

**THE REPUBLIC OF UGANDA
PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
APPEALS TRIBUNAL
APPLICATION NO. 09 OF 2023**

**BETWEEN
BULMAK ASSOCIATES LIMITED ===== APPLICANT
AND
ADJUMANI DISTRICT LOCAL GOVERNMENT =====RESPONDENT**

APPLICATION FOR REVIEW OF THE DECISION OF ADJUMANI DISTRICT LOCAL GOVERNMENT IN RESPECT OF THE PROCUREMENT FOR UPGRADING OF ADMINISTRATION ROAD (1.43KM), MARKET ROAD (1.09KM) AND ILLA ROAD (0.66KM) PROCUREMENT REFERENCE NUMBER.ADJU504/WRKS/2022-2023/00015, UNDER THE UGANDA SUPPORT TO MUNICIPAL INFRASTRUCTURE DEVELOPMENT - ADDITIONAL FINANCING (USMID-AF) PROGRAM

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

A. BRIEF FACTS

1. Adjumani District Local Government (the Respondent) initiated a procurement for *Upgrading of Administration Road (1.43Km), Market Road (1.09Km) and Illa Road (0.66Km) Procurement Reference No. ADJU504/WRKS/2022-2023/00015*, under the *Uganda Support to Municipal Infrastructure Development - Additional Financing (USMID-AF) Program*, using Open Domestic Bidding Method.
2. The Bid Notice was published in the *New Vision* newspaper of February 6, 2023. Ten (10) bidders namely *Texa Solutions Ltd, Rocktrust Contractors (U) Ltd, King Albert Constructions Ltd, Kiru General Services Ltd, Stars Group Ltd, Summit Project Ltd, Angich Enterprises Ltd, Bulmak Associates Ltd* (the Applicant), *M & I International Ltd, GAT Consults Ltd / LEE Construction Ltd* submitted bids on February 24, 2023. Upon completion of the evaluation process, the Respondent displayed the Best Evaluated Bidder Notice on March 28, 2023, with a removal date of April 10, 2023, in which *Rocktrust Contractors (U) Ltd*, was declared the Best Evaluated Bidder with a contract price of UGX 10,340,766,747/= VAT inclusive.
3. The Applicant being dissatisfied by the evaluation process sought administrative review of the entire procurement process before the Accounting Officer on April 3, 2023. In the complaint, the Applicant contended that it had offered a 12 % discount in its signed Bills of Quantities. That in response to a request for correction of arithmetic errors its bid price was shs. 10,256,764,311.2, which was less than the contract award price of *Rocktrust Contractors (U) Ltd* of UGX 10,340,766,747/= by shs 84,002,435.8. That considering *Rocktrust Contractors (U) Ltd* for the contract will cause a financial loss.
4. The Accounting Officer in a letter dated April 14, 2023, did not find merit in the Applicant's complaint, and rejected it.

B. APPLICATION TO THE TRIBUNAL

1. The Applicant being dissatisfied with the decision of the Accounting Officer, filed the instant Application with the Tribunal on April 24, 2023, seeking for review the decision of the Respondent.
2. The Applicant complains that *Rocktrust Contractors (U) Ltd* was named as the best evaluated bidder with a contract price of shs. 10,340,766,747, despite the Applicant's bid being lower by over shs. 90,000,000.
3. The Applicant framed one issue, i.e. whether the selection of *Rocktrust (U) Ltd* as the lowest evaluated bidder was valid.
4. The Applicant seeks the following reliefs from the Tribunal:
 - a) A declaration that the selection of *Rocktrust (U) Ltd* as the lowest evaluated bidder was invalid and void *ab initio*.
 - b) A declaration that *Bulmak Associates Ltd* was the lowest bidder with a contract price of shs. 10,256,764,311.2.
 - c) An order that the selection of *Rocktrust Contractors (U) Ltd* as the best evaluated bidder be cancelled and *Bulmak Associates Ltd* be stipulated as the best evaluated bidder.
 - d) Costs.

C. RESPONDENT'S SUBMISSIONS

1. The Respondent did not file a response to the Application but filed submissions.
2. It averred that *Instructions to Bidders 17.4* of the bidding document required a bidder to quote any discounts in the Bid Submission Sheet. The bid submission sheet submitted by the Applicant clearly showed that the discount was not applicable (N/A).
3. That the discount of 12% referred to by the Applicant could therefore not be considered by the evaluation committee as the

Bid Submission Sheet overrides the summary of the Bill of Quantities.

4. That the Accounting Officer is required to make a decision within 15 working days. The request for Administrative Review was made by the Applicant on April 3, 2023 and the decision was made on April 14, 2023 well within the 15 working days.

D. SUBMISSIONS OF ROCKTRUST CONTRACTORS (U) LIMITED

1. The Best Evaluated Bidder *Rocktrust (U) Ltd* filed submissions through *Isabirye & Co. Advocates*.
2. That the Respondent in her decision dated April 14, 2023 gave reasons as to why the Applicant was not the best evaluated bidder. The Bid Submission Sheet showed that the discount offered was not applicable and therefore the 12% discount offered in the Bills of Quantities could not be considered.
3. That *Instruction to Bidders 11.3* of the bidding document required every bidder to examine all instructions, forms, terms and specifications in the bidding documents and to furnish with its bid all information and documentations required.
4. That under *Instruction 17.4* of the *Instructions to Bidders*, a bidder shall quote any discounts in the Bid Submission Sheet.
5. That the bid submission sheet of the Applicant clearly shows that the Applicant did not offer any discount neither did the Applicant show at the time of bid opening that it offered any discount.

E. THE ORAL HEARING

1. The Tribunal held an oral hearing on May 9, 2023. The appearances were as follows:
2. The Applicant was represented by Counsel Mukuve Mugagga Karemire of Mukuve Advocates

3. The Respondent was represented by Mr. Oryono Grandfield Omonda, the Chief Administrative Officer of Adjumani District Local Government.
4. The best evaluated bidder was represented by Counsel John Isabirye of Isabirye & Co. Advocates.
5. The parties and their counsel highlighted their respective cases and also responded to the questions put to them by the Tribunal for clarification.
6. The Tribunal has considered the pleadings, submissions, the bids and the procurement action file.

F. RESOLUTION

1. In view of the written and oral submissions of the parties, the Tribunal has reframed the issues as follows:
 - 1) Whether the decision of the Respondent's accounting Officer was made within the statutory time limit?
 - 2) Whether the Applicant was the lowest bidder?
 - 3) Whether the selection of Rock Trust (U) Ltd as the best evaluated bidder was valid?
 - 4) What remedies are available to the parties?

Issue no. 1: Whether the decision of the Respondent's Accounting Officer was made within the statutory time limit?

2. The Applicant applied for administrative review on April 3, 2023.
3. Under Section 89(7) of the *Public Procurement and Disposal of Public Assets Act*, the Accounting Officer must make and communicate a decision within ten (10) days of receipt of a complaint. The ten days started running on April 4, 2022 and expired on April 13, 2023.

4. Regulation 139 (5) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* allows the Accounting Officer fifteen working days to make a decision. However, the provisions of the Act as amended in 2021 supersede the regulation.
5. Therefore, the Accounting Officer was bound to communicate his decision not later than April 13, 2023.
6. The decision made on April 14, 2023 was therefore out of time.
7. Under sections 91(1)(b) and 89 (8) of the *Public Procurement and Disposal of Public Assets Act*, where the Accounting Officer fails to make and communicate a decision, the aggrieved bidder must file an application before this Tribunal within ten days after the expiry of the ten days stipulated under section 89 (7).
8. The ten days started running on April 14, 2023 and would have expired on Sunday 23 April, 2023. Section 34 (1) (b) of the *Interpretation Act* provides that in computing time for the purpose of any Act, if the last day of the period is a Sunday or a public holiday (“excluded days”), the period shall include the next following day, not being an excluded day. Since Sunday April 23, 2023 was not a working day, the last day was Monday April 24, 2023. The Applicant was therefore within its statutory rights to file application in the Tribunal on Monday April 24, 2023.
9. **Issue no. 1 is answered in the negative.**
Issue no. 2: Whether the Applicant was the lowest bidder?
10. *Instructions to Bidders* no. 40 of the bidding document provides that the best evaluated bid shall be the lowest priced bid which is eligible, administratively and technically compliant to the requirements specified in the bidding document.
11. *Instructions to Bidders* (ITB) no. 19.1 of the bidding document provides that bids shall be valid until the date specified in the

bid data sheet. The bid data sheet requires bids to be valid for 120 working days.

12. Regulations 76 (a) and 77 (1) (b) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* require a preliminary examination to determine the eligibility of a bidder and the administrative compliance of a bid to the basic instructions and requirements of the bid documents.
13. The Applicant in para (e) of its Bid Submission Sheet stated that “*Our bid shall be valid until the date specified in ITB Sub-Clause 19.1 and it shall remain binding on us and may be accepted at any time before that date of 24th July 2023*”.
14. The Applicant’s bid was dated February 24, 2023. The minimum bid validity period of 120 working days should have run until August, 22, 2023. The Applicant’s bid validity period expiring on July 24, 2024 was contrary to the requirements of the bidding document specified in the Bid Data Sheet.
15. *Instructions to Bidders* no. 34.3 of the bidding document requires the Respondent to conduct a preliminary evaluation of bids to confirm administrative compliance with among others, the appropriate duration of the bid validity.
16. Paragraph 2.1 (a) of the *Evaluation Methodology and Criteria* requires a preliminary evaluation to determine the eligibility of bidders and the administrative compliance of bids received.
17. The preliminary examination stage of evaluation is conducted on a pass or fail basis in accordance with ITB 19.1; ITB 31.3; ITB 34.3; paragraph 2.1 (a) of the *Evaluation Methodology and Criteria*; and regulation 77(1) (b)(vi) and regulation 77 (3) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*. The Applicant’s bid ought and should have been rejected by the Respondent as non-compliant at the preliminary examination stage of evaluation.

18. Under regulation 80(2) (a) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, the financial comparison can only be conducted on a bid that is eligible and administratively compliant. Under paragraph 9.2 of the *Evaluation and Methodology and Criteria*, the best evaluated bid must be the bid with the lowest evaluated price, from among those which are eligible, compliant and substantially responsive. The Applicant's bid having failed one of the key requirements under preliminary evaluation should not have progressed to any other stage of evaluation beyond the preliminary examination stage of evaluation.
19. The Applicant was therefore not a compliant bidder and it did not qualify for evaluation of its purported bid price.
20. **Issue no. 2 is answered in the negative.**

Issue no. 3: Whether the selection of Rock Trust (U) Ltd as the best evaluated bidder was valid?

21. Under regulation 74 of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, the Evaluation Committee may request the clarification of information or the submission of documentation from a bidder, which relates to the correction of arithmetical errors. A request for clarification, including the correction of arithmetic errors, is addressed to a bidder in writing, signed and sent to the bidder by the chairperson of the evaluation committee. All requests for clarifications must be copied to all bidders for information purposes only and noted in the evaluation report. Where a bidder fails to respond to a request for clarification his or her bid may be rejected.
22. ITB 30.1 of the Bidding Document provides that the Procuring and Disposing Entity may at its discretion ask any bidder for a clarification of its bid, including breakdowns of unit prices.
23. ITB 32 of the Bidding Document allows correction of arithmetic errors provided the bid is substantially compliant and responsive.

ITB 32 provide as follows:

32.1 Provided that a bid is substantially compliant and responsive, the PDE may waive any non-conformity or omission in the bid that does not constitute a material deviation.

32.2 Provided that a bid is substantially compliant and responsive, the PDE may request that the bidder submit the necessary information or documentation, within a reasonable period of time, to rectify nonmaterial nonconformities or omissions in the bid related to documentation requirements. Such omission shall not be related to any aspect of the price of the bid. Failure of the Bidder to comply with the request may result in the rejection of its bid.

32.3 Provided that a bid is substantially compliant and responsive, the PDE shall rectify nonmaterial nonconformities or omissions. To this effect, the bid price shall be adjusted, for comparison purposes only, to reflect the price of the missing or non-conforming item or component. The cost of any missing items will be added to the bid price using the highest price from other bids submitted.

32.4 Provided that the bid is substantially compliant and responsive, the PDE shall correct arithmetic errors on the following basis:

(a) If there is a discrepancy between the unit price and the total price that is obtained by multiplying the unit price and quantity, the unit price shall prevail and the total price shall be corrected, unless in the opinion of the PDE there is an obvious misplacement of the decimal point in the unit price, in which case the total price as quoted shall govern and the unit price shall be corrected;

(b) If there is an error in a total corresponding to the addition or subtraction of subtotals, the subtotals shall prevail and the total shall be corrected; and

(c) If there is a discrepancy between words and figures, the amount in words shall prevail, unless the amount expressed in words is related to an arithmetic error, in which case the amount in figures shall prevail subject to (a) and (b) above.

32.5 If a bidder does not accept the correction of errors, the bid shall be rejected and the BS may be forfeited or conditions in the BSD executed.

24. According to the evaluation report dated March 9, 2023 the bids of *Rocktrust Contractors (U) Ltd, Kiru General Services Ltd and Bulmak Associates Ltd* were subjected to correction of arithmetical errors during financial comparison.
25. The Evaluation Committee found an error in the total which corresponds to the addition of subtotals in the bill of quantities

of *Rocktrust Contractors (U) Ltd.* The error of shs. 394,750,327 in the sub totals was corrected so that the total was arithmetically corrected from shs. 10,735,517,074 to shs. 10,340,766,747. The correction was communicated to the bidder on March 9, 2023.

26. *Rocktrust Contractors (U) Ltd.* acknowledged and confirmed the identified error in a letter dated March 10, 2023.
27. The Evaluation Committee in a letter dated March 9, 2023 informed *Bulmak Associates Ltd* that it had detected an arithmetic error with the Bill of Quantities making the corrected total bid price to be shs 11,655,413,990 instead of the original bid price of shs. 10,184,530,611. Details of the error were not specified. *Bulmak Associates Ltd* was requested to respond to the correction not later than February 13, 2023 [sic] to enable the Evaluation Committee to make a recommendation to the District Contracts Committee for award of contract.
28. In a letter dated March 11, 2023 and received on March 13, 2023, *Bulmak Associates Ltd* acknowledged the arithmetic error bringing the grand total amount to shs. 11,655,413,990. However, *Bulmak Associates Ltd* stated that the summary sheet of the submitted Bills of Quantities had a discount of 12% on the overall grand total. That after deducting the 12% overall discount (shs. 1,398,649,678.8) on the corrected grand total of shs. 11,655,413,990, the correct discounted grand total was shs. 10,256,764,311.2.
29. The Tribunal has also noted that under Instruction 17.4 of the *Instructions to Bidders* of the bidding document, a bidder was required to quote any discounts in the Bid Submission Sheet. Under paragraph 7.1 (a) of the Evaluation Methodology and Criteria, the total price given in the Bill of Quantities must be included in the bid price. The Bid Submission Sheet of *Bulmak Associates Ltd* dated February 24, 2023, at paragraphs (c), and (d), stated as follows:

c) "The total price of our bid, excluding any discounts offered in item (d) below is UGX 10,184,530,611/=. [TEN BILLION ONE HUNDRED EIGHTY-FOUR MILLION FIVE HUNDRED THIRTY THOUSAND SIX HUNDRED ELEVEN SHILLINGS ONLY].

d) The discounts offered and the methodologies for their application are:

Unconditional discounts. If our bid is accepted, the following discounts shall apply. N/A.

Methodology of application of the unconditional discounts. The unconditional discounts shall be applied using the following method: N/A"

30. However, in the Bill of Quantities, *Bulmak Associates Ltd* quoted a grand total of shs. 11,573,330, 240 to which it applied a discount of 12 % to reduce the bid price to shs. 10,184,530,611 quoted in the Bid Submission Sheet. Yet, in the Bid Submission Sheet, *Bulmak Associates Ltd* expressly indicated that discounts were not applicable (N/A) to its total bid price of shs. 10,184,530,611. ITB 17.3 required the price quoted in the Bid Submission Sheet to be the total price of the bid, excluding any discounts offered. Under ITB 17.4, the bidder must specifically quote any discounts in the Bid Submission Sheet. In its Bid Submission Sheet, *Bulmak Associates Ltd* quoted a price after deducting the 12% discount on the grand total in the Bills of Quantities, but specified expressly that the discount was not applicable. It should have quoted the undiscounted price, clearly specifying that the discount is applicable, stating the methodologies for the application of the discount as required under the bidding document and then separately applying the applicable discount as required under ITB 17.2 and ITB 17.3.
31. The non-conformity in the Bid Submission Sheet of *Bulmak Associates Ltd* was a material deviation within the meaning of regulation 74 (1) (a) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* and ITB 31.2 of the bidding document. That deviation could not be the subject of clarification or correction. The proper course

of action in such a circumstance is rejection of the bid under ITB 37.5 of the bidding document. When the non-compliant bid was allowed to be subjected to financial comparison, and later given an opportunity for clarification, *Bulmak Associates Ltd* used the chance to attempt to change the terms of its bid submission sheet by stating that the discount was applicable and to adjust its bid price to shs. 10,256,764,311.2.

32. The Evaluation Committee also found an error in the total of the Bill of Quantities of *Kiru General Services Ltd*. The error of shs. 3,667,522,201 in the sub totals was corrected so that the total was arithmetically corrected from shs. 8,992,196,741/= to shs.12,659,718,942. The correction was communicated to the bidder in a letter dated March 9, 2023 and email sent on Friday, March 10, 2023 at 2:17 a.m. *Kiru General Services Ltd* was requested to respond to the correction not later than February 13, 2023 [sic] to enable the Evaluation Committee to make a recommendation to the District Contracts Committee for award of contract.
33. The Tribunal has determined that the purported corrections to the bids of *Rocktrust Contractors (U) Ltd*; *Kiru General Services Ltd* and *Bulmak Associates Ltd* were illegal. The corrections were effected in the Evaluation report dated March 9, 2023 but the bidders were requested to accept the corrections on the same date. The Evaluation Committee could not legally complete the evaluation on March 9, 2023 when they had on the same date asked bidders to accept arithmetic corrections to their bids. No responses had been received.
34. *Bulmak Associates Ltd* accepted the purported arithmetic error by a letter dated March 11, 2023 but received on March 13, 2023. *Rocktrust Contractors (U) Ltd*. acknowledged and confirmed the identified error in a letter dated March 10, 2023. There is no record in the procurement action file to show that *Kiru General Services Ltd*. responded to the request for clarification.

35. Therefore, the evaluation process was still going on when the Evaluation Report was signed on March 9, 2023. The Evaluation Committee wrongly corrected the bid prices before receiving acceptances from the affected bidders.
36. The Tribunal has also noted that the Evaluation Committee corrected alleged arithmetic errors but did not state in the evaluation report and minutes the type, items and basis for correction of the errors. The Evaluation Committee in seeking clarifications on arithmetic errors, did not communicate clearly to the bidders the type of errors, which specific items had errors and the methodology for correction of the errors to enable bidders get all the information as guided under ITB 32 and respond appropriately.
37. In view of the erroneous corrections in the evaluation, issue no. 3 is resolved in the negative.

Issue No. 4: What remedies are available to the parties?

38. As resolved under issues no. 2 and 3, the bid of *Bulmak Associates Ltd* was not administratively compliant and should have been eliminated. The bid did not qualify for financial evaluation or even correction of any purported error, since it was not substantially compliant and responsive.
39. However, the Evaluation Committee carried out illegal correction of arithmetic errors as noted under issue no. 3. Therefore, the award of contract will be set aside and the procurement remitted for re-evaluation.

G. DISPOSITION

1. The Application is allowed in part.
2. The award of contract to *Rocktrust Contractors (U) Ltd.* is set aside.
3. The Respondent is directed to re-evaluate the bids in a manner not inconsistent with this decision, the law and the bidding document.
4. The re-evaluation in no. 3 above shall be completed within 10 (ten) working days from the date of this decision.
5. The Respondent shall refund the Applicant's administrative review fees.
6. The Tribunal's suspension order dated April 24, 2023, is vacated.
7. Each party to bear its own costs.

Dated at Kampala this **16th** day of **May, 2023**.



NELSON NERIMA
MEMBER



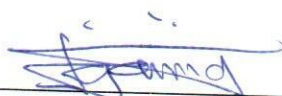
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