

THE REPUBLIC OF UGANDA

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

REFERENCE NO.2 OF 2015

REFERENCE OVER SERIOUS BREACH OF THE PPDA ACT 2003 BY BUSEMBATIA TOWN COUNCIL IN RESPECT OF PROCUREMENT REFERENCE NO IGAN510/SRVCS/14-15/00037 (UNDER SECTION 91J (I) OF THE PPDA ACT 2003.

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

RESPONDENT: BUSEMBATIA TOWN COUNCIL

**(Before: OLIVE ZAALE OTETE-CHAIRPERSON; 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

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

- i) Iganga District Local Government on 8th January 2015 invited bids for the management of Busembatia Taxi Park in Busembatia Town Council for the financial year 2014/2015 under Procurement Reference No. Igan/510/Srvcs/14-15/00037.
- ii) Two bids were received for the procurement from M/s Busembatia Taxi Operators and Drivers Cooperative Society Limited and M/s Kakooge Taxi Operators and Drivers Cooperative Society Limited.
- iii) The Notice of Best Evaluated Bidder (BEB) displayed from 4th to 17th February 2015 indicated Kakooge Taxi Operators and Drivers Cooperative Society Limited as the successful bidder and Busembatia Taxi Operators and Drivers Cooperative Society Limited as the unsuccessful bidder.
- iv) Dissatisfied with the decision of the evaluation committee, the unsuccessful bidder by letter dated 11th February 2015 applied to the Chief Administrative Officer (CAO), Iganga District Local Government for administrative review.
- v) The application for administrative review was rejected by the CAO on account that there was no merit in all the grounds raised by the Applicant. The letter rejecting the application was copied to the Town Clerk Busembatia Town Council.

- vi) The letter of bid acceptance was issued by the CAO Iganga to the Best Evaluated Bidder (BEB) on 27th February 2015.
- vii) The Authority was availed a copy of the administrative review report from Iganga District Local Government on 5th March 2015.
- viii) On 2nd March 2015 a contract was executed between the Respondent and the Best Evaluated Bidder(BEB).
- ix) By letter dated 9th March 2015, the unsuccessful bidder applied to the Public Procurement and Disposal of Public Assets Authority (Authority) for administrative review of the decision of the CAO.
- x) The administrative review hearing before the Authority was held on 2nd April 2015 and on 13th April 2015 the Authority issued its Administrative Review decision wherein it upheld the application.

2.0 REFERENCE.

- 2.1 On 23rd April 2015 the Authority filed the instant reference seeking a 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.
- 2.2 On 20th April 2015, the Tribunal wrote to Respondent (letter copied to Applicant) requesting the Respondent to file a written response to the Reference giving a chronology of events. In the same letter, the Tribunal directed both parties to file written submissions, and this was done. By copy of the same letter, the Tribunal asked the Accounting Officer Iganga District Local Government to offer a defence/answer as to why he issued a letter of bid acceptance during the administrative review period.

3.0 DISPOSAL OF REFERENCE

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

- (1) Reference dated 23rd April, 2015 filed by the Applicant and supporting attached annexures;
- (2) Response dated 11th May 2015 filed by the Respondent.
- (3) Response dated 14th May filed by Iganga District Local Government.
- (4) The Applicant's written submissions and annexes to the submissions.
- (5) A letter Ref: CR/105/1 dated 12th November 2013 to LLG Accounting Officers, Sub-Counties/Town Council

The Tribunal summoned both parties for a hearing on 19th May 2015. The Applicant was represented by Mr. John Kallemera. The Respondent was represented by Mr. Nyonyintono Asuman of Wagabaza and Company Advocates. Others who attended the hearing were Maria Mukasa Joseph, Chief Administrative Officer Iganga District, Namulondo Tappy, Town Clerk Busembatia Town Council, Isiko Charles, Senior Finance Officer Busembatia Town Council and Mr Manana, Senior Assistant Secretary Iganga District.

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 Kakooge 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 PPDA ACT, 2003.*
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 Kakooge 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:

4.2 **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. 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.

4.3 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.

4.4 **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.

- 4.5 The Accounting Officer of the Respondent made the administrative review decision on 27th February 2015 and forwarded the report to the Authority on 5th March 2015. On 2nd March 2015, the Respondent executed a contract with the BEB.
- 4.6 The execution of a contract between the Respondent and the BEB prior to the lapse of the review period stated under **section 90 (4) and (5)** was a serious breach of the Act.
- 4.7 **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 makes a final decision in respect of a complaint lodged with the Authority under section 90 (3).
- 4.8 The Applicant, both in the Reference and in its submissions, did not fault Iganga District Local Government for any wrong doing. The Applicant maintained that it is the Respondent who signed the contract in contravention of the PPDA Act. The Tribunal however directed Iganga District to submit a response because the Tribunal noted that it is Iganga District that handled the procurement; it is also Iganga District that issued the letter of bid acceptance following which, the Respondent signed the contract with the successful bidder.
- 4.9 In conclusion, Counsel for the Applicant submitted that the execution of a contract by the Respondent in respect of procurement reference no. Igan510/Srcvs/14-15/00037 was done during the administrative review period and this constituted a serious breach of sections 90(4), 90(5) and 90(7) (a) of the Act.

4.10 In her written response the Town Clerk of the Respondent stated thus:

"i) The procurement Entity was Iganga District Local Government.

ii) The procurement process was conducted by the procurement Entity (Iganga District Local Government) and Busembatia Town Council to which I am the Accounting Officer, its role was merely as the user department.

iii) The act of signing the contract which was containing the terms of contract was subsequent to the award offer and was in a representative capacity and not in the capacity of the Town clerk.

iv) As the user department we had no control over the administrative process."

4.11 In his oral submissions in response, Counsel for the Respondent submitted that the entire procurement process was handled by Iganga District Local Government, and not the Respondent; that the Respondent only came in to sign the contract following the issuance of a letter of bid acceptance by Iganga District to the successful bidder wherein the CAO Iganga informed the successful bidder that a written contract was being drafted for their signature.

4.12 Asked by the Tribunal as to what his understanding of regulation 136(2) (*grounds for administrative review*) of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006 (Local Governments PPDA Regulations) is, Counsel submitted that the regulation binds Iganga District which was the PDE in this procurement, and not the Respondent. Further asked by the Tribunal as to whether the Respondent was not required to understand the requirement that a contract should not be signed during the administrative review period, Counsel responded that the duty cannot be placed on the Respondent who was merely a user department. In conclusion of his submission, Counsel submitted that the Respondent did

not commit serious breach of the Act since it was not party to the administrative review.

4.13 The CAO Iganga submitted that there is a discrepancy between the Local Governments PPDA Regulations 2006 and the Act on matters to do with administrative review. He further submitted that under regulation 140 of the Local Governments PPDA Regulations, the Authority acts on an application from the aggrieved bidder; the Authority does not act on a copy of the administrative review report from the Accounting Officer. He contended that the Local Governments (PPDA) Regulations 2006 are silent about the requirement of the Accounting Officer not to implement the decisions contained in his or her administrative review report before an aggrieved bidder applies for further administrative review to the Authority. That as a result of this discrepancy, it cannot be said that the contract was signed during the administrative review period and hence there was no breach of the Act.

4.14 In the alternative, the CAO Iganga submitted that the process of procuring a manager for the Respondent's Taxi Park had taken abnormally long by the time he issued the letter of bid acceptance which was only four months to the end of the financial year. That the Respondent was losing local revenue hence he as Chief Administrative Officer made the decision to issue a letter of bid acceptance during the administrative review period.

4.15 In mitigation, the CAO Iganga regretted the mistake.

4.16 In rejoinder to the Respondent's submission that it's role in the procurement was merely that of a user department, Counsel for the Applicant argued that the Respondent is not a user department within the definition of user department under section 2 of the Act. Counsel contended that a Town

Council cannot be said to be a division, branch or section of a procuring and disposing entity (PDE). That under section 3(5) of the Local Governments Act, Cap 243, a Town Council is a local government with body corporate status hence clothed with the capacity to enter into contracts. That the Respondent did not sign the contract in a representative capacity; that as a Town Council, the Respondent has control over its affairs.

4.17 In rejoinder to the CAO Iganga submission, Counsel for the Applicant submitted that there is no discrepancy between the provisions of the Act and the provisions of the Local Government PPDA Regulations in respect to administrative review. That section 90(7) (a) of the Act which provides that a contract shall not be signed during an administrative review period is clear and unambiguous. Counsel submitted that section 90(7) (a) applies to local governments by virtue of section 2 of the Act.

4.18 In resolving the two issues, the Tribunal reviewed regulations 136 (2) and 140 of the Local Government Procurement (PPDA) Regulations. For ease of reference the above provisions are reproduced here below:

“Local Government PPDA Regulations.

136. (2) Where a procurement requirement is subject to administrative review by a procuring and disposing entity or authority, a contract document, purchase order, letter of bid acceptance, or other communication in form of conveying communication of a bid, that binds a PDE shall not be issued prior to completion of administrative review process (emphasis ours).

140. (1) A bidder may submit an application for administrative review to the Authority where the accounting officer does not issue a report within 15 working days or where the bidder is not satisfied with the decision of the accounting officer on the complaint.

(2) An application to the Authority for administrative review shall be submitted within ten working days after the date of the decision by an accounting officer or the date by which an accounting officer should have issued the decision (emphasis ours).

(4) (a) Upon receipt of an application, the Authority shall immediately give notice of the application to the accounting officer.

4.19 The Tribunal finds that regulation 140(1) Local Government PPDA Regulations grants a bidder a right to apply for administrative review to the Authority if the bidder is not satisfied with the decision of the accounting officer on his complaint. Regulation 140(2) allows a bidder to exercise that right within ten days from the date of the accounting officer's decision.

4.20 The CAO of Iganga district, by issuing a letter of bid acceptance to the BEB on 27th February 2015, the very day that he communicated to the unsuccessful bidder the rejection of its application for administrative review, blatantly violated regulation 140(2) of the Regulations, which allows a bidder who is dissatisfied with the Accounting Officer's decision to apply to the Authority for review of that decision.

4.21 The Tribunal did not find the arguments of both Counsel for the Applicant and the Respondent on the question of whether the Respondent is a user

department or not, relevant in resolving Issue 1 and 2. Whether it qualifies to be a user department or not, the Respondent is under a duty to comply with the procurement laws of the country.

4.22 The Tribunal finds that the Respondent, by signing a contract just one working day following the accounting officer's decision dismissing the application for administrative review by the unsuccessful bidder, contravened regulation 140(2) of the Regulations, which allows a bidder who is dissatisfied with the Accounting Officer's decision to apply to the Authority for review of that decision, and section 90(7) (a) of the Act which bars signing of contracts during administrative review period.

4.23 The Tribunal did not find merit in the argument of the CAO Iganga that the Local Government PPDA Regulations are silent about the requirement that the accounting officer should stay action on the implementation of the decisions of its administrative review report. Regulation 140(2) is loud and clear, that a bidder has ten days from the date of the accounting officer's decision to apply to the Authority for administrative review if the bidder is not satisfied with the decision of the accounting officer. The wording of regulation 140 is sufficient to indicate to the accounting officer not to implement a decision of his or her report until the expiry of 10 days allowed to the complainant to apply to the Authority.

4.24 The Tribunal rejects the argument made by the CAO Iganga that the contract was signed during administrative review period because the process of procuring a manager for the Respondent's Taxi Park had taken abnormally long and that the Respondent was losing local revenue. The Tribunal finds that no reason should justify violation of procurement laws by a procuring and disposing entity.

4.25 The actions of the CAO Iganga in hastily issuing a letter of bid acceptance during the administrative review period, and those that of the Respondent in hastily concluding a contract with the BEB before the lapse mandatory 10 day period allowed to the complainant to file administrative review Authority could conclude its review and issuance of a decision under Regulation 140(6) of the Local Government PPDA Regulations 2006, in effect fettered and frustrated the dissatisfied bidder's statutory right of review of the decision of CAO Iganga.

4.26 The Tribunal therefore, can only arrive at the inescapable conclusion that the actions of both the Respondent and Iganga District Local Government were carried out during a period of administrative review and constituted a serious breach of the Act.

5.0 *Remedies*

5.1 Counsel for the Applicant prayed that the Tribunal makes a declaration that there had been a serious breach of the Act by the Respondent. He further prayed that the Tribunal grants appropriate remedies and any other relief that it may deem fit.

5.2 Counsel for the Respondent did not make any response to this issue. The CAO Iganga acknowledged he could have made a mistake although he maintained the argument that there was a discrepancy between the Act and the Regulations.

5.3 The Tribunal makes a declaration that the actions of the Respondent and CAO Iganga constituted a serious breach of the Act.

- 5.4 To ensure that entities do not flagrantly violate the provisions of the procurement laws of the Country, the Tribunal, in exercise of the power granted to it by section 90K of the Act, hereby orders the Respondent, Busembatia Town Council and Iganga District Local Government to pay costs to the Applicant.
- 5.5 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, Busembatia Town Council by the Permanent Secretary Ministry of Local Government for signing the contract during the administrative review period.
- 5.6 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.
- 5.7 The Authority should therefore direct the recommendation for appropriate disciplinary action against the Town Clerk Busembatia Town Council to the Public Service Commission, in accordance with the provisions cited above. The Authority is advised to make a similar recommendation to the Public Service Commission against the CAO Iganga.

6.0 DECISION OF THE TRIBUNAL

1. The Tribunal declares that the decision of Iganga District Local Government to issue a letter of bid acceptance in respect of procurement reference number Igan510/SRVCS/14-15/00037 during the administrative review period amounted to a serious breach of the Act.
2. The Tribunal declares that the decision of Busembatia Town Council to execute a contract in respect of procurement reference number Igan510/SRVCS/14-15/00037 during the administrative review period amounted to a serious breach of the Act.
3. The Respondent, Busembatia Town Council is ordered to pay costs of Uganda shillings one million five hundred thousand only to the Applicant.
4. Iganga District Local Government is ordered to pay costs of Uganda shillings two million only to the Applicant.

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
ABRAHAM NKATA

SIGNED by the Said
ARCHITECT JOEL KATEREGGA