

THE REPUBLIC OF UGANDA

**PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY APPEALS
TRIBUNAL**

(PPDA APPEALS TRIBUNAL)

APPLICATION NO. 15 OF 2014⁵

**APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT
AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT OF ITS DECISION
DECLINING THE APPLICANTS' REQUEST FOR ORDERS DIRECTING THE
ELECTORAL COMMISSION TO AVAIL DOCUMENTS TO THE APPLICANT**

APPLICANTS **1/ M/S 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 ARCHITECT JOEL KATEREGGA, MEMBER)**

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BACKGROUND/FACTS

The Applicants instituted Applications No. 12 of 2015 (Ren – Form cc v. PPDA) and No. 13 of 2015 (Kalamazoo Secure Solutions Limited v. PPDA) in the PPDA Appeals Tribunal against the decision of the Authority.

Applications No 12 and 13 arose from decisions of the Authority in respect of administrative review applications to the Authority by Ren –Form cc and Kalamazoo Secure Solutions Ltd.

Ren –Form cc and Kalamazoo Secure Solutions Ltd had previously made applications for administrative review before the Accounting officer of the Entity (THE ELECTORAL COMMISSION).

Ren –Form cc and Kalamazoo Secure Solutions Ltd also applied to the Authority to conduct investigations into the procurement for the printing and supply of ballot papers for Presidential, Parliamentary, and Local Government Council Elections 2016.

The PPDA Appeals Tribunal issued its decision for applications No. 12 and 13 of 2015 on 8th November 2015, wherein it upheld the applications and directed the Authority to hear the administrative review applications by Ren – Form cc and Kalamazoo Secure Solutions Limited within seven working days.

The Authority duly complied with the decision of the Tribunal and heard the parties on 12th November 2015.

The Applicants filed this application on 16th November 2015

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION.

2.1 By letter dated 12th November 2015 the Applicants being dissatisfied with the decision of the Authority applied to the Public Procurement and Disposal of Public Assets Tribunal (the Tribunal) for review of the Authority's decision declining to grant an order to compel the Electoral Commission to furnish the Applicant with certain documents it had previously requested in its letter dated 11th November 2015 on the following grounds:-

1. *The Electoral Commission failed to avail the documents requested for in accordance with Section 89(2) of the PPDA Act 1/ 2003.*
2. *PPDA failed to order the Electoral Commission to avail those documents to the applicant and dismissed our objection which was in violation of their right to a fair hearing.*
3. *PPDA has failed to exercise its powers to investigate the Electoral Commissions award of tenders for printing and supply of ballot papers for Presidential, Parliamentary and Local Council Elections 2016 Tender No EC/SUPS/14-15/00520.*

3.0 DISPOSAL OF THE APPLICATION.

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

- (1) Application for review of the Authority's decision dated 12th November 2015;*
- (2) Authority's response to the Application dated 18th November 2015, Annexes to the Response and Submissions;*
- (3) Applicant's submissions.*

3.1 The Tribunal Conducted a hearing for the Parties on 30th November 2015 . The Applicants were represented by Mr. Edgar Agaba and Mr. Yusuf Mawanda. The Authority was represented by Mr. John Kallemera. In attendance were officials from the Electoral Commission and the agents of both Applicants.

4.0 SUBMISSIONS BY COUNSEL

At the onset of the hearing and in his submissions, Counsel for the Authority raised two (2) preliminary objections to wit: -

- (a) The application is untenable and premature on account that at the time of filing Application No. 15 of 2015 there was no decision of the Authority.
- (b) The application is untenable and fatally defective on account that there was no administrative review application before the

Accounting Officer or the Authority in respect of the grounds raised in the current application.

- 4.1 In support of the first objection Counsel for the Authority argued that, the instant application before the Tribunal was instituted under Section 91 I (1) of the PPDA Act which provides that; 'A bidder who is aggrieved by a decision made by the Authority under section 91 (4) may make an application to the Tribunal for a review of the decision of the Authority'.
- 4.2 Counsel submitted that the Applicants had not attached the alleged decision of the Authority from which they were applying for administrative review before the Tribunal. In his view the absence of a decision of the Authority, at the time of filing the instant application, rendered it defective and therefore a nullity. On that basis he concluded that the application was fatally defective and it should therefore be dismissed with costs against both Applicants.
- 4.3 In support of the second objection Counsel for the Authority cited several sections of the PPDA Act 2003, as follows;
- 4.4 Section 91 I (1) of the PPDA Act 2003 which provides that 'A bidder who is aggrieved by a decision made by the Authority under section 91 (4) may make an application to the Tribunal for a review of the decision of the Authority'.

- 4.5 Counsel also referred to section 89 (1) of the PPDA Act which provides that a bidder may seek administrative review for any omission or breach by a Procuring and Disposing Entity of the Act or the regulations made there under.
- 4.6 Counsel cited Section 90 (1) of the PPDA Act 2003 which states that a bidder who is aggrieved by a decision of a Procuring and Disposing Entity may make a complaint to the Accounting Officer of the Procuring and Disposing Entity.
- 4.7 He referred to Section 90 (1a) which provides for the form, nature and time for instituting a complaint before the Accounting Officer and Section 90 (3) of the PPDA Act 2003, which provides for the circumstances under which a bidder can make an application for administrative review to the Authority which are;-
- a) In the event that the Accounting Officer does not make a decision within the period specified in section 90 (2) (b) of the Act;
 - b) In the event that the bidder is not satisfied with the decision of the Accounting Officer.
- 4.8 Counsel cited Regulation 7 (2) (d) of the PPDA (Administrative Review) Regulations S.I No. 16 of 2014, which stipulated the requirements for instituting a complaint to the Authority which inter-

alia must include the complaint made to the Accounting Officer as well as a record of the correspondences regarding the complaint between the Accounting Officer and the bidder as stated under Regulation 7 (2) (e) of S.I No. 16 of 2014.

4.9 Counsel also relied on Regulation 7 (1) of S.I No. 16 of 2014 which provided that the complaint would be in writing and addressed to the Executive Director of the Authority.

4.10 Counsel submitted that prior to instituting the current application; the Applicants were obliged to undertake the following processes:

- i. To make a request to the Electoral Commission to be furnished with the required documents;
- ii. In the event that the Applicants were not furnished with the documents or if the documents were insufficient, they could apply to the Accounting Officer of the Electoral Commission for administrative review, as prescribed in the relevant legislations;
- iii. In the event that the Applicants were dissatisfied with the Accounting Officer's decision or the Accounting Officer did not make a decision within the statutory time frame, they could

lodge a complaint with the Authority, as prescribed in the relevant legislations;

- iv. Following a decision of the Authority or failure by the Authority to make a decision within the statutory time frame, the Applicants could make an application for administrative review to the PPDA Appeals Tribunal in accordance with the relevant legislations.

4.11 Counsel argued that the Applicants did not duly follow the procedures for administrative review as provided for in the PPDA Act, 2003 and the PPDA (Administrative Review) Regulations S.I No. 16 of 2014.

Counsel made reference to **Hoima Taxi/Bus Owners and Drivers Savings and Credit Cooperative Society v. PPDA Application No. 5 of 2014** in which the Tribunal stated at page 11 of the decision that ***“Part VII of the Act does not provide for a direct route for a bidder to file a complaint for administrative review with the Authority and that the bidder must first start with the Accounting Officer..... .. a bidder aggrieved by a decision of the Entity must follow the procedure laid down in section 90 of the PPDA Act, 2003.”***

4.12 Counsel submitted that the Applicants had failed and/or neglected to duly lodge an application for administrative review before the

Accounting Officer of the Entity and/or to the Authority, prior to instituting this appeal therefore the application was fatally defective and should be dismissed with costs against both Applicants.

4.13 In response to both preliminary objections Counsel for the Applicant referred the Tribunal to **Section 47 of the PPDA Act** which provides that “ *A procuring and disposing entity shall , upon written request by any person disclose information regarding any procurement or disposal*”. Counsel argued that the Entity was under a statutory obligation to avail the Applicants with sufficient information to enable them effectively pursue the Administrative Review hearing before the Authority. Counsel further argued that the information sought was not critical in resolving in which the principal issues whether the Applicants had paid Administrative Review fees in time and in accordance with the law and whether the Entity should be ordered to accord them an Administrative Review hearing of their complaint following their complaint.

4.14 Counsel prayed that the preliminary objections be dismissed and the Application is determined on its merits.

5.0 RESOLUTION BY THE TRIBUNAL

5.1 In resolving the Application, the Tribunal considered the documents availed to it, the submissions of both Counsel, the law applicable to this application and the substantive decision made by the Authority upholding the Applicants’ application for Administrative Review and

orders that the Entity hear the substantive application for administrative review, and refund Ugx 5 million excessive administrative fees paid by the Applicants.

- 5.2 The Tribunal will deal with the preliminary objections raised by the Respondent first which as will be seen below substantively dispose of this application.
- 5.3 This Tribunal derives its mandate from Part VIIA of the PPDA Act 1/2003. Section 91 I (1) of the Act gives an aggrieved bidder the right to make an application to the Tribunal for review of a **decision (emphasis ours)** made by the Authority.
- 5.4 In the instant application before the Tribunal ,the Applicants by letters dated 11th November 2015 wrote to the Entity requesting to availed with:-
- (a) the Evaluation report
 - (b) comparison of the Tenders, proposals or quotations , including the evaluation criteria used and
 - (c) the reasons for rejecting Ren- Form cc's/ Kalamazoo Secure Solutions Ltd bid.(sic)
- 5.5 The Applicants sought these documents to support their position in hearings to be held before the Authority pursuant to the orders of

the Tribunal directing the Authority to conduct Administrative review hearing of the Applicants complaint; protesting the Entity's decision not to grant them an Administrative Review hearing, on ground that they had not paid the statutory administrative review fees within the 10 days statutory prescribed time, to institute such review proceedings before the Accounting Officer.

5.6 Section 89 of the PPDA Act provides as follows:-

89 Administrative review

- (1) A bidder may seek administrative review for any omission or breach by a Procuring and disposing entity of this Act, or any regulations or guidelines made under this Act or of the provisions of bidding documents, including best practices.
- (2) A procuring and disposing entity shall provide a bidder who seeks administrative review with:-
 - (a) A summary of the evaluation process;
 - (b) A comparison of the tenders, proposals or quotations, including the evaluation criteria used ; and
 - (c) the reasons for rejecting the concerned bids.
- (3) The information provided to a bidder under subsections (2) shall be used only for administrative review purposes.

5.7 A perusal of the letter dated 18th November 2015 addressed to the Applicants informing them of the outcome of the Administrative Review hearing conducted by the Authority on 12th November 2015 summarizes the four (4) grounds upon which the Authority made their decision namely;- (1) Acceptability of the mode of administrative review fees payable to the Entity, (2) Entity's preferred form of payment. (3) Adequacy of the Administrative Review fees paid. (4) The Entity's claim that the Administrative Review Fees were paid late.

5.8 It is clear as demonstrated above that the process before the Authority in a nutshell was a reconsideration of the Accounting Officers decision to reject the Applicants' application for Administrative Review on the basis of nonpayment or inadequate payment of administrative fees. The information sought in the Applicants' letter dated 11th November 2015, was not relevant at the proceedings before the Authority and would not have assisted in the determination of the grounds formulated by the parties for resolution.

5.9 Secondly the information sought by the Applicants is information which is requested for at the onset of the Administrative Review proceedings before the Accounting Officer as provided for in Section 89 of the Act (reproduced above). It would have been premature for the Authority to make an order

compelling the Accounting officer to produce the documents requested by the Applicants make such an application before the Accounting officer had disposed of the substantive complaint.

5.10 We therefore agree with the Authority that this application contesting the Authority's inaction with respect to the Applicants' request for information from the Entity in its letter dated 11th November 2015, was premature because the Accounting officer had not disposed of the complaint and also misconceived since it did not impinge on the matters subject to review before the Authority for which the Applicants sought a remedy.

5.11 We are fortified in arriving at this decision by the fact that the Applicants application for Administrative review was upheld by the Authority and the ensuing orders thereafter which ineralia directed the Accounting Officer to hear the application for administrative review filed and refund of excess administrative fees paid in the sum of Ug. Shs. 5 million.

5.12 For the above reasons we therefore uphold both objections and dismiss this application with costs.

6.0 DECISION OF THE TRIBUNAL

1. The Tribunal dismisses the Application

2. The Applicant is ordered to pay costs of two million shillings.

Dated at Kampala

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