



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 04 SEPTEMBER 2024

IN THE MATTER BETWEEN

DYNAMITE CONTRACTOR INVESTMENT (PTY) LTD

APPLICANT

AND

**CENTRAL PROCUREMENT BOARD OF NAMIBIA (CPBN) 1st RESPONDENT
& 115 OTHER RESPONDENTS**

**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/OAB/CPBN-05/2023 – NOMINATED SME-SUBCONTRACTORS FOR
THE BLADING OF GRAVEL ROADS IN THE OTJIWARONGO REGION ON
BEHALF OF ROADS AUTHORITY**

Coram: Kenandei Tjivikua (Chairperson), with Brownny Mutrifa, Lukas Kudumo
Siremo, Paulina Kandali Iyambo and Tulimeyo Kaapanda.

Heard: 04 September 2024

Decided: 04 September 2024

ORDER

1. INTRODUCTION:

- 1.1 A hybrid meeting was held, using both physical and virtual modes.
- 1.2 Having heard Adv. Mbushandje Ntinda for the Applicant, Mr. Festus Hamukwaya 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) as amended (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. All Parties have indicated that they had no preliminary issues to raise. The Chairperson then granted the Applicant the opportunity to present their case.
- 2.2 The Chairperson introduced the matter and informed the Parties that this case was heard by the Review Panel on 29 July 2024, and the decision of the Review Panel was communicated to the Parties on 07 August 2024, which dismissed the review application lodged by Dynamite Contractor Investment (Pty) Ltd. The Applicant lodged an urgent application at the High Court and the decision of the Review Panel was

reviewed, set aside, and declared null and void and of no force and effect by the High Court on 16 August 2024.

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

- 3.1 The Applicant stated in its application for review that some of the objectives of the Act as stated under Section 2 thereof are to promote informed decision-making, and legality and to promote integrity and accountability in the public procurement process in Namibia. The Applicant further submitted at the onset that the 1st Respondent did not, in this matter, live up to these noble objectives. Its action/decision is subversive of such objectives as demonstrated therein. There was neither informed decision-making nor did the 1st Respondent comply with the doctrine of legality and all other requirements for fair decision-making.
- 3.2 The Applicant submitted that the 1st and 2nd Respondents are administrative bodies and officials respectively as contemplated under Article 18 of the Namibian Constitution which requires that the public administrative bodies and officials must act in a manner that is reasonable and fair when taking public administrative decisions.
- 3.3 The decision based on the basis of which the Applicant was disqualified and lost out on the bid as set out in the reasons incorporated in the Notice for Selection of procurement award is to the effect that firstly, the Applicant (the bidder) provided a responsive bid to two (2) among the four maintenance regions being the Otjiwarongo Region and Keetmanshoop maintenance regions in that it technically and financially qualified for the bids. Secondly, the impugned decision reads that *"please note that the allocation of Lots was done in consideration of bidders awarded contract areas in other regions such as Oshakati, Keetmanshoop, and Windhoek, as stated on page 41, item (v) of the bidding document"*.
- 3.4 This, therefore, meant that since a bidder was awarded a contract area in the Keetmanshoop, Oshakati, and/or Windhoek maintenance regions, such a bidder was not to be considered again for a contract in the Otjiwarongo region though it may have been responsive (technically and financially). This interpretation is wrong considering that the Applicant was only awarded one contract area which is in the Keetmanshoop maintenance region and never had a maximum of two contract areas.

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

- 4.1 The Applicant briefly outlined the chronological sequence of events by stating that it suffices to mention that the Applicant was before this Review Panel on 29 June 2023 with the same matter and relied on the following grounds for review at the time: A nominated SME-Subcontractor shall only be considered for only one (1) lot per Region and a total maximum of two (2) contract areas across the four (4) Roads Authority

maintenance regions i.e., Keetmanshoop, Windhoek, Otjiwarongo and Oshakati and the 1st Respondent decision was set aside and the Review Panel ordered on 29 June 2023 that the 1st Respondent award a procurement contract to the bidder having submitted the lowest evaluated substantially responsive bid in accordance with Section 55 (1) of the Act. This decision is still standing as it was never challenged nor set aside.

4.2 The 1st Respondent persisted that the Applicant, even though it is responsive and the lowest evaluated bidder, cannot be awarded a second lot in another region which is contrary to what the bidding document states.

4.3 The Applicant further stated that the bid (W/OAB/CPBN-08/2022) the 1st Respondent is referring to in its replying affidavit is different from the one in dispute (W/OAB/CPBN-05/2022). The Applicant reiterated that it was never served with any Court proceedings by the 1st Respondent as is specifically mentioned in its letter of 01 December 2023. The Applicant was only served with a revised Notice of Award awarding the lots to the 4th to 12th Respondents.

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

5.1 The 1st Respondent submitted that as far as these bids are concerned, the 1st Respondent has gotten different decisions from the Review Panel about these bids. The 1st Respondent further submitted that the decision of the High Court did not indicate that the decision of the Review Panel must stand but it simply set aside the decision of the Review Panel dated 14 June 2023.

5.2 The 1st Respondent submitted that all bids were evaluated in accordance with the criteria and methodology set out in the bidding documents and that the 1st Respondent followed the evaluation criteria in the bid document, hence the Applicant was not given a second lot in area 04 for Nominated SME for blading of Gravel Roads in the Otjiwarongo Region.

6. INTERESTED PARTY (OBRIEN AND FORTUNE INVESTMENTS CC)

6.1 The 2nd Respondent submitted that the Applicant referred to the consideration criteria in terms of the allocation of contract areas as indicated in the bidding document. However, the Applicant failed to indicate the required conditions to get allocated more than one lot across all four Regions as stipulated in the bidding document as follows:

"However, in case there are no compliant bidders remaining with respect to any given contract areas, the procuring agent may award more than one contract area to the lowest evaluated and substantially responsive bidder. This means that multiple contracts shall only be awarded to the same bidder on condition that:

1. Bidder's Financial capacity ceiling declared in Section V Part B2 is not exceeded.

2. *Bidder has demonstrated adequate technical capacity and.*
3. *There are no compliant Bidders without a Contract Area being awarded."*

7. FINDINGS OF THE REVIEW PANEL

Having heard the Parties at the Review Panel hearing and having considered the written submissions of the Parties, and records that disqualified the Applicant, the majority of Review Panel members made the following findings:

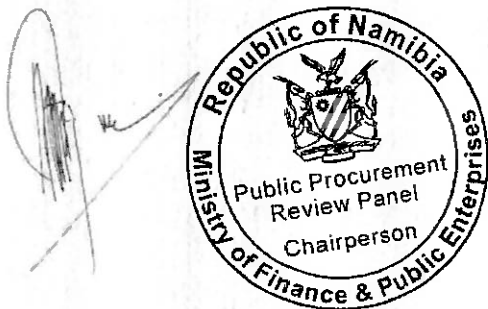
- 7.1 The 1st Respondent continued referencing to the High Court case (HC-MD-CIV-MOT-REV-2023/00301) that dealt with a different bid which has similar works for a different region, however, the review application of that matter is different from the review application now before the Review Panel. Thus, the 1st Respondent should have acted on the decision and order of the Review Panel of 29 June 2023 instead of alleging that it first needed to have a decision of the High Court for bid reference number W/OAB/CPBN-08/2022 concerning Keetmanshoop maintenance region or areas of which this was decided on 14 June 2023 by the Review Panel. It is thus established that the High Court matter (HC-MD-CIV-MOT-REV-2023/00301) involved a different bid number W/OAB/CPBN-08/2022 and did not address or challenge this particular bid of reference number W/OAB/CPBN-05/2022 concerning with Otjiwarongo maintenance region or areas.
- 7.2 As per the high court judgement (HC-MD-CIV-MOT-REV-2024/00383), the Notice of Award of procurement issued on 1 July 2024 in terms of Section 55(8) of the Act as amended for bid reference number W/OAB/CPBN-05/2022 was reviewed and set aside and declared null and void and of no force and effect and all parties were restrained and interdicted from awarding, implementing, or executing and concluding a procurement contract in the Procurement of nominated SME Subcontractor for the Blading of Gravel Roads in the Otjiwarongo Region on behalf of Roads Authority, Procurement Reference No. W/OAB/CPBN-05/2022 pending the finalisation of the Applicant's review application by the 1st Respondent.
- 7.3 The Review Panel decision dated 29 June 2023 for bid reference number W/OAB/CPBN-05/2022, which directed the 1st Respondent to comply with Section 55(1) of the Act was neither implemented by the 1st Respondent nor set aside by the High Court and hence the 1st Respondent has further violated the Act by not complying as required. Thus, the 1st Respondent cannot claim nor use the High Court judgement which dealt with the decision of the Review Panel dated 14 June 2023 for bid number W/OAB/CPBN-08/2022 and it is established that the merits are not the same since in the latter matter the Applicant (the bidder) was already awarded two contract areas in the same maintenance region of Windhoek when it participated in the bidding process.

- 7.4 It is observed that the 1st Respondent continues to further misinterpret its own criteria which is clear as indicated in the bidding document on page 41 under criteria 1.2(v) which states that, *“A Development Contractor shall only be considered for only one (1) Contract Area per Region; and in total a maximum of two (2) contract areas (emphasis underline) across the four (4) Roads Authority maintenance regions i.e. Keetmanshoop, Windhoek, Otjiwarongo and Oshakati. However, in case there are no compliant bidders remaining with respect to any given Contract Areas, the Procuring Agent may award more than one Contract Area to the lowest evaluated and substantially responsive bidder”*. In addition, it is indicated that a bidder can be awarded multiple contracts in the region provided there are no complaint bidders, and this was made as a special case with its conditions as stated in paragraph 6.1.
- 7.5 Pursuant to paragraph 7.4, the bidding document evaluation criteria as set out from pages 41 to 45 clearly explained how the evaluation will be carried out and further explained what is meant by a contract area of which part B under evaluation criteria 1.2.1 states that; *“Each Contract Area is regarded as a separate Contract and will be evaluated and awarded separately, regardless of the fact that these Contract Areas have been included in the same Bidding Document.”*
- 7.5.1 It is established that if a bidder participating in this bidding process is already awarded two contract areas by the procuring agent (1st Respondent), such a bidder has reached a maximum of two contract areas across the four Road Authority’s maintenance regions and such two contract areas can be from one region or different regions. *However, a bidder under special circumstances as indicated in the bidding data sheet requirements of the bidding document and the evaluation criteria from pages 41 to 45, may still qualify to get two contract areas from the same maintenance region or three contract areas or more provided that such a bidder is the only compliant bidder in that specific maintenance region in accordance with the bidding document requirements.*
- 7.6 Pursuant to paragraph 7.5 with the review application and based on the arguments raised by other interested parties, it is established that the Applicant was awarded one lot or contract area in the Keetmanshoop maintenance region. Furthermore, it was found that despite the Applicant being the 1st ranked bidder in all lots or areas from the Keetmanshoop maintenance region, it could not be awarded more than one contract area since there were other compliant bidders in that specific bid and hence the special condition of multiple contract areas could not apply. It is however established that under this specific bid (W/OAB/CPBN-05/2022), for which the review application was submitted, it is clear that the Applicant can still be awarded another lot or contract area since it did not reach a maximum of two contract areas. Moreover, the Applicant met all the requirements and qualifies to be awarded another contract area to have a maximum of two contract areas across all the four Road Authority’s maintenance regions, i.e., Keetmanshoop, Windhoek, Otjiwarongo, and Oshakati.

8. DECISIONS OF THE REVIEW PANEL:

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

- 8.1 That, in terms of Section 60(c) of the Act as amended, the decision of the 1st Respondent based on the Notice for Selection of Award dated 31 May 2024 is hereby set aside in whole and the matter is referred back with the following must instructions:
- 8.1.1 That, based on the 1st Respondent's reevaluation in which it issued a Notice for Selection of Award dated 31 May 2024 as per the Bid Evaluation Report, the 1st Respondent must comply with Section 55(1) of the Act as amended.
- 8.1.2 That, the 1st Respondent must issue a cancellation of the Notice for Selection of Award dated 31 May 2024 and once it makes the required corrections in compliance with the Act, it must then issue a revised Notice for Selection of Award.
- 8.1.2 That, the Review Panel order of 29 June 2023 still stands and of which this order is found to agree to the same decision and interpretation. Thus, the 1st Respondent is instructed to comply with the provisions of the Public Procurement Act, 2015 as amended.
- 8.2 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.
- 8.3 That the effective date of this Order is 04 September 2024.



KENANDEI TJIVIKUA

CHAIRPERSON: REVIEW PANEL (FOR THIS MATTER)
