

THE REPUBLIC OF UGANDA

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

APPLICATION NO 7 OF 2017

**APPLICATION FOR REVIEW OF THE PROCUREMENT PROCESS FOR THE LEASING
OF OLD KAMPALA S.S.S SCHOOL LAND COMPRISED IN LRV 146 FOLIO 12, PLOT
19 NAMIREMBE ROAD TO VOLCANO BUS COMPANY**

APPLICANT: OLD KAMPALA OLD STUDENTS ASSOCIATION

**1ST RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC
ASSETS AUTHORITY**

2ND RESPONDENT: OLD KAMPALA SENIOR SECONDARY SCHOOL

**(Before: OLIVE ZAALE OTETE- CHAIRPERSON, MOSES JURUA ADRIKO-MEMBER,
DAVID KABATERAINE-MEMBER, JOEL KATERREGGA-MEMBER AND ABRAHAM
NKATA- MEMBER)**

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS

- 1.1 The Board of Governors of Old Kampala Senior Secondary School on 29th January 2016 passed a resolution to rent out part of the school land at Plot 19 Namirembe Road (Plot 19) for use as a Bus Park.
- 1.2 On 22nd April 2016, Old Kampala Senior Secondary School (the Entity) published a bid notice in the New Vision for hiring out space at Plot 19 for use as a bus park. Two bids were received, one from Volcano Bus Company and the other from Bakuli Bus Terminal Limited. The Evaluation Committee recommended award of the contract to Volcano Bus Company and on 8th June 2016, the Contracts Committee awarded the contract to Volcano Bus Company. On 22nd July 2016, the Entity signed a Tenancy Agreement with Volcano Bus Company to let out the space at Plot 19 for use as a bus park at a cost of five (5) million per month.
- 1.3 By letter dated 8th January 2017, the Executive Committee of Old Kampala Students' Association (the Applicant), acting on behalf of the General Assembly of the Applicant petitioned the Executive Director of the Public Procurement and Disposal of Public Assets Authority (the first Respondent) to investigate the procurement process of hiring out Plot 19 so as to direct the Entity on '*how to proceed or repeat the procurement process*'.
- 1.4 By letter dated 2nd February 2017, the 1st Respondent wrote to the head teacher of the Entity informing her of the petition from the Applicant and of the commencement of investigations into the matter by the 1st Respondent.
- 1.5 As part of the investigations, the 1st Respondent held a meeting with the representatives of the Applicant and representatives of the entity. The Applicant states that at this meeting, they brought to the attention of the 1st Respondent the irregularities in the procurement process namely;
 - (i) Volcano Bus Company [the Best Evaluated Bidder (BEB)] submitted a tax clearance certificate addressed to Kampala Capital City Authority (KCCA) instead of the Entity as required by Uganda Revenue Authority.
 - (ii) the BEB did not include a valid trading licence at the time of submission of the bid but instead submitted a City Operator Identification Number (COIN)

(iii) the BEB was already indicating Plot 19 as its registered physical address even before the procurement process commenced as evidenced on the successful bidder's investment licence granted by the Uganda Investment Authority and on the application for a trading licence (COIN)

(iv) the BEB did not submit any documentation from a financial institution as its bid security as required in the bidding documents

(v) the grounds on which the other bidder Bakuli Bus Terminal Limited was disqualified at preliminary stage were the failure to provide a tax clearance certificate yet even the successful bidder did not produce a valid tax certificate.

1.6 By letter dated 20th March 2017, the 1st Respondent wrote to the Applicant informing it that after the investigations, it had found that-

"1. There was no merit in the allegation that the Contracts Committee irregularly awarded the contract to Volcano Limited at UGX 60,100,000.

2. However, the disposal process had the following procedural anomalies: (a) the headteacher did not undertake a rent valuation of the property prior to commencement of the disposal process; and (b) the head teacher did not seek Solicitor General's clearance prior to signing the Tenancy Agreement."

In the said letter, the 1st Respondent recommended that-

"1. Since there is a Tenancy Agreement in place, the Board of Governors should caution the Headteacher for the procedural anomalies.

2. The entity should seek guidance of the Solicitor General on the implementation of the Tenancy Agreement."

1.7 The Applicant was dissatisfied with the decision of the 1st Respondent, hence this Application before the Tribunal.

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

2.1 On 9th May 2017, the Applicant applied to the Tribunal for a review of the Authority's decision.

2.2 The grounds for the Application are summarized as follows:

2.2.1 *The 1st Respondent's assertion that there was no merit in the allegation that the Contracts Committee irregularly awarded the contract to Volcano Limited at UGX 60,100,000 is false because (a) the successful bidder did not meet the basic qualification of bidders because the company did not submit a tax clearance certificate and a valid trading licence among others; (b) the entity did not seek approval of the Minister as required by section 87(1c) of the PPDA Act prior to commencement of the disposal process; (c) the successful bidder was already using Plot 19 as its registered address; (d) in the advert that requested for expression of interest, the entity directed prospective bidders to check on website for more details but instead presented an email address and thus locked out prospective bidders.*

2.2.2 *The 1st Respondent's assertion that since there is a Tenancy Agreement in place, the Board of Governors should caution the Headteacher for the procedural anomalies is misplaced because (a) there cannot be a tenancy agreement if the agreement is signed before seeking clearance of the Solicitor General; (b) the 1st Respondent has no mandate to direct on what the Board of Governors ought to do (c) the 1st Respondent should have condemned the incompetence of the procurement, evaluation and contracts committee.*

3.0 **DISPOSAL OF APPLICATION**

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

- 1) The Applicant's Application to the Tribunal dated 9th May 2017, annexes to the Application, the written and oral submissions.
- 2) The 1st Respondent's response to the Application, annexes to the response, the written and oral submissions.
- 3) The Entity's response to the Application and its written and oral submissions.

3.2 The Tribunal conducted a hearing for the Parties on 19th May 2017. The Applicant was represented by Ms. Jacqueline H. Atugonza. The Authority was represented by John Kallemera and Uthman Segawa. The Entity was

represented by Mr. Katumba Chrisestom. In attendance were representatives from the Applicant and the Respondents.

4.0 **SUMMARY DECISION**

4.1 In accordance with the Act, the Tribunal delivered a summary of this decision on 22nd May 2017. What follows is the detailed reasoning in support of our decision.

5.0 **ISSUES**

5.1 Four (4) issues were formulated for resolution by the Tribunal as follows;-

(i) Whether the Applicant was adversely affected by the decision made by the 1st Respondent within the meaning of section 91 I (3) of the Act.

(ii) Whether the 1st Respondent erred in law and fact to uphold that the Entity regularly awarded the contract to Volcano Limited?

(iii) Whether the 2nd Respondent's signing of the contract before seeking clearance from the Solicitor General is legally acceptable?

(iv) What remedies are available to the parties?

6.0 **SUBMISSIONS BY COUNSEL**

6.1 In support of the first issue, which was raised as a preliminary objection, Counsel for the 1st Respondent submitted that the Applicant is not a person aggrieved by a decision of the Authority and therefore cannot institute an application before the Tribunal. He submitted that the Applicant is a company limited by guarantee and is therefore a legal entity separate from the running of Old Kampala Secondary School, the entity. He submitted that the matter before the Tribunal is in respect to a procurement conducted by the Entity. He argued that it is only persons who are directly affected who can claim to be adversely affected by the decision made by the Authority within the meaning of section 91 I (3) of the Act.

6.2 In response to the preliminary objection, Counsel for the Applicant submitted that the Applicant comprises of persons who pay taxes that are

used to finance the activities of the 2nd Respondent. She further submitted that the Applicant is represented on the Board of Governors of the entity. She stated that the Applicant is fully recognized by the Entity as evidenced by a Certificate of Recognition issued by the Entity to the Applicant, and hence the Applicant has the capacity to bring this Application before the Tribunal.

- 6.3 The Tribunal carefully considered the submissions of both parties on the preliminary objection. Under section 91 I (1) of the PPDA Act, it is primarily bidders aggrieved by a decision of the Authority who may apply to the Tribunal to review a decision of the Authority. However, under section 91 I (3) a person who is not a bidder in a procurement may apply to the Tribunal for review of a decision of the Authority if the person shows that his or her or its rights are adversely affected by the decision of the Authority. In the instant Application, the Applicant, not being a bidder had to show the Tribunal that its rights were adversely affected by the decision of the Authority.
- 6.4 In determining whether a person is adversely affected by a decision of the Authority so as to fall under the ambit of section 91 I (3), the Tribunal has to consider the facts of each particular application. The Tribunal was convinced by the submission of the Applicant that it is a stakeholder in Old Kampala Secondary School, the Entity. The Applicant is represented on the Board of Directors of the School. The Applicant is also in possession of a certificate of recognition issued by the Entity. The Tribunal accordingly finds that the Applicant is a recognised stakeholder of the Entity capable of being adversely affected by the decision of the Authority and hence has the standing to apply to the Tribunal for a review of the decision of the Authority under section 91 I (3) of the Act.
- 6.5 The Tribunal overruled this Preliminary objection and heard the Application on merits.
- 6.6 In respect to the second issue ***“whether the 1st Respondent erred in law and fact to uphold that the Entity regularly awarded the contract to Volcano Limited”***, Counsel for the Applicant submitted that the 1st Respondent was wrong to find that the Entity regularly awarded the contract to Volcano Limited. Counsel for the Applicant submitted that Volcano Limited did not meet the basic requirement on the Tax Clearance Certificate. The Tax Clearance Certificate submitted by Volcano Limited to the entity was addressed to Kampala Capital City Authority, and not to the Entity. She also contended that Volcano Limited did not possess a valid Trading License at the time of submitting the bidding document but it presented a City Operator Identification Number (COIN).

- 6.7 On the recommendation by the 1st respondent that since there is a tenancy agreement in place, the Head teacher should be cautioned, Counsel submitted that this too was a wrong decision. She contended that an agreement signed before obtaining the Solicitor General's clearance is null and void.
- 6.8 In conclusion, Counsel for the Applicant asked the Tribunal to find that the entire procurement process was null and void and to nullify the report of the 1st Respondent. She also asked the Tribunal to direct the Entity to repeat the procurement process in accordance with the law, and to award costs to the Applicant.
- 6.9 In response to the submissions of Counsel for the Applicant on this issue, Counsel for the 1st Respondent submitted that the Entity regularly awarded the contract to Volcano Limited. He submitted that the 1st Respondent established that Volcano Limited submitted in its bid, a transaction tax clearance certificate and a trading licence dated 10th October 2016.
- 6.10 On the issue of the Entity signing a contract with Volcano Limited prior to obtaining clearance from the Solicitor General, Counsel submitted that the 1st respondent found that signing a contract before obtaining clearance from the Solicitor General was in contravention of regulation 7(1) (f) of the PPDA (Contracts) Regulations 2014 which provides that an Entity shall not issue a contract document which binds it until the Attorney General makes the necessary approval of the contract. He submitted that the 1st Respondent recommended to the Board of Governors to caution the Accounting officer of the Entity. He submitted that with regard to the claim by the Applicant that the 1st respondent should have ordered for cancellation of the procurement process and the contract, the 1st Respondent could not order for such cancellation since the contract had been cleared by the Solicitor General.
- 6.11 Counsel for the 1st Respondent prayed that the Application be struck out and the Tribunal maintains the decision of the Authority.

6.12 Counsel for the Entity, Mr. Katumba also associated himself with the submissions of the 1st Respondent.

7.0 **RESOLUTION BY THE TRIBUNAL**

7.1 To resolve the issue whether the 1st Respondent erred in law and fact to uphold that the Entity regularly awarded the contract to Volcano Limited, the Tribunal considered regulations 16 and 17 of the PPDA (Evaluation) Regulations, 2014, S.I No 09 of 2014.

7.2 Regulation 17 (1) provides that an evaluation committee shall at the preliminary examination, verify the accuracy, validity and authenticity of the documents submitted by a bidder. Regulation 17(2) provides, among others, that a bidder shall be eligible where the bidder has fulfilled the obligations to pay taxes and social security contributions in Uganda. Under regulation 17(3), one of the documents required to be submitted with the bid is a trading licence. A bidder must thus submit with the bid, among other documents, a tax clearance certificate to show that the bidder has fulfilled tax obligations and a trading licence.

7.3 In the instant Application, it was submitted by the Applicant that the tax Clearance Certificate submitted by Volcano Limited was not addressed to the Entity but was instead addressed to Kampala Capital City Authority thus making it invalid. The Applicant also submitted that the Volcano Ltd did not possess a trading licence at the time of submission of bids but only had a COIN number.

7.4 The Tribunal has found on the record that the Transaction Tax Clearance Certificate issued to Volcano Ltd dated 19th May 2016 was not addressed to Old Kampala Secondary School, (the Entity) but was instead addressed to Kampala Capital City Authority. In the Note to the Transaction Tax Clearance Certificate, it is stated that *"This Tax Clearance certificate is valid only if submitted to the Addressee and for the purpose specified above"*. The Certificate also shows that the purpose for which the certificate was issued was for the purpose of getting a COIN.

7.5 The Tribunal disagrees with the finding of the 1st Respondent that the Tax Clearance Certificate was valid. The Tribunal finds that the Tax Clearance certificate was invalid for two reasons;
(i) it was not addressed to the Entity and,

(ii) it was not for purpose of submitting a bid, but for purpose of obtaining a COIN.

The Evaluation Committee should have, in accordance with Regulation 16 (2) of the PPDA (Evaluation) Regulations, failed the bid of Volcano Ltd for lack of eligibility for submitting in the bid an invalid Tax Clearance Certificate.

- 7.6 With respect to the trading licence, it is also on record that the Trade Licence Certificate is dated 10th October 2016, a date well after the date of bid submission which was 23rd May 2016. The Tribunal is thus in agreement with the submission of the Applicant that at the time of submitting bids, Volcano Ltd was not in possession of a valid Trading License and hence failed the eligibility test in regulations 16 and 17 of the PPDA Evaluation Regulations.
- 7.7 The Tribunal finds that Volcano Ltd was not eligible to be issued a contract due to the reasons stated above. The 1st Respondent was wrong in stating that the Entity regularly awarded the contract to Volcano Limited.
- 7.8 To determine whether the Entity's signing of the contract before seeking clearance from the Solicitor General was legally acceptable, the Tribunal considered article 119 (5) of the Constitution of the Republic of Uganda and regulation 7(1) (f) of the PPDA (Contracts) Regulations, 2014 SI No. 14 of 2014 cited by the 1st Respondent. Article 119 (5) of the Constitution provides that no agreement, contract, treaty, convention or document by whatever name called, to which the Government is a party or in respect of which the Government has an interest, shall be concluded without legal advice from the Attorney General, except in such cases and subject to such conditions as Parliament may by law prescribe.
- 7.9 Parliament has, through its powers delegated to the Minister responsible for finance prescribed under regulation 7 (1) of the PPDA (Contracts) Regulations, 2014, SI No. 14 of 2014 that a procuring and disposing entity shall not issue a contract document, purchase order, or other communication in any form, conveying acceptance of a bid that binds a procuring and disposing entity to a contract with a provider, until "***all relevant agencies, including, the Attorney General make the necessary approval of the contract***".
- 7.10 Both article 119(5) of the Constitution and Regulation 7(1) (f) of the PPDA (Contracts) Regulations, 2014 are couched in mandatory terms. A contract

shall not be issued or entered into with a Provider before approval of the Attorney General. The Tribunal has not seen any discretion under these provisions given to the Attorney General to clear a contract retrospectively, as was done in the instant Application.

7.11 It is the Tribunal's firm view that the Solicitor General lacked legal power to clear a contract that was signed in contravention of article 119(5) of the Constitution and regulation 7(1) (f) of the PPDA (Contracts) Regulations, 2014. Consequently, the Tribunal finds that the said contract entered into between the Entity and Volcano Ltd was void.

7.12 For the reasons expounded above, this Application succeeds.

8.0 DECISION OF THE TRIBUNAL

1. The Application is allowed and the decision of the 1st Respondent is set aside.
2. The Entity is directed to re-tender the procurement process if still interested in the procurement activity.
3. Each party shall bear its own costs.

SIGNED and dated this 16th day of 08 2017 by the said