



REPUBLIC OF NAMIBIA

REVIEW PANEL

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**IN THE REVIEW PANEL
HELD ON 30 AUGUST & 03 SEPTEMBER 2018**

IN THE MATTER BETWEEN:

OSHANA POWER LINES

APPLICANT

AND

OMUTHIYA TOWN COUNCIL

RESPONDENT

**APPLICATION FOR REVIEW IN TERMS OF SECTION 59 OF THE PUBLIC
PROCUREMENT ACT, ACT 15 OF 2015: W/ONB/OMU-01/2018/19 CONSTRUCTION
OF LOW VOLTAGE AND MEDIUM VOLTAGE RETICULATION AT OMUTHIYA
EXTENSION 8 OSHIKOTO REGION**

1. Background

1.1 During June 2018, Omuthiya Town Council, embarked on a procurement exercise using the open advertised bid procurement method as provided for under Section 27 (1) (a) (i) of the Public Procurement Act 15 of 2015, for the Construction of low voltage and medium voltage reticulation at Omuthiya Extension 8 Oshikoto Region, under Procurement Reference Number: W/ONB/OMU-01/2018/19.

1.2 Omuthiya Town Council concluded the procurement process and notified bidders in terms of Regulation 38 (1) of their intention to award the contract to The Kongom Group on 31 July 2018. The standstill period ran from 31 July 2018 to 07 August 2018. The applicant in their letter dated 02 August 2018 to the respondent objected to the intended award, citing that their bid was substantially responsive in terms of pricing and technical competence compared to that of the successful bidder.

Against this background, an application for review was filed by the applicant on 20 August 2018 in terms of Section 59 of the Public Procurement Act 15 of 2015.

1.3 Relief sought by the Applicant in their Application for Review:

The applicant in amplification of their application, raised the following points;

1.3.1 The successful bidder has no experience in electrical works,

1.3.2 The successful bidder did not submit an SME Certificate which was a requirement

1.3.3 The applicant's bid was substantially responsive in terms of pricing and technical competence compared to the successful bidder.

1.3.4 Failure by the successful bidder to provide concrete evidence of possessing a wireman's license which is mandatory in terms of Northern Namibia Regional Electricity Distributor requirements. (NORED).

2. PROCESSES FOLLOWED IN CONSIDERATION AND DETERMINATION OF THE APPLICATION FOR REVIEW FILLED BY THE APPLICANT:

The Panel in adjudicating this matter had to address *points in Limine* raised by the respondent's lawyer representing Omuthiya Town Council. The points were as follows:

- 2.1 None payment of the application fee of N\$ 5 000.00 by the applicant as provided for in terms of Regulation 42 (2) (b) of the Public Procurement Regulations.
- 2.2 Failure by the applicant to lodge an application within 7 days of being notified of a decision or action taken by a Public Entity, as the applicant conceded to the fact that they became aware of the award to the Kongom group on 31 July 2018, yet the application for Review was launched on 20 August 2018 and the responded served on 22 August 2018.
- 2.3 The applicant failed to join the successful bidder as a party who has interest in the application and the non-joinder was said to be fatal.

3. ADJUDICATION OF THE MATTER

The Review Panel in adjudicating over this matter, noted that preliminary matters raised/ *Points in Limine* had to be addressed first before attending to the merits of the case. The points raised were addressed as follows:

- 3.1. The Review Panel in dealing with *points in Limine*, was satisfied that the amount of N\$ 5 000.00 was paid and proof thereof submitted.
- 3.2. The Panel observed that the final letter notifying the applicant that they were unsuccessful was issued on 17 August 2018, hence the application to the Review Panel launched on 20 August 2018, was timely, however the applicant failed to comply with Regulation 42 (3) which reads as follows:

"The supplier or bidder must lodge the review application with the Review Panel and serve copies of the review application on public entity referred to in sub regulation (1) on a Public Entity and on any other interested person".

The Panel noted that while there is no legislation compelling joining the successful bidder to the proceedings, the above quoted provision required the applicant to serve copies of their application to the successful bidder who in this instance is an interested party, to afford them an opportunity to be heard as contemplated under Article 18 of the Namibian Constitution, the *audi alteram partem* rule.

The Review Panel having found the non-compliance to be of material effect, noted that violation of Regulation 42 (3) of the Public Procurement Act 15 of 2015 was detrimental, in that the materiality of this violation precedes consideration of the merits of the case. Having established from the legal representative of the applicant that no copy of the application was served on the successful bidder, The Panel therefore dismissed the application in terms of Section 60 (a) of the Public Procurement Act 15 of 2015.

ORDER:

Having considered all factual records developed and submitted by both appellant and respondent, together with the affidavits as well as oral representation by both parties and all other incidental records pertaining to the bid process in questing having further considered the case in totality in terms of Section 58 and 59 of the Public Procurement Act 15 of 2015, **THE REVIEW PANEL IN ACCORDANCE WITH THE POWERS VESTED IN IT IN TERMS OF SECTION 58 AND 59 OF THE PUBLIC PROCURMENT ACT 15 OF 2015, HEREBY RESOLVED** in terms of Section 60 (a) to dismiss the application.



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MS. MEKONDJO NGHIPANDULWA
CHAIRPERSON: REVIEW PANEL (I.R.O OF THIS MATTER)

