



REPUBLIC OF NAMIBIA

MINISTRY OF FINANCE AND PUBLIC ENTERPRISES

PUBLIC PROCUREMENT REVIEW PANEL

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**IN THE PUBLIC PROCUREMENT REVIEW HEARING
HELD ON 28 AUGUST 2023**

IN THE MATTER BETWEEN

ERONGOMED HEALTH DISTRIBUTORS (PTY) LTD

FIRST APPLICANT

AFRICURE PHARMACEUTICAL NAMIBIA (PTY) LTD

SECOND APPLICANT

AND

CENTRAL PROCUREMENT BOARD OF NAMIBIA

1st RESPONDENT &

OTHERS

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

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

Coram: Tulimeyo Kaapanda (Chairperson), with Brownny Mutrifa, Selma-Penna Utonih, Hellen Amupolo consenting, while Gilbert Habimana dissenting.

Heard: 28 August 2023

Decided: 29 August 2023

ORDER

1. INTRODUCTION:

- 1.1 A hybrid meeting was held, using both physical and virtual modes.
- 1.2 Having heard, **Mr. Trevor Brockerhoff** for the First Applicant, **Adv. T. Chimbwana** for the Second Applicant, **Mr. Festus Hamukwaya** 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) (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 point *in limine* that they may have before the merits of the matter are heard. The First Respondent requested that one of the Review Panel members, Mr. Fillemon Wise Immanuel recuse himself from the proceedings due to the possible bias he might have against the First Respondent. The First Respondent indicated that Mr. Immanuel is currently litigating against the First Respondent. A letter through his attorneys threatening the CPBN has already reached the First Respondent, thus his presence will

not lead to a fair decision. Mr. Immanuel elucidated that he wouldn't want to partake in these proceedings as he has already informed the Chairperson before the Parties joined the meeting. As a result, Mr. Brown Mutrifa was appointed as a replacement and joined the proceedings.

- 2.2 The Chairperson wanted to know whether the bid is still valid and the First Respondent indicated that the bid was extended until 31 October 2023.

3. GROUNDS FOR THE REVIEW AS CONTAINED IN THE APPLICANTS' APPLICATIONS FOR REVIEW:

FIRST APPLICANT – ERONGOMED HEALTH DISTRIBUTORS (LTD) PTY:

- 3.1 The First Applicant (Erongomed) in its Application for review stated that it was not afforded an opportunity to be heard by the first respondent in respect of the Sixteenth Respondent's reconsideration application, in contravention of the "*audi alteram partem*" principle and Article 18 of the Namibian Constitution.
- 3.2 It added that the review by the Sixteenth Respondent was filed outside the prescribed 7 days period in violation of Section 59 (1).
- 3.3 The 1st Applicant further stated that there was no decision taken by the First Respondent as it failed to timeously consider the reconsideration application and take a decision on it within 7 days as per Section 55 (4)(a).
- 3.4 The 1st Applicant stated the award was irregular.

SECOND APPLICANT - AFRICURE PHARMACEUTICAL NAMIBIA (PTY) LTD:

- 3.5 The Second Applicant (Africure) grounds for application are that the 2nd Applicant was not afforded the opportunity to be heard by the first respondent in respect of the Sixteenth Respondent's reconsideration application, in contravention of the "*audi alteram partem*" principle and Article 18 of the Namibian Constitution.
- 3.6 The 2nd Applicant stated that the review by the Sixteenth Respondent was filed outside the prescribed 7 days period in violation of Section 59 (1).
- 3.7 The 2nd Applicant added that no decision is taken by the First Respondent as it failed to timeously consider the reconsideration application and take a decision on it within 7 days.
- 3.8 The 2nd Applicant stated that the award was irregular.

4. APPLICANTS' SUBMISSIONS AT THE REVIEW PANEL HEARING:

FIRST APPLICANT (ERONGOMED):

- 4.1 The First Applicant (Erongomed) reiterated that its application for review is properly before the Review Panel in terms of Section 59(1) of the Public Procurement Act.

- 4.2 The First Applicant explained that its application is not an attack on anyone, but intended to raise the interpretation of the provisions of the Act.
- 4.3 The First Applicant proceeded to argue that Cospharm Investment (Pty) Ltd, aggrieved by the Notice for selection of award and its disqualification in terms of the executive summary, filed a reconsideration application on the 2nd May 2023. The First Applicant put it out that this reconsideration application was never served on any of the interested parties, more especially, the selected bidders for award including the applicant.
- 4.4 The First Applicant further argued that the 1st Respondent failed to take a decision in respect of the Cospharm Investment (Pty) Ltd's application for reconsideration and reiterates that the 1st Respondent went beyond the 7 days prescribed standstill period. The First Applicant submitted that the information contained in the Sixteenth Respondent's aborted application to the Review Panel demonstrated that there was no decision taken. If at all there was a decision on 9th May 2023 as argued by the 1st Respondent, the fact that it was not communicated to the affected or interested parties, it must be declared a nullity.
- 4.5 On the basis of the above, the 1st Respondent must be directed or ordered to award contracts to all the successful bidders as per the notice dated 26th April 2023 in terms of Section 55 (5) of the Act. The First Applicant further referred the Review Panel to the High Court judgement by Judge Sibeja J in the matter between Elite Construction v Hellen Amupolo Elite Construction CC v Amupolo (HC-MD-CIV-MOT-REV-2020/00404) [2022] NAHCMD 503 (23 September 2022) whereby the reconsideration is done and the public entity disregarded the *audi alteram partem* rule.
- 4.6 The First Applicant argued that the initial decision by the 1st Respondent to disqualify Cospharm Investment (PTY) Ltd was correct, as there was substantial evidence of non-compliance. Bringing Cospharm back in the the list of responsive bidders led to 1st Applicant losing 19 items initially awarded to it.
- 4.7 The first Applicant stated that in the absence of a 2nd Notice of selection for award after the reconsideration process, the Notice of procurement award dated 3rd August 2023 should be declared a nullity.
- 4.8 Further, the First Applicant was of the view that item 229 was initially awarded to the First Applicant. Upon reconsideration this line item was awarded to Econo Investments (Pty) Ltd. However, the executive summary dated 24 April 2023 specifies that Econo was non-responsive because they did not provide a quote for this item. In the absence of a quote for item 229, 1st Applicant questioned where the 1st Respondent received item 229 and its price from to enable it to now award item 229 to Econo Investments (PTY) Ltd

SECOND APPLICANT (AFRICURE PHARMACEUTICAL NAMIBIA (PTY) LTD):

- 4.9 The Second Applicant stated that the reconsideration application by Cospharm was never served on any of the interested parties more especially the selected bidders for award in terms of the notice selection for award.
- 4.10 The 2nd Applicant insisted that the 1st Respondent failed to take a decision in respect of Cospharm's reconsideration application within the 7 days prescribed timeline. The 2nd Applicant stated that even Cospharm raised this failure as a reason in its withdrawn application to the Review Panel.
- 4.11 Citing the executive summary sent together with the notice for selection of award of 26 April 2023, the 2nd Applicant argued that the grounds for the initial disqualification of Cospharm should stand, and there was no need for the company to be re-evaluated. It insisted that, as per the executive summary, Cospharm Investment (Pty) Ltd was disqualified for the reason that the bidder failed to comply with ITB 22.3 on page 156 of the standard bidding document as the Bidder has made an overwriting of the bid price on the bid submission form without initialling next to the overwriting.
- 4.12 The Second Applicant further stated that the Review Panel is the highest body therefore, the 1st Respondent should have made sure that it has implemented the order of the Review Panel dated 17 July 2023, when the Panel dismissed the Application by Taliindje and confirmed the decision of the 1st Respondent.
- 4.13 The Second Applicant argued that the 1st Respondent ignored the decision of the Review Panel by cancelling the award to the Second Applicant for Item 413 and proceeding to award same to Cospharm Investment (Pty) Ltd which was correctly disqualified and thus should not have been awarded any line item as per the bid.
- 4.14 In addition, the Second Applicant advanced that if I.T.B. 22.2 gives options for typing or handwriting, there was no reason for Cospharm to include both, and if they opted to include both, both options should not have errors.
- 4.15 In additional remarks, 2nd Applicant stated that the 1st Respondent cancelled the award to the 2nd Applicant for item no. 290 and awarded same to Econo Investments in contravention of ITB 8.1 (b) which requires all products offered to be accompanied by manufacturer's authorization letter.

5. RELIEF SOUGHT:

Both Applicants are seeking the following reliefs:

- 5.1 An order reviewing and setting aside the First Respondent's decision to reconsider its selection of a bid for award taken pursuant to reconsideration application filed by the Sixteenth Respondent (Cospharm) on 2 May 2023.
- 5.2 An order declaring that the First Respondent is/was obliged in terms of Section 55 (4)(A) read with Section 55(4)(B) and Section 59(1) of the Public Procurement Act, Act 15 of 2015 as amended ("the Act"), to consider and decide on the reconsideration application of the Sixteenth Respondent within the prescribed 7 days period.
- 5.3 An order declaring that the Sixteenth Respondent's disqualification from the procurement process by the first respondent was reasonable and justifiable.
- 5.4 An order declaring that the Sixteenth Respondent's withdrawn Review Application was filed out of the prescribed timelines in terms of Section 59 of the Act.
- 5.5 An order declaring that there was no Review Application filed within the standstill period envisaged in terms of Section 59(1) of the Act.
- 5.6 An order directing the First Respondent to act in terms of Section 55(5) of the Act and award the contracts to the successful bidders selected in terms of the first notice for selection of procurement award dated 26 April 2023.
- 5.7 Further and alternative relief that the Review Panel deems appropriate.

6. INTERESTED PARTIES' SUBMISSIONS

COSPHARM INVESTMENTS (PTY) LTD:

- 6.1 Cospharm Investments (Pty) Ltd, one of the interested parties, and being at the centre of the grounds for the two applications for review, submitted that its challenge was mounted on the basis that it submitted two bid price pages, one typed and one handwritten. The typed page had no overwriting on it and thus their bid was responsive. Cospharm submitted that the reasoning for not selecting it based on the handwritten page in the bid submission form is founded on incorrect, unfair and prejudicial interpretation and consideration of the bidding documents as a collective thus the decision is unlawful, unfair, unreasonable and irrational.
- 6.2 Cospharm further submitted that the evaluation and qualification criteria requirements, specifically the administrative requirements on page 156 of the bid document does not make provision for ITB 2.2.3 to be a disqualifying criterion, thus the 1st Respondent's decision to rectify its own mistake made during the first BEC evaluation process was correct.
- 6.3 In responding to the Applicants' claim that it failed to serve other bidders with its application for reconsideration, Cospharm stated that it had no obligation in law to serve copies of its application for reconsideration with any other party other than the 1st Respondent, just like all other bidders who applied for reconsideration, including first Applicant.
- 6.4 Cospharm informed the Review Panel that the Applicants have failed to serve the copies of the applications on them, and instead the Applicants served the applications on

Cospharm's lawyers, which is contrary to what the law requires. As a result, Cospharm has received the copies of applications late and subsequently filed its responding affidavit outside the prescribed period, thus has requested for condonation.

- 6.5 There is no relevance in making reference to the withdrawn application for review, as it was within Cospharm's rights to withdraw it.

ECONO INVESTMENTS PTY LTD:

- 6.6 Interested party Econo Investments (Pty) Ltd has indicated that it has withdrawn their grievances contained in its earlier application for reconsideration and that it is not opposing any of the applications. Econo Investments further pleaded for the review hearing process to be expedited and finalised to allow it as one of the awarded bidders to make financing and delivery arrangements to the public entity.

Econo Investments further stated that it has renounced two items taken from the two applicants and awarded to it in fear of possible protracted litigations regarding this matter, and also because it no longer supply those items.

7. THE FIRST RESPONDENT'S SUBMISSIONS AT THE HEARING

- 7.1 In responding to the Applicants' assertions, the 1st Respondent noted that there were similarities in the two applications, stating that both the grounds and reliefs sought are alike.
- 7.2 The 1st Respondent stated that it interpreted the provisions of the Act correctly and the sequence it followed in managing this procurement process was in full compliance with what the law says.
- 7.3 The 1st Respondent clarified that there was only one Notice for selection of award and it makes provisions for aggrieved bidders to apply for reconsiderations. Bidders, including Cospharm, Erongomed, Econo Investments and Taliindje Investments exercised their rights and applied for reconsideration at different times within the prescribed period.
- 7.4 The 1st Respondent indicated that it adjudicated and decided upon Cospharm's reconsideration application on 9th May 2023, although only communicated the decision on 26 May 2023. The decision that Cospharm's bid should be referred back to the Bid Evaluation Committee for re-evaluation was due to the typed form that was found in its submitted bid. The 1st Respondent indicated that I.T.B. 22.2 gives options for typing or handwriting, and having found both in the bid, it decided to self-correct by instructing BEC to re-evaluate all bids using the typed page which had no overwriting and to apply I.T.B. 22.2 of the Bidding Document. The first Respondent further stated that there is nothing in law which indicates that a decision communicated late is of no force or becomes a nullity. The 1st Respondent justified the delayed communication of its decision on the overloaded system, claiming there were so many applications for reconsideration which need to be attended to.

- 7.5 1st Respondent further added that Cos harm's re-introduction in the list of responsive bidders as well as the re-valuation of other bidders resulted in the movement of about 460 items re-allocated to different bidders, leading to savings, because Cospharm offered the most competitive prices than most bidders.
- 7.6 The fact that the reconsideration applications came in on different dates and produced different results for each applicant, depending on their grievances, those aggrieved by the decision of the 1st Respodent proceeded to the Review Panel, i.e., Taliindje Investments.
- 7.7 As a result, the re-evaluation was ongoing concurrently with the Review Panel process, with the 1st Respondent insisting there is no provisions in the law which requires a reconsideration process to be placed on hold in light of a Review Panel application.
- 7.8 The 1st Respondent stated that the Review Panel Order made by a different panel was in relation to the issues brought up under the application by Applicant Taliindje Investments, thus should not affect other processes resulting from the reconsideration process and that issues raised in the cited order have no bearing on the outcome of the process.

8. 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:

- 8.1 That Cospharm had no legal obligation to serve on other bidders its request for reconsideration. The cited High Court judgement by Judge Sibeja J in the matter between Elite Construction v Hellen Amupolo Elite Construction CC v Amupolo (HC-MD-CIV-MOT-REV-2020/00404) [2022] NAHCMD 503 (23 September 2022) whereby the reconsideration is done and the public entity disregarded the matter of *audi alteram partem* is not applicable in this regard. In fact, Section 55 (4A) & (4B) does not attach a service to applications for reconsideration.
- 8.2 That 1st Respondent was in full compliance with Regulation 6(3) of the Regulations when it instructed the BEC to re-evaluate all bids. BEC had wrongly used I.T.B. 22.3 to disqualify Cospharm. However, I.T.B. 22.3 was not a disqualifying criterion because it has corresponding pass/fail responsiveness criterion set in bidding document. The Board corrected its error by instructing BEC to apply I.T.B. 22.2 which relates to a pass/fail responsiveness criterion set in the bidding document.
- 8.3 After re-evaluation process, First Respondent had no obligation to issuing a notice of selection for award, because the Procurement Act Section 55 (4), (4A) and (4B) was already obliged with when a Notice of selection for award dated 26 April 2023 was issued. There is no requirement for a 2nd Notice of selection for award after the reconsideration process cited anywhere in the law. The aggrieved bidders are directed by law to the Review panel having exhausted all remedies through the application for

reconsideration during the stand still period. Therefore, the Notice of Procurement contract Award issued on 3rd August 2023 is in compliance with the law.

- 8.4 There are dissenting views from the minority who understand that there should have been another Notice of selection of award in terms of Procurement Act, Section 55 (4), (4A) and (4B) after the reconsideration process issued before the Notice of procurement contract Award issued on 3rd August 2023.

CONDONATION:

- 8.5 The contravention by the Applicants for not having served the other interested parties (bidders) directly but through their attorney is noted and condoned as it has no direct bearing on the overall process and outcome.
- 8.6 The late filing of the replying affidavit by Respondent no. 16 and the circumstances surrounding how the service was done is noted and condoned has no direct bearing on the overall process and outcome.
- 8.7 Contravention of Section 55 (4A) by the 1st Respondent, which demands that a decision be made and communicated within 7 days is noted and condoned as it has no direct bearing on the overall process and outcome. There is evidence that 1st Respondent has taken the reconsideration application decision within the prescribed period, although its communication was delayed.

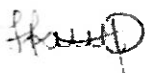
9. DECISIONS OF THE REVIEW PANEL:

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

9.1 That in terms of Section 60(a) of the Public Procurement Act 2015, (Act No.15 of 2015) as amended, the Review Panel hereby dismisses the applications and that in terms of Section 60(e) of the Act confirms the decision of the Public entity.

9.2 The effective date of this order is 29 August 2023.

9.3 The Public Entity shall provide proof of implementation of this Order to the Procurement Policy Unit within thirty (30) days from receipt date of this Order. A copy of the proof should be sent to the Review Panel Secretariat.



Tulimeyo Kaapanda
CHAIRPERSON: REVIEW PANEL (IRO THIS MATTER)

