



REPUBLIC OF NAMIBIA

MINISTRY OF FINANCE AND PUBLIC ENTERPRISES

PUBLIC PROCUREMENT REVIEW PANEL

Tel. : (00 264 61) 209 2445

Fax : (00 264 61) 236454

Telex: 908-3369

Enquiries: **Tanya Bock**

Head Office

Moltke Street

Private Bag 13295

Windhoek

IN THE PUBLIC PROCUREMENT REVIEW HEARING

HELD ON 03 NOVEMBER 2023

IN THE MATTER BETWEEN

SEBKE CIVL CONTRACTORS CC

APPLICANT

AND

HARDAP REGIONAL COUNCIL

1ST RESPONDENT

TJ CIVIL TECHNOLOGY

2ND RESPONDENT

PEACEFUL TRADING CC AND PENATU TRADING JV

3RD RESPONDENT

PENA TRADING ENTERPRISES

4TH RESPONDENT

BALKANZAR INVESTMENTS AND AFRIWACA GROUP JV

5TH RESPONDENT

VERO GROUP CC

6TH RESPONDENT

**NRK TECHNICAL SERVICES CC AND TIKHOES TRADING
ENTERPRISES**

7TH RESPONDENT

CSV CONSTRUCTION NAMIBIA PRY LTD

8TH RESPONDENT

VONKE ELECTRICITY CC

11TH RESPONDENT

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

BID NO: W/ONB/HRC-002/2023 – UPGRADING OF EXISTING OXIDATION POUNDS AT HOACHANAS SETTLEMENT IN THE HARDAP

Coram: Ehrenfried Honga (Chairperson) with Tulimeyo Kaapanda dissenting and Gilbert Habimana, Selma-Penna Utonih, Paulina Kandali Iyambo and concurring

Heard: 03 November 2023

Decided: 03 November 2023

ORDER

1. INTRODUCTION:

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

1.2 Having heard **Mr. Marthino L Olivier** for the Applicant, **Mr. Gerhard Ndafenongo** for the Respondent, and other interested parties who were jointed 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) and the Public Procurement Amendment Act, 2022 (Act No. 3 of 2022) (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. PRELIMINARIES

2.1 The Review Panel took note of the fact that the Application by the Applicant was served on the Public Entity on the 24 October 2023. The public entity stated that they received the review application on 25 October 2023.

The Review Panel further took note of the advertisement period that ran for twenty-three (23) working days instead of thirty (30) working days as per the Public Procurement Act, 2015 (Act No. 15 of 2015 as amended. The panel also addressed

the appointment of the Bid Evaluation Committee members, but the public entity could only provide proof of two members' appointment.

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

- 3.1 The Applicant explained that earthwork according to its definition, is part of construction excavation, to move soil around before lining can be placed.
- 3.2 Further, the Applicant stated that the 1st Respondent must accept that the Applicant has experience to perform the project in a record time.
- 3.3 The Applicant requested for the bid not to be cancelled based on the fact that the community of Hoachanas is suffering and waiting for the pond for a long time.

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

- 4.1 The Applicant explained that according to its definition, earthwork is part of construction excavation, to move soil around before lining can be placed.
- 4.2 Further, the Applicant stated that the 1st Respondent must accept that the Applicant has experience to perform the project in a record time.
- 4.3 The Applicant requested for the bid not to be cancelled based on the fact that the community of Hoachanas is suffering and waiting for the pond for a long time.

5. RELIEF SOUGHT:

- 5.1 The Applicant requested the Review Panel to apply Section 60(d) of the Public Procurement Act, in terms of the decision.

6. RESPONDENT'S RESPONSE TO GROUNDS OF REVIEW APPLICATION

- 6.1 The 1st Respondent disputed the allegation that oxidation ponds are similar to construction of roads etc., and that it sees the work as two different modalities from the civil engineering perspective. It further stated that earth work is just one component of the work.
- 6.2 It further claims that the Bid Evaluation Committee followed the prescribed procedures of the bidding document and has scored all bidders accordingly.

- 6.3 The 1st Respondent claims that the evaluation was based on work done by the company and not the individual being part of the company.
- 6.4 The 1st Respondent made it clear that it was not looking at similar works, it should be work for oxidation ponds which is in par or equal to it. The 1st Respondent stated that the key aspect was to be provided with certificates for similar works.

7. 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:

- 7.1 That, the First Respondent acted contrary to Section 52(9) of the Public Procurement Act 15 of 2015 when it failed to evaluate bids in accordance with the methodology and criteria set out in the bidding documents.
- 7.2 ITB 6.3 (b) requires the bidder to have completed three (3) projects of similar within the past five years. Ordinarily, similar work is broadly defined and it is not necessarily exact in nature. However, during the evaluation, BEC only considered works pertaining to oxidation ponds for maximum scoring.
- 7.3 That if the First Respondent was looking for experience in oxidation ponds, the ITB should have stipulated such.

8. DISSENTING VIEW

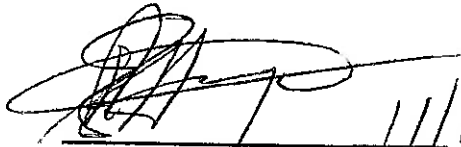
Two members - Ehrenfried Honga (Chairperson) and Tulimeyo Kaapanda dissented with the majority's decision for the Public Entity having to start the bidding process afresh; the conviction here was that the non-compliance with Section 52(9) of the Public Procurement Act 15 of 2015 and failure to evaluate bids in accordance with the methodology and criteria set out in the bidding documents should have found remedy under Section 60(d) by ordering the re-evaluation of the bids.

9. DECISIONS OF THE REVIEW PANEL:

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

- 9.1 That, the notice for selection of award issued by the 1st Respondent dated 13 October 2023 for Bid No: W/ONB/002/2023 is hereby declared as *ultra vires*, unlawful and therefore terminate the procurement proceedings and start afresh in terms of Section 60(f) of the Public Procurement Act.
- 9.2 That the effective date of this Order is on the date of the receipt of this order.

9.3 That the 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 and serve a copy of such proof to the Review Panel Secretariat.


11/Nov/2023

Ehrenfried Honga

CHAIRPERSON: REVIEW PANEL (FOR THIS MATTER)

