

THE REPUBLIC OF UGANDA

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

APPLICATION NO. 2 AND NO. 3 OF 2016

APPLICATIONS FOR REVIEW OF THE DECISION OF THE AUTHORITY

APPLICANTS: REN-FORM cc AND KALAMAZOO SECURE SOLUTIONS LTD

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

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

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS

- 1.1 These Applications arise from a bid notice published by the Electoral Commission (entity) for the printing and supply of ballot papers for presidential, parliamentary and local government council elections Lots 1-7.
- 1.2 Several bidders responded to the bid notice including the Applicants Ren-Form cc (Application 2) and Kalamazoo Secure Solutions Ltd (Application 3).
- 1.3 On 17th September 2015, the entity displayed the Best Evaluated Bidder Notice (BEBN) for the above procurement. In the BEBN, it was indicated that the bid of the Applicants failed due to a high price compared to the price of the best evaluated bidder.
- 1.4 The applicants, in separate letters both dated 18th September 2015, wrote to the Electoral Commission objecting to the best evaluated bidders. Both Applicants paid their administrative review fees of ten million each by cheque dated 30th September 2015 to the Uganda Revenue Authority account through their agents based in Uganda.
- 1.5 The entity rejected the cheques and instead advised the Applicants to either submit bank draft/guarantee or a direct Electronic Funds Transfer payment to Uganda Revenue Authority account.
- 1.6 The Applicants subsequently paid the administrative review fees by EFT as advised. However in separate letters to the Applicants both dated 7th October 2015, the entity informed the Applicants that there was no evidence that the administrative review fees had been paid by the Applicants; that the BEBN was pinned on 17th September 2015 and removed on 30th September 2015; that under section 90(1a) a-b of the Public Procurement and Disposal of Public Assets Act, 2003 (PPDA Act), the complaint to the Accounting Officer with the prescribed fee is to be made within ten working days from the date the bidder becomes aware of the circumstances giving rise to the complaint. That in view of the above, the entity could not proceed with the request for administrative review since it was received outside the mandatory time.

1.7 By letter dated 15th October 2015, the Applicants wrote to the Authority about the rejection of their administrative review applications by the entity on account that the administrative review fee paid was not adequate and also that the review fees were paid late. In another letter dated 15th October 2015 and 26th October 2015, the Applicants wrote to the Authority requesting it to investigate certain matters in respect to the procurement for print and supply of ballot papers for Presidential, Parliamentary and Local Council Elections, including matters to do with mode of payment.

1.8 The Authority by letter dated 20th October 2015 responded separately to each of the Applicants agreeing with the position of the entity that the Applicants had paid their administrative review fees out of time.

1.9 The Applicants were dissatisfied with the response of the Authority and applied to this Tribunal for a review of the Authority's decision.

1.10 The Tribunal found for the Applicants and directed the Authority to hear the Applicants' application on the merits.

1.11 The Authority heard the Applicants applications and found for the Applicants. By letter dated 18th September 2015, the Authority directed the entity to hear the Applicants' applications for administrative review.

1.12 The entity carried out the administrative review and found no merit in the complaints raised by the Applicants. The decision of the entity was contained in a letter dated 26th November 2015 addressed to the Applicants.

1.13 On 1st December 2015, the Applicants applied to the Authority for administrative review of the entity's decision. On 2nd December 2015, the Authority informed the Accounting Officer of the entity that it had received applications for administrative review from the Applicants in respect of the procurement. The Authority instructed the entity to suspend any further action regarding the procurement and requested for various documents from the entity.

1.14 On 7th December 2015, the entity communicated to the Authority stating that the contracts for the said procurement had been signed.

1.15 The Authority handled the applications for administrative review by the Applicants and resolved that the Authority cannot handle the said applications on account that the contracts in respect of the procurement had been signed.

1.16 The Applicants were dissatisfied with the decision of the Authority hence these Applications to the Tribunal.

2.0 APPLICATIONS FOR REVIEW OF THE AUTHORITY'S DECISION.

2.1 By letters dated 5th January 2015, the Applicants applied to the Tribunal for a review of the Authority's decision on the following grounds:

- (i) *The Authority wrongfully applied Regulation 2 of the PPDA (Administrative Review) Regulations 2014;*
- (ii) *The Authority failed to exercise its powers under section 91(2) (b) of the PPDA Act, 2003 to annul the act of signing the contracts during the period of administrative review.*

3.0 DISPOSAL OF APPLICATIONS

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

- (1) Application for review of the Authority's decision by Ren Form cc dated 5th January 2016 (Application No. 2 of 2016) and the Annexes to the Application;
- (2) Application for review of the Authority's decision by Kalamazoo Secure Solutions Limited dated 5th January 2016 (Application No. 3 of 2016) and the Annexes to the Application;
- (3) The Authority's responses to the Applications dated 28th October 2015, Annexes to the Response and submissions;
- (4) Applicants' submissions and Annexes to the submissions.

3.2 The Tribunal conducted a hearing for the Parties on 21st January 2016. The Applicants were represented by Mr. Edgar Agaba while the Authority was represented by Mr. Uthman Segawa and Mr. John Kallemera. The Electoral Commission was represented by Mr Eric Sabiiti. In attendance was the Gonyonga Benon Justin an agent of one Ren Form cc.

4.0 SUBMISSIONS BY COUNSEL

4.1 At the commencement of the hearing, Counsel for the Electoral Commission, Mr Sabiiti informed the Tribunal that he had instructions from the Accounting Officer of the Electoral Commission to apply for an adjournment. He stated that the entity had received a summons from the Tribunal to appear for the hearing at 4.20 pm on the day before the date scheduled for hearing. That the Accounting Officer had received the summons in the morning of the day scheduled for hearing. He stated that the notice to appear was too short. That considering the prayers of the Applicants against the entity, the entity needed time to come up with a detailed response from its Senior Management as well the members of the Electoral Commission. A notice of less than 48 hours as was in the current case was insufficient to enable the entity to make an informed response.

4.2 Responding to the entity's application for adjournment of the proceedings, Counsel for the Applicants argued that the entity was served with the applications before the Tribunal on the 7th January 2016. That the entity had had ample time to study the Applications and make a response. The hearing was adjourned for a fifteen (15) minutes to allow the Tribunal to consider the application for adjournment and make a ruling.

4.3 The Tribunal declined to grant the application for adjournment of the proceedings. The decision of the Tribunal was guided by section 91I (7) of the PPDA Act, 2003 which provides that the Tribunal shall issue a decision within a period of not more than ten working days after receiving an application for review. The Tribunal noted that the applications for review of the Authority's decision were filed with the Tribunal on 7th January 2016. The entity was served with the Applications on the same date. While the Tribunal notes the entity's submission that the notice requiring the entity to appear before the Tribunal was served on it just a day before the scheduled hearing, the Tribunal

was also mindful of the fact that the entity had been served with the Applications on 7th January 2016. The Tribunal is of the view that the entity had ample time within which it should have informed its structures of the Applications. The entity as a procuring and disposing entity should take cognizance of the strict timelines within which the Tribunal operates. Moreover the Tribunal has no power under the Act to extend the time within which it may handle applications for administrative review. The Tribunal thus declined to grant the application for an adjournment and proceeded to hear submissions from the Applicants, the Authority and the entity.

- 4.4 On the first ground that the Authority wrongfully applied Regulation 2 of the PPDA (Administrative Review) Regulations 2014, and thus failed to handle the administrative review application, Counsel for the Applicants submitted that the Authority does not derive its power to handle administrative review applications from the Regulations. He stated that Regulations by their nature provide the mode of operation and prescribe how things will be done, in what format, etc.; that the enabling law is the PPDA Act, 2003, which provides for powers of the Authority to entertain administrative review applications. He submitted that the act of relying on the Regulations in abeyance of the Act which is the parent Act was intended to defeat the interests of justice.
- 4.5 On the second ground that the Authority failed to exercise its powers under section 91(2) (b) of the PPDA Act, 2003 to annul the act of signing the contracts during the period of administrative review, Counsel submitted that under section 90(3) (b) of the Act, a bidder dissatisfied with a decision of the Accounting Officer is allowed ten days within which to make a complaint to the Authority. That the Accounting officer had to wait for ten working days to elapse in order to sign the contracts because then the likelihood of challenging his decision would be no more.
- 4.6 Counsel for the Applicant further submitted that additionally, the Accounting Officer could not sign the contracts before the lapse of fifteen working days within which the Authority had to review the decision of the Accounting Officer under section 90(4) of the Act. He submitted that the action of signing the contracts within a period of time allowed for challenging the entity's decision (ten days) and the fifteen working days within which the Authority had to review the decision of the Accounting officer was intended to defeat

part an unlawful act or decision made by an entity because the Authority did not handle the Applicants' applications for administrative review after it established that the entity had already signed the contracts.

4.11 Counsel further stated that the Authority does not have the mandate to cancel contracts under section 91(2) (b) of the Act. That the annulment of an unlawful act or decision is with respect to the contents of an administrative review decision of the Accounting Officer. He further submitted that it is only the PPDA Appeals Tribunal which specifically has the mandate to direct a procuring and disposing entity to cancel a contract with a bidder if it establishes that a bidder is involved in a fraudulent practice under section 91J(2) of the Act.

4.12 Counsel for the Authority further submitted that the appropriate remedy available for the Authority when entities sign contracts during administrative review period is to refer such entities to the Tribunal on account of a serious breach of the Act under section 91J (1) of the Act, which the Authority had done, by filing a reference with the Tribunal. The Authority submitted in conclusion that the Applications were untenable and should be dismissed with costs.

4.13 In response to the prayers for award of costs against the entity, Counsel for the entity submitted that the prayer for costs by the Applicants against the entity was premature since there was no decision made against the entity. That the costs of nine hundred and six million one hundred thousand prayed by the Applicants were exorbitant. That in any case, it is the Tribunal to tax costs. He prayed the Tribunal to dismiss the application for costs against the entity. He prayed for award of costs of twenty million Shillings each against the Applicants.

5.0 RESOLUTION BY THE TRIBUNAL

5.1 The first ground raised by the Applicants is that the Authority wrongfully declined to hear the merits of the Applicants' application for administrative review by relying on regulation 2 of the PPDA (Administrative Review) Regulations, 2014. On its part the Authority argued that regulation 2 bars the Authority from handling applications for administrative review once the entity has entered into a contract with a provider.

- 5.2 For ease of reference, Regulation 2 provides as follows:
"These Regulations shall not apply where a procuring and disposing entity has entered into a contract, for procurement or disposal, with a bidder."
- 5.3 To resolve this issue, the Tribunal closely examined the powers granted to the Authority under the Act.
- 5.4 Section 91 (1) of the Act provides that upon receipt of a complaint, the Authority shall promptly give notice of the complaint to the respective procuring and disposing entity, suspending any further action thereon by the procuring and disposing entity until the Authority has settled the matter, (emphasis ours). Section 91(3) of the Act enjoins the Authority, before taking any decision on a complaint, to notify all interested bidders of the complaint and to take into account, where necessary, representations from the bidders and from the respective procuring and disposing entity.
- 5.5 The Tribunal holds the firm view that the powers of the Authority to handle applications for administrative review are granted by section 91 of the Act, and cannot be ousted by the Regulations. The Tribunal is persuaded by the submission of Counsel for the Applicants that Regulations by their very nature are intended to provide for matters of a procedural nature. In our view, Regulation 2 purports to limit the powers of the Authority granted under section 91 of the Act.
- 5.6 Section 18(4) of the Interpretation Act, Cap 3 provides that any provision of a statutory instrument which is inconsistent with any provision of the Act under which the instrument was made shall be void to the extent of the inconsistency. The Tribunal holds the view that Regulation 2 of the PPDA (Administrative Review) Regulations 2014, is inconsistent with section 91 of the PPDA Act, 2003, to the extent to which it purports to limit the powers of the Authority to handle applications for administrative review on account that contracts have already been signed. To construe otherwise would be to curtail the powers of the Authority using a statutory instrument. It would defeat the purpose for which the right of administrative review was granted by the Legislature, and it would also perpetuate impunity because procuring and disposing entities would rush to sign contracts during administrative review

period well knowing that Regulation 2 would come into play to bar the Authority from handling the complaints.

- 5.7 Therefore with respect to the Applications before the Tribunal, the Authority should have exercised its mandate under section 91 of the Act and not declined jurisdiction on the basis of Regulation 2 of the PPDA (Administrative Review) Regulations, 2014, to the exclusion of the powers granted to it under section 91 of the Act. Ground 1 is therefore answered in the affirmative.
- 5.8 The second ground for determination by the Tribunal was that the Authority failed to exercise its powers under section 91(2) (b) of the PPDA Act, 2003 to annul the act of signing the contracts during the period of administrative review.
- 5.9 We shall first deal with the submission by the Authority that it could not exercise its powers under section 91(2) of the Act to annul in whole or in part an unlawful act or decision made by an entity because the Authority did not handle the Applicants' applications for administrative review after it established that the entity had already signed the contracts.
- 5.10 The Tribunal finds that there was an administrative review of the Applicants' applications by the Authority. On receiving the complaint, the Authority took the following steps which are consistent with the procedure normally followed by the Authority when handling applications for administrative review:
- (a) it wrote to the entity by letter dated 2nd December 2015 asking the entity to suspend further action on the procurement process and to submit the procurement file to the Authority;
 - (b) it considered the Applications for administrative review at a meeting held on the 22nd December 2015;
 - (c) it made a decision that the Authority could not handle the Application due to Regulation 2 of the PPDA (Administrative Review) Regulations, 2014.
- 5.11 As to whether the Authority failed to annul in whole or in part an unlawful act or decision of a procuring and disposing entity as required under section 91(2) (b) of the Act, while the Applicants argued that the Authority should have exercised that power because the entity signed contracts during the

administrative review period contrary to section 90(7) of the Act, the Authority maintained that it does not have the mandate to cancel contracts under section 91(2) (b) of the Act.

5.12 The record shows that the entity by letter dated 7th December 2015 wrote to the Authority confirming that contracts had been executed by 1st December 2015.

5.13 The Tribunal finds that the contracts were signed within the administrative review period. The Accounting Officer's decision was contained in a letter dated 26th November 2015. Under section 90(4) of the Act, the Authority is given 15 working days to review an administrative review decision of the Accounting Officer. Counting from the date of the decision of the Accounting Officer (26th November 2015), the 15 working days should have lapsed on the 18th December 2015. The Tribunal has taken judicial notice of the fact that the contracts were signed on 27th November 2015, 30th November 2015 and 1st December 2015, within the mandatory statutory period of administrative review contrary to section 90(7) of the Act which provides that a contract shall not be entered into by an Accounting Officer with a provider during the period of administrative review.

5.14 Accordingly, the Tribunal finds that the act of executing the contracts during the administrative review period was an unlawful act and therefore the Authority ought to have exercised its mandate under section 91(2) of the Act. The second ground is answered in the affirmative.

5.15 The Applicants applied for costs to be awarded against the entity for the reason that it was the entity that carried out the unlawful act. The entity argued that the application for costs against the entity was premature since there is no decision made against the entity.

5.16 The Tribunal is cognisant of its powers under section 91I (5)(d) of the Act which states that in reviewing a decision before it, the Tribunal may require the payment of compensation for costs reasonably incurred by a bidder who is a party to the proceedings, as a result of an unlawful act or decision of the concerned procuring and disposing entity or the Authority.

5.17 The Tribunal finds that the entity committed an unlawful act to wit, signing contracts during the administrative review period contrary to section 90(7) of the Act giving the Applicants a right to claim costs as an aggrieved party. The Tribunal has examined the Bill of Costs filled by the Applicants and has heard the entity and the Authority on the issue of costs.

6.0 DECISION OF THE TRIBUNAL

1. The Tribunal sets aside the decision of the Authority declining to handle the Applicants' complaint on account that the contracts had already been signed.
2. In exercise of its mandate under section 91(5) (d) of the Act, the Tribunal awards costs of 25 million shillings to each of the Applicants against the entity.
3. The Tribunal declines to make an order for the Authority to re-hear the Applications for administrative review because the complaints have been disposed.
4. The Tribunal declines to annul the contracts given the grave implications to the electoral process underway in the country.

Dated at Kampala this 21st day of January 2015.