

THE REPUBLIC OF UGANDA

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

APPLICATION NO 6 OF 2017

**APPLICATION FOR ADMINISTRATIVE REVIEW OF THE
PROCUREMENT PROCESS FOR FRAMEWORK CONTRACT FOR
THE HIRE OF EARTH MOVING EQUIPMENT FOR KITEZI
LANDFILL PROCUREMENT REF: NO. KCCA/NCOS/16-
17/00105.**

APPLICANT: VALLEY TECHNICAL SERVICES LTD

**RESPONDENTS: (1) PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC
ASSETS AUTHORITY
(2) KAMPALA CAPITAL CITY AUTHORITY**

**(Before: OLIVE ZAALE OTETE- CHAIRPERSON, MOSES JURUA ADRIKO-MEMBER,
DAVID KABATARAIN- MEMBER, ABRAHAM NKATA-MEMBER AND JOEL
KATEREGGA- MEMBER)**

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS

- 1.1. On 16th November 2016, the Applicant submitted a bid for Framework contract for hire of earth moving equipment for Kitezi landfill as advertised by Kampala Capital City Authority (Entity) under reference Number **KCCA/NCOS/16-17/00105**.
- 1.2. On 8th February 2017, the 2nd Respondent issued the Best Evaluated Bidder Notice wherein it was stated that the Applicant's bid was unsuccessful because it presented a D6R LGP bulldozer with a ground pressure of 34.1 Kpa which did not comply with the technical requirements and that it exerts an excess of 220kg per square meter more than maximum ground pressure stated in the bidding document.
- 1.3. On 13th February 2017 the Applicant applied for administrative review before the 2nd Respondent.
- 1.4. On 22nd February 2017, the 2nd Respondent issued its decision rejecting the administrative review application by the Applicant.
- 1.5. On 9th March 2017 the Applicant being dissatisfied with the decision of the second respondent applied to the 1st Respondent for administrative review.
- 1.6. On 7th April 2017, the 1st Respondent issued its decision rejecting the administrative review application.
- 1.7. On 26th April 2017, the Applicant still being dissatisfied filed an application before the Tribunal challenging the decision of the 1st Respondent.

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION.

- 2.1 On 26th April 2017, the Applicant applied to the Tribunal for a review of the decision of the Authority.

2.2 The grounds in the Application as stated by the applicant were as follows:

1. *Whether the Procurement Entity wrongly evaluated the Appellant's bid when they failed to consider the Appellants offer of a bulldozer (D6R) with a maximum ground pressure of 34.1 kpa whose variance with the requirement of 32 kpa is explained by empirical evidence provided by an expert arbiter?*
2. *Whether the Accounting Officer properly rejected the Appellant's application for administrative review when she made a decision that the Appellant failed at post qualification which did not consider the empirical evidence of the performance of the bulldozer in issue to match the required 32kpa?*
3. *Whether the Authority properly dismissed the Appellant's application on ground that the Procurement Entity (KCCA) properly evaluated the Appellants offered bulldozer when the empirical evidence required to evaluate the Applicant was not available and that it was not a requirement in the bidding document yet it is only from such where technical specifications could be obtained by an expert arbiter?*
4. *Whether the Appellant is entitled to be evaluated on the technical specifications by considering empirical evidence by a third party expert arbiter who explains adjustment of the prescribed ground pressure to the required 32kpa from the maximum ground pressure of 34.1 kpa ascribed to the Appellants Bulldozer?*
5. *What are the remedies available to the Appellant?*
 - a) *We propose that the Appeal be upheld and the award to the unqualified bidder be cancelled.*
 - b) *The Appellant who had a lower priced bid by approximately UGX300, 000,000/- be awarded the contract with the offered Bulldozer (D6R)*

c) *The Appellant be refunded the fees paid for administrative review.*

d) *Any other remedy the tribunal shall deem fit*

3.0 DISPOSAL OF APPLICATION

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

- (1) The Applicant's Application to the Tribunal dated 26th April 2017, Annexes to the Application, it's written and oral submissions.
- (2) The Authority's response to the Application, Annexes to the response, it's written and oral submissions.
- (3) The 2nd Respondent's response to the Application, Annexes to the response, it's the written and oral submissions

3.1 The Tribunal conducted a hearing for the Parties on 8th May 2017. The Applicant was represented by Mr. Geoffrey Nangumya, while the Authority was represented by Ms. Rebecca Masajjege, the second respondent was represented by Mr. David Oyo a representative of the Applicant was present at the hearing.

4.0 SUMMARY DECISION

4.1 In accordance with Section 91 I (7) of the Act, the Tribunal delivered a summary of this decision on Thursday 11th May 2017. What follows is the detailed reasoning in support of our decision.

5.0 ISSUES

5.1 Four (4) issues were formulated by the Parties for resolution by the Tribunal as follows:

- (a) *Whether the application is filed within the statutory time period?(Framed as a Preliminary Objection);*
- (b) *Whether the Authority erred in law and fact to uphold the 2nd Respondent's decision that the equipment offered in the Applicant's bid did not comply with the technical requirements in the Entity's bidding document?*
- (c) *Whether the Applicant is entitled to be evaluated on the technical specifications by considering empirical evidence by a third party expert arbiter who explained adjustment of the prescribed ground pressure to the required 32kpa from the maximum ground pressure of 34.1kpa ascribed to the Applicants bulldozer.*
- (d) *What remedies are available to the Parties*

6.0 SUBMISSIONS BY COUNSEL

- 6.1 In their written submissions Counsel for the Authority raised a Preliminary objection in which they argued that the instant application was filed outside the statutory time period provided for in Section 91L(I) (C) of the PPDA Act 2003 as amended. (The Act).
- 6.2 At the hearing the preliminary objection was abandoned and the parties presented arguments on the remaining three (3) issues framed above.
- 6.3 **Counsel for the Applicant in support of the second issue argued that, the root of the appeal was that the tender document issued by the 2nd Respondent contravened regulations 24(2), 24(3), 25(2) (f), 28(1) of the *Public Procurement and Disposal of Public Assets(Rules and Methods for Procurement of Supplies, Works and Non Consultancy Services) Regulations SI 8/ 2014*). Counsel complained that the parameters of the tender document were weighted to suit the eventual best evaluated bidder.**
- 6.4 Counsel argued that the impugned procurement arose out of another process which was stopped following its complaint to the Accounting Officer. Counsel argued that the impugned process was biased because it did not contain an unambiguous precise description of generic goods to be supplied. He argued

that the specifications in the tender document were slanted to favour the eventual best evaluated bidder, in particular the requirement for a bulldozer with maximum ground pressure of 32kpa.

- 6.5 Counsel relying on a technical report, written for the Applicant's benefit which was filed together with their application argued that the technical manufacturer's specification for the D6HLGP showed that it had a maximum ground pressure of 31.9 kpa.
- 6.6 Counsel on the other hand argued that the technical specifications for the machine that they offered to supply (the D6RLGP), had a maximum ground pressure of 34kpa which could be adjusted to the tender requirement of 32kpa. He pointed out that the Applicant's machine was much lighter than the machine supplied by the BEB. Finally he argued that the machine supplied by the BEB was obsolete and had been replaced by the machine which the Applicant had offered to supply to the Entity.
- 6.7 In opposition to the application, Counsel for the Authority argued that Section 6 of the bidding document provided for supply of a Bulldozer LGP and a Hydraulic Chain Excavator. She argued that the Entity required the bidders to submit undercarriage specification of a maximum ground pressure of 32kpa, however the Applicant did not submit any literature in its bid indicating the ground pressure of the Bulldozer it sought to supply.
- 6.8 Counsel stated that the 2nd Respondent was only able to establish that the ground pressure of the Applicant's bulldozer was 34.1kpa after a due diligence exercise conducted by the Entity.
- 6.9 Counsel concluded her submissions by repeating that the Applicant's bid was non - responsive because it did not meet the requirement of a maximum ground pressure of 32kpa.
- 6.10 Counsel for the 2nd Respondent argued that the impugned procurement arose out of a decision to re- tender the procurement for a framework contract for hire of earth moving equipment for Kitezi landfill. Five bidders expressed interest and all were duly evaluated by the second Respondent.

- 6.11 Counsel argued that the D6RLGP Bulldozer presented by the Applicant with a ground pressure of 34.1 kpa did not comply with the technical requirement of 32kpa. He pointed out that the evaluation committee had also noted that the Applicant's Bulldozer exerted 220kg per square meter more pressure than the required maximum ground pressure. Referring to the BEB notice, Counsel informed the Tribunal that the 2nd Respondent had specified a machine with a maximum ground pressure of 32kpa, because machines with lower ground pressure performed better than those with a higher ground pressure.
- 6.12 Counsel argued that the BEB had complied with the specifications in the tender documents, and therefore the instant application was misconceived.
- 6.13 In support of the second issue, Counsel for the Applicant argued that the evaluation committee of the second Respondent did not consider technical advice on the criteria against which satisfactory performance of the specifications in the bidding document could be achieved. Counsel argued that the maximum ground pressure which the Applicants bulldozer (D6RLGP) exerted was adjustable to the maximum range of 32kpa which the 2nd Respondent required. Counsel concluded by arguing that the Applicants bulldozer was better suited for the 2nd Respondent given its light weight and ability to operate without exceeding the 2nd Respondents limit of ground pressure. Counsel relied on their technical report and requested that the advice of the Government Mechanical Engineering Services at the Ministry of Works and Transport be obtained to enable proper evaluation of their machine and the BEB's machine.
- 6.14 In response to the arguments presented on the second issue Counsel for the 1st Respondent declined to respond because the issue of an expert's report had not been raised at the hearing before the Authority.
- 6.15 Counsel for the 2nd Respondent argued that they were not bound to act or consider the evidence of the Applicant's expert and he requested the Tribunal to disregard the unsolicited 'expert's report'.
- 6.16 In conclusion, Counsel requested the Tribunal to uphold the Authority's finding on this issue.

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.

7.2 In resolving this application, the Tribunal will deal with the issues in the same order as presented by the parties.

7.3 To determine whether the Authority was right in arriving at the decision, rejecting the Applicants application for administrative review, on the grounds that the Applicants bid was non- responsive because it offered a caterpillar bulldozer with maximum ground pressure of 34.1 kpa which was 2.1 kpa in excess of the requirement in the bidding document, we must revisit Section 6 Statement of Requirements of the bidding document.

At page 60 of the document under the paragraph titled ***“BULLDOZER LGP SPECIFICATIONS”*** The 2nd Respondent specified as follows;

DIMENSION	Min Min	Ground Clearance 1.3 Ftin/ 382mm Shoe size 36in/ 915mm width
Undercarriage	Maximum Manimum	Ground pressure 32kpa Ground Contact Area 6m ²

7.4 The bid document specifications are clear; what the 2nd Respondent required was a Bulldozer whose specifications had a maximum ground pressure of 32kPa. On the face of it therefore the Applicant’s bulldozer with a maximum ground clearance of 34.1 kpa was non-compliant. In the Evaluation report the 2nd Respondent conducted a “post qualification” exercise on the BEB and the Applicant and at page 7 of 16 of the report, the committee stated as follows; *“According to the user, this Bulldozer Low Ground Pressure (LGP) is the most important equipment for proper operations at the landfill. The critical parameter is the ground pressure exerted by the machine on the garbage. The lower the ground pressure, the better the performance as the machine easily floats on the garbage. M/s Valley Technical Services Ltd presented a bulldozer D6R LGP hired from Pineacreas Ltd. This D6R LGP has a ground pressure of 34.1 Kpa which does not comply with the technical requirements. The D6R LGP exerts 220kg per square metre more pressure than the maximum ground*

pressure required on site. Despite having a higher contact area (6.4m²) than the D6H LGP (6m²) offered by M/s Nippon Parts Uganda Ltd, the D6R LGP is much heavier in terms of operating weight (837.4 kg heavier than D6HLGP). Therefore, Valley Technical Services was found non-compliant.”

- 7.5 The Tribunal examined the report adduced by the Applicant and its major complaint that the bid specification was not suitably generic and that its bulldozer (D6H LGP) was more modern and lighter, more maneuverable with adjustable ground pressure to a maximum of 34.1 kpa. The Tribunal also noted that the Applicant’s price was lower at Ugx 2,779,785,000/- as compared to the BEB price of Ugx 2,918,694,600/-
- 7.6 The Tribunal noted that the composition of the Evaluation Committee did not include a Mechanical Engineer or Technician with competence to interrogate the competing claims of the Applicant and BEB on the suitability of their respective machines.
- 7.7 In the circumstances, the Tribunal is not persuaded that the 2nd Respondent evaluation was properly conducted in accordance with the requirements and specifications of the bidding document or that the 2nd Respondent conducted the procurement in accordance with principle of maximization of competition and ensuring value for money.
- 7.8 The Tribunal also noted that the post qualification evaluation exercise was undertaken on both the Applicant and the Best Evaluated Bidder.

Section 34 (1) of The Public Procurement and Disposal of Public Assets (Evaluation) Regulations 9/2014, provides;

(1) An evaluation committee shall undertake a post qualification evaluation to confirm whether the best evaluated bidder has the capacity and resources to effectively execute procurement for the procuring and disposing entity.

- 7.9 The post qualification exercise undertaken on both the BEB and the Applicant was irregular and contravened Section 34(1) of the regulations as cited.

7.10 For all the reasons above we allow the application and set aside the decision of the Authority.

8.0 **DECISION OF THE TRIBUNAL**

- (1) The Application is allowed.
- (2) The decision of the Authority is set aside
- (3) The Tribunal finds that the post qualification evaluation was not done in accordance with Regulation 34 of the PPDA (Evaluation) Regulations, 2014.
- (4) The Entity is directed to re- evaluate all the bids before a new evaluation committee. The Committee should utilize the services of an expert in mechanical engineering.
- (5) Each Party shall bear its own costs.

DATED this 16th day of August, 2017

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