



**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 2 DECEMBER 2022**

**IN THE MATTER BETWEEN**

**Central Procurement Board of Namibia**

**Applicant**

**AND**

**Six Thousand Security Services CC**

**1<sup>st</sup> Respondent**

**Chief Nangolo Security Services CC**

**2<sup>nd</sup> Respondent**

IN AN APPLICATION MADE IN TERMS OF SECTION 68 OF THE PUBLIC PROCUREMENT ACT, ACT 15 OF 2015 READ WITH REGULATION 46(1) AND (2) OF THE REGULATIONS TO THE PUBLIC PROCUREMENT ACT

**BID NO: W/OAB/CPBN-04/2021: PROVISION OF SECURITY AND CASH IN TRANSIT SERVICES FOR THE UNIVERSITY OF NAMIBIA CAMPUS, NEUDAMM CAMPUS, HAGE GEINGOB CAMPUS, KHOMASDAL CAMPUS, SOUTHERN CAMPUS, SAM NUJOMA CAMPUS, OGONGO CAMPUS, OSHAKATI CAMPUS, JOSE EDUARDO DOS SANTOS, HIFIKEPUNYE POHAMBA, RUNDU CAMPUS, KATIMA MULILO AND TSUMEB CENTER FOR A PERIOD OF THIRTY-SIX (36)**

**Present:** Kenandei Tjivikua (Chairperson) with Michael Gaweseb, Fillemon-Wise Immanuel, Hellen Amupolo, and Selma-Penna Utonih concurring.

**Heard :** 2 December 2022

**Decided :** 6 December 2022

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#### REVIEW PANEL ORDER

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Having had regard to the application for suspension and debarment in terms of Section 68(2)(a) of the Public Procurement Act read with Regulation 46(1) and (2) and other documents filed as part of the record and having heard Ms. Nicola Davids on behalf of the Applicant, Mr. Sisa Namandje on behalf of the First Respondent and Mr. Kadhila Amoomo on behalf for the Second Respondent who were joined on terms of Section 68(2)(b) and (c) read with Regulations 47(1) and (2), and 48(1) of the Regulations (hereinafter referred to as "the Regulations") to the Public Procurement Act, 15 of 2015 (hereinafter referred to as "the Act") on various *points in limine* raised, the Review Panel made the following findings and subsequent order hereunder towards the end.

#### 1. *POINTS IN LIMINE* RAISED BY THE FIRST RESPONDENTS

On 2 December 2022, following the opening of the proceedings by the Chairperson and prior to the substantive discussions on the material content of the application, both the First and Second Respondents, through their Legal Representatives, raised some preliminary legal objections as would follows below. The meeting was adjourned to allow the parties, particularly the Respondents to make further written submissions regarding the *points in limine* raised. In meeting this request, only Mr. Namandje on behalf of the First Respondent filed further written submissions in amplification of his client's legal objections to the

application for both suspension and debarment. These further submissions were filed on 5 December 2022. Mr. Kadhila, on behalf of the Second Respondent, had indicated he was in concurrence with submissions made by Mr. Namandje.

The Applicant maintained that its application was properly before the Review Panel for there is no prescribed format for filing an application for the suspension and/or debarment. Thus, its application read with the further submission made in amplification on 2 December 2022 of the application would suffice.

The *points in limine* raised were:

**1.1 There were no “prescribed conditions” as contemplated under Section 68(1) of the Public Procurement Act to guide the Application for Debarment and Suspension**

The Respondents submitted that Section 68(1) of the Public Procurement Act envisages that the Review Panel may only suspend or debar a bidder under the “prescribed conditions”. Thus, in so far as they (Respondents) were concerned such conditions were not yet “prescribed”.

Following a question from the Review Panel, if the conditions prescribed under Regulation 47(2) of the Regulations to the Public Procurement Act would not suffice for the purposes of conditions envisaged under Section 68(1) of the Act, Mr. Namandje conceded that they would.

**1.2 The request or application does not show that it was in the public interest to suspend the concerned bidders from public procurements pending debarment proceedings**

The Respondents further submitted that subject to there being a proper application for suspension by a public entity, Section 68(4) places the decision to suspend a bidder from the public procurements pending the completion of the disqualification or debarment proceedings at the discretion of the Review Panel, but only when doing so, is in the public interest.

**1.3 The Application is not accompanied by factual record prepared by the Public Entity (i.e., Central Procurement Board of Namibia) as contemplated under Section 68(2)(a)**

The Respondents further submitted that a public entity bringing an application for suspension and/or debarment is enjoined to prepare a factual record that must accompany the application or request for debarment or suspension in terms of Section 68(2)(a) of the Public Procurement Act read with Regulation 46(3)(d) of the Regulations to the Act.

They (Respondents) contested that the collection of e-mails and letters said to have been exchanged between the Applicant and the Town Councils of Rundu and Katima Mulilo respectively, would occasion the procedural satisfaction of this peremptory requirement.

**1.4 The request for suspension and/or debarment was not made by oath or not accompanied by a Sworn Statement or Affidavit**

Moreover, the Respondents mentioned that Regulation 47(2)(e) compels a bidder or supplier upon notice of the pending suspension and/or debarment application against it “to make written representations under oath within a reasonable time specified in the notice and serve a copy of such representation”. Further, and therefore, it cannot be correct that public entities are permitted just to submit letters purporting to be applications for suspension and/or debarment without sworn statements or affidavits, especially when such requests or applications can have far-reaching consequences for the bidders or supplier. They amplified that it is a cardinal rule that where allegations are made and such allegations would have serious consequences, the clearest case must be made out and of course, in this context, such allegations must be made under oath. Further, the First Respondent submitted that the powers of the Review Panel under Section 68 are evasive and lead to serious consequences as bidders or a bidder may be debarred from submitting bids to public entities for a maximum period of five years. In such a scenario, because of the serious nature of the consequences that may result, there is a high duty to ensure compliance and to present proper and reliable information before making such a serious and far-reaching decision.

In driving home this point, the Respondent cited the case of *Paragon V Chairperson: Review Panel*, in which it was held in paragraph 21 as follows:

*“[21] It is furthermore, clear as day, that a review application is one accompanied by a founding affidavit to place evidence before the Review Panel, and it must be lodged with the Review Panel. That is exactly the reason why other bidders, or any interested person is required to file a “replying affidavit” as contemplated in regulation 42(4) of the Public Procurement Regulations in answer to the averments contained in the founding affidavit.”*

In *Teichman Plant Hire v Coetzee and Another* of paragraphs 21 to 23 it was held that:

*“[21] From the provisions of s.64, one issue is plain – the liabilities of a close corporation cannot, without more, be imputed onto the members without the fictional piercing of the corporate veil. In this regard, an application should be made to the court for a declaration that such a course should be followed and on stated serious grounds such as fraud, grossly negligent or reckless running of the affairs of the Corporation by the members sought to be held personally liable.*

*[22] I should pertinently point out that I am of the considered view that the word ‘application’ employed in the Act should not be regarded as idle or inconsequential. It bears*

*a special meaning. It is unfortunately not defined in the Act and in this event, we need to find the meaning of an application elsewhere.*

*[23] I am of the considered view that the rules of court do give guidance as to what an application is. They, in my view, should be called in aid for the reason that any such application in terms of the s.64, is to be referred to this court for determination. I say so for the reason that the definition section of the Act states that 'Court – means the High Court of Namibia in terms of Section 7 of the Close Corporations Act 26 of 1988.' It stands to reason therefore, that this court's interpretation of an application as contained in this court's rules should be followed." \_*

The Respondents also relied on the case of *ABB v CPBN and Others* which held that:

*“[29] It must be recalled that review applications are based on motion proceedings and in which affidavits play an integral part. They constitute both the evidence and the pleadings and any annexures or other documents if relevant to the proceedings are produced to the court on oath. It is important, to give the process the seriousness and dignity it deserves in the matter by requiring the authority of a signature under oath or affirmation. Anything less may leave questions and doubts abounding as to the accuracy, correctness, and completeness of the statements conveyed in a letter.”*

On the strengths of the above, the Respondents submitted that there was no proper application for the suspension and/or debarment before the Review Panel and prayed for the Review Panel to find the same.

## **2. APPLICANT'S RESPONSE TO THE SUBMISSION MADE IN RESPECT OF THE POINTS IN LIMINE**

The Applicant maintained that its application was properly before the Review Panel, for there is no prescribed format guiding the filing of applications for suspension and/or debarment. Furthermore, the ground for the suspension and/or debarment is the falsification of documents, which is clearly stated in the request or application. Also, the factual records in the form of annexures were attached to the request or application and this is effectively sufficient to enable the Review Panel to determine the request or application concerned. There was also no statutory obligation for a public entity bringing a request or application for suspension and/or debarment to file an affidavit, founding or otherwise.

On the strengths of the above, the Applicant submitted that there was a proper application for the suspension and/or debarment before the Review Panel and prayed that for Review Panel to find the same, by dismissing the *points in limine* raised by the Applicant so that the proceedings move into the substantive discussions of the application concerned.

### 3. FINDINGS OF THE REVIEW PANEL

#### 3.1 Whether or not there were “prescribed conditions” as contemplated under Section 68(1) of the Public Procurement Act to guide the Application for Debarment and Suspension:

With Mr. Namandje having conceded to that on the existential strengths of Regulation 47(2) the assertion that there are no prescribed conditions would be untenable. This thus cleared the *point in limine* number (i.e., as per paragraph 1.1 above), hence there was no need for the Review Panel to make a further determination on this point.

#### 3.2 On whether or not the request or application for suspension and debarment must demonstrate that it was in the public interest to suspend the concerned bidders from public procurements pending debarment proceedings:

The Review Panel upheld the Applicant’s submission that the ground for the sought suspension was clearly stated in the request or application, being the “submission of falsified documents”. Further, whether or not it would be in the public interest to suspend the Respondents from the public procurement proceedings on the strengths of the Applicant’s proposal for suspension is a discretionary determination that only the Review Panel may make. So, the Applicant has discharged her onus in advancing the proposal for suspension and debarment.

#### 3.3 Whether or not the application is not accompanied by a factual record prepared by the Applicant as contemplated under Section 68(2)(a) as well as whether or not it needed to be accompanied by a sworn statement or affidavit

The Review Panel found that these two points are interrelated, hence dealt with them as one. Further, while it agrees with the Applicant’s version that the Public Procurement Act read with its Regulations does not direct whether or not the applications for review, suspension, and/or debarment should be made under oath or based on founding affidavit and only places a replying interested party under this obligation, it was equally convinced by the Respondents’ submissions that such applications should not just be made based on a letter and copies of annexures thereto (some of which are either unsigned, uncertified or do not specify who the author was). This is even more serious in the applications for suspension or debarment, which are authored by well-resourced public entities and if upheld will have dire consequences for the bidders or suppliers.

The Review Panel held further that although the Act and its Regulations are silent on this question, this silence has been broken by the judgement in the case *Paragon Investment (Pty) Ltd JV China Huayun Group V Chairperson: Review Panel* cited above by the First Respondent. The said case law made it clear that a proper application for review is one accompanied by a founding affidavit or statement of fact made under oath. This was not the case in the present matter. The record accompanying a statement under oath or affidavit gets

executed in the same fashion. This means that the factuality of the record can only measure against the commitment to stand it made by a deponent under oath. Thus, annexures attached to the present request, fall for the same deficiency.

#### 4. DECISIONS OF THE REVIEW PANEL

Based on the above findings, the Review Panel makes the following order:

- 4.1. That the *points in limine* numbered 1.1 and 1.2 raised by the Respondents are dismissed respectively.
- 4.2. That the *points in limine* numbered 1.3 and 1.4 raised by the Respondents are upheld respectively.
- 4.3. On the strengths of order number 4.2 above, read with the judgement in the case of *Teichman Plant Hire v Coetzee and Another*, there is no proper application for suspension and/or debarment against the First and Second Respondents before the Review Panel.
- 4.4. This matter is considered concluded and struck from the roll of the Review Panel proceedings.
- 4.5. That this order takes effect as of 6 December 2022.



**KENANDEI TJIVIKUA**  
**CHAIRPERSON: REVIEW PANEL (i.r.o. this matter)**