

THE REPUBLIC OF UGANDA

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

APPLICATION NO 1 OF 2016

**APPLICATION FOR REVIEW OF THE FINDINGS/DECISION OF THE PUBLIC
PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
AUTHORITY IN ADMINISTRATIVE
REVIEW OF THE TENDER FOR CONSTRUCTION OF PROPOSED 250 BED UPDF
NATIONAL REFERRAL HOSPITAL AT LOWER MBUYA.
MD/WRKS/2014-15/0017.**

**APPLICANT: CHINA NATIONAL AERO- TECHNOLOGY INTERNATIONAL
ENGINEERING CORPORATION (CATIC)**

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

**(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 The Ministry of Defence (hereinafter referred to as 'the Entity') initiated a procurement for the construction of a 250 bed UPDF National Referral Hospital at lower Mbuya. The method of the bidding process was Open International Bidding with Prequalification.
- 1.2 After the conclusion of the Prequalification process, nine firms (including the Applicant) submitted bids to the Entity on 25th September 2015.
- 1.3 On 7th October 2015 the Evaluation Committee recommended that Seyani Brothers and Company Uganda Ltd and Parbat Siyani Construction Ltd (Joint Venture) be awarded the contract for the aforementioned procurement at a contract price of UGX. 130,662,231,906/= (One Hundred Thirty Billion Six Hundred Sixty Two Million Two Hundred Thirty One Thousand Nine Hundred Six Shillings) taxes inclusive.
- 1.4 On 13th October 2015, the Contracts Committee approved the award to M/s Seyani Brothers and Company Uganda Ltd and Parbat Siyani Construction Ltd Joint Venture for construction of the 250 – Bed UPDF National Referral Hospital at Lower Mbuya at a total contract price of UGX. 130,662,231,906 (One Hundred Thirty Billion Six Hundred Sixty Two Million Two Hundred Thirty One Thousand Nine Hundred Six Shillings) taxes Inclusive.
- 1.5 The notice of best evaluated bidder was displayed from 14th October to 28th October 2015.
- 1.6 On 23rd October 2015, China National Aero – Technology International Engineering Corporation applied for administrative review to the Accounting Officer of the Entity the application was composed of eight grounds.
- 1.7 The Accounting Officer of the Entity issued the administrative review decision on 13th November 2015 wherein six grounds of the application were rejected and two grounds were upheld. The Accounting Officer directed that all the nine bids be re – evaluated.

- 1.8 On 25th November 2015 China National Aero – Technology International Engineering Corporation applied to the Authority for administrative review.
- 1.9 On 23rd December 2015 the Authority communicated its administrative review decision wherein it rejected the administrative review application by CATIC and confirmed the decision of the Accounting Officer to re – evaluate all the nine submitted bids.
- 1.10 The Applicant was dissatisfied with the decision of the Authority, hence this Application.

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY’S DECISION.

2.1 On 5th January 2016, the Applicant applied to the Tribunal for a review of the Authority’s decision.

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

1. This application to the Tribunal is locused (sic) on challenging the reasons that the entity used to justify rejection of our bid as raised by the Entity and consequent upon our application to the Authority as determined by the latter in their decision. Throughout our application, it’s our prayer that the Tribunal reviews the decision of the Authority regarding the justification and materiality of the reasons put forward for disqualification of our bid.

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 5th January 2016, Annexes to the Application, 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 18th January 2016. The Applicant was represented by Mr. Kenneth Akampurira while the Authority was represented by Mr. Uthman Segawa and John Kallemera. In attendance were representatives from both the Applicants and the Entity.

4.0 ISSUES

- 4.1 The Application raised several issues which had largely been resolved at both the Entity and Authority levels. Two issues remained for resolution by the Tribunal as follows;-

- (a) Whether the Authority was justified in rejecting the Application for administrative review on the basis of the failure of the Applicant to provide translations for qualifications of some personal and contact details for translation of some documents.*
- (b) Whether the Authority was justified in rejecting the Application for administrative review on the basis of failure by the Applicant to submit individually signed letters of confirmation of availability by each of the key personnel.*

5.0 SUBMISSIONS BY COUNSEL

- 5.1 In support of the first issue Counsel for the Applicant argued that the Authority ignored the fact that "Provision of translations for qualifications of some personnel and contact details for translations of some documents were non material omissions and therefore could be clarified. In support of this preposition Counsel cited Regulation 10(3) of the PPDA (Evaluations) Regulations, 2014 which he argued permitted an Evaluation Committee to request for clarification of a bid in situations which would not alter or amend the price of the bid or substantially change the terms of the bid or substantially alter anything which formed a crucial or deciding part of the bid. Counsel argued that the Applicant had been prequalified and that the prequalification process had disposed of a number of material issues.

- 5.2 Counsel submitted that the Entity ought to have invoked the provisions of Regulation 11(3) of the PPDA (Evaluation) Regulations 2014 and obtain clarification from the Applicant.
- 5.3 Counsel for the Applicant repeated the arguments above in support of the second issue. He also argued that the Entity would have saved over twenty (20) billion shillings if it had sought clarifications on the Applicants bid. Counsel argued that the tax payer would lose this substantial amount of money if their bid was disqualified. Counsel cited *PPDA vs_ UNRA(Uganda National Road Authority (July 2010))* in which the Authority exercising its supervisory discretion held as follows;-“ ***In light of the significant Price difference between the Best valuated Bidder and the Lowest bidder, the Entity should seek clarification from all the Bidders on their bids and waive the requirements that are deemed to be non- material in accordance with PPDA Regulations 181 and 183(4) with a view of ensuring that the Entity obtains value for money in the Procurement process***”
- 5.4 Counsel pointed out that section 48 enjoins all Procuring and Disposal Entities to evaluate and make awards bearing in mind the cardinal principles of economy efficiency and value for money.
- 5.5 He prayed that the Tribunal sets aside the Authority’s decision holding that failure by the Applicant to provide translations for qualifications of some personnel and contact details for translation of some documents were material deviations under Regulation 11(4) (b) and (c) of the PPDA (Evaluation) Regulations 2014. He prayed that the Tribunal direct the Entity to seek clarification from the bidder on translations of the Qualifications documents submitted with the bid in accordance with Regulations 10(3) and 11(3), and 11(4) of the PPDA (Evaluation) Regulations.
- 5.6 Counsel for the Authority in response argued that, Clause 13.2 of Section 1 of the bidding document provided that “*the bid, as well as correspondences and other documents relating to the bid exchanged by the bidder and the employer, shall be written in English, unless otherwise stated in the Bid Data Sheet*”.

- 5.7 Counsel submitted that Clause 13.3 of Section 1 provided that the supporting documents and printed literature that are part of the bid may be in another language provided that they are accompanied by a translation of the relevant passages in English by a competent authority, in which case for purposes of interpretation of the bid, such translation shall prevail.
- 5.8 Counsel also cited Clause 14.1 (i) of the Bid Data Sheet which required the bidder to submit contact details of the translating authorities with its bid. In summary the bidder was obligated to submit all translated documents together with the original documents and the translated document had to be certified by a government recognized translating authority in the bidder's country or an eligible country referred to in section 5 of the bidding document.
- 5.9 Counsel noted that the Applicant did not submit translations as required in its bid for all of the supporting documents and printed literature of several of its proposed staff including three proposed Field Engineers and one Electro Mechanical Engineer.
- 5.10 Counsel submitted that the Applicant had admitted in proceedings before the Authority to only providing 90 % (ninety percent) of the documents that it deemed necessary for translation which was contrary to the requirements of ITB Clause 13.3 and Clause 14.1 (i) (a) of the Bid Data Sheet which made it a requirement for all documents in languages other than English to be translated.
- 5.11 In answer to the arguments put forward by the Applicant on the second issue, Counsel for the Authority argued that the requirement to submit individually signed letters of confirmation of availability by each of the key personnel as stated in the bidding document were mandatory requirements. Counsel cited Clause 14.1(i) (b) of Section 2 of the bidding document which provided that *"the bidder shall submit with its bid as an additional document signed letters of confirmation of availability by each of the key personnel listed.* Counsel argued that the Authority had found that the Applicant had failed to comply with the above requirement and that the Applicant's omission to provide the individually signed letters amounted to a material deviation under Regulation 11(4) (b) and (c) of the PPDA (Evaluation) Regulations 2014.

Counsel submitted that the Entity's Evaluation Committee in the circumstances had properly evaluated the bid and that it was not required to seek any clarification following the Applicants failure to attach the documents.

5.12 In conclusion Counsel defended the Authority's decision which vindicated the Entity's findings that the failure of the Applicant to comply with the above requirement was a material deviation under Regulation 11 (4) (b) and (c) of the PPDA (Evaluation) Regulations, 2014. Counsel submitted that the Tribunal should not direct the Evaluation Committee of the Entity to seek further clarification from the Applicant under Regulation 10 of the PPDA (Evaluation) Regulations 2014, as prayed for by the Applicant.

6.0 RESOLUTION BY THE TRIBUNAL

6.1 The essence of the dispute before the Tribunal is a determination as to whether the Applicant's twin failures to provide translations of their personnel's qualifications with details of the translating authority and "individually signed letters of confirmation of availability by each of its key personnel" amounted to material deviation disentitling the Applicant's bid to further consideration by the Entity at the financial comparison stage under the Technical Compliance Selection(TCS) methodology which was applicable to the procurement before us.

6.2 In respect of the first issue for determination by this Tribunal, The Authority cited ITB Clauses 13.3 and 14.1 (i) (a) of the Bid data sheet which required all documentation in a language other than English to be accompanied by certified translation with contact details of the translating Authority as the basis for its finding that the Applicant had failed to comply with the mandatory requirements in the above clauses of the bidding document.

6.3 In respect of the second issue the Authority relied on Clause 14(1) (b) of Section 2 the ITB which required the bidder together with its bid to submit an additional document containing signed letters of availability of each of its listed key personnel, as the basis of its finding that failure by the Applicant to submit the document amounted to a material deviation under Regulation 11(4) (b) and (c) of the PPDA (Evaluation) Regulations 2014.

- 6.4 The Applicant however contends that the omission to submit the documents described above was not a material deviation and that the Evaluation Committee of the Entity ought to have exercised the discretion conferred upon it in Regulation 10(1) and sought clarification from the Applicant about the documentation provided or as in the instant matter the Applicant's omission to provide documentation required by the bidding document.
- 6.5 The Act has defined what amounts to material deviation 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.*
- 6.6 The test to determine whether a deviation is material or not 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.*

6.7 Applying the test laid out above it is clear that the Applicants bid was substantially compliant and responsive. The Applicant had provided the information required to enable the Entity determine its historical contract performance, capacity and both technical and quality ability. The Applicant had also provided a comprehensive list of projects undertaken. Both the Curriculum Vitae (cv's) and Certificates were provided. What was missing was the translation of the Certificates which does not fall within the definition of material deviation as stated in ITB Section 28 of the Works Bidding Documents.

Where as in the instant case, a bid is substantially compliant and responsive the entity should have waived any non-conformity in the bid and requested the Applicant to submit the translations of the certificates and documents confirming the availability of key personnel in accordance with ITB Section 29 of the bidding document which substantially reproduces the PPDA (Evaluation) Regulation 2014 which provides;

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.

6.8 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.

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

6.10 The Tribunal is not persuaded that other bidders would have been unfairly affected if the Entity had sought clarification of the omitted documentation.

6.11 The Tribunal finds 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.

6.12 The Application is upheld.

7.0 **DECISION OF THE TRIBUNAL**

1. The Tribunal sets aside the decision of the Authority in part.
2. The Entity should seek to obtain from the Applicant;
 - (a) Translations for qualifications of the affected personnel and contact details for translation of some documents;
 - (b) Signed letters of confirmation of availability by each of the key personnel
3. The Tribunal confirms the Accounting Officer's decision to re-evaluate all the nine (9) bids submitted for this procurement.

4. The Entity is directed to refund the administrative review fees paid by the Applicant.

5. Each Party shall bear its costs.

DATED this 19th Day of January 2016

SIGNED by
OLIVE ZAALE OTETE

SIGNED by
MOSES JURUA ADRIKO

SIGNED by
DAVID KABATERAINE

SIGNED by
ARCHT. JOEL KATEREGGA