



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 05 DECEMBER 2023**

IN THE MATTER BETWEEN

WECCA INVESTMENTS CC

APPLICANT

AND

NKURENKURU TOWN COUNCIL

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/NKU/001/07/2023 – CONSTRUCTION OF MUNICIPAL SERVICES
(ROADS, SEWER, AND WATER RETICULATION) FOR NKURENKURU TOWN
COUNCIL**

Coram: Fillemon Wise Immanuel (Chairperson), with Brown Mutrifa, Kenandei
Tjivikua, Tulimeyo Kaapanda and Mekondjo Katunga.

Heard: 05 December 2023

Decided: 05 December 2023

ORDER

1. INTRODUCTION:

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

1.2 Having heard **Mr. Apollos Shimakeleni**, for the Applicant, **Mr. Peter Kayambu Ntjamba**, for the Respondent, and other interested parties who were joined 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 could be heard. The Applicant informed the Review Panel that it was not served with the replying affidavit and that it has no idea as to when the replying affidavit was filed with the Review Panel.

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

3.1 The Applicant informed the Review Panel that when it received a notice for bidders not selected for the award, it requested for a reconsideration to which the First Respondent responded and acknowledged the error it made during the evaluation by failing to notify the Applicant of the purported arithmetic errors as per Section 52(5) (a) of the Public Procurement Act as amended. Despite conceding to the foresaid violation, the First Respondent alleged further that *“the Applicant could still not have made as it scored less than the successful bidder.”*

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

4.1 The Applicant explained that the first Executive Summary, on page 2, indicated that the Applicant was not responsive because after the recalculation, the corrected bid amount fell below 10% of the proposed budget of the project. Further, ITB 31 enables the employer to correct arithmetical errors as follows: *“Only for unit price contracts, if there is a discrepancy between the unit price and the total price that is obtained by multiplying the unit price and quantity, the unit price shall prevail and the total price shall be corrected, unless in the opinion of the Employer there is an obvious misplacement of the decimal point in the unit price, in which case the total price as quoted shall govern and the unit price shall be corrected.”*

4.2 The Applicant further submitted that its total bid price has not changed, hence should remain the same, and within the said 10% when regarded in terms of the provided Engineer’s estimate of N\$5,799,361.45.

5. 1ST RESPONDENT’S SUBMISSION AT THE REVIEW PANEL HEARING:

5.1 The First Respondent admitting its error in failing to inform the Applicant that it had corrected the Applicant’s bid amount. However, despite this, it insist that the Applicant could still not have make it for award selection as it was outscored by the selected bidder.

5.2 It underscored that as it stands, the Applicant’s bid amount did not. This means that the Applicant was never disqualified based on the amount however, but because it was outscored by the selected bidder in terms of the technical evaluation. Therefore, the Applicant’s application lacks falls merit rendering it unattainable for the First Respondent has fully complied with the requirements of Section 55(1) of the Public Procurement Act, (Act No.15 of 2015) as amended. The First Respondent prayed for an affirmation of its decision in this regard.

6. FINDINGS OF THE REVIEW PANEL

Having heard the Parties and having further considered the augmenting written submissions of the Parties, the Review Panel made the following findings:

- 6.1 That although the arithmetic error was given to the Applicant as the reason for its disqualification, the First Respondent informed the Review Panel during the hearing that this was not the case, for the Applicant's bid amount was never changed.
- 6.2 That the First Respondent acted contrary to Section 52(9) of the Public Procurement Act 15 of 2015 as amended, by using an evaluation formula which was not in the bidding documents.

7. DECISIONS OF THE REVIEW PANEL:

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

- 7.1 That the notice issued by the 1st Respondent and dated 01 November 2023 of the Bid No: W/ONB/NKU001-07/202E – Construction of Municipal services (Roads, Sewer, and Water Reticulation) for Nkurenkuru Town Council, is hereby declared as *ultra vires*, unlawful and therefore set aside in terms of Section 60(c) of the Public Procurement Act.
- 7.2 Further, the matter is referred back to the 1st Respondent with the following specific instructions:
 - a) That in terms of Section 52(9) of the Act as amended, the 1st Respondent must re-evaluate all bids according to the criteria and methodology set out in the bidding documents; and
 - b) That the First Respondent should only do the financial evaluation.
- 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.



Mr. Fillemon Wise Immanuel
CHAIRPERSON: REVIEW PANEL (IRO THIS MATTER)

