



REPUBLIC OF NAMIBIA
MINISTRY OF FINANCE

PUBLIC PROCUREMENT REVIEW PANEL

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IN THE PUBLIC PROCUREMENT REVIEW HEARING
HELD ON 15 MARCH 2022
IN THE MATTER BETWEEN

Oluzizi Engineering Construction

Applicant

AND

Central Procurement Board of Namibia

First Respondent

NCG Investment cc JV Neu-Olulya Trading cc

Second Respondent

Kambwa Construction (Pty) Ltd

Third Respondent

August Twenty six Construction

Fourth Respondent

Shatty Construction cc

Fifth Respondent

Weiba Construction and General Dealers cc

Sixth Respondent

JV Together Electrical Services

Pius Johannes Construction cc

Seventh Respondent

And 18 other Respondents

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

**BID NO: W/ONB/CPBN-07/2021: Construction of hostels nationwide: Pendukeni Iivula
Ithana Secondary School in the Omusati Region-Phase 1**

**Present: Rainer Trede (Chairperson) with Brownny Mutrifa, Selma-Penna Utonih,
Michael Gaweseb and Mary Shiimi.**

Heard : 15 March 2022

Decided : 15 March 2022

REVIEW PANEL ORDER

The meeting took both the physical and virtual modes.

Having heard **Ms. Andi Jamellee Janke**, for the Applicant, **Mr. Festus Hamukway** and **Ms. Nicola Davids**, for the First Respondent, and other interested parties who were joined in terms of Sub-regulation 42(5) (a) of the Public Procurement 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 application for review 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 APPLICATION

The review application was premised on the following two main ground:

1.1 Non-compliance with the Bidding Documents and Section 52 (5) of the Act

1.2 Non-compliance with Section 52 (1) of the Act.

The applicant alleges that the decision being impugned is the decision by the 1st Respondent to unreasonably apply section 52 (5) of the Public Procurement Act which reads:

"Where a bid discloses an arithmetic error, the Board or public entity concerned must correct the error and notify the bidder"

Further, the Applicant stated that in terms of Clause 26.3 of the instruction to bidder- all other envelopes shall be opened once at a time reading out: the name of the bidder and the bid price(s), including any discounts and alternative bids and indicating whether there is a modification; the presence of a Bid security or the subscription with respect to the Bid securing declaration in the letter of bid, if required; and any other detail as the Procuring Agent may

consider appropriate. Only discounts and alternative offers read out at Bid opening shall be considered for evaluation

2. THE APPLICANT

The Applicant firstly, alluded to the reason why the Application was filed late, stating that Regulation 38 (2) (d) reads as follow:

"That failure to request a public entity to reconsider its selection for award under paragraph (c) will result in the awarding of the contract to the successful bidder as contemplated in subsection (5) of that section within seven days from the standstill period"

The Applicant further stated that the Notice for Selection of Award by the First Respondent is required to comply with the prescribed formalities in respect of Section 55 (4) of the Act, read together with Regulation 38. The First Respondent's notice for selection instructed bidders as follows:

Further note that, constitutes a final decision of the board and in the absence of any application(s) for review by any of the unsuccessful bidder(s) to the Review Panel within 7-day standstill period, the Accounting Officer will award the contract to you;

The standstill period referred to in paragraph (b) starts on 15 February 2022 at 08H00 AM and will end on 21 February at 17H00 PM (Namibia time).

Regulation 38 (2) however, provides that:

That failure to request a public entity to reconsider its selection for award will result in the awarding of the contract to the successful bidder as contemplated in Subsection (5) of that Section within seven days from the standstill period.

The Applicant further referred the Panel to the Procurement Cycle with its steps.

The Applicant further contested that the selected bidder's price could not differ from the bid price announced at the bid opening as the Bid Evaluation Committee applied an uninformed methodology with different margins.

Applicant's relief sought

The Applicant requests that the bid be referred back for re-evaluation.

3. THE FIRST RESPONDENT'S POSITION

The First Respondent refers the Panel and Parties who were present in the meeting to the High Court Judgments in a matter between Radial Truss Industries (Pty) Ltd v Chairperson of the Central Procurement Board of Namibia, held; that what Regulation 38 (2) (c) then impermissibly does is to create a right for a bidder to request the board or a public entity to 'reconsider' its selection for the award within the standstill period. That right is not provided

for in Section 55 (4). This amounts to impermissibly using Regulation 38 to enlarge the meaning of Section 55 which was not provided for and not envisaged by the Legislature. If the Legislature intend to create such right for a bidder, it would have done so in Section 55 (4) and in a clear language.

Held; that any challenge to the board's notice of selection of award must be made by way of a review in terms of Section 55 (5) and that review is to be determined by the Review Panel established by the Minister in terms of Section 58.

Held; that to the extent Regulation 38 is in conflict with the provisions of the Act it is to be considered *ultra vires* and null and void.

Held; that the decision by the board to make an award and notify the successful bidder is final in nature and that after such decision the board became *functus officio*.

The First Respondent further cited another High Court judgment in a matter between ABB Namibia Ltd v Central Board of Namibia which states that: any challenge to the board's notice of selection of a ward must be made by way of review in terms of Section 55 (5) and that that review is to be determined by the Review Panel appointed by the Minister in terms of Section 58.

The First Respondent further stated that the correction of arithmetical errors and notifying bidders of such corrections is not tantamount to changing the price or the substance of the bid but is in line with Section 55 (5) of the Act. Arithmetical errors were corrected where there was a discrepancy between the unit price and the total price that is obtained by multiplying the unit price and quantity or if there was an error in a total corresponding to the addition or subtraction of subtotals.

The First Respondent's relief sought

The First Respondent request the Panel to dismiss the application and confirm the decision of the public entity.

4. FINDING(S) OF THE REVIEW PANEL

Having heard the Parties, the Review Panel resolved to first settle the question of law of whether the Applicant has complied with Regulation 42 (1).

The Review Panel further found out that the public entity complied to Section 52 (5) in that the record provided shows that the board corrected arithmetic errors and notified the bidders thereof.

Notwithstanding the fact that the Applicant is against the correction of arithmetical errors of the selected bidder, its bid discloses arithmetical errors as well, and the board corrected the errors and the Applicant agreed. The Applicant's price also differs from the bid price announced at the opening.

5. DECISION OF THE REVIEW PANEL

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

- a. In terms of Section 60(e) of the Public Procurement Act No.15 of 2015 confirms the decision of the board.
- b. The effect date of this order is from 15 March 2022.


DR. RAINER TREDE

CHAIRPERSON: REVIEW PANEL (person in this matter)

