



PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY

APPLICATION NO. 24 OF 2020/21

REPORT ON APPLICATION FOR ADMINISTRATIVE REVIEW IN RESPECT TO THE PREQUALIFICATION OF CONTRACTORS FOR THE CONSTRUCTION OF THE PROPOSED OFFICE BUILDING FOR UGANDA ELECTRICITY TRANSMISSION COMPANY LTD AT 3RD STREET PLOT 5B VOLUME 381 FOLIO 21, LUGOGO INDUSTRIAL AREA REF: UETCL/WRKS/2019-20/00011

ENTITY: UGANDA ELECTRICITY TRANSMISSION COMPANY LTD

APPLICANT: DOTT SERVICES LTD AND SADEEM AL KUWAIT GENERAL TRADING AND CONTRACTING CO. JV

DECEMBER 2020

DECISION BY THE AUTHORITY

1.0 BRIEF FACTS

1. On 18th February 2020, the Uganda Electricity Transmission Company Ltd (hereinafter referred to as the Entity) initiated the procurement for Prequalification of Contractors for the construction of the proposed office building for Uganda Electricity Transmission Company Ltd at 3rd Street Plot 5B Volume 381 Folio 21, Lugogo Industrial Area at an estimated cost of UGX 74 Billion.
2. On 4th June 2020, the Contracts Committee approved the invitation for prequalification of contractors and the use of the open domestic bidding procurement method and Evaluation Committee members.
3. On 19th March 2020, the Entity advertised the bid notice for prequalification of contractors for the construction of the proposed office building in the New Vision Newspaper a bid submission deadline of 15th April 2020.
4. On 14th April 2020, the Contracts Committee approved the extension of the bid submission deadline from 15th April 2020 to 13th May 2020.
5. On 13th July 2020, the Entity received and opened bids from 12 bidders as indicated in Table 1 below:

Table 1: Bids Submitted

No	Name of Bidder
1.	Seyani Brothers & Co. (U) Ltd and Parbat Siyani Construction Ltd
2.	Cementers (U) Ltd-Cementers Ltd (JV)
3.	The Arab Contractors (Osman Ahmed Osman and Co.)
4.	Roko Construction Ltd and Roko Construction (Rwanda) Ltd JV
5.	Weihai International Economic and Technical Cooperative Co. Ltd (WIETC)
6.	China Geo Engineering Cooperation
7.	CRJE (East Africa) Ltd
8.	China Communications Construction Co. Ltd
9.	Dott Services and Sadeem AL Kuwait General Trading & Contracting Co. (JV)
10.	China National Aero Technology International Engineering Corporation
11.	Seyani International Co. Ltd (JV) Seyani Brothers & Co. (Kenya) Ltd
12.	AC YAFENG Construction Co. Ltd

6. The Evaluation Report dated 18th August 2020, recommended approval of a shortlist of following bidders as indicated in Table 2:

Table 2: Bidders recommended for Shortlist

No	Name of Bidder
1.	Seyani Brothers & Co. (U) Ltd and Parbat Siyani Construction Ltd
2.	Cementers (U) Ltd-Cementers Ltd (JV)
3.	The Arab Contractors (Osman Ahmed Osman and Co.)
4.	Roko Construction Ltd and Roko Construction (Rwanda) Ltd JV

5. On 8th September 2020, the Contracts Committee approved the evaluation report and shortlisted the above 4 providers.

1. On 13th October 2020, the Entity displayed the notice of shortlisted bidders with the removal date of 27th October 2020.

2.0 THE ADMINISTRATIVE REVIEW PROCESS

2.1 APPLICATION TO THE ACCOUNTING OFFICER

1. On 26th October 2020, the Applicant applied for Administrative Review on the following grounds:

- i. The Entity wrongly disqualified the Applicant's bid for not submitting copies of Tax clearance certificates yet the Dott Services Ltd had attached a copy and its partner in the JV Sadeem Al Kuwait General Trading and Contracting Co. was registered in Kuwait where it is not required to pay taxes.
- ii. The Entity wrongly disqualified the Applicant's bid for not submitting copies of the national identity cards or passports of its major shareholders which was only a requirement on local providers yet the Applicant does not fall in such a category.
- iii. The Entity wrongly disqualified the Applicant's bid on account that the Applicant did not provide the value of the claim in the case disclosed as pending litigation, HCCS No. 650 of 2016 to enable the Evaluation Committee determine whether or not the claim would exceed the set threshold of 10% of the bidder's net worth.

2. On 12th November 2020, the Accounting Officer upheld ground (i) but rejected grounds (ii) and (iii). The Accounting Officer dismissed the application.

2.2 APPLICATION TO THE AUTHORITY

1. On 25th November 2020, the Applicant applied for Administrative Review before the Authority on the following grounds:

- i. The Entity wrongly disqualified the Applicant's bid for not submitting copies of the national identity cards or passports of its major shareholders which was only a requirement on local providers yet the Applicant does not fall in such a category.

- ii. The Entity wrongly disqualified the Applicant’s bid on account that the Applicant did not provide the value of the claim in the case disclosed as pending litigation, HCCS No. 650 of 2016 to enable the Evaluation Committee determine whether or not the claim would exceed the set threshold of 10% of the bidder’s net worth
2. On 25th November 2020, the Authority notified the Entity of the application for Administrative Review and invited it for a hearing on 3rd December 2020.

3.0 DISPOSAL OF THE APPLICATION

1. In investigating the application, the Authority reviewed the following documents:
 - i. Procurement requisition;
 - ii. Prequalification Bid notice;
 - iii. Bidding document issued;
 - iv. Records of bid receipt and opening;
 - v. Bids submitted;
 - vi. Minutes of the pre-bid meeting;
 - vii. Evaluation report;
 - viii. Minutes of Contracts Committee;
 - ix. Notification of shortlist;
 - x. Application for administrative review before the Accounting Officer and the Authority by Dott Services Ltd and Sadeem Al Kuwait General Trading and Contracting Co. JV; and
 - xi. Submissions by the parties.
2. On 3rd December 2020, the Authority held an online administrative review hearing which was attended by the following officials from the Entity and Dott Services Ltd and Sadeem Al Kuwait General Trading and Contracting Co. JV indicated below in Table 3:

Table 3: Persons that attended the hearing

No.	Name	Designation/Role
Officials from Uganda Electricity Transmission Company Ltd		
1.	Ms. Specioza Mukazi	Head, Procurement and Disposal Unit, representing Accounting Officer
2.	Mr. Simon Anyiru	Legal Officer
Officials from Dott Services Ltd and Sadeem Al Kuwait General Trading and Contracting Co. JV		
3.	Mr. Maheswara Reddy	Managing Director, Dott Services Ltd
4.	Mr. Ram Mohan Reddy	Director, Dott Services Ltd
5.	Mr. Rajani Kanth	Authorised Representative, Dott Services Ltd and Sadeem Al Kuwait General Trading and Contracting Co. JV

4.0 SUBMISSIONS BY THE PARTIES

4.1 SUBMISSIONS BY THE APPLICANT

The Applicant made the following submissions:

1. It was a Joint Venture and not a local provider hence the Entity wrongly disqualified its bid for not submitting copies of the national identity cards or passports of its major shareholders which was only a requirement on local providers.
2. The requirement to provide copies of the national identity cards or passports of the major shareholders of the bidder was intended to prove the nationality of the shareholders of the bidder to the Entity, determine whether or not the bidder would qualify for a margin of preference or be subject of the reservation scheme.
3. The Applicant was not required to submit the copies of the national identity cards or passports of its major shareholders who are not Ugandans.
4. That in the alternative, failure to meet the requirement to submit the copies of the national identity cards or passports of its major shareholders was a non-material non-conformity or deviation to which the Evaluation Committee should have sought clarification.
5. The Accounting Officer misdirected himself in holding that it was immaterial that the majority of the Applicant's shareholders are allegedly non-Ugandans provided there is proof of its registration or incorporation in Uganda.
6. With respect to ground two, the Applicant did not have information on historical contract non performance in terms of concluded disputes or litigation in the last five years or pending litigation as was required in the prequalification document. The pending litigation that is, Uganda National Roads Authority and Dott Services Ltd and Another (HCCS No. 650 of 2016) that was disclosed by the Applicant in its bid does not relate to historical contract performance and it was therefore improper for the Entity to disqualify its bid on account that the Applicant did not provide the value of the claim in the case.
7. That the prequalification document did not explicitly require bidders to provide the values of the claims in pending litigations.
8. In the alternative, failure to meet the requirement to provide the value of the claim in pending litigation was a non-material non-conformity or deviation to which the Evaluation Committee should have sought clarification.
9. That failure of the Evaluation Committee to seek clarification from the bidder before disqualifying the Applicant's bid was irregular and hence the Authority should direct the Entity to re-evaluate and shortlist its bid.

4.2 SUBMISSIONS BY THE ENTITY

The Entity made the following submissions:

1. The evaluation criteria stated in the prequalification document required each member of a Joint Venture or consortium to submit all the documents in Section 1.1 and this included the

requirement to submit copies of the national identity cards or passports of its major shareholders.

2. Dott Services Ltd is either a national or resident provider within the meaning of Section 3 of the PPDA Act 2003 and therefore qualified as a local provider even without necessarily proving whether or not majority of its shareholders are Ugandan citizens. The Applicant should therefore have submitted copies of the national identity cards or passports of its major shareholders.
3. On ground two, the prequalification document required bidders to provide information on any concluded disputes or litigation in the last five years or pending litigation if any and indicate that there is no pending litigation if there is none using the provided format. It further provided that all the pending litigation should not exceed 10% of the bidder's net worth.
4. The Applicant never disclosed the value of the claim in its bid and it was immaterial whether or not the pending litigation related to historical contract performance. The Applicant ought to have provided the value of the claim in the pending court case (HCCS No. 650 of 2016) disclosed in its bid to enable the Evaluation Committee determine whether or not the claim would exceed the set threshold of 10% of the bidder's net worth.
5. The Entity prayed that the Authority upholds its submissions and dismisses the application or otherwise determine it as it finds just.

5.0 RESOLUTION BY THE AUTHORITY

- 5.1 *Ground One: That the Entity wrongly disqualified the Applicant's bid on account that it did not submit copies of the National Identity Cards or Passports of its major shareholders which was only a requirement on local providers yet the Applicant does not fall in such a category.***

Findings:

1. The Applicant's bid was rejected for non submission of the identities of the major shareholders of Dott Services Ltd, a company incorporated in Uganda as member of the Joint Venture at prequalification stage.
2. The evaluation criteria under Section 3, Evaluation methodology and criteria under Appendix C of the prequalification document provided that:

“For Local Providers also attach:

Return of allotment of shares; and copies of National Identity Cards or Passports for majority shareholders

NB. After the prequalification and bidding process, the contract will be subjected to a 30% reservation to local providers if the successful bidder is not a local provider. The Entity shall also grant a margin of preference to the Local contractors in accordance with the PPDA Rules and Regulations (it shall be 7%)”.

3. The Applicant is a non-registered joint venture comprised of two members; Sadeem Al Kuwait General Trading and Contracting Co., a company incorporated in Kuwait and not registered in Uganda and Dott Services Ltd, a company incorporated in Uganda.
4. Section 59A (5) (a) and (c) of the PPDA Act, 2003 provides that for a contractor to qualify for preference as a Ugandan contractor, such contractor shall be incorporated or registered in Uganda and for a company registered in Uganda it shall have more than 50% of its share capital owned by Ugandan Citizens.
5. Section 59A (8) (a) and (b) of the PPDA Act, 2003 provide that a Joint Venture between a Ugandan contractor and a foreign partner shall be eligible for preference where the Joint Venture is registered and the Ugandan contractor in the Joint Venture qualifies for a preference under subsection (5) of this section.
6. From the above, the Applicant was not eligible for preference since it was not a registered joint venture.
7. The Authority found that the requirement to attach allotment of shares, National Identity Cards or Passports of the major shareholders was not necessary at prequalification stage as an eligibility requirement.
8. The Entity submitted that it did not apply the above criteria since it indeed to apply a margin of preference as well as reservation scheme after the prequalification process.
9. As to whether the non-submission of the identities of the major shareholders was a material deviation, the Authority found that the non-submission was not a material deviation as provided under Regulation 11(4) of PPDA (Evaluation) Regulations 2014.
10. Regulation 11(3) of PPDA (Evaluation) Regulations 2014 provides that:
“Where non-conformity or an omission in a bid is not a material deviation, an evaluation committee shall—
 - (a) waive the non-conformity or omission;*
 - (b) request the bidder to clarify the non-conformity or omission in accordance with regulation 10;*
 - (c) Correct the non-conformity or omission using sub regulation (2)”.*
11. The Evaluation Committee should have exercised any of the above three options in respect to the non-submission of the identities of the major shareholders.
12. The Applicant was not properly evaluated on the requirement to submit copies of the National Identity Cards or Passports of its major shareholders. The requirement was not relevant at prequalification stage and should have been waived or clarified by the Evaluation Committee.

Decision of the Authority on Ground One

The Authority found **merit** in the ground since the requirement was not relevant at prequalification stage and the bidder was neither eligible for a margin or preference or be subject of reservation scheme.

5.2 Ground Two: The Entity wrongly disqualified the Applicant's bid on account that the Applicant did not provide the value of the claim in the case disclosed as pending litigation, HCCS No. 650 of 2016 to enable the Evaluation Committee determine whether or not the claim would exceed the set threshold of 10% of the bidder's net worth.

Findings:

1. The Entity rejected the Applicant's bid for non-submission of the value of the claim in the pending litigation HCCS No. 650 of 2016 disclosed in its bid on account that it was required to enable the Evaluation Committee determine whether or not the claim would exceed the set threshold of 10% of the bidder's net worth.
2. The pre-qualification document under Appendix C: Evaluation Criteria Paragraph 2.2 that:
"Indicate any pending litigation against the bidder if any or indicate if there is no pending litigation against the bidder using the form below for each dispute".
3. The prequalification document provided under 5.0 Summary of eligibility and qualification criteria and compliance requirements that:
"2.0 Historical contract performance; 2.1 History of non-performing contracts: Nonperformance of the contract did not occur within the last five years prior to the deadline for application submission based on all information on fully settled disputes or litigation. A fully settled dispute or litigation is one that has been resolved in accordance with the Disputed Resolution Mechanism under the respective contract and where all appeal instances available to the applicant have been exhausted.

2.2 pending litigation: All the pending litigation shall in total not represent 10% of the applicant's net worth and shall be treated as resolved against the Applicant".
4. The prequalification document required bidders to provide the information on historical contract performance in both 2.1 and 2.2 above in Form A5.
5. The Authority reviewed the Applicant's bid and found that the Applicant submitted Form A5 and indicated therein that there is no pending litigation with respect to nonperformance of a contract. The Applicant further stated however, that, it has a pending case, HCCS No. 650 of 2016 (UNRA V Dott) at High Court Commercial Division which related to review of an earlier settlement of the certificate payment and after the project completion certificate was issued.
6. The Authority reviewed the plaint filed by UNRA on 30th August 2020 at High Court Commercial Division for HCCS No. 650 of 2016 and found that the claim against Dott Services Ltd in the above suit was for recovery of money received in the sum of UGX 29.8 Billion.

7. In the plaint, UNRA alleged that the Dott Services Ltd fraudulently and wrongfully connived with the project consultant for the road works for Tororo – Mbale and Mbale – Soroti Road and caused UNRA to pay to Dott Services Ltd the said money as compensation for contract prolongation costs for no consideration.
8. The Authority found that the suit against Dott Services Ltd related to a claim for money alleged to have been wrongfully and fraudulently received by Dott Services Ltd from UNRA.
9. The Entity submitted that the non-disclosure of the value of the claim in HCCS No. 650 of 2016 denied the Evaluation Committee an opportunity to determine whether the claim was within the limit of 10% of the bidder’s net worth and accordingly found the bid non-compliant with the requirement.
10. The Authority found that the pending litigation was not related to historical contract performance and therefore it was not necessary for the Applicant to state the value of the claim in that suit. The Evaluation Committee hence misdirected itself when it found that the Applicant ought to have provided the value of the claim in the pending litigation, HCCS No. 650 of 2016 disclosed in its bid.
11. The Authority found that the Accounting Officer erred in law and fact when he held that the Applicant ought to have submitted the value of the claim in the pending litigation in HCCS No. 650 of 2016.

Decision of the Authority on Ground Two

The Authority found **merit** in the ground since Accounting Officer erred in law and fact when he held that the Applicant ought to have submitted the value of the claim in the pending litigation in HCCS No. 650 of 2016 since it was not related to historical contract performance.

5.0 DECISION OF THE AUTHORITY

In accordance with Section 91 (4) of the PPDA Act, 2003, the application for Administrative Review by Dott Services Ltd and Sadeem Al Kuwait General Trading and Contracting Co. JV is **upheld**. The Entity is directed to:

1. Re-evaluate the submitted bids taking into consideration the above findings; and
2. Refund the Applicant’s administrative review fees.