



REPUBLIC OF NAMIBIA

MINISTRY OF FINANCE AND PUBLIC ENTERPRISES

PUBLIC PROCUREMENT REVIEW PANEL

Tel. : (00 264 61) 209 2319

Fax : (00 264 61) 236454

Head Office,

Moltke Street,

Private Bag 13295

Windhoek

Namibia

Enquiries: **H. Klukowski**

IN THE PUBLIC PROCUREMENT REVIEW HEARING

HELD ON 09 NOVEMBER 2023

IN THE MATTER BETWEEN

WILLBEDONE TRADING CC

APPLICANT

AND

**OMUSATI REGIONAL COUNCIL
AND 18 OTHERS**

1ST RESPONDENT

IN A REVIEW APPLICATION MADE IN TERMS OF SECTION 59 OF THE PUBLIC PROCUREMENT ACT, 2015 (ACT NO. 15 OF 2015) AS AMENDED.

BID NO: W/ONB/ORC-03/2023/2024 – CONSTRUCTION OF SERVICES INFRASTRUCTURE IN OKALONGO – SUPPLY, CONSTRUCTION AND COMMISSIONING OF GROUND WATER RESERVOIR AND ELEVATED WATER TOWER AT EXTENSION 2 IN ONANDJAMBA VILLAGE/OKALONGO SETTLEMENT

Present: Lukas Siremo (Chairperson), with Brown Mutrifa, Kenandei Tjivikua, Mekondjo Katunga, and Tulimeyo Kaapanda, concurring.

Heard : 09 November 2023

Decided : 09 November 2023

REVIEW PANEL ORDER

1. INTRODUCTION

- 1.1 A hybrid meeting was held, using both physical and virtual modes.
- 1.2 Having heard Ms. Taleni Mutilifa representing the Applicant, and Mr. Gervasius Kashindi representing the 1st 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
- 1.3 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. GROUNDS FOR THE REVIEW AS CONTAINED IN THE APPLICATION FOR REVIEW

- 2.1 The Applicant stated that it is pivotal that their bid was rejected for being below the engineer's cost estimate. The Applicant's bid price was N\$6,083,435.60, which was N\$188.96 less than the bidder selected for the award whose price was N\$6,083,624.56.
- 2.2 The Applicant argued that the selected bidder was not the lowest substantially responsive bidder, and its price happens to be just at the threshold, but a mere N\$188.96 more than the Applicant's price however below the engineer's cost estimate.
- 2.3 The Applicant alleged that it passed the technical evaluation stage but was deemed not responsive based on the financial evaluation as the requirement for bids to be considered for further evaluation was that the bid price should be equivalent to or up to 10% below the engineer's cost estimate.

- 2.4 The Applicant further argued that they are the lowest substantially responsive bidder in the circumstances as the margin is minimal and non-material given the scope of the contract, advising that in terms of the ITB, Clause 30.1, the Applicant's bid was substantially responsive and may waive any non-material non-conformity in the bid, thus making non-conformity highlighted above immaterial.

3. POINTS IN LIMINE RAISED ON 09 NOVEMBER 2023

- 3.1 The Applicant indicated that it sent a request for reconsideration on 09 October 2023 and the 1st Respondent replied on 10 October 2023 that they will reconsider the evaluation outcome and revert. However, the 1st Respondent never reverted to the Applicant and further stated in its replying affidavit that they could not look into the matter as they had difficulties meeting the quorum to have a meeting of the Procurement Committee, but this is unacceptable.
- 3.2 The 1st Respondent also raised a concern that it was a surprise to see that none of the bidders who took part in the bidding process were present, hence this could be an indication that they were not served by the Applicant. The Review Panel requested the Applicant to provide proof of service in this regard and the Applicant did so.

4. APPLICANT'S ARGUMENTS DURING THE REVIEW HEARING

- 4.1 The Applicant argued that it was unfairly disqualified as it is supposed to be the lowest substantially responsive bidder and that since it did not know what the 10% below the value of the engineer's cost estimate and that it is just N\$188.96 below the successful bidder, then it was the lowest substantially responsive bidder.
- 4.2 After clarification and deliberations, the budgeted amount was made known, that it is N\$6,759,582.84 including VAT and the determined amount of 10% below the engineer's estimate was N\$6,083,624.56 including VAT. The Applicant then argued that it was surprised to see that the successful bidder's bid price was exactly equivalent to that amount. It was further argued that based on that value, its bid price was just 10.003% below the engineer's cost estimate which is 10% if rounded off mathematically.
- 4.3 The Applicant further argued that the 1st Respondent could have waived this immaterial deviation since in its calculation it proved that its bid amount was just 10%, just differing with a margin of 0.003% with the successful bidder and this was insignificant.
- 4.4 The Applicant prayed that the Review Panel must set aside the decision of the 1st Respondent and instruct the 1st Respondent to re-evaluate correctly.

5. 1ST RESPONDENT'S RESPONSE DURING THE REVIEW HEARING

- 5.1 The 1st Respondent stated that it evaluated all bids fairly in terms of Section 52(9) of the Act and followed what the bidding document requirement stipulated.
- 5.2 The 1st Respondent later provided that the 10% value below the engineer's cost estimate is N\$5,290,108.31 excluding VAT (or N\$6,083,624.56 including VAT) and that the Applicant's bid amount was lower than this and hence was not considered for further evaluation as stated in the bidding document under Section IV: Evaluation Criteria, Phase 3: financial evaluation, part f. II.
- 5.3 The 1st Respondent further stressed that the Review Panel has always been hard on it when it does not evaluate in line with Section 52(9) of the Act, and hence this time around the Public Entity evaluated accordingly and wavering any requirement in favour of the Applicant is unfair to other bidders.

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 It was established that the budget estimate was made by the 1st Respondent as per the approved IPP and based on the engineer's estimate derived by using the bill of quantities (BoQ) is N\$6,759,582.84 including VAT and the determined amount which is exactly 10% below the engineer's estimate is N\$6,083,624.56 including VAT (or N\$5,290,108.31 excluding VAT). That the itemised BoQ was also provided to all bidders for them to bid correctly.
- 6.2 It was also observed that the Applicant's bid amount was N\$6,083,435.60 which is N\$188.96 less than the 10% below the minimum of the engineer's estimate (N\$6,083,624.56). This difference is 10.003% and not exactly 10% as required by the bidding document.
- 6.3 It was further established that the 1st Respondent complied with the evaluation criteria as stated in the bidding document on page 67. Section IV: Evaluation Criteria, Phase 3: financial evaluation, part f. II., stated that "*only bids equivalent to or up to 10% below the engineers cost estimate will be considered for evaluation*" and the Applicant's bid price was below the 10% cost estimated value.
- 6.4 That the Applicant was correctly disqualified. The price offered was outside the threshold prescribed in the bidding document and had the 1st Respondent waived the requirements and considered bid amounts of 10% with decimal points such as 10.003% as per the Applicant's argument, then the 1st Respondent would have contravened Section 52(9) of the Public Procurement Act, 2015 (Act No. 15 of 2015) as amended.
- 6.5. Regarding the issue of how the successful bidder's bid price was exactly equivalent to the engineer's estimated amount, the Review Panel was equally puzzled by that revelation as that brought into question and clouded the integrity of the procurement process, and no proper explanation was provided. The Review Panel did not interrogate this issue further and did not make a finding since it was not a matter put in the review application.

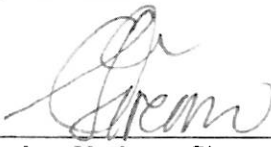
7. DECISION OF THE REVIEW PANEL

Based on the findings as stated above, the Review Panel makes the following order:

7.1 That in terms of Section 60(a) of the Public Procurement Act, 2015 as amended, the Review Panel hereby dismisses the review application filed by the Applicant in respect of BID NO: W/ONB/ORC-03/2023/2024 for Construction of Services Infrastructure in Okalongo – Supply, construction and commissioning of groundwater reservoir and elevated water tower at Extension 2 in Onandjamba Village/Okalongo settlement.

7.2 That the Review Panel hereby confirms the decision of the Public Entity (1st Respondent) in terms of Section 60(e) of the Public Procurement Act, 2015 (Act No. 15 of 2015) as amended.

7.3 The effective date of this Order is 09 November 2023.


Lukas Kudumo Siremo

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

