



REPUBLIC OF NAMIBIA

MINISTRY OF FINANCE

PUBLIC PROCUREMENT REVIEW PANEL

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IN THE PUBLIC PROCUREMENT REVIEW HEARING

HELD ON 19 JANUARY 2024

IN THE MATTER BETWEEN

UNIK CONSTRUCTION ENGINEERING (PTY) LTD JV

CK HEYDT CIVILS CC

1ST APPLICANT

ZHONG MEI ENGINEERING GROUP (PTY) LTD JV

PALLADIUM CIVIL ENGINEERING (PTY) LTD

2ND APPLICANT

AND

CENTRAL PROCUREMENT BOARD OF NAMIBIA ("CPBN")

1ST RESPONDENT

NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY

AUTHORITY ("NAMFISA")

2ND RESPONDENT

ADAPTIVE BUILDING LAND CONSTRUCTION CC JV

CHINA STATE CONSTRUCTION ENGINEERING

CORPORATION (PTY) LTD

3RD RESPONDENT

AND OTHERS

IN THE TWO REVIEW APPLICATIONS MADE BY FIRST AND SECOND APPLICANTS IN TERMS OF SECTION 59 OF THE PUBLIC PROCUREMENT ACT, 2015 (ACT NO. 15 OF 2015) AS AMENDED (“ACT”).

BID NO: W/OAB/CPBN-01/2023: CONSTRUCTION OF THE NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY (NAMFISA) HEAD OFFICE

Present: Hellen Amupolo (Chairperson), with Gilbert Habimana, Kenandei Tjivikua.

Dissenting: Paulina Kandali Iyambo, and Selma-Penna Utonih.

Heard: 19 January 2024

Decided: 19 January 2024

ORDER

1. INTRODUCTION

- 1.1. A hybrid meeting was held using both physical and virtual modes.
- 1.2. Having heard **Adv. T. Chibwana** for the First Applicant, **Mr. Ndeli Ndaitwah** for the Second Respondent, **Ms. Nicola David** for the First and Respondent, and other interested parties who were joint in terms of Sub-Regulation 42(5)(a) of the Public Procurement Regulations (hereinafter referred to as “the Regulations”) to the Public Procurement Act, 2015 (Act No. 15 of 2015) (hereinafter referred to as “the Act”) as amended; and
- 1.3. Having read the applications for review and other documents filed as part of the record, the Review Panel made the following findings:

2. BACKGROUND TO THE REVIEW APPLICATIONS

First Applicant: Unik Construction Engineering (Pty) Ltd JV CK Heydt Civils CC

- 2.1. The First Applicant stated that it was disqualified at the legal admissibility evaluation stage on the following basis:

“The bidder submitted the required documents for the key technical personnel. However, the submitted documents for the Project Manager, Site Agent, Foreman, Building Works Foreman, Surveyor and Health and Safety Officer were not certified as was required in terms of criteria 1.6.4.10 on page 45 of the bidding documents”.
- 2.2. The First Applicant submitted that the basis for disqualifying its bid was factually inaccurate, misleading, and contrary to the provisions of the bidding document.

- 2.3. The First Applicant further stated that in terms of ITB 12.1(j)(5) of the bidding documents there were only two requirements specified that related to the Project Manager, Site Agent, Foreman, Building Works Foreman, Surveyor, and Health and Safety Officer, which were required, and these are the provisions of a curriculum vitae and the provision of signed consent forms.
- 2.4. The relief sought by the First Applicant: The First Applicant prayed that the First Respondent (CPBN) be directed to set aside their decision to award and conduct a re-evaluation that would include the First Applicant.

Second Applicant: Zhong Mei Engineering Group (Pty) Ltd JV Palladium Civil Engineering (Pty) Ltd

- 2.5. The Second Applicant stated that according to the Executive Summary, the First Respondent disqualified its bid for the following reasons:
“One of the JV Partners - Zhong Mei (Pty) Ltd submitted a tax Good Standing Certificate. Upon further due diligence and inquiry to the Namibia Revenue Agency (NAMRA), the submitted tax Certificate was confirmed to have been issued unprocedural, thus it was revoked, and the bidder was deemed non-responsive in terms of criteria 1.6.4.3 on page 42 of the bidding document”.
- 2.6. The Second Applicant further stated that it was evident that the Applicant’s disqualification stemmed from a purported decision made by the Namibia Revenue Agency (NamRA) to “revoke” a tax good standing certificate that was issued to the Second Applicant.
- 2.7. The Second Applicant further alleged that NamRA did not have statutory power to “revoke” its tax good standing certificate which, according to this Second Applicant, was issued procedurally.
- 2.8. The relief sought by the Second Applicant: The Second Applicant sought for the following orders:
- 2.8.1. An order setting aside the First Respondent’s (CPBN) decision to disqualify the Second Applicant at the legal admissibility evaluation stage as set out in the Executive Summary accompanying the notice for selection of procurement award dated 24 November 2023.
- 2.8.2. An order setting aside the First Respondent’s decision to award the bid to the Third Respondent as set out in the notice for selection of procurement award dated 24 November 2023.
- 2.8.3. An order directing the First Respondent to evaluate the Applicant’s bid fairly and reasonably.

First Respondent’s (CPBN) Replying Affidavits:

First Applicant:

- 2.9. In respect of the First Applicant, the First Respondent stated that the First Applicant provided copies of qualifications of key personnel which were not

certified as was required in terms of the evaluation criterion 1.6.4.10 and ITB 12.1(J)(6) of the bidding document.

Second Applicant

- 2.10. In respect of the Second Applicant, the First Respondent stated that the Applicant was disqualified because it submitted a NamRA's tax good standing certificate that was issued irregularly.
- 2.11. The tax good standing certificate was also revoked by NamRA and on that score, and thus the Second Applicant had no valid tax good standing certificate in the bidding process and therefore disqualified as non-responsive.
- 2.12. It was the view of the First Respondent that NamRA should have been served and joined in the proceedings to be allowed to answer the allegations made.
- 2.13. The relief sought by the First Respondent: In respect of both applications, the First Respondent prayed that the Review Panel dismiss the applications in line with Section 60(a) of the Act and confirm the decision of the CPBN in line with Section 60(e) of the Act.

3. POINTS IN LIMINE

- 3.1. At the commencement of the review proceedings, the Chairperson raised a point in *limine* that needed to be ventilated prior to the substantive matters being heard. The Chairperson read Section 59(1) of the Act together with Regulation 42(1) of the Regulations and further referred the Parties to the notice for selection of procurement award issued by the First Respondent on 24 November 2023 and quoted the clause under that notice which reads as follows:

"A bidder who applied for a reconsideration as stated in (d) above, will be notified about the decision within 14-working days after the standstill period."
- 3.2. The First Applicant submitted that bidders were not notified of the existence of an exemption in terms of Section 4(2) of the Act in favour of the First Respondent and stated that the notice for selection of procurement award was confusing as bidders were not aware as to how they were supposed to count the days.
- 3.3. An Interested Party, the Third Respondent (Adaptive Building Land Construction CC JV China State Construction Engineering Corporation (Pty) Ltd), informed the Review Panel by way of a responding affidavit that all Parties were notified that there would be an additional 14 days standstill period counted from the day after the expiry of the notice for selection of procurement award and further that the Applicant cannot argue now that it was not aware that there is no exemption.

- 3.4. The Second Applicant denied that its application was late and further that the Third Respondent in its opposing affidavit contested that the Second Applicant did not submit its application within 7 days. The Second Applicant further stressed that the CPBN as First Respondent filed its replying affidavit late, breaching Regulation 42(4).
- 3.5. The Parties were not allowed to make substantive presentations on the substantive issues brought before the Review Panel but were required by the Review Panel to respond to questions posed by it regarding the procurement cycle activities and dates of events, on the point in *limine*, in line with Regulation 44.
- 3.6. The issue regarding whether the First Respondent's replying affidavit was admissible or not, as provided for in Regulation 42(4), was not deliberated and determined by the Review Panel.
- 3.7. The First Respondent sought an exemption from the Minister of Finance in terms of Section 4(2) of the Act from the statutory timelines of Section 55(4A) on 10 October 2023 and obtained an exemption from the statutory timelines of the said section of the Act.
- 3.8. The exemption allowed the First Respondent to provide a decision on the applications for reconsideration within 14 days after the standstill period as opposed to the 7 days upon receipt of the reconsideration of applications as required under Section 55(4A).
- 3.9. The standstill period for this bid in question commenced on 27 November 2023 and ended on 05 December 2023. The exemption granted provided for a reconsideration period of 14 days after the standstill period and this resulted in the reconsideration period commencing from 6 December until 28 December 2023.
- 3.10. The First and Second Applicants submitted their applications to the Review Panel within the reconsideration period, i.e., on 21 December 2023 and on 28 December 2023 respectively.

4. FINDINGS OF THE REVIEW PANEL

- 4.1. The Review Panel found that the two applications before the Review Panel were lodged prematurely because they were both lodged within the reconsideration period accorded by exemption to the First Respondent by the Minister of Finance in terms of Section 4(2) of the Act and the notice for selection of procurement award issued by the First Respondent on 24 November 2023 to the Parties.

5. DECISIONS OF THE REVIEW PANEL

On the observation of the above events, re-enforced by the concession by the Second Applicant, the Review Panel order that:

- 5.1. There was no need to hear the merits of the matters as the two applications were brought prematurely and not in conformity with Section 55(4A) of the Act, read with the exemption granted by the Minister of Finance in terms of Section 4(2) of the Act, and the notice for selection of procurement award issued by the First Respondent on 24 November 2023 to the Parties, and thus invalid.
- 5.2. Applications of the First and Second Applicants are dismissed in terms of Section 60(a) of the Act.
- 5.3. The decision of the public entity is confirmed in terms of Section 60(e) of the Act.
- 5.4. The public entity shall provide the proof of implementation of this order in 30 calendar days counted from the posting of this order on the Procurement Policy Unit ("PPU") website and shall provide a copy to the Review Panel Secretariat.



Hellen Amupolo
CHAIRPERSON: REVIEW PANEL (in this matter)

