REPUBLIC OF NAMIBIA

MINISTRY OF FINANCE

PUBLIC PROCUREMENT REVIEW PANEL

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IN THE PUBLIC PROCUREMENT REVIEW
HELD ON 11 MARCH 2022

IN THE MATTER BETWEEN

Ministry of Finance	**Applicant**
AND	
Xylo Technology	**Respondent**

IN A REVIEW APPLICATION MADE IN TERMS OF REGULATION 46 (1) OF THE PUBLIC PROCUREMENT ACT, ACT 15 OF 2015

BID NO. NCS/RFQ/09-17/2021: REQUEST FOR PROCUREMENT OF LICENSE RENEWAL FOR FORTIGATE VM

Present: Tulimeyo Kaapanda (Chairperson), Lukas Kudumo Siremo, Gilbert Habimana, Mekondjo Katunga and Ehrenfried Honga

Heard: 11 March 2022
Decided: 11 March 2022

REVIEW PANEL ORDER

The meeting took both the physical and virtual modes.

Having heard **Ms Naomi Kafita**, for the Applicant, **Mr. Joseph Munyongi** for the Respondent who were joined in terms of Regulation 48(1) of the Regulations (hereinafter referred to as the Regulations) to the Public Procurement Act, No. 15 of 2015 (hereinafter referred to as the Act) and having read the applications for suspension and debarment in terms of Section 68 of the Public Procurement Act and other documents filed as part of the record, the Review Panel made the following findings and subsequent order hereunder towards the end.

1. GROUNDS FOR REVIEW

The Review Application was premised on the following two main grounds:

1.1 Failure to honor the obligation by not commencing with the required servces within five (5) days.

The Applicant made submissions of non-compliance with the Purchase Order whereby the Respondent (Xylo Technonology) indicated that it will commence with the required services within five (5) days from the date the Purchase Order will be issued.

1.2 Non delivery of services to renew the Fortigate VM license has put the Ministry's network security at risk and vulnerable be as there is no security updates.

The Applicant argued that it wrote an official letter dated 06 January 2022 requesting Xylo Technology to deliver the requested service not later than 14 January 2022. However, Xylo Technology failed to deliver.

The Applicant request that the Review Panel suspend, debar and disqualify the Respondent (Xylo Technology) from participating in procurement proceedings for the period of two (2) years in terms of Section 68 (d) of the Public Procurement Act 2015, (Act No. 15 of 2015) and Regulation 46 of the Public Procurement Regulations.

2. MINISTRY OF FINANCE'S POSITION

The Applicant after being engaged by the Panel indicated that the Purchase Order was signed off on 22 November 2021 and sent to the Respondent, was the successful bidder. It should be noted that in the request for quotation the Respondent indicated that services will be delivered within five (5) days from the date of issue of a Purchase Order. The Respondent never delivered the goods as agreed upon and did not provide any response to the Applicant. The Applicant wrote an official letter dated 06 January 2022 requesting the Respondent to deliver the requested services not later than 14th January 2022. However, on 11th January 2022 the Applicant received the email with an attachment indicating that, the Respondent is unable to supply and deliver the license as awarded. On the same email the Respondent issued a revised quotation with an amount of N$110,400.00 for the Applicant's consideration. The Applicant further stated that the price increase was not considered as it is more than 15% and it is therefore, contrary to Section 62(3) of the Public Procurement Act.

The Applicant further stressed that the non-delivery of services to renew the Fortigate VM license has put the Ministry's network security at risk and vulnerable as there is no security updates and it is therefore requesting that the Respondent be debarred. When asked by the Review Panel as what are the dangers that could arose if the Respondent is not debarred, the Applicant stated that seeing that this was their first encounter and already breach of contract has happened, the same is foreseen to be repeated if they participate again as the Applicant cannot disqualify them from the bidding process.

3. XYLO TECHNILOGY'S POSITION

The respondent stated that it had challenges as both software suppliers were unable to supply because their offices are based in America and another in Spain and that, they were working from home during that time due to CoVID-19 and hence the suppliers' servers were also not reachable remotely. The Respondent further stressed that prices went up due to the demand in Cybersecurity hence it has indicated to the Ministry that it is unable to supply at the same price it offered in its expression of interest for which it was awarded.

When the Review Panel asked when did the Respondent become aware of price changes and did it indicate this to the Applicant? The Respondent informed the Review Panel that it became aware of the price change on 3rd December 2021 but did not revert back to the Applicant until in January 2022, after an official letter was written to them by the Applicant.

The Respondent on its final remarks apologized to the Applicant, stressing that its intention was not to disappoint the Applicant and requested that the Review Panel to be lenient as if granted, the suspension, debarment and disqualification would affect the growth of the business and lead to job losses for the employees. The Respondent further indicated that this was just a misunderstanding as it did not acquaint itself with the Act.

4. FINDING(S) OF THE REVIEW PANEL

Having heard both Parties, the Review Panel resolved to first settle the question as to why Applicant did not resort to the next lowest responsive bidder: the public entity had the latitude to cancel the Purchase Order and take a decision to move to the next bidder before the expiry of the quotation or it initiate another quicker method of procurement such as the request for three quotations, emergency procurement, etc.

The Review Panel found that the Applicant had no risk management process in place to mitigate the failure for non-delivery of services.

The Review Panel found that the Respondent failed to honor its contractual obligations. The Respondent did not attempt to contact the Applicant on price changes which it became aware on 3 December 2021, which is 11 days from receipt of Purchase Order, but only respondent on 11th January 2022 after the Applicant queried on the non-delivery of the product. The response given was that it could not supply the product on the agreed price anymore, but rather to consider a new quotation which are more than 15% increment.

In the result, the Review Panel makes the following order:

That on the strength of Section 68(1)(d) of the Public Procurement Act No.15 of 2015, the Respondent is suspended from participating in procurement activities with all public entities, effective from 11 March 2022 to 11 January 2023.

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

REPUBLIC OF NAMIBIA
Public Procurement
Review Panel
Chairperson
MINISTRY OF FINANCE