

THE REPUBLIC OF UGANDA

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

APPLICATION NO 18 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/2017-2018/0001

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

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

**2ND RESPONDENT: SEYANI BROTHERS AND CO (U) AND PARBAT SIYANI
CONSTRUCTION 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 (the Entity) advertised in the New Vision Newspaper for construction of its proposed headquarters building with a deadline submission of bids on 10th May 2018.
- 1.2 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 with a 5% discount, 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 81,622,684,925 VAT inclusive and M/s Roko Construction Ltd & Roko Construction (Rwanda) Ltd JV (the Applicant), UGX 74,313,092,184 VAT inclusive.
- 1.3 The Evaluation Committee recommended award to the Applicant at UGX 74,703,912,383 VAT inclusive, after a correction of arithmetic errors to the Applicant's bid amending the price from UGX 74,313,092,184 to UGX 74,703,912,383 VAT inclusive.
- 1.4 On 1st June 2018, the Entity displayed the Notice of the Best Evaluated Bidder with a removal date of 14th June 2018.
- 1.5 On 13th June 2018, CRJE (East Africa) Ltd applied for administrative review to the Accounting Officer.
- 1.6 On 4th July 2018, the Accounting Officer issued a decision rejecting the Application for administrative review. Being dissatisfied with the decision of the Accounting Officer, on 11th July 2018, CRJE (East Africa) Ltd applied for administrative review to the Authority.
- 1.7 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.

1.8 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 fulfil the requirement of having a minimum average of UGX 20 billion cash and cash equivalent net of bank borrowings in the audited accounts or other financial statements acceptable to the Procuring and Disposing Entity for the last four years to demonstrate the current soundness of the Applicant's financial position and its prospective long term profitability.
- ii. 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.
- iii. That the 1st Respondent erred when it failed to inquire into and provide a finding on the unethical conduct of the 2nd Respondent.
- iv. 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 represented by Mr. Peter Kauma. In attendance was a representative of the Applicant, Mr. 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 adopted as follows:

- (a) Whether the 1st Respondent properly arrived at the finding that the Applicant did not meet the requirement of having a minimum average of UGX 20 billion cash and cash equivalent net of bank borrowings in the audited accounts or other financial statements acceptable to the procuring and disposing entity for the last four years to demonstrate the current soundness of the Applicant's financial position and its prospective long term profitability.
- (b) 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.
- (c) Whether the 1st Respondent failed in its duty when it neglected and or failed to inquire into and provide a finding on the unethical conduct of the 2nd Respondent.
- (d) What remedies are available?

6.0 SUBMISSIONS BY COUNSEL

- 6.1 On issue 1, Counsel for the Applicant submitted that in as far as the criteria required i.e. *submission of audited accounts or other financial statements acceptable to the Employer, for at least 4 years to demonstrate the current soundness of the bidder's financial position and its prospective long term profitability- cash and cash equivalent net of bank borrowings must be a minimum average of UGX 20 billion*, the Applicant met this requirement. She further submitted that the Accounting Officer of the entity clarified on the issue of cash and cash equivalents of the Applicant and stated that the Evaluation Committee of the Entity had considered the books of accounts of the Applicant and found them in order.
- 6.2 Counsel further submitted on issue 1, that the 2nd Respondent who alleged in its application to the 1st Respondent that the Applicant's cash or cash equivalent net of bank borrowing would be negative if the line of credit UGX fifty billion was considered by the Evaluation Committee of the Entity was fully exhausted, did not provide proof of this assertion but merely stated that it 'had knowledge'. Counsel submitted that the 1st Respondent ought to have dismissed this allegation without even requiring the Applicant to respond, but instead agreed with the 1st Respondent that the Entity erred in its computation of cash and cash equivalent. Counsel further disagreed with the computations of the 1st Respondent regarding the issue of cash and cash equivalent, arguing that the computation by the 1st Respondent is not clear to the Applicant. She further asserted that the definition of cash and cash equivalent in International Accounting Standard (IAS) 7 cited by the 1st Respondent does not say receivables and pre-payments per se should not be included and in any case the 1st Respondent did not seek clarification from the Applicant on the issue of receivables and pre- payments. In conclusion on this issue, she submitted that the Applicant's bid was compliant and that the finding of the 1st Respondent be set aside.
- 6.3 On issue 2, Counsel for the Applicant submitted that the applicable exchange rate and date to be applied were not specified in the bidding document. She 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 before the 1st

Respondent. Counsel submitted that the 1st Respondent chose the date of practical completion of the contract, which ignores other factors. 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.

- 6.4 Counsel for the Applicant submitted that all bidders were required to attend a pre-bid meeting and at no point in time did 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 projects in Rwanda that also apply with the stated contract value as determined by the 1st Respondent.
- 6.5 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 was 28th November 2018. That accordingly the applicable rate on the completion date was UGX 3630.96 giving a contract value of UGX 93,259,174, 262.4 which met the specified standard.
- 6.6 In conclusion of this issue, Counsel for the Applicant submitted that the Applicant's bid was eligible and administratively compliant to the technical requirements of the Entity and had the lowest bid price.
- 6.7 On issue 3, Counsel submitted that section 7 (r) of the Act 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 8 of the Act empowers the 1st Respondent to require information, documents, records and reports in respect of any aspect of public procurement and disposal process where a breach, wrongdoing, mismanagement or collusion has been alleged, reported or proven against any PDE or provider. She further stated that 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.

- 6.8 Counsel for the Applicant submitted that in grounds 3 and 4 of the 2nd Respondent's application for administrative review before the 1st Respondent, the 2nd Respondent stated that it had specific knowledge of information contained in the Applicant's bid e.g. projects relied on and completed years, 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.
- 6.9 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 bid of the Applicant.
- 6.10 The Applicant invited the Tribunal to exercise its authority under section 911 (6) 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.
- 6.11 In response to issue 1, Counsel for the 1st Respondent submitted that financial statements for limited liability companies such as the Applicant are required to be prepared in accordance with International Financial Reporting Standards (IFRS); that this requirement is applicable to both Uganda and Rwanda. Counsel submitted that on 26th July 2018, the 1st Respondent sought guidance from the technical team at the Institute of Certified Public Accountants of Uganda (ICPAU) regarding the computation of cash and cash equivalent net of bank borrowings submitted in the Applicant's bid. He submitted that ICPAU responded by stating that the Applicant's computation of cash and cash equivalent did not follow the International Accounting Standards (IAS) for instance, the Applicant in its computation included 'receivables and pre-payments' yet there is always a risk that the customer

will not pay whereas under IAS 7, cash and cash equivalent must be convertible to a known amount of cash and be subject to insignificant risk of changes in value. Counsel submitted that all computations of cash and cash equivalent by the 1st Respondent on the Applicant's accounts, including the accounts of the Joint Venture Partner yielded a negative result, and thus failed to meet the criteria in the bidding document.

- 6.12 In response to Counsel for the Applicant's submission that 1st Respondent ought to have dismissed the allegation by the 2nd Respondent that the Applicant did not qualify regarding the criteria of cash and cash equivalent since the 2nd Respondent did not provide proof, Counsel for the 1st Respondent submitted that administrative review processes conducted under the PPDA Act, 2003 are distinct from court proceedings in relation to adducing evidence to support a fact. In support of this submission, Counsel argued that that unlike a court, the Accounting Officer of a procuring and disposing entity and the PPDA are enjoined to carry out investigations and collect evidence once a complaint is filed, as provided under regulations 5 and 8(3) of the PPDA (Administrative) Regulations S.I 16 of 2014.
- 6.13 In response to the issue 2, 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.
- 6.14 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.

- 6.15 Counsel submitted that the issue should be resolved in the affirmative.
- 6.16 In response to issue 3, 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.
- 6.17 Counsel for the 1st Respondent submitted that the application is devoid of merit and should be dismissed with each party bearing its own costs.
- 6.18 The Tribunal did not entertain Counsel for the 2nd Respondent to make submissions on issues 1 and 2 because the arguments were based on confidential information submitted by the Applicant to the entity for purposes of evaluating their bid and that information was obtained by the 2nd Respondent illegally.
- 6.19 In response to issue 3, Counsel for the 2nd Respondent contended that the 2nd Respondent at all times acted in accordance with the ethical requirements and the principles governing procurement under the PPDA Act, 2003. He submitted that the 2nd Respondent's assertion that it 'had knowledge' was based on its understanding of the Applicant's as its competitor in the same market as well as the Applicant's capabilities. He wondered how the statement by the 2nd Respondent that it had knowledge could be interpreted to mean that the 2nd Respondent accessed confidential information of the Applicant. He concluded this issue by submitting that the 2nd Respondent did not adduce any confidential information belonging to the Applicant in its

application for administrative review to the 1st Respondent, and that the Applicant had not proven the allegations of unethical conduct on behalf of the 2nd Respondent. Counsel prayed the Tribunal to find that no evidence had been adduced by the Applicant to substantiate the claims of unethical conduct.

7.0 RESOLUTION BY THE TRIBUNAL

The Tribunal will determine issue 2 first, an issue that was determined by the Tribunal in Application 17 of 2018, *Roko Construction Ltd & Roko Construction (Rwanda) Ltd JV versus Public Procurement and Disposal of Public Assets Authority and CRJE (East Africa) Ltd, Application 17 of 2018*, mentioned earlier in this decision. Issue 2 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 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”.

7.3 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. The Tribunal considered regulation 32(b) and 34(a) (vi) 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 we reproduce for ease of reference:

“32. Preparing bidding documents.

A procuring and disposing entity shall when preparing each bidding document ascertain that-

(a)

(b) The evaluation criterion considers all appropriate factors and that their method of application is clear;

(c)

34. Bidding documents for works.

A procuring and disposing entity shall in the bidding documents for works specify the following information-

(a) The instructions to bidders which shall include-

(i)

(ii)

(vi) 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.”

- 7.4 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.
- 7.5 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’***.
- 7.6 In resolving issue 1 to wit, *whether the 1st Respondent properly arrived at the finding that the Applicant did not meet the requirement of having a minimum average of UGX 20 billion cash and cash equivalent net of bank borrowings in the audited accounts or other financial statements acceptable to the Procuring and Disposing entity for the last four years to demonstrate the current*

soundness of the Applicant's financial position and its prospective long term profitability, the Tribunal took into account its decision in issue 2.

- 7.7 Having found that the bid document was void for contravening regulations 34(a) (vi) 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 and section 71(3) of the PPDA Act, 2003, the Tribunal did not find it worthy to determine the issue of cash and cash equivalent, because this requirement was part of the criteria of the bidding document that had been found void by the Tribunal.
- 7.8 Concerning Issue 3, *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*, the Tribunal recalls its decision on the same issue in the aforementioned Application 17 of 2018.
- 7.9 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.
- 7.10 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 15 day of 10, 2018 by the said

OLIVE ZAALE OTETE


.....

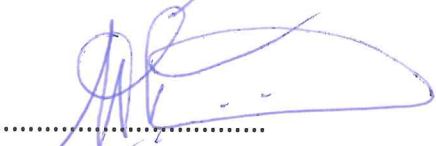
CHAIRPERSON

ABRAHAM NKATA


.....

MEMBER

DAVID KABATERAINE


.....

MEMBER