

THE REPUBLIC OF UGANDA

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

APPLICATION NO 12 & 13 OF 2017

APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT OF CONSTRUCTION OF STUDENT'S HOSTEL AT KIHUMURO PHASE 1 AND CONSTRUCTION OF COMPUTER SCIENCE BUILDING BY MBARARA UNIVERSITY OF SCIENCE AND TECHNOLOGY.

APPLICANT: YANJIAN (U) COMPANY LTD

1st RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY (AUTHORITY)

2nd RESPONDENT: MBARARA UNIVERSITY OF SCIENCE & TECHNOLOGY (ENTITY)

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

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS

1. On 9th February, 2017 the 2nd Respondent (Entity) published bid notices in the New Vision Newspaper inviting potential bidders to submit bids in respect to the construction of a students' hostel at the Kihumuro and construction of computer science building.
2. Bids were evaluated and on 27th March, 2017 the Notices of Best Evaluated Bidder (NBEB) were displayed and the successful bidders were M/S Khalsa Developments Uganda Ltd in respect to the construction of student's hostel at Kihumuro and Ms Steam Investments Ltd, in respect to the construction of computer science building.
3. On 7th April 2017, the Applicant being dissatisfied with the outcome of the award results for both procurements in respect to the construction of a student's hostel and construction of computer science building applied for administrative review to the Accounting Officer of the 2nd Respondent .
4. On 13th April, 2017 the Accounting Officer of the 2nd Respondent issued decisions upholding the Applicant's complaints in both procurement processes and ordered for the re-evaluation of all bids.
5. On the 22nd May, 2017 the second display of the Notices of Best Evaluated Bidders were displayed and the Applicant was determined the BEB in both procurement processes for the construction of student's hostel at Kihumuro and construction of computer science building.
6. On 31st May 2017, M/s Khalsa Developments Uganda being dissatisfied with the BEB award in respect to the procurement process for the construction of students' hostel at Kihumuro made a complaint to the Accounting Officer of the 2nd Respondent and the same was dismissed on 14th June 2017.
7. On 31st May 2017, M/S Steam Investments Ltd being dissatisfied with the BEB award in respect to the procurement process for the construction of computer science building made a complaint to the Accounting Officer of the 2nd Respondent and the same was dismissed on 14th June 2017.
8. On 19th June 2017, Khalsa Developments Uganda Limited being dissatisfied with the decision of the Accounting Officer of the 2nd Respondent issued

on 14th June 2017 made a complaint to the 1st Respondent and the Authority issued its decision on 18th July 2017 upholding the complaint.

9. On 19th June 2017, M/S Steam Investments Ltd being dissatisfied with the decision of the Accounting Officer of the 2nd Respondent issued on 14th June 2017 made a complaint to the 1st Respondent and the Authority issued its decision on 18th July 2017 upholding the complaint.

10. The Applicant being dissatisfied with both decisions of the Authority in respect to the procurement of construction of students' hostel at Kihumuro and construction of computer science building filed separate applications No. 12 & 13 of 2017 respectively before the Tribunal on 21st July 2017 challenging its decision.

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

2.1 On 21st July 2017, the Applicant applied to the Tribunal for a review of the Authority's decision.

2.2 The grounds for application to the Tribunal were as follows:

(a) The Authority erred in law and fact when it held that the Accounting officer failed to comply with the law on how an administrative review should be handled because the method for payment of administrative review fees by Yanjian was in contravention of Guideline 1 of 2017 issued on 10th march 2017;

(b) The Authority erred in law and fact when it decided that the Accounting Officer's decision to inquire from the Surveyor's Registration Board to establish whether Sande William was registered was irregular.

2.2 The Applicant prayed the Tribunal to set aside the decisions of the Authority; to uphold the Accounting Officer's decision maintaining M/s Yanjian Uganda Company Ltd as Best Evaluated Bidder in both procurement processes and for costs.

3.0 DISPOSAL OF APPLICATION

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

- 1) The Applicant's Applications to the Tribunal, both dated 20th July 2017, Annexes to the Application, the written and oral submissions.
- 2) The 1st Respondent's (Authority's) response to the Application, annexes to the response, the written and oral submissions.
- 3) The 2nd Respondent's (Entity's) response to the Application Annexes to the response and its written and oral submissions.

3.1 The Tribunal conducted a hearing for the Parties on 2nd August 2017. The Applicant was represented by Mr. Samuel Kakande, the 1st Respondent (Authority) was represented by Mr. John Kallemera and the 2nd Respondent was represented by Mugumya Timothy.

3.2 At the hearing, the Tribunal with the consent of the parties consolidated Applications No. 12 and 13 in accordance with O.11 r.1 of the Civil Procedure Rules, SI 71-1 because the Applicant is the same; the Respondent is the same; the entity is the same and the Applications raise same questions of law and facts.

4.0 SUMMARY DECISION

4.1 In accordance with Section 91 I (7) of the PPDA Act, the Tribunal delivered a summary of this decision on Monday 4th August 2017. What follows is the detailed reasoning in support of the tribunal's decision.

5.0 ISSUES

5.1 Four (4) issues were formulated for resolution by the Tribunal as follows:
a) *The first issue which was raised by the 1st Respondent as a preliminary objection was that the bid of the Applicant had expired and therefore the Application before the Tribunal was untenable.*

b) Whether the Authority erred in law and fact when it upheld the complaints of Khalsa Developments (U) Ltd and Ms Steam Investment Ltd in finding that the Accounting Officer failed to comply with the law on how administrative Review should be handled because the method used for payment of the administrative review fees by the Applicant was in contravention of PPDA Guidelines No. 1/2017?

c) Whether the Authority erred in law and fact when it decided that the Accounting Officer's decision to inquire from the Surveyors Registration Board to establish whether Sande William was registered was irregular in both complaints?

d) Remedies

6.0 **SUBMISSIONS BY COUNSEL**

- 6.1 With respect to the first issue, Counsel for the Authority submitted that the bids had expired and therefore the Applications were untenable and should be struck out. He stated that under ITB 17.1 of the bidding document, the bids were valid until 13th June 2017. The 2nd Respondent thereupon asked all bidders to extend bid validity up to 31st July 2017, which had also expired and as of 2nd August 2017, the date of the hearing, the bids had expired.
- 6.2 Counsel submitted that in accordance with Regulation 50 (5) of the PPDA (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations 2014, SI 8/14, an extension of bid validity can only take effect prior to expiry. He relied on ***Hoima Taxi/Bus Owners Drivers Savings and Credit Cooperative Society Vs. PPDA, Application No. 5/2015 and Patrick Aluma Vs. PPDA, Application No. 11/2015*** where Tribunal held that the Applicant ceases to be a bidder once its bid expires.
- 6.3 The Accounting Officer of the entity, Mr. Mujuni Lawrence, informed the Tribunal that he had extended the bid validity period twice; that the second time the bid validity period was extended to the 15th September 2017, and that therefore the bids were valid.

- 6.5 The Tribunal overruled this objection after verifying with the Accounting officer that he had written to the bidders to extend their bid validity to 15th September 2017.
- 6.6 On whether the Authority erred in law and fact when it decided that the method used for payment of the administrative review fees by the Applicant was in contravention of PPDA Guidelines No. 1/2017, Counsel for the Applicant submitted that the Applicant's applications to the entity were accompanied by the requisite administrative review fees which were paid by cheques NO. 001203 and 001204 in favour of the entity. He submitted that the entity acknowledged receipt of the cheques and the cheques were never dishonoured by the paying bank. Counsel then made a lengthy submission to wit, that the PPDA Guidelines on Payment of administrative review fees were not couched in mandatory terms; that the Guidelines are not subsidiary law, and that the mode of payment does not matter as long as the administrative review fees are paid at the time of submitting the application.
- 6.7 Counsel for the Applicant further submitted that even if the Tribunal was to find that the method of payment of the administrative review fees was not correct, it is trite law that non- payment of fees is a minor irregularity that can be rectified at any stage of the proceedings by the court or the Tribunal directing the defaulting party to make the necessary payment, as was held by the Supreme Court in the case of *Lawrence Muwanga Vs. Stephen Kyeyune SCCA No. 12 OF 2001*.
- 6.8 With respect to the issue whether the Authority erred in law and fact when it decided that the Accounting Officer's decision to inquire from the Surveyors Registration Board to establish whether Sande William was registered was irregular in both complaints, Counsel for the Applicant referred to **Part 1 Section 3** of the Bid Document with regard to Evaluation methodology and criteria. Clause 6.1.1 of Part 1 Section 3 of the bid document on personnel provides, inter alia, that *'the bidder must demonstrate that it will have the personnel for the key positions that meet requirements like;Membership to professional bodies of their respective disciplines for.... Quantity surveyor should also be exhibited.'* Counsel submitted that the Curriculum Vitae of Sande William indicated that he is a registered professional associate member of Uganda Institute of Surveyors (ISU) and that he had been recommended by the Institute for registration

with the Surveyors' Registration Board and that the registration was effected on 17th November 2016. He submitted that it was right for the Accounting Officer to seek for confirmation of the registration status of Sande William.

- 6.9 Counsel for the Applicant prayed the Tribunal to set aside the decision of the 1st Respondent and to uphold the Accounting officer's decision maintaining the Applicant as Best Evaluated Bidder and to be awarded costs.
- 6.10 In response, to the submissions of Counsel for the Applicant on the issue of mode of payment of administrative review fees, Counsel for the 1st Respondent submitted that the PPDA Guideline No. 1/2017 on administrative review fees which became effective on 10th March 2017 provides for mode of payment of the fees and payment by cheque is not one of the methods of payment. He submitted that the Applicant paid for administrative review fees using a personal cheque which is contrary to PPDA Guideline No. 1/2017. He further submitted that the Accounting Officer of the 2nd Respondent should have advised the Applicant on the proper method of payment in accordance with the Guideline. In conclusion on this issue, Counsel submitted that the application for administrative review by the Applicant was not accompanied by the administrative review fees since the fees were not paid in accordance with the PPDA Guideline No. 1/2017.
- 6.11 On the issue of membership to the professional body of surveyors by Mr Sande William, Counsel for the Respondent submitted that at the time of submitting its bid to the entity, the Applicant did not submit evidence that Mr. Sande William was a registered quantity surveyor and since the CV indicated that he was in the process of registration, the evaluation committee did not need to seek clarification but should have failed the bidder on that ground.

7.0 **RESOLUTION BY THE TRIBUNAL**

- 7.1 Section 90 (1a) (b) of the PPDA Act makes it mandatory for an application for administrative review to be accompanied by administrative review fees. In March 2017, the 1st Respondent issued PPDA Guideline on Administrative Review Fees, 1 of 2017 which specifies the mode of payment of administrative review fees as Uganda Revenue Authority e-

payment system, a banker's cheque, electronic funds transfer or any other method provided by the bidding document.

- 7.2 In the instant Application, it is not in dispute that the Applicant paid the requisite administrative review fees to the entity, and the funds were received by the entity. What is in issue is that the payment was done using a method which contravenes the PPDA Guidelines.
- 7.3 The Tribunal views the PPDA Guidelines on administrative review fees as an innovation by the Regulatory Authority to instill order and uniformity in the way administrative review fees are to be paid. With due respect to the submissions of Counsel to the Authority, the Tribunal finds it difficult to deny substantive justice to the Applicant who had fulfilled the mandatory requirement under section 90(1a) (b) of the Act of paying fees, just because the method of payment is not one of the methods allowed by the Guidelines. In the circumstances, while the Tribunal agrees with the submissions of Counsel for the Respondent that the payment was not made in the manner prescribed in the Guidelines, the manner of payment used by the Applicant fulfilled the requirement prescribed in section 90(1a) (b) of the Act. The Tribunal is therefore in agreement with the decision of the Accounting Officer that the fees were duly paid and therefore the Application was properly filed with the Accounting Officer.
- 7.4 Turning to the issue whether the Authority erred in law and fact when it decided that the Accounting Officer's decision to inquire from the Surveyors Registration Board to establish whether Sande William was registered was irregular, the Tribunal relied on Part 1 Section 3 of the evaluation methodology and criteria in the bidding document. Clause 6.1.1 of Part 1 Section 3 on personnel provides: *'the bidder must demonstrate that it will have the personnel for the key positions that meet requirements like; total work similar experience-minimum of 8 years and experience in similar works of 5 years filled in the relevant form included in Section iv, Bidding forms..'* *'Membership to professional bodies of their respective disciplines for.... Quantity surveyor should also be exhibited.'*
- 7.5 It is on record, and it is not in dispute, that the CV of Mr Sande William, submitted by the Applicant in its bid, indicated that he is a registered

professional associate member of the Uganda Institute of Professional Surveyors.

- 7.6 On this issue, the Authority decided that the Applicant did not provide proof that Mr Sande William was a member of a professional body. The Authority also found that at the time of bid submission, there was no evidence by the Applicant that Sande William was registered by the Surveyors' Registration Board.
- 7.7 In resolving this issue, the Tribunal looked at the wording of the bid document referred to in 7.4 above. With regard to personnel, the bid document required an applicant to have 'personnel for the key positions'. One of the requirements the key personnel, such as a quantity surveyor had to exhibit was '*Membership to professional bodies of their respective disciplines*'. The bid document did not require that a key personnel must be registered with a regulatory body such as the Surveyors' Registration Board. Perhaps this was an omission on the part of the persons who drew the technical requirements. The requirement in the bid document was simply membership to a professional body. The Tribunal will not therefore delve into the issue of proof of registration with the Surveyors' Registration Board since this was not a requirement of the bid document.
- 7.8 The Tribunal finds that the person presented by the Applicant as a quantity surveyor stated in his CV that he is a registered professional associate member of the Uganda Institute of Professional Surveyors, and thus meets the criteria of the bid document of 'belonging to a professional body'. The Authority in its decision does not dispute this fact, but it has issue with the fact that the Applicant did not show evidence that he is a member of the professional body. Proof of information stated in a CV is a matter that could have been clarified under regulation 10(4) of the PPDA (Evaluation) Regulations, 2014. The Tribunal recalls its decision in **Application 1 of 2016 China National Aero-Technology International Engineering Corporation (CATIC)** where it held that matters of proof of qualifications are matters which are clarifiable under regulation 10(4) of the PPDA Evaluation Regulations, 2014.
- 7.9 For the reasons above, this Application succeeds.

8.0 DECISION OF THE TRIBUNAL

1. The Preliminary objection is overruled.
2. Applications No. 12 & 13 are allowed and the decisions of the Authority in both complaints are hereby set aside.
3. The Tribunal in substitution for the decisions so set aside affirms the decision of the Accounting Officer of the 2nd Respondent.
4. No orders to costs.

SIGNED and sealed this^{15th}.....day of ...^{Sept.}..., 2017 by the said

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