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REASONS FOR THE ORDER

BACKGROUND

[1] On the 08th October 2018, Central Procurement Board of Namibia (hereinafter referred to as "1st Respondent") invited bids for Procurement of the Government Diamond Valuation Services: NCS/ONB/CPBN-02/2018 by way of Open National Bidding provided for in terms of Section 29 of the Public Procurement Act. No. 15 of 2015 (hereinafter referred to as "the Act"). The said bid was advertised in the local print media and on the website of the 1st. Respondent. The 1st Respondent conducted and performed the procurement process herein on behalf of the Ministry of Mines and Energy (Funding Public Entity).

[2] The bid closed on the 08th November 2018 with a total of eleven (11) bidders having expressed interest by submitting their bids to the 1st Respondent.

[3] The process of examination and evaluation of bids in terms of Section 52 of the Act, read with the Regulation 7(2) of the Public Procurement Regulations (hereinafter referred to as "the Regulations") commenced on the 09th November 2018.

[4] On the 23rd November 2018 and in accordance with Section 52(1) of the Act, the Bid Evaluation Committee requested for clarification from bidders who qualified for assessment in terms of phase 3. This request for clarification was specifically with regard to the total bid price. All these bidders, with an exception of the 6th Respondent, responded to the request by providing their total bid prices. The 6th Respondent instead wrote to the Bid Evaluation Committee advising that a total bid price was not a requirement in terms of the bidding document.

[5] On the 12th December 2018, the Bid Evaluation Committee submitted its first evaluation report to the 1st Respondent in terms of which the 1st Applicant was recommended as the successful bidder.

[6] The 1st Respondent returned the matter back to the Evaluation Committee on 17th January 2019 for re-evaluation. This decision was communicated to the 5th Respondent in a letter dated 21st January 2019.

[7] The 5th Respondent resubmitted its evaluation report to the 1st Respondent on the 3rd April 2019 in terms of which the 6th Respondent was now the recommended successful bidder.

[8] The 1st Respondent in accordance with Section 55(4) of the Act read with Regulation 38(1) and 38(2), sent out a notice of intention to award to all bidders (successful and unsuccessful) on the 14th May 2019.

[9] In response to the forementioned notice and more specifically to the invitation in terms of Regulation 38(2)(c), five (5) of the unsuccessful bidders wrote to the 1st Respondent requesting for reconsideration of their bids and the review of the selection for award

made to the 6th Respondent, being Gem Diamonds (Namibia) (Pty) Ltd. The unsuccessful bidders that submitted request for reconsideration were:

- 1st Applicant (Prestige Diamonds);
- 2nd Applicant (Global Diamonds);
- 9th Respondeent (Welwitchia Diamon Valuers)
- 11th Respondent (Metcor Diamonds); and
- 12th Respondent Hompa Investments.

[10] Upon receipt of requests for reconsideration, the 1st Respondent at its meeting held on the 27th June 2019 and after having had regard to the bidding document (entire ITB) dealt with the requests in accordance with Regulation 38(2)(c). The decision hereto was accordingly communicated to the all unsuccessful bidders that requested for reconsideration of their respective bids.

[11] The 1st Respondent proceeded and awarded the procurement contract to the 6th Respondent. This decision too was communicated to all bidders on the 3rd July 2019.

[12] It is a well laid down principle in terms of our laws that a decision to award a tender is an administrative action, hence subject to review in accordance with Article 18 of the Namibian Constitution read with Section 59 of the Act as well as Regulation 42(1).

[13] Against the above background, on the 10th July 2019, the 1st and 2nd Applicants respectively, lodged Applications for Review in accordance with Section 59 of the Act read with Regulation 42(1) and (2) of the Regulations for the review of the decision of the 1st Respondent on the grounds hereunder.

[14] Accordingly, the review hearing was held on 18th July 2019 with the Review Panel arriving at its decision on 24th July 2019 and communicating same to all the parties on 26 July 2019.

GROUNDS FOR REVIEW BY THE 1ST APPLICANT (PRESTIGE DIAMONDS)

[15] The 1st Applicant cited the following grounds in its Review Application:

(1) That the bid by the 6th Respondent (Successful Bidder), including its technical submission, credentials, skilled and experience of the project team are substantively subservient to the 1st Applicant's bid;

(2) That the Selection Committee (presumably referring to the 5th Respondent) failed to apply its mind objectively and/or fairly;

(3) That the 6th Respondent failed to provide and/or indicate the total amount in respect of the bid price as required by the bid document (referring to ITB 2.2, 2.3 and 36.1 as well as the letter by the 5th Respondent dated 23rd November 2018 in stressing the importance of the bid total amount);

(4) That the 1st Respondent had an onus of announcing the total amount for each respective bidder at the opening ceremony in terms of the bidding procedures;

(5) That the 6th Respondent failed to comply with the request in terms of the 23rd of November letter;

(6) That the 5th Respondent ought not to have proceeded and evaluated the bid of the 6th Respondent for failure to submit the total bid amount and as such the 6th Respondent should have been disqualified from further assessment;

(7) That the 6th Respondent only submitted a percentage namely 0.25% which cannot be verified as there is no bid price. Moreover, 0.25% does not correspond to 303 million, because on a proper calculation 303 is almost amounting to 0.41%.

(8) That the team proposed by the 6th Respondent illustrates very little diamond sales/negotiations experience if any and/or outdated (emphasising that none of the team a member has ever negotiated the =10.8 carat goods and that two team members are currently attending a training in SA/Kimberley since February 2019);

(9) That the 6th Respondent technical team comprises mainly of diamond sorters and not diamond valuators, both which are required;

(10) That the 6th Respondent has very low level of polished diamond/factory assessments and international exposer (presumably "exposure");

(11) That the 6th Respondent does not have DTC diamond box interpretation skills;

(12) That on the 18th of April 2019 only two members of the 5th Respondent were present contrary to the Act which requires an odd number in constituting the 5th Respondent;

(13) That the 5th Respondent irregularly and unfairly gave considerations to factors unrelated to qualifying criteria in allocating higher marks to the 6th Respondent;

(14) That it is not evident from the Training Plan by the 6th Respondent that same is backed by a requisite budget and costs estimates;

(15) That its bid was fully compliant in terms of technical competency (including provision of a requisite technical team, supporting documents, detailed social responsibility plan, training and skilled development plan with full and detailed budget and will be delivered by skilled trainers, compulsory disclosure documents as well prices activity and pricing;

(16) That on request for reconsideration, the 1st Respondent failed to deal with non-compliance by the 6th Respondent regarding the provision of total bid amount;

(17) That in terms of the 23rd November 2018 letter, the stipulation of the total amount was an essential requirement;

(18) That the 1st Respondent erred in its decision that it has not indicated the method and/or means on which they will rely to ascertain or determine the total amount from the percentage;

(19) That the award has been a matter of public interest (referring recent media publication) and that 6th Respondent does not meet the technical requirements for the bid given that crucial technical personnel has resigned from the company; and

(20) That the 1st Respondent's decision to award the tender to the 6th Respondent is marred with irregularities as it had no regard to the requirements as set out in the bid document, hence such a decision falls to set aside on the principle of good constitutional citizenship.

GROUNDS FOR REVIEW BY THE 2nd APPLICANT (GLOBAL DIAMONDS)

[16] The 2nd Applicant cited the following grounds in its Review Application

(1) That the response stated in the letter dated 3rd July 2019 by the 1st Respondent does not adequately address its concerns in terms of the request for reconsideration (referred the Review Panel to its bid and application for reconsideration to the 1st Respondent);

(2) That the award made to the 6th Respondent has been unfairly awarded;

[17] In terms of the Application for Reconsideration submitted earlier to the 1st Respondent, the 2nd Respondent alleged the following:

(3) That the bid selection criteria as stated in the bidding document were not fairly and consistently applied to its detriment;

(4) That the Score difference in percentage between itself and the 6th Respondent is 0.314% which is minimal compared to the NAD 70.4 million minimum differences in pricing between the two companies;

(5) That it objected to the reading out of prices at the bid opening session after it transpired that most of the bidders did not indicate their total bid amounts (emphasised that this was in breach of Section 1, subsection E of the bid requirements);

(6) That the 6th Respondent illustrates little diamond experience in various ways mentioned in terms of its application;

(7) That its four (4) key personnel are all having a minimum of nine (9) years of experience in valuating compared to the four (4) key personnel of the 6th Respondent that do not have any valuation experience, hence latter should not have scored 100% in phase 2 (Technical Competence)(also emphasised the difference between sorting and valuation as well as diamond classification).

(8) That the difference of NAD 70.4 million in the total bid price between itself and the 6th Respondent does not relate to the total percentage price scores proportionately.

RELIEF SOUGHT FROM THE REVIEW PANEL BY THE 1ST APPLICANT (PRESTIGE DIAMONDS)

[18] That the Review Panel sets aside the award made to the 6th Respondent and allocated same to the 1st Applicant being the most compliant bidder under the circumstances.

RELIEF SOUGHT FROM THE REVIEW PANEL BY THE 2ND APPLICANT (PGLOBAL DIAMONDS)

[19] That the Review Panel sets aside the award made to the 6th Respondent and allocated same to the 2nd Applicant.

[20] That in terms of Section 68(1) of the Act, the Review Panel consider suspending the award made to the 6th Respondent.

REPLYING AFFIDAVIT BY THE 1ST RESPONDENT (CENTRAL PROCUREMENT BOARD OF NAMIBIA)

[21] The 1ST Respondent replied to the allegations contained in the two Review Applications in one replying affidavit. It denied all allegations to the extent that they relate it and submitted the following in amplification:

(1) That it sufficiently dealt with the grounds of review by the 1st and 2nd Applicants and reasons as to why their bids were not preferred were equally provided;

(2) That both 1st and 2nd Applicants' bids was evaluated fairly and in accordance with the evaluation criteria as provided for in the bidding document;

(3) That Applicants' point scores were based on the information provided in terms of their respective bids and evaluated against the evaluation criteria;

(4) That the total amount was not a requirement in terms of the bidding document;

(5) That the bid was a unit rate bidding and the successful bidder will be remunerated based on the rates indicated in the bidding document (referred to page 53, Section VII, 6.1)

(6) That the 6th Respondent justified in its letter dated 27th November 2018 reasons for not providing the total bid price to the 5th Respondent as it was not a requirement in terms of the bidding document. However, the 6th Respondent provided percentage and rates of services for the GDV;

(7) That the ITB 36.1 referred to by the 1st Applicant deals with advance payments. Moreover, ITB 36.1 was negated by Section II of the BDS, which stated ITB 36.1 was not applicable to this bid;

(8) That ITB 26.1 allows the clarification to be sought, but no changes in the price or substance of the bid shall be sought, offered or permitted except as required to confirm the arithmetic errors discovered by the employer in the evaluation of the bids in accordance with ITB clause 28;

(9) That the requested percentage of the total value of the parcel does not have to be verified with any bid amount because this percentage will be paid to the bidder as a commission for the diamond valuation services performed;

(10) That all CVs and testimonial letters that were presented to the 5th Respondent submitted by all bidders were properly examined and evaluated by the 5th

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Respondent. Point scores allocated to each bidder were based on the evaluation criteria;

(11) That the sales and negotiation experience was not part requirements in terms of the bidding documents.

(12) That it is not a criteria in terms of the bidding documents that a bidder be disqualified on the basis that its key personnel are on training; and

[22] **In the premise, the 1st Respondent prayed that the Review Panel dismisses the two Applications for Review in terms of Section 60(a) and also confirm the decision of its in terms of Section 60(e) of the Act.**

REPLYING AFFIDAVIT BY THE 6TH RESPONDENT (GEM DIAMONDS)

[23] The 6th Respondent replied to the allegations contained in the two Review Applications in separate replying affidavits. Similar allegations were responded to by way of combined responses for the purpose herein. However, the 6th Respondent denied all allegations to the extent they relate to it and submitted as follows:

(1) That application of the 1st Applicant is defective because it was not made on a form (RP/01) of the Review Panel as prescribed under Section 59 and as result no grounds for review are articulated as required in terms of Regulation 42(2)(a);

(2) Application of the 1st Applicant was not accompanied by the fee prescribed in terms of Regulation 42(2)(b) or was paid outside the prescribed period;

(3) The 1st and 2nd Applicants failed to serve on it and any other interested party, copies of the review applications within the prescribed 7 days in terms of Regulation 42(1)(emphasizing that it was only served a copy on the 8th day);

(5) As a result of service being outside the prescribed time, the (6th Respondent) only had one (1) day of the two (2) prescribed days in terms of Regulation 42(4) for filing the replying affidavit to the review applications with a resultant effect that its right to be heard is adversely affected if not completely diminished (applicable to both Applicants);

(6) That on the basis of 5 above, an attempt to hear the review applications by the 1st and 2nd Applicants would be tantamount to violating its constitutional rights in terms of the constitution and under the Public Procurement Act;

(7) That the provisions of Regulation 42(1) – 42(4) are peremptory, hence must be complied with (emphazised that the Act does not permit flexibility or condoning of non-compliance);

(8) That it is impossible to provide a total bid amount for the nature of the services sought because it is based on future uncertain events (applicable to both Applicants);

(9) That board is legally bound the bidding document it has approved, which contain evaluation criteria and does not mention total bid price as a requirement (stressed the definition of bidding document) (applicable to both Applicants);

(10) That it stands by its prices as submitted to the 1st Respondent under the Priced Activity Schedule;

(11) That the letter by the 5th Respondent dated 23rd November 2018 requesting for clarification does not qualifies as such (stressing that this is not properly defined in terms of the Act);

(12) That total amount that ought to be inserted on the cover page are those amounts submitted in terms of the Price Activity Schedule as explained by the 1st Respondent's official at the bid opening;

(13) That it submitted CVs and reference letters of the four (4) key personnel with a total average experience exceeding 16 years permitting a maximum score in terms of the evaluation criteria(applicable to both Applicants);

(14) That DTC Box, international skills and exposure were not requirements in terms of the bidding document;

[24] **On specific allegations by the 2nd Applicant:**

(15) That it scored highest points in accordance with the evaluation criteria;

(16) That the evaluation criteria sets that the successful bidder shall be the bidder who receives the total resultant score from a total of weighting of the technical and financial;

(17) That the 2nd Applicant by signing the bid document agreed that the bid shall be awarded to the bidder with the highest resultant score (emphazised that having accepted the bid's terms and conditions, 2nd Applicant cannot *ipso facto* challenge the evaluation);

(18) That at the bid opening, the 1st Respondent only read out the total amount in terms of expert witness, polished diamond examinations and percentage offered in terms of rough diamonds (three prices);

(19) That the total amount on the cover page is of no relevance as it does not compromise the bidding process or evaluation process (referred to Section 9.1 and 13 of the bid document);

(20) That the 2nd Applicant proposed projects that were not diamond related, hence does not meet the objects of the bid of ensuring that Namibia continues to develop essential diamond technical skills and not revert to expatriates as far as sorting and valuing rough diamonds are concerned;

[25] That the 2nd Applicant is relying on a Newspaper Article to determine a non-existent total bid amount of the 6th Respondent (stressed that there is no basis for the price difference cited);

[26] **In the premises, the 2nd Respondent prayed that the Review Panel dismisses the two Applications for Review application in terms of Section 60(a) of the Act or in alternative confirm the decision of the 1st Respondent.**

PROCESSES FOLLOWED IN CONSIDERATION AND DETERMINATION OF THE REQUEST

[27] On receipt of the two applications for review, the Review Panel in accordance with Regulation 42(5)(a) of the Public Procurement Act of 2015, Article 18 of the Namibian

Constitution and in pursuance of the general principle *audi alteram partem* rule resolved to join interested parties to the review proceedings. The bidders and other parties, who attended the review proceedings were:

(a) 1st Applicant (Prestige Diamonds (Pty) Ltd)
(b) 2nd Global Diamonds Valuators Namibia (Pty) Ltd
(c) 1st Respondent (Central Procurement Board of Namibia)
(d) 5th Respondent (Bid Evaluation Committee)
(e) 6th Respondent (Gem Diamonds Namibia (Pty) Ltd)
(f) 8th Respondent (Kings Diamonds Valuation (Pty) Ltd)
(g) 9th Respondent (Welwitchia Diamond Valuators (Pty) Ltd)
(h) 10th Respondent (Ondjerera Diamond Valuators (Pty) Ltd)
(i) 11th Respondent (Metcor Diamonds CC)
(j) 12th Respondent) Hompa Investments CC
(k) 13th Respondent (Target Diamonds Services (Pty) Ltd)
(l) 14th Respondent (United Diamonds Trading Company (Pty) Ltd)
(m) 15th Respondent (Sinco Investments Five (Pty) Ltd)
(n) Ministry of Mines and Energy

[28] Since there were two separate Review Applications for, the Review Panel in terms of Regulation 44 read with Regulation 42(5)(b) decided to consolidated them into once action.

[29] The Review Panel in considering this matter, used the documents submitted by both parties, as well as oral evidence obtained from both Applicants, Respondents and other interested parties during the review hearing to arrive at its decision.

[30] Accordingly, all Applicants and Respondents alike as well as joined interested parties were present at the review proceedings to provide further clarification and/or make additional representations in support of their filed submissions or interests to the Review Panel.

ADDITIONAL REPRESENTATIONS DURING THE REVIEW HEARING

[31] As stated above, during the review hearing the Review Panel afford the Applicants and all interested parties another opportunities to make additional representations anew (for those that did not submitted representations in advance) or in amplification of those that are have already submitted representations.

The 1st Applicant raised the following points *in limine*:

Non-Compliance with Regulation 42(4)

[32] That the Applications stands unopposed because there is no replying affidavit by the 1s Respondent and if there is, it was not filed within two days of being served with the copies of the applications; or alternatively if such affidavit is available and was filed in accordance with 42(4) same was served on the 1st Applicant, therefore the Review Panel should not proceed to hear the application and/or consider any submission from the 1st Respondent. The 2nd Applicant too supported this argument.

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Improper commissioning of the 6th Respondent's Replying Affidavit

[33] That the 6th Respondent's Replying Affidavit was not properly commissioned in that it is not commissioned by a Commissioner of Oath.

The 5th Respondent has become *functus officio* in its first recommendation to the 1st Respondent to award the procurement contract to the 1st Applicant.

[34] That the 1st Respondent could not have returned the first evaluation report to the 5th Respondent with the request for the latter "sanitise" same. Also indicated that it does not understand what sanitising means.

The 1st and 2nd Applicants also amplified their Application for Review by additionally submitting the following:

Non-Compliance with Section 51(4) of the Act

[35] That in disregarding the total bid amount, both the 5th and 1st Respondents are in contravention of Section 51(4) of the Act, which provides that;

"At a bid opening session, the name of the bidder, the total amount of each bid, any discount or alternative offered, and the presence or absence of any bid security, if required, is read out and recorded, and a copy of the record is made available to any bidder on request".

[36] Further that the request for clarification by the 5th Respondent to all bidders that made it to phase 2 to submit their total bid prices illustrates that the total bid price was a vital requirement of the bidding document. Also referred the Review Panel to ITB 24.3 of the bidding document which amongst others factors, provides that the total amount of each bid will be announced by the employer at the bid opening.

[37] Contested further the clarification which was sought by Bid Evaluation Committee was in direct violation of Section 52(1) as it would have led to a change in prices and substances of bids. Section 52(1) provides as follows:

"The Board may seek clarification during the examination of bids from any bidder to facilitate evaluation, but it may neither ask nor permit any bidder to change the price or substances of its bid."

The 10th Respondent raised the following point *in limine:*

Non-Compliance with Section 26(7) (which point in any event already raised in the Review Application of the 1st Applicant).

[38] That the constitution of the Bid Evaluation Committee that evaluated the bid on the 18th April 2019, from which the recommendation to award the procurement contract concerned to the 6th Respondent has emerged, was in contravention of Section 26(7), as it consisted of two members which is an even number as opposed to the odd required in terms of the said section. On this basis, the said meeting is void and accordingly any decision made therefrom should be null.

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The 15th Respondent raised the following point *in limine:*

Non-Compliance with Regulation 42(3)

[39] It argued that the Review Applications were not properly before the Review Panel, on the following basis:

(1) That copies of the Review Applications by the 1st and 2nd Applicants were not served on all interested parties because they were limited to those that requested for reconsideration from the 1st Respondent to the exclusion of all bidders who participated in the bid and therefore remain interested in the process or bid, including the outcomes of the review proceedings.

(2) That serving of copies of the Review Application to the 1st Respondent and the other interested parties (although on a limited scope) was done outside the time frame provided for in terms of Regulation 42(1). It was amplified that Regulation 42(1) cannot be read in isolation but be read in conjunction with Regulation 42(3), hence the lodging of review application and serving of copies should both be done within seven (7) days of receipt of the decision or an action by a public entity.

The 11th Respondent represented the following to the hearing:

[40] That the reason why the bidding documents on page 38 provides for a range of 1.5 – 1.8 million carats was to guide the bidders in calculating the total bid amount. It is therefore inescapable that total bid amount was requirement.

[41] Further that its bid was the lowest hence should have been recommended for award of the procurement contract, if factoring was correctly applied and done.

The 12th Respondent submitted as follows:

[42] That it was unfairly evaluated because it was disqualified on the basis of non-submission of a Certificate of Conduct issued by the by the Namibian Police (required for all directors and employees of all bidders) in respect of its foreign directors and employee. This is despite a common cause that certificates of conduct issued by the Namibian Police are only issued to the Namibian Citizens. Further that its foreign personnel should have never be subjected to this evaluation criteria as they are not Namibian and are in any event in possession of certificates of conduct from countries of their nationality and were accordingly submitted.

RESPONSES BY THE 1ST RESPONDENT

[43] The 1st Respondent indicated that the content of its replying affidavit stands and in addition responded to some of the allegations raised by the two Applicants and other interested parties in their verbal submissions as follows:

Non-Compliance with Regulation 42(4)

[44] That there is no legal obligation on the 1st Respondent to serve copies of its replying affidavit on the two Applicants. The law rather in terms of Section 42(4) requires the 1st Respondent to file its replying affidavit to the allegations made by a bidder or supplier within two days with the Review Panel. This was done accordingly.

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The 5th Respondent has become *functus officio* in its first recommendation to the 1st Respondent to award the procurement contract to the 1st Applicant

[45] That the argument that the 5th Respondent has become *functus officio* in its first recommendation to the 1st Respondent to award the procurement contract to the 1st Applicant is not correct on the account that the 5th Respondent is a subordinate structure to the 1st Respondent.

[46] Further that the structural inferiority of the 5th Respondent to the 1st Respondent is evident in terms of Section 9(1)(l)(i) of the Act. This Section 9(1) provides:

"The powers and functions of the Board in relation to procurement or disposal of assets are to-

(l) review the recommendations of a bid evaluation committee, and –

(i) to approve or reject the recommendation of the bid evaluation committee to award a contract; or
(ii) to require the bid evaluation committee where applicable to make a new or further evaluation on specified grounds; or

(iii) to report to the Minister any decision of the Board not implemented by the public entity within the prescribed period;

[47] Further that as far as the back referral of the first evaluation report by the 1st Respondent to the 5th Respondent, the 1st Respondent made use of Section 9(1)(l)(ii) to request that the 5th Respondent makes a new or further evaluation on specified grounds.

[48] Indicated further that the use of the word phrasal verbal "sanitise" was unfortunate as the intention of the 1st Respondent was merely to request for further evaluation as per the foregoing.

Non-Compliance with Section 51(4) of the Act

[49] That although this Section provides for the total bid amount to be read out at the bid opening, the total bid amount was not a requirement in terms of this tender.

[50] Further that the request for clarification by the 5th Respondent ought to not have made, thus upon submission of the first evaluation report the deviation from the bidding document was discovered by the 1st Respondent and rectification was duly requested.

Non-Compliance with Section 26(7)

[51] That the meeting of the Bid Evaluation Committee held on the 18th April 2019, should be reviewed in the context of Regulation 9(3), which provides that:

"The majority of members of a committee present at a meeting of the committee, which members must include the chairperson, deputy chairperson and financial advisor or their alternate members constitute a quorum at the meeting".

[52] Submitted therefore that there was a quorum at the said meeting, hence recommendation that carried through to the 1st Respondent.

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[53] The 5th Respondent also got an opportunity to explain the process it followed in the examinations and evaluation of the bids. It emphasized that it requested bidders to indicate their total bid prices as per its letter dated 23rd November 2019, because it thought the total bid prices were required for financial evaluation. On the strengths of this, when all other bidders submitted their total bid prices in response to its request, with an exception of the 6th Respondent, it then proceeded to estimate a total bid price for the 6th Respondent as being NAD 303 million, an amount that is now be wrongly cited as the total bid price for the 6th Respondent. Again, on the basis of its understanding then, the 5th Respondent submitted its first evaluation report to the 1st Respondent, in terms of which the award pf the procurement was recommended to the 1st Applicant. It was only upon the back referral of the evaluation report by the 1st Respondent that its members applied their mind thoroughly on the evaluation criteria and then realised that in fact the total bid amount was not a requirement. This led to the resubmission of the subsequent evaluation report(s).

RESPONSES BY THE 6TH RESPONDENT

Non-Compliance with Regulation 42(3)

[54] That the serving of copies of the Review Application to the 6th Respondent was done outside the time frame provided for by law in terms of Regulation 42(1), as they were served on the 6th Respondent on the 8th day. Stressed that the provision of Regulation 42(1) are peremptory (MUST Comply provisions) and non-compliance thereto makes the Review Applications fatal as there can be no legitimate review. Further that Regulation 42(3) cannot be read in isolation but be read in conjunction with Regulation 42(1), as a section of a statute by law is read in context to the entire legislation and never as in isolation. It referred to the case of the ***Government of the Republic of Namibia v Geoffrey Kupuzo Mwilima***[1] and ***Nkumbula v Attorney-General***[2], which held that:

"No provision be read in isolation and construed in isolation: any word or phrase or provision in an enactment must be construed in its context"

[55] Further that it was held in the case of ***Attorney General v H R H Prince Augustus***[3] that:

"The learned law Lord's dictum boils down to this, that in construing a word or indeed a provision in an enactment, it must be within the context of the entire enactment in which it occurs"

[56] On whether the late serving of copies of the Review Applications can be condoned, it submitted that the Act does not empower the Review Panel to condone late serving or filing. ***Cited Puma Chemicals v Labour Commissioner***[4], in terms of which it was held that:

"Court has jurisdiction to condone and hear an application for review outside the time periods laid down in section 89(4) of the Labour Act 2007"

[57] Also referred the Review Panel to the case of ***Knouwds N.O v Josea and Another***[5], in which Damaseb JP held the following in relation to service:

[1] SA 29/2001 (Judgement delivered on 07/06/2002)
[2] (1972) ZR 204
[3] (1957) ALL E.R 45
[4] (LC 90/2012)[2014] NALCMD 09 (10 February 2014)
[5] 2007(2) NR 792 (HC) at 23

"If short is fatal, a fortiori, non-service cannot be otherwise. Where there is a complete failure of service it matters not that, regardless, the affected party somehow became aware of the legal process against it, entered appearance and is represented in the proceedings. A proceeding which has taken place without service is a nullity and it is not competent for a court to condone it"

[58] The above principle was duly adopted in the case of ***Central Procurement Board v Nangolo N.O.***[6]

Who is an interested party?

[59] It submitted further and again with reference to ***Nangolo's case*** that any party that stands to be detrimentally or positively affected by the decision the Review Panel makes is interested, therefore should be afford the right to be heard.

Improper commissioning of the 6th Respondent's Replying Affidavit

[60] That the error or mistake of not attaching last page of commissioning of oath by the 6th Respondent can be cured by the submission of an explanatory affidavit from the commissioner of oath and thereafter the Review Panel has the discretion to accept the affidavit and apply *presumption of regularity* principle.

[61] The Review Panel was referred to the cases of ***Black Range Pty Ltd v Minister of Mines and Energy***[7] at para 18, as well as ***Rally for Democracy and Progress v Electoral Commission of Namibia***[8] at para 23, in both instances it was held that:

"the rule of law is one of the principles upon which our state is found. The principle of legality is one of the incidents that flow from the rule of law. It follows then that by virtue of the presumption of regularity, administrative acts – even those that may later be found to have been invalid – attract legal consequences until they are set aside or avoided".

[62] ***In S v Kahn***[9] court stated that it has discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether substantial compliance with the regulations has been proved or not.

[63] Further reference was made to ***Prosecutor-General//New Africa Dimensions CC*** **and Two Others**[10], in which it was held that:

"The true principle intended to be conveyed by the rule (which the author cites in the form omnia praesumuntur rite et solemniter esse acta) seems to be that there is a general disposition in Courts of Justice to uphold official, judicial or other acts rather than to render them inoperative; and with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts and by which they were probably accompanied in most instances, although in others the assumption rests solely on grounds of public policy".

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[6] (HC-MD-CIV-MOT-REV-2017/00441) [2018] NAHCMD 357
[7] SA 09/2011
[8] 2010 (2) NR 487 (SC)
[9] (A) at 900C
[10] POCA 10/2012[2016] 123 page 40

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Whether the "TOTAL BID PPRICE" was a requirement or not in terms of the bidding document?

[64] That ITB 9.1 read with ITB 13 provides for the set of documents that comprises of the Bidding documents, of which the cover page is not mentioned. The total bid amount is therefore not a requirement in terms of the bidding documents.

[65] Further that the 1st Applicant did not raise grounds relevant to the bidding documents but rather irrelevant attacks on the 6th Respondent. Equally, the 2nd Applicant merely wants to dictate how the bid concerned should have be evaluated.

FINDINGS OF THE REVIEW PANEL

[66] Having meticulously applied its mind on the evidence led by the Applicants and Respondents, specifically the 1st and 2nd Respondents, both in terms documentary and verbal representations during the review hearing, the Review Panel held the following in respect of the *points in limine*:

Non-Compliance with Regulation 42(4)

[67] That the Application is indeed opposed by the 1st and 2nd Respondents who have duly filed their replying affidavit in accordance with Regulation 42(4). The Review Panel agrees with the reasoning of the 1st Respondent that in terms of said regulation there was no legal obligation on its part to file or serve its replying affidavit to the allegations made by the both the 1st and 2nd Applicants respectively, but rather the only obligation was for it to file such replying affidavit with the Review Panel within two (2) of being served with the copies of the review application. This was done to the satisfaction of the Review Panel. This same principle was to apply if a replying affidavit by an interested party was in contestation in as far as service is concerned.

[68] Although the 6th Respondent relied on the ruling in the ***case of Nangolo,*** which was replicated a principle held in ***Knouwds N.O case***, to the effect that:

"if short is fatal, a fortiori, non-service cannot be otherwise. Where there is a complete failure of service it matters not that, regardless, the affected party somehow became aware of the legal process against it, entered appearance and is represented in the proceedings.

[69] The Review Panel is of a well-considered view that the facts in ***Nangolo's case*** relate to a non-service to the respondent, to whom the applicant owed a legal obligation to effect service in terms of Regulation 42(4) in order to have enabled the respondent to meet the case it had faced. Such cannot be equated to the facts in present case, in terms of which the 1st and 2nd Applicants are the patrons of the Review Applications, who wilfully and preparedly sponsored the actions against the respondents.

[68] In addition the 1st and 2nd Applicants as *dominus litis* of Review Applications ought to have known the exact provisions of Regulation 42(4), such that they could have followed up with the Review Panel Secretariat to ascertain if there were replying affidavits to their applications, rather than adopting a wait and see attitude.

[69] It follows therefore that the point *in limine* regarding the non-service of copies of the replying affidavit by the 1st Respondent is dismissed.

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Improper commissioning of the 6th Respondent's Replying Affidavit

[70] That the Review Panel is of a well-considered view, that it was not the intention of the Public Procurement Act to subject the proceedings in terms of Section 59 of the Act read with Regulation 42(4) in as far as replying affidavits are concerned, to formally and legalistic procedures of normally administering, commissioning and authenticating affidavits in terms of the Justices of Peace and Commissioners of Oaths Act. No. 16 of 1963 and/or practices adopted for court related processes. Rather the intention of the Act is to ensure that bidders have easy and fast access to justice in a less legally formalistic and less costly manner. Furthermore, the Public Procurement Act does not prescribe the manner and the form that the replying affidavit contemplated under Regulation 42(4) should assume.

[71] In addition, although the 6th Respondent's replying affidavits assumed styles often followed in the litigious processes, the deponent thereto does not aver or purport that such affidavits have been made before a person referred to under subsection 8(1) and/or authenticated in accordance with subsection 8(2) of the Justices of Peace and Commissioners of Oaths Act Justices.

[72] The Review Panel aligns with the reasoning of the 15th Respondent such that the Applicants cannot demand that the replying affidavits by the 1st and 6th Respondents and/or any other interested party be commissioned by a Commissioner of Oath in accordance with the forementioned, when the Review Applications themselves are not accompanied by founding affidavits administered and authenticated in the manner prescribed in terms of the Justices of Peace and Commissioners of Oaths Act Justices or practices for court proceedings. Moreover, if it was the intention of the Public Procurement Act, that the affidavits for the purposes of Regulation 42(4) follow court practices, the Act would have introduce three types of affidavits, namely *founding, answering* and *replying*.

[73] Also assuming for a moment that it was the intention of the Act to have the replying affidavits conform to legalistic formalities, the Review Panel leans towards the position taken in ***S v Kahn case*** as cited above that court has discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether substantial compliance with the regulations has been proved or not. In the same way, the Review Panel also reserved the discretion to either refuse or reject the affidavits not attested in accordance with the Justices of Peace and Commissioners of Oaths and/or its regulation or otherwise.

[74] The above should be viewed in accordance with the ruling in ***Prosecutor-General//New Africa Dimensions CC and Two Others*** that:

> "the *true principle intended to be conveyed by the rule seems to be that there is a general disposition in Courts of Justice to uphold official, judicial or other acts rather than to render them inoperative; and with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts and by which they were probably accompanied in most instances, although in others the assumption rests solely on grounds of public policy".*

[75] In this premise, it should be the intention of the Act that the Review Panel does not just for the sake of it, render inoperative acts legally and regularly performed in the advancing of the objects of the Act'.

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[76] The Review Panel is however reluctant to agree with the 6th Respondent that the principle of the presumption of regularity stated in the ***Black Range Pty Ltd v Minister of Mines and Energy and Rally for Democracy and Progress v Electoral Commission of Namibia cases*** would apply in this instance, because the act concerned herein is not administrative in nature, but rather a mere private act.

[78] It follows therefore that also this point regarding improper or non-commissioning of the replying affidavits by the 6th Respondent is accordingly dismissed.

The 5th Respondent has become *functus officio* in its first recommendation to the 1st Respondent to award the procurement contract to the 1st Applicant.

[79] In respect of this point *in limine* and after a careful consideration of the bundles of evidence in relation thereto, the Review Panel agrees with the contestation of the 1st Respondent that the 5th Respondent is a subordinate structure to the 1st Respondent. As such in the normal order of things, the 5th Respondent actions are subject to the review of the 1st Respondent. This considered in accordance with Section 9(1)(l)(i) –(iii) means that the 5th Respondent could therefore not have become *functus officio* on the basis of its first recommendation to the 1st Respondent to award the procurement contract to the 1st Applicant.

[80] In addition, a functionary only becomes *functus officio* if its decision is published or communicated, such that it becomes immune from changes. In the case of ***President of the Republic of South Africa & others v South African Rugby Football Union & Others***[11], the Constitutional Court, in dealing with the President's power to appoint a commission of enquiry, held that:

"the appointment 'only takes place when the President's decision is translated into an overt act, through public notification' and that prior to this overt act, he was 'entitled to change his mind at any time".

[81] Reliance is also placed on Hoexter's academic summation of the above position that[12] to the effect that: *"in general, the functus officio doctrine applies only to final decisions, so that a decision is revocable before it becomes final. Finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it".*

[82] The same principle was adopted with overly approval in the case of ***Member of the Executive Council for Health, Eastern Cape Province v Kirland Investments***[13] para 15, it was held that:

"the fact that the decisions were not communicated or otherwise made known has an important effect: because they were not final, they were subject to change without offending the functus officio principle".

[83] Therefore even without the Review Applications by the 1st and 2nd Applicants, the 5th Respondent was still entitled to change its minds on its recommendation in terms of the first evaluation report, at any time on the emergence of new facts and in the absence of an overt act, through publication of its action.

[11] 2000 (1) SA 1 (CC)
[12] Cora Hoexter Administrative Law in South Africa (2 ed) (2012) para 278.
[13] (473/12) [2013] ZASCA 58 (16 May 2013)

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[84] On the basis of the above, the Review Panel is not convinced that the 5th Respondent had become *functus officio* in its first recommendation to the 1st Respondent to award the procurement contract to the 1st Applicant and accordingly this point *in limine* is dismissed.

Non-Compliance with Section 26(7) (which point in an event already raised in the Review Application of the 1st Applicant)

Section 26(7) provides that:

"The number and level of expertise of members of a bid evaluation committee depend on the value and complexity of the procurement requirement concerned, but in all cases the number of members is odd numbers with a view to enable majority decisions".

[85] The 2nd Respondent contested on this point *in limine,* that in adjudicating same regard be held to Regulation 9(3), which provides that:

"The majority of members of a committee present at a meeting of the committee, which members must include the chairperson, deputy chairperson and financial advisor or their alternate members constitute a quorum at the meeting".

[86] The Review Panel is of the views that relevant in this context is that Section 26(7) read with Regulation 13 deals with the constitution of the 5th Respondent, but does not provides for how the 5th Respondent should go about transacting its meeting businesses following the completeness of its constitution. The procedures on how the 5th Respondent may transact its meeting businesses are provided for in terms of Regulation 9(3), such that a committee already constituted by an odd number in terms of membership in accordance with Section 26(7), would proceed to have a legitimate meeting provided there is a quorum. This would essentially mean that a committee whose members are three (3), its quorum would be two (2) members and therefore will be able to have a legitimate meeting if one of its members is absent.

[87] The above however should be read in context with Section 26(7) whose intention is to enable majority decisions and by extension preventing an "equality of votes". Be it as it may, there was no evidence led in the present case that the recommendation that emerged from the meeting concerned lacked the support of the majority and/or that there was a voting at the meeting, resulting in an equality of votes.

[88] It is further observed that the meeting in contestation was a continuation meeting and not a decisive meeting where the recommendation was made and subsequently the bid evaluation report.

[89] In consistency with above, this point *in limine* is also equally dismissed.

Non-Compliance with Regulation 42(3)

[90] It was argued both by the 6th and 15th Respondent that the Review Applications were not properly before the Review Panel on the basis that not all interested parties were served with copies of the Applications as provided for in terms of Regulation 42(3). Further that where service was observed it was done outside the timeframe prescribed in terms of Regulation 42(1). Specifically the 6th Respondent was served on the 8th day. The 6th Respondent also

contested that the application fee accompanying the 1st Applicant's application appears to have been paid outside the timeframe.

Who is an interested party? or Not all interested parties were served by the Applicants

[91] The 1st Applicant argued that the interested parties in this instance, apart from the 1st Respondent are only the bidders that applied to the 1st Respondent for the reconsideration of their bids during the standstill period. They are the two applicants, 9th Respondent, 11th Respondent and 12th Respondent respectively. As such they were accordingly served.

[92] On the other hand, the 6th and 15th Respondent contested the above assertion. The 15th Respondent argued that every bidder that participated in the bid concerned remain interested in the process or the bid, including the outcomes of the review proceedings. The 6th Respondent avowed that an interested party is a party that stand to be detrimentally or positively affected by the decision of Review Panel. In support of its contention the 6th Respondent cited the case of ***The Central Procurement Board v Nangolo N. O***, where it held:

"it has been authoritatively stated in this jurisdiction that the right to be heard is presumed in every legislation, unless Parliament, in its manifold wisdom, in express and unambiguous terms, decides to exclude it. No reader of the act must be left with the misleading and pernicious impression or view that the Panel makes any of the listed decisions on its whims and caprices, particularly without having heard all the interested parties who stand to be detrimentally or positively affected by the decision they make"

[93] The Review Panel agrees with the above assertion by the 6th and 15th Respondent, but dismisses the allegation that the non-compliance by the 1st and 2nd Respondents is fatal. This is on the basis that although Regulation 42(3) is peremptory that the supplier or bidder MUST SERVE COPIES of the Review Application on a public entity and ON ANY OTHER INTERESTED PERSON, the law in terms of Regulation 42, foresaw the possibility of failure on the part of any supplier or bidder wishing to bringing an application for review, in complying with the said Regulation. To this end, Regulation 42(5)(a) places a discretion before the Review Panel to:

"at any time prior to the date of the hearing of a review application at its own initiative or on application by a person and if it is convenient to do so, allow a number of persons who has a claim for review against a public entity or any other interested persons to join the review proceedings as applicants against the same defendant or as defendants against the same applicant".

[94] The Review Panel is of a well-considered position, that where there has been a failure in service and an interested party happen to be joined in accordance with Regulation 42(5) and in good time, this should be regarded as a condonation for non-compliance with the said regulation, on the part of a bidder or supplier who is *dominus litis* and therefore the application must be allowed stand. This should however not bear if the joining has been be done, but on a short notice, such that the interested party's rights to a fair process and hearing is parted with.

[95] The above is consistent with the principle held in the case of ***Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & Others***[14] at

[14] **2008 (2) SA 481 (SCA)**

para 17 and was adopted with approval in the case of ***Dr J S Moroka Municipality v Betram (Pty) Ltd & Another***[15] that:

"[O]ur law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted".

[96] Taken into context, if our courts allows condonation with peremptory requirements on specified grounds, so should this principle find applicability in administrative enquiries of which review hearing is one. Furthermore, that a condonation by evoking Regulation 42(5)(a) is compatible with public interest as it advances the interest of justice and is accordingly granted by the Review Panel in whose benefit the provision was enacted.

[97] Moreover the joining was done in good time and when in the views of the Review Panel was convenient to so do. Thus an allegation that the rights to be heard of any of the interested parties not served by the Applicants, but only joined by the Review Panel, have been violated is a fallacy.

[98] While the Review Panel agrees with the 6th and 15th Respondents that any interested party is a party that stands to be detrimentally affected by its decision, it disagrees that it does not have the power to condone non-compliance with peremptory provisions. It follows therefore, as the shadow follows the movement of the mother body, that the non-service to all interested parties by both the 1st and 2nd Applicants in terms of Regulation 42(3) is condoned by the operation of Regulation 42(5)(a).

Service the 6th Respondent and others were served outside the seven days prescribed interns of Regulation 42(1)

[99] The 6th and 15th Respondents again argued that the 1st and 2nd Applicants failed to serve on the 6th Respondent and any other interested party copies of the review applications within the prescribed 7 days in terms of Regulation 42(1) and that they were only served with copies of the Review Application on the 8th day. They emphasized that the Regulation 42(3) should not be read in isolation but in accordance with Regulation 42(1) (referred to the ***Government of the Republic Namibia v Geoffrey Kupuzo Mwilima, Nkumbula v Attorney General*** as well as ***Attorney-General v H R H Prince Augustus*** . Further that because of late service on the 8th day, the 6th Respondent) only had one (1) day of the two (2) prescribed days in terms of Regulation 42(4) for filing the replying affidavit to the review application(s) with a resultant effect that its right to be heard is adversely affected if not completely diminished. In this regard the 6th Respondent submitted that of Regulation 42(1) – 42(4) are peremptory and no flexibility or condonation thereto is permissible (referring to ***Puma Chemicals v Labour Commissioner*** case), hence the Application are fatal (referring to ***Knouwds N. O v Josea & Another*** as well as ***The Central Procurement Board v Nangolo N.O***).

[100] None of the above however could find favour with the Review Panel on the basis that the 6th and 15th Respondent appear to have misdirecting themselves by importing "7 days" prescribed in terms Regulation 42(1) into Regulation 42(3). The Review Panel is of the views that this is not the intention of the legislature because otherwise a Review Application brought by close of business on the 7th day and which involves the multiplicity of interested

[15] **2014 (1) SA 545 (SCA)**

parties, the process of service in respect thereto may prove impossible if the timeline prescribed in terms Regulation 42(1) is to be conveniently incorporated into the provision of Regulation 42(3). This would render the object of the Act redundant.

[101] A cursory look at exact wording of the two provisions reveals that Regulation 42(1) deals with LODGEMENT and APPLICATION with and at Review Panel, whereas 41(3) deals with SERVICE to the Public Entity and any other interested party. It is therefore evident that timeline prescribed in terms of Regulation 42(1) is meant for lodgment and application and not for service. Therefore the principles in any of the above cited cases would not apply.

[102] Similarly, the 6th Respondent was served with copies of the Review Application on the 11th July 2019, constituting five (5) days before the review hearing, sufficient time to file its replying affidavit. Therefore the argument of the lateness of service with a resultant effect of diminished rights coupled by a plea to disregard the review applications cannot stand.

The 1st Application not accompanied by the fee prescribed in terms of Regulation 42(2)(b) or was paid outside the prescribed period

[103] This point was explained during the review hearing that the 1st Applicant paid the application fee during the standstill period but was then advised to first apply to the 1st Respondent for a reconsideration of its bid. However its paid application fee remain as a credit with the Review Secretariat.

[104] There is also no prescribed time as to when the application fee should paid save that it must accompany the application in terms of Regulation 42(2((a). This point therefore is trivial.

The 1st Application not being on Review Application form (RP/01) as prescribed

[105] The Review Panel is not aware of any legal Review Application prescribed form in terms Section 59(1) and promulgated in terms of Section 79(1)(a). As it stand review applications are submitted in the form that the applicant chose. This point is therefore of no substance.

Non-Compliance with Section 51(4) of the Act

[106] The 1st Applicant argued that both the 1st and 5th Respondents contravened Section 51(4) of the Act by disregarding the total bid amount in the examination, evaluation and awarding of the procurement contract concerned herein.

[107] The Review Panel is of the views that this section be generously, but yet specifically interpreted to accord with the intention of the Act. The Section provides that:

"At a bid opening session, the name of the bidder, the total amount of each bid, any discount or alternative offered, and the presence or absence of any bid security, IF REQUIRED, is read out and recorded, and a copy of the record is made available to any bidder on request".

[108] The Review Panel is of the views that the 1st Applicant misdirected itself in the interpretation of the above section as it appears to believe that provision is peremptory. To the contrary it is not. This is underpinned by a *"COMMA"* after bid security and immediately succeeded by a phrasal adjective *"IF REQUIRED"*, to highlights that the latter applies to all the preceding listed items. For all intents and purposes, *"THE TOTAL AMOUNT OF EACH BID"* is among the listed items to which the phrasal adjective "if required" applies.

[109] Therefore mandatory compliance with Section 51(4) is only required if compelled in terms of the bidding document. Whether this was a case in the present matter, we will deal with it when we evaluate the bidding requirements.

Compliance with Regulation 7(3)

Regulation 7(3) provides as follows that:

> *"The process of examination and evaluation of bids referred to in sub regulation (2) must be completed within 14 days after the opening of the bids or such other period as a public entity may extend, but not exceeding 30 days."*

[110] The Review Panel on its own accord enquired if the period of about 34 days between the 9th November 2018 when the evaluated started and the 12 December 2018 in compliance with Regulation 7(3).

[111] This was found to be in compliance on the basis that the 14 days (automatic after the opening of the bids) and the 30 days applicable to extension (which was granted) are independent of each other. The Act and/or its regulation do not provide for the timeline in case of back referral in terms of Section 9(1)(l)(ii).

SUBSTANCE OF THE REVIEW APPLICATIONS

[112] Having disposed of all the points raised *in limine*, within the context of the Public Procurement Act and its regulation, other applicable legislation as well as relevant case law as points of reference, the Review Panel now return to the material allegations contained in the Review Applications.

[113] Notwithstanding various grounds of review avowed to in the review applications and the asserted intricacies during the review proceedings, the dispute in main, gyrates around whether the disclosure of the "*TOTAL BID PRICE or AMOUNT*" was a requirement for the bid concerned.

[114] Furthermore, whether, the bid by the 6th Respondent was compliant in all aspects, including disclosure of the total bid price or amount, with the bid requirements. Also whether there was a miscarriage of objectivity and fairness on the part of the 1st and 5th Respondents in examining, evaluating and awarding the procurement contract concerned to the 6th Respondent.

[115] The answer to the above dispute-based questions, lies in both the Law in terms of the Public Procurement Act and its Regulations as well as relevant bidding document(s). It suffices noting therefore that bidding document(s) create a relation between the bid and the relevant provisions of the Act and/or its Regulations. This become apparent when viewed in the context of Section 52(9), which provides that:

> "*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 most economically advantageous bid*".

[116] From the foregoing, it is clearer that the intention of the law is to the effect that notwithstanding anything contained in the Act and its Regulation regarding evaluation, same is done according to the criteria and methodology set in the bidding document.

[117] It flows so well that a bidder seeking to challenge an award for a procurement contract in terms of our laws must rely on the *evaluation criteria and methodology set in the bidding documents* and if such a challenge is to succeed the bidder must again prove that there was a material deviation, failure of which the challenge must be dismissed.

[118] We need not to repeat ourselves as far the provisions and an appropriate interpretation of Section 51(4) of the Act is concerned, as we have earlier sufficiently dealt with same. Thus we will proceed to look and analyse the bidding documents relevant to bid in question.

[119] The 1st Applicant submitted that a disclosure of the total bid amount, which the 6th Respondent failed to make was required by the bid document in terms ITB 2.2, ITB 2.3 and ITB 36.1 under Evaluation Criteria in the bidding documents and that it was again requested in terms of the letter by the 5th Respondent dated 23rd November 2018.

[120] ITB 2.2 of the Evaluation Criteria provides that:

"In response to community empowerment and poverty alleviation, this criterion aims to encourage and compel the bidders to earmark some of their proceeds towards supporting projects and uplifting a community or communities and/or contributions towards poverty alleviation in Namibia. Bidders will be assessed on sustainability of initiatives and the percentage of proceeds that will be budgeted and directed towards Corporate Social Responsibility. Bidder proposal must include a detailed budget and attach a minimum 5 (five) letters of support from the target institutions or communities. The bids will be evaluated as follows:

Scoring:	*0% of the total income or non-sustainable initiatives*	*= 0 points*
	1 – 1.99% of the total income	*= 2.5 points*
	2 – 2.99% of total income	*= 5 points*
	3 – 3.99% of total income	*= 7.5 points*
	4 – 4.99% of total income	*= 10 points*
	5% + of total income	*= 12.5 points"*

[121] ITB 2.3 of the Evaluation Criteria provides that:

"Training is imperative to ensure that Namibia continues to develop essential diamond technical skills and to ensure that the trusted job of sorting and valuing rough diamonds in Namibia does not revert to expatriates. An in depth assessment of this criteria would look at projected costs budgeted for training, number of people intended to be trained and the areas of training that the Bidder will be assessed on sustainability of proposal and the percentage of proceeds that will be budgeted and directed towards the training proposal. Bidders must commit to training a minimum 10 (ten) people over the term of the contract. Bidder must prepare a proposal, which shall include a detailed budget. The bids will be evaluated as follows:

Scoring:	*0% of the total income or non-sustainable training proposal*	*= 0 points*
	1 – 1.99% of the total income	*= 2.5 points*
	2 – 2.99% of total income	*= 5 points*
	3 – 3.99% of total income	*= 7.5 points*
	4 – 4.99% of total income	*= 10 points*
	5% + of total income	*= 12.5 points"*

[122] While indeed ITB 2.2 and ITB 2.3 formed part of the Evaluation Criteria and Methodology, the evidence led by the 1st Applicant is contrary to their provisions because neither ITB 2.2 nor ITB 2.3 are speaking of the total bid price.

[123] In response, both the 1st and 6th Respondents disputed that total bid amount was a requirement in terms of the evaluation criteria and methodology because this bid was a unit rate bid and the successful bidder will be remunerated based on the rates indicated under Section 6.1, page 53 of the bidding document. In addition the 1st Respondent stressed that ITB 36.1 has been amended by Section II of the bidding documents to the effect that it was not applicable to this tender. The 6th Respondent emphazised the applicants are relying on the cover that made provision for total bid price, but same cover page is not listed as constituting the bidding documents in terms of ITB 9.1 read with ITB 13 (providing a list of documents comprising of bidding documents). Also that ITB 24.3 is not part of the evaluation criteria.

[124] Again both 1st and 6th Respondent stressed that although ITB 26.1 allows the clarification to be sought, including bread down of prices, it does not in accordance with Section 52(1) of the Act allows changes in the price or substance of the bid, to which the 23rd November 2018's letter is contrary. Neither the 1st Applicant (although initially appeared to advance that on the basis of the said the total bid amount be considered as a requirement) further disputed this nor did the 2nd Applicant contested same at all, at all.

Section 52(1) provides that:

*"The Board or a public entity may seek clarification during the examination of bids from any bidder to facilitate evaluation, but it **MAY NEITHER ASK NOR PERMIT** any bidder to **CHANGE THE PRICE or SUBSTANCE** of its bid".*

[125] During the hearing it was tendered in evidence that at the bid opening, majority of the bidders, with an exception of one or two did not provide total bid prices. In the views of the Review Panel, the 23rd November 2019's letter which requested bidders to provide "total offer prices" when they have already provided the price rates, bordered on the contravention of Section 52(1), therefore should not have taken place in the first place.

[126] ITB 6.1 under the General Conditions of Contract of the bidding documents, provides that:

*"the Service Provider's remuneration shall not exceed the contract **PRICE RATES** and shall be subject the **QUANTITIES PERFORMED AS AGREED** with the purchaser including all subcontractors' s costs, and all other costs incurred in Appedix A".*

[127] ITB 14.2 on the other hand provides that:

*"the bidders shall fill in **RATES** and **PRICES** for all items of the services described in Section VI the Scope of Services and Performance Specifications and listed in Section V the Activity Schedule, Items for which **NO RATE** or **PRICE** is entered by the Bidder will **NOT BE PAID** for by the Employer when **EXECUTED** and **SHALL BE DEEMED COVERED** by **OTHER RATES** and **PRICES** in the Activity Schedule".*

[128] ITB 28.1 also provides that:

*"Bids determined to be substantially responsive will be checked by the Employer for any arithmetic errors. Arithmetical errors will be rectified by the Employer on the following basis: if there is a discrepancy between **UNIT PRICES** and the TOTAL PRICE that is OBTAINED BY MULTIPLYING THE UNIT PRICE and THE QUANTITY, the UNIT PRICE SHALL PREVAIL, and the total price*

shall be corrected; if there is an error in a total corresponding to the addition or subtraction of subtotals, the subtotals shall prevail and the total shall be corrected; if there is a discrepancy between the amounts in figures and in words, the amounts in words will prevail"

[129] Although ITB 28.1 makes reference to the TOTAL PRICE which ought to be OBTAINED BY MULTIPLYING THE UNIT PRICE and THE QUANTITY, this ITB and entire bidding documents fall short of providing the applicable quantities. However still therein it emphazised that the UNIT PRICES shall prevail in the case of discrepancy.

[130] Having had regard to ITB 6.1, ITB 14.2 and ITB 28.1 above, it became illustratively clear that the intention of the 1st Respondent and/or the funding agency thereto throughout the bidding documents has been for bidders to provide PRICE RATES because QUANTITIES ON WHICH THE SERVICES ARE TO BE PERFORMED were NOT YET KNOWN, BUT ONLY TO BE AGREED UPON THE AWARDING OF THE PROCUREMENT CONTRACT (own emphasis). This is also the basis upon which the service provider (the bidder) will be remunerated.

[131] It is therefore reasonable and logical not to expect a bidder to provide a "TOTAL BID AMOUNT" based on an UNKNOWN QUANTITY OF ITEMS in terms of which the sought services are to be rendered. This was the same understanding assumed by the 6th Respondent in its response to the request for clarification sought by the 5th Respondent. Similarly the 1st Respondent was in this frame of mind when it referred the first evaluation report back to the 5th Respondent for re-evaluation on specified grounds, namely:

(1) To sanitize the report and make proper reference to ITB;

(2) To reconfirm that the facts are correct and evaluation was conducted as provided for in the ITB that was provided to the bidders.

(3) To demonstrate how the BEC arrived at the waiting criteria and whether it was provided for in the ITB.

[132] In affirmation of the above, was the 1st Applicant's response to the request to provide a total offer price, to which it indicated that the total bidding amount is based on an ASSUMPTION. This means that a total bid price provided by any bidder in terms of this bid is not premised on accuracy but on mere assumption, justifying why Rate Prices are preferred, hence they must prevail as underscored in terms of ITB 6.1, ITB 14.2 and ITB 28.1.

[133] Moreover, Phase 3 of the Section III – Evaluation Criteria against which the bids were to be evaluated, specifically provides that *"pricing for valuation done on the NAMDEB production and those from independent producers SHALL be EXPRESSED as a PERCENTAGE of the TOTAL VALUE OF THE PARCEL"*. Further that *"pricing in terms of provision of services as COURT WITNESS and EXAMINATION OF POLISHED DIAMONDS shall be expressed in N$ PER HOUR since these services do not entail valuation in their nature"*. The Review Panel could hardly find where the total bid amount was provided for in terms of the stated evaluation criteria.

[134] The Review Panel also agrees with both the 1st and 6th Respondents that sales/negotiations experience (negotiated the =10.8 carat goods), international exposure, DTC diamond box interpretation skills, resignation of personnel and having team members currently on

training as well as having more sorters than valuators are factors extraneous to the evaluation criteria and requirements in terms of the bidding documents.

[135] The Review Panel could further not find that the 1st and 5th Respondents irregularly and unfairly gave considerations to factors unrelated to qualifying criteria in allocating higher marks and awarding the procurement contract concerned to the 6th Respondent or that the latter's bid was subservient to the bid of either the 1st or 2nd Applicant or both. Alternatively, the Review Panel found no evidence that the awarding of the tender is marred by irregularities as alleged by the applicants.

[136] The Review Panel also concurs with the 1st Respondent that the concerns of both Applicants were adequately dealt with during the request for reconsideration. Also that the bid was awarded to the bidder with the highest TOTAL RESULTANT SCORE from a total of weighting of the technical and financial in accordance with evaluation criteria.

[137] The challenge to this procurement contract sought an order setting aside the tender award and in the event that such order is granted, each of the Applicants prayed that the tender be respectively awarded to it. Applications on merits are without substance, therefore apart from the fatal effect that the setting aside of a decision may have, nothing was found to justify its pursuit. Moreover, even the Review Panel could have established some anomaly in the manner the procurement contract concerned was award, the strengths of the ruling in the case of ***The Central Procurement Board v Nangolo N.O***, paragraph 46, page 19, the setting aside appears impossible. Thereunder it was held that:

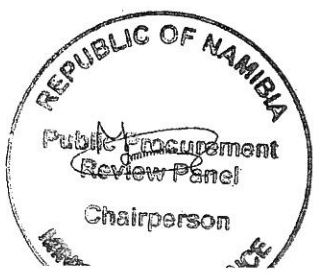
"It must be mentioned in this regard, that the applicant, having evaluated the applications for the tender in terms Section 55(5) of the Act, duly advised the 3rd respondent in the part that its bid'...is hereby accepted by the Central Procurement Board on behalf of the Roads Authority'. I am of the view that there can be no other manner of interpreting the nature and effect of that decision other than to conclude that the decision had the effect of bringing a procurement contract into force".

[138] Furthermore, in the same, the Court clearly pointed to the contradiction or conflict between Section 59 and 60 of the Act. It concluded under paragraph 53, page 21 that:

"it accordingly follows that in the instant case, a decision to award the tender to the 3rd respondent was taken. Besides the fact that that decision was fraught with serious problems, entitling this court to set it aside, it is in my view, expressed earlier in the judgement that the decision taken by the applicant in this matter resulted in the bringing of a procurement award into effect. For that reason, the Panel did not have the power in terms of Section 60, to set aside the decision and it should therefor stand".

[139] It flows from the foregoing judgement that it matters not whether there is a physical contract signed or not, but a mere decision to award the tender and which has been accordingly communicated to the successful bidder, brings the procurement contract into force as intended under Section 60(c) of the Act, therefore rendering a decision of the public entity immune from setting aside.

[140] In the present case, the 1st Respondent as the repository of powers for awarding tenders in accordance with prescribed thresholds, made a decision to award the tender concerned to the 6th Respondent. This decision was accordingly communicated to the 6th Respondent resulting in the procurement contract coming into effect, hence such a decision is immune from any challenge or action seeking to set it aside.



[142] Notwithstanding the above judgement therefore, following a vigorous evaluation of evidence, it is in interest of the public confidence, funding agencies and all procurement dealers that through review proceedings, the procurement practices in this country become robustly transparent and fair. And that public entities that strive to award tenders in accordance with the Law and Evaluation Criteria are incentivised by not setting aside their decisions on triviality. The best course to follow in this instance therefore is to dismiss the Review Applications by the 1st and 2nd Applicants and accordingly confirm the decision of the 1st Respondent to award the procurement contract to the 6th Respondent.

[143] In the result the Review Panel makes the following order;

(1) That the applications for review in terms of Section 59(1) of the Public Procurement Act, No. 15 of 2015, lodged by Prestige Diamond (PTY) Ltd and Global Diamond Valuator Namibia (PTY) Ltd, respectively, and which were in the end consolidated into one action, are hereby dismissed in terms of Section 60(a);

(2) Further that in terms of Section 60(e) of the Public Procurement Act, No.15 of 2015, the decision of the Central Procurement Board of Namibia to award Bid No. NCS/ONB/CPBN-02/2018: Procurement of Government Diamond Valuation Services to Gem Diamond Namibia (PTY) Ltd, is hereby confirmed;

(3) That this order take effect as of the 25th July 2019.

Dated at Windhoek, this 30th day of July 2019.

FILLEMON WISE IMMANUEL
REVIEW PANEL CHAIRPERSON (IRO THIS MATTER)

REPUBLIC OF NAMIBIA
Public Procurement Review Panel
Chairperson
MINISTRY OF FINANCE