



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 22 AUGUST 2023**

IN THE MATTER BETWEEN

TRIPPLE FFF INVESTMENT CC

APPLICANT

AND

**OKAHAO TOWN COUNCIL
& OTHERS**

1st RESPONDENT

IN A REVIEW APPLICATION MADE IN TERMS OF SECTION 59 OF THE PUBLIC PROCUREMENT ACT 2015- (ACT 15 OF 2015) hereinafter referred to as “Act”).

BID NO: NCS/ONB/OTC-02/2023/2024 – REFUSE REMOVAL AND DISPOSAL SERVICES FOR OKAHAO TOWN COUNCIL

Coram: Gilbert Habimana (Chairperson), with Hellen Amupolo, Michael Gaweseb consenting, while Tulimeyo Kaapanda and Donè Brinkman dissenting.

Heard: 22 August 2023

Decided: 22 August 2023

ORDER

1. INTRODUCTION:

- 1.1 A hybrid meeting was held, using both physical and virtual modes.
- 1.2 Having heard Mr. Naboth De Celestino, for the Applicant, Mr. Silas-Kishi Shakumu, 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) (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. POINTS IN LIMINE:

At the commencement of the review proceedings, the Chairperson requested the Parties to raise any point *in limine* that they may have before the merits of the matter are heard. The First Respondent alleged Applicant’s non-compliance with Section 55 (4) of the Act and stated that the aggrieved bidder has not given the First Respondent 7 days to respond to the allegations, as the Applicant proceeded to the Review Panel instead of waiting for the First Respondent to respond to its application for reconsideration.



2. GROUNDS FOR THE REVIEW AS CONTAINED IN THE APPLICANT’S APPLICATION FOR REVIEW:

2.1 The Applicant stated that it was taken aback when examining the Executive Summary of the Bid Evaluation Report received, as it became evident that the majority of the companies partaking in the bidding process received identical scores across all three cleaning Zones. This led to the presentation of duplicate information in relation to vehicles, equipment and employees in all three distinct bidding documents.

2.2 The following allegations are hereby raised:

- The recommendations made by procurement committee were disregarded or circumvented by the appointing authority during the awarding process.
- Proper procedures were not adhered to in the process of awarding contracts for all the cleaning Zones.
- The awarding process of the aforementioned bid was tainted by nepotism and favouritism.
- Tempered Executive Summary of the Bid Evaluation that was sent to the bidders.

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

4.1 The Applicant submitted the Executive Summary of the Bid Evaluation report received, as it became evident that majority of the companies partaking in the bidding process received identical scores across all three zones. This led to the presentation of duplicate information in relation to vehicles, equipment and employees in all three distinct bidding documents.

The Applicant referred the Review Panel to ITB 5.5 (d) which reads as follows:

Minimum number of vehicles required is one (1): Truck with minimum capacity of 3-7 tons/ pick-up truck with a trailer (trailer with a minimum capacity of 3 meters covered with a net). Attach valid certified copies of vehicle registration and road worthy disc (Sedan cars, SUV and rented vehicles are not eligible for this contract). Inspection date will be communicated to the qualified bidders. (Substitute of vehicle after award of contract shall meet similar requirements). The Applicant further, stated that this ITB deals with the principle of three (3) different zones and, submitted that the First Respondent in its Replying affidavit confirmed that the recommendations made by the Procurement Committee in which the Applicant was subject to be awarded one of the cleaning zones were ignored.

4.2 The Applicant stressed that Regulation 6 (3) of the Public Procurement Regulations compels the Accounting Officer to accept the recommendation for the award of the procurement contract made under sub regulation (2) (f) or request the Bid Evaluation Committee to re-evaluate the bids submitted to the public entity and to re-submit to the Procurement Committee for reconsideration and recommendation.

5. 1st RESPONDENT'S SUBMISSION AT THE REVIEW PANEL HEARING:

- 5.1 The 1st Respondent submitted that there is a non-compliance with Section 55 (4A), as the aggrieved bidder must give the public entity seven (7) days to respond to the allegations instead of waiting for the public entity to respond. The Applicant proceeded to the Review Panel.
- 5.2 On the strength of above, the 1st Respondent submitted further that on 28th July 2023, it informed the Applicant that its grievance is receiving attention and that a legal opinion has been sought by the Council on all matters of concern that have been raised. The 1st Respondent further, submitted that this application is not properly before the Review Panel, it is *ultra vires* because it was submitted to the Review Panel 15 days after the notification of bid award which is 8 days beyond the prescribed 7 days, during which a bidder can lodge an application for review.
- 5.3 Upon enquiry by the Review Panel, the 1st Respondent stated that the recommendations of the Procurement Committee, which the Applicant claims was disregarded by the Accounting Officer was not in the interest of the public entity because Procurement Committee defied the recommendation of the Bid Evaluation Committee (BEC) with no substance reasons to award a bid ranked number 3 at the expense of the bidder ranked number one (1).

6. INTERESTED PARTIES:

- 6.1 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 a submission during the hearing.

7. FINDINGS OF THE REVIEW PANEL

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

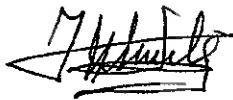
- 7.1 That the preliminary point *in limine* raised by the 1st respondent regarding applicant's noncompliance with Section 55 (4). (a) of the Act cannot stand because the public entity has not issued a notice for selection of award as prescribed by Regulation 38 Annexure 5 to the regulations. The first respondent contravened section 55 (4B) of the act by not stating the standstill period for both the successful bidder and the unsuccessful bidders.
- 7.2 That, the First Respondent misdirected itself by arguing that it was not obliged to set a standstill period in its notice because the value of the bid was below the threshold of 2million N\$. The 1st respondent, by choosing Open National bidding (ONB) as a procurement method, *de facto* bound itself to award the procurement contract in terms of Section 55 (4), (4A), (4B) & (4C) in which the standstill period is mandatory.

- 7.3 That First respondent failed to choose an appropriate procurement method for a bid whose value was below the threshold (2 million N\$) as prescribed by Annexure 2 to the Regulation (Section 30 (a), 31 (1) (b), 32 (1) and 38 (1) of the Act). For bids with prices below the threshold indicated above, 1st respondent had several procurement methods, such as “Request for Quotations”, that allow awarding procurement contracts without applying section 55 as amended.
- 7.4 That the procurement committee contravened regulation 6 (1) (b) by overriding BEC recommendation and recommending its own successful bidder to the accounting officer. It had to only review the BEC’s report, if in agreement with the BEC, recommend to the accounting officer the successful bidder recommended by the BEC or, if in disagreement, send the reviewed report back to the BEC with instructions to re-evaluate the bids.
- 7.5 That, in terms of regulation 6 (3) the accounting officer had the power to reject the Procurement Committee’s recommendation of a successful bidder not recommended by BEC.
- 7.6 That, in line with the same regulation 6 (3), upon rejection of the procurement committee’s recommendation, the accounting officer had to refer back the matter to the BEC with instructions and wait for a second BEC report channeled through the Procurement committee.
The 1st respondent conceded to the above findings 7.4 to 7.6. During the hearing proceedings.

8. DECISIONS OF THE REVIEW PANEL:

Based on the above, the Review Panel orders:

- 8.1 That in terms of section 60 (f) of the Public Procurement Act, the procurement proceedings be terminated and start afresh.
- 8.2 The effective date of the order is 22 August 2023.
- 8.3 The accounting officer to report to PPU on the implementation of this order within 30 days from the date of receipt.



Gilbert Habimana
CHAIRPERSON: REVIEW PANEL (I.R.O. THIS MATTER)

