

**THE REPUBLIC OF UGANDA**

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

**APPLICATION NO 6 OF 2019**

**APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT TO THE TENDER FOR CONSTRUCTION OF THE PROPOSED HEADQUARTER BUILDING OF THE INSPECTORATE OF GOVERNMENT-PROCUREMENT REFERENCE: IG/WRKS/2018-2019/00001**

**APPLICANT: ROKO CONSTRUCTION LIMITED & ROKO CONSTRUCTION (RWANDA) LTD JV**

**RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY**

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

## DECISION OF THE PPDA APPEALS TRIBUNAL

### **1.0 BRIEF FACTS**

- 1.1 On 25<sup>th</sup> October 2018, the Inspectorate of Government (entity) initiated the procurement for construction of the proposed headquarter building of the entity on plots 71- 75 Yusuf Lule Road and 24-26 Clement Hill Road at an estimated cost of UGX 100,926,796,468.
- 1.2 On 31<sup>st</sup> October 2018, the entity published the bid notice in the New Vision and Daily Monitor Newspapers with a bid closing date of 27<sup>th</sup> November 2018.
- 1.3 On 9<sup>th</sup> November 2018, a pre-bid meeting was held at Plot 71-75 Yusuf Lule Road and 24-26 Clement Hill Road and was attended by the representatives of the bidders.
- 1.4 On 27<sup>th</sup> November 2018, seven firms submitted bids which were opened, prices read out, recorded and evaluated.
- 1.5 The Evaluation Committee recommended award of the contract to Roko Construction Ltd and Roko Construction (Rwanda) Ltd JV at UGX 69,999,434,751.
- 1.6 On 17<sup>th</sup> December 2018, the Contracts Committee awarded the contract to Roko Construction Ltd and Roko Construction (Rwanda) Ltd JV (Applicant) at UGX 69,999,434,751.
- 1.7 On 18<sup>th</sup> December 2018, the notice of best evaluated bidder was displayed with the expiry date of 3<sup>rd</sup> January 2019.
- 1.8 On 24<sup>th</sup> December 2018, China State Construction Engineering Corporation Ltd applied for administrative review to the Accounting Officer.
- 1.9 On 16<sup>th</sup> January 2019, the Accounting Officer issued the decision rejecting the application for administrative review.

1.10 Being dissatisfied with the decision of the Authority, on 22<sup>nd</sup> January 2019, China State Construction Engineering Corporation Ltd applied for administrative review to the Authority.

1.11 On 25<sup>th</sup> February 2019, the Authority upheld the application for administrative review by the China State Construction Engineering Corporation Ltd.

1.12 On 12<sup>th</sup> March 2019 the Applicant being dissatisfied with the Authority's decision filed this Application before the Tribunal.

## **2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION**

2.1 On 12<sup>th</sup> March 2019, the Applicant filed an application to the Tribunal challenging the Authority's decision.

2.2 The ground for Application to the Tribunal was that the Respondent erred when it found that non submission of translated Articles and Memorandum of Association translated by Makerere University Institute of Languages was not a material deviation as defined by regulation 11(4) of the PPDA Evaluation Regulations, 2014.

2.3 The Applicant prayed that the Tribunal finds merit in the Application and order for damages and costs.

## **3.0 DISPOSAL OF APPLICATION**

In disposing of the Application for review, the Tribunal considered the following:

- 1) the Applicant's Application to the Tribunal dated 12<sup>th</sup> March 2019, annexes to the Application, the written and oral submissions;

- 2) the Authority's response to the Application dated 14<sup>th</sup> March 2019, annexes to the response, and the written and oral submissions;
- 3) the written submissions by China State Construction Engineering Corporation Limited dated 20<sup>th</sup> March 2019.
- 4) Oral submissions by the entity.

3.1 The Tribunal conducted a hearing for the Parties on 25<sup>th</sup> March 2019. The Applicant was represented by Ms. Diana Kasabiiti; the Respondent was represented by Mr. John Kallemera and Ms. Sheila Abamu; China State Construction Engineering Corporation Limited was represented by Mr. Alexander Kibandama, and the entity was represented by Mr. Simon Ogwal Kajura.

#### 4.0 ISSUES

The issues for resolution by the Tribunal were as follows:

- (a) *Whether the Entity should have sought for clarification from China State Construction Engineering Corporation Ltd with respect to the requirement of translation of the Memorandum and Articles of Association.*
- (b) *Whether the Respondent erred when it found that the non- submission of translated Articles and Memorandum of Association translated by the Makerere University Institute of Languages was not a material deviation as defined by Regulation 11 (4) of the PPDA (Evaluation) Regulations 2014.*
- (c) *Remedies.*

#### 4.0 SUBMISSIONS BY COUNSEL

4.1 Counsel for the Applicant argued issues 1 & 2 concurrently. Counsel submitted that at page 8 of the Respondent's decision, paragraph 5, the Authority found out that the Complainant's bid did not comply with the requirement of submission of a copy of the Memorandum and Articles of



Association translated by a competent authority, therefore what the Applicant disputes is whether the non-compliance is a matter for clarification.

4.2 Counsel for the Applicant quoted the relevant parts of the bidding document as follows:

- (a) Section 1, Part C ITB 14.1 (d) & (i) clearly stated that the Bidder's bid shall comprise, inter alia, documentary evidence in accordance with Instruction to Bidders sub-clause 4.8 establishing the bidder's eligibility to bid.
- a) Section 1, Part C ITB 13.3 provides that the bid, as well as correspondence and documents relating to the bid exchanged by the Bidder and the Employer shall be written in English, unless otherwise specified in the Bid Data Sheet (BDS).
- b) ITB 13.3 states that supporting documents and printed literature that are part of the bid may be in another language provided they are accompanied by a translation of the relevant passages in English by a competent authority in which case, for purposes of interpretation, such translation shall govern.
- c) Section 2 of the BDS item 13.3 further required that a duly stamped or sealed certificate of translation, signed by the authorized officer from a competent translating authority shall also be submitted. The competent authority for this requirement was stated as Makerere University Institute of Languages.
- d) Section 3 of the Evaluation Methodology and Criteria, Part B, clause 3.2 (h) provided the document required as evidence of eligibility to include a copy of the Memorandum and Articles of Association or its certified equivalent.

4.3 Counsel therefore submitted that M/s China State Construction Engineering Corporation Limited's bid did not comply with the above requirements. Counsel further submitted that the omission in this instant case is a material deviation for the following reasons; the criteria for evaluation was clearly specified in Section 71 (2) of the Act. A copy of the Bidder's Articles of Association or its certified equivalent was necessary to determine eligibility and the recognized translating authority was clearly specified as Makerere University Institute of Languages, eligibility is determined at preliminary evaluation stage on a pass or fail basis.

- 4.4 Counsel distinguished the case of *China National Aero Technology International Engineering Corporation (CATIC) Vs. PPDA, Application No. 1 of 2016* which decided that the Entity must first determine whether a bid was substantially compliant and responsive. Counsel submitted that the Tribunal in the CATIC case did not state whether the requirements as to translation of certificates formed part of the evaluation methodology at preliminary stage and further the bidders were at liberty to choose which translating authority they applied so long as it was recognized by the Government of Uganda and the bidder had to submit the name of such authority.
- 4.5 Counsel for the Applicant further distinguished the case of *China Geo Engineering Corporation Vs. Ministry of Water and Environment, Application No. 4 of 2016*. Counsel submitted that in the cited case the translating authority was provided however, the requirement to attach translation certificates was only applicable at technical evaluation and not preliminary state as is the requirement in the instant case. Counsel for the Applicant submitted that the two cases relied on by the Respondent are distinguishable from the instant facts brought for consideration before the Tribunal.
- 4.6 In response, Counsel for the Respondent submitted that the reason for elimination of the bid under the Best Evaluated Bidder Notice stated that the bidder submitted a copy of the memorandum and articles of association that were not translated by a competent authority. However, it disqualified the bid exclusively on the basis that the said documents were not translated by the Makerere University Institute of Languages as required in the bidding document. Counsel cited *Regulation 10 (1) of the PPDA (Evaluation) Regulations, 2014* provides that the evaluation committee may at any stage of the evaluation request a bidder to clarify the information provided in the bid documents or to submit additional documentation to clarify the information provided.
- 4.7 Counsel for the Respondent further relied on Regulation 17 (5) of the PPDA (Evaluation) Regulations/SI No. 9 of 2014 which states that where a bidder does not submit a document required in Regulation 17 (3) of SI No. 9 of

2014, the Evaluation Committee shall in accordance with Regulation 17(6) , request a bidder to submit the document. The Respondent submitted that the Memorandum of and Articles of Association are documents which a bidder can be requested to submit if they have not been submitted as part of the bid. Similarly, the Entity is compelled to request a bidder to submit the translations of the said documents if the requisite translation is lacking.

- 4.8 On the 2<sup>nd</sup> issue, Counsel for the Respondent relied on Regulation 11 (4) and argued that the non- submission of translated memorandum and articles of association was not a material deviation. Counsel submitted that Regulation 11 (4) of the PPDA (Evaluation) Regulations/SI No. 9 of 2014 cannot be used to fetter the obligation of a Procuring and Disposing Entity (PDE) to seek for clarification during evaluation process. The indiscriminate application of the provision by the Applicant amounts to absurdity since it suggests that any clarification by a PDE would unfairly affect the competitive position of other bidders.
- 4.9 Counsel for the Respondent relied on the case of *China National Aero Technology International Engineering Corporation (CATIC) Vs. PPDA, Application No. 1 of 2016* where the Respondent raised the argument that seeking for clarification from a bidder for the purpose translating qualification documents would amount to material deviation under Regulation 11 (4) (c) of SI No. 9 of 2014. It was decided by the Tribunal that the translations of the curriculum vitae and the certificates did not fall within the definition of a material deviation. This position was reiterated in *China Geo Engineering Corporation Vs. Ministry of Water and Environment, Application No. 4 of 2016*. The Respondent submitted that the Tribunal should therefore find that the non-submission of the translated Memorandum and Articles of Association by Makerere University Institute of Languages is non material deviation.
- 4.10 Counsel for China State Construction Engineering Corporation Limited submitted that in accordance with Regulation 17 (6) of the PPDA (Evaluation) Regulations/ SI No. 9 of 2014, where a bidder does not submit a document required, the Evaluation Committee shall in accordance with



Regulation 10, request the bidder to submit the document and that the Entity should have requested for the submission of the translated Memorandum and Articles of Association by Makerere University Institute of Language.

- 4.11 Counsel for China State Construction Engineering Corporation Limited submitted that in accordance with section 28 of the bidding document, its bid was compliance and responsive. Applying the test laid in clause 28 of the bidding document, China State Construction Engineering Corporation Limited provided all the relevant documentation and information required to enable the Entity to determine its historical contract performance, capacity and both technical and quality ability. What was missing was the certified translation of the Memorandum and Articles of Association by the competent authority, which does not fall within the definition of material deviation as stated in ITB Section 28 of the Works Bidding Documents.
- 4.12 Counsel for China State Construction Engineering Corporation Limited prayed that the Application be dismissed with costs and an independent Evaluation Committee (external to entity) be constituted to re-evaluate the bid.
- 4.13 Counsel for the Entity submitted that the PDE never conceded to having received Memorandum and Articles of Association from China State Construction Engineering Corporation Limited because what they submitted was invalid. He further submitted the issue of clarification should have come at the pre-bid meeting. Counsel for the Entity further stated that Notary public is not competent to translate documents save certifying documents. The purported translated Memorandum and Articles of Association from China by a Notary public is therefore invalid. He further submitted that the Entity specifically asked for translation by Makerere University Institute of Languages in its bidding document. Counsel for the Entity further submitted that Regulation 17 (6) of SI No. 9 of 2014 is in applicable since it does not cure invalidity.



## 5.0 RESOLUTION BY THE TRIBUNAL

5.1 In resolving the issues, the Tribunal scrutinized the provisions of the PPDA (Evaluation) Regulations, 2014, S.I No. 9 of 2014 and the Bidding Document. Regulation 10 which deals with clarification of bids is reproduced hereunder for ease of reference:

*10. Request for clarification of bids.*

*(1) Notwithstanding regulation (9), an evaluation committee may at any stage of the evaluation, request a bidder to clarify the information provided in the bid documents or to submit additional documentation to clarify the information provided.*

*(2) An evaluation committee shall only make a request for clarification of information or submission of documentation under sub regulation (1) where (a) there is a non-conformity or an omission in the bid, which is not a material deviation as specified in regulation 11(4).*

5.2 It is the case for the Applicant that having failed to submit in its bid, a translated copy of the memorandum and articles of association as required by clause 13.3 of the Bid Data Sheet, such non-compliance by China State Construction Engineering Corporation Limited is a material deviation within the meaning of regulation 11(4) of the PPDA Evaluation regulations 2014, which could not therefore be clarified.

5.3 The Tribunal notes that the reason for elimination of the bid of M/S China State Construction Engineering Corporation Ltd as stated in the Best Evaluated Bidder Notice was that *'the bidder submitted a copy of the memorandum and articles of association that were not translated by a competent authority as required at page 28 (ITB 13.3) of the Bid solicitation document'*. The Tribunal notes from this that the entity acknowledged that the bidder submitted a memorandum and articles of association, only that the memorandum and articles was not translated by a competent authority.

5.4 Regulation 10(1) of PPDA (Evaluation) Regulations, 2014 provides that an evaluation committee may at any stage of the evaluation, request a bidder

to clarify the information provided in the bid documents or to submit additional documentation to clarify the information provided. Regulation 17(6) of the PPDA (Evaluation) Regulations further provides that where a bidder does not submit a document required under sub regulation 17(3), the evaluation committee shall, in accordance with regulation 10, request the bidder to submit the document.

5.5 The Tribunal notes that the memorandum and articles of association was already submitted as part of the bid document. Submission of a translation of an already existing document would not tantamount to alteration or amendment or changing the substance of a bid in contravention of regulation 10(3) of the PPDA Evaluation Regulations, 2014.

5.6 The Tribunal recalls its decision in Application 1 of 2016 where it stated as follows:

*“that the test to determine whether a deviation is material or not is an objective, not a subjective test. In determining whether an omission is a material deviation, the entity must first determine whether a bid was substantially compliant and responsive..... The Tribunal finds that the Applicant’s omission to provide translations for qualifications of some personnel and failure to provide letters of confirmation of availability of key personnel are omissions that could have been clarified under regulation 10 and 11 of the PPDA (Evaluation) Regulations, 2014”.*

5.7 The Tribunal is not persuaded that the facts in the instant matter are different from the facts in the above cited Application. The Tribunal is therefore not persuaded that other bidders would have been unfairly affected if the entity had asked China State Engineering Corporation to submit a translated copy of the memorandum and articles of association.

**DECISION OF THE TRIBUNAL**

1. This application is dismissed.
2. The decision of the Authority is affirmed.
3. Each party shall bear its own costs.

Dated this .....<sup>26<sup>th</sup></sup>..... day of March 2019.

SIGNED by ]

**OLIVE ZAALE OTETE** ]

  
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**CHAIRPERSON**

SIGNED by ]

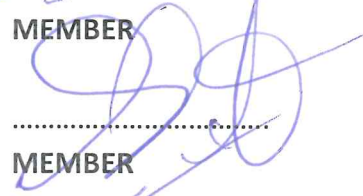
**DAVID KABATERAINE** ]

  
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**MEMBER**

SIGNED by ]

**ABRAHAM NKATA** ]

  
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**MEMBER**

SIGNED by ]

**ENG. ISANGA THOMAS BROOKES]**

  
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**MEMBER**