



REPUBLIC OF NAMIBIA

MINISTRY OF FINANCE AND PUBLIC ENTERPRISES

PUBLIC PROCUREMENT REVIEW PANEL

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**IN THE PUBLIC PROCUREMENT REVIEW HEARING
HELD ON 30 DECEMBER 2022**

IN THE MATTER BETWEEN

**ENVISION ENERGY SINGAPORE PTE LTD
AMEA POWER LTD
AQUISHA FARIDA JOOSTE
GREEN ENTERPRISE SOLUTIONS (PTY) LTD
(AMEA ENVISION ATLANTIC GREEN POWER JV)**

APPLICANT

AND

NAMIBIA POWER CORPORATION (PTY) LTD

1ST RESPONDENT

**CHINA ENERGY INTERNATIONAL GROUP CO.
RIMINII INVESTMENTS (PTY) LTD
(ENERGY CHINA-RIMINII JV)**

2ND RESPONDENT

**INNOSUN ENERGY HOLDING (PTY) LTD JV
BLACK DIAMOND ENERGY INVESTMENTS (PTY) LTD**

3RD RESPONDENT

**VOLTALIA SA
NAMIBIA INFRASTRUCTURE DEVELOPMENT AND
INVESTMENT FUND (PTY) LTD
OTESA CIVIL ENGINEERING (PTY) LTD**

**(VEO WIND JV)
IJG INFRASTRUCTURE MANAGEMENT (PTY) LTD**

4TH RESPONDENT

**AKUO ENERGY AFRIQUE S.A.S
(IJG-AKUO CONSORTIUM JV)**

5TH RESPONDENT

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

**BID NO: G/IOB/NPWR-06/2022 - PROCUREMENT OF INDEPENDENT PRODUCER
FOR THE DEVELOPMENT OF A 50 MW WIND POWER PLANT NEAR LÜDERITZ
ON A BUILD-OWN-OPERATE (BOO) BASIS**

**Coram: Kenandei Tjivikua (Chairperson), with Selma-Penna Utonih, Brownny
Mutrifa, Hellen Amupolo, and Gilbert Habimana concurring**

Heard: 30 December 2022

Decided: 30 December 2022

ORDER

The meeting took both the physical and the virtual modes.

Having heard **Mr. Shaun Ellis**, for the Applicant, **Mr. Victor Gabriel**, for the First Respondent, and other interested parties who were joined in terms of Sub-Regulation 42(5) (a) of the Public Procurement Act, 2015: Public Procurement Regulations (hereinafter referred to as “the Regulations”) 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

- 1.1 The Applicant alleged that the previous Review Panel through its ruling of 28 September 2022 made it clear that its bid was substantially responsive and should advance to Stage 3 (Commercial Criteria and Evaluation).

1.2 That the First Respondent ignored the previous Review Panel order of 28 September 2022 for the Applicant to be advanced to bid Stage 3.

1.3 That the previous Review Panel order of 28 September 2022 has already expressed itself that the Applicant's bid was substantially responsive under the evaluation and qualification criteria prescribed in Stage 2 (Qualification Criteria and Evaluation) and therefore the newly constituted Review Panel cannot make an alternative finding and it is bound by the previous Review Panel's findings contained in the ruling of 28 September 2022.

1.4 Further, if the First Respondent was dissatisfied with the ruling, it should have approached the High Court with an urgent application for review. It elected not to approach the High Court and it did so at its own peril.

2. APPLICANT'S FURTHER GROUNDS STATED DURING THE HEARING PROCEEDINGS

2.1 The Applicant stated that it had requested in its founding affidavit for the Review Panel to direct the First Respondent to make available to the Applicant and any other Interested Party a copy of the Second Respondent's (ENERGY CHINA-RIMINII JV) bid, at the hearing for inspection by the Applicant.

2.2 The Applicant stressed that its bid was disqualified for the following reason:

"That the Project Implementation Schedule was submitted but not to the required level of detail. Key milestone dates that were requested to be included in the implementation schedule as part 1 Section IV _BF2-7 Project Implementation Schedule were not included". The Applicant took the decision of the First Respondent to disqualify its bid for the reason set out in the first notice for selection of award on review to the Review Panel and succeeded with its application, in that the Review Panel through the ruling, *inter alia*, ordered:

"That the First Respondent proceed with the evaluation of 4th Applicant to Stage 3 in accordance with section 52 (9) and the instruction to bidders in the bidding document."

2.3 The Applicant alleged that the First Respondent disregarded the order of the Review Panel dated 28 September 2022 which, in the Applicant's view, was clear that its bid was substantially responsive and should advance to Stage 3. The Applicant further alerted the Review Panel that it cannot now make an alternative finding and that it is bound by its previous findings contained in the order of 28 September 2022 because the previous Review Panel has become *functus officio* in respect of this determination.

- 2.4 The Applicant further stated that if the First Respondent was dissatisfied with the previous Review Panel's order, it should have approached the High Court with an urgent application for review. It elected not to approach the High Court and it did so at its own peril.
- 2.5 The Applicant further argued that its price per kilowatt-hour is roughly 7.3% lower than the price offered by the Second Respondent and is fixed over the 25-year period which is the duration of the Power Purchase Agreement (PPA).
- 2.6 The Applicant stated that the Second Respondent's price is subject to a 0.5% fixed annual escalation rate, meaning that its price per kilowatt-hour during the last year of the PPA term will be 12.5% higher than its commencement price and 21.65% higher than the Applicant's fixed price.
- 2.7 The Applicant concluded that it was clear that its bid was substantially lower than that of the Second Respondent and that had its bid advanced to Stage 3, its price would have undoubtedly been favored as it would have resulted in a saving of N\$ 720 million.

3. FIRST RESPONDENT'S RESPONSES TO GROUNDS FOR REVIEW APPLICATION

- 3.1 The First Respondent submitted an answering affidavit on 21 December 2022.
- 3.2 The First Respondent in response to the allegations by the Applicant stated that in no way has it ignored the order of the previous Review Panel. The First Respondent further stated that it was ordered by the previous Review Panel to seek clarification in terms of Section 52(1) of the Public Procurement Act, 2015, and proceed with the evaluation of the Fourth Applicant (ENERGY CHINA-RIMINII JV) in terms of Section 52(9) of the same Act. The Post-Bid clarification was sought per the order of the previous Review Panel and it was sent to the Applicant on 21 October 2022 with a reasonable due date of 26 October 2022 at 16:30, providing the Applicant with the due opportunity to substantiate the claims that the missing or omitted information was indeed implied in the schedule of 63 milestones submitted.
- 3.3 The Response was received from the Applicant on 26 October 2022 after which the First Respondent concluded its evaluation in accordance with the provisions of the bidding document as prescribed by Section 52(9) of the Public Procurement Act.
- 3.4 In the Post-Bid Clarification Request No. 3 sent to the Applicant, the First Respondent requested the Applicant to confirm the start and end date of their submitted Project Implementation Schedule, to clarify where the minimum key milestone dates required are implied in their submitted Project Implementation

Schedule comprising of 63 milestones and had been costed in their financial proposal.

- 3.5 In response to the request, the Applicant submitted a Project Implementation Schedule stating the dates of the key milestones that were not initially provided as part of the Applicant's original bid submission.
- 3.6 In assessing the Project Implementation Schedule, the Bid Evaluation Committee (BEC) discovered that the Applicant had added 43 milestones that were not originally included as part of the Applicant's original submission. These milestones did not satisfy the criteria but rather introduced a significant amount of new information, leading the Applicant to alter the core of its original bid. The First Respondent demonstrated that the newly filed Project Implementation Schedule has a duration of 777 days as opposed to the initially submitted Project Implementation Schedule's 459 days.
- 3.7 The First Respondent further stressed that it has never ignored or disregarded the order of the previous Review Panel.
- 3.8 First Respondent further stated that it had no issue with the order of the previous Review Panel and thus did not consider it necessary to approach the High Court because they fully understood the order and complied with it.
- 3.9 After BEC re-evaluation of the Applicant's bid at Stage 2 of the evaluation process, the Applicant remained non-compliant with the minimum requirements of Qualification Criteria. The Financial Proposal of the Applicant remained unopened as the Applicant did not progress to Stage 3.
- 3.10 In conclusion, the First Respondent stressed that bidders were given enough time to prepare their bids and demonstrate their ability to compete with each other.

4. FINDINGS OF THE REVIEW PANEL

Having heard the Parties after all parties were afforded ample time, the Review Panel resolved first to settle the question of law of whether the Review Panel has the power to order a public entity to advance a bid to the next level of an evaluation stage. It further made the following findings:

- 4.1 That, in terms of Section 3 of the bidding documents, bid proposals that do not satisfy the requirements in respect of any evaluation criteria in either Stage 1 or 2 will be rejected and will not be eligible for evaluation under Stage 3.
- 4.2 That the Applicant introduced new information that substantially changed their bid, which is contrary to Section 52(1) of the Public Procurement Act that states the

following: *“The Board or a public entity may seek clarification during the examination of bids from any bidder to facilitate evaluation, but it may neither ask nor permit any bidder to change the price or substance of its bid.”* Hence, the First Respondent did not re-evaluate the bid of the Applicant.

- 4.3 That the Applicant wrongly interpreted the Review Panel’s third instruction given under Section 60(c) which states that the 1st Respondent (NamPower) proceed with the evaluation of the 4th Applicant (the Applicant) to Stage 3 in accordance with Section 52(9) and the Instruction to Bidders in the bidding document. The Applicant understood and insisted several times in its affidavit and representation during the hearing that this instruction was meant to advance the Applicant’s bid to Stage 3 of the evaluation process. Particularly, in this instance, the Applicant seems to ignore that Section 26 of the Public Procurement Act must apply to any evaluation process, partial or full, and must be conducted by a Bid Evaluation Committee (BEC) duly appointed by the public entity.
- 4.4 That the Applicant also seems to ignore that the Review Panel is not empowered to correct or improve BEC’s decision at any level of the evaluation process. For a greater reason, the Review Panel has no power to advance a bid from one stage to the other by bypassing the evaluation process that solely has to be conducted by the BEC.
- 4.5 That the Applicant expressed that the currently constituted Review Panel it appeared before on the same matter is bound by the previous Review Panel’s decision and obligated by precedence to confirm the previous order. The review panel is appointed to consider all facts and make a decision appropriate as per the facts provided. Every review panel is obligated to review and consider every case on the merits submitted and make a determination and the principles of precedence are not applied as an absolute on matters of review.
- 4.6 That the Applicant’s Project Implementation Schedule was not to the level of detail with the technical proposal as required in the Instructions to the Bidders. This was demonstrated in the hearing by the First Respondent especially the Applicant’s Project Implementation Schedule in Phase 1 of Develop and Establishment.
- 4.7 That the Review Panel decided that the request by the Applicant to have access to the Second Respondent’s bid is irregular as the dispute is ongoing and might result in the infringement of the rights or display of the trade secrets of the Second Respondent. Further to it, such a request may only be undertaken through a High Court declaration.

5. DECISIONS OF THE REVIEW PANEL

5.1 In terms of Section 60(a) of the Public Procurement Act No. 15 of 2015, the Review Panel dismisses the review application and confirms the decision of the First Respondent in terms of Section 60 (e).

5.2 The effective date of this order is from 30 December 2022.



KENANDEI TJIVIKUA

CHAIRPERSON: REVIEW PANEL (I.R.O. THIS MATTER)