

THE REPUBLIC OF UGANDA

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

APPLICATION NO 1 OF 2017

**APPEAL AGAINST PPDA DECISION TO ALLOW ADMINISTRATIVE REVIEW FOR THE
TENDER OF MANAGEMENT AND COLLECTION REVENUES FROM BUS/TAXI PARK IN
KABWOHE AND KAGANGO DIVISIONS**

ENTITY: SHEEMA MUNICIPAL COUNCIL

APPLICANT: SHEEMA UNITED DRIVERS COOPERATIVE SOCIETY LTD

**RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
AUTHORITY**

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

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS

- 1.1 Sheema Municipal Council (the entity) carried out the procurement for the management and collection of revenue from Bus Park/Taxi Park from Kabwohe and Kagango Divisions, Procurement reference SHMC 796/SRVCS/16-17/00022.
- 1.2 The bidding document issued by the entity required bidders, among other things, to submit ***“a bid security in the original form of bank draft or bank guarantee of UGX 200,000”***.
- 1.3 The entity received bids from three co-operative societies, namely, Kabwohe Itendero Taxi Operators and Drivers Cooperative Society Limited, Kabwohe Itendero Taxi Owners, Drivers and Conductors Cooperative Society Limited and Sheema United Drivers Cooperative Society Limited, the Applicant.
- 1.4 On 18th October 2016, the entity approved the award of the tender for the contract for management and collection of revenue from Bus Park/Taxi Park from Kabwohe and Kagango Divisions to the Applicant.
- 1.5 On 20th October 2016, Kabwohe Itendero Taxi Owners, Drivers and Conductors Cooperative Society Limited, hereinafter referred to as “the unsuccessful bidder” applied to the Accounting Officer of the entity for review of the decision of the contracts committee. The unsuccessful bidder had been eliminated for not submitting the original of the bid security. The unsuccessful bidder’s complaint to the entity was that the entity should not have eliminated their bid on account that they did not submit an original of the bid security since they had submitted a copy of the bid security and an original letter from the bank confirming the issuance of the bid security. That the entity should have sought clarification from the unsuccessful bidder. The entity dismissed the application.
- 1.5 Dissatisfied with the decision of the accounting officer, on 25th November 2016, the unsuccessful bidder applied to the Authority for a review of the decision of the accounting officer. The Authority upheld the application for administrative review and directed the entity to re-evaluate the bids and seek clarification regarding the bid security of the unsuccessful bidder.

- 1.6 The Applicant who was declared the best evaluated bidder was aggrieved by the decision of the Authority, hence this application.

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

- 2.1 By letter dated 6th January 2017, the applicant applied to the Tribunal for a review of the decision of the Authority.

- 2.2 The ground for the Application to the Tribunal was as follows:

*"In our view as bidders for the same tender, we feel dissatisfied and disadvantaged by the PPDA decision as the administrative review is premised on a matter we consider as material to the outcome of the whole evaluation process yet the applicant for review was **non-compliant** at the time they said the tender was being evaluated."*

3.0 **DISPOSAL OF APPLICATION**

- 3.1 The Tribunal analyzed the following documents:

- (1) The Applicant's application to the Tribunal dated 6th January 2017, Annexes to the Application, the written and oral submissions.
- (2) The Entity's response to the Application, Annexes to the response, the written and oral submissions.

- 3.2 The Tribunal conducted a hearing for the Parties on 23rd January 2017. The Applicant was represented by Mr. Twinamatsiko Enock. Ms. Mary Akiror appeared for the Authority. The entity was represented by the Ag. Head of Procurement, Mr. Besize Albert. In attendance were representatives from the Applicant co-operative society as well as representatives from Kabwohe-Itendero Taxi Owners, Drivers and Conductors Co-operative Society.

- 3.2 The Tribunal issued its decision on 30th January, 2017 in summary form in accordance with Section 91 I (7) of the Act. The detailed decision appears below.

4.0 **ISSUES**

- 4.1 Three issues were formulated for resolution by the Tribunal as follows:

- (a) *Whether the entity should have sought clarification from the unsuccessful bidder regarding the original bid security.*
- (a) *Whether the bids for the impugned procurement were still valid.*
- (b) *Remedies.*

5.0 Submissions by Counsel

- 5.1 On whether the entity should have sought clarification from the unsuccessful bidder regarding the original bid security, Counsel for the Applicant submitted that section 73 of the PPDA Act which provides for procuring and disposing entities to ask for clarification from bidders is not mandatory.

Counsel submitted that the requirement for bidders to submit an original bid security was material to the outcome of the whole evaluation. He further submitted that the unsuccessful bidder was non-compliant with the terms of the bid because it submitted a copy of the bid security instead of the original bid security.

He stated that the Applicant had complied with all the requirements of the bid, including bid security, and that if the entity was to seek clarification from the unsuccessful bidder on its original bid security, this would have disadvantaged the bidders who had complied. In conclusion on this issue, Counsel submitted that the entity was right not to seek clarification from the unsuccessful bidder because the requirement to submit an original bid security was material to the bid.

- 5.2 On the point raised by the Authority that the bid validity had expired, Counsel submitted that the 90 days bid validity had not expired and therefore the Application before the Tribunal was tenable. He asked the Tribunal to allow the application and to award costs to the Applicant.
- 5.3 In response to the submissions of the Applicant on the first issue, Counsel for the Authority submitted that the entity should have sought clarification from the unsuccessful bidder regarding the original bid security since a copy of the bid security and an original letter from Centenary Bank confirming the authenticity of the bid security were submitted as part of the bid. Citing **Application No. 1 of 2016 CATIC v. PPDA**, where the Tribunal decided that an entity must be mindful of the basic procurement principles of value for money and maximization of competition in making a determination as to whether the Applicant's failure to provide information was a material omission, Counsel submitted that the entity should have sought clarification from the unsuccessful bidder in accordance with regulations 10 and 11 of the PPDA (Evaluation) Regulations, 2014.

5.4 Counsel for the Authority dropped the issue of expiry of bid validity. She however argued that on the basis of her submission under issue 1, the Application lacks merit and should be dismissed with costs.

6.0 Resolution by the Tribunal

6.1 The Applicant before the Tribunal, who was the best evaluated bidder in the impugned procurement, is challenging the decision of the Authority directing the entity to re-evaluate the bids received and seek clarification on the bid security of the unsuccessful bidder concerning the original bid security since the unsuccessful bidder had submitted in its bid a copy of the bid security and an original letter from the bank confirming issuance of a bid security.

6.2 The Bid Document for Procurement reference SHCH 796/SRVCS/16-17/00022 under Part 1 Bidding Procedures, in respect to bid security stated as follows: ***"A Bid Security in the original form of Bank Draft or Bank Guarantee of UGX 200,000= shall be required"***. It is important to understand from the outset that submission of an original form of a Bank Draft or Bank Guarantee was a mandatory requirement under this bid.

6.3 The subject of clarification of bids is covered by section 73 of the PPDA Act and regulations 10 and 11 of the PPDA (Evaluation) Regulations 2014. For ease of reference, the provisions are reproduced here below:

6.4 Section 73 of the PPDA Act provides as follows:

"A procuring and disposing entity may ask bidders for clarification of their bids in order to assist in an evaluation and to clarify details that were not apparent or could not be finalised at the time of bidding, in accordance with procedures prescribed by regulations made under this Act".

Regulation 10 PPDA (Evaluation) Regulations 2014

"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) *An evaluation committee shall only make a request for clarification of information or submission of documentation under sub regulation (1) where-*
 - (a) *there is non-conformity or an omission in the bid which is not a material deviation as specified in regulation 11(4); or*
 - (b) *there is an arithmetic error which has to be corrected.*
- (3) *A request for clarification or submission shall not be made with intention of-*
 - (a) *altering or amending the price of the bid except to correct errors in accordance with Regulation 14;*
 - (b) *changing the substance of the terms and conditions of the bid; or*
 - (c) *substantially altering anything which forms a crucial deciding factor in the evaluation of the bid.*

Regulation 11(4) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014, provides as follows;-

- (4) *For the purposes of this regulation a “material deviation” is a deviation that-*
 - (a) *Affects in a substantial way, the scope or quality of the supplies or services or the performance of the works to be procured.*
 - (b) *Is inconsistent with the bidding document and which may in a substantial way, limit the rights of the procuring and disposing entity or the obligations of the bidder under the contract;*

6.5 While section 73 of the Act empowers an entity to seek clarification from bidders to clarify their bids, regulation 10 requires an evaluation committee to make a request for clarification of information or submission of documentation only where the non-conformity or omission in the bid is not a material deviation. Regulation 10(2) thus restricts the discretionary power of the entity under section 73 of the Act to only omissions or non-conformities where the entity is of the view that they are not material deviations.

6.6 In ***Application 1 of 2016, China National Aero- Technology International Engineering Corporation (CATIC) v. PPDA***, the Tribunal guided that the test to determine whether a deviation is material is an objective not subjective test; that the entity must first determine whether a bid was substantially

compliant. Upon making this determination the Entity must decide whether to invoke Regulation 10 and subsequently regulation 11 of the PPDA (Evaluation) Regulations 2014.

- 6.7 In the instant Application, the Tribunal finds that the bid of Kabwohe Itendero Taxi Owners, Drivers and Conductors Co-operative Society, the unsuccessful Bidder, failed in a material way when the bidder submitted a copy of the bid security instead of the original bid security that was required by the bid document. In coming to this conclusion, the Tribunal considered regulation 11 of the PPDA (Evaluation) Regulations, 2014, reproduced above, which defines what amounts to material deviation. Under 11(4) (b), a material deviation is a deviation that *“is inconsistent with the bidding document and which may in a substantial way, limit the rights of the procuring and disposing entity or the obligations of the bidder under the contract”* (emphasis ours).
- 6.8 Under regulation 53 of the ***PPDA (Rules and Methods of Procurement of Supplies, Works and Non-Consultancy Services) Regulations 2014***, the purpose of bid security is to ensure that bidders fulfill the conditions of their bid and to deter irresponsible and unserious bidders from bidding. Regulation 54 of the same Regulations lays down conditions for forfeiture of bid security to a procuring and disposing entity.
- 6.9 The Tribunal finds that the act of submitting a copy of the bid security instead of the original bid security is a material deviation within the meaning of regulation 11(4) (b) cited above because it would in a substantial way limit the rights of the entity to encash the bid security in case the bidder who submitted a copy of the bid security failed to fulfill one of the conditions of its bid. If Sheema Municipal Council submitted a copy of the bid security instead of the original bid security, the bank would not give cash to the entity. Yet on the other hand, the bidder who has kept its original bid security would at any time present the original bid security to the bank and be given its cash thus defeating the whole purpose of bid security.
- 6.10 For the reasons given above, the Tribunal departs from the finding of the Authority that the entity should have sought clarification from the unsuccessful bidder on the original bid security.
- 6.11 The Application is upheld.

DECISION OF THE TRIBUNAL

1. The Tribunal sets aside the decision of the Authority.
2. The Tribunal directs the Entity to continue with the procurement process to its final conclusion.
3. The Applicant is awarded costs of three million shillings (3,000,000/-) to be paid by the Respondent.

Dated this day of , 2017