



## **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 07 DECEMBER 2022**

**IN THE MATTER BETWEEN**

**JESAYA STEEL MANUFACTURE & ENGINEERING CC  
AND VELILE CONSTRUCTION CC JV**

**APPLICANT**

**AND**

**THE CHIEF EXECUTIVE OFFICER OF THE NAMIBIA**

**COLLEGE OF OPEN LEARNING (NAMCOL)**

**NDAKALIMWE INVESTMENT CC**

**CAPITAL TECHNICAL SERVICES CC**

**WALCON CONSTRUCTION CC**

**AFRIDECA CONSTRUCTION PTY LTD**

**BENGUELA TRADING CC**

**MAPERES INVESTMENTS CC**

**ETEMO TRADING ENTERPRISES CC**

**PENATU TRADING CC**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**3<sup>RD</sup> RESPONDENT**

**4<sup>TH</sup> RESPONDENT**

**5<sup>TH</sup> RESPONDENT**

**6<sup>TH</sup> RESPONDENT**

**7<sup>TH</sup> RESPONDENT**

**8<sup>TH</sup> RESPONDENT**

**9<sup>TH</sup> RESPONDENT**

<b>FLORIDA TRADING CC</b>	<b>10<sup>TH</sup> RESPONDENT</b>
<b>URBAN ENGINEERING CC</b>	<b>11<sup>TH</sup> RESPONDENT</b>
<b>STEPHEN GAESEB CONSOLIDATED TRADING CC</b>	<b>12<sup>TH</sup> RESPONDENT</b>
<b>VERO GROUP JV PROVENTURES INVESTMENTS CC</b>	<b>13<sup>TH</sup> RESPONDENT</b>
<b>ONYUTJI INVESTMENT CC AND QINGAJIAN</b>	
<b>INTERNATIONAL GROUP NAMIBIA CC JV</b>	<b>14<sup>TH</sup> RESPONDENT</b>
<b>OMIDI TRADING CC</b>	<b>15<sup>TH</sup> RESPONDENT</b>
<b>OMUTENDERETI CONSTRUCTION &amp; G.N. KAUNE</b>	
<b>INVESTMENT CC</b>	<b>16<sup>TH</sup> RESPONDENT</b>
<b>AUGUST 26 CONSTRUCTION PTY LTD</b>	<b>17<sup>TH</sup> RESPONDENT</b>
<b>TOUFIE INVESTMENT CC AND JOHN NAMUSHESHE</b>	
<b>CONSTRUCTION &amp; INVESTMENT CC JV</b>	<b>18<sup>TH</sup> RESPONDENT</b>
<b>ENH CIVIL CC</b>	<b>19<sup>TH</sup> RESPONDENT</b>
<b>NAMWALWA TRADING CC</b>	<b>20<sup>TH</sup> RESPONDENT</b>
<b>GEMS ENGINEERING &amp; ROAD CONSTRUCTION PTY LTD</b>	<b>21<sup>ST</sup> RESPONDENT</b>
<b>KUNENE RIVER CONSTRUCTION &amp; ELECTRICAL</b>	<b>22<sup>ND</sup> RESPONDENT</b>
<b>EDNA CONSTRUCTION PTY LTD</b>	<b>23<sup>RD</sup> RESPONDENT</b>
<b>AGAPE CONSTRUCTION CC</b>	<b>24<sup>TH</sup> RESPONDENT</b>
<b>NBT QUALITY SERVICES AND KASHINDI</b>	
<b>INVESTMENT CC JV</b>	<b>25<sup>TH</sup> RESPONDENT</b>
<b>JAMES &amp; YOUNG TRADING ENTERPRISES CC</b>	<b>26<sup>TH</sup> RESPONDENT</b>

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

**BID NO: W/ONB/NCL-01/2022: CONSTRUCTION OF THE NAMIBIA COLLEGE  
OF OPEN LEARNING (NAMCOL) OF THE WALVIS BAY CAMPUS, PHASE 1**

**Present:** Hellen Amupolo (Chairperson) with Lukas Kudumo Siremo, Ehrenfried  
Honga, Selma-Penna Utonih, concurring and Gilbert Habimana  
(dissenting).

1       **Heard**       :       **07 December 2022**  
2       **Decided**   :       **07 December 2022**

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**REVIEW PANEL ORDER**

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Having heard **Mr. Enos Mwakondange** on behalf for the Applicant, **Mr. Jack Eixab** on behalf for the First (1<sup>st</sup>) Respondent, and other interested parties who were joined in terms of Regulation 42(5) (a) of the Regulation (hereinafter referred to as the “Regulations”) of the Public Procurement Act , No. 15 of 2015 (hereinafter referred to as the “Public Procurement Act”) and having read the applications for Review and other documents filed as part of the record, the Review Panel made the following and subsequent order hereunder towards the end.

**1. BACKGROUND TO THE REVIEW APPLICATION**

- 1.1 The Applicant claimed that on the 07<sup>th</sup> October 2022, it received an email communication from the 1<sup>st</sup> Respondent which indicated that the Bid Evaluation Committee (BEC) picked up and corrected an arithmetic error during the evaluation process in the Bill of Quantities and requesting the Applicant to verify and respond by letter accepting the recalculated as correct.
- 1.2 The Applicant further claimed that on the 11<sup>th</sup> October 2022, it responded to the 1<sup>st</sup> Respondent’s email by letter in terms of which it indicated its inability to confirm the purported calculated amount as it had no knowledge as how that amount was arrived at.
- 1.3 The Applicant alleged that the 1<sup>st</sup> Respondent responded via an email dated 14<sup>th</sup> October 2022 which highlighted how the purported error was arrived at. The Applicant responded to the email on the 17<sup>th</sup> October 2022 through a letter in terms of which it refuted any arithmetic error.

- 1.4 The Applicant further claimed that it submitted that the bid concerned is not one that is for a “unit price contract” as contemplated for in the bid document, but rather a fixed contract and therefore the 1<sup>st</sup> Respondent could not have corrected the arithmetical error.
- 1.5 The Applicant claimed that the 1<sup>st</sup> Respondent made material contradictions of its own summary when advancing reasons for non-award to the Applicant under 5.6 on page 52 of the BEC evaluation report. On one hand ITB 31.1 states that an arithmetical error can only be corrected in respect of bid that is substantially responsive. Effectively, the 1<sup>st</sup> Respondent asserts that it corrected the arithmetical error in respect of the Applicant but claim under bullet 7 of 5.6 on page 52 that the Applicant was not substantially responsive.

## **2. THE APPLICANT’S GROUNDS FOR REVIEW**

- 2.1 The Applicant stated that the 1<sup>st</sup> Respondent completely missed the point when it comes to application of the 7 days standstill period. It highly relied on the Regulations which are subordinate to the legislation, Public Procurement Amendment Act as amended of 2022 is fatal to its contention over the 7 days standstill period.
- 2.2 The Applicant further stated that they have served all in any event by the 25<sup>th</sup> November 2022 which was the last day by law on which service was to be effected. It further claimed that some of the emails bounced back indicating that some recipients did not receive them. In addition, the Applicant argued that the Regulations 42(3) of the Public Procurement Act, does not indicate that one must serve copies to all interested parties, but to any other party which could be as per the Applicant’s choice.
- 2.3 The Applicant stated that the 1<sup>st</sup> Respondent takes issue with the fact that they did not complete the required information pertaining to experience in form 2.4.2(a). However, it does not dispute that same was furnished as contained in the company profiles attached to the tender document. The Applicant clearly in writing referenced a company profile which the 1<sup>st</sup> Respondent had sight of in the tender document. They could not fill the form in the space provided due to limited space to accommodate a comprehensive record of experience as required.
- 2.4 The Applicant further stated that on Stage 3 table 22 column 4 on page 26, wherein the 1<sup>st</sup> Respondent conducted the evaluation recorded a “Yes” on the question of experience in respect of Applicant having met the requirement therein. The only thing the 1<sup>st</sup> Respondent failed to do is to delete that “Yes” from the papers in their possession.
- 2.5 On the point of the application being late before the Review Panel, the Applicant argued that in its understanding as per the amended Act, 2022 (Act no. 3 of 2022) it had about 21 days from the date of issue of the notification for selection of award to the time of application for review with the Review Panel.

### **3. THE 1<sup>ST</sup> RESPONDENT'S RESPONSES TO THE REVIEW APPLICATION AND REVIEW PROCEEDINGS**

3.1 The 1<sup>st</sup> Respondent stated that there are certain points in limine regarding to the application lodged by the Applicant:

#### **3.1.1 1<sup>st</sup> Point in limine:**

The review application was lodged outside the 7 days standstill period contrary to Regulation 42(1) which reads as follow, *"A Supplier or bidder who wishes to lodge an application for review under Section 59 of the Act must, within 7 days of receipt of the decision or an action taken by a public entity, apply to the Review Panel for review."* The 1<sup>st</sup> Respondent argued that, on the 7<sup>th</sup> of November 2022, when it received the dissatisfaction of the notice made from the Applicant, which meant an indication of reconsideration, the 1<sup>st</sup> Respondent responded to the Applicant the same day on its decision and further directed the Applicant to file a review application in terms of Section 59 of the Public Procurement Act.

#### **3.1.2 2<sup>nd</sup> Point in limine: Non-Joinder**

In terms of Regulation 42(3) the Applicant must lodge the review application with the Review Panel and serve copies of the review application to the public entity referred to in sub-section (1) and on any other interested person.

3.2 The 1<sup>st</sup> Respondent stated that the Applicant was taken throughout the whole process till the last point with regards to the score where the applicant was found to be non-responsive. The Applicant scored 75 and the 2<sup>nd</sup> Respondent scored 94.

3.3 The 1<sup>st</sup> Respondent further stated that on the 28<sup>th</sup> September 2022, the BEC reconvened to re-evaluate the bid. The following bidders were subjected to the re-evaluation process: noted as 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> Respondents. They all moved through evaluation stages 1,2,3 and 4. However, the 14<sup>th</sup> Respondent scored poorly in terms of the evaluation criteria and was eliminated at the 4<sup>th</sup> stage. The remaining bidders were taken through evaluation stages 5 and 6.

3.4 The 1<sup>st</sup> Respondent stated that when the BEC started with the financial evaluation, it was noted that there was a discrepancy between the bidding document (Bill of Quantities), the hard copy and the one on Google Drive. The BEC corrected the errors as per ITB 31 and 33 on pages 13-14 of the bidding document. The 1<sup>st</sup> Respondent further stated that they corrected and final amounts recorded in stage 6 and they were communicated to the respective bidders who accepted and confirmed the correction. The only bidder who refused to accept the correction was the Applicant.

3.5 The 1<sup>st</sup> Respondent argued that, although the Applicant refused to accept the arithmetic errors despite the corrections made, it did not evoke Section 52(7) of the Public Procurement Act, which mandates a public entity or Board to disqualify a bidder who refuses to accept arithmetic errors.

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

- 4.1 That on the 7<sup>th</sup> November 2022, the Applicant wrote to the Public Entity to indicate that it was not satisfied with the outcome of the evaluation. That, on the same day the 1<sup>st</sup> Respondent provided a response to the Applicant that if it was not satisfied, they must apply for review in terms of Section 59 of the Public Procurement Act. That, the standstill period ended on the 7<sup>th</sup> November 2022, which the Public Entity responded to the Applicant which means the Applicant had 7 days to apply for the review.
- 4.2 The Review Panel found that the Applicant applied to the Review Panel on the 12<sup>th</sup> day, after a reconsideration response was given by the 1<sup>st</sup> Respondent, hence this implies that the application for review was filed late, as it was supposed to apply to the Review Panel within the 7 days after they received a response from the Public Entity.
- 4.3 It is observed that the 1<sup>st</sup> Respondent may have violated Section 26(7) as it constituted a Bid Evaluation committee (BEC) with even numbers instead of odd numbers, considering the Secretary to BEC who also signed the BEC evaluation report. This is so because the view should be that the Secretary to BEC is not supposed to sign the BEC evaluation report.
- 4.4 It is observed that, the Notice of Selection of Award was issued in terms of Section 55(4) and not in terms of Section 55 as amended because the 1<sup>st</sup> Respondent was supposed to inform the bidders that if you are not satisfied with the decision, apply for the reconsideration. Nonetheless the Applicant was aware of the amended act and indicated to have acted as per the amended act of the Public Procurement Act.
- 4.5 It is observed that, the Applicant failed to serve copies to all interested parties and thus violated Regulations 42(3) despite its own interpretation.
- 4.6 That, the Applicant refused to accept arithmetic errors, compared to all other bidders who accepted the arithmetic errors. That the Applicant should have been disqualified by the 1<sup>st</sup> Respondent in terms of Section 52(7) of the Public Procurement Act.
- 4.7 It is found that despite the Applicant's refusal to accept the arithmetic errors and despite the 1<sup>st</sup> Respondent not invoking Section 52(7) of the Public Procurement Act, the Applicant was evaluated up to the last financial stage. That the Applicant failed at the financial evaluation as its uncorrected bid amount was still 21.86% below the desired estimate of the Quantity Surveyor's project budget estimate, since 15% is the allowable margin.

## 5. DECISIONS OF THE REVIEW PANEL

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

- 5.1 That the Application against the 1<sup>st</sup> Respondent is upheld.
- 5.2 In term of Section 60(a) of the Public Procurement Act, 2015, (Act No. 15 of 2015), the Review Panel hereby orders that the application is dismissed for the reason that the review application was filed late, the Applicant refused to accept arithmetic errors and the Applicant's financial proposal was 21.86% below Quantity Surveyor's project budget estimate, since 15% is the allowable margin.
- 5.3 That this order takes effect as from the 07 December 2022



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**HELLEN AMUPOLO**

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

