

**THE REPUBLIC OF UGANDA**

**PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS APPEALS TRIBUNAL  
(PPDA APPEALS TRIBUNAL)**

**APPLICATION NO 2 OF 2019**

**APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT TO THE PROCUREMENT OF 170 TRACTORS AND MATCHING IMPLEMENTS BY NATIONAL AGRICULTURAL AND ADVISORY SERVICES (NAADS) SECRETARIAT REF: NAADS/SUPLS/2018-2019/00010**

**APPLICANT: ENGINEERING SOLUTIONS (U) LTD**

**1<sup>ST</sup> RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS  
AUTHORITY**

**2<sup>ND</sup> RESPONDENT: THE COOPER MOTOR CORPORATION LTD**

**(Before: OLIVE ZAALE OTETE- CHAIRPERSON, MOSES JURUA ADRIKO (SC)-  
MEMBER, DAVID KABATERAINE-MEMBER, ABRAHAM NKATA- MEMBER AND  
ENG. ISANGA THOMAS BROOKES-MEMBER.)**

## **DECISION OF THE PPDA APPEALS TRIBUNAL**

### **1.0 BRIEF FACTS**

- 1.1 On 27<sup>th</sup> July 2018, the National Agricultural and Advisory Services (NAADS) initiated the procurement of 170 tractors and matching implements at an estimated cost of UGX 21,594,600,000.
- 1.2 On 20<sup>th</sup> August 2018, NAADS wrote to the Permanent Secretary of Ministry of Works and Transport requesting for clearance of the specification for tractors and matching implements.
- 1.3 On 31<sup>st</sup> August 2018, the Ministry of Works and Transport cleared the specifications for the tractors with a minimum power rating of 40HP for Lot 1 and 60HP for Lot 2 and 3.
- 1.4 On 18<sup>th</sup> September 2018, the bid notice was published in the Daily Monitor Newspaper with the deadline for submission of bids of 29<sup>th</sup> October 2018.
- 1.5 On 29<sup>th</sup> October 2018, eight bids were received, opened and prices were read out and evaluated.
- 1.6 According to the evaluation report dated 11<sup>th</sup> December 2018, during the preliminary examination, one bidder Motor Centre was eliminated for failure to submit powers of attorney from each member of the Joint Venture and four bidders were eliminated at detailed commercial evaluation.
- 1.7 MAS Corporation was eliminated at the technical evaluation stage for failure to conform to the criteria stated in the bidding document.
- 1.8 Two (02) bidders namely Engineering Solutions (U) Ltd and The Cooper Motor Corporation (U) Ltd were subjected to financial evaluation for all the three Lots as indicated as follows: Engineering Solutions (U) Ltd; Lot 1 UGX 3,055,586,100, Lot 2; 4,438,265,940, Lot 3 4,438,265,940 and The

Cooper Motor Corporation (U) Ltd; Lot 1 UGX 3,233,653,050, Lot 2 4,669,512,960 & Lot 3 4,669,512,960.

- 1.9 A post qualification exercise was conducted by the Evaluation Committee on the bid of Engineering Solutions (U) Ltd and found that the bidder had dealership agreement with four companies from the four different regions of Uganda.
- 1.10 The Evaluation Committee recommended award of the contract for the supply of tractors and their implements for Lots 1, 2 and 3 to Engineering Solutions (U) Ltd as follows: Lot 1 UGX 3,055,586,100, Lot 2 UGX 4,438,265,940 and Lot 3 UGX 4,438,265,940.
- 1.11 On 11<sup>th</sup> December 2018, the Contracts Committee approved the recommendations of the Evaluation Committee and awarded the contract for the supply of tractors and their implements for Lot 1 to Engineering Solutions (U) Ltd.
- 1.12 On 12<sup>th</sup> December 2018, the Notice of the Best Evaluated Bidder was displayed with the removal date of 28<sup>th</sup> December 2018.
- 1.13 On 19<sup>th</sup> December 2018, The Cooper Motor Corporation (U) Ltd applied for administrative review to the Accounting Officer.
- 1.14 On 16<sup>th</sup> January 2019, the Accounting Officer issued the decision rejecting the application for administrative review by The Cooper Motor Corporation (U) Ltd.
- 1.15 On 16<sup>th</sup> January 2019, The Cooper Motor Corporation (U) Ltd appealed to the Authority.
- 1.16 On 5<sup>th</sup> February 2019, the Authority upheld the application by The Cooper Motor Corporation (U) Ltd and directed the Entity to re-evaluate the bids and to refund the administrative review fees to the Applicant.
- 1.17 On 11<sup>th</sup> February, 2019 the Applicant being dissatisfied with the Authority's decision filed this Application before the Tribunal.

## 2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION

- 2.1 On 11<sup>th</sup> February 2019, the Applicant filed an application to the Tribunal challenging the Authority's decision.
- 2.2 The grounds for Application to the Tribunal are that the Authority erred in law and fact when it held that the equipment offered by the Engineering Solutions (U) Ltd TAFE5900 DI 4WD did not meet the requirement of minimum 60HP.
- 2.3 The Applicant prayed the Tribunal to order that the equipment to be supplied by the Best Evaluated Bidder met the requirement of minimum 60HP and the decision to award Engineering Solutions (U) Ltd the contract for supply and delivery of 170 tractors and matching implements to NAADS be upheld.

## 3.0 DISPOSAL OF APPLICATION

In disposing of the Application for review, the Tribunal analyzed the following documents:

- 1) the Applicant's Application to the Tribunal dated 11<sup>th</sup> February 2019, annexes to the Application, the written and oral submissions;
  - 2) the Authority's response to the Application dated 14<sup>th</sup> February 2019, annexes to the response, and the written and oral submissions;
  - 3) the 2<sup>nd</sup> Respondent's response to the Application dated 20<sup>th</sup> February 2019, annexes to the response, and the written and oral submissions.
- 3.1 The Tribunal conducted a hearing for the Parties on 22<sup>nd</sup> February 2019. The Applicant was represented by Mr. Naboth Muhairwe, while the 1<sup>st</sup> Respondent/ Authority was represented by Mr. John Kallemera and the 2<sup>nd</sup> Respondent was represented by Ms. Rebecca Nakiranda.

#### 4.0 ISSUES

4.1 Two (2) issues were formulated for resolution by the Tribunal as follows:

a) *Whether the Authority erred in law and fact when it held that the equipment offered by the Engineering Solutions (U) Ltd TAFE5900 DI 4WD did not meet the requirement of minimum 60HP;*

b) *What remedies are available to the parties?*

#### 5.0 SUBMISSIONS BY COUNSEL

5.1 On the first issue, to wit, *whether the Authority erred in law and fact when it held that the equipment offered by the Engineering Solutions (U) Ltd TAFE5900 DI 4WD did not meet the requirement of minimum 60HP*, Counsel for the Applicant submitted that horsepower is the maximum power that an engine can put out and concluded that horsepower ratings can only be maximum.

5.2 Counsel for the Applicant submitted that Section 6 of the bidding document under the statement of requirements on page 58, specified that the entity required '**water cooled diesel engine, power output at rated RPM: Minimum 60HP**'. He submitted that the Applicant met this specification as specified in their Brochure which indicated that the horse power ratings of the tractor to be offered were a maximum 60HP @2300RPM which met the desired specifications of Minimum 60 HP.

5.3 Following the 2<sup>nd</sup> Respondent's decision, the Applicant wrote to the Permanent Secretary Ministry of Works and Transport as the Chief Government Advisor on mechanical equipment in a letter dated 11<sup>th</sup> February, 2019 seeking his professional interpretation whether the specifications in their Brochure met the requirements of the bid which provided for minimum 60 HP.

5.4 Counsel submitted that the Permanent Secretary of the Ministry of Works and Transport in a letter dated 13<sup>th</sup> February, 2019 responded that the Ministry of Works and Transport had given guidance to the Authority by

letter dated 29<sup>th</sup> January 2019. The guidance was as follows: ***'The brochure indicates that the TAFE 5900DI reaches maximum horsepower of 60HP at 2300 revs/min which is in line with requirements/experience.. .'*** He further stated: ***'we have no reason to doubt that the TAFE5900 DI tractor produces 60HP at a rated speed of 2300 revs/min and therefore meets the required technical specification for your procurement.'*** Counsel submitted that this should have been sufficient guidance to the Authority to find that their bid was compliant.

- 5.5 Counsel for the Applicant complained that the advice given by the Ministry of Works and Transport was conspicuously absent from the PPDA decision implying that the Authority did not take this guidance into account when making the decision. Counsel concluded that there was sufficient evidence on record to show that the Applicant offer of TAFE model 5900 DI 4WD fully met the minimum requirement of 60HP for Lot 2 and 3.
- 5.6 Counsel prayed to the Tribunal to set aside the decision of the Authority, uphold the National Agricultural and Advisory Services (NAADS) evaluation committee's decision and costs of this Application.
- 5.7 In response to same issue, Counsel for the 1<sup>st</sup> Respondent submitted that the Authority duly conducted an investigation into the matter and established that Item 4 of the Technical specifications in the bidding document for Lot 2 and 3 provided for the minimum power rating of the engine as power output at rated RPM: Minimum 60HP.
- 5.8 Counsel submitted that the Applicant's bid of a TAFE 5900DI 4WD brochure indicating 'maximum engine power: 60HP range @ 2300RPM' did not indicate any minimum yet the entity required a minimum of 60HP. He argued that the evaluation committee erred in evaluating the Applicant as compliant yet it did not meet the requirement in Item 4 of the technical specifications in the bidding document for Lots 2 and 3. Counsel defended the Authority's decision because upon perusal of the bidding document, the Authority found that the Applicant's bid did not meet the minimum requirement of 60 HP. In answer to the question put by the Tribunal concerning the expert advice provided by the Ministry of Works and

transport at the Authority's request, Counsel responded that the Authority disregarded the advice of the Ministry.

- 5.9 Counsel for the 1<sup>st</sup> Respondent prayed that the Application has no merit and it should be dismissed with each party bearing its own costs.
- 5.10 Counsel for the 2<sup>nd</sup> Respondent associated themselves with the 1<sup>st</sup> Respondent's arguments and added that the Authority correctly found that the Applicant's equipment offered did not meet the minimum requirement under the bidding document, which was minimum 60HP. Counsel argued that the Applicant restricted itself to the maximum without disclosing the minimum as per the entity's requirement. By concealing the minimum power output and restricting the maximum to 60 HP, the Applicant did not positively respond to the bid requirement .
- 5.11 Counsel for the 2<sup>nd</sup> Respondent further submitted that the brochures bearing technical specifications which were submitted by the Applicant bore glaring inconsistencies such as engine configuration among others, which inconsistencies rendered the Applicant's bid non-responsive.
- 5.12 Counsel for the 2<sup>nd</sup> Respondent cited Regulation 10 (4) (c) of the PPDA (Evaluation) Regulations, S.I No. 9 of 2014 which states that a bidder shall not be permitted to make a clarification or omission which substantially alters anything which forms a crucial or deciding factor in the evaluation of the bid.
- 5.13 Counsel further relied on Regulation 11 (4) (c) of the PPDA (Evaluation) Regulations S.I No. 9 of 2014 which states that for the purposes of this regulation a 'material deviation' is a deviation that if corrected would unfairly affect the competitive position of the other bidders whose bids are administratively compliant and responsive. Counsel therefore submitted that if the Applicant is allowed to bring in new evidence for instance the letter from the Permanent Secretary Ministry of Works and Transport and other communications from the TAFE manufacturer, this would lead to material deviation from the bidding document.

- 5.14 Counsel for the 2<sup>nd</sup> Respondent relied on the case of ***Engineering Solutions (U) Ltd Vs. PPDA, Cooper Motor Corporation Ltd & NAADS, Application No. 10 of 2016*** where the Tribunal decided that the test to determine whether a deviation is material is an objective not subjective test. In determining whether an omission is material the Entity must first determine whether a bid was substantially compliant and responsive. Upon making this determination the Entity must decide whether to invoke Regulation 10 of the PPDA (Evaluation) Regulations 2014.
- 5.15 Counsel for the 2<sup>nd</sup> Respondent submitted that the Applicant's appeal is devoid of merit and that the Authority did not err in any way. That the Tribunal rejects this Application with costs to the 2<sup>nd</sup> Respondent and the findings of the Authority be upheld with orders therein.
- 5.16 The entity clarified that the entity did not seek for clarification of the bids; and all correspondence with the Accounting officer was received during administrative review.
- 5.17 Counsel for the Applicant reiterated his prayers as stated in this Application.

## 6.0 RESOLUTION BY THE TRIBUNAL

- 6.1 The Tribunal carefully scrutinized the wording of Part 1: Section 5, Item 4 on the Technical Specifications for tractors in the bidding document which states that ***'ENGINE: Water cooled diesel Engine, Power output at rated RPM: Minimum 60HP.*** The Applicant in its bid offered a TAFE tractor with the maximum engine power: 60HP range @ 2300 RPM. The Tribunal notes that the bidding document did not specify a maximum power output. Having established these facts, the maximum engine power 60HP range @ 2300 offered by the Applicant met the requirement in the bidding document. The Tribunal is further fortified in its view by the expert guidance offered by the Ministry of Works and Transport in which the Ministry advised as follows: ***'The brochure indicates that the TAFE 5900DI reaches maximum horsepower of 60HP at 2300 revs/min which is in line with requirements/experience.....we have no reason to doubt that the TAFE5900 DI tractor produces 60HP at a rated speed of 2300 revs/min and therefore meets the required technical specification for your***



*procurement.*' The Tribunal finds no reason to depart from this expert opinion.

**DECISION OF THE TRIBUNAL**

1. The decision of the Authority is set aside.
2. The decision of the Accounting Officer is reinstated.
3. The Procurement process should continue to its logical conclusion.
4. Each party shall bear its own costs.

Dated this .....*25th*..... day of .....*Feb.*..... 2019.

SIGNED by ] .....  
OLIVE ZAALE OTETE ] **CHAIRPERSON**

SIGNED by ] .....  
MOSES JURUA ADRIKO (SC) ] **MEMBER**

SIGNED by ] .....  
DAVID KABATERAINE ] **MEMBER**

SIGNED by ] .....  
ABRAHAM NKATA ] **MEMBER**

SIGNED by ] .....  
ENG. ISANGA THOMAS BROOKES ] **MEMBER**