

THE REPUBLIC OF UGANDA

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

APPLICATION NO.7 OF 2019

**APPLICATION FOR ADMINISTRATIVE REVIEW OF THE DECISION OF PUBLIC
PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT OF
'PROCUREMENT OF 18 DOUBLE CABIN PICK-UPS REF No.
MAAIF/SUPLS/2018-19/00270-LOT 2.'**

APPLICANT: MOTORCARE UGANDA LIMITED

**1ST RESPONDENT: MINISTRY OF AGRICULTURE ANIMAL INDUSTRY
AND FISHERIES (MAAIF)**

**2ND RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC
ASSETS AUTHORITY (PPDA).**

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

DECISION OF THE TRIBUNAL

1.0 BACKGROUND/FACTS

- 1.1 On 13th December 2018, the Ministry of Agriculture, Animal Industry and Fisheries (1st Respondent) initiated the procurement for the supply and delivery of 18 Double Cabin pickups, among other vehicles.
- 1.2 On 21st December 2018, the 1st Respondent published a bid notice in the New Vision Newspaper with a submission deadline of 24th January 2019.
- 1.3 Two providers namely Toyota Uganda Ltd and Motorcare Uganda Limited were issued the bidding documents and on 24th January 2019, they submitted bids in respect to the procurement of vehicles including the procurement for the supply and delivery of 18 Double Cabin pickup vehicles which were opened and prices read out as: Motorcare Uganda Limited UGX 3,019,822,920 (VAT Inclusive) and Toyota Uganda Limited UGX 4,370,676,732 (VAT Inclusive).
- 1.4 The Evaluation Report dated 19th February 2019 indicated that Motorcare Uganda Ltd was eliminated on grounds that the bidder offered motor vehicles with lower ground clearance of 226mm below the minimum requirement of 235mm and that the bidder submitted a manufacturer's authorisation from South Africa yet they indicated in the bid compliance sheet that the country of origin for the vehicles was Thailand.
- 1.5 The Evaluation Committee recommended Toyota Uganda Ltd as the Best Evaluated Bidder (BEB) for the supply of 18 Double Cabin pickup vehicles at a contract price of UGX 4,370,676,732 inclusive of VAT.
- 1.6 The notice of the best evaluated bidder was displayed from 26th February 2019 with a removal date of 13th March 2019.

- 1.7 Being dissatisfied with the reasons stated in the notice of the best evaluated bidder, on 27th February 2019 Motorcare Uganda Ltd (Applicant) applied for administrative review to the Accounting Officer.
- 1.8 On 18th March 2019, the Accounting Officer issued a decision rejecting the application for administrative review.
- 1.9 Being dissatisfied with the decision of the Accounting Officer, on 20th March 2019, the Applicant applied for administrative review to the Authority.
- 1.10 On 16th April 2019, the Authority issued a decision rejecting the application for administrative review.
- 1.11 On 29th April 2019 the Applicant being dissatisfied with the Authority's decision filed this Application before the Tribunal.

2.0 ISSUES

- 2.1 The issues for resolution by the Tribunal were as follows:

Issue No. 1: Whether the Evaluation Committee erred in disqualifying the Applicant's bid on the ground that its offer did not meet the required minimum ground clearance?

Issue No. 2: Whether the manufacturer's authorisation submitted by the Applicant met the requirement in the bidding document?

Issue No.3: What remedies are available?

3.0 DISPOSAL OF APPLICATION

- 3.1 In disposing of the application, the Tribunal analysed the following documents-
 - (1) The Application lodged with the Tribunal and annexes attached thereto dated 29th April, 2019.
 - (2) Written response to the application and Annexes to the response; oral and written submissions by the Authority;

- (3) The Applicant's oral and written submissions and Annexes to the submissions;
- (4) The 1st Respondent's response/written submission;
- (5) Written response by the BEB.

3.2 The Tribunal conducted a hearing for the parties on 13th May, 2019. The Applicant was represented by Mr. Makada Fred, Mr. Mumpenje Andrew and Mr. Opolot Brian. The Authority was represented by Mr. John Kalemera, the 1st Respondent was unrepresented, while Mr. Ferdinand Musimenta represented the BEB.

4.0 SUBMISSIONS BY PARTIES ON ISSUES RAISED

- 4.1 In respect to the first issue, Counsel for the Applicant submitted that the technical specifications and compliance sheet under part 2 section 6, item 8 of the statement of requirements in the bidding document required a minimum ground clearance of 235mm without specifying a point of reference. The Applicant in its bid gave two points of reference to the ground clearance i.e. 327mm up to the axle or 226mm up to diff. Counsel submitted that the Applicant would have complied if the ground clearance was measured from the nearest point to the diff.
- 4.2 Counsel further submitted that the Applicant's technical brochure showed that its ground clearance was 226mm for the Nissan Navara Executive 4WD Model D 23 SE M/T. As a result, the Applicant's bid was found by the 1st respondent non-compliant with the bidding document. He further submitted that even the BEB did not measure up to the required minimum ground clearance of 235mm because its ground clearance known in the market is 220mm which is far below the specifications set by the Entity and even that offered by the Applicant.
- 4.3 Counsel submitted that since the two bidders' specifications for ground clearance did not measure up to the requirements, none deserved the award and therefore the tender should have been re-advertised. In the

alternative and without prejudice, the Entity should waive the non-compliance on ground clearance by the bidders as a minor deviation and accordingly award the contract to the Applicant whose ground clearance is closer to the one set by the Entity in the bidding document.

4.4 Counsel implored the Tribunal to use the technical experts from Ministry of Works and Transport to do verification on the ground clearance of the double cabin pickup vehicles supplied by both Motorcare Uganda Limited and Toyota Uganda Limited.

4.5 Counsel submitted that it is worth noting that the Applicant's contractual price offer was far lower than that of the BEB by UGX 1,000,000,000 (UGX One Billion). Therefore, he asked the Tribunal to apply the principles of procurement to award the contract to the Applicant in accordance with Section 43 (b), (c) and (e), 45, 46 and 48 of the PPDA Act 2003 which emphasises maximum transparency, accountability, competition, fairness, economy and value for money.

4.6 Counsel relied on the case of *Galleria in Africa Limited Vs Uganda Electricity Distribution Company Limited, Supreme Court Civil Appeal No. 08 of 2017* where Justice Faith Mwendha stated that *'The objectives of the PPDA Act for all purposes and intents are to achieve fairness, transparency and value for money procurement, among others. Therefore, the breach of the provisions is not a mere irregularity since it goes to the core of the Act.'*

In the said decision, the Learned Justice held that all the provisions of the Act are sacrosanct just like the intended objectives of the same Act. If any is offended, the whole procurement or disposal process would be a nullity. It was further held that no Entity has power to waive the non-compliance. In the impugned procurement before the Tribunal, the provisions and objectives of the Act were offended in the process of the award of contract to the BEB.

4.7 In respect to the second issue, Counsel for the Applicant submitted that the Applicant furnished the correct letter of authorisation from the manufacturer. He submitted that the Applicant is the sole distributor of

Nissan vehicles with experience of over 30 years in Uganda. Counsel for the Applicant submitted that Nissan South Africa is a global regional office which has the capacity to give letters of authorisation for all the affiliates of Nissan including Nissan Thailand.

- 4.8 Counsel further submitted that the Entity could have sought clarification in accordance with the law on the letter of authorisation issued by Nissan South Africa if they had any doubts about the country of origin. He submitted that the letter of authorisation from Nissan South Africa therefore met the requirement in the bidding document. Counsel further submitted that the Applicant had issued the same Manufacturer's authorisation letter to other entities including the 1st Respondent which clarified and awarded contracts to supply similar vehicles.
- 4.9 Counsel submitted that according to ITB 5.5, the bidder was required to submit a manufacturer's authorisation letter. The manufacturer's authorisation letter as attached clearly shows that Nissan South Africa represents Nissan Japan. For avoidance of doubt, Nissan Thailand is an affiliate of Nissan Japan. Nissan Japan has been indicated as an alternative country of origin. Therefore, Nissan South Africa could give manufacturer's authorisation for Nissan Thailand since Nissan South Africa is a representative of Nissan Japan (that has been listed as an alternative country of origin), and all its affiliates, including Nissan Thailand.
- 4.10 Counsel submitted that under Regulation 10 of the PPDA (Evaluation) Regulations, 2014, S.I No. 9 of 2014, the Entity should have sought for clarification on the information provided in the bid or to ask for additional documents from the Applicant to clarify the issue. Furthermore, the Entity could have invoked Regulation 31 of the PPDA (Procuring and Disposing Entities) Regulations, 2014 which allows at any time during the procurement process for the Entity to carry out due diligence on any bid and a bidder that requires verification. Failure to apply the cited provisions of the law by the Entity, therefore, made it arrive at a wrong decision.

- 4.11 Counsel prayed that the Tribunal should engage the services and expertise of the Engineers from Ministry of Works and Transport (MoWT) to verify the ground clearance of the double cabin pickup vehicles, and if both bids were non-compliant, the Entity should re-advertise the tender in the alternative award the tender to the Applicant, cancel the Best Evaluated Bidder award notice of Toyota Uganda Limited and make incidental orders as it deems fit.
- 4.11 In respect to the first issue, Counsel for the 2nd Respondent submitted that according to the correspondences from the Ministry of Works and Transport dated 25th September 2018, it approved the bidding document for this impugned procurement specifying minimum ground clearance to be 235mm. In the Applicant's bid, it was stated in the technical specifications sheet that the minimum ground clearance was 327mm up to axle and 226mm up to diff. He further stated that while in the brochure the minimum ground clearance was stated as 226mm. The Applicant's ground clearance did not meet the requirement specified in the bidding document and therefore the Applicant's bid did not meet the minimum ground clearance of 235mm.
- 4.13 Counsel submitted that the Bidding Document for the impugned procurement under Section 6 Statement of Requirements provides for a required minimum ground clearance of 235mm. The Applicant's bid for the impugned procurement contains a Technical Compliance sheet which provides for requirement of minimum ground clearance of 235mm and the technical specification offered by the Applicant is ground clearance of 375mm up to axle or 226mm up to differential. The technical literature offered in the Applicant's bid in respect to the requirement of minimum ground clearance is a brochure which states the minimum ground clearance for the proposed supplies is 226mm. The 2nd Respondent therefore duly upheld the reason for disqualification of the Applicant's bid because the proposed supplies did not meet the Entity's requirement of minimum ground clearance of 235mm.

- 4.14 Counsel submitted that in respect to the communications between the Authority and the MoWT, it is true the Authority on 12th April 2019, requested for technical guidance from MOWT regarding the definition of ground clearance and the point of measure for ground clearance in the case of double cabin vehicles. By the time the Authority issued its decision dated 16th April 2019, MOWT had not yet furnished it with the response. MOWT's response was received by the Authority on 17th April 2019 and it could not therefore rely on the guidance sought when issuing its decision on the impugned procurement.
- 4.15 In respect to the 2nd issue, Counsel for the 2nd Respondent submitted that ITB 11(h) (3) of the Bidding Document required bidders to submit a manufacturer's authorisation letter. The Applicant provided an authorisation letter from Nissan South Africa for vehicles whose origin is Thailand. He submitted that the Applicant should have sought for an authorisation letter from the manufacturers of Nissan from Thailand but not Nissan South Africa. Counsel contended that the Applicant did not meet the requirement in the bidding document for letter of authorisation from the manufacturer and for this reason the application should be dismissed with no orders to costs.
- 4.16 Counsel further submitted that in the Technical Specifications and Compliance Sheet in the Applicant's bid, it was stated at item No. 4 that the country of manufacture is Thailand. The Applicant was expected to submit a Manufacturer's Authorisation letter from Thailand since the proposed supplies were to be manufactured from Thailand. However, the Applicant submitted a Manufacturer's Authorisation letter from South Africa and in the said authorisation it is stated that the authorisation is exclusively for Nissan Double Cabin Pickup vehicles that are manufactured by Nissan South Africa.
- 4.17 Counsel submitted that the Applicant did not meet the above requirement in the Bidding Document and therefore prayed that this issue should be answered in the negative. He submitted that this

application lacks merit and it should be dismissed with each party bearing its own costs.

4.18 In respect to the first issue, Counsel for the Best Evaluated Bidder submitted that the Applicant's ground clearance of 226mm in its brochure clearly does not meet the requirement in the bidding document.

4.19 Counsel further submitted that there was no need to seek clarification because the letter of authorisation from the manufacturer was clear and spoke for itself and that the BEB had submitted a letter which was in the format prescribed in the bidding document.

5.0 RESOLUTION OF ISSUES BY THE TRIBUNAL

5.1 In resolving the application, the Tribunal made references to the submission by the parties, bidding document and cited provisions of the law as follows;

Issue No. 1: Ground clearance

5.2 The Tribunal considered Part 2: Section 6 of the Statement of Requirements and the Specification and Compliance Sheet for technical specifications for double cabin pickup vehicles not exceeding 2800cc of the Bidding Document at page 66 which required minimum ground clearance of 235mm.

In determining the issue of measurement of ground clearance, the Tribunal further relied on the letter from the Chief Mechanical Engineer (CME) addressed to the Tribunal dated 9th May 2019 (Exhibit Tribunal) wherein the CME opined '*in the absence of a defined reference point of measurement of ground clearance in the solicitation document, it is therefore not possible to correctly interpret the ground clearance parameter stated in the vehicle brochure or even to physically verify it.*

- 5.3 The Tribunal finds that the Bidding document was ambiguous in respect to the specification of ground clearance since it did not state the point of reference for measurement of ground clearance.
- 5.4 Based on the expert advice of Chief Mechanical Engineer, the Tribunal further finds that the basis of measuring 'ground clearance' requirement is ambiguous and it was an omission on the part of the Entity to provide unclear statement of requirements to the bidders contrary to Regulation 25 of SI No. 8/2014. Therefore, for this reason, the Evaluation Committee ought not to have used this parameter as part of its evaluation criteria.
- 5.5 Further, during the hearing, the Engineer from the MoWT explained to the Tribunal that the ground clearance may be affected by the load on the vehicle as well as tyre pressure, generally pointing to the fact that ground clearance is not static, but may oscillate due to local ground angulation, load on the vehicle or tyre pressure. For this reason, the Tribunal finds that ground clearance is a non-material factor within the meaning of Regulation 11 of the PPDA (Evaluation) Regulations 2014, which should not be used as a determinant to eliminate a bidder.

Issue No. 2-Manufacturer's authorisation

- 5.6 The Tribunal also finds that the Entity should have sought for clarification from Nisan South Africa on the authenticity of the letter of authorisation from the manufacturer in accordance with Regulation 10 (1) of the PPDA (Evaluation) Regulations/SI No. 9 of 2014.

On the whole, this application succeeds on all issues raised.

6.0 DECISION OF THE TRIBUNAL

1. The Application is upheld.
2. The decision of the Authority is set aside.
3. The Tribunal directs the Entity in accordance with Regulation 11 (3) (a) of the PPDA (Evaluation) Regulations, 2014, S.I No. 9 of 2014 to waive the non-conformity of the ground clearance in the impugned procurement since it is not a material deviation.

4. The Tribunal directs the Entity in accordance with Regulation 10 (1) of the PPDA (Evaluation) Regulations, 2014, S. I No. 9 of 2014 to seek for clarification from the Applicant on the letter of authorisation from the manufacturer in respect to the country of origin.
5. The Entity is directed to re-evaluate all the bids in accordance with the bidding document and in accordance with the direction given by the Tribunal.
6. Each party to bear its own costs.

SIGNED, SEALED and dated this 14th day of May 2019 by the said;

1. OLIVE ZAALE OTETE].....] CHAIRPERSON
2. MOSES JURUA ADRIKO SC.].....] MEMBER
3. ABRAHAM NKATA].....] MEMBER
4. ENG. THOMAS BROOKES ISANGA].....] MEMBER