

THE REPUBLIC OF UGANDA

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

**APPLICATION NO. 5 OF 2020**

APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT OF THE TENDER FOR PROCUREMENT OF 5 FARM TRACTORS FOR THE 5 IRRIGATION SCHEMES OF WEDLAI IN NEBBI/PAKWACH DISTRICT, TOCHI IN OYAM DISTRICT, MUBUKU II IN KASESE DISTRICT, DOHO II IN BUTALEJA DISTRICT AND NGENGE IN KWEN DISTRICT UNDER FIEFOC 2 PROJECT.

**APPLICANT: ENGINEERING SOLUTIONS (U) LTD**

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**1<sup>ST</sup> RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSET  
AUTHORITY**

**2<sup>ND</sup> RESPONDENT: MINISTRY OF WATER AND ENVIROMENT**

**(Before: OLIVE ZAALE OTETE- CHAIRPERSON, MOSES JURUA ADRIKO SC -MEMBER,  
DAVID KABATERAINE-MEMBER, ABRAHAM NKATA- MEMBER AND ENG. THOMAS  
BROOKES ISANGA-MEMBER.)**

## DECISION OF THE PPDA APPEALS TRIBUNAL

### 1.0 BRIEF FACTS

- 1.0 On 14 March 2020, the Ministry of Water and Environment ( 2<sup>nd</sup> Respondent) published an invitation for bids in the East African Newspaper for the procurement of five (5) farm tractors for the five (5) irrigation schemes of Wedelai in Nebbi/ Packwach District, Tochi in Oyam District, Mubuku II in Kasese District, Doho II in Butaleja District and Ngenge in Kwen District under NCB No. MWE/SUPLS/19-20/00045.
- 1.1 On 11<sup>th</sup> May 2020, the Applicant received a copy of the bidding document from the 2<sup>nd</sup> Respondent.
- 1.2 On 22<sup>nd</sup> May 2020, the Applicant made an application for administrative review to the Accounting Officer of the 2<sup>nd</sup> Respondent challenging the statutory breaches by the 2<sup>nd</sup> Respondent in the conduct of the impugned procurement process as well as the defectiveness of the bidding document.
- 1.3 The Applicant in the application notified the 2<sup>nd</sup> Respondent that the impugned procurement should be suspended immediately upon receipt of the application and further notified the 2<sup>nd</sup> Respondent that the bid submission deadline for 19<sup>th</sup> May 2020 should be extended to a date after the final determination of the administrative review process.
- 1.4 On 25<sup>th</sup> May 2020, the Applicant received an e-mail from the 2<sup>nd</sup> Respondent's procurement officer wherein it was stated that the bid submission deadline had been extended to 2<sup>nd</sup> June 2020.

- 1.5 On 28<sup>th</sup> May 2020, the 1<sup>st</sup> Respondent wrote to the 2<sup>nd</sup> Respondent, directing it to handle the application for Administrative Review and issue a decision within fifteen (15) working days from the date of the application.
- 1.6 The Applicant protested against the 2<sup>nd</sup> Respondent's failure to suspend the impugned procurement process and reiterated the Applicant's demand that the impugned procurement and the bid submission deadline should be suspended pending the determination of the Applicant's administrative review application.
- 1.7 The 2<sup>nd</sup> Respondent ignored the statutory requirement to immediately suspend the procurement process upon receipt of an administrative review complaint, closed the submission of bids and conducted a bid opening for the impugned procurement on 2<sup>nd</sup> June 2020.
- 1.8 On 4<sup>th</sup> June 2020, the Applicant made an administrative review application to the 1<sup>st</sup> Respondent objecting to the process of the closure of the bid submission and the opening of the bids as being unlawful and void on account that they were conducted during the administrative review period.
- 1.9 On 15<sup>th</sup> June 2020, the Applicant received a decision from the 1<sup>st</sup> Respondent stating that the Applicant's complaint to the 1<sup>st</sup> Respondent was premature; that the Applicant's complaint to the Accounting Officer was made on 22<sup>nd</sup> May 2020 and that in accordance with Section 90(2) of the PPDA Act, 2003 the fifteen (15) working days within which the Accounting Officer is supposed to issue a decision were to lapse on 16<sup>th</sup> June 2020.
- 1.10 Being dissatisfied with the decision of the 1<sup>st</sup> Respondent, the Applicant on 17<sup>th</sup> June, 2020 filed this Application before the Tribunal.

## 2.0 DISPOSAL OF APPLICATION

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

- 1) The Applicant's Application to the Tribunal dated 17<sup>th</sup> June 2020, Annexes to the Application, the written and oral submissions.
- 2) The First Respondents reply to the Application, Annexes to the response, the written and oral submissions.
- 3) The Second Respondents response to the application

2.1 The Tribunal conducted a hearing for the Parties on 30<sup>th</sup> June 2020. Mr. John Kallemera appeared for the Applicant, Ms. Mary Akiror appeared for the 1<sup>st</sup> Respondent, Mr. John Kateregga and Mr. Enock Tumwine represented the 2<sup>nd</sup> Respondent.

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## 3.0 SUMMARY DECISION

3.1 In accordance with Section 91 I (7) of the Act, the Tribunal delivered a summary of this decision on Tuesday 30<sup>th</sup> June 2020. What follows is the detailed reasoning in support of our decision.

## 4.0 ISSUES

4.1 Five (5) issues were raised by the parties as follows: -

4.2 Whether the 1<sup>st</sup> Respondent erred in law when it did not promptly suspend the impugned procurement upon receipt of the Applicant's administrative review application on 4<sup>th</sup> June 2020.

- 4.3 Whether the 1<sup>st</sup> Respondent erred in fact and law when it dismissed the Applicant's application on the ground that the Accounting Officer had not yet made a decision whereas the complaint by the Applicant was in respect to the breach of failure to suspend the procurement process.
- 4.4 Whether the 1<sup>st</sup> Respondent erred in law and fact when it did not make a decision regarding the illegality of the processes of closure of bid submission and bid opening by the 2<sup>nd</sup> Respondent during the administrative review period and it did not cancel the procurement process as prayed for by the Applicant.
- 4.5 Whether the 1<sup>st</sup> Respondent erred in law when it did not enforce compliance of the provisions of the PPDA Act, 2003 regarding the suspension of a procurement process upon notification and receipt of the administrative review application.

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4.6 Remedies.

5.0 **PRELIMINARY OBJECTION**

- 5.1 The 2<sup>nd</sup> Respondent raised a preliminary objection to the effect that this is a prior reviewed procurement financed under the African Development Bank (AfDB) Loan for the FIEFOC 2 Project and is wholly undertaken in accordance with the AfDB's Procurement Policy Framework. He submitted that according to Section 4 of the PPDA Act, 2003 (the Act), the AfDB's Complaints handling mechanism applies and therefore the Tribunal does not have jurisdiction to handle this application.

- 5.2 In reply, Counsel for the Applicant submitted that according to Section 2 (1) (c) of the Act, all public procurements and disposals by a procuring and disposing entity, within or outside Uganda are governed by the Act. He submitted that the 2<sup>nd</sup> Respondent is a procuring and disposing entity according to Section 2 of the Act and therefore is subjected to the jurisdiction of the Act.
- 5.3 Counsel for the Applicant posited that for Section 4 of the Act to apply, there must be a conflict between the provision of the AfDB Guidelines and the provision of the Act which is not the case in the impugned procurement.
- 5.4 Counsel for the Applicant further submitted that the Guidelines of the AfDB cannot supersede the procurement Act of the borrower country. In support of this proposition Counsel relied on *Application No. 3 of 2017, DOTT Services Ltd Vs PPDA & Uganda National Roads Authority*, in which the Tribunal decided that exercise of statutory powers and duties cannot be fettered or overridden by agreement, estoppels, lapse of time mistake and such other circumstances. For these reasons, Counsel submitted that the preliminary objection be overruled.
- 5.5 The Tribunal asked the parties to present the merits of the Application, saving the ruling on the Preliminary Objection to be in the decision of the Tribunal.
- 6.0 **SUBMISSIONS BY COUNSEL**
- 6.1 All parties filed written submissions. On the 30<sup>th</sup> June 2020, the parties were heard by the Tribunal on all issues agreed upon.
- 6.2 Counsel for the Applicant, in respect to the first issue, submitted that the 1<sup>st</sup> Respondent breached Section 91(1) of the Act and Regulation 8(1) of the

PPDA (Administrative Review) Regulations/SI No. 16 of 2014, when it did not promptly or immediately suspend the impugned procurement upon receipt of the Applicant's administrative review application. Counsel submitted that there was a duration of seven (7) working days between the receipt of the Applicant's application and the receipt of the decision of the 1<sup>st</sup> Respondent and during this period, the 1<sup>st</sup> Respondent did not suspend the impugned procurement.

- 6.3 In respect to issues 2 and 4, Counsel for the Applicant submitted that at page 3 of the current application under paragraphs (p) and (q) it was stated that the decision of the 1<sup>st</sup> Respondent was erroneous because the Applicant's administrative application to the 1<sup>st</sup> Respondent was specifically in respect to the failure by the 2<sup>nd</sup> Respondent to suspend the procurement process as provided for in Section 90 of the Act and it was not based on the merits of the application which had been made to the Accounting Officer of the 2<sup>nd</sup> Respondent.
- 6.4 Counsel submitted that the Applicant notified the 2<sup>nd</sup> Respondent on two occasions of its duty to suspend the procurement process in accordance with Section 90 (2) (a) of the Act. The 2<sup>nd</sup> Respondent was notified in the administrative review application which it received on 22<sup>nd</sup> May 2020 and it was further notified by the Applicant's Lawyers in a letter dated 26<sup>th</sup> May 2020. Counsel submitted that the 2<sup>nd</sup> Respondent consciously ignored the statutory requirements of Section 90 (2) (a) of the Act to immediately suspend the procurement process.
- 6.5 In respect to issue 3, Counsel for the Applicant submitted that it was unlawful for the 1<sup>st</sup> Respondent to avoid considering the merits of the Applicant's administrative review application dated 4<sup>th</sup> June 2020. Counsel emphasized

that the closure of the submission of bids and the opening of bids on 2<sup>nd</sup> June 2020 were conducted during the administrative review period. Counsel reiterated that the Applicant made its administrative review application to the 2<sup>nd</sup> Respondent's Accounting Officer on 22<sup>nd</sup> May 2020 and the 2<sup>nd</sup> Respondent did not suspend the procurement process but instead proceeded to conduct the processes of bid submission and opening bids on 2<sup>nd</sup> June 2020.

- 6.6 Counsel concluded that the 2<sup>nd</sup> Respondent's actions were in flagrant breach of the law and the resultant outcome was both void and unlawful. Counsel prayed that the Tribunal should uphold the application with the remedies sought.
- 6.7 In response Counsel for the 1<sup>st</sup> Respondent, in respect to the second and third issues submitted that the Applicant's application for administrative review did not satisfy the provisions of Section 90 (3) of the Act because the Accounting Officer of the 2<sup>nd</sup> Respondent did not fail to issue his or her decision within the statutory timelines considering the fact that the Applicant's application to the Accounting Officer was made on 22<sup>nd</sup> May 2020 and the application to the Authority was made on 4<sup>th</sup> June 2020, which was seven(7) working days after the application at the entity level. The Accounting Officer was therefore still within time to issue the decision.
- 6.8 Counsel for the 1<sup>st</sup> Respondent further submitted that in the present circumstances, the Applicant's application dated 4<sup>th</sup> June 2020 to the 1<sup>st</sup> Respondent was not properly before the Authority since it was made within the statutory timeline for the Accounting Officer to issue a decision.



- 6.9 She submitted that the 2<sup>nd</sup> Respondent acted within its powers to dispose of the application for administrative review and the 1<sup>st</sup> Respondent had provided guidance on the procedure to be adopted by the 2<sup>nd</sup> Respondent, including the suspension of the procurement process.
- 6.10 With respect to the first and fourth issues, Counsel for the 1<sup>st</sup> Respondent submitted that upon its receipt of a copy of the Applicant's application for administrative review to the Accounting Officer of the 2<sup>nd</sup> Respondent, it issued a letter guiding the 2<sup>nd</sup> Respondent on the procedure to be followed on receipt of the application for administrative review, under Section 90 of the Act. She submitted that the mandate to suspend the procurement process on an application for administrative review at Entity level was vested in the Accounting Officer.

#### 7.0 RESOLUTION BY THE TRIBUNAL

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- 7.1 The Tribunal carefully studied the Application, the responses to the Application and all the written Submissions. It also carefully listened to the oral arguments made by the parties at the hearing.
- 7.2 In resolving this application the Tribunal will deal with the issues in the same order as presented by the parties, beginning with the preliminary objection.
- 7.3 The impugned procurement before us stemmed from a loan agreement between the Republic of Uganda and the African Development Bank (AfDB) under the Farm Enhancement and Forestry Conservation Programme Project. *Article VII* of the Loan agreement provided guidelines for the procurement of goods and services. *Section 7.03*, under the heading Procurement of Goods provided that all procurement of goods would be carried out in accordance with the *Banks Procedures for Procurement of Goods and Works (May 2018, Revised July 2012)* as amended from time to time. *Section 7.03 (b)* of the Loan Agreement provided that procurement of farm tractors would be under National Competitive bidding (NCB) procedures using the Bank's standard

bidding documents The African Development Bank Operations procedure manual Part B , Volume 1; Roles and Responsibilities of the Bank & the Borrower dated November 2018 (Operations Procedure Manual) under the heading *Handling of Complaints* provides in Articles 8.7 and 8.8, that all complaints pertaining to procurement arising from the Banks loan funding would be received and handled in accordance with the national procurement laws and regulations of the Borrower. Section 8.7 specifically provides that all complaints received by the Bank would be sent to the Borrower. In circumstances where complaints are sent to the borrower for disposal, the Bank under section 8.8 expects that such complaints would receive the due consideration and appropriate action, in accordance with the country's mechanism for the treatment of complaints. The Tribunal has on previous occasions dealt with similar objections raised by procuring and disposing entity's contesting the jurisdiction of the Tribunal to determine administrative complaints arising from procurements made under AfDB loan funding. In Application 1/19 Rural Electrification Agency -vs- CG ANDJIES & Anor, the Tribunal held that;- *It did not find conflict between the Act, the Financing Agreement and the AfDB Rules which circumstance would oust application of the Act to resolve any disputes that may arise as provided for under section 4 of the Act.* In disposing of another such similar objection the Tribunal in, Application 3/17 Dott Services Ltd-vs- PPDA & Anor, held;- *"In any event the Entity was unable to cite to our satisfaction the relevant sections in the financing agreement or indeed the AfDB rules and procedures for procurement of goods and services that ousted the provisions of the Act, in the circumstances the reference to section 4 of the Act as the premise for ouster of the jurisdiction of the Tribunal is misconceived".*

- 7.4 The 2<sup>nd</sup> Respondent has not advanced sufficient reasons or persuasive arguments to compel the Tribunal to depart from its previous decisions, rejecting challenges to its jurisdiction, further as seen above the AfDB Operations procedure manual prescribes the use of the borrowers (Uganda) complaints handling process, this directive is consistent with the fact that this entire impugned procurement process was conducted under the auspices of the Act, for these reasons we dismiss the preliminary objection.
- 7.5 We will now proceed to dispose of the application by resolving Issues 1& 2 together and thereafter issues 3& 4 together.

- 7.6 *Whether the 1<sup>st</sup> Respondent erred in law when it did not promptly suspend the impugned procurement upon receipt of the Applicant's administrative review application on 4<sup>th</sup> June 2020.*
- 7.7 *Whether the 1<sup>st</sup> Respondent erred in fact and law when it dismissed the Applicant's application on the ground that the Accounting Officer had not yet made a decision whereas the complaint by the Applicant was in respect to the breach of failure to suspend the procurement process.*
- 7.8 The essence of the Applicants complaint to the 1<sup>st</sup> Respondent was the failure by the 2<sup>nd</sup> Respondent to suspend the procurement process pending outcome of the application to the 2<sup>nd</sup> Respondent for administrative review of the impugned procurement based upon the alleged misconduct of the 2<sup>nd</sup> Respondent in the manner the process was handled and on the alleged defectiveness of the bid documents. It is uncontested that there was a pending application for administrative review before the Accounting Officer of the 2<sup>nd</sup> Respondent filed by the Applicant on 22<sup>nd</sup> May 2020. Upon receipt of the application the 2<sup>nd</sup> Respondent extended the bid submission deadline to 2<sup>nd</sup> June 2020, on which date it closed the process and opened bids. The 2<sup>nd</sup> Respondent proceeded with the impugned procurement notwithstanding clear direction from the 1<sup>st</sup> Respondent by its letter dated 28<sup>th</sup> May 2020 directing it to dispose of the application in accordance with section 90 of the Act and the Public Procurement and Disposal of Public Assets (Administrative Review) Regulations 2014.
- 7.9 **Section 90** of the Act grants an aggrieved bidder the right to apply for review of decisions made by a procuring and disposing entity. The application by such bidder for administrative review is made to the Accounting Officer, who is required under **Section 90 (2) (a) of the Act**, to immediately suspend the procurement proceedings and render a decision in writing within fifteen (15)

working days from the date of the application indicating the corrective measures to be taken if any with reasons for such decision. It is instructive that the first mandatory executive action required of the Entity upon receipt of a complaint is the suspension of the procurement process, and this is because the law recognizes that in order for such complaints process to have any utility, a halt must be put to any further ensuing processes. Such action preserves the administrative review process.

7.10 The Tribunal recalls its decision in Application 3/2017 Dott Services Ltd-vs-Public Procurement and Disposal of Public Assets Authority & UNRA in which the Tribunal opined with respect to Sections 90(1) and 90(2) of the Act at ppg 19 as follows;- *“ The provisions of section 90(1) of the Act directing the Authority’s actions upon receipt of a complaint are couched in mandatory terms to wit the Authority shall promptly give notice of the complaint to the respective procuring and disposing entity, suspending any further action.....This mandatory direction or statutory command to the Authority upon receipt of a complaint are reemphasized in Regulation 8(1) SI 16/2014 of The Public Procurement and Disposal of Public Assets( Administrative Review) Regulations 2014, which provides as follows “The Authority shall where a complaint is filed under regulation 7, immediately:-*

- (a) notify the procuring and disposing entity of the complaint; and*
- (b) suspend the procurement and disposal proceedings”*

7.11 The Tribunal in Dott Services (supra) pointed out that *“The language used in both the Act and regulations requires prompt and or immediate action.* In that case the Tribunal gave guidance that action to suspend further processes, pending outcome of the complaint for administrative review by

the Accounting officer must be taken within **two (2)** working days of receipt of such complaint.

- 7.12 We hold that the Accounting Officer of the 2<sup>nd</sup> Respondent was duty bound to suspend the procurement process no later than two (2) working days after receiving the Applicant's application for administrative review on 22<sup>nd</sup> May 2020. The Accounting Officer's failure to immediately suspend the procurement process was a flagrant breach of **Section 90 (2) (a) of the Act**.
- 7.13 The Applicant filed an application for administrative review to the 1<sup>st</sup> Respondent consequent upon the 2<sup>nd</sup> Respondent's failure and or omission to suspend the procurement process. The 1<sup>st</sup> Respondent dismissed the application on 11<sup>th</sup> June 2020, on basis that the application was premature since the statutory time limit for the 2<sup>nd</sup> Respondent to issue its decision had not lapsed.
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- 7.14 The Tribunal finds it necessary to revisit it's decision in **Dott Services (supra)** to dispose of the 2<sup>nd</sup> Respondent's argument disputing the validity of the Applicant's complaint for administrative review to the 2<sup>nd</sup> Respondent, whilst the decision of its application for administrative review was pending before the 1<sup>st</sup> Respondent's Accounting Officer.
- 7.15 A close and purposive reading of the Tribunal's decision in **Dott Services (supra)** infers the conferment of a right of appeal to the next tier in the administrative review hierarchy, to an aggrieved bidder, where the procuring and disposing entity fails to take the essential and vital first step of suspending an impugned procurement process. This right subsists, independent of and irrespective of any pending decision in the underlying application for administrative review before the Accounting Officer. The

aggrieved bidder's right of appeal to the Tribunal equally subsists from any default by the 2<sup>nd</sup> Respondent to suspend the impugned procurement process notwithstanding the fact that the 2<sup>nd</sup> Respondent may still be within its statutory time limits to make a decision on a pending application for administrative review before it.

- 7.16 For the reasons above the Tribunal equally faults the 2<sup>nd</sup> Respondent for dereliction of its responsibility to suspend the procurement process and holds that it failed in its duty under **section 7 (r) of the Act**, to administer and enforce compliance by the 1<sup>st</sup> Respondent of the provisions of the Act more particularly section 90(2) of thereof.
- 8.0 *Whether the 1<sup>st</sup> Respondent erred in law and fact when it did not make a decision regarding the illegality of the processes of closure of bid submission and bid opening by the 2<sup>nd</sup> Respondent during the administrative review period and it did not cancel the procurement process as prayed for by the Applicant.*
- 8.1 *Whether the 1<sup>st</sup> Respondent erred in law when it did not enforce compliance of the provisions of the PPDA Act, 2003 regarding the suspension of a procurement process upon notification and receipt of the administrative review application.*
- 8.2 We find that issues 3 and 4 are disposed of for the reasons advanced above in resolving issues 1 and 2 which substantively overlapped with issues 3 and 4 as framed, by the parties.
- 8.3 Before taking leave of this Application, the Tribunal wishes to offer guidance to the 1<sup>st</sup> Respondent to issue guidelines to procuring and disposing entities regarding the mandatory applicability of the administrative complaints review

process under the Act, in all procurements instituted under loan facilities advanced by the African Development Bank (AfDB), unless there is express wording excluding applicability of the Act, and confirmation to that effect is sought and obtained from the Solicitor General.

9.0 DECISION OF THE TRIBUNAL

1. The preliminary objection is overruled.
2. The Application succeeds.
3. The decision of the 1<sup>st</sup> Respondent is set aside.
4. The impugned procurement process is cancelled.
5. The 2<sup>nd</sup> Respondent is advised to retender the procurement process, if it so wishes.
6. The 2<sup>nd</sup> Respondent is directed to refund the administrative review fees paid by the Applicant.
7. Each party shall bear its own costs.

DATED this 29<sup>th</sup> day of JULY 2020

SIGNED by ] .....  
OLIVE ZAALE OTETE ] CHAIRPERSON

SIGNED by ] .....  
MOSES JURUA ADRIKO SC ] MEMBER

SIGNED by ] .....  
DAVID KABATERAINE ] MEMBER

SIGNED by ] .....  
ABRAHAM NKATA ] MEMBER

SIGNED by ] .....  
ENG. THOMAS BROOKES ISANGA ] MEMBER