



# **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 09 MARCH 2023**

**IN THE MATTER BETWEEN**

**ANNA AND JUSTIN INVESTMENT CC**

**APPLICANT**

**AND**

**NAMIBIA INSTITUTE OF PUBLIC ADMINISTRATION**

**AND MANAGEMENT (NIPAM)**

**RESPONDENT**

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

**BID NO: NCS/ONB/NPM-11/2022/2023: SUPPLY AND DELIVERY OF REFRESHMENTS AND PROVISION OF CATERING SERVICES TO NIPAM FOR ONE (1) YEAR**

**Present: Tulimeyo Kaapanda (Chairperson) with Lukas Kudumo Siremo, Mekondjo Katunga, Ehrenfried Honga and Selma-Penna Utonih concurring**

**Heard : 09 March 2023**

**Decided : 09 March 2023**

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**REVIEW PANEL ORDER**

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**1. INTRODUCTION**

- 1.1. A hybrid meeting was held using both physical and virtual modes.
- 1.2. Having heard **Ms. Anna Ipangelwa** for the Applicant, **Mr. Ashley Brenden** for the Respondent, and other interested parties who were joined in terms of Regulation 42(5)(a) of the Public Procurement Regulations: the Public Procurement Act, 2015 (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 made the subsequent order hereunder.

**2. BACKGROUND TO THE REVIEW APPLICATION**

- 2.1 The Applicant filed an application for review aggrieved by the Respondent's decision to cancel the tender, and failure by the public entity to avail the executive summary. The Applicant requested the Review Panel to reconsider the cancellation as the two financial offers made to the public entity do not warrant a cancellation.
- 2.2 The Applicant alleged that a few days after closing of the tender, the Respondent (NIPAM) invited all three tenderers including Anna and Justin Investments, represented by Mr. Isaac Cronje, AJ's Manager, to a meeting to inform bidders that the prices announced at the opening of the tender were not entirely correct as Anna and Justin gave two options. Option 1 with lunch only N\$365.00 and Option 2 with dinner (when required ) was N\$515.00.
- 2.3 The Applicant further alleged that on the 8<sup>th</sup> February 2023, Ms. Anna Ipangelwa, Managing Member of Anna and Justin Investments cc, out of concern sent an enquiry by e-mail to Mr. Vernon Van Wyk, Senior Financial and Management Accountant,

enquiring about progress on the bid which closed on the 19 October 2022, concerned that no feedback was received despite the 120 days bid validity period approaching an end.

2.4 On the 15<sup>th</sup> February 2023, the Applicant received a notice of tender cancellation from the Respondent. When the Applicant's demands to be provided with the executive summary failed, it then approached the Review Panel.

### **Relief sought by the Applicant**

2.5 Review Panel should re-consider the cancellation of the bid as the two options quoted should not warrant cancellation.

### **3. THE APPLICANT'S GROUNDS DURING THE REVIEW HEARING**

3.1 The Applicant stated that they only became fully aware of the reasons for cancellation upon perusal of the replying affidavit, inter alia:

3.1.1 that the bid was advertised without provisions for it in the Annual Procurement Plan and this was only detected by the Accounting Officer upon receipt of the PC report.

3.1.2 that the bid did not include food tasting as part of its evaluation, and this is regarded as a material aspect, hence the cancellation in terms of Section 54(1)(g) of the Public Procurement Act, 2015 (Act No. 15 of 2015) and as amended.

3.1.3 that it is further suspected that one of the BEC members, a certain Ms. Puye Nambili is a friend to the Applicant, yet she did not declare any conflict of interest nor rescue herself.

3.2 The Applicant is disputing the reasons advanced and further claim that based on the cancellation of the letter dated 3 February 2023, the reasons for cancellation in terms of Section 54(1)(g) of the Public Procurement Act, 2015 (Act No. 15 of 2015) is not their fault and that the bid must be awarded as the new requirement and other factors such as not having budgetary provisions were not an issue before bid advertisement.

3.3 The Applicant further stated that although the notice of cancellation was dated 3<sup>rd</sup> February 2023, and it was only shared with them on the 15<sup>th</sup> February 2023 which was close to bid expiry date and this proved to be a problem in order to approach the Review Panel with valid grounds.

3.4 The Applicant also alleged that this was the third time that the same bid has been cancelled without valid reasons and hence the Respondent (NIPAM) should not be allowed to cancel but to make an award as recommended by the BEC and PC.

3.5 The Review Panel further queried the Applicant to be explicitly clear as to what relief sought as it was not clearly stated in the application. The Applicant indicated that since

the Respondent cancelled the bid without valid reasons or grounds, the public entity should be compelled to make an award.

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

- 4.1 The Respondent (NIPAM), in its replying affidavit and oral statements made during the review hearing stated that the bid was cancelled due to the three reasons cited which are (i) the procurement activity not part of the Annual Procurement Plan, (ii) Food tasting being a material evaluation criteria which was not included in the evaluation criteria of the bidding document and hence as such do not create or achieve the expected outcome in terms of Section 54(1)(g) of the Public Procurement Act and as amended, and (iii) that one of the bid evaluation committee member was found to be in conflict of interest in terms of Section 66(1)(c) and Section 66A(1)(c).
- 4.2 The Respondent further re-iterated that the bid will be re-advertised again. It further stated that the 120 days bid validity period had expired by 16 January 2023. Upon enquiry by the Review Panel as how then did it cancel a bid on 3 February 2023 whilst the bid already expired by 16 January 2023, it was observed that in terms of calendar days, the bid expiry without extension was to be on 16 February 2023.
- 4.3 The Respondent (NIPAM) also claimed that it has no recollection that the same bid was cancelled three (3) times because the representative delegate was newly appointed together with the legal representative.
- 4.4 The Review Panel queried as why the Respondent advertised a bid without first making sure it is part of the Annual Procurement Plan (APP) and that the funds for such a procurement activity were certified. The Respondent (NIPAM) indicated that previously the funds paid to the successful caterer were paid by the customers of NIPAM and as such NIPAM did not need to make any budgetary provisions. However, it has been experienced that at times some customers of NIPAM only pay after the events held by NIPAM and also NIPAM itself initiate activities which will require the services of this bid and as such NIPAM needs to make the payments, and such payments warrants budgetary provisions.

#### **5. OTHER RESPONDENTS OR INTERESTED PARTIES**

- 5.1 One of the three bidders who attended the review proceedings stated that this was the third time her company has participated in the NIPAM tender for the same services for the past three years, and in all instances, the Public Entity always come up with questionable reasons for cancelling the bids.

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

The Review Panel found that:

- 6.1 The bid is still valid as the 120 days are counted based on the interpretation of the Public Procurement Act of 2015 as amended (Public Procurement Amendment Act, 2022), by not including weekends and public holidays. The bid validity thus will expire on the 10<sup>th</sup> of April 2023.
- 6.2 The Respondent (NIPAM) was not required as per the Public Procurement Act, 2015 and as amended, to provide an executive summary of the bid evaluation report to bidders since it cancelled the bid in terms of Section 51(4)(g) and that Section of 55(4) of the Public Procurement Act of 2015 as amended was not invoked.
- 6.3 The Respondent (NIPAM) advertised a bid without first putting it on annual procurement plan (APP) which must be submitted to the Policy Unit for scrutiny and approval, and further failed to certify availability of funds before engaging into this procurement activity. This is a direct violation of Section 25(4)(a) and Section 25(4)(b) of the Public Procurement Act of 2015 as amended. That Section 25 read together with Regulations 8 of the Public Procurement Act of 2015 as amended requires all planned procurement activities per financial year(s) to be on the APP and IPP irrespective of how the funding will be made.
- 6.4 On the matter of food tasting not included in the evaluation criteria, Section 54 of the Public Procurement Act of 2015 as amended provides the Respondent legal rights to cancel if reasons for such cancellation are genuine and valid. Review Panel finds no grounds within the provisions of the Procurement Act to dispute the importance of Food tasting.
- 6.5 On the matter of conflict of interest in terms of Section 66(1)(c) and Section 66(2)(a) of the Public Procurement Act of 2015 and as amended, it is observed that the Respondent did not have sufficient proof to substantiate the claim made. Thus, in the absence of a sworn written or oral statement or affidavit from the stated employee to agree or deny, this allegation was found not good enough to be considered as reason for bid cancellation in terms of Section 54(1)(e).
- 6.6 Review panel further noted that the bid evaluation criteria had two different methods of evaluating financial proposals, i.e. on page 31 under phase 4 and on page 34 under phase 4, and that BEC decided to evaluate the financial proposal per the criteria mentioned on page 31. This demonstrates a faulty bid document and subsequent evaluation process.
- 6.7 That all issues leading to the cancellation emanates from faulty internal structural processes, thus it is unfair to bidders, as there is no recourse for bidders as Respondent (NIPAM) had not exercise due diligent and care when executing this procurement processes.

6.8 On allegation that the same bid was cancelled three times, the Review Panel was not provided with evidence, however the aggrieved bidder is advised to submit such allegations to the Procurement Policy Unit in terms of Section 7 (3) of the Public Procurement Act, 2015 for verification and investigation.

## 7. DECISION OF THE REVIEW PANEL

Based on the above findings, the Review Panel order that:

7.1 In terms of Section 60(a) of the Public Procurement Act, 2015 (Act No. 15 of 2015), the application is dismissed and confirms the decision of the public entity (Respondent, NIPAM) in terms of Section 60(e).

7.2 This bid be only advertised if included in the Annual Procurement Plan and the required funds are certified through an Individual Procurement Plan in terms of Section 25(4)(a) or Section 25(4A) and Section 25(4)(b) of Public Procurement Act, 2015 (Act No. 15 of 2015) and as amended.

7.3 This Order is effective as of 09 March 2023.



TULIMEYO KAAPANDA  
CHAIRPERSON: REVIEW PANEL (this matter)

