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 19 JULY 2023

IN THE MATTER BETWEEN

AFRICAN KING SECURITY SERVICES CC	**FIRST APPLICANT**
SIX THOUSAND SECURITY SERVICES CC	**SECOND APPLICANT**
AND	
ROADS AUTHORITY	**FIRST RESPONDENT**
WINDHOEK SECURITY SERVICES CC	**SECOND RESPONDENT**
AND 33 OTHER RESPONDENTS	

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

BID NO: G/ONB/RA-03/2022 – PROVISION OF SECURITY SERVICES TO ROADS AUTHORITY FOR A PERIOD OF 36 MONTHS IN THE WINDHOEK REGION

Coram: **Ehrenfried Honga (Chairperson) with Paulina Kandali Iyambo, Tulimeyo Kaapanda, Lukas Kudumo Siremo and Gilbert Habimana.**

Heard: **19 July 2023**
Decided: **19 July 2023**

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. Veiko Alexander**, for the First Applicant, **Mr. Eino Nangolo**, for the Second Applicant, **Mr. Francois Baongamwabo** for the First Respondent and other interested parties, who were joint in terms of sub-regulation 42(5)(a) of the Public Procurement Regulations: Public Procurement Act, 2015 (hereinafter referred to as " Regulations")) and;

Having read the applications 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 First Respondent informed the Review Panel that Regulation 42(3) compels Applicants lodging review applications to the Review Panel to serve copies of the review applications on a public entity. The First Respondent therefore stated that the Second Applicant failed to serve copies of review application on the public entity and it is for this reason that there is only the First Applicant who is before the Review Panel.

2.2 The Review Panel thereafter engaged the Second Applicant to confirm whether it is indeed true that it has not served its copies of the review application on the public entity

and other interested parties. This was confirmed by the Second Applicant and it further requested to be joined as an interested party.

2.3 The Review Panel proceedings proceeded with only the First Applicant (African King Security Services CC).

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

3.1 The First Applicant stated that Section 55(1) of the Act provides as follows: The Board or a public entity must award a procurement contract to the bidder having submitted the lowest evaluated substantially responsive bid which meets the qualification criteria specified in the pre-qualification criteria or bidding documents, following the steps outlined in subsection (3), (4), (4A), (4B), (4C), (4D) and (5).

3.2 The First Applicant submitted that it had perused the bidding documents, both at the time of preparation of its bid and after receiving the Notice for Selection of Award, and confirmed that there is no requirement or a criteria that bids shall be evaluated in order to determine that they offer the best economic advantage, nor how that would be done or any explanation of what such a criterion entails.

3.3 The First Applicant also submitted that, Section 52(9) of the Act, as amended, simply provides that every bid is evaluated according to the criteria and methodology set out in the bidding documents and is compared with other bids to determine the lowest evaluated substantially responsive bid which meets the qualification criteria.

3.4 The First Applicant further alleged that the First Respondent in many respects failed to comply with Section 52(9) as it did not evaluate its bid according to the methodology and crietria of the bidding document and that additional argument will be raised.

Relief sought

3.5 The First Applicant prays that the Review Panel makes the decision and orders to refer the matter back to the public entity for reconsideration with specific instructions.

4. FIRST APPLICANT'S SUBMISSIONS AT THE REVIEW PANEL HEARING

4.1 The First Applicant requested that the Review Panel set aside the decision of the First Respondent to award this bid to Windhoek Security Services CC as it is not in compliance with Section 52(9) of the Act. The First Applicant maintained that the First Respondent's reason for disqualifying the First Applicant for not having offered the best economic advantage bid is not contained in the bidding document, and therefore the First Respondent did not comply with the Act, in terms of Section 52(9).

4.2 The First Applicant stressed that the Executive Summary doesn't contain details which are supposed to be recorded during the opening of bids. Paragraph 6 of the First Respondent's Replying affidavit indicates that the Bid Evaluation Committee (BEC) proceeded to evaluate the substantially responsive bidders for compliance with the

gazetted and standard benchmark rate as per Instruction To Bidders (ITB) 30.2(c)(iv) - Evaluation and comparison of Financial Proposals. That, although it does not fully question the benchmark rates, it is however uncertain how this evalution was used to disqualify or find that the First Applicant's bid does not give the best economic advantage.

4.3 Moreover, the First Applicant alluded that the whole confusion further appears when the Executive Summary indicates that the First Applicant did not offer the best economic advantage bid whilst the Replying affidavit indicates that Windhoek Security Services CC was recommended for the award because it offered the lowest compliant bid amount per each site; while on the other hand, African King Security Services cc was not recommended for award because its bid amount were not the lowest at any site and therefore does not have the highest rating at any site. Thus, best economic advantage and lowest compliant bid amount is not the same thing and hence the First Applicant was not evaluated fairly as the First Respondent did not compare the bids accordingly.

4.4 Although the First Applicant did complain about the benchmark rates in its application for review which is only known by the public entity itself, the First Applicant during the review proceedings requested that the Review Panel should not ignore the issue of the benchmark rates, it should consider it through the Authority it is given by Regulation 44 of the Public Procurement Regulations to conduct a Review Proceedings in such manner as it deemed most suitable to resolve the issues before the Review Panel.

4.5 The First Applicant hinted that it is ironic that the Second Respondent's bid amount is exactly equal to the minimum amount of N$ 5589.00 VAT inclusive which is the exact minimum benchmarck rate which is required by the First Respondent and only known by the First Respondent. The First Applicant further alleged that the First Respondent in many respects did not evaluate its bid in accordance with Section 52(9) of the Act.

4.6 The First Applicant requested the Review Panel to set aside the decision of the First Respondent in terms of Section 60(c) of the Act and instruct the First Respondent to re-evaluate all bids or alternatively the Review Panel should order termination and starting afresh of the bidding process.

5. THE FIRST RESPONDENT'S SUBMISSIONS AT THE REVIEW PANEL HEARING

5.1 The First Respondent submitted that the First Applicant's review application is a still-born, it has no merits as it indicates that it doesn't understand why it was disqualified whilst the information are clearly stipulated in the Executive Summary and in the First Respondent's Replying affidavit. The First Respondent indicated that the First Applicant was disqualified because it failed to comply with Instruction To Bidders 31.1 (c) which states as follow:

"The Bidders will be rated in ascending order according to their respective Bid amounts per each site in such a way that the Bidder with the lowest compliant bid amount is rated the highest and the Bidder with the highest compliant Bid amount is rated the lowest with regard to the site. The Bidder with the highest rating for each site will be recommended for that site".

5.2 The First Respondent further indicated that paragraphs 5 -10 of the First Respondent's Replying affidavit summarises the content of the Executive Summary as was submitted by the BEC. These paragraphs reveals that there was a gazetted and standard benchmark rate as per ITB 30.2(c)(iv). The First Respondent went on to suggest that the First Applicant misunderstood Section 52(9), as the First Applicant's bid was compared to that of the Second Respondent (Windhoek Security Services CC).

5.3 The First Respondent further submitted that ITB 30.1 on page 20 of the bidding document indicates that the employer will compare the financial proposal of the bidders that meet the technical criteria and this is what the First Respondent did, considering ITB 30.2.

5.4 The Review Panel querried about ITB 30.2(c)(iv), which was raised by the First Respondent in paragraph 6 of its replying affidavit, if it was made known to bidders and also the further allegations made by the First Applicant that the bid amount of the Second Respondent is exactly the same as that of the minimum amount of the benckmark rates of N$ 5589.00 VAT inclusive per guard per month, which is contained in paragraph 7 of the replying affidavit. The First Respondent initially alluded that this was made known to bidders, but after additional enquiry, the First Respondent indicated that it was only the gazzetted rate which was public knowledge whereas the financial benchmark rates bracket used in the financial evaluation stage was only known by the First Respondent.

5.5 The Review Panel further asked if there was any formulas given on how to calculate this benchmark rates bracket, and the First Respondent just like in its replying affidavit indicated that such formulas were only included in the individual procurement plan (IPP) and further that this information was only made known to the BEC of the First respondent.

5.6 On the matter that the First Applicant wanted to know how it performed in the technical score in comparison with the Second Respondent, the First Respondent stated that as per page 48 of the bidding document, the technical evaluation criteria wa not based on scores, but rather on "Yes"or "No" questions. Any bidder who did not get a "Yes" to a question was disqualified and could not proceed to the financial evaluation.

5.7 The First Respondent argued that it has satisfactorily answered all issues before the Review Panel and that the bid of the First Applicant just did not meet the requirements

as per ITB 31.1(c)(iv) and was not considered to be the lowest substantially responsive bid.

6. INTERESTED PARTIES's CONTRIBUTION

6.1 The Second Respondent submitted that the point submitted by the First Applicant (African King Security Services CC) are of no merits and that African King Security Services CC did not raise the issue of the benchmark, thus, the Review Panel should not deal with this issue. The fact that the First Applicant accepted the terms of the bid as they were, the current avernment by the First Applicant that they are the current service provider is irrelevant and it doesn't mean that any bidder who is currently offering service must be awarded a bid.

7. FINDINGS OF THE REVIEW PANEL

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

7.1 It is established that the First Respondent indicated to have disqualified the First Applicant because its bid was not the most economically advantageus bid. However, the words "the most economically advantageous bid" have been deleted in the amended section 52 (9). Therefore, First Respondent violated Section 52(9) of the Act as amended when it applied the most economically advantageous bid methodology to evaluate bids at the financial evaluartion stage.

7.2 That, both the Second Respondent and First Respondent alleged that the issue of the bench mark rates bracket was not raised by the First Applicant in its review application and it is therefore not before the Review Panel. However, this issue was introduced by the First Respondent in its replying affidavit in paragraphs 6 and 7 to respond to the allegations of the First Applicant and as such the First Applicant had queried about this unknwon information used to evaluate its bid, thus the matter became part of the review hearing.

7.3 Pursuant to paragraph 7.2, the First Respondent's replying affidavit referred to a rate bracket of N$ 5 589.00 – N$ 7 245.00 VAT inclusive per guard per month as a method used to evaluate the bids. Although ITB 30.2(c)(iv) criteria was included as part of the bidding document and was coupled to the security industry minimum gazzetted rates, such mandatory rates bracket were not made known to the bidders and furthermore no formulae were given to guide bidders to calculate the lower and upper limits of benchmark rates bracket. The First Respondent further indicated that this gazzetted and standard benchmark rates were calculated in the individual procurement plan (IPP) and given to the BEC to evaluate bids following ITB 30.2(c)(iv) so as to arrive at the bid rating for award in terms of ITB 31.1(c). It becomes clear that the First Respondent had the information on the benchmarks rates bracket before the bid advertisement but failed

to communicate to bidders. Hence, the additional determinination of the Review Panel that the First Respondent violated Section 52(9) of the Act as amended,by introducing a new evaluation criterion unknown to bidders at the evaluation stage.

7.4 It is established that in terms of the Labour Act, 2007 (Act No. 11 of 2007) with regards to Collective Agreement for minimum wage and adjustment for Security industry as per the government gazette No. 6414 of 15 September 2017, that Article 9(1) to 9(3) sets what the minimum gazetted rates should be and this is public information to bidders. For the First Respondent to introduce a new minimum gazetted and benchmark rates which was only known to it, but however used it as an evaluation criterion is found to be irregular, unfair and not inline with Section 52(9) of the Public Procurement Act.

7.5 That if the First Respondent wished to introduce additional rates to assist bidders to perform quality services, the First Respondent should have indicated the maximum rate that a bidder must not exceed and should not have introduced another minimum rate which is not known by bidders. In addition, the First Respondent should have included the formular on how to compute the benchmark rates bracket to assist bidders on how to set its bid prices accordingly and for bidders to be aware on how they will be evaluated.

8. DECISIONS OF THE REVIEW PANEL

Based on the above findings in paragraphs 7.1 to 7.4, the Review Panel orders the following:

8.1 That the Notice for Selection of Award dated 16 May 2023 issued by the First Respondent for bid reference number NCS/ONB/RA-03/2022 – Provision of Security Services to Roads Authority for a Period of 36 Months in the Windhoek Region, is hereby set aside.

8.2 That the Review Panel hereby orders that the procurement proceedings of the above referenced bidding process be terminated and start afresh in terms of Section 60(f) of the Public Procurement Act, 2015 (Act No. 15 of 2015) as amended.

8.3 That the effective date of this order is 19 July 2023.

8.4 That the First Respondent report on the implementation of this order to the Public Procurement Unit within 30 days from the receipt date thereof and copy in the Secretariat of the Review Panel.

REPUBLIC OF NAMIBIA
Public Procurement Review Panel
Chairperson
MINISTRY OF FINANCE

Mr. Ehrenfried Honga
CHAIRPERSON: REVIEW PANEL (IRO THIS MATTER)