

THE REPUBLIC OF UGANDA

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

APPLICATION NO 19 OF 2018

APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT TO THE TENDER FOR THE CONSTRUCTION OF THE PROPOSED HEADQUATER BUILDING OF THE INSPECTORATE OF GOVERNMENT PLOT 71-75 YUSUF LULE ROAD AND 24-26 CLEMENT HILL ROAD KAMPALA UGANDA PROC REF IG/WRKS/2017-2018/0001

APPLICANT: INSPECTORATE OF GOVERNMENT

1ST RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY (PPDA)

2ND RESPONDENT: SEYANI BROTHERS AND CO (U) AND PARBAT SIYANI CONSTRUCTION LTD

(Before: OLIVE ZAALE OTETE-CHAIRPERSON, DAVID KABATERAINE-MEMBER, ABRAHAM NKATA- MEMBER)

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS

- 1.1 1.1 On 12th April 2018, the Inspectorate of Government (the Entity) advertised for the construction of its proposed headquarters building in the New Vision Newspaper with a deadline submission of bids on 10th May 2018.
- 1.2 On 10th May 2018, five firms submitted bids which were opened and prices read out as follows; M/s Seyani Brothers & Co. (U) Ltd & Parbat Siyani Construction Ltd UGX 89,915,920,986 VAT inclusive, M/s China Wu Yi Co. Ltd UGX 96,024,787,218 VAT inclusive, M/s China National Aero Technology International Engineering Corporation (CATIC) UGX 78,535,684,925 VAT inclusive, M/s CRJE (East Africa) Ltd UGX 81,535,684,925 VAT inclusive and M/s Roko Construction Ltd & Roko Construction (Rwanda) Ltd JV (the Applicant), UGX 74,313,092,184 VAT inclusive.
- 1.3 The Evaluation Committee recommended award to the Applicant at UGX 74,313,092,184 VAT inclusive. On 1st June 2018, the Contracts Committee approved the Evaluation Committee recommendation and awarded the contract to the Applicant at UGX 74,703,912,383 VAT inclusive.
- 1.4 On 1st June 2018, the Entity displayed the Notice of the Best Evaluated Bidder with a removal date of 14th June 2018.
- 1.5 On 13th June 2018, the 1st Respondent applied for administrative review to the Accounting Officer.
- 1.6 On 25th June 2018, the Accounting Officer issued administrative review decision rejecting the Application for administrative review. Being dissatisfied with the decision of the Accounting Officer, on 5th July 2018, the 2nd Respondent applied for administrative review to the Authority.
- 1.7 The Authority conducted a hearing on 19th July 2018 and issued a decision on 6th August 2018 wherein it upheld the Application and directed the Entity to re-evaluate the bids taking into consideration the findings of the Authority on

the letter of recommendation, certificate of substantial completion, the computation of the values of the completed works by Roko Construction Limited and Roko Construction (Rwanda) Ltd JV and the cash and cash equivalent net of bank borrowings and to refund the administrative review fees by the complainant in accordance with regulation 11(2) of the PPDA ((Administrative Review) Regulations, 2014.

- 1.8 Being dissatisfied with the decision and recommendations of the 1st Respondent the Applicant filed this Application before the Tribunal challenging the Authority's decision.

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION

- 2.1 On 22nd August 2018, the Applicant filed an application to the Tribunal challenging the Authority's decision.

- 2.2 The issues on which the Applicant sought a decision of the Tribunal were as follows:

- i. Whether the Authority had a duty, and neglected such duty, to demonstrably consider the peculiar background of the procurement, particularly the history of the attempts by bidders to pervert the integrity of the process, in arriving at a decision as to whether the insistence on strict adherence to criteria dictated by the bid document was necessary and justified in deciding eligibility of bidders documents.
- ii. Whether having given the best evaluated bidder (Roko) the opportunity to be heard and cross examined on the matters adversely affecting them in the application by Seyani, the Authority had an absolute and non-derogable obligation to demonstrably consider their submissions and tendered evidence before making decisions and recommendations that affected Roko adversely.
- iii. Whether the Authority had a duty, and neglected such duty, to demonstrably and thoroughly examine and adjudicate the matter raised by the Applicant that the 2nd Respondent (Seyani) had tendered submissions and evidence that amounted to an admission that they had accessed confidential and privileged information of other bidders, which information they had used to influence or pervert the procurement process, which was both unethical and criminal.

- iv. Whether the document labelled 'TO WHOM IT MAY CONCERN' signed by Jonathan E. Nsubuga and issued on a date that could be either 17th November 2016 or 16th November 2017 could be equated or suffice as a 'Certificate of Substantial completion' indicating that atleast 75% of the project is complete, as required.
- v. Whether the letter issued by the Commissioner, Corporate Services URA, stating that the project works were progressing well as required by URA can be considered adequate, even though it does not highlight the three mandatory specific areas dictated by the bid document, being the quality of work done, the timeliness of the execution of such work and the financial strength of the recommended firm.
- vi. Whether a document that is a mandatory requirement for purposes of eligibility and has been found to be lacking in materials particular can be cured at the instigation of the Executive Committee, exercising their powers under regulation 10 of the PPDA Regulations, 2014 to seek clarification from the issuing authority, in order and for purposes of rendering the document compliant and passing the bidder.
- vii. Whether the Authority was justified to adversely affect both the PDE and the BEB by discarding the PDE's CPA tendered evidence, Expert Opinion and that of the representatives of the BEB (Roko) showing that the cash and cash equivalents net of bank borrowings for the BEB was above the required average of UGX 20bn; and instead rule that they (Authority) had computed it as "*negative*", without disclosing the identity and credentials of the expert it used; the formula and standards such expert employed; the actual computations done to examine accuracy; and the final figure arrived at after the process above.
- viii. Whether the Authority was justified in discarding or ignoring the evidence and submissions of the PDE and BEB justifying the use of the rate as at bid opening and or evidence that the value as at completion combined with the Bank of Uganda rate then, respectively, was above UGX 90bn for the impugned project, rendering the BEB compliant; and without offering any substantiation for the Ruling that the rate to be applied ought to have been that of the Bank

of Uganda on 11th July 2016, and declaring the BEB's project thus non-compliant.

- ix. Whether the Authority had any plausible grounds to order the PDE to re-evaluate the bids, and to, for all intent and purposes, disqualify the BEB, without according them fair hearing on the matter or alternatively, without taking into consideration their submissions, before issuing the adverse ruling to disqualify them.
- x. Whether the Authority was justified in seemingly taking on the mandate of the Evaluation Committee and issuing directives which have the effect of curtailing the discretionary evaluation powers of the Evaluation Committee by dictating which bidder to disqualify and which bidder to deem eligible; or whether the Authority should have stopped at rendering a decision on admissibility of the documents and values, and returned the bids for fresh evaluation, as sought by the Applicant.

2.3 The Applicant prayed that the Tribunal, upon resolution of the issues above, makes the following declarations, orders and directives as corrective actions:

- i. That the letter/document titled "To Whom It May Concern" is not a certificate of substantial completion showing completion of at least 75% of the project as required under Section 3, Clause 5(c) at page 33 of the Solicitation Document, and the PDE was correct to adjudge it non-compliant and disqualify the second respondent.
- ii. That the letter of recommendation issued by the Commissioner Corporate Services, Uganda Revenue Authority is non-compliant with the requirements of the letter of recommendation listed under Section 3, Clause 5(c) at page 33 of the Solicitation Document as it did not specify the quality of work, timelines of execution of the work and financial strength of the firm; therefore the PDE was correct to adjudge it non-compliant and disqualify the second respondent.
- iii. That the two documents referred to in (i) and (ii) above were non-compliant and such defect cannot be cured by way of Evaluation Committee requesting for clarifications under the provisions of Regulation 10 of the PPDA (Evaluation) Regulations, 2014.

- iv. That strict adherence to the criteria set out in the Solicitation Document by the PDE was necessary and justified, given the background of the bidding process, where attempts to unethically pervert the procurement process had been recorded and are under investigation.
- v. That the decision of the Authority that the cash and cash equivalents of the BEB is negative is not supported by adequate evidence, therefore the computations by the PDE and the submissions of the BEB that its cash and cash equivalents net of bank borrowings is above the minimum required annual average of UGX20bn, which are supported by relevant evidence are upheld.
- vi. That the Acacia Commercial Development Project submitted by the BEB (Roko) in fulfilment of the specified experience meets the minimum requirement of having a value above UGX 90billion at completion.
- vii. That the Authority erred in disregarding the evidence submitted by the BEB, but making a decision adverse to them and the PDE, and such decision stands quashed for offending the rules of natural justice.
- viii. That the Authority erred in failing to pursue and adjudicate the issue of the second respondent's admitted unethical and unlawful access and use of confidential bidders' information, and the matter should be appropriately investigated, and the culprits sanctioned.
- ix. That the Authority erred in taking over the mandate of the Evaluation Committee by dictating that a bidder deemed non-compliant (Seyani/Second Respondent) be re-evaluated, and the BEB considered non-compliant, even before the decreed re-evaluation is carried out.
- x. That the decision of the Authority to uphold ALL the grounds of the second respondent and order a re-evaluation and refunds of the administrative costs is quashed; and in its stead, the decision of the PDE declaring Roko the BEB is affirmed, execution of the contract between PDE and BEB ordered, and the administration fee forfeited.
- xi. That the Respondents be ordered to pay costs and damages, as deemed appropriate by the Tribunal.

3.0 DISPOSAL OF APPLICATION

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

- 1) The Applicant's Application to the Tribunal dated 22nd August 2018, annexes to the Application, the written and oral submissions.
- 2) The Authority's response to the Application dated 27th August 2018, annexes to the response, and the written and oral submissions.

3.2 The Tribunal conducted a hearing for the Parties on 5th September 2018. The Applicant was represented by Ms. Pauline Nansamba; the 1st Respondent was represented by Mr. John Kallemera. The 2nd Respondent was represented by Mr. Peter Kauma. In attendance were representatives of the Applicant.

5.0 ISSUES

5.1 The issues for determination by the Tribunal were the same issues outlined in paragraph 2.2 above.

6.0 SUBMISSIONS BY COUNSEL

6.1 Counsel for the 1st Respondent raised a preliminary matter in respect of which, he sought guidance of the Tribunal before Counsel could make submissions on the issues. He stated that the decision of the Tribunal in *Roko Construction Ltd & Roko Construction (Rwanda) Ltd JV versus Public Procurement and Disposal of Public Assets Authority and CRJE (East Africa) Ltd, Application 17 of 2018* and in *Roko Construction Ltd & Roko Construction (Rwanda) Ltd JV versus Public Procurement and Disposal of Public Assets Authority and Seyani Brothers and Co (U) And Parbat Siyani Construction Ltd, Application 18 of 2018* effectively cancelled the procurement process of the Entity because the Tribunal in both decisions advised the Entity to re-tender the procurement, if it so wished. Counsel submitted that the instant Application was on all fours with Applications 17 and 18 of 2018. He stated that the current application was affected by the Tribunal orders on the aforesaid decisions. Counsel sought guidance as to whether the Tribunal

should proceed to hear this Application or adopt its orders in Applications 17 and 18 of 2018, with the necessary modifications.

6.2 Counsel for the Applicant submitted that she had no objection to the guidance sought by Counsel for the 1st Respondent. Similarly, Counsel for the 2nd Respondent agreed with both Counsel and stated that the instant Application was overtaken by the events and orders pronounced by the Tribunal in Applications 17 and 18 of 2018.

7.0 RESOLUTION BY THE TRIBUNAL

7.1. The Tribunal is in agreement with the submissions of Counsel that the instant Application is on all fours with Applications 17 and 18 of 2018 and is thus affected by the orders of the Tribunal made in those Applications and therefore abates and abides the orders in Applications 17 and 18.

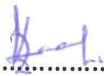
8.0 DECISION OF THE TRIBUNAL

1. This Application abates because the issues in contention have been substantively resolved in Applications 17 and 18 of 2018 in respect to the same procurement.

2. Each Party shall bear its own costs.


SIGNED and sealed this 15th day of October, 2018 by the said

OLIVE ZAALE OTETE


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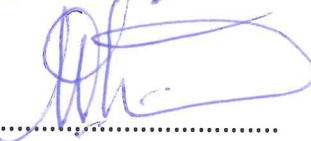
CHAIRPERSON

ABRAHAM NKATA


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MEMBER

DAVID KABATERAINE


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MEMBER