

THE REPUBLIC OF UGANDA

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

**APPLICATION NO 23 OF 2018**

**APPLICATION IN RESPECT TO THE PROCUREMENT FOR EARTH MOVING  
EQUIPMENT UNDER LOT 1: BULLDOZERS AND EXCAVATORS UNDER PROCUREMENT  
REFERENCE MWE//SUPLS/18-19/0000/1.**

**APPLICANT: MANTRAC (U) LTD**

**1<sup>ST</sup> RESPONDENT: ATTORNEY GENERAL**

**2<sup>RD</sup> RESPONDENT: NILETRAC (U) LTD**

**3<sup>RD</sup> RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS  
AUTHORITY.**

**(Before: OLIVE ZAALE OTETE-CHAIRPERSON, MOSES JURUA ADRIKO (SC)-MEMBER,  
DAVID KABATERAINE-MEMBER, ABRAHAM NKATA- MEMBER AND ENG. ISANGA  
THOMAS BROOKES-MEMBER)**

## DECISION OF THE PPDA APPEALS TRIBUNAL

### 1.1 BRIEF FACTS

- 1.1 The Ministry of Water and Environment (the Entity) initiated the procurement for Earth moving Equipment under Lot 1 to wit Five (05) Bull Dozers and Five (05) Hydraulic Excavators, Procurement Reference MWE/SUPLS/18-19/00001/1.
- 1.2 On 2<sup>nd</sup> July 2018, the bid notice was published in the New Vision and Daily Monitor Newspapers with a deadline for submission of bids on 30<sup>th</sup> July 2018.
- 1.3 On 30<sup>th</sup> July 2018, four bidders to wit Niletrac (U) Ltd, Hansom Eastern Investments (U) Ltd, Achelis (U) Ltd, Victoria Equipment and Mantrac (U) Ltd (the Applicant) submitted bids.
- 1.4 The Evaluation Committee Report dated 14<sup>th</sup> August 2018, indicated that Niletrac (U) Ltd and Mantrac (U) Ltd were responsive to both the preliminary evaluation criteria and detailed technical evaluation and proceeded to financial comparison.
- 1.5 The Evaluation Committee report dated 14<sup>th</sup> August 2018, indicated that upon carrying out financial comparison, Niletrac (U) Ltd was returned as the best evaluated bidder (BEB).
- 1.6 On 31<sup>st</sup> August 2018, the Contracts Committee approved the Evaluation Committee's recommendation and awarded the contract to Niletrac (U) Ltd at UGX 8,083,000,000 inclusive of applicable taxes.
- 1.7 On 3<sup>rd</sup> September 2018, the Notice of the Best Evaluated Bidder was displayed with the removal date of 14<sup>th</sup> September 2018.
- 1.8 On 13<sup>th</sup> September 2018, the Applicant filed for administrative review to the Accounting Officer requesting to understand the criteria for selection of the Best Evaluated Bidder.

- 1.9 On 14<sup>th</sup> September 2018, the Accounting Officer replied the Applicant by availing the Applicant the evaluation criteria used for the impugned procurement process.
- 1.10 On 21<sup>st</sup> September 2018, the Applicant filed for administrative review to the 3<sup>rd</sup> Respondent notifying it that it had received a written explanation for the criteria used to make the selection from the procuring and disposing entity and requesting for a formal hearing.
- 1.11 The 3<sup>rd</sup> Respondent did not handle the administrative review complaint made to it by the Applicant.
- 1.12 On 29<sup>th</sup> October 2018, the Applicant being dissatisfied with the 3<sup>rd</sup> Respondent's failure to handle the administrative review complaint, filed this Application before the Tribunal against the Attorney General in its representative capacity as the Government pleader of the procuring and disposing entity, the BEB and the 3<sup>rd</sup> Respondent.
- 1.13 On 30<sup>th</sup> October, 2018 the Tribunal wrote to the Accounting Officer, Ministry of Water and Environment requesting it to prepare and file a response to the application and written submissions in accordance with the summons attached.
- 1.14 On 6<sup>th</sup> November, 2018 the Tribunal issued a hearing notice to the Accounting Officer, Ministry of Water and Environment inviting it to attend a hearing on 9<sup>th</sup> November, 2018.

## **2.0 APPLICATION FOR THE REVIEW OF THE AUTHORITY'S FAILURE TO HANDLE ADMINISTRATIVE REVIEW COMPLAINT.**

- 2.1 On 29<sup>th</sup> October 2018, the Applicant filed an application with the Tribunal challenging the 3<sup>rd</sup> Respondent's failure to handle administrative review complaint.
- 2.2 The grounds for application to the Tribunal were as follows:

- i. *The 3<sup>rd</sup> Respondent's failure upon receipt of the complaint of the Applicant to review the decision of the Accounting Officer in respect of the 2<sup>nd</sup> Respondent's evaluation as the Best Evaluated Bidder for the captioned procurement reference.*
- ii. *The 3<sup>rd</sup> Respondent's failure to make a recommendation on the decision of the Accounting Officer in accordance with the statutory period provided for under the PPDA Act, 2003.*
- iii. *The 3<sup>rd</sup> Respondent's failure to issue a decision within the required twenty-one working days after receiving the Applicant's complaint in respect of the 2<sup>nd</sup> Respondent's evaluation by the Entity as the best evaluated bidder*
- iv. *The 2<sup>nd</sup> Respondent's evaluation by the Entity as the best evaluated bidder in respect of the impugned procurement reference*
- v. *The Entity's failure to respond to the Applicant's complaint regarding the evaluation of the 2<sup>nd</sup> Respondent as the best evaluated bidder in the impugned procurement process*
- vi. *Failure by the Entity to provide the Applicant with a summary of the evaluation process, a comparison of the tenders, proposals or quotations and the reasons for the disallowance of the Applicant's bid*
- vii. *The Entity's failure to evaluate the Applicant as the best evaluated bidder in respect of the impugned procurement process.*
- viii. *What remedies are available?*

### **3.0 DISPOSAL OF APPLICATION**

3.1 In disposing of the Application for failure by the 3<sup>rd</sup> Respondent to handle the administrative review complaint, the Tribunal analyzed the following documents:

- 1) The Applicant's Application to the Tribunal dated 29<sup>th</sup> October 2018, annexes to the Application, the written and oral submissions.
- 2) The 1<sup>st</sup> Respondent's response dated 7<sup>th</sup> November, 2018 and oral submissions.
- 3) The 2<sup>nd</sup> Respondent's response dated 2<sup>nd</sup> November, 2018 and the written and oral submission
- 4) The 3<sup>rd</sup> Respondent's response to the Application dated 1<sup>st</sup> November 2018, annexes to the response, and the written and oral submissions.

3.2 The Tribunal conducted a hearing for the Parties on 9<sup>th</sup> November 2018. The Applicant was represented by Mr. Barenzi Johny and Gilbert Opode; the 1<sup>st</sup> Respondent was represented by Mr. Oburu Odoi Jimmy; the 2<sup>nd</sup> Respondent was represented by Tusingwire Ronald and Ssekandi Gonzagga Kironde and the 3<sup>rd</sup> Respondent was represented by Mr. John Kallemera. In attendance were representatives of the Parties.

#### **4.0 ISSUES**

4.1 The issues for determination by the Tribunal were agreed as follows:

- 1) Whether the 2<sup>nd</sup> Respondent passed all evaluation stages as per the evaluation report of the Entity.
- 2) Whether the Accounting Officer is in breach of his administrative review statutory obligations as provided for under the law
- 3) Whether the 3<sup>rd</sup> Respondent is in breach of its statutory obligations as provided for under the law
- 4) Whether the Applicant should be declared as the best evaluated bidder under procurement reference No. MWE/SUPLS/18-19/00001/1
- 5) Whether the Applicant is entitled to damages and costs.

#### **5.0 PRELIMINARY OBJECTIONS**

5.1 Counsel for the 3<sup>rd</sup> Respondent raised a preliminary objection that the application is untenable and fatally defective because it was not preceded by any actual applications for administrative review lodged before either the Accounting Officer of the entity or the 3<sup>rd</sup> Respondent. Counsel for the 2<sup>nd</sup> Respondent raised a preliminary objection to the effect that the Applicant's application to the Tribunal was filed outside the prescribed time.

5.2 Counsel for the 3<sup>rd</sup> Respondent argued that the application is fatally defective because it was not filed before the Accounting Officer and the Authority. That in the alleged application dated 12<sup>th</sup> September 2018, the Applicant merely stated that 'We hereby apply for an administrative review of procurement process to enable us not only to understand the criteria for selection of the best evaluated bidder but also allow us to appreciate the same'. He submitted

that this did not amount to any administrative review before the Accounting Officer because there was no single grievance raised.

- 5.3 Counsel for the 3<sup>rd</sup> Respondent relied on **Section 89 (1) of the Act** which provides that a bidder may seek administrative review for any omission or breach by a procuring and disposing entity of this Act. He argued that the Applicant in its letter to the Accounting Officer did not state any omission or breach by the Entity, therefore the complaint falls short of the requirement envisaged under the law.
- 5.4 Counsel for the 3<sup>rd</sup> Respondent also relied on **Section 90 (1) of the Act** which provides that a bidder who is aggrieved by a decision of a procuring and disposing entity may make a complaint to the Accounting Officer of the procuring and disposing entity. He submitted that the letter written by the Applicant to the Accounting Officer does not qualify to be a complaint.
- 5.5 Counsel cited **Regulation 4 (2) (c) of the PPDA (Administrative Review) Regulations SI No. 16 of 2014** which states that the substantive and factual grounds of the complaint include the provision of the Act or regulations made under the Act which are subject of the breach or omission by procuring and disposing entity and where known, the names of the person involved in the subject of the complaint, the events and facts that constitute the complaint. Counsel submitted that the Applicant in its letter dated 19<sup>th</sup> September, 2018 to the 3<sup>rd</sup> respondent stated that *'We have now received a written explanation for the criteria used to make the selection from the procuring and disposing entity. This letter is therefore to request a formal hearing with your office on the same'*. Counsel argued that that the said letter is not a complaint to the Authority therefore the Applicant does not have locus before the Tribunal. He further submitted that the Applicant's letter to the Accounting Officer was written on the last day of the administrative review period and therefore the administrative review window elapsed without the Applicant filing a complaint to the Accounting Officer.
- 5.8 Counsel relied on the case of *Hoima Taxi/Bus and Drivers Savings and Credit Cooperative Society Vs PPDA, Application No. 5 of 2014*, wherein the Tribunal decided that the procedure referred to in Section 90 of the Act is specific in nature; it is a procedure to be followed by a bidder aggrieved by a decision of the Accounting in respect to administrative review. Counsel submitted that

the Applicant in its letter to the Accounting Officer did not conform to the requirement of the provision of the Act.

- 5.9 Counsel prayed that the application be dismissed with no orders to costs to the 3<sup>rd</sup> Respondent.
- 5.10 Counsel for the 2<sup>nd</sup> Respondent submitted that they join issues with the submission of the Counsel for the 3<sup>rd</sup> Respondent on the preliminary objection that there was never an application for administrative review filed by the Applicant at both the Accounting officer or with the 3<sup>rd</sup> Respondent. Counsel abandoned the preliminary objection with respect to filing out of time when the Tribunal brought to his attention the fact that the Applicant filed its application with the Tribunal on 29<sup>th</sup> October, 2018 within the prescribed period of time.
- 5.11 In reply, Counsel for the Applicant argued that nothing in the law suggests that administrative review must conform to the law. He submitted that the letter dated 12<sup>th</sup> September, 2018 to the Accounting Officer clearly indicated that the Applicant was seeking for administrative review before the Accounting officer; and that therefore the letter did not offend any provisions of Section 89 (1) of the Act. Counsel for the Applicant submitted that the said letter in itself amounted to a complaint envisaged under the law because the Accounting Officer replied to the letter seeking for information. He further submitted that the letter dated 19<sup>th</sup> September, 2018 to the Authority is a complaint itself and the two letters dated 12<sup>th</sup> September, 2018 and 19<sup>th</sup> September, 2018 must be construed as complaints by the Tribunal. Counsel for the Applicant prayed that this Tribunal finds no merit in this preliminary objections and the same be overruled.

#### **REJOINDER**

- 5.13 Counsel for the 3<sup>rd</sup> Respondent submitted in rejoinder that according to Section 89 (1) of the Act, a bidder must be challenging an omission or breach by the procuring and disposing Entity. That the two letters dated 12<sup>th</sup> September, 2018 and 19<sup>th</sup> September, 2018 do not state any omission or breach by the Entity. He further argued that Regulation 4 (2) (c) of the PPDA (Administrative Review) Regulations SI No. 16 of 2014 is explicit; one must have grounds in a complaint which in this case are lacking in the Applicant's letters to the Accounting Officer and the 3<sup>rd</sup> respondent.

- 5.15 Counsel submitted that Counsel for the Applicant admitted in his reply to the preliminary objection that the letter dated 12<sup>th</sup> September, 2018 to the Accounting Officer was seeking for information and therefore the 10 working days within which an aggrieved bidder can make a complaint expired without the Applicant making a complaint to the Accounting Officer. He prayed that the preliminary objection be upheld by the Tribunal.
- 5.16 Counsel for the 2<sup>nd</sup> Respondent in rejoinder submitted that the use of word 'may' in Sections 89 (1) and 90 (1) of the Act gives discretion to a bidder to file or not to file administrative review; but if a bidder chooses to file an application for administrative review, the bidder must conform to Regulation 4 (2) (c) of the PPDA (Administrative Review) Regulations, 2014. The two letters dated 12<sup>th</sup> September, 2018 and 19<sup>th</sup> September, 2018 do not therefore conform to the provisions of the law in order to qualify as complaints. Counsel for the 2<sup>nd</sup> Respondent prayed that the preliminary objection be upheld by the Tribunal.
- 5.17 Tribunal directed the parties to proceed with submission on the merits of the application and deferred the ruling on the preliminary objection for the decision of the Tribunal.

## **6.0 SUBMISSIONS BY COUNSEL ON THE MERITS OF THE APPLICATION**

- 6.1 Counsel for the Applicant in respect to the first issue submitted that according to Annexure C in bundle 1, at page 4, the experience and past performance of the bidder; the bidder must possess 5 years' experience of supplying commodities of the same magnitude. Counsel relied on Bundle 4, Annexure A4 which is a registration/reservation dated 13<sup>th</sup> December, 2013 and A5 a letter from Uganda Registration Services Bureau which confirmed that the 2<sup>nd</sup> Respondent was incorporated on the 13<sup>th</sup> December 2013 under registration number 176202. He submitted that accordingly, the 2<sup>nd</sup> Respondent does not have the 5 years' experience requirement of the bid document. Counsel further submitted that by the Accounting Officer failing to adhere to the 5 years' experience requirement, he offended the provisions of Section 43 (a) of the Act about equality.



- 6.3 Counsel for the Applicant abandoned Issue No. 2 in respect to whether the 1<sup>st</sup> Accounting Officer of the Ministry of Water and Environment breached his administrative review statutory obligations as provided for under the law.
- 6.4 Counsel for the Applicant in respect to Issue No. 3 submitted that the 3<sup>rd</sup> Respondent upon receipt of the letter dated 19<sup>th</sup> September, 2018 should have called the parties for a hearing but it declined therefore it breached its statutory obligations.
- 6.5 Counsel for the Applicant abandoned Issue No. 4 in respect to whether the Applicant should be declared as the best evaluated bidder under procurement reference No. MWE/SUPLS/18-19/00001/1.
- 6.6 Counsel for the Applicant in respect to Issue No. 5 stated that he attached authorities in his written submission relating to damages and costs and prayed that this Application be allowed with costs.
- 6.7 Counsel for the 3<sup>rd</sup> Respondent in respect to Issue No. 1, submitted that he does not have power to make a decision in respect to the administrative review .That it is through the communication of the Executive Director of the 3<sup>rd</sup> Respondent that such a decision can be made. Counsel submitted that this application was never handled by the 3<sup>rd</sup> Respondent during administrative review. He stated that Section 91I (6) of the Act provides for the Tribunal to affirm the decision of the Authority, vary the decision of the Authority; or set aside the decision of the Authority. He submitted that in the event the Tribunal is inclined to hear this application, it should be mindful of the case of ***Re-form and Kalamanzoo Vs Electoral Commission, Application No.15 of 2015*** to guide the Tribunal and the matter should be referred to the Authority for hearing.
- 6.8 Counsel for the 3<sup>rd</sup> Respondent in respect to Issue No. 2 submitted that he reiterates his preliminary objection that there was no complaint to the Accounting Officer and added that since Counsel for the Applicant abandoned this issue, it must be dismissed with no orders to costs to the 3<sup>rd</sup> Respondent.
- 6.9 Counsel for the 3<sup>rd</sup> Respondent in respect to Issue No. 3 submitted that the Applicant should have complaint to the Authority but they did not so there was no breach of statutory obligations.

- 6.10 Counsel for the 3<sup>rd</sup> Respondent in respect to Issue No. 4, submitted that since Counsel for the Applicant abandoned this issue, it must be dismissed with no orders to costs to the 3<sup>rd</sup> Respondent
- 6.11 Counsel for the 3<sup>rd</sup> Respondent prayed that this Application be dismissed with no orders to costs to the 3<sup>rd</sup> Respondent.
- 6.12 Counsel for the 2<sup>nd</sup> Respondent submitted that he reiterate his pleadings and would add only on the issue of 5 years of experience. He stated that the 2<sup>nd</sup> Respondent complied with the requirements of the 5 years' experience as provided for in the bid document. He argued that Regulation 34 of the PPDA (Evaluation) Regulations SI No. 9 of 2014 provides for post qualification evaluation which is not restrictive and accordingly the 2<sup>nd</sup> Respondent complied with the law.
- 6.13 Counsel for the 2<sup>nd</sup> Respondent submitted that the Applicant is not entitled to costs and damages because he did not follow the procedure laid under the law for administrative review. He prayed that the application should therefore be struck out with costs.
- 6.9 Counsel for the 1<sup>st</sup> Respondent submitted that he associated himself with the submission of the 3<sup>rd</sup> Respondent and added that there is no cause of action against the Attorney General. He prayed that this Honorable Tribunal finds it accordingly that the Attorney General is improperly joined as a party.

## **7.0 RESOLUTION BY THE TRIBUNAL**

- 7.1. The 3<sup>rd</sup> Respondent raised a preliminary objection as to whether the application is untenable and fatally defective because it was not preceded by any actual applications for administrative review lodged before either the Accounting Officer of the Ministry of Water and Environment or the 3<sup>rd</sup> Respondent.
- 7.2 The Tribunal considered the submissions from Counsel for the 3<sup>rd</sup> Respondent, 2<sup>nd</sup> Respondent and Counsel for the Applicant in respect to the preliminary objection. The Tribunal in reaching a decision on the preliminary objection relied on section 89(1) of the PPDA Act and Regulation 4 (2) (c) of the PPDA (Administrative Review) Regulations SI No. 16 of 2014.

*“ 89(1) A bidder may seek administrative review for any omission or breach by a procuring and disposing entity of this Act, or any regulations or guidelines*

*made under this Act or of the provisions of bidding documents, including best practices.*

*Regulation 4(c) states that the substantive and factual grounds of the complaint include the provision of the Act or regulations made under the Act which are subject of the breach or omission by procuring and disposing entity and where known, the names of the person involved in the subject of the complaint, the events and facts that constitute the complaint.*

7.3 The Tribunal properly addressed its mind on the contents of the letters dated 12<sup>th</sup> September, 2018 and 19<sup>th</sup> September, 2018. In the first letter dated 12<sup>th</sup> September, 2018, it is stated as follows; ***'We hereby apply for administrative review of procurement process to enable us not only to understand the criteria for selection of the best evaluated bidder but also allows us to appreciate the same'***. In the second letter dated 19<sup>th</sup> September, 2018 it is stated as follows; *'We have now received a written explanation for the criteria used to make the selection from the procuring entity. This letter is therefore to request a formal hearing with your office on the same'*. The Tribunal is persuaded by the submission of Counsel for the 3<sup>rd</sup> respondent and Counsel for the 2<sup>nd</sup> respondent that the two letters do not state any grievance to the Accounting Officer and the Authority, and hence do not meet the requirements of a complaint stipulated in section 89(1) of the Act and regulation 4 of the PPDA Administrative Review Regulations, 2014. The application before the Accounting Officer and the Entity were therefore incompetent, and cannot thus be used as a basis for filing an application with the Tribunal.

7.5 Turning to the merits of this application, since the Tribunal has upheld the preliminary objection raised by the 3<sup>rd</sup> Respondent, the resolution of the preliminary objection in the positive in effect has completely disposed of the application and for that reason we shall not delve on the merits of this application since it is inconsequential.

#### 8.0 **DECISION OF THE TRIBUNAL**

1. The preliminary objection is upheld.
2. The Application is accordingly dismissed.
3. Each party shall bear its own costs.


SIGNED and sealed this 12<sup>th</sup> day of November, 2018 by the said

OLIVE ZAALE OTETE


  
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CHAIRPERSON

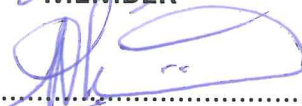
MOSES JURUA ADRIKO-SC

  
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