

THE REPUBLIC OF UGANDA

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

APPLICATION NO.15 OF 2019

APPLICATION FOR ADMINISTRATIVE REVIEW OF THE DECISION OF PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT OF 'PROCUREMENT OF ENGINEERING, PROCUREMENT AND CONSTRUCTION OF MEDIUM VOLTAGE NETWORKS, INSTALLATION OF DISTRIBUTION TRANSFORMERS PLUS THE ASSOCIATED LOW VOLTAGE NETWORKS IN VARIOUS REGIONS OF THE COUNTRY UNDER LOT 6 REF NO: REA/WRKS/18-19/00290/06.'

APPLICANT: ETRADE COMPANY LIMITED

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

2ND RESPONDENT: RURAL ELECTRIFICATION AGENCY (REA)

3RD RESPONDENT: BURHAN ENGINEERS LIMITED

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

DECISION OF THE TRIBUNAL

1.0 BACKGROUND/FACTS

- 1.1 On 24th October 2018, Rural Electrification Agency (REA) initiated the procurement of **Engineering, Procurement and Construction** of medium voltage networks, installation and distribution of transformers plus associated low voltage networks under 8 lots in the different areas of the country. Lot 6 was in respect of Tororo, Kamuli, Mayuge, Buyende Districts with an estimated cost of UGX 17,612,901,065.55
- 1.2 On 14th November 2018, the Contracts Committee approved the use of the open bidding method, the bidding document and the Evaluation Committee members.
- 1.3 On 23rd November 2018, the Entity published a bid notice in the New Vision newspaper. The deadline for bid submission was 3rd January 2019 but was extended to 23rd January 2019.
- 1.4 On 23rd January 2019, the Entity received and opened six bids for lot 6 read out prices and evaluated the bids.
- 1.5 The evaluation report dated 3rd April 2019, recommended award of contract for lot 6 to Burhani Engineers Ltd at UGX 15,460,721,418.23 VAT inclusive.
- 1.6 On 15th April 2019, the Contracts Committee approved the recommendation and awarded the contract for lot 6 to Burhani Engineers Ltd at UGX 15,460,721,418.23 VAT inclusive. The Entity displayed the Notice of the Best Evaluated Bidder with a removal date of 30th April 2019.
- 1.7 On 17th April 2019, Etrade Ltd (Applicant) applied for administrative review to the Accounting Officer.
- 1.8 On 13th May 2019, the Accounting Officer issued a decision rejecting the complaint by the Applicant.
- 1.9 On 22nd May 2019, the Applicant being dissatisfied with the Accounting Officer's decision applied for administrative review to the Authority.
- 1.10 On 21st June 2019, the Authority issued a decision rejecting the complaint by

the Applicant.

- 1.11 The Applicant being dissatisfied with the Authority's decision, on 11th July, 2019 filed this Application before the Tribunal.

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION

- 2.1 On 11nd July, 2019 the Applicant lodged an application for review of the Authority's decision dated 21st June, 2019 listing six (6) grounds of appeal with the Public Procurement and Disposal of Public Assets Appeals Tribunal (the Tribunal).
- 2.2 The Applicant prayed that the Tribunal expunges the reasons that the 1st and 2nd Respondents have raised to deny the Applicant's Bid from progressing in the Bid Evaluation process and that the Tribunal instructs the 1st Respondent to progress the Applicant's bid which was the lowest and substantially responsive to the award of tender stage.

3.0 DISPOSAL OF APPLICATION

- 3.1 In disposing of the application for review, the Tribunal analyzed the following documents-
- 1) The Application lodged with the Tribunal and appendices attached thereto dated 11th July, 2019.
 - 2) Written response to the Applicant's application by the Authority and Annexes attached to the response dated 16th July 2019;
 - 3) The Applicant's written submissions and Annexes to the submissions;
 - 4) Written response by Burhan Engineers Limited dated 16th July 2019, the Best Evaluated Bidder (BEB) of the impugned procurement.
- 3.2 The Tribunal conducted a hearing for the parties on 24th July, 2019. The parties were represented by Mr Nester Byamugisha for the Applicant; Mr John Kallemera, for the 1st Respondent, Mr. Jimmy Oburu Odoi for the 2nd Respondent and Mr. Allan Bwesigye for the 3rd Respondent.
- 3.3 During the hearing, on the guidance of the Tribunal, Counsel for the 3rd Respondent abandoned the preliminary objection that the Application is bad in law/prolix/frivolous/vexatious and does not disclose any cause of action against the 3rd Respondent.

4.0 ISSUES

4.1 On 11th July, 2019 the Applicant lodged with the Public Procurement and Disposal of Public Assets Appeals Tribunal (the Tribunal) an application for review of the Authority's decision dated 21st June, 2019 listing six (6) issues. During the hearing, the Applicant summed up their appeal into three (3) issues to wit;

Issue No. 1: Whether the Evaluation Committee unfairly disqualified the Applicant's bid on the grounds it did.

Issue No. 2: Whether the grounds on which the REA Evaluation Committee disqualified the Applicant were grounds enough to portray the Applicant's inability to execute the project.

Issue No. 3: Whether the decision of REA's Accounting Officer and the 2nd Respondent were made in contravention of the Applicant's constitutional right to a fair hearing and therefore null and void.

5.0 SUBMISSION BY THE PARTIES

5.1 The Applicant submitted that the Authority disqualified the Applicant on the premise the *'the bidder submitted completion schedule that does not indicate the preparation of preliminary design drawings but only gives approval of drawings. Pegging shall be done after shipment of materials and for 289 days. The drawings approval shall be before pegging.'* He denied submitting a 'completion schedule' since it was not one of the requirements of the bidding documents. He stated that the bidding documents required submission, under Section IV of Part 1, the following; personnel, equipment, site organisation, method statement, mobilization schedule and construction schedule. Therefore, there was no requirement to submit a completion schedule which is required at the contract closure, he added.

- 5.2 He argued that if the bidding document specifically required submission of design schedule, then the bidder would have done so. He further argued that the construction manual being referred to was not part of the bidding documents received in soft copy on the CD issued. He stated that the bidder duly complied with the requirement of Section IV of Part 1, as stated above.
- 5.3 The Applicant further submitted that the Authority in disqualifying the Applicant failed to consider and construe together three documents forming part of the Applicant's bid. That the Method of Statement, the Construction Schedule and the Mobilisation Schedule should have been read together to construe; chronology of activities required for works under this tender, process of Engineering, Design, Surveying, Network Modelling, Structural spotting and line route profiling, pegging and bush clearing, procurement and delivery of critical materials/components and how to handle as built drawings and when and how the design would be carried out. The Applicant submitted that the bid document did not require a completion schedule, and therefore the absence of such statement should not be used as a basis for disqualifying their bid.
- 5.4 The Applicant emphasised that whist the bid document had provided specific templates for personnel and equipment no such documents had been provided for site organization, method statement, mobilization schedule and construction schedule.
- 5.5 The Applicant further submitted that the Entity had provided the preliminary drawings to the bidders and therefore there was no need for preparation of preliminary drawings. He further submitted that at all material times, the Applicant was confident that the project would be executed within 23 months and therefore the issue of time was catered for. Counsel for the Applicant

prayed that the application be granted in the terms in the application subject to adjustments suggested in the submissions.

- 5.6 In respect to the second issue, the Applicant submitted that it provided only specific experience of 2 years and one month. The Applicant further submitted that the Entity found out during the evaluation that the Applicant's personnel in respect to social/communication has a specific experience of 3 years and it was therefore not possible for her not to have obtained during the gap period between her specific assignments given her background training in social work.
- 5.7 In respect to fair hearing, the Applicant submitted that the Authority heard its complaint without giving them a hearing and the submission they filed was also not considered by the Authority.
- 5.8 Counsel for the 1st Respondent submitted that the Notice of the Best Evaluated Bidder had an error; 'completion schedule' should have read 'construction schedule'. He submitted that the Applicant submitted a construction schedule that did not provide preparation of preliminary design drawing but only gave approval of drawings. The preparation of preliminary drawing would entail among others activities, line route profile surveying which is a core function of the impugned procurement.
- 5.9 He further submitted that whereas the bidder's method statement has a section on design aspects especially preparation of preliminary design drawing, this is not reflected in the construction schedule and therefore it was difficult to ascertain the time period of executing the impugned procurement.
- 5.10 He further submitted that the Procuring and Disposing Entity's construction manual clearly lays out what has to be done during the design phase; line

route surveying, preparation of survey drawings, profile surveying and approval of drawings. He stated that the construction manual was part of the bidding documents provided in soft copy.

5.11 In respect to the second issue, Counsel submitted that paragraph 6.1.1 of Section 3 of the Bidding Document required bidders to demonstrate that their proposed key personnel of social/communications Officer meets the requirement of 4 years for general work experience and the in the Applicant's bid the proposed social/communications Officer had experience of 2 years and one month provided in her curriculum vitae. She therefore did not meet the requirement of 4 years for general experience as stipulated in the Bidding Document.

5.12 In respect to a fair hearing, Counsel submitted that the Applicant made written submissions at the Authority level which were considered during the administrative review. Counsel prayed that this application lacks merit and it should be dismissed with each party bearing its own costs.

6.0 RESOLUTION OF ISSUES BY THE TRIBUNAL

6.1 In resolving the application, the Tribunal made references to the submission by the parties, bidding document and cited provisions of the law as follows;

Issue No. 1: Whether the Evaluation Committee unfairly disqualified the Applicant's bid on the grounds it did.

6.2 The Tribunal considered ITB 14.1 (g) which provides that the bid submitted by the bidder shall comprise a preliminary description of the proposed work method and schedule, including drawings and charts, as necessary.

6.3 The Tribunal made reference to 6.1, Part 1: Section 3 Evaluation Methodology and Criteria which provides that Evaluation of the Bidder's Technical Bid will

include an assessment of the Bidder's technical capacity to mobilize key equipment and personnel for the contract consistent with its proposal regarding work methods, scheduling, and material sourcing in sufficient detail and fully in accordance with the requirements stipulated in Section VI (Employer's Requirements).

- 6.4 The Tribunal took into consideration 1 (a) Part 2: Section 6 of Statements of Requirements which provides for engineering design, high precision and resolution surveying, network modelling using PLS CARD compatible with Arc GIS, structural spotting and line route profiling, pegging and bush clearing.
- 6.5 The Tribunal also considered 6.2 of Part 2: Section 6 of Statements of Requirements which provides that the indicative line routes are given in the Auto CAD Drawing and pdf drawing included in the CD provided with this document. When field survey is carried out due consideration shall be given for the following factors when selecting HV Line Route and support positions. Access for construction and future maintenance work, environmental and Aesthetic considerations, swampy ground and areas liable for flooding to be avoided, amount of tree cutting to be minimized, inconvenience caused to the other services to be minimized, construction of HV Lines in parallel with telephones lines/railway lines to be avoided e.tc.
- 6.6 The Tribunal also took note that in its Method Statement, the Applicant acknowledged that the works consist of Engineering design, surveying, network modelling, structural spotting and line route profiling, pegging and bush clearing, Procurement and delivery to site of 33kv overhead line construction materials including distribution of transformers, bulk metering equipment and switchgears, overhead bare conductors, circular precast spun concrete poles, line insulators and related hardware accessories and protection devices and it confirmed in its bid that it will undertake the

activities in the key design stages. The Tribunal further noted that the Applicant did not include these activities and timelines in its Construction Schedule.

- 6.7 The Tribunal finds that the Bidding document required bidders to provide a schedule for design activities, such as preparation of preliminary drawings and pegging in their bids, with specified time period during the project which the Applicant failed to do in the construction schedule.

Issue No. 2- Whether the grounds on which the REA Evaluation Committee disqualified the Applicant were grounds enough to portray the Applicant's inability to execute the project

- 6.8 The Tribunal also considered item 6 of Part 1: Section 3 Evaluation Methodology and Criteria which states that the Social/Communication Officer should have a general experience of 4 years. The Tribunal considered the curriculum vitae for Kukundakwe Asha attached to the Application as Annexure B.

- 6.9 The Tribunal finds that the proposed personnel of the Applicant only had experience of 2 years and one-month general experience according to her curriculum vitae submitted during the bid and therefore did not have the required 4 years' general work experience as required by the Bidding Document

Issue No. 3- Whether the decision of REA's Accounting Officer and the 2nd Respondent were made in contravention of the Applicant's constitutional right to a fair hearing and therefore null and void.

- 6.10 The Tribunal considered the letter dated 5th June 2019 by the Authority addressed to the Applicant and submission filed by the Applicant to the Authority during the administrative review period dated 7th June 2019. In the

letter dated 5th June 2019 addressed to the Applicant it is stated *'The purpose of this letter is to inform you of the above decision of the Authority and to also request you to submit written submissions in response to Rural Electrification Agency's response dated 31st May 2019. Please submit the response to the Authority by Friday 7th June 2019 to enable the Authority to commence its investigations into the matter.'*

In response, the Applicant stated in the letter dated 7th June 2019 as follows; *'As requested find our written submission in response to Rural Electrification Agency dated 31st May 2019. We have tried to capture all the issues and hold ourselves for any clarification and added an explanatory schedule for representation of parallel process.'*

The Tribunal therefore finds that the Applicant was accorded a fair hearing.

7.0 DECISION OF THE TRIBUNAL

1. The Application is dismissed.
2. The decision of the Authority is affirmed.
3. Each party to bear its own costs.
4. The Entity is directed to proceed with the procurement process to its logical conclusion.

SIGNED, SEALED and dated this 25th day of July, 2019 by the said;

1. OLIVE ZAALE OTETE]

.....


CHAIRPERSON

2. MOSES JURUA ADRIKO SC.]

.....



MEMBER

3. DAVID KABATAIREINE]

.....


MEMBER

4. ABRAHAM NKATA]

.....


MEMBER

5. ENG. THOMAS BROOKES ISANGA]

.....


MEMBER