



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

---

**PUBLIC PROCUREMENT REVIEW PANEL**

---

Tel. : (00 264 61) 209 2319  
Fax : (00 264 61) 236454

Head Office,  
Molike Street,  
Private Bag 13295,  
Windhoek  
Namibia

Enquiries: H. Klukowski

**IN THE PUBLIC PROCUREMENT REVIEW HEARING**

**HELD ON 22 JULY 2022**

**IN THE MATTER BETWEEN**

**JER CONSTRUCTION CC**

**APPLICANT**

**AND**

**ROADS AUTHORITY OF NAMIBIA  
PISCES INVESTMENTS HOLDINGS NUMBER EIGHT CC  
RJ EXCLUSIVE INVESTMENTS CC  
FILOMEN INVESTMENTS CC  
HUI TANI TRADING ENTERPRISES CC  
H THIRTY THREE INVESTMENTS CC  
THOR INVESTMENTS CC  
MAGNATE CIVIL ENGINEERING CC  
ODJOVE TRADING AND CONSTRUCTION CC  
NUUYO INVESTMENTS CC  
NORTH FACE INVESTMENTS CC  
BLC SUPPLIERS AND TRADING CC  
OKAKOVERUA BUILDING AND CONSTRUCTION CC**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT  
4<sup>TH</sup> RESPONDENT  
5<sup>TH</sup> RESPONDENT  
6<sup>TH</sup> RESPONDENT  
7<sup>TH</sup> RESPONDENT  
8<sup>TH</sup> RESPONDENT  
9<sup>TH</sup> RESPONDENT  
10<sup>TH</sup> RESPONDENT  
11<sup>TH</sup> RESPONDENT  
12<sup>TH</sup> RESPONDENT  
13<sup>TH</sup> RESPONDENT**

ANDNEY CLEANING SERVICES CC	14 <sup>TH</sup> RESPONDENT
VIDU TRADING CC	15 <sup>TH</sup> RESPONDENT
KOKERBOOM TRADING ENTERPRISES CC	16 <sup>TH</sup> RESPONDENT
SAD TRADING ENTERPRISES CC	17 <sup>TH</sup> RESPONDENT
PANOKA TRADING ENTERPRISES CC	18 <sup>TH</sup> RESPONDENT
CJ CONSTRUCTION AND TRADING CC	19 <sup>TH</sup> RESPONDENT
GORETTI'S TRADING ENTERPRISES CC	20 <sup>TH</sup> RESPONDENT
GECKOH FIFTY EIGHT INVESTMENTS GROUP (PTY) LTD	21 <sup>ST</sup> RESPONDENT
TOPAZ CONSTRUCTION AND ENGINEERING CC	22 <sup>ND</sup> RESPONDENT
J.J.J. TRADING ENTERPRISES CC	23 <sup>RD</sup> RESPONDENT
TUTWENI TRADING ENTERPRISES CC	24 <sup>TH</sup> RESPONDENT
GAMON ELECTRICAL AND CONSTRUCTION CC	25 <sup>TH</sup> RESPONDENT
PUNCHU TRADING CC	26 <sup>TH</sup> RESPONDENT
AC DEVILLIERS	27 <sup>TH</sup> RESPONDENT
NILOTSE INVESTMENTS CC	28 <sup>TH</sup> RESPONDENT
DINALEDI INVESTMENTS CC	29 <sup>TH</sup> RESPONDENT
EFINDANO MAINTENANCE AND CONSTRUCTION SERVICES	30 <sup>TH</sup> RESPONDENT
ALUGODHI ENGINEERING AND CONSTRUCTION CC	31 <sup>ST</sup> RESPONDENT
BRUMAR CONSTRUCTION CC	32 <sup>ND</sup> RESPONDENT
OSHIKOTO BUILDING CONSTRUCTION CC	33 <sup>RD</sup> RESPONDENT

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

**BID NO: W/RB/RA-09/2021: SAND REMOVAL AND RELATED WORKS IN THE LUDERITZ  
AND ORANJEMUND AREA IN THE KEETMANSHOOP REGION**

**Present: Doné Brinkman (Chairperson), with Tulimeyo Kaapanda, Kenandei Tjivikua,  
Lukas Kudumo Seremo and Gilbert Habimana, concurring.**

**Heard : 22 July 2022  
Decided : 22 July 2022**

---

**REVIEW PANEL ORDER**

---

The meeting took place using both physical and virtual modes.

Having heard Mr. Christopher Stanley, representing the Applicant and Mr. Chris Mayumbelo, representing the 1<sup>st</sup> Respondent and other interested parties to the Review hearing and having read the application for review in terms of Section 59(1) of the Public Procurement Act, (Act No. 15 of 2015) (hereinafter referred to as the "Public Procurement Act"), read with Regulation 42 of the Public Procurement Regulations: Public Procurement Act, 2015, (hereinafter referred to as the "Regulations"), and other documents filed as part of the records, the Public Procurement Review Panel made the following findings and subsequently, made the following order towards the end herein;

**1. GROUNDS FOR THE REVIEW APPLICATION**

- 1.1 The Applicant argued that the non-valid Social Security Good Standing Certificate, given by the 1<sup>st</sup> Respondent as the reason for JER Construction CC's disqualification and communicated through the notice for selection of award dated 07 July 2022, is valid. It further argued that the legal admissibility criteria on Social Security Good Standing Certificate makes no reference to a period of validity and thus creating legal uncertainty.
- 1.2 The Applicant alleged that the validity of Social Security Certificates remains a pending issue of concern that requires legal certainty. For Social Security Certificates to be a disqualification purposes becomes moot in respect of the evaluation placed upon it by the Procurement & Tender Department of Roads Authority, specifically in having disqualified the bid as entered by the Applicant.
- 1.3 The Applicant was of the opinion that the 1<sup>st</sup> Respondent's disqualification decision may be based on the still existing reasoning that the period of validity of the incumbent certificate is thirty (30 days), as perhaps based on a Social Security Commission (SSC) communiqué dated 24 September 2020, which the Applicant is privy to.
- 1.4 The Applicant further argued that it suffices to state for purposes of its application that the findings by the Public Procurement Review Panel dated 12 March 2021 in the matter of *Namibia Protection Services and others vs Central Procurement Board of Namibia* on the same issue, should be authoritative, and in the alternative, a threshold for considering the value of a Certificate of Good Standing issued by the SSC.

1.5 It was opined that in the absence of Social Security Good Standing Certificates specifically providing for validity periods and thereby given legal certainty thereon, this will remain a contested issue in the evaluation process of tender considerations. Comparatively, one can refer to a *prima facie* consideration of a Tax Good Standing Certificate and that of a Social Security Good Standing Certificate and without special ingenuity conclude that one calls for tentativeness in respect of its period of validity, while the other is silent thereon. Thus, to an ordinary bidder, there should be reasonable consideration to have regard to the period of validity on bid documents *vis-à-vis* any subsequent notices of extensions on the submissions of the bid causing the expiration of a validity period.

## **2. THE APPLICANT**

2.1 The Applicant alleged that they have been unfairly disqualified by the 1<sup>st</sup> Respondent that considered Applicant's Social Security Good Standing Certificate as expired on the bid submission date. The Applicant further stated that in essence, the absence of the said certificate being specifically indicative of its period of validity creates uncertainty, which when applied in a legal framework, should call for discretion when evaluation criteria are based thereon.

2.2 The Applicant submitted a Social Security Good Standing Certificate of a different bid dated 12 February 2022 and after such submission was acknowledged by the 1<sup>st</sup> Respondent, the Applicant then argued that the purpose of such submission was just to show to all parties that the Applicant was in good standing with the SSC even during the period of bid closing of this specific bid. The Applicant intended to show that when it came to the Good Standing Certificate with the Receiver of Inland Revenue, which indicates the validity period on the certificate, it did submit a new one which was then valid during bid submission but the same could not be indicated for the SSC because it does not have nor indicate validity period.

2.3 The Applicant claimed that it remains compliant to the requirements set out in the bidding document, specifically in respect of the SSC Certificate, because, at the time of bid closing, they submitted a Good Standing Certificate in absolute good faith and such certificate in its understanding, and in the absence of additional clarifications or explanations, was valid.

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

3.1 The 1<sup>st</sup> Respondent stated that the Applicant did not submit a valid Good Standing Certificate of the SSC in line with Section 50(2)(b) of the Public Procurement Act and ITB 13.1(d) of the bidding document.

3.2 The 1<sup>st</sup> Respondent noted that the Applicant submitted an original Good Standing Certificate dated 23 September 2021. The closing date of the bid was 10 February 2022 and therefore, the said certificate was no longer valid at that closing of bid date. This determination is based on the letter dated 24 September 2020 from the SSC addressed to the Central Procurement Board of Namibia (CPBN) which states that their Good Standing Certificate is only valid for one month (30 days) from the date of issuance.

3.3 The bidders were required to align their documents accordingly to the changes made through the Notice to Bidders, and during the bidding processes conducted by the 1<sup>st</sup> Respondent, bidders are accorded an opportunity to seek clarification where there is uncertainty observed. The Applicant did not approach the 1<sup>st</sup> Respondent to seek clarity on the "validity" aspect.

- 3.4 The Review Panel queried if the letter from the SSC to the CPBN was shared with all bidders or if it was part of the bidding document since it was used to define the validity period of the Good Standing Certificate from the SSC. The 1<sup>st</sup> Respondent replied that it was not done and that bidders should seek clarification if they were uncertain.
- 3.5 The 1<sup>st</sup> Respondent argued that even though there is no clear definition of the validity of the Good Standing Certificate from the SSC, it is common practice and based on public entities' internal policies that such a Certificate has been understood to be valid for 30 days only from the date of issue.

#### 4. FINDINGS OF THE PUBLIC PROCUREMENT REVIEW PANEL

The Review Panel found that:

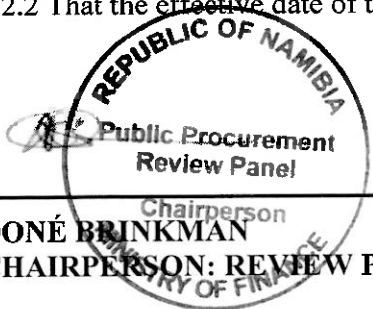
- 4.1 Although the SSC in their abovementioned letter stipulated that a Good Standing Certificate is valid for 30 days, the Certificate they issued to the Applicant does not indicate a validity period on it.
- 4.2 The Review Panel could not establish whether the validity period of thirty (30) days the 1<sup>st</sup> Respondent relied on upon their letter dated 24 September 2020 was legal because neither the Social Security Act 34 of 1994 and its accompanying Regulations, nor the bid documents define the validity as a period.
- 4.3 Moreover, Section 50(2)(b) of the Public Procurement Act referred to by the 1<sup>st</sup> Respondent does not define validity, however only states that *"A bidder or supplier is disqualified from bidding if such bidder or Supplier- is not in possession of a valid certificate of good standing with the Social Security Commission or, in the case where a company has no employees, confirmation letter from Social Security Commission."* Thus, the Review Panel established that the Applicant had a valid Certificate of Good Standing issued by the SSC and its Good Standing Certificate bore the Contract/Tender No: W/ONB/RA-09/2021 of this bid in question. (*Emphasis*).
- 4.4 The fact that the Social Security Act 34 of 1994 (Social Security Act) and its Regulations as well as any other Namibian law or policy are silent on the expiry date of a Good Standing Certificate issued by the SSC, it is difficult to state the validity thereof and to disqualify bidders when it is not clearly stipulated in any part of the bidding document.
- 4.5 The Review Panel established that the 1<sup>st</sup> Respondent had the SSC letter dated 24 September 2022 addressed to CPBN, but such a letter was not included in the bidding document to alert all prospective bidders that it will use thirty (30) days as the validity period for the Good Standing Certificate from the SSC.
- 4.6 It is further established that the CPBN, which also administers bid contracts for the 1<sup>st</sup> Respondent above its threshold, has amended its bidding document requirement where it states that "The Good Standing Social Security Certificate is valid if issued on or after bid advertisement date." This amended bidding document through the Instruction to Bidders (ITBs) is known by the 1<sup>st</sup> Respondent and had the opportunity to address this matter beforehand.
- 4.7 The Review Panel also established that the 1<sup>st</sup> Respondent considered and still considers Regulations 38(2)(c) and Regulations 38(3) in that it notified bidders to apply for reconsideration or review. The 1<sup>st</sup> Respondent is referred to a *Namibian High Court Judgement, Case no: HC-MD-CIV-MOT-GEN-2021/00255, in a matter between Radial Truss Industries (Pty) Ltd and Chairperson of the Central Procurement Board of Namibia*, where it was ruled that "to the extent Regulation 38 is in conflict with the provisions of the Act it is to be considered ultra vires and null and void" and this is so because the right to review or reconsideration *"is not provided for in Section 55(4)"* and the right to review referred

to in Section 55(5) of the Act, *“that review is to be determined by the Review Panel established by the minister in terms of Section 58”* of the Act. It is noted that the same ruling was made and referred in *Namibian High Court Judgement, Case No: HC-MD-CIV-MOT-GEN-2019/00432 in a matter between ABB Namibia (Pty) Ltd and the Central Procurement Board of Namibia.*

## **5. DECISIONS OF THE REVIEW PANEL**

In the premise, the Review Panel makes the following Order:

- 5.1 That the 1<sup>st</sup> Respondent’s notice of selection for the award in respect of bid number W/ONB/RA-09/2021: Sand Removal and Related Works in the Lüderitz and Oranjemund Areas in the Keetmanshoop Region, and/or any decision or action incidental thereto not in compliance with this Act, is set aside in whole in terms of Section 60(c) of the Public Procurement Act.
- 5.2 That in terms of Section 60(c) of the Public Procurement Act, 2015 (Act No. 15 of 2015), the 1<sup>st</sup> Respondent is hereby instructed to re-evaluate all bids which were disqualified on the grounds of the validity period of the good standing certificate from the Social Security Commission.
- 5.2.2 That the effective date of this order is 22 July 2022.

  
Chairperson  
**DONÉ BRINKMAN**  
**CHAIRPERSON: REVIEW PANEL (I.R.O. THIS MATTER)**