



REPUBLIC OF NAMIBIA

MINISTRY OF FINANCE AND PUBLIC ENTERPRISES

PUBLIC PROCUREMENT REVIEW PANEL

**IN THE PUBLIC PROCUREMENT SUSPENSION APPLICATION HEARING
HELD ON 08 JULY 2024**

IN THE MATTER BETWEEN

CENTRAL PROCUREMENT BOARD OF NAMIBIA

APPLICANT

and

PAMO TRADING ENTERPRISES (PTY) LTD

RESPONDENT

IN A SUSPENSION APPLICATION MADE IN TERMS OF SECTION 68 OF THE PUBLIC PROCUREMENT ACT, 2015, AS AMENDED, READ IN CONJUNCTION WITH REGULATION 47 OF THE PUBLIC PROCUREMENT REGULATIONS

Coram: Mekondjo Katunga (Chairperson), with Lukas Kudumo Siremo, Prof Reiner Trede, Hellen Amupolo consenting and Tulimeyo Kaapanda (dissenting).

Heard: 08 July 2024

Decided: 08 July 2024

REVIEW PANEL ORDER

1. INTRODUCTION:

- 1.1 The Review Panel was constituted in terms of section 58 (1) of the Public Procurement Act, 2015, as amended to hear an application lodged by the Central Procurement Board of Namibia (CPBN), hereinafter referred to as the “Applicant”, against Pamo Trading Enterprises (Pty) Ltd, a bidder, hereinafter referred to as the “ Respondent” whereby the Applicant sought relief from the Review Panel to suspend the respondent in terms of section 68(d) of the Public Procurement Act, 2015 (the Act), as amended.
- 1.2 In line with Regulation 47(1), the Review Panel, on 20 June 2024, held its preliminary sitting to determine whether the application by the Applicant contains reasonable and concrete grounds that would warrant the Respondent to be suspended from participating in public procurement activities for a period to be determined by the Review Panel.
- 1.3 In the same vein and in line with Regulation 47(2), the Respondent was notified of the application before the Review Panel and accorded an opportunity to make written representations under oath. This was done in the letter to the Respondent dated 21 June 2024, which also contained an invitation to the suspension application hearing.

2. GROUNDS FOR SUSPENSION AS CONTAINED IN THE APPLICATION BY THE APPLICANT

- 2.1 According to the factual records submitted by the Applicant, the Respondent participated in the bidding process conducted by the Applicant on behalf of the Ministry of Health and Social Services for the Procurement of the Supply and Delivery of Meals in accordance with the Dietary Needs of Patients under Procurement Reference Number: G/OAB/CPBN-01/2022. Whereby Lot 4 (Erongo Region) was awarded to Tuthikameni Pamwe Investments CC (“Tuthikameni”), and when the bidder failed to provide the necessary Performance Guarantees, the award was withdrawn, and Pamo was selected to replace Tuthikameni.

2.2 The Applicant indicated that following the the Notice of Selection of Award, which was issued on 04 March 2024, one of the bidders, in the name of Nutrifood (PTY) Ltd applied for reconsideration on the grounds that it would seem that Pamo Trading Enterprises (Pty) Ltd had a history of non-compliance with health and safety standards and allegedly supplied contaminated food that is not fit for human consumption at the Ministry of Health and Social Services in the Khomas Region, this was not just done at one occasion but multiple times.

2.3 Furthermore, the Applicant submitted that the Board deliberated on Nutrifood's reconsideration application and decided that because it contained serious allegations, the Ministry of Health and Social Services had to be engaged to confirm such allegations, and in addition that Pamo Trading Enterprises (Pty) Ltd should be given an opportunity to respond to the allegations and show cause why the reconsideration application of Nutrifood should not succeed. In this regard, the Respondent responded by saying that Nutrifood's entire reconsideration application is based upon speculation, irrelevant and outdated information, and is not based upon evidence, amongst others.

2.4 Furthermore, the Applicant indicated that the Public Entity, through a letter dated 19 April 2024 confirmed that Pamo Trading Enterprises (Pty) Ltd which is the Respondent had breached several terms of the contract for the Provision of Meals to the Ministry of Health and Social Services in the Khomas Region (Procurement No: NCS/EP/1309FO-80/2019) during the execution of the contract. It also attached various investigation reports and correspondences dealing with the Respondent's breaches of the contractual terms.

3. POINTS IN LIMINE

3.1 Before the proceedings could hear the merits of the case, Mr Festus Hamukwaya of the Applicant raised a preliminary issue as follows:

3.1(a) The Applicant raised an issue relating to the Debarment Application hearing that was held on 04 July 2024 in the matter between the Ministry of Health and Social Services *versus* Pamo Trading Enterprises (Pty) Ltd. The Applicant is of the considered view that the hearing of its application for suspension be postponed to at least a period of a week to give an opportunity for the decision of the Review Panel to be delivered. This is so considering that if the entity is debarred, there would be no need for the suspension as the debarred is the most serious punitive measure in this regard.

3.1(b) In response, Adv R. Heathcote of the Respondent objected to the postponement, stating that the Applicant ought to have considered such an option, at least when the matter was set down for proceedings. The Respondent indicated that it fails to understand why the Applicant would wait until the day of the hearing to ask for a postponement while the Respondent has incurred legal costs, amongst other objection reasons.

Reflection on the Points *in limine* by the Review Panel

3.2 Having considered the preliminary issue raised by the Applicant, the Review Panel resolved not to postpone the hearing but rather give the Applicant the discretion to either withdraw its application and re-lodge it, if so wished, when the decision of the Review Panel on the referenced debarment application is delivered.

3.3 In reaction to this ruling, the applicant indicated that it would be ready to proceed with its application.

4. APPLICANT'S SUBMISSIONS DURING THE PROCEEDINGS

4.1 The Applicant reiterates that its case remains as laid down in its founding affidavit and its accompanying annexures and reads the same into the records.

4.2 The Applicant submitted that the Respondent participated in the bidding process conducted by the Applicant on behalf of the Ministry of Health and Social Services for the Procurement of the Supply and Delivery of Meals in accordance with the Dietary Needs of Patients, whereby Lot 4 (Erongo Region) was awarded to Tuthikameni Pamwe Investments CC. However, when the awarded bidder failed to provide the necessary performance guarantee, the award was withdrawn, and Pamo was selected for the award in line with Section 5(7) of the Act.

4.3 The Applicant further submitted that, following the issuance of the Notice of Selection for Award, a bidder in the name of Nutrifood (PTY) Ltd applied for reconsideration on the grounds that the Respondent had a history of non-compliance with health and safety standards and allegedly supplied contaminated food that was not fit for human consumption at the Ministry of Health in the Khomas Region and this happened in numerous occasions.

4.4 The Applicant submitted that the Board deliberated on Nutrifood's reconsideration application and, due to the nature of the allegations, it then directed that the Ministry of Health and Social Services be engaged to comment on such allegations. Furthermore, the Applicant indicated that the Ministry of Health and Social Services, through a letter, confirmed that the Respondent in the matter breached several terms of the contract for the Provision of Meals to the Ministry of Health and Social Services in the Khomas Region during the execution of the contract. It also provided various investigation reports and correspondences dealing with the Respondent's breaches of the contractual terms.

4.5 The Applicant indicated that it was on these bases, and after a thorough assessment, the Board resolved that an application for suspension should be made to the Review Panel to have the Respondent suspended from the current procurement process for the supply and delivery of meals in accordance with the dietary needs of patients (Procurement Reference No: G/OAB/CPBN-01/2022).

4.6 In addition, the Applicant indicated that its application is premised in terms of section 68(1)(d), which relates to misconduct relating to the execution of a procurement contract, having considered the conduct of the Respondent, under Procurement No: NCS/EP/1309FO-80/2019.

5. RESPONDENT'S SUBMISSION DURING THE PROCEEDINGS

- 5.1 Adv. R. Heathcote of Respondent's submission is that his client is not participating as a potential bidder in the bidding process under procurement reference number G/OAB/CPBN-01/2022 as his client has already been awarded Lot 4 (Erongo Region) by the CPBBN in respect of this bid, despite this award, and despite that no reconsideration of CPBN's decision has been made nor has any review proceedings been instituted within the statutorily prescribed standstill period and that CPBN's transgression of section 55(5) is indefensible and Pamo's rights are reserved for approaching any appropriate forum to enforce its rights accordingly.
- 5.2 In addition, the Respondent's submissions are that CPBN has no right whatsoever not to award the contract after the 14 days of reconsideration have lapsed. Furthermore, if there is no decision on the reconsideration application, CPBN can no longer decide after 14 days and has no right to extend such a period.
- 5.3 Furthermore, the Respondent is of the considered view that CPBN has no right to commission an investigation based on allegations by a competitor and, therefore, they (CPBN) be ordered to award the contract after the suspension application has been dismissed by the Review Panel
- 5.4 In addition, the Respondent referred to sections 65 and 66 of the Public Procurement Act, which deals with procurement integrity and provides serious criminal sanctions. Furthermore, these sections set the tone for procurement integrity. Section 68 deals with suspensions, debarment, and disqualifications of bidders and suppliers.
- 5.5 The Respondent's submission is that section 68(1)(d) provides for about three different grounds of misconduct, and none has made provision for suspension or debarment in events of contractual obligation breaches or breaches relating to a bidding process.
- 5.6 In this regard, the Respondent is of the view that section 68 1) (d) of the Act casts a wide net, but one dominant term repeats itself – misconduct. The Respondent further indicated that both the CPBN and the Ministry of Health and Social Services have indicated how Pamo breached various clauses in the concerned procurement contract; however, they failed to inform the Review Panel that these alleged breaches were remedied by Pamo Trading Enterprises. Further, the allegations of breaches of contract cannot amount to misconduct as a breach of contract or a valid complaint which has been remedied cannot amount to misconduct.
- 5.7 Furthermore, the Respondent's submission is that the CPBN and the Ministry have failed to allege that the Respondent is guilty of any misconduct as defined in section 68(1)(d), and thus, it is fatal, and the application for suspension must be dismissed. Furthermore, the Respondent indicated that none of the respondents either from the CPBN or the Ministry are authors of the complaint or evidentiary documents being relied on, and the fact that they are not the authors of such documents of which they have no personal knowledge which precludes them from relying on those documents on the basis of the hearsay rule and does not constitute a factual record.
- 5.8 The Respondent referred to the High Court proceedings whereby it indicated that it had taken legal actions against the CPBN in relation to a bid it participated in 2020 for the supply of Food stuff to government school hostels. This was after the Review Panel granted them an order setting aside the Board's Notice of Selection of Award and ordered a re-evaluation.

5.9 However, notwithstanding the Review Panel Order, the Board refused to comply, an action which necessitated the Respondent to approach the High Court, whereby the High Court ordered the Board to comply with the Review Panel's Order. Further, notwithstanding the High Court order, the Board equally ignored the same, which forced the Respondent to file for contempt of court against the Board.

5.10 Considering the above, the Respondent is of the view that CPBN and its board members are hostile towards Pamo Trading Enterprises (Pty) Ltd and intend to 'punish' the Respondent for applying to the High Court to hold them in contempt. Therefore, their (CPBN) application for suspension is based upon retaliation and not because of the Respondent's alleged non-compliance.

6. FINDINGS OF THE REVIEW PANEL

After having heard Mr Festus Hamukwaya, for the Applicant and Adv. Raymond Heathcote, for the Respondent and considered all the factual records before it, the Review Panel found the following and decided on the matter in accordance with Regulation 47(3), as contained hereunder.

6.1 The Review Panel has considered the application by the Applicant and the accompanying documentation and affirms that the same constitutes a factual record referred to in Regulation 46(3)(d) of the Public Procurement Regulations, 2017, to the Public Procurement Act, 2015.

6.2 The Review Panel considered and assessed the factual- records in terms of Section 68(2)(a) of the Act as provided by the Applicant alongside the submissions by the Respondent on the Respondent's non-compliance and breaches of contract, and it was convinced that the evidence is overwhelming and constitutes misconduct in terms of section 68(1)(d).

6.3 The Review Panel established that the Applicant seeks relief for the Respondent to be suspended only from the procurement processes relating to Procurement Bid Reference: G/OAB/CPBN-01/2022- *for the Procurement of the Supply and Delivery of Meals in accordance with the Dietary Needs of Patients.*

6.4 The Review Panel member with dissenting views is convinced that Pamo Trading Enterprises remedied the breaches in terms of the contract provisions and thus cannot amount to misconduct cited in Section 68(1)(d). The listed breaches are anticipated in the course of the typical contract implementation, as they are influenced by factors beyond the implementing parties. The member is of the view that CPBN's application for suspension must be dismissed.

7. DECISION OF THE REVIEW PANEL

Having considered the above findings and records as submitted, the Review Panel makes the following order:

7.1 That in accordance with Regulation 47(3)(a), read together with section 68(1)(d) of the Public Procurement Act, 2015, as amended, the Review Panel hereby suspend the Respondent (Pamo Trading Enterprises (Pty) Ltd, from participating in the procurement processes of Bid Reference number G/OAB/CPBN-01/2022.

7.2 That the Respondent is only suspended from bid reference number G/OAB/CPBN-01/2022 in line with Regulation 49(1)(a) (b) of the Public Procurement Regulations, 2017.

7.3 That this order is effective from 08 July 2024.



Mekondjo Katunga Chairperson
CHAIRPERSON (in r.o. this matter)