



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 26 JUNE 2023

IN THE MATTER BETWEEN

MYL TRADING CC

APPLICANT

AND

KAVANGO EAST REGIONAL COUNCIL

1st RESPONDENT & OTHERS

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

**BID NO: W/RFQ/DPEAC-KERC/107/44/2022/2023-PROCUREMENT OF
CONSTRUCTION OF TWO CLASSROOMS AT ALOYS HASIPARA JUNIOR
PRIMARY SCHOOL**

**Coram: Mekondjo Katunga (Chairperson), with Lukas Kudumo Siremo, Rainer
Trede, Michael Gaweseb, Hellen Amupolo**

Heard: 26 June 2023

Decided: 26 June 2023

ORDER

1. INTRODUCTION:

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

1.2 Having heard **Mr. Kadhila Amoomo**, for the Applicant, 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) and as amended (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.

**2. GROUNDS FOR THE REVIEW AS CONTAINED IN THE APPLICANT'S
APPLICATION FOR REVIEW:**

2.1 The Applicant stated that the First Respondent informed them that in the absence of any application for the review of the selection of the award within seven (7) days of that notice, the First Respondent would award the contract to the successful bidder. However, after the seven days period lapsed, no applications for reconsideration were brought by the unsuccessful bidders. The First Respondent awarded the procurement contract to the successful bidder and a purchase order was issued to the applicant and the site handover took place on 18 April 2023;

2.2 The Applicant further alleged that in addition thereto, a work programme was submitted, and the necessary building materials were purchased within that week. The clearing of the site, construction of workers' temporary accommodation and digging of trenches were also completed within that week; and

2.3 The Applicant further alluded that on 24 April 2023 the Applicant was served with a notice of cancellation of the contract and the First Respondent cited section 66 (2B) of the Act and as amended, with the reason that the sole member of the company is allegedly a staff member of the Kavango East Regional Council. The Applicant informed the First Respondent that he is a school teacher employed in the Ministry of Education, Arts, and Culture.

3. **APPLICANT'S SUBMISSIONS AT THE REVIEW PANEL HEARING:**

3.1 The Applicant explained that it was awarded the bid on 18 April 2023 and that after receiving the purchase order, work programme was submitted and the necessary building materials were purchased within that week. In addition, the Applicant explained that the clearing of the site, construction of workers accommodation and digging of trenches were also completed within that week.

3.2 Further, the Applicant explained that unexpectedly, on 24 April 2023 it was served with a noticed of cancellation for award of bid no. W/RFQ/DOEAC-KERC/107/44/2022/2023. The Respondent referred to section 66 (2B) of the Act and as amended, with the reason that the Applicant as the sole member is allegedly a staff member of Kavango East Regional Council. The Applicant informed the Review Panel that, on 10 May 2023 it addressed a letter to the First Respondent demanding that the First Respondent reconsider its decision to cancel.

3.3 The Applicant stressed that the First Respondent was supposed to give the Applicant an audi as a fundamental legal principle in which the Applicant is entitled to a fair hearing and given the opportunity to respond to evidence against awarding the bid to it. The First Respondent violated Article 18 of the Namibian Constitution which speaks to administrative justice which must be given to anybody. The Applicant reiterated that it was never given a hearing in terms of administrative justice and further stated that a the member of Myl Trading CC (Applicant) is not an employee of the Kavango East Regional Council but, an employee of the Ministry of Education, Arts and Culture.

3.4 The Applicant concluded that, the decision to cancel this bid was made after the site was handed over, material were purchased and people were employed and therefore, prayed that the Review Panel orders the First Respondent to reinstate the already awarded contract, which the First Respondent has unilaterally decided to cancel.

4. THE INTERESTED PARTIES

- 4.1 One of the interested parties indicated that it is not indicated in the bid documents that teachers are not suppose to partake in this bidding process and that section 66 (2B) is clear therefore, the First Respondent must not use this section as an excuse.

5. FINDINGS OF THE REVIEW PANEL

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

- 5.1 That, the member of Myl Trading cc (Mr. Josef Likuwa) is not appointed by the Kavango East Regional Council but by the Ministry of Education, Arts and Culture. The appointment letter of 9 August 2021 states “... your appointment as a teacher in this Ministry...” and as such Kavango East Regional Council is not a Ministry of Education, Arts and Culture and therefore the sole member of Myl Trading cc (Mr. Josef Likuwa) is **not** a staff member of the public entity in terms Section 66(2B)(a).
- 5.2 That, the First Respondent violated Regulation 42(4) when it failed to file a Replying Affidavit with the Review Panel;
- 5.3 That, the First Respondent violated Article 18 of the Namibian Constitution when it failed to offer the Applicant an opportunity to respond to its decision taken as per the letter dated 20th April 2023 which was stamped and signed by the Accounting Officer on 25th April 2023. That the Applicant was not offered to make its representation considering that the procurement contract was awarded to the Applicant and a purchase order was also issued to commence with the works.

6. DECISIONS OF THE REVIEW PANEL:

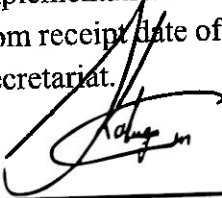
Based on the above, the Review Panel orders the following:

- 6.1 That the Notice issued by the First Respondent (Kavango East Regional Council) in its letter dated 20th April 2023, canceling the award of the Bid No: W/RFQ/DOEAC-KERC/107/44/2022/2023– Construction of two Classrooms and Storeroom at Aloys Ashipara Junior Primary School, is hereby declared as *ultra vires*, unlawful and therefore set aside in terms of Section 60(c) of the Public Procurement Act, 2015 (Act No. 15 of 2015) and as amended.
- 6.2 Furthermore, the matter is referred back to the First Respondent with the following specific instruction:

- a) That the contract should be reinstated and the Applicant shall continue with the execution of its procurement contract activities.

6.3 That the effective date of this order is 26 June 2023.

6.4 That the First Respondent (Kavango East Regional Council) shall provide proof of implementation of this Order to the Procurement Policy Unit within thirty (30) days from receipt date of this Order. A copy of the proof should be send to the Review Panel Secretariat.



Ms. Mekondjo Katunga

CHAIRPERSON: REVIEW PANEL (FOR THIS MATTER)

