



**REPUBLIC OF NAMIBIA**

**MINISTRY OF FINANCE AND PUBLIC ENTERPRISES**

---

**PUBLIC PROCUREMENT REVIEW PANEL**

---

Tel. : (00 264 61) 209 2445

Fax : (00 264 61) 236454

Telex: 908-3369

Enquiries: **Kaarina Kashonga**

Head Office,

Moltke Street,

Private Bag 13295,

Windhoek

**IN THE PUBLIC PROCUREMENT REVIEW HEARING  
HELD ON 17 MARCH 2023**

**IN THE MATTER BETWEEN**

**TALIINDJE INVESTMENT CC**

**APPLICANT**

**AND**

**CENTRAL PROCUREMENT BOARD OF NAMIBIA  
& OTHERS**

**FIRST RESPONDENT**

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

**BID NO: G/OAB/CPBN-02/2022 – PROCUREMENT OF SUPPLY AND DELIVERY  
OF CLINICAL PRODUCTS FOR THE MINISTRY OF HEALTH AND SOCIAL  
SERVICES**

**Coram:** Kenandei Tjivikua (Chairperson), with Brownny Mutrifa, Fillemon  
Wise Immanuel, Donè Brinkman and Mekondjo Katunga.

**Heard:** 17 March 2023

**Decided:** 27 March 2023

---

**ORDER**

---

**1. INTRODUCTION**

- 1.1 A hybrid meeting was held, using both physical and virtual modes.
- 1.2 Having heard **Ms. Rauha Shipindo**, for the Applicant, **Ms. Nicola Davids**, for the 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”) 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. POINTS IN *LIMINE***

- 2.1 At the commencement of the review proceedings, the Chairperson requested the Parties to raise any points in *limine* that they may have before the merits of the matter are heard. The Applicant and the Respondent informed the meeting that they do not have preliminary issues warranting the determination by the Review Panel.

### **3. GROUNDS FOR THE REVIEW AS CONTAINED IN THE APPLICANT'S APPLICATION FOR REVIEW**

- 3.1 The Applicant in its application for review informed the Review Panel that it was challenging the decision by the 1<sup>st</sup> Respondent to cancel the bid based on the fact that such a decision was made after the acceptance of the bid, and not prior to the acceptance of the bid as envisaged in terms of Section 54(1)(b) of the Public Procurement Act, 15 of 2015.
- 3.2 The Applicant amplified the foregoing by highlighting that the acceptance of the bid concerned took place on 11 January 2023, as per the Notice of Selection for Procurement Contract by the Respondent, while the cancellation followed on 22 February 2023. Therefore, the cancellation decision was made twenty-nine (29) days after the aforesaid bid acceptance.

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

- 4.1 The Applicant explained that after the 1<sup>st</sup> Respondent issued the Notice of Selection for Procurement Contract, the Respondent received applications for reconsideration. Some of the bidders who submitted the requests for reconsideration had received responses while others did not. Among those who received responses was Morgan & Queen Medical Supplies CC, which later filed an application for review in terms of Section 59 of the Act. The hearing proceedings of the aforesaid review application were underway on 22 February 2023, when the 1<sup>st</sup> Respondent cancelled the bid.
- 4.2 Further, the Applicant submitted that it is also not clear from the decision of the 1<sup>st</sup> Respondent as to on what basis it determined that the lowest evaluated bid is substantially above the applicable cost estimate. The Applicant questioned who determined the applicable cost estimate, how it (applicable cost estimate) was determined, and what was the monetary value of the applicable cost estimate.
- 4.3 The Applicant reiterated that the Act is very clear in terms of Section 54(1) which provides that "*the Board or a public entity may, at any time prior to the acceptance of a bid, reject all bids or cancel the bidding process*". In this regard, the Applicant submitted that its bid was therefore already accepted prior to the decision by the 1<sup>st</sup> Respondent cancelling the bid. Further, the Respondent has no legal basis to cancel a bid after it had been accepted as substantially responsive and such determination has been communicated to the bidder concerned through a Notice of Selection for the Procurement Contract as the case in the instant matter. Thus, placed in a proper context, Section 54 of the Act provides for cancellation before the acceptance of a bid and not thereafter.

- 4.4 Further, the Applicant was of the view that with the Notice of Selection for Procurement Contract issued, demonstrating the acceptance of the bid, the procurement contract was therefore concluded. In this regard, the Applicant also placed reliance on the Instructions to Bidders (ITB) 37.1 on page 35 of the bidding document, which provides that the Procuring Agent reserves the right to accept or reject any bid or to annul the bidding process and reject all bids at any time prior to contract award, without incurring any liability to the affected bidder or bidders.
- 4.5 Upon inquiry by the Review Panel, the Applicant stated that a bid is awarded when the Notice of Selection for Procurement Contract is issued by the Respondent and the contract starts when the standstill period lapses. The Applicant while quoting Section 59(2) of the Act, further stated that an application for review can only be done when the Notice of Selection for Procurement Contract is issued, and this is the reason that the Notice of Selection forms part of the award process.
- 4.6 In addition, the Applicant advanced that there were pending review applications before the Review Panel, and therefore in that instance, there was no other stage for the 1<sup>st</sup> Respondent to retract its own decision as the doctrine of *functus officio* provides that once an arbitrator renders a decision, it lacks any power to re-examine that decision.
- 4.7 The Applicant relied on the case of *China Estate Engineering vs Namibia Airport Company (NAC)* in which it was held that:
- “It is now firmly settled that administrative decision-making remains valid and binding, however flawed, unless set aside by a competent court. The consequence of that principle is that in a constitutional state governed by the rule of law and legality, where an administrative decision maker such as the NAC becomes aware that its decision-making is tainted by illegality (either arising from fraud by its officials, non-compliance with statutory prescripts or any other vitiating circumstance recognised in law), it is required, unless a prior challenge has been mounted by an aggrieved person with proper standing, to approach court to have the decision reviewed and set aside. Where there has been a prior challenge it may choose to go on record for the purpose of informing the court that it supports the review and make full disclosure of all the relevant evidence and documents under its control; and abide by the decision of the court. What is clear is that it (and its officials entrusted with public responsibilities) must act in good faith and not become obstructive and be defensive against those seeking to have the decision-making corrected.”*
- 4.8 On the strength of the above, the Applicant maintained that the 1<sup>st</sup> Respondent cannot decide and retract its decision by itself where it had made an affirmative determination on the appropriateness, suitability, and responsiveness of a particular procurement.
- 4.9 The Applicant informed the Review Panel that the ground relied upon by the 1<sup>st</sup> Respondent that the lowest evaluated bid was substantially above the applicable cost

estimate was known to the 1<sup>st</sup> Respondent during and throughout the evaluation process and it was not a discovery made during the applications for reconsideration. The Applicant thus argued that had the evaluation been properly conducted, the reliance for the cancellation on Section 54 (1)(b) should have taken place before issuing the Notice of Selection for Procurement Contract.

- 4.10 The Applicant prayed that the Review Panel declared the decision of the 1<sup>st</sup> Respondent as ultra vires and therefore unlawful and accordingly set it aside.

## **5. 1<sup>st</sup> RESPONDENT'S SUBMISSION AT THE REVIEW PANEL HEARING**

- 5.1 The 1<sup>st</sup> Respondent submitted that its interpretation of Section 54 of the Act is completely different from that of the Applicant. It proceeded to outline the Legislative Framework relevant to the cancellation as follows:

### **Legislative framework**

- 5.2 The 1<sup>st</sup> Respondent explained that the powers to cancel a bid fall within its mandate in terms of Section 54 of the Act. Accordingly, the bid in question was cancelled in terms of Section 54(1)(b). However, the crux in the instant matter is when the acceptance of the bid and subsequent awarding of the bid took place. It argued further that Section 55(1) of the Act provides for the 1<sup>st</sup> Respondent to award a procurement contract only after compliance with the provision of subsections (3), (4), (4A), (4B), (4C), (4D) and (5).
- 5.3 On the strength of the above, the 1<sup>st</sup> Respondent submitted further that prior to the cancellation of the bidding process, the Respondent issued a Notice of Selection for Procurement Contract in terms of Section 55(4) of the Act. This Notice was not an award but a selection for the possible award, conditions to the occurrence, or the non-occurrence of certain events. The 1<sup>st</sup> Respondent further submitted that it is clear from the wording of Section 55(4C) of the Act, that the Notice of Selection for Award is not a final award as the 1<sup>st</sup> Respondent may not award a contract or sign any agreement during the standstill period. In addition, Section 55(5) of the Act, clarifies that the procurement contract must only be awarded to the successful bidders if no application for reconsideration is made by any of the unsuccessful bidders or if no review application is filed in terms of Section 59(1) of the Act after the 1<sup>st</sup> Respondent has decided on the application for reconsideration.
- 5.4 The 1<sup>st</sup> Respondent stressed that considering the cost estimate that was provided by the Ministry of Health and Social Services, it will find itself in a position where not all the items will be procured due to the Ministry's unaffordability. Cancellation does not mean the goods are no longer required, as previously stated this was a bidding process that was not yet completed, and as such the 1<sup>st</sup> Respondent had not made a final award

in respect of this bid. Subsequently, the 1<sup>st</sup> Respondent was well within the four corners of the law when it took the decision to cancel the bidding process.

- 5.5 The 1<sup>st</sup> Respondent noted that it determined during the re-evaluation of the bids subsequent to the receipt of the applications for reconsideration that the aggregate sum of all the selected bids exceeded the cost estimate.
- 5.6 The 1<sup>st</sup> Respondent further relied on the case of *SAAB Grintek Defence (Pty) Ltd vs South African Police Service and Others* where a decision to cancel was made in the exercise of executive authority was held not to constitute an administrative action.
- 5.7 The 1<sup>st</sup> Respondent prayed that the Review Panel confirms its decision to cancel the bid and accordingly dismiss the application for review.

## **6. INTERESTED PARTIES**

- 6.1 Some of the Interested Parties supported the assertion that the Notice of Selection for Procurement Contract constitutes an acceptance of the bid. Specifically, Wellbeing Medical Supplies CC (as one of the Interested Parties) argued that the matter is premised on the law of contract, i.e., the principle of offer and acceptance. In this regard, once the 1<sup>st</sup> Respondent has issued the Notice of Selection for Procurement Contract/Award, this represents acceptance of the bid on its part. Further, the Notice of bid cancellation issued by the 1<sup>st</sup> Respondent on 22 February 2023 is therefore completely null and void as the bid acceptance had already taken place.
- 6.2 Wellbeing Medical Supplies CC also argued that the reconsideration can only consider matters raised by unsuccessful bidders in their applications for reconsideration. A Public Entity or the Board cannot rely on matters not raised in the applications for reconsideration.
- 6.3 Subsequently, it was the collective view of the Interested Parties that the Respondent cannot exercise powers that it does not have under the enabling legislation.

## **7. REQUEST FOR ADDITIONAL STATEMENTS**

- 7.1 At the end of the review hearing on 17 March 2023, the Review Panel resolved that the Parties, viz., Applicant, 1<sup>st</sup> Respondent, and any other, submit additional statements in terms of Regulation 43(4) read with Regulation 44 of the Public Procurement Regulations. The additional statements which had to be in the form of affidavits were to assist the Review Panel in making a fair determination on the issues in dispute.

7.2 Further, the additional statements were to address the following legal questions/issues for the resolution of the review application:

- 7.2.1 Whether a request for reconsideration may lead to a cancellation of a bid by a Public Entity itself?;
- 7.2.2 What constitutes an acceptance of a bid following a Notice of Selection for Procurement Contract where a process of reconsideration is statutorily provided for?;
- 7.2.3 Was there a duty on the 1<sup>st</sup> Respondent/Public Entity to comply with the rule of natural justice (*audi alteram partem*) during the reconsideration process and/or before a decision to cancel the bid was taken?; and
- 7.2.4 What were the grounds for the requests for reconsideration? (Only applicable to the Respondent.)

7.3 The Review Panel ordered that the requested additional statements should be submitted on or before 23 March 2023, at 16h00, and any late submission shall not be accepted.

7.4 The Parties were further informed that following the submission of additional statements the Review Panel shall reconvene alone and determine the matter on the strengths of the evidence led during the review hearing and/or the additional statements so requested in writing.

## **8. SUBMISSION OF ADDITIONAL STATEMENTS**

8.1 The following Parties submitted additional statements as requested by the Review Panel on 17 March 2023:

- 8.1.1 Central Procurement Board of Namibia (the 1<sup>st</sup> Respondent);
- 8.1.2 Taliindje Investment CC (the Applicant); and
- 8.1.3 Wellbeing Medical Supplies CC (Interested Party).

### **8.2 Central Procurement Board of Namibia (the 1<sup>st</sup> Respondent)**

The 1<sup>st</sup> Respondent in its additional statement addressed the Review Panel as follows:

#### **8.2.1 Whether a request for reconsideration may lead to a cancellation of a bid by a Public Entity itself?**

The 1<sup>st</sup> Respondent in summary submitted that in terms of Regulation 38(3)(b), the Respondent must assess applications for reconsideration filed by unsuccessful bidders

as contemplated under Regulation 38 (2) and “*may make other orders as the Board or procurement committee may consider necessary*”.

Therefore, the 1<sup>st</sup> Respondent argued that the reconsideration process, as contemplated under Section 55 of the Act and Regulation 38(3)(b), may lead to the cancellation of the bidding process. A decision to cancel may be an “other order as the board may consider necessary”.

### **8.2.2 What constitutes an acceptance of a bid following a Notice of Selection for the Procurement Contract where a process of reconsideration is statutorily provided for?**

In this regard, the 1<sup>st</sup> Respondent submitted that Public Entities are enjoined to satisfy all processes set out in Section 55 of the Act before the acceptance of a bid takes place. The issuance of the Notice of Selection for Procurement Contract in terms of Section 55(4) read with Regulation 38(2) of the Public Procurement Regulations is a condition that precedes the acceptance of a bid. Thus, the Notice of Selection for Procurement Contract is not a final decision as unsuccessful bidders must be given an opportunity to challenge the selection of award through reconsideration and review processes. Further, only when the decision to select the successful bidders remains unchanged after such reconsideration and review processes that the Public Entity may make a final decision, in the form of a Notice of Award, to award a procurement contract to a successful bidder/s, in terms of Section 55(1) of the Act.

The 1<sup>st</sup> Respondent accentuated that the above position becomes clear when regard is had to Section 55(4C) which barred the 1<sup>st</sup> Respondent from awarding a procurement contract during the standstill period. It (1<sup>st</sup> Respondent) amplified that bidders were informed further in terms of ITB 39 that the selection of the successful bidder is only a proposed award pending any review. Thus, a bid is accepted when it is submitted for evaluation and examination at the bid closure, but when a final Notice of Award and an Acceptance Letter are issued to successful bidders.

### **8.2.3 Was there a duty on the 1<sup>st</sup> Respondent/Public Entity to comply with the rule of natural justice (*audi alteram partem*) during the reconsideration process and/or before a decision to cancel the bid was taken?**

In answering the above question, the 1<sup>st</sup> Respondent submitted that Section 5 (2) of the Act provides as follows: “*The Board or public entity must give a written notice of the rejection of all bids or cancellation of the bidding process to all bidders that submitted bids*”.

The 1<sup>st</sup> Respondent discharged its duty, in terms of the provisions of Section 54(2) of the Act, to notify the bidders of the cancellation of the bidding process. Bidders were



properly and promptly notified of the reasons for the cancellation of the bidding process.

Furthermore, the 1<sup>st</sup> Respondent argued that the bidding documents are the legally binding framework in terms of which the Applicant together with all the other bidders on the one hand and the 1<sup>st</sup> Respondent on the other hand agreed to engage in respect of all matters related to the bid. The 1<sup>st</sup> Respondent relied on ITB 37 which read as follows: “*Procuring Agent reserves the right to accept or reject any bid, or to annul the bidding process and reject all bids at any time prior to contract award, without thereby incurring any liability to the affected bidder or bidders.*”

The 1<sup>st</sup> Respondent thus argued that the bidders forfeited their right to be heard when they agreed to partake in a bid that included the provisions of ITB 37. The 1<sup>st</sup> Respondent relied on the case of *B.K.A. Opperman v the President of the Professional Hunting Association of Namibia*<sup>1</sup>, an unreported decision of the Supreme Court, delivered on 28/11/2000, in which O’Linn A.J.A, concluded as follows on p 28:

*“To succeed in such defense the respondents had to allege and prove that, when the alleged waiver took place, the first applicant had full knowledge of the right which he decided to abandon; that the first applicant either expressly or by necessary implication abandoned that right and that he conveyed his decision to that effect to the first respondent”*

The above judgement was affirmed in the Supreme Court in the case of *Mostert v Minister of Justice*<sup>2</sup>, while addressing the concept of waiver in the context of both public and administrative law held that the defence of waiver was available to a party in the public law setting.

The 1<sup>st</sup> Respondent further relied on the case of *Westinghouse v Eskom Holding*<sup>3</sup> which addressed the legally binding nature of bidding documents in relation to bids, where the Court held that:

*“[43] The tender invitation, which sets out the evaluation criteria, together with the constitutional and legislative procurement provisions, constitutes the legally binding framework within which tenders have to be submitted, evaluated and awarded. There is no room for departure from these provisions.”*

The 1<sup>st</sup> Respondent in summary, therefore, submitted that ITB 37.1 of the bidding documents amounted to bidders’ waiver of the right to be heard when the 1<sup>st</sup> Respondent may make a decision to cancel the bidding process. The 1<sup>st</sup> Respondent argued that the Applicant, and all other interested parties, by participating in the bid

---

1 (APPEAL 328 of 1998) (1999) NAHC 22 (14 December 1999)

2 (APPEAL 83 of 2001) (2001) NAHC 40 (23 November 2001)

3 (476/2015) [2015] ZASCA 208 (9 December 2015)

accepted the position that the 1<sup>st</sup> Respondent could cancel the bidding process at any time without incurring any obligation to the bidders. The 1<sup>st</sup> Respondent further explained that the Applicant waived its rights in terms of Article 18 of the Namibian Constitution when it purchased the bidding documents and proceeded to participate in the bid well aware and appreciating the effect of ITB 37.1 of the bidding documents.

#### **8.2.4 What were the grounds for reconsideration that lead to the cancellation of the bidding process?**

The 1<sup>st</sup> Respondent informed the Review Panel that it received a myriad of applications for reconsideration during the standstill period. One such request for reconsideration was filed by SJV Medical Supplies CC, which contested that the 1<sup>st</sup> Respondent failed to apply the provisions of Section 54(1) (b), (f), and (g) of the Act when it did not cancel the procurement process because the award exceeded the cost estimate of N\$400 million. Thus, when the 1<sup>st</sup> Respondent assessed the applications for reconsideration, it took the bidder's queries/concerns into consideration and indeed found that the bids received exceeded the cost estimate, hence the decision to cancel.

### **8.3 The Applicant's Additional Statement**

#### **8.3.1 Whether a request for reconsideration may lead to a cancellation of a bid by a Public Entity itself?**

The Applicant argued that when an application for reconsideration has been lodged, the governing provision becomes Regulation 38. Specifically, Regulation 38(3) provides that the Board or a procurement committee must assess the review made by a bidder under sub-regulation (2), and the Board or procurement committee may-

*"(a) refer the matter to the bid evaluation committee, if the Board or procurement committee is of the view that the outcome of the review warrants a re-evaluation of the bids;*

*(b) make other orders as the Board or procurement committee may consider necessary; or*

*(c) recommend to the Accounting Officer that the award of the procurement contract be made to the successful bidder selected under section 55 of the Act."*

In this regard, an application for reconsideration may indeed lead to cancellation and reliance must be premised on Regulation 38(3)(b) which states that the Board can make **other orders** as the Board or public entity may consider necessary. The foregoing, however, was not the premise upon which the 1<sup>st</sup> Respondent cancelled the bid in the instant matter. The Applicant stressed that the Respondent cancelled the bidding

process in terms of Section 54(1)(b) of the Act whilst it ought to have done so in terms of Regulation 38(3)(b). Therefore, the 1<sup>st</sup> Respondent erroneously cancelled the bid in terms of Section 54 of the Act, and this rendered the cancellation decision by the 1<sup>st</sup> Respondent defective.

The Applicant concluded that the 1<sup>st</sup> Respondent should have relied on Regulation 38(3)(b) as they were past the timeframe provided for under Section 54 of the Act. The Applicant explained that a bid can only be cancelled in terms of Regulation 38 after a Notice of Selection of Award has been issued by a Public Entity, which was the case in the instant matter.

### **8.3.2 What constitutes an acceptance of a bid following a Notice of Selection for Procurement Contract where a process of reconsideration is statutorily provided for?**

The Applicant argued that acceptance takes place after the bid evaluation process has been concluded, exactly at the time of issuing the Notice of Selection for Procurement Contract/Award. Further, it was the 1<sup>st</sup> Respondent's right to accept or reject the bid. The Notice of Selection for Procurement Contract indicates which bidder's bid has been accepted or rejected. This is the focal point of what constitutes acceptance. There is an intention to be legally bound if there is no successful application challenging the award as provided for in Section 55 of the Act. Once a Notice of Selection for Procurement Contract/Award has been issued, the Applicant averred that an award in terms of the Act has taken place.

The Applicant explained that the reason upon which the Respondent claims to have cancelled the bid is premised upon Section 54(1)(b) of the Act. This section of the Act provides a timeframe when cancellation can be invoked based on any of the reasons provided for thereunder. The Applicant amplified that the period to rely on and/or invoke cancellation in terms of Section 54 is prior to the acceptance of the bid. After this timeframe has lapsed, and one or more bids has/have been accepted, the 1<sup>st</sup> Respondent can no longer reject all the bids or cancel the bidding processes based on the grounds outlined in section 54 of the Act.

Further, the grounds relied upon by the 1<sup>st</sup> Respondent, namely that the lowest evaluated bid is substantially above the cost estimate, was a live issue throughout the evaluation process. Despite this fact, the Board of the 1<sup>st</sup> Respondent proceeded to accept the bid. The Board, therefore, missed the first opportunity to cancel the bid before acceptance and therefore cannot do otherwise past that stage in terms of Section 54.

## **8.4 Interested Party - Wellbeing Medical Supplies CC**

### **8.4.1 Whether a request for reconsideration may lead to a cancellation of a bid by a Public Entity itself?**

Wellbeing Medical Supplies CC, one of the interested parties, submitted that cancellation of a bid is only provided for in terms of Sections 54 and 63, respectively, but only under the circumstances provided thereinunder, namely prior to the acceptance of the bid and due to changed circumstances. Where cancellation is decided upon in terms of any of the aforesaid sections, it must be just, fair, and unsusceptible to a challenge in the court. Further, the cancellation must be based on a valid reason and should not impact the rights of the bidders. The Act made a distinction between the cancellation of a bid before its acceptance and the termination of a procurement contract. This is in terms of Sections 54 and 63, respectively. Thus, the Wellbeing Medical Supplies CC advanced that the correct provision that could have been relied upon in the cancellation would have been Section 63(1), but still, in that instance, the reasonableness of such a decision will be subject to the test in a court of law.

Wellbeing Medical Supplies CC further argued that the reason for the cancellation does not make sense as when the 1<sup>st</sup> Respondent advertised the tender it did so with a budget/threshold. At the evaluation of the tender, the main issue of consideration was the price as contained in the bid offer. It is thus surprising how the award was made when the price exceeded the total cost estimate.

Regarding the requests for reconsideration, what is on record is that only two bidders, namely Northstreet Medical Supplies CC and Morgan & Queen Medical Supplies CC, exercised their rights in terms of Regulation 38(3). The outcome of their requests for reconsideration is still unknown.

In summary, Wellbeing Medical Suppliers CC was of the view that both Section 54 of the Act and Regulation 38(3)(b) of the Public Procurement Regulations were of no application in the instant matter because in respect of the former the bid had been accepted and a contract has been formed, and as for the latter, it does not entail the power to cancel. Instead, it (Wellbeing Medical Suppliers CC) advanced that the 1<sup>st</sup> Respondent should have placed reliance on Section 63(1) of the Act.

### **8.4.2 What constitutes an acceptance of a bid following a Notice of Selection for Procurement Contract where a process of reconsideration is statutorily provided for?**

Wellbeing Medical Suppliers CC submitted that an acceptance is a clear and an unambiguous declaration of an intention by the offered. The offeror's intention to accept the offer may be expressly stated or tacitly. Further, a bid is accepted when an

award is made. The award is made once a Notice of Selection of Award is issued to bidders. The acceptance of a tender by an organ of the state constitutes an agreement. Section 55(4) of the Public Procurement read with Regulation 38 (1 & 2) of the Public Procurement Regulations is the regulatory framework for the acceptance of bids.

Wellbeing Medical Suppliers CC stressed that where a person accepting an offer unambiguously communicated his acceptance of the offer expressly or tacitly the agreement is concluded. Further, the conduct of the 1<sup>st</sup> Respondent in terms of the foregoing sections constitutes the acceptance of a bid. The contract is formed the moment the parties reached an agreement on the material terms of the contract. This agreement was reached when the notice was sent out to the successful bidders in terms of Section 55(4).

**8.4.3 Was there a duty on the 1<sup>st</sup> Respondent/Public Entity to comply with the rule of natural justice (*audi alteram partem*) during the reconsideration process and/or before a decision to cancel the bid was taken?**

Wellbeing Medical Suppliers CC submitted that although the Act is silent on the process to be followed during reconsideration, the proceedings should be conducted in the same fashion as all other reviews where all parties involved are afforded the opportunity to address the decision-makers before the decision is made or taken (*audi*). This is to solicit the affected parties' views before a decision affecting them is made.

Further, before the decision to cancel the bid, successful bidders that were selected and informed through the Notice of Selection for Procurement Contract/Award, ought to have been offered an opportunity to be heard and indicate why the bid should not be cancelled. This would have amounted to their inclusion in the reconsideration process.

**9. 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:

- 9.1 That, acceptance of a bid by any Public Entities takes place when the Public Entity makes a determination that a bid of a particular bidder is substantially responsive and communicates a such determination to the selected or unsuccessful bidders through a Notice of Selection for Procurement Contract/Award in terms of Section 55(4) of the Act read with Regulation 38 (1 & 2).

- 9.2 That, the acceptance as per 9.1 above may either only be reversed on the basis of reconsideration in terms of Regulation 38(3)(b) if the Public Entity chose cancellation in the context of *“other orders as the Board or procurement committee may considers necessary”* or on review filed in terms Section 59 of the Act.
- 9.3 That, in other words, where a Notice of Selection for Procurement Contract/Award has been issued, and in the absence of an order in terms of Section 60(f) of the Act, the 1<sup>st</sup> Respondent could only have cancelled the bid in terms of Regulation 38(3)(b) on the grounds specified in the requests for reconsideration, and not in terms of Section 54.
- 9.4 That, the Notice of Cancellation in the instant matter indicated that the Respondent relied on Section 54 of the Act as its reason for cancellation. This was erroneous on the part of the 1<sup>st</sup> Respondent, rendering its cancellation decision vulnerable to the setting aside.
- 9.5 That, while both the 1<sup>st</sup> Respondent’s Notice of cancellation and Replying Affidavit confirm that the cancellation decision was made in terms of Section 54(1)(b), and the 1<sup>st</sup> Respondent through believed firmly that it was empowered in terms of the aforesaid provision to cancel the bidding process after sending out a Notice of Selection for Procurement Contract/Award, this position changed following the submission of an additional statement/affidavit. In said additional statement/affidavit, specifically paragraphs 15 and 16, the 1<sup>st</sup> Respondent justified the cancellation in terms of Regulation 38(3)(b) of the Public Procurement Regulations. This placed the 1<sup>st</sup> Respondent in concurrence with the Applicant regarding the correct legal basis for cancellation of a bid subsequent to the Notice of Selection for Procurement Contract/Award.
- 9.6 That, the 1<sup>st</sup> Respondent justify its shift or change of position from Section 54(1)(b) to Regulation 38(3)(b) in terms of the additional statement by submitting that it relied on the grounds stated in the request for reconsideration received SJV Medical Supplies CC, which addressed the issue of bid prices of the selected bidders being substantially above the bid cost estimate and that based on this alone, the bidding process should have cancelled. However, there were no records provided to prove that this was the basis for the cancellation decision. The minutes of the 1<sup>st</sup> Respondent’s Board meeting dated 22 February 2023, although contains discussions regarding the shortcomings in the bidding documents, incorrect methodology used in the calculation of the total bid prices, omitted recommendations in respect of some item and the total allocations having exceeded the total cost estimate of N\$400 million, there were indications that these discussions were based on any grounds specified in any request for

reconsideration by any identified bidder. In other words, there is no record showing that the Board's decision was informed by the consideration of the grounds stated in the request for reconsideration by SJV Medical Supplies CC as the 1<sup>st</sup> Respondent ostensibly alleged in its additional statement/affidavit.

- 9.7 That, the Applicant and/or all other bidders who had been selected as successful in terms of the Notice of Selection for Procurement Contract/Award were not afforded an opportunity to be heard before the 1<sup>st</sup> Respondent decided to cancel the bid. Undoubtedly, the decision to cancel the bid has an adverse effect on the bidders who were selected as successful and thus justifying why they should have been afforded an opportunity before such an impactful decision is made. This position was confirmed by the High Court of Namibia in the case of *Elite Construction CC versus Hellen Amupolo and Others*<sup>4</sup> in which it was held that:

*[116] "On the basis of audi alone, Elite's Application to review and set aside the purported re-evaluation and cancellation of the bid could succeed as it constitutes a violation of natural justice. Audi is a pillar on which justice stands and rests."*

The aforementioned case further held that:

*"[119] The reasons for cancellation were founded on the hesitation to accept the outcome of the bid re-evaluation conducted in terms of regulation 38(3)(a), affecting Elite's selection for the award. These circumstances did not meet the requirements for a valid cancellation referred to in s 54(1) of the Act."*

- 9.8 That, the 1<sup>st</sup> Respondent in its additional statement further agreed that the principles of *audi alteram partem* must be adhered to or afforded to the person who may be adversely affected by a decision prior to making such. It (1<sup>st</sup> Respondent) however justified its failure to afford *audi* by relying on the case of *B.K.A. Oppermann v President of the Professional Hunting Association of Namibia* and advanced that the bidders waived their rights to be heard as they agreed to contract in terms of ITB 37.1. that provides as follows:

*"Procuring Agent reserves the right to accept or reject any bid, or to annul the bidding process and reject all bids at any time prior to contract award, without thereby incurring any liability to the affected bidder or bidders."*

- 9.9 That, the Review Panel disagreed with the 1<sup>st</sup> Respondent that ITB 37 amounted to a waiver of a right to be heard by any bidder that would be affected by any decision of the 1<sup>st</sup> Respondent. Further, the said ITB provision was ambiguous and indistinguishable such that the bidders could have foreseen that they would be waiving their rights to be heard.
- 9.10 That, clearly in the instant matter, and regard had to the minutes of the 1<sup>st</sup> Respondent's Board dated 22 February 2023, the Board was equally hesitant to accept the recommendation(s) for the re-evaluation process by the Bid Evaluation Committee and as result opted for the cancellation in the circumstances that did not meet the requirements for a valid cancellation referred to in Section 54(1) of the Act.
- 9.11 That, the 1<sup>st</sup> Respondent did not comply with Section 55(4A) of the Act by failing to provide responses to all bidders who filed requests for reconsideration.
- 9.12 That, while the 1<sup>st</sup> Respondent may have had compelling grounds to cancel the bid in question, legality is key for it is the gauge against which justice is measured. Institutions, more so those that are creatures of statutes, must be primary defenders of legality and regularity. They must not pursue legal and regular outcomes through illegal or irregular means; or otherwise pursue illegal or irregular outcomes through thorough legal or regular means. The means must justify the end.

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

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

- 10.1 The Notice issued by the 1<sup>st</sup> Respondent and dated 22 February 2023, cancelling the Bid No: G/OAB/CPBN-02/2022 – Procurement of Supply and Delivery of Clinical Products for the Ministry of Health and Social Services, is hereby declared as *ultra vires*, unlawful and therefore set aside in terms of Section 60(c) of the Public Procurement Act.
- 10.2 The matter is referred to the 1<sup>st</sup> Respondent with the following specific instructions:
- 10.2.1 That, in terms of Section 55(4A) of the Act as amended, the 1<sup>st</sup> Respondent's Board provides responses to all bidders who had submitted requests for reconsideration pursuant to the Notice of Selection for Procurement Contract/Award dated 11 January 2023, on their specific requests; and

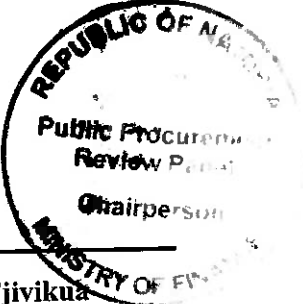



10.2.2 That, if the 1<sup>st</sup> Respondent is still desirous to cancel the bid in question, such cancellation be done in terms of the relevant provisions of the Act and/or its Regulations instead of Section 54(1) as per the preceding discussions of this order, and subject *audi alteram partem* rule in so far as the selected bidders are concerned; or

10.2.3 That, the 1<sup>st</sup> Respondent files an application seeking the cancellation of the bid in question with the Review Panel or the High Court of Namibia for a determination.

10.3 The effective date of this order is 27 March 2023.

10.4 The Public Entity shall provide proof of implementation of this Order to the Procurement Policy Unit within thirty (30) days from the effective date of this Order.



Mr. Kenandei Tjivikua

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