



**REPUBLIC OF NAMIBIA**  
**MINISTRY OF FINANCE**

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**PUBLIC PROCUREMENT REVIEW PANEL**

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**IN THE PUBLIC PROCUREMENT REVIEW HEARING**  
**HELD ON 10 May 2022**  
**IN THE MATTER BETWEEN**

**SHATTY CONSTRUTIOIN CC**

**APPLICANT**

**AND**

**CENTRAL PROCUREMENT BOARD OF NAMIBIA**

**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: W/OAB/CPBN-04/2021: CONSTRUCTION OF THE NEW MIX SETTLEMENT  
PRIMARY SCHOOL AT MIX SETTLEMENT, IN BRAKWATER, KHOMAS REGION –  
PHASE 1**

**Present: Gilbert Habimana: (Chairperson) with Tulimeyo Kaapanda, Rainer Trede,  
Mekondjo Katunga and Brownny Mutrifa**

**Heard : 10 May 2022**

**Decided : 10 May 2022**

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## REVIEW PANEL ORDER

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The Review Panel meeting held on 10 May 2022, was conducted via physical and virtual modes.

Having heard **Ms. Jamey Janke** on behalf of the Applicant (Shatty Construction CC), and in absence of the Central Procurement Board of Namibia, the 1<sup>st</sup> Respondent,

Having read the application for review in terms of Section 59(1) of the Public Procurement Act, 2015 (Act 15 of 2015) hereinafter referred to as “the Act”, read with Regulation 42 of the Public Procurement Regulations, hereinafter referred to as “Regulations”, and having examined other documents filed as part of the records, the Review Panel found the facts and subsequently make the order hereunder:

### 1. GROUNDS FOR THE REVIEW APPLICATION

1.1 The Applicant claims that 1<sup>st</sup> Respondent’s decision, purportedly taken on 20 April 2022, set out in the Revised Notice for Selection of Procurement award for the bidding process of Procurement Reference Number: W/OAB/CPBN-04/2021 (Procurement for the Construction of New Primary School at Mix Settlement), is hereby reviewed and set aside in that the 1<sup>st</sup> Respondent failed to comply with the Review Panel Order dated 28 December 2021.

The Applicant further claimed that the 1<sup>st</sup> Respondent’s decision and process in re-evaluation of the bids in the Procurement of construction of new Primary school at Mix Settlement is not in compliance with the Order of the Review Panel and to a large extent Section 52 (9) of the Act.

### 2. THE APPLICANT

The Applicant stated that the 1<sup>st</sup> Respondent caused a prejudice to the Applicant who could have been selected for award if the 1<sup>st</sup> Respondent had implemented Review Panel’s order of 28 December 2021.

Remedy sought by the applicant:

After being informed by the 1<sup>st</sup> Respondent of the award of the contract by the 1<sup>st</sup> Respondent on 06 May 2022, the applicant requested during the hearing proceedings that Review Panel resolve to suspend the award of the contract and direct the 1<sup>st</sup> Respondent to abide to the Review Panel order of 28 December 2021.

The Applicant stated that the power and functions of the First Respondent is clearly set out in Section 9 of the Act, more specifically and crucial to the matter at hand are subsections (9) (1) (j), (k) and (l) which provides that the First Respondent’s function and powers are *inter alia*.

Therefore, the First Respondent in its functions and as an administrative body must consider the recommendation of the bid Evaluation Committee and must apply their minds and expertise thereto in the reviewing of such recommendations from the Bid Evaluation Committee. The First Respondent had the function and power to request that the Bid Evaluation Committee make a new of further evaluation on grounds that such recommendation is not in line with the Review Panel Order of 28 December 2021.

### 3. THE 1<sup>ST</sup> RESPONDENT

The 1<sup>st</sup> Respondent has not attended the hearing proceedings of 10 May 2022.

1<sup>st</sup> Respondent had sent a letter to the Review Panel Secretariat on 3<sup>rd</sup> May 2022 stating “the Central Board of 1<sup>st</sup> Respondent (“CPBN”) did not receive an affidavit stating the grounds for review in support of the application filed by Shatty Construction cc as required by regulation 42 (2) (a) and (3) of the Public Procurement Regulations: Public Procurement Act, 2015 (“The regulations”)”.

1<sup>st</sup> Respondent also sent a letter to the Chairperson (i.r.o.) this matter on 06 May 2022 where they reiterated the content of their letter of 03 May 2022 and emphasized that Shatty Construction cc did not comply with Regulation 42 (1) of the Public Procurement Regulations which provides that the bidder should within 7 days of receipt of the decision or action taken by the a public entity apply to the review Pane for Review”.

#### 4. FINDINGS OF REVIEW PANEL

4.1 The Panel found that the 1<sup>st</sup> Respondent acted contrary to Regulation 42 (4) when it failed to file with the Review Panel a replying affidavit to the allegations made by a bidder.

4.2 The applicant filed on the 27 April 2022 an application with Review Panel within the standstill period.

4.3 The 1<sup>st</sup> Respondent’s Notice for Selection of award standstill periods are not corresponding:

- for the selected bidder, the standstill period stated in Part A of the Notice for Selection of Award as from **21 April 2022 to 27 April 2022**.
- For not selected bidders, the standstill period stated in same Notice for Selection of Award had to start from **20 April 2022 to 26 April 2022**.

It’s clear that if 1<sup>st</sup> Respondent used the standstill period attached to the selected bidder, the application for Review was lodged within the standstill period defined in Part A of the Notice abovementioned.

As 1<sup>st</sup> Respondent claims that Applicant did not file the application for review on time, 1<sup>st</sup> Respondent might have used the standstill period attached to Part B of the same Notice for not selected bidders which was valid for only 6 days.

4.4 The 1<sup>st</sup> Respondent stated that, for the second evaluation, they only applied criteria contained in section III of the Bidding Documents.

However, Bidding documents state that these criteria set in section III were additional to other criteria found in ITBs.

Specifically, Bid Documents state that criteria in section III were additional to ITBs. This is averred by the AMENDMENT NO1 TO THE BID DOCUMENT dated 16 July 2021 which states” However, bidders **must** submit scanned completed bidding documents (and Supporting Documents) together with a Completed Bill od quantities in excel in a virus-free USB flash/drive Compact disc in addition to the Original Hardcopies of the Bidder’s completed Bid and its accompanying two (2) copies”.

4.5 In re-evaluating the bids, 1<sup>st</sup> Respondent indicates that they used all and only criteria set in the bidding the documents, Section III, in line with Clause 34.1 of the bidding Documents.

However, introducing Section III: Qualification and Evaluation Criteria, the Bid Documents state “This section contains supplementary criteria that the Procuring Agent shall use to evaluate bids”

Under the same section III, introducing evaluation criteria, the Bidding documents state “In addition to the criteria listed in ITB 12, 15, 18, 20.2 and 34.2 (a) – (e) the following criteria in section III shall apply”.

Further, introducing the grid for Preliminary Examination of the Bids, Bidding Documents state “In addition to the criteria listed above, the following criteria will apply”;

All these statements confirm that the Procuring Agent used criteria in section III and additional criteria included in Instructions to Bidders (“ITBs”) in the first evaluation of the bids.

4.6 Also, the Panel found that bidders have been disqualified because they have not initialled a single page or a few more. The Panel could not trace in section III a criteria which eliminate a bidder for not initialling a page or a few more.

To exclusively apply evaluation criteria contained in Section III of the bidding documents is the right thing to do.

However, 1<sup>st</sup> Respondent took the decision of applying evaluation criteria exclusively stated in Section III only during the second evaluation process. The second evaluation had to use exactly the same criteria used in the first evaluation criteria because this is the information which was given to bidders from the stage of bid advertisement.

4.7 Review Pane found that 1<sup>st</sup> Respondent awarded the contract, despite being informed on the review application on 10<sup>th</sup> May 2022.

4.8 Based on Applicant’s express request to suspend the award in terms of Section 52 (9) of the Public Procurement Act, 2015 (Act No.15 of 2015), Review Panel have resolved to suspend the award 1<sup>st</sup> Respondent made to Messrs James and Young on 06 May 2022.

## 5. DECISION OF THE REVIEW PANEL

In the premise, the Review Panel make the following order:

- 5.1 In terms of section 60 (c) of the Public Procurement Act, 2015, Review Panel direct the 1<sup>st</sup> Respondent to re-evaluate all the bids in accordance with all and only criteria set in the Bidding Documents.

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**GILBERT HABIMANA**  
**CHAIRPERSON: REVIEW PANEL (I.R.O. THIS MATTER)**

