



REPUBLIC OF NAMIBIA

MINISTRY OF FINANCE

PUBLIC PROCUREMENT REVIEW PANEL

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The order of the Public Procurement Review Panel in the matter between

OMATANDO CONSTRUCTION

APPLICANT

and

KALKRAND VILLAGE COUNCIL

RESPONDENT

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

In the matter between

OMATANDO CONSTRUCTION

APPLICANT

and

KALKRAND VILLAGE COUNCIL

1st RESPONDENT

HENIMMA INVESTMENT CC

2nd RESPONDENT

Members: Mekondjo Nghipandulwa(Chairperson), with Tulimeyo Kaapanda, Fillemon
Immanuel, Dr Rainer Trede & Selma-Penna Utonih concurring.

Heard: 28 November 2019

Decided: 28 November 2019

ORDER

Having heard Mr. Cornelius Mbangula for the Applicant, Mr. Ruben Sitanga for the Respondent,
and other interested Parties in attendance, the Review Panel makes the following order:

1. That the Review Panel in the instant matter could therefore not set aside the decision of the
1st Respondent awarding a tender to Henimma Investments CC, in terms of Section 60(c).

The effect date of this order is 28 November 2019.

REASONS FOR THE ORDER

BACKGROUND

- [1] On 23 August 2019, Kalkrand Village Council (hereinafter referred to as "Respondent") advertised a bid for the construction of services (sewer & water) in Donkerhoek.
- [2] The bid closed on the 23 September 2019 and the Evaluation of Bids commenced on the same day.
- [3] Following the Notice of selection of award, which was sent out on the 28 October 2019, the Public Entity received an objection from the Applicant to reconsider or review the selection for award during the standstill period which is in line with Regulation 38 (2) (c) of the Public Procurement Regulation: Public Procurement Act, Act No. 15 of 2015 (hereinafter referred to as "Regulations").
- [4] On 13 November 2019, the Public Entity resolved that the abovementioned bid be awarded to Henimma Investment cc. It is against this background, that the Applicant filed an Application for Review on the 20 November 2019, for the decision of the Respondent to be reviewed on the grounds contained hereunder.

GROUND(S) FOR REVIEW APPLICATION

- [5] The Applicant contested the outcome of the bidding process citing the following ground(s) for the review application:

That the decision taken by the Public Entity was not fair in terms of the Technical & Financial evaluation.

RELIEF SOUGHT FROM THE REVIEW PANEL

- [6] The applicant's prayer is for the Review Panel to correct a decision or action taken by the Public Entity that is not in compliance with the Act, in terms of Section 60 (d).

PROCESSES FOLLOWED IN CONSIDERATION AND DETERMINATION OF THE REQUEST

[7] The Review Panel has in terms of Regulation 42 (5) (a) of the Public Procurement Act of 2015 joined interested parties, to the proceedings as per the *audi alteram partem* rule. The bidders who attended the review proceedings, were:

- a) Neu Olulya Trading cc
- b) Principle Investment JV Acapulco Investment cc
- c) James and Young Trading Enterprises cc
- d) Henimma Investment
- e) TJ Civil Technologies
- f) Valomek
- g) Wecca Investment cc JV D-Square Trading Enterprises cc

[8] The Review Panel in considering this matter, used the documents submitted by both parties, as well as oral evidence obtained from both the Applicant, the Respondent to arrive at its decision. Both, the Applicant and the Respondent were present at the review proceedings to provide further clarification or additional documents for submission to the Review Panel.

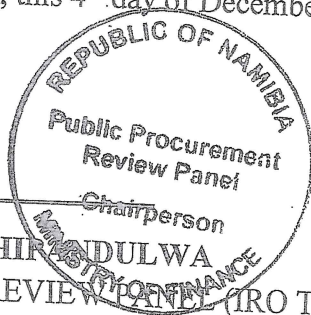
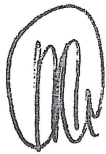
FINDINGS OF THE REVIEW PANEL

- [9] The Review Panel observed non-compliance with Section 52 (9) of the Public Procurement Act 15 of 2015 by the 1st Respondent when they failed to evaluate bids according to the methodology and criteria set out in the bidding documents, by awarding the bid to the 2nd Respondent when it lacks the relevant experience.
- [10] The 1st Respondent handled and dealt with the request for the reconsideration of the selection of award in a manner that is inconsistent to Regulation 38(3).
- [11] The 1st Respondent also failed to make use of a scoring matrix to determine how bidders were ranked in terms of technical and financial scores.
- [10] The Applicant on its part, failed to adhere to instructions to bidders ITB 6.3(b) as appearing on page 7 and 15 of the bidding documents, which required the Contract Manager/Supervisor to possess 5 working experience in works of an equivalent nature and volume, including no less than three years as Manager or as otherwise specified in the BDS.

IN THE RESULT THE REVIEW PANEL MAKES THE FOLLOWING ORDER:

- [11] Notwithstanding the anomalies characterising the process that led to the award of the bid concerned herein and on the strengths of the High Court's ruling in the case of *The Central Procurement Board v Nangolo N.O.*, paragraph 46, page 19, a position that was adopted with approval by this Review Panel in both the case of *Prestige Diamonds (Pty) Ltd & Another v Central Procurement Board of Namibia & Others as well as Vero Group CC v Aroab Town Council & Another*. Thereunder it was held that:
- "It must be mentioned in this regard, that the applicant, having evaluated the applications for the tender in terms Section 55(5) of the Act, duly advised the 3rd respondent in the part that its bid' ...is hereby accepted by the Central Procurement Board on behalf of the Roads Authority'. I am of the view that there can be no other manner of interpreting the nature and effect of that decision other than to conclude that the decision had the effect of bringing a procurement contract into force".*
- [12] Held further that *"it accordingly follows that in the instant case, a decision to award the tender to the 3rd respondent was taken. Besides the fact that that decision was fraught with serious problems, entitling this court to set it aside, it is in my view, expressed earlier in the judgment that the decision taken by the applicant in this matter resulted in the bringing of a procurement award into effect. For that reason, the Panel did not have the power in terms of Section 60, to set aside the decision and it should therefore stand".*
- [13] The Review Panel summed up the above in the *Prestige Diamond* case and again repeated same in the case of *Vero Group CC* as follows:
- "it matters not whether there is a physical contract signed or not, but a mere decision to award the tender and which has been accordingly communicated to the successful bidder, brings the procurement contract into force as intended under Section 60(c) of the Act, therefore rendering a decision of the public entity immune from setting aside".*
- [14] In the premise, the Review Panel in the instant matter could therefore not set aside the decision of the 1st Respondent awarding the bid to 2nd respondent Henimma Investments CC, in terms of Section 60(c).
- [15] The effective date of this order is from 28/11/2019.

Dated at Windhoek, this 4th day of December 2019.



MEKONDJO NGHIFINDULWA
CHAIRPERSON: REVIEW PANEL (IRO THIS MATTER)