



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 23 AUGUST 2023 IN WINDHOEK, NAMIBIA**

IN THE MATTER BETWEEN:

WINDHOEK SERSECURITY SERVICES CC

APPLICANT

AND

**NKURENKURU TOWN COUNCIL
CHIEF NANGOLO SECURITY CC
TULAMBUNGE SECURITY CC
SIKUTJI INVESTMENT CC
MYLOJE TRADING CC
MBONDY INVESTMENT CC
SIX THOUSAND SECURITY SERVICES CC
MPUNGU SECURITY CC
TRIPLE ONE INVESTMENTS CC
KAWE SECURITY CC
TWENTY NINE BATTALION INVESTMENT CC
TULIKUMO INVESTMENT CC
NAMIBIA PROTECTION SERVICES**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT
8TH RESPONDENT
9TH RESPONDENT
10TH RESPONDENT
11TH RESPONDENT
12TH RESPONDENT
13TH RESPONDENT**

**NAHOLE SECURITY AND DEBT COLLECTION
SERVICES CC
OMAMBUDU SECURITY SERVICES CC
BERTHA SECURITY SERVICES CC
ONYEKA PROTECTION SERVICES
SHIKUVULE SECURITY SERVICES CC
MUKWE SECURITY SERVICES CC**

**14TH RESPONDENT
15TH RESPONDENT
16TH RESPONDENT
17TH RESPONDENT
18TH RESPONDENT
19TH RESPONDENT**

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/NKU001/05/2023: RENDERING OF SECURITY SERVICES TO NKURENKURU TOWN COUNCIL FOR A PERIOD OF THREE (3) YEARS

PRESENT: Fillemom Wise Immanuel (Chairperson) with, Lukas Kudumo Siremo, Kenandei Tjivikua, Kandali Iyambo and Hellen Amupolo concurring

Heard on: 23 August 2023

Decided on: 23 August 2023

REVIEW PANEL ORDER

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. Magana H. Mukuve**, for the 1ST 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. BACKGROUND TO THE REVIEW APPLICATION

- 2.1 The Review Panel Secretariat received a review application in respect of bid number NCS/ONB/NKU001/05/2023 for the rendering of security services to Nkurenkuru Town Council on 8 August 2023, in terms of Section 59 of the Act read with Regulation 42(1) of the Act, as amended.
- 2.2 Upon being served with the review application, the Respondent filed its replying affidavit with the Review Panel on 14 August 2023 in response to the application.

3. GROUNDS FOR APPLICATION FOR REVIEW

- 3.1 The Applicant claimed that the 1st Respondent violated Section 52(9) of the Act, as amended as it was disqualified for the reason that the offered price is above market range.
- 3.2 It further stated that the successful bidder was awarded while offered wage per guard that is below the prescribed minimum wage in terms of the applicable Collective Agreement regulating wages in the Security Industry as contained in the Government Gazette 6414 of 2015. Further an undertaking in terms of Section 138(2) of the Labour Act, 2007 was not sufficient.
- 3.3 The Applicant claimed that the reason for disqualification is not a criterion in terms of the bidding document.
- 3.4 It further stated that the tender was already awarded on 2 August 2023 during the seven-day standstill period.
- 3.5 The Applicant prayed that the Review Panel set aside the procurement process and start afresh or alternatively re-evaluate.

4. APPLICANT'S SUBMISSION DURING THE REVIEW HEARING

- 4.1 The Applicant stated that the 1ST Respondent violated the Government Gazette 6414 of 2015 on the minimum wage for security guards, as the evaluated successful bidder did not meet this requirement whilst it did.
- 4.2 It submitted further that the 1ST Respondent violated Section 55(4)(C) for awarding a contract during standstill period and while there was a request for reconsideration in terms of Section 55(4A) pending.
- 4.3 The Applicant argued that the price offered by the successful bidder is Value Added Tax inclusive (VAT), which put the successful bidder below the minimum benchmark price of the 1ST Respondent.
- 4.4 The Applicant alluded to that its total bid amount was the lowest and most responsive, hence did not understand the claim of the 1ST Respondent saying that its bid amount was above the market range and that such a criterion was not part of the bidding document, thus Section 52(9) was violated by the 1ST Respondent (Nkurenkuru Town Council).
- 4.5 The Applicant prayed that the Review Panel must cancel this whole bidding process and start afresh in terms of Section 60(f).

5. RESPONDENT'S RESPONSE TO GROUNDS FOR REVIEW APPLICATION

- 5.1 The 1ST Respondent stated that the company selected for award was the lowest responsive bidder as per the council's price estimate and not market-related prices and that the 1ST Respondent will ensure that the awarded bidder will comply with the collective agreement as gazetted.
- 5.2 The 1ST Respondent stated that it acted in accordance with the Instruction to Bidders (ITB) 32.1 subject to Instruction to Bidders (ITB) 33, "*the employer will award the contract to the bidder whose bid has been determined to be substantially responsive to the bidding documents and who has offered the lowest evaluated Bid Price, provided that such Bidder has been determined to be (a) eligible in accordance with the provision of ITB clause 4 and (b) qualified in accordance with the provision of ITB Clause 5*".
- 5.3 The 1ST Respondent explained during the meeting that the public entity took the current contract amount and added 10% to determine the maximum amount as a baseline, which was about N\$ 1 300 000.00 excl. VAT and this became a guide that the public entity will not award any bid above this amount as approved in the Individual Procurement Plan (IPP).
- 5.4 The 1ST Respondent further confirmed that the minimum estimated bid price which can make a bidder responsive is N\$ 1 166 400.00 excl. VAT and any amount lower than this was non-responsive as it meant it never took into account the minimum wage of N\$ 10 per hour per guard as stipulated in the Security Industry Collective Agreement of 2017.
- 5.5 Upon enquiry by the Review Panel as to why the 1ST Respondent did not comply with the provisions of Sections 55(1), (4), (4A), (4B), (4C) and (4D) as per the amended Act, the 1ST Respondent claimed that it was not familiar with Act No. 3 of 2023 of the Public Procurement Act amendments and that it only and still just uses the principal Act.

6. FINDINGS OF THE REVIEW PANEL

The Review Panel found that:

- 6.1 That, the 1ST Respondent (Nkurenkuru Town Council) made an award to the 19th Respondent (Mukwe Security Services CC) during the standstill period. In terms of Section 55(4C) of the Public Procurement Act 2015 (Act No. 15 of 2015), as amended, an award made during the standstill period is invalid *ab initio*. Therefore, the award made by the 1st Respondent on 2 August 2023 is *ultra vires* and unlawful.
- 6.2 That in terms of the financial evaluation, and as again confirmed through the 1st Respondent's evidence, the minimum total bid amount for 36 months considering the security collective agreement is N\$ 1 166 400.00 excluding VAT and the maximum is N\$ 1 300 000.00 excluding VAT as per the budget amount of the public entity according to the approved IPP. Thus, any bidder with a total bid amount lower than N\$ 1 166 400.00 excluding VAT and higher than N\$ 1 300 000.00 excluding VAT is non-responsive.

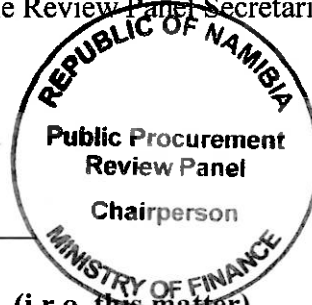
- 6.3 That, the total bid amount of N\$ 1 064 973.91 excl. VAT for the bid submitted by the 19TH Respondent (Mukwe Security Services CC) is below the minimum hourly wage requirement per guard and/or below the minimum total bid amount requirement as determined by the 1ST Respondent, rendering the 19TH Respondent (Mukwe Security Services CC) non-responsive.
- 6.4 That Town Council's budgeted amount of N\$ 1 300 000.00 excl. VAT in terms of the approved IPP, the total bid amount of the Applicant is above the budget of this procurement activity.
- 6.5 It is further established that subclause 4.2(a) of the General Conditions of Contract (GCC) of the bidding document requires that the key personnel used for bidding purposes to remain for the duration of the contract and change to such personnel can only be made with the approval of the employer and replacement should be of the same level or better. This further indicates that, the minimum wage of N\$ 10.00 per guard per hour as stipulated in the security industry collective agreement under article 9(3) will be applied when evaluating.
- 6.6 It is established that, the 1ST Respondent is not utilizing the entire Act including its amendment, but it is only selectively using part 55(8) of the Act. Thus, it is found that the 1ST Respondent deliberately violated provisions of Section 52(9) and Sections 55(1), 4, (4A), 4(B), (4C) and (4D) of the Act, as amended.

7. DECISIONS OF THE REVIEW PANEL

Based on the above findings as outlined in Section 6, the Review Panel orders the following:

- 7.1 That, the 1ST Respondent (Nkurenkuru Town Council) made an award to the 19th Respondent (Mukwe Security Services CC) during the standstill period. In terms of Section 55(4C) of the Public Procurement Act 2015 (Act No. 15 of 2015) as amended, an award made during the standstill period is invalid *ab initio*. Therefore, the award made by the 1ST Respondent on 2 August 2023 is hereby declared *ultra vires*, unlawful and does not stand.
- 7.2 That in terms of Section 60(c) of the Public Procurement Act, 2015 (Act No. 15 of 2015) as amended, the Review Panel hereby sets aside in whole the Notice for Selection of Award dated 21 July 2023 and refers the matter back to the 1ST Respondent (Nkurenkuru Town Council) with the instruction to re-evaluate bid number: NCS/ONB/NKU001/05/2023. Such a re-evaluation to account for the fact that in terms of the financial evaluation, the minimum total bid amount for 36 months considering the security collective agreement is N\$ 1,166,400.00 excluding VAT and the maximum is N\$ 1 300 000.00 excl. VAT as per the budget amount contained in the approved IPP. In addition, the 1ST Respondent (Nkurenkuru Town Council) is instructed and directed to follow the provisions of Section 55(1), 55(1), 4, (4A), 4(B), (4C), (4D) and (5) of the Act, as amended, in its further action(s) in respect of this tender.

- 7.3 That the effective date of this order is 23 August 2023.
- 7.4 That the 1st Respondent i.e., Public Entity must provide proof of implementation of this order to the Public Policy Unit within thirty (30) days from the receipt date of this order. That a copy of such proof be sent to the Review Panel Secretariat.



FILLEMION-WISE IMMANUEL
CHAIRPERSON: REVIEW PANEL (i.r.o. this matter)