

THE REPUBLIC OF UGANDA

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

APPLICATION NO 9 OF 2016

**APPLICATION FOR REVIEW OF THE DECISION OF THE ARUA MUNICIPAL COUNCIL IN
RESPECT OF THE TENDER FOR ARUA MAIN MARKET FOR
FINANCIAL YEAR 2016/2017**

**APPLICANT: ARUA- KUBALA PARK OPERATORS & MARKET VENDORS CO-
OPERATIVE SOCIETY**

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

ENTITY ARUA MUNICIPAL COUNCIL

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

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 Brief Facts

- 1.1 The Applicant participated in a procurement process for the management of Arua Main Market for financial year 2016/2017, pursuant to a bidding process initiated by Arua Municipal Council (the Entity) on 12th May 2016. The Entity had invited bids using the open domestic bidding method.
- 1.2 In the best evaluated bidder (BEB) notice the Entity stated that the Applicant had been disqualified on three (3) grounds namely;- that (a) the Applicant's Cooperatives Societies certificate of registration and (b) Income Tax Certificate had expired (c) The Applicant had not provided a bid security or recommendation letter from Arua Hill Division.
- 1.3 On 6th July 2016, the Entity awarded a contract to Aavom Enterprises, a limited liability company. .
- 1.4 By letter dated 22nd June 2016, the Applicant wrote to the Accounting Officer of the Entity applying for Administrative Review by the Accounting Officer on grounds that Applicant had complied with the requirements of the Solicitation document which required production of (a) the Bidders trading licence or its equivalent, (b) a copy of the bidders certificate of registration or its equivalent (c) a copy of the bidders income tax clearance certificate or its equivalent (d) a statement in the bid submission sheet that the bidder meets the eligibility criteria.
- 1.5 The Applicant alleged that the Accounting Officer of the Entity did not entertain the Applicant's application, and instead the Best evaluated bidder advertised several job opportunities during the pendency of the review process.
- 1.6 By letter dated 14th July 2016, the Applicant filed an application for Administrative Review to the Authority citing the same irregularities reproduced in 1.4 above. The Applicant also queried whether the Authority would handle the application impartially citing what it regarded as connivance between officials of the Entity and officials of the Authority in a previous application filed with the Authority.
- 1.7 By letter dated 20th July 2016, the Authority denied all allegations of lack of independence and connivance with the Entity and advised without prejudice that the Applicant should file its complaint directly with this Tribunal in accordance with section 91(I) (2) of the PPDA Act 2003.

1.8 By memorandum dated 16th August 2016, the Applicant filed an application for review at the Tribunal.

2.0 **Application for Review of the Authority's Decision**

2.1 On 16th August 2016, the Applicant applied to the Tribunal for administrative review of the Entity's decision.

2.2 The grounds for the Application to the Tribunal were as follows:-

(a) The Applicant avers that it was not accorded a fair hearing as the only qualified bidder before elimination of its bid.

(b) The Applicant avers that the Municipal Council's decision of eliminating its award was unfair and an act of dishonesty and that it should be reconsidered.

3.0 **Disposal of Application**

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

(a) The Applicant's application to the Tribunal dated 11th August 2016, Annexes to the application, the written and oral submissions.

(b) The Authority'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 31st August 2016. The Applicant was represented by Mr. Wasswa Ramadhan while the Authority was represented by Mr. John Kallemera., the Second Respondent was represented by Mr. Kaweesi Kakooza. In attendance were representatives from both the Applicants and the Entity.

3.2 This is the detailed decision of the Tribunal which has already been issued in summary form on 1st September 2016 in compliance with the Act.

4.0 Issues

4.1 Five issues were formulated by the parties for resolution by the Tribunal including a preliminary objection as follows:-

- (a) *Whether the Authority should be a party to the application before the Tribunal.*
- (b) *Whether the Application before the Tribunal was filed in time.*
- (c) *Whether the Applicant was rightly disqualified as stated in the best evaluated bidder notice.*
- (d) *Whether the Contract between the 2nd Respondent and Aavom Enterprises was entered into during the administrative review period.*
- (e) *Remedies.*

5.0 Submissions by Counsel

- 5.1 In support of the first issue which was also a preliminary objection, Counsel for the Authority argued that by letter dated 14th July 2016 the Applicant had applied for administrative review to the first Respondent in respect of the invitation for bids by the Entity for management of Arua Main Market for Financial Year 2016/2017.
- 5.2 In its complaint to the Authority, the Applicant alleged that the Authority lacked independence and that it had connived previously with officials from the Entity in respect of a prior complaint filed by the Applicant with respect to Kubala Market.
- 5.3 Counsel submitted that the Authority advised the Applicant to file its application for review of the Entity's decision directly to the Tribunal pursuant to Section 91(I) (2) of the Act.
- 5.4 Counsel argued that the Applicant heeded the Authority's advice and filed an application at the Tribunal therefore bypassing the Authority. In the circumstances the Authority had not handled the application for administrative review and therefore the Authority was not a proper party to the application, and should be discharged forthwith.
- 5.5 In response Counsel for the Applicant conceded that the Authority ought to be discharged since it had not made any decision which was the subject of a challenge before the Tribunal.

- 5.6 The Tribunal noted that Counsel for the Applicant had conceded that the Authority was not a party to the proceedings and thereafter summarily discharged the Authority.
- 5.7 In respect to the second issue, Counsel for the Applicant submitted that the Applicant participated in the procurement process for the management of Arua Main Market for financial year 2016/2017. However the Applicant's bid was rejected on grounds that:-
- a) It had attached an expired certificate of registration;
 - b) It had not included an income tax clearance certificate;
 - c) It had not included a bid security;
 - d) The Applicants bid had not included a recommendation letter from the relevant Division.
- 5.8 Counsel submitted that the Applicant had included authentic certificates of all the documents in (5.7 (i) to (iv)) above. Counsel faulted the evaluation committee for querying the Applicant's registration certificate which had been issued under the Co-operatives Societies Act Cap 112. Citing Section 12(1) of the Act, Counsel argued that a certificate of registration signed by the Registrar was conclusive evidence that the society had been duly registered. He argued that the only way to invalidate the registration was revocation of the certificate of registration in the Uganda Gazette.
- 5.9 Counsel argued that the Entity's evaluation committee had applied unfair criteria to their bid, because the solicitation document had simply called for documents that proved eligibility and not copies of documents that bore expiry dates falling within the bidding period.
- 5.10 Counsel also complained that the Entity had not held a pre-bid meeting as required by **Section 68(5) of the Local Government (Public Procurement and Disposal of Public Assets) Regulations 2006**, as well as under the solicitation document, and therefore denied an opportunity to avail any additional information to prepare their bid.
- 5.11 Counsel submitted that the Applicant was the only qualified bidder eligible to manage the market under an ongoing reservation scheme and therefore the only method applicable for the instant procurement was the direct procurement method since the Applicant was the only cooperative society registered with the Entity.
- 5.12 In response, Counsel for the Entity submitted that the Entity had not established a reservation scheme as argued by the Applicant. Further the Applicant had never been registered with the Entity as a market vendor.

- 5.13 Counsel accepted that the Entity was aware of the guidelines that were issued by the Ministry of Local Government directing local authorities to give priority to registered market vendors, however as far as the Entity was concerned the Act and Regulations thereunder required open domestic bidding as the preferred method which the Entity had used in the impugned procurement.
- 5.14 Counsel pointed out that the Applicant had not qualified under the process because they had:-
- (a) Presented a tax clearance certificate for the tax period from 1st July 2014 to 30th June 2015, in contravention of the requirement to present a tax clearance certificate for the tax period 1st July 2015 to 30th June 2016.
- (b) Presented a certificate of registration under the Cooperatives Act which expired on 22nd January 2016.
- 5.15 Counsel argued that the Applicant had not met the qualification criteria and therefore was disqualified.
- 5.16 That following the Applicant's complaint for Administrative Review to the Accounting Officer, the Entity had conducted the review and found no merit in the application which had been dismissed on 5th July 2016.
- 5.17 Counsel for the Entity prayed that the instant application should be dismissed with costs.

6.0 **Resolution by the Tribunal**

- 6.1 The first issue for determination before the Tribunal is whether the Application for administrative review before the Authority was filed in time and if so whether the tender for management of Arua Market was subject to a reservation scheme.
- 6.2 On 22nd June 2016, the Applicant filed an application for administrative review before the Accounting Officer of the Entity after publication of the best evaluated bidder notice which inter alia disqualified the Applicant's bid.
- 6.3 By letter dated 5th July 2016, addressed to the Chairman of the Applicant, the Entity's Accounting Officer dismissed the application, withheld the administrative fee and directed that the best evaluated bidder should be

invited to sign the contract. The letter dismissing the application was copied to various officers including the Executive Director of the Authority.

- 6.4 Upon careful perusal of the decision attached to the Entity's reply to the application as **Annexure R8**, it was found out that it does not bear any acknowledgement or receipt by the Applicant. Indeed one of the grounds of the Applicant's complaint to the Authority was that they had not received the Authority's response to their application for administrative review. However the Entity vigorously denied this allegation.
- 6.5 The onus of ensuring effective service of the Entity's decision on the Applicant squarely fell upon the Entity. The Tribunal recalls its decision in ***Application 11 of 2015, Patrick Aluma-vs- PPDA***, in which at page 7 it was decided that the mode of service must be on the complainant in person or his duly appointed agent or his advocate. Relying on ***Kiggundu-vs- Kasujja (1974) HCB 164***, the Tribunal decided that Service should be personal or substituted with leave of Court, otherwise there is no proper service. Applying the often cited principles to the matter before us, it is clear that the Entity did not discharge its burden to serve the Applicant with its decision. The Entity should have ensured that the officials of the Cooperative Society were properly served with their decision and proof of this service attested to by way of acknowledgement by the Applicant of receipt of the decision on a copy of the decision or in form of an affidavit deposed by the official effecting service of the decision. Given that there was no clear evidence of service of the Entity's decision on the Applicant, it would be almost impossible to find that the instant application before the Tribunal was filed out of time.
- 6.6 The more pertinent issue raised by the Applicant was whether the bid for management of Arua Main market initiated by the entity fell within the government reservation scheme. Our attention was drawn to the **Government Policy Decision on the Development and Management of Markets in the City Municipalities and Towns dated 17th September 2007.** The relevant excerpts of the Policy are reproduced here below for ease of reference

September 17 2017

All District Chairpersons

All Mayors of Municipalities

All Chairpersons of Town Councils.

As you may be aware for the last one year or so, there have been a lot of controversy and unrest over some of the markets in Kampala City and elsewhere in the Country

Cabinet has now considered the matter and has taken the following Policy decisions on the development and management of markets in Kampala City, Municipalities and Towns.

- (a) The Markets shall remain where they are and there shall be no change of user subject to the Town and Country Planning Act.
- (b) The sitting tenants who own the stalls (emidala) kiosks etc in the markets shall all register under their associations and that the registered market vendors shall be given the first priority to redevelop and manage the markets
- (c) The sitting market vendors shall be free to redevelop their own markets on condition that they can mobilize funds, have the capacity to construct modern markets meeting the universally acceptable standard and have received planning permission from their respective local councils and the Town and Country Planning Department and the Ministry responsible for urban planning.
- (d) In the event that the market vendors being unable to raise the required funds to reconstruct and modernize their markets, they shall be free to identify a partner with whom they can pool resources and build and manage new markets together.
- (e) In the event that the Market Vendors fail to fulfill terms (b) (c) and (d) above, the Government and local governments shall develop the markets and rent them to the vendors giving priority to the sitting/ existing vendors.
- (f) All programmes to redevelop markets in local governments must first be submitted to the Ministries of Local Government and of Urban Development and the respective local government councils for scrutiny and approval; and the sitting /existing vendors shall be kept fully informed well before these programmes commence.

The Purpose of this communication is to inform you of the Government decisions on the development and management of markets in Kampala City and other urban centres and to ask you to follow these policy guidelines in the process of developing and managing markets in Kampala City and other local governments.

I hope the guidelines will help Kampala City Council and other local governments resolve the disputes over the management and redevelopment of the markets in Kampala City and other local governments and will allow market vendors and other stakeholders to settle down on their work.

Signed Minister of Local Government.

In Application 4 of 2015 Arua Kubala Park Operators and Market Vendors SACCO vs- PPDA at pg. 11 this Tribunal held” In a nutshell the purpose of the Government Policy on Markets was to prioritize the rights of sitting tenants who owned and operated stalls and kiosks in existing markets in the development and management of those markets. To benefit from the Policy decision however, it is a requirement that the stall holders and kiosk owners in the markets register associations or cooperatives. By letter dated 21st May 2015 to Arua DLG, the Authority confirmed that the Policy decision on Markets was applicable to local government markets.

It follows therefore that any procuring and disposing entity (PDE) putting out a bid for the development or management of a market must take into account this Government Policy. A PDE cannot and should not ignore this policy at will simply because there exists no registered association or cooperative in a particular market.”

- 6.6 It is incomprehensible to this Tribunal as to the reason the Entity once again departed from Government Policy with respect to Markets and went ahead to grant a tender to a company that was not a sitting tenant or stall holder in Arua Market. This incongruous action by the Entity is even more glaring given the fact that it was a party to the application cited above in which its duty as a PDE administering markets was clearly laid out. We hold that the Entity’s action in awarding the tender for management of the Market to the BEB M/s Aavom Enterprises Ltd contravened the Government Policy reproduced above

which created a reservation scheme for stall holders in markets, taxi parks and bus parks. The Applicant's complaint about the wrong use of the open bidding method instead of the direct bidding method which applies to reservation schemes is sustained and we hold that the direct bidding method ought to have been used for the instant procurement.

- 6.7 Turning to the issue as to whether the Entity entered into a contract with the BEB during the administrative review period, it is clear after a question was put to the Entity and in their oral submissions before the Tribunal that the Entity concluded a contract with the Best Evaluated Bidder on 6th July 2016, a day after it issued a decision on the complaint filed by the Applicant before the Accounting Officer.

Section 90(7) of the Act provides as follows;

(7) Subject to Part VIIA of this Act a contract shall not be entered into by an Accounting Officer with a provider

a) during the period of administrative review;

(b) 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

In Reference 1 of 2015 PPDA-VS- MBARARA MUNICIPAL COUNCIL at pg. 7 this Tribunal held" Sections 90(7) (a) and (b) of the Act bar an Accounting Officer from concluding a Contract with a bidder during the period of Administrative Review and before the Authority makes a decision on a complaint lodged with the Authority by a dissatisfied bidder or during the period in which the Authority conducts its independent review under Section 90(4) of the Act. The Administrative Review Period under Part VII of the Act in which the Accounting Officer is statutorily barred from entering into binding Contract is both sequential and continuous. In other words the time period is unbroken and runs until all the processes provided for under PART VII are exhausted.

- 6.8 The Tribunal sees no reason to depart from the position above stated and consequently holds that the Accounting Officer fettered and frustrated the Applicant's statutory right of review of the decision of the Accounting Officer.

This action was a flagrant violation of the express mandatory bar on conclusion of contracts during the administrative review period. The Accounting Officer's actions were illegal and serious breach of the Act.

6.9 The Application is upheld in part.

7.0 **Decision of the Tribunal**

1. The Tribunal allows the application in part.
2. The administrative review fees paid at the entity level and the Tribunal shall be refunded to the Applicant by the Entity.
3. Each Party to bear its own costs.

Dated this ^{6th} day of ^{March} ~~1st~~ September 201~~6~~⁷

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