



REPUBLIC OF NAMIBIA

MINISTRY OF FINANCE AND PUBLIC ENTERPRISES

PUBLIC PROCUREMENT REVIEW PANEL

**IN THE PUBLIC PROCUREMENT DEBARMENT APPLICATION HEARING
HELD ON 12 JUNE 2024, 26 JUNE 2024 AND 05 JULY 2024**

IN THE MATTER BETWEEN

CENTRAL PROCUREMENT BOARD OF NAMIBIA

APPLICANT

and

**SIX THOUSAND SECURITY SERVICES CC
ESSER PAWA NAUKOSHO**

**1ST RESPONDENT
2ND RESPONDENT**

IN A DEBARMENT APPLICATION MADE IN TERMS OF SECTION 68 OF THE PUBLIC PROCUREMENT ACT, 2015, AS AMENDED READ IN CONJUNCTION WITH REGULATION 46(2) OF THE PUBLIC PROCUREMENT REGULATIONS

Coram: Doné Brinkman (Chairperson), Gilbert Habimana, Mekondjo Katunga, Kenandei Tjivikua and Tulimeyo Kaapanda

Heard: 31 May 2024, 12 June 2024, 26 June 2024 and 05 July 2024

Decided: 05 July 2024

REVIEW PANEL ORDER

1. INTRODUCTION:

- 1.1 The Review Panel was constituted in terms of Section 58(1) of the Public Procurement Act, 2015, hereinafter referred to as the “Public Procurement Act”, as amended to hear an application lodged by the Central Procurement Board of Namibia, hereinafter referred to as the “Applicant”, against Six Thousand Security Services CC, a bidder/supplier, hereinafter referred to as the “1st Respondent” and Esser Pawa Naukosho, hereinafter referred to as the “2nd Respondent” whereby the Applicant sought relief from the Review Panel to debar and suspend the Respondents in terms of section 68(1)(a) and (d) of the Public Procurement Act read together with Regulation 46(1) of the Public Procurement Regulations.
- 1.2 In accordance with Regulation 47(1) of the Regulations, the Review Panel, on 31 May 2024, held its preliminary sitting to determine whether the application by the Applicant contains reasonable grounds that would warrant the Respondents to be notified of the request for suspension and debarment from participation in public procurement activities for a period to be determined by the Review Panel.
- 1.3 In compliance with Regulation 47(2), the Respondents were notified of the application for suspension and debarment made to the Review Panel and accorded the Respondents an opportunity to make written representations under oath. This was done in the letter to the Respondents dated 04 June 2024, which also contained an invitation to the debarment application hearing.

2. GROUNDS FOR THE REVIEW AS CONTAINED IN THE APPLICATION BY THE APPLICANT

- 2.1 According to the factual records/documents submitted by the Applicant to the Review Panel, the 1st Respondent participated in bid number NCS/OAB/CPBN-06/2022 to render security services for the Swakopmund Municipality for a period of 24 months. The bidding process was conducted by the Applicant in this matter on behalf of the Swakopmund Municipality.
- 2.2 The Applicant in an affidavit by its Chairperson informed the Review Panel that on 09 February 2023, the Bid Evaluation Committee reported that the 1st Respondent and another bidder were conflicted in terms of Instructions to Bidders (ITB) 6.1(d), in that the 1st Respondent and another

bidder submitted the same proof of ownership of essential tools being an invoice with the same invoice number and issued by the same supplier being J Gerdes Uniwear CC.

- 2.3 The Applicant informed the Review Panel that the aforesaid invoices submitted by the 1st Respondent and another bidder were issued on the same date, had the same invoice/document number, listed the same items, had the same special border page, the items had the same item reference, had identical monetary amounts next to each item, had identical tax and discount offered and were issued by the same supplier.
- 2.4 On 28 February 2023, the Applicant addressed a letter to the Supplier; J Gerdes Uniwear CC, requesting clarification to whom invoice number IN238584 was issued. The Applicant informed the Review Panel that J Gerdes Uniwear CC replied on 01 March 2023, informing them that invoice number IN238584 was issued to a company called Shilimela Security Services CC on 14 December 2020. J Gerdes Uniwear CC in the letter addressed to the Respondent attached the invoice issued to Shilimela Security Services CC. The Applicant found that although this invoice had the same invoice number, date, total amount, tax amount, and discount amount. The said invoice however had the following differences:
 - 2.4.1 The items listed therein were different;
 - 2.4.2 The item codes were different; and
 - 2.4.3 The invoice did not bear the same special border as that of the Respondent and another bidder.
- 2.5 Further, the Applicant submitted that ITB 3.1 and 3.2 of the bidding document informed bidders that bidders participating in this procurement process were to observe the highest standards of ethics during the bidding process and the execution of contracts. ITB 3.2 of the bidding document, the Applicant informed the Review Panel, defined fraudulent practice as any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or avoid an obligation.
- 2.6 The Applicant stated that based on the written information received from J Gerdes Uniwear CC, the Applicant concluded that the 1st Respondent was conflicted as provided for in ITB 6.1(d) and contravened ITB 3.2 (ii) for amongst others, supplying false information.
- 2.7 In their founding affidavit, the Applicant stated that it addressed a letter to the Respondents in which it afforded the Respondents an opportunity to address the Applicant in writing, regarding the similarities of their invoice and that of another bidder. The Applicant further provided that in a letter dated 27 March 2023, the Respondents responded to the Applicant indicating the following:
 - 2.7.1 It is a customer of J Gerdes Uniwear CC since 2018 and approached J Gerdes Uniwear CC for uniforms and other security items on credit;
 - 2.7.2 J Gerdes Uniwear CC advised the Respondents to approach an existing client of theirs. The 2nd Respondent approached the owner of Shilimela Security Services CC who is her husband and an existing client of J Gerdes Uniwear CC;
 - 2.7.3 J Gerdes Uniwear CC would issue an invoice to the 1st Respondent but the account belonged to Shilimela Security Services CC;

- 2.7.4 In July 2022, J Gerdes Uniwear CC separated the business accounts of the 1st Respondent and Shilimela Security Services CC; and
- 2.7.5 The reason why the invoices of the 1st Respondent and the other bidders appear to be similar is due to the fact that each company that purchases on the same account is only permitted similar items per month with a specific limit.
- 2.8 The Applicant in their affidavit stated that it found that the explanation of the 1st Respondent and another bidder did not justify the reasons why they used an invoice dated 14 December 2020 issued to another entity, when these entities had their own account after July 2022. The bid was advertised in October 2022.
- 2.9 Based on the above, the Applicant resolved to file an application for debarment against the Respondents.

3. POINTS IN LIMINE

Before the merits of the case were heard, Mr. Sisa Namandje, legal representative of the Respondents raised the following preliminary points:

3.1 *The Factual Record:*

- 3.1.1 The Respondents informed the Review Panel, that in their view no factual record was developed by the Applicant or that such factual record was incomplete. The Respondents argued that in terms of Section 68(2) (a) of the Public Procurement Act and Regulation 46, the Review Panel cannot effect a suspension or debarment unless the Applicant has provided the Review Panel with a factual record.
- 3.1.2 The Respondents argued that the documents provided to the Review Panel do not constitute a full record to enable the Review Panel to effect a suspension or debarment. The Respondents stated that various documents such as the minutes of the Bid Evaluation Committee were omitted in the information provided to the Review Panel and therefore there was no full or complete factual record before the Review Panel.
- 3.1.3 On this point, the Respondents finally submitted that it was incumbent on the Applicant to develop a record that shows that false information was supplied by the 1st Respondent. Based on the documents provided by the Applicant to the Respondents, the Respondents argued that such documents do not constitute a record to show that false information was provided by the 1st Respondent in the bidding process.

3.2 *Suspension/Debarment against an Individual*

- 3.2.1 The Respondents argued that in terms of Section 68 of the Public Procurement Act and its accompanying Regulations, a suspension or debarment can only be sought against a bidder or a supplier. The Respondent stated that in law there is a clear distinction between a corporate entity and the members of such corporate entity. The Respondent stated that neither the Public Procurement Act nor its Regulations afford the Review Panel the discretion to pierce the corporate veil and debar or suspend the members of the company.

3.3 *Resolution by the Board of the Applicant*

- 3.3.1 During the Review Hearing, the Respondents argued that the resolution made by the Board of the Applicant did not authorize Mr. Amon Ngavetene to institute these debarment proceedings against the Respondents.
- 3.3.2 In addition, the Respondents argued that the Board Resolution provided by the Applicant to the Review Panel did not constitute a proper Board Resolution in the format it has been provided, for example, the Board Resolution was not signed by the person authorized to do so. Further, no reason was provided by the Applicant as to why the actual resolution was not provided as the actual resolution would be the best evidence.

3.4 *Powers of the Review Panel to Call Witnesses / Oral Evidence*

- 3.4.1 At the second hearing of the Review Proceedings, the Respondents argued that the Review Panel could call for oral evidence to be heard at the Review Proceedings in terms of Regulation 48(1) to the Public Procurement Act, however, such oral evidence must be initiated by the Parties to the Debarment Proceedings and not the Review Panel.

4. APPLICANT'S SUBMISSIONS DURING THE PROCEEDINGS

- 4.1 The Applicant informed the Review Panel that it stood on the information as provided in their founding affidavit.
- 4.2 Further, their Application for debarment and suspension was in line with Section 68 of the Public Procurement Act. The Applicant submitted at the Review Hearing that the Respondents took part in a bid for the rendering of security services for the Municipality of Swakopmund. The Bid Evaluation Committee when evaluating the bid found that an invoice submitted by the 1st Respondent, which ought to be an original invoice, appeared very similar to an invoice submitted by another bidder.
- 4.3 The Applicant additionally informed the Review Panel that a review of this bid was considered and decided upon by the Review Panel on 21 June 2023. On 21 June 2023, the Review Panel decided on this matter. The Applicant submitted that the Review Panel which heard the matter, dismissed the application made in terms of Section 60(a) of the Public Procurement Act. An application on this bid was made to the High Court of Namibia but that was withdrawn on 16 January 2024.
- 4.4 The Applicant argued that both the 1st and 2nd Respondents should be debarred from participating in public bids as Section 29(1) (a) of the Public Procurement Act which refers to Namibian citizens and not only legal entities.
- 4.5 The Applicant informed the Review Panel that the content and format of board resolutions differ from company to company and what is important is the content of the resolution. The resolution has authorized Mr. Amon Ngavetene to depose to the affidavit by the Applicant. Further, the Applicant argued that it did not rely on fraud and dishonesty as alleged by the Respondent but rather relied on the supply of false information and misconduct.

- 4.6 Finally, the Applicant indicated that a full factual record was supplied by the Applicant to the Review Panel and that the Respondents provided false information to the Applicant by misrepresenting that it had the necessary technical capacity.
- 4.7 No witness was called by the Applicant to testify during the Review Hearing.

5. RESPONDENTS' SUBMISSIONS IN THEIR REPLYING AFFIDAVIT AND DURING THE PROCEEDINGS

- 5.1 On the merits, the Respondents argued that the Applicant did not provide clear and satisfactory evidence to make out a case for debarment. The Respondent submitted that the Applicant did not provide information to prove that the Respondents were dishonest or submitted false information.
- 5.2 The Respondents argued that the Applicant could not prove that the Respondents forged a document. The Respondents explained that the 1st Respondent has bought security uniforms from J Gerdes Uniwear CC since 2018. Initially, J Gerdes Uniwear CC did not permit the 1st Respondent to have its own account and advised the Respondents to approach an existing client and purchase on the account of that client. The Respondents approached her husband, Dr. Shilimela, who was an existing customer of J Gerdes Uniwear CC. The 1st Respondent was permitted to purchase goods from J Gerdes Uniwear CC on the account of Shilimela Security Services CC on a 30-day basis. The Respondent explained it was on this basis that the invoice in question was provided to the Respondents by J Gerdes Uniwear CC. The Respondents submitted that no document was forged.
- 5.3 The Respondents called two witnesses to testify on their behalf. The first witness to testify was Dr. Banda Shilimela. Dr Shilimela in summary testified that he is the owner of Shilimela Security Services CC and a retired businessman. His company has been a client of J Gerdes Uniwear CC for many years. He has permitted several new/starter security companies to purchase goods on his account at J Gerdes Uniwear CC including the 1st Respondent.
- 5.4 Dr. Shilimela further testified that on 24 March 2023, there was an inquiry from the Applicant regarding the invoice of the 1st Respondent submitted in this bid. He went to Sonja Friedrich, the managing partner of J Gerdes Uniwear CC on or about 07 June 2023. Ms. Friedrich informed him that she would clarify the matter and he informed her that such clarification must be made in an affidavit under oath. Ms. Friedrich typed an affidavit by herself in her office and explained that the invoices were legitimate. Dr. Shilimela thereafter called Constable Martin Antindi a police officer who works at the Windhoek Central Police Station. Dr. Shilimela and Ms. Friedrich drove to the Windhoek Police Station where they found Constable Antindi in the car parking area. Ms. Friedrich signed the affidavit in the car parking area and thereafter Constable Antindi took the affidavit to the Police Station to put on a stamp.
- 5.5 Dr. Shilimela further testified that Ms. Friedrich called him on or about 12 June 2024 and said that the Review Panel had threatened her.
- 5.6 The second person to testify was Constable Martin Antindi. Constable Antindi testified in summary that on 07 June 2023, Dr. Shilimela and a white lady came to him at the Windhoek Police Station to sign a declaration. Constable Antindi stated that he and the lady signed the declaration in the parking lot of the Police Station and thereafter he went inside to place a stamp on the declaration.

5.7 Finally, the Respondent concluded by stating that if one closely examines the facts of the matter, the Applicant did not prove the grounds they have relied on if one considers the provisions of Section 68 (1) (a) and (d) of the Public Procurement Act.

6. FINDINGS OF THE REVIEW PANEL

After having heard Mr Hamukwaya for the Applicant, and Mr. Namandje for the Respondent, and having considered all the factual records before it, the Review Panel found the following and decided on the matter in accordance with Regulation 47(3), as contained hereunder.

- a) The Review Panel has carefully considered and assessed the evidence (both oral and in writing) provided by parties to the Review Panel including the documents and cases provided.
- b) The Review Panel found that a factual record was provided by the Applicant and based on the record provided, the Review Panel could decide on this matter.
- c) The Review Panel has found that the Applicant has been unable to clearly prove that the Respondents provided false information to the Applicant during the bidding process as provided for in Section 68(1) (a) and (d) of the Public Procurement Act.

7. DECISION OF THE REVIEW PANEL

Having considered the above, the Review Panel makes the following order:

- 7.1 That the application made by the Applicant to suspend and debar the Respondents is dismissed.


Ms. Doné Brinkman
CHAIRPERSON

