

**THE REPUBLIC OF UGANDA
PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
APPEALS TRIBUNAL**

APPLICATION NO. 5 OF 2022

BETWEEN

LIBRA COURT BAILIFFS & AUCTIONEERS ===== APPLICANT

AND

**NATIONAL WATER AND SEWERAGE
CORPORATION====RESPONDENT**

**APPLICATION FOR ADMINISTRATIVE REVIEW IN RESPECT OF THE
PROCUREMENT OF NON-CONSULTANCY SERVICES FOR THE
DISPOSAL OF GROUNDED MOTOR VEHICLES, MOTORCYCLES AND
OLD TYRES LOCATED AT NWSC-GABA WATER WORKS AND PIPE
YARD-6TH STREET INDUSTRIAL AREA-KAMPALA REF NO. NWSC-
HQ/SRVCS/2021-2022-00042**

**BEFORE: NELSON NERIMA; PATRICIA K. ASIIMWE; THOMAS
BROOKES ISANGA; GEOFFREY NUWAGIRA KAKIRA; PAUL
KALUMBA; AND CHARITY KYARISIIMA, MEMBERS**

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. On 22nd November 2021, National Water and Sewerage Corporation (NWSC) (The Respondent) issued a call for bids for the disposal of grounded motor vehicles, motorcycles and old tires located at NWSC-Gaba water works and pipe yard-6th street industrial Area-Kampala, Uganda under Quotation method of procurement.
2. The invitation was addressed to 6 shortlisted bidders namely *Ruka Auctioneers, Kiwa Associates & Auctioneer, Libra Court Bailiffs & Auctioneers, S-M Cathan Property Consult, Interpid Recovery Associates Ltd* and *Earth Consult (U) Ltd.*
3. On 1st December 2021, bids were received from only 3 bidders namely; *Kiwa Associates & Auctioneers, Interpid Recovery Associates Ltd* and *Libra Court Bailiffs & Auctioneers* (the Applicant).
4. During the bid evaluation process, the Evaluation Committee noted that the bidders had not attached a Valid Auctioneer's Licence as required by the Biding Document.
5. In a letter dated 15th December 2021, the Chairperson of the Evaluation Committee sought clarification from all the 3 bidders regarding the omission to attach a Valid Auctioneer's Licence as required by the Biding Document and thus requested all the bidders to provide the same within 5 working days.
6. In an email dated December 16, 2021 to the Chairperson of the Evaluation Committee pf the Applicant informed the Evaluation Committee that the Auctioneers Licence was nullified in a ruling by the "*then Chief Registrar Richard Butera*", that the said licence

was no longer issued by City Authorities and that the applicable licence is the licence issued to Court Bailiffs by the High Court.

7. *Kiwa Associates & Auctioneers* in a letter dated December 20, 2021 addressed to the Chairperson of the Evaluation Committee, informed the Evaluation Committee that the Auctioneers' Licence is the same as Trading Licence and that their attached trading licence was sufficient.
8. On the 20th January 2022, the Respondent issued the Best Evaluated Bidder Notice. The indicated date for removal of the notice was February 4, 2022. *Kiwa Associates & Auctioneers* was displayed as the Best Evaluated Bidder at a contract price of UGX 200,000 plus 0.0001% as commission.
9. The Notice of the Best Evaluated Bidder indicated that the Applicant was disqualified at the Financial stage because "*The bidder's offer was higher than the best evaluated bidder's offer*".
10. On 24th January 2022, the Applicant being aggrieved by the decision of the Respondent, applied to the Accounting Officer of the Respondent for administrative review.
11. In a letter dated 2nd February 2022, Ref. No. ADM/05, (received by the Applicant on 3rd February 2022), a one Eng. Alex Gisagara communicated for the Accounting Officer of the Respondent a decision rejecting the application for administrative review.
12. On February 11, 2022, the Applicant being dissatisfied with the decision of the Accounting Officer, applied to the Tribunal for administrative review.

B. REPLY TO THE APPLICATION

The Respondent

1. The Respondent filed a written Statement of Defence and denied that there were any errors of law or fact as alleged by the Applicant.

The Best Evaluated Bidder

2. Tribunal also invited *Kiwa Associates & Auctioneers* the best evaluated bidder to make a response as an interested party.
3. *Kiwa Associates & Auctioneers* as the Best Evaluated Bidder did not file any response to the Application but was served with all documents relating to this Application.

C. THE ORAL HEARING

The Tribunal held an oral hearing on 3rd March 2022 using the Zoom online platform. The appearances were as follows:

1. The Applicant - Bonnie Rwamukaaga- Managing Partner, Libra Court Bailiffs & Auctioneers.
2. The Respondent was represented by Aloysius Kaijuka, Manager Legal Services, Barigye Craven the Principal Legal Officer and Denise Kukundakwe. Legal Officer. In attendance were Eng. Alex Gisagara Senior Director-Engineering Services, Moses Odongo-Manager Transport, Emmanuel Obong-Procurement Assistant, and Martin Busulwa-Manager Procurement.
3. The Best Evaluated Bidder was represented by Anywar Tonny- a partner in *Kiwa Associates & Auctioneers*.

D. EVIDENCE FROM KCCA

1. Pursuant to powers under section 91K (2) of the *Public Procurement and Disposal of Public Assets Act* and Regulation 20(3) of the *Public Procurement and Disposal of Public Assets (Tribunal) (Procedure) Regulations S.I. No. 16 of 2016*, the Tribunal had deemed it fit to summon Kampala Capital City Authority (KCCA) as the licensing authority under the Trading Licensing Act and the Auctioneers Act. The purpose was to give guidance about the licensing regimes under those laws.
2. The Deputy Director in charge of Revenue Collection, Mr. Robert Nowere testified as Tribunal Witness 1.

E. SUBMISSIONS

The parties' written and oral submissions were as follows:

Applicant

1. That the Respondent's reply to the Complaint was made by Engineer Alex Gisagara who is not the Accounting Officer and that this act was contrary to Section 26 of the *Public Procurement and Disposal of Public Assets Act 2003* and attendant regulations. The Applicant cited the authorities of ***Desouza vs. Tanga Town Council (1961) E.A 337*** and ***Annebrit Aslund vs. Attorney General, Misc Cause No. 441 of 2004.***
2. That the Best Evaluated Bidder, Kiwa Associates & Auctioneers did not possess a trading licence. That the only applicable professional licence is the licence issued to Court Bailiffs by the High Court under the Judicature (Court Bailiffs) Rules 1987. It was erroneous for the Respondent to reach the decision that Kiwa Associates & Auctioneers was the best evaluated bidder. The Applicant cited the authority of ***R vs. Secretary of State for Environment, Exparte Hammersmith & Anor (1991) 1 AC 521*** to buttress its submission.

3. That the Best Evaluated Bidder, *Kiwa Associates & Auctioneers* did not possess a certificate of clearance from the National Social Security Fund (NSSF) contrary to the requirements of the bidding document.
4. That the Best Evaluated Bidder, *Kiwa Associates & Auctioneers* has had a running contract to provide auctioneering services for the Respondent for the last 4 years and that it seems the Best Evaluated Bidder was prequalified on such an erroneous basis.
5. That the Respondent erroneously shortlisted a firm that offers surveying services in the impugned procurement lending credence to the belief that the shortlist was but a smoke screen to undermine competition.
6. The Respondent erred in finding that *Kiwa Associates & Auctioneers* was the best evaluated bidder solely on lowest price, ignoring other evaluation criteria like eligibility and technical competence of a bidder.
7. That the Contracts Committee did not approve the Bidding document used in this impugned procurement contrary to section 28 (c) and 29 (a) (ii) of the PPDA Act.
8. That Respondent did not conduct a post qualification exercise and evaluation of the Best Evaluated bidder contrary to the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations No. 9 of 2014*.
9. The Applicant prayed that its application be allowed, that the Respondent be compelled to re-evaluate bids and that their administrative review fees be refunded.

Respondent

10. The Respondent submitted that the Accounting Officer has the discretion to delegate his functions as business expediency and prudence may demand and as such, the decision made in relation to the Applicant's complaint and there was no procedural impropriety on the Respondent's part. The Respondent relied on *Section 26 of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations Act 2003* and *Regulation 21(1) of Public Procurement and Disposal of Public Assets (Procuring & Disposing Entities) Regulations, 2014*.
11. The Respondent averred that no bidder including the Applicant submitted an auctioneer's licence and that trading licences were construed as sufficient.
12. The Respondent contended that the documents submitted by the best evaluated bidder as evidence of eligibility were substantially responsive to the minimum requirements of the bidding document and that the lack of the Auctioneer's Licence did not cause any miscarriage of justice to the Applicant.
13. That the Applicant never requested for a report pursuant to section 89(4) of the *Public Procurement and Disposal of Public Assets Act 2003* as amended.
14. The Respondent contended that the NSSF Clearance Certificate was not part of the documents evidencing eligibility requested for in the bidding document.
15. The respondent denied having any *family business* with the Best Evaluated Bidder. That the Best Evaluated Bidder is a

prequalified firm with the Respondent and not legally precluded from competing for any services with the Respondent. That the Applicant bears the burden to prove improper dealing between the best evaluated bidders and the Respondent.

16. The Respondent contended the shortlist of firms was formulated from the PPDA prequalified list of providers under the category of Auctioneers as well as market knowledge and that the shortlisted survey firm did not bid even after being shortlisted. The Applicant suffered no harm by the said shortlist. The Respondent relied on Regulations 43(1) and (3)(c) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations No. 9 of 2014* and the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-consultancy Services) Regulations No. 8 of 2014*.
17. The Respondent submitted that the price is one of the determinants in evaluated bids and that the Applicant's bid price was the highest despite having passed other stages of evaluation. The Respondent relied on Regulations 6(3)(b) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations No. 9 of 2014*.
18. The Respondent contended that the bidding document was approved by the Contracts Committee in accordance with sections 29 and 62 of the *Public Procurement and Disposal of Public Assets Act 2003 as amended*. The Respondent cited the decision of ***Finishing Touches Vs Attorney General Civil Suit No. 144 of 2010*** to buttress its submission.
19. The Respondent lastly contended that post qualification can only be conducted after the expiry of 10 days following a display of the notice of best evaluated bidder in accordance with Regulation 5 of the *Public Procurement and Disposal of Public Assets*

(Contracts) Regulations No. 14 of 2014. The post qualification could not be conducted during the administrative review period following a complaint by the Applicant.

20. The Respondent prayed that the Applicant's application be dismissed.

Best Evaluated Bidder

The Best Evaluated Bidders supported the decision of the Entity.

F. RESOLUTION BY THE TRIBUNAL

1. The application raised no issue for determination by the Tribunal. However, a perusal of the pleadings and submissions by the parties reveals the matters in controversy upon which the Tribunal has framed the issues as follows:
 - (1) Whether the decision by the Entity dated February 2, 2022, was made by the Accounting Officer of the Entity.
 - (2) Whether the bidding document relied upon by the Entity was approved by the Contracts Committee.
 - (3) Whether the procurement process at the Entity is run as a family business.
 - (4) Whether an NSSF clearance certificate was a requirement which the best evaluated bidder did not provide.
 - (5) Whether the criteria used to invite bidders was proper.
 - (6) Whether the best evaluated bidder should have been disqualified during evaluation process for not having an Auctioneer's licence.
 - (7) Whether the evaluation process was based on the lowest price offered without taking into consideration the technical and legal criteria.

- (8) Whether the Respondent erred when it did not conduct post-qualification on the best evaluated bidder.
- (9) What remedies are available to the parties.

Issue no. 1 -Whether the decision by the Entity dated February 2, 2022 was made by the Accounting Officer of the Entity.

2. Eng. Alex Gisagara communicated the February 2, 2022, decision of the Respondent to the Applicant for and on behalf of the Managing Director of the Entity.
3. *Regulation 21(1) of Public Procurement and Disposal of Public Assets (Procuring & Disposing Entities) Regulations No. 7 of 2014* allows an Accounting Officer to delegate functions.
4. At the hearing, we asked Eng. Gisagara to explain whether and how he was delegated to handle this administrative review complaint.
5. He cited the minute written by the Managing Director on the application for administrative review. We have reviewed the procurement action file. Indeed, when the Applicant's application was received, the Managing Director inscribed a minute on the application instructing Engineer Gisagara that "*please handle*". That instruction was considered sufficient delegation.
6. It is therefore our finding that the decision by the Entity dated February 2, 2022, was made by the Accounting Officer's delegate and therefore valid.
7. Issue no. 1 is answered in the affirmative.

Issue No.2: Whether the bidding document relied upon by the Entity was approved by the Contracts Committee

8. The Applicant did not substantiate this complaint or adduce any evidence to prove the allegation that the bidding document was not approved by the Contracts Committee.
9. We have perused the procurement action file and found minutes of the Contracts Committee that considered bid document, the firms to be invited and, the Evaluation Committee composition.
10. Under Minute 858/21/M/14, the Contracts Committee of the Respondent at its sitting of November 11, 2021, approved the *Request for proposal bidding document*, approved a shortlist of providers made up of *Ruka Auctioneers, Kiwa Associates & Auctioneers, Libra Court Bailiffs & Auctioneers, S-M Cathan Property Consult, Interpid Recovery Associates Ltd and Earth Consult (U) Ltd* and an evaluation committee constituted of *Moses Odongo, James Akena, Craven Barigye, Torach Lawrence and Obong Emmanuel*.
11. Issue no. 2 issue is resolved in the affirmative.

Issue no. 3- Whether the procurement process at the Entity is run as a family business.

12. A family owned business is defined as any business in which two or more family members are involved and the majority of ownership or control lies within a family.
13. Running a public procurement as a family business would be contrary to the basic principles of transparency, accountability, fairness, maximum competition, economy, efficiency, and value for money as required under sections 45, 46, and 48 of the *Public Procurement and Disposal of Public Assets Act*. However, the

Applicant did not present any evidence to prove that the procurement process at the Entity is run as a “family business”.

14. The Applicant complained that the best evaluated bidder has been pre-qualified for four years.
15. However, the Applicant did not cite any law showing that the pre-qualification is illegal. We do not find any merit in this complaint.
16. There was no complaint or recorded challenge of the shortlist of providers by the Contracts Committee. There is no merit in the challenge of the shortlist of a property management firm by the Applicant.
17. A shortlisted firm that is currently providing services to a PDE is not expressly barred from participating in any procurement or disposal undertaken by the Entity save for where the bidding document bars the same on grounds of conflict of interest. The current application has no similar provision or requirement in the bidding document. There is no merit in the challenge of the entity awarding contracts in the past to *Kiwa Associates & Auctioneers*
18. Issue no. 3 is answered in the negative.

Issue no. 4- Whether an NSSF clearance certificate was a requirement which the best evaluated bidder did not provide

19. Under section 70 (c) of the *Public Procurement and Disposal of Public Assets Act* and regulation 17(2) (e) of the *Public Procurement and Disposal of public Assets (Evaluation) Regulations No. 9 of 2014*, fulfillment of obligations to pay social security contributions is a basic qualification/eligibility of every bidder participating in public procurement.
20. The *Public Procurement and Disposal of public Assets Act* does not specify the criteria for proving fulfillment of obligations to pay social security contributions.
21. A National Social Security Fund clearance is not a mandatory eligibility document listed under regulation 17 (3) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations No. 9 of 2014* and the Entity under that Regulation may request for mandatory documents to be submitted. In the instant case the Entity did not request for National Social Security Fund clearance certificate
22. In the bidding document, payment of social security contributions was eligibility criteria no. 4. However, under the list of eligibility documents, there was no requirement for an NSSF Clearance Certificate.
23. In the instant case, item (c) of the Quotation Submission Sheet merely required each bidder to generally declare as follows:

We confirm that we are eligible to participate in public procurement and meet the eligibility criteria in Part 1: Bidding Procedures of your Bidding Document.
24. Under section 71 (3) of the *Public Procurement and Disposal of Public Assets Act 2003* as amended provides that no evaluation criteria other than that stated in the bidding document shall be taken into account during evaluation.

25. In the premises, submission of an NSSF clearance certificate was not a stated evaluation criteria and was therefore not mandatory at the evaluation stage.
26. Issue no. 4 is answered in the negative.
Issue no. 5- Whether the criteria used to invite bidders was proper.
27. The Applicant complains that the criteria used to invite bidders was questionable and an act of fraud, given that one of the invited bidders was a surveyor's company.
28. The Applicant did not identify the alleged surveyor's company. There is equally no evidence of fraud.
29. The Applicant did not challenge the request for quotations document which invited 6 pre-qualified firms.
30. In any case, it is not illegal or fraudulent for a surveyor's firm to bid for auctioning work so long as it meets the eligibility and qualification requirements.
31. Issue no. 5 is answered in the affirmative.

Issue no. 6- Whether the best evaluated bidder should have been disqualified during evaluation process for not having an Auctioneer's license.

32. We note that the Applicant has not been consistent in his complaint. In the application for administrative review to the Accounting Officer of the Respondent, the Applicant complained that the best evaluated bidder did not have a trading license. In the application to this Tribunal, the complaint is that the best

evaluated bidder does not have professional license, which we understand to mean an auctioneer's license.

33. An auctioneer's license issued under the Auctioneers Act cap. 270 was a required eligibility document under the bidding document.
34. None of the bidders submitted an Auctioneer's Licence as required by the Bidding Document.
35. In a letter dated 15th December 2021, the Chairperson of the Evaluation Committee sought clarification from the bidders regarding the omission to attach a valid Auctioneer's Licence as required by the Bidding Document and requested them all to provide the same within 5 working days.
36. In an email dated December 16, 2021, the Applicant claimed that the Auctioneer's Licence was nullified in a ruling by the "*then Chief Registrar Richard Butera*", that the said licence was no longer issued by City Authorities and that the applicable licence is the licence issued to Court Bailiffs by the High Court.
37. *Kiwa Associates & Auctioneers* in a letter dated December 20, 2021, claimed that the Auctioneers Licence is the same as Trading Licence and that their attached trading licence was sufficient.
38. Table 1 of the evaluation report indicates that during preliminary evaluation and assessment of eligibility, all 3 bidders were compliant with the criteria of having a valid Auctioneers license under the Auctioneers Act cap. 270. The explanation by the Entity given is that the general trading license submitted by the bidders takes precedence over the "auctioneers trading license". That the bidders were then considered for the next stage of evaluation.

39. Without delving into the claim that the general trading license takes precedence over the “auctioneers trading license”, it is apparent that the evaluation committee waived the requirement for an Auctioneers license across board for all the bidders and decided to accept a trading license in lieu. They had the power to do so under regulation 11 (3) (a) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014*.
40. We also note that the waiver was applied to all bidders and no bidder was thereby disadvantaged and the applicant did not demonstrate satisfactorily how this waiver disadvantaged them.
41. According to the testimony of Mr. Robert Nowere, the Deputy Director of Revenue Services Kampala Capital City Authority, which is the licensing authority, issues trading licenses to auctioneers to permit them to do business in the city. That Kampala Capital City Authority does not actually issue auctioneers’ licenses. The witness was not even aware that Kampala Capital City Authority has the mandate to issue Auctioneers licenses under the Auctioneers Act.
42. The Auctioneers Act cap. 270 is of rather old vintage, having come into force on 1st January 1917.
43. Under the First Schedule to that Act, the annual fee for a general license is a paltry shs. 300.
44. On the other hand, the Trade (Licensing) Act is a later law which came into force on 31st December 1969 and was last amended in 2015.
45. Under the Trade Licensing (Amendment of Schedule) Instrument S.I No. 2 of 2017, a grade 1 trading license for auctioneers costs shs. 337,500.

46. The licensing authority has not exercised its mandate under the Auctioneers Act. None of the bidders (including the complainant) has an auctioneer's license under the Auctioneers Act.
47. It is important to distinguish between bailiffs and auctioneers. Most bailiffs are also auctioneers. However, unlike bailiffs, auctioneers are not a regulated profession. There is no professional body for admitting auctioneers. There is no prescribed course of study to qualify as an auctioneer. Auctioning is therefore more of a business than a profession.
48. In the circumstances, we find no reason to fault the evaluation committee's decision to waive the requirement for an auctioneer's license under the Auctioneers Act and instead accept only a trading license under the Trade (Licensing) Act. We note that under regulation 17(3) (a) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014, a trading license is a basic eligibility document.
49. The Entity was best placed to determine how the objectives of the procurement could be met. They exercised a discretion reasonably under the circumstances.
50. The best evaluated bidder submitted a valid trading license No. TLC 2021011634 issued by Kampala Capital City Authority. The type of business is indicated as auctioneers/bailiffs/court brokers. The best evaluated bidder had permission from Kampala Capital City Authority to carry out the business of auctioning within the city.
51. Issue no. 6 is answered in the negative.

Issue no. 7- Whether the evaluation process was based on the lowest price offered without taking into consideration the technical and legal criteria.

52. We have perused the evaluation report. The evaluation committee conducted a preliminary examination and assessment of eligibility (Table 10; a detailed technical evaluation (Table 2) and a financial comparison (Table 3).
53. All the bidders passed the preliminary examination and detailed technical evaluation. The evaluation committee was thus entitled to proceed to determine the best evaluated bid as required under regulation 6(3) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014*.
54. Issue no. 7 is answered in the negative.

Issue no. 8- Whether the Respondent erred when it did not conduct post-qualification on the best evaluated bidder.

55. Regulation 34 of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014* requires post-qualification to confirm whether the best evaluated bidder has the capacity and the resources to effectively execute the procurement. However, regulation 34 (3) requires that there must be post-qualification criteria. Where the requisite post-qualification criteria exist, the post-qualification must be undertaken by the Evaluation Committee and findings stated in the evaluation report before contract award.
56. In the instant case the bidding document did not contain post-qualification criteria. Post-qualification was therefore not applicable.
57. Issue no. 8 is answered in the negative.


Issue no. 9- What remedies are available to the parties.

58. The application has failed on all the grounds. The Applicant is not entitled to any remedy.


G. DISPOSITION

1. The Application is dismissed.
2. The Tribunal's suspension order dated 11th February 2022 is vacated.
3. The Respondent may continue with the procurement to its logical conclusion.
4. Each party bear its own costs.


Dated at Kampala this 4th day of March 2022.



NELSON NERIMA
MEMBER



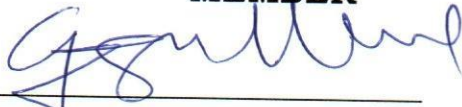
THOMAS BROOKES ISANGA
MEMBER



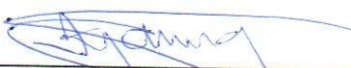
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