



**REPUBLIC OF NAMIBIA**

**MINISTRY OF FINANCE AND PUBLIC ENTERPRISES**

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**PUBLIC PROCUREMENT REVIEW PANEL**

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**IN THE PUBLIC PROCUREMENT REVIEW HEARING  
HELD ON 18 JULY 2023 IN WINDHOEK, NAMIBIA**

**IN THE MATTER BETWEEN:**

**OMAMBUDU SECURITY SERVICES CC**

**APPLICANT**

**AND**

**THE OFFICE OF THE PRIME MINISTER**

**SIRKA INVESTMENT CC**

**OMLE SECURITY SERVICES CC**

**TRIPPLE ONE INVESTMENTS CC**

**NAMIBIA PEOPLES PROTECTION SERVICES CC**

**SECURITY TRAINING COLLEGE OF NAMIBIA CC**

**SIX THOUSAND SECURITY SERVICES CC**

**SHIKUVULE TRADING CC**

**AMUTANGA TRADING ENTERPRISES CC**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**3<sup>RD</sup> RESPONDENT**

**4<sup>TH</sup> RESPONDENT**

**5<sup>TH</sup> RESPONDENT**

**6<sup>TH</sup> RESPONDENT**

**7<sup>TH</sup> RESPONDENT**

**8<sup>TH</sup> RESPONDENT**

**9<sup>TH</sup> RESPONDENT**

NELITO INVESTMENT CC	10 <sup>TH</sup> RESPONDENT
PIS SECURITY SERVICES CC	11 <sup>TH</sup> RESPONDENT
AH-64 APACHE SECURITY SERVICES CC	12 <sup>TH</sup> RESPONDENT
SHIELD FORCE SECURITY SERVICES	13 <sup>TH</sup> RESPONDENT
NAHOLE SECURITY AND DEBTS COLLECTION SERVICES CC	14 <sup>TH</sup> RESPONDENT
TSILIMENA SECURITY SERVICES CC	15 <sup>TH</sup> RESPONDENT
BERTHA SECURITY SERVICES CC	16 <sup>TH</sup> RESPONDENT
CHIEF NANGOLO SECURITY SERVICES	17 <sup>TH</sup> RESPONDENT

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

**BID NUMBER NCS/ONB-02-03/2022: RENDERING OF SECURITY SERVICES TO THE OFFICE OF THE PRIME MINISTER FOR 36 MONTHS**

**PRESENT: Dr. Rainer Trede (Chairperson) with Tulimeyo Kaapanda, Fillemon-Wise Immanuel concurring and Paulina Iyambo and Kenandei Tjivikua descending**

**Heard on: 18 July 2023**

**Decided on: 18 July 2023**

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**REVIEW PANEL ORDER**

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**1. INTRODUCTION**

1.1 The review hearing took place in the form of physical and virtual presence.

1.2 Having heard Mr. Joel Heita for the Applicant and Mr. Olsen Kahiriri for the successful bidder (Chief Nangolo Security Services CC) who attended in terms of Regulation 42(5)(a) of the Procurement Regulation: 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’’) read with Regulation 42 and other documents filed as part of the record, the Public Procurement Review Panel made the following findings and subsequent order hereunder towards the end.

**2. BACKGROUND TO THE REVIEW APPLICATION**

2.1 The Review Panel Secretariat received a review application in respect of bid number NCS/ONB/02-03/2022 for the Rendering of Security Services to the Office of the Prime Minister on 1 June 2023, in terms of Regulation 42(1) of the Act.

2.2 Upon being served with the review application, the Respondent filed a replying affidavit with the Review Panel on 6 June 2023 (in response to the application).



### **3. POINTS *IN LIMINE***

- 3.1 At the commencement of the review proceedings Mr. Olsen Kahiriri submitted that the Review Panel should disregard the Founding Affidavit of the Applicant on the basis a date was omitted in the text of the declaration by the Commissioner of Oath, rendering the affidavit null and void.
- 3.2 The Applicant contested this *point in limine* by stating that the Commissioner of Oath stamped the affidavit and the stamp has a date indicating when the affidavit was commissioned.
- 3.3 The Review Panel asked if Mr. Kahiriri can provide an authority to the effect that an affidavit which does not have a date inserted on the space provided in the declaration text, is defective and therefore null and void. This was not provided.
- 3.4 After consideration of the foregoing, the Review Panel resolved to dismiss the *point in limine* raised and continued to hear merits of the review application.

### **4. APPLICANT'S GROUNDS FOR REVIEW**

- 4.1 The Applicant claimed that the successful bidder bided below the minimum wage in terms of the Government Gazette No. 6414 dated 15 September 2017 on Collective Agreement for Minimum Wage. The successful bidder bided for N\$10.40 per hour including 15% VAT per security officer. Excluding VAT the bid per hour and guard is N\$ 9.04 for months with 30 or N\$ 8.75 for month with 31 days. This bid is below the minimum wage of N\$ 10.00 per hour for guards with more than 1 year experience and just covering the minimum wage of N\$ 8.75 for guards with less than 12 months in service.
- 4.2 The Applicant further stated that the guards have to be registered with Social Security Commission and they are also eligible to receive night-shift allowance and to be paid Sunday and Public holidays rates.
- 4.3 Furthermore, according to the Applicant the bid was evaluated based on security guards with more than one year experience, grade 10 certificate and security training and the price quoted is fixed for 36 months.
- 4.4 The Applicant stated that bidders who bided below minimum wage will not be able to pay their employees the gazetted minimum wage as per the Labour Act, 2007 because there is no company that pays employees with funds from other projects or from their reservoirs.



- 4.5 The Applicant stated that any bidder who bid below N\$10.00 per hour and guard is not substantially responsive because of violation of the Labour Act, 2007 (Act No.11 of 2007), a requirement that formed part of the bidding document.
- 4.6 The Applicant prayed that the Review Panel set aside the procurement process and start afresh or alternatively award the contract to the deserving bidder.

#### **5. 1<sup>st</sup> RESPONDENT'S RESPONSE TO GROUNDS FOR REVIEW APPLICATION**

- 5.1 The 1<sup>st</sup> Respondent was not represented during the hearing by the Accounting Officer and the officers that were present could not produce an authority letter to confirm their delegation by the Accounting Officer. Thus, the Panel could only place reliance on the sworn-in replying affidavit by the 1<sup>st</sup> Respondent.
- 5.2 In the replying affidavit the 1<sup>st</sup> Respondent disputed the allegation that Chief Nangolo Security Services CC, as the selected bidder, bid below the minimum wage being the N\$ 8.75 per hour and per guard for security officers who have been in the service for less than 12 months and N\$ 10.00 per hour and per guard for security officers who have been in a services for more than 12, months, since the bid of N\$ 10.40 per hour and guard is above the minimum wage.
- 5.3 The 1<sup>st</sup> Respondent further stated that it noticed during evaluation that the selected bidder quoted N\$ 2 426 112.00 for the total bid, this amount paying N\$ 10.40 will be entirely used for salaries, no other overheads expenses will be covered. This was aired with the supplier.
- 5.4 The 1<sup>st</sup> Respondent further stated that the Applicant is not the lowest substantially evaluated bidder for the bid in dispute.

#### **6. SUBMISSION OF INTERESTED PARTY**

- 6.1 The successful bidder, Chief Nangolo Security Service CC, who served a replying affidavit in terms of Regulation 42(4) in response to the review application reiterated the provisions of Article 9(1) - 9(3) of the Government Gazette No. 6414 dated 15 September 2017 on Collective Agreement for Minimum Wage.
- 6.2 According to the successful bidder as from 01 July 2017 the minimum wage for all security officers who have, at that time, been employed with their current employer for a cumulative period of no less than 12 months shall be N\$ 10.00. This means that the N\$ 10.00 mentioned in article 9.3 is only meant for the security officers who have at the time of that Collective Agreement employed with their employers for no less than 12 months. Any future security officers from the said enactment of that minimum wage agreement are not entitled to the N\$ 10.00 hourly rate at all under current minimum wage.

- 6.3 The successful bidder further stated on request of the 1<sup>st</sup> Respondent in a letter dated 23 May 2023 that they employ new security officers upon contract award with the 1<sup>st</sup> Respondent for which the minimum wage of N\$ 10.00 per hour and guard does not apply.
- 6.4 The successful bidder also mentioned that it was a requirement that bidders declare that they will ensure that the salaries and wages payable to its personnel are compliant to the relevant laws. The successful bidder adhered to this requirement. In this regard the bidder referred to a Supreme Court Judgement in a case between the Namibia Protection Services (Pty) Ltd vs PIS Security Services CC and others (Case No.: SA 99/2020). The following was cited in the judgement: *“It is not for the court to police PIS’s compliance with the Labour Act 11 of 2007. Firstly, it is implied that they employ people to render the services for which they tendered that they will comply with the labour law in respect of their employees. Secondly, they (PIS) gave such an undertaking. Thirdly, compliance can be enforced via the labour legislation and the office of the Labour Commissioner. Fourthly, the possible consequences of non-compliance on service delivery has been set out. Lastly, non-compliance may lead to the cancellation of the contract awarded to PIS. It could thus not be said that the bid by PIS was so contaminated by dishonesty that they could not protect the award of the bid to it in a court of law.”*

## 7. FINDINGS OF THE REVIEW PANEL

The Review Panel found that:

- 7.1 The successful bidder bid for a total price of N\$ 2 426 112 including VAT, which must be deducted and paid to the Ministry of Finance continuously. This means as stated by the Applicant the bid per hour and guard excluding VAT is N\$ 9.04 for months with 30 days and N\$ 8.75 for months with 31 days.
- 7.2 The 1<sup>st</sup> Respondent had a concern during the bid evaluation whether the successful bidder will be able to pay the minimum wages to the security officer but was satisfied with the statement of the successful bidder by letter dated 23 May 2023 that the total bid price will be able to cater for security salaries and leave adequate profits. In the replying affidavit the 1<sup>st</sup> Respondent stated that the successful bidder bid for N\$ 10.40 per hour and guard and that this amount paying N\$ 10.40 per hour will be entirely used for salaries. These statements do not consider that the rate of N\$ 10.40 includes VAT and contradict the information of the successful bidder that the rate will leave adequate profits.
- 7.3 The successful bidder’s wrong interpretation of the Collective Agreement states that security officers employed after 01 July 2017 who have been longer than 12 months with the employers are not entitled to the N\$ 10.00 hourly rate as provided for by article 9.3 of the Collective Agreement.



- 7.4 Based on the foregoing findings the conclusion is therefore that the 1<sup>st</sup> Respondent did not evaluate the bids in the tender concerned in accordance with Section 52(9) read with Section 43(2)(c) of the Act, as amended.
- 7.5 The successful bidder cannot pay the minimum wages over the three years contract period even if he employs in the first year new security officers who should receive in the second and third year a minimum wage of N\$ 10.00 per hour and guard.
- 7.6 With reference to the judgement of the Supreme Court the majority of the Review Panel decided that the judgement does not apply because VAT has to be deducted from the bidden rate of N\$ 10.40 per hour and guard. Further, the Supreme Court stated that payment of unlawful low wages will be a ground for review as it is the case in the present matter. This finding was dissented by two Panel Review Members. These two members referred to the Supreme Court Judgement in the case between the Namibia Protection Services (Pty) Ltd vs PIS Security Services CC and others. They were satisfied that there was an undertaking provided to pay minimum wages as stipulated in the Government Gazette No. 6414 dated 15 September 2017.
- 7.7 The 1<sup>st</sup> Respondent did not file the replying affidavit within 2 days upon being served with a copy of the review application as required by Regulation 42(4).

## 8. DECISION OF THE REVIEW PANEL

As per the above findings, the Review Panel makes the following order:

- 8.1 That the Notice to Bidder Selected for Award dated 9 May 2023 is hereby set aside in terms of Section 60(c) of the Public Procurement Act, 2015 (Act No. 15 of 2015) and the matter is referred back to the public entity with the instruction to re-evaluate bid NCS/ONB-02-03/2022.
- 8.2 The effective date of this Order is 18 July 2023.
- 8.3 That the 1<sup>st</sup> Respondent must provide proof of implementation of this order to the Procurement Policy Unit within thirty (30) days from the receipt date of this order with a copy to the Review Panel.



**DR. RAINER TREDE**  
**CHAIRPERSON: REVIEW PANEL (i.r.o. this matter)**



