



REPUBLIC OF NAMIBIA

MINISTRY OF FINANCE

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**PUBLIC PROCUREMENT REVIEW PANEL**

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**IN THE PUBLIC PROCUREMENT REVIEW HEARING**

**HELD ON 02 AND 11 AUGUST 2023**

**IN THE MATTER BETWEEN**

**SASH TRADING AND EARTHWORKS CC**

**APPLICANT**

**AND**

**CENTRAL PROCUREMENT BOARD OF NAMIBIA**

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

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

BID NO: W/OAB/CPBN-07/2022 – PROCUREMENT OF NOMINATED SME SUB-CONTRACTS FOR THE BLADING OF GRAVEL ROADS IN THE OSHAKATI REGION

Present: Doné Brinkman (Chairperson), with Tulimeyo Kaapanda, Selma-Penna Utonih, and Kenandei Tjivikua concurring, and Gilbert Habimana, dissenting.

Heard : 02 and 11 August 2023

Decided : 11 August 2023

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REVIEW PANEL ORDER

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1. INTRODUCTION

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

Having heard **Ms. Sylvia Kahengombe** representing the Applicant, and **Ms. N. Davids** representing the 1<sup>st</sup> Respondent 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 of the Public Procurement Regulations: Public Procurement Act, 2015 (hereinafter referred to as the “Regulations”); and

Having read the application for review and other documents filed as part of the record, the Review Panel, in respect of the matter made the following findings and subsequent order.

2. POINTS *IN LIMINE* RAISED ON 02 AUGUST 2023

- 2.1 At the commencement of the review proceedings, the Applicant requested condonation on the serving of the review application to the 1<sup>st</sup> Respondent and interested parties. The Chairperson of the Review Panel requested a twenty-minute break for the Review Panel to deliberate on the matter. The Review Panel Members decided to grant permission for the Applicant to serve the application on the 1<sup>st</sup> Respondent as requested in terms of Regulation 43(4) which reads as follows: “*The Review Panel may request or allow submission of additional statements by the parties and by other parties not participating in the application for review as may be necessary for the fair resolution of the review application*”.
- 2.2 The Applicant was ordered to serve the 1<sup>st</sup> Respondent and interested parties. The 1<sup>st</sup> Respondent had two days to reply to the application. The meeting was postponed to 11 August 2023.
- 2.3 The meeting resumed on 11 August 2023. The Applicant showed proof that they had served the 1<sup>st</sup> Respondent and only the successful bidders because she did not know they could serve all the interested parties electronically. Nevertheless, the proceedings resumed.

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

- 3.1 The Applicant referred to the notice for the selection of award dated 28 April 2023, for the Procurement of Nominated Sub-contractors for the Blading of Gravel Roads in the Oshakati Region in which they were not selected for award.
- 3.2 The Applicant further stated that the Executive summary was proof that Sash Trading and Earthworks CC ("Sash") was a responsive bidder, and ranked as the number 1 bidder however not recommended for award in terms of ITB 1.1(c) which states that "*A nominated SME Sub-Contractor shall only be considered for only one (1) per Region; and a total maximum of two (2) contract areas across the four (4) Roads Authority maintenance regions*".
- 3.3 Based on the above the Applicant disputed the reason for their disqualification and believed that the 1<sup>st</sup> Respondent had erred and wrongly interpreted the ITB incorrectly.
- 3.4 According to the Applicant, they did not reach the maximum two (2) contract areas across the four (4) Roads Authority maintenance regions, as they have only been appointed for one (1) in Keetmanshoop.
- 3.5 The Applicant requested a reconsideration by the 1<sup>st</sup> Respondent, however only received a response on 02 June 2023. The Applicant wrote a second letter on 23 June 2023 to the 1<sup>st</sup> Respondent referring to the Public Procurement Review Panel's order and decision in the matter heard on 01 June 2023, between "John Namusheshe Construction and Investment vs. the 1<sup>st</sup> Respondent ("CPBN") and others".
- 3.6 The 1<sup>st</sup> Respondent replied to the Applicant on 26 June 2023 stating that they are in the process of studying the order and bidders will be informed of the outcome in the case of "John Namusheshe".
- 3.7 The Applicant admitted that they did not lodge an application for review under Section 59(1) of the Public Procurement Act, 15 of 2015 within seven (7) days of receipt of the decision or action taken by the Public Entity.

### **4. FIRST RESPONDENT'S SUBMISSIONS AT THE REVIEW PANEL HEARING**

- 4.1 The 1<sup>st</sup> Respondent stated that in terms of Regulation 42(3) of the Public Procurement Regulations, a bidder lodging a review application in terms of Section 59(1) of the Public Procurement Act, 15 of 2015 as amended ("the Act") must within seven (7) days of receipt of the decision of the Board or Public Entity, lodge the review application with the Review Panel and serve copies of the review application on a public entity and any other interested person.
- 4.2 The 1<sup>st</sup> Respondent further narrated that the cited Regulation is couched in mandatory terms and non-compliance on the part of any applicant is fatal.
- 4.3 The Applicant filed its review application on 04 July 2023, which is outside the permissible time for filing in terms of Section 55(4B) of the Act read with Regulation 42(1) of the Regulations. In terms of these provisions, a bidder must within seven (7) days of receipt of the decision or action taken by a public entity, apply to the Review Panel for review. The Applicant received the Board's decision on 02 June 2023.

- 4.4 The 1<sup>st</sup> Respondent stressed that for the Review Panel to receive and or condone the late filing of the Applicant's application, which is way out of time, is highly irregular and ultra vires its powers.
- 4.5 The 1<sup>st</sup> Respondent also stated that the Review Panel's actions are also prejudicial to the state because a vital developmental project is being delayed for no justification reason.
- 4.6 The 1<sup>st</sup> Respondent argued that with non-service this application is null and void therefore there is no proper application before the Review Panel.

## 5. FINDINGS OF THE REVIEW PANEL

- 5.1 When the meeting resumed on 11 August 2023, it was noticed that the Applicant had sufficient time from 2 June to 13 June 2023, to lodge the review application however the applicant elected to write another letter to the 1<sup>st</sup> Respondent on 23 June 2023 in which they requested clarity on the order issued by the Review Panel on 01 June 2023 regarding another matter.
- 5.2 It was further noticed by the Review Panel, that the Applicant confused the two letters written by themselves on 08 May 2023 and 23 June 2023. The first letter dated 08 May 2023 was for reconsideration about the Notice for Selection of award while the second letter 23 June 2023 dealt with the order issued by the Review Panel on 01 June 2023 which the 1<sup>st</sup> Respondent responded to both the letters.

## 6. DECISIONS OF THE REVIEW PANEL

In the premise, the Review Panel makes the following order:

- 6.1 The Review Panel dismisses the Review Application filed by the Applicant in respect of **BID NO: W/OAB/CPBN-07/2022** – Procurement of Nominated Subcontractors for the Blading of Gravel Roads in the Oshakati Region on behalf of Roads Authority in terms of Section 60(a) of Public Procurement Act, 15 of 2015 due to the fact that the review application was filed outside the prescribed time.
- 6.2 The effective date of this Order is 11 August 2023.



**DONÉ BRINKMAN**  
**CHAIRPERSON: REVIEW PANEL (i.r.o. this matter)**

