

THE REPUBLIC OF UGANDA

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

APPLICATION NO 13 OF 2018

APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT OF AN APPLICATION FOR ADMINISTRATIVE REVIEW BY ENTERPRISE ELECTRONICS CORPORATION LIMITED (EEC) IN RESPECT TO THE PROCUREMENT FRO SUPPLY, INSTALLATION AND COMMISSIONING OF ONE DUAL POLARIZATION C-BAND WEATHER RADAR PROCUREMENT REFERENCE UMA/SUPLS/2017-2018/00016

APPLICANT: SAGEWOOD LIMITED AND SELEX ES GMBH & UGANDA NATIONAL METEOROLOGICAL AUTHORITY

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)

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS

- 1.1 On 24th November 2017, the Uganda National Meteorological Authority (the Entity) initiated the procurement for supply, installation and commission of new dual polarised C-Band weather radar at an estimated cost of UGX 10,500,000,000.
- 1.2 On 6th December 2017, the Contracts Committee approved the use of international bidding method, the bidding document and Evaluation Committee.
- 1.3 On 4th January 2018, the bid notice was published in the New Vision Newspaper with a deadline for submission of bids on 15th February 2018 which was later extended to 28th February 2018.
- 1.4 Eight firms including Sagewood Limited, and Enterprise Electronics Corporation (EEC) were issued with the bidding documents.
- 1.5 On 12th January 2018, a pre-bid meeting was held with representatives of all participating bidders.
- 1.6 On 13th February 2018, an addendum to the bidding document was advertised with its deadline on 28th February 2018, and sent to all bidders that had been issued with the bidding document.
- 1.7 Five firms submitted bids by close of bid submission date on 28th February 2018.
- 1.8 The Evaluation Committee Report dated 27th March 2018, recommended award of contract to Sagewood Ltd & Selex ES GmbH (the Applicant) at UGX 9,356,774,408.85 tax inclusive.
- 1.9 On 20th April 2018, the Notice of the Best Evaluated Bidder was displayed with a removal date of 4th May 2018.

- 1.10 On 26th April 2018, Keith Vickers on behalf of Enterprise Electronics Corporation (EEC), one of the bidders, applied to the Accounting Officer for administrative review.
- 1.11 On 2nd May 2018, the Accounting Officer dismissed the complaint on grounds that the Entity had investigated the complaint and found no merit in it.
- 1.12 On 14th May 2018, being dissatisfied with the decision of the Accounting Officer, EEC applied to the Authority for administrative review on grounds that it had met the requirements of Uganda Procurement Regulations in relation to the National Information Technology Authority of Uganda (NITA-U) Certification and the requirements of Uganda Procurement Regulations in relation to the Bid Bond.
- 1.13 On 30th May 2018, the Authority found merit in EEC's complaint and recommended re-evaluation of bids and refund of the administrative review fees to EEC in accordance with Regulation 11 (2) of the PPDA (Administrative Review) Regulations, 2014.
- 1.14 On 13th June 2018, Sagewood Ltd & Selex ES GMBH and Uganda National Meteorological Authority (the Applicants) being dissatisfied with the Respondent's decision filed this Application before the Tribunal challenging the Authority's decision.

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

2.1 On 13th June 2018, the Applicant filed an application to the Tribunal challenging the Authority's decision.

2.2 The grounds for Application to the Tribunal can be summarized as follows:

- 1. The Authority erred in law and fact when it held that the Entity did not properly evaluate EEC's Bid in regard to the requirement to submit the NITA Certificate.*

2. *The Authority erred in law and fact when it held that the Bid Security not issued in the names of the bidder (EEC) was valid.*

3.0 DISPOSAL OF APPLICATION

3.1 In disposing of the Application for review, the Tribunal analyzed the following documents:

- 1) The Applicant's Application to the Tribunal dated 13th June 2018, annexes to the Application, the written and oral submissions.
- 2) The Authority's response to the Application dated 18th June 2018, annexes to the response, and the written and oral submissions.

3.2 The Tribunal conducted a hearing for the Parties on 27th June 2018. The 1st Applicant was represented by Albert Turyahabwe, Naboth Muhairwe and Charlotte Arinaitwe, while the Respondent was represented by John Kallemera. In attendance were Musinguzi Patrick, the lawyer for the Entity, Martin Nkutu, Counsel for EEC.

4.0 SUMMARY RULING

4.1 In accordance with section 91I (7) of the PPDA Act, 2003, the Tribunal delivered a summary of this ruling on the 28th day of June 2018. What follows is the detailed reasoning in support of the Tribunal's decision.

5.0 ISSUES

5.1 Three issues were adopted for resolution by the Tribunal as follows:

(a) Whether the Authority erred in law and fact when it held that the Entity did not properly evaluate EEC's bid in regard to the requirement to submit the NITA Certificate.

(b) Whether the Authority erred in law and fact when it held that the Bid Security not issued in the names of the Bidder (EEC) was valid?

(c) What remedies are available to the parties?

6.0 SUBMISSIONS BY COUNSEL

- 6.1 Prior to the commencement of the hearing, the Tribunal inquired from representatives of the Entity as to why the entity appeared before the Tribunal as an Applicant. The Tribunal wondered whether such a procedure would not compromise the neutrality of the Entity since the Entity would likely be viewed by other bidders as taking sides with one of the bidders in the process, who in this matter was the Applicant. It was then agreed that the Entity be dropped as an applicant.
- 6.2 Counsel for the Respondent raised two preliminary objections to wit, (1) the Applicant before the Tribunal i.e. Sagewood Limited and Selex ES GMBH, the Joint Venture, was not the bidder in the impugned procurement, and (2) the first applicant did not submit valid bid security.
- 6.3 On the first objection that the Applicant was not a bidder, Counsel submitted that the bidder was not the joint venture between Sagewood Limited and Selex ES GMBH, but rather Sagewood Limited. He stated that while the BEB Notice indicated the BEB as Sagewood Limited & Selex ES GMBH (the Applicant), in the bid submission, it is Sagewood Limited that signed as bidder. He contended that ITB 3.2 of the bidding document provides for the documentation in respect of joint venture. Each joint venture must attest to the declaration in the bid.
- 6.4 With respect to the second preliminary objection, Counsel for the Respondent submitted that the Applicant did not submit a valid bid security, since the bid security was only issued to only Sagewood Limited, instead of being issued to both partners in the joint venture. The bidder who submitted the bid security is only Sagewood Limited and therefore the Applicant cannot claim that the bid security is applicable to the joint venture.
- 6.5 In response to the both preliminary objections, Counsel for the Applicant submitted that the joint venture agreement explains the roles to be played by the parties. The joint venture agreement stated that Sagewood Limited

would be the lead partner and will be responsible to present the bid. He referred the Tribunal to Section 4.2 ITB of the Bidding Document which provides that a bidder may be a natural person, private entity, government-owned entity, and subject to ITB Sub Clause 4.6, any combination of them with a formal intent to enter into an agreement or under an existing agreement in form of a joint venture, consortium, or association. He contended that the bid security is effective since under the Joint Venture Agreement, it was Sagewood Limited to sign the bid. That Paragraph 5 of the joint venture agreement provided for issuing of bid security/ guarantee by Sagewood Ltd.

- 6.6 In rejoinder to Counsel for the Applicant's response to the preliminary objections, Counsel for the Respondent insisted that it does not matter whether one is a lead partner or not but each partner in the Joint Venture Agreement had to sign the bid submission sheet; that the Applicant therefore did not submit a bid.
- 6.7 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.
- 6.8 On issue 1, Counsel for the Applicant submitted that the Authority erred when it decided that the Evaluation Committee of the Entity erred in not seeking clarification or requesting EEC to submit the certificate from the NITA-U. Counsel stated that the Authority wrongly relied on regulation 17(6) of the PPDA (Evaluation) Regulations, 2014, S.I 9 of 2014, which states that where a bidder does not submit a document required under sub regulation (3), the Evaluation Committee shall in accordance with regulation 10 of the same Regulations, request the bidder to submit the document. Counsel contended that the NITA-U certificate was a crucial document which should have been submitted before the bid submission deadline. He argued that the Authority in reaching its decision ignored regulation 10(3) and (4) of the PPDA (Evaluation) Regulations, 2014. He concluded this point by stating that the Entity can only clarify on a document that was submitted, yet in the instant matter, the NITA certificate was never provided. That the letter dated 27th February 2018 certifying that EEC had applied for the NITA certificate does not amount to a certificate.

- 6.9 Counsel prayed the Tribunal to set aside the Authority's decision, to uphold the Accounting Officer's decision and for costs of the Application.
- 6.10 In response to the first issue, Counsel for the Respondent asserted that EEC in its bid submitted a letter dated 27th February 2018, stating that 'EEC certifies that we have applied for a certificate from NITA-U. EEC was unable to complete the certification process before the due date'. Counsel asserted that regulation 17(6) and 10(1) of the PPDA (Evaluation) Regulations, 2014 provides that where a bidder does not submit a document required under sub regulation (3), the Evaluation Committee shall request the bidder to submit the document. He contended that the Evaluation Committee should have exercised powers under the said regulations to require EEC to submit the certificate.
- 6.11 Counsel for the Respondent submitted that the Application lacks merit and should be dismissed without any orders as to costs.
- 6.12 Counsel representing EEC stated that EEC did whatever it could to get the certificate from NITA-U, and the certificate was eventually submitted to the Entity but the Entity refused to accept.

7.0 RESOLUTION BY THE TRIBUNAL

7.1 Ruling on Preliminary Objections

- 7.2 The first preliminary objection was that the Applicant before the Tribunal i.e. Sagewood Limited and Selex ES GMBH, the Joint Venture, was not the bidder in the impugned procurement, and the second objection was that the first applicant did not submit valid bid security.
- 7.3 Both objections will be handled concurrently because they are closely related.
- 7.4 It was the contention of Counsel for the Respondent that the bidder in the instant procurement was not the joint venture between Sagewood Limited and Selex ES GMBH, but rather Sagewood Limited. The basis of his argument was that it is only one Partner, Sagewood who signed the Bid Submission Sheet, instead of both joint venture partners. That it is only Sagewood Limited who submitted the bid security, instead of both the

Joint venture Partners, and that therefore the bid security provided was not valid.

- 7.5 The Tribunal noted that the bidding document allowed bidders to either bid as natural persons, private entities, government-owned entities, or any combination of them, provided there was a formal intent to enter into an agreement or under an existing agreement in form of a joint venture, consortium, or association.
- 7.6 Having allowed parties to bid as joint venture or consortium, the provisions of the joint venture agreement therefore became relevant in this bidding process. Counsel for the Applicant submitted that the joint venture agreement explains the roles to be played by the parties, and that under the joint venture agreement, Sagewood Limited would be the lead partner and would be responsible to present the bid, including the bid security.
- 7.7 The Tribunal therefore finds that Sagewood Limited and Selex ES GMBH was a proper bidder in the instant procurement.
- 7.8 For this reason, the preliminary objections are overruled.
- 7.9 Counsel for the Applicant having abandoned the second issue regarding bid validity, the only issue for resolution by the Tribunal was whether the Authority erred in law and fact when it held that the Entity did not properly evaluate EEC's bid in regard to the requirement to submit the NITA-U Certificate.
- 7.10 To determine this issue, the Tribunal will rely on regulations 9, 10(1), (3) and (4) and 17(3) and (6) of the PPDA (Evaluation) Regulations, 2014, S.I 9 of 2014, which were quoted extensively by both Counsel. The Regulations are here-below reproduced for ease of reference:
- “9. No changes to bids.***
The bidding documents shall state that—
(a) a bidder shall not seek to make a change to the substance of a bid submitted and shall not be permitted to effect any change, after the deadline for submission of bids; and

(b) the bid of the bidder who attempts to make a change to the bid, after the deadline for submission of bids, shall be rejected and the bidder reported to the Authority.

10. Request for clarification of bids.

(1) Notwithstanding regulation 9, an evaluation committee may at any stage of the evaluation request a bidder to clarify the information provided in the bid documents or to submit additional documentation to clarify the information provided.

(2)

(3) A request for clarification or submission shall not be made with the intention of-

(a);

(b); or

(c) substantially altering anything which forms a crucial or deciding factor in the evaluation of the bid.

(4) A bidder shall not be permitted to make a clarification or submission which-

(a);

(b); or

(c) substantially alters anything which forms a crucial or deciding factor in the evaluation of the bid.

17. Eligibility of bidder

(1) An evaluation committee shall at the preliminary examination, verify the accuracy, validity and authenticity of the documents submitted by a bidder.

(2) A bidder shall be eligible where—

(a) the bidder has the legal capacity to enter into a contract with the procuring and disposing entity;

(b) the bidder is not insolvent, in receivership, bankrupt or being wound up;

(c) the business activities of the bidder are not suspended;

(d)

(3) For the purpose of sub regulations (1) and (2), a bidder shall be required to submit the following documents, with the bid-

(a) a copy of the trading licence of the bidder or its equivalent;

(b) a copy of the certificate of registration of the bidder or its equivalent;

(c)

(4)

(6) *Where a bidder does not submit a document required under sub regulation (3) the evaluation committee shall in accordance with regulation 10, request the bidder to submit the document.*

- 7.11 It was a requirement of the bidding document that the bidder had to submit a NITA-U certificate. At the time of submitting the Bid, EEC did not have the NITA-U certificate but submitted as part of its bid a letter to NITA-U indicating that it had applied for the certificate. The Authority in its decision states that under regulation 17(6), an evaluation committee may require a bidder to submit a document that is required. The Applicant on the other hand contends that if the Entity had received EEC's NITA-U certificate, this would have amounted to a change of a bid contrary to regulation 9 of the PPDA (Evaluation) Regulations, and would have also contravened regulation 10(3) and (4) of the said regulations.
- 7.12 The Tribunal, with respect, disagrees with the Authority in its decision that the Evaluation Committee of the entity should have exercised its power under regulation 17(6) to require the bidder to submit the NITA-U certificate.
- 7.13 A close reading of regulation 17(6) points to the fact that the power to request for a document must be done in accordance with regulation 10 i.e. *"Where a bidder does not submit a document required under sub regulation (3) the evaluation committee shall in accordance with regulation 10, request the bidder to submit the document.*
- 7.14 Regulation 10 lays down the rules that an evaluation committee must follow before requesting a bidder to submit a document after deadline of bid submission. Regulation 10(4) (c) is of particular significance.
- 7.15 The bid document required that a bidder must be in possession of a NITA-U certificate, implying that possession of this document was one of the deciding factors. It is not in dispute that EEC was not in possession of a NITA-U certificate at the time of bid submission. The Tribunal finds that if

the Evaluation Committee had accepted the submission of the NITA certificate after the bid submission deadline, it would have contravened regulation 10(4) (c), of the PPDA Evaluation Regulations 2014, which provides that a bidder shall not be permitted to make a clarification or submission which substantially alters anything which forms a crucial or deciding factor in the evaluation of the bid.

7.16 The Tribunal is also in agreement with the submission of the Applicant that the evaluation committee could not have asked for a document that was not submitted at the time of bid submission, because doing so would have amounted to change of the bid in contravention of regulation 9 of the PPDA (Evaluation) Regulations, 2014.

8.0 DECISION OF THE TRIBUNAL

1. The preliminary objections are overruled.
2. The Application is upheld.
3. The decision of the Respondent is set aside.
4. The decision of the Accounting Officer of Uganda National Meteorological Authority is reinstated.
5. Each party to bear its own costs.

SIGNED and sealed this 17th day of October, 2018 by the said

OLIVE ZAALE OTETE


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CHAIRPERSON

MOSES JURUA ADRIKO *SG*


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MEMBER

ABRAHAM NKATA


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MEMBER

DAVID KABATERAINE


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MEMBER