

THE REPUBLIC OF UGANDA

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

APPLICATION No. 10 OF 2017

**APPLICATION FOR ADMINISTRATIVE REVIEW IN RESPECT TO THE PROCUREMENT
PROCESS FOR A SERVICE PROVIDER TO DISTRIBUTE NON- MOTORABLE ROAD
CONSTRUCTION/ MAINTENANCE EQUIPMENT UNDER PROCUREMENT REFERENCE No.
MOWT/Ncons/2016-17/00355**

APPLICANT: TRANSTRAC LIMITED

**RESPONDENTS: 1. PUBLIC PROCUREMENT AND DISPOSAL
OF PUBLIC ASSETS AUTHORITY**

2. MINISTRY OF WORKS AND TRANSPORT

**CORAM: OLIVE ZAALE OTETE CHAIRPERSON, DAVID KABATERAINE MEMBER,
ABRAHAM NKATA MEMBER, ARCHT. JOEL KATEREGGA, MEMBER**

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS AND BACKGROUND

- 1.1 The Ministry of Works and Transport (the Entity) conducted a procurement process for a service provider to distribute non- motorable road construction/ maintenance equipment under procurement ref. No. MOWT/NCons/2016-17/00355.
- 1.2 The record of bid opening showed that the Applicant did not submit a Power of Attorney and had not furnished evidence of fulfilling tax obligations and social security contributions in Uganda and was accordingly not compliant during the bid evaluation process.
- 1.3 the 1st Respondent asserted that the bidding document expressly required a bidder to submit a Power of Attorney in its bid authorising a person to sign the bid on behalf of the bidder and that the bid submission sheet should be signed by the authorized signatory. The Applicant on the other hand alleged that upon its realisation that it and not submitted the Power of Attorney in its bid, it requested to submit it during the bid opening which was after the bid submission deadline and that the request should have been accepted by the Entity on account that failure to submit a power of attorney is not a material deviation.
- 1.4 On 19/05/2017 the Applicant lodged a complaint for Administrative review to the Entity's Accounting Officer on grounds that the Power of Attorney existed and had been granted although not submitted. The complaint was rejected on 02/05/2017.
- 1.5 On 8/05/2017 the Applicant lodged a complaint for administrative review to the Public Procurement and Disposal of Public Assets Authority (Authority) on two grounds; that failure to submit Power of Attorney which existed was not a material breach and that the tax certificate submitted was sufficient since the invitation to bid had not mentioned any specific period.
- 1.6 On 31/05/2017, the Authority upheld ground two and rejected ground relating to the power of attorney.

1.7 The Applicant was dissatisfied with the finding and decision of the Authority hence this application.

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION

2.1 On 13/06/2017 the Applicant filed this Application before the Tribunal challenging the decision of Authority seeking orders to the effect that failure to accept a Power of Attorney at bid opening was an error in law, and that the Applicants' bid be re-evaluated.

3.0 DISPOSAL OF APPLICATION

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

(i) The Applicant's Application to the Tribunal dated 13th June 2017, Annexes to the Application, the written and oral submissions.

(ii) The Respondent'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 June 2017. The Applicant was represented by Mr Albert Turyahabwe and the Authority was represented by Mr John Kallemera.

4.0 SUMMARY DECISION

In accordance with Section 91I (7) of the PPDA Act, 2003 the Tribunal delivered a summary of this decision on Tuesday 27th June 2017. What follows is the detailed reasoning in support of the decision.

5.0 ISSUES

5.1 Three (3) issues were formulated by the parties for resolution as follows;

- 1. Whether failure to submit a Power of Attorney in the Applicants' bid was a material omission.***

2. *Whether omission of the Power of Attorney in the applicant's bid could be clarified under the Public Procurement and Disposal of Public Assets Authority (Evaluation) Regulations 2014.*

3. *Remedies.*

6.0 Submissions by Counsel

- 6.1 Counsel for the Applicant stated that the Power of Attorney was already in possession of the Applicant at the time of opening of bids. He submitted that the Evaluation Committee of the Entity ought to have asked the Applicant to submit the Power of Attorney since Regulation 10 (4) of the PPDA (Evaluation) Regulations, 2014, S.I 9 of 2014 allows for submission of additional documentation. He argued that asking for the power of attorney would not have affected in any way the scope or quality of the supplies or services, or in a substantial way limited the rights of the procuring and disposing entity. Counsel submitted that the failure to submit a Power of Attorney is not a material deviation within the meaning of regulation 10(4) of the PPDA (Evaluation) Regulations, 2014.
- 6.2 Counsel for the Applicant relied on *Application No. 1 of 2016 China Aero-Tech International Engineering Corporation Vs. PPDA* where the Tribunal held that in determining whether an omission is a material deviation, the entity must first determine whether a bid was substantially compliant and responsive. The Tribunal found that the Applicant's omission to provide translations for qualifications of some personnel and failure to provide letters of confirmation of availability of key personnel are omissions that could have been clarified under Regulation 10 and 11 of the PPDA (Evaluation) Regulations, 2014. Similarly the Tribunal in its decision in Application No.4 of 2016 *China Geo-Engineering Corporation Vs. Ministry Of Water & Environment* held that the omissions to provide academic qualification of some personnel and or certificates of equivalency from the National Council of Higher Education were not material deviations and could have been clarified under Regulation 10 and 11 of the PPDA (Evaluation) Regulations, 2014.

- 6.3 Counsel further submitted that the spirit of Section 45 of the PPDA Act, 2003 which provides that all procurement and disposal processes shall be conducted in a manner which promotes transparency, accountability and fairness ought to have been called into play. He argued that rejecting the Power of Attorney was erroneous and misconceived and against the principles of public procurement and disposal.
- 6.4 Counsel prayed the Tribunal to find that failure to allow submission of a Power of Attorney was an error; that the Entity should be directed to seek clarification of a Power of Attorney and to evaluate the Applicant's bid. He also prayed for costs against both the Authority and the Entity.
- 6.5 In response, Mr. Kallemera, Counsel for the Respondent submitted that he would sum up all the three issues in one issue to wit, whether the Entity should have accepted the Power of Attorney by the Applicant at bid opening.
- 6.6 Counsel for the Respondent submitted that a failure to submit a Power of Attorney contravenes regulation 10 (4) (b) and (c) of the PPDA (Evaluation) Regulations, 2014 which provides that a bidder shall not be permitted to make a clarification or submission which changes the substance of the terms and conditions of the bid or substantially alters anything which forms a crucial or deciding factor in the evaluation of the bid. He submitted that a Power of Attorney is the only document giving substance to the bid; that allowing it after submission of the bid amounts to a correction of the bid which affects the competitive position of other bidders.
- 6.7 Counsel cited section 72 of the PPDA Act, 2003 which prohibits any alterations or any changes in the substance of bids, including changes in price, after the date and time of bid closing, except as may be otherwise prescribed by regulations made under the Act.
- 6.8 Counsel submitted that while it is within the powers of the Evaluation Committee to seek clarification or ask for additional documentation, the Evaluation Committee in the instant case could not ask for a Power of Attorney. He referred to Section 12.1 (c) of the Instruction to Bidders (ITB) which provided that a bid shall comprise of, among others, written confirmation authorizing the signatory of the bid to commit the Bidder, in accordance with ITB sub-clause 20.2. He

contended that a Power of Attorney must be part of the bid, and that without the Power of Attorney; the bid was defective and ought to have been rejected. He further submitted that allowing the submission of Powers of Attorney during bid opening would be inconsistent with the bidding document and it would unfairly affect the competitive position of other bidders. He further submitted that the lack of a Power of Attorney in the Applicant's bid was a material omission which rendered the bid substantially non-compliant and non-responsive.

- 6.9 He submitted that the Application is untenable and should be dismissed with costs.

7.0 Resolution by the Tribunal

- 7.1 The Tribunal carefully studied the Application, the responses to the Application and the written submissions. It also carefully listened to the oral arguments made by the parties at the hearing. In resolving this Application the Tribunal will deal with the issues in the same order as presented by the parties.

Issue 1: Whether failure to submit a Power of Attorney in the Applicants' bid was a material omission.

- 7.2 In the instant Application, the Applicant submitted a bid to the entity and omitted to include a Power of Attorney. During bid opening, the Applicant wanted to submit the Power of Attorney but the officer in charge of bid opening refused to accept the power of attorney. Consequently, the Applicant's bid was unsuccessful *inter alia*, due to failure to submit a Power of Attorney. It is the Applicant's case that the entity should have exercised its powers under regulation 10 of the PPDA (Evaluation) Regulations, 2014 to call for the Power of Attorney and that the Respondent erred in upholding the decision of the entity.
- 7.3 The general rule regarding changes to bids is laid down in regulation 9 of the PPDA (Evaluation) Regulations, 2014, and it is to the effect that a bidder shall not seek to make a change to the substance of a bid and shall not be permitted to effect any change, after the deadline for submission of bids. The exception to this general rule is found in regulation 10 of the same Regulations which allows an evaluation committee to seek clarification or call for additional documentation to clarify information provided in a bid. The evaluation committee is however not

at liberty to ask for clarification or seek additional documentation on any issue. Regulation 10(2) provides that an evaluation committee shall only make a request for clarification of information or submission of additional documentation if the nonconformity or omission in the bid is not a material deviation or if there is an arithmetic error which has to be corrected. Regulation 11 (4) defines a material deviation. Regulation 11(4) (b) and (c) are relevant to the issue at hand. For ease of reference, they are reproduced:

(4) For the purposes of this regulation a “material deviation” is a deviation that—

(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;

(c) if corrected would unfairly affect the competitive position of the other bidders whose bids are administratively compliant and responsive;

7.5 Section 12.1 (c) of the Instruction to Bidders (ITB) provided that the bid shall comprise of, among others, a *written confirmation authorizing the signatory of the bid to commit the Bidder, in accordance with ITB sub-clause 20.2*. The Tribunal finds that the Applicant’s bid which did not have a Power of Attorney was inconsistent with Section 12.1 (c) of the bidding document and therefore a material deviation within the meaning of regulation 11(4) (b), hence the Evaluation Committee could not call for the Power of Attorney in the course of the evaluation. On this same issue, the Tribunal is also in agreement with the submission of the Respondent that a Power of Attorney is the only document giving substance to the bid; that allowing it after submission of the bid amounts to a correction of the bid which affects the competitive position of other bidders.

7.6 The Tribunal is in agreement with the finding of the Respondent that failure to submit a Power of Attorney was a material deviation, hence the Evaluation Committee was right not to call for a Power of Attorney as an additional document. As seen from 7.5 above, there was no written confirmation authorizing the submission of the bid and therefore there was no bid.

Issue 2: Whether omission of the Power of Attorney in the applicant's bid could be clarified under the Public Procurement and Disposal of Public Assets Authority (Evaluation) Regulations 2014.

7.7 This issue is closely related to issue 1. As already stated under Issue 1, a failure to submit a Power of Attorney is a material deviation and cannot therefore be clarified under regulation 10(2) of the PPDA Regulations, 2014.

8.0 DECISION OF THE TRIBUNAL

The Tribunal finds that:

1. Failure by the applicant to submit a Power of Attorney in its bid was a material deviation under Regulation 10 (4) of PPDA (Evaluation) Regulations, SI No. 9 of 2014.
2. The absence of the Power of Attorney could not be clarified by the Evaluation Committee after closing of bid submission as it would contravene Regulations 11 (4) (b) and (c) of SI No. 9 of 2014.
3. The application is dismissed.
4. Each party shall bear own costs.

SIGNED and sealed this15th.....day of.....Sept....., 2017 by the said.