

UGANDA / JUDGMENT

**Ka Cyber Security Technologies v Mbarara
City Council (Application 18 of 2024)
[2024] UGPPDPAAT 27 (29 April 2024)
[2024] UGPPDPAAT 27**

COURT

Public Procurement and Disposal of Public Assets
Appeals Tribunal

BEFORE

Gimara SC, Chairperson, Nerima, Panel Member,
Isanga, Nuwagira, Kalumba, Kyarisiima, Kayemba

CASE / FILE NUMBER

Application 18 of 2024

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THE REPUBLIC OF UGANDA

PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS APPEALS TRIBUNAL

APPLICATION NO. 18 OF 2024

BETWEEN

KACYBER SECURITY TECHNOLOGIES:.....

AND

MBARARA CITY COUNCIL:.....

APPLICATION FOR REVIEW IN RESPECT OF THE PROCUREMENT FOR THE PROVISION OF NON-CONSULTANCY SERVICES FOR INSTALLATION AND MANAGEMENT OF STREET PARKING SMART SOLUTION FOR MBARARA CITY UNDER PROCUREMENT REFERENCE NO. MBAR 609/ NON CONS/2023-2024/00001

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

DECISION OF THE TRIBUNAL

BRIEF FACTS \$A.\$

- 1. Mbarara City Council (**the Respondent**) initiated a tender for the installation and management of street parking smart solution for Mbarara City under procurement reference MBAR609/NON-CONS/2023-2024/00001 number: $\overline{\text{on}}$ February 19 2024, using open domestic bidding method.
- \$2.\$ Eight (8) bidders namely; Maco Global Agencies Ltd, Kacyber Security Technologies Ltd (**the Applicant**), Mbarara City Property Owners and Managers Cooperative Society Ltd, Woodfix Technical Services Ltd, Joseneous Investment Ltd, Fueless Technologies Ltd, *Yoya Technologies Ltd and Digital Chronicles Ltd* submitted bids.
- \$3.\$ Upon the conclusion of the evaluation process, the Respondent issued a Notice of Best Evaluated Bidder on March 20, 2024. indicating that *Yoya Technologies Ltd* was the best evaluated bidder at a contract price of 40% commission of the revenue collected per week VAT inclusive.
- \$4.\$ The Notice of Best Evaluated Bidder indicated that the Applicant's bid was disqualified because:
 - "Did not declare in the Bid Submission Sheet nationality of the Bidder under item (h) Contrary to Part 1: section 1 instruction to bidders 13.1 (h) of the bidding document
 - Did not submit a signed and stamped Vendor information $\bullet$ form/beneficial ownership form as was required contrary to *Part 1: Section 3 Evaluation Methodology and Criteria, Eligibility Criteria 3.1 (1) in the bidding document.*
 - Submitted a Price Schedule that did not indicate the commission payment methodology / system of the total collected revenue per week".
- 5. The Applicant was dissatisfied with the procurement process and filed a complaint before the Accounting Officer of the Respondent on March 25, 2024.
- 6. The Accounting Officer of the Respondent did not make and communicate a decision regarding the Complaint, prompting

the Applicant to file Registry Applications 18 of 2024 with the Tribunal on April 8, 2024.

$\mathbf{B}$. APPLICATION BEFORE THE TRIBUNAL

- 1. The Applicant avers that it was the obligation of the Accounting Officer to deliver the administrative review decision within the time prescribed by law.

- \$2.\$ The Applicant avers that by virtue of the fact the bidding document make it mandatory that the provider must use IRAS (Integrated Revenue Administrative System), yet IRAS is a product of Yoya Technologies Ltd, the best evaluated bidder, and that this amounts to a conflict of interest.
- The Applicant further avers that the best evaluated bidder was 3. not active for a period of four \$(4)\$ years, lacked three \$(3)\$ years of genuine experience, lacked the experience in smart parking and payment system, lacked the genuine powers of attorney registered within the bidding period and prays for a declaration that the best evaluated bidder was full of falsehood.
- \$\overline{4}\$ The Applicant goes on to add that the evaluation was conducted by the evaluation committee with falsehoods contrary to the procedure as stated in the bidding document.

\$\mathbf{C}\$. REPLY TO THE APPLICATION

The Respondent filed a reply by which it contended as follows; 1.

Failure of the Accounting Officer to make and communicate the decision to the Applicant was as a result of the intervention of the Office of IGG who took away the procurement action file and for whose Order the Accounting Officer was bound to comply.

- The Application is premature as the Applicant did not give to \$2.\$ the Accounting Officer, notice of its intention to file this application within five working days from the date of expiry of ten days within which the Accounting Officer is required to give and communicate the decision as required by regulation 9 (2) of the PPDA (Administrative Review) Regulations, 2023.
- 3. The Integrated Revenue Administration System (IRAS) is a system owned and controlled by the Government of Uganda like

any other Government System as \$M/s\$ Yoya Technologies Limited was a mere developer and does not have control over the system nor does it generate Payment Reference Numbers (PRN) as the same are generated through Uganda Revenue Authority. The application is speculative, devoid of evidence of conflict of interest, not believable and intended to mislead this Tribunal and the same should be ignored.

- \$4.\$ M/s Yoya Technologies Limited was registered on 31st October, 2019 and since then it has been involved in the development of various systems of similar processes as indicated in its bid submitted for this impugned procurement, which experience the Entity is looking for and not necessarily the same system. PROVIDED it can be customized for Street parking and Management and integrated with IRAS.
- 5. The Respondent prayed that the application be dismissed with costs.

D. APPLICANT'S SUBMISSIONS

- 1. The Applicant submits that once a complaint is raised before the Accounting Officer, he/she has the obligation to deliver a decision within a period of ten (10) days in accordance with Section 89 (7) of the PPDA Act, 2003 (as amended). In the instant case, the Accounting Officer erred in law when he acted contrary to the provisions of the Act.
- \$2.\$ The Applicant submits that a conflict of interest arises when an individual's personal interests or relationship interfere with their ability to make impartial decisions in their official capacity. That in the instant case, the bidding documents made it mandatory that whichever company goes through uses IRAS (Integrated Revenue Administrative System), a system designed to integrate local revenue collections
- 3. The Applicant submits that IRAS is a product of Yoya Technologies Ltd, the best evaluated bidder which is a conflict of interest. Furthermore, the best evaluated bidder cannot carry out collection as a vendor and then use its own system to assess itself.
- \$4.\$ The Applicant submits that the bid document imposes requirements on the successful bidder to install and implement

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a street parking smart solution that integrates with the existing system (IRAS) used by the Respondent.

- \$5.\$ The Applicant submits that a good procurement process must promote non-discrimination, transparency, accountability and fairness. The foregoing requirement puts the best evaluated bidder in an advantageous position as opposed to other bidders hence a conflict of interest.
- 6. The Applicant further submits that the best evaluated bidder ought to have been disqualified at the preliminary stage owing to its conflict of interest and the fact that it does not possess the required experience.
- \$7.\$ The Applicant accordingly prays that the Tribunal be pleased to determine inter alia the Application in its favour, disqualify the best evaluated bidder and declares it as declared the best evaluated bidder.

\$E\$. RESPONDENT'S SUBMISSIONS

The Respondent did not file written submissions but its counsel made oral submissions at the hearing to amplify their case.

\$\mathbf{F}\$. ORAL HEARING

- 1. The Tribunal held an oral hearing on April 24, 2024 via Zoom videoconferencing. The appearances were as follows:
- 1) Mr. Kizza Joseph represented the Applicant
- 2) Counsel Mr. Alauterio Ntegyereize, Senior Legal Officer and Ms. Dinah Mwije, Head of Procuring and Disposing Unit of the Respondent appeared for the Respondent.
- 3) Mr. Batungwa Frank Tumusiime, a Director of the Yoya Technologies Ltd appeared for the Interested Party.

\$G\$. RESOLUTION

- 1. The Application raised four (4) issues for determination by the Tribunal which are resolved as follows:
- Whether the Accounting Officer of the Respondent erred in law \$1)\$ when he failed to make and communicate a decision regarding the complaint within statutory timelines?

when he failed to make and communicate a decision regarding the complaint within statutory timelines?

- Whether Yoya Technologies Limited has a conflict of Interest? \$2)\$
- Whether the Respondent complied with the evaluation \$3)\$ methodology in the impugned procurement?
- What reliefs are available to the Parties? \$4)\$

Issue No.1: Whether Accounting Officer of the Respondent erred in law when he failed to make and communicate a decision regarding the Complaint within statutory timelines?

- \$2.\$ An Accounting Officer is duty bound to make and communicate a decision within 10 days upon receipt of a complaint from a bidder. See Section 87(3) of the Public Procurement and Disposal of Public Assets Act 2003 & Regulation 8 of the PPDA (Administrative Review) regulations, 2023.
- \$3.\$ Having received the Applicant's complaint on March 25, 2024, the Accounting Officer had 10 days from March 25, 2024, to make and communicate a decision regarding the Complaint. The said days commenced on March 26, 2024 and elapsed on April 4, 2024.

- \$4.\$ We observed that the Inspectorate of Government on April 3, 2024, wrote to the City Town Clerk of the Respondent and ordered the Respondent to halt the award of contract to the best evaluated bidder until the completion of its investigations into the matter and later on April 4, 2024, the Mbarara Regional Inspectorate Office of the Inspectorate of Government instructed the Respondent to submit the in writing, procurement action file to its Regional Office.
- 5. Despite the orders of the Inspectorate of Government, the Respondent's Accounting Officer still had a duty to communicate a decision to the Complainant before or by April 4, 2024.
- 6. The Respondent's Accounting Officer did not communicate or make a decision by April 4, 2024, and is in breach of the law. To that extent, the Accounting Officer erred.

\$7.\$ This issue is resolved in the affirmative.

Issue No.2: Whether Yoya Technologies Limited has a conflict of Interest?

- 8. The Applicant contends that the statement of requirements in Part 2, Section 6 on pages 61 and 62 (para 2.1.7), required a provider's revenue collection solution to be able to integrate with the existing revenue management system of IRAS (Integrated Revenue Management System); a system that is a product of *Yoya Technologies Limited*; which is a case of conflict of interest. To that extent, *Yoya Technologies Limited* ought to have been disqualified at the preliminary stage of evaluation.
- 9. In proof of its assertion, the Applicant relies on extracts from the website of *Yoya Technologies Limited* that indicate that the bidder is a leading sub national revenue solutions provider having undertaken services with Local Government Finance Commission, Fort Portal City, Makindye Ssabagabo Municipal Council, Mubende Municipal Council, National Environment Management Authority. Resource *Enhancement* and. Accountability Programme (REAP) of the Ministry of Finance, Planning and Economic Development, the Ministry of Lands, Housing and Urban Development, Uganda Revenue Authority and Kampala Capital City Authority amongst others. See pages 41-45 of the Application.
- The Applicant avers that awarding the Contract to Yoya \$10.\$ Technologies Limited is contrary to the doctrine of nondiscrimination, is a breach of the ethical code of conduct and fairness since Yoya Technologies Limited is put in a more advantageous position than other bidders.
- \$11.\$ The term conflict of interest is not defined in the Public Procurement and Disposal of Public Assets 2003. However ITB Sub Clause 4.4 (d) and Code No.3 of the code of ethical code of conduct in business for bidders and providers, found at Part 1. Section 4 of the Bidding Forms, provides guidance on the incidences of conflict of interest. Similarly, the basic principles of public procurement and disposal in which all public procurement and disposal

must be conducted to wit: nondiscrimination, transparency, accountability, and fairness, maximisation of competition and promotion of ethics all proffer

incidences of conflict of interest. See Sections 43(a), 43(b), 43(c), 43(f); 44, 45, 46 and 49 of Public Procurement and Disposal of Public Assets 2003. Also see Application No. 18 of 2021. *Abasamia Hwolerane Association Ltd v Jinja City Council* page 11, para 9-10.

- 12. Existence of a conflict of interest is a question of both law and fact. The 8th Edition of Black's Law Dictionary defines a Conflict of Interest as a real or seeming incompatibility between one's private interest and one's public or fiduciary duties.
- 13. In the case of **Uganda vs Patricia Ojangole Criminal Case No. 1/2014** Justice Gidudu held that; " Conflict of interest has also been generally defined as any situation in which an individual or corporation is in position to exploit a professional or official capacity in some way for their personal or corporate benefit. ... It is both the actual and the perception that counts when tracing conflict of interest in a transaction. It is what a reasonable person would conclude while viewing the transaction from a distance that counts. It is related to the rule against bias. The old adage that justice must not only be done but must be seen to be done applies to conflict of interest."
- 14. The Applicant bears the burden to prove the conflict of interest it alleges. There is no evidence that there is an incompatibility between the private interests of Yoya Technologies and the interests of the procuring and disposing entity. We therefore do not find any proof of conflict of interest by Yoya Technologies Limited, within the meaning of ITB Sub Clause 4.4 (d) or Code No.3 of the code of ethical code of conduct in business for bidders and providers as posited by the Applicant.
- 15. We have perused the bid of *Yoya Technologies Ltd* and observed that at pages 152 to 154, the bidder attached a contract between the bidder and Ministry of Finance, Planning and *Economic* Development, MOFPED/REAP/CONS/21-Ref 22/00020 dated April 21, 2022 for the purpose of rolling out the IRAS (Integrated Revenue Management System) in 6 district local governments of Mbarara, Mbale, Kumi, Wakiso, Lira and Gulu.
- 16. It can be deduced from the Contract of April 21, 2022 that *Yoya* Technologies Ltd indeed undertook a consultancy for the rolling out of the IRAS (Integrated Revenue Management System) in Mbarara district local government.
- 17. However, the bidding document in the impugned procurement, does not explicitly bar *Yoya Technologies Ltd* as a consultant who rolled out the IRAS (Integrated Revenue Management System) from participating in the impugned procurement. All that was required is that the solution to be provided would be able to successfully integrate with the IRAS that the Respondent currently uses.

- 18. Attempts to bar a provider who hitherto played a role in developing or rolling out the IRAS from participating in the impugned non-consultancy procurement without any express prohibition stated in the bidding document would amount to using an evaluation criterion other than that stated in the bidding document contrary to Section 71(3) of the Public *Procurement and Disposal of Public Assets 2003.*

This issue is resolved in the negative. 19.

Issue No.3: Whether the Respondent complied with the evaluation methodology in the impugned procurement?

- 20. The Applicant contends that *Yoya Technologies Limited* has not been in existence and active for a period of 4 years prior to the bid submission deadline and that the bidder did not have the required 3 years working experience with public or private sector in enterprise system solutions with local revenue collection contrary to the commercial and technical evaluation criteria stated 5(i) and (p) of Part 1, Section 3, Evaluation Methodology and Criteria on page 43-44 of the bidding document.
- 21. The Applicant also attached a Certificate of change of name No. BRS-NCHC-9-22/01441 issued by the Registrar of Companies certifying that *Yoya Consultancy Ltd* that was incorporated on October 31, 2019, changed its name to Yoya Technologies Limited on October 17, 2022.
- 22. The Applicant avers that *Yoya Technologies Limited* may have been in existence for over 4 years but has not been active having changed from a consultancy company to a technology company in the last 2 years. It therefore lacks the required 3 years working experience with public or private sector in enterprise system solutions with local revenue collection.
- 23. To prove activity for over 4 years prior to the bid submission and relevant experience, recourse is made to the commercial and technical evaluation criteria 5(i), (n) and (p) in Part 1, Section *3, Evaluation Methodology and Criteria on page 44 of the* bidding document specifically, a provider was required to *present reference letters/ contract copies and contact information* of at least (3) clientele to support the claims of previous experience in similar solutions where the assignment has been successfully implemented in local governments with similar challenges preferably in East Africa in past 3 years.
- In our view, a certificate of change of name where the word 24. Consultancy is changed to Technologies in a bidder's registered name is not compelling enough to bolster the Applicant's assertion of Yoya Technologies Limited's alleged lack of experience in enterprise system solutions with local revenue collection. On this point alone, the Applicant's claims would and should fail.

- 25. We have however examined the bid of *Yoya Technologies Limited* and observed that the bidder attached the following contracts to prove that it has the required experience;
- contract for consulting services with the Government of the \$(i)\$ Republic of Uganda represented by the *Ministry of Finance*, Plannina and *Economic* Development. Ref MOFPED/REAP/CONS/21-22/00322 dated October 13, 2022 for the purpose of rolling out the IRAS (Integrated Revenue Management System) in 79 local governments in 4 phases (on page 145-151);
- \$(ii)\$ contract between the bidder and *Ministry of Finance*, *Planning* and Economic Development, Ref MOFPED/REAP/CONS/21-22/00020 dated April 21, 2022 for the purpose of rolling out the IRAS (Integrated Revenue Management System) in 6 district local governments of Mbarara, Mbale, Kumi, Wakiso, Lira and Gulu(on page 152-154.
- (iii) contract between the bidder and National Environment Management Authority, Ref NEMA/CONSRVCS/22-23/00026 dated 14th June 2023 for the purpose of creating an *environmental licensing and information management system for* \$NEMA\$ (on page 163-171).
- contract between the bidder and Kampala Capital City \$(iv)\$ *Ref KCCA/CONS/2020-021/00689* dated 7th September 2021 for the purpose of enhancing arrears management and reporting modules of the eCITIE system (on page 172-184).
- A reference letter from the Local Government Finance \$(v)\$ Commission dated October 31, 2023 indicating that the bidder provided consultancy services under MOFPED/REAP/CONS/21-22/00020 and MOFPED/REAP/CONS/21-22/00322 to design, develop, customise, deploy, roll out and support the Integrated Revenue Management System (page 185).
- A reference letter from the Directorate of Revenue Collection of \$(vi)\$ KCCA dated November 29, 2021 indicating that the bidder consultancy services for enhancing provided arrears management and reporting modules of the *eCITIE* system--page 188.
- A reference letter from KCCA dated October 7, 2023 indicating (vii) that the bidder provided consultancy services for *development* and deployment of a project database and online mapping tool for greater Kampala Metropolitan area.
- (viii) A reference letter from the Directorate of Revenue Collection of KCCA dated November 29, 2021 indicating that the bidder consultancy services for enhancing provided arrears management and reporting modules of the *eCITIE* system--page 187.
- A referenced letter from National Environment Management \$(ix)\$ Authority dated November 23, 2023 indicating that the bidder was contracted to provide consultancy services for environmental licensing and information management system for NEMA-page 189.

- It is therefore our finding that the bid of Yoya Technologies 26. Limited was responsive to the requirement of activity for over 4 years prior to the bid submission and relevant experience in

similar solutions with local governments in East Africa in the past 3 years.

27. This issue is resolved in the affirmative

Issue No.4: What reliefs are available to the Parties?

28. The Applicant has failed to prove the substantial grounds of its application and is not entitled to any reliefs.

\$H\$. DISPOSITION

- \$1.\$ The Application is dismissed.
- \$2.\$ The Respondent is at liberty to continue with the tender for the installation and management of street parking smart solution for Mbarara City under procurement reference number: MBAR609/NON-CONS/2023-2024/00001 to its logical conclusion.
- \$3.\$ The Tribunal's suspension order dated April 8, 2024, is vacated.
- \$4.\$ Each party shall bear its own costs.

Dated at Kampala this 29th day of April 2024.

FRANCIS GIMARA S. C. **CHAIRPERSON**

Munici

NELSON NERIMA MEMBER

THOMAS BROOKES ISANGA MEMBER

GEOFFREY NUWAGIRA KAKIRA MEMBER

PAUL KALUMBA MEMBER

CHARITY KYARISIIMA MEMBER

KETO KAYEMBA MEMBER

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