

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

APPLICATION NO. 35 OF 2024

BETWEEN

MUGA SERVICES LIMITED :::::::::::::::::::::::::::::::::::APPLICANT

AND

- 1. GOFA INVESTMENTS LIMITED**
- 2. MG ENGINEERS AND CONTRACTORS LIMITED**
- 3. UGANDA CIVIL AVIATION AUTHORITY :::::::::::::::RESPONDENTS**

**APPLICATION FOR REVIEW IN RESPECT OF THE
PROCUREMENT FOR THE UPGRADE OF THE RUNWAY, TAXIWAY
AND APRON AT JINJA AIRFIELD UNDER PROCUREMENT
REFERENCE NUMBER UCAA/WRKS/2023-2024/00054**

**BEFORE: NELSON NERIMA; GEOFFREY NUWAGIRA KAKIRA;
PAUL KALUMBA; CHARITY KYARISIIMA; AND KETO KAYEMBA,
MEMBERS**

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. Uganda Civil Aviation Authority (UCAA) (the 3rd Respondent) initiated a tender for the upgrade of the Runway, Taxiway and Apron at Jinja Airfield under procurement reference number UCAA/WRKS/2023-2024/00054 using the open domestic bidding method for the procurement of the works on May 9, 2024.
2. The 3rd Respondent received bids from thirteen (13) bidders namely; *Tetra Technical Services Limited; Ocean Tech & Tegeka (Joint Venture); Roko Construction Company Limited; China Communications and Construction Company Limited; Stirling Civil Engineering Limited; Bulmak Associates Limited; KTM Investments Limited; Niem Establishments Limited; Al-Mubarak Contracting Limited; Stars Group and Kenfields Services SED (Joint Venture); Kiru General Services Limited; Muga Services Limited and Gofa Investments Limited & MG Engineers and Contractors Limited Joint Venture*) on June 4, 2024.
3. Upon conclusion of the evaluation and adjudication process, the Respondent issued a Best Evaluated Bidder Notice on June 11, 2024, in which *Gofa Investments Limited & MG Engineers and Contractors Limited Joint Venture* was named as the best evaluated bidder at a contract price of UGX. 23,471,923,508/=.
4. The notice stated that *Muga Services Limited* (the Applicant) was disqualified at the Financial Stage of Evaluation, for offering a bid price of UGX. 24,145,072,798/=, higher than that of the Best Evaluated Bidder.
5. The Applicant being dissatisfied with the procurement process, filed a complaint before the Accounting Officer of the Respondent on June 14, 2024 on the following grounds:

- (i) The best evaluated bidder and the joint venture partners individually did not fulfil the mandatory technical experience as required.
 - (ii) The validity of the best evaluated bidder notice was doubted because it indicated a date of display as June 11, 2023 and date of removal as June 24, 2024 yet the year is 2024.
 - (iii) The procurement was done out of the EGP (GOU Electronic Procurement Portal) system and transparency was compromised and the evaluation was faced with subjectivity and hurried work.
 - (iv) The Accounting Officer issued a decision on June 24, 2024 whereby he found no merit in all the grounds of the Applicant's complaint.
6. The Applicant being dissatisfied by the decision of the Accounting Officer of the 3rd Respondent filed the instant application with the Tribunal on July 5, 2024, seeking to review the decision.
 7. The Applicant made fresh allegations that the certificates of completion submitted by the best evaluated bidder were either forged, or unrelated to the works.
 8. The Application raised the following issues for determination;
 - 1) *Whether or not the best evaluated bidder Gofa Investments Limited & MG Engineers Joint Venture met all the requirements for experience under Section 6.2.7 and 6.2.8 of the Bidding Document*
 - 2) *Whether or not the best evaluated bidder Gofa Investments Limited & MG Engineers Joint venture met the requirements under Section 6.2.5 and 6.2.8 of the Bidding Document.*
 9. The Applicant prayed that the Best Evaluated Bidder Notice be set aside and that it be declared the Best Evaluated Bidder.
 10. The 3rd Respondent filed a response to the Application on July 10, 2024. The 3rd Respondent contended that the Applicant

did not furnish the Accounting Officer with evidence that the best evaluated bidder did not fulfil the mandatory technical experience under the Bidding Document, and there were therefore no circumstances that gave rise to the Application.

11. The 3rd Respondent reiterated its findings that the best evaluated bidder met the technical and financial requirements under the Bidding Document.
12. The 3rd Respondent prayed that the Application be dismissed.
13. The Best Evaluated bidder filed a response on July 11,2024 in support of the Respondent's award decision.

B. ORAL HEARING

1. The Tribunal conducted an oral hearing via zoom on July 18, 2024.
2. The appearances were as follows:
 - 1) Mr. Robert Apenya appeared for the Applicant.
 - 2) Mr. John Kallemera for the 3rd Respondent (Entity).
 - 3) No appearances were entered for the 1st and the 2nd Respondents.

C. RESOLUTION

1. In view of the pleadings and the written and oral submissions, the issues have been framed as follows:
 - 1) Whether or not the Respondent lawfully evaluated the bids in respect of Specific Experience?
 - 2) Whether or not the Respondent lawfully evaluated the bids in respect of Financial Resources?
 - 3) What remedies are available to the parties?
2. The Tribunal has considered the pleadings, submissions, the bids and the procurement action file.

Issue no. 1:

Whether or not the Respondent lawfully evaluated the bids in respect of Specific Experience?

4. Regulation 5 of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2023* provides that the evaluation of bids shall be conducted in accordance with the evaluation criteria specified in the bidding documents; and that an Evaluation Committee shall not, during an evaluation, make any amendment including any addition to the evaluation criteria stated in the bidding document, and shall not use any other criteria other than the criteria specified in the bidding document. Regulation 19 requires the Evaluation Committee to conduct a detailed evaluation of a bid that passes the preliminary examination to assess— (a) 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. The detailed evaluation must 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.

5. ITB 29.1 of the Bidding Document provides that the Entity shall use the criteria listed in Section 3, Evaluation Methodology and Criteria.
6. ITB 31.1 of the Bidding Document provides that the Entity's determination of a bid's responsiveness shall be based only on the contents of the bid itself with the exception of findings recorded in the Evaluation Report after a due diligence or post qualification.
7. ITB 31.2 of the Bidding Document provides that a substantially responsive bid is one that conforms to all the terms, conditions and specifications of the Bidding Document without material deviation, reservation or omission.
8. However, regulation 6 of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2023* and ITB 32 of the Bidding Document permits the Entity to waive or request for missing information through clarification, provided the bid is substantially compliant and there is no material deviation.
9. For purposes of complying with the requirements for General Experience (Factor 6.2.6), a bidder was required to demonstrate *Experience under contracts in the role of contractor, subcontractor, or management contractor for at least the last 03 (three) years prior to the bid submission deadline of 5,000,000,000/=*.
10. Factor 6.2.7 (Specific Experience) provides as follows:
Participation as a contractor, subcontractor, or management contractor in at least the last 03 (three) years prior to the bid submission deadline of Ug.shs. 5,000,000,000/=, that have been successfully and substantially completed (at least 70 percent complete) and that are similar to the proposed works. The similarity was to be based on the physical size, complexity, methods/technology, or other characteristics as described in Section VI. Employer's Requirements. Attach contracts and completion certificates.

11. For joint ventures or consortium or Associations, the condition was for at least one partner to meet requirements for one characteristic.
12. Under Factor 6.2.8, a Bidder was required to demonstrate experience under contracts executed during the period stipulated in 6.2.7, with a minimum experience in Civil Engineering works projects (Roads or runways) and must submit at least 03 completed projects. For joint ventures or consortium or Associations, the condition was for at least one partner to meet the requirements.
13. Bidders were required to demonstrate General Experience using Form 9. Bidders were required to demonstrate Specific Experience using Form 10, Form 10A; and Form 10A (b).
14. *Gofa Investments Limited & MG Engineers and Contractors Limited Joint Venture* did not submit Form 9; Form 10, Form 10A; or Form 10A (b). Instead, they submitted a self-designed Table entitled *General Experience* and listed 25 contracts allegedly executed in the period 2009-2024.
15. Non-conformity with a particular form does not render a document void. The substance rather than the form is considered. Section 43 of the *Interpretation Act Cap. 2* provides that where any form is prescribed by any Act, an instrument or document which purports to be in such form shall not be void by reason of any deviation from that form which does not affect the substance of the instrument or document or which is not calculated to mislead. See our decision in ***APPLICATION NO.4 OF 2021- SAMANGA ELCOMPLUS JV versus PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY (PPDA) RESPONDENTS UGANDA ELECTRICITY DISTRIBUTION COMPANY LIMITED*** and ***APPLICATION NO. 13 OF 2021-KASOKOSO SERVICES LIMITED versus JINJA SCHOOL OF NURSING AND MIDWIFERY.***

16. The non-use of the prescribed form is therefore not fatal so long as the required information and documentation is submitted.
17. The Tribunal noted that *Gofa Investments Limited & MG Engineers and Contractors Limited Joint Venture* submitted copies of assorted completion certificates and call off-orders but did not submit copies of contracts relied upon to prove the Specific Experience.
18. The Evaluation Committee did not determine whether the omission to submit the contracts was a material deviation which would lead to rejection of the bid. The Evaluation Committee did not determine whether, if the deviation was not material, the missing documents could be requested through clarification.
19. The Evaluation report indicates that the bid of the *Gofa Investments Limited & MG Engineers and Contractors Limited Joint Venture* was responsive to Form 9-Specific Experience. This is erroneous because Form 9 was for General Experience, not Specific Experience.
20. The Specific Experience was evaluated on June 6, 2024 but the minutes of the Evaluation Committee do not specify which contracts submitted by each bidder were determined to qualify as Specific Experience. However, the Evaluation Committee Report indicates that during post qualification on June 7, 2024, the following documents submitted by *Gofa Investments Limited & MG Engineers and Contractors Limited Joint Venture* were determined as Specific Experience:
 - 1) Framework contract for mechanized maintenance of unpaved roads Lot4 Jinja station totaling to 106 km.
 - 2) Term maintenance of 48 selected national roads phase V; Lot 4.
 - 3) Upgrading to bitumen standard for Bulindo-Nakwero Road
21. As a matter of fact, *Gofa Investments Limited & MG Engineers and Contractors Limited Joint Venture* did not submit any

actual contracts copies. The underlying contracts for the call – off orders and completion certificates were not submitted.

22. During detailed evaluation, the Evaluation Committee should have assessed the documentation submitted by each bidder to determine which of the claimed projects qualified as Specific Experience. Under ITB 39.1 of the Bidding Document, post qualification is used to determine whether the bidder that is selected as having submitted the best evaluated bid is qualified to perform the contract satisfactorily. The Evaluation Committee can only verify what has been evaluated during the detailed evaluation. The procedure adopted by the Evaluation Committee was erroneous.

23. Issue no. 2 is resolved in the negative.

Issue No. 2:

Whether or not the Respondent lawfully evaluated the bids in respect of Financial Resources?

24. Factor 6.2.5 (Financial Resources) provides as follows:

The bidder must demonstrate access to or availability of financial resources such as liquid assets, unencumbered real assets, lines of credit, and other financial means, other than any contractual advance payments to meet; (i) the cash-flow requirement: of Ug shs 10,000,000,000/= and(ii) the overall cash flow requirements for the contract and its concurrent commitments.

25. For joint ventures or consortium or Associations, the condition was for at least one partner to meet seventy percent (70%) of the requirement.

26. Bidders were required to demonstrate Financial Resources using Form 8.

27. *Gofa Investments Limited & MG Engineers and Contractors Limited Joint Venture* did not submit Form 8. As resolved

under issue no. 1, the non-use of the prescribed form was not fatal so long as the bidder provided the required information and documents.

28. *Gofa Investments Limited & MG Engineers and Contractors Limited Joint Venture* submitted a credit line confirmation from I&M Bank (Uganda) Ltd for not less than UGX. 10,000,000,000. They also submitted a credit line confirmation from C.B World Investment Ltd to supply 50/70 penetration bitumen on credit up to UGX. 1,000,000,000.
29. The Evaluation Report does not show that the Evaluation Committee specifically evaluated all the bids for responsiveness to the requirement for Financial Resources.
30. However, the Evaluation Report indicates that during post qualification the credit line UGX. 10,000,000,000 from I&M Bank was confirmed.
31. Availability of financial resources was an evaluation criterion which should have been evaluated during detailed evaluation. It was erroneous for the Evaluation Committee to omit this evaluation and purport to carry it out only on the best evaluated bidder purportedly as post qualification. As resolved under issue no. 1, the Evaluation Committee can only verify what has been evaluated during the detailed evaluation. The procedure adopted by the Evaluation Committee was erroneous.
32. Issue no. 2 is resolved in the negative.

Issue No.3:

What remedies are available to the parties?

33. The Respondent's Evaluation committee failed to properly evaluate the bids with respect to financial resources and specific experience.

34. The procurement will be remitted back to the 3rd Respondent for re-evaluation.
35. The 3rd Respondent is best qualified to handle the allegations of forgery when conducting due diligence and post qualification.

D. DISPOSITION

1. The Application is allowed in part.
2. The Best Evaluated Bidder Notice dated June 11, 2024, is set aside.
3. The Respondent is directed to re-evaluate the bids 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 ten (10) working days from the date of this decision.
5. The Tribunal's suspension order dated July 8, 2024, is vacated.
6. The Respondent shall refund the Applicant's administrative review fees.
7. Each party shall bear its own costs for this Application.

Dated at Kampala this 22nd day of July, 2024.



**NELSON NERIMA
MEMBER**



**GEOFFREY NUWAGIRA KAKIRA
MEMBER**



**PAUL KALUMBA
MEMBER**



**CHARITY KYARISIIMA
MEMBER**



**KETO KAYEMBA
MEMBER**