

THE REPUBLIC OF UGANDA

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

APPLICATION NO. 3 OF 2015

**APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND
DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT OF THE
TENDER(PROCUREMENT) FOR EJUPALA MARKET FOR FINANCIAL YEAR 2015-2016.**

APPLICANT: PEACE GLORIA

**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 , MEMBER)**

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BACKGROUND/FACTS

- 1.1 On 27th April 2015 Arua District Local Government (DLG) published an invitation to bid for the management of Ejupala market in the Daily Monitor newspaper.
- 1.2 On 4th June 2015, the Contracts Committee of Arua DLG awarded the contract for the management of Ejupala market to Ms. Lina Tisoru at UGX. 2,650,000.
- 1.3 On 17th June 2015 Peace Gloria applied to the Accounting Officer of Arua DLG for administrative review contesting the award of the contract for the management of Ejupala market to Ms. Lina Tisoru.
- 1.4 On 19th June 2015, the Chief Administrative Officer instituted a committee to handle the Administrative Review application.
- 1.5 The Chief Administrative Officer of Arua DLG did not find merit in the application for administrative review as stated in a communication dated 3rd July 2015 to the Applicant.
- 1.6 On 16th July 2015 the Applicant applied to the Authority for administrative review.
- 1.7 On 21st July 2015, the Authority instructed the Chief Administrative Officer Arua DLG to suspend any further action regarding the procurement process.
- 1.8 On 4th August 2015, the Authority convened an administrative review hearing.

1.9 By letter dated 7th August 2015, the Authority informed the Applicant that her application for Administrative Review had been rejected.

1.10 By the same communication the Authority ordered Arua DLG to re-evaluate all bids for the procurement for management and collection of revenue for Ejupala Market, in light of its observation on the non compliance of the best evaluated bidder to the requirement of financial capacity.

2.0 **APPLICATION FOR REVIEW OF THE RESPONDENT'S DECISION.**

2.1 By Memorandum dated 26th August 2015, the Applicant lodged an Application with the Tribunal for review of the Respondent's decision on the following grounds:

(i) *That the Authority grossly erred in law and in fact by advising the procuring entity to reevaluate bids which were non responsive to the requirements of financial capacity.*

(ii) *That the Authority grossly erred in law and in fact in holding that the Administrative fees of the Applicant should not be refunded despite finding the best evaluated bidder non responsive.*

3.0 **DISPOSAL OF APPLICATION**

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

(1) Memorandum and Annexures in support for review of the Respondent's decision dated 26th August 2015 (the Application);

- (2) Respondent's response to the Application and submissions;
- (3) Applicant's submissions and Annexes to the written submissions;
- (4) The Standard Bidding Document for Management of Markets, Taxi Parks, Produce Fee and Landing Sites for FY 2015/2016

3.2 The Tribunal summoned the Applicant and the Respondent for a hearing on 8th September 2015. The Applicant was represented by Mr. Nelson Chemari and Mr. Wasswa Ramadhan. The Respondent was represented by Mr. John Kallemera. In attendance were officials from Arua District Local Government namely Mr Martin Andua Drani Deputy Chief Administrative officer and Mr. Sam Draku, Procurement Officer.

3.3 The parties raised the following issues for determination by the Tribunal:

(i) Whether the Authority was right to advise the entity to re evaluate bids which were non responsive to the requirement of Financial Capacity

(ii) Whether the Authority correctly held that the Administrative fees for the Applicant should not be refunded

3.4 Submissions by Counsel

Issue 1: *Whether the Authority was right to advise the entity to re evaluate bids which were non responsive to the requirement of Financial Capacity*

The Applicant in their written and oral submissions argued that the Authority having found all the bids to be non-responsive on the requirement of financial capacity erred when it ordered a re -evaluation of all bids for the procurement

for management and collection of revenue for Ejupala Market. This decision was based on the Authority's finding that the Evaluation Committee of Arua District Local Government (the Entity) had relied on information within its knowledge but which had not been included in the bid document. Counsel submitted that there was nothing to re evaluate since all the bids were found to be non responsive. They contended that in effect the Authority was impliedly ordering a re –tender, which was beyond their powers. In support of this preposition, Counsel relied on **Application No 1/2014 Kubala Market – Vs- PPDA** where the Tribunal held that the Authority had no power to order a retender of a procurement process. In their view the Authority ought to have awarded the Contract to the Applicant, because she was the highest bidder in conformity with the principle of ensuring value for money.

3.5 In reply Counsel for the Authority submitted as follows:

3.6 That the Authority duly advised the Entity to re -evaluate all the bids because it observed the bid of the Best Evaluated Bidder was non - responsive to the Entity's requirement of financial capacity. That on scrutinizing the bids the Authority established that the Applicant's average closing bank balance for the requisite months in the impugned procurement was UGX. 2,424,666 while the Entity required an amount of UGX. 8,850,000. Further the Best Evaluated Bidder (Ms. Tisoru Lina) had an average closing bank balance for the requisite months amounting to UGX. 3,995,643 while the Entity required an amount of UGX. 7,950,000.

3.7 In conclusion he submitted that the Authority's decision to order a re-evaluation was justified given the responsiveness of the best evaluated bid.

3.8 Issue 2: ***Whether the Authority correctly held that the Administrative fees for the Applicant should not be refunded?***

3.9 Counsel for the Applicant submitted that the Applicant was aggrieved by the Authority's decision not to refund the administrative review fees she had paid because her complaint had prompted the Authority to undertake an investigation into the procurement process which established that the Best Evaluated Bidder's (BEB) bid was non responsive. That although the Applicant had not pleaded the issue of the BEB non responsiveness at the Administrative Review stage, the net result of their action had been the nullification of the BEB and order for reevaluation of all bids. Therefore their application had been successful entitling them to a refund of Administrative Review fees.

3.10 In reply Counsel for the Authority submitted that pursuant to Section 8 (1)(c) of the Act, the Authority can commission or undertake investigations and institute procurement or disposal contract and performance audits.

He submitted that in accordance with the aforesaid mandate the Authority conducted an independent investigation and established that the BEB bid was non responsive. That the Authority did not rely on information availed by the Applicant when it reached its decision. Further that the Applicant did not seek for a refund of the Administrative review fees at the Administrative Review.

3.11 In support of his submissions Counsel referred us to Regulation 11(3) of the Public Procurement and Disposal of Public Assets (Administrative Review) Regulations SI6/2014, which provides as follows:

Fees for Administrative Review

(2) Where a Complaint is withdrawn or dismissed, the fee shall not be refundable.

3.12 Counsel argued that the Application for Administrative Review had been found to be meritless and was rejected therefore the Applicant was not entitled to a refund of the statutory fee paid for Administrative Review.

3.13 During the Course of proceedings the Tribunal asked Counsel for the Authority to address it on the extent to which a bidding document maybe customized under ***Regulation 48(1) of the Local Governments (PPDA) Act 2003***, which provides as follows;-

“Standard bid documents and other documents issued by the Authority and any other competent authority, may be customized for use by a procuring and disposing entity by the entry of the contact details of the procuring and disposing entity such as name and address, the addition of a logo or any other form of identification of the procuring and disposing entity”.

3.14 This request was occasioned by a careful review of the proceedings before the Authority in which an issue had been raised by the Applicant and couched for resolution in those proceedings as follows; ***“Whether the Entity customized the bidding document without authorization from the Authority and introduced a new ground of elimination which does not feature anywhere in the PPDA Act or the Standard Bidding Document issued by the Authority”***

3.15 Counsel submitted that the issue of customization of bidding documents had not been raised by the Applicant as a ground for review by the Tribunal.

3.16 The Tribunal was alive to the fact that this issue was not formulated as a ground of review by the Applicant, however it was relevant to the resolution of the Application and was consistent with Section 91(6) of the Public Procurement and Disposal of Public Assets Act 2003 which provides as follows:

“For the purposes of reviewing a decision of the Authority, the Tribunal shall make a decision in writing and give reasons for the decision, including its findings on material questions of fact and reference to the evidence or other material on which those findings were based and may.....”

We are further fortified in taking this approach by the recent decision of the Supreme Court of Uganda in Crane Bank Ltd-vs- Nipun Narottam Bhatia (SCCA 2/ 2014) wherein the Court whilst construing the Appellate Jurisdiction of the Court of Appeal pursuant to Rule 102 of the Court of Appeal Rules held that an appellate Court could deal with the issue of illegality drawn to its attention if the issue had been pleaded or canvassed in the lower court even if it had not been formulated as a ground of appeal in that Court.....

3.17 In response to the question put by the Tribunal, Counsel for the Authority argued that Regulation 48 of the Local Governments (PPDA) Regulations 2006 permitted an entity to customize the standard bidding document issued by the Authority. That the PDE had customized the standard bidding document for public vehicle parking areas (parks), which also dealt with revenue collection and management. He submitted that the Authority has not yet issued a standard bidding document for the management of markets revenue collection and management.

4.0 Resolution of Issues by Tribunal

The Tribunal carefully studied the Application, the responses to the Application and written submissions. It also listened carefully to the oral arguments made during the hearing.

- 4.1 In determining whether the Authority could order for reevaluation of the bids, the Tribunal relied on **regulation 140 of the Local Governments (Public Procurement) Regulations 2006** which provides for administrative review by the Authority. Sub regulation (7) thereof provides that the decision of the Authority shall indicate whether the application was upheld or rejected, the reasons for its decision and any corrective measures to be taken.
- 4.2 In its decision, the Authority stated that it found that the best evaluated bidder's bid was also non responsive to the requirement of financial capacity and should have been eliminated by the Evaluation Committee. Consequently, the Authority advised the entity to re-evaluate all the bids for the procurement for management and collection of revenue for Ejupala market.
- 4.3 It is the finding of the Tribunal that the Authority correctly exercised its power under regulation 140(7) of the Local Governments PPDA Regulations 2006, to advise the entity to re-evaluate all the bids, as a corrective measure.
- 4.4 In their pleadings, Counsel for the Applicant asked the Tribunal to make a declaration that re-evaluation of bids which are non-responsive to the requirement of financial capacity is not a corrective measure.
- 4.5 It should be noted that four bids were submitted in this procurement. The Tribunal found that the Authority did not state that all the bids in the procurement were non-responsive. The Authority stated that it looked at only

two of the four bids submitted in the procurement i.e. the complainant's bid and the BEB's bid.

4.6 Counsel for the Applicant did not adduce evidence to show that the other two bids were also non responsive. It is therefore not true to state that all bids were non responsive since no evidence was adduced about the two bids.

4.7 The Tribunal therefore finds that based on its findings, the Authority correctly exercised its mandate to advise the entity to re-evaluate all the bids.

5.0 We now turn to the issue of whether the Applicant is entitled to a refund of its administrative fees.

5.1 In resolving this issue, the Tribunal closely examined the decision of the Authority.

5.2 The Authority in its decision made an observation that the BEB was not responsive to the requirement of financial capacity and should have been eliminated by the evaluation committee. On the basis of this finding, the Authority advised the entity to re-evaluate **ALL** bids.

5.3 The Tribunal finds that the net effect of this decision was to uphold the complaint in part. Therefore because the complaint succeeded in part, Paragraph 3 of the *Guideline on Administrative Review Local Government PPDA Guidelines Number 5/2008*, which provides that the Accounting Officer shall refund the administrative fees to a bidder whose application, is upheld on completion of administrative review is applicable.

5.4 To the extent that the complaint succeeded in part, the Tribunal finds that the Authority should have ordered for a refund of the Complainant's administrative review fees.

- 6.0 We now turn to the issue of to what extent the Procuring and Disposing Entity Arua District Local Government could customize the Standard Bidding Document issued by the Authority for Management and Collection of Revenue for Public Vehicle Parking Areas.
- 6.1 The facts as contained in the pleadings were that on 3rd April 2014, the Authority issued a letter to all entities to customize the standard bidding document issued for public vehicle parking areas for purposes of management of markets. In his submissions Counsel for the Authority conceded that the Authority had not yet issued a standard bidding document for the management of markets.
- 6.2 In accordance with the Authority's directive the PDE duly issued a Standard Bidding Document for the Management of Markets, Taxi Parks, Produce Fee and Landing Sites for the FY 2015/2016.
- 6.3 The issue before the Tribunal with respect to the bidding document used by Arua DLG is whether an entire Standard bidding document could be customized and put to an entirely different use without prior approval by the Authority.
- 6.4 The Authority as seen earlier in this ruling invoked Regulation 48 of the Local Governments (PPDA) Regulations 2006 in aid of its directive to Arua DLG to "customize its Standard Bidding Document for public vehicle parking areas because in its view the document was for the generic purpose of revenue collection and management. In its decision on the application for Administrative Review the Authority observed as follows;-

“The Authority finds that the Entity did not have to seek authority for all subsequent customization of the standard bidding document for revenue collection and management.”

6.5 Regulation 48 (Supra) is very clear. It provides that Standard Bidding Documents issued by the Authority or any other competent authority, ***may be customized for use by a procuring and disposing entity by the entry of the contract details of the procuring and disposing entity such as name and address, the addition of a logo or any other form of identification of the procuring and disposing entity. (emphasis ours)***

6.6 The wording of the section on plain reading limits customization to minor or cosmetic change. The section does not give a PDE a blank cheque to change a standard bidding document wholesale under the guise of “customizing” the document. Indeed to advocate for such a broad reading of the parameters of Regulation 48 of the Local Government Regulations would be sanctioning an abdication of the Authority’s cardinal roles provided in Section 7 (1) (d) and (e) of the Act which provides as follows:

(d) prepare, update and issue authorized versions of the standardized bidding documents, procedural forms and any other attendant documents to procuring and disposing entities;

(e) ensure that any deviation from the use of the standardized bidding documents, procedural forms and any other attendant documents is effected only after the prior, written approval of the Authority;

6.7 It is our finding that the bidding document issued by DLG was a wholesale deviation from the Standard Bidding Document that the Authority had issued

for the management of public vehicle parking areas. As already seen, this document was used in aid of a completely different purpose i.e. collection and management of revenue from markets. The correct procedure that ought to have been adopted by Arua DLG prior to its use is prescribed in regulation 10 of the Public Procurement and Disposal of Public Assets Regulation 6/ 2014. For ease of reference, regulation 10 is reproduced herebelow:

“10. Deviation from use of standard document

- (1) A procuring and disposing entity may, where the standard bidding documents, procedural forms or any other attendant documents are not suitable for a procurement or disposal process, apply to the Authority, in writing, for approval to deviate from the use of these documents.*
- (2) The Authority shall, in respect of the application made under sub regulation(1), issue its decision within ten working days of the receipt of the application.*
- (3) The Authority may-*
 - (a) approve the application for deviation for deviation without modifications or conditions;*
 - (b) approve the application for deviation with modifications or conditions;*
 - (c) reject an application for deviation.*
- (4) Where the Authority approves an application for deviation, the Authority shall state whether the approval is for a single procurement or disposal requirement or for a number of procurement or disposal requirements.*

(5) *Where the approval is for a number of procurement or disposal requirements, the Authority shall state the duration of the deviation, the maximum value of the deviation and the limitations of a deviation, if any, and the circumstances or conditions for using the alternative document.*

(6) *Where the Authority rejects an application, the Authority shall state the reasons for rejecting the application.*

(7) *.....”.*

6.8 The Tribunal faults Arua DLG for using a bidding document which was a deviation from the Standard Bidding document issued by the Authority for a different purpose, without seeking and obtaining approval from the Authority to use the bidding document.

6.9 Before we take leave of this point the Authority is urged to expedite the process of issuing a Standard Bidding Document for use by procuring and disposing entities for procuring the services of management of markets.

6.10 We therefore hold that the bidding process initiated by Arua DLG pursuant to the bidding document issued for the management of taxi parks produce fee and landing sites was void *ab intio* and thus a nullity.

6.11 For the aforesaid reasons this Application succeeds. The Tribunal sets aside the decision of the Authority and orders Arua DLG to refund the applicant’s administrative fees.

6.3 The Applicant is awarded Uganda shillings 2 million to settle all its out of pocket and legal costs.

7.0 DECISION OF THE TRIBUNAL

1. The Tribunal sets aside the decision of the Respondent that the Entity should re evaluate the bids.
2. The Tribunal orders the Accounting Officer Arua District Local Government to refund the Applicant's administrative review fees.
3. The Applicant is awarded Uganda shilling 2 million to cover its out of pocket expenses and legal costs.

Dated at Kampala this 10th Day of September 2015.

SIGNED by the said

OLIVE ZAALE OTETE

SIGNED by the said

MOSES JURUA ADRIKO

SIGNED by the said

DAVID KABATERAINE

SIGNED by the said

ARCHT. JOEL KATEREGGA