

THE REPUBLIC OF UGANDA

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

APPLICATION NO 14 OF 2015

**APPLICATION AGAINST UNFAIR EVALUATION PROCESS AND REQUEST FOR AN
IMPARTIAL TECHNICAL EVALUATION OF PROCUREMENT REF: PPDA/CONS/15-
16/00580 OF 8TH JUNE 2015**

APPLICANT: INTERNATIONAL PROCUREMENT CONSULTANTS

**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 On 26th June 2015, International Procurement Consultants (the Applicant) submitted a proposal for the procurement of consultancy services to De Point Consultants Limited, the Agent for the Public Procurement and Disposal of Public Assets Authority (the Respondent).
- 1.2 At the preliminary stage of the procurement process, the Applicant was assessed by De Point Consultants (the Agent) as non-compliant for technical evaluation. The reason for the disqualification was because the specimen signature of Mr James Katarya Kiyonga, the Applicant's representative indicated on the powers of attorney was different from his signature on the Applicant's technical bid submission sheet.
- 1.3 On 20th August 2015, the Applicant complained to the Authority against being eliminated from the procurement process at the preliminary stage by the Agent due to a matter that could have been clarified.
- 1.4 By letter dated 21st September 2015 addressed to the Agent, the Authority provided guidance that the inconsistency in the signatures is a matter that should have been clarified during the evaluation process in accordance with regulation 43 of the PPDA (Procurement of Consultancy Services) Regulations, 2014. The Authority then directed the Agent to evaluate the technical proposal of the Applicant.
- 1.5 The Agent issued a supplementary technical evaluation report for the procurement on 6th October 2015 which showed that the Applicant had scored 74.9, a mark above the minimum technical qualifying mark of 70. The Authority in its communication to the Agent dated 12th October 2015 recommended that since the Applicant had scored a minimum qualifying mark, the financial proposal of the Applicant should be opened.
- 1.6 By letter dated 22nd October 2015, the Applicant wrote to the Authority calling for cancellation of the technical evaluation. The gist of the complaint was that the Applicant's proposal was not evaluated; that a figure of 74.9 was allocated to the Applicant so as to deny the Applicant from being awarded a contract.

1.7 In response to the complaint, the Authority by letter dated 4th November 2015, advised the Applicant that the evaluation process was still ongoing because financial proposals had not yet been evaluated; that the Applicant should await the final outcome of the evaluation process and that it could consider applying for administrative review.

1.8.1 The Applicant was dissatisfied with the response of the Authority, hence this Application.

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION.

2.1 On 4th November 2015, the Applicant applied to the Tribunal for a review of the Authority's decision.

2.2 The main ground for the Application to the Tribunal was as follows:

"When the Managing Director of De Point was directed to carry out evaluation process of our proposal, attention was not given to our presentations, but decided to allocate to us a miserable 74.9 points that placed us at the bottom of the consultants that submitted proposals to suit pre-arranged position, making sure that we are completely out of the award bracket".

3.0 DISPOSAL OF APPLICATION

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

- (1) Application against unfair evaluation process and request for an impartial technical evaluation of procurement ref: PPDA/CONS/15-16/00580 dated 4th October 2015 but received by the Tribunal on 4th November 2015;
- (2) Several written exchanges between the Applicant and De Point Consultants annexed to the Applicant's Application and written submissions.
- (3) The Authority's response to the Applications, Annexes to the Response and submissions;

3.1 The Tribunal conducted a hearing for the Parties on 17th November 2015. The Applicant was represented by Mr. Lawrence Tumuhairwe while the Authority was represented by Mr. John Kallemera. In attendance were Mr. James Katarya Kiyonga from the Applicant and Mr. Alfred Kabuchu and Ms. Ruth Kobusingye from De Point Consultants Limited.

3.2 Submissions by Counsel

At the commencement of the hearing, Mr. John Kallemera, Counsel for the respondent raised a preliminary objection to the Application relying on two preliminary points of law namely (i) *the Application was untenable and premature on account that the Application was filed out of time* and (ii) *the Application was 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. It allowed both Counsel to address the Tribunal on the preliminary points and on the substantive merits of the Application.

3.3 On the first preliminary point that the Application was filed out of time, Counsel for the Respondent stated that the Applicant's complaint relates to the technical evaluation stage of the procurement. He submitted that the Applicant became aware of its score of 74.9 points, which it is dissatisfied with on the 20th October 2015. He contended that the Applicant had 10 working days from 20th October 2015 to appeal against its score at the technical evaluation stage and that the ten working days expired on 3rd November 2014. He submitted that the Applicant filed the Application with the Tribunal on 4th November 2015 and was therefore outside the statutory time frame. Counsel prayed that the Tribunal dismiss the Application for being filed out of time.

3.4 On the second preliminary point that the Applicant did not pay the administrative review fees within the statutory period, Counsel stated that under section 90 (1a) (a) and (b) of the PPDA Act, 2003, an applicant for administrative review is required to submit its application for administrative review to the Accounting Officer in writing with the prescribed fee within ten

working days from the date the Applicant first became aware or ought to have become aware of the circumstances giving rise to the complaint.

- 3.5 Counsel contended that the statutory time line expired on 3rd November 2015 but to date the Applicant has not paid the required fees. He argued that the Applicant should have paid its administrative review fees on the 22nd October 2015 when it filed a complaint with the Authority. On the basis of this preliminary objection, the Respondent asserted that the Application should be dismissed with costs.
- 3.6 Turning to the substantive ground raised by the Applicant that the score awarded by De Point Consultants Limited was miserable and was awarded with the intention of ensuring that the Applicant was out of the award bracket, Counsel for the Respondent submitted that the Applicant has not alluded to any cogent facts to dispute the technical evaluation process conducted by the Agent. He argued that the Applicant has merely based its complaint on presumptions and speculation of bias. Counsel submitted that the technical evaluation process for the impugned procurement was conducted in accordance with the merit point evaluation contained in the bidding document and it was lawful. He reiterated his earlier prayers that the Application be dismissed with costs.
- 3.7 In response to the first preliminary points that the application was filed outside the statutory time frame, Mr. Tumuhairwe, Counsel for the Applicant submitted that the Applicant wrote a complaint to the Authority on 22nd October 2015. That the Authority responded to the complaint on 4th November 2015 and on that same date, the Applicant filed this Application with the Tribunal. Counsel contended that the Application was therefore filed in time since the response of the Authority that the Applicant is aggrieved with was dated 4th November 2015.
- 3.8 In response to the second preliminary point 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 complaint submitted to the Authority on 22nd October 2015 was not an application for administrative review which required the payment of administrative review fees. He contended that the Applicant's complaint to the Authority was made under section 91(3) of the PPDA Act. Counsel for the Applicant then stated that the Tribunal should decide whether

the complaint to the Authority dated 22nd October 2015 was an application for administrative review.

- 3.9 On the substantive ground of this Application where the Applicant is complaining about the award of a low mark of 74.9, Counsel submitted that evaluation committee did not evaluate the Applicant's proposal in accordance with the merit point evaluation stipulated under regulation 48 of the PPDA (Procurement of Consultancy Services) Regulations 2014. He argued that the Applicant company had engaged in similar work in the past where the same Agent, De Point Consultants awarded it 81.6 points.
- 3.10 The Applicant further argued that if in the past, it had scored such a higher mark in assignments of a similar nature, how could the mark now drop to 74.9 points when the Applicant company has now acquired better experience and hence written better proposals? He contended that of all firms that submitted proposals in the procurement, the Applicant was the most professional and most experienced and could therefore not obtain such a low mark.
- 3.11 Counsel further submitted that the supplementary technical evaluation report that contained the Applicant's results is unprecedented and is not supported by any law. He argued that the evaluation report pointed out general weaknesses in the Applicant's proposal without mentioning specific areas of weakness.
- 3.12 The Applicant prayed that the Tribunal quashes the decision of De Point Consultants on the technical evaluation outcome of the Applicant and a re-evaluation by an impartial party be carried out to establish the truth. The Applicant further prayed that from now on, a parallel evaluation be conducted on all evaluation processes conducted by De Point Consultants for verification and that an investigation is constituted in the whole of the procurement process for verification.
- 3.13 By way of rejoinder on the issue of the supplementary evaluation report, Counsel for the Respondent argued that it is lawful to carry out a supplementary evaluation report as part of the bigger evaluation report.

4.0 Resolution by the Tribunal

- 4.1 The Tribunal will deal first with the preliminary points of law in the order raised by the parties.
- 4.2 The Tribunal has considered the submissions of both counsel with respect to the preliminary points raised.
- 4.3 On the preliminary point that the application was filed with the Tribunal outside the statutory time line of ten working days, the Tribunal, with respect, is not persuaded by counsel for the Respondent's submission that time for filing the complaint started running on 20th October 2015, the date the Applicant became aware of the 74.9 points awarded which the Applicant is disputing.
- 4.4 We find that the Applicant, after learning that it was awarded 74.9 points, wrote a letter to the Authority dated 22nd October 2015 wherein it disputes the evaluation process. The Authority responded to this complaint by letter dated 4th November 2015, in which the Authority asked the Applicant to await the final outcome of the evaluation. It was after receiving this presumably unfavourable response from the Authority that the Applicant filed this Application with the Tribunal on the same date, 4th November 2015. Clearly the time started running on 4th November 2015, when the Applicant received the Authority's response, and not on 20th October 2015, when the Applicant became aware of the results. The Application was therefore filed in time.
- 4.5 We find no merit in the first preliminary point and it is therefore dismissed.
- 4.6 On the second preliminary point that the application is untenable and fatally defective on account that the Applicant did not pay the administrative review fees within the statutory period, we agree with the submission of Counsel for the Respondent that the Applicant has not paid the administrative review fees within the statutory period.
- 4.7 Under section 90(1a) (a) of the PPDA Act, a complaint by a bidder against a procuring and disposing entity shall be in writing and must be submitted with

a prescribed fee. The complaint by the Applicant to the Authority dated 22nd October 2015 was not accompanied by a fee. With respect, the Tribunal does not agree with the submission of Counsel for the Applicant that the complaint made to the Authority was not an application for administrative review. The right to seek administrative review is provided for under section 89 of the PPDA Act which provides that a bidder may seek administrative review for any omission or breach by a procuring and disposing entity and the complaint must be in writing.

- 4.8 In the letter dated 22nd October 2015 to the Authority, the Applicant lists the omissions and misdeeds that the Agent of the procuring and disposing entity (PPDA) committed against the Applicant. The Applicant concludes this letter thus *“we are therefore appealing for your intervention in this matter and we are requesting for cancellation of the technical evaluation process and demanding an independent party to review the evaluation and establish the truth”*. The Tribunal finds that this request is to the Authority to review the decision of its Agent. The letter dated 22nd October 2015 therefore was an application for administrative review and the Applicant should have paid administrative review fees as required by section 90(1a) (a) of the PPDA Act.
- 4.9 The above finding notwithstanding, the Tribunal recalls the decision of the Supreme Court in the case of **Lawrence Muwanga Vs. Stephen Kyeyune Supreme Court Civil Appeal 12 of 2001**. In that case, the Supreme Court held that a court has residual powers to order a party to pay proper fees and such an order is made in the interest of justice.
- 4.10 Having found that the Applicant filed its complaint to the Authority within time, the Tribunal will not dismiss the Application for want of payment of administrative review fees but shall, basing on the guidance of the above cited case, require the Applicant to pay administrative review fees to the Accounting Officer of the Authority.
- 4.11 We now turn to the substantive ground of this Application which is that the Agent when evaluating the technical proposal of the Applicant did not give attention to the presentations, but decided to allocate the Applicant a miserable 74.9 points that placed it at the bottom of the consultants that submitted proposals to suit a pre-arranged position.

4.12 In resolving this issue, the Tribunal closely looked at the relevant parts of the **Supplementary Technical Evaluation Report** provided by the Authority. Table 2B of this Report contains the “Evaluators’ Score Sheet for Detailed Technical Evaluation”. We found that the evaluation committee had five (5) evaluators. Each of these i.e. Evaluator 1 to 5 in their score sheet awarded scores to each of the bidders using detailed evaluation criteria which included specific experience, methodology used and key personnel. On the evidence of the score sheet which shows how each bidder’s points were arrived at, the Tribunal finds it difficult to agree with the Applicant that the 74.9 points were merely “allocated”.

4.13 In the result, the Application is dismissed.

5.0 **DECISION OF THE TRIBUNAL**

1. The Application is dismissed.
2. The Accounting Officer of PPDA is directed to assess the administrative review fees which should have been paid by the Applicant at the time of filing the complaint with the Authority and serve the assessment on the Applicant.
3. The Applicant is directed to pay the administrative review fees assessed by PPDA within 14 days from the date of service of the assessment on it.
4. Each party shall bear its own costs.

Dated at Kampala this day of November 2015.

SIGNED by
OLIVE ZAALE OTETE

SIGNED by
MOSES JURUA ADRIKO

SIGNED by
DAVID KABATERAINE

SIGNED by
JOEL KATEREGGA