

THE REPUBLIC OF UGANDA

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

APPLICATION NO 4 OF 2020

APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT OF LOT 4 - DOHO 1 IRRIGATION SCHEME CATCHMENT AND THE NEIGHBOURING AREAS CATHMENT RESTORATION AND OFF SET OF CARBON FOOT PRINTS UNDER PROCUREMENT REFERENCE MWE/SUPLS/19-20/00029/1/2/3/4/5/6/7/8/9/10/11/12.

APPLICANT: KYAKUWAIRE BUSINESS ENTERPRISES LIMITED

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

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2<sup>ND</sup> RESPONDENT: MINISTRY OF WATER & ENVIRONMENT

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

## DETAILED DECISION

### **1.0 BRIEF FACTS**

- 1.1 The Ministry of Water and Environment (entity) placed an invitation to bid in the New Vision Newspaper dated 10<sup>th</sup> December 2019 a procurement of the supply of assorted quality tree and bamboo seedlings for catchment restoration of the irrigation schemes and offset of carbon footprints under GOU FIEFOC-2 Project and FSSD Program 15 (MWE/SUPLS/19-20/00029/1/2/3/4/5/6/7/8/9/10/11/12) to selected catchments and neighbouring areas in 12 Lots.
- 1.2 The entity received seven bids which were evaluated and M/s Bresun Enterprises (U) Ltd was declared as the best evaluated bidder for the impugned procurement.
- 1.3 On 3<sup>rd</sup> February 2020, the Notice of Best Evaluated Bidder was displayed by the Entity with a removal date of 14<sup>th</sup> February 2020.
- 1.4 On 14<sup>th</sup> February 2020, the Accounting Officer received an administrative review complaint from M/s Kyakuwaire Business Enterprises Ltd (Applicant) in respect to Lot 4.
- 1.5 On 25<sup>th</sup> February 2020, the Entity wrote to the Applicant acknowledging receipt of the complaint and directed the Applicant to pay Uganda Shillings Five Hundred Thousand as administrative review fees not later than 28<sup>th</sup> February 2020.
- 1.6 On 26<sup>th</sup> February 2020, the Applicant paid the administrative review fees and communicated the payment to the Accounting Officer in a letter dated 27<sup>th</sup> February 2020.
- 1.7 On 6<sup>th</sup> March 2020, the Accounting Officer issued a decision to the effect that he did not find merit in the complaint, to undertake any corrective measure.

- 1.8 On 11<sup>th</sup> March 2020, the Applicant, being dissatisfied by the decision of the Accounting Officer, applied for administrative review to the Authority (1<sup>st</sup> Respondent).
- 1.9 On 29<sup>th</sup> May 2020, the 1<sup>st</sup> Respondent considered the complaint lodged before it by the Applicant and dismissed the application on account that the administrative review fees for the application to the Accounting Officer was paid out of time and therefore, should not have been entertained.
- 1.10 On 8<sup>th</sup> June, 2020, the Applicant, being dissatisfied with the decision of the 1<sup>st</sup> Respondent, filed this Application before the Tribunal. In the Application, the Applicant prayed that the Tribunal determine the application for review on the grounds presented to the Authority; halts the procurement process until disposal of the appeal and returns the Applicant as the best bidder.

## 2.0 DISPOSAL OF APPLICATION

- 2.1 In disposing of the application, the Tribunal analysed the following documents-
- 1) The Application dated 8<sup>th</sup> June, 2020, and annexes to the application lodged with the Tribunal on the same date;
  - 2) The Applicant's written and oral submissions;
  - 3) The 1<sup>st</sup> Respondent's written response filed with the Tribunal and annexes attached thereto;
  - 4) 1<sup>st</sup> Respondent's written and oral submissions;
  - 5) The 2<sup>nd</sup> Respondent's response to the application;
  - 6) Response to the application by the best evaluated bidder, Bresun Enterprises Uganda Limited filed with the Tribunal.
- 2.2 The Tribunal conducted a hearing for the parties on 22<sup>nd</sup> June 2020 (via video conferencing). The Applicant was represented by Mr. Ronald Kasiisa and Mr. Solomon Baligeya. The 1<sup>st</sup> Respondent was represented by Mr. Uthman Segawa and Ms. Mary Akiror. In attendance on behalf of the 2<sup>nd</sup> Respondent

was Mr. John Kateregga. The BEB was represented by Mr. Joel Basoga and Mr. Francis Tumwesigye.

### **3.0 SUMMARY RULING**

3.1 In accordance with section 91(7) of the PPDA Act, 2003, the Tribunal delivered a summary ruling on the 23<sup>rd</sup> June 2020. The following is the detailed reasoning for the decision.

### **4.0 ISSUES**

4.1 The issues for which the Applicant sought a decision of the Tribunal were:  
*1: Whether the 1<sup>st</sup> Respondent erroneously declined to handle and grant remedies due to the Applicant on pretext that the fees were not paid in time.*

*2: Whether the 1<sup>st</sup> Respondent failed to comply with Section 91(4) of the PPDA Act when it failed to issue its decision within twenty-one working days after receiving the Applicant's complaint on 11<sup>th</sup> March 2020.*

*3: What remedies are available to the parties?*

### **5.0 SUBMISSIONS ON AGREED ISSUES**

5.1 In respect to the first issue, Counsel for the Applicant submitted that the 1<sup>st</sup> Respondent erroneously declined to handle and grant remedies due to the Applicant on grounds that the administrative review fees were not paid in time yet Guideline 1(d) of the **PPDA Guidance on Administrative Review Fees 1 of 2017 (PPDA Guidelines)**, requires the Accounting Officer to provide guidance to the bidder of the fees payable where there is no predetermined value. He submitted that the Applicant's complaint filed to the 2<sup>nd</sup> Respondent on the 14<sup>th</sup> February 2020 was not accompanied by the administrative review fees because the Accounting Officer had not guided as to the amount payable as administrative review fees. Counsel for the

Applicant submitted that the impugned procurement was in Lots and as such, there was no predetermined value hence the guidance of the Accounting Officer as to the sum to be paid as administrative review fees was required. He referred to **Guideline 1(d) of PPDA Guidelines** which provides that *where the procurement is divided in Lots, the Accounting Officer shall provide guidance to the bidder using the estimate of the individual lot complained against*. He submitted that the Accounting Officer offered the guidance on administrative review fees to be paid by letter dated 25<sup>th</sup> February 2020 and accordingly on 26<sup>th</sup> February 2020, the Applicant paid the administrative review fees. He prayed the Tribunal to find that it was an error for the 1<sup>st</sup> Respondent to decline to handle the application when fees had been paid in accordance with the PPDA Guidelines.

- 5.2 In respect to the second issue, Counsel for the Applicant submitted that the 1<sup>st</sup> Respondent failed to comply with Section 91 (4) of the PPDA Act, 2003 (the Act) when it failed to issue its decision within twenty-one working days after receiving the complaint on 11<sup>th</sup> March 2020. Counsel further submitted that the Circular dated 1<sup>st</sup> April 2020 and 20<sup>th</sup> May 2020 about the conduct of procurement activities during the lockdown period as a result of COVID-19 and guidance on undertaking procurements during the COVID-19 period respectively could not oust the application or compliance with the law. Counsel for the Applicant further submitted that the Authority's decision dated 29<sup>th</sup> May 2020 is illegal because it was issued out of the statutory time period of twenty-one working days. Counsel for the Applicant prayed that for these reasons, the Tribunal should be pleased to set aside the decision of the Authority, determine the application for review on the grounds presented to the Authority and return the Applicant as the best evaluated bidder.

5.3 Counsel for the 1<sup>st</sup> Respondent, in respect to the first issue, submitted that according to Section 90(1) (a) of the PPDA Act, 2003, a bidder who is aggrieved by a decision of a procuring and disposing entity may submit an application for administrative review to the Accounting Officer with the prescribed fee within ten working days from the date the bidder first becomes aware or ought to have become aware of the circumstances giving rise to the complaint. He also quoted regulation 6(1) (a) and 9(1) (c) of the **PPDA (Administrative Review) Regulations, 2014, S.I 16 of 2014**, which enjoin the Accounting Officer and the Authority respectively, to dismiss a complaint where the Applicant does not fulfil the requirement of payment of fees. He further cited the case of *M/S ETC Agro Tractors and Implements Ltd vs PPDA (Application No. 9 of 2014)* where the Tribunal ruled that the Authority was right to decline to hear an application where the applicant had failed to pay administrative review fees. Counsel further submitted that the Applicant received the notice of best evaluated bidder on 7<sup>th</sup> February 2020 and submitted a complaint to the Accounting Officer on 14<sup>th</sup> February 2020 without payment of the prescribed fee. Counsel argued that the ten working days from the receipt of the notice of the best evaluated bidder lapsed on 21<sup>st</sup> February 2020. The Applicant paid administrative review fees on 26<sup>th</sup> February 2020, which was three working days after the statutory period of ten working days and was therefore out of time.

5.4 Counsel for the 1<sup>st</sup> Respondent in respect to the second issue submitted that following the Presidential address that instituted a lock down in light of the COVID-19 pandemic on 30<sup>th</sup> March 2020, the operations of the 1<sup>st</sup> Respondent were affected, and no activities were being handled. In light of the circumstances and in accordance with Section 6 (b) of the Act, the 1<sup>st</sup> Respondent issued a circular to all procurement and disposal entities on the conduct of procurement activities. He further submitted that the circular was

issued in accordance with the Authority's mandate to advise the Central and Local Government on all public procurement and disposal policies, principles and practices, and therefore the timelines for handling the Applicant's application for administrative review were halted thirteen days after the receipt of the application for administrative review. He submitted that on 20<sup>th</sup> May 2020, in accordance with its mandate, the 1<sup>st</sup> Respondent further issued Circular No.3/2020 guiding that it had resumed the handling of administrative reviews previously lodged before it; that the Circular revived the timelines for handling applications, and that the decision in respect to the Applicant's application was issued twenty days after receipt of the application and was therefore within the statutory timeline provided under section 91(4) of the Act. In the alternative, but without prejudice to the aforesaid, Counsel argued that the Applicant's allegation that the decision of the Authority was illegal for being issued out of time renders the Applicant's application before the Tribunal incompetent for contravening section 91L (1) (c) of the PPDA Act in respect to time for filing applications before the Tribunal.

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Counsel for the 1<sup>st</sup> Respondent submitted that the application lacks merits and that it should be dismissed with each party to bear its own costs.

- 5.5 The 2<sup>nd</sup> Respondent submitted that he concurred with the submission by the Counsel for the 1<sup>st</sup> Respondent and added that on 14<sup>th</sup> February 2020, the Applicant did not seek for guidance from the Accounting Officer on the payment of administrative review fees when he filed complaint for administrative review. He submitted that guidance was sought by the Applicant on the 25<sup>th</sup> February 2020 from the Accounting Officer on payment of administrative review fees long after the lapse of the ten working days of administrative review period.

- 5.6 The 2<sup>nd</sup> Respondent further submitted that the entity signed a contract with Bresun Enterprises (U) Ltd (best evaluated bidder) on 11<sup>th</sup> June 2020 though it did not issue it out to Bresun Enterprises (U) Ltd.
- 5.7 Counsel for Bresun Enterprises (U) Ltd (the Best Evaluated Bidder) submitted that he concurred with the submission by the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent.
- 5.8 In reply, Counsel for the Applicant contended that the 2<sup>nd</sup> Respondent could not legally sign a contract with Bresun Enterprises (U) Ltd on 11<sup>th</sup> June 2020 when the Tribunal suspended the procurement process on 10<sup>th</sup> June 2020.

## 6.0 RESOLUTION OF ISSUES

*Issue 1: Whether the 1<sup>st</sup> Respondent erroneously declined to handle and grant remedies due to the Applicant on pretext that fees were not paid in time.*

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- 6.1 Section 90(1a) (a) of the Act provides that an application for administrative review shall be accompanied with a prescribed fee. Regulation 6(1) (a) of the PPDA Administrative Review Regulations, 2014, S.I 16 of 2014, provides that the Accounting Officer shall not investigate a complaint if it does not fulfil the requirements of regulation 4 and section 90(1a) of the Act (*the latter includes the requirement to pay administrative review fees*). Regulation 9 of the said Regulations provides that the Authority shall not investigate a complaint where the Authority determines that the complaint does not comply with section 90 and 91 of the Act.
- 6.2 Section 90(1a) (a) of the Act, 2003 and regulations 6(1) (a) and 9 of the PPDA Administrative Review Regulations, 2014, S.I 16 of 2014, require an application for administrative review to be accompanied with payment of



administrative review fees. The amount of fees to be paid are dependent on the value of the procurement, and the rates are clearly set out in the Schedule to the Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014, S.I 16 of 2014.

- 6.3 In his submissions, Counsel for the Applicant invited the Tribunal to note that the impugned procurement was in Lots (Lot 1 to Lot 12) and hence, there was no predetermined value of the procurement, and as such, the guidance of the Accounting Officer was required as regards fees payable for administrative review. This statement was not disputed by the 1<sup>st</sup> Respondent during the hearing. The Applicant further relied on the PPDA Guidelines, specifically 1(d) which provides that *where the procurement is divided in Lots, the Accounting Officer shall provide guidance to the bidder using the estimate of the individual lot complained against*. Counsel for the Applicant informed the Tribunal that following the guidance of the Accounting Officer of the entity by letter dated 25<sup>th</sup> February 2020, the Applicant paid fees the next day on 26<sup>th</sup> February 2020.
- 6.4 In their submissions on the question of seeking guidance on fees to be paid from the Accounting Officer, Counsel for the 1<sup>st</sup> Respondent stated that the Applicant ought to have known the fees payable since the fees are set out in regulation 11 and the Schedule to S.I 16 of 2014. Counsel for the 1<sup>st</sup> Respondent did not make any submission on the PPDA Guidelines 2017 1(d) referred to by Counsel for the Applicant.
- 6.5 While the Tribunal agrees with the submission of Counsel for the 1<sup>st</sup> Respondent that administrative fees are required by law to be paid by an applicant at the time of filing a complaint with the Accounting Officer, we find however that because the impugned procurement was in Lots, the PPDA Guidelines 2017 1(d) became applicable. Under the cited Guideline, where the

procurement is in lots, as indeed was the case with this procurement, the Accounting Officer must give guidance to the Applicant on the fees to be paid. During the hearing, Counsel for the Applicant informed the Tribunal that the Applicant sought to get an assessment of the administrative review fees to be paid from the Accounts section of the 2<sup>nd</sup> Respondent but the Applicant was told by the relevant officers that the assessment could only be issued on the advice of the Accounting Officer, hence the delay. What is evident is that following the advice of the Accounting Officer on 25<sup>th</sup> February, the Applicant paid administrative fees the on 26<sup>th</sup> February 2020 and thereafter, the Accounting Officer handled the complaint, which was dismissed. The Tribunal is persuaded by the submission of the Applicant that it could only pay fees following guidance of the Accounting Officer. In insisting that the Applicant should be aware of the fees to be paid, the Tribunal finds that the 1<sup>st</sup> Respondent appeared to act contrary to its own guidelines issued to bidders in 2017. It was also telling that the 1<sup>st</sup> Respondent in its submissions chose not to mention the 2017 Guidelines, choosing instead to focus on the Schedule to S.I 16 of 2014, as though the Guidelines did not exist. The 1<sup>st</sup> Respondent ought to have considered their own guidelines and should have taken this into account to explain the failure by the Applicant to pay fees at the time of filing the complaint with the Accounting officer.

- 6.6 The 1<sup>st</sup> Respondent relied on the case of *M/S ETC Agro Tractors and Implements Ltd vs PPDA (Application No. 9 of 2014)* where the Tribunal ruled that the Authority was right to decline to hear an application where the applicant had failed to pay administrative review fees. The Tribunal is persuaded by the submission of Counsel for the Applicant that the facts of the *M/S ETC Agro Tractors and Implements Ltd vs PPDA* case are different from the ones in the instant application. In *M/S ETC Agro Tractors and Implements* case, the Applicant in that case refused to pay the administrative review fees even after it was advised on the amount to be paid. In the instant application,

the Applicant paid fees as soon as it was advised on the amount of the fees to be paid. The 1<sup>st</sup> Respondent ought to have heard the Applicant's complaint on the merits since it had paid administrative review fees. The 1<sup>st</sup> issue is answered in the affirmative.

*2: Whether the 1<sup>st</sup> Respondent failed to comply with Section 91(4) of the PPDA Act when it failed to issue its decision within twenty-one working days after receiving the Applicant's complaint on 11<sup>th</sup> March 2020*

6.7 Counsel for the Applicant would like the Tribunal to declare that the decision of the Authority dated 29<sup>th</sup> May 2020 is illegal because it was issued out of the statutory time of twenty-one working days; that the Authority's Circulars issued following the COVID 19 Lockdown could not oust the provisions of the PPDA Act which has set the timelines in which complaints should be handled; and that Presidential Directives and administrative circulars cannot be used to repeal or suspend an Act of Parliament.

6.8 The Tribunal notes that section 90(4) of the PPDA Act, 2003 enjoins the Authority to issue a decision within twenty-one working days after receiving a complaint. It is not in dispute that the Applicant filed its complaint with the Authority on 11<sup>th</sup> March 2020, and the decision of the Authority should have therefore been issued on or by 13<sup>th</sup> April 2020.

6.9 While the Tribunal agrees with the assertion by Counsel for the Applicant that Presidential Directives and Circulars do not suspend the operation of an Act of Parliament, the Tribunal is persuaded by the submission by the 1<sup>st</sup> Respondent that its operations were greatly affected during the COVID 19 lockdown and it was practically not possible to conduct any activities. The Tribunal finds that it was prudent for the 1<sup>st</sup> Respondent, in light of the prevailing circumstances to

guide on procurement and disposal activities. In fact, as soon as the situation permitted, the 1<sup>st</sup> Respondent on 20<sup>th</sup> May 2020 issued another Circular wherein it guided that it had resumed handling administrative reviews, and the Applicant's complaint was handled soon thereafter. The Tribunal finds that in the circumstances, the 1<sup>st</sup> Respondent did what it is mandated to do to comply with the Presidential Directives aimed at curbing the spread of COVID 19. The Tribunal finds that the 1<sup>st</sup> Respondent's decision dated 29<sup>th</sup> May 2020 is not illegal. The 2<sup>nd</sup> issue is answered in the negative.

*3: What remedies are available to the parties?*

- 6.10 In the Application, the Applicant prayed that the Tribunal determines the application for review on the grounds presented to the Authority; halts the procurement process until disposal of the appeal and returns the Applicant as the best bidder.
- 6.11 Having found that the 1<sup>st</sup> Respondent ought to have handled the Applicant's complaint filed with it since the Applicant had paid administrative review fees, the Tribunal declines the request to determine the application for review on grounds presented to the Authority. The Authority is best placed to handle the merits of the Application filed by the Applicant. The matter is therefore referred back to the Authority to handle the merits of the complaint.
- 6.12 In the course of the hearing, a representative of the 2<sup>nd</sup> Respondent, Mr. Kateregga, informed the Tribunal that the 2<sup>nd</sup> Respondent signed a contract with the Best Evaluated Bidder, M/S Bresun Enterprises (U) Ltd on **11<sup>th</sup> June 2020**. Mr. Kateregga informed the Tribunal that the 2<sup>nd</sup> Respondent received the Authority's decision dismissing the Applicant's complaint on 29<sup>th</sup> May 2020.
- 6.13 Section 91L (1) (c) of the PPDA Act, 2003 provides that an application to the Tribunal for review of a decision of the Authority made under section 91I shall be lodged with the Tribunal within **ten working days** of being served by the Authority with its decision. From 29<sup>th</sup> May 2020 when the PPDA decision was served on the 2<sup>nd</sup> Respondent, the Applicant had up to **16<sup>th</sup> June 2020** to lodge its application with the Tribunal for a review of the decision of the Authority.

Signing of a contract on 11<sup>th</sup> June 2020 was therefore done during the administrative review period in contravention of section 90(7) of the PPDA Act which provides that a contract shall not be entered into by an accounting officer with a provider during the period of administrative review.

- 6.14 The Learned Trial Judge in the case of **Arua Kubala Park Operators and Market Vendors Cooperative Society Ltd** at pg 20 held “*Administrative merits review tribunals, resources permitting may inquire more widely than courts, and may adopt a function closer to that of pursuing truth than that which Court may adopt. As statutory agencies both the Public Procurement and Disposal of Public Assets Tribunal and the Appellants (Authority) lie in the correct and preferable application of the relevant legislation and policy to procurement decisions, rather than on the procedural limitations of arguments as found in the Courts of law.*”
- 6.15 In keeping with the principle cited in the above case, the Tribunal, after learning during the hearing that a contract was signed with the provide in contravention of section 90(7) of the Act declares the contract signed null and void.

## 7.0 DECISION OF THE TRIBUNAL

1. The Application succeeds in part.
2. The decision of the 1<sup>st</sup> Respondent is set aside.
3. The Contract signed between the 2<sup>nd</sup> Respondent and Bresun Enterprises (U) Limited (Best Evaluated Bidder) in respect to the impugned procurement process was signed during the administrative review period in contravention of section 90(7) of the PPDA Act, 2003, and is therefore void abnatio. Accordingly, the contract is set aside.
4. The matter is referred back to the Authority to hear the merits of the administrative review complaint filed by the Applicant to the Authority since the Applicant duly paid the administrative review fees.
5. The 2<sup>nd</sup> Respondent must refund the administrative review fees paid by the Applicant.
6. Each party shall bear its own costs.

SIGNED and Sealed this 23<sup>rd</sup> June 2020 by;

1. OLIVE ZAALE OTETE ] .....  
CHAIRPERSON
2. MOSES JURUA ADRIKO-SC ] .....  
MEMBER
3. ABRAHAM NKATA ] .....  
MEMBER
4. ENG. THOMAS BROOKES ISANGA] .....  
MEMBER