

REPUBLIC OF NAMIBIA



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

Case No: HC-MD-CIV-MOT-REV-2020/00404

In the matter between:

ELITE CONSTRUCTION CC

APPLICANT

and

HELEN AMUPOLO

FIRST RESPONDENT

COUNCIL FOR THE MUNICIPALITY

OF SWAKOPMUND

SECOND RESPONDENT

KASHIKUDI INVESTMENTS CC

THIRD RESPONDENT

NBT QUALITY SERVICES CC

FOURTH RESPONDENT

(‘The First Application’)

Consolidated with the matter of:

Case No: HC-MD-CIV-MOT-REV-2020/00364

In the matter between:

KASHIKUDI INVESTMENTS CC

FIRST APPLICANT

NBT QUALITY SERVICES CC

SECOND APPLICANT

and

THE PROCUREMENT REVIEW PANEL	FIRST RESPONDENT
THE MINISTER OF FINANCE OF THE REPUBLIC OF NAMIBIA	SECOND RESPONDENT
COUNCIL FOR THE MUNICIPALITY OF SWAKOPMUND	THIRD RESPONDENT
THE CHAIRPERSON OF THE EVALUATION COMMITTEE OF THE MUNICIPAL COUNCIL OF SWAKOPMUND	FOURTH RESPONDENT
ELITE CONSTRUCTION CC (‘The Second Application’)	FIFTH RESPONDENT

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

Coram: SIBEYA J
Heard: 08 June 2022
Delivered: 23 September 2022

Flynote: Public law - Public Procurement Act, Act 15 of 2015 - Section 55(4) and (5) of the Public Procurement Act, Act 15 of 2015 discussed in respect of the review period.

Bid validity period - Period within which a bidder agrees to keep their offer legally binding - Purpose of the bid validity period is for bidders to commit not to modify or withdraw their bid for a specified period.

Audi alteram partem principle rehearsed - Any kind of statute impliedly enacts that the *audi alteram partem* is to be observed.

Summary: In November 2019, the Municipal Council of Swakopmund (the Council) initiated a bid, calling for bidders to submit their bid, for Bid W/ONB/SM-

004/2019 Procurement of Works for the Construction of the SME Industrial Park on Erf No 4866 Swakopmund. The closing date for submission of the bids was 23 January 2020.

On 23 January 2020, Elite Construction CC (Elite) submitted a bid to the Bid Evaluation Committee of the Council under reference no. W/ONB/SM – 004/2019. Bids were also submitted by Kashikudi Investments CC (Kashikudi) and NBT Quality Services CC (NBT), amongst others.

The crux of the matter is that, on 12 March 2020, Elite was selected for the award. The unsuccessful bidders were simultaneously informed to lodge any review within the period of 16 March 2020 and 23 March 2020 (standstill period).

Following Elite being selected for the award, there was exchange of correspondences between Kashikudi and NBT, on the one side, and the Council, on the other side, between 17 March 2020 and 20 March 2020. A thorough analysis of such correspondences reveals objections raised in respect of Elite being selected for the award.

These objections were viewed by the Council to constitute a review as contemplated in regulation 42 of the Public Procurement Regulations (the Regulations), thus the Council, through its accounting officer did not award a contract to Elite in terms of the provisions of s 55(5) of the Public Procurement Act 15 of 2015 (the Act).

It eventually played out that, on 24 March 2022, the Council without the knowledge and without affording interested parties an opportunity to make representations proceeded to internally conduct a review of the bid awarded to Elite. This resulted in the bidders being awarded revised bidding scores. The Bid Evaluation Committee found the bid of Kashikudi and NBT to be substantially responsive and as the lowest evaluated bid. As a result of this new evaluation, it was apparently recommended that the contract be awarded to Kashikudi and NBT, at the exclusion of Elite.

On 4 June 2020, the Council notified Elite, as well as Kashikudi and NBT, that the bid has been cancelled in terms of s 54(4) of the Act, thus no award has been made.

The said communication was further amplified by a letter of 8 June 2020, wherein the Council indicated that there was certain internal irregularities committed that is why they canceled the bid. Kashikudi and NBT then, after seeking legal advice, addressed a letter to the Council on 16 June 2020, wherein they advised the Council that it could not cancel the bid on the grounds mentioned in the letter.

On 14 August 2020, the Council, responded to Kashikudi and NBT and stated that, unless the concerned bidders apply for review to the Public Procurement Review Panel (Review Panel), of the actions and decisions of the Council within 7 days of the said date of the letter, the Council would proceed with the 'subsequent procurement process'.

The decision that the Council took was to commence with a new procurement process. Kashikudi and NBT then filed a review application to the Review Panel on 21 August 2020, challenging the decision of the Council to cancel the bidding process and to start the process afresh.

The parties stated their respective cases and on 2 September 2020, the Review Panel delivered a ruling and found that the bid validity period lapsed and ordered that the procurement process start afresh.

Held that - The standstill period commence to run on 13 March 2020 to 19 March 2020.

Held further that - The Council's review/reconsideration of Elite's selection for the award, its re-evaluation of the bids and the subsequent re-evaluation report, all conducted pursuant to regulation 38, were *ultra vires* and constitutes a nullity.

Held further that - Once Elite had been selected for award and the bidders informed thereof, the selection was final and the Council could not have revisited the selection as they were *functus officio*.

Held further that - Elite was entitled but irregularly not afforded the opportunity to be heard prior to the Council's decision to embark upon a re-evaluation of the bids, in terms of regulation 38(3).

Held further that - A public entity may, at any time prior to the acceptance of a bid, reject all bids or cancel the bidding process, in terms of s 54(1) of the Act. It may do so for the limited reasons set out in s 54(1)(a) to (g), amongst which is if '(e) an irregularity that warrants the cancellation of the bidding process occurred.' The Council cancelled the bid by notice of 4 June 2020. In the notice, reliance was placed on s 54(4) of the Act, which was no authority for the cancellation and it is plain that the reasons for the cancellation were founded on the hesitation to accept the outcome of the bid re-evaluation conducted in terms of regulation 38(3)(a), affecting Elite's selection for the award.

Held further that - It is ordered that the Council must comply with s 55(5) of the Public Procurement Act 15 of 2015 and award a contract under procurement reference No. W/ONB/SM-004/2019 for the Construction of the SME Industrial Park on Erf No 4866, Swakopmund to Elite.

ORDER

AD FIRST APPLICATION

1. The decision of the Public Procurement Review Panel of 2 September 2020 that the BID NO: W/ONB/SM-004/2019 – Construction of SME Industrial Park on ERF 4866, Swakopmund is non-existent by operation of law, so does any decision that was made outside the bid validity period, in the absence of any extension and as dawn comes after night, so does the result follow the action, the Review Application is dismissed in terms of section 60 (a) of the Public Procurement Act (Act 15 of 2015) and the Public Entity is ordered to start the procurement process afresh, is hereby reviewed and set aside.

2. The decisions of the second respondent:
 - (a) of 19 March 2020, not to award the contract under procurement reference No. W/ONB/SM-004/2019 // Construction of SME Industrial Park on Erf No. 4866, Swakopmund to the applicant;
 - (b) of 24 March 2020, to conduct a review of the bids submitted under procurement reference No. W/ONB/SM-004/2019 // Construction of SME Industrial Park on Erf No. 4866, Swakopmund upon objections received from a bidder;
 - (c) of 04 June 2020, to cancel the bidding process under procurement reference No. W/ONB/SM-004/2019 // Construction of SME Industrial Park on Erf No. 4866, Swakopmund;
are hereby reviewed and set aside.
3. The award of the tender for Bid W/ONB/SM-004/2019 for the procurement of Works for the Construction of the SME Industrial Park on Erf No 4866 Swakopmund to Elite Construction CC (the applicant in the first application) 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 and award a contract under procurement reference No. W/ONB/SM-004/2019 for the Construction of the SME Industrial Park on Erf No 4866, Swakopmund to Elite Construction CC (the applicant in the first application).
5. The third and fourth respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the application consequent upon the employment of one instructing and one instructed legal practitioner.
6. The matter is regarded as finalised and is removed from the roll.

AD SECOND APPLICATION

1. The application is dismissed.
2. The applicants must, jointly and severally, the one paying the other to be absolved, pay the costs of opposition of the application of the fifth respondent consequent upon the employment of one instructing and one instructed legal practitioner.
3. The matter is regarded as finalised and is removed from the roll.

JUDGMENT

SIBEYA J:

Introduction

[1] In public procurement, review bodies have generally been prohibited from interfering with concluded contracts. This is particularly so, as time is of the essence in the procurement process and any disruptions delay the implementation of government contracts. Delays are undesirable as they lead to the inflation of costs, which at the end of the day government has to incur. The procuring process involves high expenditure of public funds and requires an assurance that public money is not wasted. The disruption that comes with bidders' remedies therefore has to be regulated to ensure that it remains minimal while affording bidders the right to justice. It is for this reason that the standstill period was created by s 55(4) read with s 55(5) of the Public Procurement Act 15 of 2015, to set a time limit within which unsuccessful bidders aggrieved with the bidding process can lodge their complaints before the contract is concluded. Once the time period has lapsed, contracts awarded can then be concluded between the government and the successful bidder.

[2] Procurement process is time sensitive, and as such procurement bodies must acquaint themselves with the enabling legislation and policies to avoid delays, as their lack of knowledge is becoming more and more eminent.

Parties and representation

[3] From the onset, I wish to highlight that case number: HC-MD-CIV-MOT-REV-2020/00364 (second application) was consolidated with case number: HC-MD-CIV-MOT-REV-2020/00404 (first application). The first application is, therefore, the live application by order of this court dated 8 April 2021, for the above applications to be heard as one. This is based on the fact that the proceedings sought to be reviewed and set aside comprise the same factual background and administrative process between the same interested parties.

[4] In the first application, the applicant is Elite Construction CC. The first respondent is Ms Hellen Amupolo N.O. in her capacity as chairperson of the Public Procurement Review Panel. The second respondent is the Council for the Municipality of Swakopmund. The third respondent is Kashikudi Investments CC and the fourth respondent is NBT Quality Services CC.

[5] In the second application the first applicant is Kashikudi Investments CC and the second applicant is NBT Quality Services CC. The first respondent is the Procurement Review Panel. The second respondent is the Minister of Finance. The third respondent is the Council for the Municipality of Swakopmund. The fourth respondent is the Chairperson of the Evaluation Committee of the Municipal Council of Swakopmund and the fifth respondent is Elite Construction CC.

[6] For the purpose of this judgment, the parties will be referred to as follows: Elite Construction CC will be referred to as 'Elite'. Kashikudi Investment CC will be referred to as 'Kashikudi' and NBT Quality Services CC will be referred to as 'NBT'.

[7] The Council for the Municipality of Swakopmund, which appears to be the focal point of most of the issues and thus central to both applications, will be referred to as 'the Council'.

[8] Elite is represented by Mr Barnard, Kashikudi and NBT are represented by Mr Kasita and the Council and its associated respondents are represented by Mr Burger.

[9] The Council did not oppose the main relief sought in both applications and will abide by the court's order. Their participation in these proceedings is to assist the court with supplying the record; providing the facts and its reasoning relevant to decisions taken; identify where it fell short and to deny that it acted *mala fide*.

Factual Matrix

[10] The facts upon which the first and second applications are based are not in dispute. The facts that I set out hereinafter are those I discern to be of importance in the determination of both the first and the second applications.

First application

[11] In November 2019, the Council initiated a bid, calling for bidders to submit their bid, for Bid W/ONB/SM-004/2019 Procurement of Works for the Construction of the SME Industrial Park on Erf No 4866 Swakopmund. The closing date for submission of the bids was 23 January 2020.¹

[12] On 23 January 2020, Elite submitted a bid to the Bid Evaluation Committee of the Council under reference no. W/ONB/SM – 004/2019. Bids were also submitted by Kashikudi and NBT amongst others.

[13] On 7 February 2020, the Bid Evaluation Committee of the Council evaluated the bids so received and recommended to the Council that the resulting contract be awarded to Elite. On 4 March 2020, the Procurement Committee of the Council adopted the recommendation of the Bid Evaluation Committee to award the contract to Elite.

¹ Paragraph 11 to 12 of the Council for the Municipality of Swakopmund Answering Affidavit.

[14] On 12 March 2020, the Council notified Elite, that it was the successful bidder in terms of the provisions of s 55(4)(a) of the Public Procurement Act, Act 15 of 2015 (hereinafter referred to as “the Act”) and regulation 38 of the Public Procurement Regulations (hereinafter referred to as “the Regulations”), and has been selected for the award.

[15] In this letter, the Council not only informed Elite that it had been selected for the award, it also informed as follows:

(b) You are hereby informed that in the absence of any applications for review or objections of the selection for the award within 7 days of this notice, the accounting officer of the Municipality of Swakopmund shall award the contract to the selected bidder.

(c) The standstill period of 7 days referred to in (b) starts on **16 March 2020** and ends on **23 March 2020**.

(d) Please note that the issuing of the purchase order/acceptance letter of this offer shall be subject to (b) and (c).'

[16] On 12 March 2020, the Council by letter gave notice to Kashikudi and NBT, that they are the non-successful bidders in terms of s 55(4)(b) of the Act and regulation 38 of the Regulations.

[17] In this letter the Council informed the non-successful bidders, *inter alia*, that:

b. Kindly note that if you are not satisfied with the selection for the award made by the public entity, you may make an application for the review of the selection made within 7 days of the commencement of the standstill period. In the absence of an application for review, the procurement contract will be awarded to the person selected for the award.

c. The stand still period of 7 days referred to starts on **16 March 2020** and ends on **23 March 2020**'

[18] All the entities which had submitted bids were informed of the outcome on 12 March 2020.

[19] There seemed to have been an exchange of correspondences between Kashikudi and NBT, on the one side, and the Council, on the other side, between 17 March 2020 and 20 March 2020. A thorough analysis of such correspondences reveal objections raised in respect of Elite being selected for the award.

[20] The said objections were perceived by the Council to constitute a review/appeal. Why I say it was 'perceived' will become clearer as this judgment unfolds. The said objections levelled by Kashikudi and NBT were not brought to the attention of Elite.

[21] Despite Elite not being alerted to any objections or application for review made during the standstill period, the Council, through its accounting officer did not award a contract to Elite in terms of the provisions of s 55(5) of the Act. The reason for this stance transpired in the correspondence of 17 March 2020 which the Council received from Kashikudi and NBT, namely:

- a) A letter of 17 March 2020, where it was indicated that Kashikudi and NBT 'appeal' against the award.
- b) The Council responded to Kashikudi and NBT by letter dated 19 March 2020 wherein it set out the method utilized for bid evaluation and then duly concluded that: 'We are confident that the evaluation methodology applied to this bid was in terms of the Public Procurement Act, 2015 and as per the evaluation criteria's set out in the bidding document. Thus, in the absence of any other objections, Council shall proceed and award this bid to **MESSRS. ELITE CONSTRUCTION CC.**'

[22] On 20 March 2020, Kashikudi and NBT addressed a further letter to the Council and made further enquiries on the bid evaluation, *inter alia*, that:

'Under Section 55 subsection 4, NBT Quality Services JV Kashikudi Investments CC would like to apply for an administrative review with regards to the issued notice for selection for the award'

[23] Kashikudi and NBT further requested that:

‘...With the technicalities raised above, we therefore request the Chief Executive Officer in terms of Regulation 38 (3) of the Public Procurement Act Regulations to assess our review accordingly’

[24] As mentioned above, none of these exchanged correspondences between the Council on the one side, and Kashikudi and NBT on the other side, were copied and/or dispatched and/or communicated to Elite at the time, save for an informal e-mail, received from Mr. Patrick Hamalwa of the Council on 23 March 2020 stating the following:

‘Dear Sir/Madam

With regards to abovementioned bid, we have received objections which are being taken into consideration thus no award will be made after standstill period which is ending today until matter (*sic*) has been resolved. Outcome will be communicated in due course.

Regards’

[25] Elite by way of a letter, indicated that they were not afforded an opportunity to partake in the process of considering the objections raised by parties who were discontented with the outcome of the bidding process.

[26] The Council responded to Elite by letter dated 26 March 2020, wherein it was stated, *inter alia*, that:

‘We are however not at liberty to discuss the objections of other bidders. The outcome of the review will be communicated to all bidders when finalised.’

[27] The Bid Evaluation Committee of the Council proceeded to re-evaluate the bids on 24 March 2020. This resulted in the bidders being awarded revised bidding scores. The Bid Evaluation Committee found the bid of Kashikudi and NBT to be substantially responsive and the lowest evaluated bid. As a result of this new

evaluation it was apparently recommended that the contract be awarded to Kashikudi and NBT, at the exclusion of Elite.

[28] I pause here to mention that the re-evaluation was conducted internally by the Bid Evaluation Committee of the Council without the knowledge or participation of any of the interested or affected parties.

[29] On 7 May 2020, Elite, through its erstwhile legal practitioners addressed a letter to the Council in which the review process followed was queried and sought clarity as to why it was excluded from the said process and why it was denied the right to participate in the review process, given its well vested interests.

[30] The Council responded by letter dated 8 May 2020. In this letter the Council informed that they had:

‘... Received objections/application of review within the standstill period from MESSRS KASHIKUDI INVESTMENTS JV NBT QUALITY SERVICES, . . . thus Council could not proceed and ... award bid to Messrs. Elite Construction CC.’

[31] The Council further pointed out that their understanding of the provisions of s 59 of the Act read with regulation 38 of the Regulations is to the effect that the correspondence received from Kashikudi and NBT amounted to a review application and they were thus obliged to deal with the ‘review’ and could not award the contract to Elite.

[32] This was not taken kindly by Elite. An exchange of correspondences then ensued in which the Council argued in favour of their action, while Elite stuck to its stance that there was no application for review and it ought to be awarded the contract.

[33] On 4 June 2020, the Council notified Elite, as well as Kashikudi and NBT, that:

'The abovementioned bid has been cancelled in terms of section 54(4) of the Public Procurement Act, Act 15 of 2015, thus no award has been made.'

[34] The said communication was further amplified by a letter of 8 June 2020, wherein the Council indicated that there was certain internal irregularity committed that is why they canceled the bid. Kashikudi and NBT then, after seeking legal advice, addressed a letter to the Council on 16 June 2020, wherein they advised the Council that it could not cancel the bid on the grounds mentioned in the letter.

[35] The Council, through its legal practitioners, responded to Kashikudi and NBT on 14 August 2020. It stated that, unless the concerned bidders apply for review by the Public Procurement Review Panel (hereinafter referred to as "the Review Panel") of the actions and decisions of the Council within 7 days of the said date of the letter, the Council would proceed with the 'subsequent procurement process'.

[36] The decision that the Council took was to commence with a new procurement process. Kashikudi and NBT then filed a review application to the Review Panel on 21 August 2020, challenging the decision of the Council to cancel the bidding process and to start the process afresh. The Council filed a replying affidavit on approximately 25 August 2020 and Elite filed an answering affidavit on 27 August 2020.

[37] In their review application Kashikudi and NBT sought, *inter alia*, the following relief:

'1.1 Reviewing and/or correcting and/or setting aside the First Respondent's decision to cancel bid - Procurement reference number: W/ONB/SM-004/2019 - Construction of SME Industrial Park on Erf 4866, Swakopmund.

1.2 Reviewing and/or correcting and/or setting aside the First Respondent's decision to award the bid in question to Elite Construction.'

[38] The parties stated their respective cases.

[39] On 2 September 2020, the Review Panel delivered a ruling, which was communicated to Elite via e-mail on 4 September 2020, comprising the following order:

‘1. That the BID NO: W/ONB/SM-004/2019 - Construction of the SME Industrial Park on ERF 4866, Swakopmund, is non-existent by operation of law, so does any decision that was made outside the bid validity period, in the absence of any extension.

2. As dawn comes after night, so does the result follows the action, the Review Application is dismissed in terms of Section 60 (a) of the Public Procurement Act (Act 15 of 2015) and the Public Entity is ordered to start the procurement process afresh.

3. That this order takes effect as of the 02 September 2020.’

[40] In essence the Review Panel, found that the bid validity period lapsed and ordered that the procurement process start afresh.

[41] What is apparent in this matter is that the Review Panel arrived at the aforesaid conclusion out of its own volition. None of the parties to the proceedings sought the said relief.

Second application

[42] Following the ruling of 2 September 2020, Kashikudi and NBT instituted review proceedings under case number HC-MD-CIV-MOT-REV-2020/00364. As alluded to above, it is formally consolidated with the present matter as they have elements of commonality among them. This necessitated that they be heard together.

[43] Kashikudi and NBT sought the following relief:

‘1. Reviewing and/or correcting and/or setting aside the order by the Public Procurement Review Panel (the first respondent) delivered on 02 September 2020 and communicated to the applicants on 04 September 2020;

2. An order declaring that the bid validity periods of the responsive bidders be extended in accordance with Section 49 of the Act (15 of 2015) of their respective bids for 90 days after the date of this order, on the same bidding conditions;

3. An order directing the applicants application for review of the selection of Elite Construction CC (the fourth respondent) (*sic*) for award, is referred back to the Bid Evaluation Committee for re-evaluation of all the bids, in compliance with the *audi alterem partem* rule and the bid evaluation criteria, alternatively;

4. An order declaring the applicants as the successful bidders as per third respondent's re-evaluation report dated 24 March 2020; and consequently, ordering third respondent to comply with Section 55 (1) of Act 15 of 2015.'

[44] During arguments, however, Kashikudi and NBT indicated to this court that they no longer persist with the alternative claim. The reason for its change in position was purportedly because this court has in *Radial Truss Industries(Pty) v Chairperson of the Central Procurement Board of Namibia*² indicated that regulation 38(2)(c) of the Regulations is *ultra vires* s 55(4) of the Act. The *Radial Truss Industries* judgment was also approved by Masuku J, in *ABB Namibia (Pty) Ltd v Central Procurement Board of Namibia Others*.³ Regulation 38(2)(c) authorized a public entity to reconsider its own decision.

Elite's case and argument

[45] The bone and marrow of Elite's case was that the 'objections' levelled by Kashikudi and NBT did not constitute review proceedings, fit for internal consideration by the Council. In this connection, Elite contended that the requirements for an application for review are set forth in regulation 42. These requirements set out: what is to be contained in such an application, the application fee that is to be paid, the parties who are to be served with the application and the direction of the procedure to be followed once the appropriate parties have so been served with the application. As such, the methods adopted by Kashikudi and NBT

² *Radial Truss Industries (Pty) v Chairperson of the Central Procurement Board of Namibia* 2021 (3) NR 752 (HC) at paras 36 – 38.

³ *ABB Namibia (Pty) Ltd v Central Procurement Board of Namibia Others* 2021 (3) NR 710 (HC) at para 74-75

were procedurally incorrect and were not in compliance with the statutory requirements.⁴

[46] Elite further contended that the seven-day standstill period, as per the provisions of s 55(5) of the Act as well as in the regulations thereto, is to run from the date of notice of selection, being 12 March 2020. Thus, the standstill period had to commence on 13 March 2020 and end on 19 March 2020. The stipulation in the said notice, that the standstill period would run from 16 March 2020 and end on 23 March 2020, constituted an irregularity.

[47] Elite launched the last arrow to its bow by pressing that neither Kashikudi nor NBT nor the Council at any stage deemed it just or necessary to involve Elite in the proceedings that resulted in the Council's eventual decision not to award the contract to Elite. Elite further stated that the Council's decision to refer the bid back to the Bid Evaluation Committee for re-submission and the decision to cancel the bid was made without its participation or knowledge. This was a gravely unjust omission by the Council, which rendered those proceedings void, so Elite contended.

[48] Mr Barnard argued that, the requirements for a valid review application are set out in s 59 of the Act read with regulation 42 of the Regulations. Such an application must be made to the Review Panel within seven days of receipt of the impugned decision or action. The impugned actions and decisions which Kashikudi and NBT sought to have reviewed by the Review Panel, was the award to Elite as set out in the letter of 12 March 2020 and the cancellation of the bid on 4 June 2020. The review application was served and filed on or about 21 August 2020 at the earliest. Elite received this application on 22 August 2020. This is more than six months after the expiry of the seven day stand still period.

[49] There not being a valid review application before the Review Panel, it did not have jurisdiction to entertain the application. In respect of this contention, Mr Barnard laid great store *on Green Enterprise Solutions (Pty) Ltd v Chairperson of the Public Procurement Review Panel*⁵

⁴ Paragraph 37 of supplementary affidavit of Elite.

⁵ *Green Enterprise Solutions (Pty) Ltd v Chairperson of the Public Procurement Review Panel* (HC-MD-CIV-ACT-MOT-REV-2020/00235) [2021] NAHCMD 478 (14 October 2021).

[50] In summation, Mr Barnard argued that:

1. The Review Panel did not have a valid review to entertain before it and thus it had no jurisdiction to review.
2. The Review Panel acted *ultra vires* when it dismissed the purported review application and declared the bid as 'non-existent by operation of law'.
3. The decision by the Council not to award the contract to Elite in terms of the provisions of s 55(5) was *ultra vires* and unlawful.
4. The decision by the Council to withdraw the bidding process purportedly in terms of the provisions of s 54(1) of the Act was incompetent and unlawful. By that time Elite's bid had already been accepted and the due selection of Elite for the award was beyond reproach.

Kashikudi and NBT's case and arguments

[51] Kashikudi and NBT's case is premised on the re-valuation conducted on 24 March 2020. Furthermore, in response to Kashikudi and NBT's aforesaid purported application for review, Council's bid evaluation committee re-evaluated the bids and produced a review report, amongst others:

- a) reducing the score of Elite from 92.32% to 67.09%;
- b) increasing the score of NBT/Kashikudi from 82.9% to 90.35%;
- c) increasing the score of OCB Builders from 73.08% to 73.85%.

[52] The Bid Evaluation Committee of the Council, explained the outcome of the review as follows (quoted verbatim):

'The review of the evaluation has concluded in some score changes. The main reason for the changes in the score is due to misinterpretations of the clauses in the Bidding Data Sheet. Additionally some minor calculation errors were discovered and corrected.'

[53] Furthermore, Kashikudi and NBT were of the opinion that, seeing that they filed a review application on 20 March 2020, and which the Council considered, but did not act on, no award of the contract was made by the Council during the bid validity period despite the fact the Elite received the notice of selection on 12 March 2020. Mr Kasita in this connection submitted that the Review Panel was correct in finding that the bid validity period lapsed.

[54] To further buttress the position that a notice of selection of the award does not amount to the award of a contract, Mr Kasita relied on the case of *PIS Security Services CC*,⁶ as an analogy, wherein the court agreed with the finding in *Central Procurement Board v Nangolo NO and Others*,⁷ that the Public Procurement Review Panel could not set aside a decision or an order that brought a procurement contract into force.

[55] Mr Kasita argued that in *PIS Security Services CC* matter, the applicants were given a notice of the award within the bid validity period. However, one of the respondents challenged the decision of the Central Procurement Board, at the Review Panel, to set aside the notice of award. It was set aside. The court, on review, ordered that the decision of the Review Panel should be set aside, because the Review Panel acted *ultra vires* in setting aside a decision that brings into force a procurement contract.

[56] In summation, Mr Kasita argued that the notice of selection of the award does not bring a procurement contract or framework into force, as the public entity can be ordered by the Review Panel to set aside that decision.

⁶ *PIS Security Services CC v Chairperson of the CPBN* (HC-MD-CIV-MOT-GEN-2020-00321) [2021] NAHCMD 1 (18 January 2021)

⁷ *Central Procurement Board v Nangolo NO and Others* (HC-MD-CIV-MOT-REV-2017/00441) [2018] NAHCMD 357 (09 November 2018) at para 51.

[57] In view of the fact that the bid validity period would have lapsed before the award of the bid to Kashikudi and NBT following the re-evaluation, there is no longer any bid to be awarded to Kashikudi and NBT, so argued Mr Kasita. It follows as a matter of consequence that Kashikudi and NBT can no longer seek the relief sought in their notice of motion, Mr Kasita stated. It was, however, argued by Mr Kasita that, the court should nevertheless award costs for Kashikudi and NTB against the Council because the Council's Procurement Committee acted negligently when they failed to complete the bidding process within the bid validity period. Furthermore, the Council acted negligently in refusing to communicate the outcome of their review application to Kashikudi and NBT, so it was argued.

[58] Mr Kasita emphasized that Kashikudi and NBT were put out of pocket when they attended to the proceedings at the Review Panel just to be informed that the bid validity period has expired, similarly now, by this court and, therefore, the Council should bear the wasted costs.

Council's case and arguments

[59] As stated earlier in this judgment, Mr Burger submitted that the Council does not oppose the main relief sought by the applicants in their respective review applications. The Council only opposes Kashikudi and NBT's application for 'an award of damages for loss of income and or profit/earned'.

[60] Mr Alfeus Benjamin - the Chief Executive Officer of the Council deposed to the answering affidavit on behalf of the Council and contends that the relief for damages sought is not competent in these review proceedings and in any event lacks evidence.

[61] Mr Benjamin indicated to this court that the Council entered an appearance to oppose and take part in these proceedings only to:

- a) provide this court with the record of the procurement process under review;

- b) relay to the court relevant facts, its reasoning and understanding of the law, when conducting the procurement process under review;
- c) provide aspects where it realises its procurement process did not comply with the law;
- d) deny allegations that it acted *mala fide*; and
- e) state that it will abide by the Order of this Court.

[62] Mr Benjamin, then proceeded to provide a summary of the procurement process and the Council's reasoning. Such reasoning will follow suit hereinafter.

[63] It is the Council's case that on 07 February 2020, the Bid Evaluation Committee evaluated the bids and found three responsive bids. The responsive bids were scored as follows:

- a) bidder no. 1 - Elite offering the contract at N\$24 863 706.86 scored 92.32%;
- b) bidder no. 4 - the joint venture between NBT and Kashikudi offering the contract at N\$24 728 278.14 (as corrected) scored 82.9%;
- c) bidder no. 8 - OCB Builders CC ("OCB Builders") offering the contract at N\$ (as corrected) scored 73.08%.

[64] The Council's Bid Evaluation Committee in their report to the Council's Procurement Committee recommended that the contract be awarded to Elite at N\$24 838 746.56, because it achieved the highest combined score, incorrectly saying in their report that the offer was 'the lowest price quotation obtained' from compliant bidders.

[65] On 19 February 2020, the Council's Procurement Committee considered the evaluation report and called for an explanation of the evaluation and selection.

[66] On 4 March 2020, the Council's Procurement Committee adopted the recommendation of the Bid Evaluation Committee and recommended the award of the contract to Elite at N\$24 863 706.85, stating that they selected for award 'the bidder with the highest score, after technical and financial evaluation as set out in the bidding document.'⁸

[67] On 12 March 2020, the Council gave notice to Elite, that it was the successful bidder in terms of the provisions of s 55(4)(a) of the Act and regulation 38 of the Regulations, and has been selected for the award.

[68] In this letter, the Council further stated that:

'(b) Your are hereby informed that in the absence of any applications for review or objections of the selection for the award within 7 days of this notice, the accounting officer of the Municipality of Swakopmund shall award the contract to the selected bidder.

(c) The standstill period of 7 days referred to in (b) starts on **16 March 2020** and ends on **23 March 2020**.

(d) Please note that the issuing of the purchase order/acceptance letter of this offer shall be subject to (b) and (c).'

[69] Mr Benjamin states that on 17 March 2020, the Council received a written 'appeal' by Kashikudi and NBT against the award of the contract to Elite, taking issue with the selection made, on the following grounds:

- a) Instructions to bidders (ITB) 34.1 stipulated that the contract would be awarded to the lowest bidder.
- b) Elite at N\$21 620 614.64 (excluding value-added tax) was not the lowest bidder.
- c) Kashikudi and NBT at N\$21 502 798.38 (excluding value-added tax) was the lowest bidder.

⁸ Paragraph 19 of the Council for the Municipality of Swakopmund Answering Affidavit.

[70] Mr Benjamin, then indicated that the Council's understanding of s 55(5) of the Act and regulations 38(1) to (3) is that once Elite and all unsuccessful bidders were notified that Elite was selected for the award of the contract, such award was subject to the standstill period of 7 days from 16 to 23 March 2020. Mr Benjamin emphatically stated that the application for review by an unsuccessful bidder within the standstill period is to be assessed by the procurement committee in terms of regulations 38(2) and (3). Therefore, according to Mr Benjamin, Kashikudi and NBT indeed applied for a review to reconsider Elite's selection for award, within the standstill period.

[71] Mr Benjamin further stated that on 24 March 2020, and in response to Kashikudi and NBT's aforesaid application for review, the Council's Bid Evaluation Committee re-evaluated the bids and produced a review report, amongst others:

- a) reducing the score of Elite from 92.32% to 67.09%;
- b) increasing the score of NBT/Kashikudi from 82.9% to 90.35%;
- c) increasing the score of OCB Builders from 73.08% to 73.85%.

[72] The above re-evaluation was purportedly based on the procedures prescribed in regulation 38(2)(c) and (d) and 38(3), so Mr Benjamin stated.

[73] Mr Benjamin further stated that during August 2021, the provisions of s 55 and regulation 38 were considered by this Court. Angula, DJP in the matter of *Radial Truss Industries (Pty) Ltd v Chairperson of the Central Procurement Board of Namibia and Others 2021 (3) NR 752 (HC)*, in effect, held that:

- a) regulation 38(2)(c) impermissibly created a right for a bidder to request a public entity to reconsider its selection for award during the standstill period;

- b) that right was not provided for in section 55 of the Act and regulation 38 impermissibly enlarged the meaning of section 55, not intended by the legislature;
- c) to the extent that regulation 38 is in conflict with the provisions of the Act, it is to be considered *ultra vires* and null and void;
- d) once the public entity has selected a bidder for award and notified the bidders of the selection, its decision is final (not conditional) and the public entity may not revisit (reconsider) its selection and becomes *functus officio*;
- e) the public entity's selection of a bidder for award is a decision or an action taken which may, within the standstill period, be subjected to a review by the Public Procurement Panel, as contemplated in s 59(1) of the Act.

[74] The above decision provided clarity on the interplay between s 55(5) and regulation 38, so Mr Benjamin stated.

[75] The Council concluded by stating that, the result to the current matter is that:

- a) The Council's review/reconsideration of Elite's selection for the award, its re-evaluation of the bids and the subsequent re-evaluation report, all conducted pursuant to regulation 38, were *ultra vires* and constitutes a nullity.
- b) Once Elite had been selected for the award and the bidders informed thereof, the selection was final and the Council could not have revisited the selection as they were *functus officio*.
- c) The selection of Elite could have been reviewed within the 7 days standstill period but only by the Review Panel in terms of s 59 review application.

- d) In any event, Elite was entitled but irregularly not afforded the opportunity to be heard prior to the Council's decision to embark upon a re-evaluation of the bids, in terms of regulation 38(3).
- e) The cancellation of the bid was based on the hesitation to accept the outcome of the re-evaluation conducted which did not meet the requirements for a valid cancellation.
- f) A public entity may, at any time prior to the acceptance of a bid, reject all bids or cancel the bidding process, in terms of s 54(1) of the Act. It may do so for the limited reasons set out in s 54(1)(a) to (g), amongst which is if '(e) an irregularity that warrants the cancellation of the bidding process occurred.' The Council cancelled the bid by notice of 04 June 2020. In the notice, reliance was placed on section 54(4) of the Act, which was no authority for the cancellation. It is plain that the reasons for the cancellation were founded on the hesitation to accept the outcome of the bid re-evaluation conducted in terms of regulation 38(3)(a), affecting Elite's selection for award.

[76] Mr Benjamin concluded by stating that the aforementioned circumstances did not meet the requirements for a valid cancellation referred to in s 54(1) of the Act and in any event, the re-evaluation was *ultra vires*, as stated. The cancellation was thus irregular and stands to be set aside.

Discussion and analysis

When does the standstill period commence?

[77] Before dwelling into the in-depth analysis of the merits of this matter, there seems to be one grave issue lingering in the air, which might just come back to bite, if not authoritatively dealt with from the onset and that is: when does the standstill period commence to run? To determine this issue, it is incumbent on this Court to examine several provisions of the Act.

[78] To that end, Elite's view is that the purported review application was brought by Kashikudi and NBT on 20 March 2020, which was not within the standstill period as required by s 55(4) of the Act. Section 55(4) and (5) of the Act provides as follows:

'(4) An accounting officer must, in the prescribed manner and form, notify-

(a) the selected bidder of the selection of its bid for award; and

(b) the other bidders, specifying the nature and address of the successful bidder and the price of the contract.

(5) In the absence of an application for review by any other bidder within 7 days of the notice referred to in subsection (4), the accounting officer must award the contract to the successful bidder.' (emphasis added)

[79] In addition, regulation 38(2) of the Regulations provides that the notice referred to in section 55(4) must inform the bidders-

'(a)...

(b) of the date and time when the standstill period commences and ends.'

[80] Mr Kasita contended that nowhere in s 55(4) of the Act did the legislature use the words 'from date of receipt of notice'. Mr Kasita, for comparative purpose, referred the court to s 59(3) of the Act, where the legislature specifically used the words 'receipt of the application' to indicate when computation would commence.

[81] Section 59 (3) of the Act reads as follows:

'The Review Panel must strive to make a decision as contemplated in section 60 within seven days of receipt of the application for review or as soonest as practical possible, but not later than 14 days.'

[82] Mr Kasita submits that the reason thereof is that the notice itself, in terms of regulation 38(2) would specify when the standstill period would commence and end, and does not necessary have to commence from the date when the notice was received.

[83] As an analogy to buttress his argument, Mr Kasita argued that the legislature did not intend the computation of the seven days to commence from the date of receipt of the notice. Mr Kasita referred to the Mauritius' Public Procurement Act 33 of 2006. The Mauritius Public Procurement Act is similarly worded to the Namibian Public Procurement Act.

[84] In terms of s 40(3) of the Mauritius Public Procurement Act, it reads that 'in the absence of a challenge by any other bidder within 7 days of the date of the notice referred to in subsection (3), the contract shall be awarded to the successful bidder'. Consequently, the Mauritius legislature used the words from date of notice, which the Namibian legislature did not use, so Mr Kasita argued.

[85] I find Mr Kasita's argument extremely worrisome. Without even relying on extraneous factors, and without the necessity to seek refuge from Mauritius, it is clear as day, that the seven-day standstill period, as per the provisions of s 55(4) read with s 55(5) of the Act as well the Regulations, is to run 'from the date of the said notice'. It requires no magnifying glasses to read that s 55(5) of the Act speaks of seven days of the notice and does not leave room to any entity or person to read in their preferred seven days. Like it or not, seven days is seven days of the notice of selection. The seven days, therefore, commenced on 13 March 2020 and ended on 19 March 2020. The stipulation in the notice of selection, that the standstill period would run from 16 March 2020 and end on 23 March 2020, is irregular, which ought to be set aside.

[86] I thus find that the standstill period commenced to run on 13 March 2020 to 19 March 2020.

[87] Having put the issue of the standstill period to bed, the next kernel issue is whether or not there was a valid review application before the Review Panel.

Was there a valid review application before the Review Panel?

[88] In this connection, I find it imperative to discuss the contents of regulation 42 of the Regulations.

[89] Regulation 42(2) of the Regulations in its entirety reads 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 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\$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 subregulation (1) and on any other interested person.

(4) Upon being served with the copies of the review application under subregulation (3), the public entity or any other interested person must within two days file with the Review Panel a replying affidavit to the allegations made by a bidder or supplier.

(5) The Review Panel may at any time prior to the date of the hearing of a review application at its own initiative or on application by a person and if it is convenient to do so –

(a) allow a number of persons who has a claim for review against a public entity or any other interested persons to join the review proceedings as applicants against the same defendant or as defendants against the same applicant; or

(b) where separate review applications have been instituted and after notifying all interested parties, consolidate the review applications as one action.'

[90] In *Paragon Investment (Pty) Ltd JV China Huayun Group v Chairperson: Review Panel*,⁹ the court held at para 21 that:

‘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.’

[91] Without laboring too much on the issue, the above authority cements my findings that the ‘objections’ levelled by Kashikudi and NBT on 17 and 20 March 2020 by way of letters, did not constitute review proceedings, fit for consideration by the Review Panel. In terms regulation 42, the requirements for a review are clear as to what is to be contained in such application, the application fee that is to be paid, the parties who are to be served with the application and the direction of the procedure to be followed once the appropriate parties have so been served with the application. None of this is evident from the record filed.

[92] As I draw curtains to a close in this matter, the last issue for determination is whether or not the bid validity period lapsed.

Did the bid validity period lapse?

[93] This is a hotly contested issue. The parties were at all times up in arms in respect of the bid validity period and none of them showed any signs of backing down.

[94] Mr Kasita, rightfully so in my view, stated that a bid validity period is the period within which a bidder agrees to keep their offer legally binding. During the bid validity period, if the bidder decides to withdraw their bid or not to sign the contract, if selected, the bidder’s bid security (if one was required) would be forfeited. The purpose of the bid validity period is for bidders to commit to not modify or withdraw their bid for a specified period. Thus, it is required that a public entity must complete

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

the selection process and sign the contract within the bid validity period. The period of bid validity is stated in the bidding documents. The bid validity period is usually calculated to extend from the bid opening date up to the date when the contract is signed.

[95] Section 1 of the Act defines a bid as:

‘an offer or proposal submitted in response to a request to supply goods, works or services, or any combination thereof, and, where applicable, includes any prequalification process’.

[96] The law that governs the bid validity period of the present bid is the Act, namely: s 49 of the Act, and the bidding document, namely: the Instructions to Bidders.

[97] Section 49 of the Act stipulates as follows:

‘(1) A bid remains valid for the period as indicated in the bidding documents which may not be more than 180 days.

(2) The validity period of a bid may be extended only with the agreement of the bidder concerned.

(3) A bidder who agrees to an extension of the validity period of his or her bid must furnish a corresponding extension of his or her bid security, if security was required for the original bid submission.’

[98] Moreover, 19.1 of the Instructions to bidders’ (ITB) states that the bid validity period will be valid for 90 days after the deadline set for the submissions of the bid. The deadline is counted as day one of the validity.

[99] On the basis of the above, it was common cause between the parties that the closing date for the bid was 23 January 2020. Notice of selection was given to Elite on 12 March 2020. The 90 days bid validity period should thus have expired around 30 March 2020.

[100] Mr Kasita strongly submitted that since Kashikudi and NBT filed a review application on 20 March 2020, and which the Council considered, but did not act on, no award of the contract was made by the Council during the bid validity period. Therefore, he concluded, the Review Panel was correct in finding that the bid validity period had lapsed.

[101] In support thereof, Mr Kasita, relied on the Supreme Court judgment in *Arandis Power (Pty) Ltd v President of the Republic of Namibia and Others*¹⁰ wherein the Court stated as follows:

[53] Clause 14.8 of the policy deals with the tender validity and periods and extensions to it. It provides: “Tenders shall be valid for the period stipulated in the specific terms of reference of the Tender from the closing date of the Tender to allow NamPower adequate time to finalise the Tender award.”

[54] The further subclauses of clause 14 permit an extension of tender validity period on good cause shown to satisfaction of the tender board. A further subclause expressly authorizes the extension of time where the assessment of tender is not completed within the tender validity period. The clause specifically provides that extensions would be for the minimum period needed.

[55] The RFP in this matter provided that tender proposals are valid for a period of six months from the closing date or such further date as NamPower may agree with the shortlisted bidders. The tender closing date was set at 12 September 2014. This meant that tender proposal were only valid until 11 March 2015, unless the tender validity period was to have been extended. No extension occurred and the Nampower made its decision to award the tender on 30 March 2015 – after the validity period had expired, as was conceded by Nampower.

[56] Clause 33 deals with the awarding of tenders. It expressly provides: “The awarding of tenders and quotations to the successful tenderers shall always be made within the tenders’ validity period and in accordance with levels of authority.”

¹⁰ *Arandis Power (Pty) Ltd v President of the Republic of Namibia and Others* 2018 (2) NR 567 (SC).

[57] In this matter, there had been no tender award during the validity of the competing tenders. Clause 33 expressly requires that Nampower is to award tenders within their validity period. The elaborate provisions concerning securing extension to a tender validity period had not been invoked by Nampower.

[58] Mr Budlender relied upon a trilogy of cases in South Africa as to the consequences of a tender award after the expiry of the tender validity period. Those three decisions concerned the legal consequence of a failure by a public body, to accept, within the stipulated validity period for the (tender) proposals, any of the proposals received. The same issue arises in this review.

[59] In each of those cases, the same conclusion was reached. In the first of the trilogy, Southwood J in *Telkom SA Ltd v Merid Training (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Ltd and Others* concluded: “The question to be decided is whether the procedure followed by the applicant and the six respondents after 12 April 2008 (when the validity period of the proposals expired) was in compliance with section 217 of the Constitution. In my view it was not. As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete - *albeit* unsuccessful – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposal. If it failed to award a tender within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender. . .

[60] This well-reasoned approach was followed by Lasket J in *Joubert GalpinSearle Inc and Others v Road Accident Fund and Others* 2014 (4) SA 148 (ECP) para 74, in reaching a similar conclusion: ‘By the time the tender validity period has expired, there is nothing to extend because, as Southwood J said in *Telkom*, the tender process has been concluded, *albeit* unsuccessfully. The result, in this case, is that the RAF had no power to award the tender once the bid validity period had expired and it had no power to extend the period as it purported to take the decision. Put in slightly different terms, there were no valid bids to accept, so RAF had no power to accept the expired bids. ...

[63] It follows that the award of the tender to Xaris outside the validity period, in the absence of any extension, rendered it invalid.’

[102] The *Arandis* matter sets out our law neatly on the bid validity period and the effect thereof. It is apparent from the *Arandis* matter that a contract concluded outside the bid validity period constitutes no contract as the bid had lapsed and is equivalent to no bid to be accepted.

[103] Can Mr Kasita be said to be on the correct side of the law in his argument that the Council did not act on the said review applications of 17 and 20 March 2020, and, therefore, no award of the contract was made by the Council during the bid validity period, thus, vindicating the Review Panel in its decision that the bid validity period had lapsed?

[104] I disagree that the bid validity period lapsed. It is common cause that on 12 March 2020, the Council gave notice to Elite, that Elite was the successful bidder in terms of the provisions of s 55(4)(a) of the Act and regulation 38 of the Regulations, and had been selected for the award. The decision was, therefore, made to award the bid to Elite if there are no objections filed.

[105] I find it difficult to fathom, Mr Kasita's argument that by 30 March 2020, no award had been made when the bid validity period expired, in the face of the notice of selection of the successful bidder of 12 March 2020.

[106] I thus find that the bid validity period did not lapse as the award, had been made already weeks before the bid validity period purportedly lapsed i.e. 30 March 2020. The reason why Elite, despite the award made to it, never signed the contract was due to the unlawful and unauthorized approach adopted by the Council not to sign the contract upon receipt of letters from Kashikudi and NBT.

[107] To add fuel to this already raging fire, Mr Benjamin in his answering affidavit on behalf of the Council, unequivocally concedes that all bids expired on 22 April 2020, which was 90 days after the closing date for the submission of bids, 23 January 2020. He states that the decision to withdraw the tender process was justified on the following basis:

- a) At this date, 30 March 2020, no award had been made when the bid validity periods expired.
- b) The Council's Bid Evaluation Committee recommended that Elite be informed of its selection for the award and not 'that the resulting contract be awarded to Elite.'

[108] I thus find that this attempted justification on behalf of the Council is not valid. The letter by the accounting officer of the Council to Elite on 12 March 2020 is unequivocal. Elite had been selected for the award and in the absence of any proper review application, the accounting officer of the Council shall award the contract to the selected bidder.

[109] The reference in this letter to 'objections' is of no consequence. The Act does not make provision for the suspension of an award on the basis of objections. The awarding of the contract to Elite would be subject only to a valid review application being received within the standstill period. No valid and proper review application was so received.

[110] Over and above the reasons for invalidity of the decision to withdraw the award which is conceded by the Council, the officials of Council were *functus officio* after awarding the bid to Elite. They could not cancel the bidding process without the decision to select Elite and to award the contract to Elite having been set aside. Elite had a vested right emanating from the selection of the award.

[111] The provisions of s 54 of the Act are unequivocal. The power to reject bids and to cancel the bidding process is available to the Council only prior to a selection having been made. By the time the Council purported to cancel the bid, in *casu*, Elite had already been selected as the successful bidder. Such selection stands until set aside.

Audi alteram partem principle

[112] Elite was not afforded *audi* when the Council entertained the purported objections from Kashikudi and NBT received on 17 and 20 March 2020. *Audi* is natural justice deserved by all.

[113] The learned author Baxter points out that the requirement to act fairly is expressed in two principles in the form of two Latin maxims: *audi alteram partem* ('hear the other side'); and *nemo iudex in propria causa* ('no one may judge his own cause'). The court in *Swaziland Federation of Trade Union v The President of Industrial Court of Swaziland and Others*¹¹ remarked as follows regarding the *audi alteram partem* principle:

'The *audi alteram partem* principle which requires that the other party-must be heard before an order can be granted against him, is one of the oldest and most universally applied principles enshrined in our law - That no man is to be judged unheard was a precept known to the Greeks. Embraced in the principle is also the rule that an interested party against whom an order may be made must be informed of any possibly prejudicial facts or considerations that may be raised against him in order to afford him the opportunity of responding to them or defending himself against them.'

[114] Masuku J in *Skorpion Mining Company (Pty) Ltd v Road Fund Administration*¹² aptly expressed the principle as follows: "It must also be poignantly observed and repeated that it is assumed that Parliament presumed the application of the *audi alteram partem* principle in every legislative enactment unless provided otherwise and in clear and unambiguous language".

[115] Furthermore, in *Westair Aviation (Pty) Ltd v Namibia Airports Company*,¹³ Hannah J stated the following in this regard:

'One begins with the presumption that any kind of statute impliedly enacts that the *audi alteram partem* is to be observed, and because there is a presumption of an implied

¹¹ *Swaziland Federation of Trade Union v The President of Industrial Court of Swaziland and Others* (11 of 1997) [1997] SZSC 13 (01 January 1997).

¹² *Skorpion Mining Company (Pty) Ltd v Road Fund Administration* (I 2063-2014) [2016] NAHCMD 201 (12 July 2016).

¹³ *Westair Aviation (Pty) Ltd v Namibia Airports Company* 2001 NR 256 (HC).

enactment, the implication will stand unless the clear intention of Parliament negatives and excludes the implication.' (emphasis added)

[116] On the basis of *audi* alone, Elite's application to review and set aside the purported re-evaluation and cancellation of the bid could succeed as it constitutes a violation of natural justice. *Audi* is a pillar on which justice stands and rests.

Conclusion

[117] In the circumstances, I am of the considered view that the Council, as well as Kashikudi and NBT who jumped on the bandwagon have, unfortunately, fallen on the wrong side of the law.

[118] A public entity may, at any time prior to the acceptance of a bid, reject all bids or cancel the bidding process, in terms of section 54(1) of the Act. It may do so for the limited reasons.

[119] The reasons for the cancellation were founded on the hesitation to accept the outcome of the bid re-evaluation conducted in terms of regulation 38(3)(a), affecting Elite's selection for the award. These circumstances did not meet the requirements for a valid cancellation referred to in s 54(1) of the Act.

[120] In any event, the re-evaluation was *ultra vires* and falls to be set aside. Similarly, the cancellation itself offended the *audi altram partem* rule and was thus irregular and in contravention of Article 18 of the Namibian Constitution.

Costs

[121] The last question relates to the costs of the application. The established rule applicable to costs, is that costs follow the event. There is no reason in law or logic as to why this rule should not apply to this matter. I was not referred to any reason to

deviate from the said principle, nor, could I find such reason. Costs will, therefore, be awarded against third and fourth respondents.

[122] The question that remains for determination is whether or not the Council should be mulcted in costs. Mr Burger submitted that costs should not be awarded against the Council. The Council does not oppose the relief sought by the applicants. It entered an appearance to defend only to provide the court with the record of the procurement process, provide the relevant facts of the matter to the court and its reasoning and understanding of the law and deny allegations that it acted with *mala fide*. The Council further stated that it will abide by the order of this court. It is the Council's further position that it is interested to complete the procurement process according to law.

[123] As alluded to above, the Council admitted to have acted unlawfully when it failed to afford *audi* to Elite during the considerations of the objections raised. The Council, therefore, did not strictly speaking oppose Elite's application. The position taken by the Council was to cooperate with the court and provide sufficient information and documents in order to assist the court to make a just decision.

[124] Pickard JP in *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others*,¹⁴ remarked that:

'It is almost standard practice that an independent tribunal such as the Tender Board would in review proceedings comply with the requirements of Rule 53 of the Uniform Rules of Court by making the record of proceedings available and its reasons and such other documentation as the Court may need to adjudicate upon the matter and, if necessary, to file an affidavit setting out the circumstances under which the decision was arrived at. It seems, however, unusual to me that an independent tribunal such as the Tender Board should file such comprehensive and lengthy papers and offer such stringent opposition by employing senior counsel and the like to argue their case. More often than not independent tribunals, having done their duty in terms of the provisions of Rule 53, take the attitude that they abide by the decision of the Court and leave the other matters to the interested parties to dispute

¹⁴ *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others* 1999 (1) SA 324 (CK) at 353. See also: *Julies and Others v Speaker of the National Assembly and others* 2006 (4) SA 13 (C) at p. 22.

before the Court. When they do so the Court will in the normal course of circumstances not grant costs against the tribunal, save if it is satisfied that the latter acted *mala fide*.’

[125] Independent tribunals which do not actively oppose litigation but rather file documents including affidavits, where necessary, in order to provide relevant information for better adjudication of the matter before court, demonstrate cooperation with the court. Such conduct on the part of independent tribunals should be appreciated by the courts and should not, in the absence of malice, be mulcted in costs.

[126] In *casu*, the position of the Council to abide by the outcome of the proceedings and further filing documents including an affidavit to provide necessary information to the court is commendable. In the exercise of my discretion, I find that the position of the Council befits a no adverse costs order. In view of the foregoing, I find that the Council and Ms Helen Amupolo N.O should not be mulcted in costs.

Order

[127] In view of the foregoing findings and conclusions, I make the following order:

AD FIRST APPLICATION

1. The decision of the Public Procurement Review Panel of 2 September 2020 that the BID NO: W/ONB/SM-004/2019 – Construction of SME Industrial Park on ERF 4866, Swakopmund is non-existent by operation of law, so does any decision that was made outside the bid validity period, in the absence of any extension and as dawn comes after night, so does the result follow the action, the Review Application is dismissed in terms of section 60 (a) of the Public Procurement Act (Act 15 of 2015) and the Public Entity is ordered to start the procurement process afresh, is hereby reviewed and set aside.
2. The decisions of the second respondent:

(a) of 19 March 2020, not to award the contract under procurement reference No. W/ONB/SM-004/2019 // Construction of SME Industrial Park on Erf No. 4866, Swakopmund to the applicant;

(b) of 24 March 2020, to conduct a review of the bids submitted under procurement reference No. W/ONB/SM-004/2019 // Construction of SME Industrial Park on Erf No. 4866, Swakopmund upon objections received from a bidder;

(c) of 04 June 2020, to cancel the bidding process under procurement reference No. W/ONB/SM-004/2019 // Construction of SME Industrial Park on Erf No. 4866, Swakopmund;

are hereby reviewed and set aside.

3. The award of the tender for Bid W/ONB/SM-004/2019 for the procurement of Works for the Construction of the SME Industrial Park on Erf No 4866 Swakopmund to Elite Construction CC (the applicant in the first application) 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 and award a contract under procurement reference No. W/ONB/SM-004/2019 for the Construction of the SME Industrial Park on ERf No 4866, Swakopmund to Elite Construction CC (the applicant in the first application).
5. The third and fourth respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the application consequent upon the employment of one instructing and one instructed legal practitioner.
6. The matter is regarded as finalised and is removed from the roll.

AD SECOND APPLICATION

1. The application is dismissed.
2. The applicants must, jointly and severally, the one paying the other to be absolved, pay the costs of opposition of the application of the fifth respondent consequent upon the employment of one instructing and one instructed legal practitioner.
3. The matter is regarded as finalised and is removed from the roll.

O S Sibeya
Judge

APPEARANCES:

AD FIRST APPLICATION:

APPLICANT:

MR. BARNARD

Instructed by Louis Du Pisani Legal Practitioners

FIRST AND SECOND

RESPONDENTS:

MR. BURGER

Instructed by Kinghorn Associates

THIRD AND FOURTH

RESPONDENTS:

MR. KASITA

Instructed by Haufiku & Associates

AD SECOND APPLICATION

FIRST AND SECOND APPLICANT:

MR. KASITA

Instructed by Haufiku & Associates

FIRST, SECOND, THIRD AND

FOURTH RESPONDENTS:

MR. BURGER

Instructed by Kinghorn Associates

FIFTH RESPONDENT:

MR. BARNARD

Instructed by Kinghorn Associates