

THE REPUBLIC OF UGANDA

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

APPLICATION NO. 9 OF 2015

APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT OF THE PROCUREMENT OF OFFICE SPACE FOR UGANDA TOURISM BOARD REF: UTB/NCons/2014-2015/00016.

APPLICANT: TWED PROPERTY DEVELOPMENT LIMITED

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

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

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BACKGROUND/FACTS

- 1.1 The Uganda Tourism Board (entity), on 13th October 2014, published a bid notice in the New Vision Newspaper for office space. The bid closing date was 7th November 2014.
- 1.2 The bid notice contained a planned procurement schedule which indicated among others, that bid evaluation process would take place on the 14th November 2014; the best evaluated bidder notice would be published on 17th November 2014 and contract signature would take place on 1st December 2014. The notice contained a statement that the planned procurement schedule '*would be subject to changes*'.
- 1.3 Four firms, including the Applicant, TWED Property Development Limited submitted bids. Three of the bidders were eliminated at the preliminary examination of the bids for reasons outlined in the evaluation report.
- 1.3 On 20th November 2014, the Evaluation Committee conducted a site visit and inspection of the Applicant's premises on Plot 10 Kafu Road, Kampala. The Evaluation Committee issued a report where it recommended the Applicant as the best evaluated bidder (BEB).
- 1.4 The Contracts Committee however rejected the report of the Evaluation Committee recommending the Applicant as the BEB on three grounds namely (1) there was no pre-visit report attached to the evaluation report; (2) the entity needed parking space for 100 vehicles but the evaluation report indicated 89 parking lots; (3) single floor space was not indicated as part of the required specifications.
- 1.5 The Contracts Committee recommended that a conclusive pre-visit report be attached to the evaluation report and specifications clearly outlined to guide the Committee. The Contracts Committee noted that bids were set to expire on 30th January 2015.

- 1.6 On 16th February 2015, the Applicant wrote to the entity inquiring about the status of its bid. In the same letter, the Applicant informed the entity that they had extended their bid validity for four weeks.
- 1.7 On 16th February 2015, the Applicant made a complaint to the Inspectorate of Government (IGG) alleging that there was corruption and abuse of office by officers of the Uganda Tourism Board during the process of procuring office space for UTB.
- 1.8 On 23rd February 2015, the IGG launched an investigation into the matter. The IGG wrote to the Chief executive officer of UTB informing him to suspend any further action on the procurement till further communication on the matter from her office. On 24th April 2015, the IGG wrote a letter clearing the entity to conduct fresh bids since the entity was not satisfied with the bids received.
- 1.9 The Applicant, on 27th April 2015 wrote to the entity requesting for reasons why their bid failed. This letter was copied to the Authority. The Authority wrote the accounting officer of the entity on 10th May 2015 requesting him to update the Applicant on the status of its bid. By 30th June 2015, the entity had not responded to the Applicant on the status of its bid.
- 1.10 On 20th July 2015, the accounting officer of the entity wrote to the Applicant informing it that the procurement process had been cancelled and a new advertisement would be made. On 23rd July 2015, the accounting officer wrote to all bidders informing them that following the expiry of the bids on 30th January 2015, the procurement had been cancelled and a new advertisement would be made and they would be free to participate in the bidding process.
- 1.11 The Applicant applied for administrative review to the accounting officer of the entity complaining against cancellation of the procurement process. The Application was dismissed. The Applicant then applied to the Respondent for review of the decision of the Accounting officer. The application was again dismissed by the Respondent.
- 1.12 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 By application dated 28th September 2015, the Applicant lodged an Application with the Tribunal on the following grounds:

- (i) *The Authority erred when it merely directed the Officer of the entity to warn the head of the procurement and disposal unit for leading to the expiry of bids instead of validating the said bids and requiring the entity to complete the procurement on the basis of submitted bids.*
- (ii) *The Authority erred when it ignored and declined to rule on the efforts made by the bidder (Applicant) to extend its bid and the deliberate non-communication from the procuring entity in response to the bidder.*
- (iii) *The Authority erred when it upheld the refusal of the entity to disclose the grounds upon which the bidder's bid were unsatisfactory as communicated to the IGG.*
- (iv) *The Authority erred when it ruled that the expiry of the bids, although deliberately occasioned by the entity itself was sufficient ground for cancelling the entire bidding process.*
- (v) *The Authority erred and allowed the entity to flout the purpose of procurement laws and regulations when it failed to provide any directions on management of the fresh bidding process to ensure that the same is not designed to block participation of previous bidders in the first procurement.*
- (vi) *The Authority erred in law when it determined that an entity does not have to give any reasons for failing to follow its own procurement schedule notwithstanding the damages in form of lost bargains and inconvenience suffered by the bidder.*

2.2 DISPOSAL OF APPLICATION

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

- (1) Application for review of the Authority's decision dated 28th September 2015;
- (2) Authority's response to the Application dated 1st October 2015, Annexes to the Response and submissions;
- (3) Applicant's submissions;

3.1 The Tribunal conducted a hearing for the Parties on 14th October 2015. The Applicant was represented by Mr. Jude Byamukama while the Authority was represented by Mr. John Kallemera and Ms. Esther Kusiima. In attendance was Mr. Sunday Tinka Herbert, Operations Officer of the Applicant Company.

3.2 **Submissions by Counsel**

Counsel for the Applicant argued issues I, ii and iv, concurrently; issues iii and five concurrently and then issue vi. Counsel submitted that at the heart of this Application is the mandate of the Authority in determining grievances, especially where the Authority is convinced that a procuring and disposing entity has committed an irregularity.

3.3 Counsel submitted that in its administrative review, the Authority found that the expiry of bids was directly occasioned by the entity because the contracts committee brought this matter to the attention of the Procurement and Disposal Unit of the entity but nothing was done. Counsel further submitted that in spite of this finding, the Authority merely decided that the Accounting Officer should caution the Head Procurement and Disposal Unit for failing to heed the advice of the contracts committee.

3.4 Counsel for the Applicant argued that the Authority has implied mandate under sections 8(1) (e) and 91(2) of the Act to revive an expired bid. He contended that there is nothing in the law that prohibits the reviving of an expired bid. He contended that a bid is an offer; and that if a person who made the offer (the bidder) is willing to keep the offer, why should the entity refuse the offer and seek for new offers. He referred the Tribunal to some **Authorities** in the United States of America where a Tribunal with powers similar to the instant Tribunal revived expired bids.

- 3.5 Counsel contended that the approach by the Authority to merely caution the entity is deeply flawed and goes against the letter and spirit of section 45 and 48 of the PPDA Act which emphasizes that all procurement should be conducted in a manner that promotes transparency, accountability, fairness, economy, efficiency and value for money.
- 3.6 He further submitted that in this particular procurement, the entity ignored its procurement schedule and kept bidders in the dark till the intervention of the Inspectorate of Government. He stated that the Authority was wrong to claim that entities are not bound to give reason for changing their procurement schedule since this goes against the spirit of fairness and transparency enshrined in section 45 of the Act.
- 3.7 He further submitted that it is contrary to the PPDA Act to allow an Accounting officer to deliberately sabotage a procurement process by refusing to ask bidders to extend their bids and then seek to carry out a fresh procurement process. Counsel further submitted the Authority erred when it upheld the refusal of the entity to disclose the grounds upon which the bidder's bid were unsatisfactory as communicated to the IGG. Counsel submitted that section 47(1) of the Act requires an entity to disclose information regarding any procurement or disposal process. Counsel contended that section 47(2) on which the Authority relied to approve the entity's refusal to disclose information to the Applicant is not applicable since the information which the bidder required was its own and not that of other bids.
- 3.8 On the issue of the entity ordering for fresh bids, Counsel submitted that in view of the advanced nature of the procurement, the Authority should have required the entity not to alter specifications in the solicitation documents for a fresh bidding process. That this was not done and goes against the principle of transparency and fairness.
- 3.9 Counsel prayed that the Tribunal should set aside the Authority's decision and direct the entity to validate the expired bids and proceed with the procurement. That in the alternative, the Tribunal should order a fresh bidding process using the same bidding documents. That where the Tribunal orders for a fresh bidding process, the Tribunal should order the entity to

compensate the Applicant for the expenses involved in bid preparation, costs of the application for administrative review at the accounting officer and the Authority and compensation to the tune of three hundred million shillings as compensation for the nine months' rent that the Applicant lost in keeping vacant space under the assumption that Uganda Tourism Board would take it up. Counsel submitted that

3.10 In reply, Mr. Kallemera, Counsel for the Authority submitted that the Authority does not have the mandate to validate bids and/or require Uganda Tourism Board to complete the procurement on the basis of submitted bids. That the mandate of the Authority is drawn from Section 8 of the PPDA Act, 2003 which does not include validating bids or requiring Procuring and Disposing Entities to complete procurement on the basis of expired bids. He contended that the powers of the Authority under section 8(1) (e) and 91(2) of the Act do not include power to revive expired bids as submitted by Counsel for the Applicant. He contended that when addressing complaints, the Authority must do so in compliance with the procurement law. That in the instant matter, the power to extend bid validity is given to procuring and disposing entities under regulation 52 (5) of the PPDA (Rules and Methods for Procurement of Supplies, Works and Non – Consultancy Services) Regulations, 2014, not the Authority. On the USA cases cited where a Tribunal can revive an expired bid, Counsel submitted that the USA law is not part of the Common Law. That if a statute is clear on a matter as is the case with the regulation cited above, one cannot use cases from other jurisdictions to depart from what the statute states.

3.11 He further submitted that the only method of extension of the bid validity period is as provided under **Regulation 52 (5) of the PPDA (Rules and Methods for Procurement of Supplies, Works and Non – Consultancy Services) Regulations, 2014**. He further submitted that a Procuring and Disposing Entity (PDE) is independent in the execution of its procurement and disposal functions under Section 38 of the PPDA Act 2003. That it was upon Uganda Tourism Board to request for bid extension in accordance with the procurement laws. That it is therefore erroneous and/or misconceived for the Applicant to assert that the Authority should have required the Entity to complete the procurement on the basis of the submitted bids that were already expired. He further submitted that once a bid has expired, there is no

bid. That the Authority was therefore justified to hold that once the bids had expired, there were no bids and therefore the procurement process had to be terminated.

3.12 On whether the Authority erred when it upheld the refusal of the procuring entity to disclose the grounds upon which the bids were unsatisfactory, Counsel for the Authority submitted that it acted within the law in upholding the refusal of the Procuring Entity to disclose the grounds upon which the bids were unsatisfactory. He cited section 47 (2) (a) (ii) of the PPDA Act, 2003 which provides that *“Notwithstanding subsection (1) a procuring and disposing entity shall not disclose to a bidder or to any other person who is not involved in the preparation of the solicitation documents, the evaluation process or the award decision, any information relating to the examination, clarification, evaluation and comparison of bids before the best evaluated bidder notice is displayed on the procurement and disposal notice board of the procuring and disposing entity.”*

3.13 He stated that in the impugned procurement, the Best Evaluated Bidder Notice was not displayed by the entity given that there was no Best Evaluated Bidder for the impugned procurement. That the Authority was therefore justified in deciding that the Entity could not disclose the grounds upon which the bids were unsatisfactory since it would be in contravention of section 47(2) of the Act.

3.14 On the prayer by the Applicant that the Tribunal orders for the procurement to continue under expired bids, Counsel argued that the Tribunal has no such power. On the 300,000,000 prayed for as lost rent, Counsel contended that the Applicant has not supported this claim by any scintilla of evidence; that this is mere conjecture which should not be entertained by the Tribunal. He referred the Tribunal to the Court of Appeal case of **George Ruyondo**.

In conclusion, he submitted that the Application lacked merit. He prayed that the Application should be dismissed with costs

4.0 Resolution of issues by the Tribunal

The Tribunal has carefully considered the pleadings and the oral and written submissions of both Counsel. The Applicant's case, in summary, is that Uganda Tourism Board, the entity in this Application mishandled the procurement. That the contracts committee of the entity brought to the entity's notice the fact that bids were expiring on 30th January 2015 but the entity did not write to the bidders to extend their bids as required by the law, but it instead opted for a fresh procurement.

- 4.1 The Applicant is further dissatisfied with the manner in which the Authority exercised its powers when handling their complaint during administrative review. The gist of their dissatisfaction is that having found, as it did, at administrative review, that the expiry of bids was occasioned by the entity, the Authority should not have merely asked the accounting officer of the entity to caution the head of the procurement and disposal unit but should have validated the expired bids and required Uganda Tourism Board to complete the procurement on the basis of submitted bids.
- 4.2 The Tribunal is in agreement with the Authority's finding regarding the extension of bid validity. The Authority in its decision dated 18th September 2015 at page 4 dealt with this matter thus:-

“Under the bidding document in the Bid Data Sheet, it was stated that the bids shall be valid until 30th January 2015. On 29th January 2015, the Contracts committee noted that bids were set to expire on 30th January 2015. The entity did not request bidders to extend their bid validity in accordance with Regulation 52 (5) of the PPDA (Rules and Methods for Procurement of Supplies, Works and Non – Consultancy Services) Regulations, 2014 and as such all bids expired. a procurement process cannot proceed when bids have expired”.

From the documents considered, there is no evidence that the entity wrote to the bidders asking them to extend their bids. What is on record is that on the 16th February 2015, the Applicant wrote to the entity extending their bid validity for four weeks.

- 4.3 The Tribunal agrees with the Authority's submission that the only method of extension of the bid validity period is as provided under Regulation 52 (5) of

the PPDA (Rules and Methods for Procurement of Supplies, Works and Non – Consultancy Services) Regulations, 2014. The Tribunal recalls its decision in **Hoima Taxi/Bus Owners and Drivers Savings and Credit Cooperative Society Application No. 5 of 2014** where the issue of extension of bid validity was handled and it was decided that it is Regulation 49 (5) of the Local Government (PPDA) Regulations, 2006 (*which is in the same terms as Regulation 52 (5) of the PPDA (Rules and Methods for Procurement of Supplies, Works and Non – Consultancy Services Regulations, 2014)*) which specifically provides for how bid validity period may be extended. In that Application, as is the same with the instant Application, the Entity did not request the bidders to extend their bid validity and the Tribunal held that there was no bid.

4.4 We shall now turn to the demand by the Applicant that since the Authority found that the expiry of the bids was occasioned by the entity, the Authority should not have merely asked the accounting officer of the entity to caution the Head Procurement and Disposal Unit but should have validated the bids and asked the entity to proceed with the procurement.

4.5 The Authority’s decision on this issue appears at page 4 of its decision thus:

“The Authority noted that Twed Property Development Limited in its application requested that the Authority takes over and completes the procurement process on the bids that were earlier submitted. The Authority advises that as a regulator, the Authority does not conduct procurement processes for its entities. This request cannot therefore be handled by the Authority”.

4.6 The Tribunal concurs with the decision of the Authority on this matter. Section 25(1) of the Act 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.

4.7 The Tribunal is of the firm view that in the execution of its regulatory functions, the Authority must respect the specific roles and functions conferred on procuring and disposing entities by the PPDA Act and

Regulations made under the Act. Since entities are responsible for the management of procurement activities, the Authority could not take over and complete the procurement nor order the procurement to continue on the basis of expired bids.

Accordingly, grounds I, ii, iv, v and vi fail.

- 4.8 With respect to ground iii of its Application, the Applicant states that the Authority erred when it upheld the refusal of the entity to disclose the grounds upon which the bidder's bid were unsatisfactory as communicated to the Inspector General of Government. In upholding the refusal by the entity to disclose the information required by the Applicant, the Authority relied on Section 47 (2) (a) (ii) of the PPDA Act, 2003 provides that:

*“Notwithstanding subsection (1) a procuring and disposing entity shall not disclose to a bidder or to any other person who is not involved in the preparation of the solicitation documents, the evaluation process or the award decision, any information relating to the examination, clarification, evaluation and comparison of bids **before** the best evaluated bidder notice is displayed on the procurement and disposal notice board of the procuring and disposing entity.”*

- 4.9 In its decision, the Authority stated that regarding the impugned procurement, the Best Evaluated Bidder Notice was not displayed by the Entity given that there was no Best Evaluated Bidder for the impugned procurement. That the Entity could not disclose the grounds upon which the bids were unsatisfactory since it would be in contravention of the above cited legal provision.

- 4.10 The Tribunal finds no reason to depart from the finding of the Authority on this matter. Clearly what the Applicant required to know was why Uganda Tourism Board made a conclusion that the Applicant's bid was unsatisfactory. According to section 47 (1) of the Act, a procuring and disposing entity shall, upon written request by any person, disclose information regarding any procurement or disposal process. Section 47(2) however provides that this information cannot be provided before the best evaluated bidder (BEB) notice is displayed on the procurement and disposal notice board of the procuring

and disposing entity. In the instant matter, it is on record that while the evaluation committee recommended the Applicant as the BEB, the Contracts Committee rejected the evaluation committee's recommendation hence no bidder was ever posted on the notice board of UTB as the BEB. Accordingly, no information could be disclosed to any bidder as to why their bid failed since the BEB notice had not yet been displayed.

Ground iii therefore fails.

4.11 This Application however exposes the likelihood of abuse of privileged position of procuring and disposing entities as against bidders in matters to do with extension of bid validity. Under the law, only a procuring and disposing entity may request bidders to extend their bid validity and not vice versa. In the instant application and in others which the Tribunal has handled before, entities simply allow bids to expire in complete disregard of the interests of bidders. **The Authority is invited to take note of this as an area of possible abuse of power by procuring and disposing entities.** The Authority should advise entities to take stern disciplinary action against officers involved in the procurement process who deliberately refuse to ask bidders to extend bid validity thereby frustrating the interests of bidders, as was the case in the instant matter.

5.0 Remedies

The Applicant prayed, among other prayers that the Tribunal directs the entity to suspend all attempts at commencing a fresh bidding process in respect to the procurement of office space for Uganda Tourism Board or in the alternative, that the if the Tribunal orders a fresh bidding process, the process should proceed using the solicitation documents in the cancelled procurement process. The Applicant also prayed that in the event that the Tribunal authorizes a fresh bidding process, it makes an order that the entity compensates the Applicant 300,000,000 shillings being lost bargains in terms of rental space.

5.1 In making these prayers, the Applicant relied on section 91I (5) (b) and (d). For ease of reference, the relevant section is reproduced below:

“91I (5) In reviewing a decision before it, the Tribunal may—

(b) direct the concerned procuring and disposing entity, with respect to anything to be done or redone in the procurement or disposal process;

(d) require the payment of compensation for any costs, reasonably incurred by the 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 of the Authority”.

5.2 The Tribunal declines to direct the entity to suspend all attempts at commencing a fresh bidding process in respect to the procurement of office space for Uganda Tourism Board. As explained earlier in this Decision, under section 25(1) the PPDA Act, it is the entity that is responsible for management of procurement activities. The Tribunal consequently declines to grant the prayers to order payment of compensation of 300,000,000 to the Applicant, since this prayer was dependent upon the first prayer (stopping fresh bidding process) being granted.

6.0 DECISION OF THE TRIBUNAL

1. The Application is dismissed.
2. The Tribunal **affirms** the decision of the Authority that the Entity (Uganda Tourism Board) proceeds with the new procurement process.
3. Each Party shall bear its own costs.

Dated at Kampala this 15th Day

SIGNED by the said
OLIVE ZAALE OTETE

SIGNED by the said
DAVID KABATERAINE

SIGNED by the said
ARCHT.JOEL KATEREGGA