

THE REPUBLIC OF UGANDA

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

APPLICATION NO 19 OF 2017

**APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT
AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT TO THE
PROCUREMENT OF CONSULTANCY SERVICES FOR DESIGN REVIEW AND
CONSTRUCTION SUPERVISION OF UNBS HEADQUARTERS UNDER PHASE II REF:
UNBS/CONS/16-17/00023**

APPLICANT: ECO-SHELTER & ENVIRONMENTAL CONSULTANTS

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

**2ND RESPONDENT: UGANDA NATIONAL BUREAU OF STANDARDS
(UNBS)**

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

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS

- 1.1 The Uganda National Bureau of Standards (the entity) placed a call in the New Vision Paper of 11th August 2016 inviting interested firms to express their interest to provide consultancy services for the design review and construction supervision of UNBS Headquarters under Phase II, Ref: UNBS/CONS/16-17/00023.
- 1.2 The Entity shortlisted three bidders namely Eco-Shelter & Environmental Consultants (the Applicant), M/s Sileshi Consult Consulting Architects and Engineers Plc and M/s Joadah Consult Ltd, who were invited to submit technical and financial proposals.
- 1.3 On 2nd June 2017, all the three shortlisted providers submitted technical and financial proposals. On 21st July 2017, the Applicant received a copy of the Best Evaluated Bidder Notice, indicating that M/s Joadah Consult Ltd was the Best Evaluated Bidder at a bid price of UGX 700,000,000/= including taxes.
- 1.4 On 3rd August 2017, the Applicant lodged a complaint for administrative review to the Accounting Officer of the Entity. The Accounting Officer rejected the complaint.
- 1.5 Dissatisfied with the Accounting Officer's decision, on 17th August 2017, the Applicant applied to the Authority for review of the Accounting Officer's decision. The Authority rejected the application for administrative review.
- 1.6 The Applicant was dissatisfied with the decision of the Authority hence this Application to the Tribunal.

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION

- 2.1 On 25th September 2017, the Applicant filed an application to the Tribunal challenging the Authority's decision.

2.2 The grounds for Application to the Tribunal are as follows:

2.2.1 *Mr. Marianus De Jager, the proposed Project Manager/Team Leader by Joadah Consult Ltd, is not qualified for the post because he is not a registered architect and does not have a valid practicing certificate allowing him to practice in Uganda which was a key qualification requirement for the post.*

2.2.2 *The entity, by accepting the documents issued from South Africa amounted to a change of the Request for Proposal (RFP) requirements for the qualifications and work experience of the Project Manager/Team Leader thus favouring Joadah Consult Limited.*

2.2.3 *Mr. Marianus de Jager's claimed work experience for having performed similar assignments in Uganda since 2014 is also invalid since he is not registered in Uganda and has no valid temporary practicing certificate issued by the Architects Registration Board (ARB) as required for foreign architects to work in Uganda and therefore his claimed work experience in Uganda is illegal and he is liable for prosecution by the ARB.*

2.3 The Applicant prayed the Tribunal to direct the entity to review and declare the Applicant the best evaluated bidder since it had technically been evaluated as the best and its quotation is lower than the third best evaluated bidder.

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 25th September 2017, annexes to the Application, the written and oral submissions.
- 2) The Authority's response to the Application dated 27th September 2017, annexes to the response, and the written and oral submissions.

- 3.1 The Tribunal conducted a hearing for the Parties on 10th October 2017. The Applicant was represented by Mr. Nelson Nerima, while the Authority was represented by Mr. John Kallemera and M/s Mary Akiror.

4.0 **SUMMARY RULING**

- 4.1 In accordance with section 91I (7) of the PPDA Act, 2003, the Tribunal delivered a summary of this ruling on 11th October, 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:

- a) *Whether the Authority erred in law and fact to find that Mr. Marianus De Jager the proposed Project Manager/Team Leader for M/s Joadah Consult Ltd qualified for the post despite not being a registered Architect with a valid practicing certificate allowing him to practice in Uganda which was a key qualification requirement for the post?*
- b) *Whether the jobs that Mr. Marianus De Jager claims to have done in Uganda were/are being done illegally and therefore his claimed experience from those jobs cannot be taken as genuine experience and this illegal practice should not be allowed to continue under this project?*
- c) *Whether it was lawful for the Entity to sign a contract with the Best Evaluated Bidder during administrative review period?*
- d) *What remedies are available to the parties?*

6.0 **SUBMISSIONS BY COUNSEL**

- 6.1 On the first issue, to wit, *whether the Authority erred in law and fact to find that Mr. Marianus De Jager the proposed Project Manager/Team Leader for M/s Joadah Consult Ltd qualified for the post despite not being a registered Architect with a valid practicing certificate allowing him to practice in Uganda which was a key qualification requirement for the post*, Counsel for the Applicant submitted that Mr. Marianus De Jager the

proposed Project Manager/Team Leader of the Best Evaluated Bidder (BEB) was not qualified because he lacked a practicing certificate allowing him to practice as an architect in Uganda. He cited the letter from the Chairperson of the evaluation committee of the entity dated 15th June 2017 which asked the BEB to produce a practicing certificate for the proposed team leader as evidence that the proposed team leader had no practicing certificate qualifying him to practice in Uganda. Counsel quoted section 11 of the Architects Registration Act Cap 269 which requires foreign architects to be temporarily registered in order to practice in Uganda. He also quoted section 14(4) of the same Act which provides that no person shall engage in, or carry on the practice of architecture unless the person is the holder of a valid practicing certificate. He submitted that the proposed team leader did not possess temporary registration nor did he possess a practicing certificate. He submitted that the bid of the BEB should have been rejected at the evaluation stage because the proposed team leader was not qualified to practice architecture in Uganda as per the provisions of the Architects Registration Act Cap 269.

- 6.2 On the point that the RFP did not explicitly state that the practicing certificate of the team leader had to be from Uganda, Counsel stated that the Chairperson of the evaluation committee in his letter to the BEB requesting for a Practicing certificate issued from Uganda clarified what the RFP omitted to say. He submitted that Regulation 10 and 19 of the PPDA (Evaluation) Regulations 2014/SI No. 9 of 2014 allows an evaluation Committee to seek for clarification.
- 6.3 On the second issue, *whether the jobs that Mr. Marianus De Jager claims to have done in Uganda were/are being done illegally and therefore his claimed experience from those jobs cannot be taken as genuine experience and this illegal practice should not be allowed to continue under this project*, Counsel for the Applicant submitted that Mr. Marianus De Jager's claims of having performed similar assignments in Uganda is invalid since he is not registered in Uganda and has no valid temporary practicing certificate issued by the ARB as required by the Architects Registration Act for Foreign Architects and consequently, his claimed practice and work experience in Uganda is illegal and cannot be presented as proof of competence to perform the assignment being applied for.

- 6.3 With respect to the third issue, *whether it was lawful for the entity to sign a contract with the Best Evaluated Bidder during administrative review period*, Counsel for the Applicant submitted that the 2nd Respondent (the entity) in its response shows that the Solicitor General cleared the contract and it was signed. He contended that if the contract was signed, then it was done unlawfully. He stated that the Applicant received the 1st Respondent's decision on 18th September 2017; that the 10 working days would have expired on 29th September 2017. He submitted that the contract was signed contrary to S.90 of the PPDA Act. He prayed that the Tribunal should nullify the contract signed contrary to the law.
- 6.4 Counsel prayed the Tribunal to set aside the decision of the 1st Respondent, direct a refund of the administrative review fees and to order for costs incurred at the Tribunal and for costs of the administrative review proceedings below the Tribunal.
- 6.5 In response to issue 1 regarding the qualifications of the proposed team leader of the BEB Mr. Marianus De Jager, Counsel for the 1st Respondent submitted that the Proposal of the BEB included the practicing certificate of the proposed team leader, Registration number 6738 issued by the South African Council for the Architectural Profession, valid until 1st January 2018. He submitted that the 1st Respondent duly found that the statement of requirements did not specify the country or body responsible for issuing the practicing certificate of the Project Manager/Team leader. Counsel averred that the Applicant's attempt to introduce the requirement of authorization to practice as an architect in Uganda would amount to a change in the evaluation criteria in contravention of regulation 7(2) of the PPDA Evaluation Regulations. S.I 9 of 2014 which provides that an evaluation committee shall not make an amendment or addition to the evaluation criteria stated in the bidding document and shall not use any other criteria other than the criteria stated in the bidding document.
- 6.6 Without prejudice to the above argument, Counsel for the 1st Respondent submitted that section 11 of the Architects Registration Act Cap 269 provides for temporary registration of architects who are not ordinarily resident in Uganda and it is stated that the registration of such persons

shall be only for the period of any specific work for which the person has been engaged. Counsel submitted that the said temporary registration can only be granted consequent to a person being engaged to undertake specific work and therefore the proposed team leader could only attain the said registration upon proof that M/S Joadah Consult Limited had been successfully awarded the consultancy project. Counsel asked the Tribunal to answer this issue in the negative.

- 6.7 On the second issue, *whether the jobs that Mr. Marianus De Jager claims to have done in Uganda were/are being done illegally and therefore his claimed experience from those jobs cannot be taken as genuine experience and this illegal practice should not be allowed to continue under this project*, Counsel for the 1st Respondent asserted that the Applicant's assertions on this issue are unsubstantiated and speculative on account that there is no proof that the jobs undertaken in Uganda by the said Mr. Marianus De Jager required the use and /or submission of a valid practicing certificate issued in Uganda by the Architects Registration Board. He further submitted that there was no requirement in the RFP for the proposed team leader to submit any practicing certificates in respect of jobs/projects evidencing the experience of the team leader.
- 6.8 On *whether it was lawful for the Entity to sign a contract with the Best Evaluated Bidder during administrative review period*, Counsel for the 1st Respondent stated that the 1st Respondent was constrained to submit on the issue of signing a contract by the entity during the administrative review period. He stated that the 1st Respondent expects the entity to be aware of the provisions of the PPDA Act regarding signing of contracts during the administrative review period.
- 6.9 Counsel for the 1st Respondent stated that the Application lacks merit and should be dismissed with costs.

7.0 **RESOLUTION BY THE TRIBUNAL**

- 7.1 The Tribunal will resolve the issues in the same order as raised by the Parties.

7.2 In issue 1, the Applicant contends that the bid of the BEB M/S Joadah Consult limited should have failed at evaluation stage since the proposed team leader Mr. Marianus De Jager did not possess a practicing certificate to practice architecture in Uganda. On the other hand, the 1st Respondent contends that the RFP simply stated that the Project Manager/Team leader should be a registered architect or quantity surveyor or engineer with a valid practicing certificate and the relevant qualification; that the RFP did not specify that the Project Manager/Team Leader must possess a practicing certificate issued from a specific Country as alleged by the Applicant.

7.3 Noting that the architect in question, Mr. Marianus De Jager is not resident in Uganda, the Tribunal, in resolving this issue, relied on the provisions of the Architects Registration Act, Cap 269 relating to issuing of practising certificates to foreign architects or architects who are not resident in Uganda. Section 11 of the Architects Registration Act, Cap 269 provides as follows:

“11. Temporary registration.

(1) Where any person satisfies the board that—

- a) he or she is not ordinarily resident in Uganda;*
- b) he or she is or intends to be resident in Uganda in the capacity of a professionally qualified architect or for the express purpose of carrying out specific work for which he or she has been engaged;*
- c) he or she is, or immediately prior to entering Uganda was, in practice as an architect in that capacity as to satisfy the board of his or her fitness to serve the public as a professionally qualified architect, the board may authorise the registrar to register that person only for the duration of the period of any specific work for which he or she has been engaged; provided he or she satisfies the board, he or she may carry out work with a registered architect.*

(2) “

- 7.4 A close reading of section 11(1) quoted above clearly shows that for a person to be temporarily registered in Uganda as a professional architect, that person must fulfill the conditions specified in section 11(1) (a) relating to ordinary residence; the conditions in (1) (b) relating to performance of work as a professional architect for which he or she has been engaged; and must show under (1) (c) that he or she was, or immediately prior to entering Uganda was, in practice as an architect in that capacity as to satisfy the board of his or her fitness to serve the public as a professionally qualified architect. Once a person has satisfied the Architects Registration Board (ARB) on these conditions, the ARB may authorize the registrar to register that person only for the duration of the period of any specific work for which he or she has been engaged; provided he or she satisfies the board, he or she may carry out work with a registered architect.
- 7.5 The Tribunal finds that it is a condition of the ARB Act that temporary registration can only happen where the architect shows the Board proof that he or she is engaged to perform work as a professional architect in Uganda. An architect cannot be expected to attach a practicing certificate at the time of bidding since at this stage he or she is not assured of an engagement in Uganda. Accordingly, the Tribunal is in agreement with the submission of the 1st Respondent that temporary registration can only be granted consequent to a person being engaged to undertake specific work and therefore the proposed team leader could only attain the said registration upon proof that M/S Joda Consult Limited had been successfully awarded the consultancy project. The Chairperson of the evaluation Committee who asked for a practicing certificate from the proposed team leader of the BEB did so in error. On this issue, the Tribunal is in agreement with the decision of the 1st Respondent.
- 7.6 On the second issue, *whether the jobs that Mr. Marianus De Jager claims to have done in Uganda were/are being done illegally and therefore his claimed experience from those jobs cannot be taken as genuine experience and this illegal practice should not be allowed to continue under this project*, the Tribunal is in agreement with the submission of the 1st Respondent. The Applicant did not provide proof to the Tribunal that the jobs undertaken in Uganda by the said Mr. Marianus De Jager required the use and /or submission of a valid practicing certificate issued in Uganda by

the Architects Registration Board. Consequently, the Tribunal is unable to pronounce itself on whether the said Mr. Marianus De Jager worked in Uganda as an architect illegally.

- 7.8 In resolving the issue of the BEB signing a contract with the entity during administrative review period, the Tribunal shall rely on section 90(7) of the PPDA Act which provides that subject to Part VIIA of the Act, a contract shall not be entered into by an accounting officer with a provider during the period of administrative review; or before the Authority makes a final decision in respect of a complaint lodged with the Authority under subsection (3) or before a decision is made in accordance with Part VIIA of this Act (Proceedings before the Tribunal).
- 7.9 A contract signed in contravention of section 90(7) is tainted with illegality right from inception and should not be allowed to stand. To decide otherwise would be to condone an illegality since the contract was signed in flagrant contravention of section 90(7) of the PPDA Act. In **Makula International Ltd vs. His Eminence Cardinal Nsubuga & Anor [1982] HCB 11** at p. 15 the law regarding illegality was stated thus:

“A court of law cannot sanction what is illegal and illegality once brought to the attention of the court overrides all questions of pleading including admissions made thereon.....”

DECISION OF THE TRIBUNAL

1. The Application succeeds in part.
2. The execution of the contract by the Accounting Officer during administrative review period infringed Section 90 (7) (a) & (b) of the PPDA Act, 2003. The executed contract is therefore null and void.
3. The Entity should refund the Applicant the administrative fees paid at the Entity level.
4. The Entity may re-tender the procurement process if it so wishes.
5. Each party shall bear its own costs.

Dated this day of 2018.

SIGNED by
OLIVE ZAALE OTETE

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] CHAIRPERSON

SIGNED by
MOSES JURUA ADRIKO

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] MEMBER

SIGNED by
DAVID KABATERAINE

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] MEMBER

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] MEMBER