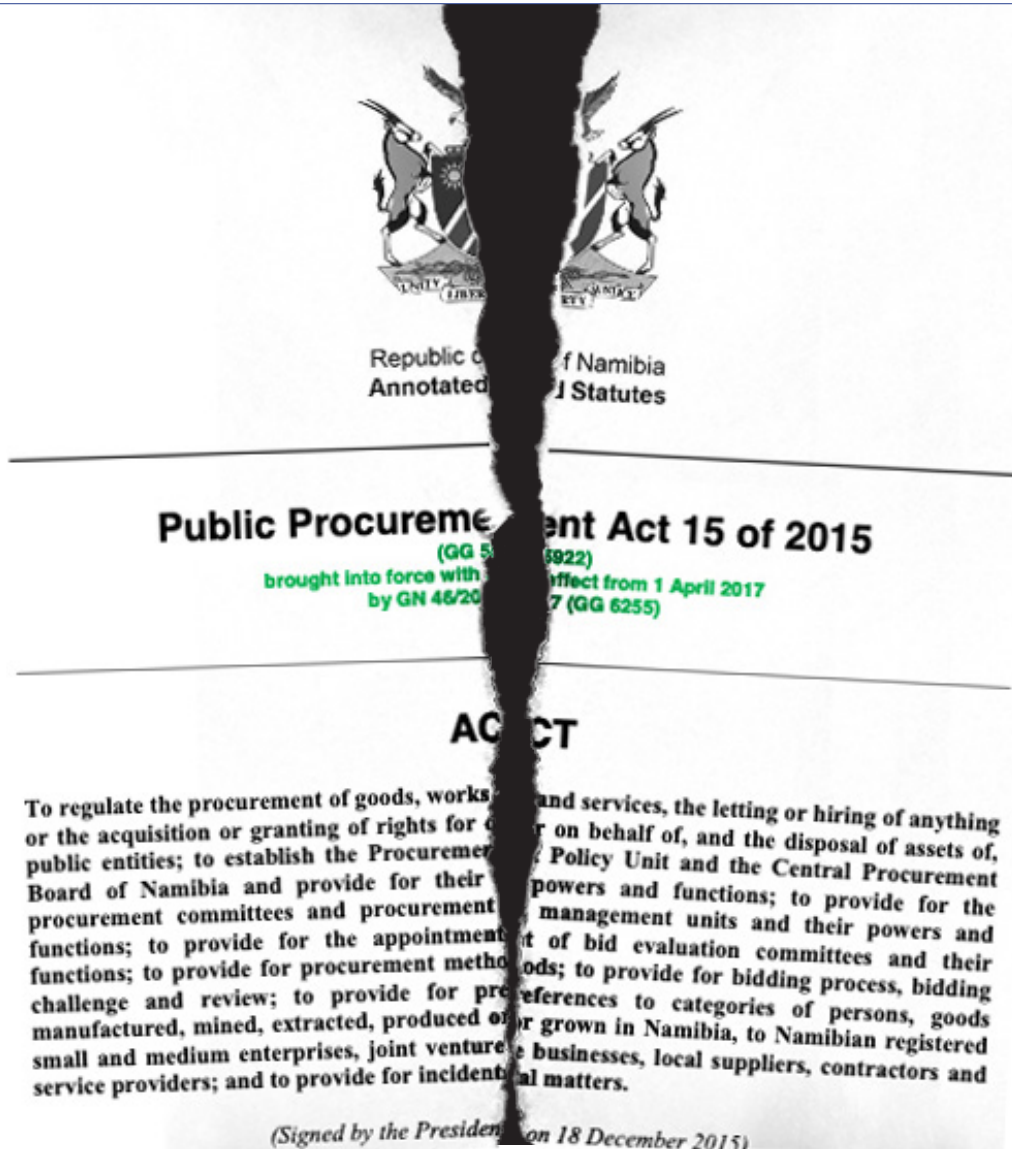


PROCUREMENT TRACKER NAMIBIA



Issue No. 9

April 2020



Rule of law broken

The Public Procurement Act was supposed to be a bright new dawn, so why and how has it gone so wrong? We review the first three years of the new procurement system.

When he officiated at the unveiling of the new corporate identity of the Central Procurement Board of Namibia (CPBN) in March 2020, then finance deputy minister Natangwe Ithete cautioned that the

new board not become tainted by the same negative perceptions that haunted the old Tender Board.

And he was right. For while the Public Procurement Act of 2015 ticks most of the right boxes in terms of best practice on paper, the operationalising and implementation of the law has been a very rocky exercise. Hence the negative perceptions.

The system's troubles commenced in

the starting blocks, when it emerged in March 2017 that then finance minister Calle Schlettwein was on the verge of appointing the CPBN following an opaque process. This while the law, in section 11 (c) of Part 3, provides for an "open, fair and transparent" recruitment process.

And that was just the beginning of the implementation challenges that were to follow.

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Transparency & accountability deficits

While the law starts off by stating that transparency and accountability are core to the procurement system it establishes, these two critical governance principles have been in deficit since 1 April 2017.

Since the first edition of *Procurement Tracker Namibia* came out, in June 2018, one of the issues that we have repeatedly spotlighted as showing concerning implementation shortfall has been the transparency inducing features of the framework.

Three years down the line, offices, ministries, agencies and state-owned enterprises continue to struggle and fail in the timely and obligatory production, submission and making public of annual procurement plans, individual procurement plans and quarterly procurement progress reports.

According to the Procurement Policy Unit (PPU) in the finance ministry, there are over 170 procuring entities in the state sector, but over the first three years of the new dispensation less than half have consistently managed to provide evidence of such plans and reports, and none regularly, as per the law.

To illustrate, in the three years since the operationalising of the new system, neither the PPU nor the CPBN have produced an annual report – which combined would give an overview of the functioning of the procurement system – as per the law.

And as transparency has suffered in the new system, so too has accountability.

Since April 2017 there have been a number of procurement initiatives that have invited investigation, that either didn't happen or haven't been made public, and the various officials involved have largely not been held accountable for compromising the new procurement system in its sensitive early stages.

Institutional weakness

The transparency and accountability deficits point to what has become the obvious culprit: institutional weaknesses.

Governance in the state sector has always been problematic – entities across the state have been struggling to produce annual reports and most of those who do, including ministries, are challenged to deliver clean audits, pointing to lax financial controls. Across all levels of state there is a shortage of skills and capacity, and this plays out too in the procurement structures within state entities.

As we pointed out in *Procurement Tracker Namibia 8*, in October 2019, lack of capacity in the procurement function appears to be very severe.

Three years down the line, offices, ministries, agencies and state-owned enterprises continue to struggle and fail in the timely and obligatory production, submission and making public of annual procurement plans, individual procurement plans and quarterly procurement progress reports.

Both the PPU and CPBN have repeatedly indicated that they are under-staffed and under-skilled and it is clear that “there exists a large capacity gap among procurement practitioners. The new legislation requires a professional approach in public procurement proceedings. There is therefore a need for a new breed of procurement professionals”, as stated by a draft procurement capacity building strategy developed by the PPU in 2017/18.

According to an assessment in this draft strategy document, the procurement system could possibly only function optimally at some point after 2030, if capacity is developed appropriately over the intervening years.

This suggests that the system could limp on for years to come and points to a lack of appropriate planning that should actually have preceded the implementation and operationalising of the law.

Corruption and waste

All this has created fertile ground for corruption and mismanagement of state resources to flourish.

While there's no hard data to cite on this, the testimonies of some – both from the private and public sectors – operating within the procurement system point to alleged corrupt activities and waste and mismanagement of resources not having abated significantly since 1 April 2017, even as due to economic and fiscal conditions since 2016 there has been less spending in the public procurement sphere.

Some of the high profile instances of alleged corruption that we have pointed to in previous editions include irregular procurement and related financial management practices at the justice ministry in 2019, as well as irregularities around procurement on such big infrastructure projects as the upgrading of the Hosea Kutako International Airport and road building contracts in and around Windhoek.

At the same time, at the heart of the procurement system, at the CPBN, deputy chairperson Lischen Ramakhutla remains under a cloud of suspicion over conflict of interest and corruption allegations, related to the entity's website and the involvement of a company associated with her brother. The finance ministry, despite former minister Schletwein announcing over a year ago that the matter would be investigated has yet to pronounce itself on this matter.

It is governance occurrences such as these that have tainted the image of the new procurement dispensation, as alluded to in March 2020 by the then deputy finance minister Natangwe Ithete at the CPBN's rebranding.

Why this matters

If a culture of non-compliance or lax and slow compliance with the rules set down in law is allowed to fester in the public procurement system then the legal framework will ultimately fail to deliver the envisaged outcomes. Given what has already transpired over the three years since 1 April 2017, the signs are not encouraging. The way in which the provisions of the Public Procurement Act of 2015 appear to be disregarded or treated as optional by many entities in the public sector is symptomatic of the state-wide culture characterised by non-adherence to good governance principles. And, clearly, simply not enough is being done to safe-guard critical state functions, such as procurement, from being infected by this culture.

Public procurement and COVID-19

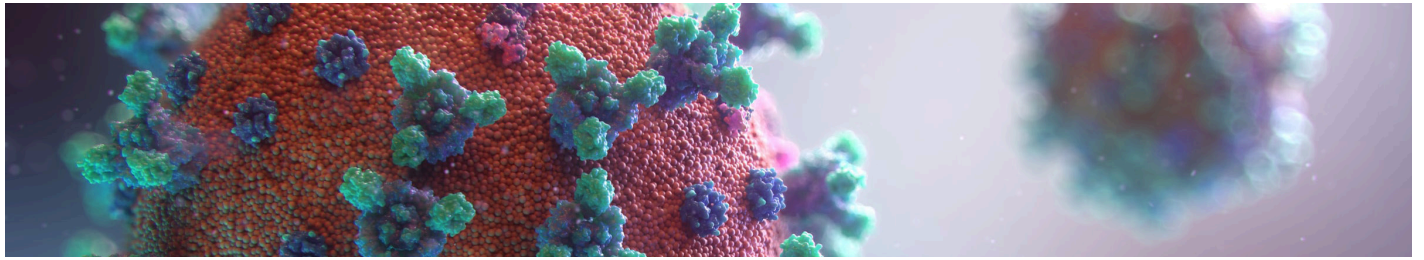


Photo by Fusion Medical Animation on Unsplash

In mid-March 2020 lipumbu Shiimi was appointed new finance minister by president Hage Geingob, and one of his first orders of business was to issue a directive to halt all public procurement activities, except those needed to combat the COVID-19 pandemic.

According to the directive issued on 27 March 2020, Shiimi took the step of drastically scaling down public procurement activities in order to give effect to the state of emergency and lockdown measures announced by the president on 18 March 2020.

In the directive addressed to ministers and managers across the state sector, Shiimi stated: “All procurement of goods, works and services are hereby put on hold except for the procurement of essential goods, works and services that are aimed at curbing the COVID-19 pandemic.

“A bid that has been advertised for bidding before the date of commencement of this directive, whether the bid advert has been closed or not, the completion of this bidding process has been suspended until the lockdown period has been lifted in line with the state of emergency.”

He goes on to direct that, similarly, all activities of the Review Panel had also been suspended for the duration of the lockdown period and that the suspension of state-wide procurement activities was to minimise the



Image courtesy: neweralive.na

Finance minister lipumbu Shiimi

spread of COVID-19.

In line with the minister’s directive, on 30 March 2019 the Central Procurement Board of Namibia (CPBN) announced that it would be “closed with immediate effect and until such time that the lockdown is lifted”.

Procurement and the state of emergency

When the state of emergency was announced on 18 March 2020, prime

minister Saara Kuugongelwa-Amadhila mentioned that procurement rules would need to be suspended so that purchases of essential goods and services could be sped up.

But the 27 March 2020 directive by minister Shiimi and subsequent statements do not indicate how public procurement would be handled during the state of emergency.

Finance ministry spokesperson Tonateni Shidhudhu has indicated, though, that all procurement would be done using the emergency procurement method, in line with section 33 of Part 5 of the Public Procurement Act.

That said, according to Article 25 (b) of the constitution, the proclamation of a state of emergency should state exactly which laws and rights would be suspended.

However, the regulations to the emergency proclamation, which were gazetted on 28 March 2020 – a day after lipumbu Shiimi issued the directive suspending all public procurement in line with section 73 of Part 12 of the law – do not mention public procurement or the suspension of the provisions of the Public Procurement Act.

Rather, the regulations, in section 14 make provision for ministers to issue directives relating to “(a) supplementing or amplifying on any provision of these regulations; or (b) ensuring that the objectives of these regulations are attained”.

Even so, the regulations make it clear that in order for any directive to have legal force it has to be approved by the attorney-general and it has to be gazetted.

At the time of publication of this edition of *Procurement Tracker Namibia*, no Government Gazette giving force to the Shiimi directive had yet been publicly available, nearly two weeks after the directive had been issued.

Procurement Tracker Namibia will be monitoring the procurement landscape during the state of emergency and will provide an update in the next edition.

Directives by Minister

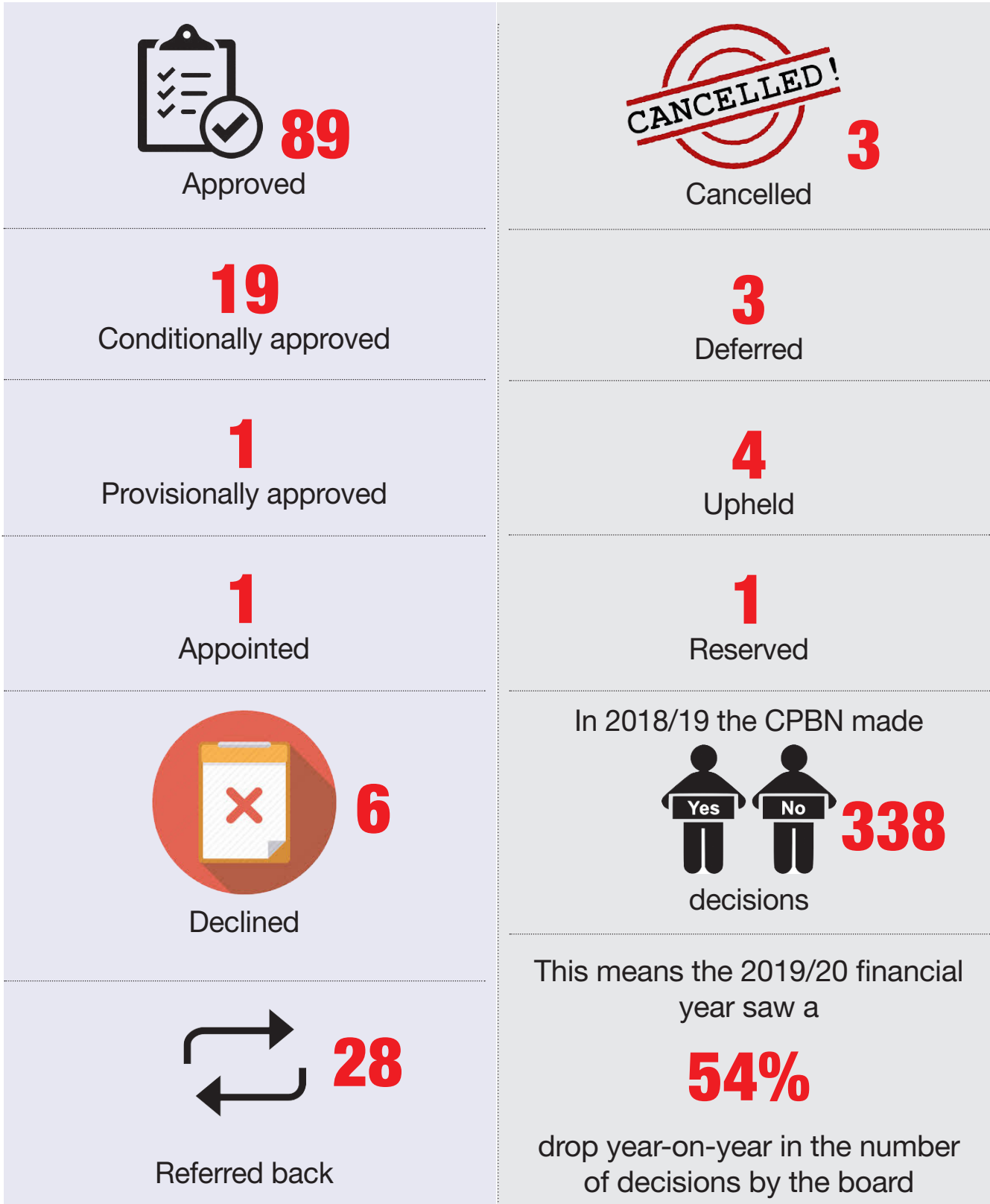
73. (1) The Minister, pursuant to a policy of the Government or when he or she thinks it necessary or expedient, may direct in writing the Policy Unit, Board or public entity to attend to any aspect or matter of general application relating to procurement of goods, works or services, or to the letting or hiring of anything or the acquisition or granting of any right for or on behalf of the public entities, and for the disposal of their property.

(2) After having considered the directive under subsection (1), the Policy Unit, Board or public entity must give effect to or cause the policy directive to be implemented.

(3) A policy directive issued under this section is issued and executed in terms of this Act.

CPBN decisions 2019/20

For the 2019/20 financial year (up to 27 February 2020) the CPBN had made 155 procurement decisions related to procurement actions by government departments, agencies and enterprises. The board made the following decisions ...



Source: www.cpb.org.na

CPBN contracts up ... or not

Most of the current procurement board's contracts ended on 31 March 2020, and the situation has become complicated.

When the nine-member Central Procurement Board of Namibia (CPBN) was sworn into office in April 2017, seven of them were appointed on three-year contracts, while the chairperson Patrick Swartz and deputy chairperson Lischen Ramakhutla were appointed on five-year contracts.

According to the Public Procurement Act of 2015, the chairperson and deputy chairperson are full-time employees of the CPBN, while the other board members are not.

The initial contracts of the seven other members of the board have now expired, at the end of March 2020.

Procurement Tracker Namibia has tried to ascertain what the status of these seven members' contracts are now – whether they had been re-appointed, or even whether the recruitment of new board members was underway.

It appears the issue was resolved before the end of March 2020 and before former finance minister Calle Schlettwein was transferred to the agriculture ministry and former Bank of Namibia governor Iipumbu Shiimi took over at finance.

But it only appears so.

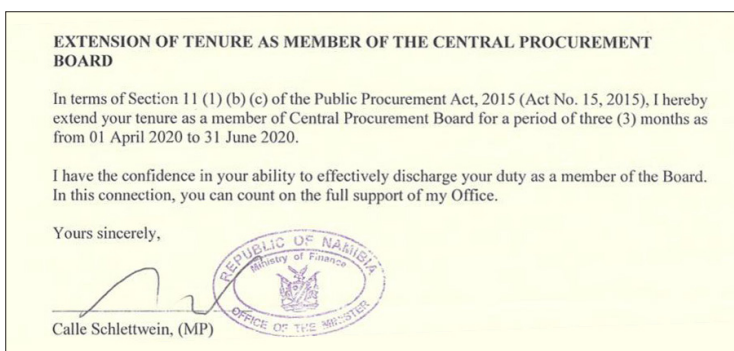
When contacted for comment, the CPBN did not shed light on this issue in late March 2020, with board spokesperson Johanna Kambala simply stating: "In terms of Section 11 (1) (c) of the Public Procurement Act of 2015, the Board members of CPBN are solely appointed by the Minister of Finance. CPBN thus wishes to refer you to the Minister of Finance in this regard."

Finance ministry spokesperson Tonateni Shidhudhu had this to say about the contractual status of the seven board members: "The current board of CPBN was re-appointed for the next six months, pending the finalisation of the recruitment process of the new board. The recruitment process had started but could not be completed because of the current COVID-19 lock down. The board members have received their reappointment letters last Tuesday."

Lawful re-appointments?

And this is precisely where the situation becomes complicated.

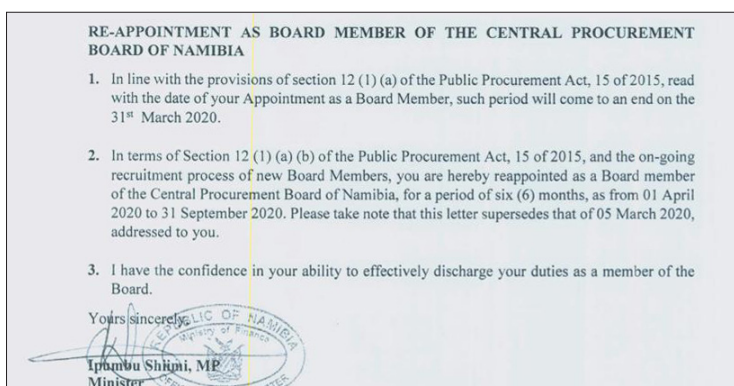
On 5 March 2020, then still finance minister Calle Schlettwein had issued letters (image 1 Schlettwein letter) extending the "tenure" of the seven affected board members for three months – from 1 April 2020 to 31 June 2020.



Schlettwein letter

Schlettwein cited section 11 (1) of the Public Procurement Act of 2015 as the legal basis for the tenure extensions. However, this section of the law does not enable such an extension. In fact, there are no provisions in the law allowing for extension of CPBN board member contracts.

Then on 24 March 2020, almost immediately after taking the reins as finance minister from Schlettwein, new minister Iipumbu Shiimi sent another letter (image 2 Shiimi letter) to the affected CPBN board members informing them that they had been re-appointed for a period of six months – from 1 April 2020 to 31 September 2020.



Shiimi letter

Shiimi stated that his letter "supersedes" Schlettwein's 5 March letter, and he cites section 12 (1) of the law as giving him authority to re-appoint the seven board members.

However, this also appears to be problematic, for the wording of section 12 (1) suggests that the seven affected board members are only eligible for appointment to one three-year term and not for re-appointment. Only the chairperson and deputy chairperson are eligible for re-appointment, and for only one additional term.

The fact that the recruitment of a new board will be conducted over the next six months – until 31 September 2020 – indicates that the seven affected members will be replaced and not re-appointed as per the law.

Why this matters

If the re-appointment of the seven affected board members is challenged and proven to be irregular according to section 12 (1) of the Public Procurement Act of 2015, then any decision of the board over the intervening six months could become legally problematic for both the CPBN and government.

Procurement Briefs

CPBN identity

Three years after coming into existence, on 12 March 2020 the Central Procurement Board of Namibia (CPBN) unveiled its new corporate identity at an event in Windhoek. At the event CPBN chairperson Patrick Swartz said that the entity was in the process of finalising its five-year strategic plan, that focuses on four (4) key areas, namely governance, institutional capacity, stakeholder relations and sustainable public procurement.

Still no annual reports

It's been three years since the operationalising of the Public Procurement Act of 2015, and according to the law both the Procurement Policy Unit (PPU) in the finance ministry and the Central Procurement Board of Namibia (CPBN) are supposed to produce annual reports that should be submitted for scrutiny in parliament.

However, to date neither of these entities have produced such reports.

When approached on this topic, finance ministry spokesperson Tonateni Shidhudhu stated: "With regard to the annual report of the PPU, there has been some delays in the finalization of the report but we are hoping to table it when parliament resumes business."

CPBN spokesperson Johanna Kambala stated: "The annual reports of the CPBN are at their final stages of completion. We expect that these reports will be submitted to Parliament no later than 31 May 2020."

Whether this 31 May 2020 deadline will be met seems questionable as both the work of the CPBN and parliament were suspended for 21 days under the state of emergency – in place since late March 2020 – brought on by the COVID-19 pandemic.

The timely production and parliamentary scrutiny of such annual reports gives effect to the transparency and accountability measures in the Public Procurement Act and is necessary to give the public access to information related to the functioning of the procurement system.

Law amendments

In June 2019 *Procurement Tracker Namibia* reported that the finance ministry has been contemplating amending the Public Procurement Act since mid 2018.

In July 2019 the ministry gathered officials from across the state sector to discuss the challenges being experienced throughout the procurement system and ways to improve, as well as to propose potential areas for amendment.

The Procurement Policy Unit (PPU) in the finance ministry led this initiative. The Central Procurement Board of Namibia (CPBN) had also submitted proposals for amendment.

In early December 2019 the PPU submitted draft amendments to the finance minister Calle Schlettwein and at the end of January 2020 Schlettwein created a



Image: Nestor Shekunangela

task team, headed by CPBN deputy chairperson Lischen Ramakhutla, to review the proposals.

In early March 2020 the task team submitted its review of the draft amendments to the finance ministry, with the report handed to finance ministry executive director Ericah Shafudah. Since then very little has happened on this issue, as events have been over-run by the changes in government following the November 2019 elections and the COVID-19 pandemic, and the subsequent declaration of a state of emergency in Namibia by president Hage Geingob in late March 2020.

Procurement Tracker Namibia will keep track of this issue and provide an update in the next edition.

HLPNE recommendations

In late February 2020 the High-Level Panel on the Namibian Economy (HLPNE), which was created by president Hage Geingob in March 2019, released its much-awaited report of proposals to resuscitate growth in the Namibian economy.

One of the areas that was spotlighted for fixing was the public procurement system, and the HLPNE made the following recommendations:

"The HLPNE recommends that the CPB considers the potential benefits of a phased approach and exempt key SoEs with adequate capacity to manage their own procurement function whilst embracing the principles of the Procurement Act.

There is an urgent need to split the roles of the Accounting Officer and that of the Chairperson as currently provided for in Section 11 of the Act. This will enable the Accounting Officer to focus on procurement distinctively, whilst the Chairperson focuses on the governance of the CPB. Demarcation of duties and roles safeguards against any conflict of interest that may arise and ensures adherence to best corporate governance principles."

It is worth noting that these recommendation are hardly new or unique, for they reflect areas that have actually already been identified as in need of reform and amending of the Public Procurement Act.

Vetting vexes procurement system

Is it legal or not? Some have questioned whether the practice is based in law.

Vetting of potential staff of the Central Procurement Board of Namibia (CPBN) remains an issue of concern in relation to capacity-related shortcomings in the public procurement sector, according to media and other reports.

Vetting is basically the process of conducting thorough background checks on people before offering them employment.

The *Namibian Sun*, on 4 March 2020, published an article which started off stating: “The head of the Central Procurement Board of Namibia (CPBN), Patrick Swartz, says they remain understaffed due to the national intelligence service’s strict vetting process, which potential employees have to subject themselves to.”

This has been a recurring issue over the last few years, as such claims of “strict vetting” have been made since early 2018.

Some individuals involved in the public procurement system have anonymously, in talks with *Procurement Tracker Namibia*, questioned the necessity and legality of involving the Namibia Central Intelligence Service (NCIS) in the recruitment processes of the CPBN, stating that the fact that such vetting is not mentioned in the Public Procurement Act of 2015 should mean that it is being conducted illegally.

Lawful intelligence

However, the fact that the procurement law does not make mention of vetting of CPBN staff does not make the practice illegal.

The process of vetting prospective CPBN staff was introduced by former finance minister Calle Schlettwein sometime in 2017/18, after the initial staff compliment of the CPBN had taken office.

That this after-the-fact process has caused disruption cannot be denied, as reports and statements since then illus-



Photo: The Namibian

CPBN chair Patrick Swartz.



trate, but the practice appears to be legal in terms of the Namibia Central Intelligence Service Act of 1997. According to this law, the NCIS has the power to “(b) gather ministerial intelligence at the request of any interested office, ministry or agency, and without delay to evaluate and transmit as appropriate to that office, ministry or agency such intelligence and any other intelligence at the disposal of the Service and which constitutes ministerial intelligence; ... d) assist with the carrying out of security vetting investigations for the security clearance of persons who hold or may hold vettable posts in offices, ministries and agencies or who have or may have access to any sensitive or classified information ...”

So, while the procurement law does not explicitly enable a vetting process, it would seem clear that there is legal grounding for calling in the NCIS to conduct checks on staff and prospective staff of the CPBN.

Vetting in section 5 of the Namibia Central Intelligence Service Act 10 of 1997.

- (b) gather ministerial intelligence at the request of any interested office, ministry or agency, and without delay to evaluate and transmit as appropriate to that office, ministry or agency such intelligence and any other intelligence at the disposal of the Service and which constitutes ministerial intelligence;
- (c) regulate, in co-operation with any office, ministry or agency entrusted with any aspect of the maintenance of the security of Namibia, the flow of security intelligence and the co-ordination between the Service and that or any other office, ministry or agency of functions relating to such intelligence;
- (d) assist with the carrying out of security vetting investigations for the security clearance of persons who hold or may hold vettable posts in offices, ministries and agencies or who have or may have access to any sensitive or classified information;

Responding to Schlettwein's claims

On 31 October 2019, during a media briefing former finance minister Calle Schlettwein made certain claims related to the factualness of reporting in the *Procurement Tracker Namibia (PTN)* of October 2019. The minister's claims relate to PTN's continued reporting on the lack of transparency throughout the public procurement system.

Schlettwein's claims:

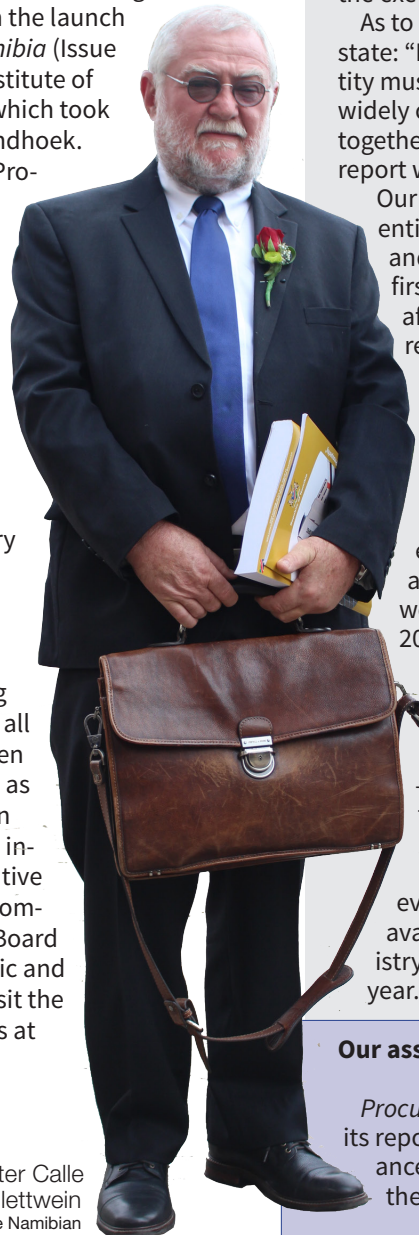
"I would also like to touch on the issue of procurement which time and again has become a matter of public concern.

The Ministry of Finance has been following media reports that emanated from the launch of the *Procurement Tracker Namibia* (Issue No.8 of October 2019) by the Institute of Public Policy Research (IPPR), which took place on 29 October 2019 in Windhoek.

IPPR claims that the Central Procurement Board of Namibia (CPBN) is not forthcoming and is not transparent in making information available to the public pertaining to procurement activities. The CPBN is governed by the Public Procurement Act, 2015 (Act no 15 of 2015). In terms of Section 55 (8) the Board is required to promptly and in a prescribed manner publish a notice of every procurement or disposal award together with the executive summary of the bid evaluation report.

The claim by IPPR is deviating from the factual information as all procurement activities have been published on the CPBN website as required by the law. Information published on the CPBN website includes but not limited to: Executive Summaries by Bid Evaluation Committees, Awards, Current Bids, Board Decisions. Members of the public and the media are encouraged to visit the CPBN website on a regular basis at www.cpb.org.na."

Former finance minister Calle Schlettwein
Photo: The Namibian



Response to Schlettwein

The *Procurement Tracker Namibia* (PTN) of October 2019 does not specifically single out the CPBN as non-compliant in terms of transparency, but rather government-wide transparency deficits, by commenting on the lack of transparency evidenced by the absence of annual procurement plans and quarterly procurement reports, among others, by public entities.

As the minister pointed out, according to section 55 (8) of the law, the CPBN or public entity that has awarded a procurement contract must "promptly in a prescribed manner publish a notice of every procurement or disposal award together with the executive summary of the bid evaluation report".

As to the prescribed manner, section 39 (1) of the regulations state: "For the purposes of section 55(8) of the Act, a public entity must publish on its website and on any other print media widely circulated in Namibia a notice of every procurement together with the executive summary of the bid evaluation report within seven days of the procurement award."

Our interpretation of these provisions is that every state entity that procures must publish notice of every approved and awarded procurement contract on its website, in the first instance, and then in any print media immediately afterwards, along with a summary of the bid evaluation report.

However, this simply is not the practice throughout most of the state sector.

For instance, taking the CPBN as an example, there is no notice or executive summary of the award of the rental contract for the premises occupied by the CPBN on the board's website, just as there is no notice or bid evaluation committee report summary of all other operational procurement contracts available on the board's website. The CPBN's annual procurement plan for the 2019/20 financial year is also not available on its website.

Similarly, according to a report on the Ministry of Finance website, from 8 May 2018 to 6 March 2019 the ministry awarded 286 procurement contracts – ranging in value from just over N\$1,000 to several millions – for everything from flight tickets and event catering to office computers and cabling, amounting to N\$25.6 million.

Not a single one of the notices or summaries of bid evaluation committee reports for any of these awards is available on the ministry's website and neither is the ministry's annual procurement plan for the 2018/19 financial year.

Our assessment

Procurement Tracker Namibia stands by the "factualness" of its reporting on the issue of the general state of non-compliance of state entities with the transparency provisions of the Public Procurement Act of 2015.