



**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 APPLICATION  
HELD ON 10 MAY 2024**

**IN THE MATTER BETWEEN**

**OTESA CIVIL ENGINEERING (PTY) LTD**

**APPLICANT**

*and*

**ROADS AUTHORITY  
NAMIBBETON (PTY) LTD  
AND OTHERS**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> -6<sup>TH</sup> RESPONDENTS**

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

Bid No: W/ONB/RA-30/2022 – UPGRADING OF MR 119 (T0602 TO KM 6 TALISMANUS) TO LOW VOLUME SEAL STANDARDS PHASE 1 OMAHEKE REGION

**Coram: Ehrenfried Honga (Chairperson), Lukas Kudumo Siremo, Selma-Penna Utonih, Tulimeyo Kaapanda and Gilbert Habimana.**

**Heard: 10 May 2024**

**Decided: 10 May 2024**

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**REVIEW PANEL ORDER**

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**1. INTRODUCTION:**

1.1 The Review Panel was constituted in terms of section 58 (1) of the Public Procurement Act, 2015 as amended to hear a review application lodged by the Otesa Civil Engineering (PTY) Ltd, hereinafter referred to as the “Applicant”, against Roads Authority, a public entity, hereinafter referred to as the “1<sup>ST</sup> Respondent” whereby the Applicant sought relief from the Review Panel to correct the decision of the First Respondent and order that the Applicant's Bid is fully responsive in that the Applicant is solely owned by Elmo Kaiyamo, amongst others.

1.2 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. GROUNDS FOR THE REVIEW AS CONTAINED IN THE APPLICATION BY THE APPLICANT**

2.1 The Applicant is aggrieved by its disqualification in that the bid was found not responsive on the basis that the Applicant has two owners listed as per the company documents and that a valid proof of citizenship has not been provided by the 2<sup>nd</sup> owner as per the evaluation criteria, section III/5 of the bidding document (ITB 1.1 (b)).

2.2 The Applicant believes that the 1<sup>ST</sup> Respondent got it wrong, as the deponent is the only owner of the Applicant and has owned all shares since January 2024. The deponent indicated that the second owner had resigned before the applicant’s bid was submitted in respect of the bid in review.

2.3 The Applicant further argued that the Memorandum of Association, Form CM 2 - Part C and Form CM44 C, were signed in 2013 by two (2) owners, who were equal partners in the Applicant, whilst the latest Share Certificate No 7, issued on 16<sup>th</sup> of January 2024 clearly identifies, the undersigned, as the sole registered proprietor of two hundred (200) Ordinary Shares.

2.4 Further, the Applicant submitted that a certain Mr Jerry Mameja's 100 shares were transferred to Mr Elmo Kaiyamo, making him the sole registered proprietor of the entity owning all the two hundred

(200) ordinary shares. In this regard, the Applicant referred to a register information sheet from Khomas Secretarial Services CC, showing the transfer of the said shares.

2.5 On these grounds, the Applicant takes issue with its disqualification and views it as unfair and unreasonable. It believes that its bid was fully responsive, and there was no need to include the identity of the applicant's second owner, as suggested by the first respondent.

### **3. APPLICANT'S SUBMISSION AT THE REVIEW HEARING**

3.1 Mr Ronald Ketjijere of the Applicant reiterated that the grounds as contained in the application remain. He, however, cemented that the main or the crack of the matter is whether the Applicant at the time of bid submission was owned by two different owners or shareholders, and it is his submission that it was not the case as the other owner, in the name of Mr Jerry Mameja had resigned as a Director, and his shares were successfully transferred to Mr Elmo Kaiyamo who then became a sole owner of the Applicant.

3.2 Further, Mr Ketjijere indicated that, as per the Instructions to Bidders (ITB) by the first Respondent, bidders should attach the owner's identity documents. It was, therefore, impossible for the Applicant to submit an identity document for the former owner, who had already resigned or ceased to be the owner of the entity. He further invited the Review Panel to note that no amendment was made to the founding documents of the entity, only the transfer of the shares as per the share certificate entered into records.

3.3 Mr Ketjijere further made a supplementary submission of a confirmatory affidavit by a certain Christina Maria Jurgens, a member of the Khomas Secretariat Services CC, confirming the transfer of shares.

### **4. 1<sup>ST</sup> RESPONDENT 'S SUBMISSION AT THE REVIEW HEARING**

4.1 The 1<sup>ST</sup> Respondent indicated that its submission is premised on the Replying Affidavit as deposed by its Chief Executive Officer. The Respondent indicated that the submission of identity documentation by the Applicant is not in dispute. However, the First Respondent indicated that it is important to note that the evaluation of bids was done based on what was submitted by the Bidder.

4.2 The 1<sup>ST</sup> Respondent made a submission that the Articles of Association submitted by the Applicant indicate that the entity consists of 4000 ordinary shares and indicates two owners, namely Elmo Kaiyamo with 50 ordinary shares and Jerry Mamela with 50 ordinary shares. Further, it is the Respondent's considered view that as per the Companies Act of 2004, if redistribution in shares percentage occurred, then change must be registered with BIPA, and a new Article of Association will be issued indicating new owners, each with their respective share percentage. The Applicant did not attach the revised Articles of Association indicating that Elmo Kaiyamo is the sole owner but only submitted a share certificate indicating that Elmo Kaiyamo owns 200 shares. This alone does not indicate sole ownership.

4.3 Further, it is the 1<sup>ST</sup> Respondent's submission that the share certificate does not indicate ownership but only the number of shares a certain individual has in the entity. The 1<sup>ST</sup> Respondent further noted that the evidence submitted during the hearing demonstrating share transfer and ownership was not part of the Applicant's bid.

## 5. FINDINGS OF THE REVIEW PANEL

Having heard the Parties and having considered the written submissions and other related records, the Review Panel made the following findings:



- 5.1 That the Applicant failed to comply with the requirements of the Bidding Document, specifically to the evaluation criterion III/5 relating to ITB 1.1(a) of the Bidding document, which indicates that the bid is reserved for Namibian registered entities with 100% shareholding vesting in Namibian citizens and that Bidders should provide valid certified copy of proof of citizenship in the form of Namibian Identity Document (ID), certified by a Commissioner of Oath;
- 5.2 That the evidence submitted by the Applicant at the time of bid submission indicates the company is owned by two shareholders, each with 50 ordinary shares; that is a total of 100 issued shares of the 4000 authorized. Further evidence indicates the resignation of Mr Mameja as a Director, but not as a shareholder in the Applicant;
- 5.3 That at the time of bid submission, there was neither evidential proof of the movement/transfer of the shares from Mr Mameja to Mr Kaiyamo; nor how Mr. Kaiyamo's shares increased from 50 to 200 shares indicated in the share certificate. That the share certificate that was attached to the bid only shows the number of shares owned by Mr Kaiyamo. However, nowhere in the evidence was it indicated that he is the "sole owner" of the applicant;
- 5.4 That the movement in shareholding ought to be registered or recorded with the Business and Intellectual Property Authority (BIPA). In fact, a Form CM 42 issued in terms of section 141 of the Companies Act ought to be issued.
- 5.5 Based on the above findings, the Review Panel considers that the Applicant's bid was fairly disqualified from the bidding process as it failed to satisfy the requirements of the Bidding document, specifically the criterion III/5 correlated to ITB 1.1 (a) and (b) of the Bidding Document.

## 6. DECISION OF THE REVIEW PANEL

Based on the above findings, the Review Panel Orders the following:

- 6.1 That, in terms of section 60(a) of the Public Procurement Act, 2015 (Act No. 15 of 2015) the Review Panel hereby dismisses the review application and further, in terms of section 60(e) of the Act, the Review Panel confirms the decision of the public entity.

- 6.2 That this Order is effective from 10 May 2024

  
  
Ehrenfried Hong  
CHAIRPERSON: (Finance & Public Enterprises)