



PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY

**REPORT ON APPLICATION FOR ADMINISTRATIVE REVIEW IN RESPECT TO THE
SUPPLY OF ONE BRAND NEW STATION WAGON UNDER PROCUREMENT REF.
PBU/SUPLS/2020/00190**

ENTITY: POST BANK UGANDA LIMITED

APPLICANT: TOYOTA UGANDA LIMITED

NOVEMBER 2020

1.0 BACKGROUND

1. On 13th July 2020, Post Bank Uganda Ltd initiated a procurement for the supply of one new station wagon at an estimated cost of UGX. 570 Million
2. On 28th July 2020, Post Bank Uganda Ltd published a bid notice in Monitor newspaper with 25th August 2020 as the deadline of bid submission.
3. On 29th July 2020 and 25th August 2020, the Entity issued bidding documents to Toyota Uganda Ltd and Maybach Motors Ltd respectively.
4. On 25th August 2020, two bids were received and opened. The prices read out are indicated in Table 1 below:

Table 1: Firms that submitted bids

No	Name	Price Read Out (UGX)
1.	Toyota Uganda Limited	607,216,089
2.	Maybach Motors Limited	560,000,000

5. Both bidders passed the preliminary examination. Toyota Uganda Limited was eliminated during detailed evaluation for reasons indicated in Table 2 below:

Table 2: Reasons for Elimination of Toyota Uganda Limited

No	Requirement of Entity	Reason
1.	Payment terms	Provided a payment condition for overdue payments to attract an interest charge of 2.5% per month or any part thereof
2.	The delivery INCOTERMS being DDP-PBU yard	DDP-Toyota Uganda Bonded Warehouse Namanve
3.	Acceptable delivery/completion period was within 4 weeks from the date of contract signature	Offered 1-3 months after contract signing subject to Covid-19 related supply chain and business interruptions, receipt of irrevocable letter of credit/payment, required documentation for registration and units remaining unsold;
4.	Inclusion of all costs components for performance of the contract	Duties, taxes and registration fees were subject to change without notice

6. On 27th August 2020, the Evaluation Committee recommended Maybach Motors Ltd as the best evaluated bidder. On the same day, the Contracts Committee approved the award to Maybach Motors Limited at a contract price of UGX. 560 Million. All applicable taxes inclusive (DDP).
7. The Notice of Best Evaluated Bidder was displayed on 2nd September 2020 with a removal date of 15th September 2020 indicating Maybach Motors Ltd as the best evaluated bidder at a contract price of UGX. 560 Million. All applicable taxes inclusive (DDP).

8. On 14th September 2020, Toyota Uganda Ltd applied for an Administrative Review to the Head Procuring and Disposing Unit stating that Maybach Motors Ltd did not comply with ITB 5.5 of the Bid Data Sheet which required all bidders to provide a Manufacturer's Authorisation Form as evidence that the bidder had been duly authorized by the manufacturer of the vehicles to supply the vehicles in Uganda.¹
9. On 18th September 2020, the Accounting Officer Post Bank Uganda Ltd dismissed Toyota Uganda Ltd's application for Administrative Review on the ground that the application to the Entity was signed by the Finance Manager-Ms. Anita Akishure who is unknown in the entire bidding process.
10. On 1st October 2020, M/s Sebalu & Lule Advocates applied for Administrative Review to the Authority on behalf of Toyota Uganda Ltd.
11. On 2nd October 2020, the Authority directed Post Bank Uganda Ltd to suspend action on the procurement process with the exception of extension of bid validities and securities where required.

2.0 APPLICATION FOR REVIEW TO THE AUTHORITY

1. On 1st October 2020, Toyota Uganda Limited applied for Administrative Review to the Authority through M/s Sebalu & Lule Advocates.
2. The issues raised by Toyota Uganda Limited in its application for Administrative Review to the Authority were as follows:
 - i) *Whether the Entity's decision to dismiss Toyota's complaint on a preliminary basis that it was signed by the Finance Manager instead of the done of the Power of Attorney was erroneous, invalid and should be set aside;*
 - ii) *Whether the disqualification of Toyota Uganda in the best evaluated bidder notice on the grounds that it did not accept both the terms and conditions of the proposed contract and the delivery and completion period was erroneous, invalid and therefore a nullity*
 - iii) *Whether Toyota Uganda Limited's complaint has merit on the substantive issue of Maybach Motors Limited's non-compliance to ITB 5.5*

3.0 DISPOSAL OF THE APPLICATION

1. In investigating the application for Administrative Review, the Authority adopted the following methodology:

¹ The Evaluation Committee noted that Maybach Motors Limited provided a distributor/reseller authorization instead of a Manufacturers Authorisation. Following technical guidance from MOWT, the Evaluation Committee considered the requirement to be substantially responsive. The bidder/authorized also offered a manufacturer warranty of 3 years.

Analysis was made of the following documents:

- a) Bidding document;
- b) Record of bid opening;
- c) Bids submitted by the bidders;
- d) The evaluation report and minutes;
- e) Minutes of the Contracts Committee;
- f) Notice of Best Evaluated Bidder;
- g) Application for Administrative Review by Toyota Uganda Limited;
- h) Submissions by the Entity and the best evaluated bidder; and
- i) Correspondences with respect to the Administrative Review.

2. On 21st October 2020, the Authority convened an Administrative Review hearing which was attended by the following persons indicated in Table 3:

Table 3: Representation at the Administrative Review Hearing

No	Name	Designation
Officials from Post Bank (U) Ltd (The Entity)		
1.	Mr. Julius Kakeeto	Managing Director
2.	Mr. Aggrey Amanyabyoona	Head Procurement & Disposal Unit
Officials from Sebalu & Lule Advocates for Toyota (U) Ltd (Complainant)		
1.	Mr. Francis Kalanda	Associate
2.	Mr. Michael Mafabi	Partner
Officials from Maybach Motors Limited (Best Evaluated Bidder)		
1.	Mr. Wilson Kanyankole	Managing Director
2.	Mr. John Kallemera	Lawyer

4.0 PRELIMINARY OBJECTIONS

1. The Accounting Officer's decision dated 18th September 2020 indicated that the Entity did not decide on the merits of application due to the following reasons:
 - i. The signatory to the application was a stranger to the entire bidding process.
 - ii. According to the firm's power of Attorney submitted with its bid, Pieter Overbeek, the General Manager aftersales and Kampala branch is the authorized person for Toyota Uganda/lawful attorney and agent with full power and authority to execute the instruments or documents and deal with all matters related to the prequalification, submission and completion of tenders for the supply and delivery of motor vehicles to the Government institutions and deal with matters and actions relating to tenders once awarded.
2. In addition to the above the best evaluated bidder, Maybach Motors Limited also raised the following preliminary objections in its submission to the Authority at the hearing and in a letter dated 23rd October 2020:
 - i. The application arises from an invalid complaint and is fatally defective; and

- ii. Grounds two and three² of application should not be addressed by the Authority because they were not considered or determined by the Accounting Officer of the Entity
3. The Authority resolved to handle the preliminary objection upon which Toyota Uganda Limited's application was dismissed at the Entity level since the merits of application were not handled by the Entity.

5.0 SUBMISSIONS BY THE PARTIES ON THE PRELIMINARY OBJECTION

Issue extracted by the Authority

Whether the Entity erred in law and fact when it dismissed Toyota Uganda Ltd's application on the basis that it was signed by the Finance Manager instead of the Donee of the Power of Attorney

5.1 SUBMISSIONS BY TOYOTA (U) LTD

- i. The Entity erroneously imposed a wide scope and interpretation to the meaning and terms of the power of attorney. The Entity failed to appreciate that the power of attorney did not extend to administrative review proceedings i.e. authorization of the donee to sign a complaint for those proceedings or matters.
- ii. Interpretation of the terms and authority of a power of attorney is a matter of law. A power of attorney is interpreted strictly as stated in **Gold Trust Bank (U) Limited Vs Josephine Zalwango Nsimbe HCCS No. 226 of 1992** where it was stated that “ *a power of attorney is interpreted strictly in the sense that one has to show that on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication*”
- iii. The above strict interpretation of a power of attorney was emphasized by the PPDA Appeals Tribunal in **Twenty Third Century Systems PVT Limited Vs PPDA and NSSF Application No. 5 of 2017** in which it was stated that *the Power of Attorney tendered was specific in respect to the tender by NSSF. The Tribunal could not construe the power of Attorney to include powers given to the Applicant to handle administrative review matters*”.
- iv. Toyota Uganda Ltd appointed the donee to the following:
“ *be our lawful attorney and agent with full power and authority for us and in our behalf to execute the in instruments or documents and deal with all matters related to the prequalification for, submission and completion of tenders for the supply and delivery of motor vehicles, motorcycles and spare parts, warranty service and repairs of vehicles, motorcycles, tractors and forklifts to the Government of Uganda, parastatals, government*

² Grounds 2 and 3 are in respect to erroneous disqualification of Toyota Uganda and Maybach Motors Limited's non-compliance to ITB 5.5 respectively

institutions and their entities in Uganda and deal with all issues, matters and actions relating to the tenders once awarded’.

- v. The above excerpt set out the limit of the donee’s powers to the matters prescribed in the power of attorney and in relation to the distinct stages of the procurement cycle.
- vi. The power of attorney in the bid is silent in regard to who could represent Toyota in signing a complaint and from the wording it is open to any authorized officer of Toyota Uganda Ltd to sign the complaint.

The donee could not sign the complaint because it did not relate to *prequalification for, submission and completion of tenders*. Similarly the donee could not sign since it did not relate to *matters and actions relating to the tenders once awarded*’ because no contract or tender had been awarded

- vii. At the hearing, it was submitted that the person who signed the complaint on behalf of the complainant did not need powers of attorney. The Powers of Attorney did not confer powers to Peter Overbeek, the General Manager to submit/handle administrative reviews. There is no express provision in the powers of attorney for the General Manager to sign an application for administrative review.
- viii. Regarding the reasons for disqualification which were not raised at the Accounting Officer level, the complainant submitted that despite the fact that the grounds were not raised, the complainant enjoyed a non-derogable right to be heard by the Authority as provided for under Article 28 of the Constitution of the Republic of Uganda, 1995.

5.2 SUBMISSIONS BY THE ENTITY

- i. The signatory to the application was a stranger to the entire bidding process. Ms. Anita Akishure who signed the complaint was not the lawful attorney therefore the application could not be handled.
- ii. The powers of attorney submitted in the bid by Toyota Uganda Limited, authorised Pieter Overbeek, the General Manager aftersales and Kampala Branch to execute the instruments or documents.

5.3 SUBMISSION BY THE BEST EVALUATED BIDDER:

- i. The application arose from an invalid complaint and it is therefore fatally defective. The application to the entity was based on speculation and guesswork since the applicant did not know whether the best evaluated bidder complied with ITB 5.5.

- ii. The application was not in accordance with Section 89 (1) of the PPDA Act, 2003 since the omission or breach by the entity was not disclosed by the Applicant .
- iii. It is only the person who has powers of attorney that has authorisation to sign an application for administrative review since that that point the tender process is not yet complete.
- iv. Peter Overbeek, was authorized by Toyota Uganda to handle all matters relating to the impugned procurement from the submission of the bid up to contract management. The Administrative Review process is part of the procurement process

6.0 RESOLUTION BY THE AUTHORITY ON THE PRELIMINARY OBJECTION RAISED

Preliminary issue raised:

Whether the Entity erred in law and fact when it dismissed Toyota Uganda Ltd's application on the basis that it was signed by the Finance Manager instead of the Donee of the Power of Attorney

Findings:

1. Toyota Uganda Limited's application for Administrative Review to Post Bank Uganda Limited dated 14th September 2020 was signed by Ms. Anita Akishure the Finance Manager.
2. The Entity did not consider Toyota Uganda Limited's application on the basis that the signatory to the application was a stranger to the entire bidding process. According to the powers of attorney submitted in the bid of Toyota Uganda Limited, Pieter Overbeek, the General Manager Aftersales was the authorized person for Toyota Uganda/lawful attorney and agent with full power and authority to execute the instruments or documents.
3. Toyota Uganda Limited submitted that the Entity failed to appreciate that the power of attorney did not extend to complaints in administrative review proceedings and in so far as it relates to authorization of the donee to sign a complaint for those proceedings or matters
4. The Authority reviewed the power of attorney dated 12th September 2019 submitted in Toyota Uganda Limited's bid and noted that Pieter Overbeek, was authorized:
 - i. To be the lawful attorney and agent with full power and authority;
 - ii. To execute instruments or documents;
 - iii. To deal with all matters related to the prequalification for, submission and completion of tenders for the supply and delivery of motor vehicles, motorcycles and spare parts, warranty service and repairs of vehicles, motorcycles, tractors and forklifts to the Government of Uganda, parastatals, government institutions and their entities in Uganda; and
 - iv. To deal with all issues, matters and actions relating to the tenders once awarded.

5. Section 89 (1) of the PPDA Act, 2003 states that a bidder may seek administrative review for any omissions or breach by a procuring and disposing entity of the Act, Regulations and guidelines.
6. Applications for Administrative Reviews are submitted and signed on behalf of bidders by their authorized representatives or duly instructed lawyers.
7. The only authorized person to execute instruments or documents in the tender on behalf of Toyota Uganda Ltd with a power of attorney was Pieter Overbeek and not Ms. Anita Akishure.
8. With respect to the submission by Toyota Uganda Ltd from **Gold Trust Bank (U) Limited Vs Josephine Zalwango Nsimbe HCCS No. 226 of 1992**, the Authority found that a strict interpretation and fair construction of the contents of the Power of Attorney in the bid by Toyota Uganda implied that Pieter Overbeek was authorized to deal with matters such as administrative reviews which relate to the tender once awarded the current contract. The current tender was awarded to Maybach Motors Limited and the administrative review followed the award.
9. The Authority therefore found merit in the preliminary objection raised by the Entity since Ms. Anita Akishure was never authorized and/or designated to sign the application for Administrative review on behalf of Toyota Uganda Limited.
10. The Entity did not err in law and fact when it dismissed Toyota (U) Limited's application on the basis that it was signed by the Finance Manager instead of the Donee of the Power of Attorney.

Decision on the ground

The Authority found merit in the preliminary objection raised by the Entity since Ms. Anita Akishure was never authorized and/or designated to sign the application for Administrative review.

7.0 DECISION OF THE AUTHORITY

The Authority dismisses the application for Administrative Review since it was signed by a person who was never authorized and/or designated by the bidder Toyota Uganda Limited in the bid.