

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-REV-2019/00496

In the matter between:

<b>GLOBAL DIAMONDS VALUATORS NAMIBIA (PTY) LTD</b>	<b>APPLICANT</b>
and	
<b>CENTRAL PROCUREMENT BOARD OF NAMIBIA</b>	<b>1<sup>st</sup> RESPONDENT</b>
<b>REVIEW PANEL</b>	<b>2<sup>nd</sup> RESPONDENT</b>
<b>THE MINISTER OF MINES AND ENERGY</b>	<b>3<sup>rd</sup> RESPONDENT</b>
<b>THE MINISTER OF FINANCE</b>	<b>4<sup>th</sup> RESPONDENT</b>
<b>GEM DIAMONDS NAMIBIA (PTY) LTD</b>	<b>5<sup>th</sup> RESPONDENT</b>
<b>KINGS DIAMOND VALUATION (PTY) LTD</b>	<b>6<sup>th</sup> RESPONDENT</b>
<b>WELWITCHIA DIAMOND VALUERS (PTY) LTD</b>	<b>7<sup>th</sup> RESPONDENT</b>
<b>ONDJERERA DIAMOND VALUATORS (PTY) LTD</b>	<b>8<sup>th</sup> RESPONDENT</b>
<b>METCOR DIAMONDS CC</b>	<b>9<sup>th</sup> RESPONDENT</b>
<b>HOMPA INVESTMENTS (PTY) LTD</b>	<b>10<sup>th</sup> RESPONDENT</b>
<b>TARGET DIAMOND SERVICES (PTY) LTD</b>	<b>11<sup>th</sup> RESPONDENT</b>
<b>UNITED DIAMOND TRADING COMPANY (PTY) LTD</b>	<b>12<sup>th</sup> RESPONDENT</b>
<b>SINCO INVESTMENT FIVE (PTY) LTD</b>	<b>13<sup>th</sup> RESPONDENT</b>
<b>PRESTIGE DIAMOND SERVICES NAMIBIA (PTY) LTD</b>	<b>14<sup>th</sup> RESPONDENT</b>

**Neutral citation:** *Global Diamonds Valutors Namibia (Pty) Ltd v Central Procurement Board of Namibia* (HC-MD-CIV-MOT-REV-2019/00496) [2023] NAHCMD 151 (28 March 2023)

**Coram:** RAKOW, J

**Heard:** 14 February 2023

**Delivered:** 28 March 2023

**Flynote:** Review – Bid in respect of diamond valuation – Bid be declared in conflict with Article 18 of the Namibian Constitution – Unreasonable delay of review application instituted – Delay of almost five months – Applicant seemingly did nothing until the beginning of December 2019 as it believed that the Ministers of both Finance and/or Mines and Energy will set aside the tender allocation – Application dismissed.

**Summary:** The applicant, in essence, seeks to review and set aside the decision taken by the first respondent (“the Board”) on or about 9 May 2019 to the effect that the fifth respondent (“Gem Diamonds”) be awarded the Bid in respect of diamond valuation. The applicant further seeks a declarator that any agreement(s) entered into between the Minister of Mines and Energy and/or the Board, on the one hand, and Gem Diamonds on the other, according to the bid award is invalid, alternatively that it be set aside. The applicant also seeks an order that the decision to award the bid be declared in conflict with Article 18 of the Namibian Constitution. The applicant also seeks to review and set aside the decision taken by the second respondent to the effect that the applicant’s application for review in terms of section 59(1) of the Public Procurement Act 15 of 2015 was dismissed. Their argument centers on the fact that the successful candidate did not comply with the bidding instructions as per the Instructions to bidders’ document. According to this document, a bidder was expected to examine all instructions, forms, terms, and specifications in the said document.

Only the first and fifth respondents followed through in opposing the application. On behalf of the first respondent, it was argued that the premise by the applicant that the fifth respondent allegedly failed to state the total amount of its bid is not only without any basis but wrong. In this particular Bid, the bidders were required to provide unit rates. The instruction was that phase 3 will carry a total weight of 25 per cent of the total scoring and that pricing for valuations done on the NAMDEB production and

those from independent producers shall be expressed as a percentage of the total value of the parcel. On the other hand, pricing in terms of the provision of services as court witness and examination of polished diamonds shall be expressed in N\$ per hour.

On behalf of the fifth respondent, it was submitted that the decisions by both the First and Second respondents cannot be faulted as every decision that was made was reasonable and in line with the instructions to bidders. They further wish to raise the point that there was an unreasonable delay as the review application instituted by the applicant was dismissed on 30 July 2019. The present review application was only launched on 20 December 2019. It was submitted that the time period it took the applicant to institute the review application was unreasonable, especially if regard is had to the fact that the applicant was at all times legally represented. This period should be considered in the full context of the facts.

*Held that:* in this instance the review panel gave their decision on 30 July 2019 and these proceedings were only instituted on 20 December 2019. This is a delay of almost five months. When making a factual finding on these facts the court must conclude that the delay was indeed unreasonable. The second question now is whether this delay should be condoned. To be able to condone this delay the court needs to determine the reason for the delay.

*Held further that:* when deciding on condoning the delay, the court takes into account that the applicant seemingly did nothing until the beginning of December 2019 as it believed that the Ministers of both Finance and/or Mines and Energy will set aside the tender allocation. There is however no evidence that the applicant enquired regularly from these respective ministers as to whether they indeed were going to set aside the allocation and cancel the process. The court believes that they at least should have acted earlier than 20 December 2019.

The application is dismissed with costs.

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**ORDER**

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1. The application is dismissed with costs, such costs to include an instructed and instructing legal practitioner where applicable.
  2. The matter is removed from the roll and regarded as finalized.
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## JUDGMENT

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RAKOW, J

### The parties to the review

[1] The applicant is Global Diamond Valuers Namibia (Pty) Ltd, a private company duly incorporated under the company laws of Namibia. The first respondent is the Central Procurement Board of Namibia which was established as a juristic person in terms of section 8 of the Public Procurement Act 15 of 2015 (the Act) and which is responsible for the procurement of goods, works, and services in respect of public entities. The second respondent is the Review Panel appointed by the Minister of Finance, who is the fourth respondent, in terms of section 58 of the Act. The third respondent is the minister of Mines and Energy, duly appointed in terms of Article 32(3)(j)(bb) of the Namibian Constitution, and who is one of the responsible ministers concerning the matters relevant to this application. The fourth respondent is also appointed in terms of the Namibian Constitution and also a responsible minister concerning the matters relevant to this application.

[2] The fifth respondent is Gem Diamonds Namibia (Pty) Ltd, a private company incorporated under the company laws of Namibia and the company which was awarded the bid to perform diamond valuation services of diamonds received for the Namibian Diamond Trading Company on behalf of the Ministry of Mines and Energy. The remainder of the respondents from the sixth to the fourteenth are all companies who submitted tenders as part of the process of awarding the valuation services contract. The applicant in this review matter was one of the unsuccessful applicants for the valuation tender together with the sixth to fourteenth respondents.

### The current valuation system

[3] The current process provides for the Government Valuator to receive and value diamonds received from the Namibia Diamond Trading Company which in turn receives the diamonds from NAMDEB. There they are sorted and prepared for sale. The function of Government Valuator is a function under the Ministry of Mines and Energy but is being outsourced by them and the subject matter of this case. Outsourcing happens through a procurement contract of these specific valuation services.

[4] The valuation of the diamonds is jointly done between the Government Valuator and a NAMDEB negotiating team where the NAMDEB team applies the so-called book value which is then adjusted on the specific characteristics of the diamonds to be valued, which in turn results in the specific valuation value of the said diamonds. Of these diamonds, 85 per cent will be supplied to special customers while 15 per cent will be sent to Namdia (Namibian Desert Diamonds).

[5] This process is designed to ensure that a person who wishes to sell unpolished diamonds or dispose of unpolished diamonds, submits such diamonds to the Ministry of Mines and Energy, to allow for the determination of their market value, in line with the requirements set out in section 44 of the Diamond Act 13 of 1999. Section 45 of the same act further determines that no unpolished diamonds may be exported from Namibia unless such diamonds were submitted to the Minister of Mines and Energy for the determination of their market value.

[6] In terms of section 64 any person who intends to export from Namibia any polished diamonds of above a specific prescribed weight has to inform the Minister of Mines and Energy of such export and the Minister may examine the said diamonds to determine whether they are polished diamonds. These services are then also rendered by the Government Valuator.

#### The Procurement process

[7] The Public Procurement Act was brought into force on 1 April 2017 and the objects of the Act are inter alia, to promote integrity, accountability, transparency, efficiency, fair dealing, informed decision-making, and legality in the procurement of assets, works, and services. Under section 8 the Central Procurement Board was

established to oversee the work that needs to be done, specifically conducting the bidding process on behalf of public entities. The Procurement Board also has the power to appoint a Bid Evaluation Committee in terms of section 26(1) of the Act, which in turn oversees the examination and evaluation of bids received.

[8] In terms of section 40 of the Act, the Board must prepare an invitation to bid, inviting bidders to bid and submit their offers. A bid so handed in remains valid for a period, not more than 180 days but this period can be extended with the agreement of the bidder concerned and will have to furnish an extension of the bid security provided in instances where security is required in the original bid submission.

[9] Section 55(1) of the Act requires the 'Board or a public entity must award a procurement contract to the bidder having submitted the lowest evaluated substantially responsive bid which meets the qualification criteria specified in the pre-qualification or bidding documents.'

[10] Any bidder who disputes the award of a bid by the Board can approach the Review Panel in terms of section 58 of the Act. This panel consists of 5 persons who are appointed by the Minister of Finance and before an aggrieved bidder can institute proceedings in the High Court challenging the allocation of a bid, all internal remedies must be exhausted (in terms of section 59).

[11] In terms of section 63, a contract can also be terminated due to changed circumstances and a public entity may withdraw an award or terminate a procurement contract at any time for its convenience on the grounds of changed circumstances - in that the continuation of the contract is not or will not be in the public interest, or any variation in a contract price causes the total contract amount budgeted for to exceed by more than 15 per cent.

#### The Bid for Valuation Services

[12] In June 2018, the Procurement Policy Unit of the Ministry of Finance developed an Individual Procurement Plan in terms of which the Ministry of Mines and Energy wished to procure the services of a Government Diamond Valuator. The expected outcome of this plan includes uninterrupted trading in diamonds at fair

market values and the transfer and enhancing of skills and know-how to Namibians in diamond sorting, valuing, reporting and marketing intelligence which would result in a five-year contract for these services.

[13] On 8 October 2018, the Procurement Board invited bids for the Procurement of Government Diamond Valuation Services with reference NCS/ONB/CPB-2/2018. In terms of the Bidding Documents, a bidder is to examine all instructions, forms, terms and specifications in the Bidding Documents and as per the Instruction to Bidders in clause 9.2 it is specifically mentioned that a failure to furnish all information required by the bidding document or to submit a bid not substantially responsive to the bidding documents in every respect will be at the bidder's risk and may result in the rejection of the bid.

[14] Certain salient clauses of the Instructions to Bidders should be referred to concerning the matter currently before the court. In terms of clause 14 of the Instruction to Bidders as part of their bids had to set out a Price Activity Schedule which formed the basis of how the bid price would be ascertained. The front page of the bidding document also contained a portion where the bidder has to state the total amount of the bid.

[15] In terms of clause 26 of the Instructions to Bidders, the Employer may ask any bidder for clarification of the Bidder's Bid, which includes a breakdown of the prices in the Activity Schedule and any other information the Employer may require. Clause 26.1 also states that this request and response thereto shall be in writing via email or facsimile, but no change in the price or substance of the bid shall be offered or permitted.

[16] Clause 32 of the Instruction to Bidders, the successful bidder will be the bid which has been determined to be substantially responsive to the bidding documents as well as offered the lowest evaluated bid price. Clause 33 of this document allows for the Employer to accept or reject the bid and cancel the bidding process and reject all bids at any time before the award of the said contract without incurring any liability to the affected bidders.

[17] The Employer referred to herein, is the Procurement Board on behalf of the Ministry of Mines and Energy. The bidders were also in addition to all the other documentation, requested to submit a Training and Skills Development Proposal and a Corporate Social Responsibility Proposal. According to the bid document, the evaluation of a submitted bid would be in different phases. Phase 1 relates to documents a bidder must submit, failure to do so will lead to automatic disqualification. These documents relate to the proof of 100 per cent Namibian ownership, the bid securing declaration, and a certified copy of a Good Standing Tax certificate, to name but a few of these documents.

[18] Phase 2 consists of the technical evaluation and it is indicated that it will carry a total weight of 75 per cent of the total scoring. This evaluation is further divided into an evaluation of the technical competence of the 4 key personnel of the bidder which will be required to sort and value at an NDTC sight. It continues and states that only experience in diamond sorting and valuation will be considered. It then also lists the number of points which will be allocated per the number of years such a person has experience. This component will carry 5 per cent of the weight of the total Technical Evaluation. The second criteria which will be evaluated under phase 2 will be corporate social responsibility and it will carry a total weight of 12.5 per cent of the total Technical evaluation. The bidder is to earmark some of their proceeds towards uplifting communities or towards poverty alleviation in Namibia.

[19] A further criteria that will be considered under phase 2, is the Training and Skills development criteria which carried a total weight of 12.5 per cent of the 75 per cent weight awarded to phase 2. The amount of marks allocated was determined by the per cent of total income the bidder intends to spend on training specifically towards the sorting and valuing of rough diamonds. The assessment would look at the projected costs budgeted for, number of people to be trained and the areas of the training.

[20] Phase 3 of the evaluation which carried a total weight of 25 per cent of the total scoring dealt with the pricing and was again divided in three items. Number 1 being the diamond valuation as per section 44 and 45 of the Diamond Act, with the unit measure expressed in a percentage of the total value of the parcel making up 12.5 per cent of the 25 per cent; the examination in terms of section 64 of the



Diamond Act which is a per hour rate, making up 6.25 per cent of the total scoring and then the third item being expert witness services which also was scored by the hour and also made up 6.25 per cent of the total scoring out of 25 per cent.

[21] The bid was therefore made up of three phases, phase one where non-compliance would lead to disqualification, phase two consisting of 75 per cent of the value of the bid and phase three consisting of 25 per cent of the value of the bid. The bid form then also contained several documents that needed to be completed and submitted together with the bid.

### The bid evaluation

[22] The applicant submitted its bid on 8 November 2018 and included in it, on page 54 in detail the total bid price. The applicant looked at its historic data in respect of annual carats valued per year and the average price per year. It then calculated the average carats per year and the average price per year. It then projected the annual carats and average price data for the years 2019 to 2023 which was premised on a projection that the caratage would remain steady at N\$1 800 000 annually. In doing so they came to a total bid price of N\$233 462 880. This figure was less than 50 per cent of what the Ministry of Mines and Energy estimated as the value of the bid as it seems that they calculated the value of the bid at N\$480 000 000 for five years.

[23] It further seems from the affidavit of Mr Mujeu who deposed to the affidavit on behalf of the applicant that at the opening of the bids, the other bidders did not refer to a total bid price which was required to be submitted on the front page of the bid. It seems that the other bidders gave a percentage of the price on turnover in respect of the sale of the diamonds.

[24] The Bid Evaluation Committee opened these bids and evaluated the eleven bids received. On 22 November 2018, the committee addressed a letter to Gem Diamonds, the eventually successful bidders and asked them to provide the total offer price for their bid (the amount required on the front page of the bidding document) as well as to illustrate how they arrived at the total bid amount. In turn, they responded that it is impossible to do so because such a price depends on future

events including uncertain diamond productions, the examination of polished diamonds in which quantity is uncertain as well as the provision of expert witness testimony in future and current cases. They further wrote that unless someone can predict how many diamonds will be produced or how many diamond-related cases will be committed or the amount of time that will be spent on those cases as well as how many cut diamonds will be submitted, it will be impossible to determine a total amount for the contract. Gem Diamonds further indicated that the request was to express their rates on page 39 of the bid document as a percentage for the valuation of the diamonds and an hourly rate for the rest. There is no mention under the pricing schedule of a total price.

[25] The Bid Evaluation Committee evaluated the 11 bids and gave detailed reasons as to why the bids of the tenth, eleventh, twelve and thirteenth respondents were rejected during phase 1. A total of 7 bids remained and proceeded to phase 2. During this evaluation, it was realized that only one bidder provided a total amount for the bid. The Bid Evaluation Committee then approach these bidders and asked them to provide a total bid amount, which five of them did, except Gem Diamonds for the reasons stated above. The Bid Evaluation Committee then proceeded and did the calculations on behalf of Gem Diamonds to come up with an estimated total bid amount.

[26] At the end of the evaluation of both phase 2 and phase 3, the bidders were ranked from one to seven, with Gem Diamonds Namibia (Pty) Ltd ranked on top as they scored 75 per cent for phase 2 and 25 per cent for phase 3. Second was Prestige Diamond Services (Pty) Ltd, who scored 75 per cent and 22.5 per cent, and thirdly Ondjerera Diamond Valuers (Pty) Ltd who scored 75 per cent and 14.5 per cent. The Bid Evaluation Committee then determine the substantially lowest evaluated bid by taking the top three bids, adding the total amounts together, and then dividing it by three which gave them the amount of N\$240 115 523,89 as well as deducting 15 per cent of this amount which calculated to N\$204 098 202,96. These two amounts were then the maximum and minimum acceptable bid amounts and as a result, any total bid offer falling between these bid amounts is the substantially responsive bid.

[27] The Bid Evaluation Committee proceeded and recommended Prestige Diamond Services (Pty) Ltd for the award of the tender as they attained 97.5 per cent in phases 2 and 3 as well as having the total bid offer of N\$232 000 000 fall within the acceptable range of both minimum and maximum acceptable amounts. Gem Diamond Namibia (Pty) Ltd was not recommended although it scored the highest on phases 2 and 3 evaluations, being 100 per cent, the bid total amount as calculated by the Bid Evaluation Committee is more expensive than the maximum acceptable bid amount and it does not include the services of examination and expert witness. The risk further is that if the total bid offer that the bidder failed to provide and indicated on his bidding document is more than the available budget for the project, then the employer will not afford to fund the services of the bidder. The third bidder, Ondjerera Diamond Valuers (Pty) Ltd obtained a combined score of 89,5 per cent but his total bid offer was lower than the acceptable minimum total bid. The applicant was ranked sixth and scored 81,25 per cent.

#### The Board's instructions

[28] The Board requested a report on the examination and evaluation of the bid. The report provided to them indicated that Gem Diamonds (Pty) Ltd did not provide a total bid amount and that the Bid Evaluation Committee calculated the bidder's estimated total bid amount. It proceeded and pointed out that this amounts to preferential treatment and a gross irregularity in the procurement process. Inexplicably the Bid Evaluation Committee now ranked Gem Diamonds as the bidder with the highest weighting of 97,5 per cent, the Prestige Diamonds at 97,12 per cent, and thirdly Kings Diamonds at 95,31 per cent. In a report titled Close Out Report dated 3 April 2019. This report seemingly replaced the initial report and now Gem Diamonds seems to be the successful bidder and Ondjerera Diamond Valuers was replaced by Kings Diamonds. The percentages scored by the parties also seemed to have changed. It seems that the Bid Evaluation Committee now only evaluated the bids that scored 75 per cent in phase 2 in phase 3. It seems further that the maximum and minimum bid value methodology was not used in the second report.

[29] It transpired that the board was still not satisfied and a third report was compiled wherein the successful bidder was again Gem Diamonds, but the percentage allocated to it, has again changed. It now scored 89,664 per cent.

During the meeting on 25 April 2019, the Bid Evaluation Committee explains that for the first report, the Committee used the internal scorecard that was presented by the Ministry of Mines and Energy at the time of preparing the documents for a public advert. The rates and percentages indicating the base were compiled by the Ministry based on the industry norm and market research. For the second and third reports the Bid Evaluation Committee did not use the internal pricing scorecard from the Ministry as it was not commended by the Board and it used the formula based on the information provided in the ITB, with rates and percentages provided by the bidders.

#### The Board's decision

[30] On 9 May 2019, the Board met and discussed the submission from the Bid Evaluation Committee. One of its members, Ms Nakale was of the view that the formula used was not properly explained and she was therefore not supporting the decision. Her reservation was noted but the Board proceeded and resolved to approve the Bid Evaluation Report concerning the Procurement of Government Diamond Valuers on behalf of the Ministry of Mines and Energy and awarded the bid to Gem Diamond Namibia (Pty) Ltd.

#### The review of the Review Panel

[31] The review grounds raised by the applicant in its review referred to the irregularities which took place at the opening of the bids when only the bid of the applicant had the total value of the bid displayed on the first page. The next review ground dealt with the evaluation of technical competence where the bidders were scored on the experience their four key personnel had. It seems that the Bid Evaluation Committee gave the same percentage of 50 per cent without looking at the number of combined experience in sorting and valuing each of the bidder's personnel. The applicant was further of the opinion that it should have scored more for the corporate responsibility and training and skills development criteria.

[32] The determination of the price under phase 3 was also not correct. The applicant indicated its price for the sorting and valuation of diamonds and for the examination of diamonds and the provision of expert witness services, the applicant indicated that it was not going to charge anything. Gem Diamonds however indicated that it will charge N\$2 500 per hour for these services. The fact that the

applicant did not intend to charge for these services was not taken into account during the scoring. The valuation process was further defective and allowed for large discrepancies between the various stages of the evaluation. And the last ground for review was that Gem Diamonds failed to submit a certificate of good conduct for one of its directors and provided for in the Instruction to Bidders and should have been disqualified under phase 1. One of the core complaints remained that the bid was awarded to the bidder with the highest Bid price, which is contrary to the provisions of section 55(1) of the Public Procurement Act.

[33] The Review Panel had a hearing on 18 July 2019 and on 25 July 2019 dismissed the review application and provided reasons for their dismissal on 30 July 2019. After the final decision was announced, the Minister of Mines and Energy wrote to the board concerning the procurement of these services. In its response the Board indicated that the successful bidder is substantively the most responsive and that the process was subjected to review by the Review Panel, coming to the same conclusion.

[34] On 8 August 2019, the Minister of Finance wrote to the Minister of Mines and Energy questioning the award, his main concern being the 'value for money' principle. The Minister of Finance requested the Minister of Mines and Energy to invoke its powers in terms of section 63(1) of the Act by withdrawing the continuation of the contract. This did not happen and on 14 August 2019, Gem Diamonds wrote a letter to the Executive Director of the Ministry of Mines and Energy to confirm that the contract in terms of the award had been signed by them. The applicant expected that some action would be taken by the Minister of Mines and Energy or the Minister of Finance.

[35] On 9 December 2019 one of the legal practitioners for the plaintiff, Ms McLeod started to investigate the shareholding of Gem Diamonds at the Business and Intellectual Property Authority. It seems that the entity was registered as Bygone Investments (Pty) Ltd and was a so-called shelf company. This information and the information provided in the bid of Gem Diamonds differ significantly.

The review application to the court

[36] The review application which was filed reads as follows:

1. Calling upon the first respondent to show cause why:

1.1 The purported decision taken by the first respondent on or about 09 May 2019 to the effect that the fifth respondent be awarded the bid (Reference No. NCS/ONB/CPBN-20/2018) in respect of diamond valuation ("the impugned decision"), should not be reviewed and set aside in terms of Rule 76(1); and

1.2 The decision referred to in paragraph 1.1 above, should not be declared to conflict with Article 18 of the Namibian Constitution.

2. Declaring invalid, alternatively setting aside, any agreement(s) concluded between either of the first or third respondents, on the one hand, and the fifth respondent on the other, according to the impugned decision referred to in paragraph 1.1 above.

3. Calling upon the second respondent to show cause why:

3.1 The decision taken by the second respondent on or about 30 July 2019, to the effect that the applicant's application for review in terms of section 59(1) of the Public Procurement the applicant's application for review in terms of section 59(1) of the Public Procurement Act, No. 15 of 2015 was dismissed ("the second impugned decision"), should not be reviewed and set aside in terms of Rule 76(1); and

3.2 The decision referred to in paragraph 3.1 above should not be declared to conflict with Articles 12 and 18 of the Namibian Constitution.

4. Ordering the first, second, and third respondents, and any other such respondents who might oppose the relief sought in this application, to pay the applicant's costs jointly and severally, the one paying the others to be absolved.

5. Granting further and/or alternative relief to the applicant.

IN THE ALTERNATIVE TO PART A: PART B

6. Directing that the third respondent exercise discretion in terms of section 63(1)(a) of the Public Procurement Act, Act No. 15 of 2015, to withdraw the award to the fifth respondent of the Bid (Bid Reference No: NCS/ONB/CPBN-02/2018) and to terminate the contract entered into with the fifth respondent, on the basis that the aforesaid Bid and the continuation of the aforesaid contract are not in the public interest.
7. In the event of opposition to this Part B, ordering the third respondent, and any respondent who may oppose this application, to pay the applicant's costs jointly and severally, the one paying the others to be absolved.
8. Granting further and/or alternative relief.

Point in limine

[37] The fifth respondent raised an issue regarding the service of the application on the Ninth, Eleventh, and Thirteenth Respondents. As such, a review application must be served by the Deputy Sheriff and such service must comply with the provisions of rule 8(3) of the rules of court. On 16 June 2021, the applicant applied for an order allowing substitute service for the Ninth, Eleventh, and Thirteenth respondents. In an affidavit, Mr Tjitemisa indicated that he traced the addresses for these respondents through BIPA as the only information on the bid documents are their telephone numbers. The deputy sheriff could not effect service on the addresses obtained from BIPA and filed returns of non-service. He, therefore, approached the court for an order for substituted service on these parties via the newspapers.

[38] This did not happen but the ninth respondent was eventually served together with the eleventh and thirteenth respondents. The ninth respondent was served at Heinutsburg Street 31 on a certain Amon Metarwee, a representative of the ninth respondent. The eleventh respondent was served at the deputy sheriff's office on George Kamati and the thirteenth respondent was served at no 915 Schuster street Klein Windhoek on a responsible employee, Fransina Nghipulepo. Except that the name of George Kamati, the same name that was used on the documentation of the eleventh respondent, whose phone number the applicant's legal practitioner obtained. The court found that the service of these three respondents was not sufficient and gave an order that the application must be served on them again to

allow them to participate in these proceedings should they wish to do so. They were so served and did not indicate that they want to participate in these proceedings. The matter was then postponed for the court to deal with the merits of the application.

#### The case of the applicant

[39] The applicant, in essence, seeks to review and set aside the decision taken by the first respondent (“the Board”) on or about 9 May 2019 to the effect that the fifth respondent (“Gem Diamonds”) be awarded the Bid in respect of diamond valuation. The applicant further seeks a declarator that any agreement(s) entered into between the Minister of Mines and Energy and/or the Board, on the one hand, and Gem Diamonds on the other, according to the bid award is invalid, alternatively that it be set aside. The applicant also seeks an order that the decision to award the bid be declared in conflict with Article 18 of the Namibian Constitution. The applicant also seeks to review and set aside the decision taken by the second respondent to the effect that the applicant’s application for review in terms of section 59(1) of the Public Procurement Act 15 of 2015 was dismissed.

[40] Their argument centers on the fact that the successful candidate did not comply with the bidding instructions as per the Instructions to bidders’ document. According to this document, a bidder was expected to examine all instructions, forms, terms, and specifications in the said document. Clause 9.2 of the instructions to bidders states that:

‘Failure to furnish all information required by the bidding documents or to submit a bid not substantially responsive to the bidding documents in every respect will be at the Bidders risk and may result in the rejection of its bid.’

[41] The instructions to bidders document further give instructions and in terms of clause 14 of the instructions to bidders, the bidder was required to set out the price activity schedule which would be the basis upon which a bid price could be ascertained. For the applicant, it was argued that the importance of the bid price was evidenced by the front page of the bidding documents where the bidder was required to state the total amount of the bid. A bidder had to complete the first page of the bid by indicating the total amount of the bid. The bidding document states categorically



on this portion “To be completed by Bidder upon submission”. According to the argument, there can therefore be no doubt that a fundamental requirement of the procurement process was a categorical statement of the total amount of the bid which had to be provided upon submission of the bid.

[42] It was also pointed out that in terms of clause 26 of the instructions to bidders, the employer may, at its discretion, ask any bidder for clarification of the bidder’s bid, including breakdowns of the prices in the activity schedule and other information that the employer may require. Clause 26.1 further states:

‘The request for clarification and the response shall be in writing via e-mail or facsimile, but no change in the price or substance of the Bid shall be sought, offered, or permitted except as required to confirm the correction of arithmetic errors discovered by the Employer in the evaluation of the Bids ...’

[43] This suggests that the bid price must be furnished by the bidder on submission and there could be no change to that price or the substance of the bid after the submission date.

[44] The argument then proceeded and pointed out that in terms of clause 32 of the instruction to bidders, the employer will award the contract to the bidder –

‘... whose Bid has been determined to be substantially responsive to the bidding documents and who has offered the lowest evaluated Bid price....’

[45] It was argued that this clause is subject to the bidder having been determined to be eligible for the bid and qualified in terms of the Instructions to bidders.

[46] It was argued on behalf of the applicant that for the board to suggest that this is not peremptory, but rather that “not all bids require that bidders indicate a total amount for the bid since the nature of each bid differs”, ignores the provisions of the Act. The board further fails to deal with a critical aspect of the applicant's case, namely, the letter from the Bid Evaluation Committee dated 22 November 2018 addressed to Gem Diamonds requesting clarity about their “total offer price for your bid”.

[47] Counsel for the applicant further pointed out that in the founding papers, the applicant raised several serious concerns about the role of the Bid Evaluation Committee and how it went about the evaluation of the bids, and the recommendations it made to the board. It was submitted that it is important that the Court should have heard from the members of the Bid Evaluation Committee – or at least their chairperson - as to how they went about their business but no member of the Bid Evaluation Committee has deposed to an affidavit or even a confirmatory affidavit, in opposition to the relief sought even though it is the applicant's version that it committed several reviewable irregularities.

[48] The initial "reasoning" used by the Bid Evaluation Committee in awarding the tender to Prestige Diamonds Services (Pty) Ltd makes no sense at all. According to the Report, the Bid Evaluation Committee adopted a "methodology" by simply determining the "substantially lowest evaluated bid" by taking the average of the three top-ranked bidders – Gem Diamonds, Prestige Diamonds, and Ondjerera Diamond Valuers. No explanation was given as to why they did not take the average of all seven bidders. As it was, only Prestige Diamonds and the applicant fell within the range, being between N\$204 098 202,96 and N\$240 115 532,89. Despite this, Prestige Diamonds was ranked number one and the applicant number six. Prestige Diamond Services initially did not provide a total bid offer, and only did so after the Board had requested it to do so.

[49] It was further argued that in this initial report, the Gem Diamonds Bid was not recommended for the award of the contract because the Bidder did not indicate his total bid offer as requested even after clarification was sought by the Bid Evaluation Committee. The Board then also considered this recommendation and asked the Bid Evaluation Committee to sanitize the report and to make proper reference to the instructions to bidders, to confirm that facts are correct and that the evaluation was conducted as provided for in the instruction to bidders and to demonstrate how the Bid Evaluation Committee arrived at the 25 per cent weighting criteria.

[50] The second Bid Evaluation Committee report dated 28 February 2019 again mentioned that Gem Diamonds did not provide a total bid amount but the Bid Evaluation Committee used their calculations to come up with a total bid amount for

Gem Diamonds. It is argued that in doing so, the Bid Evaluation Committee was assisting one bidder to become compliant with the bidding documents, and this amounts to preferential treatment.

[51] The result of this second evaluation was that Gem Diamonds were now the bidder with the highest ranking. The Bid Evaluation Committee never explained in the report nor an affidavit in these proceedings why this change has now occurred. On 11 April 2019, the Secretary to the Board wrote to the Chairperson of the Bid Evaluation Committee informing them that the report was referred back to them. The Bid Evaluation Committee was directed to “explain the cause of the deviation from the first report to the second report and then subsequently the third report. This report also did not contain any explanation as to what factors were taken into account and what evidence was added to the report after the request from the Board.

[52] In its Report dated 25 April 2019, the Bid Evaluation Committee explained that the applicant was ruled out for further consideration since it was found to be “technically non-compliant”. This only serves to re-emphasize the confusion on their part as it is not clear what they meant and if the applicant had been “technically non-compliant”, they would have been disqualified in the first round of the evaluation. The applicant has substantial experience in the sorting and valuation of diamonds. The applicant has total combined years of experience of 27,5 years, King Diamond 20,75 years, Prestige Diamonds 19,5 years, Ondjerera Diamonds 18,5 years and Gem Diamonds 17,75 years. Gem Diamond’s key personnel have no valuation experience but Gem Diamonds still received 100 per cent for technical compliance. All of the companies received the same score, without the Bid Evaluation Committee looking at the years of experience as sorters and years of experience as valuers. It was submitted that the whole evaluation process was arbitrary.

[53] The applicant acknowledged that there has been a delay in the applicant approaching the court on review. It is trite that an application for review must be brought within a reasonable time. What is reasonable depends on the circumstances. Where the delay is found to be unreasonable, the court may nevertheless decide to condone it if the applicant can give a satisfactory explanation for it. The court will also take into account other factors, especially any prejudice caused to the other party.

[54] The court must decide whether there has been an unreasonable delay and if so whether such a delay can be condoned. Each case should further be judged on its merit. The reason for requiring applicants not to delay unreasonably in instituting judicial review can be succinctly stated. It is in the public interest that both citizens and government may act on the basis that administrative decisions are lawful and final in effect. It undermines the public interest if a litigant is permitted to delay unreasonably in challenging an administrative decision upon which both government and other citizens may have acted.

[55] It is not necessary to establish prejudice for a court to find the delay to be unreasonable, although of course, the existence of prejudice will be material if established. There may, of course, be circumstances when the public interest in finality and certainty should give weight to other countervailing considerations. That is why once a court has determined that there has been an unreasonable delay, it will decide whether the delay should nevertheless be condoned. The applicant has explained the reasons for the delay and the events that had occurred between the dates on which they became aware of the relevant decisions to the date of bringing this application. These are set out in the founding papers.

#### Case on behalf of the first respondent

[56] On behalf of the first respondent, it was argued that the premise by the applicant that the fifth respondent allegedly failed to state the total amount of its bid is not only without any basis but wrong. In this particular bid, the bidders were required to provide unit rates. The instruction was that phase 3 will carry a total weight of 25 per cent of the total scoring and that pricing for valuations done on the NAMDEB production and those from independent producers shall be expressed as a percentage of the total value of the parcel. On the other hand, pricing in terms of the provision of services as court witness and examination of polished diamonds shall be expressed in N\$ per hour.

[57] Clause 14.223 of the bidding document requires the bidder to:

‘... fill in rates and prices for all items of the Services described in Section VI of the Scope of Service and Performance Specifications and listed in Section V of the Activity

Schedule, Items for which no rate or price is entered by the Bidder will not be paid for by the Employer when executed and shall be deemed covered by the other rates and prices in the Activity Schedule.'

[58] It was submitted on behalf of the first respondent that it is apparent from the Bidding Documents and the Individual Procurement Plan that it was not possible to have or insist on a "total amount", in the circumstances, as there were too many variables that were not standardized to enable a fair comparison of total prices for this bid. These variables relate to quantities of diamond carats, size of carats and price of carats, which are normally expressed and set, in US dollars while the foreign exchange rate between the Namibia dollar and the United States dollar is continuously fluctuating. The Chairperson further explained that due to the nature of the services required in this particular bid, it would not be possible to provide a "total amount" as a bid price and as such, clause 14.1 of the bidding documents, specifically referred to the bidders to the activity schedule of Section V of the bidding document which they were required to complete.

[59] It was also argued that from the above it is clear that the fifth respondent duly complied with the bid requirements. The explanation given by the CPB represented a reasonable and rational explanation for the decision not to require the total value to be completed in the tender documents. The applicant misconstrues the inclusion on the front page of the Bid Documents of a total amount, as well as how the total amount was calculated.

[60] What the applicant seeks to do is not consistent with the approach adopted by our Courts. It is not what was required by the Bid documents read as a whole. The applicant's argument that there was non-compliance with section 40 of the Act, requiring the Board to invite bidders "to submit priced offers" for the supply of services is simply untenable. The bidder's offer is however priced, the price is expressed as a percentage of the total value of the parcel, in terms of provision of services as court witness and examination of polished diamonds are "expressed in N\$ per hour since these services do not entail valuation in their nature." Indeed, there is full compliance with section 40 of the Act.

[61] The applicant further argues that the Bid Evaluation Committee purportedly committed a gross irregularity by recommending the award of the bid to the Central Procurement Board. It did, so the argument goes when it concluded that the bid of the fifth respondent was "substantially responsive having complied with the requirements of the Instructions to Bidders" in the circumstances where it inexplicably ranked the fifth respondent as the bidder with the highest weighting of 97,50 per cent, Prestige Diamonds as the second highest with 97,12 per cent and Kings Diamond was third-ranked with 95,31 per cent. The allegation that the ranking of the applicant as number 3 was not explained by the Bid Evaluation Committee is unfounded. On the contrary, the Bid Evaluation Committee in its evaluation report explained the details of how the criteria on phase three (3) were applied to each bidder on page 12 of the Bid Evaluation Committee Reviewed report of 03 April 2019, the Bid Evaluation Committee indicated under paragraph 7 of their report, the reasons why the fifth respondent had been recommended for the award. They state as follows:

'The bidder attained 97.50% on both phase two and phase three evaluated criteria the bid was found to be substantially responsive to the professional technical and financial qualification requirements technically compliant concerning the technical specifications and with the highest total result in the score and hence recommended for the award.'

#### Case on behalf of the fifth respondent

[62] On behalf of the fifth respondent, it was submitted that the decisions by both the First and Second respondents cannot be faulted as every decision that was made was reasonable and in line with the instructions to bidders. They further wish to raise the point that there was an unreasonable delay as the review application instituted by the applicant was dismissed on 30 July 2019. The present review application was only launched on 20 December 2019. It was submitted that the tie period it took the applicant to institute the review application was unreasonable, especially if regard is had to the fact that the applicant was at all times legally represented. This period should be considered in the full context of the facts.

[63] It was argued that the applicant was aware that the contract with the fifth respondent would commence once the review application to the second respondent

was dismissed. They submitted that when all the factors they set out as relevant, are considered, the delay was in the circumstances unreasonable.

[64] On behalf of the fifth respondent, it was further argued that the relationship between the first respondent and the second respondent is that the Bid Evaluation Committee is in essence an internal functionary of the First Respondent and is subject to the supervision, control, and directives given to it by the first respondent. Therefore the first respondent also appoints the members of the Bid Evaluation Committee, oversees the examination and evaluation of the bids by the Bid Evaluation Committee, has the power to review the recommendation of the Bid Evaluation Committee and the power to approve and reject the evaluation done by the Bid Evaluation Committee. The first respondent can also direct the Bid Evaluation Committee to make a new or further evaluation on grounds that the first respondent may specify to the Bid Evaluation Committee.

[65] The court was referred to *Shillimela Security & Debt Collections CC & Others v Permanent Secretary of the Ministry of Agriculture, Water and Forestry & Others*<sup>1</sup> where it was found that the Bid evaluation Committee could not make any reviewable decision as it is only an internal functionary of the first respondent.

[66] The applicant is dissatisfied with the scoring and the reasons for the scoring of its bid at the evaluation stage. This scoring was approved by the first respondent and as such, an administrative decision by the first respondent. From its review application, it is clear that the applicant does not seek any review relief related to the scoring criteria applied by the first respondent.

[67] It was further argued that the applicant contends that the bidding documents required the bidders to place a specific amount in respect of the diamond valuation services but what was required was only the provision of a percentage fee rate for diamond valuation services. All bidders, including the applicant, provided a percentage fee in respect of diamond valuation services. There was therefore, no confusion by any of the bidders concerning whether or not a fee reflected as a

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<sup>1</sup> *Shillimela Security & Debt Collections CC & Others v Permanent Secretary of the Ministry of Agriculture, Water, and Forestry & Others* (HC-MD-CIV-MOT-GEN 40/2019 {2021} NAHCMD 115 (10 March 2021)).

percentage of the value of the diamonds to be valuated had to be provided as part of the bid submitted by each bidder.

### The unreasonable delay before the review was instituted

[68] The proper approach to the question of unreasonable delay was set out in our Supreme Court in *Keya v Chief of the Defence Force*<sup>2</sup> as follows:

[21] This Court has held that the question of whether a litigant has delayed unreasonably in instituting proceedings involves two enquiries: the first is whether the time that it took the litigant to institute proceedings was unreasonable. If the court concludes that the delay was unreasonable, then the question arises whether the court should, in an exercise of its discretion, grant condonation for the unreasonable delay.<sup>3</sup> In considering whether there has been an unreasonable delay, the High Court has held that each case must be judged on its facts and circumstances<sup>4</sup> so what may be reasonable in one case may not be so in another. Moreover, that enquiry as to whether a delay is unreasonable or not does not involve the exercise of the court's discretion.<sup>5</sup>

[22] The reason for requiring applicants not to delay unreasonably in instituting judicial review can be succinctly stated. It is in the public interest that both citizens and government may act on the basis that administrative decisions are lawful and final in effect. It undermines that public interest if a litigant is permitted to delay unreasonably in challenging an administrative decision upon which both government and other citizens may have acted. If a litigant delays unreasonably in challenging administrative action, that delay will often cause prejudice to the administrative official or agency concerned, and also to other members of

<sup>2</sup> *Keya v Chief of the Defence Force* 2018 (1) NR 1 SC.

<sup>3</sup> See *Krüger v Transnamib Ltd (Air Namibia) and Others* 1996 NR 168 (SC) at 170 - 171, citing with approval the South African decision *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 (N) at 798G – 799E. See also *Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others* 2009 (1) NR 277 (HC); *Global Industrial Development (Pty) Ltd v Minister of Mines and Energy and Another* 2009 (1) NR 277 (HC); *Namibia Grape Growers and Exporters v Minister of Mines and Energy* 2002 NR 328 (HC); *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC) at paras 41 – 43 and *Ogbokor and Another v Immigration Selection Board and Others*, as yet unreported decision of the High Court, [2012] NAHCMD 33 (17 October 2012). For other South African decisions, see *Wolgroeiërs Afslaers v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39 B – D, *Setsokeane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander* 1986 (2) SA 57 (A); *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at paras 46 – 48; *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) at paras 5 and 2

<sup>4</sup> See *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia and Others* 1997 NR 129 (HC) at 132 (per Strydom JP). See also *Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others*; *Global Industrial Development (Pty) Ltd v Minister of Mines and Energy and Another*, cited above n 1, at para [14].

<sup>5</sup> See *Radebe*, cited above n 1, at 798 I; *Setsokeane*, cited above n 1, at 86 E – F; *Gqwetha*, cited above n 1 at para 48.



the public. But it is not necessary to establish prejudice for a court to find the delay to be unreasonable, although of course the existence of prejudice will be material if established.<sup>6</sup> There may, of course, be circumstances when the public interest in finality and certainty should give weight to other countervailing considerations. That is why once a court has determined that there has been an unreasonable delay, it will decide whether the delay should nevertheless be condoned. In deciding to condone an unreasonable delay, the Court will consider whether the public interest in the finality of administrative decisions is outweighed in a particular case by other considerations.

[26] ..... It may well be that these time periods provide some guidance as to what the Legislature would consider to be appropriate time periods, but they cannot be determinative of the question of 'unreasonable' delay, which must turn on the facts and circumstances of each case.'

[69] In *SA Poultry Association and Others v Minister of Trade and Industry and Others*<sup>7</sup> the following was said about the enquiries the court ought to make:

'Two enquiries are to be determined: the first is an objective one and is whether the delay was on the facts unreasonable. The second is whether the delay should be condoned. As stated in *Keya v Chief of the Defence Force and others*, the first enquiry is a factual one and does not involve the exercise of a discretion. It entails a factual finding and a value judgment based upon those facts. The second enquiry involves the exercise of a discretion. There is a narrow ambit of an appeal, against the exercise of a discretion. This court would only interfere with the exercise of that discretion when it is found not to have been exercised judicially by the court a quo.'

[70] In the *SA Poultry* case the court specifically dealt with the legal principles governing delay in review proceedings. These are described as follows:

'[42] The parties were in agreement that the High Court correctly set out the dual enquiry in determining the question of undue delay in review proceedings. That test has been consistently applied by this court and was neatly summarised by O'Regan AJA in *Keya* as quoted by the court a quo referred to in para [17] above.

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<sup>6</sup> See *Wolgroeijs Afslaers*, cited above n 1, at 41 E - F; *Associated Institutions Pension Fund*, cited above n 1, at 321; *Gqwetha*, cited above n 1, at para 22.

<sup>7</sup> *SA Poultry Association and Others v Minister of Trade and Industry and Others* (SA 37 of 2016) [2018] NASC 2 (17 January 2018).

[43] In essence, a court is to engage in two enquiries. The first is an objective one and is whether the delay was on the facts unreasonable. The second is whether the delay should be condoned. As stated in *Keya*, the first enquiry is a factual one and does not involve the exercise of a discretion.<sup>8</sup> It entails a factual finding and a value judgment based upon those facts.

[44] The second enquiry involves the exercise of a discretion. As was correctly accepted by all the parties, the ambit of an appeal is narrower when directed against the exercise of this form a discretion. This court would only interfere if the discretion was not exercised judicially.<sup>9</sup> This principle was amply summarised by the full court in *RDP (II)*:

“[106] The relief sought related to a matter falling within the inherent powers of the high court to regulate its own procedures. As such, the discretion which the court a quo exercised on consideration of the facts of this case, was judicial in nature and involved a value judgment on whether the appellants had given a proper and satisfactory explanation for their failure to include the amplified papers as part of the election application. Although a discretion of that nature is not unfettered, it is well settled that a court of appeal would be slow to interfere with it “unless a clear case for interference is made out and (it) should not interfere where the only ground for interference is that the Court of appeal might have an opinion different to that of the Court a quo or have made a different value judgment”. The power to interfere on appeal in such instances is strictly circumscribed. It is considered a discretion in the “strict or narrow sense, ie a discretion with which this court as a court of appeal can interfere only if the court below exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons, or materially misdirected itself”.<sup>10</sup>”

[71] In *Keya*<sup>11</sup> the Judge President of the High Court set out the steps that would precede the bringing of a review application. He said:

‘It is now judicially accepted that an applicant for review need not rush to Court upon his cause of action arising as he is entitled to first ascertain the terms and effect of the offending decision; to ascertain the reasons for the decision if they are not self-evident; to seek legal counsel and expert advice where necessary; to endeavour to find an amicable solution if that is possible; to obtain relevant documents if he has good reason to think they exist and they are necessary to support the relief desired; consult with persons who may depose to affidavits in support of the review; and then to consult with counsel, prepare and

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<sup>8</sup> *Keya* at paras 21-22.

<sup>9</sup> *Namibia Grape Growers* at p 218, *Kruger* at p 173.

<sup>10</sup> At para 106.

<sup>11</sup> *Supra*

lodge the launching papers. The list of possible preparatory steps and measures is not exhaustive; but in each case where they are undertaken they should be shown to have been necessary and reasonable. In some cases it may be required of the applicant, as part of the preparatory steps, to identify and warn potential respondents that a review application is contemplated. Failure to so warn a potential respondent may lead to an inference of unreasonably delay.'

#### Was the delay unreasonable?

[72] When determining whether the delay was unreasonable, the court must decide whether the delay on the facts was unreasonable. In this instance the review panel gave their decision on 30 July 2019 and these proceedings were only instituted on 20 December 2019. This is a delay of almost five months. When making a factual finding on these facts the court must conclude that the delay was indeed unreasonable. The second question now is whether this delay should be condoned. To be able to condone this delay the court needs to determine the reason for the delay.

[73] When deciding on condoning the delay, the court takes into account that the applicant seemingly did nothing until the beginning of December 2019 as it believed that the Ministers of both Finance and/or Mines and Energy will set aside the tender allocation. There is however, no evidence that the applicant enquired regularly from these respective ministers as to whether they indeed were going to set aside the allocation and cancel the process. This did not happen in September, October, or November. The court believes that they at least should have acted earlier than 20 December 2019. It is further also the case that the same legal representatives dealt with the matter of the applicant when it was referred to the review panel and should have been able, without too much difficulty, to draft the founding papers in this matter. The only action the applicant took was when one of the legal practitioners acting for the applicant approached BIPA on 9 December 2019 and started looking into the directors of the fifth respondent.

[74] It is further in the public interest for the valuation services that will be rendered by the successful bidder to continue as soon as possible after the previous contract

ended as the diamond industry is a significant role player in the economic landscape of Namibia.

[75] The cost is to follow the event.

[76] In the result, I make the following order:

1. The application is dismissed with costs, such costs to include an instructed and instructing legal practitioner where applicable.
2. The matter is removed from the roll and regarded as finalized.

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E RAKOW  
Judge

#### APPEARANCES

APPLICANT: AW Corbett (with him J Tjitemisa)  
Instructed by Tjitemisa & Associates, Windhoek

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