

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

Practice Direction 61

Case Title: TJ Civil Technology CC and The Chairperson of the Review Panel Hardap Regional Council Sebke Civil Contractors CC Pena Trading Enterprises CC CSV Construction Namibia (Pty) Ltd Balkanzar Investment CC JV Africawayca Group Peaceful Trading Enterprise CC JV Penatu Trading CC NRK Technical Services CC JV Tikhoes Trading Enterprises Vero Group CC	Applicant 1 st Respondent 2 nd Respondent 3 rd Respondent 4 th Respondent 5 th Respondent 6 th Respondent 7 th Respondent 8 th Respondent 9 th Respondent	Case No: HC-MD-CIV-MOT-REV- 2023/00545 Division of Court: High Court (Main Division)
Heard before: Honourable Justice Claasen	Heard On: 12 December 2023 Delivered: 20 December 2023.	

Neutral citation: *TJ Civil Technology CC v The Chairperson of the Review Panel* (HC-MD-CIV-MOT-REV-2023/00545) [2023] NAHCMD 831 (20 December 2023)

The order:

1. The applicant's non-compliance with the rules of this court pertaining to dispensing with the forms, service and time periods for the exchange of pleadings provided for in the Rules is condoned and this application is heard on an urgent basis as provided for in rule 73(3);
2. The decision made by the first respondent (Review Panel) dated 11 November 2023 that the notice of selection of award by the second respondent (Hardap Regional Council) dated 13 October 2023 for Bid No. W/ONB/HRC-002/2023 is ultra vires, unlawful and to terminate the procurement proceedings and start afresh in terms of section 60(f) of the Procurement Act 15 of 2015 as amended is hereby reviewed and set aside;
3. The award for the tender for Bid W/ONB/HRC-002/2023 for the upgrading of the existing sewer oxidation ponds at Hoachanas Settlement in the Hardap Region to TJ Civil Technology CC (the applicant) by the second respondent is hereby confirmed;
4. The second respondent must comply with section 55(5) of the Public Procurement Act 15 of 2015 (as amended) and award the contract under W/ONB/HRC-002/2023 for the upgrading of existing sewer oxidation ponds at Hoachanas settlement in the Hardap Region to TJ Civil Technology CC (the applicant);
5. The third respondent is directed to pay the applicant's cost.
6. The matter is regarded as finalised and is removed from the roll.

Reasons for the order:

CLAASEN J

Introduction

[1] The applicant was the successful bidder for the upgrading of existing sewer oxidation ponds at Hoachanas Settlement in the Hardap Region. That was up until the award was set aside by the Review Panel. The applicant issued a notice of motion on an urgent basis basically seeking an administrative review. The grounds of review were that the Review Panel made a decision without jurisdiction, ie in the absence of an application by the second respondent to reconsider its decision, nor was it served on the applicant. Secondly, that there was non-compliance with regulation 42(3) of the Public Procurement Regulations. The application was opposed by the third respondent only.

Summary of background

[2] I turn to the facts that forms the backdrop of the application. The facts emerged from the parties' affidavits and annexures and are largely common cause, save to say that the parties attached interpretations to the facts.

[3] The applicant received a Notice for Selection of Award from the second respondent on 13 October 2023 for a tender issued under number W/ONB/HRC-002/2023. Part B of the said Notice indicated the standstill period as commencing on 13 October 2023 until 23 October 2023 and informed the unsuccessful bidders about the steps that they may take in case they were dissatisfied with the award.

[4] The third respondent used that opportunity and wrote a letter (the first letter) to the second respondent. That letter was dated 17 October 2023 and it was entitled 'Letter of Objection to Notice of Award'. Apart from objecting to the award, the letter requested disclosure of the reasons for the evaluation that resulted in it not being chosen. The second respondent replied on the same date and informed the third respondent that the determination was based in accordance with the bid index of each of the bidders and what it entails.

[5] Dissatisfied with that response the third respondent wrote a second letter on 18 October 2023 to the second respondent, wherein it stated that the explanation given did

not address their objection and that it has left the third respondent with no option but to continue to seek recourse at the Review Panel. The third respondent asserts in its answering affidavit that a meeting ensued between the second respondent on 20 October 2023 and that no minutes were taken at the said meeting. After that the second respondent addressed a letter to the third respondent, wherein it reiterated its stance that the applicant was selected.

[6] The applicant's case is that it was not aware of any application for reconsideration as envisaged by s 55(4A) of the Act as it had not been served on the applicant.

[7] On 24 October 2023 the third respondent applied to the Review Panel for a review of the decision by the second respondent to award the tender to the applicant herein. The applicant referred to the equivalent application that was emailed to him as a purported review application. That is because it merely consisted of a three page 'memorandum' signed by a certain Mr Madjiedt, without any supporting affidavit nor any proof of payment of the required payment of N\$5000. That was different to the 'review application' send to the Review Panel, as that was a complete application, which included the affidavit and proof of payment.

[8] The Review Panel convened on 3 November 2023, at which time it declined to hear the applicant because it did not file a replying affidavit. On 17 November 2023, the decision of the Review Panel was communicated to all the bidders. The nub of that decision was that it declared the decision of 13 October 2023 by the second respondent for Bid No. W/ONB/HRC-002/2023 *ultra vires* and unlawful, thus terminating the proceedings therein. The Review Panel furthermore ordered the second respondent to start afresh in terms of s 60(f) of the Public Procurement Act 15 of 2015 as amended (hereinafter referred to as 'the Act').

[9] It is also common cause that the applicant initially set down an urgent application, for this same matter, on 26 November 2023. However the applicant withdrew that application and tendered costs, as it merely cited the Review Panel and not the Chairperson of the Review Panel. That has been attended to in this application.

Urgency

[10] The third respondent argued that the court should strike the matter on account of lack of urgency. In support of that prayer, it asserted that the second respondent had on 28 November 2023 extended the bid validity for another 60 days. The third respondent contends that there is a remedy to the applicant, although it accepted that the extension of the bid validity does not guarantee anything to the applicant. Furthermore that a certain 'Aqua Services' installed a water treatment plant in August 2021 and that the 'situation is still manageable'.

[11] The applicant, on the other hand, emphasised the purpose of the oxidation ponds was to remove impurities in order to make the water safe for human consumption, that the applicant, as successful tender has no other remedy and the inherent underlying urgent nature of public procurement contracts. Being mindful that the applicant has not delayed unreasonably upon discovering the state of affairs and that the provision of clean and safe water for the Hoachanas community is a matter of public health soonest, this court will hear the matter on an urgent basis.

Review Record

[12] The third respondent pointed out that because of the truncated timelines it was subjected to file an answering affidavit whilst the review record had not been uploaded by the first respondent. The applicant's view was that the two issues raised in its review application are simple and that the attached annexures comprehensively depicts what had happened herein.

[13] The record was uploaded belatedly by the first respondent, after the answering affidavit was due. There is no qualm that reviews under rule 76, brought in the ordinary course, has the advantage of the review record being provided up front. In canvassing that with the parties, the third respondent was unable to point out any specific form of prejudice caused by that.

[14] In having regard to the paper trail that was attached to the founding affidavit it is

clear that the said application provided all the material documents required for the case at hand. The issues contained in the grounds of review are relatively straightforward and was clearly discernible from the said application. It was not a situation of the third respondent being put in a position of not knowing what case it was expected to meet. That explains why the third respondent could not pinpoint any specific prejudice. Having regard to the documents herein and the issues under review, this complaint is of no consequence and I proceed to deal with the legal issues contained in the grounds of review.

Grounds of Review

[15] The applicants first ground centred around lack of jurisdiction on the basis that there was no reconsideration application to the second respondent, nor was any reconsideration application served on the applicant. The applicant argued that the first letter of objection by the third respondent was 'seeking full disclosure on what reasons it has been evaluated as unsuccessful.' The second letter by the third respondent merely informed the second respondent that their response did not address the objection and that the third respondent was left with no choice but to seek recourse at the next level. The applicant, furthermore, states that the subsequent meeting between the second and third respondent was characterised by the second respondent as a 'special meeting that was called by the public entity to have a round table discussion with the bidder to hear their dissatisfaction.' None of these constituted a reconsideration application as contemplated by the Act, nor were these papers served on the applicant.

[16] The third respondent's answer to that argument was that indeed the two letters and meeting amounted to a reconsideration application. In support thereof the third respondent cited *Radial Truss Industries Ltd v Chairperson of the Central Procurement Board of Namibia and Others*¹ wherein the meaning of 'a request reconsideration' was described in Black's Law Dictionary as 'an applicant's submission of further arguments after initial rejection;' 'to discuss or take up a matter again'. In respect of the complaint that the 'reconsideration application was not served, counsel for the third respondent argued that s 55(4A) of the Act does not require service on a party other than the public

¹ *Radial Truss Industries Ltd v Chairperson of the Central Procurement Board of Namibia and Others* 2021(3) NR 752(HC).

entity that has to determine the reconsideration application. Counsel for the third respondent argued that *audi alteram partem* is flexible and that it may be expressly or impliedly ousted or greatly reduced in its operation.

[17] Additionally, the applicant also raised a ground that there was no proper review application before the Board, nor was it served on the applicant. The applicant deposed that the third respondent dismally failed to comply with regulation 42(3) insofar as the 'application' that was e-mailed to the applicant merely contained a three page memorandum without any affidavit or proof of payment. Counsel for the applicant relies on the authorities of *Elite Construction CC v Amupolo*² and *Paragon Investment (Pty) Ltd JC China Huayun Group v Chairperson: Review Panel*.³

[18] The third respondent argued that the purpose of service was to bring the matter to the attention of a party, which had happened herein. It was also submitted on behalf of the third respondent that s 59 of the Act read with regulation 42 does not prescribe the form for a review application. Counsel for the third respondent argued that since the notice that was served on the applicant made reference to an affidavit being attached (although there was no such affidavit attached) the applicant should have made efforts to obtain the affidavit.

Discussion

[19] The relevant section is to be found in s 55 of the Act. It provides that a public entity must award a procurement contract to the bidder having submitted the lowest evaluated substantially responsive bid which meets the qualification criteria specified in the pre-qualification or bidding documents, after it has complied with the steps outlined in subsections (3) and (4).⁴ The section carries on and provides that an unsuccessful bidder may, within seven days from the date of receipt of the notice referred to in subsection (4), apply to the public entity to reconsider its selection of a bid for award and the board or public entity must, within seven days from the date of receipt of the application, notify the

² *Elite Construction CC v Amupolo* (HC-MD-CIV-MOT-REV-2020/00404) [2022] NAHCMD 503 (23 September 2022).

³ *Paragon Investment (Pty) Ltd JC JV China Huayun Group v Chairperson: Review Panel* (HC-MD-CIV-MOT-GEN-2022/00264) [2022] NAHCMD 321(29 June 2022).

⁴ Section 55(1) of the Act.

bidder of its decision.⁵ If the unsuccessful bidder does not receive a response (to its application for reconsideration) from or is not satisfied with a decision of the public entity, the unsuccessful bidder may within the seven days referred to in s 59 of the Act apply to the Review Panel for review of the decision or action as contemplated in s 59(1) of the Act.⁶ In terms of s 55(5) of the Act, in the absence of an application for review by any other bidder referred to in s 55(4), the third respondent is under an obligation to award the procurement contract to the successful bidder.

[20] The question as to whether there was a reconsideration application and whether it was served on the applicant takes us back to the letters addressed to the second respondent during the standstill period. The first letter conveys the first respondent's objection to the award made, it points out that though it was scored as the second best responsive bid, it regarded itself as the lowest responsive evaluative bid and asks for full disclosure as to how the decision was made. The second letter by the third respondent informed the second respondent that their response did not address the objection and that the third respondent was left with no choice but to seek recourse at the next level. Both the letters also quoted s 55(1) of the Act. We know that the second respondent also called a meeting. After the meeting, the second respondent wrote a letter to the third applicant which stated:

'With reference to the deliberation of the meeting your presentation was appreciated. The Regional Council however, wish to inform you that it is still convinced that TJ Civils is the best recommended company.'

[21] Collectively considered, it leaves the impression that the third respondent has indeed engaged the second respondent to discuss or to take up the decision again, as per the definition in Black's Law Dictionary. The correspondence referred to in the previous paragraph supports that impression that these efforts constituted an exercise in reconsideration of its decision of 13 October 2023. The second respondent could not have asserted that it still regards the applicant as the best recommended company, had it not been the case. In view of that, I accede to the argument by counsel for the third respondent that insofar as the argument was that it in effect amounted to reconsideration.

[22] However, that does not absolve the third respondent from serving its papers for

⁵ Section 55(4A).

⁶ Section 55(4B).

reconsideration on the applicant. That issue was considered in *Henimma Investments CC v Review Panel*⁷ wherein the principle was reiterated that service must always be effected on an interested party and the court stated at para 10 that:

‘I find that there was no service on the applicant who was the successful bidder in this matter. It therefore calls on me to point out that the applications of the third and the fourth respondents for reconsideration contravenes the regulations for not being served on the successful bidder and in my view therefore constitutes no application at all for reconsideration.’

[23] I am in agreement with that stance. It is in alignment with the matter of *Motor Vehicle Accident Fund v The Public Procurement Review Panel*,⁸ wherein Ueitele J held that:

‘[44] In my view, the provisions of s 55 of the Act makes the existence of an application for reconsideration of a decision of the entity a condition precedent for the Review Panel to review the decision of a public entity. It follows that in the absence of an application for reconsideration as contemplated in s 55(4A), the Review Panel has no power to review the decision of the public entity. It thus follows that in the present matter the Review Panel had no power to review the decision of the Fund and the Review Panel acted ultra vires when it did so, and its decision is thus to be set aside and is hereby set aside.’

[24] As for the second ground of review there is no doubt that although a complete review application was sent to the Review Panel, the same was not transmitted to the applicant. Regulation 42(2) of the Public Procurement Regulations reads as follows:

‘(2) An application for review contemplated in subregulation (1) must –
(a) contain the grounds for review as well as any supporting documents on which the supplier or bidder rely on; and
(b) be accompanied by an application fee of N\$5000.’

[25] The contention by the third respondent that there is no prescription that there should be an affidavit and that, ultimately, there was substantial compliance on the part of the third respondent do not suffice.

⁷ *Henimma Investments CC v Review Panel* (HC-MD-CIV-MOT-REV-2023-00129)[2023] NAHCMD 419 (31 March 2023).

⁸ *Motor Vehicle Accident Fund v The Public Procurement Review Panel* (HC-MD-CIV-MOT-REV-2023/00052) [2023] NAHCMD 79 (28 February 2023).

[26] *In Paragon Investment (Pty) Ltd JC China Huayun Group v Chairperson: Review Panel*⁹, which concerned a review application, the court stated that:

[21] It is furthermore, clear as day, that a review application is one accompanied by a founding affidavit to place evidence before the Review Panel, and it must be lodged with the Review Panel. That is exactly the reason why other bidders, or any interested person is required to file a “replying affidavit” as contemplated in regulation 42(4) of the Public Procurement Regulations in answer to the averments contained in the founding affidavit.’

[27] It has to be remembered that the applicant has an interest in the matter, in fact it is the party with the most to lose. All that was sent to the applicant was a mere ‘Notice’, nothing more nothing less. Thus, the argument of a flexible *audi* wherein that is tacitly ousted or reduced by the legislation does not hold water herein. The applicant not being furnished with the third respondent’s affidavit which forms the basis of its review application, deprived it not only of *audi alteram partem*, but also the opportunity to know what case he has to meet at the Review Panel and meaningfully address that in a replying affidavit that would have afforded it an opportunity at the hearing of the Review Panel.

[28] Regulation 42(3) is unequivocally clear as it provides that:

‘The supplier or bidder must lodge the review application with the Review Panel and serve copies of the review application on a public entity referred to in subregulation (1) and on any other interested person’. (My emphasis).

[29] The third respondent failed to do that and it caused grave prejudice to the applicant who was stripped of its award at the hearing of the Review Panel.

[30] For these reasons, I make the order as set out above.

Judge’s signature:

Note to the parties:

⁹ *Paragon Investment (Pty) Ltd JC JC China Huayun Group v Chairperson:Review Panel HC-MD-CIV-MOT-GEN-2022/00264*[2022] NAHCMD 321(29 June 2022).

Claasen J	Not applicable.
Counsel:	
Applicant	Respondent
F Beukes of Metcalfe Beukes Attorneys, Windhoek	L Ihalwa Instructed by Andreas-Hamunyela Legal Practitioners, Windhoek