

THE REPUBLIC OF UGANDA

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

APPLICATION NO.19 OF 2019

APPLICATION FOR ADMINISTRATIVE REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT TO THE TENDER FOR MANAGEMENT OF REVENUE COLLECTION FROM MOBILE VANS, DISTRIBUTORS AND PROMOTERS IN ENTEBBE MUNICIPALITY.

APPLICANT: BRIDGETTEE BUSINESS SERVICES (U) LTD

1<sup>ST</sup> RESPONDENT: ENTEBBE MUNICIPAL COUNCIL

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2<sup>ND</sup> RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY (PPDA).

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

## DECISION OF THE TRIBUNAL

### 1.0 BACKGROUND/FACTS

- 1.1 On 6<sup>th</sup> May 2019, Entebbe Municipal Council (1st Respondent) initiated the procurement process for management of revenue collection from mobile vans, promoters and distributors in Division A and B in Entebbe Municipality at an estimated cost of UGX 2,286,000.
- 1.2 On 10<sup>th</sup> May 2019, the Contracts Committee approved the use of the open domestic bidding method.
- 1.3 On 21<sup>st</sup> May 2019, the Entity published the bid notice in the Monitor Newspaper with a bid closing date of 12<sup>th</sup> June 2019.
- 1.4 On 12<sup>th</sup> June 2019, four firms submitted bids which were opened and prices read out.
- 1.5 According to the Evaluation Report dated 26<sup>th</sup> June 2019, two bidders were eliminated at the preliminary stage.
- 1.6 Bridgettee Business Services (U) Ltd and Skype Transport Services Ltd proceeded to the technical and commercial evaluation and Bridgettee Business Services Ltd was eliminated.
- 1.7 Skype Transport Services Ltd proceeded to the financial evaluation stage and was recommended for award of the contract at a total contract price of UGX 3,000,000.
- 1.8 On 28<sup>th</sup> June 2019, the Contracts Committee approved the recommendation and awarded the contract to Skype Transport Services Ltd.
- 1.9 On 1<sup>st</sup> July 2019, the notice of the best evaluated bidder was displayed with a removal date of 12<sup>th</sup> July 2019.
- 1.10 On 12<sup>th</sup> July 2019, the Applicant applied for administrative review to the Accounting Officer.
- 1.11 On 24<sup>th</sup> July 2019, the Accounting Officer issued the decision rejecting the application for administrative review by the Applicant.

1.12 On 2<sup>nd</sup> August 2019, the Applicant applied for administrative review to the Authority.

1.13 On 22<sup>nd</sup> August 2019, the Authority issued the decision rejecting the application for administrative review by the Applicant.

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

2.1 On 4<sup>th</sup> September, 2019 the Applicant, being dissatisfied with the Authority's decision, lodged with the Public Procurement and Disposal of Public Assets Appeals Tribunal (the Tribunal) an application for review of the Authority's decision dated 22<sup>nd</sup> August, 2019.

2.2 The Applicant prayed that the decision made by the 2<sup>nd</sup> Respondent be set aside and the Tribunal directs the Entity to redo the procurement process.

2.3 On 4<sup>th</sup> September 2019, the Tribunal served the application on Skype Transport Services Ltd and requested it to file written response/submission if any, but there was no written response/submission filed.

2.4 On 10<sup>th</sup> September 2019, the Tribunal invited Skype Transport Services Ltd to attend hearing on 17<sup>th</sup> September 2019 at 2:30pm.

## **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 on 4<sup>th</sup> September 2019 and annexes attached thereto ;
- 2) The Applicant's written submissions and Annexes to the submissions received on 10<sup>th</sup> September 2019;
- 3) The 1<sup>st</sup> Respondent's written submission dated 12<sup>th</sup> September 2019;
- 4) The 2<sup>nd</sup> Respondent's written response to the application dated 6<sup>th</sup> September 2019.

3.2 The Tribunal conducted a hearing for the parties on 17<sup>th</sup> September. The parties were represented by Mr. Nicholas Atuhairwe and Mr. Kiggundu Ronald for the Applicant, Mr. Kato Ali Hassan for the 1<sup>st</sup> Respondent and Mr. John Kallemera for the 2<sup>nd</sup> Respondent.

#### 4.0 ISSUES

Four issues were formulated for resolution by the Tribunal as follows:

**Issue No. 1:** Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents erred in law and fact in rejecting the Applicant's application for review holding that the Applicant failed to submit evidence of two years' experience in management of revenue collection, bank statements and reference letters from previous clients yet the best evaluated bidder did not submit evidence to support its two years' experience contrary to Section 38 of the PPDA Act, 2003.

**Issue No. 2:** Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents erred in law and fact in holding that the Applicant was eliminated at the technical evaluation stage for being non-responsive to the requirements of the bidding document yet the best evaluated bidder Skype Transport Services Ltd ought to have been eliminated at the technical evaluation stage for lack of meeting the bid requirements under Part 1 of the bidding document.

**Issue No. 3:** Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents erred in law and fact when they failed to provide the Applicant with a comparison of the tenders, proposals or quotations including the evaluation criteria used contrary to the provisions of Section 89 (2) of the PPDA Act.

**Issue No.4:** What remedies are available?



During the course of the hearing, the Tribunal raised the issue of the procurement method used in the impugned procurement and asked the 1<sup>st</sup> Respondent to address it on this issue.

#### 4.0 PRELIMINARY OBJECTION

4.1 Counsel for the 1<sup>st</sup> Respondent submitted that the issues raised in the appeal to the Tribunal were neither raised in the application for administrative review with the Entity nor with the Authority. He submitted that under Section 91 I (1) of the Act, a bidder who is aggrieved by a decision made by the Authority under section 91(4) may make an application to the Tribunal for a review of the decision of the Authority. He submitted that the 2<sup>nd</sup> Respondent did not make a decision on the issues raised by the Applicant before the Tribunal, and therefore the Tribunal had nothing to review. He prayed that the Tribunal dismisses the Application and upholds the decision of the Authority.

4.2 In reply to the preliminary objection, Counsel for the Applicant referred the Tribunal to the case of *Arua Municipal Council Vs Arua United Transporters SACCO, Civil Appeal No. 25 of 2017*, where Justice Stephen Mubiru held that a 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. He argued that the Tribunal is enjoined with the function of evaluating and substituting the correct or preferable decision standing in the place of a decision maker and in doing so, the Applicant must be given the opportunity to be heard on the merits of its case.

Furthermore, he submitted that the 1<sup>st</sup> Respondent is not prejudiced in any way by the Tribunal giving opportunity for the Applicant to present its case. The Applicant therefore submitted that the preliminary objection be overruled.

4.3 Counsel for the 2<sup>nd</sup> Respondent raised a preliminary objection to the effect that in the Applicant's application for administrative review to both the Accounting Officer's decision dated 12<sup>th</sup> July 2019 and the 2<sup>nd</sup> Respondent, the Applicant did not raise any of the grounds he has raised before the Tribunal. He submitted that Section 90 (1) (1a) (b) of the Act provides that the complaint to the Accounting Officer of a Procuring and Disposing Entity must be made within ten working days from the date the bidder first becomes aware or ought to have become aware of the circumstances giving rise to the complaint. He submitted that Section 90 (3) of the Act states that where a bidder is not satisfied with the decision of the Accounting Officer the bidder may make a complaint to the Authority within ten working days from the date of communication of the decision by the Accounting Officer. Taking into account the above provisions, Counsel submitted that the Applicant had an obligation to raise the complaint regarding the best evaluated bidder's alleged lack of experience in management of revenue collection, bank statements and reference letters from previous clients to the Accounting Officer within ten working days from the date the Applicant allegedly became aware or ought to have been aware of it. Counsel submitted that the Applicant did not raise this complaint to the Accounting Officer within the statutory time frame and therefore is barred from raising this issue before the Tribunal.

4.4 Counsel for the Applicant reiterated his earlier submission in respect to the first preliminary objection raised by the 1<sup>st</sup> Respondent. He added that the preliminary objection be overruled.

4.5 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.

## 5.0 SUBMISSION BY THE PARTIES

5.1 In respect to the first issue, Counsel for the Applicant submitted under Part 1 of the Bidding Document under the Technical Compliance, the bidders were required to submit evidence of two years' experience of the bidder in

management of revenue collection services, financial capacity of the bidder, submission of bank statements for the last six months accompanied by a letter from the bidder's bankers, submission of audited books of accounts for the last two years 2017 and 2018 and academic documents for the key personnel. Counsel submitted that although the Applicant did not meet the requirement of two years' experience as indicated in the bid document, Skype Transport Services Limited, the Best Evaluated Bidder (BEB) did not submit evidence of having two years' experience in management of revenue collection.

- 5.2 Counsel submitted that the bid document for the BEB only had evidence of one year audited books of account for the year 2018 which would technically have not met the requirement of the bid document. He submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents should have clearly evaluated the bid of the best evaluated bidder to establish that it too lacked and or did not meet the Technical Requirements for the Bidding Document before declaring it the BEB.
- 5.3 In respect to the second issue, Counsel for the Applicant submitted that since the BEB did not meet the Technical Requirements in the Bid Document, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents ought to have been eliminated at the technical evaluation stage for lack of meeting the requirement of the Bidding Document.
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- 5.4 In respect to the third issue, Counsel for the Applicant submitted that during the administrative review period at the Authority level, the Applicant's representative requested the 2<sup>nd</sup> Respondent to provide the evidence of the BEB's bid document in comparison to the Applicant which was denied contrary to Section 89 (2) of the Act. In doing so, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied the Applicant a right to fair hearing when it failed to provide the Applicant with a comparison of the tenders, proposals or quotations, including the evaluation criteria used and the reasons for rejecting the concerned bids.
- 5.5 Counsel further submitted that Article 28 of the 1995 Constitution of the Republic of Uganda provides that in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. Counsel submitted that Applicant's legal representative duly lodged the administrative review complaint and it was denied thereby denying the Applicant the right to a fair hearing. He prayed that the Tribunal



- 5.13 Counsel further submitted that the Applicant has not submitted any scintilla of evidence or stated any fact in the application to substantiate the allegation that the bid of the BEB lacked the two years' experience in management of revenue collection, bank statements and reference letters from previous clients. This allegation alludes to the fact that the Applicant was privy to the contents of the bid of the BEB without receipt of the information from the Entity in contravention of Section 47 (1) of the PPDA Act.
- 5.14 In respect to the second issue, Counsel submitted that the 2<sup>nd</sup> Respondent gave reasons for the disqualification of the Applicant at the technical stage which were duly enumerated in resolving issue 1. He submitted therefore this issue is generalised, misleading and misconceived.
- 5.15 In respect to issue three, Counsel submitted that the 2<sup>nd</sup> Respondent does not have any obligation to furnish the said documents to the Applicant under Section 89 (2) of the Act. In any event, the Applicant had ten working days to lodge this complaint to the 2<sup>nd</sup> Respondent under Section 90 (3) of the Act, however it did not do so and therefore it is statutorily barred from raising this matter before the Tribunal. Counsel therefore submitted that this application lacks merit and should be dismissed with each party bearing its own costs.
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should direct the procurement entity concerned to redo the procurement, set aside the Authority's decision and costs be awarded to the Applicant.

- 5.6 In respect to the first and second issues, Counsel for the 1<sup>st</sup> Respondent submitted concurrently that according to the bidding document, it was a requirement for all bidders to submit evidence of two years' experience in management of revenue collection. The Applicant did not submit her evidence and also conceded by stating that it did not meet the requirement of two years' experience as indicated in the bidding document. He submitted that the BEB on the other hand was compliant with the two years' experience of the management of revenue collection services according to the Evaluation Report dated 26<sup>th</sup> June 2019.
- 5.7 Counsel submitted that according to the Evaluation Report dated 26<sup>th</sup> June 2019, Table 1-Preliminary Examination and Assessment of Eligibility, item 17 clearly specifies that the BEB was compliant and submitted its bank statements and a reference letter from its banker with account details.
- 5.8 In respect to the third issue, Counsel for the 1<sup>st</sup> Respondent submitted that a perusal of the administrative review application before the Accounting Officer of the Entity and the application to the Executive Director of the Authority did not include any request by the Applicant for the said documents. The Applicant ought to have made his application for the same formally but the allegation that 'during the administrative review, the Applicant's representative requested the 2<sup>nd</sup> Respondent to provide the evidence of the BEB's bid in comparison to the Applicant's which was denied is a mere sham and an afterthought to seek a remedy that is tenable. Counsel submitted that the application should be dismissed and the decision of the 2<sup>nd</sup> Respondent be affirmed and with no orders to costs.
- 5.9 In respect to the first issue, Counsel for the 2<sup>nd</sup> Respondent submitted that the bidding document provides for the impugned procurement provides the evaluation criteria to determine the technical compliance of a bid and it is stated at page 7 that the requirements are for; 2 years' experience of the bidder in management of revenue collection services, Financial capacity of the bidder; submission of bank statements for the last six (6) months accompanied by a letter from the bidder's bankers and submission of audited books of accounts for the last two (2) years 2017 and 2018 and Signed CVs of

the Leaders of the Association showing evidence of qualification for the Chairperson, Treasurer and Secretary.

- 5.10 Counsel submitted that in the 2<sup>nd</sup> Respondent's administrative review decision dated 22<sup>nd</sup> August 2019, it was found that there was evidence of two years' experience in management of revenue collection services, or financial capacity as evidenced by audited books of accounts for the last two calendar years, 2017 and 2018 and bank statements for the last six months .Counsel further submitted that in the decision of the 2<sup>nd</sup> Respondent it was stated that the Applicant admitted in its application to the Authority dated 2<sup>nd</sup> August 2019 that it did not meet all the above requirements as they were stated in the bidding document because the company had only been incorporated on 6<sup>th</sup> June 2019.
- 5.11 Counsel submitted that in the Applicant's application for administrative review to both the Accounting Officer dated 12<sup>th</sup> July 2019 and the 2<sup>nd</sup> Respondent, the Applicant did not raise any ground to the effect that the BEB did not submit evidence of two years' experience in management of revenue collection, bank statements and reference letters from previous clients.
- 5.12 Counsel further submitted that Section 90 (1) (1a) (b) of the Act provides that a complaint to the Accounting Officer of a Procuring and Disposing Entity must be made within ten working days from the date the bidder first becomes aware or ought to have become aware of the circumstances giving rise to the complaint. He submitted that Section 90 (3) of the Act states that where a bidder is not satisfied with the decision of the Accounting Officer, the bidder may make a complaint to the Authority within ten working days from the date of communication of the decision by the Accounting Officer. Taking into account the above provisions, the Applicant had an obligation to raise the complaint regarding the best evaluated bidder's alleged lack of experience in management of revenue collection, bank statements and reference letters from previous clients to the Accounting Officer within ten working days from the date the Applicant allegedly became aware or ought to have been aware of it. Counsel submitted that the Applicant did not raise this complaint to the Accounting Officer within the statutory time frame and therefore is barred from raising this issue before the Tribunal.

6.3 The Bidding Document at page 6 provides for eligibility criteria for bidders to be eligible to participate in this impugned procurement. In respect to eligibility criteria, the bidding document provided that bidders are required to meet the following criteria to be eligible to participate in the procurement. The criteria included at (2) *'eligibility for the reservation scheme for the management of parks/markets*. In other words, for a bidder to participate in the impugned procurement, the entity had to ensure that the bidder is eligible for the reservation scheme for management of parks/markets. The Tribunal considered regulation 53 of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations, SI No. 39 of 2006, which provides for reservation schemes. *Sub regulation (7) (a) thereof provides that a procurement under a reservation scheme shall, at all times be based on competition among eligible persons*. The Tribunal finds that the Contracts Committee of the 1<sup>st</sup> Respondent contravened regulation 53(7) (a) when it approved the open domestic bidding method in the impugned method, instead of using a Selective Bidding that allows for competition among eligible providers, as required for procurements under a reservation scheme.

6.4 Since the bidding document provided that bidders under the impugned procurement had to be *eligible for the reservation scheme for the management of parks/markets*, the Tribunal also considered the Revised Policy Guidelines on the Management and Levying of Parking Fees in Local Government's Public Service Vehicle Parking.

Clause 4 (1) of the Guideline states that the procurement process for Management Services for the Parks in Local Governments shall be reserved for Park operators in accordance with the PPDA Act's Reservation Scheme for a period not exceeding two years. All processes and stages of procurement must be adhered to as stipulated in the relevant regulations.

Clause 4 (iii) of the said Guidelines states that the selective Bidding Method shall be used where there are more than one eligible Park Operators Cooperative Society and have not merged into a Cooperative Union.

Following from this, the Tribunal finds that for the impugned procurement, the 1<sup>st</sup> Respondent should have used a selective bidding method, inviting bidders from a list of those who are eligible for the reservation scheme for the management of parks/markets, in accordance with regulation 53(7) and the



Guidelines cited above. Accordingly, the Tribunal finds that the open bidding method used by the Entity in the impugned procurement is inconsistent with the provisions of the law on reservation schemes and the Bidding Document issued by the Entity. The open domestic bidding method used by the Entity also contravenes Revised Policy Guidelines on the Management and Levying of Parking Fees in Local Government's Public Service Vehicle Parking which operationalise reservation scheme for parks. The Tribunal finds that the Entity should have used the Selective procurement method of reservation scheme instead of open domestic bidding.

6.5 Having found that the procurement method used in the impugned procurement was in contravention of both the law and the bidding document, the Tribunal found no reason to delve into resolving the issues framed by the parties in the impugned procurement.

6.6 Issue No. 4 is about remedies available to parties. For remedies, see 7.0 below of the decision.

#### 7.0 DECISION OF THE TRIBUNAL

1. The preliminary objections are overruled.
2. The Application is dismissed.
3. The decision of the Authority is set aside.
4. The Entity may re-tender the impugned procurement process if it so wishes, taking into account the procurement method provided for reservation schemes in the bidding document and the policy guidelines issued on 13<sup>th</sup> February 2017 by the Minister of Local Government.
5. Each party to bear its own costs.

SIGNED, SEALED and dated this 18<sup>th</sup> day of September 2019 by the said:

1. OLIVE ZAALE OTETE

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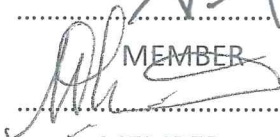

CHAIRPERSON

2. MOSES JURUA ADRIKO-SC

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MEMBER

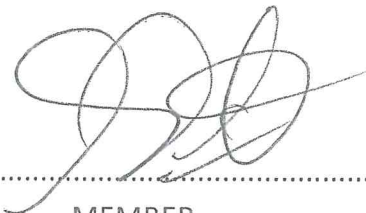
3. DAVID KABATERAINE

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MEMBER



4. ABRAHAM NKATA



MEMBER