- 4.3 Instead of receiving a Notice of Award the Applicant was informed on 9 June 2022 about cancellation of the bidding process in terms of Section 54(1)(f), i.e., that the bid is not economically viable. This cancellation is a violation of Section 54(1) of the Act stating that the Public entity may cancel the bidding process at any time prior to the acceptance of a bid.
- 4.4 By issuing a Notice of Selection without having the required funds the Respondent also ignored the responsibilities of the Procurement Management Unit (PMU) including according to Regulation 8 to provide an indication of the budget available for the procurement of services [8(2)(d)(vii)] and to prepare procurement plans for each individual procurement [8(3)].
- 4.5 The Respondent failed to provide evidence of the claimed budget constraints being the only reason for cancellation of the bid. The Respondent confirmed during the hearing

having a budget of N\$1 900 00.00, but the financial offer of the Applicant was lower, i.e. N\$ 1 393 524.00.

4.6 On 5 August 2022 the Respondent started re-bidding but violated Section 54 (3) of the Act by using the same specifications. The only difference to the former bidding document is a restriction to companies located within Ohangwena Region with preference of companies from Helao Nafidi. Section 71 of the Act allows only national preferences which is underlined by Regulations 52 as well as by the bidding method selected by the Respondent, i.e Open National Bidding.

4.7 Regulation 7(2) requiring commencement of the evaluation within 5 days after the opening of bids was violated. The bids were opened on 11 May 2022 and the evaluation commenced on 17 May 2022, i.e. after 6 days.

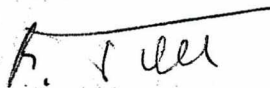
4.8 Also Regulation 42(4) was violated stating that the public entity must within 2 days after being served with the application file with the Review Panel a replying affidavit. The Respondent received the application on 15 October but filed the affidavit only 24 October 2022.

## 5. DECISION OF THE REVIEW PANEL

As the result, the Review Panel hereby makes the following order:

5.1 That the procurement proceedings be terminated and start afresh considering the above findings of the Review Panel.

5.2 That this order is effective on 27 October 2022.



**DR. RAINER TREDE**

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

