

THE REPUBLIC OF UGANDA

PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY APPEALS

TRIBUNAL

(PPDA APPEALS TRIBUNAL)

REFERENCE OVER SERIOUS BREACH OF THE PPDA ACT 2003 BY THE UGANDA CANCER INSTITUTE IN RESPECT OF PROCUREMENT REFERENCE NO. UCI /SUPLS/16-17/00112/1 (LOT 1) AND PROCUREMENT REFERENCE NO. UCI/SUPLS/16-17/00112/2 FOR THE SUPPLY DELIVERY INSTALLATION AND COMMISSIONING OF LINEAR ACCELERATOR (LOT 1) AND POSITIONING AIDS AND DOSIMETRY EQUIPMENT (LOT 2)(UNDER SECTION 91J (1) OF THE PPDA ACT 2003)

APPLICANT PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
AUTHORITY

RESPONDENT: UGANDA CANCER INSTITUTE

REFERENCE NO. 1 OF 2018

(Before: OLIVE ZAALE OTETE- CHAIRPERSON, MOSES JURUA ADRIKO (SC) - MEMBER,
DAVID KABATARAINI -MEMBER AND ABRAHAM NKATA- MEMBER)

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BACKGROUND/FACTS

The Applicant makes this reference over alleged serious breach of the Public Procurement and Disposal of Public Assets Act, 2003 (the Act) by the Uganda Cancer Institute (the Respondent). The facts pertaining to this reference are as follows;

- i) On 31st August 2017, the Entity published an advertisement in the New Vision Newspaper for supply, delivery, installation and commissioning of Linear Accelerator System (LOT 1) and Positioning Aids and Dosimetry Equipment (LOT 2). The advertisement stipulated that the bidding process would be conducted in accordance with the African Development Bank's (ADB) Rules and Procedures for the Procurement of Goods and Works' May 2008 edition as revised in July 2012.
- ii) On 14th September 2017, a pre- bid meeting was held, two (2) Addendums were issued on 2nd October and 17th October 2017, which occasioned revision of the bid submission deadline to 3rd November 2017.
- iii) On 3rd November 2017, bid submission was closed and two (2) firms submitted bids for both Lot 1 and Lot 2. The two firms were Elekta Ltd/ Elekta (Pty)Ltd and Elsmmed Healthcare Solutions
- iv) The bids for Lot 1 and Lot 2 submitted by Elekta Ltd/ Elekta(Pty) were found to be non- responsive at technical evaluation stage.
- v) On the other hand the Evaluation Committee found the bids for Elsmmed Healthcare Solutions Ltd responsive at preliminary and commercial stages

and passed for financial evaluation. The Evaluation Committee recommended award of Lot 1 at USD\$ 3,590,000 and Lot 2 at USD\$390,000 to Elsméd Healthcare Solutions Ltd (BEB) and the Contracts Committee awarded the contract of Lot 1 and Lot 2 to the BEB.

- vi) Notice of Best Evaluated Bidder (BEB) was displayed from 6th to 20th February 2018.
- vii) The Entity submitted the evaluation report and bid documents for Lots 1 and Lot 2 to ADB on 20th November 2017. By letter dated 29th January 2018, the ADB issued a No- Objection to award of Contract to the BEB at a contract price of USD\$3,590,000 for Lot 1 and USD\$390,000 for Lot2.
- viii) The Entity submitted a draft contract to the Solicitor General for review on 21st February 2018, which was cleared for execution on 2nd March 2018.
- ix) On 15th February 2018, the Entity received a complaint letter from ENSAfrica Advocates acting on behalf of M/ S ELEKTA LTD/ELEKTA (PTY)Ltd (aggrieved bidder) in which the bidder complained that it was aggrieved by the Entity's decision to award the contract to the BEB, and requested the Entity to avail them: (a) a summary of the evaluation process, (b) detailed technical and financial comparison of the two bids, (c) detailed reasons for rejection of their clients bid.
- x) The Entity declined to respond to the complaint ostensibly because the Advocates had no authority to make a complaint on behalf of the bidder. The Entity on receiving the letter, formed an opinion that ENSAfrica Advocates were unknown to the procurement process since their records reflected that the only true and lawful agent authorized to act on behalf of

the aggrieved bidder was one Shashikant Kunder- the Country Director, Meditec (U) Ltd, who had been nominated by them as their “true and lawful Attorney and Agent” in connection with all correspondences regarding the tender.

- xi) The Entity in its defence nonetheless argued that it prepared clear and specific responses to the aggrieved bidders complaints and furnished them with;- (i) A summary of the evaluation process, and (ii) the detailed reasons for rejection of its bid. These documents were served on the bidder’s lawful Attorney Mr. Shashikant Kunder on 28th February 2018. This information was not shared with ENSafrica Advocates, whom as earlier seen above were deemed to be unauthorized representatives of the bidder.
- xii) On 19th March 2018, the Entity issued a notification of contract award to the successful bidder and the contracts were signed on 20th March 2018
- xiii) The aggrieved bidder filed a complaint with the Applicant on 22nd March 2018, seeking administrative review of the decision by the Entity which had disqualified its bid for being non- compliant and substantially non-responsive. .
- xiv) On 19th April 2018, the Applicant conducted an administrative review hearing in the presence of both the aggrieved bidder and the BEB, in dismissing the complaint which it held, to be unmeritorious, the Applicant observed that the contracts executed between the Respondent and the BEB for Lots 1 and 2, was done during the Administrative Review period contrary to Section 90(7) of the PPDA Act 2003(the Act) .

- xv) The Authority asserts that the Respondent signed a contract with the BEB during the administrative review period and this action constituted a serious breach of the Act.

2.0 **REFERENCE**

2.1 On 8th May 2018, 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 executed a contract with the BEB during the Administrative Review period.

2.2 On 16th May 2018, the Tribunal issued a summons to the Respondent to file a written response to the Reference giving a chronology of events and directed the Respondent not to proceed with the procurement process till until final disposal of the Reference. The Respondent filed a detailed response with the Tribunal on 21st May 2018. On the same day, the Tribunal

2.3 On 16th May 2018, the Tribunal wrote to both the BEB and the aggrieved bidder to be present during the hearing and make representations if necessary.

3.0 **DISPOSAL OF THE REFERENCE.**

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

(1) *Reference dated 8th May 2018 filed by the Applicant and supporting annextures;*

(2) *Response dated 21st May 2018 filed by the Respondent.*

3.1 The Tribunal conducted a hearing on 30th May 2018. The Applicant was represented by Mr. John Kalemera and the Respondent was represented by Ms. Charity Nambasa a State Attorney and Mr. Sam Byamukama.

3.2 Three issues were formulated for resolution by the Tribunal as follows:

(a) Whether the Accounting Officer of the Respondent entered into a contract with the BEB during the Administrative Review period in contravention of the PPDA Act and Regulations.

(b) If so whether the actions of the Accounting Officer amounted to a serious breach of the Act.

(c) Remedies.

4.0 **SUBMISSIONS BY COUNSEL**

4.1 In their written and oral submissions, Counsel for the Applicant argued that on 2nd March 2018, the Applicant received an application for administrative review from the aggrieved bidder, in respect of Procurement reference number UCI/SUPLS/16-17/00112/1 (LOT 1) and Procurement reference number UCI/SUPLS/16-17/00112/2,(Lot2) for the supply , delivery installation and commissioning of Linear Accelerator System(Lot 1) and supply, delivery installation and commissioning of positioning aids and dosimetry equipment (Lot 2).

- 4.2 Counsel submitted that the Respondent's Evaluation Committee determined the BEB's bid responsive at technical evaluation and after financial evaluation stage, recommended award of the contract for Lots 1 and Lot 2 to the BEB. Following this recommendation, draft contracts were approved by the Solicitor General on 2nd March 2018, and on 20th March 2018, the Respondent signed contracts with the BEB. Counsel argued that the Authority had found during the course of its administrative review of the aggrieved bidder's complaint that these contracts were signed during the administrative review period. Citing the Tribunal's previous decisions inter alia: Mbarara Municipal Council (Reference 1/15), and Busembatia Town Council (Reference 2/15), Counsel submitted that the Respondent was in serious breach of the Act when it executed contracts during the Administrative Review period, contrary to Section 90(7) of the Act. Counsel prayed for a declaration by the Tribunal that the Respondent's actions were illegal and a serious breach of the Act. Counsel prayed that each party bear their costs.
- 4.3 In reply in both their written and oral submissions, the Respondents Accounting Officer admitted that the contract for Lots 1 and 2 for the procurement in reference was signed on 20th March 2019, after the Entity had received a letter from the Solicitor General clearing the draft contract with the best evaluated bidder.
- 4.4 The Respondent in its defence argued that: (i) the procurement was not subject to the Act since the procurement was being made out of a loan facility advanced to Uganda by the African Development Bank, and that all the Bidders were aware that the procurement was governed by the African Development Bank's rules and procedures for the procurement of goods and works, May 2008 edition as revised in 2012,(AFDB Rules), which inter alia required a bidder upon receipt of a

detailed debrief to lodge a complaint with the Director of Procurement and Financial services at the AFDB, before lodging a complaint to the Applicant or the Tribunal. (ii) That on 28th February 2018, it provided a detailed debrief to the aggrieved Bidder's lawfully nominated Mr. Shahshikant Kunder in accordance with Clause 2.6.5 of Section 11 of the AFDB Rules. (iii) That the aggrieved bidder's Advocates relied on the detailed debrief availed to Mr. Kunder when it filed its complaint on 2nd March 2018. The Respondent also argued that the bid validity period expired on 5th April 2018, and finally that the aggrieved bidders bid was non-compliant and substantially non-responsive.

4.5 The Respondent in conclusion prayed that the Tribunal makes a finding that there had been no breach of the Act and in the alternative the Respondent prayed that in the event that the Tribunal found the Contract was signed during the administrative review period, it should not cancel the contract given the adverse effects such a decision would have on service delivery of radiotherapy treatment to thousands of cancer patients from across the Great Lakes region.

5.0 RESOLUTION BY THE TRIBUNAL

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

5.2 Section 90(7) (a) and (b) of the Act prohibits an Accounting officer from concluding a contract with a bidder during the period of administrative review, set out in Part VII of the Act.

5.3 In the instant reference it is an undisputed fact that the aggrieved bidder through its advocates M/S ENSafrica Advocates made a complaint to the Respondent

about its decision to reject the aggrieved bidder's bid as non-compliant, vide letters dated 15th February 2018 and on 19th February 2018. It is also undisputed that the Respondent issued a detailed debrief to the complaints made by the aggrieved bidder's advocates on 28th February 2018. It is not clear when the debrief was served upon the aggrieved bidder's advocates or Mr. Shahshikant Kunder, the aggrieved bidder's authorized representative.

- 5.4 In its complaint to the Applicant dated 22nd March 2018, M/s ENSafrica Advocates on behalf of the aggrieved bidder annexed the debrief prepared by the Respondent which the Respondent allegedly served to the aggrieved bidder's lawfully appointed attorney well before the complaint was lodged with the Applicant.
- 5.5 The Respondent and the aggrieved bidder disagree on the date when the debrief was served and also whether it was a response within the meaning of the Act to the complaint made to the Accounting Officer.
- 5.6 It therefore falls upon the Tribunal to determine whether the debrief issued by the Respondent amounted to a response to the aggrieved bidder's complaint and if it did what was its effect on subsequent actions taken by the aggrieved bidder including the complaint filed with the Applicant which was dismissed.
- 5.7 Section 90 (i) of the Act provides that a bidder who is aggrieved by a decision of a procuring and disposing entity may make a complaint to the Accounting Officer within 10 working days of first becoming aware of the circumstances giving rise to the complaint. Section 90 (2) (b) directs the Accounting Officer to make a

decision on the complaint within 15 working days of receipt of the complaint indicating corrective measures if any ,and giving reasons for their decision, and further that a copy of the decision must be submitted to the Authority.

- 5.8 Applying the law to the facts before us, it is clear that the Respondent dealt with the aggrieved bidder's complaint in a lopsided and erroneous way. It mistakenly assumed that the Act and regulations thereunder were inapplicable to the procurement in reference. It compounded this mistake by not serving the aggrieved bidder's advocates with the detailed debrief mistakenly assuming that it was only obligated to deal with the "lawfully appointed agent" in the bidding process which we must stress does not preclude a bidder from appointing a firm of advocates to prosecute a complaint if that bidder disagrees with the outcome of a bidding process.
- 5.9 Be that as it may, nonetheless and notwithstanding the Respondents mistaken actions we find that the Respondent did respond to the Complaint filed by the aggrieved bidder, as evidenced by the fact that this response was annexed to documentation filed by the aggrieved bidder's advocates in support of its subsequent complaint to the Applicant.
- 5.10 All bidders are cognizant of the fact that the administrative review process is governed and conducted according to mandatory timelines prescribed by the Act. In the instant case the aggrieved bidder having received the detailed brief on or about 28th February 2018, ought to have filed its subsequent complaint with the Applicant on or before 15th March 2018.

- 5.11 We note however that the complaint was filed with the Applicant on 22nd March 2018, seven days after lapse of the statutory prescribed date for filing a complaint before the Applicant. In the premises the complaint which was lodged and subsequently dismissed for other reasons, after the prescribed period for filing a complaint, was void abintio. In other words the aggrieved bidder forfeited any further right to administrative redress arising out of any malpractice arising out of the instant bidding process when it failed or neglected to file a complaint with the Applicant on or before 15th March 2018.
- 5.12 Having established that the aggrieved bidder forfeited its right to seek further redress from the Applicant because it failed to lodge its complaint with the Applicant within the lawfully prescribed period, we inexorably also find that there was no legal bar or impediment on the Respondent at the time it signed the contract with the BEB on 20th March 2018.
- 5.13 Our findings in the preceding paragraphs substantially dispose of this application negating any further obligation on the Tribunal to deal with the other issues canvassed by the parties.

6.0 DECISION OF THE TRIBUNAL

1. The instant application be and is hereby dismissed.
2. The Tribunal discharges the order directing the Respondent to desist from taking any further steps in the procurement process, the Respondent may proceed to conclude the procurement process.

3. Each party shall bear its own costs

Dated at Kampala this 26th day of June, 2018.

SIGNED by the said]
OLIVE ZAALE OTETE] CHAIRPERSON

SIGNED by the said]
MOSES JURUA ADRIKO (SC)] MEMBER

SIGNED by the said]
DAVID KABATERAINE] MEMBER

SIGNED by the said]
ABRAHAM NKATA] MEMBER