

REPUBLIC OF NAMIBIA
MINISTRY OF FINANCE



PUBLIC PROCUREMENT REVIEW PANEL

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**IN THE PUBLIC PROCUREMENT REVIEW
HELD ON 04 SEPTEMBER 2019**

IN THE MATTER BETWEEN

ADENCO CONSTRUCTION NAMIBIA PTY LTD

1st APPLICANT

POWER LINE AFRICA NAMIBIA JV

2nd APPLICANT

AND

CENTRAL PROCUREMENT BOARD OF NAMIBIA

RESPONDENT

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

**BID REFERENCE NO: W/ONB/CPBN-01/2019 PROCUREMENT OF DESIGN AND
CONSTRUCTION OF THE KHURUB-AUSSENKER 321 KV TRANSMISSION LINE**

**Coram: Rainer Trede (Chairperson), with Ono Nangolo, Donè Brinkman, Sem Toska
and Michael Gaweseb**

Heard: 03 September 2019

Decided: 04 September 2019

ORDER

Having heard Ms L. Shaanika for the first Applicant, Mr. Stephan Vlieghe for the second respondent, and Mr. Patrick Swartz for the Respondent, and other interested Parties in attendance, the Review Panel makes the following order:

1. That the procurement proceedings be terminated and start afresh in terms of Section 60 (f) of the Public Procurement Act, Act No. 15 of 2015 on the grounds that the Public Entity failed to comply with Section 43(2)(c) of the Public Procurement Act No. 15 of 2015.

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

REASONS FOR THE ORDER

BACKGROUND


- [1] On 04 February 2019, the Central Procurement Board of Namibia (hereinafter referred to as "Respondent") advertised a bid for the Design and Construction of the Khurub-Aussenkehr 132kv Transmission line. Bid reference number W/ONB/CPBN-01/2019.
- [2] The bid closed on 05 April 2019, with only three bidders who participated in the bidding process and were evaluated as from 08 April 2019 to 10 July 2019.
- [3] The Respondent indicated that the unusual long evaluation process was attributed to an exemption granted by the appointing authority (Minister of Finance) which waived the provisions of Regulations 7 (3) in respect of the bid evaluation timelines.
- [4] The Respondent issued a notice of cancellation on 19 August 2019, in terms of Section 54 (a) of the Public Procurement Act 15 of 2015 indicating that all bids were found to be non-responsive. The cancellation was however challenged by two bidders Adenco Construction Namibia and Power Line Africa Namibia JV who alleged the reasons advanced for the cancellation were not valid.
- [5] It is against this background, that the Applicants filed Applications for Review on the 27th August 2019, for the decision of the Respondent to be reviewed on the grounds contained herein below.

GROUNDS FOR REVIEW APPLICATION

APPLICANT 1: ADENCO CONSTRUCTION NAMIBIA PTY LTD

- [6] The Applicant contested the outcome of the bidding process citing the following grounds for the review application:
- 6.1 The Applicant alleged that the Respondent refused to provide reasons as to why their bid was non-responsive, and therefore applied for review in terms of Section 57 of the Public Procurement Act 15 of 2015, for the Review Panel to instruct the respondent to provide them with the reasons why their bid was non-responsive.

APPLICANT 2: POWER LINE AFRICA NAMIBIA JV

- [7] The Applicant contested the outcome of the bidding process citing the following grounds for the review application:
- 7.1 The Respondent cancelled the bid since the Applicant is not “responsive”. The Public Procurement Act of 2015 defines “responsive” as follows: “responsive”, in relation to a bid means responsive to the basic requirements of a bid regarding ability to perform and complete on time.
- 7.2 The Applicant is able to perform and complete the scope of work on time and is thus responsive.
- 7.3 The only requirements which the Applicant did not fulfill according to the Respondent were 3 issues contained under 3.5 in the bid checklist attached to ITB.
- 7.4 Item 3.5 deals with a letter of intent if the bidder is a joint venture and the information requested is not pertinent to the question of the Applicant’s ability to perform and complete on time; and 

- 7.5 The Applicant submits that even if item 3.5 was pertinent to the issue of being responsive, the Applicant complied, or substantially complied with item 3.5 of the ITB checklist and the Respondent acted irrationally, unreasonably and unfairly in taking the decision. The Respondent should have waived any non-material conformity, asked for more information and or requested further documentation to be submitted by the Applicant.

RELIEF SOUGHT FROM THE REVIEW PANEL


APPLICANT 1: ADENCO CONSTRUCTION NAMIBIA PTY LTD

- [8] The Review Panel to instruct the Central Procurement Board to comply with Section 57 of the Public Procurement Act 15 of 2015 and provide the Applicant with a debriefing.

APPLICANT 2: POWER LINE AFRICA NAMIBIA JV

- [9] Reviewing and setting aside the decision of the Respondent to cancel the Invitation for Bids for the Design and Construction of Khurub-Aussenkehr 132 KV transmission Line, in terms of Section 60 (c) of the Public Procurement Act 15 of 2015.
- [10] Directing the Respondent that it has acted and/or proceeded in a manner that is not in compliance with the Public Procurement Act 15 of 2015 by cancelling the invitation for bids and directing the Respondent to proceed in a manner that is in compliance with the Public Procurement Act 15 of 2015 by accepting and/or approving and/or considering the bid submitted by the Applicant in terms of Section 60 (b) of the Public Procurement Act No. 15 of 2015.
- [11] Directing the Respondent to detail, in writing, in what respect/s the Applicant has not complied with item 3.5 of the checklist of the ITB and affording the applicant an opportunity to rectify, clarify and/or submit any documentation or make any representations (verbal or written) needed to address that alleged non-compliance prior to taking any decision to cancel or award the bid.

PROCESSES FOLLOWED IN CONSIDERATION AND DETERMINATION OF THE REQUEST:

- [12] 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) Power Line Africa Namibia JV;
- (b) Adenco Construction Namibia; and
- (c) TAP/Protecton/Ablon

All bidders were duly notified as provided for under Regulation 57.

- [13] The Review Panel in considering this matter, used the documents submitted by all parties, as well as oral evidence obtained from both the Applicants, the Respondent and other interested parties to arrive at its decision. The two Applicants 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

- [14] The Review Panel having engaged the Respondent on the potential non-compliance with Regulations 7 (3) (Bid evaluation timeline) was informed that the Respondent was granted an exemption for a period of 180 days by the Honourable Minister of Finance and documentary evidence to that effect was submitted. The Panel noted that the directive grants the Respondent 180 days to evaluate a bid.
- [15] The Review Panel observed inconsistencies with the evaluation process in that the bidding document was found to be vague and inconsistent with the provisions of Section 43 (2) (c) of the Public Procurement Act. The 2nd Applicant (Power Line Africa) was initially disqualified for failing to provide a Tax Good Standing Certificate and Social Security Certificate of the minority joint venture partner as well as the insurance which was supposed to be joint and several liability.
- [16] The Panel having interrogated the aspect of whether the 2nd Applicant's bid was responsive, noted that the bid did not contain a Letter of Intent which had to contain certain provisions. It was however indicated that there were three requirements in the checklist attached to ITB. These are;
- Statement that the members of the joint venture will undertake jointly and severally the obligations of the joint venture under the contract if awarded;
 - Statement that the joint venture shall, upon the award of the contract, submit for approval of the employer a proper joint venture agreement....;
 - Statement that the composition or constitution of the joint venture shall not be altered without prior written consent by the Employer.

The second Applicant failed to comply with these requirements. The Applicant argued that the attached Joint Venture Agreement superseded a letter of intent while in respect of the other requirements they argued that the Respondent should have used the provisions of Section 52 (1) of the Public Procurement Act 15 of 2015 to seek clarifications and or allow additional submission of documents.

[17] In respect of Adenco Construction Namibia, the 1st applicant, the bidder submitted financials which rendered their bid unresponsive due to the fact that a majority of the financials were that of their South African partners. It was further indicated that they had not done work to the magnitude of 132 KV, therefore out motivated. The Panel observed that the minutes dated 14 June 2019 of the Bid Evaluation Committee, indicate that the bid document did not specify the need for all JV partners to submit all their mandatory documents. Yet the two bidders were disqualified on a criteria not specified in the bid document which was in violation of Section 52 (9) of the Public Procurement Act 15 of 2015.

[18] The Panel noted that the 1st Applicant filed an initial application on time, however the subsequent application received on 02 September 2019 following the debriefing meeting held with the Respondent, was out of time hence inadmissible and inconsistent with the provisions of Section 59 (1) (a) of the Public Procurement Act 15 of 2015 read with Regulations 42(1). The Panel having due regard to its mandate and considering the procurement process in totality, on its own initiative, joint Adenco Namibia to the proceedings in terms of in terms of Regulation 42 (5) (a).

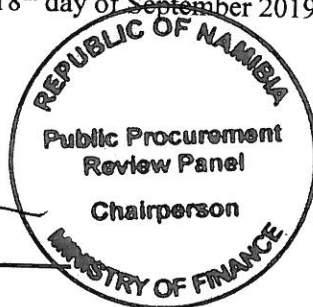
[19] The Panel noted contraventions Section 43 (2) (c) with Section 52(9) of the Public Procurement Act 15 of 2015. It was noted that vague specifications breeds unfairness in evaluation and the only remedy would be a termination of the procurement process. The Review Panel therefore resolved as follows:



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

- [20] That the procurement proceedings be terminated and start afresh in terms of Section 60 (f) of the Public Procurement Act, Act No. 15 of 2015 on the grounds that the Public Entity bid document requirements were found to be inconsistent with the provisions of Sections 43 (2) (c) Public Procurement Act, Act No. 15 of 2015.

Dated at Windhoek, this 18th day of September 2019.



DR. RAINER TREDE
CHAIRPERSON: REVIEW PANEL (IRO THIS MATTER)