

THE REPUBLIC OF UGANDA

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

APPLICATION NO 4 OF 2016

**APPLICATION FOR ADMINISTRATIVE REVIEW OF PROCUREMENT OF WORKS IN
RESPECT OF THE TENDER FOR CONSTRUCTION OF RWENGAAJU MODEL VILLAGE
IRRIGATION SCHEME IN KABAROLE DISTRICT.
MWE/WRKS/14-15/00039**

APPLICANT: CHINA GEO- ENGINEERING CORPORATION

RESPONDENT: MINISTRY OF WATER & ENVIROMENT.

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

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS

- 1.1 On 10th September 2015, the Ministry of Water and Environment (hereinafter referred to as 'the Entity') requested for advice from the Authority with regard to whether the failure to submit a code of ethical conduct in business and certified copies of academic documents of proposed personnel should be regarded as non – material deviations.
- 1.2 By letter dated 18th September 2015, the Authority guided the Entity that the failure to sign and submit a code of ethical conduct in business can be treated as a non – material deviation in instances where a bidder has signed a standard Bid Submission Sheet. The Authority further advised that the failure to submit academic qualification documents of proposed personnel affects the responsiveness of the bid and was a material deviation.
- 1.3 By letter dated 19th October 2015, the Entity sought further guidance from the Authority in respect of the Procurement Reference No. MWE/WRKS/14 – 15/00039 (hereinafter referred to as the 'impugned procurement') with regard to the financial comparison of the bid prices of the Best Evaluated Bidder and the lowest read – out bid price and the necessity to carry out due diligence for a non – technically compliant bid.
- 1.4 By letter dated 29th October 2015, the Authority gave its advice regarding the issues raised in the Entity's communication dated 19th October 2015.
- 1.5 By letter dated 26th November 2015, the Entity communicated to the Applicant's Advocates informing them that it had submitted the complaint regarding the impugned procurement to PPDA.
- 1.6 By letter dated 27th November 2015, the Entity communicated to the Authority stating that it had received an application for administrative review from China Geo – Engineering Corporation (hereinafter the "Applicant") regarding the impugned procurement and that it was not in a position to conclusively make a decision in the matter since it required legal interpretation. The Entity requested the Authority to address the issues raised in the complaint.

- 1.7 The Authority advised the Entity to handle the application for administrative review in accordance with the relevant provisions of the law and the Entity was also advised to consult the Attorney General where legal advice was required.
- 1.8 On 8th December 2015, the Accounting Officer of the Entity dismissed the administrative review application by the Applicant.
- 1.9 On 18th December 2015, the Applicant applied for administrative review to the Authority in respect of the impugned procurement.
- 1.10 On 19th January 2016 the Authority declined to handle the administrative review application by the Applicant on account that it had a conflict of interest since it had already pronounced itself on the issues raised in the application.

2.0 **APPLICATION FOR REVIEW OF THE ACCOUNTING OFFICER'S DECISION**

- 2.1 On 22nd January 2016, the Applicant applied to the Tribunal for a review of the decision of the Accounting Officer of the Entity, following the decision of the Authority in its letter, dated 19th January 2016 not to entertain the Applicants complaint filed on 18th December 2015 on grounds that there was a conflict of interest.
- 2.2 The Application was brought under Section 91 I (1) and (2) because the Authority declined to hear the Applicant because of conflict of interest.

The Authority filed submissions and stated that it was not a party to the application and that the Tribunal should determine exclusively between the parties (China Geo- Engineering Corporation and Ministry of Water and Environment)

- 2.3 The grounds for the Application to the Tribunal were as follows:-

1. ***That the refusal to provide the information requested by the Applicant was a breach of Section 89 of the Act.***
2. ***That the decision of the Accounting Officer to dismiss the Complaint was unlawful and should be set aside; and***

3. That the failure by the Entity to take into account the principles of maximizing competition and value for money was contrary to provisions of the Act.

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 22nd January 2016, 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.

3.1 The Tribunal conducted a hearing for the Parties on 5th February 2016. The Applicant was represented by Mr. Alexander Kibandama while the Entity was represented by Engineer Ronald Kasozi, Engineer John Twinomujuni, Assistant Commissioner and Ms. Meke Jane the Principal Procurement Officer all of whom are Civil Servants at the Entity. The Authority was represented by John Kallemera and Ms. Eron Namusoke. The managing Director of the Applicant Lin Yi and Mr. Ling wu Xin were also present at the hearing.

4.0 ISSUES

4.1 Three (3) issues were formulated by The Parties for resolution by the Tribunal as follows;-

- (a) ***Whether the Entity decision not to furnish the Applicant with information prior to lodging its application for Administrative review was justified.***
- (b) ***Whether the Accounting Officers decision to dismiss the complaint was justified.***
- (c) ***Remedies.***

5.0 SUBMISSIONS BY COUNSEL

- 5.1 Counsel for the Applicant in support of the first issue cited Section 45 of the Public Procurement and Disposal of Public Assets Act, 2003(the Act) which provides that all procurement and disposal processes shall be conducted in a manner which promotes transparency, accountability and fairness.
- 5.2 Counsel also cited Sections 89(2) and 89(3) of the Act which provide that a procuring and disposing entity shall provide a bidder who seeks administrative review with a summary of the evaluation process; a comparison of the tenders, proposals or quotations, including the evaluation criteria used; and the reasons for rejecting the concerned bids. Where such information is provided the latter section stipulates that it shall only be used for administrative review purposes.
- 5.3 Counsel submitted that they requested the Entity to provide the information in the provisions cited above however the Entity responded on 19th November 2015, by letter couched in the following terms *"the entity would appreciate a formal communication to us from the Applicant authorising you as their representative on this matter. Otherwise we are duty bound and willing to address your concern as per law established."*
- 5.4 Counsel complained that the Entity did not provide the information within the statutory 10 working days period and therefore the Applicant had no option but to submit the Complaint on 20th November 2015 without the benefit of the requested information.
- 5.5 Counsel submitted that they made two (2) additional requests for information which the Entity ignored, and instead by letter dated 8th December 2015, the Accounting Officer made a decision to dismiss the complaint without providing any information to the Applicant.
- 5.6 Counsel submitted that this was a scenario that Section 89 (2) and (3) of the Act intended to prevent so that a complaining bidder would have access to all material information before submitting its complaint. Counsel opined that the Accounting Officer's decision must be set aside on this basis alone because compliance with Section 89(2) and (3) of the Act was not optional but compulsory and the Entity's failure to comply rendered the decision of the Accounting Officer illegal and therefore a nullity.

- 5.7 Counsel concluded by making a prayer of the Applicant for the Accounting Officer's decision to be set aside.
- 5.8 In support of the second issue Counsel for the Applicant argued that by a letter dated 8th December 2015, the Accounting Officer made a decision to dismiss the Applicants bid on grounds;- *"That the Applicant does not dispute the reason for its elimination as stated in paragraph 5.2 of the complaint;"*
- 5.9 Counsel submitted that the accounting officer failed to read and address his mind to the gist of the Complaint or simply ignored the Applicants submission.
- 5.10 Counsel criticised the Authority for giving erroneous advice to the Entity which relied on the said advice in reaching the conclusion that failure to submit certified copies of the academic qualification documents of proposed personnel was a material deviation.
- 5.11 Counsel argued that the rejection of the Applicants bid on those grounds was unfair unjust and contrary to the law because:-
- (i) All the Academic qualifications of the Applicants personnel were fully set out in the Bid Documents and that the only documents that were not attached were copies of their personnel's academic certificates, contrary to the reasons advanced by the Entity in their letter dated 13th November 2015 which stated:-
- "Academic qualification documents of all the personnel proposed for the assignment was not submitted as required in part 1: Section 4 bidding forms of the bid document".*
- (ii) The Evaluation Committee failed to exercise their powers properly and diligently as required by the Evaluation Regulations and accordingly came to a wrong conclusion.
- 5.12 Counsel argued that the mere fact that the Applicant's Bidding Documents were not in strict compliance with the requirements of Form 2 did not render them void because the Evaluation Committee was required to satisfy itself

that the omission to include such documents was so substantial that it affected the overall character of the Applicant's Bid, and that if the omission were to be corrected, it would unfairly impact on other competitive bids.

- 5.13 Counsel submitted that the Evaluation Committee was required to evaluate the deviation/omission in accordance with Regulation 11(2) of the Evaluation Regulations and ITB 28.2 of Section 1 of the Bidding Document. The Evaluation Committee needed to satisfy itself that the omission by the Applicant was material.
- 5.14 Counsel argued that before coming to the conclusion that a bid was non-compliant on account of a material deviation it ought to remind itself of the provisions contained in ITB 29.2 which provided that an omission could be corrected if it was not related to any aspect of the price of the bid.
- 5.15 Counsel argued that the Applicant's Bid was rejected for not providing additional information that was clearly not envisaged to be used for the evaluation process; he opined that the right and appropriate course of action was for the Evaluation Committee to request for the additional information in accordance with ITB 29.2 from the Applicant. This was not done and accordingly, the Accounting Officer should have annulled the decision to reject the Applicant's Bid.
- 5.16 In conclusion Counsel for the Applicant made the following prayers:-
- (a) That the Tribunal reviews and sets aside the decision of the Accounting Officer dated 8th December 2015;
 - (b) That the Tribunal directs the Entity to accept submission of academic documents of the Applicant's key staff;
 - (c) That the Tribunal orders the Respondent to evaluate the financial proposal of the Applicant; and
 - (d) That this Honorable Tribunal orders the stay of the procurement process that is the subject of this dispute pending the outcome of this Application.

5.17 In response to the submissions of the Applicant on the first issue the representatives of the Entity conceded that they received a letter from the the Applicant's advocates', M/s ENS Africa Advocates, dated 16th January 2016 indicating that they intended to commence administrative review proceedings on behalf of their client. That letter sought the following information from the Entity;-

- (i) A summary of the evaluation process including all the relevant correspondence and documents relied on in the process;
- (ii) A detailed financial comparison of their clients bid and the bid of M/s Dott Services Ltd; and
- (iii) The detailed reasons for rejecting their clients bid.

5.18 They argued that the letter from the Applicant's representatives did not conform to the requirements under the Act. They also argued that the Applicants advocates did not provide a power of attorney or written communication from the Applicant confirming that they had instructions to receive the documents they had requested. The Applicant's also argued that they would have contravened Sections 47(b) (ii) and 47 (iv) (c) of the Act if they availed the Applicant with the information sought for by their advocates. They concluded that the Applicant had not suffered any prejudice because all the information requested for by the Applicants representative had been included in the best evaluated bidder notice.

5.19 Responding to the second issue the representatives of the Entity argued that the Bidding document at Part 1 Section 3- and Clause 6.1.1 of the ITB required demonstration by the bidder that it had the requisite personnel armed with sufficient academic qualifications set out in the bidding criteria. They pointed out that the bidding documents obliged all bidders to provide those details in the specified fields for evaluation. They pointed out that the bidding documents emphasized in italics as follows;

NB: for education and professional qualification; Attach certified copies if (sic) obtained in Uganda. For Foreign firms attach Certification as to the

equivalence of qualification from National Council of Higher Education in Uganda.

- 5.20 They argued that to comply with the above requirement all bidders during the Technical Evaluation stage had to attach certified copies of academic qualifications of the proposed personnel. If the academic qualifications had been obtained abroad the bidders were duty bound to provide an equivalence certification of those qualifications from the National Council of Higher Education.
- 5.21 They submitted that the Applicant's bid had a material deviation and was thus rendered substantially non-compliant and un responsive when they failed to provide certified copies of the academic qualifications of the personnel and i equivalence certificates from the National Council for Higher Education.
- 5.22 In conclusion they submitted that the Applicant's bid had been found to be non-responsive at the detailed evaluation stage and therefore did not undergo any financial evaluation under the Technical compliance selection method which was the prescribed bidding methodology.
- 5.23 They prayed that the Tribunal upholds the decision of the Accounting Officer and dismiss the application with costs.

6.0 RESOLUTION BY THE TRIBUNAL

- 6.1 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.
- 6.2 In resolving this application the Tribunal will deal with the issues in the same order as presented by the parties.
- 6.3 To determine whether or not the Entity's failure to provide the information requested for by the Applicant was legal, we have to revisit Section 89 of the PPDA Act which provides as follows:-

89 Administrative Review

- (1) A bidder may seek administrative review for any omission or breach by a procuring and disposing entity of this Act, or any provisions of bidding documents, including best practices.
- (2) A procuring and disposing entity shall provide a bidder who seeks administrative review with:-
 - (a) A summary of the Evaluation Process;
 - (b) A comparison of the tenders proposals or quotations, including the evaluation criteria used; and
 - (c) The reasons for rejecting the concerned bids.
- (3) The information provided to a bidder under subsection (2) shall be used only for administrative review purposes.

6.4 From the outset it should be noted that the provisions of Section 89 are couched in mandatory terms. The purpose of the legislation is to provide an aggrieved bidder with sufficient information to challenge a procurement process in which it has taken part.

6.5 Turning to the facts before us, the Applicant's advocates sought information as prescribed by law within the very short statutory time frame to lodge an administrative review on 16th November 2015.

6.6 The Entity responded on 19th November 2015 (the penultimate day) for the Applicant to lodge its application for administrative review advising the Applicant's advocates to obtain a formal letter from the Applicant "*authorizing the advocates as their representative*". The Applicant thereafter filed their application without obtaining information from the Entity on 20th November 2015. The Applicant's advocates made additional requests for information on 1st December and 8th December 2015. Both these requests were ignored by the Accounting officer.

- 6.7 The Entity as seen above argued that it was unable to provide the information because the Applicant's advocates had no instructions and that provision of the information sought would have contravened Section 47 b (ii) which precludes disclosure of information where the right to privacy is infringed and Section 47 (iv) (c) of the Act which precludes disclosure of information if such disclosure would disadvantage a bidder in ongoing commercial negotiations or in commercial completion.
- 6.8 The purpose of Section 89 as already stated is intended to ensure that a bidder's right to have the a Procuring and Disposing Entity's decision reviewed is preserved. The section in addition upholds the important procurement principle of equality of arms of both the bidder and the procuring entity. In other words the bidder who has gone to considerable expense to prepare and lodge a bid should not have their statutory right of administrative review constricted, weakened or fettered on the whims of an Accounting Officer who decides to frustrate an Administrative Review process by withholding information in the Entity's keeping.
- 6.9 It is inappropriate for the Entity to doubt the authority of the Applicants Counsel to obtain information on their Clients behalf. If the Entity had any doubt about the Applicants legal representatives it could have easily sought clarification by making a telephonic or email enquiry requesting the Applicant to confirm that it had appointed Legal Counsel.
- 6.10 Sections 47 b (ii) and 47(iv) (c) cited in support of the Entity's decision are inapplicable in the context of an administrative review, because the Administrative Review process is a quasi-judicial process in which the decision of the entity is suspended pending a fresh review of the procurement process. This exercise can only be undertaken after full disclosure of all the material facts to the aggrieved party to ensure that the basic procurement and disposal principles of transparency, accountability and fairness are observed.
- 6.11 We find therefore that the explanation advanced by the Entity for noncompliance with the mandatory provisions of Section 89 of the Act reproduced above both inadequate and unpersuasive.

6.12 We hold that the Entity acted contrary to the law when they refused to avail the Applicants representatives with the information they had sought to lodge their application for Administrative review before the Accounting Officer.

6.13 We now turn to the second issue which requires us to determine whether the Accounting Officers decision was lawful.

6.14 In their letter dated 8th December 2015, the Accounting officer dismissed the Applicants application for Administrative Review on the basis inter-alia that he had sought guidance from the PPDA who advised that the failure by the Applicant to submit certified copies of the academic qualifications of their proposed personnel was a material deviation.

6.15 Material deviation in a bidding document is defined in Regulation 11(4) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014, which 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;

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

(d) Impacts the key factors of a procurement including cost, risk, time and quality and causes:-

(i) unacceptable time schedules, where it is stated in the bidding document that time is of the essence;

(ii) unacceptable alternative technical details, such as design materials, workmanship, specifications, standards or methodologies; or

(iii) unacceptable counter-bids with respect to key contract terms and conditions, such as payment terms, price adjustment, liquidated damages, sub-contracting or warranty.

6.16 The Tribunal recalls its decision in **Application 1/16 China Aero-Tech International Engineering Cooperation (CATIC)-VS- PPDA** in which the Tribunal set out a test to guide Evaluation Committees in making a determination of whether an omission in a bidding document was material or not.

At page 7 of that Decision the Tribunal held as follows;

The test to determine whether a deviation is material is an objective not subjective test. In determining whether an omission is material deviation the Entity must first determine whether a bid was substantially compliant and responsive.

Guidance as to what constitutes a substantially compliant and responsive bid can be obtained from the Standard Bidding Document for the Procurement of Works by Open and Restricted Bidding issued by PPDA March 2014 under Section 28, Instruction to Bidders which provides;

28. *Compliance and Responsiveness of Bids*

28.1 *The Employer's determination of a Bid's compliance and responsiveness is to be based on the contents of the bid itself.*

28.2 *A substantially compliant and responsive bid is one that conforms to all the terms, conditions, and specifications of the Bidding Document without material deviation, reservation, or omission. A material deviation, reservation, or omission is one that:*

(a) *affects in any substantial way the scope, quality, or performance of the Works specified in the Contract; or*

(b) *limits in any substantial way, inconsistent with the Bidding Document, the Employer's rights or the Bidder's obligations under the Contract; or*

(c) *if rectified would unfairly affect the competitive position of other Bidders presenting substantially compliant and responsive bids.*

(d) *impacts the key factors of a procurement including cost, risk, time and quality and causes*

(i) *unacceptable time schedules, where it is stated in the bidding document that time is of the essence;*

(ii) *unacceptable alternative technical details, such as design, materials, workmanship, specifications, standards or methodologies; or*

(iii) unacceptable counter-bids with respect to key contract terms and conditions, such as payment terms, price adjustment, liquidated damages, sub-contracting or warranty.

28.3 If a bid is not substantially compliant and responsive to the Bidding Document, it shall be rejected by the Employer and may not subsequently be made compliant and responsive by the Bidder by correction of the material deviation, reservation, or omission.

At page 10 of the same Decision the Tribunal held;

“While exercising its power under Regulation 10 the 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 Applicants failure to provide the information was a material omission.

An Entity should be frugal where spending of public funds is involved.”

6.17 Applying the test that was formulated by the Tribunal in the afore-cited decision we find that Applicant’s bid was substantially responsive and compliant. The omissions to provide academic qualifications of some personnel and or certificates of equivalency from the National Council of Higher Education were non material deviations that could have been clarified under Regulation 10 and 11 of the PPDA (Evaluation) Regulations, 2014.

6.18 The Accounting Officers decision dismissing the Application for Review on the basis that the Applicants bid was unresponsive on account of the “material omission” not to include the academic qualifications of some of its personnel or an equivalence certificate from National Council of Higher Education was misconceived and erroneous.

6.19 The Application is upheld.

7.0 DECISION OF THE TRIBUNAL

- i) The Tribunal sets aside the Accounting Officer dated 8th December 2015.

- ii) The Tribunal directs the Entity to request the Applicant to submit certified copies of education and professional qualifications and or certification as to the equivalence of those qualifications from the National Council of Higher Education.
- iii) The Tribunal directs the Entity to refund the administrative review fees paid by the Applicant.
- iv) Each Party shall bear its own costs.

Dated this 8th day of February 2016