



**REPUBLIC OF NAMIBIA**

**MINISTRY OF FINANCE AND PUBLIC ENTERPRISES**

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**PUBLIC PROCUREMENT REVIEW PANEL**

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**IN THE PUBLIC PROCUREMENT REVIEW HEARING  
HELD ON 22 NOVEMBER 2023**

**IN THE MATTER BETWEEN**

**HOANIB TRADING ENTERPRISES CC**

**APPLICANT**

**AND**

**CENTRAL PROCUREMENT BOARD OF NAMIBIA**

**ROADS AUTHORITY**

**NESSIPARK INVESTMENTS CC**

**EFINDANO MAINTENANCE CC**

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

**2<sup>ND</sup> RESPONDENT**

**3<sup>RD</sup> RESPONDENT**

**4<sup>TH</sup> 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/RA-11/2021 – PROCUREMENT OF THE EMERGING  
CONTRACTORS' CONTRACTS FOR THE BLADING OF GRAVEL ROADS IN THE  
WINDHOEK REGION**

**Coram: Donè Brinkman (Chairperson), with Kenandei Tjivikua, Selma-Penna  
Utonih, Michael Gaweseb and Mekondjo Katunga.**

**Heard: 22 November 2023**

**Decided: 22 November 2023**

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**ORDER**

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**1. INTRODUCTION:**

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

1.2 Having heard **Ms. Fatima Frenandes** for the Applicant, **Ms. Nicola Davids** 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) 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. POINTS IN LIMINE:**

2.1 At the commencement of the review proceedings, the Chairperson requested the Parties to raise any point in *limine* that they may have before the substantive merits of the matter were heard. The First Respondent briefly explained the sequence of events and further explained that the bid under review was handled by the Roads Authority first before it was discovered by the Roads Authority that the bid was above its threshold. The bid was thereafter handed over to the Central Procurement Board of Namibia (“CPBN”) on 3 April 2023. The First Respondent further explained that the Roads

Authority extended the bid validity period and indicated that it was still valid by the time it was handed over to the First Respondent.

**3. GROUNDS FOR THE REVIEW AS CONTAINED IN THE APPLICATION FOR REVIEW:**

3.1 The Applicant in its Application for review informed the Review Panel that the First Respondent failed to extend the bid validity period on time and such a failure constitutes that the award made on 14 August 2023 was invalid, as there was no valid bid to be awarded.

3.2 The Applicant contended that the First Respondent should not have operated under the amendment version of the Public Procurement Act mid-way through the process. This was argued to be irregular as the amendment was not enacted retrospectively. The First Respondent should not have relied on an amendment whilst the entire process was almost finalized. The Applicant further stated that the bidders, including the Applicant, did not agree to the extension until 18 July 2023. The initial date agreed by the Applicant was 21 May 2023, therefore an award after the said date is contrary to Section 49 of the Act, which further affected the validity period of the bid.

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

4.1 The Applicant explained that the First Respondent made a mistake in concluding that the Applicant failed to respond to the request to extend the bid validity of 19 January 2023. The Applicant further explained that it had responded and agreed to the extension on 20 January 2023. The Applicant duly responded to the request hence the disqualification that followed was unlawful and unfounded.

4.2 Further, the Applicant submitted that it is denied that the First Respondent has the right to disqualify the Applicant placing its reliance on ITB 19 which refers to the bid validity period. The bidding document indicates that the employer may request the bidders to extend the validity period and that the request and response should be made in writing. The bidding document in no way empowers the First Respondent to disqualify any bidder for failing to respond. The Applicant contended that the First Respondent's reliance on the same is without merit and would in any event be in violation of Section 49 of the Public Procurement Act 15 of 2015.

4.3 The Applicant reiterated that Section 49(2) of the Act enables the extension of the bid validity period subject to the bidder being in agreement. The agreement by the bidder is optional and can in no way be construed to be an obligation of bidders, failing which their disqualification is warranted. The Applicant further cited the Court Judgement in the matter between Elite Construction cc and Hellen Amupolo (case No: HC-MD-CIV-MOT-REV-2020/00364) arguing that one bidder's non-responding to the extension will render the whole bid invalid.

4.4 Further, the Applicant stated that it applied for a review on 15 September 2023, however, the First Respondent asked the Applicant to withdraw its application because the consideration process was still not finalised. Upon enquiry by the Review Panel, the Applicant stated that it had a meeting with the First Respondent on 11 October 2023 and that the reasons provided during the meeting were not satisfactory to the Applicant hence it decided to lodge a review application on 15 October 2023.

## **5. 1<sup>ST</sup> RESPONDENT'S SUBMISSION AT THE REVIEW PANEL HEARING:**

5.1 The 1<sup>st</sup> Respondent submitted that the bid is still valid as the bid has been extended with the last extension being on 10 October 2023. The 1<sup>st</sup> Respondent argued that one bidder's non-responding to an extension of the bid would not render the whole bid invalid. The First Respondent further submitted that this review application is premature and should not be before the Review Panel. The 1<sup>st</sup> Respondent indicated that it was communicated to the Applicant that the First Respondent did not make a final decision in respect of the Applicant's application for reconsideration because an inquiry was made to the Roads Authority on the bid validity extension which was done by it and that no response was received by the time the Applicant requested for the reconsideration. It is common cause that Section 59(1) of the Act states that a bidder may apply to the Review Panel of a decision or an action taken by the Board or by a public entity.

5.2 The 1<sup>st</sup> Respondent explained that Section 49(1) and (2) of the Act indicate that the bidding document may set the bid validity period at 180 days. The validity period of 180 days as stipulated in the bidding document may be extended only with the agreement of the bidders, and, therefore, the First Respondent submitted that the Applicant misdirected itself by stating that the bid validity period expired on 22 October 2023.

## **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 first application by the Applicant which was lodged at the Review Panel on 15 September 2023 was filed outside the prescribed period of 7 days but the application was later withdrawn.
- 6.2 That the second application was brought in time and it was not pre-mature as per the First Respondent's assumption.
- 6.3 That, the First Respondent failed to provide proof that the email which the Applicant provided as proof of responding to the extension request was manipulated.

**7. DECISIONS OF THE REVIEW PANEL:**

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

- 7.1 That the notice issued by the 1<sup>st</sup> Respondent and dated 14 August 2023 for selection of procurement award of Bid No. W/ONB/RA-11/2021-WHK 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 1<sup>st</sup> Respondent with the following specific instructions:
- a) That in terms of Section 55(4A) of the Act as amended, the 1<sup>st</sup> Respondent's Board respond to all bidders who had submitted requests for reconsideration pursuant to the notice of selection for procurement contract/award on their specific requests; and
  - b) The bid is sent back to the First Respondent for reconsideration.
- 7.3 The Public Entity shall provide proof of implementation of this Order to the Procurement Policy Unit within thirty (30) days from receipt date of this Order. A copy of the proof should be sent to the Review Panel Secretariat.

