

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. Mbale District Local Government (the Respondent) initiated a tender for the construction of a three-classroom at Jewa Primary School Phase 1 under procurement reference number: MBAL891/WRKS/23-24/00010 using open domestic bidding and was advertised in New Vision newspaper on November 13, 2023.
2. On December 4, 2023, the Respondent received bids from 5 bidders namely, *Nami Hardware Ltd*, *Gebana Company Ltd*, *Transworld Agencies Ltd*, *Muroma Building and Suppliers Ltd*, *K&K Commercial Agencies Ltd*.
3. Upon conclusion of the evaluation process, the Evaluation Committee recommended *Gebana Company Ltd* with a total evaluated price of UGX. 163,800,335 VAT inclusive to be awarded the contract.
4. The Evaluation Committee observed that *Gebana Company Ltd* had submitted a bid price of UGX. 163,800,335, over and above the Respondent's reserve price of UGX 156,920,217. The committee recommended that a negotiation should be conducted.
5. Following approval by the Contracts Committee a 3-man negotiation team was appointed and a negotiation was conducted with *Gebana Company Ltd* on December 20, 2023.
6. Upon conclusion of the negotiation and adjudication processes, the Respondent displayed a Best Evaluated Bidder Notice on December 21, 2023 with a removal date of January 8 2024, indicating that *Gebana Company Ltd* was the best evaluated bidder with a Contract Price of UGX. 157,190,152.
7. The Notice of Best Evaluated Bidder also indicated that the Applicant's bid failed for two reasons, i.e. "*did not attach code of*

conduct in (ESHS) form”; and “did not attach organisation qualification form”.

8. On January 4, 2024, *Nami Hardware Ltd*, the Applicant being dissatisfied with the procurement process, filed an administrative review complaint before the Accounting Officer of the Respondent.
9. The complaint to the Accounting Officer of the Respondent was based on two grounds, i.e. that the reason given for failure of their bid was not satisfactory; and that the contract price awarded to Gebana Company Ltd was UGX. 157,190,152 yet their bid price read out during the opening of bids was UGX. 161,232,445.
10. On January 19, 2024, the Accounting Officer communicated the findings of the Administrative Review Committee which found that the complaint had no merit.
11. The findings of the Administrative Review Committee were as follows:
 - a) that in the bid document which was submitted by Nami Hardware Ltd, the code of conduct on ESHS had no declaration on commitment on handling ESHS and the right declaration on ESHS was wrongly placed under the heading of the code of conduct for contractors’ personnel.
 - b) that the Applicant had appointed its employees on 14/11/2023 but alleged that it had been working with these employees for all the previous projects which is not true.
 - c) that the Applicant did not declare the current commitment with Mbale District/other agencies it had an incomplete project of construction of 5 stance lined pit latrine at Bukhanakwa Primary School.
 - d) that the contract price awarded to Ms Gebana Company Ltd of UGX 157,190,152 was arrived at after arithmetic checks were

carried out and the corrected figures came to UGX 163,800335; after negotiations the contract price was agreed at 157,190,152.

12. The Applicant being dissatisfied by the decision of the Respondent, filed the instant application with the Tribunal on January 25, 2024, seeking to review the decision of the Respondent.
13. The Respondent in its response reiterated the findings of the administrative review committee.
14. The Best Evaluated Bidder on being invited as an interested party filed a submission contending that the Applicant's claims are baseless and only intended to hinder performance of their lawfully won contract.

B. THE ORAL HEARING

1. The Tribunal held an online hearing on February 15, 2024. The appearances were as follows:
Mr. Mugoya Safiyi Wadada Namanda, the Managing Director of Nami Hardware Limited appeared for the Applicant.
Mr. Luke Lokuda, the Chief Administrative Officer of Mbale DLG appeared for the Respondent.
Mr. Brian Natwesiga, a Director in Gebana Company Ltd appeared for the Best Evaluated Bidder.

C. RESOLUTION

1. The Tribunal has considered the Application, the response, the procurement action file and the submissions of the parties.
2. The Application did not frame any issues for determination by the Tribunal.
3. Considering the facts deduced from the pleadings and the procurement action file, the issues are framed as follows:
 - 1) Whether the Applicant's bid was rightfully disqualified by the Respondent?

2) What remedies are available to the parties?

Issue No.1:

Whether the Applicant's bid was rightfully disqualified by the Respondent?

4. The Best Evaluated Bidder Notice displayed by the Respondent on December 21, 2023, indicated that the Applicant's bid was disqualified for **“did not attach code of conduct in (ESHS) form” and “did not attach organisation qualification form”**.
5. In the Accounting Officer of Respondent's reply to the Applicant dated January 19, 2024, the Respondent averred that the code of conduct in the ESHS on page 0211(Appendix vii) in the Applicant's bid had no declaration on the applicant's commitment on handling ESHS and that the correct commitment on ESHS was wrongly placed in the code of conduct for contractors' personnel on page 212. Further, that the code of conduct in the ESHS submitted by the Applicant its Complaint to the Accounting Officer was different from what was submitted in the bid
6. The Applicant contended in its application that the “ESHS” form was submitted and printed on its letter head.
7. ITB 15.1(i) of the bidding document on page 30-31 stated as follows;
“The bidder shall submit with its bid the following additional documents.....
ESHS Code of Conduct for Contractor's Personnel
The bidder shall submit its Code of Conduct that will apply to the Contractor and Sub Contractor's Personnel to ensure compliance with its Environmental, Social, Health and Safety (ESHS) obligations under the contract. [Note: Complete and include the risks to be addressed by the Code in accordance with Section 6, Statement of Requirements, e.g. risks associated with labour influx, the spread of communicable diseases, sexual harassment,

gender-based violence, sexual exploitation and abuse, illicit behaviour and crime, and maintaining a safe environment etc.]

In addition, the Bidder shall detail how this Code of Conduct will be implemented. This will include: how it will be introduced into conditions of employment/engagement, what training will be provided, how it will be monitored and how the Contractor proposes to deal with any breaches.

The Contractor shall be required to implement the agreed Code of Conduct.

Environment and Social Management Plan (ESMP)

The Contractor shall be required to submit for approval, and subsequently implement. The Contractor's Environment and Social Management Plan that includes the Strategies and Implementation Plans described below:

[Note: insert name of applicable plans and strategies and specific risk/s]

- [e.g. Traffic Management Plan to ensure the safety of local communities from construction traffic;*
- [e.g. Water Resource Protection Plan to prevent contamination of drinking water as well as protection of fragile ecosystems e.g. biodiversity, wetlands etc.];*
- [e.g. Resettlement Action Plan for prospective PAPs];*
- [e.g. Boundary Marking and Protection Strategy for mobilization and construction to prevent offsite adverse impacts];*
- [e.g. Strategy for obtaining Consents/Permits prior to the start of relevant works such as opening a quarry or borrow pit];*
- [e.g. Gender-based violence and sexual exploitation and abuse (GBV/SEA) prevention and response action plan].*
- [e.g. strategy for marking and respecting worksite boundaries, waste management plan, community engagement plan, decommissioning plan etc.]*

[Note: The extent and scope of these requirements should reflect the significant ESHS risks or requirements set out in Section 6 as advised by Environmental/Social specialists./ The key risks to be addressed by the Bidder should be identified by Environmental/Social specialists, for example from screening, the Project Brief/ Environmental and Social Impact Assessment (ESIA). The risks may arise during

mobilization or construction phases and may include construction traffic impacts on the community, pollution of drinking water. depositing on private land and impacts on rare species etc.

8. Part 1, Section 3, Evaluation Methodology and Criteria, C, Detailed Evaluation Criteria, 5(d) stipulated that the criteria for assessment of responsiveness of a bid would consider “*ESHS Code of Conduct as detailed under Section 4 Bidding Forms and Environment and Social Management Plan*”.
9. We examined the Applicant’s bid and observed the following;
 - a) On page 0211, the Applicant included a blank Code of Conduct (ESHS) Form (as it is provided for on page 61 of the bidding document) countersigned against the form and embossed its stamp dated November 18, 2023 on the form.
 - b) The Applicant inserted the Code of Conduct for Contractor's Personnel form as contained in the bidding document (under part 1, section 4, bidding forms on page 61-63) as part of its bid with the Applicant’s stamp embossed on it and with a signature on pages 0211, 0213(A) and 0213(B)1 of its bid.
 - c) The Applicant then went ahead and reproduced the contents of the aforementioned Code of Conduct for Contractor's Personnel form on its letterhead and signed off against them with a stamp of the Company dated November 20, 2023 on pages 0212, 0213(B)2 and 0214 of its bid.
 - d) On page 0215 of its bid, the Applicant inserted the Environmental and social Management Strategies, Implementation Plans including Code of Conduct (ESHS) Implementation form as contained in the bidding document (under part 1, section 4, bidding forms on page 64). This form contains a signature and the Applicant’s stamp embossed on it.
 - e) Pages 039 -059 of the Applicant’s bid contain the detailed narrative of the Applicant’s Environmental, Social, Health and Safety (ESHS), code of conduct and Environment and Social Management Plans.

- f) On page 0294 of its bid, the Applicant inserted form 5B on Environmental, Social, Health and Safety Performance Declaration Management Strategies, Implementation Plans including Code of Conduct (ESHS) (under part 1, section 4, bidding forms on page 74) as part of its bid with the Applicant's stamp embossed on it and with a signature. This form is followed by an actual declaration on ESHS performance on page 0295.
10. The Tribunal has held that non-conformity with the prescribed form does not render the application void. Further, non-conformity with the specific format of form provided for in the standard bidding document issued by a procuring and disposing entity does not render the format submitted by a bidder void. The focus is on the substance rather than the form. See section 43 of the *Interpretation Act*, and Tribunal decisions in **SAMANGA ELCOMPLUS JU PPDA & UEDCL, Application No. 4 of 2021 and FRIDA B. KWIKIRIZA v BULIISA DISTRICT LOCAL GOVERNMENT, Application No. 28 of 2022, Application No.13 of 2021 Kasokosoko Services Ltd v Jinja School of Nursing and Midwifery; and Orungo Market Vendors Association vs Amuria District. Local Government, Application No.41 of 2022.**
11. It is therefore our finding that the Applicant's bid contained ESHS Code of conduct for contractor's personnel, environmental and social management strategies, implementation plans including code of conduct (ESHS) implementation as required in ITB 15.1(i), the detailed evaluation criteria, and Section 4 on the Bidding Forms specific to Environment and Social Management Plan of the bidding document.
12. The Tribunal however, noted that the ***Environment and Social Management Plan (ESMP)*** is submitted for approval and later implementation by the Contractor.

It is a futuristic document which is relevant to a bidder who has been awarded the contract and has become the contractor. It is not an evaluation criteria during the evaluation process.

See: ***Application no. 30 of 2021, Gat Consults Limited v National Water and Sewerage Corporation.***

13. The veracity or authenticity of the submitted documents is another matter that can be resolved by a conduct of due diligence as stipulated in regulation 26 of the *Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities) Regulations, 2023*.
14. The Respondent therefore erred in determining that the Applicant did not attach the code of conduct in (ESHS) form.
15. The second limb of the Respondent's contention is that the Applicant "did not attach organisation qualification form".
16. The Respondent did not make any response to this issue. The Applicant did not make any submissions on the same.
17. The requirement for qualification form is contained in Part I: Section 4 Bidding Forms Qualification Forms on page 69. It states that "*To establish its qualifications to perform the contract in accordance with Section 3: Evaluation Methodology and Criteria. The Bidder shall provide the information requested in the corresponding Information Sheets included hereunder.*"
18. The forms of focus here are contained in Part I: Section 4 Bidding Forms, Table of forms on page 48. These are Form 4- *Bidder Information Sheet on page 70, Form 4A(c)&((d)-(Party to JV and Historical Contract non-performance), 5A (Pending Litigation), Form 5B(f)-(Environmental, Social, Health and Safety Performance Declaration), Form 6(g)-(Current Contract Commitments/ Works in progress), Form 6(h) &(i)-(Financial Situation and Historical Financial Performance), Form 7 (Average Annual Turn Over), Form 8 (Financial Resources).*

19. We examined the Applicant's bid and observed that the Applicant submitted the following documents in its bid;
 - a) Form 4-Bidder Information Sheet on page 0290.
 - b) Form 4A (c)&(d)- (Party to JV and Historical Contract non-performance) on page 0292.
 - c) Form 5A (Pending Litigation on page 0292.
 - d) Form 5B(f)-(Environmental, Social, Health and Safety Performance Declaration) on page 0295.
 - e) Form 6(g)-(Current Contract Commitments/Works in progress) on page 0297.
 - f) Form 6(h) & (i)-(Financial Situation and Historical Financial Performance) on page 0299.
 - g) Form 7 (Average Annual Turn Over) on page 0302.
 - h) Form 8 (Financial Resources) on page 0304.
20. It is our finding that the Applicant duly submitted the information requested in the corresponding Information Sheets for purpose of establishing its qualifications with capacity to perform the contract.
21. As to whether the information submitted is correct and sufficient to enable the evaluation committee to determine the capacity of a bidder to perform the contract is the preserve and discretion of the evaluation committee and may be exercised through the conduct of due diligence.
22. The respondent therefore erred in determining that the Applicant "did not attach organisation qualification form".
23. **Issue no. 1 is resolved in the negative.**

Issue No.2:

What reliefs are applicable to the parties?

24. Having found that the Evaluation Committee erred in the evaluation of the bids, the Tribunal shall remit the procurement back to the Respondent for re-evaluation.

D. DISPOSITION

1. The Application is allowed.
2. The award of contract to *Gebana Company Ltd* in the procurement of construction of a three-classroom block at Jewa Primary School Phase 1 under procurement reference number: MBAL891/WRKS/23-24/00010 is set aside.
3. The Respondent is directed to re-evaluate the bids in the impugned procurement in a manner not inconsistent with the decision of the Tribunal, the bidding document, and the law.
4. The re-evaluation in no.3 above shall be completed within ten (10) working days from the date of this decision.
5. The Respondent shall refund the administrative review fees paid by the Applicant.
6. The Tribunal's suspension order dated January 25, 2024, is vacated.
7. Each party shall bear its own costs.

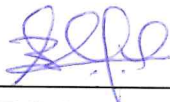
Dated at Kampala this 19th day of February, 2024.



FRANCIS GIMARA S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



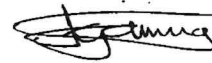
THOMAS BROOKES ISANGA
MEMBER



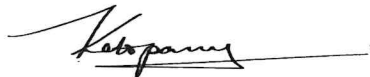
GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER



KETO KAYEMBA
MEMBER