

THE REPUBLIC OF UGANDA

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

APPLICATION NO 3 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: NDOVU MOTORS LIMITED

1ST RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY

2ND RESPONDENT: ENGINEERING SOLUTIONS LTD

(Before: OLIVE ZAALE OTETE- CHAIRPERSON, 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 27th 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 20th 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 31st 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 18th September 2018, the bid notice was published in the Daily Monitor Newspaper with the deadline for submission of bids of 29th October 2018.
- 1.5 On 29th October 2018, eight bids were received, opened and prices were read out and evaluated.
- 1.6 According to the evaluation report dated 11th 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 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 11th 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 12th December 2018, the Notice of the Best Evaluated Bidder was displayed with the removal date of 28th December 2018.
- 1.13 On 24th December 2018, Ndovu Motors Ltd applied for administrative review to the Accounting Officer.
- 1.14 On 16th January 2019, the Accounting Officer issued the decision rejecting the application for administrative review by Ndovu Motors Ltd.
- 1.15 On 24th January 2019, Ndovu Motors Ltd appealed to the Authority.
- 1.16 On 5th 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 18th 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 18th February 2019, the Applicant filed an application to the Tribunal challenging the Authority's decision.
- 2.2 The Grounds of the Application and Cross appeal are as follows;

- (a) That the Executive Director, having found out that the entity erred in evaluating M/s Engineering Solutions (U) as compliant to the specifications of the bid whereas not, erred in failure to make a decision on procurement process as a whole.
 - (b) The Executive Director erred in both law and fact in finding that the Applicant did not comply with the submission of audited accounts for three years thus rejecting the application.
- 2.3 The Applicant prayed that the Tribunal finds merit in the Application and order a re-evaluation of the bids submitted to the entity with strict adherence to the law and/ or in alternative cancel the entire procurement process and order a refund of the administrative review fees and payment of costs of the Application.

By way of cross appeal, the cross Appellant/2nd Respondent raised three grounds.

- 2.4 The Authority erred in law and fact when it held that the Evaluation Committee erred in its disqualification of the Applicant for absence of the Dealership Agreement in its bid.
- 2.5 The Authority erred in law and fact when it held that the Evaluation Committee had erred in its disqualification of the Applicant for failure to submit evidence of supply of tractors for the last two years that is equivalent to UGX 1 Billion on the ground that the Evaluation Committee should have sought clarification from the Applicant.
- 2.6 The Authority erred in law and fact in its disqualification of the Applicant for failure to submit evidence of service centres in the four regions of Uganda on the ground that the Evaluation Committee should have sought clarification.

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 18th February 2019, annexes to the Application, the written and oral submissions;

- 2) the 1st Respondent/ Authority's response to the Application dated 21st February 2019, annexes to the response, and the written and oral submissions;
- 3) the 2nd Respondent's response to the Application dated 20th February 2019, annexes to the response, and the written and oral submissions.

3.1 The Tribunal conducted a hearing for the Parties on 28th February 2019. The Applicant was represented by Mr. Agaba James, while the 1st Respondent/ Authority was represented by Mr. Rebecca .N. Masajjage and the 2nd Respondent was represented by Mr. Muhairwe Naboth.

3.2 During the hearing, Counsel for the 1st Respondent raised a preliminary objection in respect to the cross appeal and Counsel for the 2nd Respondent accordingly withdrew the cross appeal against the 1st Respondent.

4. PRELIMINARY OBJECTION

4.1 Counsel for the 2nd Respondent raised a preliminary objection that the Applicant's appeal is incompetent as the Authority made a decision on 5th February 2019 in the application for administrative review by The Cooper Motor Corporation when it ordered for re-evaluation of bids.

4.2 Counsel submitted that PPDA having rejected the entire application by the Applicant could not make any further orders affecting the entire procurement process because there are only two bids to wit; The Cooper Motor Corporation and Engineering Solutions Ltd which were compliant. Thus, since the Applicant's Application was rejected, any further orders affecting the entire procurement process could not be given.

4.3 Counsel further submitted that both the Entity and PPDA rejected the Applicant's application for administrative review on the ground that it submitted audited books of accounts for only one year contrary to the three years that were required in the bidding document. He submitted that Applicant's company having been incorporated on 14th April, 2016 could have audited accounts for the last three financial years.

- 4.4 In response to the preliminary objection, Counsel for the Applicant submitted that preliminary objection is a matter of law and that Counsel for the 2nd Respondent never alluded to that. Counsel for the Applicant submitted that the decision against which he is appealing did not have decision for re-evaluation and the 2nd Respondent could therefore not raise a preliminary objection to an application which is not adjudicated upon. He prayed that the Tribunal finds no merit in this preliminary objection.
- 4.5 Counsel for the 2nd Respondent in rejoinder, submitted that the decision of PPDA in the administrative review process is touching issues in this case in the Tribunal and the Applicant should have seen the decision in Application No. 2 of 2019 because it has consequences on the matter before this Tribunal.

5. **SUBMISSIONS BY COUNSEL**

- 5.1 On the first ground, Counsel for the Applicant submitted that having found that the best evaluated bidder did not conform to the specifications for Lot 2 and Lot 3 that required Minimum 60HP-4WD, the Authority failed to make a decision on the fate of the procurement process to the detriment of the rest of the bidders.
- 5.2 Counsel further submitted that nothing in law can save the Best Evaluated Bidder in the procurement process because the 1st Respondent made a finding that it is not compliant to the bidding document.
- 5.3 Counsel submitted, on the second issue that the Tribunal should look at ground 4 of the said Authority's decision. The solicitation document required bidders to submit audited books of account for the last three years. Specific experience on Part 3 (5) (b) of the bidding document under the specific experience, required bidders to provide, *'evidence of successfully completing at least one supply contract particularly for tractors and implements worth a minimum of UGX 1 Billion over the last two years'*. Therefore, experience per say, was never a requirement in the procurement process and the audited books of account submitted by the Applicant was sufficient in the procurement process.
- 5.4 Counsel further submitted that Regulation 11 (3) (a) of the PPDA (Evaluation)/SI No. 9 of 2014 requires the Evaluation Committee to waive the

non-conformity given the that the company had only existed for two years and at that the company submitted accounts for the years it had operated; that it was impracticable to have accounts for three years but still with accounts for two years its commercial responsiveness would be gauged without prejudice to the other bidders. Counsel relied on the case of *China Aero-Technology International Engineering Corporation Vs. PPDA, Application No. 1 of 2016*, where the Tribunal decided that the Act has defined what amounts to a material deviation that is to say a deviation that affects in a substantial way, the scope or quality of the supplies of works to be procured, where the deviation is inconsistent with the bidding document in a substantial way. The Executive Director aware that this constituted a material deviation incapable of being cured he ought to have directed the entity on the best practices preferably ordering the re-evaluation of the bids given they are still valid.

- 5.5 Counsel prayed to the Tribunal to find merit in the arguments as presented and allow the application with orders as to re-evaluation of the bids submitted to the entity with strict adherence to the law and/ or in alternative cancel the entire procurement process and order a refund of the administrative review fees and payment of costs of this application.
- 5.6 In response to first issue, Counsel for the 1st Respondent submitted that it reiterates its submission in the written response to the application. The 1st Respondent asserts in respect to the specific complaint lodged before it by the Applicant, there was no error in failing to make a decision since all the grounds were decisively considered and determined.
- 5.7 Counsel submitted that in the decision in *The Cooper Motor Corporation (U) Ltd* complaint, the 1st Respondent categorically directed the entity to re-evaluate the bids. The decision in the *Cooper Motor Corporation Ltd* complaint preceded the 1st Respondent's decision regarding the Applicant's complaint and therefore the Entity was aware of the directive to re-evaluate the bids in the impugned procurement process.
- 5.8 Counsel submitted that Part 1: Section 3 (5) Evaluation Methodology and Criteria under the detailed evaluation, Commercial Criteria required bidders to provide audited books of accounts for the last three financial years prepared by a certified audit firm. The 1st Respondent established that the

Applicant was incorporated on 14th April 2016 and therefore it did not provide audited accounts for three years as required by the Bidding Document.

- 5.9 Counsel further submitted that Part 3 (5) (b) of the bidding document under the specific experience is different from Part 1: Section 3 (5) Evaluation Methodology and Criteria under the detailed evaluation and the argument that they are the same should be disregarded.
- 5.10 Counsel for the 1st Respondent prayed that the Application has no merit and it should be dismissed with each party bearing its own costs.
- 5.11 Counsel for the 2nd Respondent submitted that he associated himself with the 1st Respondent's arguments and he reiterated his arguments in the written submission. Counsel for the 2nd Respondent submitted that the decision in Application 2 of 2019 before the Tribunal cannot be sustained in this Tribunal because in the earlier decision of *Engineering Solutions (U) Ltd Vs. PPDA & The Cooper Motor Corporation Ltd, Application No. 2 of 2019*, the Tribunal decided and therefore it is functus officio. Counsel for the 2nd Respondent further submitted that the Tribunal is bound by the doctrine of precedent and should take judicial notice of its decision.
- 5.12 Counsel for the 2nd Respondent further submitted on the second issue that failure to submit audited books for the last three years by the Applicant is a material deviation under *Regulation 11 (4) (c) of the PPDA (Evaluation)/SI No. 9 of 2014* which if corrected would unfairly affect the competitive position of the other bidders whose bids are administratively compliant and responsive.

6. RESOLUTION BY THE TRIBUNAL

- 6.1 The Tribunal addressed its mind on the preliminary objection raised by the 2nd Respondent and the arguments put by Counsel for the Applicant. It was established by the Tribunal that the Authority had made a decision on 5th February 2019 in a separate application for administrative review by Cooper Motor Corporation wherein it ordered for re-evaluation of bids in the impugned procurement. In this matter, the applicant herein was not a party to the proceedings and therefore was not privy to the order made. It would have only been fair if the Authority had brought to the attention of the applicant its decision and order to have bids in the impugned procurement re-

evaluated. The applicant therefore cannot be stopped from appealing against a decision of the Authority in which he was party and where he felt aggrieved as it would be against provisions of Section 91(1) of the PPDA Act, 2003 which allows an aggrieved parties to appeal against a decision of the Authority. The Tribunal over rules the 2nd respondent on this point.

6.2 The argument raised by the applicant that after the Authority had faulted the BEB for failure to meet technical specifications, there was nothing left of the procurement apart from cancellation or ordering evaluation of all bids in the opinion of the Tribunal was overtaken by events after the decision of the Authority was set aside in whole. This Tribunal in application No. 2 of 2019 departed from the finding of the Authority on technical specifications and upheld the decision of the Entity which had found the BEB compliant and responsive.

6.3 The Tribunal noted that Paragraph 2 Section 3 (5) (b) required bidders to provide evidence of commercial responsiveness of audited books for the last three financial years prepared by a certified audit firm. It is very clear from the wording of the bidding document that for a bidder to qualify, it needed to produce audited books for the last three financial years. The Applicant in its application at page 3 stated that *'It should be noted that at the time of bidding the company had only operated for two years as it was incorporated on the 14th April 2016....'*

The Tribunal finds that the Applicant did not meet the requirement of the audited books for the last three financial years since it was incorporated on 14th April 2016.

7. DECISION OF THE TRIBUNAL

1. The Preliminary point of objection is overruled.
2. The Application is dismissed.
3. The Entity should continue with the procurement process to its logical conclusion.
4. Each party shall bear its own costs.

Dated this 4th day of March 2019.

SIGNED by]
OLIVE ZAALE OTETE] CHAIRPERSON

SIGNED by]
DAVID KABATERAINE] MEMBER

SIGNED by]
ABRAHAM NKATA] MEMBER

SIGNED by]
ENG. ISANGA THOMAS BROOKES] MEMBER