

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

APPLICATION NO. 9 OF 2021

BETWEEN

MY MAKA GROUP LIMITED=====APPLICANT

AND

UGANDA NATIONAL BUREAU OF STANDARDS=====RESPONDENT

APPLICATION FOR REVIEW OF THE DECISION OF THE ACCOUNTING
OFFICER OF UGANDA NATIONAL BUREAU OF STANDARDS IN RESPECT OF
THE PROCUREMENT FOR SUPPLY AND DELIVERY OF MORNING BITES
UNDER FRAMEWORK CONTRACT [PROC REF NO. UNBS/SUPLS/2020-21/00216

BEFORE: FRANCIS GIMARA S.C, CHAIRPERSON; NELSON NERIMA; THOMAS
BROOKES ISANGA; GEOFFREY NUWAGIRA KAKIRA; AND PAUL KALUMBA,
MEMBERS

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DECISION OF THE TRIBUNAL

A. Brief Facts

1. On 18th March 2021, Uganda National Bureau of Standards (the Respondent) advertised for the supply and delivery of morning bites to UNBS Standards House, Nakawa and Katwe under Procurement Reference No. UNBS/SUPLS/2020-21/00216 under open domestic bidding procurement method. The Applicant along with seven (7) other bidders submitted bids.
2. On 21st April 2021, the respondent received and evaluated 8 bids from; Nzuri Company Limited, Syra Investments Limited, Super Taste Limited, Kahwa2go Limited, My Maka Group Limited, Source of the Nile Hotel Namanve, Baguma NP and Family, and High End Restaurant.
3. According to the Evaluation Report dated 25th May 2021, only three bidders namely My Maka Group Ltd (the Applicant), High End Restaurant, and Super Taste Limited passed the preliminary evaluation stage and proceeded to the detailed commercial and technical evaluation stage.
4. The Evaluation Committee Report and their minutes dated 25th May 2021 indicated that Super Taste Limited and High End Restaurant, proceeded to the financial comparison stage where Super Taste Limited was ranked the best evaluated bidder.
5. On 10th June 2021, the Applicant received notice of the Best Evaluated Bidder via email to the effect that Super Taste Limited had been declared the Best Evaluated Bidder. The Best Evaluated Bidder Notice indicated that My Maka Group Limited had failed the evaluation having submitted Audited Books of Accounts for only 2 years instead of the required 3 years.
6. On 18th June 2021, being dissatisfied by the outcome of the award decision, the Applicant applied to the Accounting Officer of the Respondent for administrative review and paid the necessary administrative review fees.
7. In his letter dated 5th July 2021, the accounting officer communicated his

decision upholding the award decision. The accounting officer in his decision stated that, "...on further perusal into submitted audited accounts, these were found invalid due to lack of a mandatory statement thus, a "statement of cash flows" and that Best Evaluated Bidder, " was found to have existed since 2015 to to-date evidenced by attachments of Trading Licences from KCCA hence qualifying at this stage"

8. On 12th July 2021, the Applicant requested for a summary of the evaluation process, a comparison of the tenders including the evaluation criteria used. A summary of the evaluation process was received by the Applicant on 13th July 2021.
9. On 15th July 202, the Applicant, having been dissatisfied with the decision of the Accounting Officer, appealed to the PPDA Appeals Tribunal.

B. Application to the Tribunal

1. The Applicant contends the Entity and the Accounting Officer erred in law and fact in selecting Super Taste Ltd as the Best Evaluated Bidder as it did not meet the requirements of the bidding document of having been in business for at least 3 years prior to the bid submission deadline.
2. The Applicant contends that Super Taste Ltd was incorporated on 8th June 2018 and had not been in existence for at least 3 years required under the terms of reference in the bidding document. That the Accounting Officer's reliance on trading licenses submitted from 2015 to conclude that the company had been in business since 2015 was erroneous because the only required proof of existence/registration of a company is a certificate of registration issued by Uganda Registration Services Bureau.
3. The Applicant avers that My Maka Group Ltd was the only bidding company that qualified to pass the Detailed Evaluation Stage since it met the 3-year requirement having been incorporated on 19th November 2013.
4. The Applicant further argued that it was unfairly disqualified for having

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submitted audited accounts for 2 years (2019 and 2020) instead of the required 3 years. The Applicant admitted that the audited accounts for 2018 were erroneously omitted in their bid submission. That since the audited accounts show a comparison between the current and previous year, the submitted audited accounts of 2019 showed a comparison of the previous year 2018.

5. The Applicant further argued that in the event that the entity was not satisfied the information presented in the audited accounts submitted by the Applicant, that the best practice would have been to seek clarification instead of disqualifying the Applicant.
6. The application named the Entity, Uganda National Bureau of Standards as the Respondent to the Application.

C. Replies to the Application

1. The named Respondent refuted the Application and contended that the Applicant was fairly disqualified on account of failure to meet the bid requirement of submission of audited accounts for three years.
2. The Respondent contended that the business of Super Taste Ltd was in existence and established prior to its registration in 2018.
3. The Respondent averred that it carried out a post qualification exercise of the Best Evaluated Bidder and was indeed satisfied of its suitability and ability to perform the contract.

D The oral hearing

The Tribunal held a virtual hearing using the Zoom cloud meetings software on 2nd August 2021. The appearances were as follows:

1. Alvin Jabo, an Advocate and Angela Kirabo, a Director of My Maka Group Limited represented the Applicant.
2. Hassan Walusimbi the Legal Counsel, Godfrey Beyagala-Principal Accountant, Maurice Musuga-Contracts Committee Chairperson, Roselyn Mbabazi Tusiime-

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Senior Procurement Officer, Godfrey Babalanda-Procurement Manager and Doreen Nanvule-Legal Officer represented the Respondent.

3. Cissy Nambajja, the Managing Director of Super Taste Limited, represented the Best Evaluated Bidder.

E. SUBMISSIONS

Counsel representing the Applicant and Respondents highlighted their written submissions and also provided clarifications orally to the Tribunal.

Applicant

1. The Applicant averred that the Best Evaluated Bidder, Super Taste Limited did not comply with the bid requirements and that the declaration of Best Evaluated Bidder be declared *void ab initio*.
2. Counsel for the Applicant submitted that trading licenses are not a proper determinant for the date of registration of a company.
3. The Applicant contended that although it erroneously failed to submit the audited accounts in accordance with the instruction to bidders, the Respondent ought to have sought clarification since the submitted audited accounts for the financial year 2019 bore financial information of the previous year.
4. The Applicant averred that since another bidder, High End Restaurant had been disqualified for having failed to submit authentic accounts as a result of it having been incorporated in 2021, the same principles ought to have been applied to Super Taste Limited which did not meet the three-year requirement.
5. The Applicant prayed that the Tribunal finds merit in all the grounds and grants the Application.

Respondent

1. The Respondent's representatives at the oral hearing argued that the Respondent did its best and followed the lawful procurement procedures for this procurement in question.
2. That the Applicant failed to respond to the requirements in the bidding document as it only submitted audited books of account for two years as opposed to the required three years.
3. That the Respondent did not have to seek for clarification as it was at the discretion of the Respondent to do so. That clarification is only sought for further particulars on information which has already been provided which was not the case in this Application.
4. That the Respondent was not interested in how long the company had been in existence but as long as it was registered at the time of bid submission. The Respondent was more interested in whether the company was capable of handling such business and that the Best Evaluated Bidder was suitable and met the requirements of the bid.
5. The Respondent prayed that the Application be dismissed.

Best Evaluated bidder

1. The Best Evaluated Bidder associated with the submission of the Respondent.
2. Regarding existence, the Best Evaluated bidder emphasised that it started its operation in 2015 as per the KCCA Trading licenses. Super Taste further argued that it registered its business name with URSB under tracking No. 0010000802214-BN211994 on 29th May, 2015 but the certificate of incorporation was issued to it on 8th June, 2018.

F. RESOLUTION BY THE TRIBUNAL

We now revert to the substantive issues in this application:

- i. *Whether the Best Evaluated Bidder met the requirements of the bid?*

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- ii. *Whether the Applicant's bid was unfairly disqualified by the Entity and the Accounting Officer?*

Resolution of the Issues

Issue 1

Whether the Best Evaluated Bidder met the requirements of the bid?

1. ITB 33.3 of the bidding document provides that, "*The Procuring and Disposing Entity shall evaluate the technical aspects of the bid submitted in accordance with ITB Clause 18, to confirm that all requirements specified in Section 6, **Statement of Requirements of the Bidding Document** have been met **without any material deviation or reservation**". Under Section 6 (Statement of Requirements) of the bidding document – subsection 3 (Specifications and Compliance sheet) paragraph 3 (d) (Description of services to be offered), the statement of requirements provided that, "*The provider should be a company that has been in the food business for at least 3 years*".*
2. The Applicant argued that the Best Evaluated Bidder, Super Taste Ltd was not eligible on the premise that it was incorporated in June 2018 and had not been in existence for at least three years.
3. The Accounting Officer in response stated that the Best Evaluated Bidder had been in existence long before its incorporation as far back as 2015 evidenced by its presentation of trading licenses.
4. According to a print out of the online search availed to us by the Best Evaluated Bidder, Super Taste was registered as a business name on 2nd May 2015. The BEB has argued that Super Taste Ltd started its operations in 2015 as per the KCCA trading licences.
5. The Tribunal has appraised the trading licenses in question and noted that they are issued to "*Super Taste*" as a business name, and not "*Super Taste Limited*" as a



company. Super Taste Limited was indeed registered as a company on 8th June 2018 and is different from a business name Super Taste which was registered in 2015. This is further buttressed by the fact that the Best Evaluated Bidder in its bid submitted a certificate of incorporation of Super Taste Limited and not a certificate of business name registration of Super Taste.

6. Section 2 of the **Companies Act 2012** defines a company to mean a company formed and registered under the Act or an existing company or a re-registered company under the Act. A company is registered under section 18 of the Companies Act

7. **Section 22** of the **Companies Act 2012** on conclusiveness of incorporation of a company, states that a certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence in respect of registration and of matters precedent and incidental to registration have been complied with and that the association is a company authorized to be registered and duly registered under the Act.

8. Case law has determined that a certificate of incorporation is conclusive as to the date on which a company was incorporated. See: ***SUPREME COURT CIVIL APPEAL NO. 16 OF 1993- FAM INTERNATIONAL LIMITED & ANOTHER VERSUS MOHAMED HAMID EL-FATIH.***

9. The question then is whether a bidding company can exist before its registration as a company by the Registrar of Companies. A company comes into existence as a body corporate at the beginning of the day on which it is registered. The company's name is the name specified in the certificate of registration. Separate legal personality is the basic tenet on which company law is premised. Establishing the foundation of how a company exists and functions, it is perceived as, perhaps, the most profound and steady rule of corporate jurisprudence. In the acclaimed case of ***SALOMON V. SALOMON & CO LTD [1897] AC 22***, it was concluded that a company exists as a legal person separate from its members or directors from the date of its incorporation.

10. Therefore, while a business name, “*Super Taste*” was registered in 2015 and started trading, the bidding company, “*Super Taste Limited*” was registered on 8th June

2018. This bidding company is in law different from the proprietor of the earlier registered business name "Super Taste". The city operator licensed under the Trade License is Cissy Nambejja and Super Taste was a business name.

11. The fact that a business establishment was existing as a business name owned by a one Cissy Nambejja prior to its registration as a company does not automatically warrant pre-registration existence as a company. The bidder named was Super Taste Ltd, a company registered in Uganda. As a company, it had to meet all the attendant requirements related to eligibility. The documentary evidence required under ITB 18.1 for purposes of section 6, 3 (D) of the statement of requirements is nothing else but a certificate of incorporation that confirms that the company has been in food business for more than 3 years. This bidding company's business life span commenced on 8th June 2018 and had not attained 3 years as at 21st April 2021, the deadline for bid submission. This bidding company was 2 months' shy of clocking 3 years as at the 21st day of April 2021.
12. **Section 49 of the PPDA Act** requires all procurement and disposal to be conducted in a manner which promotes transparency, accountability and fairness. The Post Qualification exercise conducted by the Respondent shows that another bidder, High End Restaurant was disqualified on account of not having been in existence for 3 years which led it to question the authenticity of the submitted accounts. However, this standard was not used for Super Taste Limited which did not meet the three-year requirement.
13. It therefore follows that the decision to declare Super Taste Limited as the Best Evaluated Bidder was erroneous. We are fortified in our submission by relying on the decision of Lady Justice Lydia Mugambe in *ROKO CONSTRUCTION LIMITED V PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY & ORS [2018] UGHCCD 137*, where it was held that the decision to award a contract to a bidder whose bid was not substantially responsive to the minimum requirement of the detailed evaluation to be awarded a contract, contravened **Regulation 19 (4) of the Public Procurement and Disposal of public Assets (Evaluation) Regulations 2014**, that such a decision was a nullity.
14. **The Tribunal therefore answers this question in the affirmative.**



Issue 2

Whether the Applicant's bid was unfairly disqualified by the Entity and the Accounting Officer?

15. The detailed evaluation criteria as deduced from the Standard Bidding Document (last page of the application) Section 3 **Part C, 5. Commercial Criteria, 5.1 (c)**, required the bidder to provide audited books of accounts for the last 3 years. The Applicant admitted on paragraph 13 (e) on page 5 of the Application that audited books of accounts for the year 2018 was erroneously omitted.
16. The Respondent, after examination found the Applicant's bid lacking in this aspect and disqualified the Applicant for failure to submit audited accounts for three years and lacking a statement of cash flows showing whether the Applicant is in a good financial position to perform the contract. The Applicant has averred that its bid was unfairly disqualified for failure to submit audited books of account for three years and has argued that the Respondent ought to have sought clarification instead of disqualification on this ground.
17. For the Tribunal to properly determine this question therefore, reference must first be made to the governing bid document for the procurement in question. An entity can only request for further information from a bidder provided that its bid is substantially compliant and responsive. In other words, the Entity cannot request for further information from a bidder whose bid had a material deviation. Therefore, the important question to consider under this issue is whether the Applicant's bid was marred with a material deviation due to its failure to submit audited accounts for three years.
18. In *CHINA AERO-TECH INTERNATIONAL ENGINEERING CORPORATION(CATIC) VS. PPDA, APPLICATION NO. 1 OF 2016*, the Tribunal held that in determining whether an omission is a material deviation, the entity must first determine whether a bid was substantially compliant and responsive.
19. In *ROKO CONSTRUCTION LTD & ROKO CONSTRUCTION (RWANDA) LTD JV VS. PPDA APPLICATION NO. 6 OF 2019*, the Tribunal reiterated its holding in a similar **Application No. 1 of 2016** as follows:

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“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.”

20. Under regulation 11 (4) (c) of the PPDA (Evaluation) Regulations, 2014 a material deviation includes one which *if corrected would unfairly affect the competitive position of the other bidders whose bids are administratively compliant and responsive.*

21. Clarification of bids is provided for in section 73 of the PPDA Act. Regulations 10, 11 and 17(6) of the **PPDA (Evaluation) Regulations** provide detailed procedures for clarification of bids. The import of section 73 of the PPDA Act and regulations 10, 11 and 17 of the **PPDA (Evaluation) Regulations** is that clarification may be used where the evaluation committee determines that it will assist in the evaluation and also to provide missing details in the submitted information or documents. Clarification is not meant to introduce new information or documents in order to cure a material deviation in the bid. See the decision of this Tribunal in **APPLICATION NO. 13 OF 2020 - SMILEPLAST LTD versus PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY & NATIONAL AGRICULTURAL ADVISORY SERVICES.**

22. Regulation 10(2) of the PPDA (Evaluation) Regulations 2014 permits an Evaluation Committee to request for clarification of information or submission of documentation only in circumstances where:

- a. *there is a nonconformity or an omission in the bid, which is not a material deviation as specified in regulation 11 (4); or*
- b. *there is an arithmetic error which has to be corrected.*

23. Regulation 17 (6) of the PPDA Evaluation Regulations also permits an evaluation committee to ask a bidder to submit a document required under sub regulation (3). Regulation 17 (3) of the PPDA Evaluation Regulations defines eligibility



documents to mean a copy of the trading licence of the bidder or its equivalent; a copy of the certificate of registration of the bidder or its equivalent; a signed statement indicating that the bidder does not have a conflict of interest in the subject of the procurement; and any other relevant eligibility documents or statements as may be stated in the bidding documents.

24. In the instant case, audited books of accounts were a commercial criteria and not mere eligibility documents. The Applicant by their own admission failed to submit audited accounts for 2018. The failure or omission by the Applicant to attach or submit audited books of accounts for the 3 years was a material deviation as specified in **Regulation 11(4) (c) of the PPDA (Evaluation) Regulations** for if corrected, would unfairly affect the competitive position of other bidders whose bid are administratively compliant and responsive.
25. The Evaluation Report of the Evaluation Committee of the Respondent clearly indicated that the other bidders Super Taste Limited and High End Restaurant's bids were administratively compliant and responsive in as far as the commercial criteria and technical evaluation was concerned. Any attempt to allow the Applicant to submit a document it omitted would be to the detriment other bidders who have responsibly submitted their documents. This would offend the principle of fairness.
26. The Tribunal dealt with a similar circumstance in **TRANSTRAC LIMITED VS. PPDA & MINISTRY OF WORKS AND TRANSPORT, PAT APPLICATION NO.10 OF 2017** wherein it held that the absence of the Power of Attorney could not be clarified by the Evaluation Committee after closing of bid submission as it would contravene Regulations 11 (4) (b) and (c) of S.I No. 9 of 2014.
27. For the above reason we find that the entity was right in disqualifying the bidder for not attaching audited accounts for 3years.
28. We also note that in the administrative decision of the Respondent's Accounting Officer, he cited an additional reason for disqualification of the Applicant's bid stating that its submitted audited books of account for 2019 and 2020 did not include a "statement of cash flows". This issue of the missing "statement of Cash Flows" does not feature in the evaluation report. The evaluation committee determined the Applicant to be compliant with respect to audited books of account for 2019 and

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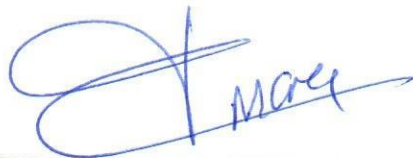
2020. The issue of missing “statement of cash flows” is therefore an afterthought which was first raised during administrative review. The respondent’s Accounting Officer erred when he relied on this ground. The Tribunal also notes that the Respondent did not subject the best evaluated bidder to similar scrutiny with respect to the contents of its audited books of account.

29. The upshot of our findings in this decision is that both the Applicant and the Best Evaluated Bidder were not qualified for an award in this procurement.

G. DISPOSITION

1. The Application partially succeeds.
2. The decision of the Accounting Officer is set aside.
3. The procurement process is hereby cancelled and the entity is advised to retender if it so wishes.
4. The Entity must refund the administrative review fees paid by the Applicant.
5. Each Party to bear its own costs.

Dated at Kampala this ___ day of August 2021.



FRANCIS GIMARA S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER