

THE REPUBLIC OF UGANDA

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

REFERENCE NO.1 OF 2015

REFERENCE OVER SERIOUS BREACH OF THE PPDA ACT 2003 BY MBARARA MUNICIPAL COUNCIL IN RESPECT OF PROCUREMENT REFERENCE NO MBAR761/SRVCS/00008(UNDER SECTION 91J (I) OF THE PPDA ACT 2003.

APPLICANT: PUBLIC PROCUREMENT AND DISPOSAL OF ASSETS AUTHORITY (PPDA)

RESPONDENT: MBARARA MUNICIPAL COUNCIL

(Before: MOSES JURUA ADRIKO- MEMBER, DAVID KABATERAINE-MEMBER, ABRAHAM NKATA MEMBER, and ARCHITECT JOEL KATEREGGA, MEMBER)

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BACKGROUND/FACTS

The Applicant makes this reference over alleged serious breach of the Public Procurement and Disposal of Public Assets Act, 2003, (the Act) by Mbarara Municipal Council (Respondent). The facts pertaining to this reference are stated below:

1. On 6th January 2015, the Respondent , invited bids for the management and collection of revenue from public vehicle parking areas in Mbarara Municipal Council under Procurement Reference No. Mbar761/Srvcs/00008.
2. Two bids were received for the said procurement from M/s Mbarara United Taxi Owners, Conductors and Drivers Cooperative Society Limited and M/s Mbarara United Taxi Operators Cooperative Society Limited.
3. On 27th January 2015 the Contracts Committee of the Respondent approved the award of the contract for the said procurement to M/s Mbarara United Taxi Operators Cooperative Society Ltd (the Best Evaluated Bidder).
4. On 28th January 2015 a copy of the Best Evaluated Bidder Notice for the stated procurement was displayed by the Respondent.
5. By application dated 30th January 2015 M/s Mbarara United Taxi Owners, Conductors and Drivers Cooperative Society Ltd (the Aggrieved Bidder) applied for administrative review of the said procurement.
6. On 5th February 2015 the Authority communicated to the Accounting Officer of the Respondent stating that it had received a copy of the application for administrative review and advised on the appropriate procedural steps to be taken.
7. By letter dated 16th February 2015, the Accounting Officer of the Respondent dismissed the application for administrative review brought by the Aggrieved Bidder.
8. On 16th February 2015, the Respondent sent a copy of the administrative review report to the Authority.
9. On 17th February 2015 the Aggrieved Bidder applied to the Authority for administrative review in respect of the procurement and served the Respondent with a copy of the application.

10. By letter dated 19th February 2015 the Authority notified the Accounting Officer of the Respondent that it had received an application for administrative review from the Aggrieved Bidder and advised that all action on the said procurement process should be suspended.
11. On 20th February 2015 a contract was executed between the Respondent and the Best Evaluated Bidder.
12. The Administrative Review hearing before the Authority was held on 6th March 2015.
13. The Authority issued its decision arising out of the Administrative Review proceedings on 18th March 2015.

2.0 REFERENCE.

On 1st April 2015 the Authority filed the instant reference seeking declaration that there had been a serious breach of the Act by the Respondent. The grounds for the reference are that the Respondent executed a contract with the successful bidder on a date prior to the lapse of the administrative review period contrary to section 90(7) (a) of the Act.

- 2.1 On 20th April 2015, the Tribunal wrote to the Respondent (letter copied to Applicant) requesting the Respondent to file a written response to the Reference giving a chronology of events.
- 2.2 In the same letter, the Tribunal directed both parties to file written submissions. This was done and submissions were filed by both parties on 27th April 2015 (the Respondent) and 4th May 2015 (the Applicant)

2.0 DISPOSAL OF REFERENCE

In disposing of the Reference the Tribunal analyzed the following documents:-

- (1) Reference dated 1st April, 2015 filed by the Applicant and supporting attached annexures;
- (2) Response dated 27th April 2015 filed by the Respondent and supporting attached annexures.

(3) The Applicant's written submissions and annexes to the submissions.

3.1 The Tribunal summoned both parties for a hearing on 12th May 2015. The Applicant was represented by Mr. John Kallemera and Ms. Sheila Nakiwala. The Respondent was represented by Mr. Edgar Agaba, and Mr. Johnson Munono Baryatuma the Respondent's Town Clerk attended the hearing.

3.2 The issues for resolution by the Tribunal were the following:-

1. *Whether the Accounting officer of the Respondent entered into a contract with M/s Mbarara United Taxi Operators Cooperative Society Ltd during the period of administrative review?*
2. *If so, whether the actions of the Accounting officer amounted to a serious breach of the Act?*
3. *Remedies.*

4.0 RESOLUTION OF ISSUES

***BOTH Issue one (1):** Whether the Accounting officer of the Respondent entered into a contract with M/s Mbarara United Taxi Operators Cooperative Society Ltd during the period of administrative review? and Issue two (2) If so, whether the actions of the Accounting officer amounted to a serious breach of The Act, were argued together by both parties.*

4.1 Counsel for the Applicant in both the reference and in their written submissions argued that there was a serious breach of the Act by the Respondent for the following reasons:

1. **Section 90 (7) (a)** of the Act, provides that a contract shall not be entered into by an Accounting Officer with a provider during the period of administrative review.
2. The period of administrative review before the Accounting Officer had not yet lapsed on account that under **section 90 (2) (b)** of the Act, the Accounting Officer was mandated to submit a copy of his or her administrative review decision to the Authority.
3. That upon receipt of the decision of the Accounting Officer the Authority would within fifteen (15) working days review the decision as stated in **section 90 (4)** of the Act.

4. **Section 90 (5)** of the Act, provides that where the Authority fails to make a recommendation within the time prescribed under subsection (4), the Accounting Officer could implement the corrective measures indicated in his or her administrative review decision.
5. The Accounting Officer of the Respondent made the administrative review decision on 16th February 2015 and forwarded the report to the Authority on the same date.
6. The execution of a contract between the Respondent and the Best Evaluated Bidder prior to the lapse of the review period stated under **section 90 (4) and (5)** was a serious breach of the Act.
7. **Section 90 (7) (b)** of the Act provides that a contract shall not be entered into by an Accounting Officer with a provider before the Authority made a final decision in respect of a complaint lodged with the Authority under section 90 (3).
8. A copy of the administrative review application to the Authority by the Aggrieved Bidder was copied to the Respondent who acknowledged receipt of the said application on 17th February 2015.
9. The Respondent executed a contract with the Best Evaluated Bidder on 20th February 2015 prior to a final decision by the Authority in respect of the application for administrative review.
10. That execution of the contract by the Respondent was in contravention of **section 90 (7) (b)** of the Act, and amounted to a serious breach of the Act.

- 4.2 The Authority submitted in conclusion that execution of the contract by the Respondent during the administrative review period was a serious breach of the aforementioned provisions of the Act.

The Authority cited **Uganda Railways Corporation v. Ekwaru & Others Civil Application No. 185 of 2007** in which the Court of Appeal held that *“a court of law cannot sanction what is illegal, an illegality once brought to the attention of the court overrides all questions of pleadings including any admissions made.”*

- 4.3 The Applicant prayed for a declaration that the actions of the Respondent were illegal and amounted to a serious breach of the Act. The Applicant prayed for costs in the reference. During the hearing, the prayer for costs was withdrawn.

- 4.4 In his oral submissions in response, Counsel for the Respondent conceded that the Contract with the best evaluated bidder was concluded during the administrative review period. That as far as the Respondent was concerned the only issue before the Tribunal was to determine the appropriate remedy. He submitted that the Respondent's actions did not constitute a serious breach of the law because **Section 91(J) (1)** presupposed a series of actions that culminated in a serious breach of the law and not a single action as in the instant reference.
- 4.5 In the alternative Counsel submitted that there were no remedies in the Act for serious breach and therefore the Tribunal could not make a declaration as to whether there had been a breach in the absence of remedies.
- 4.6 In mitigation Counsel for the Respondent argued that the Respondent had accepted the Authority's decision and regretted the oversight in ignoring the Authority's directions.
- 4.7 The Tribunal will handle the two issues concurrently.
- 4.8 **Part VII** of the Act provides for administrative review. Under **Section 89 of the Act** a bidder can seek administrative review for any omission or breach by a procuring and disposing entity of the Act, regulations or guidelines under the Act or of the provisions of bidding documents, including best practices.
- 4.9 **Section 90 of the Act** provides for review by an Accounting officer of any complaint of the decision of a procuring and disposing entity brought by an aggrieved bidder. This section prescribes the manner in which such a complaint is brought and provides for suspension of the procurement proceedings during the period of Administrative Review.
- 4.10 Under **Section 90(2)(b)** the Accounting officer is obligated to make a reasoned decision on the Complaint within fifteen(15) working days indicating the corrective measures to be taken , if any and submit a copy of the decision to the Authority. **Section 90 (2) (b)** further gives the aggrieved bidder a right to file a complaint to the Authority within 10 days of the Accounting officer's decision if they are dissatisfied with the decision
- 4.11 Under **Section 90(4)** of the Act, the Authority is obligated upon receipt of a copy of the Accounting officer's decision to review the decision and make reasoned recommendations and prescribe corrective measures to be undertaken by the procuring and disposing entity, if required.

- 4.12 **Sections 90(7) (a) and (b)** of the Act bar an Accounting officer from concluding a Contract with a bidder during the period of Administrative Review and before the Authority makes a decision on a complaint lodged with the Authority by a dissatisfied bidder or during the period in which the Authority conducts its independent review under **Section 90(4)** of the Act
- 4.13 The Administrative Review period under **Part VII of the Act** in which the Accounting officer is statutorily barred from entering into binding Contract is both sequential and continuous. In other words the time period is unbroken and runs until all the processes provided for under Part VII are exhausted.
- 4.14 In the instant case the Authority obtained a copy of the Accounting Officers Report on 16th February 2015. The dissatisfied bidder filed a complaint with the Authority on 17th February 2015. On 19th February 2015 the Authority notified the Respondent's Accounting Officer of the complaint. However in total disregard of the communication the Respondent concluded a contract with the best evaluated bidder on 20th February 2015, the very next working day.
- 4.15 Did the Respondent's action constitute serious breach? **Section 9 of the Act** gives the Authority discretion to recommend to a competent authority suspension or other disciplinary action against an officer responsible *for serious or persistent breach* (emphasis ours) of the Act. Under **Section 91J(1)** of the Act the Authority in addition to its actions under Section 9 of the Act may refer persistent or serious breaches of the Act, guidelines or regulations made under the Act to the Tribunal.
- 4.16 The Respondent argued as has already been seen that the act of signing a Contract during the Administrative Review period did not amount to a serious breach.
- 4.17 The Act does not define a serious breach and the Tribunal could not find any definition of serious breach apposite to the matter before it in any legal dictionaries. However, contravention of a mandatory provision of the law is a serious breach.
- 4.18 The legislature provided for very short time frames for the conduct of the Administrative Review by both the Accounting officer and the Authority upon receipt of a complaint by a dissatisfied bidder. It should be borne in mind that the review conducted by the Authority is principally for three purposes as defined in **Section 6 of the Act** to wit; - under **Section 6 (a)** to *ensure the application of fair, competitive, transparent, non discriminatory and value for money procurement and disposal standards and practices*; under **Section 6 (c)**

*set standards for the public procurement and disposal systems in Uganda; and under **Section 6(d)** to monitor compliance of procuring and disposing entities.....*

- 4.19 It was incumbent upon the Respondent to ensure that the basic principles of Public Procurement and Disposal as prescribed in **Section 43** of the Act were adhered to. The Respondent's actions in concluding a contract with the best evaluated bidder during the administrative review period was inconsistent with its statutory obligation to ensure transparency, accountability and fairness.
- 4.20 The actions of the Respondent in hastily concluding a contract with the best evaluated bidder under procurement reference number MBAR761/SRVCS/00008 before the Authority could conclude its review and issuance of a decision under **Section 90(4)** of the Act in effect frustrated the purpose for which the Authority was established by usurping the statutory powers cited above, vested in the Authority.
- 4.21 The Respondent's actions also fettered and frustrated the dissatisfied bidder's statutory right of review of the decision of the Respondent's decision. The Respondent's actions were a flagrant violation of the express mandatory bar on conclusion of contracts during the administrative review period and their action was therefore illegal.
- 4.22 The Tribunal therefore, can only arrive at the inescapable conclusion that the actions of the Respondent were a serious breach of the Act.

The Tribunal answers issues 1 and 2 in the affirmative.

We now turn to the third issue of remedies.

5.0. Remedies

- 5.1 Counsel for the Applicant prayed that the Tribunal makes a declaration that there was a serious breach of the Act by the Respondent. The Authority did not make any prayer for Costs.
- 5.2 Counsel for the Respondent argued that the Authority had already recommended for appropriate disciplinary action to be taken by the Permanent Secretary Ministry of Local Government against the Accounting officer for his rushed action to sign the procurement contract during the Administrative Review period. Secondly that the Act did not give the Tribunal any power to award a remedy in the present circumstances and therefore the

application for the declaration proposed by the Applicant should be dismissed with costs.

5.3 The Tribunal notes that the Authority, in accordance with section 9 of the Act, recommended appropriate disciplinary action to be taken against the Accounting Officer, Mbarara Municipal Council by the Permanent Secretary Ministry of Local Government for his complete disregard of the Act and for his rushed actions to sign the contract to defeat the administrative review process.

5.4 Article 200(4) of the Constitution of the Republic of Uganda provides that the power to appoint persons to hold or act in the office of town clerk in the service of a city or a municipality, including the power to exercise disciplinary control over persons holding or acting in any such office and to remove those persons from office is vested in the Public Service Commission. This provision is replicated in section 55 (1A) of the Local Governments Act Cap 243.

The Authority should therefore direct the recommendation for appropriate disciplinary action against the Town Clerk Mbarara Municipal Council to the Public Service Commission, in accordance with the provisions cited above.

5.5 The Tribunal will not delve into a detailed consideration of its powers granted by the Act suffice to say that they are clearly stated in **Part VIIA** of the Act. Having found that there was a serious breach of the Act, the Tribunal accordingly makes a declaration that the actions of the Respondent in concluding a contract during the Administrative Review period amounted to a serious breach of the Act.

5.6 The Tribunal notes that the Authority withdrew its prayer for costs. However, given the finding that there was a serious breach of the Act, and to ensure that such actions do not recur in the future, the Tribunal is compelled to award costs of Uganda shillings three million only to be paid by the Respondent to the Applicant.

DECISION OF THE TRIBUNAL

1. The Tribunal declares that the decision of Mbarara Municipal Council to execute a contract in respect of procurement reference number Mbar761/Srvcs/00008 during the Administrative Review period amounted to a serious breach of the Act.

2. The Respondent is ordered to pay costs of Uganda shillings three million only to the Applicant.

Dated at Kampala this 15th Day of June 2015.

SIGNED by the said
MOSES JURUA ADRIKO

SIGNED by the said
DAVID KABATERAINE

SIGNED by the said
ABRAHAM NKATA

SIGNED by the Said
ARCHITECT JOEL KATEREGGA