



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case number: HC-MD-CIV-MOT-REV-2022/00437

In the matter between:

ROADS AUTHORITY OF NAMIBIA

APPLICANT

and

**THE CHAIRPERSON: PUBLIC PROCUREMENT
REVIEW PANEL**

1ST RESPONDENT

PUBLIC PROCUREMENT REVIEW PANEL

2ND RESPONDENT

LAU TOM CONSTRUCTION CC

3RD RESPONDENT

POLLADIUM CIVIL ENGINEERING

4TH RESPONDENT

ERONGO QUARRY & CIVIL WORKS

5TH RESPONDENT

KHAN TRADING CC

6TH RESPONDENT

THE 7TH TO THE 39TH RESPONDENTS, DESCRIBED IN ANNEXURE "A"

Neutral citation: *Roads Authority of Namibia v The Chairperson: Public Procurement Review Panel & others* (HC-MD-CIV-MOT-REV-2022/00437) [2024] NAHCMD 33 (6 February 2024)

Coram: Ndauendapo J

Heard: 9 June 2023

Delivered: 6 February 2024

Flynote: Civil Practice – Administrative Law – Review of Administrative decisions – Reviewing and setting aside of the decisions of the Review Panel– Declaring such decisions *ultra vires* Regulation 42 and the relevant provisions of the Public Procurement Act (PPA),15 of 2015 – Decisions by the Review Panel declared in conflict and *ultra vires* the provisions of the PPA and is set aside.

Summary: On 16 September 2021, the applicant advertised tenders for routine maintenance of bitumen roads for the five regions, namely: Windhoek Region; Keetmanshoop Region; Otjiwarongo Region; Oshakati Region and Rundu Region. The third to sixth respondents submitted various bids regarding the advertised regions and were unsuccessful for different reasons. Disenchanted with the reasons provided by the applicant for rejecting their bids, the third to sixth respondents launched a review application before the second respondent. The applicant only learned of the fourth respondent's review application on the day of the hearing, as the applicant did not receive any application from them, and neither is the fourth respondent's application part of the review record dispatched by the second respondent.

On 3 June 2022, the review application was heard. The second respondent decided on the review application, on the same date. The reasons were only released on 13 July 2023. The second respondent found, *inter alia*, (a) the grounds on which the fourth respondent's bid was disqualified was invalid; (b) that the application for bids in question was above the threshold and it is contrary to Regulation 2(2) of the Public Procurement Regulations. The second respondent found that the contract value of each of the five bids was above the threshold of Thirty-Five Million Namibian Dollars as prescribed by Regulation 2(1) read together with Annexure 1 of the Public Procurement Regulations; (c) The second respondent then found that the bids were beyond the applicant's threshold and must be handed over to the Central Procurement Board of Namibia. In the end, the second respondent ordered that the procurement

proceedings be set aside and should start *de novo*. The applicant in this review application (grounds of review) avers that, the second respondent determined the application of the fourth respondent in contravention of Regulation 42 of the PPA. The applicant further avers that, the finding by the second respondent, that the bids exceeded the Thirty-Five Million Namibian Dollars threshold was *ultra vires* its powers as it was not an issue before it for determination. The third respondent opposed the application and raised a point *in limine* of non-joinder of the unsuccessful bidders to this review application. Third respondent submitted that the second respondent did not err in finding that the applicant has not complied with the provisions of the Act in so far as the threshold is concerned.

Held: that by not bringing a review application before the second respondent or by failing to participate, when joined in the review application before the second respondent, the unsuccessful bidders waived their right to be joined in a subsequent review application to the high court.

Held further: that by dealing and determining the issue of the threshold *mero motu*, the second respondent acted *ultra vires* the powers conferred on it by law and this court hereby reviews and sets aside that decision.

ORDER

1. The point *in limine* of non-joinder raised by the third respondent is dismissed.
2. The second respondent's decision dated 03 June 2022 to the effect that the bids No. W/ONB/RA-04/2021, W/ONB/RA-05/2021, W/ONB/RA-06/2021, W/ONB/RA 07/2021&W/ONB/RA-08/2021 exceed the public entity's threshold (the impugned decision) is hereby reviewed and set aside

3. The second respondent's decision dated 03 June 2022, to the effect that the bids purportedly above public entity's threshold be handed over to the Central Procurement Board, is hereby reviewed and set aside.
4. The second respondent's decision dated 03 June 2022, terminating the procurement proceedings is hereby reviewed and set aside.
5. It is declared that the applicant's outcome of the bidding evaluation process as indicated in the notice for selection of award issued on 24 May 2022 is valid.
6. The applicant is hereby directed and permitted to proceed with the concluding and signing of procurement contracts with the successful bidders.
7. The third respondent is ordered to pay the costs of the applicant, such costs to include the costs of one instructing and one instructed counsel.
8. The matter is removed from the roll and regarded as finalised.

JUDGMENT

Ndauendapo J

Introduction

[1] Before me is a review application in which the following relief is sought:

'1. The second respondent's decision dated 03 June 2022 to the effect that the bids No. W/ONB/RA-04/2021, W/ONB/RA-05/2021, W/ONB/RA-06/2021, W/ONB/RA 07/2021 and W/ONB/RA-08/2021 exceed the public entity's threshold (the impugned decision) is hereby reviewed and set aside, in the alternative, the impugned decision is declared null and void and of no legal force and effect *ab initio*.

2. The second respondent's decision dated 03 June 2022 to the effect that the bids purportedly above public entity's threshold be handed over to the Central Procurement Board is hereby reviewed and set aside.
3. The second respondent's decision dated 03 June 2022 to the effect that terminating the procurement proceedings is hereby reviewed and set aside.
4. It is declared that the applicant's outcome of the bidding evaluation process as indicated in the notice for selection of award issued on 24 May 2022 is valid.
5. The applicant is hereby directed and permitted to proceed with the concluding and signing of procurement contracts with the successful bidders.
6. Any respondent electing to oppose this application is ordered and directed to pay the applicant's costs, being the cost of one instructing and one instructed counsel. Applicant's costs, being the cost of one instructing and one instructed counsel.
7. Further and/or alternative relief.'

The application is opposed by the third respondent only.

The parties

[2] The Applicant is Roads Authority Namibia, a state-owned enterprise, duly established in terms of the Road Authority Act 17 of 1999 ("the RAA") read with the Public Enterprises Governance Act 1 of 2019 ("the PEGA"), with its head office at Snyman Circle, Ausspanplatz, Windhoek, and whose address of service is c/o its attorney of record.

[3] The first respondent is the Chairperson of the Public Procurement Review Panel, duly appointed in terms of s 58(2) of the PPA (Act), with its place of business at Ministry of Finance Building, Moltke Street, Windhoek, Namibia.

[4] The second respondent is the Public Procurement Review Panel, a statutory body established in terms of s 58 of the Act, with its power and functions contained in the provisions of s 58,59 and 60 of the Act, with its offices located at Ministry of Finance, building, Moltke Street, Windhoek, Namibia.

[5] The third respondent is Lau Tom Construction CC, a close corporation duly registered in terms of the applicable laws under registration number CC/2011/6590 of Namibia with its registered place of business at 439 and 441 Stasie Weg Street, Outjo, Namibia.

[6] The fourth respondent is Pollandium Civil Engineering, a corporate entity, registered in terms of the laws of Namibia, and whose address of service is care of: No.27 Shoeman Street, Windhoek North, Namibia.

[7] The fifth respondent is Erongo Quarry & Civil Works, a company duly registered in terms of the laws of the Republic of Namibia with its registered place of business at 2680 c/o Hidipo Hamutenya Avenue and Hertz Road, Walvis Bay, Republic of Namibia, and whose address of service is c/o its attorneys of record, to wit, Murorua Kurtz Kasper Inc. Legal practitioners.

[8] The sixth respondent is Khan Trading CC, a close corporation duly registered in terms of the laws of the Republic of Namibia with its registered place of business at 2680 c/o Hidipo Hamutenya Avenue and Hertz Road, Walvis Bay, Republic of Namibia, and whose address of service is the same as the fifth respondent.

[9] The seventh to the thirty-ninth respondents, all inclusive, all tendered for the tender described hereunder but did not participate in the review of the award of the bid. The identity and particulars of the seventh to the thirty-ninth respondents are disclosed in Annexure A, attached to the founding affidavit of Mr Lutombi.

[10] No relief is sought against the seventh to thirty-ninth respondents, all-inclusive who are cited herein merely for the interest they may have in the

outcome of these proceedings.

Factual background

[11] The summary of the relevant background facts as gleaned from the founding affidavit filed are as follows: On 16 September 2021, the applicant advertised tenders for routine maintenance of bitumen roads for the five regions, namely: Windhoek Region (tender number: W/ONB/RA-04/2021); Keetmanshoop Region (tender number: W/ONB/RA-05/2021); Otjiwarongo Region (tender number.: W/ONB/RA- 06/2021); Oshakati Region (tender number: W/ONB/RA-07/2021); and Rundu Region (tender number: W/ONB/RA-08/2021).

[12] The third to sixth respondents submitted various bids regarding the advertised regions and were unsuccessful for different reasons. Disenchanted with the reasons the applicant provided for rejecting their bids, the third to the sixth respondents launched a review application before the second respondent.

[13] The applicant only learned of the fourth respondent's review application on the day of the hearing as the applicant did not receive any application from them, and neither is the fourth respondent's application part of the review record dispatched by the second respondent.

[14] On 3 June 2022, the review application was heard. The second respondent decided on the review application on the same date. The reasons were only released on 13 July 2023. The second respondent found:

(a) The bids for the third, fifth, and sixth respondents were rightfully disqualified. There is no counter application challenging that finding by any of the bidders.

(b) The second respondent also found that the grounds, on which the fourth respondent's bid was disqualified, were invalid (*sic*).

(c) The second respondent found that the application for bids in question

was above the threshold and it is contrary to Regulation 2(2) of the Public Procurement Regulations. The second respondent found that the contract value of each of the five bids was above the threshold of Thirty-Five Million Namibian Dollars as prescribed by Regulation 2(1) read together with Annexure 1 of the Public Procurement Regulations.

(d) The second respondent then found that the bids were beyond the applicant's threshold and must be handed over to the Central Procurement Board of Namibia. In the end, the second respondent ordered that the procurement proceedings be set aside and should start *de novo*.

[15] The third respondent opposed the application and raised a preliminary point of non-joinder of the other unsuccessful bidders to this review application.

Issues

[16] The issues for determination are (in summary), the following:

(a) Non-joinder;

(b) The fourth respondent's failure to comply with Regulation 42; and

(c) The second respondent's finding that the bids are beyond the applicant's threshold (exceeding Thirty-Five Million Namibian Dollars) in the Public Procurement Regulations and terminating the process and ordering the process to start afresh.

Applicant's case

[17] Mr Conrad Lutombi, the applicant's Chief Executive Officer, deposed to the founding affidavit. He avers that, on 16 September 2021, the applicant advertised in the print media and its website for interested entities to submit separate bids in respect of routine maintenance of Bitumen Roads of separate regions (five regions of Namibia) on their own and for a thirty-six month period in five (5)

regions. The deadline for submission for the aforementioned bids was 3 February 2022. The applicant received over 800 bids collectively and the third, fourth, fifth and sixth respondents were amongst the bidders. Evaluation Committees - ("BEC") - were constituted as required in terms of s 26 of the PPA.

[18] On 23 May 2022, in compliance with s 55(5) of the PPA, the applicant issued a notice for selection of award detailing the outcome of the evaluation process by listing both the bidders selected for the award and the unsuccessful bidders. The notice of selection of award further notified bidders aggrieved by the outcome of the award of their right to make an application for the review within 7 days of the receipt of the same notice.

[19] The third respondent submitted a bid in respect of three towns namely: Rundu, Otjiwarongo and Oshakati. All the bids were unsuccessful. The fourth respondent also submitted a bid for the Windhoek, Keetmanshoop, Otjiwarongo, Oshakati and Rundu Region. The bids were unsuccessful. The fifth and the sixth respondents only submitted a bid in respect of Otjiwarongo region. The bids were also unsuccessful.

[20] The third to sixth respondents were dissatisfied with the reasons given by the applicant for the rejection of their bids and launched review applications before the second respondent. No review application of the fourth respondent was received by the applicant. The applicant in this application opposed the review applications before the second respondent.

[21] On 3 June 2022, the second respondent heard the review applications and decided on the same date. However, the second respondent's decision and reasons for the decision were only released to the parties on 13 July 2022. In its decision, second respondent found that there are merits in the applicant's decision to disqualify Lau Tom, Erongo Quarry and Khan Trading. Accordingly, the applications for review, in so far as it relates to the third, fourth and sixth respondent were unsuccessful.

[22] The second respondent, *mero motu* raised and made the following

findings: first, the second respondent found that the application for bids in question is above the threshold and it is contrary to Regulation 2(2) of the Public Procurement Regulations. The second respondent was of the view that the contract value of each of the five bids is above the threshold of thirty-five million Namibian Dollars as prescribed by Regulation 2(1) read together with Annexure 1 of the Public Procurement Regulations. The second respondent further held that, *“the threshold cannot be determined per lot rather per bid”* (sic).

[23] Secondly, the second respondent correctly found that the reasons given by the applicant for dismissing the third, fifth and sixth respondent's bids were reasonable and fair as they have failed to comply with the respective provision of the ITB and BDS. However, the second respondent found that the reasons given for disqualifying the fourth respondent were invalid. Thirdly, that the applicant was inconsistent in applying its own evaluation criteria. Fourthly, the second respondent found that the parties were given less than 7 days period within which any aggrieved party may apply for a review. It is the aforementioned findings and determination and orders of the Review Panel that the applicant impugns in these proceedings.

Grounds of review

Fourth respondent's failure to comply with Regulation 42

[24] Mr Lutombi contends that, the second respondent unfairly and unreasonably turned a blind eye to the third to sixth respondents' failure to comply with Regulation 42 of the Public Procurement Regulations. The fourth respondent did not comply with these regulations as there was no review application served on the applicant herein. Further, there is no proof whatsoever that the fourth respondent paid the requisite application fee. Despite the objections raised by the applicant in the review proceedings, the second respondent proceeded with the review application in respect of the fourth respondent. For this reason alone, the second respondent acted *ultra vires* the Constitution, PPA and the Regulations in one or more of the following material respects:

(a) The second respondent failed to comply with the Article 18 of the Namibian Constitution. Thus, the second respondent's conduct to continue with the hearing of fourth respondent's review application deprived the applicant's an opportunity to adequately respond to the fourth respondent's application in violation of Article 18 of the Namibian Constitution read together with r 42 of the Public Procurement regulations.

(b) He submits that the second respondent acted *ultra vires* Regulation 42 of Public Procurement regulations and Article 18 of the Constitution by extension.

[25] He contends that the second respondent misdirected itself in reaching the finding that the fourth respondent's grounds of disqualification were invalid. The second respondent states in their decision that BDS6.2 (e) does not explicitly state that the bidder is required to have "uninterrupted" bitumen road construction experience.

Bids allegedly beyond the threshold

[26] Mr Lutombi avers that, the second respondent considered irrelevant and immaterial facts which were not before them and neither raised by any party to the review proceedings. The second respondent misdirected itself by basing its decision on the grounds not raised by any of the parties to the review applications. He avers that, notwithstanding regulation 44, which states that "a review proceeding is conducted in such a manner as the Review Panel considers most suitable to resolve the "issues before it", the second respondent is still expected to restrict itself to the issues brought before them. He thus contends that the second respondent acted *ultra vires* as it is not empowered by any law to formulate and/or add grounds to the review application.

[27] He avers that second respondent acted outside of its powers to *mero motu* raise issues relating to the threshold during the review proceedings. The second further stepped outside its mandate in allowing other parties to make statements

and/or input during the review proceedings, which were not related to the submitted grounds for the applications filed in line with regulation 42(2). He avers that Regulation 42 to 44 further make it clear that the second respondent has no mandate to review whole procurement process followed by the Public Entity. The second respondent is only empowered to review the specific grounds and supporting evidence submitted before them by bidders or any other person. Only the Procurement Policy Unit is empowered to review a procurement activity of a public entity in order to ensure compliance in line with s 7(1)(l) of the Public Procurement Act, 2015. The second respondent, therefore, assumed powers that are not invested in it, by carrying out all their review application hearings in a manner that aims to review the entire procurement process followed, rather than focusing and determining the review applications and grounds therein.

[28] Notwithstanding the fact that the second respondent acted *ultra vires* their powers as highlighted above, he further avers that the second respondent made an error of law in their interpretation of the term 'threshold' and further holding the applicant must hand over the procurement process to Central Procurement Board of Namibia.

[29] He submits that all contracts are within the prescribed contract limit. The applicant is the correct repository to conduct the bidding process as opposed to the Central Procurement Board. He avers that although the contracts are advertised under one bidding process, they still remain individual contracts and cannot be deemed to be one contract amount. The second respondent therefore erred when they took the collective value of the contracts within the bidding process to reach a conclusion that the applicant had procured above its threshold. He contends that advertising the contracts in one bidding process is simply to enhance efficiency and to save costs relating to the bidding process for both applicant and bidders alike

[30] He further avers that the second respondent misdirected itself on law in finding that the applicant failed to comply with the seven-day notice period for bidders to launch review application as 'it included two public holidays and a Sunday' (*sic*). In doing so, the second respondent failed or refused to properly

apply the provisions of s 4 of Interpretation of Laws Proclamation 37 of 1920 which clearly includes public holidays and Sundays in computation of days.

[31] On 03 June 2022, the review application was heard. The first respondent decided on the review application on the same date. The reasons were only communicated on 13 July 2023. The second respondent found:

(a) The bids for the third, fifth, and sixth respondents were rightfully disqualified. There is no counter application challenging that finding by any of the bidders.

(b) The second respondent also found that the grounds on which the fourth respondent's bid was disqualified were invalid.

(c) The bids of the applicant exceeded the threshold of Thirty-Five million Namibian Dollars and set aside the bidding process and ordered it to start afresh.

Third respondent's case

[32] Mr Kandundu, the sole member of the third respondent deposed to the answering affidavit on behalf of the third respondent. He raised a point in *limine* of non-joinder. He avers that 800 parties submitted bids and have an interest in the matter and should have been joined to these proceedings. He contends that the applicant wishes to have the decision of the second respondent set aside which will affect every party that submitted a bid and such all the bidders must be cited in these proceedings.

[33] He avers that the applicant did not comply with s 55 of the Act and Regulation 38(1) in that some parties including the sixth respondent that submitted bids were not informed that their bids were rejected. He contends that the findings of the second respondent were not unreasonable, irrational and arbitrary. He denies that the second respondent's findings were irregular and prejudicial to the applicant. The second respondent did not misdirect itself when it

considered the threshold prescribed by Regulation 44. The applicant fragmented the tender amount in an attempt to circumvent the prescribed threshold limit of Thirty-five Million Namibian Dollars which is prohibited by law in terms of s 65 of the PPA.

[34] He contends that the notice was issued on 23 May 2022 and the seven days lapsed on Monday, 30 May 2022. The last day of the seven days was not a Sunday or public holiday as envisaged by s 4 of the interpretation of Laws Proclamation 37 of 1920.

Submissions on behalf of applicant

[35] Mr Nekwaya submitted that it is common cause that the third respondent has not joined those it complains must be joined in these proceedings when it filed its review application before the second respondent. The parties not joined to these proceedings are the bidders whose bids were not accepted by the applicant and who chose not to challenge the tendering process's outcome with the second respondent. They have accepted the outcome of the bidding process. Those bidders do not qualify for their bids for reasons given by the applicant. Accordingly, they have no direct interest in the proceedings.

[36] In support of the contention that the respondents who were not joined do not have a direct and substantial interest in these proceedings, Mr Nekwaya referred this court to *Mavara and Another v Shapwa*¹, where Masuku J laid a test to determine whether it is necessary to join the party to the proceedings as follows:

“The substantial test is whether the party that is alleged to be a necessary party for the purpose of joinder has a legal interest in the subject matter of the litigation, which may be affected by the judgment of the court in the proceedings concerned.

Put differently, “If the order which might be made would not be capable of being sustained or carried into effect without prejudicing a party, that party was a necessary

¹ *Mavara and another v Shapwa* (HC-MD-CIV-MOT-GEN 181 of 2021) [2021] NAHCMD 603 (10 June 2021).

party.”

[37] Mr Nekwaya argued that what can be distilled from the above authorities is that a party must have “direct and substantial interest” or “legal interest,” which could be prejudicially affected by the judgment of the court.

[38] Mr Nekwaya also referred to the *Namibia Construction (Pty) Ltd v The Chairperson of the Tender Board*², a matter that was decided before the promulgation of the PPA. This matter concerns a direct review application to the High Court as the two applicants who were unsuccessful bidders were dissatisfied with the Tender Board’s decision. In that case, this court ruled that these unsuccessful tenderers ought to have been joined and relying on the case *Amalgamated Engineering Union v Minister of Labour*³. In that matter, the court expressly stated that:

‘There is nothing before me to show that they had waived their right to be joined.’

[39] In contradistinction, *SJV Medical Supplies CC v The Review Panel*⁴ falls under the statutory review of the PPA. In this case, Masuku J relying on the judgment in *Namibia Construction (Pty) Ltd*⁵, held that the unsuccessful tenderers who did not participate in the proceedings before the Review Panel have a direct and substantial interest in any order the court might make concerning the tender.

[40] Mr Nekwaya submitted that, viewed in the context of the statutory regime, the Court in *SJV Medical Supplies CC*⁶ is clearly wrong and this court should not follow that decision. He submitted that by applying the ruling in *Namibia Construction (Pty) Ltd*⁷ *mutatis mutandis*, the court failed to consider that the

² *Namibia Construction (Pty) Ltd v The Chairperson of the Tender Board* (A 283/2007) [2014] NAHCMD 6 (21 January 2014).

³ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

⁴ *SJV Medical Supplies CC v The Review Panel* (HC-MD-CIV-MOT-GEN-2020/00318) [2020] NAHCMD 460 (6 October 2020).

⁵ *Namibia Construction (Pty) Ltd v The Chairperson of the Tender Board* (A 283/2007) [2014] NAHCMD 6 (21 January 2014).

⁶ *Ibid.*

⁷ *Ibid.*

former concerned a direct review to this court in circumstances where there was no right of review internally with the second respondent. In contrast, in the latter, there is a first layer of a review internally, and after that, a subsequent review. He submitted that the decision or order sought to be reviewed has nothing to do with these parties.

[41] Mr Nekwaya contended that even if the court were to find that those unsuccessful bidders have a direct and substantial interest in the proceedings, they are either *estopped* or they had waived their right to be joined. He submitted that those entities waived their right to be joined and participate in the review proceedings before the second respondent.

[42] Mr Nekwaya submitted that the unsuccessful bidders tacitly waived their rights to be joined. Firstly, the third to the sixth respondents are the only aggrieved bidders who applied to review and set aside the applicant's decision for the procurement of the award. Secondly, all the unsuccessful bidders elected not to participate in the proceedings before the review panel, although notified for not being selected for the award in terms of s 55 of PPA and being served with the applications for the review by the fourth, sixth, and seventh respondents. Thirdly, by virtue of their non-intervention, the second respondent neither invited them to the review panel hearing nor said anything about them in its decision.

[43] Mr Nekwaya contended that the PPA grants these unsuccessful bidders the right to seek a review before the second respondent and to exhaust local remedies. By failure to lodge a review or present themselves before the second respondent, these bidders waived their rights to be parties to the subsequent review proceedings seeking to review the initial proceedings they were not part of. He submitted that these unsuccessful bidders' failure to present themselves before the second respondent constitutes a waiver to the subsequent review proceedings before this court. In *Amalgamated Engineering Union v Minister of Labour*⁸, deemed a *locus classicus* on joinder, it was held that a person with direct and substantial interest is entitled to be joined "unless the court is satisfied that he has waived his right to be joined."

⁸ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

[44] Mr. Nekwaya submitted that the applicant was only served with the applications of the third, fifth, and sixth respondents for review before the second respondent. It is common cause that neither the applicant nor any other respondent received any application from the fourth respondent for review before the second respondent. Equally, nothing in the review record dispatched by the first and second respondents evinced that the fourth respondent indeed lodged a review application before the second respondent. Nor has the fourth respondent produced a copy of its application in these proceedings. The only answer produced by the respondents in the face of the challenge is that:

“The third respondent has no knowledge of the allegations contained in so far as it pertains to the fourth respondent.”

[45] Mr Nekwaya argued that, it follows that the fourth respondent failed to comply with the provisions of s 59 of the PPA read together with Regulation 42 of the Regulations; subsequently, the second respondent should not have considered its application. Section 59(1) of the PPA provides as follows:

‘(1) A bidder or supplier may, as prescribed, apply to the Review Panel for a review of a decision or an action taken –

- (a) by the Board; or
- (b) by a public entity,

within seven days after the bidder or supplier is notified of the decision or action.

...

(4) A bidder or supplier who is aggrieved or claims to have suffered, or to be likely to suffer, loss under this Act must exhaust all available remedies under this Act before instituting any judicial action in the High Court.’

[46] He submitted that Regulation 42 adds flesh to the skeletal section 59 provides as follows:

‘(1) A supplier or bidder who wishes to lodge an application for review under section 59 of the Act must, within 7 days of receipt of the decision or an action

taken by a public entity, apply to the Review Panel for review.

(2) An application for review contemplated in sub-regulation (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\$5 000.
- (c) 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 sub-regulation (1) and on any other interested person. . .'

[47] Mr Nekwaya referred this court to *Green Enterprise Solutions (Pty) Ltd v Chairperson of the Public Review Panel*, where the court addressed the question under consideration. The Court addressed this s 55 (5) of the Act and stated as follows:

'[23] This provision is clear and mandatory. Once the bidders have been notified about the successful bidder, they are given a stand-still period of 7 days within which to launch a review application. Should this not be done within that period, the accounting officer must award the contract to the successful bidder. This is couched in peremptory terms. . .

[25] The 1st respondent was in no position to consider the application for review. Strictly speaking there existed no application for review before it. This is so because the mandatory period within which the aggrieved bidders were to lodge their application had lapsed and none of the bidders lodged any review application. I find that this ground raised by the applicant is eminently meritorious.'

[48] The fourth respondent did not serve the applicant with any review application. The fact that there is no fourth respondent's application in the review record dispatched by the first and second respondents only affirms that the fourth respondent did not lodge any review application before the Review Panel. Not only that, nothing in the Review record evinces that the fourth Respondent paid the requisite application fee of N\$5000.

[49] Mr Nekwaya submitted that by entertaining the fourth respondent's review

application in the absence of the review application in compliance with Regulation 42(2) and the absence of payment of the requisite fee, the second respondent unlawfully condoned the fourth Respondent's infraction with the provisions of Regulation 42(2), hence acted *ultra vires*.

[50] Further, there is no evidence that the fourth respondent had lodged its review application within seven days. The fourth respondent further failed to serve the application to the applicant or any other interested person, which is confirmed by the fact that no other respondent confirmed that they were served with the fourth respondent's application. The second respondent failed to observe the limitations of Regulation 42 of the Public Procurement Regulations and thus acted *ultra vires*. He referred this Court to *Immanuel v Minister of Home Affairs and Others*⁹), where Damaseb JP stated that:

[53] Judicial review has two aspects: First, it is concerned with ensuring that the duties imposed on decision-makers by law (which includes the Constitution) are carried out. A functionary who fails to carry out a duty imposed by law can be compelled by the High Court to carry it out. Secondly, judicial review is concerned with ensuring that an administrative decision is lawful, i.e. that powers are exercised only within their true limits. If a functionary acts outside the authority conferred by law, the High Court can quash his or her decision. This is the doctrine of *ultra vires*.'

[51] Mr Nekwaya submitted that, because the second respondent acted outside the review powers conferred by s 59 of the PPA read together with Regulation 42, the court should squash the second respondent's decision about the fourth respondent.

[52] Mr Nekwaya submitted that the issue of the threshold was neither raised by any party. Nor was it put before the second respondent for determination. In terms of Regulation 44:

'The proceedings before the Review Panel are conducted in such a manner as the Review Panel considers most suitable to resolve the issues before the Review Panel.' [Emphasis added].

⁹ *Immanuel v Minister of Home Affairs and Others* (PA 315 of 2005) [2006] NAHC 30 (28 August 2006).

[53] Mr Nekwaya further submitted that, Regulation 44 limits the proceedings of the Review Panel to “issues before [it].” This court made succinctly found on this aspect that:

[27] I now turn to deal with the first ground of review that was upheld by the 1st respondent. It is common cause that the 1st respondent, when determining an application for review, is confined to the papers that are before it. It is improper for a panel to raise or deal with issues that are not placed before it. Neither the 4th nor 5th respondent raised the ground for review which the 1st respondent found competent to uphold. On this score I find that the 1st respondent acted *ultra vires* when it *mero motu* raised and decided upon grounds not within the confines of the papers before it.¹⁰

[54] Mr Nekwaya submitted that by going beyond the issues placed before it, the second respondent acted *ultra vires* as it failed to observe the limitations of the law. For that reason alone, the court is invited to quash the second respondent’s decision as promised in *Immanuel v Minister of Home Affairs and Others*¹¹.

[55] Mr Nekwaya submitted that another reason why this court should set the second respondent’s decision aside is that, in considering the threshold issue, the second respondent considered irrelevant considerations because its decision was taken on an incorrect factual basis. He referred to *Pepcor Retirement Fund and Another v Financial Services Board and Another*¹², where the court held that:

‘Judicial intervention has been limited to cases where the decision was arrived at arbitrarily, capriciously or *ma/a fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter: *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) at 152C-D; *Hira and Another v Booyesen and Another*

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¹¹ *Immanuel v Minister of Home Affairs and Others* (PA 315 of 2005) [2006] NAHC 30 (28 August 2006).

¹² *Pepcor Retirement Fund and Another v Financial Services Board and Another* (198/2002) [2003] ZASCA 56.

1992 (4) SA 69 (A) at 938 -C. There are decisions in other jurisdictions, however, which go further.’ [Emphasis added].

[56] He submitted that it is established law that, a decision based on a material error of fact due to consideration of irrelevant considerations is subject to review. In *Pepcor Retirement Fund and Another v Financial Services Board and Another*¹³, Cloete JA further stated:

‘In my view, a material mistake of fact should be a basis on which a Court can review an administrative action. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to have been made.’ [Emphasis added].

[57] Mr Nekwaya submitted that in light of the above *dictum*, there were no material facts available for the decision on the threshold to be made appropriately, as it was never the subject of the review application serving before the second respondent. Because of this manifest material mistake of fact, the court is called upon to review and set aside the second respondent’s decision.

[58] He further submitted that the second respondent’s decision to set aside the bids and refer the procurement process to the Central Procurement Board is based on an erroneous interpretation of the term “*threshold*” under s 8(a) of the Public Procurement Act and Regulation 2(1) and 2(2) of the Public Procurement Regulations. These Provisions provides as follows:

‘Section 8(a): the Central Procurement Board of Namibia has a principal object – “to conduct the bidding process on behalf of public entities for the award of contracts for procurement or disposal of assets that exceed the threshold prescribed for public entities...”’

Regulation 2(1) and (2): ‘The Board must conduct the bidding process on behalf of a public entity for the award of a contract that exceed the threshold for such public entity as specified in Annexure 1’ and ‘A public entity must conduct its own bidding process for

¹³ *Pepcor Retirement Fund and Another v Financial Services Board and Another* (198/2002) [2003] ZASCA 56.

the award of a contract that is within the threshold as specified in Annexure 1.’
[Underlining for emphasis].

[59] He submitted that from the above-quoted provisions, it is clear that the threshold ceiling is defined with reference to the contract amount and not the entire bidding process. The bids were for ‘works,’ and the threshold is Thirty-five Million Namibian Dollars in *Annexure 1* of the Public Procurement Regulations. As demonstrated under paragraph 42 of the applicant’s founding affidavit, the applicant conducted five bidding processes with 39 individual contracts across the five regions. None of the 39 contracts exceeds the threshold of Thirty-five Million Namibian Dollars. Further, the bidding documents for the five bidding processes specified that “each contract area is regarded as a separate contract and will be awarded separately.”

[60] Mr Nekwaya submitted that the second respondent’s misinterpretation of the term threshold by lowering its ceiling to the entire bidding process instead of the contract amount is an error tantamount to a mistake of law and hence reviewable. Furthermore, in *Ekuphumleni Resort (Pty) Ltd and Another v Gambling and Betting Board, Eastern Cape, and Others*¹⁴, the court set aside a decision by the respondent to award a gambling license based on the respondent’s erroneous interpretation of the request for proposals formulated by the respondent and in terms of which bids were submitted and adjudicated. The court held that this error amounted to a mistake of law and hence was reviewable. Considering the striking similarity of the instant case to the above authorities, the court is invited to follow the precedent set by the above authorities and review and set aside the ruling by the second respondent.

[61] The second respondent ordered and ruled that “the Notice period given was less than the prescribed seven days, as it included two public holidays and a Sunday” (*sic*). As per Regulation 42(1) of the Public Procurement Regulations, the applicant, on 23 May 2022, in its Notice of Selection Award, notified the bidders who were not satisfied by the selection award to apply for review before

¹⁴ *Ekuphumleni Resort (Pty) Ltd v Gambling and Betting Board, Eastern Cape* 2010 (1) SA 228 (E).

the second Respondent within seven days period, the period which stretched from 24 May 2022 to 30 May 2022.

[62] Mr Nekwaya submitted that it is an arithmetical fact that the period of 24 May to 30 May, amounts to seven days. This period excludes the day the Notice of Award was issued (23 May 2022).

[63] He submitted that the second respondent's order that the notice period was less than seven days for the simple reason that it included a public holiday and a Sunday is a clear error of law as it is contrary to s 4 of Interpretation of Laws Proclamation 37 of 1920 which provides as follows:

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

[64] The provision of s 4 of the Interpretation of Laws Proclamation 37 of 1920 is precisely similar to s 4 of South Africa's Interpretation Act 33 of 1957. In *S v Kashire*¹⁵, the court interpreted s 4 of South Africa's Interpretation Act 33 of 1957 as follows:

'The days mentioned in this section must surely be computed with reference to s 4 of the Interpretation Act 33 of 1957, i.e. inclusive of Saturdays, Sundays and public holidays but exclusive of the first day and inclusive of the last day.' [Emphasis added].

[65] He argued that from the above, it is clear that the prescribed days include Sundays and public holidays. The interpretation and application of 'days' adopted in *Kashire*¹⁶ was endorsed by Parker J (as he then was) in *S v Paulo and Another*¹⁷.

¹⁵ *S v Kashire* (260/78) [1978] ZASCA 115 (28 September 1978).

¹⁶ *Ibid.*

¹⁷ *S v Paulo and Another* (3) (CC 10 of 2009) [2011] NAHC 65 (10 March 2011).

[66] Mr Nekwaya submitted that the finding by the second respondent is a reviewable error as it is premised on the wrong interpretation and application of computation of days.

Submissions on behalf of third respondent

[67] Mr Shimutwikeneni raised a point *in limine* of non-joinder. He submitted that all 800 parties who submitted bids have an interest in the matter as it relates to a bidding process they were party to. The applicant received bids and is aware of all the identities of the parties that should be cited. All the bidders would have an interest in the outcome of this matter and should therefore be cited even if no relief is sought against them.

[68] Mr Shimutwikeneni submitted that It is trite that all parties have a direct and substantive (*sic*) interest in the matter should be part of such proceedings.

[69] He referred this court to *Ondonga Traditional Authority v Oukwanyama Traditional Authority*¹⁸, where the court held that:

'It is trite when a person has an interest of such a nature that he or she is likely to be prejudicially affected by any judgment given in the action, it is essential that such a person be joined as an applicant or respondent. The objection or non-joinder may be raised where the point is taken that a party who should be before court has not been joined or given notice or the proceedings. The test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned.'

[70] He contended that all the bidders have active bids that would be forwarded to the Central Procurement Board for evaluation and or a fresh procurement process. This application seeks to set aside all bidders having their bids evaluated by the Central Procurement Board. He argued that the applicant states that the bidders cannot be joined to the proceedings because they did not part-

¹⁸ *Ondonga Traditional Authority v Oukwanyama Traditional Authority* (APPEAL 44 of 2013) [2015] NAHCMD 170 (27 July 2015).

take in the review application before the second respondent. It is submitted that the outcome of the review panel's decision used its discretion to raise issues that were not in the third respondent's papers.

[71] Mr Shimutwikeneni submitted a party that has direct and substantial interests in the matter can only be excluded upon its consent. It is imperative to note that the applicant has not made any averment in its founding affidavit that the bidders not joined to these proceedings have given their consent. What the applicant relies on is the apparent waiver by the bidders because they were not cited by the third respondent in its application for review.

[72] He submitted that even if the bidders that are not part of these proceedings did not partake in the review proceedings before the second respondent, its decision put them at an advantage in that, their bids can still be evaluated as the applicant did not have the authority to conduct the procurement process. The applicant's application seeks to take that away which is a prejudice to the bidders. He referred to *Standard Bank v Maletzky*¹⁹, where it was held that:

'The failure to join necessary parties is a fundamental flaw in the proceedings and will inevitably prejudice both the three respondents but also the administration of justice itself.'

[73] He contended that the second respondent's decision that the bid is above the threshold pertains to a point of law and not factual allegations that need to be alleged by the bidders. The second respondent acted within the confined prescribed s 60(d) of the Public Procurement Board. Section 60(b) empowers the second respondent to act as follows:

"Direct the Board or the public entity that has acted or proceeded in a manner that is not in compliance with this Act or proceed in a manner that is in compliance with this Act."

[74] He argued that the applicant has thus approached the court with unclean

¹⁹ *Standard Bank Namibia Ltd and Others v Maletzky and Others* (15 of 2013) [2015] NASC 12 (24 June 2015.)

hands, being fully aware that it has not complied with the provisions of the Act in so far as the threshold is concerned. He submitted that there is a nexus between the relief that the applicant seeks and its unclean hands. In essence, the applicant is asking the court to turn a blind eye to its non-compliance with the Act in that it conducted a bidding process where the bid amount exceeds the prescribed threshold.

[75] He contended that Regulation 2 of the Regulations made in terms of s 79 of the Public Procurement Act 15 of 2015 states as follows:

'The board must conduct the bidding process on behalf of a public entity for the award of a contract that exceeds the threshold for such public entity as specified in Annexure 1'.

[76] Mr Shimutwikeni submitted, the applicant states that the seven days period notice was complied with. The notice contained the date from 24 May 2022 to 30 May 2022. During that period, 29 May 2022 was a Sunday and in terms of the Interpretation Act, the Sundays is excluded from the computation of days which the applicant failed to consider.

Discussion

[77] The third respondent raised *in limine the* issue of non-joinder of unsuccessful bidders by the applicant to this review application. The legal position of non-joinder in review applications is well settled. In *Mavara v Shapwa*²⁰, Masuku J laid a test to determine whether it is necessary to join the party to the proceedings as follows:

'The substantial test is whether the party that is alleged to be a necessary party for the purpose of joinder has a legal interest in the subject matter of the litigation, which may be affected by the judgment of the court in the proceedings concerned.'

Put differently, "if the order which might be made would not be capable of being

²⁰*Mavara and another v Shapwa* (HC-MD-CIV-MOT-GEN 181 of 2021) [2021] NAHCMD 603 (10 June 2021).

sustained or carried into effect without prejudicing a party, that party was a necessary party.”

[78] In *Stellmacher v Christians*²¹, Silungwe AJ held that:

“[16] The expression ‘interested person’ judicially means someone who has a direct and substantial interest in the subject matter and the outcome of the litigation. The interest must be a real interest, not merely an abstract or academic interest. A mere financial or commercial interest will not suffice.” [My underlining]

[79] In *Namibia Construction v The Chairperson of the Tender Board Namibia Construction (Pty) Ltd*²², this court dealt with the matter that was decided before the promulgation of the PPA. It concerns a direct review application to the High Court, by two unsuccessful bidders who were dissatisfied with the Tender Board’s decision. This court ruled that these unsuccessful tenderers ought to have been joined and relying on the case of *Amalgamated Engineering Union v Minister of Labour*²³, this court said that:

“There is nothing before me to show that they had waived their right to be joined”

[80] That case is distinguishable from the present matter as it was before the promulgation of the PPA. Under the PPA, internal review remedy is available to an aggrieved bidder, whereas, under the repealed Tender Board Act, the unsuccessful bidder’s remedy was to approach the High court for a review application. In that instance and on the authority of *Namibia Construction*, unsuccessful bidders had to be joined. However under the PPA, an unsuccessful bidder has an internal remedy of review before the second respondent. If the unsuccessful bidder does not exercise that internal remedy of review or if joined to the review application by any other aggrieved bidder before the second respondent and does not participate, then in my respectful view, the aggrieved bidder (unsuccessful bidder) has waived the right to be joined in subsequent

²¹ *Stellmacher v Christiaans and Others* (APPEAL 170 of 2007) [2008] NAHC 2 (21 February 2008).

²² *Namibia Construction (Pty) Ltd v The Chairperson of the Tender Board* (A 283/2007) [2014] NAHCMD 6 (21 January 2014).

²³ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

review application to the high court. With regard to waiver, the court in the *Roads Accident Fund v Mothupi*²⁴ held that:

'[18] The outward manifestations can consist of words; of some other form of conduct from which the intention to waive is inferred; or even of inaction or silence where a duty to act or speak exists. A complication may arise where a person's outward manifestations of intention are intrinsically contradictory, as for instance where one telefax indicates an intention to waive and another, perhaps as a result of a typographical error, does not. That problem does not arise in this case and consequently need not be discussed (cf *Mahabeer v Sharma NO and Another* 1985 (3) SA 729 (A) at 737D - E). Nor is it necessary to consider some of the other problems relating to waiver which do not arise in this case, such as whether the manifestation of an intention to waive must of necessity be communicated to the other side and, if so, whether by some means or another it must always be 'accepted' or acted upon by the other party.'

[81] In *SJV Medical Supplies CC v The Review Panel*²⁵, a case decided under the PPA regime, Masuku J relying on the judgment in *Namibia Construction (Pty) Ltd*²⁶, said that the unsuccessful tenderers who did not participate in the proceedings before the Review Panel have a direct and substantial interest in any order the Court might make concerning the tender and must be joined to the review application in the High Court. I, with respect disagree with that ruling. The unsuccessful bidder had the opportunity to bring a review application before the Review panel or if joined, failed to participate, that inaction, is a clear demonstration that the unsuccessful bidder had tacitly waived its right to be joined to subsequent review application to the High Court. The parties (bidders) complained of not being joined, did not challenge the decision of the applicant before the second respondent and therefore accepted the outcome. The third respondent did also not join them when it brought the review application before the second respondent. In the result, it was not necessary to join those parties to this review application as they waived their right to be joined. In the result, the point in limine is refused.

²⁴ *Roads Accident Fund v Mothupi* (518/98) [2000] ZASCA 27 at para 18.

²⁵ *SJV Medical Supplies CC v The Review Panel* (HC-MD-CIV-MOT-GEN-2020/00318) [2020] NAHCMD 460 (6 October 2020).

²⁶ *Namibia Construction (Pty) Ltd v The Chairperson of the Tender Board* (A 283/2007) [2014] NAHCMD 6 (21 January 2014).

[82] I now turn to the first ground of review, non-compliance with Regulation 42. It is common cause that the fourth respondent's application for review before the second respondent was not served on the applicant or on the other respondents. It is also not in the record dispatched by the first and second respondents in terms of r 76 (2) (b), nor was such a copy produced in these review proceedings.

[83] Section 59(1) of the PPA is couched in the following terms:

“(1) A bidder or supplier may, as prescribed, apply to the Review Panel for a review of a decision or an action taken –

- (a) by the Board; or
- (b) by a public entity,

Within seven days after the bidder or supplier is notified of the decision or action.

...

(4) A bidder or supplier who is aggrieved or claims to have suffered, or to be likely to suffer, loss under this Act must exhaust all available remedies under this Act before instituting any judicial action in the High Court.’

[84] Regulation 42 provides as follows:

‘(1)A supplier or bidder who wishes to lodge an application for review under section 59 of the Act must, within 7 days of receipt of the decision or an action taken by a public entity, apply to the Review Panel for review.

(2) An application for review contemplated in sub regulation (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\$5 000.

...

(3)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 sub-regulation (1)

and on any other interested person.’

[85] The use of the word ‘must’ in the above provisions is a clear indication that those provisions are peremptory. In *Green Enterprise Solutions (Pty) Ltd v Chairperson of the Public Review Panel* the court pronounced itself on s 55(5) as follows:

‘[23] This provision is clear and mandatory. Once the bidders have been notified about the successful bidder, they are given a stand-still period of 7 days within which to launch a review application. Should this not be done within that period, the accounting officer must award the contract to the successful bidder. This is couched in peremptory terms. . .

[25] The 1st respondent was in no position to consider the application for review. Strictly speaking there existed no application for review before it. This is so because the mandatory period within which the aggrieved bidders were to lodge their application had lapsed and none of the bidders lodged any review application. I find that this ground raised by the applicant is eminently meritorious.’

[86] In *Ngavetene and Others v Minister of Agriculture, Water and Forestry and Others*²⁷ the court held that:

‘[53]... the *ultra vires* doctrine is based on the assumption that a person or a public body which owes its legal existence and derives its power from a statute, or an agreement or the common law can do no valid act unless thereto authorized by such enabling legislation or instrument. Any limitations on the exercise of power which are prescribed by a statute must be observed.

[54] It is in the interest of justice and the rule of law that courts ensure that invalid decisions by Ministers and public officers do not stand. By doing so the courts will enforce compliance with the principle of legality and the interest of justice would be advanced’ (My Emphasis)

[87] In *Immanuel v Minister of Home Affairs and Others*²⁸, Damaseb JP said

²⁷ *Ngavetene and Others v Minister of Agriculture, Water and Forestry and Others* (HC-MD-MOT-CRT-2017/00316 delivered 26 November 2018).

²⁸ *Immanuel v Minister of Home Affairs and Others* (PA 315 of 2005) [2006] NAHC 30 (28 August

that:

[53] Judicial review has two aspects: First, it is concerned with ensuring that the duties imposed on decision-makers by law (which includes the Constitution) are carried out. A functionary who fails to carry out a duty imposed by law can be compelled by the High Court to carry it out. Secondly, judicial review is concerned with ensuring that an administrative decision is lawful, i.e. that powers are exercised only within their true limits. If a functionary acts outside the authority conferred by law, the High Court can quash his or her decision. This is the doctrine of *ultra vires*.'

[88] As alluded to, the fourth respondent's review application before the second respondent was not served on the applicant or on the other respondents as required by Regulation 42(9). There is also no proof that the N\$5000 was paid by the fourth respondent as required by Regulation 42(8) (b).

[89] By entertaining the fourth respondent's review application in contravention of the mandatory provisions of s 59 and Regulation 42, the second respondent acted *ultra vires* its power conferred on it by law. This court can therefore review and set aside that decision and regard it as invalid.

[90] I now turn to the second ground of review. The second respondent found that the bids were above the applicant's threshold and on that basis nullified the procurement proceedings and held that same should start a fresh. The issue of the threshold was not before the respondent for determination, nor raised by any party to the review application. It was determined *mero motu* by the second respondent. Regulation 44 provides that:

'The proceedings before the Review Panel are conducted in such a manner as the Review Panel considers most suitable to resolve the issues before the Review Panel. . .

As stated above, the issue of the threshold was not before the second respondent for determination.' (My emphasis)

[91] In *Green Enterprise Solutions (Pty) Ltd v Chairperson of the Public Review Panel*²⁹ Masuku J In dealing with “issues” before the second respondent, said the following:

‘[27] I now turn to deal with the first ground of review that was upheld by the 1st respondent. It is common cause that the 1st respondent, when determining an application for review, is confined to the papers that are before it. It is improper for a panel to raise or deal with issues that are not placed before it. Neither the 4th nor 5th respondent raised the ground for review which the 1st respondent found competent to uphold. On this score I find that the 1st respondent acted *ultra vires* when it *mero motu* raised and decided upon grounds not within the confines of the papers before it.’

[92] By dealing with and determining an issue which was not raised in the papers before it, the second respondent acted *ultra vires* its powers and for that reason alone the decision of the second respondent cannot stand.

[93] Another reason why the decision of the second respondent cannot stand on the issue of the threshold is that the second respondent based its decision on irrelevant considerations and not based on material facts before it. In *Pepcor Retirement Fund and Another v Financial Services Board and another*³⁰, the court held that:

‘Judicial intervention has been limited to cases where the decision was arrived at arbitrarily, capriciously or *ma/a fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones...’

[94] And further at para 47³¹ the court reasoned thus:

‘In my view, a material mistake of fact should be a basis on which a Court can

²⁹ *In Green Enterprise Solutions (Pty) Ltd v Chairperson of the Public Review Panel* (HC-CIV-MOT-REV-2020/00235)[2021]NAHCMD 478(14 Oct 2021).

³⁰ *Pepcor Retirement Fund and Another v Financial Services Board and Another* (2003) (6) SA 38 (SCA) at par [32].

³¹ *Ibid.*

review an administrative action. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to have been made.' My Emphasis)

[95] Mr Nekwaya correctly, in my view, submitted that In light of the above *dictum*, there were no material facts available for the decision on the threshold to be made appropriately, as it was never the subject of the review application serving before the second respondent. Because of this manifest material mistake of fact, the court can review and set aside the decision of the second respondent.

[96] Mr Nekwaya further contended that the second Respondent's decision to set aside the bids and refer the procurement process to the Central Procurement Board is based on an erroneous interpretation of the term "*threshold*" under s 8(a) of the Public Procurement Act and Regulation 2(1) and 2(2) of the Public Procurement Regulations. These Provisions provides as follows:

4.1 "Section 8(a): the Central Procurement Board of Namibia has a principal object – "to conduct the bidding process on behalf of public entities for the award of contracts for procurement or disposal of assets that exceed the threshold prescribed for public entities...

4.2 Regulation 2(1) and (2): 'The Board must conduct the bidding process on behalf of a public entity for the award of a contract that exceed the threshold for such public entity as specified in Annexure 1" and "A public entity must conduct its own bidding process for the award of a contract that is within the threshold as specified in Annexure 1...'

[97] From the above-quoted provisions, Mr Nekwaya correctly submitted that it is clear that the threshold ceiling is defined with reference to the contract amount and not the entire bidding process. The bids were for 'works,' and the threshold is Thirty-Five Million Namibian Dollars in *Annexure 1* of the Public Procurement Regulations.

[98] According to Mr Lutombi, the applicant conducted five bidding processes

with 39 individual contracts across the five regions. None of the 39 contracts exceeds the threshold of Thirty-Five Million Namibian Dollars. Further, the bidding documents for the five bidding processes specified that “each contract area is regarded as a separate contract and will be awarded separately.” Mr Kandundu on behalf of the third respondent averred that the applicant fragmented the tender amount in an attempt to circumvent the prescribed threshold limit of Thirty-Five Million Namibian Dollars which is prohibited in terms of s 65 of the Act (Public Procurement Act, 15 of 2015). That is simply not correct. These were individual contracts across the five regions and each contract did not exceed the Thirty-Five Million Namibian Dollars threshold. Accordingly, the submission by Mr Nekwaya that the second respondent erroneously misconstrued the term “threshold” by lowering its ceiling to the entire bidding process instead of the contract amount is an error tantamount to a mistake of law and hence reviewable is meritorious. In *Ekuphumleni Resort (Pty) Ltd and Another v Gambling and Betting Board, Eastern Cape, and Others*³² the court set aside a decision by the respondent to award a gambling license based on the respondent’s erroneous interpretation of the request for proposals formulated by the respondent and in terms of which bids were submitted and adjudicated. The court held that this error amounted to a mistake of law and hence was reviewable.

[99] In *casu*, the erroneous interpretation of the term threshold amounted to a mistake of law and is similarly reviewable.

[100] One matter remains. The second respondent found that the applicant failed to comply with the seven-day notice period as it included two public holidays and a Sunday. On 23 May 2022, in its Notice of Selection Award, notified the bidders who were aggrieved by the selection award to apply for review before the second respondent within seven days period, the period which stretched from 24 May 2022 to 30 May 2022. The period between 24 May to 30 May amounts to seven days. This period excludes the day the Notice of Award was issued (23 May 2022). The finding by the second respondent that the period was less than seven days because it included a Sunday and a public holiday is

³² *Ekuphumleni Resort (Pty) Ltd and Another v Gambling and Betting Board, Eastern Cape, and Others* (2010) (10) SA 228(E).

simply wrong. In terms the Interpretation of Laws Proclamation 37 of 1920, s 4 provides as follows:

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

[101] Section 4 of South Africa’s Interpretation Act 33, which is similar to our section 4, was interpreted as follows, in *S v Kashire*³³ at 167F-G:

‘The days mentioned in this section must surely be computed with reference to s 4 of the Interpretation Act 33 of 1957, i.e. inclusive of Saturdays, Sundays and public holidays but exclusive of the first day and inclusive of the last day.’(My underlining)

[102] In light of the above, it is clear that the prescribed days include Sundays and public holidays. The interpretation and application of computation of ‘days’ adopted in *Kashire*³⁴ was endorsed by Parker J (as he then was) in *S v Paulo and Another*³⁵.

[103] The finding by the second respondent was clearly an error in the interpretation and computation which this court can review and set aside. It is therefore submitted that the finding by the second Respondent is a reviewable error as it is premised on the wrong interpretation and application of computation of days.

Conclusion

[104] It is clear that the second respondent acted *ultra vires* the provisions of the relevant provisions of the PPA and regulations when it *mero motu* determined that the applicant’s bids were above the threshold and annulled the bidding

³³ *S v Kashire* 1978(4) SA 166 (SWA).

³⁴ *Ibid.*

³⁵ *S v Paulo and Another* (3) (CC 10 of 2009) [2011] NAHC 65 (10 March 2011).

process. The decisions of the second respondent are therefore liable to be reviewed and set aside. Accordingly the application must succeed.

Order

1. The point in limine of non-joinder raised by the third respondent is dismissed.
2. The second respondent's decision dated 03 June 2022 to the effect that the bids No. W/ONB/RA-04/2021, W/ONB/RA-05/2021, W/ONB/RA-06/2021, W/ONB/RA 07/2021&W/ONB/RA-08/2021 exceed the public entity's threshold (the impugned decision) is hereby reviewed and set aside
3. The second respondent's decision dated 03 June 2022 to the effect that the bids purportedly above public entity's threshold are handed over to the Central Procurement Board is hereby reviewed and set aside.
4. The second respondent's decision dated 03 June 2022 terminating the procurement proceedings is hereby reviewed and set aside.
5. It is declared that the applicant's outcome of the bidding evaluation process as indicated in the notice for selection of award issued on 24 May 2022 is valid.
6. The applicant is hereby directed and permitted to proceed with the concluding and signing of procurement contracts with the successful bidders.
7. The third respondent is ordered to pay the costs of the applicant, such costs to include the costs of one instructing and one instructed counsel.
8. The matter is removed from the roll and regarded as finalised.

APPEARANCES:

APPLICANT: E NEKWAYA
INSTRUCTED BY: FB LAW CHAMBERS, WINDHOEK

THIRD RESPONDENT: H SHIMUTWIKENI
OF HENRY SHIMUTWIKENI & CO INC, WINDHOEK