

THE REPUBLIC OF UGANDA

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

APPLICATION NO 8 OF 2018

**APPLICATION FOR ADMINISTRATIVE REVIEW IN RESPECT TO THE
PROCUREMENT OF TRACTORS AND MATCHING IMPLEMENTS BY NATIONAL
AGRICULTURAL ADVISORY SERVICES (NAADS) SECRETARIAT UNDER
PROCUREMENT REF: NAADS/SUPLS/2017-18/00101**

APPLICANT: ENGINEERING SOLUTIONS (U) LIMITED

**RESPONDENTS: 1. PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
AUTHORITY**

2. NATIONAL AGRICULTURAL ADVISORY SERVICES (NAADS)

3. COOPER MOTOR CORPORATION (U) LIMITED (CMC)

**(CORAM: OLIVE ZAALE OTETE- CHAIRPERSON, DAVID KABATERAINE-MEMBER,
ABRAHAM NKATA- MEMBER**

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS

- 1.1 On 13th October 2017, the National Agricultural Advisory Services (the Entity) initiated the procurement process for supply and delivery of 110 tractors and matching implements under two Lots at an estimated cost of UGX 12,942,600,000 i.e. Lot 1- 70 tractors of 42 Horse Power (HP) and Lot 2- 40 tractors of 65 HP.
- 1.2 On 14th December, 2017, the bid notice was published in the New Vision Newspaper with a deadline for submission of bids on 12th January 2018. This was later extended to 19th January 2018.
- 1.3 On 20th December, 2017, a pre-bid meeting was held with representatives of all participating bidders.
- 1.4 On 22nd December, 2017, an addendum to the bidding document was advertised and sent to all bidders that had been issued with the document with the following changes: provision for the cost of basic training of operators in basic operation and routine maintenance for 120 hours on the delivered tractors along with a detailed training program and a schedule for operators and provision for the detailed and costed schedules and program for comprehensive training of tractor operators/mechanics on operations and maintenance for 1000hrs running of tractor state the contact hours of training.
- 1.5 On 19th January, 2018 seven (7) bids were opened and the prices read out as follows: Cooper Motor Corporation Ltd (CMC) Lot 1 UGX 4,644,491,950 and Lot 2 UGX 3,255,667,800; Engineering Solutions (U) Limited Lot 1 UGX 4,853,647,000 and Lot 2 UGX 3,399,667,020; Toyota Ltd Lot 1 UGX 5,327,444,458 and Lot 2 UGX 3,856,537,640; MAS Corporation Ltd Lot 1 UGX 5,350,828,517.3 and Lot 2 UGX 3,668,079,326.8; Motor Centre EA Lot 1 UGX 6,607,800,500 and Lot 2 UGX 4,170,898,000; Farm Engineering Industries Ltd Lot 1 UGX 99,306,000 and Lot 2 UGX 133,054,000 and Ndovu Motors Lot 1 UGX 3,860,909,202 and Lot 2 UGX 5,456,767,330.

- 1.6 The Evaluation Committee report dated 9th February 2018 recommended award of the contract to Cooper Motor Corporation Ltd (CMC) at UGX 4,644,491,950 and UGX 3,255,667,800 VAT inclusive for Lots 1 and 2, respectively.
- 1.7 On 1st March, 2018, the Notice of Best Evaluated Bidder (NBEB) was displayed with a removal date of 15th March, 2018.
- 1.8 On 7th March, 2018, Engineering Solutions (U) Ltd (Applicant) applied to the Accounting Officer for administrative review on ground that the Evaluation Committee erred in law and fact when it found CMC as the best evaluated bidder yet CMC's bid was not administratively compliant with the recommended maintenance service for 2000hrs requirement in their price schedule as provided in the bidding document.
- 1.9 On 27th March, 2018, the Accounting Officer upheld the application for administrative review and suspended the award of the contract to CMC.
- 1.10 On 5th April, 2018, CMC filed for an administrative review before the Accounting Officer challenging its decision in regard to the Engineering Solutions (U) Limited application that found CMC's bid administratively non-compliant.
- 1.11 On the 12th April, 2018, the Accounting Officer responded to CMC's administrative review application and referred CMC to its earlier decision in regard to Engineering Solutions (U) Limited application it had issued on the 27th April 2018.
- 1.12 On 16th April, 2018, CMC filed a complaint to the Authority on grounds, inter alia, that the Accounting Officer failed to investigate its administrative review application filed with it on the 5th April 2018 and that its bid was administratively compliant.
- 1.13 On 30th April, 2018 the Authority wrote to all the bidders informing them about the administrative review application by CMC and requested all bidders to file with it any information the bidders may have on the procurement process.

- 1.14 On 7th May, 2018, Engineering Solutions (U) Limited (the Applicant) filed submissions with the Authority in reply to the CMC's administrative review application.
- 1.15 On 8th May, 2018, the Authority held a hearing of the CMC administrative review application but the Applicant was not invited to attend the hearing.
- 1.16 On 17th May, 2018, the Authority issued its decision wherein it upheld the administrative review application by CMC.
- 1.17 On 23rd May, 2018, the Applicant received an e-mail from the Entity forwarding the decision of the Authority regarding the CMC's administrative review application wherein the Authority held inter alia that the bid of CMC was administratively compliant and that the Entity should re-instate CMC as the Best Evaluated Bidder and proceed with the procurement process.
- 1.18 On 25th May, 2018, the Applicant being dissatisfied with the Authority's decision filed this Application before the Tribunal challenging the tribunal's decision.

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION.

- 2.1 On 25th May 2018, the Applicant filed an Application with the Tribunal for review of the Authority's decision.
- 2.2 The grounds for the Application to the Tribunal were:
- (a) *The PPDA Authority misdirected itself on the law and facts and erred when it found that Cooper Motor Corporation (U) Limited's bid was administratively compliant and held that the price of the bid by CMC was inclusive of the maintenance and training costs.*
- (b) *The PPDA Authority erred in law by not inviting the Applicant for the hearing of the administrative review application on the 8th May 2018 in contravention of the Applicant's right to a fair hearing under Article 28 and 44 of the Constitution of the Republic of Uganda 1995 and against the principles of natural justice.*

(c) The PPDA Authority erred in law and fact when it found that the Accounting Officer for NAADS did not issue a decision for CMC's administrative review application which entitled CMC to appeal to the PPDA Authority on the ground of failure to issue a decision in accordance with Section 90 (3) of the PPDA Act, 2003.

(d) It was erroneous for the PPDA Authority to order a re-instatement of CMC as best evaluated bidder when its bid was administratively non-compliant.

3.0 DISPOSAL OF APPLICATION

3.1 The Tribunal analyzed the following documents:

- (1) The Applicant's Application to the Tribunal dated 25th May, 2018, Annexes to the Application, the written and oral submissions.
- (2) The Authority's response to the Application dated 29th May, 2018, Annexes to the response and oral submissions.

3.2 The Tribunal conducted a hearing for the Parties on 6th June 2018. The Applicant was represented by Mr. Yusuf Mawanda and Mr. Brian Kalule. The 1st Respondent was represented by Mr. John Kallemera and Ms. Sheila Nakiwala. CMC was represented by Ms. Rebecca Nakiranda. In attendance were representatives from Engineering Solutions (U) Limited, CMC, and NAADS.

4.0 SUMMARY RULING

4.1 In accordance with section 91I (7) of the PPDA Act, 2003, the Tribunal delivered a summary of this ruling on the 8th June 2018. What follows is the detailed reasoning in support of the Tribunal's decision.

5.0 ISSUES

5.1 Five issues for resolution by the Tribunal were as follows:

1. *Whether the 1st Respondent misdirected itself on the law and facts and erred when it found that the 3rd Respondent's bid was administratively*

compliant and held that its price was inclusive of maintenance and training costs.

2. *Whether the 1st Respondent erred in law by not inviting the Applicant for the hearing of the administrative review application on 8th May 2018 in contravention of the Applicant's right to a fair hearing under Article 28 and 44 of the Constitution of the Republic of Uganda 1995 and against the principles of natural justice.*
3. *Whether the 1st Respondent erred in law and fact when it found that the Accounting Officer of the 2nd Respondent did not issue a decision for the 3rd Respondent's administrative review application which entitled the 3rd Respondent to appeal to the 1st Respondent on the ground of failure to issue a decision in accordance with Section 90(3) of the PPDA Act 2003.*
4. *Whether it was erroneous for the 1st Respondent to order a re-instatement of the 3rd Respondent as Best Evaluated Bidder when its bid was administratively non-compliant.*

5: What remedies are available to the parties.

6.0 Submissions by Counsel

- 6.1 Counsel for the Applicant argued issues 1 and 4 concurrently. Counsel maintained that the 1st Respondent misdirected itself on the law and facts and erred when it found that CMC's bid was administratively compliant and held that the price of the bid by CMC was inclusive of the tractor maintenance and training costs.
- 6.2 Counsel submitted that **Part 1 Section 4 Bidding Forms** of the Bidding Document for this procurement activity provided for a price schedule for supplies and related services; that this schedule contained 9 columns and it was a requirement that each column be filled. He argued that in order to arrive at the Total Price Delivered Duty Paid (DDP), the evaluation committee had to compute the figures in all the columns. Counsel stated that CMC, the best evaluated bidder's bid was blank in column 7 on "maintenance service for 2000 hours". He contended that the failure by CMC to include a cost in column 7 for tractor maintenance and service for 2000 hours was inconsistent

with the requirements of the bidding document and therefore the bid of CMC was administratively non-compliant.

- 6.3 Still on the first issue, Counsel for the Applicant submitted that the 1st Respondent erred in finding that CMC's bid was compliant with respect to the issue of tractor maintenance and service for 2000 hours because the bid provided in its Specification and Compliance Sheet, Item 21 that '*maintenance for 2000 hours has been incorporated in that of supply for tractors*'. Counsel contended that it was not sufficient for a bidder to state in its Specification and Compliance Sheet, Item 21 that maintenance for 2000 hours has been incorporated in that of supply for tractors. He argued that the bidder had to additionally specify the cost of maintenance for 2000 hours in the Price Schedule because the Evaluation Committee could not derive the final quoted prices of each bidder from the Specification and Compliance Sheet, but rather from the price schedule, which required a bidder to insert specifically a cost for tractor maintenance/ service for 2000 hours. For the above reasons, Counsel argued that it was erroneous for the 1st Respondent to order a reinstatement of the 3rd Respondent as Best Evaluated Bidder when its bid was administratively non-compliant.
- 6.4 On issue 2, Counsel for the Applicant submitted that the 1st Respondent erred in law by not inviting the Applicant for the hearing of the administrative review application on 8th May 2018 and violated the Applicant's right to a fair hearing in contravention of Articles 28 and 44 of the Constitution of the Republic of Uganda 1995 and against the principles of natural justice. Counsel submitted that the 1st Respondent, having informed all bidders of the administrative review application before it by CMC, and having requested them to provide information in respect to the same, should have invited the Applicant for a hearing of the administrative review proceedings, but the 1st Respondent did not. Counsel relied on ***Meis Industries Limited v. Mohamed Enterprises Limited, (2012) 2 EA***, where it was held that a fair hearing entails both parties to a dispute being afforded similar opportunities to present their respective case. He argued that since the Applicant was not provided an opportunity to attend the hearing held by the 1st Respondent, the decision arrived at by the 1st Respondent should be nullified on that ground.

- 6.5 With respect to issue 3, Counsel for the Applicant submitted that the 1st Respondent erred when it found that the Accounting officer of the Entity did not issue a decision for CMC's administrative review application which resulted into CMC appealing to the 1st Respondent on ground of failure by the Entity to issue a decision in accordance with section 90(3) of the Act. He argued that the Applicant filed an application for administrative review to the Entity challenging the award of contract in the NBEB to CMC and the application was resolved in the Applicant's favour. That it was therefore procedurally defective for CMC to lodge another administrative review complaint to the Entity. He contended that CMC should have challenged the decision of the Entity with the 1st Respondent instead of making a fresh application for administrative review to the Entity to review its own decision.
- 6.6 Counsel prayed the Tribunal to find that CMC's bid was not administratively compliant with the law and the requirements of the bidding document and the decision of the 1st Respondent to reinstate CMC as the BEB to be set aside, and instead maintain the decision of the Entity to re-evaluate the bids. He prayed for general damages and costs of the Application to be awarded.
- 6.7 In response to issue 1 and 4, Counsel for the 1st Respondent submitted that the bidding document under the Specification and Compliance Sheet NO. 21 provided that the *"Tractor recommended maintenance service for 2000 hours (bidder to indicate applicable schedule and actual activities to be carried out-cost of maintenance and service for 2000 hours to be incorporated in that of supply of tractor"*. Counsel submitted that with respect to maintenance service for 2000 hours, under the Technical Compliance Sheet, CMC's bid provided that maintenance service for 2000 hours has been incorporated in that of the supply of tractors. He further argued that CMC's bid provided a separate maintenance cost schedule and actual activities to be carried out for servicing of up to 2050 hours, hence CMC was compliant to the requirement, therefore the 1st Respondent rightly reinstated CMC as the BEB.
- 6.8 In response to issue 2 on right to a fair hearing, Counsel for the 1st Respondent relied on section 91 (3) of the PPDA Act which provides that, *"Before taking any decision on a complaint, the Authority shall notify all interested bidders of the complaint and may take into account representations from the bidders and from respective procuring and disposing entity"*. He submitted that the 1st

Respondent fulfilled the requirements of section 91(3) when it invited bidders who had participated to make any representations. He argued that the Applicant made its representation by way of a submission. He argued that there was no need to seek the Applicant's attendance at the hearing since it was not a party to the proceedings before the 1st Respondent. Counsel for the 1st Respondent argued that the case cited by the Applicant *Meis Industries*, applies to parties to a suit and therefore distinguishable to the application before the Tribunal, since the Applicant was not a party. He quoted the case of **Prime Contractors Ltd & Ors vs. PPDA & Anor HCMC No. 91 of 2014** where the Judge noted that a right to be heard does not necessarily mean physical appearance. He concluded this point by submitting that the Applicant was heard by the 1st Respondent because it was given an opportunity to make a submission, which it did.

- 6.9 In response to issue 3, Counsel for the 1st Respondent submitted that the 1st Respondent duly found that the 2nd Respondent's Accounting Officer did not issue a decision, or conduct administrative review in accordance with Section 90 (3) of the PPDA Act, 2003 and Regulation 5 of the PPDA (Administrative Review) Regulations 2014, S.I No. 16 of 2014. He argued that a bidder aggrieved by a decision of the Accounting officer must first file a complaint to the Accounting Officer, not directly with the Authority as stated by Counsel for the Applicant. He submitted that this view was stated by the Tribunal in ***Hoima Taxi Bus Owners Cooperative Society Application 5 of 2014***. He argued however that this issue is no longer of significance since CMC was ultimately heard by the 1st Respondent.
- 6.10 Counsel for CMC associated with the submission of the 1st Respondent, further emphasizing that the recommended maintenance service costs for 2000 hours had been incorporated in the price for the supply of the tractors under Item 21 of the compliance sheet.

7.0 Resolution by the Tribunal

- 7.1 The Tribunal will handle the issues in the same manner as argued by Counsel for the parties.
- 7.2 Under issues 1 and 4, the Tribunal has to determine whether the bid of CMC was administratively non-compliant because CMC bid price schedule was blank in column 7 on "maintenance service for 2000 hours.

- 7.3 It should be noted that the bidding document, under *Specification and Compliance Sheet Item NO. 21*, it provided that the “Tractor recommended maintenance service for 2000 hours (bidder to indicate applicable schedule and actual activities to be carried out- cost of maintenance and service for 2000 hours to be incorporated in that of supply of tractor”. In other words, under this item, a bidder in its bid was to indicate the cost of maintenance and service for 2000 hours to be incorporated in that of supply of the tractors.
- 7.4 It is not in dispute that CMC indicated in its bid under Specification and Compliance Sheet, Item 21 that maintenance for 2000 hours has been incorporated in that of supply of tractors. The Applicant however contends that this was not sufficient; that the bidder had to additionally specify the cost of maintenance for 2000 hours in the Price Schedule, and that by failing to do that, CMC’s bid was inconsistent with the bidding document and therefore administratively non-compliant.
- 7.5 The Tribunal has found regulation 18 of the PPDA (Evaluation) Regulations, 2014, instructive in determining this issue. Regulation 18(1) provides that 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. Regulation 18(3) provides that an evaluation committee shall determine the administrative compliance of a bid with the instructions in the bidding document and its responsiveness to the requirements of the procuring and disposing entity, based on the contents of the bid.
- 7.6 The Tribunal finds that with respect to the requirement that a bidder must provide for cost of maintenance and service for 2000 hours, the bid of CMC catered for this requirement under item “*Specification and Compliance Sheet NO. 21*” by indicating thereat that the cost of maintenance and service for 2000 hours was incorporated in that of supply of tractors. By catering for this cost in its bid, albeit not in column 7 of the Price Schedule, the CMC bid met this basic requirement and was therefore administratively compliant in accordance with regulation 18(1) and (3) of the PPDA (Evaluation) Regulations, 2014, S.I 9 of 2014. The 1st Respondent therefore rightly reinstated CMC as the BEB.

7.7 With respect to issue 2 on right to a fair hearing, the Tribunal was persuaded by the submission of Counsel for the 1st Respondent who stated that the 1st Respondent met its obligation under section 91(3) of the PPDA Act, 2003, when it invited the Applicant to make representations on the matter before it. Indeed the Applicant made its submission to the 1st Respondent. The Tribunal is further in agreement with the authority quoted by Counsel for the 1st Respondent **Prime Contractors Ltd & Ors vs. PPDA & Anor HCMC No. 91 of 2014** where the Judge noted that a right to be heard does not necessarily mean physical appearance. It is the firm view of the Tribunal that the Applicant was heard by the 1st Respondent when it submitted its representations by way of a written submission to the 1st Respondent.

7.8 On issue 3, the Tribunal is in agreement with the submission of Counsel for the 1st Respondent that the issue is of no consequence since CMC was eventually heard by the 1st Respondent. The Tribunal has decided in earlier applications that a bidder who is aggrieved by a decision of the Accounting Officer must file its complaint first with the Accounting Officer.

8.0 DECISION OF THE TRIBUNAL

1. The Tribunal finds that the Best Evaluated Bidder (CMC) complied with the requirements of the bidding document and therefore, its bid was administratively compliant. The blank space left by the best evaluated bidder at the price schedule is non-material because the cost for maintenance and service was incorporated in the cost of the tractors.
2. The Tribunal affirms the decision of the Authority in the impugned procurement process.
3. The application is accordingly struck out with no orders to costs.

SIGNED and sealed this 17th 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