

THE REPUBLIC OF UGANDA

PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY APPEALS
TRIBUNAL

(PPDA APPEALS TRIBUNAL)

REFERENCE NO. 2 OF 2019

REFERENCE OVER SERIOUS BREACH OF THE PPDA ACT 2003 BY THE MINISTRY OF PUBLIC SERVICE IN RESPECT OF THE TENDER FOR CONSTRUCTION OF A REGIONAL SERVICE UGANDA CENTRE AT KASESE MUNICIPALITY REF: MoPS/WRKS/2018-2019/00251).

APPLICANT ~~PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS~~
AUTHORITY

RESPONDENT: MINISTRY OF PUBLIC SERVICE

(Before: OLIVE ZAALE OTETE (CHAIRPERSON), DAVID KABATERAINE (MEMBER), ABRAHAM NKATA (MEMBER) AND ENG. THOMAS BROOKES ISANGA (MEMBER).

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BACKGROUND/FACTS

- 1.1 The Respondent initiated a procurement process for the construction of a regional service centre at Kasese Municipality using the open bidding method.
- 1.2 On 6th June 2019, the Notice of the Best Evaluated Bidder for the impugned procurement was displayed with a removal date of 19th June 2019. The notice indicated that Rohi Services Limited was eliminated at the preliminary evaluation stage, but did not provide the reasons for elimination.
- 1.3 On 13th June 2019, Rohi Services Limited requested the Accounting Officer of the Respondent for reasons for elimination of its bid.
- 1.4 On 14th June 2019, the Accounting Officer responded to the request and gave reasons for elimination of the bid submitted by Rohi Services Limited.
- 1.5 On 18th June 2019, Rohi Services Limited applied for administrative review to the Accounting Officer of the Respondent and attached a Bank Draft in favour of Permanent Secretary.
- 1.6 On 18th June 2019, the Accounting Officer responded to the Applicant with details of the Ministry's account for payment of the required administrative review fees on account that the Applicant had erroneously made payment by way of a bank draft in favour of the Permanent Secretary of the Respondent.

- 1.7 On 19th June 2019, Rohi Services Limited effected a Real Time Gross Settlement (RTGS) payment to the Respondent through Centenary Bank as payment of administrative review fees amounting to UGX 5,000,000.
- 1.8 On 20th June 2019, the Respondent received a letter dated 19th June 2019, from Rohi Services Ltd indicating that a payment by RTGS of the administrative review fees was made to the Respondent's account and that the application for administrative review had already been submitted on 18th June 2019.
- 1.9 On 21st June 2019, the Respondent signed a contract with Muga Services Ltd for the impugned procurement.
- 1.10 On 27th June 2019, the Applicant advised the Respondent to issue an administrative review decision within fifteen working days from the date of receipt of the application for administrative review by Rohi Services Limited in respect of the impugned procurement.
- 1.11 On 8th July 2019, the Respondent replied to the Applicant stating that Rohi Services Limited's application for administrative review was not considered because the administrative review fees had not been paid to the right account.
- 1.12 On 10th July 2019, Rohi Services Limited applied to the Applicant for administrative review. On 12th July 2019, the Applicant notified the Respondent of the application for administrative review, requested for relevant documents and instructed the Respondent to suspend any action in the procurement process.

1.13 On 22nd July 2019, the Respondent replied to the Applicant stating that the contract between the Respondent and Muga Services Ltd was signed on 21st June 2019 and is under implementation and cannot be subject of administrative review.

1.14 On 2nd August 2019, the Applicant issued a decision in respect of Rohi Services Limited's application for administrative review in which it stated that a Reference shall be made to the Tribunal for breach of Section 90 (7) of the PPDA Act, 2003 by the Accounting Officer of the Respondent.

2.0 REFERENCE

2.1 On 16th August 2019, the Authority filed the instant reference seeking a declaration that there had been a serious breach of the Act by the Respondent in respect of the Procurement in reference because the Respondent had entered into a contract with the provider during the Administrative Review period.

2.2 On 16th August 2019, the Tribunal issued summons to the Respondent to file a written response to the Reference. The Respondent filed a detailed response with the Tribunal on 22nd August 2019.

3.0 DISPOSAL OF THE REFERENCE

3.1 *In disposing of the Reference the Tribunal analyzed the following documents;*

(1) Reference dated 16th August 2019 filed by the Applicant and supporting annexes

(2) Response dated 22nd August 2019 filed by the Respondent.

3.2 The Tribunal conducted a hearing on 22nd August 2019. The Applicant was represented by Mr. John Kallemera and the Respondent was unrepresented.

3.3 Two issues were formulated for resolution by the Tribunal as follows:-

(a) Whether the Accounting Officer of the Respondent entering into a contract with the provider during the Administrative Review period amounted to a serious breach of the Act.

(b) Remedies

4.0 SUBMISSIONS BY COUNSEL

4.1 Counsel for the Applicant submitted that Section 90 (3) of the PPDA Act, 2003 provides that a bidder may make a complaint to the Authority within ten working days from the date of communication of the decision by the Accounting Officer. This period is known as the administrative review period under Section 90 (7) (a) of the PPDA Act, 2003.

4.2 Counsel submitted that on the 6th June 2019, the Notice of the Best Evaluated Bidder for the impugned procurement was displayed with a removal date of 19th June 2019. The reason for elimination of the bid submitted by Rohi Services Ltd was given 14th June 2019. He further submitted that on 18th June 2019, Rohi Services Limited applied for administrative review to the Accounting Officer of the Respondent and on 19th June 2019, Rohi Services Limited effected payment

to the Respondent's account as payment for the administrative review fees. On 20th June 2019, the Respondent received a letter dated 19th June 2019 from Rohi Services Limited indicating that a payment of the administrative review fees was made to the Respondent's account. On 21st June 2019, the Respondent signed contract with the Best Evaluated Bidder (Muga Services Ltd) for the impugned procurement during the administrative review period, which fettered the right of Rohi Services Limited to pursue administrative review process.

4.3 Counsel further submitted that the Real Time Gross Settlement (RTGS) form was made on 19th June 2019, the last day for removal of the notice of the best evaluated bidder. He submitted that the actual application for administrative review was lodged by Rohi Services Limited to the Accounting Officer of the Respondent on 18th June 2019. This was still within the ten days from the date when the bidder became aware of the circumstances giving raise to the complaint as provided for under Section 90(1a)(b)

4.4 Counsel prayed that the Tribunal should declare that there was a serious breach of the PPDA Act, 2003 by the Respondent in respect of the impugned procurement on account that the Entity executed a contract during the administrative review period and costs of this reference be provided for.

4.5 The Respondent in reply submitted that the Best Evaluated Bidder Notice was displayed on 6th June 2019 with the removal date of 19th June 2019 indicating that M/s Rohi Services Limited was eliminated at the preliminary stage in accordance with Regulation 4 (1) (b) of the PPDA (Contracts) Regulation/SI No. 14 of 2014. Regulation 4 provides that a procuring and disposing entity shall, within five working days after the decision of the contracts committee to award a contract, display a notice of best evaluated bidder to all bidders who participated

in the bidding process. Regulation 4 (3) (f) of the PPDA (Contracts) Regulation/SI No. 14 of 2014 states that the notice of best evaluated bidder shall state the unsuccessful bidders and the stage at which their bids failed or were eliminated. The Respondent further submitted that the Notice of Best Evaluated Bidder expired on the 19th June 2019, and since there was no pending administrative review or complaint from any bidder by close of business on 19th June 2019, the draft contract document was submitted to and approved by the Solicitor General on the 20th June 2019.

4.6 The Respondent submitted that the bank draft was not honored because it was wrongly addressed. The RTGS was received on 20th June 2019, though effected on 19th June 2019. The Accounting Officer of the Respondent dismissed the administrative review by Rohi Services Limited on 18th June 2019.

4.7 The Respondent further submitted that the contract between the Ministry of Public Service and M/s Muga Services Ltd was signed on 21st June 2019, the Contract Manager was appointed on 27th June 2019, and the site was handed over to M/s Muga Services Ltd on 8th July 2019. The Respondent submitted that the Contract is currently under implementation with a substantial amount of work accomplished. The Respondent submitted that they were not aware when the administrative review period ends hence they misinterpreted the law. The Respondent asked for leniency from the Tribunal

5.0 RESOLUTION BY THE TRIBUNAL

5.1 In resolving the Application, the Tribunal considered the documents availed to it, and the submissions of both Counsel.

- 5.2 Section 90(1a)(b) of the Act provides that a complaint by a bidder against a procuring and disposing entity shall be made within ten working days from the date the bidder, first becomes aware or ought to have become aware, of the circumstances giving rise to the complaint.
- 5.3 The Tribunal noted that Section 90 (3) of the Act provides that where a bidder is not satisfied with the decision of the Accounting Officer, the bidder may make a complaint to the Authority within ten working days from the date of communication of the decision by the Accounting Officer.
- 5.4 Section 90(7) (a) and (b) of the Act prohibits an Accounting officer from entering into a contract with the provider during the period of administrative review, set out in Part VII and Part VIIA of the Act.
- 5.5 The Tribunal relied on the Notice of the Best Evaluated Bidder which was displayed on 6th June 2019 with a removal date of 19th June 2019 and the letter dated 14th June 2019 from the Accounting Officer of the Respondent addressed to Rohi Services Ltd. The Tribunal also examined the letter dated 18th June 2019 from Rohi Services Limited addressed to the Accounting Officer of the Respondent. In the said letter, Rohi Services Limited requested for administrative review in the impugned procurement and the letter contained response to the reasons why their bid was rejected. The Tribunal further examined the letter dated 18th June 2019, from the Accounting Officer of the Respondent to Rohi Services Limited wherein he stated *'We have noted that you have attached a Bank Draft number 863489 of UGX 5,000,000 (Uganda Shillings Five Million) in favour of the Permanent Secretary Ministry of Public Service. This is to advise you that the Ministry's account number is 000050088000017; Account Title: Civil*

Service College Uganda; Bank: Bank of Uganda; Branch: Kampala Road in Uganda'. Following this guidance from the Respondent, on 19th June 2019 Rohi Services Limited paid the administrative reviews fees of UGX 5,000,000 through RTGS in the Centenary Bank.


5.6 The Tribunal finds that Rohi Services Limited commenced the administrative review process on 18th June 2019 and accordingly paid the administrative review fees on 19th June 2019 before the expiry of the ten days provided for under Section 90(1a)(b). In the finding of the Tribunal, the administrative review process started on the 18th June 2019 and the Respondent signed a contract with the best evaluated bidder on 21st June 2019. The signing of the contract by the Respondent with the best evaluated bidder was clearly within the ten days provided by the law for administrative review period. Accordingly, the Tribunal therefore finds that there was serious breach of the PPDA Act, 2003 by the Respondent in respect of the impugned procurement on account that the Entity entered into a contract with a provider during the administrative review period in contravention of section 90 (7) (a) of the Act.

6.0 DECISION OF THE TRIBUNAL

1. The Tribunal makes a declaration that there was serious breach of the PPDA Act, 2003 by the Respondent in respect of the impugned procurement on account that the Entity entered into a contract with a provider during the administrative review period.
2. Each Party shall bear its own costs

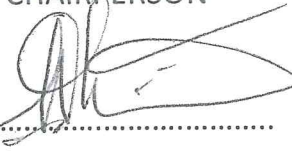
Dated at Kampala this ^{25th} day ofSeptember..... 2019.

SIGNED by the said
OLIVE ZAALE OTETE


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CHAIRPERSON

SIGNED by the said
DAVID KABATERAINE


.....

MEMBER

SIGNED by the said
ABRAHAM NKATA


.....
MEMBER

SIGNED by the said
ENG. THOMAS BROOKES ISANGA


.....
MEMBER