

THE REPUBLIC OF UGANDA

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

APPLICATION NO.18 OF 2019

APPLICATION FOR ADMINISTRATIVE REVIEW OF THE DECISION OF PUBLIC
PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT OF
'TENDER FOR COLLECTION OF REVENUE FROM ABAITA ABABIRI DAILY MARKET

APPLICANT: ABAITA ABABIRI MARKET VENDORS AND TRADERS
COOPERATIVE SOCIETY LIMITED

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

2ND RESPONDENT: WAKISO DISTRICT LOCAL GOVERNMENT

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

DECISION OF THE TRIBUNAL

1.0 BACKGROUND/FACTS

1. On 24th April 2019 the Entity (2nd Respondent) initiated the procurement for the revenue collection from Abaita Ababiri Daily and Mubuulo market in Kitabi Town Council.
2. On 25th April 2019, the Entity published the bid notice in the New Vision Newspaper with a bid submission deadline of 24th May 2019.
3. On 24th May 2019, two bidders submitted bids which were opened on the same day and prices read out as follows; Abaita Ababiri Market Vendors and Traders Cooperative Society Limited at UGX 3,820,000 and Okwegatta Gemanyi Abaita Ababiri Daily Market Vendors Association at UGX 4,350,000.
4. According to the Evaluation Report dated 30th May 2019, both bidders passed the preliminary, detailed technical evaluation and proceeded to the financial evaluation stage.
5. On 30th May 2019, the Contracts Committee approved the recommendation of the Evaluation Committee and awarded the contract to Okwegatta Gemanyi Abaita Ababiri Daily Market Vendors Association at UGX 4,350,000.
6. On 31st May 2019, the notice of the best evaluated bidder was displayed with a removal date of 18th June 2019.
7. On 5th June 2019, the Applicant applied for administrative review to the Accounting Officer. By letter dated 28th June 2019, the Accounting Officer communicated his decision to the Applicant and forwarded it to the Authority. The decision was to the effect that the procurement be cancelled, but the entity would not implement the decision until prior to obtaining a recommendation from the Authority or on the expiry of fifteen working days in accordance with section 90(4) of the PPDA Act.
8. On 8th July 2019, the Applicant applied for administrative review to the Authority and on 30th July 2019, the Authority issued a decision rejecting the application for administrative review.

9. The Applicant being dissatisfied with the Authority's decision, on 13th August, 2019 filed this Application before the Tribunal.

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION

2.1 On 13th August, 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 30th July, 2019.

The Applicant prayed that the decision made by the 1st Respondent advising the 2nd Respondent to implement the decision of the Authority after ten working days be set aside.

3.0 DISPOSAL OF APPLICATION

3.1 In disposing of the application, the Tribunal analysed the following documents-

- 1) The Application lodged with the Tribunal and appendices attached thereto dated 13th August 2019.
- 2) The Applicant's written submissions and Annexes to the submissions received on 26th August 2019;
- 3) The 1st Respondent's written response dated 16th August 2019.
- 4) 2nd Respondent's written response to the application dated 19th August 2019;
- 5) The written submission, of Okwegata Gemanyi Abaita Ababiri Daily Market Vendors Association (Best Evaluated Bidder) dated 21st August 2019.

3.2 The Tribunal conducted a hearing for the parties on 26th August, 2019. The parties were represented by Ms Nsereko Saudah for the Applicant, Mr. John Kallemera for the 1st Respondent, Mr. James Katono for the 2nd Respondent and Mr. Wilson Asimwe for the Best Evaluated Bidder.

4.0 ISSUES

Four issues were formulated for resolution by the Tribunal as follows:

Issue No. 1: Whether the association which is intended to be awarded the tender is eligible to winning according to the bidding document.

Issue No. 2: Whether the Authority can make a decision contradicting the recommendations of the Administrative Review Committee of the Chief Administrative Officer.

Issue No. 3: Whether the 2nd Respondent's action of waiving some of the requirements without prior notice to all the bidders is valid.

Issue No.4: What remedies are available?

5.0 SUBMISSION BY THE PARTIES

- 5.1 In respect to the first and third issues, Counsel for the Applicant submitted concurrently that Section 71(3) of the PPDA Act provides that no evaluation criteria other than that stated in the bidding document shall be taken into account. The bidding document issued to the bidders by the 2nd Respondent stated that bids failing any stage will be eliminated and not considered in subsequent stages. The Applicant submitted relevant experience for two years' but the Best Evaluated Bidder only presented a Certificate of Incorporation indicating it was registered in 2017. The Best Evaluated Bidder did not therefore possess the required past experience of three years.
- 5.2 Counsel submitted that the change in the terms of the bidding document by the Evaluation Committee was not communicated to the Applicant. The acts of the Evaluation Committee in waiving some requirements of the bidding document violated Section 71 (3) of the PPDA Act, 2003.
- 5.3 Counsel further submitted that the Bidding Document clearly stated that if a bid does not conform with the requirements in stage 1, then it would not be considered in subsequent stages. She further contended that at page 14 of 48 of the Bidding Document, it is stated that the Best Evaluated Bidder shall be the highest priced bid which is eligible and substantially responsive to the commercial and technical requirements of the procuring and disposing entity and therefore, it is not enough to be the highest bidder, but the bidder should also pass the eligibility test which in this case the Best Evaluated Bidder did not pass.

- 5.4 Counsel also relied on the case of *Ambitious Construction Company Ltd Vs Uganda Broadcasting Services, Civil Suit No. 335 of 2012* by Justice Christopher Madrama Izama who held that Regulation 81(5) of the Local Governments (PPDA) Regulations/SI No. 39 of 2006, requires that an Evaluation Report should contain reasons for the rejection of any bid and details of any non-material deviations accepted and the way in which they have been quantified and taken into account in the financial comparison. She submitted that in the instant case, the 2nd Respondent failed to follow the Regulations because the report did not contain the reasons for rejecting the bid.
- 5.5 In respect to the second issue, Counsel for the Applicant submitted that the mandate of the Authority is embedded in Section 91 (2) of the PPDA Act, 2003 which provides that the Authority shall annul in whole or in part an unlawful act or decision made by the Procuring and Disposing Entity in respect of an administrative review complaint. The decision of the Accounting Officer which was to the effect that the procurement process be cancelled was not annulled by the 1st Respondent and it was not indicated anywhere in the decision by the 1st Respondent that it annulled the decision of the Accounting Officer. The flaws in the decision of the Authority are the grounds of this application that the Authority erred in making a decision contradicting that of the Accounting Officer without any basis or reason.
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- 5.6 Counsel submitted that the application should be allowed, the procurement process be suspended and the bid be re-opened, damages and costs of the application be awarded to the Applicant.
- 5.7 In respect to the first and third issues, Counsel for the 1st Respondent submitted concurrently that the bid of the Best Evaluated Bidder comprised of a Certificate of Registration dated 30th September 2017. He further submitted that the bid submitted by the Best Evaluated Bidder provided in Form A6 information on experience in similar works with the earliest date of completion being the management of revenue collection from Abaita Ababiri Daily/Mubuulo market in Kitabi Town Council that was completed in June 2017. The 1st Respondent reviewed the Evaluation Report which provided that both bidders were found non-compliant with respect to the requirement of experience in similar works completed in the past three years. The 1st Respondent agreed with the finding of the evaluation committee that both bidders did not have the required experience of three years in the Bidding Document.

- 5.8 Counsel relied on Regulation 73 (4) of the Local Governments (PPDA) Regulations, 2006, S.I No. 39 of 2006 which provides that a Procuring and Disposing Entity may waive any non-conformity or omission in a bid that does not constitute a material deviation. He further relied on regulation 75(1) of the Local Governments (PPDA) Regulations, 2006, S.I No. 39 of 2006 which defines what amounts to a material deviation or non-material deviation. He submitted that experience did not fit within the definition of material deviation in the impugned procurement and therefore could be waived by the entity in accordance with regulation 74 of the Local Government (PPDA) Regulations since both bidders did not have the experience in similar works completed in the past three years and that the requirement was waived for both parties by the Evaluation Committee. He submitted that in accordance with the above cited provision of the law, the Evaluation Committee rightly waived the requirement of experience since it is a non- material deviation in accordance with regulation 75(1) of the Local Governments (PPDA) Regulations, 2006, S.I No. 39 of 2006.
- 5.9 In respect to the second issue, Counsel for the 1st Respondent submitted that *Section 91 (2) (b)* of the PPDA Act, 2003 provides that the Authority shall, unless it dismisses the complaint, annul in whole or in part an unlawful act or decision made by the procuring and disposing entity. Counsel submitted that the 1st Respondent has the statutory mandate to annul the administrative review decision by the Accounting Officer which the 1st Respondent did in the impugned procurement. Counsel prayed that the application lacks merits and should be dismissed with no orders to costs.
- 5.10 Counsel for the 2nd Respondent submitted that he associated himself with the submission by the 1st Respondent and added that the assessment of commercial responsiveness in stage 2 of the bid evaluation methodology is important and therefore the reason why the Entity considered the issue of the highest price in this particular procurement.
- 5.11 Counsel for the Best Evaluated Bidder associated himself with the submission by the 1st Respondent. He prayed that the Tribunal awards the Best Evaluated Bidder general damages if it finds no merit in this application. He further submitted that the Tribunal awards costs to the Best Evaluated Bidder.

6.0 RESOLUTION OF ISSUES BY THE TRIBUNAL

The Tribunal in resolving the issues considered the documents specified at paragraph 3.1 and the oral submissions made at the hearing.

Issue No. 1: Whether the association which is intended to be awarded the tender is eligible to winning according to the bidding document.

Issue No. 3: Whether the 2nd Respondent's action of waiving some of requirements without prior notice to all the bidders is valid

- 6.1 The Tribunal resolved to handle issues 1 and 3 concurrently. The point raised by the Applicant under issues 1 and 3 is to the effect that the experience of three years in similar works was one of the criteria in the bidding document, and that since the Best Evaluated Bidder was found not to possess that experience, the Best Evaluated Bidder should have been failed at preliminary evaluation; that instead, the entity waived the requirement of experience and declared Okwegatta Gemanyi Abaita Ababiri Daily Market Vendors' Association the best evaluated bidder. The Applicant also states that the entity did not inform the bidders about the waiver.
- 6.2 The 1st Respondent on the other hand acknowledges that while experience was a requirement in the bidding document, having found that both bidders lacked the requisite three years' experience, the evaluation committee correctly waived the experience. Relying on regulation 75(1) of the Local Government PPDA Regulations which defines what a material deviation or omission is, the 1st Respondent argued that experience did not qualify as a material deviation in the impugned procurement.
- 6.3 The Tribunal examined Part I Bidding Procedures and Instruction 3 at page 10 and Part 2: Statement of requirements at page 27 of 48 of the Bidding Document which provides for a requirement by the bidders to possess experience in similar works completed in the past three years. The Tribunal notes that the Evaluation Committee in its Evaluation Report waived the requirement of experience for both bidders and relied only on the criterion of price to award the contract to the Best Evaluated Bidder.
- 6.4 The question to be determined is whether the 1st Respondent is right in deciding that the entity correctly waived the requirement of experience. In

answering this question, the Tribunal considered Regulation 73(4) of the Local Governments (PPDA) Regulations, 2006, S.I No. 39 of 2006 provides that where a bid is substantially compliant and responsive, the procuring and disposing entity may waive, clarify or correct any non-conformity or omission in the bid that does not constitute a material deviation. Regulation 73(4) permits an entity to waive a non-conformity in a bid, as long as that non-conformity is not material.

- 6.5 The Tribunal further considered Regulation 75(1) of the Local Governments (PPDA) Regulations, 2006, S.I No. 39 of 2006 which provides that a material deviation or omission is one that-
- (a) affects in any substantial way the scope, quality, or performance of the works, services or supplies specified in the bid document;
 - (b) would limit in any substantial way, inconsistent with the bid documents, the procuring and disposing entity's rights or the bidder's obligations under any resulting contract; or
 - (c) if corrected would unfairly affect the competitive position of other bidders presenting substantially responsive and compliant bids.

- 6.6 The Tribunal is therefore persuaded by the submission of Counsel for the 1st Respondent that the requirement of experience was not a material deviation within the meaning of regulation 75(1), and therefore it could be waived under regulation 73(4) of the said Regulations. There is no requirement under the law for the entity to notify the bidders of the waiver of a requirement during the evaluation process. The waiver also was applied to both the Applicant and the Best Evaluated Bidder and therefore there was no unfairness caused to both bidders. Issues 1 and 3 are therefore answered in the affirmative.

Issue No. 2: Whether the Authority can make a decision contradicting the recommendations of the Administrative Review Committee of the Chief Administrative Officer

- 6.7 With respect to issue 2, the question raised was whether the Authority can make a decision contradicting the recommendations of the Administrative Review Committee of the Chief Administrative Officer. In resolving this question, the Tribunal considered section 91(2) of the PPDA Act which

provides that the Authority shall, unless it dismisses the complaint, annul in whole or in part an unlawful act or decision made by the procuring and disposing entity. The 1st Respondent's decision is not inconsistent with the mandate of the 1st Respondent under section 91(2) of the Act.

6.8 The Tribunal noted that the 1st Respondent rejected the application during administrative review at the Authority level. This is understood by the Tribunal that the decision of the 1st Respondent to reject the application concurred with the decision of the Evaluation Committee of the entity in regard to the waiver of the requirement of experience.

6.9 The Tribunal however noted that the 1st Respondent did not, in its decision, state remedies in accordance with section 91(4) of the Act which requires the Authority when issuing a decision to state the reasons for its decision and the remedies granted if any. This could have guided the entity on how to proceed, especially having notice of the fact that the Accounting Officer in his administrative review decision, cancelled the procurement, pending the recommendation of the Authority. The Tribunal faults the 1st Respondent for this anomaly. The Tribunal finds though that this anomaly does not in any way alter the decision of the 1st Respondent.

6.8 Issue No. 4 is about remedies available to parties. For remedies, see 7.0 below of the decision. On the whole, this application fails.

7.0 DECISION OF THE TRIBUNAL

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

SIGNED, SEALED and dated this 27th day of August 2019 by the said:

1. OLIVE ZAALE OTETE


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CHAIRPERSON

2. ABRAHAM NKATA



MEMBER

3. ENG. THOMAS BROOKES ISANGA



MEMBER