



**REPUBLIC OF NAMIBIA**

**MINISTRY OF FINANCE AND PUBLIC ENTERPRISES**

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**PUBLIC PROCUREMENT REVIEW PANEL**

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**IN THE PUBLIC PROCUREMENT REVIEW HEARING**

**HELD ON 07 MAY 2024**

**IN THE MATTER BETWEEN**

**CHINA COMMUNICATIONS CONSTRUCTION COMPANY LTD JV PROFILE  
INVESTMENTS (PTY) LTD** **APPLICANT**

**AND**

**CENTRAL PROCUREMENT BOARD OF NAMIBIA  
& OTHERS**

**1<sup>st</sup> RESPONDENT**

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

**BID NO: G/ONB/CPBN-01/2023 – PROCUREMENT OF SUPPLY AND DELIVERY OF RAILS, TURNOUTS AND STOP BLOCKS FOR THE NORTHERN RAIL EXTENSION PHASE 3 BETWEEN ONDANGWA AND OSHAKATI AND UPGRADING OF THE SOUTHERN RAILWAY LINE SECTION BETWEEN SANDVERHAAR AND BUCHHOLZBRUNN**

**Coram: Brownny Mutrifa (Chairperson), with Rainer Trede, Selma-Penna Utonih, Donè Brinkman and Michael Gaweseb.**

**Heard: 07 May 2024**

**Decided: 07 May 2024**

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**ORDER**

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**1. INTRODUCTION:**

- 1.1 A hybrid meeting was held, using both physical and virtual modes.
- 1.2 Having heard **Mr. Olsen Kahiriri**, for the Applicant, **Mr. Festus Hamukwaya**, for the 1<sup>st</sup> 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) as amended (hereinafter referred to as “the Act”) and;

Having read the application for review and other documents filed as part of the record, the Review Panel made the following findings and subsequent order hereunder towards the end.

**2. GROUNDS FOR THE REVIEW AS CONTAINED IN THE APPLICANT’S APPLICATION FOR REVIEW:**

- 2.1 The Applicant in its Application for Review informed the Review Panel that the purpose of its application is to review the decision and/ or action to award; and/or intention of the 1<sup>st</sup> Respondent to cancel the bid for the procurement of Supply and delivery of rails, turnouts and stop blocks for the Northern rail extension phase 3

between Ondangwa and Oshakati and upgrading of the Southern railway line section between Sandverhaar and Buchlozbrunn.

- 2.2 The Applicant amplified the foregoing by highlighting that the Respondent disqualified the Applicant under a false pretense by stating that the Applicant is non-responsive in respect of the procurement reference number G/ONB/CPBN-01/2023 consequent to inform that it intends to cancel the bid.
- 2.3 The Applicant seeks an order in terms of section 60 (b), (c) and (d) of the. An order reviewing, correcting and setting aside the 1<sup>st</sup> Respondent's decision and/ or action dated 18 March 2024 and that of 25 March 2024, which disqualified the Applicant under an alleged illicit pretense that the Applicant is non-responsive to the aforesaid bid, consequently, the intention of the 1<sup>st</sup> Respondent's to cancel the bid without a reasonable and fair reason.

### 3. POINTS IN LIMINE:

- 3.1 At the commencement of the review proceedings, the Chairperson requested the Parties to raise any points in *limine* which they may have before the merits of the matter are heard.
- 3.2 The 1<sup>st</sup> Respondent raised an initial issue regarding the Applicant's premature filing of its application and further submitted that the final decision on whether to cancel the bidding process has not been made by the Board. The Board has further not communicated to the bidders on whether the bid has been cancelled as the matter is still under consideration by the Board. The Applicant stated in its Application for Review that its application is premised on the notice for intention to cancel the bid by the Board. Therefore, the reason for the prematurity advanced by the 1<sup>st</sup> Respondent is that bidders were asked to provide reasons as to why the bid should not be canceled, and that process had not been completed as the Board is yet to pronounce itself on the reason provided by the bidders. The 1<sup>st</sup> Respondent argued that there is currently no cancellation as the Board has not made a final decision.
- 3.3 The 1<sup>st</sup> Respondent further explained that when a Notice of Selection of Award is issued, the bidders may request for reconsideration and the Board is obliged to respond to such reconsideration within 14 days based on the exemption made by the Minister of Finance and Public Enterprises. The Act does however not prescribe timelines regarding the current process in which the Board requested bidders to provide reasons why the bid should not be cancelled.

### 4. APPLICANT'S SUBMISSIONS AT THE REVIEW PANEL HEARING:

- 4.1 The Applicant explained that its application was created by the Notice of Intention to Cancel the bidding process served by the Board in its Executive Summary in terms of

Section 52 (1) (a) of the Act . The Applicant further submitted that the 1<sup>st</sup> Respondent indicated in the Notice of Intention to Cancel that all bidders are non-responsive and further invited all bidders to provide written representations on or before Wednesday, 27 March 2024, 17h00 PM, showing cause why the 1<sup>st</sup> Respondent should not proceed to cancel the bidding process.

- 4.2 Further, the Applicant submitted that its bid is responsive as oppose to the reason provided by the 1<sup>st</sup> Respondent to disqualify the Applicant as its Current Ratio is above 1 (one), contrary to the 0.96 figure indicated in the Executive Summary.

**5. 1<sup>st</sup> RESPONDENT’S SUBMISSIONS AT THE REVIEW PANEL HEARING:**

- 5.1 The 1<sup>st</sup> Respondent argued that the Applicant is conflating the process for reconsideration with the Review Panel procedures. Reconsideration only occurs after a Notice for Selection of Award is issued. In this matter no Notice of Selection of Award was issued by the Board. The 1<sup>st</sup> Respondent further stated that as far as the relief sought by the Applicant is concerned, it has not made out a case as to why the Review Panel should make an order declaring that its bid is substantially responsive and that it should be awarded a bid.

**6. FINDINGS OF THE REVIEW PANEL**

Having heard the Parties at the Review Panel Hearing and having considered the written submissions of the Parties, the Review Panel made the following findings:

- 6.1 That Applicant prematurely filed an Application for Review before the Review Panel; and


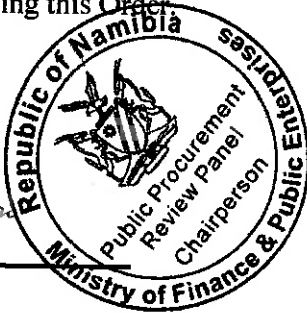
**7. DECISIONS OF THE REVIEW PANEL:**

Based on the above, the Review Panel orders the following:

- 7.1 That in terms of section 60 (a) of the Public Procurement Act, the application is hereby dismissed and;
- 7.2 That the Notice issued by the 1<sup>st</sup> Respondent and dated 18 March 2024, cancelling the Bid No: G/ONB/CPBN-01/2023 – procurement of supply and delivery of rails, turnouts and stop blocks for the northern rail extension phase 3 between Ondangwa and Oshakati and upgrading of the southern railway line section between Sandverhaar and Buchholzbrunn is hereby declared as *ultra vires*, unlawful and therefore set aside in terms of Section 60(c) of the Public Procurement Act.
- 7.3 Further, the matter is referred back to the 1<sup>st</sup> Respondent with following specific instructions:

a) That the 1<sup>st</sup> Respondent finalises this matter within 30 days for effectiveness, efficiency and transparency.

b) The Public Entity shall provide proof of implementation of this Order to the Procurement Policy Unit with copy to the Review Panel within thirty (30) days from the date of receiving this Order.

**Brownny Mutrifa**

**CHAIRPERSON: REVIEW PANEL (IRO THIS MATTER)**