

**THE REPUBLIC OF UGANDA**

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

**APPLICATION NO 8 OF 2017**

**APPLICATION REGARDING A RECOMMENDATION BY THE PARLIAMENT OF UGANDA TO THE PUBLIC PROCUREMENT AND PUBLIC ASSETS DISPOSAL AUTHORITY TO INVESTIGATE ALLEGED FRAUD BY CHINA COMPLETE PLANT IMPORT & EXPORT CORPORATION LTD IN THE PROCUREMENT PROCESS FOR THE CONSTRUCTION OF A NEW CHAMBER OF PARLIAMENT.**

**APPLICANT: CHINA COMPLETE PLANT IMPORT AND EXPORT CORPORATION LTD.**

**RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY.**

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

## DECISION OF THE PPDA APPEALS TRIBUNAL

### 1.0 BRIEF FACTS

- 1.1 On 30<sup>th</sup> August 2016, the Clerk to Parliament wrote to the Public Procurement and Disposal of Public Assets Authority (Respondent) recommending further investigation on allegations of fraudulent practices against China Complete Plant Import and Export Corporation Ltd (the Applicant) with respect to the cancelled procurement for the construction of the new chamber of parliament.
- 1.2 In his letter, the Clerk to Parliament alleged that the Applicant had submitted a forged letter of confirmation of availability of one of its proposed staff (Engineer John Muchiri) who had denounced the letter as not having been authored by him.
- 1.3 On 26<sup>th</sup> October the Authority wrote to the Applicant notifying them of the recommendation received from Parliament, and requested them to submit a defense and appear at a hearing at the Authority's offices on 11<sup>th</sup> November 2016.
- 1.4 The Applicant then filed HCCS 682 of 2016, and Miscellaneous Application 908 of 2016 at the High Court of Uganda, seeking inter-alia injunctive orders staying an investigation by the Authority.
- 1.5 By letter dated 11<sup>th</sup> November 2016, the Applicant's advocates informed the Authority that they had obtained an Interim Order staying the investigation by the Authority and were therefore unable to respond to the letter requesting the Applicant to appear before the Authority to respond to the allegations made against it.
- 1.6 On 14<sup>th</sup> December 2016, the High Court of Uganda dismissed the Miscellaneous Application filed by the Applicant and directed the Authority to continue with its investigation.
- 1.7 On 20<sup>th</sup> January 2017, a meeting was held at the Authority which was attended by the Applicant's representatives and representatives from Parliament.

- 1.8 By letter dated 27<sup>th</sup> January 2017, the Authority wrote to the Applicant requesting them to respond to further queries arising out of the meeting held with the Applicant.
- 1.9 By letter dated 22<sup>nd</sup> February 2017, the Applicant's advocates on behalf of their client wrote to the Authority declining to respond to any queries until the Authority had set up an impartial investigation team.
- 1.10 By letter dated 16<sup>th</sup> May 2017, the Authority advised the Applicant to appeal to the Tribunal for a determination of the matter in accordance with Regulation 15 of the PPDA Regulations SI No 06 of 2014, in light of the allegations of bias and conflict of interest levelled against the Authority.

## 2.0 **APPLICATION**

- 2.1 On 29<sup>th</sup> May 2017, the Applicant lodged an appeal at the Tribunal for a review of the decision of the Authority in its letter dated 19<sup>th</sup> January 2016 not to entertain the Applicants complaint filed on 18<sup>th</sup> December 2015 on grounds that there had been an accusation of bias and conflict of interest levelled against the Authority by the Applicant.
- 2.2 The Applicant filed a statement of facts and reasons in support of the application which in summary:
1. ***Questioned the jurisdiction of the Authority's Management Advisory Committee to investigate and conduct a hearing in respect of the recommendation to suspend the Applicant.***
  2. ***Questioned the composition of the Management and alleged that it had been illegally constituted.***
  3. ***Questioned whether the Chairman of the Management Committee could preside over proceedings after appearing as Counsel for the Authority in HCCS 682 OF 2016 and Miscellaneous Application 908 of 2016.***
  4. ***Complained about the Principal Legal Officer of Parliament appearing as Prosecutor in proceedings before the Management Advisory Committee.***

### 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 29<sup>th</sup> May 2017, Annexes to the Application, the written and oral submissions.
- 2) The Entity's response to the Application, Annexes to the response, the written and oral submissions.

3.1 The Tribunal conducted a hearing for the Parties on 7<sup>th</sup> June 2017. The Applicant was represented by Mr. David Kaggwa, while the Authority was represented by Mr. John Kallemera, representatives of the Applicant and Parliament were also in attendance.

### 4.0 SUMMARY DECISION

4.1 In accordance with Section 91 I (7) of the Act, the Tribunal delivered a summary of this decision on Thursday 8<sup>th</sup> June 2017. What follows is the detailed reasoning in support of the Tribunal decision.

### 5.0 ISSUES

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

- (a) *Whether the Management Advisory Committee of the Applicant had the jurisdiction to conduct a hearing and an investigation in respect of a recommendation to suspend the Applicant?*
- (b) *Whether the Chairperson and the Management Advisory Committee of the Applicant had a conflict of interest and was biased against the Applicant?*
- (c) *Whether the Applicant was accorded a fair hearing during the proceedings conducted by the Respondent on 20<sup>th</sup> January 2017?*
- (d) *Whether the Tribunal should determine the suspension recommendation contained in the letter from Parliament dated 30<sup>th</sup>*

*August 2016 in accordance with Regulation 15 of the PPDA Regulations, 2014*

6.0 SUBMISSIONS BY COUNSEL

- 6.1 Counsel for the Applicant in support of the first issue submitted that the Management Advisory Committee (MAC) did not have authority to summon, investigate and make a decision to suspend the Applicant. Counsel argued that these functions were vested in the Board under the Act and were non – delegable by the Board to any other body. Quoting Section 15A (i)(f) of the Act, Counsel argued that the Act reserved powers to hear complaints from the Public, Procuring and Disposing Entities, providers or any other bodies, with the Board. Citing the case of **Richard Mwami -vs- MTN (HCCS 177 of 2012)** Counsel argued that MAC could not make any recommendations to the Board to suspend the Applicant, because MAC was not legally constituted.

Counsel argued that MAC departed from its terms of reference when it conducted a full hearing during the course of its preliminary investigations. Counsel argued that the proceedings before MAC contravened the Applicant's constitutional right to conduct lawful trade or business, because the proceedings had the effect of suspending the Applicant from engaging in any public procurement.

- 6.2 In support of the second issue Counsel for the Applicant argued that the composition of MAC which was chaired by Mr. Uthman Segawa had a conflict of Interest and any decision made by this body was biased. He supported this argument by referring to the proceedings in HCCS 682/2016 & MA 908/16 referred to above in which Mr. Uthman Segawa had appeared as Counsel for the Authority. Counsel argued that Mr. Segawa's prior knowledge of the matters before MAC had resulted in a biased decision allowing the proceedings to continue despite the fact that the letter addressed to the Authority from Parliament had not cited any fraudulent conduct by the Applicant. Counsel submitted that Mr. Segawa had arbitrarily constituted Mr. Solomon Kirunda, the Principal Legal Officer of Parliament as the Lead Counsel, who proceeded to prosecute the allegation of fraud against the Applicant. He argued that Mr. Kirunda could only have appeared as a witness but not lead Counsel.

- 6.3 In support of the third issue Counsel for the Applicant argued that the Applicant was not accorded a fair hearing at MAC because its Chairman had denied them the opportunity to cross examine Eng. John Muchiri whose denunciation of the appointment letter had given rise to the claim by Parliament of alleged fraudulent conduct by the Applicant and subsequent referral of the matter to the Authority.
- 6.4 Counsel for the Applicant prayed that the Tribunal should find the proceedings before MAC null and void, order fresh hearing before the board of directors, and in the alternative if the Tribunal found that MAC was lawfully constituted order a re- hearing which excluded Mr Segawa as part of the quorum of MAC. Counsel prayed for costs of the proceedings.
- 6.5 In response to the submissions of the Applicant on the first issue, Counsel for the Authority argued that Parliament in its letter dated 29<sup>th</sup> August 2017, informed the Authority that the Applicant and another bidder had “issues of forgeries which were offences under the Act that called for suspension of a bidder as per clause 94 (a) for breach of the providers code of ethics.
- 6.6 Counsel submitted that this was the first time the delegation of powers to the Authority Management Advisory Committee (MAC) to conduct an investigation on behalf of The Board Authority was being raised. Counsel argued that Section 15A (4) of the Act, provided that anybody aggrieved by a decision made under Section 15A could appeal to the Authority Board. Counsel pointed out that there was no pending appeal to the Authority board under Section 15A (4) of the Act, and that in any event there had been no recommendation made to the Board of the Authority to suspend the Applicant.
- 6.7 In response to the second issue Counsel for the Authority submitted that the Chairman of the MAC did not have a conflict of interest, and was not biased as alleged by the Applicant. Counsel argued that the Applicant had filed an action in the High Court against the Authority and it was obliged to defend itself. That the Chairman of MAC who appeared to defend the suit against the Authority was only doing so in his official capacity as the Authority Legal Director. In his opinion the Chairman of MAC had exercised his discretion

correctly when he refused to recuse himself from the proceedings before MAC in relation to the investigation being conducted upon receipt of the recommendation from Parliament. Counsel submitted that there had been no argument made before the High Court about whether the Applicant had been found culpable by the Authority with respect to the pending complaint. In conclusion on the issue, Counsel argued that the allegation of bias and conflict of interest against the Chairman of MAC was in bad faith and totally unsubstantiated by the evidence on record or the manner in which the proceedings were conducted at MAC.

6.8 Responding to the third issue, Counsel submitted that the Engineer (John Muchiri) whose availability had given rise to the complaint by Parliament had been invited to the hearing but was unable to attend because of a longstanding conflicting obligation. He argued that all the correspondence relevant to the investigation had all been availed to the Applicant and it had been given ample opportunity to rebut the documentation and or furnish the Authority with rebuttal documentation.

6.9 In response to the fourth issue, Counsel argued that Regulation 15 of the PPDA Regulations, SI No. 06 of 2014 provided that if an aggrieved bidder alleged bias or conflict of interest on the part of the Authority, which affected its ability to deal impartially with a recommendation to suspend the provider, it could appeal directly to the Tribunal for determination of the matter. It was because of the repeated allegations of bias and conflict of interest that the Authority had referred the matter to the Tribunal, in the interest of justice. He prayed that the Tribunal should finally determine the recommendation for suspension made by Parliament, since all the pertinent information relating to the recommendation was now before the Tribunal.

#### 7.0 **RESOLUTION BY THE TRIBUNAL**

7.1 The Tribunal carefully studied the Application, the responses to the Application and the written submissions. It also carefully listened to the oral arguments made by the parties at the hearing.

7.2 In resolving this application the Tribunal will deal with the issues in the same order as presented by the parties.

- 7.3 To resolve the first issue, which in a nutshell questions the Authority of MAC to conduct investigations after receiving a recommendation to suspend a provider from a procuring and disposing entity, the Tribunal studied the extract of the Minutes of the Management Advisory Committee Meeting (MAC) held on Friday 20<sup>th</sup> January 2017. In his communication from the Chair the Chairperson of the proceedings addressed the Applicant, the complainant and all present as follows:-

*“The meeting was informed that the invited persons were before the Management Advisory Committee established by the Board to handle preliminary investigations for suspension of providers, Administrative reviews and accreditations among others. The meeting was further informed that the final decision on the matters handled by the Committee is by the Authority’s board of directors. He informed the meeting that the proceedings were in accordance with Section 94 of the Act and PPDA Regulations 12-14.*”

- 7.4 Section 15 of the PPDA Act, 2003 provides as follows:

**15 Committees of the Board.**

- (1) The Board may establish:-
- (a) a Complaints Review Committee which shall handle complaints from providers and any other interested parties arising out of the execution of the procurement or disposal function by the procuring and disposing entities;
  - (b) an Advisory Committee which shall review the performance of the Authority, the procuring and disposing entities and the Complaints Review Committee; and
  - (c) any other committee that maybe necessary for the better carrying out of the functions of the Authority.
- (2) The Board shall determine the terms of reference of the committees, their composition and, in consultation with the Minister, their terms and conditions of service.



This provision gives the Board of the Authority wide discretion to set up such subcommittee it deems appropriate for the better carrying out of the Authorities mandate.

- 7.5 The Tribunal is satisfied that the Management Committee of the Authority was properly established in accordance with section 15 of the Act, with full authority to conduct preliminary investigations as outlined above by the Chairperson in his communication to the participants at meeting held on 20<sup>th</sup> January 2017, and hear the Applicant on the recommendation made by Parliament for its suspension in accordance with Section 94 of the Act.
- 7.6 Turning to the second issue in which the Applicant complained that the Chairperson of MAC was biased and had a conflict of interest, arising from the fact that he had acted as Counsel for the Authority in Miscellaneous Application 908/2016, in which the Applicant had obtained an interim protective order staying hearing of the MAC to investigate the recommendation to suspend the Applicant, it is worth recalling Article 28(1) of the Constitution which provides that in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair speedy and public hearing before an independent and impartial court or tribunal established by law. Construing this Article in its widest possible terms as is the norm in interpreting the Constitution the following principles maybe drawn from the Article:-
- (a) No man maybe a judge in his own cause, or sit in judgment on an issue in which he has a direct interest.
  - (b) The Court or Tribunal should not have formed a preconceived decision without hearing the merits of the matter before it.
  - (c) The Court or Tribunal must dispense justice without fear favour or ill will towards any of the parties appearing before it.
- 7.7 Applying these principles to the arguments raised by the Applicant it is an uncontested fact that the Chairperson of MAC had appeared as Counsel for the Authority in Miscellaneous Application 908 of 2016, in which the

Applicant sought and obtained a protective order barring any further investigation of the recommendation, it has been alleged by the Applicant that in his arguments defending the application he may have given the impression that the alleged forgery of the letter of confirmation had been confirmed. Whilst the burden of proving conflict of interest or bias was on the Applicant, it would appear that on the facts as presented it would not be unreasonable to impute lack of impartiality on the part of the Chairperson of MAC having regard to his role as Counsel for the Authority in the prior hearings before Court. The Tribunal therefore finds that the Chairman of MAC was biased in discharging his duty as Counsel for the Authority in the just concluded hearing before Court and thereafter acting as Chairman of MAC because in so doing he gave credence to the Applicants apprehension that he had already formed an opinion on the issue before MAC, and as such a conflict of interest arose.

7.8 Turning to the third issue as to whether the Applicant received a fair hearing during the proceedings conducted by the Authority on 20<sup>th</sup> January 2017, we start by referring to the Minutes of the MAC meeting of that date. In the communication from the Chair, the Applicant and other participants at the hearing were informed of the procedure at the hearing as follows;

***“The Chairperson informed the meeting of the procedure to be adhered to and stated that the Entity would present their case clearly stating the reasons for the recommendation to suspend COMPLANT (the Applicant). That COMPLANT would be given an opportunity to respond to the allegations raised by the Entity and that staff from the Authority would request for clarifications from either parties during their submission. He advised them to make reference to the documentary evidence and the law in the course of their submissions.”*** It is apparent that the meeting did indeed follow the procedure stated in the Chairpersons communication. In **Richard Mwami –vs- MTN (U) LTD**, the Hon Mr Justice Benjamin Kabito at pg 6 held as follows; ***“The right to a fair hearing is now constitutional. Article 42 of the constitution provided for a right to just and fair treatment in administrative decisions. Article 44 (c) also makes the right to a fair hearing non-derogable. .... The case of GENERAL MEDICAL COUNCIL VS SPACKMAN (1943) ALLER 637 set the minimum standard of a fair hearing where their Lordships stated that; “I do not think they are bound to treat such questions as though it was a trial ... they can obtain information or use any way they think best always***

*giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any statement prejudicial to their view.”*

7.9 Regulation 14 of the PPDA Regulations (SI 6/14) lays out in great detail the obligations of the Authority in carrying out their duties upon receiving a recommendation to suspend a provider. This regulation embodies all the requirements of what would be considered a fair hearing. We reproduce below the regulation for ease of reference.

**14 Investigations by the Authority**

**(1) Upon receipt of a recommendation to suspend a provider, the Authority shall immediately:-**

**(a) Notify the provider, giving full details of the recommendation and invite the provider to submit information or evidence in defence; and**

**(b) Institute an investigation**

**(2).....**

**(3).....**

**(4) A provider who is the subject of a recommendation for suspension, shall be permitted to submit evidence:-**

**(a) in person or through a representative;**

**(b) through presentation of witnesses; or**

**(c) in writing**

**(5).....**

7.10 The Tribunal finds that the Authority carried out the hearing at MAC on 20<sup>th</sup> January 2017, in accordance with Regulation 14 reproduced in part above, save that as resolved in the previous issue there was a perception of bias in that the Chairperson of the proceedings could have been said to have already formed a pre- conceived decision and therefore had a conflict of interest, as a result the Applicants right to obtain a fair hearing was adversely affected.

8.0 Turning to the issue concerning whether the Tribunal should dispose of the recommendation made by Parliament for suspension of the Applicant, we

note that whilst Regulation 15 gives the Tribunal the mandate to deal with a recommendation for suspension by a procuring and disposing entity, that mandate comes with a caveat in that the Tribunal must be satisfied that the Applicant seeking this relief has made a credible case that the Authority is unable to dispose of the recommendation impartially, because of apparent conflict of interest. As seen above the Tribunal is satisfied that the Applicant proved that the Chairperson presiding over the MAC proceedings could be said to have been biased, and therefore a conflict of interest had arisen.

- 8.1 The Tribunal finds that notwithstanding the perceived bias and resultant conflict of interest discussed above, the issue of apparent bias of MAC as constituted at the time of the hearing is remediable and we therefore do not find any justifiable reason for ousting the Authority's mandate to determine the recommendation to suspend the Applicant in these circumstances. The Tribunal therefore remits the recommendation to suspend the Applicant back to Authority for investigation and further management, on the basis that the Chairperson of MAC as constituted should not preside or sit as an assessor in any subsequent hearing affecting the recommendation to suspend the Applicant.
- 8.2 Before taking leave of this Application, the Tribunal wishes to offer guidance to the Authority when handling investigations / hearings by MAC. The Authority must ensure that the applicant is seen to have been given a right to a fair hearing. Officers of the Authority who have acted as Counsel in proceedings before Courts of Law on matters which may come up before MAC must not sit in or preside in subsequent hearings before MAC of matters that they have handled previously in Court, this will enhance the perception of impartiality at such subsequent hearing.
- 8.3 The Application is allowed in part.

9.0 DECISION OF THE TRIBUNAL

1. The Management Advisory Committee had jurisdiction to conduct a hearing and investigation in respect of a recommendation to suspend the Applicant.
2. The Management Advisory Committee quorum did not adhere to the principles of natural justice in so far as one of the participants prosecuted the Authority's defence in proceedings at the High Court which contested/disputed the Authority's decision to proceed with the Investigations.
3. The Tribunal refers this application back to the Authority to conduct a fresh investigation in respect to the recommendation to suspend the Applicant.
4. Each Party shall bear its own costs.

DATED this 8<sup>th</sup> day of Sept. August 2017