



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 28 SEPTEMBER 2023

IN THE MATTER BETWEEN

ADAPTIC INVESTMENTS CC

TJIUEE CLEANING EXPERTS CC

FIRST APPLICANT

SECOND APPLICANT

AND

NAMIBIA AIRPORTS COMPANY LIMITED

& OTHERS

FIRST RESPONDENT

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

BID NO: NCS/ONB/NAC-001/2023 – PROVISION FOR CLEANING SERVICES FOR THE HOSEA KUTAKO INTERNATIONAL AIRPORT (HKIA)

Coram: Donè Brinkman (Chairperson), with Fillemon Wise Immanuel, Ehrenfried Honga, and Mekondjo Katunga concurring. Kenandei Tjivikua dissenting in respect of decisions made.

Heard: 25 September 2023

Decided: 30 September 2023

ORDER

1. INTRODUCTION:

- 1.1 A hybrid meeting was held, using both physical and virtual modes.
- 1.2 Having heard **Mr. Benedictus Ngairorue** for the First Applicant, **Ms. Zebaldine Ndjavera** for the Second Applicant, **Mr. Lot Haifidi** for the First 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”) as amended; 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* RAISED BY THE PARTIES:

- 2.1 At the commencement of the review proceedings, the Chairperson requested the Parties to raise points in *limine* that they may have before the substantive merits of the review applications are heard. The First Applicant (Adaptic Investments CC) informed the Review Panel that the First Respondent’s replying affidavit was filed late and it is contradictory to Regulation 42(4) of the Public Procurement Regulations. The First Applicant further stated that Regulation 42(3) compels a bidder to lodge its review application with the Review Panel and serve copies of the review application on a

- public entity and on any other interested person. The First Applicant queried whether the replying affidavit of the First Respondent may only be viewed by the Review Panel and queried why the replying affidavit was not sent to the Applicants.
- 2.2 This preliminary point was disposed of when the First Applicant was provided with the replying affidavit of the First Respondent. The Review proceedings adjourned for a period to allow the First Applicant to study the replying affidavit of the First Respondent. The First Applicant was satisfied to proceed with the review proceedings following the adjournment.
- 2.3 The First Respondent raised a query regarding the capacity of Mr. Ngairorue in representing the First Applicant. The First Respondent indicated that Mr. Ngairorue works for a public entity therefore, the First Respondent wanted to understand in what capacity he was representing the First Applicant.
- 2.4 Mr. Ngairorue informed the Review Panel that he has a power of attorney to represent the First Applicant in these proceedings. In addition, Mr. Ngairorue informed the Review Panel that he has a substantial interest in this matter as he is married in community of property to the owner of the First Applicant and that he has taken leave from his place of employment. The First Respondent accepted the power of attorney presented by Mr. Ngairorue.
- 2.5 The First Respondent further informed the Review Panel that no valid review application has been filed by Tjiuee Cleaning Experts CC in the manner contemplated by Section 59 of the Public Procurement Act read with Regulation 42 of the Regulations. The First Respondent argued that the purported founding affidavit of the Second Applicant was not properly commissioned and therefore no valid review application was filed with the Review Panel, and it is for that reason the review application for Tjiuee Cleaning Experts CC should be dismissed.
- 2.6 The Second Applicant (Tjiuee Cleaning Experts CC) replied to the allegation by the First Respondent by stating that her founding affidavit was signed by herself and by a Police Officer as a Commissioner of Oath and thereafter it was submitted and accepted by the Review Panel.
- 2.7 At the conclusion of the hearing, the Review Panel requested the First Respondent to provide a legal submission stating in law that every page of the affidavit must be initialled. The First Respondent, despite a reminder being sent, failed to provide the submissions. The Review Panel found that the Second Applicant had her affidavit commissioned by the Police, confirmed her reasons in the review hearing, and thus attempted to fully comply with the provisions of the Act, and therefore accepted the Review Application of the Second Applicant.

3. GROUNDS FOR THE REVIEW AS CONTAINED IN THE REVIEW APPLICATIONS:

- 3.1 Essentially the First Applicant argued that the scoring of the bid was done incorrectly and that the bid was not evaluated as per the bid evaluation sheet. The First Applicant stated that the bid evaluation sheet provided for key personnel for site supervision with a minimum of three (3) years' experience in the cleaning environment for this contract and that curriculum vitae were to be provided for the key personnel indicating relevant experience in the cleaning environment.
- 3.2 The First Applicant stated that this information was provided as required in the bidding documents and that they were not awarded marks despite providing the necessary documents.
- 3.3 The First Applicant informed the Review Panel that the evaluation committee alleged that it was not clear that the supervisor has experience of more than three (3) years in a cleaning environment and that the job title provided as General Assistant does not explicitly elaborate the duties entailed and how it is related to cleaning duties.
- 3.4 The Second Applicant essentially informed the Review Panel that their company when evaluated by the First Respondent scored zero (0) under the supervision and monitoring mechanism as well as under manpower policy recruitment and screening mechanism, even though all the referred papers were submitted and placed under the proper headings. The Second Applicant therefore also determined that the scoring document by the First Respondent when evaluating the bid was incorrect.

4. APPLICANTS' SUBMISSIONS AT THE REVIEW PANEL HEARING:

- 4.1 The First Applicant explained that after reading the 1st Respondent's replying affidavit, it does not indicate what the affidavit is and therefore the affidavit is contrary to Regulation 42(4). The First Applicant argued what the First Respondent submitted was a mere affidavit and not a replying affidavit as required in terms of Regulation 42(4) of the Public Procurement Regulations which requires that "*upon being served with the copies of the review application under subregulation (3), the public entity or any other interested person must within two days file with the Review Panel a replying affidavit to the allegations made by a bidder or supplier.*"
- 4.2 The First Applicant further submitted that the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 prescribed who Commissioner of Oaths are. Page 7 of the First Respondent's affidavit displays that it was not properly commissioned in that the commissioner of oath did not clearly stipulate the designation that she commissioned the affidavit in her capacity (*ex officio*) as required in terms of the Justices of Peace and Commissioners of Oaths Act 16 of 1963.

- 4.3 Further, the First Applicant argued that the bidding document required the bidders to submit a declaration on the company letter stating that their cleaning personnel would be vetted. The First Applicant argued that there was no requirement that certificates of good conduct had to be attached at this stage. The First Applicant maintained that they provided the required letter and ought to have been awarded 5 points for attaching the required letter.
- 4.4 The First Applicant further argued that the bidding documents of the First Respondent requested that a curriculum vitae of the site supervisor be provided indicating three years of cleaning experience. The First Applicant argued that it submitted two curriculum vitae of supervisors and that the one curriculum vitae contained the required three years of cleaning experience.
- 4.5 The Second Applicant argued in two-fold. Firstly, like the First Applicant, the Second Applicant argued that it submitted a declaration indicating that it will have their personnel vetted. Despite providing this declaration, they were not awarded the required 5 marks.
- 4.6 Secondly, the Second Applicant argued that they submitted a recruitment policy and a structure as required in the bidding documents. The Second Applicant stated that although it provided the structure and the recruitment policy, the First Respondent did not award any marks to it.

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

- 5.1 The First Respondent submitted that the bidding document required that one curriculum vitae for the cleaning supervisor be submitted. It was the intention that the contract would have a cleaning supervisor. The First Applicant's bidding document contained firstly the curriculum vitae of Mrs. Anna Kundu. The curriculum vitae of Ms. Kundu was studied and found that she did not meet the requirements of three years of cleaning experience for a similar contract. The curriculum vitae did not articulate the specific work that Mrs. Kudu was supervising. Moreover, the curriculum vitae of Mrs. Kundu did not contribute any relevance to the strength of the bid as there was no information on previous and/or current work status. The First Applicant's supervisor therefore did not have a minimum of 3 years supervision experience in the cleaning environment and was not responsive to the evaluation criterion requested in this category of evaluation.
- 5.2 The First Respondent further submitted that the evaluation criteria in the screening mechanism category of the bidding document required bidders to attach cleaning personnel certificates of good conduct from the Namibian Police to confirm the vetting of cleaning personnel. The First Respondent argued that the First Applicant did not attach the required certificates of good conduct for cleaning personnel and as a result, the initial 5 marks that were accorded to the First Applicant were replaced with a zero mark.

- 5.3 The First Respondent argued that the Second Applicant submitted a checklist that lacked information on how the cleaning personnel would be supervised and monitored. The Second Applicant further failed to indicate in its recruitment policy that it will recruit general cleaning personnel with a minimum of 3 years of experience in a cleaning environment. Further, no certificate of good conduct for cleaning personnel was attached to the Second Applicant's bidding document.
- 5.4 The First Respondent concluded that all bids were evaluated in accordance with Section 52(9) of the Public Procurement Act and asked that the Review Panel dismiss the Applications and confirm its decision.

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 bids were not evaluated in accordance with Section 52 9) of the Public Procurement Act 15 of 2015 as amended.
- 6.2 That, the bidding document provided that 5 marks would be awarded to a bidder who provided a declaration on a letterhead indicating that the cleaning personnel would be vetted. The bidding document did provide that certificates of conduct from the Namibian Police had to be attached.
- 6.3 That, the First Respondent was not specific on the form or design of the structure it required (i.e., how the structure must look like). Therefore, the First Respondent is obliged to consider the structure provided by the Second Applicant.

7. DECISIONS OF THE REVIEW PANEL:

Based on the above, the Review Panel orders the following:

- 7.1 That the notice issued by the First Respondent dated 15 August 2023, for the Bid No: NCS/ONB/NAC-004/2023 – Provision of cleaning services for Hosea Kutako International Airport (HKIA) is hereby declared as *ultra vires*, unlawful and therefore set aside in terms of Section 60(c) of the Public Procurement Act as amended.
- 7.2 Further, the matter is referred back to the First Respondent with the following specific instructions:
- a) That the First Respondent evaluate all bids in terms of Section 52(9) of the Public Procurement Act 15 of 2015 as amended. All bids must be

specifically evaluated according to what is stipulated in the bidding document of the First Respondent.

- 7.3 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.



Donè Brinkman

CHAIRPERSON: REVIEW PANEL (FOR THIS MATTER)

