



**REPUBLIC OF NAMIBIA
MINISTRY OF FINANCE**

PUBLIC PROCUREMENT REVIEW PANEL

**IN THE PUBLIC PROCUREMENT REVIEW
HELD ON 17, 18 AND 24 JUNE 2025**

IN THE MATTER BETWEEN

Eyambeko Namibia Catering (Pty) Ltd	1st Applicant
James and Young Trading Enterprises CC	2nd Applicant
Kunene Catering Services (Pty) Ltd	3rd Applicant
Pamo Trading Enterprises CC	4th Applicant
Platinum Investment CC	5th Applicant
Ongurukuena Investments Fourteen CC JV Investments (Pty) Ltd	6th Applicant
Oshipaya Investment CC	7th Applicant

AND

The Central Procurement Board of Namibia	1st Respondent
Haritage Caterers (Pty) Ltd	2nd Respondent
Free Namibia Caterers CC	3rd Respondent
Mukapa Investment CC	4th Respondent
Agrofood International (Pty) Ltd	5th Respondent
Food Pro Investment CC	6th Respondent
O'zoDiac Star Pension Hotel CC	7th Respondent
Ritaka Trading Enterprises CC	8th Respondent
H.P.P Investment CC	9th Respondent
Papa Smurf Investment CC JV Elderwood Trading CC	10th Respondent
Qatar Investment CC	11th Respondent
Ziara Energy & Investment (Pty) Ltd	
JV Ekanda Food Services CC	12th Respondent
Tradevest Holdings Group (Pty) Ltd	13th Respondent
Ndafi Trading and Investment CC	14th Respondent
Konia Investment CC	15th Respondent
TMU Supply and Delivery Services (Pty) Ltd	16th Respondent
Mono Trading CC JV Dilu Investment Group CC	17th Respondent
Entity Investment CC	18th Respondent
Gamon Trading Enterprises CC	19th Respondent
Ndume Trading Enterprises CC	20th Respondent

Bons Trading Enterprises CC	21 st Respondent
Florida Trading CC	22 nd Respondent
New Success Investment CC	23 rd Respondent
Magnetize Investment CC	24 th Respondent
SS Lopes T/A Lisboa Wholesalers JV	
Ndahomenwa Trading Enterprises CC	25 th Respondent
E.U.S Agro Processors CC	26 th Respondent
RCL Food Namibia (Pty) Ltd	27 th Respondent
Evesh Investment CC JV Galacsy Investment Group CC	28 th Respondent
Multi Solutions CC JV Emancipate Investment (Pty) Ltd	29 th Respondent
Kayunyi Investments (Pty) Ltd	30 th Respondent
Passions Culinary and Hospitality Institute CC	31 st Respondent
Supreme Gaming and Electronic CC	32 nd Respondent
African Deli (Pty) Ltd	33 rd Respondent
Protea Hotels Namibia (Pty) Ltd	34 th Respondent
Paskanova Investment CC	35 th Respondent
Seal Caterers (Pty) Ltd	36 th Respondent
Atlantic Catering Solutions (Pty) Ltd	37 th Respondent
Ongoma Trading Enterprises CC	38 th Respondent
Windila Services CC	39 th Respondent
Toufies Investment CC	40 th Respondent
Erongo Youth Trading CC	41 st Respondent
Alber Investment CC	42 nd Respondent
Sitwala C. J Investment CC	43 rd Respondent
Karas Youth Trading CC	44 th Respondent
JAK CC JV Windhoek Shelfco Commercial Sixty-Six (Pty) Ltd	45 th Respondent
Trion Technology Solutions CC	46 th Respondent
Aminata Investment CC JV Shekinah Events CC	47 th Respondent
Karipititjo Investment CC	48 th Respondent
Salute Trading CC	49 th Respondent
Gwaambahe Guest House CC	50 th Respondent
Explore Africa Investment (Pty) Ltd	51 st Respondent
Activision Namibia Trading CC JV Gemini Poultry Trading CC	52 nd Respondent
Chakula Investment Group (Pty) Ltd	53 rd Respondent
Thomas Nghivalwas Ehafo Stores	54 th Respondent
ATR Investment CC	55 th Respondent
Power Investment CC	56 th Respondent
Clouds Trading Enterprises CC	57 th Respondent
ETA Investments CC JV ETN Technical Services CC	58 th Respondent
Camelot Investment Group (Pty) Ltd	59 th Respondent
Fundamental Trading Enterprises CC	60 th Respondent
Shamrock Investments Number Fifty Two CC	61 st Respondent
Ontoko Trading Enterprises CC	62 nd Respondent
Muthakaz Investment CC	63 rd Respondent

LMH Investment CC	64 th Respondent
Oases General Dealers CC	65 th Respondent
Willbedone Trading CC	66 th Respondent
Kambwa Trading CC JV AFI Trading CC	67 th Respondent
Heina Trading CC JV Napandue Investment CC	68 th Respondent
Patriot General Services (Pty) Ltd	69 th Respondent
Sash Trading and Earthworks CC	70 th Respondent
Ken Investment CC	71 st Respondent
Ndakalimwe Investment CC	72 nd Respondent
Eekulo (Pty) Ltd JV	73 rd Respondent
Dunedin Investment CC	74 th Respondent
Beva Investment CC	75 th Respondent
August 26 Holdings (Pty) Ltd	76 th Respondent
Jacque's Cleaning & Catering CC	77 th Respondent
Punchu Trading CC	78 th Respondent
Whitebridge Investment CC	79 th Respondent
OKG Food Services (Pty) Ltd	80 th Respondent
Omaungu Caterers CC	81 st Respondent
Dinina Investment CC	82 nd Respondent
African Hospitality and Tourism (Pty) Ltd	83 rd Respondent
Nakahale Investment CC	84 th Respondent
Moderien Investment CC	85 th Respondent
Equity Technical and Supply Services CC JV	86 th Respondent
Pesa Trading Enterprises CC	
Enersense Holding Investments (Pty) Ltd JV Erf 109	87 th Respondent
Gobabis (Pty) Ltd T/A Omaheke Megasave	
Igloo Investment CC	88 th Respondent
Old Wagon Investment CC	89 th Respondent
Citiproduce CC	90 th Respondent
Elolo Food Services (Pty) Ltd	91 st Respondent
Olduvai Investment CC	92 nd Respondent
Beyond Agriculture Investments	93 rd Respondent
Tuthikameni Pamwe Investments CC	94 th Respondent
Padana Investments CC JV ATRAH Transport CC	95 th Respondent
Tuyapeni Trading Enterprises CC JV Vidu Trading CC	96 th Respondent
El Mondo Trading CC	97 th Respondent
Shafa Trading Enterprises CC	98 th Respondent
Om"Kwana Caterers CC	99 th Respondent
Undera Investment Group (Pty) Ltd	100 th Respondent
Decade Trading CC	101 st Respondent
Pofiha Investments CC	102 nd Respondent
Kobra Investments CCC	103 rd Respondent

**IN THE REVIEW APPLICATIONS MADE IN TERMS OF SECTION 59 OF THE
PUBLIC PROCUREMENT ACT, ACT 15 OF 2015, AS AMENDED**

*BID NO: G/ONB/CPBN-03/2024: Supply and Delivery of Foodstuff to Government
Hostels for a Period of Three (3) Years.*

**Present: Doné Brinkman (Chairperson), Tulimeyo Kaapanda, Ehrenfried
Honga, Brownly Mutrifa and Lukas Kudumo Siremo concurring.**

Heard: 17, 18 and 24th June 2025.

Decided: 24 June 2025.

REVIEW PANEL ORDER

1. INTRODUCTION

- 1.1 The Review Panel was constituted in terms of Section 58 (1) of the Public Procurement Act, Act 15 of 2015, as amended (hereinafter referred to as the "Act") to adjudicate on seven applications for review for bid number G/ONB/CPBN-03/2024, for the procurement of the '*Supply and Delivery of Foodstuff to Government School Hostels for a Period of Three (3) Years*' (hereinafter referred to as 'the bid').
- 1.2 Following a Notice of Selection of Award issued by the Central Procurement Board of Namibia (hereinafter referred to as the 'CPBN') and a reconsideration process, the following bidders lodged applications with the Review Panel:
- 1.2.1 Eyambeko Namibia Catering (Pty) Ltd;
 - 1.2.2 James and Young Trading Enterprises CC;
 - 1.2.3 Kunene Catering Services (Pty) Ltd;
 - 1.2.4 Pamo Trading Enterprises CC;
 - 1.2.5 Platinum Investment CC;
 - 1.2.6 Ongurukuena Investments Fourteen CC JV Investments (Pty) Ltd; and
 - 1.2.7 Oshipaya Investment CC.
- 1.3 The Review Panel read the applications for review made in terms of Section 59 of the Act, read with Regulation 42 of the Public Regulations, 2015 as amended (hereinafter referred to as 'the Regulations'), read the replying

affidavits received, considered the oral representations and all other documents provided to the Review Panel and made a decision on this matter on the 24th day of June 2025. At the Review Panel hearing on 17 June 2025, the legal representative of Ongurukuena Investments Fourteen CC JV Investments (Pty) Ltd, Mr Kavari, informed the Review Panel that he has received instructions that Ongurukuena Investments Fourteen CC JV Investments (Pty) Ltd withdraws its review application. As a result of this withdrawal, the review application made by Ongurukuena Investments Fourteen CC JV Investments (Pty) Ltd, was not considered by the Review Panel.

2. BACKGROUND:

2.1 The six (6) applications for review which served before the Review Panel (excluding the withdrawn one), on the 17th and 18th of June 2025, relate to Bid Number G/ONB/CPBN-03/2024, for the procurement of the '*Supply and Delivery of Foodstuff to Government School Hostels for a Period of Three (3) Years.*' The procurement exercise was facilitated and conducted by the CPBN on behalf of the Ministry of Education, Innovation, Sport, Youth, Sports, Arts and Culture, (previously known as the Ministry of Education, Arts and Culture) in terms of the Act and its Regulations as amended. The estimated cost of the bid was N\$ 2,098,396, 000.00.

2.2 The procurement method used by the CPBN was Open National Bidding and the bid was advertised on or about 03 June 2024. The closing date for the submission of bids was on or about 09 September 2024. According to the Executive Summary issued by the CPBN on or about 02 April 2025, 109 bids were received by the CPBN for evaluation. The bid was separated into lots per region as follows:

- 2.2.1 Lot 1: Erongo Region;
- 2.2.2 Lot 2: Hardap Region;
- 2.2.3 Lot 3: Kavango East Region;
- 2.2.4 Lot 4: Kavango West Region;
- 2.2.5 Lot 5: //Kharas Region;
- 2.2.6 Lot 6: Khomas Region;
- 2.2.7 Lot 7: Kunene Region;
- 2.2.8 Lot 8: Ohangwena Region;
- 2.2.9 Lot 9: Omaheke Region;
- 2.2.10 Lot 10: Omusati Region;
- 2.2.11 Lot 11: Oshikoto Region;
- 2.2.12 Lot 12: Oshana Region;
- 2.2.13 Lot 13: Otjozondjupa Region; and
- 2.2.14 Lot 14: Zambezi Region.

- 2.3 The CPBN, via a Notice for Selection of Procurement Award in terms of Section 55 (4) of the Act, as amended and Regulation 38 (1) of the Regulations informed the bidders that the following bidders were awarded per lot as follows:
- 2.3.1 Lot 1: Erongo- Food Pro Investment CC;
 - 2.3.2 Lot 2: Hardap- not awarded;
 - 2.3.3 Lot 3: Kavango East- O'zoDiac Star Pension Hotel CC;
 - 2.3.4 Lot 4: Kavango West- Ritaka Trading Enterprises CC;
 - 2.3.5 Lot 5: //Kharas- N.H.P.P Investment CC;
 - 2.3.6 Lot 6: Khomas- Papa Smurf Investment CC JV Elderwood Trading CC;
 - 2.3.7 Lot 7: Kunene- Qatar Investment CC;
 - 2.3.8 Lot 8: Ohanwena- Agrofood International (Pty) Ltd;
 - 2.3.9 Lot 9: Omaheke- Mukapa Investment CC;
 - 2.3.10 Lot 10: Omusati- Heritage Caterers (Pty) Ltd;
 - 2.4.11 Lot 11: Oshikoto- Free Namibia Caterers CC;
 - 2.5.12 Lot 12: Oshana- Ziara Energy & Investment (Pty) Ltd JV Ekanda Food Services CC;
 - 2.5.13 Lot 13: Otjozondjupa- Tradevest Holdings Group (Pty) Ltd; and
 - 2.5.14 Lot 14: Zambezi- Ndaifi Trading and Investment CC.
- 2.4 The CPBN further in their Notice for Selection of Procurement Award, informed all bidders that the standstill period for this bid would be from 04 April 2025 at 08h00 am and ends on 15 April 2025 at 17h00 pm (Namibian time).
- 2.5 After reconsideration letters were considered and decided upon by the CPBN, the Review Panel Secretariat received seven (7) applications for review regarding this bid. The Applicants hereinbelow, are listed in alphabetical order and not in the order in which their applications were received by the Review Panel Secretariat. The Review Panel further received replying affidavits from the CPBN, Free Caterers CC (hereinafter referred to as 'Free Caterers'), Heritage Caterers CC (hereinafter referred to as 'Heritage Caterers'), Mukapa Investment CC (hereinafter referred to as 'Mukapa Investment') and Agrofood International (Pty) Ltd (hereinafter referred to as 'Agrofood International').
- 2.6 The Review Panel when receiving the applications for review and the replying affidavits, may in terms of Regulation 44 of the Regulations, conduct the Review Panel proceedings in such a manner which the Review Panel considers most suitable to resolve the issues before it. In addition, where separate review applications have been instituted, the Review Panel

may in terms of Regulation 42 (5) (b) consolidate the review applications as one action. The Review Panel, therefore, decided that as all seven (7) applications for review related to one bid and because the Respondents and interested parties would be the same, to have one hearing to consider all seven (7) applications for review as a consolidated one. The Review Panel, in addition, in terms of Section 42 (5) (a), joined all interested parties to the review hearing proceedings. At the Review Panel hearings, the Review Panel allowed all applicants and respondents to briefly present their ground for review/opposition to the Review Panel.

3. GROUNDS FOR REVIEW:

3.1 Regulation 42 (2) of the regulations provides that:

*“(2) An application for review contemplated in subregulation (1) must-
(a) contain the grounds for review as well as any supporting documents on which the supplier or bidder rely on; and
(b) be accompanied by an application fee of N\$ 5000.00.”*

3.2 The Review Panel has satisfied itself that all applicants who participated in the review proceedings on the 17th and 18th of June 2025, paid the required application fee of five thousand Namibian Dollars.

3.3 The Review Panel herein below summarised the grounds of review by each applicant based on the review applications, documents submitted, submissions and as presented to the Review Panel at the review hearings on 17th and 18th of June 2025. The Review Panel, in addition, for each application for review submitted, hereinbelow summarised the grounds of opposition made by the respondents in their replying affidavits, documents submitted and as presented to the Review Panel at the review hearing. Not all information and affidavits provided by the applicants and respondents are recorded herein but were duly considered by the Review Panel.

3.4 At the commencement of the review proceedings, the Chairperson asked if any of the parties wished to raise preliminary points. Pamo Trading Enterprises CC (hereinafter referred to as ‘Pamo Trading’) raised *a point in limine*. Pamo Trading was represented by Mr C. Visser who raised a preliminary point at the Review Panel Hearing regarding the bid validity of the bid. Another applicant raised this point in their application for review. The arguments on whether the validity period has expired or not will be discussed in the order hereinbelow under the summary of the parties who discussed the bid validity period either orally or in their respective affidavits.

3.5 **1st Review Application: Eyambeko Namibia Catering (Pty) Ltd (hereinafter referred to as 'Eyambeko Catering'):**

3.5.1 Eyambeko Catering lodged an application for review with the Review Panel on or about 13 May 2025. During the Review Panel proceedings, Eyambeko Catering was represented by Mr C Visser from Koep and Partners.

3.5.2 Eyambeko Catering informed the Review Panel that it had submitted a bid for Lots 3, 8, 9, 10, 12 and 13. Eyambeko Catering in its application for review, requested the Review Panel to review and to set aside the CPBN's decision dated 2 April 2025.

3.5.3 Prior to lodging its application for review, Eyambeko Catering on 14 April 2025, applied to the CPBN to reconsider its decision. On 09 May 2025, the CPBN responded to the application for reconsideration by Eyambeko Catering, by stating that the Board resolved that the request made by Eyambeko Catering lacks sufficient merit and provided reasons why this decision was made.

3.5.4 Eyambeko Catering in their application for review informed the Review Panel that their bid was disqualified for the following reasons:

"The bidder scored 60%, below the required minimum of 70% as there is no reference letters submitted for the Contract Manager and Unit Manager as per the requirement, contrary to item No. 5.2 of the Technical Evaluation Requirements on page 50 of the bidding Documents."

Eyambeko Catering argued that it complied with the 'references' requirement and provided these references in detailed curriculum vitae enclosed in its bidding documents. The information supplied in the curriculum vitae included the identity of the client, and the contact person with contact details so that the Bid Evaluation Committee can verify the references. The Bid Evaluation Committee could have, and still can, verify these references. Eyambeko Catering therefore argued that they have substantially complied with the requirements of the bidding document.

3.5.5 Eyambeko Catering in their founding affidavit further argued that Item Number No. 5.2 is a score-based criteria, ranging from 20 points and that based on this score-based criteria, Eyambeko Catering should have been allocated points for providing these references and should have been found to be substantially responsive for phase 2.

3.5.6 Mr Visser on behalf of Eyambeko Catering at the Review Panel Hearing and in their replying affidavit further informed the Review Panel that in their view the Executive Summary was incomplete in that the summary does not inform Eyambeko Catering how many points were allocated to its bid in respect of phase 2 and does not contain the benchmark price in terms of which each bidder's price was allegedly scored in accordance with the scoring matrix and formula provided for in the bidding documents under Phase 4 - (pages 57 - 58). Eyambeko Catering argued that without disclosing the benchmark price, the calculations and the methodology used, no bidder will be able determine whether they are the lowest responsive bidder in terms of the criteria and scoring matrix set out in the bidding document.

3.5.7 At the Review Panel hearing, Mr Visser emphasised that Eyambeko Catering does not know what the score allocation is, how the scoring was done and requested for the score allocation.

Submissions by the CPBN on the review application by Eyambeko Catering:

3.5.8 The CPBN in their replying affidavit in summary stated that Eyambeko Catering's Bid was evaluated and disqualified in accordance with the criteria and methodology outlined in the bidding document and in compliance with Section 52 (9) of the Act. CPBN argued that the disqualification was fair and reasonable.

3.5.9 The CPBN at the Review Hearing informed the Review Panel that Eyambeko Catering was afforded an opportunity to engage with the CPBN where clarifications regarding the benchmark price could have been discussed and the questions it had regarding their scoring could have been explained and discussed. The CPBN informed the Review Panel that Eyambeko Catering failed to avail itself for this opportunity.

3.5.10 Mr Bangamwabo, on behalf of the CPBN argued that the Executive Summary is a summary of the Bid Evaluation Committee's evaluation report and does not contain the full details of the evaluation process.

3.5.11 Finally, the CPBN argued that Eyambeko Catering provided Curriculum vitae and not reference letters as required in the bidding document. The CPBN further informed the Review Panel that Eyambeko Catering did not prove it had an experienced unit manager and contract manager and loss 20 marks for the aspects relating to the unit manager and 20 marks for aspects relating to the area manager.

Submissions by Mukapa Investments CC (hereinafter referred to as 'Mukapa Investment') on the review application by Eyambeko Catering:

- 3.5.12 Mukapa Investments defended the review application filed by Eyambeko Catering and filed a replying affidavit. In summary Mukapa Investment argued that the disqualification of Eyambeko Catering by the CPBN was fair as they failed to submit the required documents. Mukapa Investments informed the Review Panel that no contact details were provided in certain curriculum vitae provided by Eyambeko Catering in their bid document. Further the curriculum vitae of Cornelius Ndalipomwene lists two references but does indicate the duration of work and working experience (type of work they were doing). The curriculum vitae of Mrs Petronella Koegelenberg provided contact details but does not say whose contact details it is and does not indicate if they are personal or professional references.
- 3.5.13 At the Review Panel hearing, Mr Shimakeleni contended that Pamo Trading Enterprises CC and Eyambeko Catering's review applications were filed by one law firm. Points such as bid validity was raised in one review application and not in the other review application.
- 3.5.14 Mukapa Investments concluded by stating that the Review Panel does not have the powers in terms of Section 60 of the Act to grant the orders sought by Eyambeko Catering.
- 3.5.15 Regarding bid validity Mukapa Investments, stated that the word "day" in the Act is defined as referring to "working day excluding weekends and public holidays" and when one uses working days, as per the Act, as amended, the bid validity has not lapsed. They further reasoned that on the present facts, there is a conflict between the definition of computation of 'days' as per the bidding document and the computation of 'days' in the Act. Section 2 of the Act, as amended, provides that in such circumstances, the Act prevails, Mukapa Investment stated. Further Mr Shimakeleni reasoned that when interpreting an issue, one should also have regard to the nature of the issue and any prejudice to be suffered by any bidder. Mukapa Investments submitted that the bid validity is in favour of the bidders, as that allows the bid to remain valid and for them to stand a chance of being awarded the bid.
- 3.5.16 Mukapa Investment in their replying affidavit refers the Review Panel to the case of *Total Namibia (Pty) Ltd v OBM Engineering And Petroleum Distributors (SA 9 of 2013) [2015] NASC 10 (30 April 2015)*, in which the Supreme Court, observed as follows:

“South African courts too have recently reformulated their approach to the construction of text, including contracts. In the recent decision of Natal Joint Municipal Pension Fund v Endumeni Municipality Wallis JA usefully summarised the approach to interpretation as follows – ‘Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.

Mukapa Investments detailed that meaning of words is, to a significant extent, determined by the context in which they are uttered and that the key considerations when it comes to interpretation is the avoidance of situations that would lead to manifest absurdity, inconsistency, hardship or would be contrary to the intention of the legislature.

Submissions by Haritage Caterers (Pty) Ltd on the review application by Eyambeko Catering:

- 3.5.17 Haritage Caterers (Pty) Ltd (hereinafter referred to as ‘Haritage Caterers’) defended the review application filed by Eyambeko Catering and filed a replying affidavit. Haritage Caterers at the Review Panel hearing reasoned that Eyambeko Catering was correctly disqualified by the CPBN. Haritage Caterers explained that in their view there is a distinct difference between a curriculum vitae and a reference letter. The bid requirement was that a reference letter should have been provided, and a curriculum vitae was the second document to be provided. Haritage Caterers explained that if the reference letters were not attached to the bidding document of Eyambeko Catering, then in such an event, Eyambeko Catering was correctly disqualified. The disqualification of Eyambeko Catering by CPBN according to Haritage Caterers was thus fair and reasonable in the present circumstances.

3.5.18 Haritage Caterers at the Review Panel Hearing made submissions regarding preliminary points which will be dealt with in the summary of the review application of Pamo Trading Enterprises CC.

3.6 **2nd Review Application: James and Young Trading Enterprises CC (hereinafter referred to as 'James and Young Enterprises'):**

3.6.1 James and Young Enterprises lodged an application for review with the Review Panel on 20 May 2025. During the Review Panel proceedings, James and Young Enterprises was represented by Mr E Mwakondange & Associates from Mwakondange & Associates Incorporated.

3.6.2 James and Young Enterprises informed the Review Panel that it had submitted a bid for all Lots, however, its application for review only contests Lots 3 and 4.

3.6.3 James and Young Enterprises in their application for review, requested the Review Panel to review and set aside the notice of selection of award dated 02 April 2025 in respect of this bid pertaining to Lots 3 and 4. Further James and Young Enterprises, requested the Review Panel to review and set aside the CPBN's decision declaring it to be irrational, unfair and unreasonable decision when it decided that the bid of James and Young Enterprises is not a responsive bid in respect of Lots 3 and 4. Furthermore, James and Young Enterprises, requested the Review Panel to review and order for re-evaluation of its bid in respect of Lots 3 and 4. Finally, James and Young Enterprises, requested the Review Panel to review and set aside the CPBN's decision not to select it for award in this Bid, in respect of Lots 3 and 4.

3.6.4 Prior to lodging its application for review, James and Young Enterprises on 15 April 2025, applied to CPBN to reconsider its decision. On 09 May 2025, the CPBN responded to the application for reconsideration by James and Young Enterprises, by stating that the Board resolved that the request made by James and Young Enterprises lacks sufficient merit.

3.6.5 James and Young Enterprises in its founding affidavit, informed the Review Panel that on or about 04 April 2025, it received an electronic Notice to Bidders as well as an Executive Summary in which it was informed that its bid was not selected for award for the following reasons:

"The bidder submitted a Title Deed and Lease Agreement in the name of: Lukas Shilongo, Simon Andjamba, Moses & Tuyeimo Shakela, Jakobus & Sila Bezuidenhout and Oluzizi Luxury Investment Number Two CC, however there are no supporting Fitness Certificate(s) submitted.

Additionally, the bidder submitted a Title Deed from Sefalana Properties (Pty) Ltd and Fitness Certificate from Metro Cash & Carry Sefalana but there is no Lease Agreement provided as required in ITB 12.1 (h) (9), addendum no. 3 and item No. 4.8 of the Mandatory Document requirements on page 46 of the bidding document.”

“The bidder has submitted the following documentary proof obtained from third party organizations which are not certified as per the requirement: ID copy for Rebekka Uunona, contrary to item No. 4.15 of the Mandatory Documents Requirements on page 48 of the bidding document.”

James and Young Enterprises argued that Section 2 of the Act and the preamble of the Act, inter alia seeks to promote integrity, accountability, transparency, fair-dealing and informed decision-making, among other considerations. Section 2 of the Act according to the founding affidavit of James and Young Enterprises, requires informed decision-making in the procurement process with the ultimate objective to see to it that the Board or Public Entity engaged in the evaluation process must be alive to the prevailing circumstance surrounding the bid and thereby make an informed decision which is sound, fair and reasonable.

3.6.6 James and Young Enterprises further argued that in fulfilment of the Mandatory Requirements of ITB 12.1 (h) (9), Addendum No. 3 and item No. 4.8, it had in respect of Lots 3 and 4 submitted a valid fitness certificate, a valid lease agreement and a confirmation in lieu of Title Deed from the Agro-Marketing and Trading Agency (hereinafter referred to as ‘AMTA’). AMTA according to James and Young Enterprises is an agency of the Ministry of Agriculture, Water and Forestry that is mandated to coordinate and manage the marketing and trading of Agricultural Produce in Namibia and amongst others it manages the Fresh Produce Hubs and National Strategic Food Reserve Infrastructure towards attainment of food safety and security.

3.6.7 Mr Mwakondange at the Review Hearing argued that AMTA is an agency of the state and as such AMTA does not have any immovable property registered in its name as all State assets are sole proprietary of the State under the control of the treasury. In summary, Mr Mwakondange informed the Review Panel that AMTA cannot have a titled deed to the warehouses it manages on behalf of the State. James and Young Enterprises thus argued that the CPBN when evaluating the bids, failed to reasonably consider exceptional circumstances and the purpose of requiring a title deed, especially considering the fact that James and Young Enterprises furnished a confirmation letter attesting to the fact that AMTA has no title deed to the property. The absence of a title deed does not take away AMTA’s

exclusive mandate and right to lease the warehouse for effective and efficient utilization thereof, James and Young Enterprises explained.

- 3.6.8 James and Young Enterprises further stated that there is reasonable justification as to why James and Young Enterprises could not have submitted a title deed and therefore the CPBN's failure to appreciate the ultimate purpose of requesting for a title deed and weight exceptional circumstances of James and Young Enterprises renders the decision of the CPBN irrational, unfair, unreasonable and thus led to an uninformed decision. When asked why James and Young Enterprises did not seek for clarification regarding the letter from AMTA, Mr Mwakondange stated that the bidding criteria was clear and there was no need to seek for clarification.
- 3.6.9 Regarding the identity document, James and Young Enterprises argued that item No. 4.15 of the Mandatory Document Requirements on page 48 read with addendum No. 3 made no requirement for a bidder to submit an identity document of a manager. The identity document submitted whether certified or not did not form part of the mandatory document requirements of the bidding document and thus should not have been a disqualifying factor.
- 3.6.10 James and Young Enterprises also argued in their founding affidavit that the CPBN evaluated the Bid contrary to the criteria set out in the bidding document because the CPBN ranked bidders from the lowest priced to the highest priced, which is contrary to what the criteria requires. James and Young Enterprises concluded by stating that the bid required evaluation by making use of an engineer's estimate. The CPBN according to James and Young Enterprises did not demonstrate how the engineer estimate has been applied let alone its applicability to the evaluation of the Bid.

Submissions by the CPBN on the review application by James and Young Enterprises:

- 3.6.11 The CPBN in their replying affidavit explained that James and Young Enterprises submitted a letter from AMTA titled 'Confirmation in lieu of Title Deed' in place of the required title deed. The CPBN argued that ITB 12.1 (h) (9) required bidders to submit title deeds as proof of ownership or leasehold and therefore the letter of AMTA is not a title deed and could thus not be accepted for evaluation purposes. At the Review Panel Hearing, Mr Hamunyela for CPBN argued that the criteria set out in the bidding document was clear and if James and Young Enterprises were uncertain regarding the submission of the letter from AMTA, they could have sought for clarification. Further they argued that the Deed Registry Act deals with State land and provides that the holder of State Land can obtain a letter of grant.

- 3.6.12 Further the CPBN explained that bidders were required to submit certified copies of all documents issued by third-party organizations, in accordance with evaluation criterion 4.15 of the Mandatory Documents Requirements. The identification document submitted by James and Young Enterprises for Ms. Rebekka Uunona, which was issued by the Ministry of Home Affairs, Immigration, Safety and Security, was a third-party document and was not certified as required. The uncertified submission of this document rendered the bid non-responsive. At the Review Panel proceedings, Mr Hamunyela explained that James and Young Enterprises elected to submit the identity document and as a third-party organization document it had to be certified.
- 3.6.13 The CPBN thus argued that the bid of James and Young Enterprises, was evaluated and disqualified in accordance with the criteria and methodology outlined in the bidding document and in compliance with Section 52 (9) of the Act.
- 3.6.14 The CPBN in their replying affidavit argued that the issue of benchmark price raised by James and Young Enterprises was not raised in their reconsideration application despite the benchmark price not being a reason why the bid of James and Young Enterprises was disqualified. Nevertheless, the CPBN informed that clarification 42 issued to all bidders explained the application of the standard benchmark price.
- 3.6.15 The CPBN concluded by stating that this bid directly affects the provision of essential catering services to learners in public schools and the interruption or delay in the implementation of this contract would have serious negative implications for the welfare of minor children who rely on this service for their daily sustenance.

Submissions by Haritage Caterers on the review application by James and Young Enterprises:

- 3.6.16 Although oral submissions were not made by Haritage Caterers at the Review Panel Hearing regarding the application of Haritage Caterers, a replying affidavit was filed by Haritage Caterers which was considered by the Review Panel. In their replying affidavit, Haritage Caterers indicated that James and Young Enterprises in their founding affidavit submits that it complied with the requirements of bid but fails to attach any form of proof which indicates that it complied with the requirements of the bid. In the absence of such evidence opposing bidders are unable to determine whether James and Young Enterprises was compliant to the requirements of the bid.

- 3.6.17 Haritage Caterers further state that in their founding affidavit, James and Young Enterprises provided that if its bid was not disqualified for the reasons provided in the Executive Summary it would have been awarded Lots 3 and 4. Haritage Caterers argue that James and Young Enterprises however failed to mention the prices which prices would have played a substantial role in the outcome of the evaluation.
- 3.7 **3rd Review Application: Kunene Catering Services (Pty) Ltd (hereinafter referred to as 'Kunene Catering Services'):**
- 3.7.1 Kunene Catering Services lodged an application for review with the Review Panel on 19 May 2025. During the Review Panel proceedings, Kunene Catering Services was represented by Ms C Boois from Brockerhoff & Associates Incorporated.
- 3.7.2 Kunene Catering Services informed the Review Panel that it had submitted a bid in respect of lots 1, 6, 7 and 12 of the Bid. Kunene Catering Services in their application for review, requested the Review Panel to in terms of Section 60 (b), to direct the CPBN to reconsider its bid in phase 1 of the evaluation stage in respect of lots 6, 7 and 12. Further, Kunene Catering Services requested the Review Panel in terms of Section 60 (c) to set aside the decision of the CPBN of 02 April 2025 and 09 May 2025 in whole and refer the matter back to the CPBN for reconsideration and direct the CPBN to find Kunene Catering Services' bid to be fully responsive in phase 1 of the evaluation stage in respect of Lots 6, 7 and 12. Finally, Kunene Catering Services in terms of Section 60 (d) to correct the CPBN'S decision of 02 April 2025 and 09 May 2025 for an order that Kunene Catering Services bid is fully responsive in phase 1 of the evaluation stage in respect of Lots 6, 7 and 12.
- 3.7.3 Prior to lodging the application for review with the Review Panel, Kunene Catering Services applied for reconsideration to the CPBN on 15 April 2025. The CPBN responded to Kunene Catering Services reconsideration application on 09 May 2025, by stating that the Board resolved that the request by Kunene Catering Services lacks sufficient merit.
- 3.7.4 Kunene Catering Services informed the Review Panel that bid was disqualified for the following reasons:
- "The bidder has submitted the following documentary proof obtained from third party organizations which are not certified as per the requirement: Page 5 of the Title Deed for Corridor Logistics (Pty) Ltd, contrary to item No. 4.15 of the Mandatory Documents Requirements on page 48 if the bidding documents."*

Kunene Catering Services argued that the disqualification of its bid was not done in accordance with the instructions to bidders as contained in the bidding document and that such disqualification was unreasonable, unfair and without merit.

- 3.7.5 Item No. 415 of the Mandatory Documents Requirements on page 48 of the bidding documents read as follows:

“Are all the required documentary proof obtained from third party organizations certified by a Commissioner of Oath appointed in terms of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963)?”

- 3.7.6 In their application for review, Kunene Catering Services stated that from the Bid documents submitted, Kunene Catering Services attached documentary proof obtained from third party organizations to wit: Title Deed of Corridor Logistics (Pty) Ltd, which rented its storage facility to the Applicant. In addition, Kunene Catering Services certified the said Title Deed. At the review panel hearing, Ms Boois on behalf of Kunene Catering Services argued that Kunene Catering Services had applied for four lots. In three of the four Lots Kunene Catering Services was fully compliant. Ms Boois therefore questioned why Kunene Catering Services was disqualified from all Lots when for only one lot, being Lot 1, the title deed was not commissioned. Ms Boois argued that there was full compliance with Lots 6, 7 and 12, all third party documents were certified.

- 3.7.7 Kunene Catering Services further argued that when regard is had to lots 6, 7 and 12, Kunene Catering Services' tendered price is cheaper than the successful bidders. Kunene Catering Services finally argued that in terms of ITB 15.8 of the Bidding Data Sheet, bids were invited for individual contracts (lots). Prices quoted in the costed menu shall correspond to 100% of the items and quantities specified in the menus. Therefore, Ms Boois argued as the bids were invited for individual lots, mandatory documents were submitted for specific lots and that Kunene Catering Services should have been considered for Lots 6, 7 and 12 where they were fully compliant.

Submissions by the CPBN on the review application by Kunene Catering Services:

- 3.7.8 The CPBN replied to the application by Kunene Catering Services, by informing the Review Panel in their replying affidavit that Kunene Catering Services, submitted documentary evidence from a third party organisation which was not certified in accordance with the prescribed requirements;

being page 5 of the title deed submitted for Corridor logistics (Pty) Ltd for Erf 1248 in Walvis Bay was not certified as required under Item No. 415 of the Mandatory Document Requirements.

- 3.7.9 The CPBN explained to the Review Panel that the Mandatory Requirements of the Bid was set out on page 45 of the bidding documents. CPBN further explained that on page 48 of the bidding document it provides that the bidders submission will either be responsive or non-responsive and bidders who do not comply with any of the mandatory documents/requirements will be disqualified from the entire evaluation process and will not be considered further. CPBN argued that all the required documents had to be certified as prescribed for a bid to be evaluated further.
- 3.7.10 The CPBN argued that Kunene Catering Services' assertion that its bid should have been evaluated for Lots 6, 7 and 12 is misplaced and is a fundamental misunderstanding of the procurement process and evaluation methodology applied. Mr Hamunyela who appeared on behalf of the CPBN argued that the evaluation of the bids was not done lot specific. Mr Hamunyela explained that the initial stage of evaluation determined whether a bid was responsive and compliant with the mandatory administrative, legal, technical, post-qualification and financial requirements. He further argued that the examination and evaluation process mandated that each bidder must first satisfy all mandatory requirements applicable overall to the bid, before they may be considered for the award of a specific Lot. Kunene Catering Services bid was therefore found to be non-responsive due to its failure to comply with the mandatory document requirements.
- 3.7.11 The CPBN concluded that Kunene Catering Services bid was evaluated and disqualified in accordance with the criteria and methodology outlined in the bidding document, in compliance with Section 52 (9) of the Act and that the decision made by the CPBN was fair and reasonable.
- 3.7.12 Haritage Caterers filed a replying application to the review application of Kunene Caterers. Haritage Caterers in summary however provided that due to the fact that the application of Haritage Caterers does not affect the Lot awarded to Haritage Caterers, it does not oppose the application unless the award or order made affects the Lot awarded to Haritage Caterers.
- 3.8 **4th Review Application: Pamo Trading Enterprises CC (hereinafter referred to as 'Pamo Trading'):**
- 3.8.1 Pamo Trading lodged an application for review with the Review Panel on 13 May 2025. During the Review Panel proceedings, Pamo Trading was represented by Mr C Visser from Koep & Partners.

- 3.8.2 Pamo trading informed the Review Panel that it had submitted a bid for Lots 1, 3, 4, 7 and 14. Prior to lodging its application for review with the Review Panel, Pamo Trading applied for reconsideration to the CPBN on 14 April 2025. The CPBN responded to Pamo Trading's reconsideration application on 09 May 2025, by stating that the Board resolved that the request by Pamo Trading lacks sufficient merit and provided reasons thereto.
- 3.8.3 Pamo Trading at the commencement of the Review hearing raised a preliminary point indicating that the bid was no longer valid. Pamo Trading in their founding affidavit argued that on page 32 of the bidding document, the bid validity period was determined to be 180 days. Mr Visser at the Review Hearing quoted Section 49 (1) of the Act which provides that 'a bid remains valid for the period as indicated in the bidding document which may not be more than 180 days.'
- 3.8.4 ITB 21.1 provided that the bid validity period shall be 180 days. Pamo further argued that in terms of Section 1.3 (c) of the bidding documents, under the heading titled 'Section 1. Instruction to Bidders', the word 'day' is defined as follows:
- "1.3 Throughout these Bidding Documents: (c) "day" means calendar day unless otherwise stated."*
- 3.8.5 Pamo Trading goes on to state that the Notice of Selection of Award, provided that the Closing Date of Submissions of Bids was 9 September 2024 and the Notice of Selection of Award was not issued before 02 April 2025, which means that the Bid was issued after 205 calendar days when the 180-calendar day bid validity period had already expired. Pamo Trading therefore argues that the Notice of Selection was issued at a time when there were no valid bids anymore because the bid validity period had expired.
- 3.8.6 The second matter raised by Pamo Trading in its review application and at the Review Panel proceedings is that there are currently pending proceedings before the High Court of Namibia between the parties in respect of Bid No: G/ONB/CPBN-01/2020 (Procurement of Supply Foodstuffs to Government School Hostels on Behalf of the Ministry of Education, Arts and Culture). Further, Pamo Trading informed the Review Panel that they also applied to the High Court under case number HCMD-CIV-MOT-REV-2024/00440, to review and set aside the CPBN's decision to cancel the bidding process on 7 December 2023. Pamo Trading further said that it is common cause that both applications before the High Court are pending and have not yet been determined. Pamo Trading argued that both

bidding proceedings (i.e. Bid No: G/ONB/CPBN-01/2020 and G/ONB/CPBN-03/2024) relate to the exact same procurement process, the exact same services for the exact same public entity, and for the exact same period (i.e. three years).

3.8.7 Based on the above, Pamo Trading therefore applies that the implementation, and any further steps, of the current bidding process be stayed pending the final determination of the two matters in the High Court of Namibia.

3.8.8 On the merits of its review application, Mr Visser on behalf of Pamo Trading argued that Pamo Trading's disqualification was irrational, disproportional and unfair. Pamo Trading was disqualified by the CPBN for the following reasons:

"The bidder submitted a supporting document in another language, however; it is not accompanied by a translation of the relevant passages in English as per ITB 11.1 and item No. 3.1 of the Preliminary/ Administrative requirement on page 44 of the bidding document."

Pamo Trading argued that Clause 32 of the bidding documents which is to the effect that if it is found that a document was submitted in another language and was not accompanied by a translation, then such an omission does not constitute a material deviation of the bidding requirements justifying a bidder's disqualification.

3.8.9 Pamo Trading in their review application states that its bid was substantially responsive and as a result, the CPBN should have requested Pamo to submit the necessary translation, within a reasonable period, in terms of Clause 32 of the bidding documents which reads as follows:

"32. Non-conformities, Errors, and Omissions

32.1 Provided that a Bid is substantially responsive, the Procuring Agent may waive any non-conformities or omissions in the Bid that do not constitute a material deviation.

32.2 Provided that a bid is substantially responsive, the Procuring Agent may request the Bidder to submit the necessary information or documentation, within a reasonable period of time, or to rectify nonmaterial non-conformities or omissions in the bid relating to documentation requirements."

Pamo Trading therefore requested the Review Panel to grant an order for the CPBN to provide Pamo Trading with an opportunity, in terms of clause

32 of the bidding documents, to submit a translation of the relevant portion of the document which is allegedly not in the English language.

- 3.8.10 Finally Pamo Trading argued that the Executive Summary that accompanied the Notice to Award, does not contain the benchmark price in terms of which each bidder's price was allegedly scored in accordance with the scoring matrix and formula provided for in the bidding documents. Pamo Trading stated that in the absence of disclosing the benchmark price, the CPBN's calculations and methodology, it is not possible to determine which bidder is the lowest responsive bidder in terms of the criteria and scoring matrix set out in the bidding documents. Pamo Trading requested that the CPBN be compelled to disclose the benchmark price, its calculations and the methodology used to determine the lowest substantially responsive bidders.

Submissions by the CPBN on the review application by Pamo Trading:

- 3.8.11 The CPBN in their replying affidavit explained that on 10 October 2023, the CPBN obtained an exemption from the Minister of Finance in terms of section 4(2) of the Act. This exemption extended the period within which the CPBN is required to issue a decision on the reconsideration application. The CPBN further explained that the effect of the exemption is that the CPBN is entitled to communicate its decision on applications for reconsideration within fourteen (14) working days after the expiry of the standstill period, rather than within seven days of receiving a reconsideration application. In this bid, the CPBN stated that the standstill period commenced on the 4th of April 2025, and concluded on 15 April 2025, within the 14-working day period which expired on 09 May 2025.
- 3.8.12 On the merits, the CPBN argued that Pamo Trading's bid was evaluated and disqualified in accordance with the criteria and methodology set out in the bidding document, in compliance with section 52(9) of the Act. The disqualification was thus both fair and reasonable, the CPBN said. The CPBN stated that Pamo Trading did not comply with the administrative requirements of the bid and therefore their bid was correctly disqualified.
- 3.8.13 Regarding the benchmark price, CPBN stated that it issued Clarification 42 to all bidders, which clearly explained the application of the Standard Benchmark Price. Therefore, CPBN explained that in its view all bidders, were duly and reasonably informed of the methodology to be applied in determining the lowest evaluated bidder.
- 3.8.14 Regarding the application to stay the proceedings, the CPBN explained that the Review Panel does not have the same inherent powers which the High

Court of Namibia has. CPBN argued that if Pamo Trading wanted to have the current proceedings before the Review Panel stayed, they should have done so by approaching the High Court of Namibia to stay the current proceedings before the Review Panel.

Submissions by Haritage Caterers on the review application by Pamo Trading:

3.8.15 Haritage Caterers in their replying affidavit reiterated that Section 49 (1) of the Act, as amended, provides that a bid remains valid for the period indicated in the bidding documents which may not be more than 180 days. Mr Jones who appeared on behalf of Haritage Caterers argued that days as defined in the amended Act means a 'day' other than Saturday, Sunday or a public holiday. Mr Jones further argued that Section 21.1 of the bidding document correctly refers to 180 days as provided for in Section 49.1 of the Act, as amended. The definition of "day" in Section 1, Instructions to Bidders is in conflict with the definition of "days" in the Act, as amended. Therefore, on the preliminary point, Haritage Caterers concluded that the CPBN was entitled to rely on the definition of days as provided for in the Act.

3.8.16 Haritage Caterers in their replying affidavit, informed the Review Panel that ITB Section 8.1 provides that the clarification of bidding documents is read as follows:

"8.1 A prospective Bidder requiring any clarification of the Bidding Documents shall contact the Procuring Agent in writing at the Procuring Agent's address specified in the BDS. The Procuring Agent will respond in writing to any request for clarification within three (3) working days, provided that such request is received no later than the number of days, specified in the BDS, prior to the deadline set for submission of bids. The Procuring Agent shall forward copies of its response to all those who have acquired the Bidding Documents directly from it, including a description of the inquiry but without identifying its source. Should the Procuring Agent deem it necessary to amend the Bidding Document as a result of such a clarification, it shall do so following the procedure under ITB Clause 9 and ITB Sub-Clause 25.2."

Mr Jones further argued that the initial closing date for submissions of bidding documents was 05 August 2024 and Section II of the Bidding Data Sheet stipulates that clarifications should reach the agent not later than 16 July 2024. Therefore, Mr Jones argued that this was an indication that the intention of the bidding document was to reference business days as provided for in the Act and not calendar days. It is Haritage's Caterers contention that throughout the entire ITB document, the set dates contained

in the documents and timelines relating thereto were calculated based on business days and not based on calendar days.

3.8.17 Regarding the application to stay the current proceedings, Haritage Caterers informed the Review Panel that the pending litigation is not litigation in respect to this bid under consideration by the Review Panel. All the parties in the pending litigation are not all parties in this bid for example. Haritage Caterers who is a successful bidder in this bid is not a party to the proceedings in the High Court.

3.8.18 Haritage Caterers concluded by stating that the requirement for the attachment of documents to be translated to English was compulsory and Pamo Trading failed to do so. Haritage Caterers referred to the case of *Menzies Aviation (Namibia) Proprietary Limited v Namibia Airports Company Limited (SA 73-2023) [2024] NASC (14 May 2024)* in their replying affidavit where paragraph 37 provides as follows:

“It is not for the bidder to prescribe what the bid must contain. This is for the body or entity inviting the bids. Whereas these bid requirements must comply with the relevant statutory prescriptions, this does not prevent such entities from stipulating further requirements. Given the diverse nature of the goods and services that are involved when it comes to government or public enterprises it is obvious that the prescriptions in the Act are simply the minimum requirement (s) and not ‘fit all’ requirements in respect of government or public enterprises.”

Submissions by Free Namibia Caterers CC (hereinafter referred to ‘Free Namibia Caterers’ on the review application by Pamo Trading:

3.8.19 Free Namibia Caterers opposed Pamo Trading’s application although the Lots in which Pamo Trading bid for was not the Lot awarded to Free Namibia Caterers. Free Namibia Caterers in their replying affidavit however explained, that due to Pamo Trading contention regarding the bid validity period, they have opposed the review application.

3.8.20 Free Namibia Caterers in their replying affidavit informed the Review Panel that Section 49 of the Act, as amended, is not couched in peremptory terms but are directory. Further Free Namibia Caterers argued that even if the bid validity has expired, which they deny, the bid validity period was tacitly and impliedly extended by the conduct of the CPBN and Free Namibia Caterers. Mr Doeseb, who appeared on behalf of Free Namibia Caterers, at the Review Panel Hearing argued that Pamo Trading never engaged the CPBN after the purported expiry date to confirm whether the procurement would be cancelled and/or terminated on the basis that the bid period expired. Mr

Doeseb further stated that Pamo Trading only started crying foul about the bid validity after it learned its fate of the bids submitted in this procurement exercise.

Submissions by Agrofood International (Pty) Ltd (hereinafter referred to as 'Agrofood International') on the review application by Pamo Trading:

3.8.21 Agrofood International opposed the application for review by Pamo Trading. In their application for review, Agrofood International informed the Review Panel that it is their contention that in terms of Section 1 of the Act, as amended, "days" means a day other than Saturday, Sunday or public holiday. The Bidding Document does not define "days". Mr Nangolo on behalf of Agrofood International argued that the Bidding document only defines the word "day" to mean calendar day but does not define "days" and in terms of ITB 21.1 of the bidding document 'the Bid validity period shall be 180 days. The word 'days' is not defined in the bidding document but only defined in the Act. The 180 days indicated on ITB 21.1 are "days" as defined in the Act, Agrofood International argued.

3.8.22 Agrofood International further in its replying affidavit stated that Pamo Trading in its founding affidavit, stated that it received the Notice of Selection of Award on 03 April 2025 and filed its reconsideration application on 14 April 2025. Thus, Agrofood International contends that if the Applicant is to use "calendar days" as it suggests, then it was supposed to file its reconsideration application on or before 10 April 2025, but not on 14 April 2025. Further, if Pamo Trading insists on the usage of 'calendar days', then its reconsideration application was filed late and should have not been considered by the CPBN. Mr Nangolo on behalf of Agrofood International, argued that Pamo Trading cannot be selective on when to apply calendar days and when to apply business days.

Submissions by Mukapa Investments on the review application by Pamo Trading:

3.8.23 Mukapa Investment informed the Review Panel that Pamo Trading failed to submit the required translation and therefore it was correctly disqualified. Regarding the bid validity period, Mukapa Investment submitted that the bid validity period was extended by the CPBN on 23 May 2025. Mukapa Investment further stated that the word 'day' in the Act, as amended, is defined as referring to a 'working day excluding weekends and public holidays' and when one uses working days, as per the Act, as amended, the bid validity has not lapsed. Further, Mukapa Investment informed the Review Panel that the bidding documents are prepared by virtue of Section

43 of the Act, as amended, read with Section 33 of the Regulations and on the present facts, there is a conflict between the definition of computation of 'days' as per the bidding document and the computation of 'days' in the Act, as amended. In terms of Section 2 of the Act, as amended, that in such circumstances, the Act, as amended prevails, Mukapa Investment argued.

3.8.24 Finally on the bid validity period, Mukapa Investment argued that the bid validity is in favour of the bidders, as that allows the bid to remain valid and for them to stand a chance of being awarded the bid. Should a bid validity period lapse, the bid process will cease to exist and his cannot be said to be in favour of any bidder, which perhaps explains why the point of bid validity is only raised by bidders who were disqualified, Mukapa Investment argued.

3.8.25 In its heads of arguments, Mukapa Investment raised the matter of public interest in relation to this bid. Mukapa Investment emphasised that Pamo Trading was incorrect to state that there are no public interest considerations in this matter as all government school hostels are receiving foodstuffs and catering services under procurement reference number G/RFQ/10-57/2024-2025. Mukapa Investment submits that that the above submission is incorrect as the bid under procurement reference number G/RFQ/10-57/2024-2025 was terminated by the Review Panel, and the public entity was ordered to start the process afresh. Further, although the High Court subsequently set aside the Review Panel's Order, an appeal has been filed to the Supreme Court under case number SA 50/2025 and in terms of Rule 121 of the High Court Rules, once an appeal is lodged to the Supreme Court, the Order of the High Court is suspended pending the adjudication of the Appeal. Mukapa Investment therefore concludes that whatever contracts are being carried out, it appears, are being done so unlawfully.

3.9 **5th Review Application: Platinum Investment CC (hereinafter referred to as 'Platinum Investment'):**

3.9.1 Platinum Investment lodged an application for review with the Review Panel on 20 May 2025. During the Review Panel proceedings, Platinum Investment was represented by Mr T Bockerhoff from Bockerhoff & Associates Incorporated.

3.9.2 Platinum Investment informed the Review Panel that it had submitted a bid in respect of Lots 3, 4 and 14 of the Bid. Platinum Investment in their application for review, requested the Review Panel to in terms of Section 60 (b) direct the CPBN to reconsider Platinum Investment's bid in phase 1 of the evaluation stage in respect of Lots 3 and 4. Further Platinum Investment

requested an order in terms of Section 60 (c) of the Act, as amended, by setting aside the decision of the CPBN of 02 April 2025 and 09 May 2025 in whole, refer the matter back to the CPBN for reconsideration and direct the CPBN to find Platinum Investment's bid fully responsive in phase 1 of the evaluation stage in respect of Lots 3 and 4. Furthermore, Platinum Investment requested the Review Panel in terms of Section 60 (d) of the Act, as amended, to correct the CPBN's decision of 02 April 2025 and 09 May 2025 and order that Platinum Investment's bid is fully responsive in phase 1 of the evaluation stage in respect of Lots 3 and 4.

3.9.3 Prior to lodging the application for review with the Review Panel, Platinum Investment applied for reconsideration to the CPBN on 15 April 2025. The CPBN responded to Platinum Investment reconsideration application on 09 May 2025, by stating that the Board resolved that the request by Platinum Investments lacks sufficient merit.

3.9.4 Platinum Investment informed the Review Panel that its bid was disqualified for the following reasons:

"the bidder has submitted the following required documentary proof obtained from third party organizations which are not certified as per the requirement: Reference for Eunice Uupindi from Hilton, contrary to item No. 4.15 of the Mandatory Documents Requirements on page 48 of the bidding document."

"the bidder submitted a Lease Agreement and fitness certificate, but no title deed was submitted as required in ITB 12.1 (h) (9), addendum no. 3 and item No. 4.8 of the mandatory Documents requirements on page 46 of the bidding document."

Platinum Investment in their founding affidavit, states that their disqualification from the bidding process was irrational, unfair, unreasonable, without merit and contrary to the objects and dictates of the Act.

3.9.5 Platinum Investment informed the Review Panel that the document of Eunice Uupindi attached to the bidding document is an original reference letter issued by the Hilton Hotel. An original reference letter cannot be certified and therefore the submission of an original reference letter complied with ITB 4.15 of the bidding document and Platinum Investment should have been found responsive and proceeded to the next phase of the evaluation process. Further in the founding affidavit, Platinum Investment refers to a directive dated 29 August 2019, which in essence provides that in terms of Section 50 (2) of the Act, valid original documents are to be

accepted. Platinum Investment therefore submits that it complied with ITB 4.15 of the bidding document.

3.9.6 Regarding the second disqualification, Platinum Investment ought to have provided a title deed in the name of the lessor. Platinum Investment argued that it was not possible to provide the title deed as the premises leased from AMTA in Rundu and Ongwediva respectively does not have a title deed. Mr Brockerhoff, who appeared on behalf of Platinum Investment argued that the letter provided by AMTA served as a title deed. Mr Brockerhoff argued that administrative bodies such as the CPBN must act fairly in their operations and that when evaluating the bids, the CPBN ought to have adopted a purposive approach and not a narrow approach to the evaluation of the bids.

3.9.7 Mr Brockerhoff further argued that Platinum Investment's bid prices are lower than the successful bidder for lots 3, 4 and 14.

Submissions by the CPBN on the review application by Platinum Investment:

3.9.8 The CPBN in their replying affidavit, explained that the evaluation process was not done lot specific but rather the examination and evaluation process, as set out in the bidding document, mandates that each bidder must first satisfy all mandatory requirements applicable to the overall bid before they may be considered for the award of any specific lot. CPBN expressed that the bidding document and addendum No. 3 made it clear that compliance with these provisions was essential for a bid to proceed to further stages of evaluation.

3.9.9 At the Review Panel hearing and in its replying affidavit, the CPBN stated that the reference letter submitted for Ms Eunice Uupindi issued by the Hilton Hotel was an uncertified copy and not an original as alleged. The Bid of Platinum Investment therefore did not meet the mandatory requirements of the bidding document.

3.9.10 Further, the CPBN informed the Review Panel that Platinum Investment submitted a letter titled 'Confirmation in lieu of Title Deed' in place of a title deed as required. The CPBN argued that ITB 12.1 (h) (9) of the bidding document expressly required the submission of a title deed as proof of ownership or leasehold. The failure to attach a title deed rendered the bid unresponsive.

3.9.11 The CPBN further informed the Review Panel that clarification 3: dealt with warehouse requirements and informed the bidders that a letter from a

headman indicating that the land belongs to the bidder where the warehouse is will not be accepted. Clarification 4 to the bidders indicated that a bidder must have a warehouse in each Lot that he is bidding for. Clarification 67 informed the bidders, that a bidder is required to provide warehouse in each Lot they bid for.

3.9.12 The CPBN concluded by stating that when a public entity is ceased with a matter, it is mandated to adjudicate on specifications clearly set out in the document and such specifications cannot be substituted and changed.

3.10 **6th Review Application: Oshipaya Investment CC (hereinafter referred to as 'Oshipaya Investment'):**

3.10.1 Oshipaya Investment lodged an application for review with the Review Panel on 20 May 2025. During the Review Panel proceedings, Oshipaya Investment was represented by Ms N Alexander from Sisa Namandje & Co.

3.10.2 Oshipaya Investment informed the Review Panel that it had submitted a bid in respect of Lots 3, 4, 6, 8, 9, 10, 12 and 13 of the Bid. Oshipaya Investment in their application for review, requested the Review Panel to review and set aside the whole of the decision of the CPBN dated 02 April 2025 and the further decision made in relation to Oshipaya Investment's reconsideration application which decision is dated 09 May 2025. Further Oshipaya Investment requested the Review Panel to order that Oshipaya Investment's bid is responsive and set aside the disqualification of its bid. In the alternative, Oshipaya Investment requested the Review Panel to direct the CPBN to set aside its decision pertaining to Oshipaya Investment's bid and refer the matter back to CPBN to evaluate Oshipaya Investment's bid together with other bidders. In the further alternative, Oshipaya Investment sought an order directing the CPBN to terminate the procurement proceedings and start them afresh. Finally, Oshipaya investment in summary sought an order directing the CPBN to proceeded in a manner that is in compliance with the Act.

3.10.3 Prior to lodging the application for review with the Review Panel, Oshipaya Investment applied for reconsideration to the CPBN on 15 April 2025. The CPBN responded to Oshipaya Investment reconsideration application on 09 May 2025, by stating that the Board resolved that the request by Oshipaya Investment lacks sufficient merit and provided reasons for its decision.

3.10.4 Oshipaya Investment informed the Review Panel that its bid was disqualified for the following reasons:

“the bidder is conflicted in terms of ITB 5.2, as the bidder submitted a lease agreement to lease a warehouse to Vidu Trading cc and a fitness certificate was issued in the name of Oshipaya Investments cc, who is also participating in the same bid, which places the bidder in a position to access information about or potentially influence the bid of another bidder, contrary to the Conflict of Interest requirement item no. 2.3 on pages 43 of the bidding document.”

Oshipaya Investment in their founding affidavit informs the Review Panel that it did not at any time lease a warehouse to Vidu Trading CC as was determined by the Bid Evaluation Committee and the CPBN. Oshipaya Investment argues that it was unfair and interesting that the CPBN only disqualified Oshipaya Investment and not the other party involved in the alleged conflict, as is evident in the Executive Summary issued by the CPBN. At the Review Hearing Ms Alexander who appeared for Oshipaya Investment explained that Oshipaya Investment does own the Erf in Katutura and consequently cannot lease the said erf.

- 3.10.5 Oshipaya Investment further informed the Review Panel that it submitted a fitness certificate issued in the name of Oshipaya Investment in terms of the requirements of ITB 12.1 (h)(9) in the bidding document. Oshipaya Investment confirmed to the Review Panel that the fitness certificate was not shared with anybody and Oshipaya Investment did not allow anybody to use its fitness certificate.
- 3.10.6 Oshipaya Investment in their founding affidavit informs the Review Panel that the CPBN to have arrived at the decision made above, should prove that Oshipaya Investment has a relationship with another bidder directly or through a common third parties and that Oshipaya Investment as a result of the relationship is put in a position to have access to information about or influence on the bid of another bidder. Oshipaya Investment argued that from the reading of ITB 5.2 (c) the relationship that existed between Oshipaya Investment and that of any other bidder must be so that Oshipaya Investment is in a position to influence the bid of the other. Oshipaya informed the Review Panel that it nor any member of Oshipaya Investment have a relationship with Vidu Trading cc or any other bidder directly or through a common third parties.
- 3.10.7 Oshipaya Investment in their founding affidavit, further argued that in terms of regulation 7 (3) of the Regulations the CPBN is entitled to extend the period for examination and evaluation of bids to a maximum period of thirty (30) days from the date of opening of bids. This meant Oshipaya Investment argued that the evaluation report should have been finalised at the latest on 21 October 2024. Oshipaya Investment submitted that the executive

summary indicated that the date of submission of the Bid evaluation report as 25 February 2025. Therefore, the evaluation was completed outside of the period provided for in the Act.

- 3.10.8 Oshipaya Investment in their founding affidavit further informed the Review Panel that it is aggrieved by the financial evaluation criteria used to rank bidders based on a standard benchmark price calculated at the mean market price of the at-the-market prices being the bid prices of only the bidders whose bids are compliant in terms of the administrative, legal, technical and financial requirements in the bidding document. Oshipaya Investment stated that the process by which the standard benchmark price was set raises significant concerns about the fairness and transparency of the procurement process in this bid, as the bidders are left to rely on a formula without a clear understanding of the price expectations. They provided that there was no benchmark price set in the bidding document against which the bidders were to determine their prices and the standard benchmark against which bids were to be ranked. Finally on this point Oshipaya Investment argued that the standard benchmark price was not revealed in the Executive Summary either and that the standard benchmark price must be available and must exist before the submission of bids. Oshipaya Investment stated that the way the benchmark price was set is in non-compliance Section 43(2)(c) of the Act, as amended, which provides that a bidding document must contain the methodology and criteria to be used in the evaluation of bids and the determination of the best evaluated bids.

Submissions by the CPBN on the review application by Oshipaya Investment:

- 3.10.9 The CPBN in their replying affidavit, explained that Clause 5.2 of the Instructions to Bidders in the bidding document strictly prohibited conflict of interest and mandated the disqualification of any bidder found to have such a conflict. When evaluating the bids, the Bid Evaluation Committee found a lease agreement form between Oshipaya Investment and Tuyapeni Trading Enterprise CC JV Vidu Trading CC and fitness certificates, issued by the Rundu and Eenhana Town Councils in the name of Oshipaya Investment, in the bid submitted by Tuyapeni Trading Enterprise CC JV Vidu Trading CC (hereinafter referred to as Vidu Trading).
- 3.10.10 In addition, the fitness certificates submitted by Tuyapeni Trading Enterprise CC JV Vidu Trading CC lists Maria Andjamba as the owner of Oshipaya Investment, and the founding statement submitted by Oshipaya Investment identifies Maria Andjamba as a member of Oshipaya Investment. This according to the CPBN establishes a material relationship between the

Applicant and Tuyapeni Trading Enterprise CC JV Vidu Trading CC and consequently, creates a conflict of interest as defined in ITB Clause 5.2 and Evaluation Criterion 2.3 of the bidding document, which necessitated the disqualification of Oshipaya Investment from the procurement process. CPBN at the Review Hearing explained that the erf listed in the lease agreement under contention is the same erf number listed in a fitness certificate found in the bid of Oshipaya Investment.

3.10.11 The CPBN in their replying affidavit further highlighted that Oshipaya Investment in their application for reconsideration, did not raise the matter of bid validity but rather raised the matter for the first time in their application for review. Nevertheless, the CPBN argued that the bid is valid.

3.10.12 On the matter raised by Oshipaya Investment regarding the evaluation period of the bids, CPBN explained that the CPBN obtained an exemption from the Minister of Finance on 15 October 2024 from the provisions of Regulation 7(3) of the Regulations to the Act. Further the CPBN provided that the bid evaluation committee completed the examination and evaluation of bids on the 15th of October 2024, which was within the prescribed period of 30 days. The CPBN stated that the executive summary does not necessarily indicate when the examination and evaluation of bids were completed and that Oshipaya Investment mistakenly appears to have misconstrued 25 February 2025 as the date of completion of the evaluation, when in fact, the examination and evaluation process was concluded on 15 October 2024. Finally on this point CPBN explained that any actions taken after that date did not form part of the evaluation itself but rather involved the Bid Evaluation Committee implementing Board resolutions based on the evaluation completed on 15 October 2024.

3.10.13 CPBN further explained that the standard benchmark price was explained in all bidders in clarification 42. Clarification 42 explained the standard benchmark price to the bidders as follows:

"For the purpose of Bid Evaluations, the Standard 'Benchmark' Price will be determined as follows:

- i. Calculating the at-the-market price mean (μ) of the at-the-market prices (being the Bid Prices) of only the Bidders whose: administrative, legal, technical, and financial bid submissions were deemed to be compliant in each lot (these will form the population of the Bid Prices, i.e., the at-the-market prices for the given lot). In addition, the Bidders' Individual standard score (z-score) MUST fall within one Standard Deviation (δ) of the at-the-market price mean*

- (μ) (i.e., the z-score must fall between -1.0 and +1.0). Z- score will only be used to calculate the benchmark and not to disqualify.
- ii. Calculating the Arithmetic mean ($\bar{x}$) (being the mean of all the Bidders whose z-score is within -1.000000 and +1.000000).
 - iii. Finally, the arithmetic mean ($\bar{x}$) (being the mean of all the Bidders whose z-score is within -1.000000 and +1.000000), constitute the Standard 'Benchmark' Price.

Standard 'Benchmark' Price = Arithmetic Mean

Note: The formula for calculating the Standard Score (i.e., z-score) is:

$$z = (x - \mu) / \delta$$

Where:

z is the Individual Standard Score (i.e. z-score),

x is the particular Bidder's Bid Price,

μ is the at-the-market price mean and

δ is the standard deviation of the mean of the compliant bidder's bid price from the arithmetic mean.

Bidders whose Bid Prices vary by more than 10% up or 10 % down from the respective Standard 'Benchmark' Price(s) calculated for the given lots shall be deemed to be non-compliant and shall be rejected."

- 3.10.14 The CPBN therefore in summary concluded that the bid of Oshipaya Investment in investment was evaluated and disqualified in accordance with the criteria and methodology clearly outlined in the bidding document, in compliance with section 52(9) of the Act, as amended. The CPBN argued that the disqualification was fair and reasonable.

Submissions by Free Namibia Caterers on the review application by Oshipaya Investment:

- 3.10.15 Free Namibia Caterers in their replying affidavit indicates to the Review Panel that they have been awarded Lot 11, which is a Lot for which Oshipaya Investment did not compete in and therefore, it goes without saying that the selection for award regarding Lot 11 is not impugned by the review application by Oshipaya Investment. However, due to the fact that Oshipaya Investment in orders 1.1, 1.4 and 1.6 seeks to terminate the procurement proceedings and start them afresh, Free Namibia Caterers opposes the review application of Oshipaya Investment.

- 3.10.16 Free Namibia Caterers argued that Oshipaya Investment in their review application should have sought an order to set-aside in part the CPBN's decision in so far as it relates to its selection of a successful bidder for Lots 3, 4, 6, 7, 8, 9, 10, 12 and 13, only. Further Free Namibia Caterers argued that the bidding document guards against any conflict of interest consequent to a direct relationship between bidders participating in the same procurement process. They further explained that the CPBN found that Oshipaya Investment submitted a lease agreement to lease a warehouse to Vidu Trading, being another bidder in the same procurement process. Free Namibia Caterers argues that as a matter of logic the conflict of interest perceived by the CPBN under the circumstances could and should not be ignored due to the potential detrimental consequences it yields in conceivably tainting the procurement process. Therefore, Mr Doeseb on behalf of Free Namibia Caterers stated that the suspicion of appearance of conflict of interest is reasonable under the circumstances as Oshipaya Investment and Vidu have a direct relationship flowing from the lease agreement.
- 3.10.17 Regarding the argument relating to the bid evaluation period, Free Namibia Caterers explained that Regulation 7 (3) clearly uses the words 'must be completed'. Free Namibia Caterers says that Oshipaya Investment does not disclose nor establish when the bid evaluation was actually completed and instead, Oshipaya Investment simply refers to the date on which the evaluation report was submitted in support of its argument. Free Namibia Caterers further argued that this point was not argued by Oshipaya Investment in its application for reconsideration and therefore is an afterthought raised in the review application of Oshipaya Investment.
- 3.10.18 Free Namibia Caterers explained that the benchmark price was explained to bidders in clarification 42 and as a consequence, Oshipaya Investment was reasonably informed by the CPBN on how the standard benchmark price for evaluation will be applied in the procurement process and the methodology and criteria to be used in the evaluation of bids in its determination of the best evaluated bids.
- 3.10.19 Regarding the bid validity period, Free Namibia Caterers in their replying affidavit stated that Oshipaya Investment does not address any of the following simple questions of how, what, when and why it says the bid has expired. Free Namibia Caterers argued that Oshipaya Investment merely pays lip service to this ground by scantily alluding to it and without properly establishing this ground through relevant facts. They concluded by stating that there is no evidence from its papers to support this ground. At the Review Panel Hearing Mr Doeseb referred the Review Panel to the case of *Ilex South Africa (Pty) Ltd v National Health Laboratory Service and others*

2021 (5) SA 587 (GJ), in which Mr Doeseb stated that although the bid validity was found to be invalid and the bid process invalid the Court taking into account all circumstances, including public interest decided not to set aside the awards made by the public entity, although invalid.

Submissions by Haritage Caterers on the review application by Oshipaya Investment:

- 3.10.20 Similarly, to Free Namibia Caterers, Haritage Caterers explained in their replying affidavit that Oshipaya Investment seeks to review and set aside the whole of the decision of the CPBN dated 2 April 2025. Consequently, the decision sought by Oshipaya Investment also pertains to Lots for which the Oshipaya Investment did not submit bids. Resultantly, Haritage Caterers provides that it appears that the broad nature of the relief sought by Oshipaya Investment seeks to affect the rights and interests of all successful bidders, even those who were successfully awarded Lots for which the Oshipaya did not submit a bid.
- 3.10.21 Haritage Caterers further stated that whilst it does not know what is contained in the bid of Oshipaya Investment, it is submits that Oshipaya Investment should have requested the CPBN to arrange a formal viewing of its bid, which Oshipaya Investment failed to do. Haritage Caterers argue that such a viewing would have eradicated the contradicting versions which exists between the CPBN and Oshipaya Investment. In the absence of such formal viewing having taken place, it follows that the CPBN's perception that there exists, or appeared to exist a conflict of interest, and the subsequent disqualification of Oshipaya Investment on the basis of such perceived conflict of interest, was reasonable Haritage Caterers argued.
- 3.10.22 Regarding Regulation 7 Haritage Caterers states that Oshipaya Investment in their founding affidavit has not made out a case to support their view that the bid evaluation process was not finalised within the time frame provided for in the Act. Haritage Caterers says there are no facts deposed to by Oshipaya Investment in its founding affidavit to support this argument, and the argument holds no water.

4. Preliminary Points

4.1 Bid Validity:

- 4.1.1 Two preliminary points were raised during the Review Panel Hearing. The first preliminary point considered by the Review Panel related to the bid validity period. Having considered the aforementioned arguments raised by the respective bidders in their written and oral affidavits and submissions,

the Review Panel finds that the bid validity period has not expired. The Review Panel therefore dismissed the argument that the bid validity period has expired for the reasons provided herein below.

- 4.1.2 Section 1 (e) of the Act, as amended, provides that the word 'days' means a day other than Saturday, Sunday or public holiday. Therefore, the legislature intended that where the word 'days' is used in a procurement activity/document conducted in terms of the Act, it shall be any day excluding a Saturday, Sunday or public holiday. Section 3 (2) of the Act further provides as follows:

"(2) The extent to which this Act or directives made under it conflict with any other law, regulations, rules or directives on matters relating to public procurement of goods, works or services, or disposal of assets by a public entity, the provisions of this Act or directives prevail."

- 4.1.3 Section 7 (1) (i) of the Act, referring to the functions of the Procurement Policy Unit, further guides as follows:

"to issue authorised versions of the standard bidding documents, standard forms of contracts, pre-qualification documents, procedural forms, requests for proposals and other similar documents for mandatory use by every public entity."

Standard bidding documents under Section 7 (1) (i) of the Act are issued by the Procurement Policy Unit. The bidding document in this bid, which bidding document was issued under legislation and a directive from the Procurement Policy Unit, defined 'day' as a calendar day unless otherwise stated. This definition of the word 'day' in the bidding document is clearly in conflict with the definition of 'days' in terms of the Act as amended. Therefore, where a conflict exists between the Act, as amended, and the bidding document issued by the Procurement Policy Unit under law, the definition as contained in the Act, as amended, prevails.

- 4.1.4 In addition to the above, it is evident that the entire procurement process in this bid was conducted using working days e.g. timelines in which the bids was evaluated and dates set for clarifications from the bidders. It is thus clear that the CPBN and the bidders understood that the timelines in the bid would be calculated using working days. If one has regard to the observations made by the Court in *Total Namibia (Pty) Ltd v OBM Engineering And Petroleum Distributors (SA 9 of 2013) [2015] NASC 10 (30 April 2015)*, it becomes apparent that the interpretation of the bidding document should be done in totality (the context in which it was written) and be interpreted in the light of what is reasonable and what is sensible.

4.2 Application to Stay the Proceedings

4.2.1 As stated above, Pamo Trading Enterprises requested the Review Panel to stay the current Review Panel Proceedings before the Review Panel under bid number G/ONB/CPBN-03/2024 because there are currently two pending proceedings before the High Court of Namibia between the parties in respect of bid number G/ONB/CPBN-01/2020 (Procurement of Supply Foodstuffs to Government School Hostels on Behalf of the Ministry of Education, Arts and Culture), which one includes an application to review and set aside the CPBN's decision to cancel the bidding process on 7 December 2023.

4.2.3 The Review Panel duly considered this preliminary point and found that not all parties especially interested parties in the current proceedings before the Review Panel are not the same parties to the parties in two applications currently before the High Court of Namibia, for example some of the interested parties who were awarded Lots by the CPBN in the current bid, are not parties in the High Court proceedings. Secondly the proceedings refer to two different bids, issued under different bid numbers and different bidding criteria/ documents. The current bidding process was administered under bid number G/ONB/CPBN-03/2024 and the second under bid number G/ONB/CPBN-01/2020.

4.2.4 The Review Panel further found that the High Court of Namibia unlike the Review Panel has inherent jurisdiction to stay proceedings. The Review Panel is bound to act and make decisions within the four corners of the Act and its accompanying regulations. The Review Panel further noted the caution provided by the High Court of Namibia in the case of *Government of the Republic of Namibia (Minister of Land Reform) v Kamunguma* (HC-MD-CIV-ACT-OTH-2017-00069) [2018] NAHCMD 237 (8 August 2018) which in paragraph 7 held as follows:

"This court possesses the inherent jurisdiction to prevent the abuse of process by staying proceedings but also have the power to grant such an application in certain circumstances."

Further in paragraph 8 the High Court referenced the case of in *Mouton v Gaoseb* where Masuku J explained as follows:

"It thus becomes clear that applications for stay of proceedings are not granted lightly and merely for the asking. It would seem that exceptional circumstances must be proved to be extant before the court may resort to this measure. I would think this is because once legal proceedings are

initiated, it is expected that they will be dealt with speedily and brought to finality because tied in them are rights and interests of parties, which it is in the public interest to bring to finality without undue delay. Applications for stay have the innate consequence of holding the decisions and the rights and interests of the parties in abeyance. It is for that reason that these applications are granted sparingly. It would appear to me, in line with the overriding principles of judicial case management, the bar for meeting the requirements for stay of proceedings is even higher as the application impacts on the completion of the case, time expended on the application itself (not to mention the time to be waited during the time when the stay operates if successful) and obviously, the issue of costs.'

- 4.2.5 The Review Panel further agreed with the arguments made before it, that prior to the commencement of the current Review Panel proceedings, Pamo Trading Enterprises had an opportunity to approach the High Court to request a stay of the current Review Panel proceedings, which they elected not to do. The Review Panel therefore in terms of Section 60 (a) of the Act, dismissed this preliminary point.

5.1 The Review Application By Eyambeko Catering:

- 5.1.1 The bid by Eyambeko Catering was in summary disqualified because it scored less than the required 70% because it failed to submit reference letters for the Contract Manager and Unit Manager as per the requirement, contrary to item No. 5.2 of the Technical Evaluation Requirements on page 50 of the bidding Documents.

- 5.1.2 Section 52 (9) of the Act, as amended, reads as follows:

"(9) Every bid is evaluated according to the criteria and methodology set out in the bidding documents and the evaluated cost of each bid is compared with the evaluated cost of other bids to determine the lowest evaluated substantially responsive bid which meets the qualification criteria most economically advantageous bid."

The bidding document required that references letters for listed portfolios in a company be provided. Scores were provided for each reference letter submitted e.g. an area manager. During the Review Hearing proceedings, it became evident that Pamo Trading did not dispute that they did not provide the required references letters but rather argued that it submitted a substantially compliant bid because the information provided in the reference letters could have been obtained in the submitted curriculum vitae or could have been easily obtained by the Bid Evaluation Committee.

- 5.1.3 In the case of *Menzies Aviation (Namibia) Proprietary Limited v Namibia Airports Company Limited (SA 73-2023) [2024] NASC (14 May 2024)*, the Supreme Court in paragraph 37 held as follows:

“Where a relevant entity invites bids, it stipulates its requirements, including compulsory requirements, such as the initialling and certifying of documents. It is common cause that the initialling of the bids was compulsory in respect of the bid under consideration. If Menzies was of the view that the uninitialed documents were not relevant to its bid it should not have included them in the bid. They were clearly not of that view and hence the inclusion of these documents. To now, after the event, attempt to distinguish them from the initialled documents and to suggest only the initialled documents should have been considered can thus not be accepted. To put a burden on those who checked whether the bids complied with the formal compulsory bid requirements to consider the nature, relevancy and materiality of the uninitialed documents is not correct. It was clear from the requirements that bids that did not comply with the formalities would not be considered, i.e. be disqualified. This is not unfair to any bidder as they were made aware of these requirements, and they should have adhered to them. It goes without saying that the uninitialed documents accompanied the bid for a purpose or they would not have been included in the bid. This being so, they should have been initialled or properly certified. It is not for the bidder to decide what the requesting body or entity would need and supply only such documents in the bid irrespective of the bid requirements and then cry foul if the bid is disqualified for not complying with the bid requirements.

- 5.1.4 It follows that in respect of the bidding document of this bid, the CPBN specified what the requirements of the bid is and what scores will be allocated in relation to the requirements of the bidding document. It is not disputed that Eyambeko Catering did not provide the reference letters requested in the bidding document and therefore it was not allocated marks for documents which it did not submit. It is not the work of the Bid Evaluation Committee to call for references which the bidder did not provide. The Review Panel therefore finds that Eyambeko Catering was scored correctly by the CPBN, and its review application is dismissed in terms of Section 60 (a) of the Act, as amended.
- 5.1.5 Eyambeko Catering further informed the Review Panel that the Executive Summary is incomplete, and it is unable to establish what the benchmark price is. Clarification 42 to the bidders clearly explained how the price of this bid would be evaluated. Further, the CPBN provided the bidders an opportunity to discuss the outcome of the process and the questions posed by Eyambeko Catering could have been discussed at this meeting, Eyambeko Catering however failed to attend the set meeting.

5.2 The Review Application by James and Young Enterprises:

5.2.1 James and Young Enterprises was disqualified from the bid as it did not provide the requested fitness certificate for certain Lots, no title deed was provided for certain Lots, and one third-party organisation document was not certified.

5.2.2 When considering the review application by James and Young and the replying affidavits, the Review Panel once again place reliance on Section 52 (9) of the Act, as amended, which amongst others provided that a bid must be evaluated according to the criteria and methodology set out in the bidding document. Further the Review Panel again relied on the case of *Menzies Aviation (Namibia) Proprietary Limited v Namibia Airports Company Limited* (SA 73-2023) [2024] NASC (14 May 2024), where the Court found as follows:

"It is not for the bidder to prescribe what the bid must contain. This is for the body or entity inviting the bids."

The CPBN therefore had the prerogative to prescribe what the bid must contain and the bidders wishing to participate in the bid had the duty to comply with the requirements set forth in the bidding documents. The Review Panel is also aware that the requirements set forth in the bidding documents must comply with the relevant statutory prescriptions.

5.2.3 James and Young Enterprises admitted at the Review Panel Hearing that it did not attach a required title deed. Further James and Young Enterprises admitted that the identity document of Rebekka Uunona was not certified. James and Young Enterprises at the Review Panel Hearing argued that it had a valid lease agreement with AMTA, however AMTA as an agency of the State does not have a title deed. The bid requirement however required a valid title deed. James and Young Enterprises understood this was a requirement in the bid and the failure to provide same would lead to a disqualification. James and Young Enterprises further during the clarification stage of this bid did not ask the CPBN whether it would accept letters in lieu of title deeds. Regulation 34 of the Regulations, provided bidders the opportunity to seek for clarification to enable such bidder to bid. It was therefore incumbent on James and Young Enterprises to seek clarity when it realised that it does not have a document required in the bid and/or ensure it entered into lease agreements with entities which had valid title deed as required in the bid. The CPBN had a valid reason why this was a requirement in the bid and therefore disqualifying James and Young Enterprises for failing to provide the required documentation was a reasonable decision made by the CPBN.

5.2.4 James and Young Enterprises further argued that the identification document of Rebekka Uunona was not a required document and therefore not relevant to

this bid. The identity document submitted whether certified or not did not form part of the mandatory document requirements of the bidding document and thus should not have been a disqualifying factor, according to James and Young Enterprises. The Review Panel found that Item No. 415 of the Mandatory Documents Requirements on page 48 of the bidding documents read as follows:

“Are all the required documentary proof obtained from third party organizations certified by a Commissioner of Oath appointed in terms of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963)?”

It was therefore a mandatory requirement of the bid that all documents from a third-party organisation must be certified in terms of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963.

- 5.2.5 The Supreme case in the case listed above of *Menzies Aviation (Namibia) Proprietary Limited v Namibia Airports Company Limited (SA 73-2023) [2024] NASC (14 May 2024)*, faced a similar scenario where Menzies Aviation argued that uninitialed pages in its bid were not substantive, mandatory or prescribed documentation. The Supreme Court held as stated before as follows:

“Where a relevant entity invites bids, it stipulates its requirements, including compulsory requirements, such as the initialling and certifying of documents. It is common cause that the initialling of the bids was compulsory in respect of the bid under consideration. If Menzies was of the view that the uninitialed documents were not relevant to its bid it should not have included them in the bid. They were clearly not of that view and hence the inclusion of these documents. To now, after the event, attempt to distinguish them from the initialled documents and to suggest only the initialled documents should have been considered can thus not be accepted. To put a burden on those who checked whether the bids complied with the formal compulsory bid requirements to consider the nature, relevancy and materiality of the uninitialed documents is not correct. It was clear from the requirements that bids that did not comply with the formalities would not be considered, i.e. be disqualified.”

It follows that James and Young included the identity document of Rebekka Uunona, because it felt the document was relevant and to expect the Bid Evaluation Committee to consider the relevance and materiality of the document cannot be accepted. The CPBN therefore correctly disqualified the bid of James and Young Enterprises correctly.

- 5.2.6 The Review Panel further found that clarification 42 explained to the bidders how the bid would be evaluated according to pricing. In light of the above, the

Review Panel decided to dismiss the review application of James and Young Enterprises in terms of Section 60 (a) of the Act, as amended.

5.3 The Review Application by Kunene Catering:

5.3.1 Kunene Catering was disqualified for the following reason:

"The bidder has submitted the following documentary proof obtained from third party organizations which are not certified as per the requirement: Page 5 of the Title Deed for Corridor Logistics (Pty) Ltd, contrary to item No. 4.15 of the Mandatory Documents Requirements on page 48 of the bidding documents."

5.3.2 At the Review Panel Hearing, Kunene Caterings provided that in three of the four Lots Kunene Catering Services was fully compliant. The crux of the matter was whether Kunene Catering should have been disqualified for all the Lots it applied for because it was non-compliant in one lot (did not meet the mandatory documents in one Lot applied for)? CPBN argued that the evaluation was not done per Lot and in phase 1 of the evaluation it first determined the mandatory documents in totality and not per Lot. Kunene Catering argued that the bid was invited per Lot and that the mandatory documents should have been evaluated per Lot.

5.3.3 The Review Panel had to study the bidding document to make a decision on this matter. Item 4.15 of Section III-Evaluation and Qualification Criteria reads as follows:

"Are all the required documentary proof obtained from third party organizations certified by a Commissioner of Oath appointed in terms of the Justices of Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963)?"

Further, the note on page 48 of the bidding document reads as follows:

"Note: The Bidders' submission will either be responsive or non-responsive. Bidders who do not comply with any of the above Mandatory Documents/Requirements will be disqualified from the entire evaluation process and will not be considered further."

ITB 15.8 of the bidding document reads as follows:

"Bids are being invited for individual contracts (lots). Prices quoted in the costed menu shall correspond to 100% of the items and quantities specified in the menus."

Clarification 42 (i) reads as follows:

*“Calculating the at-the-market price mean (μ) of the at-the-market prices (being the Bid Prices) of only the Bidders whose: administrative, legal, technical, and financial bid submissions were deemed to be compliant **in each lot** (these will form the population of the Bid Prices, i.e., the at-the market prices for the given lot).”* (the emphasis is ours).

Clarification 3 reads as follows:

“a bidder must have a warehouse in each lot bided for.”

- 5.3.4 The Review Panel further took into account that Kunene Catering alleged that they were cheaper in some of the Lots in which they were disqualified. Kunene Catering therefore did not only allege an irregularity but also alleged that because they were cheaper, they were disadvantaged as a result of the alleged irregularity.
- 5.3.5 When deciding on an interpretation of the bidding document, regard was had to decision referred to above of *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* (SA 9 of 2013) [2015] NASC 10 (30 April 2015) to determine what the sensible and reasonable meaning of the document in totality is. Having duly considered the content to the bid, the Review Panel found that the bid was invited for individual contracts (Lots). Therefore, the administrative, legal, technical, financial and mandatory documents should have been considered per Lot. In addition, clarification 42 explained that the administrative, legal, technical and financial bids would be need to be compliant in each lot. The Review Panel further took into account the purpose of the Act, as amended, and its objective (considered a purposive approach) as outlined in Section 2 of the Act, as amended.
- 5.3.6 Having considered the above, the Review Panel found that Kunene Catering was wrongly disqualified in the evaluation of three Lots in phase 1 of the evaluation as Kunene Catering met the requirements of the bidding documents in three of the Lots for which they submitted bids. Kunene Catering admitted that they were not compliant in Lot 1 and for this Lot they were correctly disqualified by the CPBN. The evaluation by the CPBN of the bidding document submitted by Kunene Catering was not conducted according to the criteria and methodology set out in the bidding document. The Review Panel considered the case of *Chairperson of the Review Panel and Others v Stream Two Properties CC* (SA 43/2022) [2023] NASC 49 (15 December 2023), in which it was held that ‘*the relevant part of s 55(1) provides that the Board must award a procurement contract to the bidder who submitted the lowest evaluated substantially responsive bid, which meets the qualification criteria specified in the pre-qualification or bidding documents.*’

- 5.3.7 For the three Lots (6, 7 and 12) in which Kunene Catering submitted bids and where they were complaint, the bids of Kunene Catering should be re-considered. The Review Panel therefore in terms of Section 60 (c) of the Act, as amended, sets aside in part the decision of the CPBN, as communicated in the Notice of Selection of Award, in respect of Lot 6, 7 and 12 and refers the matter back to the CPBN to reconsider the bids of Kunene Catering only in respect of Lots 6, 7 and 12. The CPBN must evaluate the bids of Kunene Catering for Lots where they have submitted all the required documents.

5.4 The Review Application by Pamo Trading:

- 5.4.1 As stated above the preliminary points raised by Pamo Trading in their application for review was dismissed accordingly.
- 5.4.2 Pamo Trading was disqualified for the following reason:
- "The bidder submitted a supporting document in another language, however; it is not accompanied by a translation of the relevant passages in English as per ITB 11.1 and item No. 3.1 of the Preliminary/ Administrative requirement on page 44 of the bidding document."*
- 5.4.3 As provided for above, the prerogative to set requirements in a bidding document rests with the Board or a Public Entity. One of the bidding requirements under administrative requirements as per ITB 11.1 of the bidding document and item No. 3.1, was that documents submitted in another language must be translated into the English language. The bidders were therefore obligated to provide a translation for documents submitted in another language than English. Pamo Trading admitted that the translation was not provided and argued that the CPBN should have requested the translation from Pamo Trading. The Review Panel relied on paragraph 37 in the case of *Menzies Aviation (Namibia) Proprietary Limited v Namibia Airports Company Limited (SA 73-2023) [2024] NASC (14 May 2024)*, which has been quoted in paragraph 5.1.3 of this order.
- 5.4.4 It follows that in respect of the bidding document of this bid, the CPBN specified what the requirements of the bid. It is not disputed that Pamo Trading did not provide the translated documents are requested in the bidding document and therefore it was disqualified. It is not the work of the Bid Evaluation Committee to seek for documents which should have been provided under the administrative requirement section. The Review Panel therefore finds that Pamo Trading was correctly disqualified by the CPBN and its review application is therefore dismissed in terms of Section 60 (a) of the Act, as amended.

5.5 The Review Application by Platinum Investment:

5.5.1 The bid by Platinum Investment was disqualified for the following two reasons:

“the bidder has submitted the following required documentary proof obtained from third party organizations which are not certified as per the requirement: Reference for Eunice Uupindi from Hilton, contrary to item No. 4.15 of the Mandatory Documents Requirements on page 48 of the bidding document.”

“the bidder submitted a Lease Agreement and fitness certificate, but no title deed was submitted as required in ITB 12.1 (h) (9), addendum no. 3 and item No. 4.8 of the mandatory Documents requirements on page 46 of the bidding document.”

5.5.2 The Review Panel viewed the reference letter of Ms Eunice Uupindi from Hilton as contained in the bidding document of Platinum Investment. Platinum Investment informed the Review Panel that the reference letter was an original and not a copy as alleged by the CPBN. The Review Panel found that the letter from Hilton relating to Ms Eunice Uupindi as contained in the bidding document of Platinum Investment is indeed a copy which was not certified. Item 4.15 of the Mandatory document section of the bidding document required that bidders certify all documents received from third-party organisations. Therefore, the Review Panel found that Platinum Investment did not comply with Item 4.15 of the bidding document and on this ground alone, the bid of Platinum Investment was correctly disqualified by the CPBN.

5.5.3 Platinum Investment further submitted a letter titled ‘Confirmation in lieu of Title Deed’ in place of a title deed as required in the bidding document. ITB 12.1 (h) (9) of the bidding document required the submission of a title deed as proof of ownership or leasehold. As provided for in the bidding document, the failure to attach a title deed rendered the bid unresponsive.

5.5.4 As stated above Section 52 (9) of the Act, as amended, mandates the CPBN to evaluate bids according to the criteria and methodology set out in the bidding document. The Review Panel finds that the bid of Platinum Investment was disqualified correctly and that the CPBN correctly evaluated the bid in terms of Section 52 (9) of the Act, as amended. It follows that the Review Panel dismisses the review application of Platinum Trading in terms of Section 60 (a) of the Act, as amended.

5.6 The Review Application by Oshipaya Investment:

5.6.1 The bid of Oshipaya Investment was disqualified for the following reason:

“the bidder is conflicted in terms of ITB 5.2, as the bidder submitted a lease agreement to lease a warehouse to Vidu Trading cc and a fitness certificate was issued in the name of Oshipaya Investments cc, who is also participating in the same bid, which places the bidder in a position to access information about or potentially influence the bid of another bidder, contrary to the Conflict of Interest requirement item no. 2.3 on pages 43 of the bidding document.”

5.6.2 Oshipaya Investment informed the Review Panel that it did not at any time lease a warehouse to Vidu Trading CC as was determined by the CPBN. The Review Panel found there is a purported lease agreement between entered into between Oshipaya and Vidu Trading. Oshipaya Investment during the proceedings did not deny that there was a lease agreement document between Oshipaya Investment and Vidu Trading in the bidding document of Vidu Trading. Oshipaya Investment however denied that they entered into this lease agreement found in the bidding document of Vidu Trading.

5.6.3 Further, the Review Panel found that it was not disputed that when evaluating the bids, the CPBN found not only a lease agreement between Oshipaya Investment and Vidu Trading CC and but also fitness certificates, issued by the Rundu and Eenhana Town Councils in the name of Oshipaya Investment, in the bid submitted by Vidu Trading. Oshipaya Investment did however allege that fraud may have occurred in the submission of the bid of Vidu Trading. It could further not be disputed that the erf listed in the lease agreement under contention is the same erf number listed in a fitness certificate found in the bid of Oshipaya Investment.

5.6.4 The Review Panel observed that whilst Oshipaya alleged fraud was committed, such fraud has not been reported to the Police to investigate the alleged fraud. The Review Panel also observed that the bidding document made provision for the disqualification of bidders who were found to be conflicted.

5.6.5 In light of the above, the Review Panel could not fault the decision of the CPBN regarding a conflict of interest created between Oshipaya Investment and Vidu Trading as defined in ITB Clause 5.2 and Evaluation Criterion 2.3 of the bidding document. On this point the Review Panel finds that Oshipaya Investment was correctly disqualified by the CPBN and that the bid was disqualified in terms of what is provided for in the bidding document. The Review Panel noted the remarks made Chief Justice Shivute in paragraph 50 of the case *Chairperson of the Review Panel and Others v Stream Two Properties CC (SA 43/2022)*

[2023] NASC 49 (15 December 2023), where it was held that 'in that context that an allegation or reasonable suspicion of appearance of a conflict of interest – a matter that could conceivably taint the procurement process – could and should not be ignored due to their potential detrimental consequences.'

- 5.6.6 Regarding the period for the examination of bids, the Review Panel found that the CPBN did have an exemption from the Minister of Finance and that the bid was evaluated within the thirty-day timeframe.
- 5.6.7 Finally, regarding the determination of the benchmark price, the Review Panel found that Clarification 42 clearly explained to bidders at length how the pricing of the bid would be evaluated.
- 5.6.8 In light of the above, the Review Panel dismissed the review application of Oshipaya Investment in terms of Section 60(a) of the Act, as amended.

6. Conclusion and Order:

In the premises:

1. The review applications of Eyambeko Catering, James and Young Enterprises, Pamo Trading, Platinum Investment and Oshipaya Investment are dismissed respectively, in terms of Section 60(a) of the Act, as amended.
2. The decision of the CPBN (as communicated in the Notice of Selection of Award) is set aside in part, as far as it relates to the bid of Kunene Catering. The decision on the Lots where Kunene Catering submitted all the required documentation is set aside being Lots 6, 7 and 12, in terms of Section 60(c) of the Act, as amended.
3. Further in terms of Section 60(c) of the Act, as amended, the CPBN must re-evaluate the bid of Kunene Catering only in terms of Lots 6, 7 and 12.
4. In terms of Section 60 (e), the Review Panel confirms the decision of CPBN in respect of Lots 1, 3, 4, 5, 8, 9, 10, 11, 13 and 14 may be awarded.
5. The CPBN must provide proof of the execution of this order, within 30 days after receipt of this order.
6. The order is effective from 24 June 2025.


Ms. Doné Brinkman
CHAIRPERSON: (i.r.o. this matter)

