



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 19 DECEMBER 2023**

IN THE MATTER BETWEEN

**ADAPTIVE BUILDING LAND CONSTRUCTION CC JV CHINA STATE
CONSTRUCTION** **APPLICANT**

AND

CENTRAL PROCUREMENT BOARD OF NAMIBIA 1st RESPONDENT & OTHERS

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

**BID NO: W/ONB/CPBN/01/2023 – PROCUREMENT OF CONSTRUCTION OF THE
NAUTE-KEETMANSHOOP WATER PIPE REPLACEMENT AND ANCILLARY
WORKS: PHASE 1**

Coram: Brownny Mutrifa (Chairperson), with Kenandei Tjivikua, Hellen
Amupolo, Selma-Penna Utonih and Paulina Kandali Iyambo.

Heard: 19 December 2023

Decided: 19 December 2023

ORDER

1. INTRODUCTION:

- 1.1 A hybrid meeting was held, using both physical and virtual modes.
- 1.2 Having heard **Mr. Kadhila Amoomo**, 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) (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 merits of the matter are heard. The Applicant stated that the Second Respondent has not complied with Regulation 42 (4) of the Public Procurement Regulations therefore, the Replying affidavit submitted by the Second Respondent is not properly before the Review Panel and the Second Respondent should not be accorded an opportunity make any representation during these proceedings.

The Second Respondent submitted that Regulation 42 (5) requires that the Review Panel may at any time prior to the date of the hearing of a review application at its own

initiative or on application by a person and if it is convenient to do so allow a number of persons who has a claim for review against a public entity or any other interested persons to join the review proceedings as applicant against the same defendants or as defendant against the same applicant.

The Review Panel agreed to the submissions by the Applicant and informed the Parties that the Second Respondent's Replying affidavit was filed outside prescribed period of 2 days.

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

3.1 The Applicant in its Application for review informed the Review Panel that as per the executive summary, the Applicant who is number 4 in the list was disqualified for three reasons:

- The bidder provided a reference letter for the project in similar works completed however, the reference letter does not indicate the project value nor give a brief description of the scope of work done as required in a ITB 12 (j) 2;
- Schwartzkuppe project the bidder provided a reference letter and take over certificate, however the difference letter does not specify the diameter of the pipe as required in ITB 12 (j)2;

3.2 The Applicant further stated that regarding the Schwartzkuppe project the First Respondent's BEC has agreed and recognized that the Applicant has provided a reference letter and take over certificate, however the First Respondent's BEC stated that reference letter does not specify the diameter of the pipe as required in ITB 12 (j) 2. The reference letter and its accompanying completion and take over certificate contains all the required information, and on this letter alone, the applicant has satisfied the requirement. The BEC was at liberty and in the best procurement practice to confirm with client Namwater on this aspect of diameter.

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

4.1 The Applicant explained that it was disqualified based on the reasons related to ITB 12 (j) 2 and further stated that the bidding document does not contain such an ITB, the mistake has been made and the actual reference should have been 12.1 (j) 2 and this is a clear indication that the First Respondent disqualified the applicant for a not-existing ITB.

4.2 Further, the Applicant submitted that it is provided a list of several projects all meeting the criteria set and that these projects are listed starting on page 110 of the bidding document. The diameter of the 40mm pipe as required has also been listed on page 110 of the bid document as specifically required by the ITB.

4.3 The Applicant submitted that after it submitted a reconsideration application, the first Respondent impermissibly came up with a new reason, which was not contained in the Executive Summary. The reason was however contained in the response to the reconsideration application letter. It is that the letter from Bergstan Consulting Engineers is older than 7 years. The Applicant further submitted that the First Respondent became *functus officio* when it provides the new reason for disqualification.

4.4 Further, the Applicant stated that the First Respondent went on to state that the letter submitted by the bidder was issued in 2015. The fact that the letter was issued in 2015, is not a requirement of the ITB and it does not mean that the Applicant has not done the work or possess the necessary experience. The First Respondent disqualified the Applicant for invalid reasons, this is more important when it's viewed in the context of the financial implications of this bid on Namwater. The First Respondent's bid is higher in price more than N\$14 million, then the bid of the Applicant. The public entity for which the first Respondent is procuring for is expected to spend N\$ 14 million more for such invalid reason.

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

5.1 The 1st Respondent submitted that there was a typo error in the Chairperson's Replying affidavit, the ITB is typed as ITB 21(j)2 instead of ITB 12.1 (j) 2. The First Respondent submitted that the Applicant did not meet the requirements of ITB 12.1 (j) 3 of the bidding document which stipulates that the bidder must submit a list of all plant and equipment to be used on the works as listed in table 2.6 Equipment. In terms of ITB 12.1 (j) (3) proof of ownership is required for movable equipment registered with NATIS and an asset register for any other equipment. The reason provided by the First Respondent with regard to the letter from Bergan consulting Engineers which is older than 7 years is not a new ground for disqualification as per the Applicant's assumption, and therefore, the Applicant cannot state that the First Respondent is *functus officio* because the First Respondent has not yet made a final decision but it has only issued the Notice for selection of award.

5.2 The 1st Respondent explained that the ITB 21.1 (j) (2) reads as follows:

“the bidder must submit a list of a minimum one (1) project in similar work (water pipeline, sewer pipeline, with minimum diameter of 400mm) carried out by the bidder over the last seven (7) years amounting to a project value of N\$ 15, 000,000.00”

“the evidentiary proof shall be in the form of either of the following:

i) *Practical Completion and/or Final Completion Certificate (s), for at least one (1) project from the Project Consultant, principal Agent and/or Project Employer. The said certificate (s) should be accompanied with a supporting reference letter indicating the following:*

- *A brief but accurate description of the scope of works*

- *The contract/project duration, and*
- *The contract/ project amount."*

5.3 On the strength of the above, the 1st Respondent submitted further that the fact that the Applicant submitted a list of several projects is not disputed. However, the Applicant failed to submit the evidentiary proof of the listed projects submitted in the form of practical or final completion certificates and reference letters as reference to the diameter of the pipeline listed.

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 letter provided by the Applicant did not reference to the diameter of the pipeline listed, as a result the First Respondent could not deduce or validate if the applicant has worked on a pipeline with a diameter of 400mm.
- 6.2 The invoice of the batching equipment provided as a proof of ownership and listing of it in the Key equipment as per the first respondent was not adequate to be considered as an asset register, However the Review Panel deems it adequate in the absence of guidance how a assets register must read to be sufficient proof that the applicant has a batching plant and equipment listing is sufficient listed as assets to be used for this particular procurement.
- 6.3 That the First Respondent evaluated bids in accordance with the criteria and methodology set out in the bidding document.

7. DECISIONS OF THE REVIEW PANEL:

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

In terms of Section 60 (a) the Review Panel dismisses the application and confirm the decision of the Board in terms of section 60 (e)

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.



Mr. Brown Mutrifa
CHAIRPERSON: REVIEW PANEL (PRO THIS MATTER)

