

THE REPUBLIC OF UGANDA

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

APPLICATION NO 21 OF 2017

**APPEAL TO THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC
ASSETS APPEALS TRIBUNAL IN RESPECT OF PROCUREMENT OF
INSURANCE SERVICES FOR GROUP PERSONAL ACCIDENT FOR
EMPLOYEES COMBINED WITH WORKER'S COMPENSATION
PROCUREMENT REF: UNRA/NCONS/2016-17/00117.**

APPLICANT: SANLAM INSURANCE UGANDA LIMITED

**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

- 1.1 On 2nd May 2017, Uganda National Roads Authority (the Entity) placed an advertisement in the New Vision inviting sealed bids from eligible bidders for the provision of Group Personal Accident for UNRA employees combined with Workers Compensation.
- 1.2 On 9th August 2017, the Contracts Committee awarded Sanlam General Insurance Uganda Limited (the Applicant) to provide the required insurance services at an evaluated price of UGX 1,494,459,566.
- 1.3 On 9th August 2017, the Entity displayed the Best Evaluated Bidder Notice with a removal date of 22nd August 2017.
- 1.4 On 11th August 2017, UAP Old Mutual Insurance Uganda Limited received a copy of the Best Evaluated Bidder Notice and on 15th August 2017, applied to UNRA for administrative review.
- 1.5 On 30th August 2017, the Accounting Officer rejected the complaint and upheld the Contracts Committee's award decision to the Applicant for provision of insurance services for Group Personal Accident and Worker's Compensation to UNRA staff.
- 1.6 On 12th September 2017, being dissatisfied with the Accounting Officer's decision UAP Old Mutual Insurance Uganda Limited complained to the Authority for an administrative review alleging that the Applicant did not comply with the applicable guidelines for minimum rates issued by the Insurance Regulatory Authority which requires Insurance providers not to charge below the prescribed minimum rates.
- 1.7 On 12th October 2017, the Authority issued its administrative review decision wherein it annulled the decision of the entity to award to the Applicant the contract for the impugned procurement to the Applicant.

1.8 On 31st October 2017, the Applicant being dissatisfied with the decision of the Authority filed this Application before the Tribunal challenging the decision of the Authority.

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

2.1 On 31st October 2017, the Applicant filed an Application with the Tribunal for a review of the Authority's decision on the following grounds:

- a) The Authority erred in its decision to annul the whole decision of the entity to award the contract as the same was not based on any error by any party whatsoever.
- b) The Authority erred in its decision to annul the decision of the entity to award the contract when it failed to show what specific error it alleges but rather delved into speculation.
- c) There is no substantial effect to the complaint raised by the complainant UAP Mutual Insurance Uganda to warrant the decision of the Authority to annul the decision of the entity to award the contract.

3.0 **DISPOSAL OF APPLICATION**

3.1 The Tribunal analyzed the following documents:

- (1) The Applicant's Application to the Tribunal dated 31st October 2017, Annexes to the Application, the written and oral submissions.
- (2) The Authority's response to the Application dated 2nd November 2017, Annexes to the response and oral submissions.

3.2 The Tribunal conducted a hearing for the Parties on 10th November 2017. The Applicant was represented by Mr. John Isabirye while the Authority was represented by Mr. John Kallemera.

4.0 **ISSUES**

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

1: *Whether the Authority erred in its decision to annul the decision of the Entity to award the contract as the same was not based on any error by any party?*

2: *Whether the Authority erred in its decision to annul the decision of the Entity to award the contract when it failed to show specific error it alleges but rather delved into speculation?*

3: *Whether there is substantial effect to the complaint raised by the complainant UAP Old Mutual Insurance Uganda Limited to warrant the decision of the Authority to annul the decision of the Entity to award the contract?*

4: *What remedies are available to the parties?*

5.0 Submissions by Counsel

- 5.1 At the commencement of the hearing, Counsel for the Respondent raised a preliminary objection to the effect that the procurement process was cancelled by the entity on 18th October 2017, following the decision of the Authority in an administrative review filed by UAP Mutual Insurance Uganda Limited and yet the application before the Tribunal was filed on 31st October 2017. He further submitted that the Applicant cannot rely on a bid that is cancelled by the entity.
- 5.2 Counsel submitted that Section 91 I (1) of the PPDA Act, 2003 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. Counsel further submitted that Section 3 of the PPDA Act, 2003 defines a bidder to mean a physical or artificial person intending to participate or participating in public procurement or disposal proceedings. He therefore submitted that the Applicant is not a bidder since the procurement process was cancelled by the Accounting Officer of the entity.
- 5.3 Counsel also relied on the case of ***Airport Consulting Vs. PPDA, Application No. 8 of 2016*** where the Tribunal decided that by the time the application was filed before it, the procurement process had been cancelled by the CAA's

Accounting Officer in his letter dated 11th July 2016 to PPDA, and therefore there was no bidder. The Application was accordingly struck off.

- 5.4 Counsel for the Applicant in reply submitted that the application before the Tribunal was submitted within 10 working days from the date when the Authority issued its decision on 17th October 2017.
- 5.5 Counsel for the Applicant further submitted that the purported letter dated 18th October 2017 from the Entity cancelling the procurement process was not communicated to the bidders including the Applicant. He argued that if there was cancellation of the bid by the entity, it should have been communicated to the Applicant. Counsel therefore submitted that therefore there was no cancellation of the bids by the Accounting Officer of the entity.
- 5.6 Counsel for the Applicant further submitted that the above case cited by the Counsel for the Respondent is not applicable since in the instant case before the Tribunal the Accounting Officer did not communicate the purported cancellation to the Applicant. He submitted that the preliminary objection be disregarded.
- 5.7 Counsel for the Respondent in rejoinder submitted that there is no room or option for the bidders to reject a cancellation by the Accounting Officer of the entity because the cancellation has already happened. He submitted that Section 25 of the PPDA Act, 2003 empowers the procuring and disposing entity to be responsible for the management of procurement process. It is therefore wrong to assert that a procuring and disposing entity cannot cancel procurement process.
- 5.8 The ruling on the preliminary objection will be addressed later in this decision.
- 5.9 In the course of hearing this application, the Tribunal inquired into the issue of the validity of bids of the impugned procurement process and the parties were invited to submit on the status of the bid validity.
- 5.10 Counsel for the Respondent submitted that bids expired on the 3rd November 2017 and that upon a bid expiring, a bidder loses the right to participate in a procurement process. He submitted that Section 3 of the PPDA Act, 2003 defines a bidder to mean a physical or artificial person intending to participate or participating in public procurement or disposal process. Therefore once one is not a bidder, one loses the right to bring an Application to the Tribunal. The

powers of the Tribunal to issue orders under Section 91I (5) & (6) of the PPDA Act, 2003 can only benefit a bidder.

- 5.11 Counsel for the Respondent further submitted that one of the Applicant's prayers is to remain as a Best Evaluated Bidder even after the expiry of the bids, and that this is not possible. He submitted that the administrative review period does not freeze a bid validity period, hence bids can expire during administrative review.
- 5.12 Counsel further submitted that since there was no extension of the bid validity period in accordance with Regulation 52 (5) of the PPDA (Rules and Methods of Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014/ SI No. 8 of 2014, the bids had expired. Counsel asked the Tribunal to find that the bid validity period had expired and therefore there is no bidder and the application should be struck out.
- 5.13 Counsel for the Applicant submitted that when this application was filed before the Tribunal, the bid was still valid. Counsel asked the Tribunal to extend the bid validity to take retrospective effect from the time when this application was filed on 31st October 2017.
- 5.14 Counsel for the Applicant submitted that the procuring and disposing entity should have written to the bidders requesting them to extend the validity of their bids. This was mandatory but the entity did not do it. The refusal by the entity to ask bidders to extend the validity of their bids was intentional. He submitted that the Tribunal should therefore extend the bid validity to take a retrospective effect.

6.0 **Resolution by the Tribunal**

- 6.1 The issues for determination by the Tribunal for resolution are the preliminary objection that the Accounting Officer cancelled the bids before this application was filed with the Tribunal and the expiry of the bid validity. In resolving the issues, the Tribunal relied on the submission by both Counsel and the applicable laws.
- 6.2 The preliminary objection was to the effect that the Applicant was not a bidder who could bring an Application to the Tribunal since the entity had cancelled the procurement process on the 18th October 2017, way before the

Applicant filed this Application to the Tribunal on 6th November 2017. In resolving this preliminary objection, the Tribunal considered the legality of the entity's cancellation of the procurement process on the 18th October 2017.

- 6.3 Section 25 (1) of the PPDA Act, 2003, which was cited by Counsel for the Respondent in defence of the cancellation of the procurement process by the entity, provides that a procuring and disposing entity shall be responsible for the management of all procurement and disposal activities within its jurisdiction in accordance with this Act, regulations and guidelines made under this Act. It was the submission of Counsel for the Respondent that since section 25 of the Act grants the overall responsibility of the procurement process to a procuring and disposing entity (PDE), then a PDE can choose to cancel a procurement process at any time during the procurement process.

6.4 With due respect, the Tribunal disagrees with the submission of Counsel for the Respondent that a PDE can cancel a procurement process at any time. It is the considered view of the Tribunal that while section 25 of the PPDA Act, 2003 grants the responsibility of management of all procurement and disposal activities to a PDE, the same section requires that a PDE must manage procurement and disposal activities in accordance with the PPDA Act, 2003.

- 6.5 Section 75 of the PPDA Act, 2003 provides that a procuring and disposing entity may reject any or all the bids at any time prior to the award of a contract. The Tribunal finds that an accounting officer may exercise his or her power to reject bids under section 75 of the PPDA Act only if a contract has not been awarded. Section 3 of the PPDA Act defines an award as a decision of a contracts committee to determine a successful bidder. In the instant Application, the contracts committee had already made an award by declaring the Applicant as the best evaluated bidder. The Accounting Officer of the entity therefore lost the power under section 75 of the PPDA Act, 2003 to cancel the procurement process once there was an award in place. It is the firm view of the Tribunal that a Best Evaluated Bidder only loses that status through a decision of an administrative review process, and not through cancellation of a procurement process by a PDE since all the procurement process of the activity are suspended during the administrative review process until the issues are settled.

- 6.6 Counsel for the Respondent submitted that there is a difference between 'rejecting bids' as used under section 75 of the PPDA Act, 2003 and cancellation of a procurement process. He argued that while under section 75 of the PPDA Act 2003, an entity may not reject bids after award of the contract, the entity may cancel a procurement process at any time.
- 6.7 The Tribunal finds that a bid is core to a procurement process. There cannot be a procurement process without a bid. Section 3 of the PPDA Act, 2003 Act defines a bid as an offer to provide or to acquire works, services or supplies or any combination thereof. The same section defines procurement as acquisition by purchase, rental, lease, hire purchase, licence, tenancy, franchise, or any other contractual means, of any type of works, services or supplies or any combination. Clearly, you cannot separate a bid from a procurement process. The Tribunal finds the attempt to separate the two to be merely academic. Accordingly, the Tribunal finds that the entity's cancellation of a procurement process after award of the contract was in contravention of section 75 of the Act and therefore the cancellation was ineffective.
- 6.8 Secondly, on 17th October 2017 when the PPDA made a decision annulling the decision of the entity, the Applicant who was aggrieved by that decision acquired a right to appeal the decision of the PPDA under section 91 I (1) of the PPDA Act, 2003 which provides that a bidder who is aggrieved by a decision made by the Authority may make an application to the Tribunal for a review of the decision of the Authority. Under section 91L (1) (c) of the PPDA Act, 2003 an application to the Tribunal for review of a decision of the Authority made under section 91 I shall be lodged with the Tribunal within ten working days of being served by the Authority with its decision. It means that on 18th October 2017 when the entity cancelled the procurement process, the Applicant's right to appeal the PPDA decision was subsisting. The Applicant did not lose a right to appeal the decision by a stroke of the pen of the entity. The Tribunal finds that the cancellation was ineffective and unlawful for it was done in contravention of sections 75, 91 I (1) and 91L (1) (c) of the PPDA Act, 2003.
- 6.9 The preliminary objection is accordingly overruled.
- 6.10 With respect to the issue of bid validity, the Tribunal noted that the bids had expired on 3rd November 2017. While it is true that at the time of filing the Application before the Tribunal, the bid of the Applicant was valid, at the time of hearing the Application the bid validity had expired. Regulation 52 (5) of the

PPDA (Rules and Methods of Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014/ SI No. 8 of 2014, provides that where an extension to the bid validity period becomes necessary, a bidder shall be requested in writing, before the expiry of validity of their bids, to extend the validity for a specified period to complete the process outlined in sub-regulation (3).

6.11 The Tribunal finds that the power to request for the extension of bid validity only lies with the Accounting Officer of an entity. The Tribunal does not have the mandate to extend the bid validity under any circumstance.

6.12 The Tribunal is in agreement with the submission of the Respondent that once the bid validity period expires, a bidder loses the right to bring an application before the Tribunal.

6.13 Before we take leave of this issue, the Tribunal wishes to observe that there is a trend by the PDEs taking advantage whenever there are administrative reviews to refuse or ignore to request the bidders to extend the validity of their bids as required of them by Regulation 52 (5) of SI 8/2014. By refusing or ignoring to request the bidders to extend the validity of the bids, it undermines the administrative review process and the rights of the bidders to be heard and granted remedies through fair justice. Accordingly, the Tribunal recommends that in accordance with its mandate under Section 7 (f) and 97 of the PPDA Act, 2003, the Authority should issue guidelines to cure this anomaly.

7.0 DECISION OF THE TRIBUNAL

1. The cancellation of the procurement process by the Entity's Accounting Officer after the award of the contract was contrary to Sections 75, 91 I (1) and 91L (1) (c) of the PPDA Act, 2003.
2. The Procuring and Disposing Entity omitted to request the bidders to extend their bid validity period in accordance with Regulation 52 (5) of the PPDA (Rules and Methods of Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014/ SI No. 8 of 2014 and consequently the bids expired on 3rd November, 2017. Without a valid bid, the applicant ceased to be a bidder under section 3 of PPDA Act and its application becomes incompetent under section 91I (1) of the Act.

3. The Application is accordingly dismissed with no orders to costs.

DATED this day of 19th of Dec, 2017.

SIGNED by]
OLIVE ZAALE OTETE CHAIRPERSON

SIGNED by]
DAVID KABATERAINE] MEMBER

SIGNED by]
ABRAHAM NKATA] MEMBER

SIGNED by]
ARCHT. JOEL KATEREGGA] MEMBER