

THE REPUBLIC OF UGANDA

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

APPLICATION NO. 7 OF 2016

**APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC
PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN THE MATTER OF
CIVIL WORKS FOR UPGRADING KIGUMBA-BULIMA ROAD (69 KMS) FROM GRAVEL
TO BITUMINOUS PROC. REF: UNRA/WORKS/2012-13/00001/02/01**

APPLICANT: DOTT SERVICES LIMITED

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

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

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS

- 1.1 On 2nd December 2015, Dott Services Limited (the Applicant), submitted a bid to Uganda National Roads Authority (UNRA or the Entity) for civil works for upgrading of Kigumba-Bulima Road (69 kms) to bitumous standard.
- 1.2 The bidding document under Section III: Evaluation Criteria clause 2.3.2 required bidders to have an Average Annual Turnover equal to-***Minimum***

average annual turnover of USD 45 million calculated as total certified payments received for contracts in progress or completed, within the last five (5) years”.

- 1.3 The Entity evaluated the bids and displayed a Best Evaluated Bidder (BEB) Notice in which the Entity stated that the Applicant was non-compliant to the commercial and technical evaluation because the Applicant did not have an average annual turnover of US \$45 million and lacked specific experience in two projects similar to the Kigumba-Bulima road civil works.
- 1.4 Specifically, with regard to the annual turnover, the BEB Notice stated that the Applicant was unsuccessful because it had an annual turnover of US \$ 43.826 million which is less than the US \$ 45 Million required under sub factor 2.3.2 of the evaluation criteria.
- 1.5 On 11th April 2016, the Applicant applied for administrative review to the Accounting Officer of the Entity. The Accounting Officer by letter dated 28th April 2016 dismissed the Application for administrative review.
- 1.6 Dissatisfied with the decision of the Accounting Officer, the Applicant submitted an application for administrative review to the Authority on 13th May 2016. One of the grounds for application to the Authority, was that the evaluation committee failed to note that the Applicant’s contracts for the period were denominated in US Dollars, Euros and Uganda shillings and that the entity erroneously converted the Applicant’s payments which were in US Dollars and Euros into shillings, which was unnecessary since the amounts were already in US Dollars and Euros.
- 1.7 The Authority upheld the decision of the entity that the Applicant did not meet the average annual construction turnover of US \$ 45 million, hence the Applicant’s bid could not reach the financial comparison stage.
- 1.8 The Applicant is aggrieved with the decision of the Authority, hence this Application to the Tribunal for review of the decision of the Authority.
- 2.0 **APPLICATION FOR REVIEW OF THE AUTHORITY’S DECISION.**
- 2.1 On 16th June 2016, the Tribunal received an Application from the Applicant for review of the Authority’s decision.

2.2 The grounds for Application to the Tribunal were stated as follows:

- i. ***Whether Dott Services Limited met the required average turnover of US \$ 45 million calculated as total certified payments received by Dott Services Limited for contracts completed or in progress from 2010 to 2014.***
- ii. ***Dott Services Limited quoted UGX 153,242,651,047 compared to China Railway No. 5 Engineering Group Ltd which quoted 159, 608, 817,499, a difference of over UGX 6,000,000,000.***

3.0 DISPOSAL OF APPLICATION

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

- (1) The Application to the Tribunal for review of the Authority's decision, Annexes to the Application, the Bid document, the written and oral submissions.
- (2) The Authority'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 29th June 2016. The Applicant was represented by Mr. Enos Tumusiime and Mr Tom Magezi while the Authority was represented by Mr. John Kallemera. In attendance were representatives from the Applicant company and from UNRA.

3.2 The Tribunal issued its decision in summary form on 30th June 2016 in accordance with section 91I(7) of the PPDA Act. The detailed decision appears here below.

4.0 ISSUES

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

(a) Whether the bid by Dott Services Limited met the minimum average turnover of US \$ 45 million calculated as total certified payments received by Dott Services Limited for contracts completed or in progress from 2010 to 2014.

(b) Whether the Applicant's bid was technically compliant and should be passed on for financial evaluation.

(c) Remedies available.

5.0 SUBMISSIONS BY COUNSEL

- 5.1 At the commencement of the hearing, Counsel for the Authority raised a preliminary objection, to wit, the Application made by the Applicant to the Tribunal did not include a decision of the Authority to be reviewed by the Tribunal contrary to regulation 6(2) (a) (i) of the Public Procurement and Disposal of Public Assets (Appeals Tribunal) (Procedure) Regulations 2016. Counsel submitted that the Application is therefore incomplete and should be struck out with costs. He argued that in the alternative, if the Tribunal decides to proceed with the Application, the Applicant should pay costs of thirty million shillings.
- 5.2 In response to the preliminary objection, Counsel for the Applicant stated that he had, subsequent to filing the Application with the Tribunal, filed the decision of the Authority with the Tribunal. He sought leave of the Tribunal to serve the decision on the Authority. He applied that the copy of the decision of the Authority which was subsequently filed be on record.
- 5.3 The Tribunal allowed both Counsel to address the Tribunal on the substantive merits of the Application.
- 5.4 Issues 1 and 2 were argued by both Counsel concurrently because they are interlinked.
- 5.5 On whether the bid by Dott Services Limited met the minimum average turnover of US \$ 45 million calculated as total certified payments received by Dott Services Limited for contracts completed or in progress from 2010 to 2014, Counsel for the Applicant submitted as follows:

- 5.6 The Applicant stated that under clause 2.3.2 of the bid document, the minimum of USD 45 million was to be calculated as 'total certified payments received for contracts within the last five years'. The Applicant stated that after calculating its certified payments in the different currencies i.e. US Dollars, Euros and Uganda shillings, the minimum average annual turnover of the Applicant was US Dollars 50,709, 000 which was above the minimum of USD 45 million required for a bidder to be financially and technically compliant.
- 5.7 The Applicant further contended that even if Bank of Uganda foreign exchange rates were to be applied to its annual turnover as indicated in Form FIN 3.2 of the Applicant's bid, the Applicant's minimum average turnover would be US \$ 45, 023,251.98, which is still above the minimum required in the evaluation criteria.
- 5.8 Counsel for the Applicant contended that the Entity and the Authority made an error in applying calendar year official midrate foreign exchange rates contained in R.7 (***Bank of Uganda Foreign Exchange Rates: Uganda Shillings per US\$***) to the Applicant's annual turnover for the periods 2010 to 2014 contained in Form FIN 3.2 of the Applicant's bid. He stated that the financial year of the Applicant as seen in the audited accounts attached to the bid runs from 1st July to 30th June of the next year. He further submitted that if the Entity had applied foreign exchange rates according to the Applicant's financial year, the Applicant's minimum average annual turnover in US Dollars would be US \$ 45,023,251.91. He argued that because the entity and the Authority computed the Applicant's minimum average annual turnover in US Dollars using the foreign exchange rates according to the calendar year i.e. January 2010 to December 2010 up to January 2014 to December 2014, they arrived at a minimum average annual turnover in US Dollars of US \$ 43,825,654, which is below the minimum required in the evaluation criteria, and hence disqualified the Applicant from moving to the next stage of evaluation.
- 5.9 He submitted that because the Applicant's minimum average annual turnover in US Dollars is over US\$ 45 million, the Applicant ought to have been declared compliant and be allowed to proceed to the next stage of financial evaluation. The Applicant prayed the Tribunal to find that its bid was commercially and technically compliant and should proceed to the financial evaluation stage.

- 5.10 In response to Counsel for the Applicant's submission on the issue 'whether the bid by Dott Services Limited met the minimum average turnover of US \$ 45 million calculated as total certified payments received by Dott Services Limited for contracts completed or in progress from 2010 to 2014', Counsel for the Authority submitted as follows:
- 5.11 That the requirement of a minimum average turnover of US \$ 45 million specified in sub factor 2.3.2 of the evaluation criteria had nothing to do with financial statements of a bidder, audited or otherwise. He submitted that clause 2.3.2 simply required 'total certified payments received by a bidder for contracts completed or in progress in the last five years i.e. from 2010 to 2014'.
- 5.12 Counsel for the Authority argued that the Applicant did not adhere to the requirement in 2.3.2 because it did not provide details for total certified payments in Form FIN 3.2. He contended that the minimum of USD \$ 45 million was to be calculated from total certified payments received in contracts completed or in progress and not from figures generated from audited accounts for specific financial years. He argued that certified payments are received throughout the year i.e. any part of the year and not only financial year. Counsel further submitted that it was wrong for the Applicant to state that the Entity should have applied Bank of Uganda exchange rates for the financial year. He concluded that it was prudent and appropriate for the Entity to apply Bank of Uganda exchange rates for the calendar year, which when applied, the Applicant's average minimum annual turnover for 5 years was below the required USD \$ 45 million.
- 5.13 Counsel for the Authority further submitted that the annual turnover figures submitted by the Applicant in its bid under Form FIN 3.2 were all in Uganda shillings, and that the Applicant's Form FIN 3.2 contained no details regarding calculation of the Applicant's certified payments in the different currencies i.e. US Dollars, Euros and Uganda shillings. He argued that the Form required the bidder to state the amount and the currency. That the Applicant chose to state its annual turnover in Uganda shillings, and that this is what the entity used to compute the USD equivalent.

5.14 Counsel further stated that right from bid submission through to the Application before the Tribunal, the Applicant has indicated different figures for its average turnover. In conclusion, Counsel stated that the Applicant did not meet the minimum US\$ 45 million as required in the evaluation criteria. Counsel submitted that the Application is untenable and should be dismissed with costs.

5.15 In rejoinder to Counsel for the Authority's submission, Counsel for the Applicant submitted that the Applicant did nothing wrong in using financial years as opposed to calendar year in its financial statements. He reiterated what he had stated earlier that the bid document required bidders to submit audited financial statements and that the Applicant presented its financial statements in accordance with the bid document. Counsel wondered what the annual turnover would be based on if not on financial statements which are derived from payments received in the course of its business as a contractor. He argued that what the Tribunal should determine in this Application is not the Applicant's turnover amounts for the years 2010 to 2014 but rather, the Bank of Uganda foreign exchange rates applied by the Entity to the turnover amounts to obtain the USD equivalent.

6.0 RESOLUTION BY THE TRIBUNAL

6.1 The Tribunal will first make a decision on the preliminary objection raised by the Authority which was that the Application before the Tribunal was incomplete on account that the decision of the Authority sought to be reviewed was not attached to the Application contrary to regulation 6(2) of the PPDA Appeals Tribunal Procedure Rules 2016. For ease of reference, regulation 6(2) (a) (i) of the PPDA (Tribunal) (Procedure) Regulations are reproduced here below:

" The application shall include a brief statement of the reasons for the Application and issues on which a decision is sought and shall be accompanied by the decision to be reviewed where applicable"

6.2 The Tribunal acknowledges the fact that at the time of filing the Application, the decision of the Authority sought to be reviewed was not attached to the Application as required by the Tribunal Procedure Regulations. The Tribunal

however brought this fact to the attention of the Applicant soon after the Application was filed. The Applicant responded immediately by filing the decision with the Tribunal. By the time of the hearing, the decision of the Authority was already part of the Tribunal's record. The Tribunal notes however that the Applicant should have served the Authority with the decision soon after filing it with the Tribunal. The Tribunal is however of the view that this omission was expeditiously corrected by the Applicant and finds no reason why the Application should be dismissed on account of this irregularity. The preliminary objection is overruled.

- 6.3 The essence of the dispute before the Tribunal is a determination as to whether the Applicant (Dott Services Limited) met the required average turnover of US \$ 45 million calculated as total certified payments received by Dott Services Limited for contracts completed or in progress from 2010 to 2014.
- 6.4 The Applicant states that its minimum average annual turnover for the period 2010 to 2014 calculated using certified payments in the different currencies received by the Applicant i.e. US Dollars, Euros and Uganda shillings over the period 2010 to 2014, is US Dollars 50,709, 000, which is above the minimum of USD 45 million required for a bidder to be financially and technically compliant. The Applicant also contends that even if Bank of Uganda rates are applied to its annual turnover as stated in Form FIN 3.2 of the Applicant's bid, the Applicant's average annual turnover would be US \$ 45, 023,251.98.
- 6.5 The Authority on the other hand contends that the annual turnover figures submitted by the Applicant in its bid under Form FIN 3.2 were all in Uganda shillings and not in US Dollars or Euros. That consequently, the Entity was right to verify the Applicant's Uganda shilling amounts by reference to the Bank of Uganda official rates since the Bank of Uganda is the Authority in Uganda for foreign exchange rates for conversion of Uganda shillings to other currencies.
- 6.6 In determining this matter, the Tribunal considered the Applicant's turnover for the five years as stated in its bid as Form FIN 3.2, and the exchange rates applied to the turnover by the Entity and the Authority. For ease of reference, Form FIN 3.2 as appeared in the Applicant's bid is reproduced below:

Annual Turnover (Construction Only)		
Year	Amount in (UGX)	USD Equivalent
2014	171,515,250,000	66,011,000
2013	145,462,095,000	56,080,000
2012	78,729,029,000	39,641,000
2011	67,310,435,000	35,070,000
2010	84,485,093,000	56,741,000
Average annual construction turnover	109,500,381,000	50,709,000

6.7 The Tribunal notes that Form FIN-3.2 above does not show how the Applicant's minimum average annual turnover for the period 2010 to 2014 calculated using certified payments in the different currencies received by the Applicant i.e. US Dollars, Euros and Uganda, was arrived at, either by way of Notes to the Form or otherwise.

6.8 The Applicant has argued that the bid document did not require the bidders to attach certified payments from which the entity could have clearly seen the payments in the different currencies and the different foreign exchange rates applicable to those payments. On the issue of certified payments, the Tribunal observed the decision of the Authority appearing in XIV page 11 of the Authority's decision which reads as follows:

"The Authority noted that UNRA in its decision stated that no payment certificates were submitted for each of the five years. The Authority found that there was no requirement in the bidding document to submit a payment certificate to support the requirement for average annual turnover but rather that the bidders were required to fill Form 3.2 indicating the annual average turnover date from construction within the last five years, showing the amount and currency and the US dollar equivalent".

While this argument has merit, it leaves the question, how would the entity have ever deciphered the rates used by the Applicant in converting its average annual turnover from Uganda shillings to USD equivalent other than a simple conversion using the official Bank of Uganda rates for the relevant period?

6.9 In the premises, the Tribunal is in agreement with the use of Bank of Uganda exchange rates by the entity in converting the annual turnover amounts for the period 2010 to 2014 provided by the Applicant in Form FIN-3.2.

6.10 The Applicant, during the hearing of this Application presented the BoU rates month per month for the relevant period. For ease of reference, a few of the BoU rates are extracted in the Table below.

**“Foreign Exchange Rates
(Uganda shillings per US\$)**

Year/Month	Bureau Weighted Average		Bureau	Official
	Buying Rate	Selling Rate	Mid Rate	Mid Rate
Jul-09	2,094.48	2,112.55	2,103.52	2,110.77
Aug-09	2,065.97	2,074.53	2,070.25	2,071.67
Sep-09	1,962.69	1,970.01	1,966.35	1,961.90
Oct-09	1,895.15	1,903.53	1,899.34	1,898.28
Nov-09	1,852.08	1,869.36	1,860.72	1,873.78
Dec-09	1,891.55	1,897.82	1,894.69	1,896.64
Jan-10	1,928.84	1,945.67	1,937.26	1,935.63
Feb-10	1,989.75	1,988.74	1,988.74	1,996.54
Mar-10	2,078.14	2,078.95	2,078.55	2,086.37
Apr-10	2,079.85	2,100.12	2,089.99	2,083.00
May-10	2,164.33	2,170.20	2,167.27	2,174.57
Jun-10	2,243.60	2,253.67	2,248.64	2,257.44
Jul-10	2,249.12	2,264.98	2,257.05	2,257.29
Aug-10	2,222.09	2,227.85	2,224.97	2,230.94
Sep-10	2,246.66	2,253.74	2,250.20	2,251.30
Oct-10	2,258.01	2,263.37	2,260.69	2,264.82
Nov-10	2,284.59	2,287.46	2,286.03	2,288.87
Dec-10	2,297.87	2,318.52	2,308.20	2,303.93
Jan-11	2,323.64	2,330.42	2,327.03	2,332.47
Feb-11	2,328.38	2,333.10	2,330.74	2,341.93
Mar-11	2,383.02	2,403.94	2,393.48	2,393.31
Apr-11	2,362.46	2,367.13	2,364.80	2,367.59
May-11	2,381.39	2,392.35	2,386.87	2,387.68
Jun-11	2,453.60	2,456.56	2,455.08	2,461.04
Jul-11	2,575.07	2,578.04	2,576.56	2,587.23

Aug-11	2,750.97	2,765.83	2,758.40	2,753.23
Sep-11	2,795.01	2,802.88	2,798.95	2,814.02
Oct-11	2,793.62	2,807.07	2,800.35	2,805.37
Nov-11	2,515.92	2,588.65	2,552.29	2,582.18
Dec-11	2,444.99	2,446.84	2,445.92	2,446.91

- 6.11 The Tribunal notes that in computing the Applicant's average turnover for the five years 2010-2014 using Bank of Uganda rates, the entity used the average rate for a calendar year, ignoring an important fact, which is that the Applicant's accounting period was a financial year and not a calendar year as could be clearly seen from the Applicant's audited financial statements attached to its bid.
- 6.12 The Tribunal calculated the average foreign exchange rate using a **calendar year** (basing on Table in 6.1 above) and obtained the rates that were used by the Entity as indicated in the BEB Notice i.e. 1USD: 2177.56, 2522.75, 2503.31, 2586.46, 2600.33 for 2010, 2011, 2012, 2013 and 2014 respectively.
- 6.13 A similar calculation of the average foreign exchange rate using a **financial year** starting with FY 2009-2010 up to FY 2013 to June 2014 gave a different rate i.e. 1USD 2028.88, 2323.43, 2557.15, 2591.12, 2538.03 for 2010, 2011, 2012, 2013 and 2014 respectively.
- 6.14 The footnotes to Form FIN 3.1 at page IV-34 of the Bid document provide as follows:
- "Attached are copies of the financial statements (balance sheets, including all related notes, and income statements) for the years required above complying with the following conditions:*
- *Must reflect the financial situation of the bidder or partner to a JVCA and not sister or parent companies.*
 - *Historic financial statements must be audited by a certified accountant.*
 - *Historic financial statements must be complete, including all notes to the financial statements*
 - *Historic financial statements must correspond to accounting periods already completed and audited (no statements for partial periods shall be requested or accepted).*

- 6.15 The Tribunal is in agreement with the submission of the Applicant that both the Entity and the Authority erred in using Bank of Uganda official midrates (calendar) for the years 2010, 2011, 2012, 2013 and 2014 and not the financial year as applicable. The Applicant's bid clearly indicated that Applicant's financial year ran from 1st July to 30th June of the next year.
- 6.16 The Applicant's annual turnover for 2010 was obtained from the financial statement for the FY July 2009 to 30th June 2010; for 2011 was obtained from the financial statement for the FY July 2010 to 30th June 2011; for 2011 was obtained from the financial statement for the FY July 2010 to 30th June 2011; for 2012 was obtained from the financial statement for the FY July 2011 to 30th June 2012; for 2013 was obtained from the financial statement for the year July 2012 to 30th June 2013 and for 2014 was obtained from the financial statement for the year July 2013 to 30th June 2014.
- 6.17 The Tribunal respectfully disagrees with the submission of Counsel for the Authority that the certified payments did not have to be obtained from the financial accounts. The bid document (refer to paragraph 6.15 of this decision) specifically required that this be the case and the Applicant duly submitted its audited financial statements with the bid.
- 6.18 Consequently, when calculating the annual turnover for the Applicant in USD equivalent, the Entity should have used the average foreign exchange rate that accorded with the Applicant's financial year since the Bank of Uganda posts on its website foreign exchange conversion rates for each month.
- 6.19 Had the Entity done this, the Applicant's minimum average annual turnover for the five years would have come to over USD \$ 45 million. The Tribunal finds that it was incumbent upon the Evaluation committee of the Entity to consider the Applicant's bid in its entirety by closely looking at the bid and all the attachments to the bid. By failing to see that the Applicant's accounting period ran from 1st July to June 30th of the next year, the Entity and the Authority used foreign exchange rates that do not tally with the Applicant's accounting period and hence came up with a wrong figure.
- 6.20 The Tribunal finds that the Applicant met the minimum USD \$ 45 million and is therefore commercially and technically compliant and its bid should be subjected to further evaluation.

7.0 DECISION OF THE TRIBUNAL

1. The preliminary objection raised by the Authority is dismissed.
2. The Tribunal sets aside the decision of the Authority.
3. The Applicant's bid is compliant to sub factor 2.3.2 average annual turnover of USD 45 million; the Entity (UNRA) is therefore directed to proceed with further evaluation of the Bid.
4. The Authority is directed to pay the Applicant costs of 10,000,000.

DATED this 30th day of June, 2016.