



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 07 SEPTEMBER 2023

IN THE MATTER BETWEEN

AFRICURE PHARMACEUTICAL NAMIBIA (PTY) LTD APPLICANT

AND

**CENTRAL PROCUREMENT BOARD OF NAMIBIA
OTHERS**

1st RESPONDENT &

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

BID NO: NCS/ONB/CPBN-01/2022 – PROCUREMENT OF SUPPLY AND DELIVERY OF ANTI-RETROVIRAL (ARVs) PRODUCTS FOR THE MINISTRY OF HEALTH AND SOCIAL SERVICES

Coram: Paulina Kandali Iyambo (Chairperson), with Brownny Mutrifa, Ehrenfried Honga, Selma-Penna Utonih and Mekondjo Katunga.

Heard: 07 September 2023

Decided: 07 September 2023

ORDER

1. INTRODUCTION:

- 1.1 A hybrid meeting was held, using both physical and virtual modes.
- 1.2 Having heard **Mr. Ronaldo H. Katjijere**, for the Applicant, **Mr. Festus Hamukwaya**, 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. GROUNDS FOR THE REVIEW AS CONTAINED IN THE APPLICANT’S APPLICATION FOR REVIEW:

- 2.1 The Applicant in its Application for review informed the Review Panel that it is a local manufacturer of pharmaceutical products; And as such qualifies, as of right, to certain reservations and preferences, the Directive made by the Minister in terms of Section 73 (2) which gives the Minister the power to make certain Directives, including Directives to the Respondent, which directives must be complied with.

- 2.2 The Applicant amplified the foregoing by highlighting that it follows from the above that at the time of submission of the Applicant's bid, the First Respondent was under obligation to comply with the Directive and to consider the Applicant's bid in accordance with the "Act" and the "Directive" to benefit the Applicant from the reservations and preferences stated in the directive. I respectfully submit that First Respondent does not have discretionary powers of not complying with the Directive as Section 73 (2) mandated as follows:

73 (2) after having considered the directive under subsection (1), the Policy Unit, Board or public entity must give effect to or cause the policy directive to be implemented.

3. APPLICANT'S SUBMISSIONS AT THE REVIEW PANEL HEARING:

- 3.1 The Applicant explained that its Application is based on the directive issued by the Minister in terms of section 73 of the Public Procurement Act which is ignored by the 1st Respondent in this matter, the Applicant further explained that the objectives of the Public Procurement Act is to built procurement capacity in Namibia and to promote, facilitate and strengthen measures to implement the empowerment and industrialisation policies of government including the job creations of Namibian citizens. The Applicant stated that there is a withdrawal of the directive issued interms of section 73 of the Public Public Procurment Act of 2015 on preferential procurement (local sourcing Directive) and further quoted paragraph 4 of the same Directive which states as follow: *Kindly be advised that all procurments subject to the Local Sourcing Directive referred to above that have been advertised before 1st February 2023 will continue to be administered in accordance with the Local Sourcing Dirctive. As from 1st February 2023 all procurement preferences should be granted only in terms of Code of Good Practice issued on 31 January 2023.*

- 3.2 Upon inquiry by the Review Panel, about the 5% Price Preference on the bidders total cost for those who have submitted a substantially responsive bid, and how was the 1st Respondent supposed to apply the threshold of value not exceeding N\$30 000 000 (for works), the Applicant explained that this bid is awarded per lot, further that the Applicant did not bid for all the Products/Lots it is for this reason that, the 1st Respondent should have awarded 5% of the Applicant's total cost for all Lots the Applicant offered.

4. 1st RESPONDENT'S SUBMISSION AT THE REVIEW PANEL HEARING:

- 4.1 The 1st Respondent submitted that the Applicant indicated in this particular bid that it is a Packer and not a Manufacturer. In as far as the letter of 01 February is concerned, the 1st Respondent is not preview to it hower, it can not answer to anything regarding that letter. The local sourcing directive do not apply in this bid hence, the 1st Respondent could not evaluate in accordance with the local sourcing directive. This bid was

advertised on 14th October 2022 and the Applicant bought its bid document four (4) days after this bid was advertised, therefore the Applicant has Six (6) months to prepare this bid and it should have had enough opportunity to ask for clarification. The 1st Respondent received seven (7) application for reconsideration yet, none of the reconsiderations deals with local sourcing it is for that reason that the 1st Respondent strongly object to the Applicant that it has not made up a case.

4.2 Further, the 1st Respondent explained that it sent a query to the Minister of Finance and Public Enterprises in which it asked for an authorisation to apply a margin or preference for Namibian suppliers for the bid of Supply and delivery of Pharmaceutical Products for the Ministry of Health and Social services however, the Minister responded by a letter dated 17 September 2021 stating that in the absence of the Code of Good Practice, preferences could not be applied.

5. INTERESTED PARTIES:

5.1 One of the Interested Parties (**Windhoek Medical Solution**) submitted that the issue manufacturer and supplier, all bidders are suppliers in terms of this bid and further indicated that preference to local suppliers was not part of this bid. The Windhoek Medical Solution further stated that there are no merits in the Application therefore, it must be dismissed.

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 that the letter/Directive which clearly states that: *all procurments subject to the Local Sourcing Directive referred to above that have been advertised before 1st February 2023 will continue to be administered in accordance with the Local Sourcing Directive. As from 1st February 2023 all procurement preferences should be granted only in terms of Code of Good Practice issued on 31 January 2023.* dated 01 February 2023 is addressed to all the Ministers, Mayors Chairpersons of the Regional and Local Council and Chairpersons of all governing bodies therefore, the Panel could not understand how this letter was not received by the 1st Respondent.

7. DECISIONS OF THE REVIEW PANEL:

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

7.1 That, in terms of Section 60 (c) of the Public Procurement Act the decision of the Board is hereby set aside

7.2 Further, the matter is referred back to the 1st Respondent with the following specific instructions:

- a) That the CPBN verify with the Ministry of Finance on the veracity of the letter dated 1st February 2023, and its implication to this bid.
- b) That the response determine the way forward if indeed it was a directive that must have been followed by CPBN.
- c) That CPBN communicate the respond of the Minister to the Review Panel keeping the panel abreast on the matter.

7.5 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 send to the Review Panel Secretariat.



Paulina Kandali Iyambo
CHAIRPERSON: REVIEW PANEL (IRO THIS MATTER)

