



**PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
AUTHORITY**

**REPORT ON APPLICATION FOR ADMINISTRATIVE REVIEW IN RESPECT TO
THE PROCUREMENT OF A PROVIDER FOR THE OPERATION AND
MAINTENANCE OF KAMPALA – ENTEBBE EXPRESSWAY (51.4Km) –
UNRA/NCONS/18-19/00005**

ENTITY: UGANDA NATIONAL ROADS AUTHORITY

**APPLICANT: CHINA COMMUNICATIONS CONSTRUCTION COMPANY
LIMITED**

OCTOBER 2020

DECISION BY THE AUTHORITY

1.0 BRIEF FACTS

1. On 3rd July 2018, the Uganda National Roads Authority (UNRA) initiated the procurement for operation and maintenance of the Kampala-Entebbe Expressway at an estimated cost of UGX 163.8 Billion. The scope of works for the 5 year Operation and maintenance procurement included:
 - i. Improvement works (one off design and construction works¹)
 - ii. Admeasurement road maintenance works²;
 - iii. Performance based operation and maintenance services³.
2. On 4th July 2018, the Contracts Committee approved the open international competitive bidding method with pre-qualification, the pre-qualification notice and the prequalification document for the procurement of an operator for the operation and maintenance of Kampala – Entebbe Express Highway (51.4Km).
3. On 21st July 2018, UNRA published a prequalification notice in the East African newspaper (Issue of 21st to 28th July, 2018) and in the New Vision of 26th July, 2018. The bid submission deadline was 23rd August 2018.
4. On 28th August 2018, the Contracts Committee approved an extension of the submission deadline to 24th September 2018.
5. On 24th September 2018, the Procurement and Disposal Unit received the following bids for the prequalification of operators for the operation and maintenance of Kampala – Entebbe Express Highway (51.4Km):
 - i) Tolcon Group Pty Ltd & Vea Road Maintenance and Civils Pty Ltd;
 - ii) Group Five Construction Pty Ltd;
 - iii) Consortium of China Communications Construction Company Ltd & CCCC Investment Company Ltd (The Consortium);
 - iv) Kapsch Trafficom S.A Holding Pty Ltd;
 - v) Korea Expressway Corporation;
 - vi) Coil Limited & Eagle Infra India Limited;
 - vii) United Bank of Africa/ Uganda-Multiplex Limited (JV);
 - viii) EGIS Road Operations SA; and
 - ix) KEE VINCI Highways Operations.

¹ RFP Part 2 Section 4.2.1 provided for installation of additional road safety facilities, expressway lighting, tolling system and over load control systems.

² RFP Part 2 Section 4.4.1 provided for maintenance of pavement and main carriage way (filling and pothole repair, sealing of cracks, joint and repair of spalls); and maintenance of shoulders (correction of shoulder drop off, filling of depressions among others.

³ RFP Part 2 Section 4.3 provided that this would include highway and tolling operations, weighbridge operations, routine road maintenance and toll plaza and weighbridge maintenance.

6. During the prequalification stage, four firms were eliminated due to the reasons indicated in Table 1 below:

Table 1: Firms eliminated and reasons for their elimination

No.	Name of Bidder	Reasons for being eliminated
1.	Coil Limited & Eagle Infra India Limited	<ul style="list-style-type: none"> • One of the Joint Venture partners – Coil Ltd did not provide evidence of ongoing operation and maintenance project. • One of the Parties in the JV - Coil Ltd had a networth of USD 439,000 which was less than 25% of USD 20 Million i.e USD 5 Million. • The Applicant also had less than three years of operation and the concession agreement provided was for Eagle Deep not Eagle Infra India Ltd. Of the three projects presented i.e Gachibowli to Shamshabad, Patancheru to Shamirpet, Shamirpet to Pedda Amberpert, operation had started in November 2017 which was less than the three years required in the prequalification document.
2.	United Bank of Africa/ Uganda-Multiplex Limited (JV)	<ul style="list-style-type: none"> • One the Joint venture partners (Multiplex Limited did not have a networth of 25% of the overall requirement. Multiplex Limited had a net worth of USD 1,725,972 which is less than 25% of the overall requirement (USD 20 Million) or USD 5M and does not meet the minimum annual turnover of 50 Million in highway operation and maintenance as required. • Failure to attach any project where they have experience in long term operation and/or facilities management of motorways and other criteria set in the prequalification document. Projects presented by the bidder did not meet the required experience.
3.	Tolcon Group Pty Ltd & Vea Road Maintenance and Civils Pty Ltd	<ul style="list-style-type: none"> • All ongoing projects submitted by Tolcon Group (Pty) Ltd are for Tolcon Lehumo (Pty) and there is no relationship declared between the two companies. There is no evidence provided for one of the contracts submitted. • All parties combined did not meet the required Net worth of 20 Million USD and none had a net worth of atleast 5 Million USD (25%). The Net worth of Tolcon was USD 132,315 and that of VEA was USD 853,397. • One of the projects N1 North indicated that it was started in June 2019. However, the award letter by SANRAL showed that the offer was accepted on 24th November 2014. Project N17 was awarded to Tolcon Lehumo (Pty) Ltd and not Tolcon Group Pty. Based on the inconsistency, the bidder was non-compliant. All projects

No.	Name of Bidder	Reasons for being eliminated
		<p>presented by VEA were for routine maintenance operations and not operation and maintenance of motorways.</p> <ul style="list-style-type: none"> Projects listed in the Form EXP 4.2 were for Tolcon Lehumo Pty Ltd but there was neither a partnership agreement nor a Joint Venture agreement showing that Tolcon Group (Pty) Ltd participated in the tolling part from the two projects N17 and Huguenot. VEA Maintenance and Civils (Pty) Ltd lacked Tolling experience and all projects listed were for road routine maintenance contract.
4.	Kapsch Trafficom S.A Holding Pty Ltd	<ul style="list-style-type: none"> Failure to submit Articles of Association and audited books of accounts certified by auditors. The projects presented are only for tolling system applications and not for operation and maintenance of motorways.

7. On 7th March 2019, the Contracts Committee approved the prequalification evaluation report and the following firms were pre-qualified:

Table 2: Pre-qualified firms

No.	Name of Bidder	Country
1.	Group Five Construction Pty Ltd	South Africa
2.	Consortium of China Communications Construction Company Ltd & CCCC Investment Company Ltd (The Consortium)	China
3.	EGIS Road Operations SA	France
4.	KEE VINCI Highways Operations	France
5.	Korea Expressway Corporation	Korea

8. On 12th September 2019, the Contracts Committee approved the bidding document, shortlist and invitation to bid.
9. On 24th January 2020, the Entity received and opened technical bids from the following two bidders:
- i) Consortium of China Communications Construction Company Ltd & CCCC Investment Company Ltd; and
 - ii) EGIS Road Operations SA
10. During preliminary evaluation, China Communications Construction Company Ltd & CCCC Investment Company Ltd (the Consortium) was found non-compliant with the requirement in ITB clause 4.4.5 of the bidding document, on the account that one of the consortium

members, China Communications Construction Company Ltd, was the main contractor in the design and building of the Kampala – Entebbe expressway project.

11. On 13th February 2020, the Evaluation Committee recommended that the financial bid of EGIS Road Operations S.A be opened.
12. On 20th February 2020, the Contracts Committee approved the technical evaluation report and recommended EGIS Road Operations S.A to proceed to the financial stage of evaluation.
13. On 26th February 2020, UNRA issued the Consortium a notification for a non-successful technical proposal indicating that The Consortium was eliminated for failure to meet the requirements in ITB clause 4.4.5.
14. On 27th February 2020, the complainant wrote to UNRA requesting for a reasonable explanation why they were considered non-compliant to ITB 4.4.5 of the bidding document yet they had been passed on a similar requirement under ITA 4.4 during prequalification.
15. On 3rd March 2020, UNRA wrote a letter to the complainant indicating that it was in breach of the instructions to bidders since one of the members of the consortium (China Communications Construction Company Ltd) participated in the design and construction of Kampala – Entebbe Expressway.
16. On 5th March 2020, the financial bid for EGIS Road Operations S.A was opened with a quoted price of UGX 122,863,844,023.

2.0 THE ADMINISTRATIVE REVIEW PROCESS

1. On 6th March 2020, The Consortium applied for Administrative Review to the Accounting Officer. The complainant raised one ground at the Entity level as indicated below.

The Consortium was unfairly treated at technical evaluation during bidding. The complainant was compliant with ITA 4.4 in regard to conflict of interest during prequalification. However, they were unfairly disqualified on the same requirement under ITB 4.4.5 at bidding (Request for Proposal)

2. On 29th May 2020, the Accounting Officer issued a decision to the complainant rejecting the application.

3.0 APPLICATION FOR REVIEW BY THE AUTHORITY

1. On 27th March 2020, the complainant applied for an Administrative Review to the Authority raising the following grounds:
 - i) *UNRA did not respond to their complaint even after the Authority (PPDA) requesting the Accounting Officer to investigate the matter within 15 working days;*

ii) The Consortium was unfairly treated at technical evaluation during bidding. It complied with ITA 4.4 in regard to conflict of interest during prequalification. However, they were unfairly disqualified on the same requirement under ITB 4.4.5 at bidding (Request for Proposal)

2. On 12th May 2020, the Authority instituted investigations of the Administrative Review and requested UNRA to submit the procurement file and submissions.
3. On 10th June 2020, the Authority convened an Administrative Review hearing which was attended by representatives of the Entity and the Applicant.
4. The Complaints Review Committee at its 119th meeting held on 22nd June 2020 considered the application and upheld. The Committee found that the Applicant and/or any of its affiliates had no conflict of interest in the subject of the procurement. The Committee directed the Entity to re-evaluate the bids received and refund the Administrative Review fees in accordance with Regulation 11 (2) of the PPDA (Administrative Review) Regulations, 2014.
5. The Entity implemented the decision of the Authority and displayed a notice to bidders on 7th August 2020.

4.0 APPLICATION TO THE PPDA APPEALS TRIBUNAL

1. On 20th August 2020, Egis Road Operations S.A appealed to the PPDA Appeals Tribunal against the decision of the Authority on the ground that it was procedurally improper that the Authority determined the application by the Consortium without its notification as required by the PPDA Act, 2003.
2. The Authority in its submission at the Tribunal admitted that the Applicant was a bidder whom it ought to have notified of CCCC's application for Administrative Review before taking a decision in accordance with the provisions of Section 91 (3) of the PPDA Act, 2003. The Authority regretted the omission which did not prejudice or occasion injustice to the Applicant.
3. On 3rd September 2020, the PPDA Appeals Tribunal set aside the Authority's decision and directed the Authority to notify all interested bidders of the complaint by Consortium of China Communications Construction Company Limited and CCCC Investment Company Limited and determine the complaint de novo
4. On 3rd September 2020, the Tribunal set aside the Authority's decision and directed it to notify all interested bidders of the complaint by CCCC and determine the complaint de novo. On 7th September 2020, the detailed decision was issued by the Tribunal.
5. On 10th September 2020, the Authority informed all the bidders that had participated in the procurement of the complaint and requested them to submit any relevant information by 18th September 2020.

4.0 DISPOSAL OF APPLICATION

1. In investigating the application for Administrative Review, the Authority analysed the following documents:
 - i) Prequalification document;
 - ii) Applications submitted by bidders;
 - iii) Evaluation report for prequalification;
 - iv) Shortlist of providers;
 - v) Request for Proposal;
 - vi) Record of bid opening;
 - vii) Bids submitted by the bidders;
 - viii) The evaluation report and minutes;
 - ix) Minutes of the Contracts Committee;
 - x) Application for Administrative Review by the Consortium ;
 - xi) The PPDA Appeals Tribunal decision dated 3rd September 2020;
 - xii) The written submissions of Egis Road Operation S.A, UNRA and China Communications Construction Company dated 18th, 29 and 30th September 2020 respectively; and
 - xiii) Correspondences with respect to the Administrative Review.

5.0 SUBMISSIONS BY THE PARTIES

Preliminary Objection raised by Egis Road Operations S.A

Issue 1: Whether CCCC has a right to apply for Administrative Review yet it was the Consortium that was a bidder

5.1 Submissions by Egis Road Operations S.A

- i. CCCC in its own right had no locus standi to submit the application. It asserted that the application should have been by the consortium and not CCCC alone.
- ii. The PPDA Appeals Tribunal⁴ had ruled that only the consortium has locus to file an application and not an individual member of the consortium in its own right. The application before the Authority was incompetent and should therefore fail.

5.2 Submissions by UNRA

UNRA associated itself to the submission by Egis Road Operations S.A.

⁴ Twenty Third Century Systems PVT Limited V. PPDA and National Social Security Fund Application No. 5 of 2017

5.3 Submission by the Applicant

UNRA was aware that it applied for Administrative Review both at Entity level and before the Authority as CCCC Consortium.

6.0 *Issue 2: Whether the Accounting Officer issued a decision to the complainant within 15 working days;*

6.1 Submission by the Applicant

1. The Applicant submitted an Administrative Review on 6th March 2020 before the Accounting Officer of UNRA who had not responded to it by the 27th March 2020 when it applied before the Authority.
2. The Applicant opted to appeal to the Authority in accordance with Section 90(3) (a) of the PPDA Act, 2003.
3. The Accounting Officer was in breach of the obligation to make a decision within 15 working days from receipt of the application for Administrative Review.

6.2 Submission by Egis Road Operations S.A

Egis did not make any submission on this matter.

6.3 Submission by UNRA

UNRA issued a decision dated 2nd June 2020 in response to the application.

7.0 *Issue 3: Whether CCCC had a conflict of interest in the procurement of an operator for the operation and maintenance of Kampala – Entebbe Express Highway*

7.1 Submissions by the Applicant

1. Section 1 of ITA 4.4 provided that Applicants and all parties constituting the Applicant shall not have a conflict of interest. *‘Applicants shall have no conflict of interest, of the design or technical specifications of the services that are the subject of this prequalification’.*
2. UNRA prequalified and shortlisted the CCCC-Consortium together with four other bidders which confirmed that the Applicant did not have any conflict of interest as outlined in ITA 4.4.
3. Part 2 of the bidding document issued on specifications had the same scope of works similar to one in the prequalification document. However ITB 4.4 stated that *‘a bidder shall not have conflict of interest.’* It further stated that a bidder may be considered to have a conflict of interest if the bidder, 4.4.5 *‘or any of its affiliates participated as a consultant or contractor in the preparation of the design, technical specifications or construction of the works that are the subject of the bid including all the existing roadway and related facilities’.*

4. The Applicant should not have been disqualified since the bidding was open to prequalified bidders in accordance with ITB Section 1 Clause 3. The changes by UNRA in the ITB under 4.4.5 on conflict of interest were illegal, procedurally improper and a nullity as they contravened the Section 70 PPDA Act 2003 and Regulations 21 and 23 of the PPDA (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014.
5. The scope of works for operation and maintenance is different from one of design and build. The Applicant did not design, prepare the Terms of Reference or prepare bills of quantities forms or participate in preparation of bidding documents for the operation and maintenance of the Kampala – Entebbe Expressway. Thus the Applicant had no conflict of interest in the subject of the procurement since the contract for design and construction of the Kampala – Entebbe Expressway is an independent and distinct from the procurement for operation and maintenance of the Kampala – Entebbe Expressway.
6. It was an afterthought that UNRA in its letter dated 3rd March 2020 to indicate that the Applicant was prequalified in error. For transparency, non-discrimination, promotion of ethics and fairness under Sections 45 and 49 of the PPDA Act, 2003, the decision to prequalify the Applicant could not be revisited at technical evaluation stage but for all the five companies that submitted pre-qualification bids.
7. The contract for the design and construction of the Kampala- Entebbe Expressway provided for warranties and defects liability that CCCC- Consortium has to observe and UNRA to enforce but are not a subject to the current application.

7.2 Submissions by Egis Road Operations S.A

1. CCCC waived its right to challenge the conflict of interest requirement in the bidding document and acquiesced in the application of those requirements when it failed seek clarification from UNRA.
2. The conflict of interest is premised on the likelihood that the Applicant would in furtherance of its commercial interest at the expense of the Ugandan public, transfer a portion of its liability for warranty breaches under the Design and Build contract to the operation and maintenance contract.
3. There is a conflict of interest as allowing CCCC to proceed to technical evaluation would result into the Applicant transferring the cost of remedying a warranty breach under the Design and Build contract to the operation and maintenance stage which negates value for money for the Uganda tax payer.
4. The definition of “conflict of interest” applied at prequalification was in substance consistent with one in the bidding document and hence the Authority should consider the substance of the conflict over the form.

7.3 Submissions by UNRA

1. The Applicant's bid did not comply with the terms and conditions of the bidding document and the Evaluation Committee was justified in finding the bid non-compliant.
2. The Applicant was the design and build contractor for the Kampala – Entebbe Expressway project and was deemed to have read the conflict of interest clause and aware that the works, the subject of the procurement were still under its warranty under the contract. It did not challenge the provisions on conflict of interest at the two pre-bid meetings held or seek any clarification on the bidding document.
3. The nature of contract signed by the parties required to issue a warranty for some aspects of the work related to any defects arising from faulty designs. The warrant was for a period of 5 years and is valid up to 15th May 2025. If the warrantor were to take charge of the operation and maintenance, it would be required to determine whether it is liable to make good the defects or such defects fall outside the scope therefore payable under the operation contract. The contractor would be a judge in its own case. Thus, the temptation to place their private interests ahead of their obligations under warranty is real and hence the provision in ITB 4.4.5 to guard against the conflict of interest.
4. The Applicant did not meet the requirement of the bidding document ITB 4.4.5 on conflict of interest. If awarded the contract, it would be very difficult for the Entity to apportion liability under the warranty provision since for each defect the contractor would insist is not construction related.
5. The procurement requires an independent provider to establish cause of defects since it would be neutral and would be paid maintenance fee whether the defect is attributed to design failure, construction related or not. An award to the Applicant would diminish the importance of the warranty under the previous contract.
6. The Applicant's reliance on Sections 45 and 49 of the PPDA Act, 2003 is irrelevant to the complaint and allowing the Applicants prayers would contravene the two provisions.

8.0 Issue 4: Evaluation where another Bidder's financial was opened and disclosed

8.1 Submissions by Egis Road Operations S.A

1. The Authority should consider Regulation 30(2) of the PPDA (evaluation) Regulations, 2014 which bars evaluation of bids opened at separate session in order to preserve the integrity of the procurement process against the risk of bid tampering.
2. Egis in objection to the grant of the Applicant's application submitted that since its financial bid had been opened and disclosed on 5th March 2020, it would be contrary to Regulation 30(2) of the PPDA (Evaluation) Regulations, 2014 to have another financial bid opening session yet one had been undertaken before. It asserted that to protect the integrity of the process and the risks of bid tampering, the application should be rejected.

8.2 Submissions by the Applicant

1. There is nothing in the regulation cited that stops CCCC – Consortium’s financial bid from being opened under regulation 28 or being compared with EGIS’s financial bid particularly where UNRA was in breach of the PPDA Act, 2003.
2. Regulation 31 of the PPDA (Evaluation) Regulations, 2014 provides that to determine the best evaluated bid, bids (not bid) shall be weighed and a total score is awarded the contract.

8.3 Submissions by UNRA

UNRA did not make any submission on this matter.

9.0 RESOLUTION BY AUTHORITY

Preliminary objection raised

Whether CCCC has a right to apply for Administrative Review yet it was the Consortium that was a bidder

Findings

- i. Egis Road Operation S.A submitted that China Communications Construction Company Ltd in its own right had no locus standi to submit the application. It asserted that the application should have been by the consortium and not CCCC alone.
- ii. The application before the Accounting Officer dated 6th March 2020 was submitted by. China Communications Construction Company Ltd. On page 2 of 3, it indicated that “China Communications Construction Company Ltd *hereby applies for Administrative Review to UNRA to review its decision and declare CCCC technically compliant and open CCCC’s financial proposal.*
- iii. The application before the Authority dated 27th March 2020 was submitted by M/s Tumusiime Kabega & Co on behalf of China Communications Construction Company Ltd.
- iv. The technical bid by the Consortium dated 24th January 2020 was signed by Ju Weipeng on behalf of CCCC-CCCC Investment Consortium.
- v. The bid also included a power of attorney for the Joint Venture/Consortium which appointed China Communications Construction Company Ltd to undertake the following acts:
 - a) To submit the bid/proposal and participate in the aforesaid bid specification of the Employer on behalf of the Joint Venture/ Consortium
 - b) To negotiate with the Employer the terms and conditions for award of the contract pursuant to the foresaid bid and sign the contract with the Employer for and on behalf of the “Joint Venture/Consortium”.
 - c) To do any other acts and /or submit any document related to the above.

- d) To receive, accept and execute the contract for and on behalf of the “Joint Venture/Consortium.
- vi. The Authority found that CCCC was authorized to submit the bid/ proposal and to undertake any other acts which include the submission of Administrative Reviews.
- vii. The case cited by Egis of Twenty Third Century Systems PVT Ltd (TTCS) Vs PPDA and NSSF, the consortium of TTCS applied for administrative review before the Accounting Officer of NSSF and the Authority. However, only one member of the consortium appealed before the Tribunal and the application was struck out on a preliminary objection. The decision of the Tribunal in the above case i.e. Application No. 5 of 2017 is distinguishable from the current application. The applicant, Twenty Third Century Systems PVT Ltd had a power of attorney authorizing it to have exclusive dealings with NSSF yet the power of attorney in the bid by the consortium provided for undertaking any other acts related to the procurement.
- viii. The Authority found **no merit in the preliminary objection**. CCCC rightly applied for administrative review since it had power of attorney to act on behalf of the consortium.

Ground one

Whether the Accounting Officer issued a decision to the complainant within 15 working days;

Findings

4. On 6th March 2020, China Communications Construction Company Ltd applied for Administrative Review to the Accounting Officer.
5. On 27th March 2020, China Communications Construction Company Ltd applied for Administrative Review to the Authority stating among others that it had not received the Accounting Officer’s decision and hence opted to apply for Administrative Review to the Authority in accordance with Section 90(3) (a) of the PPDA Act, 2003.
6. On 2nd June 2020, the Authority received a copy of the Accounting Officer’s decision dated 29th May 2020. There was no evidence on the file received from UNRA indicating that China Communications Construction Company Ltd had received and signed for the decision.

Decision of the Authority on the ground

The Authority found **merit** in the ground since there was no evidence that the Accounting Officer issued the decision to the complainant. However, the complainant found redress under 90(3) (a) of the PPDA Act, 2003 and applied for Administrative Review to the Authority.

Ground Two:

Whether the Accounting Officer erred in law and fact in concluding that CCCC was not compliant on ITB 4.4.5 in regard to conflict of interest yet the firm had been considered compliant on a similar requirement under ITA 4.4 during the prequalification stage.

Findings:

1. The prequalification document under ITA 4.4 stated that *“Applicants and all parties constituting the applicant shall not have a conflict of interest. Applicants shall be considered to have a conflict of interest if they participated as consultants in the preparation of the design or technical specifications of the services that are the subject of the prequalification.....”*
2. The qualification criteria and requirements under Section III clause 1.2 of the prequalification document required all applicants to have “No Conflict of Interest” and this was to be evidenced from the Application Submission Forms submitted.
3. According to the evaluation report of the prequalification process, the Consortium of China Communications Construction Company Ltd & CCCC Investment Company Ltd was found to be compliant to the requirement of having no conflict of interest. The bidder was qualified to the next stage and invited to submit a bid and submitted.
4. Section I Clause 4.4 of the bidding document required that *“A bidder shall not have a Conflict of Interest”*. Sub-clause 4.4.5 stated that *“A bidder may be considered to have a Conflict of interest for the purpose of this bidding process if the bidder or any of its affiliates participated as a consultant or contractor in the preparation of the design, technical specifications or construction of the works that are the subject of the bids including all the existing roadway and related facilities”*.
5. According to the evaluation report dated 13th February, 2020, the Consortium was found non-compliant to ITB 4.4.5 since *“one of the consortium members (CCCC Ltd) participated as the main contractor in the design and construction of the works that are the subject of procurement”*.
6. Regulation 17 (2) (f) of the PPDA (Evaluation) Regulations, 2014 provides that *“a bidder shall be eligible where a bidder does not have a conflict of interest in respect to the subject of the procurement”*.
7. The Authority noted that the subject of procurement was operation and maintenance of Kampala – Entebbe Express Highway comprising of :
 - a) Installation of additional road safety facilities, expressway lighting, tolling system and over load control systems.
 - b) Maintenance of pavement and main carriage way (filling and pothole repair, sealing of cracks, joint and repair of spalls); and maintenance of shoulders (correction of shoulder drop off, filling of depressions among others.

- c) Highway and tolling operations, weighbridge operations, routine road maintenance and toll plaza and weighbridge maintenance
8. The subject of procurement is defined as works, services or supplies that are to be procured by an entity and have a distinct reference number from the design and construction contract.
9. The Authority reviewed documents submitted by UNRA and found no evidence that CCCC Ltd participated in the design, technical specifications and preparation of terms of reference for the operation and maintenance of the Kampala – Entebbe Expressway hence no conflict of interest.
10. The Authority further established that the construction of the works that are the subject of the bid were futuristic and could not have meant past works.
11. The **design and construction** of the Expressway and **operation and maintenance** of the Expressway are two separate contracts with different contractual obligations with different scope that can be clearly separated by UNRA. The consortium did not participate in the contract for design and construction of the Expressway to amount to conflict of interest and neither did any of the affiliates of the consortium participate as a consultant or contractor in the preparation of the design, technical specification or construction of the works of the operation and maintenance of the Kampala- Entebbe expressway, the subject of the bid. The two different contracts can be managed effectively by the competent Contract Manager.
12. The Authority further noted that the Entity changed the definition of conflict of interest at the bidding stage from one under prequalification by adding to the definition “...*any bidder or any of its affiliates participated as a consultant or contractor in the preparation of the design, technical specifications or construction of the works that are the subject of the bid including all the existing roadway and related facilities*”.
13. The above change in the definition of “conflict of interest” at the bidding stage was intended to impose a restrictive requirement to the prequalified Consortium which included CCCC Ltd as an affiliate contrary to Regulation 7(4) of PPDA (Evaluation) Regulations, 2014.

Decision of the Authority on the Ground

The Authority found merit in the ground since the complainant and/or any of its affiliates had no conflict of interest in the subject of the bid.

Ground Three

Evaluation where another Bidder’s financial bid/proposal was opened and disclosed

Findings

1. Egis Road Operation S.A submitted that:
 - a) The Authority should consider Regulation 30(2) of the PPDA (evaluation) Regulations, 2014 which bars evaluation of bids opened at separate session in

order to preserve the integrity of the procurement process against the risk of bid tampering.

- b) Since its financial bid had been opened and disclosed on 5th March 2020, it would be contrary to Regulation 30(2) of the PPDA (Evaluation) Regulations, 2014 to have another financial bid opening session yet one had been undertaken before. It asserted that to protect the integrity of the process and the risks of bid tampering, the application should be rejected.
2. Regulation 30(1) of the PPDA (Evaluation) Regulations, 2014 provides that a financial comparison shall be conducted on the bids that met the minimum qualifying score under the detailed technical evaluation of the technical bids.
3. Regulation 30(2) of the same regulations provides that the financial comparison shall only be conducted on the bids that are opened at the session of opening financial bids.
4. The financial bid opening had been held before the Administrative Review by the Applicant was filed with the Entity and the prices of Egis were disclosed. The financial proposal of the Applicant was not opened since it had been eliminated at preliminary evaluation.
5. Best procurement practice requires that financial bids/proposals are opened at the same session and financial comparisons done on bids that are opened at a session of financial opening.
6. Owing to the circumstances at hand, the bidders that are responsive at technical evaluation should be requested to resubmit financial proposals and the proposals be opened at the same session immediately after financial bid closing time.

Decision of the Authority on the Ground

The Authority found **merit** in the ground since the financial bids/proposals were not opened at the same session and financial comparisons is done on bids that are opened at a session of financial opening.

DECISION OF THE AUTHORITY

In accordance with Section 91 (4) of the PPDA Act, 2003 and in light of the findings above, the application for Administrative Review by CCCC Ltd is **upheld**.

Owing to the fact that the Entity had opened the financial bid of Egis Road Operations S.A and that the re-evaluation of the technical bids received had been undertaken following the Authority's decision which was set aside by the Tribunal, the Authority directs that the Entity re-evaluates the technical bids and requests bidder(s) for resubmission of financial bids/proposals. This should be done within a reasonable timeframe to enable the conclusion of the evaluation and the procurement process.