



REPUBLIC OF NAMIBIA
MINISTRY OF FINANCE AND PUBLIC
ENTERPRISES

PUBLIC PROCUREMENT REVIEW PANEL

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IN THE PUBLIC PROCUREMENT REVIEW

HELD ON 21 JUNE 2023

IN THE MATTER BETWEEN

FILLEMOM INVESTMENTS AND TRUCKS CC

APPLICANT

AND

CENTRAL PROCUREMENT BOARD OF NAMIBIA

1ST RESPONDENT

ROADS AUTHORITY OF NAMIBIA

2ND RESPONDENT

SASH TRADING AND EARTHWORKS AND 81 OTHERS

BIDDERS

3RD RESPONENT

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

**BID NO: W/OAB/CPBN-09/2022: PROCUREMENT OF NOMINATED SME-
SUBCONTRACTORS FOR THE BLADING OF GRAVEL ROADS IN THE
KEETMANSHOOP REGION ON BEHALF OF ROADS AUTHORITY**

**Present: Brownly Mutrifa (Chairperson) with Hellen Amupolo, Dr. Rainer Trede,
Paulina Kandali Iyambo, Michael Gaweseb concurring .**

1 Heard : 21 June 2023
2 Decided : 21 June 2023

REVIEW PANEL ORDER

1. INTRODUCTION

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

1.2 Having heard **Ms. Lovisa Isack** on behalf for the Applicant, **Ms. Nicola Davids** on behalf for the 1st Respondent, and other interesting parties who attended virtually in terms of Regulation 42(5)(a) of the Procurement Regulations: Public Procurement Act, 2015 (hereinafter referred to as the "Regulations") and having read the application for Review in terms of Section 59(1) of the Public Procurement Act, 2015 (Act No. 15 of 2015) (hereinafter referred to as the "Act") and further having read the application for Review and other documents filed as part of the record, the Public Procurement Review Panel found the following and subsequently order hereunder:

2. APPLICANT'S GROUNDS FOR REVIEW

2.1 The Applicant stated that based on the information provided in the Executive Summary of the Bid Evaluation Report, especially on page 22, it is evident that the Applicant was responsive throughout all evaluation stages and was not disqualified based on responsiveness. The Applicant further stated that they submitted the lowest bid in comparison to the recommended bidders in respect of Lot GU-KHP 28 and GU-KHP 29 respectively.

- 2.2 The Applicant stated that considering the information presented in the report and the recommendations put forth by the Bid Evaluation Committee regarding the selection of bidders for the award, particularly regarding Lot GU-KHP 28 and GU-KHP 29, the Applicant submitted an application for reconsideration on 02 May 2023.
- 2.3 The Applicant further stated that the dissatisfaction with its non-recommendation was conveyed to the 1st Respondent through the reconsideration letter. In the letter, the Applicant specifically highlighted the fact that, despite meeting the requirements and being responsive, the Bid Evaluation Committee overlooked the Applicant's bid when making recommendations for the best evaluated substantially responsive bidders for Lot GU-KHP 28 and GU-KHP 29.
- 2.4 By the response to the letter of reconsideration the Applicant was informed about the reason for not being considered for any Lot explaining that the Applicant already holds a Lot in the Procurement of Nominated SME Sub-contractors in the Windhoek Region and therefore cannot be awarded a second Lot across all the regions as there are other compliant bidders without contracts already awarded to them. In view of the Applicant this argument of the 1st Respondent contradicts the provisions of ITB 1.1, which states "A Nominated SME Sub-Contractor shall only be considered for only one (1) lot per Region; and a total maximum of two (2) contract areas across the four (4) Roads Authority maintenance regions i.e. Keetmanshoop, Windhoek, Otjiwarongo and Oshakati. However, in case there are no compliant bidders remaining with respect to any given Contract Areas, the Procuring Agent 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:
- i. Bidder's financial capacity ceiling declared in Section IV Part B2 is not exceeded;
 - ii. Bidder has demonstrated adequate technical capacity; and
 - iii. There are no compliant Bidders without a contract area being awarded."
- 2.5 The Applicant submitted that they agree that indeed the Applicant is already awarded one Lot in Windhoek Region, under a separate procurement tender. The Applicant still meant the total maximum number of two (2) Lots per areas. However, the 1st Respondent stated that there were other compliant Bidders who were not awarded any contract areas.
- 2.6 The Applicant stated that the review application is brought before the Review Panel in terms of Section 59 (1) of the Act, and essentially the application is well-founded for review to exercise its discretion that the Notice of Selection for Award dated the 28th of April 2023 and the Execution Summary of the Bid Evaluation Report be set aside, and the Central Procurement Board of Namibia re-evaluates the bid of Fillemeon Investments and Trucks CC.

3. 1ST RESPONDENT'S SUBMISSION

- 3.1 The 1st Respondent stated that based on ITB 1.1 on page 32 of the bidding document

“ the Applicant misdirects themselves by stating that the First Respondent erred in not selecting them for the impugned lots as they are awarded a lot in the Windhoek Region. In addition, there are other compliant bidders who were not awarded any contract areas as such as the Applicant is not eligible to be awarded a lot in this procurement process.”

3.2 The 1st Respondent stated that it's a rule of the Public Entity when a bidder buys a bidding document and they submit the bid then they agree to the terms and conditions and rules set out in the bidding document. In addition, the bidders are given an opportunity to ask questions during the pre-meeting that was held where all bidders were clearly explained about the criteria and they were accorded an opportunity to ask their questions but the Applicant did not have questions. The 1st Respondent submitted that the Applicant understood the requirements and conditions set out in the bidding documents, including the provisions of ITB 1.1 at the time of bidding as the Applicant did not raise any question or sought of clarification.

3.3 The 1st Respondent prayed that the application is dismissed in terms of Section 60(a) of the Act and the 1st Respondent's decision is confirmed in line with Section 60(e) of the Act.

4.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:

4.1 ITB 1.1 states that a bidder shall only be considered for one Lot per region, i.e. the Applicant having a contract for the Windhoek region based on a separate bid should not be excluded for the Keetmanshoop region.

4.2 The report of the Bid Evaluation Committee dated 5 December 2022 recommended the Applicant for award of Lot GU-KHP 29. This awardance was approved by the Central Procurement Board of Namibia on 13 December 2022.

4.3 On page 43 of the bidding document, the financial evaluation used is simple ranking of bid amount to determine the lowest evaluated bid, living out the following text of applied criterion 1.2.1A IV *“in such a way that the bidder with the lowest evaluated responsive bid amount is rated the highest and the bidder with responsive bidder would be deemed compliant as per Section 55(1) of the Public Procurement Act 15 of 2015.”*

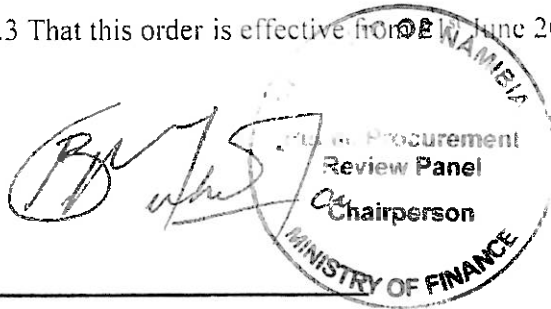
4.4 In terms of Section 28(2) of the Act the bid was issued , stipulates “Subject to this Act, a public entity may confer an advantage or preference to Namibian goods, services, suppliers or persons in the empowerment categories in the case of open advertised bidding process.” The criterion 1.1.1 A IV of part I Section III evaluation and qualification criteria, on page 43 of the bidding document introduced by the procuring agent at its sole discretion can not apply to this bid because works are not included in Section 28(2) of the Public Procurement Act 15 of 2015.

5. DECISION OF THE REVIEW PANEL

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

That in terms of Section 60(d) of the Public Procurement Act 2015, (Act No.15 of 2015), the Review Panel hereby corrects the decision or action by the Board that is not in compliance with this Act. Lot GU-KIIP 29 should be awarded to the Applicant Fillemon Investments and Truck cc.

6.3 That this order is effective from 01 June 2023.



The image shows a handwritten signature in black ink over a circular official stamp. The stamp contains the text: 'Public Procurement Review Panel Chairperson' and 'MINISTRY OF FINANCE'. The stamp also features the acronym 'KAMIA' at the top and '01' at the bottom.

MR. BROWNY MUTRIFA
CHAIRPERSON: REVIEW PANEL (i.r.o. this matter)