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Reference:

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Enquiries:

Datum: 26 June 2020
Date:

OFFICE OF THE MUNICIPAL MANAGER

NOTICE LETTER TO PROVINCIAL TREASURY

TO: The Head of Department

Provincial Treasury Western Cape

Mr David Savage

Email:

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CONSIDERATION OF THE APPOINTMENT OF INOVASURE (PTY) LTD FOR THE PROCUREMENT OF ITS ENERGY VAULT PRODUCT AS AN UNSOLICITED BID, OVER A PERIOD OF 25-YEARS

PURPOSE

1. To inform you of the above intention of the Kannaland Municipality and to solicit your views and recommendations in compliance with the following prescripts:
 - i. Municipal Finance Management Act, 2003 (Act 56 of 2003) – [MFMA], section 33(1), as the intended contract will exceed 3 financial years, i.e. 25 years.
 - ii. Supply Chain Management Regulations of 1 July 2005 –[SCMR], Regulation 37(3), in consideration of the unsolicited bid.
 - iii. MFMA section 120(6) read with Public Private Partnership Regulations of 1 April 2005 – [PPPR], Regulation 4, in consideration of the public private partnership agreement.
2. To provide you with the reasons for the intention as prescribed.
3. To explain how this process is aligned with the Public Private Partnership processes underway.

4. To give you access to the necessary documents.

BACKGROUND

5. With the intermittent and endemic shortage of lifegiving energy to the municipal area for which the Council approved a very innovative but simple, paid-for by-the-supplier, renewable energy storage and generation solution, being called the InovaSure Energy Vault project, on 9 October 2018.
6. The project entails the linking of the substation/s to the InovaSure 'Energy Vault', at InovaSure's own cost, which creates the real and substantial value for the Municipality in that, amongst other benefits, an approximate 33% increase in capacity will immediately occur. In addition, the equipment value for this process (approximately R1.2 billion per Energy Vault) will be passed onto the Municipality's balance sheet after a period of 25 years (Build Operate Transfer ['BOT']). After conversion of the relevant substation/s to include the InovaSure Energy Vault, the referenced substation/s will no longer be under pressure in terms of performance during peak periods and will be in a position to act in concert with the other InovaSure Energy Vaults and so very significantly increase their efficiency and performance capabilities. In addition, the InovaSure Energy Vault proposal further allow for the enhancing of the capabilities of the distribution network.
7. The intention is for the project to be executed as a Public Private Partnership with the support from the DBSA. The project is registered at NT under M180 and the GTAC under TASM 180.
8. For the past 19-months the Municipality embarked on extensive consultation processes inclusive of various community participation sessions to announce the intention and the project and to solicit support. The various feasibility studies were also available on the municipal website since November 2018.
9. The Municipality has now reached the point of project implementation and needs to formally procure the services.
10. As the renewable energy solution adopted by the Council is a patented product of InovaSure (Pty) Ltd, it is the intention to adopt their product solution which was submitted as an unsolicited bid.
11. Additionally, to ensure a sustainable and financially viable product solution as recommended and supported by the various feasibility studies, the project duration will be at least 25-years.
12. The following is therefore submitted in compliance with the relevant legal prescripts.

UNSOLICITED BID COMPLIANCE REQUIREMENTS – SCMR 37

13. SCMR 37(3) provides the requirements for a public participation process and prescribes that the public and potential suppliers must be provided with:

- i. Reasons why the bid is not open.
- ii. An explanation of potential benefits.

Reasons why the bid is not open:

14. Following is a brief discussion of why the invitation of open competitive bids is impractical:

- (i) The product offering has been designed and patented specifically for the requirements of the municipality and consists of extensive protected commercial private information.
- (ii) Detailed feasibility and legal studies have been concluded and independently confirmed for the project.
- (iii) Inovasure expressed the willingness to accept a significant portion of financial and commercial risks.
- (iv) The product offering is a new initiative in the country, and it is not possible to identify detailed tender specifications.
- (v) The product offering and team bring extensive international expertise to the country
- (vi) Inovasure already secured funding support for the project.
- (vii) The product offering is supported by ESKOM and the DBSA.
- (viii) Inovasure is the sole provider of the product.

Explanation of potential benefits:

15. ***The product is demonstrably a unique innovative concept:*** The uniqueness and innovation of the Inovasure Energy Vault project have been extensively considered and reported on in the feasibility studies concluded for the project as referenced in Parts A and B of the Inovasure Feasibility study report of 1 November 2018, which was independently supported by Stefanutti Stocks and Fairbridges Attorneys on 20 March 2019 and the DBSA on 14 February 2020.

16. ***The product will be exceptionally beneficial or have exception cost benefits for the municipality:*** Except for the benefits already discussed above, other benefits, from a socio-economic, financial, sustainability and environmentally friendly perspective have been extensively considered and reported on in the feasibility studies concluded for the project as referenced in Part C of the Inovasure Feasibility study report of 1 November 2018, which was independently supported by Stefanutti Stocks and Fairbridges Attorneys on 20 March 2019.

25-YEAR CONTRACT COMPLIANCE REQUIREMENTS - MFMA SECTION 33

17. MFMA, section 33(1)(a) prescribes the processes to be followed by a municipality should it enters into a contract that will impose financial obligations on the municipality beyond the three financial years, requiring from the Municipal Manager to make public the draft contract and an information statement summarising the Municipality's obligations and invite the public to comment.
18. Attention is directed to the fact that as per the feasibility studies and confirmed commitment from Inovasure, the majority of the project risk will be carried by it and it will also take responsibility for securing funding for the majority infrastructure and capital investments for this multi-billion project.
19. The municipality's financial risk is limited to the same or less than its current exposure to ESKOM.
20. The relevant draft contract is found hereto, and your attention is specifically directed to the following clauses which deals with the responsibilities, obligations, and rights of the Municipality:

<u>2.</u>	<u>THE EMPLOYER</u>	23
<u>2.1</u>	<u>Right of Access to the Site</u>	23
<u>2.2</u>	<u>Permits, Licences or Approvals</u>	24
<u>2.3</u>	<u>Employer's Personnel</u>	Error! Bookmark not defined.
<u>2.4</u>	<u>Employer Obligations</u>	Error! Bookmark not defined.
<u>3.</u>	<u>THE EMPLOYER'S ADMINISTRATION</u>	ERROR! BOOKMARK NOT DEFINED.
<u>3.1</u>	<u>The Employer's Representative</u>	Error! Bookmark not defined.
<u>3.2</u>	<u>Other Employer's Personnel</u>	Error! Bookmark not defined.
<u>3.3</u>	<u>Delegated Persons</u>	Error! Bookmark not defined.
<u>3.4</u>	<u>Instructions</u>	Error! Bookmark not defined.
<u>3.5</u>	<u>Determinations</u>	Error! Bookmark not defined.
<u>10.</u>	<u>EMPLOYER'S TAKING OVER</u>	ERROR! BOOKMARK NOT DEFINED.
<u>10.1</u>	<u>Taking Over of the Works and Sections</u>	Error! Bookmark not defined.
<u>10.2</u>	<u>Taking Over of Parts of the Works</u>	Error! Bookmark not defined.
<u>10.3</u>	<u>Interference with Tests on Completion</u>	Error! Bookmark not defined.
<u>20.</u>	<u>TERMINATION BY EMPLOYER</u>	61
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<u>22.</u>	<u>RISK AND RESPONSIBILITY</u>	65

<u>22.1</u>	<u>Indemnities</u>	65
<u>22.2</u>	<u>Contractor's Care of the Works</u>	Error! Bookmark not defined.
<u>22.3</u>	<u>Employer's Risks</u>	Error! Bookmark not defined.
<u>22.4</u>	<u>Consequences of Employer's Risks</u>	Error! Bookmark not defined.
<u>22.5</u>	<u>Intellectual and Industrial Property Rights</u>	Error! Bookmark not defined.
<u>22.6</u>	<u>Limitation of Liability</u>	Error! Bookmark not defined.

PUBLIC PRIVATE PARTNERSHIP [PPP] ALIGNMENT

21. From the beginning it was the intention to formally register the product solution as a Public Private Partnership, and if successful, the benefit of this solution may also be shared with neighbouring municipalities.
22. On 18 April 2019 the NT GTAC team confirmed that it has no objection with the intended project and on 21 November 2019 the NT GTAC team provided the municipality with a project reference number TASM 180, which was confirmed by the National Treasury on 26 November 2019.
23. Since November 2019, the evidence on record reflects that the municipality made more than 44 attempts to meet with the NT and NT GTAC to discuss the level of the latter's support as per MFMA s120(5).
24. Notwithstanding the aforesaid challenges, the Municipality obtained legal advice which advised it that:
 - (i) Notwithstanding the current perception that National Treasury and/or GTAC formal approvals are required in order to continue with a municipal PPP process, there is none such a prescript.
 - (ii) The only legislative prescripts available to Municipalities in relation to PPP's are found in the MFMA, section 120 and the relevant PPPR's 1 to 12.
 - (iii) MFMA section 168 provides that the NT may issue guidelines to municipalities. In this regard in 2016, the following guidelines were issued, namely the NT GTAC Guidelines for Municipal Service Delivery through PPP's.
 - (iv) MFMA section 168(3) very specifically prescribes that guidelines issued are not binding on municipalities unless it was adopted as such by Council. As the NT GTAC Guidelines for Municipal Service Delivery through PPP's, 2016, were not formally adopted by the Kannaland Municipal Council, these guidelines have no power in law and cannot be enforced.

- (v) Mindful of the fact that the said PPP guidelines have no power in law, the only prescripts the municipality must comply with are MFMA, section 120 and the PPPR's.
 - (vi) MFMA, section 120 does not prescribe the requirement for Treasury Approvals during PPP's, but merely refer to the solicitation of the National Treasury's views and recommendations on the feasibility study in terms of section 120(6)(c).
 - (vii) The PPPR's also do not prescribe the requirement for Treasury Approvals during PPP's, but merely refer to the:
 - a) Notification of the relevant treasuries when it wishes to conduct a MFMA section 120(4) feasibility study as per PPPR 2(1)(a).
 - b) To solicit the views and recommendations of the relevant treasuries on the evaluation of the bid of a preferred bidder as per PPPR 4(1)(b).
 - c) To solicit the views and recommendations of the National Treasury on the content of the PPP-agreement and the capacity of the preferred bidder to comply with his or her obligations in terms of the public-private partnership agreement.
 - (viii) It was confirmed that with the evidence on record and after completion of the processes as recommended in the report, the Municipality will have had fully complied with its prescribed consultation with the National Treasury.
 - (ix) It was further confirmed that there is an alignment between PPP activities and an unsolicited bid, and that full compliance is feasible.
25. The Municipality, as advised, had therefore decided to continue with the unsolicited bid process aligned with the MFMA requirements for a contract longer than 3-yrs as well as the PPP requirements and where feasible the PPP guidelines.
26. The contract attached to this notification as per MFMA section 33, is therefore similar to the contract provided to the relevant NT PPP-unit and GTAC on 22 March 2019 and serves as compliance with the PPPR 4(3).
27. In the event that the PPP process cannot be successfully concluded, the municipality will continue with the procurement process and enter into a Service Delivery Agreement with the preferred bidder in order to activate the DBSA funding.

RELEVANT DOCUMENTS

The following relevant documentation is available for perusal by visiting the municipal website at <https://www.kannaland.gov.za/inovasure-energy-project-kannaland-municipality>
 28. and you can open the documents by clicking on the relevant link:

- (i) Project specific requirements.
- (ii) Council Resolution of 9 October 2018.
- (iii) Feasibility study of 1 November 2018 – Executive Summary.
- (iv) Feasibility study of 1 November 2018 – Part A: Introduction and interventions.
- (v) Feasibility study of 1 November 2018 – PART B: Feasibility of interventions.
- (vi) Feasibility study of 1 November 2018 – PART C: Investment and finance.
- (vii) Draft Public Private Partnership Agreement.
- (viii) Municipal advert as prescribed.
- (ix) Municipal notice as prescribed.

WAY FORWARD ACTIONS

29. Enquiries may be directed to Ms Wilmie Viljoen at email - wilmie@kannaland.gov.za or telephone - 028 551 1023.

30. Your views and recommendations within the next 30 days as from date of this correspondence will be greatly appreciated and, in the absence, thereof, we will accept that you have no objection.

Kind regards



Signed:
Municipal Manager: R Stevens