



REPUBLIC OF NAMIBIA

MINISTRY OF FINANCE AND PUBLIC ENTERPRISES

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**PUBLIC PROCUREMENT REVIEW PANEL**

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Tel. : (00 264 61) 209 2445

Fax : (00 264 61) 236454

Telex: 908-3369

Head Office,

Moltke Street,

Private Bag 13295,

Windhoek

Enquiries: **Kaarina Kashonga**

**IN THE PUBLIC PROCUREMENT REVIEW HEARING**

**HELD ON 01 JUNE 2023**

**IN THE MATTER BETWEEN**

**JOHN NAMUSHESHE CONSTRUCTION & INVESTMENTCC APPLICANT**

**AND**

**CENTRAL PROCUREMENT BOARD OF NAMIBIA  
& OTHERS**

**FIRST RESPONDENT**

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

**BID NO: W/OAB/CPBN-08/2022 – PROCUREMENT OF DEVELOPMENT  
CONTRACTS FOR THE BLADING OF GRAVEL ROADS IN THE  
KEETMANSHOOP REGION**

**Coram: Selma-Penna Utonih (Chairperson), with Ehrenfried Honga, Hellen  
Amupolo, Paulina Kandali Iyambo and Gilbert Habimana.**

**Heard: 01 JUNE 2023**

**Decided: 01 JUNE 2023**

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**ORDER**

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**1. INTRODUCTION**

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

1.2 Having heard **Mr. Henry H. Shimutwikeni**, for the Applicant, **Ms. Nicola Davids**, 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 record, 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 Applicant stated that Regulation 42 (2) makes provision for the Public Entity to file a replying Affidavit. However, the replying Affidavit in the Applicant’s possession is not commissioned. Therefore, the Applicant wanted to know whether the Review Panel have the same replying Affidavit as the Applicant. The Review Panel Secretariat clarified that the Respondent filed two affidavits by mistake, a commissioned replying Affidavit and a non-commissioned replying Affidavit. The mistake came from the Review Panel Secretariat which inadvertently sent a non-commissioned replying Affidavit to the interested parties.

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

3.1 The Applicant stated that based on the Executive Summary of the Bid Evaluation Report on page 10, it's clear that the applicant was responsive and was not disqualified based on responsiveness and had bid the lowest price for the first two contract areas;

3.2 The Applicant further stated that the procuring agent's criteria which excluded the Applicant from being awarded was that as the Applicant had already been awarded procurement contracts in Windhoek Maintenance area, the Applicant cannot be awarded with another contract.

3.3 The Applicant's position is that the evaluation criteria introduced by the Procuring agent

is:

Uncertain and Unclear Contrary to Section 43 (2) (a) of the Act.

Unfair and uncompetitive (in violation of Section 2 of the Act which deals with the objects of the Act);

Inconsistent

The Procuring Agent also failed to consistently apply its evaluation criteria by awarding a procurement contract to Quiver Tree Investment 13 (Pty) Ltd., which, according to Applicant's information, currently has three blading contracts respectively in Keetmanshoop, Otjiwarongo and Windhoek regions.

### **4. APPLICANT'S SUBMISSIONS AT THE REVIEW PANEL HEARING**

4.1 The Applicant submitted that it seeks relief as indicated on page 11 of its Founding Affidavit that the Review Panel set aside the Notice for selection of award dated 20<sup>th</sup> of April 2023, with the Executive Summary attached to it.

4.2 The Applicant further submitted that the evaluation criteria of the bid document at paragraph 1.2 v states as follows:

"A Development Contractor shall only be considered for only one (1) contract area per Region; and in total a maximum of two (2) contracts areas across four (4) Roads Authority maintenance regions, i.e., Keetmanshoop, Windhoek, Otjiwarongo and Oshakati".

**However, in a case where there are no compliant bidders remaining with respect to any given contract areas, the Procuring Agent may award more than one (multiple) contract area to the lowest evaluated and substantially responsive bidder. This means that Multiple Contracts shall only be awarded to the same bidder on condition that:**

1.1.8.i.1 Bidders Financial capacity ceiling declared in Section IV Part B2 is not exceeded.

1.1.8.i.2 Bidder has demonstrated adequate technical capacity; and

1.1.8. 1.3 There are no compliant bidders without a contract area being awarded.

- 4.3 The Applicant stated, in its submission, that the evaluation criteria introduced by the Respondent is uncertain and unclear and it's contrary to the Competition Act 2 of 2003 and inconsistent in violation of Section 2 of the Public Procurement Act which deals with the objectives of the Act.
- 4.4 The Applicant further stated that the Respondent's criteria do not also identify the period that has to lapse for a bidder to be awarded multiple contracts and if the evaluation criteria is applicable for procurement contracts that are awarded by the Roads Authority itself.
- 4.5 Applicant alleged that it obtained a favourable score and had the lowest amount than the parties to whom procurement contracts had been awarded. Applicant further alleged that it was also ranked first or second on all the contract areas as illustrated in the executive summary but was not recommended for any contract area. To support the above allegation, Applicant quoted Clause 1.2.1 IV of the Bidding Document which states  
*"Fourthly, bidders whose offers have been determined to be the lowest evaluated bids and are substantially responsive to the Bidding Document will be rated in ascending order according to their respective Bid Amounts in such a way that the Bidder with the lowest evaluated responsive bid Amount is rated the highest and the bidder with the highest evaluated responsive bid Amount is rated the lowest. The lowest evaluated responsive bidder would be deemed compliant as per section 55 (1) of the Public Procurement Act (15 of 2015)".*
- 4.6 Applicant also alleged that the criteria prevent bidders from competing against other bidders on the mere fact that they were successful bidders in other bids. Which in any event the Respondent failed to clearly identify. During the bidding process, the bidders were not placed on the same pedestal as a matter of fairness. The applicant was relegated to inferiority because of its ability to be more responsive and score better than other bidders leading to it being awarded procurements contracts.
- 4.7 Applicant insisted that the Respondent's decision not to award a procurement contract has an anti-competitive effect. It prevents the Applicant from competing with other bidders more so that previous contracts assist bidders in substantiating their experience in their bids.

## 5. 1<sup>st</sup> RESPONDENT'S SUBMISSION AT THE REVIEW PANEL HEARING

- 5.1 The Respondent submitted that Section 9 of the Act, which deals with the mandate and powers of the CPBN, specifically in its subsection section (1) (m), allows the procuring agent to take appropriate action "to fairly distribute contract areas across the four

regions amongst all responsive bidders to ensure the attainment of the objectives of the act as articulated in section 2". This intent has been translated into instructions laid down in the ITB 1.1 (C) and the evaluation criterion 1.2 V of the bidding Document

- 5.2 Regarding Applicant's allegation that the Procuring Agent contravened the Anti-Competition Act 2 of 2003, the Respondent stated that "the bid in question is for the procurement of works and as such the provisions of the Anti-Competition Act 2 of 2003 cited by the Applicant do not find application herein".
- 5.3 The Respondent further submitted that Section 43 (2) speaks to the criteria set down in the bidding documents and that, it is their argument that the Central Procurement Board of Namibia complied with this provision.
- 5.4 ITB 1.1(C) on page 32 of the bid document states as follows:
- " A Development Contractor shall only be considered for only one (1) contract area per region; and in total maximum of two (2) contract areas across the four (4) Roads Authority maintenance regions (Keetmanshoop, Windhoek, Otjiwarongo and Oshakati). Which means that the Respondent shall only award one contract to a bid per specific area. However, in case there are no compliant bidders remaining with respect to any given Contract areas, the Central Procurement Board of Namibia may award more than one contract area to the lowest evaluated and substantially responsive bidder. This means that multiple contracts shall only be awarded to the same bidder on condition that bidders Financial Capacity ceiling declared in Section IV Part B2 is exceeded, bidders has demonstrated adequate technical capacity and there are not compliant bidders without a Contract Area being awarded."
- 5.5 A Pre-bid meeting was held where and all bidders were clearly explained about the criteria and they were accorded an opportunity to raise their questions but bidders were not having questions.
- 5.6 On the strength of above, the Respondent submitted that the Applicant understood the requirements and the condition set out in the bidding document, including the provisions of evaluation criterion 1.2 V at the time of bidding, as they did not raise any questions or sought any clarification from the First Respondent before bid closure.

The Respondent prayed that the application is dismissed in terms of Section 60 (a) of the Act and the first Respondent's decision is confirmed in line with section 60 (e).

## **6. INTERESTED PARTIES**

- 6.1 Some of the Interested Parties supported the assertion that the Instruction to Bidders is ambiguous.
- A selected bidder for award, Quiver Tree Investment 13 (Pty) Ltd., clearly indicated that the other contracts the Applicant is referring to as awarded to it by the Central

Procurement Board of Namibia, are the contracts which were awarded by Roads Authority in 2014 and renewed to date.

## 7. 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:

- 7.1 Section 28 (2) of the Act in terms of which this bid was issued, stipulates “Subject to this Act, a public entity may confer an advantage or preference to Namibian goods, services, suppliers or persons in the empowerment categories in the case of open advertised bidding process”. Therefore, the criterion 1.2.1A IV of part I Section III – Evaluation and Qualification Criteria, page 43 of the bidding document, introduced by the Procuring Agent at its sole discretion, cannot apply to this bid because works are not included in section 28 (2) of the Public Procurement Act, 2015 (Act No.15 of 2015).
- 7.2 Review panel found that all the awarded procurements contracts referred to by the Respondent had their own reference numbers and are thus separate procurement processes which cannot be affected in any way by a running bid process with its own bid reference number
- 7.3 Procuring Agent failed to consistently apply Criterion 1.2.1A IV “as is” in part I Section III – Evaluation and Qualification Criteria, page 53 of the bidding document throughout the bidding process.
  - a) The Evaluation flow Chart p.46 of the Bidding Document has curtailed the criterion to the selection of the lowest evaluation bidder based on a simple ranking of bid amounts.
  - b) The financial evaluation also used a simple ranking of bid amounts to determine the lowest evaluated bid, living out the following text of the applied criterion 1.2.1A IV (page 43 of the bidding document) *“in such a way that the bidder with the lowest evaluated responsive bid Amount is rated the highest and the bidder with the highest evaluated responsive bid Amount is rated the lowest. The lowest evaluated responsive bidder would be deemed compliant as per section 55 (1) of the Public Procurement Act (15 of 2015).*
  - c) The evaluation result of all lots (BEC report No. 2) was based on a simple ranking of bid amounts, and also left out the second part of the evaluation criterion 1.2.1 A.iv shown above.

## 8. DECISIONS OF THE REVIEW PANEL

Based on the above, the Review Panel orders that:

- 8.1 In terms of Section 60 (d) of the Act, the Notice for Selection of Award issued by the Procuring Agent on 20 April 2023 is corrected as follows:

8.1.1.

### Part A

**Notice to bidder Selected for award**

Bidder No.	Bidder name	Lot Code	Price at Bid Opening (N\$) Including VAT	Discount Offered	Arithmetically corrected Bid Price (N\$)	Proposed Award Amount (N\$) including VAT	Physical Address
7	John Namusheshe & Investment CC	DC-KHP 01	55,050,592.00	None	-	55,050,592.00	
25	Lukas Roads Rails and Civil cc	DC-KH O 02	73,336,259.00	None	-	73,336,259.00	05 Prof. Mburumba Kerina Street Windhoek
9	Ndakalimwe Investment CC JV Zero Six Five Trading CC	DC-KHP 03	91,600,174.00	None	-	91,600,174.00	ERF 5854 Pasteur Street Windhoek West
11	Quiver Tree Investment 13 (Pty) Ltd.	DC-KHP 04	94,197,241.75	None	-	94,197,241,75	ERF 4822 Edison Street Swakopmund
17	James and Young Trading Enterprises CC	DC-KHP 05	95,579,879,85	None		95,579,879.85	ERF 539Empelheim Mariental

**8.1.2** The following text “\*Please note that the allocation of lots was done in consideration of bidders awarded contract areas in other regions such as Oshakati and Otjiwarongo” is deleted.

**8.1.3**

**Part B**

**Notice to Bidder not selected for award**

**The list of unsuccessful bidders includes Namibia Welding & Civil cc but exclude John Namusheshe & Investments CC.**

**8.1.4** Further note that, in terms of Section 55 (5) as amended,

- a) if no application for reconsideration is made by any bidder under subsection (4A), or
- b) after the Procuring Agent has made a decision on an application under subsection (4A) and no application for review is made under section 59 (1), the Central Procurement Board of Namibia (CPBN) will award the procurement contract to the successful bidder.

**8.2** The effective date of his order is 01 June 2023.

8.3 The 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.



**Ms. Selma-Penna Utonih**

**CHAIRPERSON: REVIEW PANEL (IRO THIS MATTER)**