



REPUBLIC OF NAMIBIA

MINISTRY OF FINANCE

PUBLIC PROCUREMENT REVIEW PANEL

Tel. : (00 264 61) 209 2319

Fax : (00 264 61) 236454

Head Office,
Moltke Street,
Private Bag 13295,
Windhoek

Enquiries: K. Shigwedha

**IN THE PUBLIC PROCUREMENT REVIEW
HELD ON 09 & 12 MARCH 2021**

IN THE MATTER BETWEEN

Namibia Protection Services

Omle Security Services cc

Bertha Security Services cc

1st Applicant

2nd Applicant

3rd Applicant

AND

Central Procurement Board of Namibia

First Respondent

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

BID NO: NCS/ONB/CPBN-02/2020: PROVISION OF SECURITY SERVICES TO TELECOM.

Present: Hellen Amupolo (Chairperson) with Selma-Penna Utonih, Dr. Petrina Johannes,
Fillemon Wise Immanuel, Michael Gaweseb.

Heard : 09 March 2021

Decided : 12 March 2021

REVIEW PANEL ORDER

The meeting took both the physical and virtual modes.

Having heard Mr. Cobus Visser, for the First Applicant, Mr. Brenden Ashley for the Second Applicant, Mr. Appolos Shimakeleni for the Third Applicant, Mr. Festus Hamukwaya for the First Respondent and other interested parties who were joined in terms of Regulation 42(5) (a) of the Regulations (hereinafter referred to as the Regulations) to the Public Procurement Act, No. 15 of 2015 (hereinafter referred to as the Act) and having read the applications 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.

1. *Validity: Social Security Commission Good Standing Certificates*

All three applicants were synonymous in their contestation that their Social Security Commission (hereinafter referred to as SSC or Commission) Good Standing Certificates, as were submitted before or by the closing date of the bidding process are valid because there was no expiry date or validity period indicated on the certificates.

The First Applicant submitted that no law or policy prescribes the expiry date or validity period of the SSC Good Standing Certificate (s). The First Applicant further alleged that they submitted their bidding document on the 03 July 2020 which was the initial deadline indicated in the bidding document, and that they were never notified of the new change in the bid closing date of 27 July 2020. The First Applicant further indicated that they never signed the notices of extension issued by the First Respondent, compelling bidders to take note and accept the new bid closing date, respectively.

The First Applicant submitted that no law or policy prescribes the expiry date or validity period of the SSC Good Standing Certificate (s). The First Applicant further alleged that they submitted their bidding document on the 03 July 2020 which was the initial deadline indicated in the bidding document, and that they were never notified of the new change in the bid closing date of 27 July 2020.

The Second Applicant submitted that the SSC Good Standing Certificates indicate no expiry dates. Further, if the First Respondent was fair during its bid evaluation process, it would have reached out to them and request the re-submission of SSC Good Standing Certificates as at the point of evaluation. This omission made the process flawed, resulting in a biased, unfair and unlawful decision when considered in the context of Section 2 of the Act, read with Article 18 of the Namibian Constitution.

The Third Applicant submitted that there was a distinctive difference between the Good Standing Certificates issued by the Inland Revenue of the Ministry of Finance and the ones that the SSC issues. The former provide certainty in terms of the expiry dates, while the latter is open with no expiry dates indicated. Therefore, it is not discretionary to the First Respondent to determine if the SSC Good Standing Certificates are valid or not. Further, that its SSC Good Standing Certificate was valid on the submission date and is still valid in the absence of an expiry date indicated on the certificate.

The First Respondent contended that the SSC Good Standing Certificates of the three applicants were invalid as at the bid-closing date of 27 July 2020. Further, that SSC Good Standing Certificates are valid only for 30 days from the date they were issued. The First Respondent drew this conclusion from the SSC's letter dated 23 September 2020, following its request for clarification during the evaluation process, furthermore, that all applicants only submitted their bids on the 27 July 2020.

There were several issues ancillary to the validity question of the SSC Good Standing Certificates as tabulated below.

1.1 Invitation and attendance of the review proceedings by an official from SSC

This issue could only be dealt with a bit later into the proceedings, when the First Respondent requested an official from the SSC to augment its submission on the invalidity of the SSC Good Standing Certificates for some bidders, including the applicants. The Review Panel acting *moro motu* enquired on the lawfulness of both the invitation and attendance of the review proceedings by the said official thereof.

The First Respondent indicated that the official from the SSC was in attendance on its invitation as it had envisaged that the validity of the Good Standing Certificates issued by the Commission was going to be central to the review proceedings.

The Review Panel enquired where the First Respondent derived the powers from of inviting or joining persons to the review proceedings. The First Respondent indicated it had thought the Commission would assist the Review Panel in understanding its letter of 23 September 2020. The Review Panel noted that the letter was clear and it would not require the assistance of someone, not a party to the proceedings to understand the same.

1.2 Letter from the Social Security Commission dated 23 September 2020

The Review Panel interrogated the SSC's letter to ascertain if it says what the First Respondent said it says. Paragraphs 3 and 4 were more relevant to the issue in dispute. Paragraph 3 specifically says:

"The Commission's good standing certificate is only valid for the month it was issued. This is based on the fact that employers have a grace period of thirty (30) days (after the end of each month) to ensure that their respective MSD contributions is paid to the Commission"

The Review Panel pointed out that nowhere does the above paragraph indicate that the Good Standing Certificate was only valid for 30 days as concluded by the First Respondent. The Review Panel observed that the paragraph indicates that a certificate is only valid for the month it was issued, i.e if the certificate was issued on 29 June 2020, it expired on 30 June 2020, literally only valid for one day. Further, the 30 days referred to in the paragraph is the grace period that employers have to ensure payment of their MSD contributions and not for the validity of the good standing certificates. Alternatively, the 30-day period relates to account payments and not to a validity period. The letter is unclear against what the grace period is measured, i.e whether calculated from the date of making the last payment or the expiry date of the last payment's validity. Logically, the latter makes sense. This would mean that an employer who has paid up his/her MSD contribution for June and therefore is in good standing for that month, will also be in good standing for July because of the benefit occasioned by the grace period.

Paragraph 4 states that:

"In the case of Good Standing Certificate bearing a tender number the same principle, in terms of the period applies as per above explanation. In addition, it is the prerogative of each organization to decide whether the certificate is valid in the case where tender evaluation is only done later than a month or more after the tender closed and date of the good stand certificate"

The Review Panel also observed that from the preceding paragraph, it appears the Commission itself is not sure of the expiry date of its good standing certificates. The Commission also did not advise the First Respondent that the applicants' certificates were not valid, but rather that it was its prerogative to decide whether they are valid in case the evaluation is only done a month or more after the tender has closed.

1.3 Origin of the request for clarity by the First Respondent to the SSC

The Review Panel's inquiry as to at what point the request for clarification on the validity period of the SSC Certificates was made, what gave rise to the request, what was specifically requested and who made the request. Member(s) of the Bid Evaluation responded that they do not know the answer to any of the above, as they were only presented with the Commission's letter alongside the bid documents at the commencement of the evaluation.

Further, the Review Panel requested the First Respondent to provide records providing answers to the above queries.

At the second meeting of the Review Panel, the First Respondent provided the Review Panel with a note, dated 10 August 2020, from a certain Ms. Monika NS Lyambezi (Chairperson of the BEC) and

addressed to the CEO of the SSC, Mrs. Milka Mungunda. The note with the subject "Request for Clarification" did not bear the letterhead of the First Respondent. This note states as follow:

"The Bid Evaluation Committee hereafter, referred to as the BEC, seeks clarification from your office on the validity period of the Social Security Good Standing Certificate for bidders. Example if the Social Security Good Standing Certificate was issued on 05 June 2020 what will the expiry date be? And if it was issued on 25 June 2020 what will the expiry date be"

It further requested for feedback to be provided by close of business, Wednesday, 12 August 2020.

The Review Panel was further provided with another note titled "Request for Clarification" addressed to External Procurement Unit and approved by a certain R. Haipinge (External Procurement Unit) and a certain Ms. E. Shiponeni (Secretary to the Board). This note only contained one line that read "validity of Social Security Good Standing Certificate" and nowhere does it make reference to the SSC or that it was addressed thereto.

1.4 Bid Requirements for the Social Security Commission Good Standing Certificates

The Applicants submitted that all that was required is a valid SSC Good Standing Certificate in terms of the Instructions To Bidders (ITB 1.4) on page 26 of the bidding documents. Nowhere in the bidding documents does it state that the said certificate be valid by the bid closing date. Further, the bid closing date has been shifted several times without the First Respondent receiving acknowledgments that the Applicants have received the addendum or deadline of the extension notice.

The First Respondent indicated the a valid SSC Good Standing Certificate was a requirement in terms of Section 50(2) of the Act, read with ITB 1.4 in this specific instance. Further, it acknowledged that there were several extension notices or addendum and the latest one, dated 14 July 2020, advised the bidders to ensure that their mandatory documents were valid by the deadline of bids submission.

The Review Panel enquired if the Applicants had acknowledged receipt of the deadline of extension notices or addendum and whether the latest notice (14 July 2020) had aimed at effecting amendments to ITB 1.4. The First Respondent undertook to verify if the Applicants did receive the deadline extension notice against which the validity was going to be tested. Further, that the notice of 14 July 2020 amended ITB 1.4.

1.5 Extension of the Bid Validity Period

The First Respondent was requested to provide an account of all the bidders that were informed against those that have agreed in writing to the extension of the Bid Validity Period.

2. Finding(s) of the Review Panel

The specific findings of the Review Panel were as follows:

2.1 Invitation and attendance of the review proceedings by an official from SSC

The First Respondent is not a repository of authority or powers of joining parties to the review proceedings, interested or not. Such powers are only vested in the Review Panel. If the SSC was an interested party, it could have been joined either through the Review Panel's initiative or on its application in terms of Regulations 42(5)(a). Alternatively, and because the SSC was not an interested or participating party to the proceedings, its attendance would only have been justified in terms of Regulation 43(4) and this was not the case. In the premise, the invitation and attendance of the SSC at the review proceedings were rendered unprocedural and therefore unlawful. Accordingly, the SSC's official was then excused from the proceedings with no submissions made.

2.2 Letter from the Social Security dated 23 September 2020 and its content

The Review Panel found that the First Respondent neither informed the bidders of the difficulty regarding the status of their SSC Good Standing Certificates nor allowed them the opportunity to explain or cure the alleged deficiency.

Further, that the use of the SSC's letter in the evaluation was extraneous to the evaluation criteria in violation of Section 52(9) of the Act, making it untenable, unfair and unlawful. If the First Respondent wanted to use the said letter, although this would not have legitimized it in light of the closed bidding process, it should have at least allowed the bidders an opportunity to be heard on the matter to demonstrate its commitment to fairness and transparency. Further, even if the use of the letter was sound in law, the First Respondent misdirected itself on its content.

2.3 Origin of the request for clarity by the First Respondent to the SSC

There were serious contradictions in the evidence of the First Respondent. During the proceedings in the sitting of the Review Panel, members of the Bid Evaluation Committee indicated they did not know at what point the request for clarification on the validity period of the Social Security Commission's certificates was made, what gave rise to the request, what was specifically requested and who made the request, as they were only presented with the Social Security Commission's letter along with bid documents at the commencement of evaluation.

Yet the note dated 10 August 2020 and bearing no letterhead indicated that a certain Ms. Monikka NS Lyambezi, Chairperson of the BEC, requested clarification. Mysteriously, when the SSC responded to this request for clarification the response was addressed to a certain Ms. E. Shiponeni whose reference was nowhere in terms of the request. Further, the request for clarification did not specifically address the validity status of the applicants' SSC Good Standing Certificates. Furthermore, the response does not even address specific questions or make specific reference to the content of the request earlier sent to the Commission.

Nothing turned out as far as the second note is concerned. After all, it was not even addressed to the Commission. The contradictions in the evidence leave much desired in terms of the procedural fairness and invulnerability of the process.

2.4 Bid Requirements for the Social Security Commission Good Standing Certificates

Section 50(2)(b) provides that:

“A bidder or supplier is disqualified from bidding if such bidder or supplier is not in possession of a valid certificate of good standing with the Social Security Commission or, in the case where a company has no employees, a confirmation letter from Social Security Commission”

The above subsection does not indicate the point in time against which the validity period was to be measured. It appears a bidder or supplier only needs to prove three things in this regard, namely;

- i) possession of a certificate of good standing;
- ii) validity of such a certificate; and
- iii) that the certificate is with or is issued by the SSC.

Nor the Procurement Act/its Regulations or bidding documents nor the SSC Act or its Regulation define what a valid SSC Good Standing Certificate constitutes. In the absence of a statutory definition, recourse is had to the dictionary definition. Therefore, the word possession refers to an act of having, owning or controlling. The Applicants in this instance have all discharged the possession obligation. The validity, on the other hand, refers to the state of being legal or official. Alternatively, being logical or factual. What the Applicants needed to demonstrate in this regard was that certificates they have, own or control (in their possession) are legal or official, alternatively logical or factual (valid). The Applicants have also discharged the validity obligation by proving that the certificates they have, own or control are legal, official, logical and factual. The issuer of the certificates concerned, being the Social Security Commission was not in dispute. Therefore, the First Respondent should have evaluated the bids of the Applicants for they are compliant in as far as possession of valid Good Standing Certificates with the SSC is concerned. The failure or omission by the SSC to indicate the certificate expiry dates on the certificates themselves (if required) must not be at the peril of bidders. The averment that the notice or addendum of 14 July 2020 has amended ITB 1.4 does not suffice as the bidding is directive on how amendments were to be made.

2.5 Extension of the Bid Validity Period

The First Respondent provided proof that all applicants have agreed to the extension of the bid validity period.

In the result, the Review Panel makes the following order:

1. The First Respondent's Notices of Selection for the Awards in respect of Tender No: NCS/ONB/CPBN – 02/2020, and/or any decision or action incidental thereto not in compliance with this Act, are set aside in whole, this matter or bid is referred back to the First Respondent for reconsideration with the specific instructions; in terms of Section 60(c) of the Public Procurement Act, 2015 (Act No. 15 of 2015). The instructions are as follows:
 - a) That the First Respondent re-evaluate all the bids that contained a Social Security Commission Good Standing Certificates issued during the bid opening period of 26 May 2020 to 27 July 2020 for the Tender No: NCS/ONB/CPBN – 02/2020;
 - b) That the re-evaluation herein is limited to bidders that have agreed in writing to the extension of the Bid Validity Period in accordance with Section 49(2) and/or 43(3) (if applicable) of the Public Procurement Act; save and include bidders that did not receive a notice for an extension by omission or conduct of the First Respondent;
 - c) That if the re-evaluation herein takes longer than the remaining portion of the extended Bid Validity Period, the First Respondent should seek another extension with bidders with those that remained in the race after the initial extension of the Bid Validity Period; and
 - d) This Order is effective as of 12 March 2021.



HELLEN AMUPOLO
CHAIRPERSON: REVIEW PANEL (in terms of this matter)

