

**THE REPUBLIC OF UGANDA**

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

**APPLICATION NO 10**

**APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT OF THE TENDER FOR CONSULTANCY FOR DESIGN REVIEW AND SUPERVISION SERVICES FOR THE IMPROVEMENT OF DEPARTURES AREA AT ENTEBBE INTERNATIONAL AIRPORT DELIVERED ON 18<sup>TH</sup> SEPTEMBER 2015.**

**APPLICANT/BIDDER: M/S ARCH DESIGNS LTD.**

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

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

## DECISION OF THE PPDA APPEALS TRIBUNAL

### 1.0 BACKGROUND/FACTS

- 1.1 Civil Aviation Authority (hereinafter referred to as 'the Entity') published a request for Expression of Interest (EOI) for consultancy for the design review and supervision services for the improvement of departures area at Entebbe International Airport (hereinafter referred to as 'the services') on 7<sup>th</sup> May 2015 and 15<sup>th</sup> May 2015 in the Daily Monitor and New Vision newspapers respectively.
- 1.2 The Request for EOI provided that the Entity required a suitably skilled and experienced consultant to perform the following:
  - Undertake design review;
  - Supervision of construction works; and
  - Prepare as built drawings.
- 1.3 Arch Design Ltd in association with EES Africa Pty Ltd and Turner and Townsend (Pty) Ltd submitted an expression of interest for the aforementioned services.
- 1.4 On 10<sup>th</sup> July 2015 the Entity displayed the notice indicating successful consultants who had been shortlisted.
- 1.5 The said Notice provided that the Applicant's Expression of Interest was eliminated for the reason that it had provided the designs for the departures that are to be reviewed by the consultants and that they did not declare conflict of interest.
- 1.6 On 16<sup>th</sup> July 2015 the Applicant applied to the Accounting Officer of the Entity for administrative review and the administrative review fees were paid on 5<sup>th</sup> August 2015.
- 1.7 The Accounting Officer of the Entity dismissed the Applicants application for administrative review as stated in his decision dated 24<sup>th</sup> August 2015.
- 1.8 On 28<sup>th</sup> August 2015, the Applicant applied to the Authority for administrative review.
- 1.9 The Authority rejected the Applicant's administrative review application in a decision dated 22<sup>nd</sup> September 2015.

## 2.0 APPLICATION FOR REVIEW OF THE RESPONDENT'S DECISION.

2.1 By Memorandum dated 28<sup>th</sup> September 2015, the Applicant lodged an Application with the Tribunal for review of the Respondent's decision on the following grounds:

- (i) *In accordance with the PPDA Regulation No 10(a) of Statutory Instruments 2014 No 16, we are not satisfied by the Authorities decision and we hereby submit our application for the Appeals Tribunal for an Administrative Review especially on **Ground Two of the PPDA Administrative Review Report and more so the definition of "Continuation of Services and Further Services under Conflict of Interest PPDA Guidelines.** We note that "Further Services or non consulting services are those for which physical aspects of the activity predominate, are bid and contracted on the basis of performance of measurable physical output and for which performance standards can be clearly identified and consistently applied such as drilling, ariel photography, satellite imagery, mapping and similar operations as well as construction of works, manufacture of goods, and operation and maintenance of facilities or plant. While the Consulting Services, to which these guidelines apply, are of an intellectual and advisory nature". Design Review and Supervision are not further services but continuation of Consulting Services.*

## 2.2 DISPOSAL OF APPLICATION

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

- (i) Memorandum and Annexures in support for review of the Respondent's decision dated 28<sup>th</sup> September 2015 (the Application);
- (ii) Respondent's response to the Application and submissions;
- (iii) Applicant's submissions and Annexes to the written submissions;

2.4 The Tribunal summoned the Applicant, and the Respondent for a hearing on 14<sup>th</sup> September 2015. The Applicant was represented by Mr. Edgar Agaba. The Respondent was represented by Mr. John Kallemera and Ms. Esther Kusiima. In attendance was Mr. Richard Barugahare, the Applicants Managing Director.

2.5 The parties raised one issue for determination by the Tribunal:

*Whether the Consultancy Services that were sought by Civil Aviation Authority (CAA) in the new procurement process are “Continuation of Services” or “Further Services” within the meaning of Clause 37.2 of the General Conditions of Contract (GCC) of the previous contract between CAA and the Applicant.*

### 3.0 Submissions by Counsel

3.1 Issue 1: *Whether the Consultancy Services that were sought by Civil Aviation Authority (CAA) in the new procurement process are “Continuation of Services” or “Further Services” within the meaning of Clause 37.2 of the General Conditions of Contract (GCC) of the previous contract between CAA and the Applicant.*

3.2 The Applicant in their written and oral submissions argued that the Applicant had applied to the Entity to undertake the Design Review and Supervision of Services under Procurement Reference No CAA/SRVCS/14-15/00289 which he successfully concluded. The concluded Consultancy was for the development of the VIP area, staff car parks and walkways and to improve Departures Area at Entebbe International Airport. The contract was executed between 9<sup>th</sup> May 2013 and February 2015. The Applicant completed the assignment and submitted his final report to the Entity.

3.3 Referring to the **World Banks Procurement Guidelines for selection and Employment of Consultants January 2011, “Applicability of Guidelines Clause 1.7 & 1.8; Conflict of Interest Clause 1.9(c) and Unfair Competitive Advantage Clause 1.10”** and the **African Development Bank Rules and Procedures for the**

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use of Consultants May 2008 Edition, Clauses 1.7 & 1.8 Conflict of Interest Clause 1.9(a-b) and Unfair Competitive Advantage Clause 1.10, Counsel argued that the Rules precluded a provider or firm engaged to provide goods, works or non consulting services for a project from providing consulting services resulting from or directly related to those goods, works, or non-consulting services.

3.4 However a Consulting firm such as the Applicant was exempted expressly from the above-stated exclusion and therefore was not barred from providing services arising directly or directly related to services already rendered.

3.5 Counsel argued that the services that the entity was procuring for "Design Review and Supervision of Construction for the improvement of departures at Entebbe International Airport – CAA/SRVCS/14-15/000289 was a *continuation of service and not a further service* and therefore there was no bar or conflict arising from the Applicants bid to provide services under that tender. In support of this position Counsel cited GCC Clause 37.2 (which had been included in their initial contract) that clause reads as follows;-

" the Provider shall after the conclusion or termination of the Contract, be limited in its role in connection with the Project and shall not be permitted any further involvement in the provision of procurement of works, supplies or further services **other than** a continuation of the services, for any project resulting from or closely related to the Services",

3.6 Counsel construed this provision in the present context to mean that a Consultant who had provided services under a previous contract had to be specifically excluded from providing additional services under a related or continuation of the previous contract.

3.7 In conclusion he submitted that to preclude the Applicant from responding to the new tender would cause upheaval in the Architectural Industry since it was not uncommon for Architects to both design, review their designs and supervise construction of the ensuing Project.

3.8 The Applicant's prayers were as follows;-

(a) The Applicant be allowed to participate in the tender for the Consultancy for design review and supervision services for the improvement of Entebbe International Airport- Procurement Reference No CAA/SRVCS/11-12/00142.

(b) The Applicant be awarded Costs of the Application.

3.9 In reply Counsel for the Authority in their written and oral submissions argued that

4.0 The Applicant executed a contract with the Entity for consultancy services for the development of VIP and staff car parks and walkways to improve the departures area at Entebbe International Airport vide Ref: CAA/SRVCS/11-12/000142.

4.1 The Terms of Reference of the previous contract provided for the project scope which required the consultant to:

- Carry out topographic survey of the car parks, walkways and the access road to the departures area to be redesigned;
- Carry out the necessary soil investigations;
- Prepare architectural designs and details;
- Prepare structural, electrical and mechanical designs;
- Make proposals for the improvement of lighting at the public car park;
- Prepare bills of quantities;
- Prepare specifications;
- Prepare cost estimates for the implementation of the designs;
- Seek statutory approval for the architectural and structural drawings.

4.2 That The Authority was satisfied that the services provided by the Applicant under the previous contract were for the improvement of the Departures area at Entebbe International Airport and that the assignment was successfully completed by the Applicant and a final report was submitted to the Entity.

4.3 He argued that the that the services for which the Applicant submitted an Expression of Interest were further services which emanated from and were related to the previous contract that had been undertaken by the Applicant.

4.4 In response to the arguments on the applicability of The World Bank Procurement Guidelines and the African Development Bank Rules and

Procedures for the use of Consultants in determining what constituted a Continuation of Service or Further Service. Counsel submitted that the clauses cited by Applicant's Counsel did not define "continuation of services" and "further services" and essentially both publications only dealt with how the Guidelines should be applied. Counsel submitted that these guidelines were not used in the previous or current procurement by the Entity.

- 4.5 Counsel referred the Tribunal instead to the definition of "Continuation of services", in the Oxford Advanced Learner's Dictionary which defined the term as follows; *"The Action of carrying something on over time or the state of being carried on"*. In his view relying on this definition "Continuation of services" meant the action of "carrying services over time or the state of services being carried on."
- 4.6 Counsel argued that the issue before the Tribunal was whether the services in the new procurement were a continuation of the services in the previous contract or whether they were distinct and independent services. Counsel submitted that the services provided by the Applicant under the previous contract were successfully completed and a final report submitted to the Entity so it was untenable for the Applicant to assert that they were still in progress.
- 4.7 Counsel submitted that It was therefore misconceived for the Applicant to assert that the Design review and construction supervision services that were sought in the new procurement were a continuation of the consulting services of the previous contract.
- 4.8 With respect to the definition of "further services", Counsel referred to the Oxford Advanced Learner's Dictionary, which defines "further" to mean *"more or additional"* in his view therefore "further services" would mean more , additional or extra services.
- 4.9 Summarizing their arguments Counsel for the Authority submitted that the consultancy services under the new procurement were for design review, and supervision of construction works which were related to the initial services in the previous contract. The applicant's Expression of Interest fell within the provisions of GCC clause 37.2 of the contract for consultancy services between the Entity and Arch Design Ltd, which prohibited the Applicant from any further involvement in the provision of further Services because the design review and construction of supervision envisaged in the new tender were not a continuation of the design of the civil works as alleged by the applicant.

## 5.0 Resolution of Issues by Tribunal



- 5.1 The Tribunal carefully studied the Application, the responses to the Application and written submissions. It also listened carefully to the oral arguments made during the hearing.
- 5.2 The issue before the Tribunal is to determine whether the tender for Consultancy to review and supervise construction at the departures area in Entebbe International Airport (Procurement Reference No CAA/SRVCS/11-12/00142 was a continuation of the consultancy service previously undertaken by the Applicant for the development of VIP and staff car parks and walkways to improve the departures area at Entebbe International Airport ( Ref: CAA/SRVCS/11-12/000142) which included inter-alia as seen above, preparation of architectural, structural, electrical and mechanical designs for the departures area as well as preparation of bills of quantities, specifications and cost estimates, or if as argued by the Authority this procurement was a further service arising out of and related to the first service rendered by the Applicant.
- 5.3 To determine this question reference must first be made to the Entity's statement of requirement or in daily parlance its needs which are contained in the Expression of Interest which sought Consultancy Services for "***Design Review and Supervision Services for the Improvement of the Departures Area at Entebbe International Airport***"
- 5.4 From the evidence adduced before the Tribunal it is clear that the current procurement arose directly from the Consultancy service previously rendered by the Applicant. Bearing this fact in mind it is our finding that had the Entity intended a Continuation of Service under the first contract such stipulation would have been included in that contract. In other words the first contract would have been broken into two (2) separate parts, the first part would have dealt with the initial service of providing architectural drawings and related services, and the second part which would have commenced on satisfactory conclusion of the first part dealing with supervision of the Construction and related processes. In other words the Entity would have not provided for the conclusion and rendering of a report by the Consultant for the first consultancy service had their intention been for the same Consultant to continue under the same contract.
- 5.5 This interpretation of the Entities intentions is made demonstrably clear by the fact that the Expression of Interest specifically called for the Consultant to



review designs already in the possession of the Entity. The designs that are subject to review are the designs submitted to the Entity by the Applicant under the previously concluded consultancy.

- 5.6 It would have been absurd for the Entity to expect an unbiased review of the designs if the Applicant was assigned that duty in light of his prior engagement.
- 5.7 We agree with Counsel of the Applicant that the Applicant was barred by GCC Clause 37.2(reproduced above) from providing any service under the expression of interest because the Applicant expressly agreed as such in the first contract concluded with the Entity.
- 5.8 In this particular instance before the Tribunal the Entities expression of Interest stipulated Project design review which was formulated in a separate request for proposals as distinct from the previously concluded consultancy and it was not a continuation of service as argued by the Applicant but a further service from which the Applicant was barred from participating arising from obligations created by the first contract.
- 5.9 In the premises the Tribunal finds this application to be wholly without merit and dismisses it.

**6.0 DECISION OF THE TRIBUNAL**

1. The Tribunal hereby dismisses the Application.
2. Each party shall bear its legal costs.

*Dated at Kampala this 15<sup>th</sup> day of September 2015.*

SIGNED by the said  
OLIVE ZAALE OTETE

SIGNED by the said  
MOSES JURUA ADRIKO

SIGNED by the said  
DAVID KABATERAINE

SIGNED by the said  
JOEL KATEREGGA