



REPUBLIC OF NAMIBIA
MINISTRY OF FINANCE

PUBLIC PROCUREMENT REVIEW PANEL

Tel. : (00 264 61) 2099111

Fax : (00 264 61) 236454

Telex: 908-3369

Enquiries: M. Jonga

10 John Meinert Street
Fiscus Building
Private Bag 13295
Windhoek

IN THE PUBLIC PROCUREMENT REVIEW
HELD ON 20 MARCH 2019

IN THE MATTER BETWEEN

ALSTOM GRID JV RADIAL TRUSS INDUSTRIES

APPLICANT

And

CENTRAL PROCUREMENT BOARD OF NAMIBIA

1st RESPONDENT

NAMIBIA POWER CORPORATION (PTY) LTD
(NAMPOWER)

2ND RESPONDENT

CONSOLIDATED POWER PROJECTS NAMIBIA
(PTY) LTD

3rd RESPONDENT

APPLICATION FOR REVIEW IN TERMS OF SECTION 59 OF THE PUBLIC
PROCUREMENT ACT, ACT 15 OF 2015:

BID NO:

NPWR/2015/50, CONSTRUCTION OF THE NEW 400KV KUNENE SUBSTATION
AND OMATANDÓ 400/132KV SUBSTATION EXTENSIONS

1. BACKGROUND

1.1 In 2015, Namibia Power Corporation (Pty) Ltd (hereinafter referred to as 2nd Respondent) advertised bid No. NPWR2015/50 for Construction of the New 400kV Kunene Substation and Omatando 400/132kV Substation Extensions.

1.2 The 2nd Respondent resolved to cancel the bid due to the fact that the bids exceeded the budget available at the time, to mention one of various reasons. The decision was challenged in the High Court by Consolidated Power Projects Namibia (Pty) Ltd (hereinafter referred to as 3rd Respondent). The High Court ruling of 6 December 2017, reviewed and set aside the decision of the 2nd Respondent's Board and directed the Central Procurement Board of Namibia (CPBN) (hereinafter referred to as 1st Respondent) "to consider and adjudicate all bids for Tender NPWR/2015/50 that passed the first evaluation stage (technical) and were invited to the second evaluation stage (financial) and were invited to the second evaluation stage". The Bid Evaluation Committee (BEC) of the 1st Respondent undertook the second evaluation stage of the three bids received. The BEC recommended to the 1st Respondent that Alstom Grid JV Radial Truss Industries (Applicant) be considered for the award having submitted a substantially responsive bid. After several board meetings, the 1st Respondent resolved to cancel the bid.

1.3 Following the cancellation of the bid process by the 1st Respondent on 1 March 2019, one of the bidders, Alstom Grid JV Radial Truss Industries (Pty) Ltd (hereinafter referred to as Applicant), launched an Application for Review on 7 March 2019 in terms of Section 59 of the Public Procurement Act, Act 15 of 2015 (hereinafter referred to as "the Act").

2. GROUNDS FOR APPLICATION

2.1 The Applicant contested the outcome of the bidding exercise conducted by the 1st Respondent citing the following grounds for the application:

- a. The reasons given by the 1st Respondent are not supported by necessary facts;
- b. The 1st Respondent ignored relevant facts;
- c. The 1st Respondent failed to apply its mind; and
- d. The 1st Respondent was influenced by improper or incorrect information or motivates.

3. RELIEF SOUGHT FROM THE REVIEW PANEL

The Applicant's prayer is that Review Panel should make an order in terms of section 60(b); and/or 60 (c) and (or) 60(c) of the Act.

4. PROCESSES FOLLOWED IN CONSIDERATION AND DETERMINATION OF THE REQUEST

- 4.1 The Review Panel evoked Regulation 42(5)(a) of the Public Procurement Regulations 15 of 2015, and joined interested parties, to the proceedings as per the *audi alteram partem* rule. Two parties were joined to the Review Panel proceedings namely, 2nd and 3rd Respondents. The 3rd Respondent latter made written presentation but was not in attendance at the hearing.
- 4.2 The Review Panel in considering this matter used the documents submitted by all interested parties as well as oral evidence obtained from the parties to arrive at its decisions. All parties were invited to the review proceedings on request to provide further clarification and/or additional documents for submission to the Review Panel.

5. FINDINGS OF THE REVIEW PANEL

- 5.1 Considering the documents in position of the Review Panel and oral representation from the Applicant, 1st and 2nd Respondents, the Review Panel observed that the bid price of the bidder recommended by the BEC of the 1st Respondent was substantially above the cost estimate and the available funds indicated on the Financial Certificate provided by the 2nd Respondent. It was further observed that without any additional funds availed by the 2nd Respondent, the bid would therefore not be economically viable to proceed with. This finding is supported in terms of Section 54(1) (b) & (f) of the Act.
- 5.2 The Review Panel noted that the 2nd Respondent provided a Financial Certificate for bids upon request by the 1st Respondent. This is done to satisfy Section 25(4)(b) of the Act in that availability of funds must be certified before commencement of each procurement process. The initial cost estimate was later increased taking cognizance of inflation rate, exchange rate and new technologies according to 2nd Respondent's submission during the hearing. Even with the increased cost estimate the Applicant's bidding price was above the cost estimate.
- 5.3 The Review Panel took note that one of the Applicant's prayers was an opportunity to negotiate its bid cost in order to bring it closer to the applicable cost and to make the bid economically viable to proceed since they were the lowest responsive evaluated bidder. However, Section 55(2) prohibits any "negotiation between the Board or a public entity and a selected bidder, except in such special circumstances as the Minister may determine".
- 5.4 The Review Panel was informed that market research was conducted by the 2nd Respondent to substantiate and to motivate their project cost estimate. The 2nd Respondent during the procurement process engaged an independent consultant to investigate the bid prices of the bidders in relation to the project cost estimate.
- 5.5 In terms of Section 49(1) a bid remains valid for the period as indicated in the bidding documents which may not be more than 180 days. The first extension of the bid validity period was done on 6 July 2018 after the 180 days have elapsed, counting from the court

order date (06 December 2017). Therefore, the extension of the bid validity is deemed to be invalid and the bid document is null and void at the time of bid validity period extension.

6. DECISIONS OF THE REVIEW PANEL

6.1 Having considered all factual records developed and submitted by both the Applicant and the Respondents, together with affidavits as well as oral representation by parties and all other incidental records pertaining to the bid process in question;

6.2 Having further considered the case in its totality in terms of Section 58, 59 and 60 of Act 15 of 2015, read with its Regulations,

THE REVIEW PANEL, HEREBY RULE

- (a) In terms of Section 60(a) of the Act to dismiss the application of the Applicant on the ground of section 54(1)(b) & (f) of the Act.
- (b) Recommend that the 2nd Respondent conducts new market research on the cost estimate of the projects considering various variable factors such as the time that has lapsed since 2015, change in technologies, currency exchange rates and inflation rate that will have an impact on the cost estimate should they wish to re-advertise this bid.

The effect date of this order is from 20 March 2019.


MR. KENANDEL TJIVIKUA
CHAIRPERSON: REVIEW PANEL (PROFESSOR'S MATTER)

