



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 18 and 21 APRIL 2023

IN THE MATTER BETWEEN

PENATU TRADING CC

APPLICANT

AND

KAVANGO WEST REGIONAL COUNCIL

FIRST RESPONDENT

& 25 OTHER RESPONDENTS

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

BID NO: W/OAB/KWRC-DOEAC-02/2022 – THE CONSTRUCTION FOR EXTENSION OF LARGE CIRCUIT OFFICE MODULE (CIR2) AT NZINZE CIRCUIT OFFICE: KAVANGO WEST REGIONAL COUNCIL-DIRECTORATE OF EDUCATION, ARTS AND CULTURE

Coram: Lukas Kudumo Siremo (Chairperson), with Tulimeyo Kaapanda, Michael Gaweseb, Mekondjo Katunga and Kenandei Tjivikua

Heard: 18 April 2023

Decided: 21 April 2023

ORDER

1. INTRODUCTION

1.1 A hybrid meeting was held, using both physical and virtual modes.

1.2 Having heard **Mr. Frans Kamenye** for the Applicant, **Mr. Mpasi Haingura** for the Respondent, and other interested parties who were joint in terms of sub-regulation 42(5)(a) of the Public Procurement Regulations (hereinafter referred to as “the Regulations”) to the Public Procurement Act, 2015 (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 records, the Review Panel made the following findings and subsequent order hereunder towards the end.

2. POINTS IN *LIMINE*

2.1 At the commencement of the review proceedings, the Chairperson requested the Public Entity to confirm whether the bid was awarded and if the contract was signed. The Public Entity (1st Respondent) confirmed that the award was made on 24 March 2023 and indicated that the contract was not yet signed. However, the selected bidder confirmed that they have signed a contract on 31 March 2023 and, currently await the 1st Respondent to hand over the site.

- 2.2 It was further observed that the issue of the notice of award and the contract signing were done during the standstill period, and when the Review Panel queried why the 1st Respondent made a contract award and signed a contract during the standstill period which is in violation of Section 55(4c) of the Act as amended, the 1st Respondent was unable to explain the action/decision taken. Further, the 1st Respondent confirmed that it was aware of the reconsideration request and had directed the Applicant to act in terms of Section 59(1) of the Act.

3. GROUNDS FOR THE REVIEW AS CONTAINED IN THE APPLICANT'S APPLICATION FOR REVIEW

- 3.1 The Applicant in its application for review is challenging the reason for its disqualification, stating it met all the requirements as set out in the bid document. Applicant stated that the bid document was clear in requiring bidders to furnish liquid assets and or credit facilities to the value of N\$1,000, 000. The Applicant has short-term investment accounts with First National Bank with balances over N\$4 million. These investments made it possible for the Applicant to be able to access lines of credit from the bank which was substantiated by the credit facility letter, contingency, and overdraft letter that formed part of the bidding documents. These letters were attached to the bid document in order to fulfil the requirements set out in the bidding document. The Applicant further stated that its lines of credit or liquid assets net other contractual commitments amounts to N\$2 million from FNB Namibia and a 30-day material account to the value of N\$400,000 from Pupkewitz Megabuild; these sums up to an amount of N\$2,400,000 available to undertake this project.

4. APPLICANT'S SUBMISSIONS AT THE REVIEW PANEL HEARING

- 4.1 The Applicant explained that the bid was advertised and it made sure that it provide all the required documents to meet the requirements as set out in the bidding documents. The Applicant further stated that it was surprised to see a notice for selection of award (a notification) which indicated that it was unsuccessful and is convinced that the process of evaluation was not fair and that the 1st Respondent failed to follow its own requirements during the process of evaluation.

4.2 Relief sought:

The Applicant sought assistance from the Review Panel to offer guidance and correct the decision by the 1st Respondent if it is found to be not in compliance with the Public Procurement Act.

5. 1st RESPONDENT'S SUBMISSION AT THE REVIEW PANEL HEARING

- 5.1 The 1st Respondent submitted that during the evaluation it looked at the three (3) main evaluation components, namely Administration, Technical, and Financial and the most

important component was the financial evaluation. Under financial compliance three subcomponents were considered namely:

- 5.1.1 Evidence of access to financial resources (cash in hand, lines of credit). This evaluation criterion is found on page 28 of the bid document under clause 1.8.
 - 5.1.2 The Contractor must have a minimum average annual financial amount of construction of N\$500,000 over the last 5 years as per instructions to bidders (ITB) 6.3(a) on page 17 of the bid document.
 - 5.1.3 The balance of liquid assets and/or credit facilities net of other contractual commitments of the successful bidder shall be N\$1 million as per ITB 6.3(e) on page 18 of the bid document.
- 5.2 The 1st Respondent alleged that the Applicant was not disqualified based on the access to lines of credit as it was claimed but rather the disqualification is based on financial statement records submitted by the Applicant for the year ended 31 March 2022 which indicated that the company had other contractual commitments on other liabilities with more than N\$1 million hence the company exceeded the minimum requirements.
- 5.3 Upon enquiry from the Review Panel, if the Applicant did not provide any letters from First National Bank Namibia that showed the credit facilities, lines of credit, and/or access to finance to perform the project, it was observed that the Bid Evaluation Committee (BEC) decided to interpret a criterion of financial statement differently from how the bid document required it and further misdirected itself to not consider all the relevant information given by the Applicant.
- 5.4 The Review Panel further queried if the 1st Respondent understood the purpose of the financial statements, which are time-bound as the finances of the bidder would change monthly based on operations. Review Panel further interrogated how can it be concluded from 31 March 2022 financial statement that the obligation of the bidder exceeded the minimum requirements considering the newly issued N\$2 million credit facility availability and contingency facilities as provided by First National Bank Namibia. The 1st Respondent replied that the BEC just considered this as lines of credit, but not access to financial resources.
- 5.5 The Review Panel queried whether the bidder recommended for award met the indicated requirements because it is apparent in the bid document of the successful bidder, that only financial statements for 2 years (2019 and 2020), and no lines of credit were provided except a letter from First National Bank Namibia, which gave a letter of intent to provide a performance guarantee of 10% of the contractual amount.

6. FINDINGS OF THE REVIEW PANEL

Having heard the Parties at the Review Panel Hearing and having considered the written submissions of the Parties and the documents presented, the Review Panel made the following findings:

- 6.1 That, the 1st Respondent acted contrary to Section 52(9) of the Act when it failed to evaluate bids in accordance with the criteria and methodology set out in the bidding document. Thus, the 1st Respondent did not evaluate the Applicant's bid correctly and it disqualified it unfairly.
- 6.2 That, the Applicant has met all the requirements as set out in the evaluation criteria, and has attached all the needed information to its bid proving that it has cash in hand, lines of credit, material credit, and contingency credit all to the value of N\$2,400,000. Applicant has also submitted for 3 years as required.
- 6.3 That, in terms of ITB 6.3(e) as indicated on page 18 of the bid document, the selected bidder submitted only financial statements for two (2) years (from September 2019 to September 2020) and not for three (3) years as required in the bid document.
- 6.3 That, in terms of the evaluation criteria on page 28 of the bid document, clause 1.8, the selected bidder did not attach proof to show that it has access to financial resources (cash in hand, lines of credit, etc.), however only attached a letter of intent from the bank to indicate that it will be provided with a performance guarantee of 10% of the contractual amount.
- 6.4 That, the award was made prematurely. The 1st Respondent violated Section 55(4c) of the Act as amended when it issued a notice for the award and further signed a contract during the standstill period. Therefore, the contract is unlawful, ultra vires, null and void.
- 6.5 The Review Panel found that the 1st Respondent contravened Regulation 42(4) when it failed to file with the Review Panel a replying affidavit within two days as prescribed by the Regulations.

7. DECISIONS OF THE REVIEW PANEL

Based on the above findings, the Review Panel orders the following:

- 7.1 The Notice of award issued by the 1st Respondent dated 24 March 2023, and the contract that was signed on 31 March 2023 for the bid number: **W/OAB/KWRC-DOEAC-02/2022** – The construction for extension of large circuit office module (CIR2) at Nzinze Circuit Office: Kavango West Regional Council - Directorate of Education, Arts and Culture, is hereby declared as *ultra vires, null and void ab initio* in terms Section 55(4c), and therefore the action and decision of the 1st Respondent is hereby set aside in whole in terms of Section 60(c) of the Public Procurement Act, 2015 (Act No. 15 of 2015) as amended.
- 7.2 The matter is referred back to the 1st Respondent (Public Entity) in terms of Section 60(c) with the following specific instructions:
- 7.2.1 That the bids of the Applicant and other bidders must be re-evaluated in terms of Section 52(9) of the Act, just as indicated in the bidding document considering the relevant information provided by the Applicant and other bidders.
- 7.2.2 The 1st Respondent must complete its re-evaluation and issue a new notice for selection of award to all bidders within 14 days from the date of receipt of this Order.
- 7.3 The effective date of this order is **21 April 2023**.
- 7.4 The 1st Respondent (Public Entity) shall provide proof of implementation of this Order to the Procurement Policy Unit within thirty (30) days from the effective date of this Order.



Mr. Lukas Kudumo Siremo

CHAIRPERSON: REVIEW PANEL (IRO THIS MATTER)

