

THE REPUBLIC OF UGANDA

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

APPLICATION NO 17 OF 2018

APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT TO THE TENDER FOR THE CONSTRUCTION OF THE PROPOSED HEADQUATER BUILDING OF THE INSPECTORATE OF GOVERNMENT PLOT 71-75 YUSUF LULE ROAD AND 24-26 CLEMENT HILL ROAD KAMPALA UGANDA PROC REF IG/WRKS/2017-2018/001

**APPLICANT: ROKO CONSTRUCTION LTD & ROKO
CONSTRUCTION (RWANDA) LTD JV**

**1ST RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC
ASSETS AUTHORITY (PPDA)**

2ND RESPONDENT: CRJE (EAST AFRICA) LTD

**(Before: OLIVE ZAALE OTETE-CHAIRPERSON, DAVID KABATERAINE-MEMBER,
ABRAHAM NKATA- MEMBER)**

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS

- 1.1 On 12th April 2018, the Inspectorate of Government advertised for the construction of its proposed headquarters building in the New Vision Newspaper of with a deadline submission of bids on 10th May 2018.
- 1.2 Sixteen firms purchased and were issued with the solicitation documents.
- 1.3 On 24th April 2018, a pre-bid meeting was held at the Entity.
- 1.4 On 10th May 2018, five firms submitted bids which were opened and prices read out as follows; M/s Seyani Brothers & Co. (U) Ltd & Parbat Siyani Construction Ltd UGX 89,915,920,986 VAT inclusive, M/s China Wu Yi Co. Ltd UGX 96,024,787,218 VAT inclusive, M/s China National Aero Technology International Engineering Corporation (CATIC) UGX 78,535,684,925 VAT inclusive, M/s CRJE (East Africa) Ltd UGX 81,535,684,925 VAT inclusive and M/s Roko Construction Ltd & Roko Construction (Rwanda) Ltd JV (the Applicant), UGX 74,313,092,184 VAT inclusive.
- 1.5 The Evaluation Committee recommended award to the Applicant at UGX 74,313,092,184 VAT inclusive.
- 1.6 On 1st June 2018, the Contracts Committee approved the Evaluation Committee recommendation and awarded the contract to the Applicant at UGX 74,703,912,383 VAT inclusive.
- 1.7 On 1st June 2018, the Entity displayed the Notice of the Best Evaluated Bidder with a removal date of 14th June 2018.
- 1.8 On 13th June 2018, CRJE (East Africa) Ltd applied for administrative review to the Accounting Officer.
- 1.9 On 4th July 2018, the Accounting Officer issued administrative review decision rejecting the Application for administrative review.
- 1.10 Being dissatisfied with the decision of the Accounting Officer, on 11th July 2018, CRJE (East Africa) Ltd applied for administrative review to the Authority.
- 1.11 The Authority conducted a hearing on 6th August 2018 and issued a decision wherein it partially upheld the Application and directed the Entity to re-evaluate the bids taking into consideration the findings of the Authority on the computation of the values of the completed works by Roko Construction Ltd & Roko Construction (Rwanda) Ltd JV and to refund the administrative review fees to CRJE (EA) Ltd.

1.12 On 20th August 2018, the Applicant being dissatisfied with the 1st 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 20th August 2018, the Applicant filed an application to the Tribunal challenging the Authority's decision.

2.2 The grounds for application to the Tribunal were as follows:

- i. That the 1st Respondent erred when it found that the Applicant did not meet the requirement of having at least two contracts within the last five years, each with a value of at least UGX 90 Billion that have been successfully and substantially completed (at least 75%) and that are similar to the proposed works.
- ii. That the 1st Respondent erred when it failed to inquire into and provide a finding on the ethical conduct of the 2nd Respondent.
- iii. What remedies are available?

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 20th August 2018, annexes to the Application, the written and oral submissions.
- 2) The Authority's response to the Application dated 24th August 2018, annexes to the response, and the written and oral submissions.

3.2 The Tribunal conducted a hearing for the Parties on 4th September 2018. The Applicant was represented by Ms. Diana Kasabiiti; the 1st Respondent was represented by Mr. John Kallemera. The 2nd Respondent was not in attendance and did not file a written response to the Application although he had been effectively served with the process. In attendance was a representative of the Applicant, Mr. Willie Swanepoel.

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 4th day of September 2018. What follows is the detailed reasoning in support of the Tribunal's decision.

5.0 ISSUES

5.1 The issues for determination by the Tribunal were agreed as follows:

- (a) Whether the 1st Respondent properly found that the Applicant did not meet the requirement of having at least two contracts within the last five years, each with a value of at least UGX 90 Billion that have been successfully and substantially completed (at least 75%) and that are similar to the proposed works.
- (b) Whether the 1st Respondent failed in its duty when it neglected and or failed to inquire into and provide a finding on the ethical conduct of the 2nd Respondent.
- (c) What remedies are available?

6.0 SUBMISSIONS BY COUNSEL

6.1 On issue 1, Counsel for the Applicant submitted that the applicable exchange rate applied to the contract price for Acacia Commercial and Hotel was the rate at bid opening. She submitted that this was the same rate used by the Entity as clarified by the Accounting Officer of the Entity during the administrative review hearing. Counsel submitted that the 1st Respondent did not give reasons for applying the Bank of Uganda exchange rate at date of completion, thus arriving at a value below UGX 90 billion.

6.2 Counsel for the Applicant submitted that all bidders were required to attend a pre-bid meeting and at no point in time does the question of exchange rate to be applied arise. That it is contrary to the principles of non-discrimination and fairness as set out in section 43 (a) and (b) of the PPDA Act, 2003 to apply criteria that was not communicated in the bidding document prior to submission of bids. Counsel further submitted that the finding of the 1st Respondent in effect removes a level playing field that was described in the bidding document by the Entity. She contended that had the clarification on

exchange rates been stated in the bidding document, the Applicant would have had chance to consider its various construction project in Rwanda that also apply with the stated contract value as determined by the 1st Respondent.

- 6.3 Counsel for the Applicant further argued that without prejudice to the foregoing argument, the completion date applied by the 1st Respondent i.e. 11th July 2016 was erroneous. That the correct completion date for Acacia Commercial Development is 28th November 2018. That accordingly the applicable rate on that date was 3630.96 giving a contract value of UGX 93,259,174, 262.4 which meets the specified standard.
- 6.4 In conclusion of this issue, Counsel for the Applicant submitted that Counsel stated that the Applicant's bid was eligible and administratively compliant to the technical requirements of the Entity and had the lowest price.
- 6.5 On issue 2, Counsel submitted that section 7 (r) of the PPDA states as one of the functions of the 1st Respondent the duty to administer and enforce compliance with all provisions of the Act, Regulations and guidelines issued under the Act. Section 43 (d) and (f) of the Act requires that all public procurement and disposal shall be conducted in accordance with inter alia the principles of confidentiality and promotion of ethics.
- 6.6 She further submitted that in grounds 3 and 4 of the 2nd Respondent's application for administrative review before the 1st Respondent, the 2nd Respondent had specific knowledge of information contained in the Applicant's bid e.g. projects relied on, which could not have been known by any other way except by breach of the confidentiality principle orchestrated by the 2nd Respondent. That in ground 5 of its application, the 2nd Respondent had clear knowledge of who the Applicant had proposed as project personnel and even the detail of the positions proposed.
- 6.7 Counsel submitted that at the administrative review hearing before the 1st respondent, the Entity sought for and requested that a finding be made as to how confidential information set out in the bid document of the Applicant had come to the knowledge of the 2nd Respondent but the 1st Respondent did not make a finding on the issue. She submitted that the Applicant is aggrieved by the failure of the 1st Respondent to fully inquire into and make a finding on how the 2nd Respondent obtained the alleged information relating to the

Applicant's confidential financial documents and specific experience submitted as part of the confidential bid of the Applicant.

- 6.8 The Applicant invited the Tribunal to exercise its authority under section 91I of the PPDA Act 2003 to make a decision or refer this issue to the 1st Respondent for consideration in accordance with the directives of the Tribunal.
- 6.9 In response to the 1st issue, Counsel for the 1st Respondent stated that the applicable exchange rate cannot be the rate as at the date of bid opening since the impugned contract was not completed at the date of bid opening. That the Entity or the Applicant are not liberty to arbitrarily determine the appropriate date for the exchange rate. That this must be determined in accordance with the criteria stated in the bidding document. He submitted that it was a requirement for the contract to be substantially or successfully completed and in the instant case, and in the instant case the contract was completed on 9th July 2016. He submitted that the allegation by the Applicant that the 1st Respondent imposed a date which deviated from the evaluation criteria in contravention of section 71(3) of the PPDA Act, 2003 is self-defeating. He submitted that it is the Applicant and the evaluation committee of the Entity that applied a date to determine the value of the exchange rate (date of bid opening) which has no bearing whatsoever on the requirement in 6.2.7 Section 3 Part 1 of the Bidding document. He submitted that to use the exchange rate at bid opening would create an absurdity.
- 6.10 In response to the matter that the completion date applied by the 1st Respondent i.e. 11th July 2016 was erroneous, Counsel submitted that the certificate of making good defects dated 28th November 2017 is immaterial in determining the issue of completion date because the said certificate was submitted to the Entity long after the display of notice of best evaluated bidder and therefore the certificate was not submitted in the Applicant's bid and was not evaluated by the evaluation committee.
- 6.11 Counsel submitted that the issue should be resolved in the affirmative.
- 6.12 In response to issue 2, the 1st Respondent submitted that the administrative review complaint made to it by the 2nd Respondent did not contain any ground in respect of this issue. That the objective of administrative review as provided under section 89(1) of the PPDA Act, 2003 is to provide redress to a bidder that alleges an omission or breach by an Entity. He submitted that this issue could not have been resolved by the Accounting officer of the Entity

or by the 1st Respondent during administrative review proceedings in respect of the 2nd respondent's complaint. He submitted that the applicant should have made a formal complaint requesting for an investigation into this matter as provided for under the law. He submitted that this issue should be resolved in the negative.

- 6.13 Counsel for the 1st Respondent submitted that the application is devoid of merit and should be dismissed with each party bearing its own costs.

7.0 RESOLUTION BY THE TRIBUNAL

- 7.1. Issue 1 to wit, *whether the 1st Respondent properly found that the Applicant did not meet the requirement of having at least two contracts within the last five years, each with a value of at least UGX 90 Billion that have been successfully and substantially completed (at least 75%) and that are similar to the proposed works.*
- 7.2 The Applicant relied on two buildings Mapeera House and Acacia Commercial and Hotel Development. The 1st Respondent cleared Mapeera House as meeting the specified requirement as to floors and contract value, but found that while Acacia Commercial and Hotel Development met the requirement as to floors, it failed to meet the requirement as to contract value of UGX 90 billion.
- 7.3 The contract price for Acacia Commercial and Hotel Development was USD 25,684,440.16. To obtain the UGX equivalent of 90 billion, the Entity applied a Bank of Uganda exchange rate of UGX 3700 pertaining at the date of bid opening which was 10th May 2018 realising a figure of UGX 95, 032,428,000, thus the Applicant was found to meet the minimum requirement of UGX 90 billion. On the other hand, at the administrative review hearing before the 1st respondent, the 1st Respondent held that the Entity should have applied a Bank of Uganda exchange rate of UGX 3385.65 pertaining at the 11th July 2016, the next working day after actual completion of the contract, realising a figure of UGX 86,958,524.28, thus according to the 1st Respondent, Acacia Commercial and Hotel Development did not meet the criteria on the minimum requirement of UGX 90 billion.
- 7.1.4 The Tribunal considered the Instruction to Bidders Part 1 Section 3, Item 6.2.7 of the Evaluation Method and Criteria of the Bidding Document for the

impugned procurement which set out the following requirements as to the specific experience of bidders:

“participation as a contractor in at least two contracts within the last five years, each with a value of at least UGX 90 Billion, that have been substantially completed (at least 75%) and that are similar to the proposed works. The similarity shall be based on the physical size, complexity, methods/technology or other described criteria in Section VI, employers’ requirements. For clarity, similar buildings refers to a storeyed office building of at least 15 floors with one basement above ground level, constructed using reinforced concrete columns, beams, shear walls and slab with block work infill, glass curtain walling”.

- 7.1.5 The Tribunal found that the Instruction to Bidders cited above did not provide a procedure for conversion of a bidder’s contract price in foreign currency to a single currency, Uganda shillings. Due to this omission to specify details as to exchange rate, source and date to be used in the conversion to obtain the UGX 90 billion, the Evaluation Committee of the Entity decided to use the exchange rate at bid opening while during administrative review, the 1st Respondent used the exchange rate at completion of the contract.
- 7.1.6 The Tribunal considered **regulation 32(b) of the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non- Consultancy Services) 2014, S.I 8 of 2014**, which provides that the evaluation criteria considers all appropriate factors and that their method of application is clear. **Regulation 34(a) (vi) of the same S.I 8 of 2014**, provides that a procuring and disposing Entity shall include in the bidding document for works the procedure for conversion of prices to a single currency for evaluation purposes, including the source and date of exchange rates to be used for conversion.
- 7.1.7 The Instruction to Bidders Part 1 Section 3, Item 6.2.7 of the Bidding Document contravened the above cited Regulations in as far as they did not provide a procedure for conversion of a bidder’s contract price in foreign currency to Uganda shillings.
- 7.1.8 Consequently, the Tribunal finds that the evaluation committee used a criteria that was not provided for in the bidding document to arrive at a figure for Acacia Commercial and Hotel Development, contrary to **section 71(3) of the**

PPDA Act, 2003 which provides that ***'no evaluation criteria other than that stated in the bidding document shall be taken into account'***.

7.1.9 On this issue, the Tribunal finds that the bidding document in the impugned procurement did not comply with the law, and is therefore nullified.

7.2 Issue 2, *Whether the 1st Respondent failed in its duty when it neglected and or failed to inquire into and provide a finding on the ethical conduct of the 2nd Respondent.*

7.2.1 The Tribunal noted that the information regarding the Applicant's Acacia Commercial and Hotel Development was not information that was provided in the Best Evaluated Bidder Notice dated 1st June 2018, in the impugned procurement, implying that this information was obtained by the 2nd Respondent from a source other than the Entity.

7.2.2 The Tribunal finds that in accordance with section 8 (1) (c) of the PPDA Act, 2003, the 1st Respondent has the power to commission or undertake investigations on any matter relating to procurement, either upon notice or on its own volition. In order to safeguard the integrity of the public procurement and disposal process, the 1st Respondent is urged to take up the matter with the Entity as soon as possible.

8.0 DECISION OF THE TRIBUNAL

1. The application succeeds in part.
2. The bidding document is declared void.
3. The decisions of both the Entity and the 1st Respondent are set aside.
4. The Entity may re-tender the impugned procurement process of it so wishes, taking into account regulations 32 and 34 of the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) 2014, S.I No. 8 of 2014.
5. Each party shall bear its own costs.

SIGNED and sealed this 4th day of September, 2018 by the said

OLIVE ZAALE OTETE



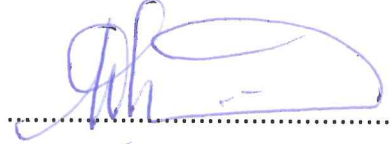
CHAIRPERSON

ABRAHAM NKATA



MEMBER

DAVID KABATERAINE



MEMBER