

THE REPUBLIC OF UGANDA

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

APPLICATION NO. 12 AND NO. 13 OF 2015

**ADMINISTRATIVE REVIEW IN RESPECT OF TENDER FOR PRINTING AND SUPPLY OF
BALLOT PAPERS FOR PRESIDENTIAL, PARLIAMENTARY AND LOCAL GOVERNMENT
COUNCIL ELECTIONS 2016 (EC/SUPLS/2015-2016 /00520)**

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 The Electoral Commission (entity) published a bid notice 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 12) and Kalamazoo Secure Solutions Ltd (Application 13).
- 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 Commission could not proceed with the request for administrative review since it was received out of the mandatory time.

1.7 By letter dated 15th October 2015, the Applicants wrote to the Authority about the rejection of their administrative review application 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 as follows:

1. *The BEBN was displayed on 17th September 2015 with a removal date of 30th September 2015. Under section 90(1) (b), you are required to submit the application for administrative review in writing to the Accounting Officer within ten (10) working days from the date you first became aware of or ought to have become aware of the circumstances giving rise to the complaint.*

2. *Under section 90(1) (a), the administrative review is supposed to be submitted with the administrative review fees. According to section 90(2) of the PPDA Act, 2003, it is only after receipt of the complaint and the prescribed fees that the Accounting Officer can take action;*

3. *The Authority noted that by 2nd October 2015, you had not paid the administrative review fees as evidenced by the date on the URA payment Registration Slip i.e. 5th October 2015 that you have attached on your letter”.*

1.9 The Applicants were dissatisfied with the response of the Authority, hence this Application.

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY’S DECISION.

2.1 By letter dated 23rd October 2015, the Applicants applied to the Tribunal for a review of the Authority’s decision.

2.2 By application dated 23rd October 2015, the Ren-Form cc lodged an Application (Application 12) with the Tribunal on the following grounds:

- (i) *The Authority did not address the issue of mode of payment which was rejected by the Electoral Commission thus declaring that the review was out of time. The Tribunal should address the issue of acceptable mode of payment under the Bidding Document. What is stated in the letter by the Electoral Commission dated 30th September 2015 is for bid security and performance security.*
- (ii) *The Authority did not address the second ground of failure by the entity to subject the samples to the Uganda National Bureau of Standards testing as per criteria laid down in the bid document.*
- (iii) *The Authority did not address the ground of whether the bidder fulfilled the criteria of three jobs of similar complexity and proof execution of such jobs, Section 6 of the Bidding Document.(sic)*
- (iv) *The Electoral Commission also states that the amount paid was lower than the prescribed amount. The regulation 16 of 2014 of the Administrative Review Fees Regulations; 5-50 billion-100 billion is shs. 10,000,000 (ten million shillings).(sic)*

2.2 By application dated 23rd October 2015, Kalamazoo Secure Solutions Limited lodged an Application (Application 13) with the Tribunal on similar grounds as the ones reproduced above.

3.0 **DISPOSAL OF APPLICATION**

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

- (1) Applications for review of the Authority's decision dated 23rd October September 2015;
- (2) Authority's responses to the Applications dated 28th October 2015, Annexes to the Response and submissions;
- (3) Applicant's submissions and Annexes to the submissions;

- 3.1 The Tribunal conducted a hearing for the Parties on 6th November 2015. The Applicant was represented by Mr. Edgar Agaba and Mr. Mawanda Yusuf while the Authority was represented by Mr. John Kallemera. In attendance were two officers from the Electoral Commission and the agents of both Applicants.
- 3.2 At the commencement of the hearing, the Tribunal asked both Counsel if they had any objection to the Tribunal consolidating Application 12 of 2015 (*Ren-Form cc versus Public Procurement and Disposal of Public Assets Authority*) and Application 13 of 2015 (*Kalamazoo Secure Solutions Limited versus Public Procurement and Disposal of Public Assets Authority*) since both arose from the same tender, shared the same facts and raised the same grounds for review by the Tribunal. Counsel consented to the consolidation of the Applications.

4.0 Submissions by Counsel

At the commencement of the hearing, Counsel for the Applicant informed the Tribunal that he had dropped grounds (ii) and (iii) namely,

- (ii) *The Authority did not address the second ground of failure by the entity to subject the samples to the Uganda National Bureau of Standards testing as per criteria laid down in the bid document.*
- (iii) *The Authority did not address the ground of whether the bidder fulfilled the criteria of three jobs of similar complexity and proof execution of such jobs, Section 6 of the Bidding Document.*

- 4.1 Mr. John Kallemera, Counsel for the respondent raised a preliminary objection to the Application filed by Ren-Form cc to wit: ***the application is untenable and fatally defective on account that there was no application for administrative review before the Authority.*** He also raised a preliminary objection to the Application filed by Kalamazoo Secure Solutions Limited to wit: ***the application is untenable and fatally defective on account that the Applicant did not pay the administrative review fees within the statutory period.*** The Tribunal noted that these two objections had been raised in the Respondent's written submissions so it allowed both Counsel to address the Tribunal on the preliminary objections and on the substantive merits of the consolidated Application.

- 4.1 In response to the preliminary objection to the application filed by Ren Form cc that it is untenable and fatally defective on account that there was no application for administrative review before the Authority.
- 4.2 Counsel for the respondent argued that the Authority did not receive any application for administrative review from the Applicant as alleged in the appeal to the Tribunal. He stated that the communication received by the Authority from the Applicant dated 15th October 2015 referenced “Administrative review on Tender No: EC/SUPLS/14 – 15/00520 for the printing and supply of ballot papers for presidential, parliamentary and local government council elections 2016” was not an application for administrative review, but was merely an account of the events and correspondences between Ren – Form CC and the Entity for the period of 18th September 2015 to 15th October 2015.
- 4.3 He further argued that in the said communication, Ren-Form CC did not request the Authority to carry out an administrative review and it did not amount to a complaint as provided for under section 91 of the PPDA Act, 2003 and regulation 7 (2) of the PPDA (Administrative Review) Regulations S.I No. 16 of 2014.
- 4.4 He further submitted that the communication from Ren-Form cc did not contain any grounds of the complaint or the corrective measures requested from the Authority, which are mandatory and essential elements for an administrative review under regulation 7 (2) (f) and (g) of the PPDA (Administrative Review) Regulations S.I No. 16 of 2014.
- 4.5 He submitted that section 91 I of the PPDA Act 2003 which provides for appeals to the Tribunal, is only applicable in circumstances where there was a complaint before the Authority, however in the instant case there was no complaint as elaborated above. On the basis of the preliminary objection, the Respondent submitted that the Application was fatally defective and should be dismissed with costs.
- 4.6 In response to the preliminary objection to the Application filed by Kalamazoo Secure Solutions Limited i.e. **the application is untenable and fatally defective on account that the Applicant did not pay the administrative**

review fees within the statutory period, Counsel for the Respondent submitted that the Best Evaluated Bidder Notice was displayed on 17th September 2015. That under section 90 (1a) (a) and (b) of the PPDA Act, 2003 the Applicant was required to submit its application for administrative review to the Accounting Officer in writing with the prescribed fee within ten (10) working days from the date it first became aware or ought to have become aware of the circumstances giving rise to the complaint. That the aforementioned statutory provisions explicitly state that the prescribed fee must be paid within ten (10) working days.

- 4.7 Counsel submitted that the statutory ten working days had expired by 2nd October 2015 however the Applicant made payment of the administrative review fees on 5th October 2015. He cited regulations 6 and 9 of the PPDA (Administrative Review) Regulations S.I No. 16 of 2014 which provide for the dismissal of complaints by the Accounting Officer and the Authority where a complaint does not fulfill the requirement of section 90 (1a) of the Act.
- 4.8 He submitted that the Applicant did not pay the administrative review fees within the statutory period which was in contravention of section 90 (1a) (a) and (b) of the PPDA Act, 2003 and therefore the Accounting Officer of the Entity, as well as the Authority, were entitled to dismiss the Applicant's complaint without investigation in accordance with Regulation 6 and 9 respectively of the PPDA (Administrative Review) Regulations S.I No. 16 of 2014.
- 4.9 On the basis of this preliminary objection, the Respondent asserted that the Application is fatally defective and it should be dismissed with costs.
- 4.10 Counsel prayed that the Tribunal upholds both objections and dismiss the Application with costs.
- 4.11 On the substantive issue **whether the Authority received and/or made a decision regarding an application for administrative review made by the Applicants in respect of the tender for printing and supply of ballot papers for Presidential, Parliamentary and Local Government Council elections 2016**, Counsel submitted that the Authority did not make any decision in respect of an application for administrative review made by the Applicants in respect of the said tender.

- 4.12 He stated that in the communication from the Applicant dated 15th October 2015 addressed to the Authority and referenced “Investigation into print and supply of ballot papers for Presidential, Parliamentary and Local Government Council Elections 2016 Tender No: EC/SUPLS/14 – 15/00520”, the Authority was categorically requested to investigate the referenced matter under section 8 (c). That section 8 (c) of the PPDA Act, 2003 states that the Authority shall have the power to commission or undertake investigations and institute procurement or disposal contract and performance audits.
- 4.13 He further submitted that the Authority is considering the request for an investigation by the Applicants and it has not yet made a decision concerning the said request. He asserted that the grounds of appeal stated in the appeal to the Tribunal dated 23rd October 2015 were not raised or made before the Authority in the application for administrative review and therefore the Applicants are precluded from raising them before the Tribunal.
- 4.14 He cited the decision of the Tribunal in **Application No. 5 of 2014 Hoima Taxi/Bus Owners and Drivers Savings and Credit Cooperative Society v. PPDA** where it was stated that Part VII of the PPDA Act does not provide for a direct route for a bidder to file a complaint for administrative review with the Authority and therefore the bidder must first make a complaint to the Accounting Officer.
- 4.15 He concluded his submission with an assertion that the Application is untenable and misconceived and it should be dismissed with costs.
- 4.16 On the substantive issue **whether the Applicant applied for administrative review to the Authority regarding the grounds raised in Application No. 13 of 2015**, Counsel submitted that the letter submitted by the Applicants to the Authority dated 15th October 2015 was not an administrative review and it contravened Regulation 7 (2) (f) and 7 (2) (g) of S.I No. 16 of 2014 and was therefore defective.
- 4.17 Counsel for the Authority asserted that the Application is untenable and misconceived and it should be dismissed with costs.
- 4.18 In response to the preliminary objection raised in Ren Form cc that the application is untenable and fatally defective on account that there was no application for administrative review before the Authority, Mr. Edgar Agaba,

Counsel for the Applicants submitted that the Applicants' letters to the Authority dated 15th October 2015 and entitled "*Administrative Review on Tender EC/SUPLS/2015-2016 /00520 for Printing And Supply of Ballot Papers for Presidential, Parliamentary and Local Government Council Elections 2016*" were complaints properly filed with the Authority because they raised grounds that the entity had unlawfully rejected to hear their applications for administrative review on ground that they had paid the administrative review fees late and also that the fees paid were inadequate.

- 4.19 In response to the preliminary objection raised in the Application by Kalamazoo that the application is untenable and fatally defective on account that the Applicant did not pay the administrative review fees within the statutory period, Counsel for the Applicants submitted that the Applicants paid administrative fees by cheque dated 30th September 2015 which was within time. That the advice by the entity that the mode of payment for administrative fees should be in accordance with the provisions of the bidding document was wrong because the mode of payment specified in the bidding document relates to bid security and performance guarantee and not administrative review fees. Counsel further submitted the entity only advised them on mode of payment on 30th September 2015 when the period for filing administrative review was about to expire thus denying the Applicants their right to lodge an administrative review. He further argued that payment by cheque is not an illegal mode of payment in Uganda.
- 4.20 Counsel prayed that the preliminary objections should be dismissed and the Application be heard on its merits.
- 4.21 On the first substantive issue **whether the Authority received and/or made a decision regarding an application for administrative review made by the Applicants in respect of the tender for printing and supply of ballot papers for Presidential, Parliamentary and Local Government Council elections 2016**, Counsel submitted that in response to the Applicants' complaint, the Authority maintained the entity's position that the Applicants did not pay their administrative review fees in time. That the response by the Authority did not address the issue of mode of payment. That the response by the Authority was a decision by the Authority which was made without according the Applicants a right to be heard.

4.22 On the second substantive issue **whether the Applicants applied for administrative review to the Authority** Counsel submitted that the Applicants' letters dated 15th October 2015 were entitled 'Administrative review.....' and they raised complaints against the entity and were therefore complaints before the Authority within the meaning of regulation 7 (2) (f) of the PPDA (Administrative Review) Regulations S.I No. 16 of 2014.

4.23 In conclusion, he submitted that the Tribunal should find that the Authority dismissed the Applicants' complaints to it without according the Applicants a hearing. He prayed that the Tribunal should order the Authority to give the Applicants a hearing. He also prayed for costs.

5.0 **Resolution by the Tribunal**

5.1 The Tribunal will deal first with the preliminary points of law in the order raised by the parties.

5.2 The Authority asserts that the application is untenable and fatally defective on account that there was no application for administrative review before the Authority.

5.3 In dealing with this point of law, the Tribunal carefully scrutinized the Applicants' letters to the Authority dated 15th October 2015. First, the Tribunal finds that the subject matter of the letters is titled "**Administrative review on Tender**" which in our view was a strong pointer as to the intention of the letters. In the said letters, the Applicants are outlining the unfairness visited on them by the entity. This included the mode of payment not accepted by the entity; the preferred mode of payment by the entity and how this was communicated to the Applicants a few days to expiry of the time for filing complaints; that their fees were inadequate and also paid outside time. These do not appear to us to be a 'mere account of events' as alleged by the Authority but were issues raised by the Applicants for which the Authority was called upon to address.

5.4 The Tribunal finds that the letters dated 15th October 2015 were complaints within the meaning of S.I 16 of 2016 because they raised issues which called for remedies by the Authority. In fact in the response by the Authority to the

letters dated 20th October 2015, the Authority correctly refers to them as *“issues from your letter”*.

- 5.5 We find no merit in the preliminary objection and it is therefore dismissed.
- 5.6 On the second preliminary objection that the application is untenable and fatally defective on account that the Applicant did not pay the administrative review fees within the statutory period, it is not in dispute that under the PPDA Act 2003 and the PPDA (Administrative Review) Regulations, 2014, an application for administrative review must be accompanied with administrative review fees. Regulation 11(1) of S.I 16 of 2016 provides that the fees in the Second Column of the Schedule to the Regulations shall be paid to a procuring and disposing entity for the administrative review for a procurement or disposal of a value specified in the first column. The Regulation does not however stipulate a mode of payment for the fees. This means that an entity on receiving an application for administrative review has to promptly guide a bidder on how to pay the fees.
- 5.7 It is on record that the Applicants submitted their application for administrative review to the entity on 18th September 2015. The entity should have advised them then how to pay the administrative review fees. It is on 30th September 2015, when the Applicants had paid the fees by cheque that the entity directs them that the fees should be paid by EFT or bank guarantee and by the time the Applicants oblige, the EFT comes out after 2nd October 2015, the date by which the Applications should have been submitted.
- 5.8 The Tribunal finds that payment by cheque is a lawful mode of payment in Uganda. The payment made by the Applicants on 30th September 2015 was lawful and was made within the statutory period.
- 5.9 We find no merit in the second preliminary objection and it is also dismissed.
- 5.10 On whether the Authority received a complaint and made a decision regarding an application for administrative review made by the Applicants in respect of the tender for printing and supply of ballot papers for Presidential, Parliamentary and Local Government Council elections 2016, as pointed out earlier in our resolution of the first preliminary objection, we are of the firm

view that the Applicants filed a complaint to the Authority in their letters dated 15th October 2015. The response by the Authority to the Applicants dated 20th October 2015 wherein the Authority tells them that their applications to the Electoral Commission was filed outside the statutory time was a decision by the Authority which was made without according the Applicants a hearing.

5.11 In the case of **Turyatamba and Others Vs. Attorney General and Others Constitutional Petition No. 15 of 2006** had this to say on the right to be heard”

“the right to be heard is a fundamental basic right. It encompasses every aspect of fair procedure and the whole area of due process of the law...”

We therefore find that the Regulator failed in its duty to hear the Applicants complaints which infringed their basic fundamental right to heard.

5.12 On the issue of payment of administrative review fees outside the statutory period, the Tribunal, as already discussed from a resolution of preliminary objection 2 finds that payment by cheque dated 30th September 2015 was lawful and was made within the statutory ten days of filing a complaint. The rejection of the payment by cheque by the entity was irregular and lacked any legal basis. Accordingly, the Tribunal finds that payment of administrative review fees was made within the required time.

The Tribunal therefore upholds the Applications.

6.0 DECISION OF THE TRIBUNAL

1. The Tribunal upholds Application 12 of 2015.
2. The Tribunal upholds Application 13 of 2015.
3. The Tribunal sets aside the decision of the Authority in Application 12 and 13 and makes the following orders:
 - (a) in accordance with the powers granted to the Tribunal under section 91(6)(c)(ii) of the PPDA Act, the Tribunal refers the matters back to the Authority for it to hear the Applicants on the merits;

- (b) due to the urgency of the matter, the Authority is directed to conduct the hearings within 7 working days from the date of this decision;
- (c) no further action on the procurement should be undertaken till the Authority has made its decision.

4. The Respondent shall pay each Applicant costs of two million shillings.

Dated at Kampala this 8

SIGNED by
OLIVE ZAALE OTETE

SIGNED by
MOSES JURUA ADRIKO

SIGNED by
DAVID KABATERAINE

SIGNED by
JOEL KATEREGGA