

THE REPUBLIC OF UGANDA

**PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS APPEALS TRIBUNAL
(PPDA APPEALS TRIBUNAL)**

APPLICATION NO 9 OF 2017

APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY ON THE PRELIMINARY OBJECTION RAISED BY CHINA NATIONAL AERO-TECHNOLOGY INTERNATIONAL ENGINEERING CORPORATION (CATIC) IN THE PROCUREMENT PROCESS FOR CONSTRUCTION OF A NEW CHAMBER OF PARLIAMENT

APPLICANT: CHINA NATIONAL AERO-TECHNOLOGY INTERNATIONAL ENGINEERING CORPORATION (CATIC)

RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY

(Before: OLIVE ZAALE OTETE- CHAIRPERSON, MOSES JURUA ADRIKO-MEMBER, JOEL KATEREGGA-MEMBER AND ABRAHAM NKATA- MEMBER)

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS

- 1.1 By letter dated 29th August 2016, the Clerk to Parliament wrote to the Public Procurement and Disposal of Public Assets Authority (the Authority) drawing to the attention of the Authority fraud practices discovered during the evaluation of bids for the cancelled procurement for the construction of the proposed new Chamber of Parliament. In the said letter, the Clerk to Parliament stated that two bidders, one of which is China National Aero-Technology International Engineering Corporation (CATIC), the Applicant, had issues of forgeries which are offences under the PPDA Act, 2003 that call for suspension of such bidders. The Clerk concluded the said letter with the statement, *“with those findings, I am forwarding to you the issues for further investigation”*.
- 1.2 On 11th October 2016, the Authority wrote to the Applicant instructing it to submit to the Authority a defence to the allegations of fraudulent practices raised in the Clerk to Parliament’s letter. In the same letter, the Authority invited the Applicant to appear at the Authority’s premises on 21st October 2016 to attend a hearing of the matter.
- 1.3 On 28th October 2016, an interim order was granted by the High Court in Miscellaneous Application NO. 861 of 2016 restraining the Authority from continuing with the investigations against the Applicant. The Applicant filed an Application in High Court seeking an order of a stay against the Authority from continuing with the investigation against the Applicant. In November 2016, the High Court dismissed the Application and directed the Authority to continue with the investigations.
- 1.4 On 30th September, 2016 the Authority wrote to the Engineers Registration Board requesting for confirmation as to whether it issued the impugned certificates of registration for Xu Shiato, Wu Shuming and Chen Guohua that were submitted in the bid of CATIC for the construction of the new chamber of Parliament.

- 1.5 On 6th October, 2016, the Authority received a reply from the Engineers Registration Board (ERB) stating that it did not issue the impugned three Certificates of registration that were submitted in the bid for CATIC in respect to the proposed construction of the new chamber of Parliament.
- 1.6 On 10th February 2017, the Authority conducted a hearing of the investigation into detected fraud by the Applicant in respect of a bid to construct a new Chamber of Parliament.
- 1.7 By letter dated 20th February 2017, the Applicant challenged the hearing conducted by the Authority on 10th February 2017 and raised four (4) preliminary objections as follows:
 - (a) Whether the purported hearing before the Authority [Management Advisory Committee MAC] on the PDE's (Parliament) recommendation for further investigation is properly and lawfully instituted.
 - (b) Whether the purported hearing before the Committee is within the time stated by law.
 - (c) Whether the Committee is acting outside its realm of authority.
 - (d) Whether the process followed by the Authority offends the Constitution of the Republic of Uganda and the cardinal principles of natural justice.
- 1.8 The Authority overruled all the four objections. The Applicant was dissatisfied with the decision of the Authority on the objections, hence this Application to the Tribunal.

2.0 **APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION**

- 2.1 Being dissatisfied with the conclusions and decision of the Authority in respect to the preliminary objections, on 30th May 2017, the Applicant applied to the Tribunal for a review of the Authority's decision overruling the objections.
- 2.2 The grounds for the Application to the Tribunal are as follows:

2.2.1 *The Authority erred in law and fact when it decided that the letter from the PDE dated 29th August 2016 amounted to a recommendation for suspension of the Applicant.*

2.2.2 *The Authority erred in law when it held that the Authority is not precluded from handling the purported suspension investigation and or hearings or delivering a suspension decision beyond the time prescribed by statute.*

2.2.3 *The Authority erred in law and fact when it held that the issue as to whether the Management Advisory Committee was acting within its realm of authority was premature.*

2.2.4 *The Authority erred in law and fact when it held that it had not contravened provisions of the Constitution of the Republic of Uganda and cardinal principles of natural justice in handling the impugned recommendation for suspension hearing.*

2.3 The Applicant prayed the Tribunal to uphold the preliminary objections on points of law and to award costs of the Application to the Applicant.

3.0 **DISPOSAL OF APPLICATION**

In disposing of the Application for review, the Tribunal analyzed the following documents:

- 1) The Applicant's Application to the Tribunal dated 30th May 2017, annexes to the Application, the written and oral submissions.
- 2) The Authority's response to the Application dated 5th June 2017, annexes to the response, and oral submissions.

3.1 The Tribunal conducted a hearing for the Parties on 13th June 2017. The Applicant was represented by Noah Wasige, while the Authority was represented by John Kallemera.

4.0 SUMMARY DECISION

4.1 In accordance with the Act, the Tribunal delivered a summary of this decision on 15th June 2017. What follows is the detailed reasoning in support of our decision.

5.0 ISSUES

5.1 Five (5) issues were formulated for resolution by the Tribunal as follows;-

- (i) *Whether the letter from Parliament dated 29th August 2016 amounted to a recommendation for suspension of the Applicant.*
- (ii) *Whether the Authority is precluded from handling a suspension investigation and or hearings or delivering a suspension decision beyond the time prescribed by statute.*
- (iii) *Whether the Management Advisory Committee was acting within its realm of Authority.*
- (iv) *Whether the Authority handled the suspension investigation in accordance with the principles of natural justice and the Constitution of the Republic of Uganda.*
- (v) *Remedies.*

6.0 SUBMISSIONS BY COUNSEL

6.1 On the first issue, to wit, *whether the letter from Parliament dated 29th August 2016 amounted to a recommendation for suspension of the Applicant*, Counsel for the Applicant submitted that the letter of the procuring and disposing entity (PDE) dated 29th August 2016 did not amount to a recommendation for suspension of the Applicant, but was a recommendation for further investigation because it was referenced ***“Recommendation for Further Investigation of Detected Fraud”***. Quoting section 94 of the PPDA Act, 2003 which provides for suspension of providers, Counsel submitted that the Authority may only suspend a provider upon a recommendation for suspension made by a PDE following the procedure specified in regulations 12, 13 and 14 of the PPDA Regulations, 2014, SI No. 06 of 2014.

- 6.2 Counsel further submitted in respect to the first issue that the letter of the PDE cannot be interpreted to be a recommendation for suspension “*when the investigations by the PDE were incomplete and were being referred to the Authority only for further investigations for the PDE to verify its suspicion before taking any decision*” (Page 4 of Applicant’s written submissions). He further submitted that the letter does not fit the requirements for a recommendation for suspension as laid down in Regulation 13 of the PPDA Regulations 2014, because that regulation only deals with a recommendation by a PDE to suspend a provider, yet in the instant matter, there was no recommendation for suspension by the PDE. He argued that it was wrong for the Authority to hold hearings in pursuance of a suspension.
- 6.3 On the second issue, *whether the Authority is precluded from handling a suspension investigation and or hearings or delivering a suspension decision beyond the time prescribed by statute*, Counsel for the Applicant argued this issue without prejudice to the submissions made under *Issue 1*. He cited regulation 14(5) of the PPDA Regulations, 2014, S.I NO. 6 of 2014 which provides that the Authority shall issue its decision on a recommendation to suspend a provider in writing within twenty one working days from the date of receipt of the recommendation. He stated that the Authority received the PDE’s recommendation for further investigation on 30th August 2016, but only wrote to the Applicant notifying it of the allegations on 11th October 2016, twenty eight working days after receipt of the letter from the PDE. He argued that the Authority has not yet issued a decision to-date, beyond the statutory timeline of twenty one days stipulated under regulation 14(5). He cited ***Uganda Revenue Authority vs. Uganda Consolidated Properties Ltd Civil Appeal of 2000***, where Hon. Justice Twinomujuni held that time limits set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with. He further cited ***Sitenda Sebalu vs. Sam K. Njuba EPA 26 of 2007*** where the Supreme Court held that if there is no statutory provision or rule which gives the court discretion to extend or abridge the time set by statute, then the court has no residual or inherent jurisdiction to enlarge a period of time laid down by statute. He concluded this issue by stating that the Authority is precluded by law from making a decision in the impugned matter outside the statutory period of twenty one days.

- 6.4 On the third issue *whether the Management Advisory Committee (MAC) was acting within its realm of Authority*, Counsel for the Applicant submitted that the MAC is not one of the committees established under section 15 of the PPDA Act i.e. Complaints Review Committee and Advisory Committee. He submitted that MAC is not established by any provision in the PPDA Act, 2003 and the Committee was therefore acting outside the realm of the law.
- 6.5 With respect to the fourth issue, *whether the Authority handled the suspension investigation in accordance with the principles of natural justice and the Constitution of the Republic of Uganda*, Counsel restated article 42 of the Constitution of the Republic of Uganda which guarantees the right to just and fair treatment in administrative decisions. Counsel contended that pertinent functions in the administration of justice of public procurement and disposal proceedings in Uganda are performed by one and the same body. He submitted that the Authority through its different officers and offices acts as the investigator, prosecutor and judge thus waning any possibility of impartiality in its quasi-judicial action. He contended that the Authority having satisfied itself as the investigator that the alleged offence was committed, the Authority cannot find otherwise as judge/adjudicator, thereby grossly contravening the cardinal principles of natural justice as well as fundamental human rights of the Applicant enshrined in the Constitution of the Republic of Uganda.
- 6.6 Counsel for the applicant further submitted that dduring the proceedings investigating the Applicant's conduct in the bid process, the Management Advisory Committee of the Authority acted contrary to the cardinal principles of natural justice because the quorum of the Committee included the investigator, of the reference for suspension which is inconsistent with the principles of natural justice.
- 6.7 The Applicant prayed the Tribunal to uphold the preliminary objections on points of law and set aside the decision of the Authority, and also find that any subsequent action of the Authority is invalid.
- 6.8 In response to the first issue *whether the letter from Parliament dated 29th August 2016 amounted to a recommendation for suspension of the*

Applicant, Counsel for the respondent submitted that the recommendation made by the PDE to the Authority was for suspension since it categorically informed the Authority that the offence of forgery by the Applicant called for suspension of the Applicant under section 94 (a) of the PPDA Act, 2003. He submitted that the PDE's letter fulfilled all the requirements for a recommendation for suspension by an entity as contained in regulation 13(1) of the PPDA Regulations 2014. He further submitted that under sections 8(1) (f) and 94 of the PPDA Act, only the Authority has the mandate to suspend a provider. He contended that there is no provision in the Act or the Regulations which mandates an entity to restrict the Authority's role to only carrying out investigations. He submitted that it cannot be true that the PDE only intended for the Authority to undertake investigations and not pursue the matter to its logical conclusion.

- 6.9 On *whether the Authority is precluded from handling a suspension investigation and or hearings or delivering a suspension decision beyond the time prescribed by statute*, Counsel for the Authority, citing ***Motor Centre East Africa Ltd v. PPDA Miscellaneous Cause No. 90 of 2010***, submitted that the Authority is not precluded from handling the suspension investigation or delivering the suspension decision beyond the statutory period provided in regulation 14(5) of the PPDA Regulations, 2014. In this case, the learned trial judge held that the statutory requirement for the Authority to deliver its decision within twenty one days was not intended to be mandatory but directory since the purpose of the Regulations is merely to ensure expeditious determination of disputes under the PPDA Act rather than ouster the jurisdiction of the Authority over the matter after the prescribed period. Counsel further submitted that the Authority has not concluded its investigations and has on several occasions asked the Applicant to file its defence but the Applicant is yet to do so.
- 6.10 In response to the third issue *whether the Management Advisory Committee (MAC) was acting within its realm of Authority*, Counsel submitted that suspension of providers is done by the Board, not MAC. He submitted that MAC has jurisdiction to handle investigations and hearings on behalf of the Board. He submitted that in the instant matter, the

Authority has not concluded investigations in the matter and the consideration of the suspension decision is yet to be carried out by the PPDA Board.

6.11 On *whether the Authority handled the suspension investigation in accordance with the principles of natural justice and the Constitution of the Republic of Uganda*, Counsel submitted that the procedure followed by the Authority in the impugned suspension investigation is in accordance with the relevant provisions of the PPDA Act, 2003 and PPDA Regulations 2014. He stated that the Applicant is being afforded a fair hearing in accordance with the principles of natural justice, but the Applicant had instead taken various diversionary methods to delay and frustrate the investigation process.

6.12 Counsel for the Authority prayed that the Tribunal finally determines the suspension on account that all the relevant documentation has been furnished to it by the parties and also to forestall any further claims of bias by the Applicant in respect of the investigation.

7.0 **RESOLUTION BY THE TRIBUNAL**

7.1 The Tribunal will resolve the issues in the same order as raised by the Parties.

7.2 In the 1st issue, the Applicant contends that the letter from the Clerk to Parliament to the Authority did not recommend that the Authority commences suspension hearings against the Applicant, but only asked the Authority to conduct further investigations in the matter of fraud that had been discovered by Parliament in the course of evaluation of bids. The Authority on the other hand argues that the letter was a recommendation by Parliament to the Authority to suspend the applicant because it categorically stated that the offence of forgery by the Applicant called for suspension.

7.3 In resolving this issue, the Tribunal considered the mandate of the Authority with respect to suspension of providers as stipulated in section 94 of the PPDA Act, 2003. For ease of reference, section 94 is reproduced:

“The Authority may on the recommendation of a procuring and disposing entity or after investigations on its own initiative, suspend a provider from engaging in any public procurement or disposal process for a period determined by the Authority, where—
(a) the provider breaches the Code of Ethics of providers;
(b) “

7.4 From the above section, it is clear that only the Authority has the mandate to suspend a provider. This is done either on recommendation of a procuring and disposing entity or on the initiative of the Authority. The Tribunal finds that the letter by Parliament to the Authority was written in the spirit of section 94. Having found an apparent forgery in the course of evaluation of bids, Parliament chose to refer the matter to the Authority, the body clothed with the mandate to suspend providers under the PPDA Act. The Tribunal is persuaded by the submissions of Counsel for the Authority that the letter from Parliament amounted to a recommendation for suspension because it made reference to a call for suspension of such a bidder as per section 94 of the Act. The Tribunal is further persuaded by the submissions of the Authority that there is no provision in the Act or the Regulations which mandates an entity to restrict the Authority's role to only carrying out investigations. Even if the Tribunal was to agree with the submissions of the Applicant that the Authority was only instructed to conduct further investigations and not commence suspension hearings, what would the Authority do with the result of the investigation? Was the Authority supposed to make an investigation report back to the entity as suggested by the Applicant in their submissions? The Authority as the body mandated by law to carry out the suspensions had a duty to commence suspension hearings on receiving a letter containing alleged fraud by a provider from an entity. The Authority has no duty to report back to the entity the result of its investigations as submitted by the Applicant. The Tribunal's conclusion on this matter is that the letter from Parliament to the Authority amounted to a recommendation for suspension.

7.5 In determining whether the Authority is precluded from handling a suspension investigation and or hearings or delivering a suspension decision beyond the time prescribed by statute, the Tribunal relied on decisions of Court in *Motor Centre East Africa Ltd v. PPDA Miscellaneous Cause No.*

90 of 2010 and Sitenda Sebalu v. Sam K. Njuba and Electoral Commission, Election Petition Appeal 26 of 2007.

- 7.6 Under regulation 14(5) of the PPDA Regulations, 2014, the Authority is required to issue its decision on a recommendation to suspend a provider in writing within twenty one working days from the date of receipt of the recommendation. The Authority is out of time to issue this decision and so the Applicant is stating that the Authority is precluded by law from making a decision in the impugned matter outside the statutory period of twenty one days. The Applicant is relying on the decisions in ***Uganda Revenue Authority vs. Uganda Consolidated Properties Ltd Civil Appeal of 2000***, where Hon. Justice Twinomujuni held that time limits set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with and the case of ***Sitenda Sebalu vs. Sam K. Njuba EPA 26 of 2007*** where the Supreme Court held that if there is no statutory provision or rule which gives the court discretion to extend or abridge the time set by statute, then the court has no residual or inherent jurisdiction to enlarge a period of time laid down by statute. He concluded this issue by stating that
- 7.7 In resolving this issue of time limits, the Tribunal considered the ‘*intention of the Legislature*’ test considered by the Court in the cases of ***Motor Centre East Africa Ltd v. PPDA Miscellaneous Cause No. 90 of 2010*** and the case of ***Sitenda Sebalu vs. Sam K. Njuba EPA 26 of 2007***. The Supreme Court in the case of *Sitenda Sebalu vs. Sam K. Njuba EPA 26 of 2007* stated that there is no rule of thumb or a universal rule of interpretation for determining if in a given statutory provision, the word ‘shall’ is used in the mandatory sense or in a directory sense. The Supreme Court held that while the court must rely on the language used in a statute to give it proper interpretation, the primary target and purpose is to discern the intention of the legislature in enacting the provision.... *A better test for determining validity is to ask whether it was the purpose of the legislation that an act done in breach of the provision should be invalid....that emphasis ought to be on the consequences of non-compliance.*
- 7.8 In ***Motor Centre East Africa Ltd v. PPDA Miscellaneous Cause No. 90 of 2010***, the learned trial judge held that the statutory requirement for the Public Procurement and Disposal of Public Assets Authority to deliver its

decision within twenty one days was not intended to be mandatory but directory since the purpose of the Regulations is merely to ensure expeditious determination of disputes under the PPDA Act rather than ouster the jurisdiction of the Authority over the matter after the prescribed period.

- 7.9 The Tribunal is in agreement with the views expressed by the Court in the above decisions. Regulation 14(5) which requires the Authority to issue a decision regarding suspension within twenty one days is intended to ensure that the Authority expeditiously handles suspension matters before it. We do not believe that failure to meet the timeline should ouster the jurisdiction of the Authority to handle suspension investigations or hearings or render further actions of the Authority in that regard invalid. Besides, the allegations against the Applicant in this matter are grave. The Tribunal finds that much as the statutory timeline within which the Authority must have issued the decision has long lapsed, in the interest of justice, the Authority should finalise its investigations and offer the Applicant an opportunity to defend itself against the allegations.
- 7.10 On the issue that the Management Advisory Committee (MAC) was not acting within the realm of the law, the Tribunal finds that section 15 of the Act empowers the Authority to establish two standing committees namely, the Complaints Review Committee and the Advisory Committee. Besides these Committees, section 15 (1) (c) empowers the Board of the Authority to establish *'any other committee that may be necessary for the better carrying out of the functions of the Authority'*. The Tribunal thus respectfully disagrees with the submission by Counsel for the Applicant the MAC is not one of the Committees established under section 15 of the Act.
- 7.11 On the issue whether the Authority handled the suspension investigation in accordance with the principles of natural justice and the Constitution of the Republic of Uganda, the Applicant contends that pertinent functions in the administration of justice of public procurement and disposal proceedings in Uganda are performed by one and the same body contrary to the natural justice principles enshrined in the Constitution of the Republic of Uganda. He stated that the Authority through its different officers and offices acts as the investigator, prosecutor and judge thereby grossly contravening the cardinal principles of natural justice as well as

fundamental human rights of the Applicant enshrined in the Constitution of the Republic of Uganda.

- 7.12 Section 8 of the PPDA Act gives the Authority certain powers including the power to summon and examine witnesses, call for production of books, commission or undertake investigations and suspend a provider from conducting public procurement in accordance with section 94. The Act thus gives the Authority investigatory, prosecutorial and adjudicative powers. It is the considered view of the Tribunal that as long as the Authority observes principles of natural justice in the execution of its varied regulatory functions, there is no harm in those functions being performed by one body.
- 7.13 From the foregoing, the Tribunal is in agreement with the decision of the Authority on the preliminary objections raised by the Applicant before the Authority.
- 7.14 The Tribunal declines to hear the suspension hearing against the Applicant as prayed by the Authority. The power to suspend a provider is given to the Authority by section 94 of the Act. Therefore any suspension proceedings must of necessity be conducted by the Authority. The Tribunal therefore directs the Authority to conclude any investigations and offer the Applicant an opportunity to defend itself against the allegations of fraud raised in the letter from the Clerk to Parliament.
- 7.15 Before taking leave of this Application, the Tribunal wishes to offer guidance to the Authority when handling investigations/hearings by the MAC. The Authority must ensure that the Applicant is given a right to a fair hearing. Officers of the Authority who have investigated the matter should not again sit on the panel hearing the defence of the Applicant. The Authority must, when conducting the investigations/hearings, do all in its power to remove any perception of bias or impartiality.

DECISION OF THE TRIBUNAL

1. The letter from the Clerk to Parliament addressed to the Authority dated 29th August 2016, is a recommendation for suspension of the Applicant

because the letter substantially fulfilled the requirements for a letter recommending suspension as stipulated in Regulation 13(1) of the PPDA Regulations 2014, S.I 6 of 2014.

2. The Authority conducted the suspension investigation regarding the Applicant in accordance with its mandate, notwithstanding expiry of the 21 working days period in the regulations which are directory.

3. During the proceedings investigating the Applicant's conduct in the bid process the Management Advisory Committee of the Authority acted contrary to the cardinal principles of natural justice because the quorum of the Committee included the investigator, of the reference for suspension which is inconsistent with the principles of natural justice.

4. The Application is referred back to the Authority to continue with the investigation, mindful of the principles of natural justice, which require separation of the investigatory and hearing processes in the exercise of powers delegated to the Management Advisory Committee of the Authority.

5. Each party shall bear its own costs.

Dated this 15th day of 08 2017.