

**THE REPUBLIC OF UGANDA
PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
APPEALS TRIBUNAL**

APPLICATION NO. 25 OF 2023

BETWEEN

SAMANGA SOLUTIONS LTD:.....APPLICANT

AND

UGANDA NATIONAL ROADS AUTHORITY:.....RESPONDENT

**APPLICATION FOR REVIEW IN RESPECT OF THE
PROCUREMENT FOR INSTALLATION OF STREET LIGHTING
ALONG ENTEBBE ROAD - ZANA - MPALA SECTION (19 KM) REF.
NO. UNRA/WORKS/22-23/00100/01(LOT 1) USING THE
RESTRICTED BIDDING METHOD**

**BEFORE: FRANCIS GIMARA SC; NELSON NERIMA; THOMAS
BROOKES ISANGA; GEOFFREY NUWAGIRA KAKIRA; CHARITY
KYARISIIMA; AND KETO KAYEMBA, MEMBERS**

A. BRIEF FACTS

1. Uganda National Roads Authority (UNRA) (the respondent) initiated a procurement for Installation of Street Lighting along Entebbe Road - Zana - Mpala Section (19 KM) Ref. No. UNRA/WORKS/22-23/00100/01(Lot 1) using the Restricted Bidding method on July 25, 2023.
2. Six firms namely, *Green Power International Ltd; Sinew Limited; Relief Uganda Ltd; Stirling Civil Engineering Ltd; Excel Construction Ltd; and Samanga Solutions Ltd* (the Applicant) submitted bids by the deadline of August 9, 2023.
3. During evaluation process, the chairperson of the Evaluation Committee addressed a letter dated September 8, 2023 to *Green Power International*, to request a copy of the certificate of completion of a contract which had been submitted as specific experience. The request was made as a clarification.
4. Upon conclusion of the evaluation process, M/s Green Power International Limited was recommended as the Best Evaluated Bidder at an evaluated total price of UGX 23,238,276,192 (Uganda Shillings Twenty-Three Billion Two Hundred Thirty-Eight Million Two Hundred Seventy-Six Thousand One Hundred Ninety-Two only). The Notice of Best Evaluated Bidder was displayed on September 28, 2023 with a removal date of October 11, 2023.
5. The Applicant's bid was disqualified at the financial comparison stage, for having submitted a bid price higher than that of the best evaluated bidder.
6. The Applicant being dissatisfied with the evaluation process, applied for administrative review before the Accounting Officer on October 5, 2023, based on three (3) grounds;
7. That the bid of Green Power International Limited was not substantially compliant because the bidder submitted documentation pertaining to a project executed in China by Green Power International and not the bidder Green Power International Limited.

- i. -that the clarification sought by the Respondent from Green Power International Limited was irregular because the bidder was Green Power International Limited
 - ii. -that the bidder Excel Construction Limited did not possess the required specific experience
8. The Accounting Officer made an administrative review decision on October 13, 2023, dismissing the Applicant's complaint.
9. The Applicant then filed the instant application with the Tribunal on October 23, 2023, seeking to review the decision of the Respondent.
10. The Respondent filed a response to oppose the Application.

B. APPLICANT'S SUBMISSIONS

1. The Applicant filed submissions through *M/S Ouma, Tinyinondi & Co. Advocates*.

Whether the bid of Green Power International Ltd was substantially compliant?

2. The Best Evaluated Bid was not substantially compliant and responsive to all the instructions, terms and conditions of the solicitation documents without material deviation or omission because the impugned Best Evaluated Bidder does not have the required experience.
3. Counsel submitted at length on the bidding document, the evaluation regulations and the documents relied on by the best evaluated bidder. In counsel's view, Green Power International Limited does not have the required technical capacity and its bid was not substantially compliant.

Whether a reference to Green Power International Limited and Green Power International is the same?

Whether the Respondent's sought clarification from Green Power International was irregular?

4. The company that submitted a bid is called Green Power International Limited whereas the entity that the Respondent sought clarification from was Green Power International.
5. The two mentioned companies are technically different.

Whether M/S Excel Construction Limited's bid should have passed the Technical Compliance stage during the evaluation exercise;

6. In the Notice of Best Evaluated Bid, the reason for the failure of M/s Excel Construction Limited, was stated as the Bidder's price being higher than that of the impugned Best Evaluated Bidder. This implies, M/s Excel Construction Limited passed the Technical Compliance stage. This is in total contravention with the law in reference to Technical Compliance.
7. A quick check with the said company's website (www.excelconstruction.org), and its profile demonstrates that M/s Excel Construction Limited, has never supplied, installed and commissioned solar street lights to comply with the technical requirements stated in Section 6.2.5 & 6.2.8 of the tender document and Section VI: Employer's Requirements.
8. M/s Excel Construction Limited, has constructed several hospitals whose lighting component experience does not meet the requirements for similar works. The similarity shall be based on the physical size, complexity, methods/technology or other characteristics as described in Section VI, Employer's requirements.
9. M/s Excel Construction Limited does not technically comply and therefore should have failed at the Technical stage.
10. Counsel prayed that the application be granted.

C. RESPONDENT'S SUBMISSIONS

1. The Respondent filed written submissions through its Directorate of Legal Services.

Whether the Bid of Green Power International Limited was substantially compliant?

2. The Respondent submits that the bid submitted by Green Power International Limited was evaluated and found to be substantially compliant and responsive to the terms of the bidding document.
3. M/s Green Power International Limited presented work experience worth UGX. 14,491,328,399.83 in its bid covering the period from 2020 to June 2023 which included 7 contracts.
4. The Evaluation Committee rightly found that the bid submitted by Green Power International Limited was not only substantially compliant and responsive to the terms of the bidding document but also the lowest priced bid.

Whether a reference to Green Power International Limited and Green Power International is the same?

The omission of the word “Limited” in the Respondent’s request for clarification to the bidder dated 18th September 2023 does not create two separate legal entities as the Applicant implies. The omission of the word “Limited” did not prejudice the Bidders in any way to warrant grant of the Applicant’s prayers.

5. The omission of the word “Limited” in the request for clarification was an error on the part of the Respondent which error does not change who the Bidder is and should not be visited on Green Power International Limited by denying them their right as the Best Evaluated Bidder.

Whether the Respondent’s sought clarification from Green Power International was irregular.

6. In accordance with regulation 10 of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014, an evaluation committee has the mandate to seek for clarification from the bidder on the information provided in its bid especially where there is non-conformity or an omission in the bid that is not a material deviation.
7. The omission of the word “Limited” in the Respondent’s request for clarification to Green Power International Limited was an error by the Respondent which did not in any way change the identity of the company nor does it create a separate legal entity.

8. The Applicant does not show how the inadvertent omission of the word 'Limited' in the BEB's name prejudices their bid.
9. Whereas the Respondent sought clarification from Green Power International, accidentally omitting the word "Limited" in its request, the said letter was addressed to the registered address for Green Power International Limited.
10. The clarification sought was in respect of experience already submitted by the Bidder and the clarification was merely to ascertain the status of the said project.
11. Due diligence by a PDE can be carried out any time, and therefore the Applicant cannot dictate as to when the Respondent should have carried out a due diligence on the document received.

Whether M/s Excel Construction Limited's bid should have passed the Technical Compliance stage during the evaluation exercise?

12. The bid by Excel Construction Limited was evaluated and found to be substantially compliant and responsive to the requirements of the bidding document and as such passed the Technical Compliance stage during the evaluation exercise.
13. The Respondent contends that M/s Excel Construction Limited presented work experience worth UGX. 131,066,221,819.35 in his bid covering the period from 2019 to February 2022.
14. The electrical works carried out by Excel Construction Limited under the various projects they submitted are classified under associated works including power reticulation.
15. The Respondent therefore submits that the bid for M/s Excel Construction Limited was evaluated and found to be substantially compliant and responsive hence passing the Technical Compliance stage.
16. The Respondent prayed that the Tribunal affirms the decision of the Respondent and dismisses this application with costs.

D. SUBMISSIONS OF GREEN POWER INTERNATIONAL LIMITED

1. The Best Evaluated Bidder Green Power International Limited filed written submissions through its authorised representative.

Whether the Bid of Green Power International Limited was substantially compliant?

2. The Best Evaluated Bidder's (Green Power International Limited) bid as submitted to the Respondent was substantially compliant and responsive.

Whether a reference to Green Power International Limited and Green Power International is the same?

3. The failure to include the word "Limited" in the company name does not in any way refer to a different company. The word 'Limited' is simply to show the extent of liability of the company.

Whether the Respondent's clarification from Green Power International was irregular?

4. The clarification sought was not irregular. ITB 27.1 in the Bidding document provides that the Respondent may ask any Bidder for a clarification of its Bid to assist in the examination, evaluation, comparison and post-qualification of the bids.

5. In addition, regulation 10 of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014*, mandates the Respondent to seek for clarification from the bidder on the information provided in its bid especially where there is non-conformity or an omission in the bid that is not a material deviation.

Whether M/s Excel Construction Limited's bid should have passed the Technical Compliance stage during the evaluation exercise?

6. The Best Evaluated Bidder did not respond to this issue since it relates to information that is not within its knowledge and access.

Remedies

7. The Best Evaluated Bidder prayed that the Tribunal finds that the Application has no merit and should be dismissed with costs.

E. EXCEL CONSTRUCTION LIMITED

1. M/S Excel Construction Limited was invited to the hearing but did not make any submission.

F. THE ORAL HEARING

1. The Tribunal held an online hearing on 8th November, 2023. The appearances were as follows:

- 1) Charles Ouma and Pauline Nsubuga, counsel for the Applicant. In attendance was Gloria Kairaba, CEO of the Applicant.
- 2) Isabella Taimamigisha, Titus Kamyia and Bruce Nahamya, counsel for the Respondent. In attendance was Roberto Korobe, procurement officer, Works, and Stephen Ocen, electrician.
- 3) Dalia Moses, manager of the technical department represented Green Power International Limited. In attendance was John Bosco Mugisha, head of the corporate affairs department.
- 4) Louis Limo, civil engineer, represented the Excel Construction Limited.

G. RESOLUTION

1. The Application raised 5 issues for determination by the Tribunal. In view of the submissions, the issues have been reframed as follows:

- 1) Whether Green Power International Limited is different from Green Power International Limited?
- 2) Whether the bid of Green Power International Limited was substantially compliant with the requirements of the bidding document?
- 3) Whether the Respondent erred when it requested *Green Power International Ltd* to submit a copy of a certificate of completion as a clarification?
- 4) Whether the Respondent erred when it found that Excel Construction Ltd's bid was responsive to the technical evaluation criteria?
- 5) What remedies are available to the parties?

Issue no. 1:

Whether Green Power International Limited is different from Green Power International Limited?

1. We have carefully perused the bid submitted by Green Power International Limited.
The submission sheet, bill of quantities of the bidder and declaration of eligible countries are stated on letterheads of the bidder. The three documents contain the bidder's logo which is stated as Green Power International (without the word "limited"), but the last page of the submission sheet indicates that RON SONGLIN in the capacity of MANAGING DIRECTOR was duly authorized to sign the bid for and on behalf of GREEN POWER INTERNATIONAL LIMITED.

The following documents indicate the bidder's name as GREEN POWER INTERNATIONAL LIMITED.

- i. A Certificate of change of name from EAST ENERGY UGANDA LIMITED to Green Power International Limited issued on 8th October 2018 with Reg No: 8002000505705, issued by KAMUSIIME RACHEL as Registrar of Companies. The document was certified as a true copy by Mudoola Charlotte Thereza on 18th December 2018.
- ii. An amended Memorandum and Articles of Association in the names of Green Power International Limited and bears the stamp date of November 10, 2021, and the names Tumwine Anita as Registrar of URSB.

- iii. A certificate of registration issued by PPDA Register of Providers with Registration No. PRV/WKRS/SUPLS/SRVCS/230123998/JAN23 indicating that Green Power International Limited has been duly registered on the PPDA Register of Providers. The Certificate indicates the postal address as Plot 120, Luthuli Bugolobi.
 - iv. NSSF Clearance Certificate No. 00031945 issued to Green Power International Limited on June 26, 2023, by NSSF.
 - v. A certificate of registration issued by Uganda Revenue Authority indicating that Green Power International Limited is a registered taxpayer with URA. The Certificate indicates the principal place of business physical address as Plot 120, Luthuli Bugolobi.
 - vi. A transactional tax clearance certificate No. PL01240060296 issued to Green Power International Limited. The Certificate indicates the physical address of the taxpayer as Plot 120, Luthuli Bugolobi.
 - vii. A trade license certificate No. TLC 20231223642 issued to Green Power International Limited by KCCA.
 - viii. A power of Attorney dated July 1, 2020, donated by Green Power International Limited, nominating RON SONGLIN of Plot 120, Luthuli Bugolobi as lawful attorney of the bidder. The instrument bears a stamp date of July 1, 2023, and the names Birungi Alice Singahakye as Registrar of URSB.
 - ix. Certificate of registration of a workplace No. OSH:003815/A is issued to Green Power International Limited by the Commissioner, Occupational Safety and Health. The Certificate indicates the location of workplace of occupier as Plot 120, Luthuli Avenue, Bugolobi, Kampala.
2. From the above documentation, the bidder is *Green Power International Limited* whose place of business or office is located at Plot 120, Luthuli Avenue, Bugolobi, Kampala.
 3. In our view, the omission of the word "*Limited*" from the name of the bidder GREEN POWER INTERNATIONAL in the submission sheet, bill of quantities, declaration of eligible countries and request for clarification request was a non-fatal misnomer. The Respondent knew that its letter of September

18, 2023, seeking clarification was addressed to none other than the bidder GREEN POWER INTERNATIONAL LIMITED. There was no manifest bad faith in the omission of the word “Limited” from the name of the bidder GREEN POWER INTERNATIONAL, and it was not intended to mislead anyone.

4. The omission does not change the identity of GREEN POWER INTERNATIONAL LIMITED, the bidder in procurement conducted under Ref. No. UNRA/WORKS/22-23/00100/01(Lot 1). The said omission be rectified by Respondent correcting its procurement records, inserting the omitted word to depict the correct name of the bidder as GREEN POWER INTERNATIONAL LIMITED. See ***Application No. 12 of 2021, Abasamia Hwolerane Association Limited v Jinja City Council, page 14, para 32*** and ***Application No. 11 of 2021, Globe World Engineering (U)Ltd v Jinja City Council.***
5. **This issue is therefore resolved in the negative.**

Issue no. 2:

Whether the bid of Green Power International Limited was substantially compliant with the requirements of the bidding document?

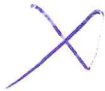
6. Section 52 of the *Public Procurement and Disposal of Public Assets Act* stipulates that a contract is awarded to the best evaluated bidder ascertained based on the methodology and criteria in the bidding documents. Section 71 (3) of the *Public Procurement and Disposal of Public Assets Act* states that no evaluation criteria other than stated in the bidding documents shall be taken into account.
7. Regulation 19 of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014* provides the detailed evaluation must assess the responsiveness of the bid to the terms and conditions of the bidding document; and (b) the technical responsiveness of the bid to the statement of requirements; and compare the details of a bid with the criteria stated in the bidding document. A bid which is not substantially responsive to the minimum requirement of the detailed evaluation must be rejected at the detailed evaluation stage.

8. ITB 35 provides that the Employer shall compare all substantially compliant and responsive bids to determine the best evaluated bid or bids, in accordance with Section 3-Evaluation Methodology and Criteria.
9. The Employer's requirements for specific experience are found in Clause 6.2.4 and 6.2.5 of Section 3-Evaluation Methodology and Criteria.
10. Clause 6.2.4 (General Experience) requires *Experience under contracts in the role of contractor, subcontractor, or management contractor for at least the last **five (5) years** prior to the bid submission deadline with activity in at least nine months of each year.* The documentation required to prove this general experience is Form 9.
11. The bid submission deadline was August 9, 2023. Therefore, a bidder had to demonstrate experience for at least the last five (5) years (August 9, 2018- August 9, 2023), with activity in at least nine months of each year. The minimum experience was for at least 5 years, with activity in at least nine months of each year of those 5 years as per the evaluation criteria.
12. *Green Power International Limited* submitted Form 9 with the following general experience:
 - i. *July 2021- July 2023- Provision of services to support communities in the implementation of solar energy technologies in the settlements of Lamwo, Adjumani, Moyo, Obongi, Yumbe, Koboko, Terego, madi Okollo, Kamwege, Kikuube, and Kiryandongo District.*
 - ii. *November 2022-November 2023- Supply and installation of 0.6 Kw water pumping systems at 5 locations.*
 - iii. *November 2021-January 2022- Adjumani water supply and sanitation project-drilling of groundwater boreholes*
 - iv. *November 2021-December 2021- Hydrogeological survey, borehole drilling, development and test pumping and solar pumping.*

- v. *July 2020-December 2020- Construction and expansion of Sembabule water treatment plant*
 - vi. *February 2020-March 2020- Drilling and distribution of water at the housing units for labourers in Atiak sugar factory.*
 - vii. *September 2019-November 2019- Solar systems at Ruhama*
 - viii. *September 2018-October 2018- Supply and installation of back up solar power source for WFP Arua*
 - ix. *October 2018-November 2018-Installation of a solar pumping system at Glad Farm.*
13. The bid of Green Power International Limited did not demonstrate experience for at least the last five (5) years (August 9, 2018- August 9, 2023), with activity in at least nine months of each year.
 14. The earliest project submitted by Green Power International Limited was done in October 2018-November 2018 i.e installation of a solar pumping system at Glad Farm. Therefore, the general experience of Green Power International Limited did not amount to a minimum duration of 5 years.
 15. The evaluation report does not show how the evaluation of the criteria, which required activity in at least nine months of each year in the last 5 years, was assessed. The minimum experience was for at least 5 years, with activity in at least nine months of each year of those 5 years. The bids of Green Power International Limited and other bidders were not evaluated to determine whether they had activity in at least nine months of each year of those 5 years mentioned.
 16. Clause 6.2.5 (Specific Experience) requires “*Participation as contractor, management contractor, or subcontractor, in 2 (two) similar contracts within the last 5 (five) years with a total combined contract value or value of similar works therein of at least **Lot 1:- UGX 5 Billion**; that have been successfully and substantially completed (at least 70 percent complete) and that are similar to the proposed Works. The similarity shall be based*

on the physical size, complexity, methods/technology, or other characteristics as described in Section VI, Employer's Requirements"; provable by "Form 10 Certificates of Completion, Payment Certificates, Reference Letters from past Clients".

17. The bid submission deadline was August 9, 2023. Therefore, a bidder had to demonstrate specific experience of at least 2 contracts *within* the last 5 (five) years (August 9, 2018- August 9, 2023), with a total combined contract value or value of similar works therein of at least UGX 5 billion.
18. The documentation required to prove this specific experience is Form 10, certificates of completion, payment certificates, reference letters from past clients.
19. *Green Power International Limited* submitted Form 10 with the following specific experience:
 - i. Sub-contract for purchase and supply and installation of street lights and spare parts (civil work rehabilitation of Hima-Katungulu road (58 km) worth UGX. 2,617,975,320, completed on January 5, 2022. The bidder submitted a certificate of completion from the main contractor *China Railway No.3 Engineering Group Co Ltd*, stating a project commencement if May 22, 2021 and completion date of January 5, 2022. The bidder also submitted a letter of recommendation from the said main contractor.
 - ii. Sub-contract for solar street light installation in Ronjiang County, China worth UGX. 10,101,196,600. The completion date stated in the Form 10 is May 23, 2020. However, the bidder also submitted a sub-contract with the main contractor *Gayou Lamp Factory* dated October 22, 2020 but stating that installation had to be completed by the end of December 2018.
20. The 2 contracts submitted by *Green Power International Limited* to prove specific experience were both done within the stipulated 5-year period of August 9, 2018- August 9, 2023. The 2 contracts are also worth more than the minimum value of UGX 5 billion which was prescribed.
21. As stated above, the documentation required to prove specific experience is Form 10, certificates of completion, payment certificates, reference letters from past clients.

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22. *Green Power International Limited* submitted Form 10 required. However, with respect to the sub-contract for solar street light installation in Ronjiang County, China, the bidder did not submit a certificate of completion, a payment certificate, or a reference letter from the client. To that extent, the bid was not substantially complaint with the requirements of the bidding document relating to specific experience.
23. As already observed, the Tribunal has noted with concern that the completion date for street light installation in Ronjiang County, China as stated in the Form 10, is May 23, 2020. However, the sub contract submitted by the bidder is dated October 22, 2020 which is after the purported completion date stated in Form 10. Curiously, clause 10 (f) of the sub-contract states that installation had to be completed by the end of December 2018, which is more than 2 years before the execution of the sub-contract. These glaring discrepancies and inconsistencies were not explained. If the evaluation committee had not undertaken a perfunctory evaluation, they would have detected this anomaly.
24. At page 40 of the Bidding Document, (continuation of Section 3-Evaluation Methodology and Criteria) bidders were required to also provide information and documentation of:-
- a) authority to seek references from the bidders' bankers; and
 - b) proposals for subcontracting companies of the works amounting to no more than 10 percent of the Contract Price.
25. However, such subcontractors' experience was not to be taken into account in determining the bidder's compliance with the evaluation criteria.
26. ITB 5.1 (b) requires bidders to complete and submit the information and documentation stated in Section 3-Evaluation Methodology and Criteria. We have carefully perused the evaluation report. We do not see evidence that all the bids were evaluated to determine compliance with the requirement to provide documentation for authority to seek references from the bidders' bankers. The criterion was simply ignored. The Respondent was duty bound to apply this criterion, unless waived.

27. Due to the errors and omissions discussed under this issue, it is our finding that the bid of Green Power International Limited was not substantially compliant with the requirements of the Bidding Document mentioned above.
28. **Issue no. 2 is resolved in the negative.**

Issue no. 3:

Whether the Respondent erred when it requested Green Power International Ltd to submit a copy of a certificate of completion as a clarification?

29. During evaluation process, the chairperson of the Evaluation Committee addressed a letter dated September 8, 2023 to Green Power International, to request a copy of the certificate of completion or reference letter for the solar street light installation contract in Ronjiang County, China. This contract had been submitted as specific experience. The request was made as a clarification. Green Power International responded by letter dated September 19, 2023 and submitted a copy of the completion certificate, dated February 13, 2021.
30. ITB 29.1 and 29.2 provide as follows:
29.1 Provided that a bid is substantially compliant and responsive, the Employer may waive any non-conformity or omission in the bid that does not constitute a material deviation.

29.2 Provided that a bid is substantially compliant and responsive, the Employer may request that the bidder submit the necessary information or documentation, within a reasonable period of time, to rectify nonmaterial nonconformities or omissions in the bid related to documentation requirements. Such omission shall not be related to any aspect of the price of the bid. Failure of the Bidder to comply with the request may result in the rejection of its bid.
31. An Entity can only request for further information from a bidder provided that its bid is substantially compliant and responsive. In other words, the Entity cannot request for further information from a bidder whose bid had a material deviation. Therefore, the important question to consider under this issue is whether the bid of Green Power International was marred

with a material deviation due to its failure to submit a certificate of completion.

32. In ***China Aero-Tech International Engineering Corporation (CATIC) v PPDA, Application No. 1 of 2016***, the Tribunal held that in determining whether an omission is a material deviation, the Entity must first determine whether a bid was substantially compliant and responsive.
33. In ***Roko Construction Ltd & Roko Construction (Rwanda) Ltd JV versus PPDA Application No. 6 of 2019***, the Tribunal reiterated its holding in a similar ***Application No. 1 of 2016*** as follows:

“the test to determine whether a deviation is material or not is an objective, not a subjective test. In determining whether an omission is a material deviation, the entity must first determine whether a bid was substantially compliant and responsive.”
34. Under regulation 11 (4) (c) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014* a material deviation includes one which if corrected would unfairly affect the competitive position of the other bidders whose bids are administratively compliant and responsive.
35. Clarification of bids is provided for in section 73 of the *Public Procurement and Disposal of Public Assets Act. Regulations 10, 11 and 17(6) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014* provide detailed procedures for clarification of bids.
36. Regulation 10(2) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014* permits an Evaluation Committee to request for clarification of information or submission of documentation only in circumstances where:
 - a) *there is a nonconformity 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.*

37. Regulation 17 (6) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014* also permits an evaluation committee to ask a bidder to submit an eligibility document required under regulation 17 (3). Regulation 17 (3) defines eligibility documents to mean a copy of the trading licence of the bidder or its equivalent; a copy of the certificate of registration of the bidder or its equivalent; a signed statement indicating that the bidder does not have a conflict of interest in the subject of the procurement; and any other relevant eligibility documents or statements as may be stated in the bidding documents.
38. The import of section 73 of the *Public Procurement and Disposal of Public Assets Act* and regulations 10, 11 and 17 of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014* is that clarification may be used where the evaluation committee determines that it will assist in the evaluation and also to provide missing details in the submitted information or documents.
39. Clarification is not meant to introduce new information or documents in order to cure a material deviation in the bid. See the decisions of this Tribunal in **APPLICATION NO. 13 OF 2020 - SMILEPLAST LTD v PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY & NATIONAL AGRICULTURAL ADVISORY SERVICES** and **APPLICATION NO. 9 OF 2021- MY MAKU GROUP LIMITED v UGANDA NATIONAL BUREAU OF STANDARDS**.
40. In **APPLICATION NO. 9 OF 2021- MY MAKU GROUP LIMITED v UGANDA NATIONAL BUREAU OF STANDARDS**, the Tribunal found that audited books of accounts were a commercial criteria and not mere eligibility documents. That the failure of the Applicant to submit audited accounts for was a material deviation, and the Entity was right to disqualify the bidder for not attaching audited accounts for 3years.

41. In the instant case, a completion certificate or reference letter were commercial criteria and not mere eligibility or historical public documents like a certificate of incorporation, memorandum and articles of association etc. The failure or omission by *Green Power International Ltd* to submit a completion certificate or reference letter as proof of specific experience was a material deviation as defined in regulation 11(4) (c) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014*, because, if corrected, would unfairly affect the competitive position of other bidders whose bid are administratively compliant and responsive.
42. The Tribunal dealt with a similar circumstance in ***Transtrac Limited v PPDA & Ministry of Works and Transport, PAT Application No.10 of 2017*** wherein it held that the absence of the power of attorney could not be clarified by the Evaluation Committee after closing of bid submission as it would contravene regulations 11 (4) (b) and (c) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014*.
43. An Evaluation Committee also has power to waive a non-material non-conformity or omission under regulation 11 (3) (a) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014*. However, in the instant case, the non-conformity or omission was material.
44. The Respondent erred when it requested *Green Power International Ltd* to submit a copy of a certificate of completion as a clarification.
45. **Issue no. 3 is answered in the affirmative.**

Issue no. 4:

Whether the Respondent erred when it found that Excel Construction Ltd's bid was responsive to the technical evaluation criteria?

46. In view of the remedies we intend to order, we do not wish to pre-empt the outcome of the process. It is therefore unnecessary at this stage to scrutinize the bids individually.

47. We only wish to observe that a bid is evaluated on its contents, but not on what a competitor or his counsel have seen or not seen on an alleged website. To that extent, the purported check with the said company's website is irrelevant.

Issue No. 5:

What remedies are available to the parties?

48. We have found that the bid of the best evaluated bidder was not substantially responsive to the all the requirements of the detailed evaluation criteria.
49. There was also failure to apply all applicable evaluation criteria across the board.
50. Failure or omission to apply a mandatory criterion vitiates the evaluation.

See: ***APPLICATION NO. 23 OF 2023- MBARARA CITY UNITED BIKADDE MARKET VENDORS ASSOCIATION LTD v MBARARA CITY COUNCIL.***

51. In the circumstances, we shall remit the procurement back to the Entity for re-evaluation of all the bids.

DISPOSITION

1. The Application is allowed.
2. The award of the contract to *Green Power International Ltd* for installation of street lighting along Entebbe Road - Zana - Mpala Section (19 KM), is set aside.
3. The Respondent is directed to re-evaluate the bids for installation of street lighting along Entebbe Road - Zana - Mpala Section, in a manner not inconsistent with this decision, the bidding document and the law.
4. The re-evaluation in no. 3 above shall be completed within 10 (ten) working days from the date of this decision.
5. The Tribunal's suspension order dated October 23, 2023, is vacated.
6. Each party shall bear its own costs.

Dated at Kampala this 13th day of November, 2023.



FRANCIS GIMARA S.C
CHAIRPERSON



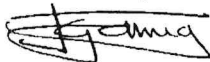
NELSON NERIMA
MEMBER



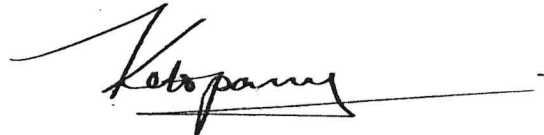
THOMAS BROOKES ISANGA
MEMBER



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