



**REPUBLIC OF NAMIBIA**

**MINISTRY OF FINANCE**

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**PUBLIC PROCUREMENT REVIEW PANEL**

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**IN THE PUBLIC PROCUREMENT REVIEW**

**HELD ON 04 MARCH 2021**

**IN THE MATTER BETWEEN**

<b>Sistemas Avanzados De Tecnologia, S.A. (SATEC)</b>	<b>First Applicant</b>
<b>Lex Technologies (Pty) Ltd</b>	<b>Second Applicant</b>
<b>Green Enterprise Solution (Pty) Ltd</b>	<b>Third Applicant</b>

**AND**

<b>Central Procurement Board of Namibia</b>	<b>First Respondent</b>
<b>Telecom Namibia Ltd</b>	<b>Second Respondent</b>

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

**BID NO: G/OIB/CPBN-02/2020: Supply, Delivery, Installation, Commissioning and  
Maintenance of Operations and Business Support Systems (OSS/BSS) to Telecom  
Namibia**

**Present: Selma-Penna Utonih (Chairperson) with Fillemon Immanuel, Mekondjo  
Nghipandulwa, Hellen Amupolo and Kenandei Tjivikua.**

**Heard : 04 March 2021**

**Decided : 04 March 2021**

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**REVIEW PANEL ORDER**

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Having heard **Mr. Trevor Brokerhoff**, for the First Applicant, **Mr. Wonder Mushonga** for the Second Applicant, **Mr. Ilana Erasmus** for the Third Applicant, and **Ms. Rebecca Haipinge** for the First Respondent, and other interested parties who attended the physical and virtual hearing proceedings.

In accordance with Regulation 44 of the Regulations to the Public Procurement Act, No. 15 of 2015, the Review Panel observed that unlike in a review application of a decision for the award of a procurement contract, where the burden of proof is always on the applicant, the same shift to the public entity/board in an instance of a review application relating to the cancellation decision.

Therefore, the First Respondent was requested to be first in making submissions on why the bidding process has been cancelled.

***1. Points in limine***

***1.1 Late Filing of the Review Applications***

The First Respondent indicated that it will only respond to the application of the First Applicant because it was the only one submitted during the standstill period.

The First Applicant corroborated this version, saying that there was only one valid application before the Review Panel, being its application.

The Third Applicant, while acknowledging that indeed its application was filed outside the standstill period, it submitted that the application of the First Applicant suffers the same blow.

This was because the First Applicant filed its application for review on 23 February 2021, when the standstill period already ended on 20 February 2021. Further, the Third Applicant sent a request for an explanation of the reason for the cancellation to the First Respondent on 18 February 2021, which request was nowhere nearer to being a review application. It is stressed that the law in terms of Regulation 42(1) is clear that a review application must be filed within seven (7) days of receipt of the decision or action taken by a public entity or board with Review Panel.

The Second Applicant, while indicating that it also first wrote to the First Respondent to which it received no reply, acknowledged that its application for review was equally lodged outside the standstill period. It further corroborated the version of the Third Applicant that all three applications were outside the statutorily prescribed period for filing review applications.

The First Applicant responded to the above by highlighting that it first submitted a request for an explanation to the First Respondent on 18 February 2021 to which a reply was received that the latter was looking into the request. This request was well within the standstill period. Further, the First Applicant argued that the lodgment with the Review Panel was also within the seven (7) days standstill period and regard had to be given to the working days because neither the Procurement Act nor its Regulations define a day.

The Review Panel indicated that in the absence of the definition of a day in the Procurement Act or its Regulations, it has always placed reliance on the Interpretation of Laws Proclamation 37 of 1920 as amended, in its proceedings. Section 4 provides that:

*“When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day unless the last day shall happen to fall on a Sunday or on any other day appointed by or under the authority of a law as a public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.”*

The Third Applicant endorsed the approach of the Review Panel as correct.

As a result of the above, the First Respondent also concurred that all review applications were then out of time.

The Review Panel further requested the First Applicant to indicate the legal basis for its application in terms of the Public Procurement Act and/or Regulations. The First Applicant indicated that its application was filed in terms of Section 59(1) read with Regulation 42(1). On the question of whether these were the only legal provisions upon which the application was based, the First Applicant's response was affirmative.

### ***1.2 E-mail not a prescribed form of service***

The First Applicant argued that an e-mail is not a form of service in terms of Regulation 57 of the Regulations to the Public Procurement Act. Further, regard had to the word 'receipt' used in the provisions of Regulation 42(1), the First Applicant only received the e-mail containing the notice of cancellation on 16 February 2020 and proceeded to request the First Respondent to explain its cancellation decision.

The Secretariat explained that there is an exemption by way of a directive issued by the Minister of Finance in terms of Sections 4 and/or 73 of the Public Procurement Act allowing parties to make use of e-mails as a form of service. The First Applicant contested that such exemption or directive would be unlawful on the basis that the Minister introduced a form of service additional to those prescribed under Regulation 57.

On the assertion of having received the notice of cancellation only on 16 February 2021, the First Respondent disputed this version citing that, it received the delivery report on the same day that the notice was sent to the First Applicant. The Second Applicant amplified that even if an e-mail containing the notice of cancellation was not delivered on the day it was sent, the First Applicant would not escape the fact that the bidding document in terms of ITB 1.3 provides that communication channels include e-mails.

## **2. Finding(s) of the Review Panel**

Having heard the Parties on the points *in limine* raised, regard had to be given to relevant laws and without having gone onto the merits or demerits of any of the review applications and/or other documents filed as part of the record, the Review Panel found the following:

### ***2.1 On late filing***

That Section 55(4) and 55(5) of the Act read with Regulation 38(2)(c) have no applicability to the present matter. These provisions apply only where there has been a notice for the selection of an award and not in the instance of a cancellation decision or any other action. An application for review of a decision that does not concern a notice for the selection of an award ought to be filed only in terms of Section 59(1) of the Public Procurement read with Regulation 42(1) directly to the Review Panel. Such application needs not to be conditioned to the reconsideration by the public entity/board envisaged under Regulation 38(2)(c). The provisions of Regulation 42(1) in the peremptory language require that an application for review must be filed with the Review Panel within the seven (7) days of the receipt of a decision by the public entity/board. This was not observed in the present review.

## ***2.2 On reckoning of days***

In terms of section 4 of the Interpretation of Laws Proclamation 37 of 1920, the number of days for the doing of any act, or for any other purpose in terms of the Public Procurement Act and/or its Regulations are reckoned exclusively of the first and inclusively of the last day. Whereas if the last day falls on a Sunday or a public holiday, is reckoned exclusively of the first day and every Sunday or public holiday.

## ***1.3 On e-mail as a form of service***

That exemption by way of a directive issued by the Minister of Finance and providing for e-mails to become a form of service is lawful and enforceable. The Minister is empowered to do so in terms of Sections 4(2) of the Public Procurement Act. The Minister is also empowered to give directives in terms of Section 73(1) of the Act. The bidding document also states that e-mail was going to be a form of service.

**In the result, the Review Panel makes the following order:**

- a) That the Applications against the First Respondent are dismissed in terms of Section 60(a) of the Public Procurement Act, 2015 (Act No. 15 of 2015).
- b) This Order is effective 04 March 2021.

  
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SELMA-PENNA UTONIH  
CHAIRPERSON: REVIEW PANEL

