

THE REPUBLIC OF UGANDA

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

APPLICATION NO.17 OF 2019

APPLICATION FOR ADMINISTRATIVE REVIEW OF THE DECISION OF PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT OF 'TENDER FOR MANAGEMENT OF COMMERCIAL VEHICLES (MONTHLY STICKERS/LOADING AND OFFLOADING) IN KASANGATI LOT 2 REF; WAKI 555/SRVS/2019-20/00001'.

APPLICANT: WAKISO SEVEN STAR'S ASSOCIATION LTD

1ST RESPONDENT: WAKISO DISTRICT LOCAL GOVERNMENT

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

Before: MOSES JURUA ADRIKO-SC (CHAIRPERSON), ABRAHAM NKATA (MEMBER), DAVID KABATAIRAINI (MEMBER) AND ENG. THOMAS BROOKES ISANGA, MEMBER)

DECISION OF THE TRIBUNAL

1.0 BACKGROUND/FACTS

- 1.1 On 25th April 2019, Wakiso District Local Government (Entity/1st Respondent) initiated the procurement for the management of revenue collection from monthly stickers, loading and off-loading in Kasangati under Lot 2. On the same date, a bid notice was published in the New Vision Newspaper with a bid submission deadline of 24th May 2019.
- 1.2 On 24th May 2019, three bidders submitted bids which were opened on the same day and prices read out.
- 1.3 On 27th May 2019, the Evaluation Committee recommended the award of the contract to Green Base Services and Contractors Ltd.
- 1.4 On 30th May 2019, the Contracts Committee approved the recommendations of the Evaluation Committee and awarded the contract to Green Base Services and Contractors Ltd at UGX 2,655,555 inclusive of VAT.
- 1.5 On 31st May 2019, the Notice of the Best Evaluated Bidder was displayed with a removal date of 18th June 2019.
- 1.6 On 5th June 2019, Wakiso Seven Star's Association Ltd (Applicant) applied for administrative review to the Accounting Officer.
- 1.7 On 28th June 2019, the Accounting Officer issued the decision rejecting the application for administrative review by the Applicant.
- 1.8 On 3rd July 2019, the Applicant applied for administrative review to the Authority.
- 1.9 On 23rd July 2019, the Authority issued a decision rejecting the application for administrative review by the Applicant
- 1.10 The Applicant being dissatisfied with the Authority's decision, on 1st August, 2019 filed this Application before the Tribunal.

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION

- 2.1 On 2nd August, 2019 the Applicant lodged with the Public Procurement and Disposal of Public Assets Appeals Tribunal (the Tribunal) an application for review of the Authority's decision dated 23rd July, 2019.
- 2.2 The Applicant prayed that the decision made by the 2nd Respondent on 23rd July 2019, advising the Entity to proceed with the procurement be set aside.

3.0 DISPOSAL OF APPLICATION

3.1 In disposing of the application, the Tribunal analyzed the following documents-

- 1) The Application lodged with the Tribunal and appendices attached thereto dated 2nd August, 2019.
- 2) The Applicant's written submissions and Annexes to the submissions dated 8th August 2019;
- 3) The 1st Respondent's written response dated 9th August 2019, of the impugned procurement.
- 4) 2nd Respondent's written response to the Applicant's application by the Authority and Annexes attached to the response dated 7th August 2019;
- 5) The written submission dated 12th August 2019, of Green Base Services and Contractors (U) Ltd (Best Evaluated Bidder).

3.2 The Tribunal conducted a hearing for the parties on 15th August, 2019. The parties were represented by Mr Wanyama John for the Applicant, Mr. James Katono for the 1st Respondent, Mr. John Kallemera for the 2nd Respondent and the Best Evaluated Bidder was unrepresented.

4.0 ISSUES

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

Issue No. 1: Whether the Authority erred in law and fact when it approved the decision by Wakiso District Local Government to award the contract to Green Base Services and Contractors (U) Limited.

5.0 PRELIMINARY OBJECTION

- 5.1 Counsel for the 2nd Respondent raised a preliminary objection that the Applicant in its application formulated one ground that the Authority erred in law and fact when it approved the decision by Wakiso District Local Government to award the contract to Green Base Services and Contractors (U) Ltd whereas in the Applicant's written submission dated 8th August 2019, it formulated one more ground that the reserve price for the impugned procurement was 2,000,000 but the Best Evaluated Bidder offered a price of UGX 2,655,555 inclusive of value added taxes.
- 5.2 Counsel for the 2nd Respondent submitted that the second ground was never raised in the application filed by the Applicant to the Tribunal and therefore it accordingly contravenes the provision of Section 91 L (1) (c) of the PPDA Act, 2003 which states that an application to the Tribunal for review of a decision of the Authority made under section 91I shall be lodged with the Tribunal within ten working days of being served by the Authority with its decision. Counsel further relied on Regulation 9 (1) (c) of the PPDA (Administrative Review) Regulations/SI No. 16 of 2016 which states that the Authority shall not investigate a complaint where the Authority determines that the complaint does not comply with section 90 and 91 of the Act. Counsel submitted that the Tribunal should dismiss the application for non-compliance with the law.
- 5.3 Counsel for the 1st Respondent concurred with the submission by the Counsel for the 2nd Respondent and added that Regulation 36 (1) of the PPDA (Tribunal) (Procedure) Regulations, 2015 states that in any matter relating to the proceeding of the Tribunal for which these Regulations do not provide, the

rules of practice and procedure of the High Court. Counsel submitted that the civil procedure rules of High Court is very clear on pleadings and since the Applicant introduced a ground in the written submission which was not pleaded for in the application, the application must therefore be dismissed for non-compliance with the rules of pleadings.

5.4 Counsel for the Applicant in reply, submitted that the Applicant's application raised a general ground therefore including another sub set of ground in the Applicant's written submission does not in any way prejudice the Respondents' case. He prayed that the preliminary objection be overruled.

5.5 The Tribunal asked the parties to present the merits of the Application, saving the ruling on the Preliminary Objections to be in the main decision.

6.0 SUBMISSION BY THE PARTIES

6.1 In respect to the first issue, Counsel for the Applicant submitted that the 2nd Respondent dwelt on whether Green Base Services and Contractors (U) Ltd had submitted a bid security and ignored the time element. He submitted that at the time of closure of bid submission, Green Base Services and Contractors (U) Ltd did not have its bid security ready with it. Counsel submitted that the 2nd Respondent ignored to investigate the time the bid security was issued by Equity Bank and the time the bid security was received by Wakiso District Local Government (1st Respondent) and in the absence of an explanation by the 1st Respondent, it was wrong for the 2nd Respondent to reject the Applicant's application.

6.2 Counsel submitted that Section 26(4) of the PPDA Act, 2003 states that prior to commencement of procurement process, an Accounting Officer shall

undertake an assessment of the market prices of supplies, services or of the unit costs of the works in respect of which the procurement is to be made by a procuring and disposing entity. Counsel further submitted that Section 26(5) of the Act, which states that subject to section 74, an Accounting Officer shall not sign a contract where the price quoted by the bidder who is evaluated by a contracts committee as the best evaluated bidder is higher than the market price established by the Accounting Officer in accordance with subsection (4). Counsel therefore submitted that at page 3, paragraph 10 of the decision of the 2nd Respondent, Green Base Service and Contractors (U) Ltd was to pay a price of UGX 2,655,555 inclusive of value added taxes which is way above the reserve price of UGX 2,000,000.

6.3 Counsel submitted that this honourable Tribunal exercises its powers to subject all the reports to fresh scrutiny and make a fair decision. He prayed the application be allowed.

6.4 In respect to the first issue, Counsel for the 1st Respondent submitted that the date of the bid security was before the closure of the bid submission therefore the Best Evaluated Bidder submitted the bid security together with its bid. Counsel further submitted that the Applicant has not provided any evidence to show that there were errors on the part of the 2nd Respondent. The record of bid opening shows that the Best Evaluated Bidder was present and he presented the bid security. He prayed that the application be dismissed.

6.5 In respect to the first issue, Counsel for the 2nd Respondent submitted that Section 91L (1) (b) of the PPDA Act, 2003 states that an application to the Tribunal for review of a decision of the Authority made under section 91I shall include a statement of the reasons for the application. He submitted that at page 3 of the application, the Applicant stated reasons in support of the application that Wakiso Seven Star's Association Ltd believes that the decision

by the PPDA, directing Wakiso District Local Government to proceed to award the contract to Green Base Services and Contractors (U) Ltd is wrong and illegal as hereunder but fell short of stating the reasons in its application. Counsel therefore argued that the application stands without reasons contrary to the provisions of the PPDA Act, 2003.

6.6 Counsel further submitted that according to Annexure R3, at page 4, in investigating the application for administrative review, the Authority analysed the following documents; bidding document, record of bid opening, bids submitted by the bidders among other documents. He submitted that at page 7 of Annexure R3, the Authority studied the submissions of both parties and established that according to the record of bid opening dated 24th May 2019, Green Base Services and Contractors (U) Ltd submitted a bid security of UGX 1,000,000. The Authority reviewed the bid of Green Base Services and Contractors (U) Ltd and found that the bid contained a bid bond guarantee issued by Equity Bank Ltd. Counsel submitted that the 2nd Respondent rightly found that Best Evaluated Bidder complied with the requirements of the bidding document.

6.7 Counsel for the 2nd Respondent further submitted that Section 26 (4) and (5) of the PPDA Act, 2003 in so far as reserve price is concerned is not applicable in this impugned procurement because the Entity was interested more in making money more money therefore the higher price quoted by the best evaluated bidder is better in terms of collecting revenue. Counsel prayed that the application lacks merits and should be dismissed with no orders to costs.

7.0 RESOLUTION OF ISSUES BY THE TRIBUNAL

Preliminary Objection.

7.1 In resolving the preliminary objection, Tribunal examined the written

submission of the Applicant dated 8th August 2019. At page 2, paragraph 3 of the written submission, the Applicant stated that the *'The Applicant's appeal is hinged on one ground'*. The Tribunal established that the issue of the reserve price was not formulated as an independent issue in the Applicant's written submission but it is a sub set issue arising out of the ground formulated by the Applicant in its application.

7.2 The Tribunal considered the case of *Arua Municipal Council Vs Arua United Transporters SACCO, Civil Appeal No. 25 of 2017*, where Justice Stephen Mubiru held that merits review allows all aspects of an administrative decision to be reviewed, including the finding of facts and the exercise of any discretion conferred upon the decision maker. The merits review tribunal, or other reviewer, considers both the lawfulness of the administrative decision it is reviewing and the facts going to the exercise of discretion. He further held that merits review is the function of evaluating and substituting the correct or preferable decision standing in the place of the decision maker, as opposed to enforcing the law that constrains and limits the powers of the other branches of government that is characteristic of judicial review.

This Tribunal is enjoined with the function of evaluating and substituting the correct or preferable decision standing in the place of decision maker and in doing so, the Applicant must be given the opportunity to be heard on the merits of its case. Furthermore, the 1st Respondent is not prejudiced in any way by the Tribunal giving opportunity for the Applicant to present its case. The Tribunal therefore accordingly overrules the preliminary objection.

Issue No. 1: Whether the Authority erred in law and fact when it approved the decision by Wakiso District Local Government to award the contract to Green Base Services and Contractors (U) Ltd.

7.3 The Tribunal considered the record of receipt of bids and LG PP Form 9 and R2record of bid opening LG PP Form 10 both dated 24th May 2019 issued by the 1st Respondent. The Tribunal established that according to the record of receipt of bids, the Best Evaluated Bidder (BEB), Green Base Services and Contractors (U) Ltd submitted bids at 10:32a.m. The record of bid opening further shows that Green Base Services and Contractors (U) Ltd had bid security at the time of bid opening.

7.4 The Tribunal also considered the bid guarantee/bid security dated 24th May 2019 issued by Equity Bank (U) Ltd addressed to the Head, Procurement and Disposal Unit, Wakiso District Local Government and the letter dated 18th June 2019 from the Equity Bank (U) Ltd addressed to the Accounting Officer, Wakiso District Local Government verifying the authenticity of the bid security of the Best Evaluated Bidder.

The Tribunal therefore, accordingly finds that the BEB had bid security at the time of bid opening.

7.5 In respect to the sub issue, the Tribunal considered section 43 of the PPDA Act, 2003 which provides for the application of basic principles of public procurement and disposal. The Tribunal observed that the impugned procurement is for purposes of collecting revenue by the 1st Respondent as opposed to a procurement of expending. In procurement of collecting revenue, the purpose is to collect more revenue and if a bidder offers more money than the reserve price, the better because there is value for money. The Tribunal finds that the Best Evaluated Bidder's price of UGX 2,655,555 inclusive of value added taxes which is way above the reserve price of UGX 2,000,000 provides more value for money.

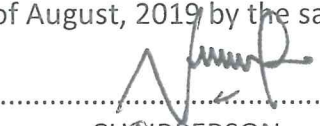
7.6 Issue No. 2 is about remedies available to parties. For remedies, see 7.0 below of the decision. On the whole, this application is rejected on all issues raised.

8.0 DECISION OF THE TRIBUNAL


1. The Preliminary objection is overruled.
2. The Application is dismissed.
3. The decision of the Authority is affirmed.
4. Each party to bear its own costs.

SIGNED, SEALED and dated this 16th day of August, 2019 by the said;

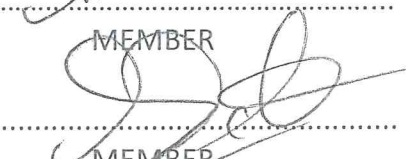
1. MOSES JURUA ADRIKO- SC.


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CHAIRPERSON

2. DAVID KABATAIRAINÉ


.....
MEMBER

3. ABRAHAM NKATA


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MEMBER

4. ENG. THOMAS BROOKES ISANGA


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MEMBER