



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 16 AUGUST 2023

IN THE MATTER BETWEEN

FRESH UNIT INVESTMENTS CC

APPLICANT

AND

**MINISTRY OF FINANCE AND PUBLIC ENTERPRISES
& OTHERS**

FIRST RESPONDENT

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

BID NO: W/RFQ/09-5/2023 – REPLACEMENT OF CERAMIC TILES AT MINISTRY OF FINANCE AND PUBLIC ENTERPRISES, HEAD OFFICE

Coram: Lukas Kudumo Siremo (Chairperson), with Ehrenfried Honga, Tulimeyo Kaapanda, Mekondjo Katunga and Kenandei Tjivikua.

Heard: 16 August 2023

Decided: 17 August 2023

ORDER

1. INTRODUCTION:

- 1.1 A hybrid meeting was held, using both physical and virtual modes.
- 1.2 Having heard **Mr. Josef Josephat**, for the Applicant, and **Mr. Justus Mwafongwe**, 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) 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 in its application for review informed the Review Panel that as a practice it always enquires about the outcome of all bids it has participated in to improve on its shortcomings. As such, on 24 July 2023, the Applicant visited the Procurement Management Unit (MPU) of the Ministry of Finance and Public Enterprises to enquire about the outcome of the bid reference number: W/RFQ/09-5/2023 for the replacement of Ceramic tiles at Ministry of Finance Head Office. The Applicant alleged that it was then informed that the evaluation process was finalized and that the bid was already awarded.

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- 2.2 The Applicant further highlighted that it was surprised to note that its offer was the most responsive and lowest in terms of the set evaluation criteria whilst the First Respondent opted to award a bid to the bidder that has quoted an amount higher than its offer. The Applicant stressed that in terms of Section 55(4)(a) and (b), the Accounting Officer is mandated to notify the bidders and give a seven (7) day cool-off period for the bidders to state their objections should there be any. The Applicant informed the Review Panel that in this case, the Accounting Officer failed to act as per the provisions under section 55 of the Act and that the Public Entity (Ministry Finance and Public Enterprises), as a custodian of the Public Procurement Act, was supposed to abide by the provision of the Act hence, it opted to rush and award the contract unprocedural.
- 2.3 In addition, the Applicant submitted that it was unfairly disqualified by the First Respondent and the reason given was that the Applicant provided an uncertified copy of the Social Security Good Standing Certificate, which the Applicant claimed that it has provided an authentic and genuine good standing certificate which was an original as issued electronically by the system of Social Security Commission when one applies online.
- 2.4 The Applicant prayed that the Review Panel must consider its review application in terms of Section 60(b), (c) and (d) of the Act.

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

- 3.1 Upon inquiry by the Review Panel, the Applicant stated that it abides by what it basically submitted in its application for review to the Review Panel and further reiterated that its Social Security Good Standing Certificate is authentic as it was printed from the portal of the Social Security Commission. The Applicant stressed that it was up to the bid evaluation committee of the First Respondent to enquire with the relevant authority if there were any uncertainties rather than disqualifying it without thought.
- 3.2 In addition to this, the Applicant explained to the Review Panel that the Social Security Commission introduced a new system where clients are to print their own original good standing certificates as provided and loaded on the portal. The Applicant further explained that the Procurement Management Unit (PMU) Secretary of the First Respondent had confirmed that they had a similar case prior, which they had sought clarity from the Social Security Commission and that the narrative to say that the First Respondent is unaware that the Social Security Good Standing Certificate can now be accessed from the portal is untrue.
- 3.3 The Applicant further made allegations that this issue could have been resolved before as it had approached the relevant offices of the First Respondent to discuss this matter, but it was never afforded the opportunity to be heard, but rather ignored and the First Respondent then decided to act not in accordance with the provisions of the Act.

4. FIRST RESPONDENT'S SUBMISSION AT THE REVIEW PANEL HEARING:

- 4.1 The First Respondent submitted that it will as well abide by its answering affidavit, and it was for this reason that the Review Panel decided to interrogate the First Respondent and queried why the Applicant was disqualified for submitting a Good Standing Certificate which was printed from the portal. The First Respondent informed the Review Panel that it only became acquainted with this information that the Good Standing Certificates can now be issued and printed from the portal after the evaluation of this bid.
- 4.2 Pursuant to paragraph 4.1, The First Respondent submitted further that during the evaluation of this bid, the Bid Evaluation Committee (BEC) had an original Good Standing Certificate which an Adhoc Bid Evaluation Committee used to compare to all other certificates and that is how all the bidders who submitted the Certificates which are printed from the portal were disqualified. The BEC did so because it was accustomed to the old system of how certificates look like.
- 4.3 Upon enquiry by the Review Panel, the First Respondent stated that it was convinced that it had an original document/ certificate therefore, it could not follow up/ enquire from the Social Security of Commission about the authenticity of the Good Standing Certificates which looks different from the original one. The First Respondent further re-emphasised that bids were evaluated in accordance with the evaluation criteria and methodology set out in the bidding documents which is in line with section 52(9) of the Public Procurement Act, 2015, and therefore, the First Respondent expected the bidders to submit either a certified copy or an original certificate.
- 4.4 On the matter related to making an award in terms of Section 55(8) and issuing a purchase order instead of first adhering to the provisions of Sections 55(1), (4), (4A), (4B), (4C) and (4D) of the Act as amended, the First Respondent stated that it followed its understanding of the Directive issued on 23 May 2017 and the Directive issued of 09 December 2022 and it argued that these two Directives informed it that for procurement activities which are below Two Million Namibia Dollars (N\$ 2 000 000.00), it is exempted from those issuing a notice for selection of award, exempted from having any standstill period and that it can just issue notice of award directly.
- 4.5 The First Respondent further argued that since it used a request for sealed quotations (RFQs) as a procurement method, it was not required for it to issue any notice for the selection of the award. Moreover, it argued that based on the Electronic Procurement Phase 1 Guideline V3 applicable from 01 April 2022, all its RFQs are done on the E-G Portal and therefore one is unable to request from three bidders only as indicated in Section 32(2) of the Act and it stated that it does not have any database for pre-qualified bidders.

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5. INTERESTED PARTIES:

- 5.1 There was no replying affidavit submitted by any of the interested parties in terms of Regulation 42(4) of the Public Procurement Regulations and based on that no interested party was accorded an opportunity to make submissions.

6. 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:

- 6.1 That, the directive of 23 May 2017 issued by the Minister of Finance and Public Enterprises in terms of Section 79(1)(c) stated as follows:

"The Minister may make regulations relating to - operational thresholds regarding procurements;"

"Pursuant to the above, Section 55(8) of the Public Procurement Act, 2015 and Provision 39 of the Public Procurement Regulations, 2017 the Procurement Policy Unit hereby sets operational threshold at a procurement value above Two Million Namibian Dollars (N\$ 2 000 000.00). In addition to the above, Individual Procurement Plans must be prepared for all procurements above the threshold indicated herein as outlined in provision 8(3) 39 of the Public Procurement Regulations, 2017."

It is observed that the First Respondent misdirected itself by claiming that the above directive exempted public entities from following Sections 55(1), (4), (4A), (4B), (4C), and (4D) of the Act as amended, and that for a procurement value below Two Million Namibia Dollars (N\$2,000,000), that it must award directly in terms of Section 55(8). Moreover, it is observed that the Directive was specific to just matters related to Section 55(8) read with Regulation 39 and matters related to Regulation 8(3).

- 6.2 Pursuant to paragraph 6.1 above, the First Respondent had further claimed that the directive issued on 23 May 2017 is still in force and hence it was obligated to act in a manner it did. The Review Panel has established that the First Respondent further misdirected itself in this regard because the argued directive of 23 May 2017 was withdrawn with immediate effect on 07 December 2022 by the Minister of Finance and Public Enterprises. The Directive of 07 December 2022 was issued to all public entities with the subject *"Withdrawal of the Directive on Procurement threshold for Section 55(8) of the Public Procurement Act, 2015 and 39 of the Public Procurement Regulations, 2017 // Standstill period and publishing of the bid evaluation report"* reads as follows:

"Kindly take note that in order to remain consistent with the Public Procurement Act, 2015 as amended, the Directive issued on 23 May 2017 on the above-mentioned

subject matter is hereby withdrawn with immediate effect. A new Directive replacing the above-mentioned Directive is attached hereto, for ease of reference and immediate implementation by all public entities."

- 6.3 Following paragraph 6.2 above, the new Directive referred to in paragraph 6.2 was issued on 09 December 2022 in terms of Section 4(2) and Section 73(1) of the Public Procurement Act, 2015 as amended and specifically paragraphs 4 and 5 of that Directive read as follows:

Paragraph 4: "Pursuant to the above, I hereby, in terms of Section 4(2) read together with Section 73(1) of the Public Procurement Act, 2015, as amended, grant a general exemption to all public entities in respect of all procurements below Two Million Namibia Dollars (N\$ 2 000 000.00) from the applications of the following provisions of the Act:"

"4.1 Section 55(8) read together with regulation 39 of the Public Procurement Regulations, 2017 from the requirement to publish a notice of a procurement award and the executive summary of the bid evaluation report, on their websites and any other printed media; and

"4.2 Regulation 8(3) from the requirement to prepare an individual procurement plan."

Paragraph 5: "The exemption from Section 55(8) read with regulation 39 is subject to the condition that public entities must publish an e-notice of award and the executive summary for every procurement, including the procurements below Two Million Namibia Dollars (N\$ 2 000 000.00), on the E-G portal as stipulated under paragraph 6 of the Electronic Procurement Phase 1 Guidelines V3 applicable from 01 April 2022."

Thus, it is established that the First Respondent in its replying affidavit and arguments raised during the review hearing proceedings still misdirected itself by alleging that the new directive of 09 December 2022 obligated it to not follow the provisions of the Act, which are Sections 55(1), (4), (4A), (4B), (4C), and (4D) of the Act as amended. It is observed that public entities were not exempted from having a standstill period or from issuing a notice for selection award under any procurement methods used regardless of its procurement value.

- 6.4 It is established that the Electronic Procurement Phase 1 Guidelines V3 applicable from 01 April 2022 mandates public entities to advertise through the system if the procurement value is below Two Million Namibia Dollars (N\$2,000,000). It is further observed that the procurement method for the request for sealed quotations (RFQ) as used by the First Respondent could be done through the E-G portal. However, it is observed that the use of RFQ through the E-G Portal violates Section 32(2) of the Act and that a new directive is required to make an exemption to Section 32(2) of the Act

as these provisions which mandates that quotations must first be sourced from bidders unless the item in question is not available from three suppliers.

- 6.5 It was further observed that not only is the First Respondent acting contrary to the provisions of Sections 55(1), (4), (4A), (4B), (4C), and (4D) of the Act as amended, but that most public entities are continuously acting in a similar manner and of which when RFQ procurement method is used, most public entities just issue a notice of award and reference Regulation 16(1) and further used the Directives referred in paragraph 6.1, 6.2 and 6.3 as what empowers them to do so. This practice is in violation of Section 2 of the Act as amended and in violation of Sections 55(1), (4), (4A), (4B), and (4C) of the Act as amended. To this regard, the Review Panel through its Review Panel Secretariat will write officially to the Procurement Policy Unit (PPU) to address this type of actions which are in violation of the Act.
- 6.6 It is further established that the Applicant was wrongly disqualified as it has provided a valid and authentic original good standing certificate from the Social Security Commission of which such certificate is generated electronically if one or a bidder applies online or could be printed directly from the Social Security of Commission offices if a bidder approaches them. Thus, the BEC of the First Respondent could have utilized Section 52(1) if it was not privy to new information rather than arguing that it used its past knowledge to compare how the manually issued Good Standing Certificates by the Social Security Commission look like. Moreover, it was also established that more than 6 bidders submitted a Good Standing Certificate generated from the portal but the First Respondent could not confirm if all of them were disqualified on the same basis as per its argument.

7. DECISIONS OF THE REVIEW PANEL:

Based on the above findings as outlined in paragraphs 6.1 to 6.6, the Review Panel orders the following:

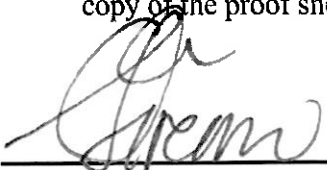
- 7.1 That the Notice of Award dated 13 July 2023 which was issued by the First Respondent and the Purchase Order issued on 20 July 2023 is hereby declared as *ultra vires*, unlawful, and therefore set aside in terms of Section 60(c) of the Public Procurement Act, 2015 (Act No. 15 of 2015) as amended.
- 7.2 Furthermore, the matter is referred back to the First Respondent with the following specific instructions:
- a) That, the First Respondent re-evaluates all bids in terms of Section 52(9) of the Act as amended and considers all bidders who were disqualified on the merit of Social Security Good Standing Certificates which are generated from the online portal.


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- b) That, upon completion of the BEC evaluation and approval of the Accounting Officer, that all provisions of Section 55 of the Act, 2015 (Act No. 15 of 2015) as amended must be adhered to.

7.3 The effective date of this order is 17 August 2023.

7.4 The Public Entity shall provide proof of implementation of this Order to the Procurement Policy Unit within thirty (30) days from the receipt date of this Order. A copy of the proof should be sent to the Review Panel Secretariat


Lukas Kudumo Siremo
CHAIRPERSON: REVIEW PANEL (FOR THIS MATTER)



REPUBLIC OF NAMIBIA
Public Procurement
Review Panel
Chairperson
MINISTRY OF FINANCE