

THE REPUBLIC OF UGANDA

**IN THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
APPEALS TRIBUNAL AT KAMPALA
APPLICATION NO. 6 OF 2021**

**GAT CONSULTS LIMITED AND
LEE CONSTRUCTION LIMITED (JV) ===== APPLICANT**

VERSUS

**1. PUBLIC PROCUREMENT AND DISPOSAL
OF PUBLIC ASSETS AUTHORITY (PPDA)
2. MINISTRY OF WATER AND ENVIRONMENT } ===== RESPONDENTS**

**APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC
PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN
RESPECT OF TENDER FOR CONSTRUCTION OF KAPCHORWA PIPED
WATER SUPPLY AND SANITATION. REF: MWE/WRKS/20-21/00011**

**BEFORE: FRANCIS GIMARA S.C.(CHAIRPERSON); NELSON NERIMA;
ENG. THOMAS ISANGA BROOKES; AND GEOFFREY NUWAGIRA
KAKIRA, MEMBERS**

DECISION OF THE TRIBUNAL

A. Background of decision

In accordance with section 91I (7) the Act, the Tribunal delivered a summary decision on 24th June 2021. What follows is the detailed reasoning in support of the decision.

B. Brief Facts

1. On 27th November, 2020, the 2nd Respondent initiated the procurement for construction of Kapchorwa water supply and sanitation system; to which the Applicant responded with a bid price of UGX 13,941,914,948/= as was read out at the bid opening held on February 11, 2021.
2. On 4th December 2020, the Contracts Committee approved the Limited Competitive bidding method, the bidding document and Evaluation Committee for the procurement.
3. The bidding document was issued to 17 bidders and on 11th February 2021, six firms submitted bids, which were opened and prices read out as follows; M/s Reddy's Borehole & Technical Services Ltd UGX 9,701,239,080; M/s Zhonghao Overseas Construction Engineering Co. Ltd UGX 22,857,860,839; M/s GAT Consults Ltd JV Lee Construction UGX 13,941,914,948; M/s Techno Three (U) Ltd JV PS Construction UGX 17,504,906,693; M/s Mohan Mutha Exports Pvt Limited and SMC Infrastructure Pvt Ltd JV; M/s Weihai International Economic and Technical Corporative Company Ltd (no bid submission sheet).
4. According to the Evaluation Report dated 9th March 2021, two firms were eliminated at the detailed evaluation stage. An evaluation process conducted by the 2nd Respondent; the Applicant was eliminated at the technical evaluation stage for 5 reasons indicated in the Evaluation Report dated March 9, 2021.
5. In the process of evaluation of the bids, the Applicant's bid reached the financial comparison stage and was issued by the 2nd Respondent a notice of correction of errors.
6. Techno Three (U) Limited JV PS Construction who had submitted a bid price of UGX 17,504,906,693/= was recommended as the best

evaluated bidder with a bid price of UGX 17,018,759,492/= and was awarded the Contract by the Contracts Committee on March 15, 2021.

7. On 18th March 2021, the publication of award of contract for goods and works information notice was displayed by the 2nd Respondent following the issuance of a No objection by the African Development Bank.
8. The Applicant being aggrieved by the outcome of the procurement process, applied to the Accounting Officer of the 2nd Respondent on March 25, 2021. The Accounting Officer rejected the Application for administrative review on April 20, 2021.
9. On April 27, 2021, the Applicant being aggrieved by the decision of the Accounting Officer of the 2nd Respondent, filed an Application for Administrative Review with the 1st Respondent.
10. On May 31, 2021, the 1st Respondent in accordance with Section 91(4) of the Act informed the Applicant that its Application was rejected for having no merit on the two grounds that had been raised.

C. Application to the Tribunal

1. Gat Consults Limited and Lee Construction Limited (JV) (the Applicant) being dissatisfied with the instant Application before decision of the Authority lodged an Application before the Tribunal to challenge the decision of the Authority.
2. The Application raised 6 grounds for the decision of the Tribunal;
 - (i) *Whether the Applicant is entitled to the documents requested in accordance with Section 89(2) of the PPDA Act.*
 - (ii) *Whether the bid which had reached a financial comparison could be rejected for the reasons that should have been advanced at the preliminary and technical stages.*
 - (iii) *Whether the projects submitted by the Applicant were of the similar nature in terms of either physical size, complexity, methods or technology.*
 - (iv) *Whether the information provided by the Applicant in the documents submitted in support of its bid was sufficient in respect of mobilization of personnel.*

- (v) *Whether the decision of the Evaluation Committee to declare TECHNO THREE (U) LTD JV PS CONSTRUCTION as the best evaluated bidder was against the principles of procurement as provided for under Section 43 of the PPDA Act.*
- (vi) *Whether the applicant presented the best bid in comparison with the best evaluated bidder.*

3. The Applicant sought 4 remedies from the Tribunal:
 - 1) Setting aside the decision of the Authority and substituting it with an Order allowing the Application
 - 2) Declarations to the effect that;
 - a) The applicant is entitled to documents requested for under section 89(2) of the PPDA Act
 - b) Projects submitted by the Applicant were of a similar nature and complied with terms of the solicitation document
 - c) Sufficient information regarding mobilisation of workforce was submitted by the Applicant
 - d) That the Applicant presented the best evaluated bid.
 - 3) An order prohibiting the Entity from taking further action in respect to the procurement until the Application is disposed of.
 - 4) Costs of the Application.

D. Replies to the Application

1st Respondent/PPDA

1. The 1st Respondent maintained its decision that the Application lacks merit and that it justifiably rejected it under Section 91(4) of the PPDA Act, 2003.
2. The 1st Respondent contended that the 5 projects submitted by the Applicant as evidence of similar projects successfully completed were not similar in terms of physical size, complexity, methods or technology with regard to the scope of works as defined in the 2nd Respondent's bidding document.
3. The 1st Respondent therefore prayed that the Application for administrative review before the Tribunal ought to be dismissed with each party bearing its own costs.

2nd Respondent/ Ministry of Water and Environment

- 1) The 2nd Respondent opposed the Application on the following grounds.
- 2) The 2nd Respondent contended that the Applicant is not entitled by law, to receive or be given the documents it requested for, from the 1st Respondent and that the bid in question did not meet the qualification criteria as stated in Section III of the bidding document and was therefore eliminated pursuant to ITB 32 and Regulation 34(4) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014.

E. The hearing

The Tribunal held a virtual hearing using the Zoom cloud meetings software on 23rd June, 2021. Representations were as follows;

- 1) Adv. Richard Mwebembezi of Messiers Richard Mwebembezi Solicitors and Advocates, represented the Applicant.
- 2) Mr. Leonard Mugizi, a Director of the Applicant was in attendance
- 3) Adv. Mary Akiror, the Legal Manager, assisted by Amanda Chrispa Lulu, a Senior Legal Officer, of the PPDA Legal Department, appeared as counsel for the 1st Respondent.
- 4) Eng. John Twiunomujuni, represented the Accounting Officer of the 2nd Respondent and was assisted by Eng. Felix Twinomuchunguzi.
- 5) John Katerega the Head Procurement and Disposal Unit and Akidi Maria the Senior Procurement Officer of the 2nd Respondent were also in attendance
- 6) JB Singh and Amandeep Singh represented *Techno Three (U) Ltd Jv Ps Construction* (best evaluated bidder) as an interested party, who was invited by the Tribunal.
- 7) Mr. Atiku Saki Mansoor, the Registrar and Mr. Kiwa Francis Franck, the Senior Legal Officer of the PPDA Appeals Tribunal were in attendance.

F. Submissions

Counsel for both parties highlighted the salient arguments in the parties' respective pleadings and written submissions also made clarifications to the Tribunal.

Applicant

1. The Applicant argued that the 2nd Respondent's refusal to avail the documents requested for by the Applicant was contrary to Articles 28, 41 and 42 of the 1995 Constitution of the Republic of Uganda and thus denied them the right to fair hearing. The Applicant relied on the decision of ***Hyporito Cassiano Desouza V. Tanga Town Council (1961) EA 377*** to support their submission
2. The Applicant further submitted that the reasons advanced for the disqualification of the Applicant at financial comparison stage were a mere afterthought, unlawful, unfair and contrary to R. 15 of the PPDA (Evaluation) Regulations, 2014. The Applicant relied on the decision of Supreme Court in ***Galleria in Africa Limited V. Uganda Electricity Distribution Company Limited Supreme Court Civil Appeal No 8 of 2017*** to buttress their submission
3. On the legality of the post qualification evaluation exercise, the Applicant submitted the exercise can only be conducted in respect of the best evaluated bidder and as such, as the 2nd Respondent ought to have awarded the Contract to the Applicant.
4. The Applicant submitted that the 5 projects submitted as proof of experience complied with the scope of works as defined in the 2nd Respondent's bidding document and were sufficient proof of the required experience and that the 2nd Respondent applied different standards of scrutiny in evaluating the bids exhibiting unfairness. The decision of Justice Mubiru in ***Arua Municipal Vs Arua United Transporters SACCO Civil Appeal No. 25 Of 2017*** to support their supposition.
5. The Applicant submitted that its bid was unfairly rejected yet its bid price was lower than that of the best evaluated bidder by three-billion-shillings contrary to section 43 of the PPDA Act 2003
6. The Applicant therefore prayed that the Tribunal sets aside the decision of the 1st Respondent and directs that the Applicant be awarded the Contract as the Best Evaluated Bidder. The Applicant further prayed for costs of the Application.

1st Respondent

7. The 1st Respondent submitted that Applicant is not entitled by law, to receive or be given the documents since such information is confidential and its sharing is prohibited under Section 47(2)(iv)(C) of the PPDA Act 2003.

8. Further that the Applicant had not made the request for the said information to the 2nd Respondent and only made it at appeal to the 1st Respondent and as such, the Applicant was thus estopped from raising the issue of failure to gain access to information at the appellate stage. The 1st Respondent relied on the decision of ***Banco Arabe Espanol V. Bank of Uganda [1991] UGSC1*** in support of its submission, and added that the Applicant having been availed with Notice of the Best Evaluated Bidder, the Applicant was therefore aware of the reasons for rejection its bid.
9. The 1st Respondent submitted that none of the 5 projects submitted by the Applicant as evidence of similar projects successfully completed were similar in terms of physical size, complexity, methods or technology with regard to the scope of works provided in the bidding document and some of the said projects did not meet the required scope of works of a minimum production capacity of 3000m³/day minimum production capacity or include a water treatment plant and further that the mobilisation schedule included equipment and material attached in the Applicant's bid did not provide for the workforce
10. The 1st Respondent submitted that the Application for administrative review before the Honourable Tribunal lacked merit, no new issues that were not raised before the 1st Respondent could be raised and addressed before the Tribunal and therefore prayed that the Application be dismissed with each party bearing its own costs.

2nd Respondent

11. The 2nd Respondent submitted that the Applicant is not entitled by law, to receive or be given the documents since such information is confidential and its sharing is prohibited under Section 47(2)(iv)(C) of the PPDA Act 2003. The 2nd Respondent relied on the decision of Justice Lydia Mugambe in ***Valley Technical Services V Uganda National Roads Authority (Miscellaneous Cause 301 Of 2018) [2021] UGHCCD 36*** to argue that an entity cannot be compelled to disclose information relating to other bidders.
12. The 2nd Respondent further submitted that in the request for administrative review to the Accounting Officer, the Applicant did not

request for any specific documents save for a request for the Applicant's Letter to the 1st Respondent dated 27th April 2021, copied to the Accounting Officer. That the Applicant was provided with a summary of the evaluation process, a comparison of the tenders received and the reasons for rejection of the bids were communicated to all bidders as contained in the Notice of Best Evaluated Bidder (document R2-C), the evaluation criteria used was communicated in the bid document (Part 1: Section III: Evaluation and Qualification Criteria) (document R2-A) and that further clarifications on the reasons for rejection were provided to the Applicant in the response by the Accounting Officer to the administrative review by the Accounting Officer and by the PPDA (documents R2-D and R2-E).

13. The 2nd Respondent in its written submissions clarified that the evaluation was conducted in accordance with the African Development Bank guidelines, that the bidding document was based on the standard bidding document for procurement of small works issued by the African Development Bank dated June 2010 (as stated in document R2-A: Preface) using a 4 tiered evaluation similar to the one provided under Regulation 15 of the PPDA Act 2014 and thus argued that based on Section 4A (2) of the PPDA Act 2003, the African Development Bank guidelines prevailed over the PPDA Act in respect to the said procurement.
14. The 2nd Respondent submitted that the Applicant passed three stages of evaluation namely the preliminary, detailed evaluation stage, financial comparison but failed at the post qualification stage and that all limitations of the Applicant's bid emanating from the 3 stages were communicated in the Notice of Best Evaluated Bidder (document R2-C).
15. That in accordance with ITB 32.2, a post qualification analysis of the firms that passed the first three stages was provided in the evaluation report and as such M/s Reddy's Borehole & Technical Services Ltd was the lowest evaluated bidder and that it is not true that the bidder had missing bills, as alleged by the Applicant and that upon failing to meet the post qualification criteria, its bid was disqualified and evaluation proceeded to the next lowest bidder. The Applicant was the second lowest bidder and failed to satisfy the post qualification criteria with regard to similar experience (Section III Evaluation and Qualification Criteria: 2.4.2 Specific Experience and 2.5 Personnel) and was subsequently disqualified pursuant to ITB 32 and Regulation

34(4) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014. The evaluation proceeded to the third lowest bidder M/s Techno Three (U) Ltd in JV with PS Construction Ltd who satisfied the qualification criteria provided in the bid document and was in accordance with ITB 32.1 selected as the Best Evaluated Bidder

16. The 2nd respondent submitted that up to the review of the Applicant's complaint to the 2nd Respondent's Accounting Officer on matters relating to the powers of attorney, audited books of accounts, access to financial resources were deemed to be fulfilled by the Applicant and thus responsive to the bidding requirements
17. The 2nd Respondent thus prayed that the Tribunal upholds the decision of the 1st Respondent and for the dismissal of the Application with costs.

G. RESOLUTION BY THE TRIBUNAL

18. In disposing of the Application, the Tribunal analysed the following documents;
 1. The Application to the tribunal dated 10th June 2021 marked at the hearing by the Tribunal as **D1**
 2. The 1st Respondent's Reply to the Application filed on June 15, 2021, marked at the hearing by the Tribunal as **D2**
 3. The 2nd Respondent's Reply to the Application filed on June 14th, 2021, marked at the hearing by the Tribunal as **D3**
 4. Applicant's written submissions filed on June 17, 2021, marked at the hearing by the Tribunal as **D4**
 5. Submission by Best Evaluated Bidder to the Tribunal dated June 16, 2021, marked at the hearing by the Tribunal as **D5**
 6. Applicant's rejoinder to the Response by the 1st Respondent, marked at the hearing by the Tribunal as **D6**
 7. The Bidding Document as submitted by the 1st Respondent, marked at the hearing by the Tribunal as **D7**
 8. The Evaluation Report as submitted by the 1st Respondent (**R2-B**), marked at the hearing by the Tribunal as **D8**
 9. Written Submissions of the 1st Respondent, filed by Email to the Tribunal on Tuesday, June 22, 2021 at 14:05pm, marked at the hearing by the Tribunal as **D9**

10. Written Submissions of the 2nd Respondent, filed with leave of the Tribunal by email on Wednesday, June 23, 2021 at 23:53pm, now marked as **D10**.
19. The Tribunal observed an overlap between the six issues framed by the Applicant. The Tribunal has therefore reframed 3 issues for its consideration in disposing of the Application as follows;
- (i) *Whether the delay or omission or refusal to provide documents requested for by the Applicant from the 1st Respondent was lawful*
 - (ii) *Whether the Applicant's bid was lawfully eliminated*
 - (iii) *What Remedies are available to the parties*

Issue No. 1- Whether the delay or omission or refusal to provide documents requested for by the Applicant from the 1st Respondent was lawful

20. The provision of information by a procurement and disposal entity to a bidder who seeks administrative review is derived from Section 89(2)(a-c) and (3) of the Public Procurement and Disposal of Public Assets Act 2003. The information provided to a bidder pursuant to the said section is restricted for only Administrative review purposes.
21. The Applicant in its application for administrative review before the entity, did not request the 2nd respondent for any information prior to its application for administrative review. Instead, the request for information was made on 19th May 2021 after the Accounting Officer of the 2nd Respondent had already made its decision. A second letter dated June 8, 2021 addressed both Respondents and requesting for information was worded as follows;

We hereby request for the following;

- a) *A summary of the evaluation process and report,*
 - b) *A comparison of the tenders, proposal or quotation including evaluation criteria. **In particular, we request for the bids submitted especially the best evaluated bidders bid. i.e Techno Three (U) Ltd JV PD Construction.***
22. The Respondents submitted that the Applicant was not entitled to the information requested for on 3 grounds namely

- (i) That the information sought was confidential and any attempt to share the same was explicitly prohibited under Section 47(2)(iv)(C) of the 2003 Act
- (ii) That an entity could not be compelled to disclose information relating to other bidders relying on the decision of *Justice Lydia Mugambe* in **Valley Technical Services V Uganda National Roads Authority (Miscellaneous Cause 301 Of 2018) [2021] UGHCCD 36**
- (iii) The Applicant having been availed with Notice of the Best Evaluated Bidder, was therefore aware of the reasons for the rejection of its bid and could not be prejudiced by the said information not being shared and;

The Applicant having failed to request for the said information in its application for administrative review before the 2nd Applicant, was thus estopped from raising the issue of failure to gain access to information at the appellate stage before the 1st Applicant relying on the decision of **Banco Arabe Espanol V. Bank of Uganda [1991] UGSC 1**

Determination

- 23. An administrative review refers to a statutory relief provided to a bidder under section 89 of the Public Procurement and Disposal of Public Assets Act 2003 for any omission or breach by a procuring and disposing entity of the Act, or any regulations or guidelines made under the Act or of provisions of bidding documents, including best practices.
- 24. The administrative review process under the Act has three progressive levels. The *first level* being review by the Accounting officer pursuant to section 90 of the Public Procurement and Disposal of Public Assets Act 2003, the *second level* being review by the Authority pursuant to section 91 of the Public Procurement and Disposal of Public Assets Act 2003 and the *third* and *last* level being the review of decisions of the Authority by the Tribunal pursuant to section 91 I of the Public Procurement and Disposal of Public Assets Act 2003.
- 25. It is also important to note that Section 89(2) is silent on the timelines within which the said information can be availed but what is clear from the reading of Section 89(2) is that the duty of a Procurement and Disposal Entity to provide a bidder who seeks *administrative review* is continuous and applies to all the three levels of administrative review.

26. While interpreting the mandatory or directory nature of the use of the word “*Shall*” in Section 89(2) of the PPDA Act 2003, the Supreme Court in ***Kampala Capital City Authority V Kabandize & 10 Ors (Civil Appeal-2014/13) [2017] UGSC 44***, while faced with a similar scenario held that *the emphasis should not be on the failure to comply but on the consequences of the failure*. Accordingly, the consequence of failure to provide the Applicant with information that is listed under Section 89(2) (a-c) of the PPDA Act 2003 would violate the Applicant’s right to a fair hearing in as far as the Applicant being restrained or curtailed in making adequate preparations for its administrative review process.
27. The 2nd Respondent was therefore under obligation to provide the Applicant with information that is listed under Section 89(2) (a-c) of the PPDA Act 2003 namely; *a summary of the evaluation process, a comparison of the tenders, proposal or quotation including evaluation criteria used and the reasons for rejecting the concerned bids.*
28. The 2nd Respondent partially complied with the statutory requirement by only providing the Applicant with *the reasons for rejecting the concerned bids* as is reflected in the Notice of Best Evaluated Bidder but did not provide the Applicant with the other two namely *a summary of the evaluation process* and *a comparison of the tenders including evaluation criteria used*. The 2nd Respondent instead only submitted the reasons for rejection to the 1st Respondent, with a copy to the Applicant, during the second stage of the administrative review before the 1st Respondent. This was contrary to Section 89(2) (a-c) of the PPDA Act 2003.
29. The Tribunal agrees with the submission of the Respondents that the Applicant was not entitled to be provided with the best evaluated bidder’s (***Techno Three (U) Ltd JV PD Construction***) bid. A competing bidder’s bid is not one of the documents stipulated under Section 89(2) (a-c) of the PPDA Act 2003, that should as a matter of right be provided to a bidder seeking administrative review.
30. The Tribunal however disagrees with the submission of the Respondents that the information requested for by the Applicant was prohibited under Section 47(2)(iv)(C) of the PPDA Act 2003. This is because the cited section only applies to information supplied in confidence by a bidder and there must be sufficient evidence to show that disclosure of such information would put the affected bidder at a disadvantage in commercial negotiations or prejudice the bidder in commercial competitions. We have read the decision of *Valley*

Technical Services V Uganda National Roads Authority (Miscellaneous Cause 301 Of 2018) [2021] UGHCCD 36 relied on by the 2nd Respondent and found it inapplicable to the case at hand.

31. In this Application however, the Respondents have not adduced evidence adduced to show that the best evaluated bidder (*Techno Three (U) Ltd JV PD Construction*) had supplied information to the 2nd Respondent in confidence. In any case, the commercial competition between the Applicant and other bidders in the impugned procurement had just been concluded with the publication of Notice of Best Evaluated Bidder on March 18, 2021. There were no further or anticipated negotiations relating to the procurement in question in light of the fact that negotiations are prohibited under S74 of the PPDA Act 2003.
32. The Tribunal accordingly finds that the failure to provide the Applicant with a summary of the evaluation process and a comparison of the tenders including evaluation criteria used was contrary to section 89(2)(a-c) of the PPDA Act 2003, as it offended the basic principles of public procurement namely *transparency, accountability and fairness* as stated in Section 43 of the PPDA Act 2003.

The 1st issue is answered in the negative.

Issue No. 2- Whether the Applicant's bid was lawfully eliminated

33. In order to determine whether the evaluation of the Applicant's bid and its elimination was lawful, it is important to first establish the legal regime applicable to this procurement.
34. Under Section 2 (1) (a) (iii) of the PPDA Act, 2003, the Act is to apply to all public procurement and disposal activities to do with the public finances of a procuring and disposing entity. Section 2 (1) (c) adds that the Act shall apply to procurement and disposal by a procuring and disposing entity within or outside of Uganda.
35. The procurement in issue is by the Ministry of Water and Environment which is a Ministry of Government and therefore a procuring and disposing entity within the meaning of 2 (1) (a) (iii) and 3 of the PPDA Act.

36. The aforementioned provisions support the deduction that the PPDA Act, 2003 and regulations thereunder can be applied to the resolution of the issues surrounding the currently impugned procurement.
37. Section 4 (1) of the PPDA Act, 2003 provides that where the Act conflicts with an obligation of the Republic of Uganda arising out of an agreement with one or more States, or with an international organisation, the provisions of the agreement shall prevail over the Act.
38. The 2nd Respondent submitted that the evaluation of this particular procurement was conducted under the African Development Bank guidelines and that the bidding document was based on the standard bidding document for procurement of small works issued by the African Development Bank dated June 2010 (as stated in document R2-A: Preface) using a 4 tiered evaluation similar to the one provided under Regulation 15 of the PPDA Act 2014 and that consequently the African Development Bank guidelines prevailed over the PPDA Act and regulations pursuant to Section 4A (2) of the PPDA Act 2003.
39. The Tribunal noted that the said submission on the applicable evaluation guidelines or regulations is a departure from the pleadings submitted by the 1st Applicant. The 2nd Respondent's Reply to the Application (**D3**) at page 2 pleaded that "*MWE conducted the evaluation of bids in accordance with the PPDA Guidelines and the AfDB procurement guidelines.*"
40. Any party who alleges that a condition imposed by a donor of funds or in a bilateral loan agreement conflicts with the PPDA Act 2003 and regulations made thereunder is mandated to cite to the satisfaction of the Tribunal, the relevant sections of the financing agreement or condition that ousts the provisions of the Act as held in ***Dott Services Ltd Vs. UNRA And PPDA And Anor, PAT Application No 3 of 2017, Rural Electrification Agency Vs. CG Andjies And PPDA, PAT Application No 1 Of 2019*** and more recently in ***Engineering Solutions (U) Ltd Vs. PPDA and Ministry Of Water And Environment, PAT Application No 5 Of 2020.***
41. The 2nd Respondent has not cited any conflict between the PPDA Act 2003 and regulations made thereunder and the *AfDB procurement*

guidelines. The 2nd Respondent was therefore, bound to conduct the evaluation in accordance with the provisions of the PPDA Act 2003 and regulations made thereunder; the bidding document; and the African Development Bank procurement guidelines. There might be some differences in the terminology used in the bidding document/ African Development Bank procurement guidelines vis-à-vis the PPDA Act 2003 and regulations made thereunder, but the broad principles and procedures are generally similar.

42. **Regulation 15 of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations, S.I No. 9 of 2014* states that the evaluation of a bid for the procurement of supplies, works or non-consultancy services using the technical compliance evaluation method shall be conducted under the following four stages—**

(a) a preliminary examination to determine the eligibility of the bidders and the administrative compliance of the bids received;

(b) a detailed evaluation of the bids to determine their technical responsiveness of the bids that are eligible after the preliminary examination carried out under paragraph (a); and

(c) a financial comparison of the bids that are eligible after the detailed evaluation carried out under paragraph (b) and to determine the best evaluated bid; and

(d) post qualification in accordance with regulation 34, to determine that the best evaluated bidder has the capacity and the resources to effectively execute the contract.

43. Under regulation 15 (b) of the above regulations, a detailed evaluation immediately follows the preliminary examination.

44. Under regulation 34 of ***The Public Procurement and Disposal of Public Assets(Evaluation) Regulations, 2014***, a post qualification is carried out to confirm whether the ***best evaluated bidder*** has the capacity and the resources to effectively execute a procurement for the procuring and disposing entity.

45. The 2nd Respondent's Reply to the Application (**D3**) at page 4 states that *the bid for GAT Consults Limited and Lee Construction Limited (JV) was evaluated to pass the preliminary, detailed evaluation stage, financial comparison but failed at the post qualification stage.*

46. The above pleading amounts to an admission (within the meaning of section 16 of the Evidence Act) that the Applicant's bid passed the first, second and third stages of evaluation as stipulated in Section III (Evaluation and Qualification Criteria) in the bidding document.

47. No. 32.1 to 32.3 of the Instructions to Bidders states as follows:

32.1 The Employer shall determine to its satisfaction whether the Bidder that is selected as having submitted the lowest evaluated and substantially responsive bid meets the qualifying criteria specified in Section III, Evaluation and Qualification Criteria.

32.2 The determination shall be based upon an examination of the documentary evidence of the Bidder's qualifications submitted by the Bidder, pursuant to ITB 16.

32.3 An affirmative determination shall be a prerequisite for award of the Contract to the Bidder. A negative determination shall result in disqualification of the bid, in which event the Employer shall proceed to the next lowest evaluated bid to make a similar determination of that Bidder's qualifications to perform satisfactorily.

48. The determination that the Bidder that is selected as having submitted the lowest evaluated and substantially responsive bid meets the qualifying criteria is done by scrutinising the information in Section IV, Bidding Forms.

49. Pre-qualification presupposes that a bidder has passed the previous stages of scrutiny and remains only with scrutiny of its Bidding Forms in the manner stated in ITB 32.

50. In the instant case, the Publication of Award/ Notice of Best Evaluated Bidder which was stamped 18th March 2021 enumerates six reasons for the rejection of the Applicant's bid. Two of the reasons (i.e unsigned books of accounts and submission of only one power of attorney) have nothing to do with the qualifying criteria under ITB 32. These two reasons belong to the preliminary examination.

51. It is a contradiction for the 2nd Respondent to contend that the Applicant reached post-qualification stage but at the same time issue a Publication of Award/Notice of Best Evaluated Bidder which claims that the Applicant failed due to inter alia submitting incomplete

documents (which is a matter for administrative compliance under preliminary examination).

52. Regulation 7 (1) of ***The Public Procurement and Disposal of Public Assets(Evaluation) Regulations, S.I No. 9 of 2014*** provides that the evaluation of a bid, shall be conducted in accordance with the evaluation criteria stated in the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non Consultancy Services) Regulations, 2014 and in the bidding document.
53. Regulation 7(2) of the said regulations provides that an evaluation committee shall not, during an evaluation, make an amendment or addition to the evaluation criteria stated in the bidding document, and shall not use any other criteria other than the criteria stated in the bidding document.
54. The stage and reasons for elimination of the Applicant's bid remains shrouded in mystery.
55. We are therefore unable to agree with the 2nd Respondent that it carried out a valid post-qualification on the Applicant as a lowest evaluated bidder in terms of the bidding document and the applicable laws.
56. In view of the orders for re-evaluation, we wish to provide some guidance on the interpretation of the evaluation criteria relating to experience as stipulated in the evaluation and qualification criteria.

Section III (Evaluation and Qualification Criteria states as follows:

2.4.1 General experience

Experience under contracts in the role of contractor, subcontractor, or management contractor for at least the last Five (05) years prior to the applications submission deadline, and with activity in at least nine (9) months in each year. The contracts should be in water works and for completed works, defects liability completion certificates should also be presented.

2.4.2 Specific experience

(a)Participation as contractor, management contractor, or subcontractor, in at least three (03) contracts within the last Eight (08) years, each with a value of at least \$ 2,000,000 (United

States Dollars Two Million, that have been successfully and substantially completed and that are similar to the proposed Works. The similarity shall be based on the physical size, complexity, methods/technology or other characteristics as described in Section VI, Requirements.

For the above or other contracts executed during the period stipulated in 2.4.2(a) above, a minimum experience in the following key activities: (i) Construction of a full conventional water treatment plant (or major expansion of water treatment plant of a similar nature) of 3,000m³/day minimum production capacity including all associated electrical and mechanical works. (ii) Supply, laying and commissioning of 5km of water transmission mains pipelines (steel pipes) and distribution network of 80km. (iii) Supply, installation and commissioning of pressed galvanized steel sectional tanks of at least 500m³ capacity

57. The similarity of previous projects required under 2.4.2 above can be based on:
- the physical size;
 - complexity;
 - methods/technology; or
 - other characteristics as described in Section VI, Requirements.
58. We do not agree that the previous projects must necessarily be of a physical size similar to the project at hand. The reference to specific cubic metres or lengths of pipes in 2.4.2.1 should therefore be read in the context of a bidder who wishes to rely on similarity of physical size. The reference to these measurements should be read in the context of similarity of size.
59. We decline to construe these words in isolation of the criteria generally. There was an effort to specifically define the parameters of the value and size of previous projects. However, the exact parameters of complexity; methods/technology; or other characteristics were not specified. The evaluation committee must therefore make an objective assessment to determine similarity of complexity; methods/technology; or other characteristics.
60. Mindful of section 46 of the PPDA and regulation 37 (4) of ***The Public Procurement and Disposal of Public Assets (Rules and Methods***

for Procurement of Supplies, works and Non-Consultancy Services) Regulations S.I No. 8 of 2014, care should be taken not to interpret or apply criteria in a manner which restricts competition.

61. Physical size is just one of the elements of similarity. A bidder can also demonstrate similarity by showing that the previous projects were similarly complex; used the same methods/technology or had other similar characteristics.
62. It is not mandatory to prove the specific sizes of previous projects if a bidder for instance chooses to rely on complexity or methods/technology or other characteristics.
63. For instance, the best evaluated bidder relied on *inter alia* the construction of houses; construction of a reservoir etc but there is no indication that this bidder was subjected to scrutiny as to whether these projects measured up to the cubic metres and kilometres mentioned in criteria 2.4.2 (*Specific Experience*).
64. The evaluation criteria does not require exact or identical experience in the construction of water treatment plants including all associated electrical and mechanical works, supply, laying and commissioning of water transmission mains pipelines using steel pipes and distribution network; and supply and installation of pressed galvanized steel sectional tanks.
65. Guided by our recent decision in **Samanga Elcomplus JV Vs. PPDA & UEDCL, PAT No. 4 of 2021, para 41, page 18**, where the Tribunal defined similarity to mean evidence which is similar but not necessarily identical or the same as, it is our finding after a careful scrutiny of the evidence before us that the evaluation criteria and the actual evaluation was not properly and uniformly applied to all bidders. The level of scrutiny applied to the best evaluated bidder was different from that applied to other bidders. This was contrary to the law.

The 2nd issue is answered in the negative.

Issue No. 3- What remedies are available to the parties

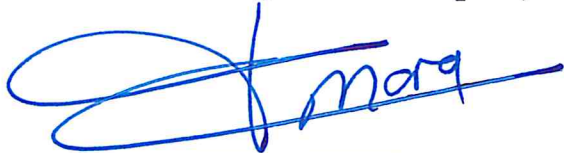
68. The Tribunal is a merits review body whose decision involves a consideration of whether, on the available facts, the decision made was a correct one, includes, reconsideration of the facts, law and policy aspects of the original decision and determination of the correct decision and further being directed to ensuring fair treatment of all persons affected by a decision, and improving the quality and consistency of primary decision making. Per **Hon Justice Stephen Mubiru** in **Public Procurement and Disposal of Public Assets Authority V Basaar Arua Bus Operators Cooperative Society Ltd, Civil Appeal-2016/4) [2017] UGHCCD 5.**

69. We shall remit the evaluation process back to the Entity, with directions to conduct a re-evaluation in a manner consistent with this decision, the PPDA Act and regulations and the bidding document.

G. DISPOSITION

1. The Application is allowed in part
2. The administrative review decisions of the 1st Respondent and the accounting officer of the 2nd Respondent are set aside.
3. The 2nd Respondent/Entity shall conduct a re-evaluation in accordance with the applicable legal provisions.
4. The Entity must refund the administrative review fees paid by the Applicant.
5. The Tribunal's suspension order dated June 10, 2021 is hereby vacated.
6. Each party to bear its own costs.

Dated and signed at Kampala, this 30th day of June, 2021.



**FRANCIS GIMARA S.C.
CHAIRPERSON**



**NELSON NERIMA
MEMBER**



**ENG. THOMAS ISANGA BROOKES
MEMBER**



**GEOFFREY NUWAGIRA KAKIRA
MEMBER**