

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

SINVULA LAND SURVEYORS

AND

OTJIWARONGO MUNICIPALITY

APPLICANT

RESPONDENT

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

In the matter between

SINVULA LAND SURVEYOR'S

APPLICANT

and

OTJIWARONGO MUNICIPALITY

RESPONDENT

**Coram: Dr. Rainer Trede (Chairperson), with Tulimeyo Kaapanda, Selma-Pennah
Utonih, Phillemon Wise Immanuel and Mekondjo Nghipandulwa concurring.**

Heard: 27 June 2019

Decided: 1st July 2019

ORDER

Having heard Mr. E.S Sinvula for the Applicant, Mr. Ismael //Hoebeb for the Respondent, the Review Panel makes the following order:

1. That the Application is dismissed in terms of Section 60(a) of the Public Procurement Act, Act No. 15 of 2015 on the grounds that the application was not brought before the Review Panel in line with Regulation 42(1) of the Public Procurement Regulations: Public Procurement Act, Act No. 15 of 2015;

REASONS FOR THE ORDER

BACKGROUND

- [1] On 20 March 2019, the Otjiwarongo Municipality invited bidders in terms of Section 35 (1) of the Public Procurement Act, 15 of 2015, Request for Proposals: Bid Reference number SC/RP/OTM/1/2019 - The provision of Land Surveying Services for the subdivision of ERF 2123 Extension 7 Otjiwarongo. Five bidders were invited to participate in the procurement process.
- [2] The bid evaluation commenced on 24 April 2019 and indicated as concluded on the same date, as per documents submitted. However, the Municipality of Otjiwarongo informed the Panel that the information appearing in the documents submitted was inaccurate, as the bid evaluation was said to have been concluded on the 8th May 2019.
- [3] Following the notice for selection of award, which was issued on 16 May 2019 to bidders, the Public Entity received an objection from Sinvula Land Surveyors to reconsider or review the selection for award to Mutengu Land Surveyors during the standstill period which ran from 16-23 May 2019 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] The Public Entity on 28 May 2019, in line with Section 55 (5) of the Act, awarded the bid to Mutengu Land Surveyor, without addressing the grievance letter received from Sinvula Land Surveyors. Email correspondences between the Public Entity and the Applicant indicate that the bidder had requested the Respondent to notify him once an award is in place. This seems not to have been done as the Respondent only addressed the Applicant's grievances on 03 June 2019, five days after notifying the successful bidder of the award.
- [5] It is against this background, that the Applicant filed an Application for Review on 20 June 2019, for the decision of the Respondent to be reviewed on the grounds contained herein below.

GROUND FOR REVIEW APPLICATION

- [6] The Applicant contested the outcome of the bidding process in terms of Section 59 (1) (b) of the Act citing the following grounds for the review application:

- 6.1 The Applicant alleges that the Public Entity deviated from the bidding document requirements when the bid evaluation Committee (referred to as Review Committee by the Municipality) used a scoring matrix which was not part of the bidding document and placed more weight on the 'Methodology used' instead of experience and qualification which were indicated as paramount requirement.
- 6.2 The Applicant is more experienced, and has a lower price compared to that of the awarded bidder.
- 6.3 The Applicant further alleges that the Public Entity failed to give preference to Namibian companies, as provided for under the Object of the Act- the awarded bidder is a foreign national.

RELIEF SOUGHT FROM THE REVIEW PANEL

- [7] The Applicant requests the Municipality of Otjiwarongo to suspend the award in terms of Section 59 (2) of the Public Procurement Act No.15 of 2015 pending review proceedings.

PROCESSES FOLLOWED IN CONSIDERATION AND DETERMINATION OF THE REQUEST

- [8] The Review Panel in considering this matter, used the documents submitted and oral evidence obtained by the Applicant, the 1st Respondent and the 2nd (Mutengu Land Surveyor's) Responded 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.
- [9] The Review Panel has in terms of Regulation 42(5)(a) of the Public Procurement Act of 2015 joined the following interested parties, to the proceedings as per the *audi alteram partem rule*, as enshrined in Article 18 of the Namibian Constitution;
- (a) F Mutengu Land Surveyors (applicant)
 - (b) Steyn Land Surveyors
 - (c) G Marwa Land Surveyors
 - (d) C G Pieterse Professional Land Surveyors

FINDINGS OF THE REVIEW PANEL

- [10] The Review Panel observed non-compliance with Section 50 of the Act as bids were accepted without mandatory documents, and only one bidder complied with this provision. In response, the Panel was informed that excluding mandatory documents was as a result of training conducted by the Policy Unit, where the Respondent was advised to do so.
- [11] The Panel also observed non-compliance with Section 35 (6) & (7) of the Act in that those bidders that attained the required minimum pass mark were not read in the presence of the bidders and there after consider to evaluate the financial proposals of bidders who have attained the minimum pass mark in the technical evaluation.
- [12] The Review Panel also observed non-compliance with Section 52 (9) in that the Public Entity failed to evaluate bids according to the criteria and methodology set out in the bid document. The bid document indicated experience and qualifications as being key or paramount requirements, however during the bid evaluation stage, methodology was regarded as the paramount requirement hence allocated higher marks compared to experience and qualifications. The bid document was devoid of the evaluation criteria used by the Bid Evaluation Committee, thereby depriving bidders of the evaluation criteria used.
- [13] The Review Panel observed that the Otjiwarongo Municipality failed to follow the proper channel when the- evaluation took place, in that the provisions of Regulation 38 (3) were not adhered to. The grievances received were only dealt with by the Accounting Officer and were not forwarded to the Procurement Committee, who recommends to the Accounting Officer for approval of the successful bidder.
- [14] It was also indicated that that the letter dated 03 June 2019 addressed to the applicant was supposed to have been issued prior to the date of award which was 28 May 2019.
- [15] The Review Panel further established that there was violation of Regulations 39 when the Public Entity admitted during the hearing, that they did not publish the award in any local media or on their website.
- [16] The Review Panel having considered all documents and oral evidence from both the Applicant and the Respondent observed that the application for review was admitted in contravention of Regulation 42(1) as the Review Application was outside the provision of the 7 days. The application was filed on 20 June 2019, while the last communication to the applicant was dated 03 June 2019 and received the same date. The application is therefore outside the 7 day review period.

[17] In the result the Review Panel makes the following order;

1. That the Application is dismissed in terms of Section 60(a) of the Public Procurement Act, Act No. 15 of 2015 on the grounds that the application was not brought before the Review Panel in line with Regulation 42(1) of the Public Procurement Regulations: Public Procurement Act, Act No. 15 of 2015.

Dated at Windhoek, this 08th day of July 2019



DR. RAINER TREDE
CHAIRPERSON: REVIEW PANEL

