

THE REPUBLIC OF UGANDA

**IN THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
APPEALS TRIBUNAL AT KAMPALA
APPLICATION NO.12 OF 2019**

APPLICATION FOR ADMINISTRATIVE REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY (PPDA) IN RESPECT OF TENDER FOR CONSTRUCTION OF SEED SECONDARY SCHOOLS IN SELECTED SUB-COUNTIES IN UGANDA (LOT-5 BUDONGO SUBCOUNTY IN MASDINDI DISTRICT, NGWEDO SUBCOUNTY IN BULIISA DISTRICT AND KIRYANDONGO SUBCOUNTY IN KIRYANDONGO DISTRICT) PROCUREMENT REFERENCE NO. MOES/WRKS/2018-2019/00119.

APPLICANT: FREMATEX SERVICES (U) LIMITED

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

**(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 TRIBUNAL

1.0 BRIEF FACTS

- 1.1 The Ministry of Education and Sports on behalf of selected district Local Governments initiated the procurement for the construction of seed secondary schools in the selected sub-counties, clustered in 28 Lots.
- 1.2 On 17th December 2018, the Ministry of Education and Sports published a bid notice in the New Vision Newspaper with a bid submission deadline of 17th January 2019. On 18th January 2019 an addendum was issued changing the bid submission deadline to 4th February 2019.
- 1.3 In respect to Lot 5, the bidding document was issued to 13 bidders and on 4th February 2019, 5 bidders submitted bids which were opened and prices read out as follows: Pyra Limited Architects UGX 8,120,820,745, Maali Construction Company Ltd UGX 6,556,997,017; Frematex Services (U) Ltd 2,649,797,500, CMD Investments Ltd 6,240,551,748 and Stanhope Construction and General Merchandise UGX 5,874,397,155.
- 1.4 Lot 5 comprised of 3 sub counties where seed schools were to be constructed, namely Budongo sub-county (Masindi District), Ngwendo sub county (Buliisa District) and Kiryandongo sub county (Kiryandongo District).
- 1.5 During evaluation stage, CMD Investments Ltd and Frematex Services Ltd (the Applicant) were found to be compliant at the detailed technical evaluation and the Evaluation Committee proceeded to post qualification criteria to determine the responsiveness of the 2 bidders. However, CMD Investments Ltd was eliminated for failure to demonstrate access to or availability of financial resources, in form of liquid assets, unencumbered real assets, lines of credit, of minimum of UGX 3 Billion.
- 1.6 The Evaluation Committee corrected arithmetic errors in Frematex Services (U) Ltd.'s bid to UGX 8,173,898,900 for the 3 schools under Lot 5.
- 1.7 The Evaluation Committee recommended the Applicant as the Best Evaluated Bidder (BEB) with prices for each school as follows; Kiryandongo sub county UGX 2,719,754,800, Budongo sub county UGX 2,722,374,500 and Ngwendo sub county UGX 2,731,769,600 totalling to UGX 8,173,898,900.

- 1.8 On 29th March 2019, Kiryandongo District Local Government displayed the notice of the best evaluated bidder for the construction of a seed secondary school at Kiryandongo Sub County in which the Applicant was returned as the BEB at bid price of UGX 2,719,745,800.
- 1.9 On 4th April 2019, CMD Investments Ltd applied for administrative review to Gulu District Chief Administrator Officer (the Accounting Officer).
- 1.10 The Accounting Officer Gulu district Local Government did not issue a decision in respect to the application for administrative review.
- 1.11 On 8th May 2019, CMD Investments Ltd applied for administrative review to the Authority on account that the Accounting Officer did not issue a decision within fifteen working days from the date of receipt of the application as required under section 90 (2) (b) of the PPDA Act, 2003.
- 1.12 In its decision dated 6th June 2019, the Authority upheld the application for administrative review by CMD Investments Ltd.
- 1.13 On 20th June, 2019 the Applicant being dissatisfied with the Authority's decision filed this Application before the Tribunal.

2.0 ISSUES

Issue No. 1: Whether the Respondent erred in law and fact in finding that Masindi and Buliisa Local Government failed to display the notices of the best evaluated bidder.

Issue No. 2: Whether the Respondent erred in law and fact in finding that Kiryandongo District Local Government did not display the notice of the best evaluated bidder in the proper form and failed to send a notice of the best evaluated bidder to all the other bidders.

Issue No. 3: Whether the Respondent erred in law and fact when it held that CMD Investments Ltd met the cash flow requirement of the bid.

Issue No. 4: Whether the Respondent erred in law and fact when it held that Kiryandongo District Local Government misrepresented CMD Investments

Ltd.'s Bid price for construction of the seed secondary school in Kiryandongo sub-county.

Issue No.5: What remedies are available?

3.0 DISPOSAL OF APPLICATION

3.1 In disposing of this Application, the Tribunal analysed the Applicant's Application to the Tribunal, Annexes to the Application and the written and oral submissions; and the Respondent's response to the Application, Annexes to the response and the written and oral submissions.

3.2 The Tribunal held a hearing for the parties on 3rd July 2019. During the hearing, the Applicant was represented by Amos Masiko and Kabagenyi Ritah; the Respondent was represented by Sheila. C. Abamu and CMD Investments Ltd was represented by Muhangi George.

4.0 SUBMISSIONS BY COUNSEL

4.1 Counsel for the Applicant in respect to the first issue submitted that Masindi and Buliisa District Local Governments did not fail to display notice of the best evaluated because at the time CMD Investments Ltd filed a complaint with the Accounting Officer of Gulu District Local Government, Masindi and Buliisa had not yet awarded contracts so they could not therefore display notice of the best evaluated bidder. Counsel for the Applicant further submitted that the application by CMD Investments Ltd was premature.

4.2 In respect of the second issue, Counsel for the Applicant submitted that Kiryandongo District Local Government displayed the notice of the best evaluated bidder in the required format which is attached as Annexure E to the application to the Tribunal. He further submitted that the notice of the best evaluated bidder was displayed on 29th March 2019 in accordance with Regulation 4(1) of the PPDA (Contracts) Regulations, 2014. Counsel for the Applicant further submitted that the complaint by the CMD Investments Ltd stopped Kiryandongo District Local Government from serving the notice of the best evaluated bidder on all the bidders.

4.3 In respect of the third issue, Counsel for the Applicant submitted that CMD Investments Ltd, in connivance with others at large, altered its bid by

removing a page which indicated it had a UGX 500 million credit line and substituted the original page in the bid with a fresh page indicating that the Applicant had a UGX 5 Billion credit line to support their bid. He argued that the letter issued by the Bank dated 1st February 2019 confirming the willingness to provide CMD Investments Ltd with a credit line up to UGX 5 Billion to enable them execute any successful tender awarded from Equity Bank Ltd was not part of the original bid but was fraudulently inserted in the bid after the bid opening date. Counsel for the Applicant further submitted that the preceding page 193 and the succeeding Page 195 were machine numbered and stamped. However, the impugned page 194 in CMD Investment Ltd.'s bid was handwritten implying that it was fraudulently inserted after the bid opening.

- 4.4 In respect of the fourth issue, Counsel for the Applicant relied on Annexure K (record of bid opening) attached to the application. He submitted that there was no misrepresentation of CMD Investment Ltd.'s bid because at the time of bid opening, the figure which was read out for CMD Investments Ltd was UGX 6,240,551,748 and it is the same figure contained in the notice of the best evaluated bidder.
- 4.5 Counsel for the Applicant prayed that the decision of the Authority be set aside, the application be allowed and the Applicant be confirmed as the BEB and cost of this Application be borne by the Respondent.
- 4.6 In response to the first issue, Counsel for the Respondent submitted that *Regulation 85 (3) & (5) of the Local Governments (PPDA) Regulations, 2006, S.I No. 39 of 2006* provides for the display of notice of BEB and communication to all the bidders. Masindi and Buliisa District Local Governments did not display the notice of the best evaluated bidder and the same was not sent to all the bidders therefore they did not adhere to requirement of the law.
- 4.7 In response to the second issue, Counsel for the Respondent submitted that the notice of the BEB was not clear on the date of display, signature of the Accounting Officer and removal date. He further submitted that Kiryandongo District Local Government did not adhere to the circular issued on 24th August 2010 by the Authority to all Entities to the effect that Entities should abide by the provisions of the law with regard to display and issuance of notices of the best evaluated bidder.

- 4.8 In response to the third issue, Counsel for the Respondent submitted that the copy of CMD Investment Ltd.'s bid that was submitted by Gulu District Local Government to the Respondent during administrative review at the Authority level contained a letter from Equity Bank Ltd dated 1st February 2019 confirming the Bank's willingness to provide a line of credit of up to UGX 5 Billion to CMD Investments Ltd. Counsel further submitted that the Evaluation Committee was silent on how it arrived at the figure of UGX 2,171,789,625 which was the estimated figure of cash flow for CMD Investments Ltd.
- 4.9 With respect to the fourth issue, Counsel for the Respondent submitted that in the notice of the BEB, Kiryandongo District Local Government included the prices of the bid for CMD Investments Ltd for Lot 5 of UGX 6,240,551,748 whereas for Frematex Services Ltd it only included bid price of UGX 2,719,745,800 for Kiryandongo District Local Government and therefore this is a misrepresentation on the part of CMD Investment Ltd.'s bid price.
- 4.10 In conclusion, Counsel for the Respondent submitted that this application lacks merit and it should be dismissed with each party bearing its own costs.
- 4.11 Counsel for CMD Investments Ltd submitted that he associated himself with the submission of the Respondent but added that in Form 8 (Financial Resources), the figure UGX 5,000,000,000 was presumably an error. The correct figure is contained in Equity Bank Ltd.'s letter of comfort, dated 1st February 2019, attached as page 194; wherein the amount is stated as UGX5 Billion. This document on page 194 of the bid was not among the documents to be machine numbered, unlike others, had to be submitted in the original form. The other documents submitted in original form included the Bid Security and the Powers of Attorney.
- 4.12 Counsel for CMD Investments Ltd further submitted that the format of the notice of BEB by Kiryandongo district local government was not in the format required by the Respondent and referred the Tribunal to the correct version of the notice of best evaluated bidder which was attached to their submission as Annexure 2 which should have been used in this particular procurement. He further submitted that Section 90 (2) (a) of the Act provides for the suspension of the procurement process and added that several correspondences were exchanged during the suspension process of the procurement which have been adduced in this Tribunal as evidence. He therefore urged Tribunal to disregard correspondences that came after the suspension of the procurement.

He associated himself with the Authority's decision and therefore prayed that this application be dismissed.

5.0 RESOLUTION BY THE TRIBUNAL

- 5.1 In resolving the application, the Tribunal considered submissions by all Counsel and the authorities cited.

Issue No. 1: Failure to display the notices of the best evaluated bidder by Masindi and Buliisa District Local Governments.

- 5.2 The Tribunal agreed with the submission by Counsel for the Applicant that by the time CMD Investments Ltd lodged complaint before the Accounting Officer, Masindi and Buliisa District Local Governments had not yet awarded contracts and therefore could not display for CMD Investments Ltd the notice of BEB. The Tribunal also noted that the information about further actions by both districts with respect to the impugned procurement had not been availed to the Authority at the time of the hearing of the complaint.

- 5.3 The Tribunal further observed that there is no time frame set by the PPDA Act or the Regulations from the time of submission of the evaluation report to, and the award of the contract to the contracts committee. Regulation 85 of the Local Government (Procurement) Regulations, 2006 cited by the Respondent applies where the contracts committee has already awarded the contract. In the current application, Buliisa and Masindi districts had not yet awarded a contract and hence the time frame of 5 working days for displaying a Notice of BEB specified in regulation 85 of the aforementioned regulations could not apply. The issue is answered in the affirmative.

Issue No. 2- Form of the notice of best evaluated bidder and failure to send a notice of the best evaluated bidder to all the other bidders.

- 5.4 The Tribunal observes that on 24th August 2010, the Authority issued a circular to all the Entities to the effect that the Entities should abide by the provisions of the law with regard to display and issuance of notices of best evaluated bidder. The said format of notice of best evaluated bidder to be adopted by the Entities is attached as Annexure 2 in the submission by CMD Investments Ltd.

- 5.5 The Tribunal finds that the Notice of Best Evaluated Bidder (NOBEB) displayed by Kiryandongo District Local Government did not adhere to the circular issued by the Respondent. The Tribunal also found that Kiryandongo district local government did not communicate the notice of best evaluated bidder to all the bidders as required by the law but also included 'corrected' figures of unsuccessful bidders who were not considered at financial stage of the evaluation. The issue is answered in the negative.

Issue No. 3- Whether CMD Investments Ltd met the cash flow requirement of the bid.

- 5.6 From the documents of CMD's bid reviewed by the Tribunal, it met the minimum cash flow requirement the 3 billion.
- 5.7 On the contention that one of CMD's documents evidencing financial capacity page 194 of CMD bid was handwritten and did not bear a stamp, , the Tribunal is not persuaded by the allegation that it was fraudulently inserted after the bid closing date because the Applicant failed to show evidence to back that assertion and therefore it remains speculative. The issue is answered in the negative.

Issue No.4- Misrepresentation of CMD Investments Ltd.'s Bid price for construction of the seed secondary school in Kiryandongo sub-county by Kiryandongo District Local Government misrepresented.

- 5.8 The Tribunal observes that according to the notice of BEB, CMD Investments Ltd was disqualified for not meeting the required cash flow of UGX 3 Billion and not because it had a high bid price. The Tribunal further observed that a misrepresentation of a fact should be followed by a benefit for an intended party and there is no proof that the alleged misrepresentation of bid price by Kiryandongo District Local Government illegally benefited or intended to benefit the Applicant. The Tribunal finds that there was no misrepresentation of CMD Investments Ltd.'s bid price by Kiryandongo District Local Government. The issue is answered in the affirmative.
- 5.9 In conclusion, the Tribunal finds that this application succeeds in part, though on issues that do not affect the Authority's decision in a substantial manner.

5.0 DECISION OF THE TRIBUNAL

1. The Application is allowed in part.
2. The order of the Respondent directing the Ministry of Education and Sports to appoint an independent evaluation committee to re-evaluate the bids is varied and substituted with the following order:
“Gulu district, as the selected lead local government as per the Planned Procurement Schedule contained in the Bid Notice is directed to appoint an evaluation committee to re-evaluate the bids taking into account the findings of the Authority and the Tribunal”.
3. The order by the Authority directing refund of administrative review fees to CMD Investments Ltd is affirmed.
4. Each party to bear its own costs.

SIGNED and sealed this 4th day of July 2019 by the said,

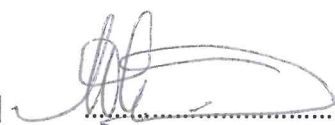
OLIVE ZAALE OTETE

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] **CHAIRPERSON**

MOSES JURUA ADRIKO-SC

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] **MEMBER**


DAVID KABATAREINE

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] **MEMBER**

ABRAHAM NKATA

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ENG. ISANGA THOMAS BROOKES

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