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

Head Office,
Moltke Street,
Private Bag 13295
Windhoek

Enquiries: **Kaarina Kashonga**

IN THE PUBLIC PROCUREMENT REVIEW HEARING
HELD ON 06 JULY 2023

IN THE MATTER BETWEEN

TALIINDJE INVESTMENT CC	**APPLICANT**
AND	
CENTRAL PROCUREMENT BOARD OF NAMIBIA	**FIRST RESPONDENT**
CHAIRPERSON OF THE BID EVALUATION COMMITTEE	**SECOND RESPONDENT**
NAMPHARM (PTY) LTD	**THIRD RESPONDENT**
& ALL OTHER BIDDERS	

IN A REVIEW APPLICATION MADE IN TERMS OF SECTION 59 OF THE PUBLIC PROCUREMENT ACT, 2015 (ACT NO. 15 OF 2015) AS AMENDED

BID NO: G/OIB/CPBN-01/2022 – PROCUREMENT OF SUPPLY AND DELIVERY OF PHARMACEUTICAL PRODUCTS FOR THE MINISTRY OF HEALTH AND SOCIAL SERVICES

Coram: **Kenandei Tjivikua (Chairperson), with Lukas Kudumo Siremo, Fillemon Wise Immanuel, Tulimeyo Kaapanda and Mekondjo Katunga.**

Heard: **06 July 2023**
Decided: **17 July 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 First 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 stated that the bid for the Procurement of Supply and Delivery of Pharmaceutical Products for the Ministry of Health and Social Services was in respect of medicines, scheduled substances, as well as products that were neither medicines nor scheduled substances, namely baby powder milk products.

2.2 It stated that these baby powder milk products do not therefore require an import license from the Namibia Medicines Regulatory Council, as they do not qualify as medicine

under the Medicine and Related Substances Control Act, 2003 (Act 13 of 2003), as amended.

2.3 It further argued that a Close Corporation that does not conduct business as a pharmaceutical, therefore does not require a registration certificate from the Registrar of the Pharmacy Council of Namibia in terms of the relevant provisions of the Pharmacy Act, 2004 (Act No.9 of 2004) as amended.

2.4 The Applicant stated that it is not involved in the importation of medicines and/or scheduled substances, nor does it operate or conduct business as a pharmacist and as such the Applicant then submitted a bid only in respect of baby powder milk products.

3. APPLICANT'S SUBMISSIONS AT THE REVIEW PANEL HEARING

3.1 The Applicant submitted that there was a request for reconsideration submitted and the Board was of the view that the Applicant was rightfully disqualified because the Applicant failed to provide a required import license which is wrong according to the Applicant. The Applicant explained that the products for which it submitted a bid are milk products and that the brand names of preferred powder milk were specifically indicated in the bid document.

3.2 Furthermore, the Applicant submitted that it is indeed evident from the list of products provided by the Applicant in its bidding document that none of the products qualify as medicines or scheduled substances. These products are infant/baby powder milk products and are available for purchase at supermarkets, and even at some informal outlets, they would, therefore, be paramount to violating the fundamental constitutional right of the Applicant to carry on any trade or business, as provided for under Article 21 (1) (j) of the Namibian Constitution by preventing it from selling baby powder milk products which are also available at service stations.

4. FIRST RESPONDENT'S SUBMISSION AT THE REVIEW PANEL HEARING

4.1 The First Respondent submitted that the Applicant was fairly disqualified, indicating that Regulation 34(1) of the Public Procurement Regulations compels bidders to request a public entity to clarify a provision contained in a bid document to enable bidders to bid. It was the First Respondent's submission that the bid documents contained clear instructions and therefore the Applicant could not request clarifications.

4.2 The First Respondent explained that some of the key requirements of this bid were that bidders should have an Import License and be registered with the Pharmacy Council of Namibia or a Regulatory Authority of the country of practice as required by instructions to bidders (ITB) 8.1 read with evaluation criteria 4.6 of the bidding document. However, the Applicant did not provide this documentation as required and was disqualified.

4.3 ITB 7.4 (b) read with mandatory evaluation criteria 4.10 further required that the bidder's products should be listed on the latest medicine register of the Namibia Medicines Regulatory Council (NMRC) or if the bidder is offering unregistered products, it should have a letter of authorization from the NMRC. However, the Applicant did not provide this and hence as per that evaluation criteria, it was not responsive and disqualified.

5. INTERESTED PARTIES

5.1 No Interested party filed a replying affidavit to reply to the review application and therefore, no interested party was accorded any opportunity to make a representation during the Review proceedings.

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 The mandatory evaluation criteria number 4.6 with reference to Instruction to Bidders (ITB) 8.1(a) and (b) required that the bidder must have a valid certified copy of the import license from NMRC or certified copy of the manufacturing license, however, the Applicant did not submit the same and was disqualified as it was non-responsive.

6.2 The mandatory evaluation criteria number 4.10 with reference to Instruction to Bidders (ITB) 7.4(b) required that the bidder's products should be listed on the latest medicine register of the Namibia Medicines Regulatory Council (NMRC) or if the bidder is offering unregistered products, it should have a letter of authorization from the NMRC, however, the Applicant did not comply with this requirement and was found non-responsive and disqualified accordingly.

6.2 That, the Applicant failed to exercise its rights in terms of Regulation 34 (1) of the Public Procurement Regulations, as it had sufficient time to clarify with the First Respondent if it was eligible to take part in the bidding process and could have further requested the First Respondent to consider amending some of the requirements which seemed not relevant in some of the product items.

6.3 That, the bids were evaluated in accordance with the criteria and methodology set out in the bidding documents in terms of Section 52(9) of the Act and the First Respondent did not disqualify the Applicant unfairly, but in accordance with the bidding document requirements.

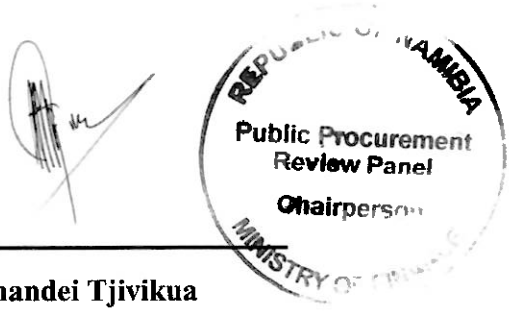
7. DECISIONS OF THE REVIEW PANEL

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

7.1 In terms of Section 60(a) of the Public Procurement Act, 2015 (Act No.15 of 2015), the Review Panel hereby dismisses the review application.

7.2 The Review Panel hereby confirms the decision of the First Respondent in terms of Section 60 (e) of the Public Procurement Act, 2015 (Act No. 15 of 2015) as amended.

7.3 The Effective date of this order is 17 July 2023.



Mr. Kenandei Tjivikua
CHAIRPERSON: REVIEW PANEL (FOR THIS MATTER)