

THE REPUBLIC OF UGANDA

**IN THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC
ASSETS APPEALS TRIBUNAL AT KAMPALA
APPLICATION NO. 23 OF 2021**

COIL LTD ===== APPLICANT

VERSUS

**NATIONAL HOUSING AND CONSTRUCTION
COMPANY LIMITED=====RESPONDENT**

**APPLICATION FOR REVIEW IN RESPECT OF THE TENDER
FOR WORKS UNDER DOMESTIC BIDDING METHOD FOR THE
COMPLETION OF OUTSTANDING WORKS AT JASMINE
APARTMENTS SITE NAALYA VIDE PROCUREMENT REF NO.
NHCC/WRKS/2020/2021/00002.**

**BEFORE: FRANCIS GIMARA S.C, CHAIRPERSON; ENG.
THOMAS BROOKES ISANGA; GEOFFREY NUWAGIRA KAKIRA;
AND PAUL KALUMBA; MEMBERS**

DECISION OF THE TRIBUNAL

A Background

1. National Housing and Construction Company Limited (the Respondent/Entity) on July 1, 2021, issued out a bidding document for procurement of works under open domestic bidding method for the completion of outstanding works at Jasmine apartments site Naalya vide Procurement Ref No. NHCC/WRKS/2020/2021/00002. The Bid Notice was advertised in the New Vision Newspaper of July 1, 2021
2. Bids were issued to 16 firms as per Form 8 –Record of issue of Bidding Documents.
3. A pre-bid meeting was held on 8th July 2021, attended by 23 bidders as per Form 10 –Record of Minutes of Pre-Bid Meeting and certificates of attendance for the pre-bid meeting and site visit issued by the Respondent, to all the bidders who attended.
4. Only 11 Bidders namely, *Interior Technologies Ltd, Scaffold Engineering and Construction Company Limited, CATIC, Prism Construction Co Ltd, King Albert Constructions Ltd, Sarjan Construction (U)Ltd, HL Construction Limited, CMD Investments Ltd, Fabrication Systems (u) Ltd, COIL Ltd and Concrete Construction Ltd* submitted bids for the said procurement on July 23, 2021 as per Form 11 –Record of Bids received. The Bids were also opened on July 23, 2021
5. Evaluation of bids was conducted and according to the evaluation report signed on 1st September 2021 *King Albert Constructions Ltd* was recommended by the Evaluation Committee as the best evaluated bidder and for award of Contract at a contract price of UGX 8,409,815,496/= VAT inclusive. The best evaluated bidder notice (NOBEB) was displayed on September 16, 2021 with a removal date of September 29, 2021.
6. *COIL Ltd* (the Applicant) Applicant being dissatisfied the outcome of procurement process, applied for administrative review to Accounting Officer of Respondent on September 29, 2021. The Complaint was dismissed by the Accounting Officer on October 11, 2021.

A. Application to the Tribunal

1. The Applicant being dissatisfied with the decision of the Accounting Officer, filed the instant Application on October 25, 2021 before the Tribunal to challenge the decision of the Accounting Officer of the Respondent
2. The Applicant challenged the failure or omission by the Accounting Officer to provide a reason for the disqualification of the Applicant's bid
3. The Applicant further challenged the refusal by the Accounting Officer, to avail it with minutes of the Contracts and Evaluation Committee
4. The Applicant challenged decision of the Respondent to reject one of the three projects it had submitted on the ground that it fell outside the last five years having been completed in February 2015
5. The Applicant prayed for the following reliefs that it sought from the Tribunal;
 - (i) The Entity refunds the Applicant the Administrative review fees and costs of the Application amounting to Uganda shillings ten million only
 - (ii) That the entity's disqualification of the Applicant's bid at the technical evaluation stage be set aside
 - (iii) That the bids be re-evaluated
 - (iv) That the entity be ordered to reasonably compensate the Applicant for costs incurred by the Applicant
6. The Applicant made this application on the following grounds:
 - a) *Whether the entity's accounting officer erred in law and fact when he failed to give reasons for his decision.*
 - b) *Whether the entity's accounting officer erred in law and fact when he refused to avail the documents requested for by the Applicant for purposes of administrative review.*

- c) *Whether the entity erred in law and fact when it decided that only two out of the three projects presented as similar assignments met all the attributes of similarity, that the third project falls outside the last five years, that it was concluded in February 2015.*

Reply to the Application

1. The Respondent denied claims of the Applicant as stated in paragraph 2.5, 2.6 and 2.7 of the Application.
2. The Respondent claimed that the Application is devoid of merit, misconceived and brought in bad faith since the Applicant did not have the required experience as required by the bidding document
3. The Respondent contended that reasons for dismissing the Applicant's Complaint were stated in the Accounting Officer's letter of October 18, 2021
4. That the minutes of the evaluation committee and contracts committee could not be shared with the Applicant on grounds of confidentiality
5. The Respondent therefore prayed that the Application is dismissed

B. Written submissions

Applicant

1. The Applicant submitted that the failure of the Accounting Officer to give reasons for his decision was a violation of Section 89(4) of the PPDA Act as amended.
2. That refusal to provide information requested for by the Applicant amounted to breach of the cardinal principles of transparency, accountability and fairness and that in accordance with Sections 45 and 89(4), the Applicant was entitled to be given the relevant documents or at least excerpts

or summaries of the same to enable the Applicant to prepare and prosecute the administrative review proceedings.

3. That the certificate issued to the Applicant under the project in question (*at page 43 of the Application*) has 11th February 2017 as the final completion date which is the conclusive evidence that the contract was completed then and not in 2015 as asserted by the Entity. Applicant relied on the decision of **Matthew Hall Ortech Limited v Tarmac Roadstone Limited (1997)** to buttress its submissions on the conclusiveness of a Final Certificate issued to a contractor
4. Applicant also submitted that Bidding Form 10 on Specific experience cannot take precedence over the actual completion certificate. The completion certificate is the source document and that it was obvious that the date of February 2015 in Bidding Form 10 was an error. It should have read February 2017 and should have been resolved through clarification under section 73 of the PPDA Act and regulation 10 of the PPDA (Evaluation) Regulations 2014.

The Respondent

1. The Respondent submitted that the Accounting Officer had in his letter dated 18th October 2021 to the Applicant, indicated that the Applicant failed at the technical stage due to lack of experience. Therefore, reasons for the dismissal were stated.
2. That all necessary information required by the Applicant for purposes of Administrative review were shared and that the Respondent was not under obligation to share with the Applicant information that was withheld for confidential grounds
3. That the 3rd Project stated in the Bidding Form 10 by the Applicant did not qualify as per the solicitation document. The date considered for the completion of works is the practical completion date which is February 11, 2015 excluding defects liability period.

4. The Respondent prayed that the Application is dismissed with each party bearing own costs

The best evaluated bidder

5. The best evaluated bidder did not make any written submissions.

C. The oral hearing

The Tribunal held an oral hearing on November 11, 2021 via zoom software. The appearances were as follows:

1. Christine Nabisawa, in-house legal counsel for the Applicant. In attendance was Catherine Layet, a Quantity Surveyor/ Project Coordinator and Habineza Juliet-Quantity Surveyor for the Applicant.
2. Wangota Emmanuel as Counsel for the Respondent, In attendance, Eng. Ambrose Musinguzi-Head Projects, Eng. Emmanuel Sentamu Ivan and Mbiine Francis the Head Procurement and Disposal Unit of the Respondent.
3. Perez Kyewalyanga, represented the *King Albert Constructions Ltd* as the Best Evaluated Bidder.
4. The parties highlighted their written submissions and provided clarifications.
5. *King Albert Constructions Ltd* the best evaluated bidder who attended the said nothing at the hearing.

D. Resolution by the Tribunal

Issue No. 1: Whether the entity's accounting officer erred in law and fact when he failed to give reasons for his decision.

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1. Section 89 (7) of the *Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021* states that “*The Accounting Officer shall make and communicate a decision, in writing, which shall be addressed to the bidder who makes a complaint, within ten working days and which shall indicate the reasons for the decision taken and the corrective measures to be taken, if any*”
2. The legal requirement is that the decision by the accounting officer regarding a compliant must be made within ten working days and the reasons for the decision taken must be indicated. The Applicant’s complaint is that the accounting officer in making a decision, did not indicate the reasons for the decision.
3. We examined the contents of the Accounting Officer’s decision communicated in the October 11, 2021 letter. The said letter interalia, indicated there was no merit in the Complaint. There was no explanation or reason given for the decision made.
4. By a letter dated October 13, 2021, the Applicant requested the Respondent to provide *a copy of the Evaluation Report, a copy of minutes of the Contracts Committee and a copy of Minutes of the Evaluation Committee* as the Applicant intended to appeal against the decision of the Accounting Officer.
5. Instead, the reasons for the decision of the Accounting Officer were later provided in the letter dated 18th October 2021, while responding to the Applicant’s October 13, 2021 letter.
6. In paragraph 2 of the said 18th October 2021 letter, the reasons for dismissal of the Complaint were stated to wit “... *your failure at the technical stage was due to lack of specific experience i.e. only two out of three projects presented as similar assignments met all the attributes of similarity, the 3rd project falls outside the last 5 years as it was completed February 2015*”.
7. The letter went ahead to attach a report indicating the reasons for the rejection of the Applicant’s bid and the stage at which the Applicant’s bid was rejected in accordance with **section**

89(4) of the Public Procurement and Disposal of Public Assets (Amendment) Act, 2021

8. We find that the Accounting Officer erred in law and fact when he did not indicate the reasons for the said decision in the letter communicating his decision on October 11, 2021. It is immaterial and does not take away the statutory obligation to state duties even when the Accounting Officer mistakenly believed that the said reasons had been communicated. See para 2 of the October 18, 2021 letter.
9. We are fortified in our finding by relying on the decision of the England and Wales Court of Appeal (Civil Division) in **Flannery v Halifax Estate Agencies Limited [2000] 1 ALL ER 373** where it was held that the duty to give reason is;

“is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties - especially the losing party - should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in Ex p. Dave) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.

The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.

*The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject-matter.....This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. **Transparency should be the watchword**". Also see*

Mariana and others v BHP plc and BHP Ltd [2021] EWCA Civ 1156 (July 27, 2021)

7. **This issue is therefore answered in the affirmative**

Issue No. 2: Whether the entity's accounting officer erred in law and fact when he refused to avail the documents requested for by the applicant for the purposes of administrative review.

8. We have already observed that by a letter dated October 13, 2021, the Applicant requested the Respondent to provide *a copy of the Evaluation Report, a copy of minutes of the Contracts Committee and a copy of Minutes of the Evaluation Committee* as the Applicant intended to appeal against the decision of the Accounting Officer
9. The obligation of the entity under section 89(4) of the of the *Public Procurement and Disposal of Public Assets (Amendment) Act 2021* is to upon request by a bidder, provide a report indicating the reasons for the rejection of the bidder and the stage at which the bidder was rejected.
10. A report indicating the reasons for the rejection of the bidder and the stage at which the bidder was rejected was attached to the Accounting Officer's letter to the Applicant dated 18th October 2021. The Accounting Officer was under no further duty to avail the Applicant with *Minutes of a copy of minutes of the Contracts Committee and a copy of Minutes of the Evaluation Committee.*
11. It is our finding that the Accounting Officer complied with the obligation stated under **section 89(4)** of the **Public Procurement and Disposal of Public Assets (Amendment) Act, 2021**
12. **This issue is therefore answered in the negative.**

Issue No. 3: Whether the entity erred in law and fact when it decided that only two out of the three projects presented as similar assignments met all the attributes of similarity, that the third project falls outside the last five years, that it was concluded in February 2015.

13. The Evaluation Criteria in this Application, specific to the issue at hand is deduced from the Standard Bidding Document at **Part 1, Section 3, item 6.1 Personnel and Equipment, B-Equipment, Clause 6.2.8, Specific Experience** which states as follows;
- a) *“Participation as contractor, management contractor, or subcontractor, in at least three (03) contracts within the last 5 years, each with a value of at least 5 Billion, that have been successfully and substantially completed (at least 70 percent complete) and that are similar to the proposed works. The similarity shall be based on the physical size, complexity, methods/Technology or other characteristics as described in section 6, statement of requirements.”*
14. However, before we delved into the review of the issue before us, we examined the evaluation report relied upon by the Respondent and noted that there were glaring inconsistencies and omissions in the evaluation report, that ought to have been corrected so that the procurement process is tritely transparent, accountable and fair to all bidders involved, as stipulated in section 45 of the *Public Procurement and Disposal of Public Assets Act 2003*.
15. Some of the salient inconsistencies and omissions we noted in the evaluation report are as follows;
- a) That blanket waivers of evaluation criteria for some bidders were made **without** specifying the names of bidders and details of the waivers as well as the recommendations to address the omissions generally stated in the **evaluation report under page 6 of 10**, for example, *“Bidders who by error or omission did not attach three candidates for the last three positions that were part of the list of key personnel in the Employer’s Statement of Requirements annexed to the bidding document but did not specifically appear in the bidding document were exempted and their bids considered compliant on the basis of ten out of thirteen of key personnel”*
- b) There was no recorded justification for the waiver of key

evaluation criteria that by law and bidding document, should have been mandatorily considered and particulars of the specific bidders who were affected and how they were affected by the said waivers. For instance, we noted that the **evaluation report under page 6 of 10 while dealing with** general experience, stated as follows;

“The Committee unanimously agreed specific experience as superior over general experience requirement. As such bidders who did not satisfy the former but met the later was considered technically compliant”

16. The Tribunal in **China Aero-Tech International Engineering Corporation (CATIC) Vs. PPDA, Application No. 1 of 2016**, held and guided that *in determining whether an omission is a material deviation, the entity must first determine whether a bid was substantially compliant and responsive*

17. In **Roko Construction Ltd & Roko Construction (Rwanda) Ltd JV versus PPDA Application No. 6 of 2019**, the Tribunal reiterated its holding in a similar **Application No. 1 of 2016** as follows:

“the test to determine whether a deviation is material or not is an objective, not a subjective test. In determining whether an omission is a material deviation, the entity must first determine whether a bid was substantially compliant and responsive.”

18. Sufficient guidance on what constitutes a “material deviation” and its effect is provided for under **Regulation 11 of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014**. The said guidance provides key considerations to be made by the Evaluation Committee, prior to and in granting waivers.

11(4) For the purposes of this regulation a “material deviation” is a deviation that— (a) affects in a substantial way, the scope or quality of the supplies or services or the performance of the works to be procured; (b) is inconsistent with the bidding document and which may in a substantial way, limit the rights of the procuring and disposing entity or the obligations of the bidder

under the contract; (c) if corrected would unfairly affect the competitive position of the other bidders whose bids are administratively compliant and responsive; or (d) impacts the key factors of a procurement including cost, risk, time and quality and causes— (i) unacceptable time schedules, where it is stated in the bidding document that time is of the essence; (ii) unacceptable alternative technical details, such as design, materials, workmanship, specifications, standards or methodologies; or (iii) unacceptable counter-bids with respect to key contract terms and conditions, such as payment terms, price adjustment, liquidated damages, sub-contracting or warranty.

19. Clarification of bids is provided for in section 73 of the *Public Procurement and Disposal of Public Assets 2003* as amended, read together with Regulations 10, 11 and 17(6) of the **Public Procurement and Disposal of Public Assets (Evaluation) Regulations**, provide detailed procedures for clarification of bids. The import of aforementioned provisions is that clarification may be used where the evaluation committee determines that it will assist in the evaluation and also to provide missing details in the submitted information or documents.
20. Clarification is not meant to introduce new information or documents in order to cure a material deviation in the bid. See the decision of this Tribunal in **APPLICATION NO. 13 OF 2020 - SMILEPLAST LTD versus PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY & NATIONAL AGRICULTURAL ADVISORY SERVICES**.
21. **Regulation 10(2)** of the **Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014** permits an Evaluation Committee to request for clarification of information or submission of documentation only in circumstances where:
 - a. *there is a nonconformity or an omission in the bid, which is not a material deviation as specified in regulation 11 (4); or*
 - b. *there is an arithmetic error which has to be corrected.*
22. Post qualification requirements and due diligence as provided for in the bidding document as part of determination of best evaluated bidder were partially done according to the evaluation report at **8 of 10**), states that, “*This (meaning post qualification)*

was partially done on the understanding that a due diligence would be conducted on the best evaluated bidder”.

23. Regulation 34(1) of the **Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014** provides that, *“an evaluation committee shall undertake a post qualification evaluation to confirm whether the best evaluated bidder has the capacity and resources to effectively execute a procurement of the procuring and disposing entity”.*
24. An examination of the records indicates that the evaluation committee did not complete or fully comply with the evaluation criteria under post-qualification but instead, partially undertook post-qualification evaluation as stated in the evaluation report. We found this to be irregular and an anomaly, contrary to Regulation 34 (1) of the **Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014**
25. It therefore suffices that the bids in this impugned procurement are re-evaluated in accordance with and in a manner consistent with this decision, the law and bidding document. The Respondent is further directed to clearly document and indicate the basis for key decisions and recommendations made in the evaluation process.
26. **This issue is therefore answered in the negative.**

Issue 4: What remedies are available to the parties

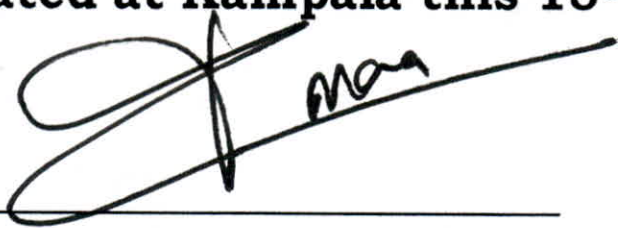
27. In view of our findings under issues no. 1 in the affirmative, issues 2 and 3 in the negative, the Application partially succeeds.
28. We shall therefore set aside the administrative review decision of the Accounting Officer of the Respondent and remit the procurement back to the entity for re-evaluation at the detailed evaluation stage.

E. DISPOSITION


1. The Application partially succeeds.

2. The administrative review decision of the accounting officer is set aside.
3. The procurement is remitted back to the Entity, with directions to conduct a fresh evaluation from the detailed evaluation stage, in a manner consistent with this decision, the PPDA Act and regulations and the bidding document
4. The Entity must refund the administrative review fees paid by the Applicant.
5. The Tribunal's suspension order dated October 25, 2021 is vacated.
6. Each party to bear its own costs.

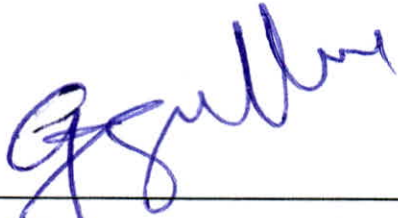
Dated at Kampala this 15th day of November, 2021.



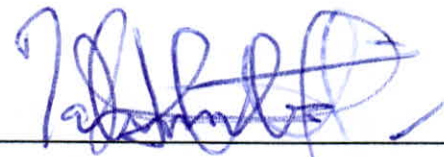
**FRANCIS GIMARA S.C
CHAIRPERSON**



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