

**THE REPUBLIC OF UGANDA**

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

**APPLICATION NO 20 OF 2017**

**APPEAL TO THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC  
ASSETS  
APPEALS TRIBUNAL IN RESPECT EXPRESSION ON INTEREST FINANCE  
AND BUILD FOR BUKERERE JUBILEE CENTRE PROCUREMENT  
REFERENCE NO: NHCC/SRV/17/00015.**

**APPLICANT: NUDAWN FACILITIES MANAGEMENT LLC**

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

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

## DECISION OF THE PPDA APPEALS TRIBUNAL

### 1.0 BRIEF FACTS

1. National Housing and Construction Company (the Entity) advertised for bids for expression of interest for the finance and build of Bukerere city as per procurement reference No: NHCC/SRV/17/00015.
2. On 13<sup>th</sup> April 2016, Nudawn Facilities Management LLC (the Applicant) submitted its bid for the expression of interest for the finance and build of Bukerere city.
3. On 29<sup>th</sup> June 2017, the Applicant was notified of the Best Evaluated Bidder and the reason for its not being successful was given.
4. On 6<sup>th</sup> July 2017, the Applicant wrote to the Head of Procurement of the Entity seeking for clarification on the issues raised on the notice of the Best Evaluated Bidder.
5. In a letter dated 12<sup>th</sup> July 2017, the Accounting Officer wrote to the applicant giving clarification on the reasons for its elimination. The applicant was surprised with the new issues that were raised in the said letter.
6. On 13<sup>th</sup> July 2017, the Applicant again wrote to the Entity seeking clarification on submission of certain documents.
7. On 29<sup>th</sup> July 2017, the Accounting Officer of the Entity informed the Applicant that he had fully clarified the issues raised in his earlier letter dated 12<sup>th</sup> July 2017.
8. On 3<sup>rd</sup> August 2017, the Applicant filed a complaint for administrative review at the Entity level citing unfair evaluation.
9. On 16<sup>th</sup> August 2017, the Accounting Officer issued a decision that the complaint for administrative review was received outside the stipulated time provided by the PPDA law. However, an internal review of the Expression of Interest was constituted and it agreed with the findings of the evaluation report and the shortlist based on the reasons provided by the Evaluation Committee.
10. On 29<sup>th</sup> August 2017, the Applicant filed a complaint for administrative review to the Authority and it was dismissed since it was filed out of time stipulated by the PPDA law.
11. On 12<sup>th</sup> October 2017, the Applicant being dissatisfied with the decision of the Authority filed this Application before the Tribunal challenging its decision.

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

2.1 On 12<sup>th</sup> October 2017, the Applicant filed an Application with the Tribunal for a review of the Authority's decision.

2.2 The grounds for the Application to the Tribunal are:

- a) The Authority erred in law and fact when it dismissed its application for having been filed out of time.
- b) The Authority failed to evaluate the independence, transparency and performance of the procurement structure at National Housing and Construction.

## **3.0 DISPOSAL OF APPLICATION**

3.1 The Tribunal analyzed the following documents:

- (1) The Applicant's Application to the Tribunal dated 12<sup>th</sup> October 2016, Annexes to the Application, the written and oral submissions.
- (2) The Authority's response to the Application dated 18<sup>th</sup> October 2016, Annexes to the response and oral submissions.

3.2 The Tribunal conducted a hearing for the Parties on 25<sup>th</sup> October 2017. The Applicant was represented by Mr. Chris Kabuga while the Authority was represented by Mr. John Kallemera and Mary Akiror.

## **4.0 SUBMISSIONS BY COUNSEL**

4.1 Mr. Chris Kabuga, Counsel for the Applicant submitted that the Authority erred in law and fact when it dismissed its application for having been filed out of time.

4.2 He submitted that the application was brought under Section 91(1) of the PPDA Act, 2003 which provides that a bidder who is aggrieved by a decision made by the Authority under Section 91(4), may make an application to the Tribunal for a review of the decision of the Authority.

4.3 Counsel further submitted that on 6<sup>th</sup> July 2017, the Applicant wrote to the Entity seeking clarification on the issues raised on the notice of the Best

Evaluated Bidder and again the Applicant on 13<sup>th</sup> July 2017 wrote to the Entity seeking for clarification on submission of certain documents. He submitted that the communication from the Accounting Officer of the Entity reached the Applicant on 16<sup>th</sup> July, 2017. Counsel further submitted that on 29<sup>th</sup> July 2017, the Accounting Officer replied to the Applicant's letter that in the letter dated 12<sup>th</sup> July, 2017 he had clarified the issues raised by the Applicant.

- 4.4 Counsel submitted that the Applicant became aware of the circumstance giving rise to the complaint on 29<sup>th</sup> July 2017 when it received the letter from the Accounting Officer of the Entity informing them that he had fully clarified the issues raised in his earlier letter dated 12<sup>th</sup> July 2017. He further submitted that when computation of time is calculated from 29<sup>th</sup> July 2017, the Applicant clearly filed its complaint before the Entity within the time stipulated by the law.
- 4.5 In respect to the 2<sup>nd</sup> issue, counsel submitted that in accordance with Section 45 of the PPDA Act, 2003 all procurement and disposal shall be conducted in a manner which promotes transparency, accountability and fairness.
- 4.6 Counsel submitted that the Applicant requested for the bank details to enable it pay for the administrative review fees but the Accounting Officer of the Entity rejected to furnish it with the bank details. The process was therefore not transparent and unfair to the Applicant. He further submitted that the Applicant thinks the whole process is unfair, discriminatory in nature and the refusal to provide Bank details constitutes unfair hearing.
- 4.7 In conclusion, Counsel prayed that the Tribunal should hear this application to enable the Applicant to fully participate in the procurement process.
- 4.8 In response to the submission by Counsel for the Applicant, Mr. John Kallemera, Counsel for the Authority stated that the gist of this application is that the application was filed before the Accounting Officer of the Entity out of time.
- 4.9 Counsel for the Authority submitted that the Notice of the Best Evaluated Bidder was displayed on 29<sup>th</sup> June 2017 and the Applicant acknowledged receipt of the same. He submitted that the acknowledgement was after the Entity sent e-mails to all the bidders and the Applicant thereafter sought for clarification and the Accounting Officer replied on 12<sup>th</sup> July 2017.

4.10 Counsel submitted that Section 90 (1) (b) of the PPDA Act, 2003 is explicit. 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. He further submitted that on 29<sup>th</sup> June 2017 when the e-mail communication was sent to all the bidders this was the time they ought to have become aware. Counsel further submitted that even if the Authority is to become generous to the Applicant by relying on the letter dated 12<sup>th</sup> July 2017, still the Applicant filed this Application late by six (06) days.

4.11 Counsel relied on the case of **Mohammed Vs. Roko Construction Ltd, S.C.C.A No. 014 of 2015** where the appellant filed the application to set aside the arbitral award long out of time. Citing the case of **Makula International Ltd vs. Eminence Cardinal Nsubuga and Another**, Court held among others that;

*'it is well established that a court has no residual or inherent jurisdiction to enlarge a period of time laid down by a statute.... Extending time... several months after the expiry of the statutory period was made without jurisdiction. It is nullity and must be set aside'.*

Counsel submitted that the Applicant was clearly out of time and the application should be struck out with costs.

4.12 In respect to the 2<sup>nd</sup> issue, Counsel submitted that it had nothing to do with the case before the Tribunal. He argued that the issue is about Authority failing to evaluate the independence, transparency and performance of the procurement structure at National Housing and Construction but not about the procurement process. He further argued that the Applicant in his submission talked about Section 45 of the PPDA Act, 2003 and yet this ground was not contained in his application before the Tribunal dated 12<sup>th</sup> October 2017. Counsel further submitted that this ground is therefore incurably defective.

4.13 He submitted that the application before the Tribunal was untenable and it should be dismissed with costs.

4.14 Counsel for the Applicant in rejoinder submitted that the Applicant only became aware about the circumstances giving rise to the complaint on 28<sup>th</sup> July 2017. He reiterated his earlier prayers.

## 5.0 RESOLUTION BY THE TRIBUNAL

- 5.1 The application before the Tribunal seeks to find out whether the Applicant applied for administrative review to the entity within the time stipulated by the law and also whether the Authority failed to evaluate the independence, transparency and performance of the procurement structure at National Housing and Construction Co. Ltd.
- 5.2 Section 90 (1) (b) of the PPDA Act, 2003 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 Applicant in his submission clearly stated that on 29<sup>th</sup> June 2017 they were notified of the Best Evaluated Bidder and the reason for not being successful to progress to the next stage of the process.
- 5.4 With respect to the first issue on filing the Application out of time, the Tribunal is in agreement with the submission of Counsel for the Respondent that the Applicant first became aware of the circumstances giving rise to the complaint when the Notice of the Best Evaluated Bidder was sent to all the bidders by email on 29<sup>th</sup> June 2017, hence the ten days started running on 1<sup>st</sup> July 2017 and ended on 14<sup>th</sup> July 2017. The Tribunal is also in agreement with the submission of the Respondent that even if time for filing was to start counting from 12<sup>th</sup> July 2017, the date when the Applicant received the clarification from the Accounting Officer, still the Applicant filed the Application late by six (06) days.
- 5.5 Counsel for the Applicant submitted in respect to the 2<sup>nd</sup> issue by stating that it was not conducted in accordance with Section 45 of the PPDA Act, 2003 and Counsel for the Respondent rebutted the said submission by arguing that this ground was not contained in the Application of the Applicant dated 12<sup>th</sup> October 2017.
- 5.6 The Applicant in his application before the Tribunal dated 12<sup>th</sup> October 2017 stated that the Authority failed to evaluate the independence, transparency and performance of the procurement structure at National Housing and Construction Co Ltd.
- 5.7 The Tribunal finds that the Applicant in his application was aggrieved by the failure of the Authority to evaluate the independence, transparency and

performance of the procurement structure at the National Housing and Construction but not the procurement process therefore he cannot amend his pleadings in the written submission.

5.8 The Tribunal finds that even if the Applicant is allowed to argue ground two, the refusal and unfairness by the Accounting Officer to furnish the Applicant with the Bank details would not suffice because the complaint was already out of time as stipulated by the PPDA Act, 2003.

#### 5.0 DECISION OF THE TRIBUNAL

1. The Application is dismissed.
2. The Tribunal affirms the decision of the Authority.
3. Each party to bear its own costs.

DATED this day of 26<sup>th</sup> October, 2017.

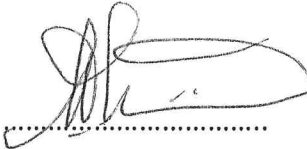
SIGNED by  
OLIVE ZAALE OTETE

] ]

  
.....  
CHAIRPERSON

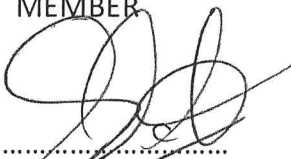
SIGNED by  
DAVID KABATERAINE

] ]

  
.....  
MEMBER

SIGNED by  
ABRAHAM NKATA

] ]

  
.....  
MEMBER

SIGNED by  
ARCHT. JOEL KATEREGGA

] ]

  
.....  
MEMBER