

THE REPUBLIC OF UGANDA

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

APPLICATION NO. 2 OF 2015

APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY TO CANCEL THE PROCUREMENT IN RESPECT OF THE TENDER FOR PROVISION OF INSURANCE SERVICES FOR GROUP PERSONAL ACCIDENT AND WORKMEN COMPENSATION (LOT 2) REFERENCE URA/SRVCS/CSD/15-16/00001.

APPLICANT: LION ASSURANCE COMPANY LIMITED

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

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

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BACKGROUND/FACTS

- 1.1 On 17th March 2015, Uganda Revenue Authority (URA) published a bid notice in the Daily Monitor Newspaper for the provision of insurance services. The insurance services required were split in 12 classes/lots. Lot 2 was in respect to group personal accidents/workmen's compensation (compensation to employees against accidental death/ or bodily injury). Lion Assurance Company Limited (the Applicant) was declared best evaluated bidder (BEB) under Lot 2.
- 1.2 AIG Uganda Limited (the complainant) was one of the insurance companies that put in a bid for Lot 2. The BEB Notice indicated that the complainant's bid was non responsive because the bidder left out an item of security officers in computing the annual premium yet this was clarified at the pre-bid meeting. The complainant was dissatisfied with the decision of the Procurement and Disposal Unit and applied to the Accounting Officer URA (Commissioner General) for administrative review.
- 1.3 In the application for administrative review, the complainant stated that its technical proposal on Lot 2 was unfairly evaluated in regard to annual premium relating to security officers. That the proposal submitted by the complainant complied with the requirements in the bidding document and the clarification received from URA during the bidding period. The Commissioner General found no merit in the complainant's application and dismissed it.
- 1.4 The complainant was dissatisfied with the decision of the Commissioner General and applied to the Public Procurement and Disposal of Public Assets Authority (the Respondent) for review of the Commissioner General's decision.
- 1.5 The Respondent found merit in the grounds raised by the complainant and upheld the application. The Respondent found that there was no record indicating that the issue as to whether security personnel should be treated as security guards was clarified to the bidders in the bidding document, at the

pre-bid meeting or in the subsequent email communications thus creating ambiguity. Consequently, the Respondent made a decision to the effect that URA should cancel the procurement.

- 1.6 The Applicant as best evaluated bidder is aggrieved by the decision of the Respondent and has lodged this Application to the Tribunal under regulation 10 of the Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014.

2.0 APPLICATION FOR REVIEW OF THE RESPONDENT'S DECISION.

By letter dated 10th August 2015, the Applicant lodged an Application with the Tribunal for review of the Respondent's decision on the following grounds (the grounds have been summarized):

- (i) *The burden to distinguish between security personnel and security guards was placed on URA erroneously. The express request made to URA by the complainant was 'whether URA had guards'. That this request could not have elicited the answer to the question whether security personnel and security guards mean the same thing for purposes of classification and therefore determination of rates. It is unfair to punish the best evaluated bidder for a question not framed by the complainant.*
- (ii) *It is the duty of the insurer to assess the risk based on the need identified by the client, risk exposure in their line of duty of the category of employee and allocate the rating accordingly. This duty cannot be passed on by the procuring entity. The burden to categorize the risk based on security personnel due to the heightened nature of their job which could therefore not be the same as that of other administrative staff, was entirely upon the bidders.*
- (iii) *The Insurance Regulatory Authority (IRA) provides a guideline for ratings for different classes. That guideline cannot be exhaustive for a subject as complex and varied as insurance. That any experienced insurer to whom a particular categorization is not clear can seek and obtain guidance from the IRA and not from the procuring entity. No*

evidence was adduced to show that the complainant sought the assistance of the IRA to guide them on the rating as per practice.

- (iv) Where an insurer does not seek clarification from the IRA, it is reasonable to conclude that the insurer has clearly understood the words used in the bid and therefore can appropriately classify the category in issue.*
- (v) The complainant, which operated under a mis-categorization, should not disadvantage a compliant bidder and seek to overturn the entire process.*
- (vi) It is incumbent upon insurers to properly categorize risk, not those seeking insurance to categorise risk.*

2.1 **DISPOSAL OF APPLICATION**

In order to properly address all the issues raised in this Application, the Tribunal asked the complainant to also respond and make submissions on the grounds raised by the Applicant.

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

- (1) Application for review of the Respondent's decision dated 10th August 2015 the Application;
- (2) Respondent's response to the Application and submissions;
- (3) Applicant's submissions and Annexes to the written submissions;
- (4) Complainant's response and written submissions and Annexes to the written submissions;
- (5) Minimum Premium Rates issued by Insurance Regulatory Respondent (IRA) to insurers;
- (6) Letter by IRA to the Tribunal dated 14th August 2014.

2.2 The Tribunal summoned the Applicant, the Respondent and the Complainant for a hearing on 21st August 2015. The Applicant was represented by Mr. Ernest Kalibbala. The Respondent was represented by Mr. John Kallemera and Ms. Sophia Masagazi while the Complainant was represented by Mr. Munanura Andrew. In attendance were the following officers from URA, IRA and representatives of the Applicant and the Complainant.

2.3 The parties raised the following issues for determination by the Tribunal:

- (i) *Whether URA clarified and/or was mandated to clarify on the distinction between security guards and security personnel during the impugned procurement process.*
- (ii) *Whether the bidders involved in the impugned procurement had the mandate to categorize the risk and allocate the rating accordingly.*
- (iii) *Whether a bidder should seek guidance from IRA in the event that a categorization for procurement of insurance services is not provided for in the IRA guideline for ratings.*
- (iv) *Whether the complainant did not raise the issue of Categorisation/classification of security guards and/or security personnel with IRA and it was precluded from raising the issue after the results of the bid process had been concluded.*
- (v) *Whether the classification and the rate applied by the Applicant for security personnel was erroneous.*
- (vi) *Whether the administrative review process before the Respondent culminated in an erroneous decision on account that it is incumbent upon the insurers and not the procuring and disposing entity to properly categorise risk.*

3.0 SUBMISSIONS BY COUNSEL

Issue 1: Whether the URA clarified and/or was mandated to clarify on the distinction between security guards and security personnel during the impugned procurement process.

- 3.1 The Applicant made lengthy submissions on this issue. The gist of the submission was that where a party identifies an ambiguity, it has the duty to point out specifically and seek clarification within the time frame of the bid document. It is not the duty of the procuring unit to identify ambiguities or provide answers to questions that have not been asked.
- 3.2 Counsel submitted that as an insurer of repute, the complainant should have specifically and clearly sought clarification on the issue, which it did not do. That instead, the complainant asked URA whether it had security guards, to which URA responded 'we do not have security guards'. He contended that there was no specific question asked by the complainant regarding the issue of how to treat the category called 'security personnel'. There is no evidence that the complainant did ask URA to specify the nature of work that security personnel did in order to assess the risk appropriately.
- 3.3 Counsel submitted that the Respondent based its decision to cancel the procurement on the purported failure by URA to provide evidence in the pre bid meeting minutes or subsequent communications that clarification was given to the bidders. He further submitted that this is erroneous because the complainant did not ask a specific question about security personnel but instead sent an email inquiring about security guards.
- 3.4 Counsel argued that it is the duty of the one who perceives ambiguity to exist to seek clarification by asking relevant questions about the ambiguity. He argued that the Respondent came to a wrong conclusion by placing on URA the burden to respond to a question that was not asked.
- 3.5 In response, the Respondent stated that the minutes of the pre-bid meeting held on the 27th March 2015 did not contain any clarification on whether security personnel were to be categorised as security guards owing to the high risks that they are exposed to. URA did not clarify to the bidders in the bid

document, pre-bid meeting minutes or in subsequent email communications the issue of categorization of security personnel.

- 3.6 He submitted that under section 60(2) of the PPDA Act, URA had an obligation to provide a detailed and/or definitive and unambiguous description of the services required and all incidental matters regarding the procurement including the categories of staff. That the ambiguity on the part of URA is apparent from the fact that in the BEB Notice, the reason it gave for the elimination of the bid of the complainant was that *“group personal accident, the bidder left out an item of security officers in computing the annual premium yet this was clarified at pre bid meeting. Although URA does not employ security officers, customs enforcement staff were to be put under this category because of the risks they are exposed to”*
- 3.7 The Respondent further submitted that URA referred to the category of employees for the impugned procurement as security personnel on some occasions and on other occasions it referred to them as security officers. In the email communication dated 14th April 2015 from a one Apophia Kanyange, they were referred to as ‘security personnel’ yet in the BEB Notice, they were referred to as security officers, customs enforcement staff...’.
- 3.8 In summary on this issue, the Respondent submitted that URA had the obligation to appropriately clarify to all bidders the specific categories of its employees for the impugned procurement process. Specifically that URA did not clarify whether the security personnel should be treated as security guards.
- 3.9 In its response to the Application before the Tribunal, Counsel for the complainant submitted that URA never clarified that security personnel/customs enforcement officers were to be treated as security guards in the pre bid minutes. That in the emails dated 14th and 20th April 2015, the opinion of the Commissioner General dated 26th June 2015 and the BEB notice confirmed that URA does not employ security guards meaning that none of their employees/staff fall under this category or had the risk exposure. URA never provided proof that they clarified this issue at the pre bid meeting.

Issues 2 to 6 are closely interconnected to issue 1. All the submissions by Counsel on issue 1 touched on issues 2 to 6 without specifically isolating issue by issue.

4.0 RESOLUTION OF THE ISSUES

4.1 The Tribunal carefully studied the Application, the responses to the Application and written submissions. It also listened carefully to the oral arguments made during the hearing. The Tribunal noticed that certain matters were introduced that were not pleaded or argued during the administrative review by the Respondent. The Tribunal found that all the issues raised during this Application however revolved around one main issue i.e. whether the bid by the complainant was compliant.

4.2 The Tribunal hence decided to deal with the main ground that was raised during administrative review by the Respondent i.e. “whether *the Complainant was unfairly eliminated under Lot 2: Group personal accidents and workmen’s compensation for failing to include security personnel in computing the annual premium*”.

4.3 We shall start with the question of failure by the complainant to include security personnel in computing the annual premium.

The crux of the Respondent’s decision that the procurement should be cancelled was that “*there is no record indicating that the issue as to whether security personnel should be treated as security guards was clarified to the bidders in the bidding document, at the pre bid meeting or in the subsequent email communications thus creating an ambiguity*”.

4.4 In both the oral and written submissions to the Tribunal, the Respondent maintained that URA had the obligation to appropriately clarify to all bidders the specific categories of its employees for the impugned procurement process. Specifically that URA had to clarify whether the security personnel should be treated as security guards but the record does not show that it did.

The relevant statement of requirements for Lot 2 read thus:

“URA would like to obtain a provider for insurance services. The policy coverage to be undertaken includes the following classes/lots: Lot 2- group personal accidents/workmen’s compensation to employees against accidental death/or bodily injury.”

4.5 According to the minutes of the pre bid meeting held on 27th March 2015, the question asked in relation to the issue of categorization of staff was *“How is URA going to categorize staff for insurance purposes”*. The answer to the question was *“they will be categorised according to rank and role and this will be communicated to bidders.”* The minutes of the pre bid meeting were forwarded to all bidders by email dated 7th April 2015.

A number of further requests for clarification by bidders were sent to URA by email after the pre-bid meeting. The Tribunal will single out only those requests for clarification that it found relevant to resolving the issue at hand:

(a) By letter dated 20th March 2015, the complainant sought clarification from URA on *‘the category of designations under staff group personal accident and workers compensation and whether the stated benefit is the total monthly or annual earnings.*

(b) On 8th April 2015, the Applicant sought clarification thus: *we have noted that the list of employees to be covered under group personal accident and workers compensation did not give categories which form the basis of rates to be applied. Also confirm whether some staff are to be covered under worker’s compensation only and others under group personal accident.*

(c) Another clarification sought was *‘we seek clarification on the categorisation of employees for Lot 2 group personal accident/workers compensation. Please provide a break down in terms of administration staff, drivers and security personnel’.*

4.6 It should be noted that the above stated requests for clarification from URA were sought by different bidders, including the complainant and they rotated around the issue of categorisation of URA staff.

In an email dated 13th April 2015, URA clarified to all bidders as follows: *Please find attached the information regarding monthly payments for the different categories of staff also note that temporary staff will be for*

workman's compensation only while the rest of the staff are for group personal accident.

In a further email to all bidders dated 14th April 2015, URA asked the bidders to refer to the attachment and also asked the bidders to note that drivers are referred to as fleet assistants.

For ease of reference, the information in the attachment is reproduced here below:

| <i>AGE DISTRIBUTION</i> | | |
|-----------------------------------|-----------------------------|--------------------|
| <i>20-30 years</i> | <i>663</i> | |
| <i>31-45 years</i> | <i>1286</i> | |
| <i>46-50 years</i> | <i>303</i> | |
| <i>51-55 years</i> | <i>132</i> | |
| | <i>2384</i> | |
| <i>Asst. Commissioner total</i> | <i>250,340,390</i> | <i>19</i> |
| <i>Commissioner General Total</i> | <i>40,971,878</i> | <i>1</i> |
| <i>Commissioner total</i> | <i>125,772,840</i> | <i>6</i> |
| <i>Fleet assistant total</i> | <i>282,304,193</i> | <i>175</i> |
| <i>Graduate trainee total</i> | <i>336,000,000</i> | <i>170</i> |
| <i>Manager total</i> | <i>616,322,128</i> | <i>76</i> |
| <i>Office attendant total</i> | <i>179,525,295</i> | <i>113</i> |
| <i>Officer 1 total</i> | <i>4,824,221,596</i> | <i>1,391</i> |
| <i>Officer II total</i> | <i>503,229,951</i> | <i>159</i> |
| <i>Supervisor total</i> | <i>1,239,574,619</i> | <i>233</i> |
| <i>Security personnel</i> | <i>126,176,542</i> | <i>41</i> |
| <i>Total</i> | <i>8,524,439,432</i> | <i>2384</i> |

- 4.7 **Regulation 49 of the PPDA (Rules and Method for Procurement of Supplies, Works and Non Consultancy Services) Regulations 2014** provides that bidding documents shall state that a bidder may seek clarification on the bidding documents and shall state the date by which the clarification shall be sought. Regulation 49(2) further provides that where a request for clarification is received, the entity shall promptly provide a clarification in writing which shall be copied to all bidders to whom bidding documents were issued.
- 4.8 In order to be in a position to prepare responsive and compliant bids, the law has offered bidders an opportunity to seek clarification of a bidding document where the information in a bidding document is found to be insufficient or appears unclear. It is therefore incumbent upon bidders to fully take advantage of that opportunity so as to prepare responsive and compliant bids.
- 4.9 During administrative review by the Respondent, the Respondent found that URA did not specifically clarify whether security personnel should be treated as security guards.
- 4.10 The Tribunal examined in detail the exact clarification that was sought by the complainant and found as follows: ***The first clarification was 'the category of designations under staff group personal accident and workers compensation and whether the stated benefit is the total monthly or annual earnings.'***
- 4.11 In response to the clarification whether the stated benefit is monthly or annual, URA clarified in the record of pre bid minutes that the total benefits are monthly. In response to the category of designations under staff group personal accident and workers compensation, URA provided an attachment which provides a list of the categories of staff, the number of staff in each category and their monthly benefits. The List is reproduced above.
- 4.12 The **second clarification** sought by the complainant was made on 20th April 2015 and read thus ***'we await your clarification on drivers, support staff, security guards under the GPA...'***. To this request, URA answered ***'we do not have security guards. You will note that the***

above information and schedules had earlier been provided kindly refer to them.'

4.13 From the detailed analysis of the clarification sought by the complainant restated above, the Tribunal did not find a clarification sought by the complainant from URA to wit "*whether security personnel should be treated as security guards*". This question (which the Tribunal agrees should have been the right question asked by the Complainant) was never asked by the complainant but was actually framed by the Respondent during its review of the Commissioner General's decision. The clarification sought by the complainant was "**whether URA has security guards**", to which URA answers 'no'. As the email response of URA on this clarification dated 20th April 2015 pointed out, '*You will note that the above information and schedules had earlier been provided kindly refer to them.'*

4.14 URA had earlier provided a list to all bidders indicating the category of its staff. The list had no category of staff called security guards, but had security personnel, totaling 41 in number and earning a total monthly salary of UGX 126,176,542.

4.15 The Schedule of Minimum Premium Rates 2013, issued by the Insurance Regulatory Authority to insurers has provided 4 classes in respect to personal accident and group personal accident. Class 4 provides for 'construction and drivers, security guards and turn boys.

The complainant, having found that the Rating Schedule does not use the words 'security personnel' but instead uses the words 'security guards' should then have asked URA the question, 'since you do not employ security guards but security personnel, should we treat security personnel as security guards for purposes of determining the rate? The Tribunal finds that the complainant did not ask such a question.

4.16 The Tribunal is persuaded by the submission of the Applicant that there was no specific question asked by the complainant regarding the issue of how to treat the category called 'security personnel'.

4.17 It is the finding of the Tribunal that the right clarification which should have been sought by the complainant from URA was instead framed by the Respondent during its review of the Commissioner General's

decision; such question as has been shown was not framed by the complainant.

4.18 The decision of the Respondent to cancel the procurement on the ground that the record did not contain a clarification as to whether security personnel should be treated as security guards is therefore misconceived because no such question was asked by the complainant and hence the minutes of the pre bid meeting could not have contained an answer to a question that was never asked.

4.19 On the question by the Respondent that URA failed to discharge its duty to clarify bids, an examination of the responses by URA to clarifications sought by bidders in respect to categorization of staff appears adequate. By providing a list of the categories of staff, the number of staff in each category and their monthly emoluments, bidders were able to apply the different rates in the preparation of their bids. This explains why the Applicant, who had sought a related clarification on categorisation of staff was able to put in a compliant bid using the clarification provided by URA.

4.20 We shall now turn our attention to the question of *whether the complainant was unfairly eliminated under Lot 2?*

In resolving this question, the Tribunal turned to the relevant provisions of the PPDA (Evaluation) Regulations, 2014 and the relevant provisions of the Bidding Document.

4.21 Regulation 15 of the **PPDA (Evaluation) Regulations 2014** provides that the evaluation of a bid for the procurement of supplies, works or non-consultancy services using the technical compliance evaluation method shall be conducted under four stages as follows-

(a) a preliminary examination to determine the eligibility of the bidders and the administrative compliance of the bids received;

(b) a detailed evaluation of the bids to determine their technical responsiveness of the bids that are eligible after the preliminary examination;

(c) a financial comparison of the bids that are eligible after the detailed evaluation carried out under paragraph (b); and

(d) post qualification ----- to determine the best evaluated bidder has the capacity and the resources to effectively execute the contract.

4.22 Under **regulation 18(1)**, an evaluation committee shall determine the administrative compliance of a bidder by confirming that the bidder conforms satisfactorily to the basic instructions, requirements and the terms and conditions of the bidding documents without any material deviation or omission. **Under regulation 18(4), a bid that is not administratively compliant shall be rejected at the evaluation stage.**

4.23 The **Bidding document, Part 1 Section 1 (Instructions to Bidders), paragraph 28.2** provides that a substantially compliant and responsive bid is one that conforms to all the terms, conditions and requirements of the bidding document without material deviation, reservation or omission. **Paragraph 28.3** further states that if a bid is not substantially compliant and responsive, to the bidding document, it shall be rejected by the Procuring and disposing entity.

The **Bidding document (Section 3: Evaluation Methodology and Criteria paragraph 2.2)** provides that the evaluation of the bid was to be conducted in three sequential stages namely-

(a) a preliminary examination to determine the eligibility of bidders and the administrative compliance of bids received;

(b) a detailed evaluation to determine the commercial and technical responsiveness of the eligible and compliant bids; and

(c) a financial comparison to compare costs of the eligible, compliant, responsive bids received and determine the best evaluated bid.

Under **paragraph 2.3**, failure of a bid at any stage of the evaluation shall prevent further consideration at the next stage of the evaluation.

4.24 The Tribunal examined in detail the complainant's bid summary attached to the complainant's response to this Application (R.1). In the bid summary, the complainant catered for all the categories of staff included on the list provided by URA to all bidders (*also reproduced in this Decision*), except the category 'security personnel'. In their submissions before the Tribunal, the complainant actually conceded that *'the impression that we left out this item (security personnel) is*

created by not having the words 'security personnel in the bid document'.

4.25 The Tribunal finds that by omitting to specifically mention the words 'security personnel' in its bid, the complainant's bid failed the administrative compliance test enshrined in regulation 18(1) of the PPDA (Evaluation) Regulations 2014 and was therefore rightly rejected.

4.26 In the complaint to the Commissioner General, the complainant stated that it did not miss out any category of staff in its bid. In the submissions before the Tribunal, the Complainant had this to say:

"AIG did not leave out an item of security personnel. On 14/4/2015, URA provided a total monthly salary of UGX 8,524,439,432 for its employees. On 14/4/2015 URA also advised the bidders to include temporary staff for only workmen's compensation. The monthly payment for temporary staff was UGX 71,400,000. Hence the total monthly salary for LOT 2 was UGX 8,595,839,432. Clearly if the salary of temporary staff is removed in our bid document, the monthly salary for other staff is UGX 8,524,439,432. If we had left out the item security personnel, the total figures would have been less than the amounts provided in the Schedule of 14th April 2015. In our view the words security personnel were irrelevant since they did not attract a separate rate under class 4. It is clear that the impression that we left out this item is created by not having the words 'security personnel' in the bid document" (Emphasis ours).

4.27 In the above statement, the complainant is inviting the Evaluation Committee to make certain calculations with respect to the salary of temporary staff as compared to the total salary for Lot 2 in order to determine if any category of staff was left out. Clearly the evaluation committee could not have started these calculations at the preliminary stage of evaluation. The complainant rendered its bid non responsive the moment it omitted to mention of a category of staff known as 'security personnel' in its bid document. The evaluation committee therefore correctly exercised its power under regulation 18(4) of the PPDA (Evaluation) Regulations 2014 to reject a bid that is not administratively compliant at preliminary stage.

4.28 The Tribunal therefore finds that the complainant's bid was not unfairly eliminated under Lot 2.

In the premises, the Tribunal finds that the Respondent came to a wrong decision in making an order for cancellation of the procurement.

4.29 *Having dealt with the main issue, the Tribunal has substantively disposed of the Application and therefore did not find it useful to handle the other sub issues which were related to the main issue.*

4.30 Before we take leave of this Application, the Tribunal makes the following observation: procuring and disposing entities should seek the services of experts at the stage of drawing statement of requirements especially in technical fields of procurement as in the instant case. Where there is a regulatory body in place on the subject of procurement, the regulatory body should be involved at the stage of drawing statement of requirements. In the instant case, the advice of the Insurance Regulatory Authority should have been sought when drawing the statement of requirements. The involvement of the experts at the beginning will result into a more comprehensive statement of requirements.

5.0 DECISION OF THE TRIBUNAL

1. The Tribunal sets aside the decision of the Respondent that the Entity should cancel the procurement.
2. The Tribunal Orders that the procurement process proceeds to its conclusion.
3. The Order of the Tribunal dated 11th August 2015 is hereby vacated.
4. Each party shall meet its own costs.

Dated at Kampala this 25th Day of August 2015.

SIGNED by the said
OLIVE ZAALE OTETE

SIGNED by the said
MOSES JURUA ADRIKO

SIGNED by the said
DAVID KABATERAINE

SIGNED by the said
Joel Kateregga

SIGNED by the said
Abraham Nkata