

THE REPUBLIC OF UGANDA

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

APPLICATION NO 17 OF 2015

**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 BULEGENI TOWN WATER SUPPLY**

APPLICANT: GAT CONSULTS LIMITED

**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 On 21st July 2015, the Ministry of Water and Environment (the entity) initiated the procurement process for the construction of Bulegeni Town Water Supply. GAT Consults Limited (the Applicant) was one of the firms that submitted bids to the entity.

1.2 The evaluation report submitted to the contracts committee on the 2nd October 2015 indicated that the Applicant was eliminated at the technical evaluation stage due to the following reasons:

(a) the bidder's proposed work programme did not include the mandatory 12 months of defects liability period;

(b) the bidder's project director was not duly authorised to commit on behalf of the bidder with respect to the procurement;

(c) the site engineer did not demonstrate previous experience of similar nature and complexity to the project. The projects performed by staff were not stated;

(d) The draughts person did not have experience in preparation of architectural and engineering drawings. The roles played in the given projects did not demonstrate the required experience.

(e) The site foreman for plumbing works did not include any specific projects that he participated in;

(f) The site foreman for bricklaying and concrete practice proposed did not include any specific projects that he participated in. This made it impossible to prove his previous experience.

1.3 The Applicant applied to the Accounting Officer for administrative review on 12th October 2015. The Accounting Officer dismissed the complaint.

1.4 On 22nd October 2015, the Applicant applied for administrative review to the Authority. The Applicant raised three grounds at the Authority level of the administrative review process. Ground 3 which is relevant to this Application

was *'the proposed personnel in the bid demonstrated the required previous experience of similar nature and complexity and the specific projects performed'*.

1.5 The Authority did not find merit in ground 3 but found merit in the other two grounds. The Authority upheld the application by the Applicant and ordered the entity to re-evaluate the bids submitted.

1.6 The Applicant was dissatisfied with the finding of the Authority on ground 3, hence this Application.

2.0 **APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION.**

2.1 On 4th December 2015, 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. The finding on ground three of the complaint regarding personnel is unfair and not based on the facts as presented in the bid.

2. The finding on ground three contradicts the decision of the Authority to order a re-evaluation and is simply prejudicial to GAT Consults Limited in respect of the evaluation and puts it to a disadvantage.

3. We find this unlawful as it creates a bias against GAT Consults bid on re-evaluation.

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 4th December 2015, 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 16th December 2015. The Applicant was represented by Mr. Richard Mwebembezi while the Authority was represented by Mr. John Kallemera. In attendance was Mr Leonard Mugizi from GAT Consult Limited.

4.0 SUBMISSIONS BY COUNSEL

4.1 At the commencement of the hearing, Mr. John Kallemera, Counsel for the Authority raised a preliminary objection to the Application to wit, ***the Application is fatally defective because it seeks to prevent the entity from carrying out a re-evaluation which the entity has already conducted.*** The Tribunal allowed both Counsel to address the Tribunal on the preliminary objection and also on the substantive merits of the Application.

4.2 Counsel for the Authority made reference to the decision of the Authority which upheld the application for administrative review made by the Applicant at the Authority. In the decision, the Authority advised the entity to re-evaluate the bids. Counsel argued that the essence of the Application before the Tribunal is to preclude or prevent the entity from carrying out the re-evaluation. Counsel argued that because the re-evaluation has taken place, this Application has been overtaken by events and is untenable. Counsel prayed that the Tribunal dismiss the Application with costs.

4.3 Turning to the substantive ground raised by the Applicant whether the finding by the Authority on ground three of the complaint regarding personnel was unfair and not based on facts presented in the bid, Counsel stated that ground three of the Applicant's complaint was to the effect that the proposed personnel in the Applicant's bid demonstrated the required previous experience of similar nature and complexity and the specific projects performed.

4.4 He quoted Part 1 Section 3- Evaluation Methodology and Criteria, sub section 6.1.1 of the bidding document which stated that the bidder shall provide details of the proposed personnel and their experience and records in relevant Forms. For the draughts person, the bid stated that a draughts person shall have a minimum of a Diploma in Architecture or Civil and Building Engineering

from a recognised institution/university. The draughts person should also have As-Built Drawings with at least 3 years' experience in preparation of architectural or engineering drawings. Counsel submitted that there was no evidence that Mr. Jessy Musamba who was proposed as the draughts person had prepared As-Built Drawings. He argued that the Authority duly carried out an investigation into the personnel requirement in accordance with the provisions of the bidding documents and accordingly made appropriate findings with regard to ground three of the Applicant's complaint before the Authority.

4.5 Counsel further submitted that an entity is precluded from requesting for clarification in the event that there is non-conformity or an omission in the bid which is a material deviation as specified in Regulation 11 (4) of S.I No.9 of 2014. Regulation 11 (4) (c) of the said Regulations defines a material deviation to include a deviation that if corrected would unfairly affect the competitive position of other bidders whose bids are administratively compliant and responsive. The failure by the applicant to furnish in its bid the requisite information regarding its proposed personnel was a material deviation under Regulation 11(4) (c) of the said Regulations and therefore the entity could not seek for clarifications regarding the same from the applicants. He prayed that the Tribunal answers this issue in the negative

4.6 On whether the finding on ground three contradicts the decision of the Authority to order a re-evaluation and is simply prejudicial to the Applicant in respect of the re- evaluation putting the Applicant to a disadvantage, Counsel for the Authority asserted that the Authority upheld the Applicant's application for administrative review having disagreed with the Evaluation Committee's decision on ground one and two. The Authority therefore advised the Entity to re-evaluate the bids submitted. He cited the Tribunal's decision in **Application No. 3 of 2015 Peace Gloria vs. PPDA**, where the Tribunal found that the Authority correctly exercised its mandate to advise the Entity to re-evaluate all the bids. In that application, the Authority had not found merit in the Applicant's application, however it based its decision on the fact that the Entity had not adhered to the relevant Government Policy on Markets in Local Governments prior to undertaking the impugned procurement. He prayed that the Tribunal answers this issue in the negative.

- 4.7 On whether the advice to re-evaluate was unlawful and created a bias against the Applicant, Counsel submitted that in accordance with Section 91 (4) of the PPDA Act 2003 and in light of its findings on grounds one and two, the application for administrative review by the Applicant was upheld. The Authority duly and lawfully carried out its mandate under the provisions of the PPDA Act, 2003 by advising the Entity to re-evaluate all bids submitted since the reasons given by the Entity to reject the Applicant's bid as enumerated in ground one and two of the Application for the administrative review to the Authority were found unsatisfactory. He submitted that the Entity enjoys independence in the performance of its functions under Section 38 of the PPDA Act, 2003 and therefore it should not be biased by the decision of the Authority (with regard to the findings on ground three), when undertaking the re-evaluation.
- 4.8 He prayed that the Tribunal answers this issue in the negative. Counsel for the Authority prayed that the Application should be dismissed with costs.
- 4.9 In response to the preliminary objection that the application has been overtaken by events, Counsel for the Applicant submitted that the PPDA Act 2003 has preserved a right of appeal against decisions of the Authority. The Applicant exercised the right of appeal in time and this cannot be rendered useless by the entity's desire to rush to exclude the Applicant from being fairly treated at re-evaluation level. He stated that the Tribunal is mandated under section 91 L (6) of the Act to affirm, vary, set aside, substitute or refer the matter to the Authority for reconsideration.
- 4.10 On the substantive grounds of this Application which Counsel argued jointly, Counsel submitted that the personnel under contention are employees of the Applicant for over a period of years. That the personnel have each been part of a team that has executed several projects under the entity as detailed in the company's bid. With specific reference to the draughts person Mr Jessy Musamba, Counsel submitted that Mr Musamba is in charge of all the design checks and workmanship. That he is in charge of ensuring equal distribution of water facilities within the communities which implies that one has to come out with a network layout of service points, which is an as-built drawing that shows all the components of the project. He concluded on this point that the projects undertaken by the Applicant are clearly stated in Form 9 showing the

project name, client, type of work and value. That the personnel proposed for the contract clearly have the required qualifications and experience as required by the solicitation document and that therefore PPDA could not have made the finding otherwise and also to order for a re-evaluation.

- 4.11 Counsel further argued that the Authority should have ordered the entity to seek clarification on the issue of personnel from the Applicant. He asked the Tribunal to exercise its powers under section 91L(6) of the Act to set aside the findings of the Authority and order the entity to seek further clarification from the Applicant on the issue of personnel during re-evaluation. Counsel also prayed the Tribunal to make an order that the re-evaluation should be conducted by a new evaluation team to promote transparency.

5.0 RESOLUTION BY THE TRIBUNAL

- 5.1 The Tribunal will deal first with the preliminary objection raised by Counsel for the Authority. The essence of the objection is that the Application before the Tribunal is to preclude or prevent the entity from carrying out the re-evaluation. That since the re-evaluation has taken place, this Application has been overtaken by events and is untenable. The Tribunal has considered the submissions of both counsel with respect to the preliminary objection raised.
- 5.2 The Tribunal is persuaded by the submissions of Counsel for the Applicant that the right to appeal against a decision of the Authority in administrative review is preserved under the Act. Section 91I (1) of the Act provides that a bidder who is dissatisfied with a decision of the Authority may make an application to the Tribunal for a review of the decision of the Authority. Section 91L (1) (c) of the Act provides that the application for review of the decision of the Authority shall be lodged with the Tribunal ten working days of being served by the Authority with its decision. It is not in dispute that the Applicant lodged the Application with the Tribunal in time. The Tribunal finds that the Applicant lawfully exercised its right of appeal. That the entity re-evaluated the bids at the time it did cannot therefore render the Application for review to the Tribunal be regarded as overtaken by events and therefore untenable. The Tribunal finds no merit in the preliminary objection. It is dismissed.

- 5.3 In resolving the issue that the finding of the Authority on ground three was unfair, the Tribunal closely looked at evaluation criteria in the bid document, specifically relating to personnel. The evaluation criteria detailed the specific qualifications and experience that each of the required personnel must have. With specific reference to the draughts person, the requirement was that the draughts person should *'also have prepared As-Built Drawings with at least three years' experience in preparation of architectural or engineering drawings'*. The Tribunal holds the firm view that it was incumbent upon the Applicant to state in its bid that each of the proposed personnel met the specific requirements as detailed in the evaluation criteria. It was not sufficient to state that the personnel proposed by the Applicant in the bid had worked with the Applicant on projects of a similar nature over a period of five years and hence possessed the requisite experience. The Tribunal also finds that the Applicant did not explicitly state that the proposed personnel had the specific experience as detailed in the evaluation criteria.
- 5.4 The Applicant submitted that the Authority should have sought clarification from the Applicant under regulation 10 of the PPDA Evaluation Regulations, 2014, just as it did seek clarification on other issues from other bidders. Regulation 10(2) provides that an evaluation committee shall only make a request for clarification of information or submission of documentation where there is nonconformity or an omission which is not a material deviation. The Tribunal finds that the failure by the Applicant to provide details of specific experience of its proposed personnel as required in the bid document was a material deviation and hence not clarifiable under regulation 10(2) of the PPDA Evaluation Regulations, 2014.
- 5.5 The Tribunal is in agreement with the advice of the Authority to the entity to re-evaluate the bid, having upheld two out of the three of the Applicant's grounds. We do not find the Authority's decision to be contradictory in any way as alleged by the Applicant. The Applicant also failed to show the Tribunal how the Evaluation Committee, on re-evaluation would be biased. The Tribunal therefore declines to make an order that the re-evaluation should be conducted by a fresh evaluation committee.
- 5.6 The Application is dismissed.

6.0 **DECISION OF THE TRIBUNAL**

1. The Tribunal affirms the decision of the Authority.
2. The Application is dismissed.
3. The Authority is awarded costs of two million shillings.

Dated at Kampala this 18th Day of December 2015.

SIGNED by
OLIVE ZAALE OTETE

SIGNED by
MOSES JURUA ADRIKO

SIGNED by
DAVID KABATERAINE

SIGNED by
ARCHT. JOEL KATEREGGA