

UGANDA / JUDGMENT

Abasamia Hwolerane Association Limited v Jinja City Council (Application No. 12 of 2021) [2021] UGPPDPAAT 15 (23 August 2021)

[2021] UGPPDPAAT 15

COURT

Public Procurement and Disposal of Public Assets
Appeals Tribunal

BEFORE

Nerima, Panel Member, Gimara SC, Chairperson,
Kakira, Kalumba

CASE / FILE NUMBER

Application No. 12 of 2021

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THE REPUBLIC OF UGANDA PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS APPEALS TRIBUNAL

APPLICATION NO. 12 OF 2021

BETWEEN

ABASAMIA HWOLERANE ASSOCIATION LTD *=====*APPLICANT

AND

JINJA CITY COUNCIL =====RESPONDENT

APPLICATION IN RESPECT OF THE PROCUREMENT FOR ENFORCEMENT OF
COLLECTION of REVENUE FROM PROPERTY RATES AND GROUND RENT IN JINJA
CITY SOUTH WEST IN SOUTHERN DIVISION UNDER PROCUREMENT REFERENCE
NO. JC755/SRVCS/21-22/00001

BEFORE: FRANCIS GIMARA S. C, CHAIRPERSON; NELSON NERIMA; THOMAS BROOKES
ISANGA; GEOFFREY NUWAGIRA KAKIRA; AND PAUL KALUMBA, MEMBERS

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

- 1. Jinja City Council (the Respondent) advertised (issued an Invitation to bid under open domestic bidding under procurement notice No.2 JC/PROC/01/2021-2022), a procurement for provision of various services in the New Vision of on Monday, April 19, 2021.
- 2. The Respondent in the invitation to bid grouped the procurements (under Revenue Centers) for enforcement of collection of revenue into four categories i.e "A", "B", "C" to "D". Each category had different items to be bidden for individually and the invitation to bid clearly stated that no bidder was allowed to bid for more than one item in a category. Category "A" had three items namely:
 - 1) Enforcement of collection of revenue from property rates and ground rent in Jinja City **South West in Southern Division**,
 - 2) Enforcement of collection of revenue from property rates and ground rent in Jinja City **South East in Southern Division**
 - 3) Enforcement of collection of revenue from property rates and ground rent in **Northern Division**
- 3. In respect of item 1 in category "A" (revenue collection from Property Rate and Ground Rent in Jinja City South West in Southern Division) there were 5 bidders namely Rojoke Photo Lab & Art Co. Ltd, Unique Commodity Services Limited, White Knights Consults Ltd, Chrisanna Consults and Abasamia Hwolerane Association Ltd. (the Applicant). The bids were opened on May 7, 2021. All passed the preliminary evaluation stage and were subjected to commercial and detailed technical evaluation stage. Four bidders that included the applicant namely Rojoke Photo Lab & Art Co. Ltd, Unique Commodity Services Limited, Chrisanna Consults and **Abasamia Hwolerane Association Ltd. (the Applicant)**, passed commercial and detailed technical evaluation stage.
- 4. At the Financial Comparison stage of the Evaluation, *Abasamia Hwolerane Association Ltd (*the Applicant) was ranked the second best evaluated bidder while *Rojoke Photo Lab & Art Co. Ltd* was ranked the first best evaluated bidder and recommended for award of contract at a price of 5.9% commission on every collection made, VAT Inclusive as per the evaluation report dated 17th June 2021. Unique Commodity Services Limited and Chrisanna Consults were ranked third best and fourth best respectively
- 5. The Best Evaluated Bidder Notice was displayed on June 18, 2021.
- 6. *Abasamia Hwolerane Association Ltd* (the Applicant) being dissatisfied with the outcome of the procurement process, applied for administrative review to Accounting Officer of Respondent on June 23, 2021.

- 7. The Applicant complained that *Rojoke Photo Lab & Art Co. Ltd* bided for more than one item in a category contrary to the advert; that *Rojoke Photo Lab & Art Co. Ltd* was declared as best evaluated bidder at 10 % commission contrary to the 5.9 % commission that was read at the bid opening; and that the Applicant's previous performance was evaluated as unsatisfactory without any criteria or reasons.
- 8. The Respondent's accounting officer in accordance with regulation 139 (2) of the of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006 appointed an administrative review committee which concluded that the complaints were not valid and recommended continuation of the procurement process.
- 9. In a letter dated July 21, 2021, Respondent's accounting officer communicated the findings of the administrative review committee to the Applicant.

B. APPLICATION TO THE TRIBUNAL

- 1. The Applicant being dissatisfied with the administrative review report filed the instant Application on 3 rd August, 2021 before the Tribunal.
- 2. The Applicant contests the Respondent's administrative review report on the following **eight (8) grounds**:
 - (a) The Respondent erred both in law and facts when she found that Rojoke Photo Lab and Art and Rojoke Photo Lab & Co. Ltd are two different companies.
 - (b) The Respondent erred in law when she allowed two applications by Rojoke Photo Lab & Art in category "A" contrary to the terms and conditions of the Advert.
 - (c) The Respondent erred in law and fact when she awarded the contract for revenue collection of property rates and ground rent to Rojoke Photo Lab & Art which is a non-existent company.
 - (d) The awarding of the contract to Rojoke Photo Lab and Art was erroneous because she was not the highest bidder.
 - (e) The Applicant contests the findings of the Committee that there was no influence by Rojoke Photo Lab and Art.
 - (f) The Applicant contests the findings of the committee that the Applicant's performance in the previous contracts was unsatisfactory.
 - (g) The Respondent erred in law and fact in correction of an error in Rojoke Photo Lab & Art as there was no communication.
 - (h) Rojoke Photo Lab & Art submitted a bid in Jinja South East and another Rojoke Photo Lab & Art Co. Ltd in Jinja West. The Applicant contends it was irregular to award a contract to Rojoke Photo Lab & Art in Jinja West where she did not submit a bid.

C. REPLIES TO THE APPLICATION

- 1. The Respondent averred as follows:
- 2. *Rojoke Photo Lab and Art* and *Rojoke Photo Lab & Co. Ltd* are two different entities who bided for different items.
- 3. The best evaluated bidder for enforcement of Revenue Collection for Property Rates and Ground Rent in Jinja City South West Southern Division was *Rojoke Photo Lab & Co. Ltd* but the best evaluated bidder notice reads *Rojoke Photo Lab and Art* which was a typo error that was to be rectified at the time of issuing the award letter and contract signing.
- 4. There was no evidence of influence from the director of *Rojoke Photo Lab and Art* although he is a former employee of Jinja Municipal Council.
- 5. The unsatisfactory performance formed a material ground for not awarding the Applicant the contract.
- 6. The best evaluated bidder *Rojoke Photo Lab & Co. Ltd* also filed a response. They averred that *Rojoke Photo Lab & Co. Ltd* bided for only Jinja South West and quoted 5.9 % as bid contract price as opposed to 10 % which was an error from the procurement office.
- 7. They admitted that one of their directors was a former employee of Jinja Municipal Council who retired about five years ago.
- 8. They requested the Tribunal to rectify the matter and award.

D. THE ORAL HEARING

1. The Tribunal held an oral hearing via zoom Application on 19 th August 2021. The appearances were as follows:

For the Applicant - Egessa Patrick Neinda, the Managing Director of the Applicant

For the Respondent – Ms Janet Nabwanso, the Senior Procurement Officer of the Entity/Respondent

2. *Rojoke Photo Lab & Co. Ltd* did not attend the oral hearing although they had been duly notified and had submitted their response to the Application in writing to the Tribunal on August 18, 2021

E. SUBMISSIONS

- 1. The Applicant highlighted their written submissions and also provided clarifications orally to the Tribunal.
- 2. The Applicant sought the following reliefs:

- a) That M/s Abasamia Hwolerane Association Ltd is declared the best evaluated bidder and awarded the contract for enforcement of Revenue Collection for Property Rates and Ground Rent in Jinja City South West Southern Division.
- b) That the Applicant is compensated all costs, and damages incurred in the process.
- c) That people involved in this procurement process be investigated and be put to book to serve as examples to defer such act to happen in this similar exercise in Uganda.
- d) The bidder involved in this process should be suspended from bidding in Jinja City.
- 3. The Respondent did not file written submissions. They however highlighted their response and also gave clarifications to the Tribunal.
- 4. The Tribunal has considered the application, the response by the Respondent, the response by the best evaluated bidder, the written submissions by the Applicant and the clarifications made at the oral hearing by the Applicant and the Respondent.

F. RESOLUTION BY THE TRIBUNAL

- 1. The grounds formulated by the Applicant raise 5 substantive issues as follows:
- i. Whether *Rojoke Photo Lab and Art/Rojoke Photo Lab & Art Co. Ltd* improperly submitted bids for more than one item in category "A" of the procurement
- ii. Whether the contract for revenue collection of property rates and ground rent in Jinja City South West in Southern Division was awarded to a nonexistent company which did not bid?
- iii. Whether the Respondent erred in law and fact when it corrected the best evaluated bidder notice in respect of the name and contract price of the best evaluated bidder?
- iv. Whether the Respondent erred in law and fact when it found that the Applicant's performance in the previous contracts was unsatisfactory?
- v. Whether the Respondent erred in law and fact when it found that there was no influence by *Rojoke Photo Lab & Art*?
- vi. What remedies are available to the parties?

Preliminary observations

- 2. Before we resolve the issues, we have noted that when the Accounting Officer of the Respondent received the Applicant's application for administrative review, he appointed an administrative review committee which submitted its report to him on 5th July 2021. By a letter dated 12th July 2021, the Accounting Officer forwarded the report to the Applicant purportedly under regulation 139 (2) of the of the **Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006.**

- 3. Under section 89 (7) of the **Public Procurement and Disposal of Public Assets Act** as amended, the Accounting Officer must make a decision within ten days of receipt of a complaint and then communicate to the complainant the decision, reasons for the decision and corrective measure if any. The procedure under regulations 139 of the **Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006** requires the Accounting Officer to first suspend the procurement or disposal process, then constitute a committee of three persons with the requisite technical expertise on the subject of the complaint, to review and advise on the complaint. The committee submits its recommendation to the Accounting Officer. Based on the report, the Accounting Officer must advise the complainant in writing and the recommendation should indicate whether there is merit in the complaint; the reasons for the recommendation; and any corrective measures to be taken. The Accounting Officer must submit a copy of the report to the Authority.
- 4. In the instant case, the Accounting Officer did not explicitly make a decision. He merely forwarded the report of the administrative review committee. Under the law, the report of the administrative review committee is advisory. The final decision must be made by the Accounting Officer. The Senior Procurement Officer of the Respondent has conceded that the Accounting Officer did not make a decision
- 5. An application to the Tribunal is ordinarily made against the decision of the

Accounting Officer made under section 89 (7) of the **Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021**. In the instant case, no explicit decision was made by the Accounting Officer. The Applicant indeed purported to appeal against the administrative review report.

- 6. Technically, in the absence of a decision by the Accounting Officer, the Tribunal still has jurisdiction to entertain the Application as if filed under section 89 (8) of the **Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021**. Section 89 (8) allows an application to be filed by an aggrieved bidder where the Accounting Officer fails to make a decision within ten days of receipt of a complaint.
- 7. The Tribunal will accordingly invoke its jurisdiction under section 89 (8) of the **Public Procurement and Disposal of Public Assets Act as amended by Act No. 15 of 2021**.

Resolution of the Issues

The Tribunal recast some of the issues during the resolution as follows:

Issue 1

Whether *Rojoke Photo Lab & Art Co. Ltd* should have been disqualified for submitting bids for more than one item in category "A" of the procurement?

8. The invitation to bid as advertised grouped the procurement for enforcement of of collection of revenue into four categories i.e "A" to "D". The invitation to bid stated that no bidder was allowed to bid for more than one item in a category. The categories and items were as hereunder:

No	REVENUE CENTER	RESERVE	BIDDING
PRICE	FEE		
Category A			
1.	Enforcement of collection of revenue	10%	100,000.
	from property rates and ground rent in	Commission	
	Jinja City South West in Southern		
	Division		
2.	Enforcement of collection of revenue	10%	100,000.
	from property rates and ground rent in	Commission	
	Jinja City South East in Southern		
	Division		
3.	Enforcement of collection of revenue	10%	70,000.
	from property rates and ground rent in	Commission	
	Northern Division		
Category B			
4.	Enforcement of collection of revenue	10%	70,000.
	from Hotel Tax in Southern Division	Commission	
5.	Enforcement of collection of revenue	10%	70,000.

|| from Hotel in Northern Division | Commission ||

||||

|| Category C |||

||||

| 6. | Enforcement of collection of revenue | 10% | 70,000. |

|| from Local Service Tax in Southern | Commission |

|| Division |||

| 7. | Enforcement of collection of revenue | 10% | 70,000. |

|| from Local Service Tax in Northern | Commission |

|| Division |||

|| Category D |||

| 8. | Enforcement of collection of revenue | 10% | 70,000. |

|| from Billboards and Advertisements in | Commission |

||||

| 9. | Southern Division
Enforcement of collection of revenue | 10% | 70,000. |

|| from Billboards and Advertisements in | Commission |

|| Northern Division |||

9. ITB 4.4(e) of the Bidding Document provides as follows:

4.4 A Bidder shall not have a conflict of interest. All Bidders found to be in conflict of interest shall be disqualified. A Bidder may be considered to

have a conflict of interest with one or more parties in this bidding process, if they:

- *(a) have controlling shareholders in common; or*
- *(b) receive or have received any direct or indirect subsidy from any of them; or*
- *(c) have the same legal representative for purposes of this bid; or*
- *(d) have a relationship with each other, directly or through common third parties, that puts them in a position to have access to information about or influence on the bid of another Bidder, or influence the decisions of the Procuring and Disposing Entity regarding this bidding process; or*

- *(e) submit more than one bid in this bidding process. However, this does not limit the participation of subcontractors in more than one bid, or as Bidders and subcontractors simultaneously.*
- 10.*Rojoke Photo Lab & Co. Ltd* bidded in Category "A" under item 1 for revenue collection from property rates and ground rent in Jinja City South West in Southern Division.
- 11.*Rojoke Photo Lab and Art* bidded in Category "A" under item 2 for revenue collection from property rates and ground rent in Jinja City South East in Southern Division.
- 12. According to the certificate of incorporation (Annex 1 to the Respondent's response and Annex 1 of the Best Evaluated Bidder's response to the Application) Rojoke *Photo Lab & Co. Ltd* was incorporated on *June 25, 2019* as a company limited by shares.
- 13. According to the certificate of registration (Annex 1 to the Respondent's response) *Rojoke Photo Lab and Art* was registered as a business name on 6 th February 2017. However, according to a letter from Uganda Registration Services Bureau (Annex "A4" to the Applicant's submissions, *Rojoke Photo Lab and Art* ceased to carry on business as a registered business name. Although the business name was deregistered, the firm is apparently still in business as evidenced by its bid.
- 14. In the instant case, the invitation to bid clearly stated that no bidder was allowed to bid for more than one item in a category. The invitation to bid is part of the solicitation documents and must be complied with. Section 3 of the *Public*

Procurement and Disposal of Public Assets Act 2003 defines "solicitation documents" to mean bidding documents or any other documents inviting bidders to participate in procurement or disposal proceedings; and includes documents inviting potential bidders to pre-qualify, and standard bidding documents.

- 15. We have noted ITB 6.2 which states that the bid notice or any pre-qualification document is not part of the bidding documents. However, ITB 6.2 cannot override the above express provisions of the Act.
- 16.ITB 4.4(e) of the Bidding Document is also to the effect that a bidder who submits more than one bid in the current bidding process shall be disqualified for having a conflict of interest. The question to resolve is whether *Rojoke Photo Lab and Art* and *Rojoke Photo Lab & Art Co. Ltd* are the same entity for purposes of conflict of interest.
- 17. The Tribunal has determined that there was a conflict of interest when *Rojoke Photo Lab & Co. Ltd* bidded in Category "A" under item 1 for revenue collection from property rates and ground rent in Jinja City South West in Southern Division; and *Rojoke Photo Lab and Art* bidded also in Category "A" under item 2 for revenue collection from property rates and ground rent in Jinja City South East in Southern Division.

- 18. According to the memorandum and articles of association of *Rojoke Photo Lab & Art Co. Ltd,* as annexed to their response to this application*,* one Okiria James owns 60 % of the shares and is also a director of the company.
- 19.*Rojoke Photo Lab & Art Co. Ltd* submitted a power of Attorney nominating a one *OKIRIA JAMES* as its lawful attorney. There is another power of attorney signed by the same *OKIRIA JAMES trading as Rojoke Photo Lab and Art* appointing a one MUKODA BETTY as its lawful attorney. Okiria James is therefore the sole proprietor of the firm *Rojoke Photo Lab and Art*. Both powers of attorney are annexed to the Respondent's response to the Application.
- 20. Okiria James has a controlling shareholding in both common *Rojoke Photo Lab and Art* and *Rojoke Photo Lab & Art Co. Ltd.* Okira James is the directing mind of both *Rojoke Photo Lab* and *Art* and *Rojoke Photo Lab & Art Co. Ltd.* The two entities have a relationship with each other, directly, that puts them in a position to have access to information about or influence on the bid of another.
- 21. The submission of bids for items under one category amounted to a conflict of interest as defined in the invitation to bid and ITB 4.4(e) of the Bidding Document and was prohibited under the invitation to bid.
- 22. It is trite law that a company is a body corporate and exists as a legal person separate from its members or directors. Technically therefore, *Rojoke Photo Lab & Art Co. Ltd* is a separate legal and corporate entity from its majority shareholder/director who also trades as *Rojoke Photo Lab* and *Art*.*
- 23. However, a company cannot be used as a façade, sham or mask to circumvent a statute or legal obligations. *In Jones v Lipman (1962) 1 WLR 832*, the defendant contracted to sell a house to the plaintiff. He changed his mind and refused to complete the transaction. In order to circumvent an order for specific performance, he conveyed the property to a company formed for that purpose alone, which he alone owned and controlled. The court ordered specific performance against the defendant and the formed company. It was held that the defendant company is the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.
- 24. Similarly, *Rojoke Photo Lab and Art/Rojoke Photo Lab & Art Co. Ltd* cannot circumvent the conflict-of-interest prohibition by using the guise of separate corporate personality.
- 25. Under regulation 77 of the **Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006**, a preliminary examination must be conducted to determine inter alia whether a bidder is eligible and the administrative compliance of a bid to the basic instructions and requirements of the bid documents. Due to conflict of interest, Rojoke *Photo Lab & Art Co. Ltd* ought to have been disqualified at the preliminary stage from the procurement for revenue collection from property rates and ground rent in Jinja City South West in Southern Division.

- 26. The submission of bids for more than one item in category "A" using connected entities rendered *Rojoke Photo Lab & Art Co. Ltd* to have a conflict of interest in the procurement for item 1 for revenue collection from property rates and ground rent in Jinja City South West in Southern Division. *Rojoke Photo Lab & Art Co. Ltd* accordingly became ineligible for that procurement.
- 27. We need not comment about the bid by *Rojoke Photo Lab and Art* in Category "A" under item 2 for revenue collection from property rates and ground rent in Jinja City South East in Southern Division. There has been no application for administrative review in respect of that particular item.
- 28. Issue no. 1 is answered in the positive.

Issue 2

Whether the contract for revenue collection of property rates and ground rent in Jinja City South West in Southern Division was awarded to a non-existent company which did not bid?

- 29.*Rojoke Photo Lab & Co. Ltd* bidded in Category "A" under item 1 for revenue collection from property rates and ground rent in Jinja City South West in Southern Division. The bid submission sheet is Annex 5 to the Respondent's Response to the application. The evaluation committee report dated 17th June recommended *Rojoke Photo Lab & Co. Ltd* as the best evaluated bidder for award of the contract to revenue collection from property rates and ground rent in Jinja City South West in Southern Division. The evaluation committee therefore recommended *Rojoke Photo Lab & Co. Ltd* to be awarded the contract for revenue collection from property rates and ground rent in Jinja City South West in Southern Division at the price of UGX. 5.9 % commission on every collection made VAT inclusive.
- 30. However, the notice of best evaluated bidder dated 18th June 2021 indicated *Rojoke Photo Lab & Art* as the best evaluated bidder revenue collection from property rates and ground rent in Jinja City South West in Southern Division at a contract price of 10 % commission*. The best evaluated bidder notice is Annexure "D" to the application. This notice of best evaluated bidder obviously misstated the name of the best evaluated bidder and the contract price as adjudicated by the evaluation committee.
- 31. The Respondent admits the error and contends that the same was corrected when a new notice of best evaluated bidder was issued and copies picked by bidders. The corrected notice of best evaluated bidder is Annex 4 to the Respondent's response to the Application.
- 32. The Tribunal finds that the naming of Rojoke Photo Lab and Art as the best evaluated bidder at a contract price of 10 % Commission was a misnomer, not intended to mislead anyone. See the recent Tribunal decision in *GLOBE WORLD ENGINEERING (U) LIMITED VS. JINJA CITY COUNCIL, APPLICATION NO. 11 OF 2021*.

- 33. The bidder in this procurement was clearly listed in all documents prior to the notice of best evaluated bidder notice as *Rojoke Photo Lab & Co. Ltd.* The evaluation committee report was also clear that the best evaluated bidder was *Rojoke Photo Lab & Co. Ltd* at the price of UGX. 5.9 % commission.
- 34. Issue no. 2 is answered in the negative.

Issue no. 3

The Respondent erred in law and fact when it corrected the notice of best evaluated bidder notice in respect of the name and contract price of the best evaluated bidder?

- 35. As resolved under issue no. 2, the initial notice of best evaluated bidder was erroneous when it indicated the best evaluated bidder as *Rojoke Photo Lab & Art* at a contract price of 10 % commission instead of *Rojoke Photo Lab & Co. Ltd* at the price of 5.9 % commission. The Respondent was perfectly in order to correct the error and issue a corrected notice of best evaluated bidder. The corrected notice is Annex 4 to the Respondent's response to the Application.
- 36. Under regulation 85 of the **Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006**, a notice of the best evaluated bidder must be displayed on a procuring and disposing entity's notice board and may be posted on the Authority's website. (4) A notice of best evaluated bidder shall be published for a minimum of ten working days prior to contract award. It must also be sent to all bidders who participated in the procurement.
- 37. The Respondent claims that the corrected notice was displayed and copies were sent to all bidders. However, there is no evidence that that the copies were picked by the bidders as

alleged. The Senior Procurement Officer of the Respondent informed the Tribunal that the Applicant picked a physical copy of the corrected notice while the rest of the bidders received copies by *whatsapp*. The Applicant denied receipt of the corrected notice. The evidence of receipt by the Applicant and other bidders was not availed to the Tribunal. There is also no evidence that the said corrected notice of best evaluated bidder was displayed as required under the law.

To that extent, the purported issue of a corrected notice of best evaluated bidder was not in compliance with regulation 85 of the **Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006**.

- 38. Issue no. 3 is answered in the positive.

Issue no. 4**Whether the Respondent erred in law and fact when it found that the Applicant's performance in the previous contracts was unsatisfactory?**

- 39. As part of its bid, the Applicant submitted two recommendation letters. The first letter was a recommendation letter dated 27th April 2021 from the Senior Assistant Town Clerk of Mpumudde/Kimaka/Nalufenya Division. The letter stated that the Applicant had been contracted for enforcement and management of revenue collection from hotels in Mpumudde Division in 2019/2020 and that their performance had been good and satisfactory despite covid 19 negative effects on the hotel industry. The second letter was a recommendation letter dated 29th April 2021 from the Senior Assistant Town Clerk of Southern Division. The letter stated that the Applicant had been contracted for enforcement of revenue collection from ground rent and property rates in Magwa Parish for financial year 2019/2020 and that their performance and working relationship had been good.
- 40. On the contrary, the notice of best evaluated bidder issued on 18th June 2021 indicates that the Applicant was the *2 nd best and unsatisfactory performance as per information from the user department.*
- 41. The administrative review committee report also claims that the unsatisfactory performance of the Applicant formed a material ground for eliminating the Applicant.

During evaluation, the evaluation committee chairperson wrote to the Treasurer of the Respondent on 14th June 2021 seeking information on previous performance of the seven bidders. The Acting Head of Finance responded in a letter dated 16th June wherein he rated the performance of the Applicant at 0.26 %. Only four bidders including *Rojoke Photo Lab & Co. Ltd* were rated as satisfactory*. According to the Respondent's response to the application, this unsatisfactory performance formed a material ground for not awarding the Applicant the contract.

- 42. However, the evaluation committee report does not rate the Applicant's performance as unsatisfactory. The claims of unsatisfactory performance as stated in the notice of best valuated bidder notice, the administrative review report and the Respondent's response to the Application are not supported by the evaluation report. There is no evidence that the Applicant was eliminated during the evaluation. Indeed, the Applicant's bid passed the technical evaluation and proceeded to financial evaluation. It was evaluated as 2nd best based on its second highest price of 6 %. The Acting Town Clerk who issued the notice of best evaluated bidder had no power to formulate his own reasons for the Applicant's ranking as 2nd best. The power to evaluate bids is vested in the evaluation committee.
- 43. Issue no. 4 is answered in the positive.

Issue no. 4**Whether the Respondent erred in law and fact when it found that there was no influence by *Rojoke Photo Lab & Art*?**

44. The Applicant contests the findings of the Committee that there was no influence by *Rojoke Photo Lab and Art.* This allegation was not substantiated in the complaint to the accounting officer. The Applicant only made a casual statement that the director of *Rojoke Photo Lab and Art* is a former employee of Jinja Municipal Council who retired in recent years and has attachments to and interests with council staff.*
- 45. The Applicant's submissions also made reference to regulation 20 of the **Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006**. Regulation 20 (2) of the said regulations provides that councillors, employees of a council, members of the contracts committee and other statutory bodies of a council are prohibited from being bidders or providers to the council either directly or indirectly.
 - 46. The administrative review committee did not find any evidence that the director of *Rojoke Photo Lab and Art* influenced the procurement process, although he is a former employee of Jinja Municipal Council.
 - 47. We equally do not find any evidence that the director of *Rojoke Photo Lab and Art* influenced the procurement. Moreover, the said director is a former but not current employee of the Respondent.
 - 48. This allegation was not proved.
 - 49. Issue no. 5 is answered in the negative.

Issue no. 6**What remedies are available to the parties?**

- 50. In view of the Respondent's errors on the question of conflict of interest; the impugned unsatisfactory performance of the Applicant; and the botched correction of the notice of best evaluated bidder, the evaluation of the bids cannot stand.
- 51. We shall accordingly remit the procurement for enforcement of collection of revenue from property rates and ground rent in Jinja City South West in Southern Division back to the Respondent for a re-evaluation.
- 52. In view of this course of action, we cannot award the applicant the remedies it prayed for i.e. to be declared the best evaluated bidder and awarded the contract for enforcement of Revenue Collection for Property Rates and Ground Rent in Jinja City South West Southern Division. Similarly, the question of damages, costs, and disciplinary action against officials of the Respondent cannot arise at this stage.

G. DISPOSITION

- 1. The Application is allowed in part.
- 2. The procurement for enforcement of collection of revenue from property rates and ground rent in Jinja City South West in Southern Division is remitted back to the Respondent for a re-evaluation which is consistent with this decision.
- 3. The Respondent shall refund the Applicant's administrative review fees.
- 4. The Tribunal's suspension order dated August 3, 2021 is vacated.
- 5. Each party to bear its own costs.

day of August 2021. Dated at Kampala this

summino **NELSON NERIMA**

FRANCIS GIMARA S. C CHAIRPERSON

THOMAS BROOKES ISANGA

MEMBER

GEOFFREY NUWAGIRA KAKIRA MEMBER

MEMBER

PAUL KALUMBA MEMBER

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