



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 02 MAY 2024

IN THE MATTER BETWEEN

TOIVO NUUGULU ARCHITECTS JV BOB MOULD ARCHITECT 1ST APPLICANT

RUBEN REDDY ARCHITECTS (PTY) LTD

2ND APPLICANT

and

MINISTRY OF SPORT, YOUTH AND NATIONAL SERVICES 1ST RESPONDENT

MARLEY TJITJO ARCHITECTS

2ND RESPONDENT

AK CONSULTING ENGINEERS

3RD RESPONDENT

& OTHERS

**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: SC/RP/027-05/2023 – PROVISION OF LEAD CONSULTANCY SERVICES :
(ARTCHITECTURAL, CIVIL/STRUCTURAL, ELECTRICAL AND MECHANICAL
ENGINEERING AND QUANTITY SURVEYING) REQUIRED FOR DESIGN,
DOCUMENTATION AND SUPERVISION FOR THE UPGRADING AND
RENOVATION OF THE INDEPENCE STADIUM, WINDHOEK TO
CONFEDERATION OF AFRICAN FOOTBALL (CAF) STADIUM REGULATIONS
CATEGORY 3**

Coram: Tulimeyo Kaapanda (Chairperson), with Lukas Kudumo Siremo,
Ehrenfried Honga, Gilbert Habimana and Hellen Amupolo.

Heard: 2 May 2024

Decided: 2 May 2024

ORDER

1. INTRODUCTION:

- 1.1 A hybrid meeting was held, using both physical and virtual modes.
- 1.2 Having heard, **Mr. Tangeni Ausiku** for the 1ST Applicant, **Adv. Tinashe Chibwana** for the 2ND Applicant, **Mr. Nicolars Tebwe** for the 1ST 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 records, the Review Panel made the following findings and subsequent order hereunder towards the end.

2.2 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.

- 2.2 The 1ST Respondent sought to determine if there were any additional replying affidavits that were not served on the public entity, aside from the one submitted by Marley Tjitjo Architects (the 2ND Respondent), which the public entity is privy to.
- 2.3 The 1ST Applicant indicated that the replying affidavit from the 1ST Respondent, was filed late hence violated Regulation 42(4) of the Public Procurement Regulations, 2017 and as such its review application is unopposed. The Review Panel invoked Regulation 44 in order to engage the 1ST Respondent where necessary when clarity was needed.
- 2.4 The 2ND Respondent challenged that the deponent, a certain Kondjeni Nkandi of the 2ND Applicant neglected to assert their authorization to initiate the review application as they were not part of the bidders, thus suggesting that the application be dismissed solely on that basis. The Review Panel clarified that based on the documents and records submitted by the 1ST Applicant, it is observed that Kondjeni Nkandi is a member of Nkandi Architects Incorporated and Nkandi Architects Incorporated was part of the bidder as it made a joint venture with Ruben Reddy Architects.

3. GROUNDS FOR THE REVIEW AS CONTAINED IN THE 1ST APPLICANT'S APPLICATION FOR REVIEW:

- 3.1 The 1ST Applicant (Toivo Nuugulu Architects Inc JV Bob Mould Architect) in its application for review informed the Review Panel that in terms of Article 18 of the Namibian Constitution, the administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.
- 3.2 The 1ST Applicant further submitted that the 1ST Respondent has not acted in accordance with Article 18 as it has failed to exercise its discretion fairly and reasonably by its non-compliance with the provisions of the Procurement Act 15 of 2015.
- 3.3 The 1ST Applicant stated that Section 55(4) of the Public Procurement Act, 2015 as amended mandates that "*an Accounting Officer or the Chairperson of the Board where the Board is procuring on behalf of a public entity must, in the prescribed manner and form, notify*" –
- (a) *The successful bidder of the selection of its bid for award; and*
 - (b) *The other bidders, specifying the name and address of the successful bidder and the price of the contract, accompanied by the executive summary of the bid evaluation report*".
- 3.4 Further, the 1ST Applicant submitted that the 1ST Respondent failed to comply with above in that when the Applicant was notified of the selection of award, the purported

“Executive Summary” provided does not detail how the first respondent examined the and evaluated the Applicant’s bid.

4. GROUNDS FOR THE REVIEW AS CONTAINED IN THE 2ND APPLICANT’S APPLICATION FOR REVIEW:

- 4.1 That the 1ST Respondent acted unlawfully when it sought to disqualify the Applicant’s bid by relying on evaluation criteria that did not emanate from the bidding documents.
- 4.2 The 2ND Respondent did not meet the evaluation criteria specified at section 2 Instructions to Consultants (the bidding documents) and was wrongly awarded a score of 97.5 by the 1ST Respondent.

5. 1ST APPLICANTS’ SUBMISSIONS AT THE REVIEW PANEL HEARING:

- 5.1 The 1ST Applicant (Toivo Nuugulu Architect JV Bob Mould Architect) submitted that the 1ST Respondent failed to comply with Section 55(4) of the Public Procurement Act which mandates the Accounting Officer to notify the successful bidder of the selection of its bid for award and, the other bidder, specifying the name and address of the successful bidder and the price of the contract and the Notice must be accompanied by the executive summary of the bid evaluation report. The 1ST Respondent failed to fully comply with Section 55(4) because the executive summary provided does not detail how the 1ST Respondent examined and evaluated bids.
- 5.2. The 1ST Applicant further submitted that it was prejudiced by the conduct of the 1ST Respondent in failing to provide detailed report and the reasons which lead to the 1ST Applicant being unsuccessful and how did the 1ST Respondent arrive to 90.5 as the score of the 1ST Applicant.
- 5.3 The Review Panel queried if the 1ST Applicant has any opinion what it deemed to be its total bid score or points. The Applicant indicated that as far as it was concerned the 1ST Respondent should have awarded it 100 points as it fully complied and met all the technical requirements.
- 5.4 On the strengths of the review grounds, the 1ST Applicant prayed that the Review Panel refer the matter back to the 1ST Respondent for re-evaluation.

6. 2ND APPLICANTS’ SUBMISSIONS AT THE REVIEW PANEL HEARING:

- 6.1 The 2ND Applicant (**Ruben Reddy Architects (Pty) Ltd**) submitted that the its application is based on the non-compliance by the 1ST Respondent when it disqualified the Applicant’s bid relying of an evaluation criteria that did not emanate from the bidding document. The 2ND Applicant further submitted that it was among the bidders that qualified for Phase 2 of the evaluation process, which was the technical evaluation stage. It is evident that the evaluation criteria for this bid was premised solely on the

technical quality of the bid as contemplated by Section 27(1)(e)(ii) of the Public Procurement Act, 2015. It is the Applicant's submission that price was not specified in bidding document as part of the evaluation criteria.

- 6.2 Upon inquiry by the Review Panel, the 2ND Applicant submitted that the bidding document did not provide for a disqualification of the financial proposal on any ground whatsoever, neither does the bidding document require the bidder to submit the information that was suddenly the basis of evaluation. The 2ND Applicant further submitted that the decision by the 1ST Respondent is unlawful because it is *ultra vires* the provisions of the bidding document and created evaluation criteria that was not specified in the bidding document.
- 6.3 On the strength of above grounds, the 2ND Applicant prayed that the Review Panel direct the 1ST Respondent to act in compliance with the provisions of the bidding documents and the Public Procurement Act, 2015 (Act no. 15 of 2015).

7. 1ST RESPONDENT'S SUBMISSIONS AT THE REVIEW PANEL HEARING

- 7.1 On the matter of the 1ST Applicant, the Review Panel requested the 1ST Respondent to utilize the bid evaluation report to specifically indicate the specific technical evaluation where points or marks were lost. The 1ST Respondent argued that it had evaluated correctly and that the applicant did not get full scores or points on those technical areas because the Applicant did not provided all the necessary information.
- 7.2 The Review Panel queried as how did the Bid Evaluation Committee (BEC) ended up scoring half of the full marks on areas which only had full points/marks, and also why not zero (points). The 1ST Respondent indicated that, it was based on the BEC's understanding and interpretation depending on the information given and if such information was not fully satisfactory, then half of the full points were given.
- 7.3 The Review Panel further requested the 1ST Respondent to clarify as why its executive summary did not provide the most relevant information as requested by the 1ST Applicant, the 1ST Respondent argued that the Act does not mandate public entities to provide the full bid evaluation report but only the executive summary of it. In that case the 1ST Respondent provided bidders with a correct executive summary as per the standard template provided on the website of the Procurement Policy Unit.
- 7.4 On the 2ND Applicant's application, when the 1ST Respondent argued that on it did not take into account a situation where two bidders will have the same score and results in a tie. Due to that situation, the 1ST Respondent then derived its powers from Section 35(8) as it conducted the procurement activity in terms of Section 27(b)(ii) and evaluate financial proposals of the 2ND Applicant and the 2ND Respondent, which resulted in the 2ND Respondent being the most responsive.

8. 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:

- 8.1 That the 1ST Respondent acted contrary to Section 52(9) of the Public Procurement Act, 2015 as amended as the evaluation was not conducted in accordance to the criteria and methodology set out in the bidding document. The 1ST Respondent further evaluated bidders using a financial criteria whilst it was not part of the bidding document requirements.
- 8.2 That in terms of the bidding document requirement, the 1ST Respondent was supposed to negotiate with a consultant who obtains the highest score and upon successful negotiations it could then have proceeded to issue an award. Furthermore, it was part of the bidding document requirement that in an event where the negotiations are not successful, the public entity will negotiate with the second highest ranked bidder.
- 8.3 That some of the evaluation criteria were not clear as how marks/points will be allocated and based on which information could a bidder get 0 points, full points or half of the full points. It was observed that the BEC was subjective on how to allocate the points.
- 8.4 That the public entity was not clear as to what is the estimated value of the contract in the Individual Procurement Plan (IPP) hence lacked clarity regarding the threshold within which it falls.

9. DECISIONS OF THE REVIEW PANEL:

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

- 9.1 That in terms of Section 60(c) of the Public Procurement Act, 2015 as amended the Review Panel hereby set aside in whole the Notices for Selection of Award that were issued on 26 March 2024.
- 9.2 That in terms of Section 60(f) of the Public Procurement Act, 2015 as amended the Review Panel hereby order that the procurement proceedings be terminated and start afresh.
- 9.3 The Public Entity must provide proof of implementation of this Order to the Procurement Policy Unit within thirty days of receipt of this Order, and a copy to be served to the Review Panel Secretariat.


TULIMEYO KAAPANDA

CHAIRPERSON: REVIEW PANEL (IRO MATTER)

