

THE REPUBLIC OF UGANDA

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

APPLICATION NO. 5 OF 2016

**APPEAL AGAINST THE ADMINISTRATIVE REVIEW DECISION BY THE AUTHORITY VIDE
TENDER REF. NO. CUFH/SUPLS/15-16 00023**

APPLICANT: GRECO INTERNATIONAL LIMITED

**AUTHORITY: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
AUTHORITY**

**(Before: OLIVE ZAALE OTETE- CHAIRPERSON, DAVID KABATERAINE-MEMBER, JOEL
KATEREGGA-MEMBER AND ABRAHAM NKATA- MEMBER)**

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS

- 1.1 On 22nd September 2015, China Uganda Friendship Hospital Naguru (the Entity) initiated procurement for the design, supply, installation, testing, commissioning and maintenance of oxygen plants for 13 Regional Referral Hospitals in Uganda.
- 1.2 Five firms, including Greco International Limited, the Applicant, submitted bids to the Entity.
- 1.3 Part 1 Section 1 of the Bid Data Sheet provided as follows:
"Bidders who use banks domiciled outside the employer's country must secure along with the bid security a declaration from a correspondent bank in Uganda that it will honour the bid security on behalf of the issuing bank."
- 1.4 The evaluation report dated 30th November 2015 indicated that three of the bidders, including the Applicant, were not responsive at the preliminary evaluations.
- 1.5 The Applicant was failed at preliminary evaluation because *"the bid security provided was from a foreign bank without declaration from a corresponding Ugandan bank to honour the bid security on behalf of the issuing bank as required in Bid Data Sheet Instruction to Bidders (ITB) 21.2"*.
- 1.6 The evaluation report recommended the award to Silverbacks Pharmacy Limited. The contracts committee on 10th December 2015 awarded the contract to Silverbacks Pharmacy Limited. The notice of best evaluated bidder was displayed from 11th December 2015 to 24th December 2015.
- 1.7 On 22nd December 2015, the Applicant applied for administrative review to the Accounting Officer of the Entity on three grounds, one of which was the rejection of their bid security on grounds that it was given by a foreign bank without declaration from a corresponding Ugandan bank.
- 1.8 The Accounting Officer of the Entity by letter dated 28th December 2015 dismissed the Application for administrative review.
- 1.9 Dissatisfied with the decision of the Accounting Officer, the Applicant submitted an application for administrative review to the Authority on 13th January 2016. One of the grounds for application to the Authority, which is of

relevance to the Application before the Tribunal, was the rejection of the Applicant's bid security on grounds that it was given by a foreign bank without declaration from a corresponding Ugandan bank.

1.10 On 17th February 2016, the Authority communicated its administrative review decision wherein it found merit in two of the three grounds of the Applicant thereby upholding the Applicant's application for administrative review. With respect to the ground "*rejection of the bidder's security on grounds that it was given by a foreign bank without declaration from a corresponding Ugandan bank as required by ITB Clause 21.2*", the Authority found that the Applicant did not comply with the requirement in the bidding document because it did not provide a corresponding financial institution in Uganda to honour the bid security on behalf of the issuing bank at the point of bid submission.

1.11 The Applicant was dissatisfied with the finding of the Authority on the ground reproduced in 1.9 above, hence this Application.

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION.

2.1 On 3rd March 2016, the Tribunal received an Application from the Applicant for review of the Authority's decision.

2.2 The reasons for Application to the Tribunal were stated as follows:

i. That the bidding document issued for the procurement under ITB 21.1 to the Bid Data Sheet only required a Bid Security in form of Unconditional Bank Guarantee in format provided in the Bidding Document from a bank acceptable to the employer.

ii. Bidders who use Banks domiciled outside the employer's country must secure along with the Bid Security, a declaration from a correspondent Bank in Uganda that it will honor the Bid security on behalf of the issuing Bank.

iii. The format provided in the Bidding Document required that the Guarantee be subject to the Uniform Rules for Demand Guarantee No. 758.

iv. That the Authority reviewed the Uniform Rules for Demand Guarantees

(URDG) and found that the rules are silent as to the requirement to have a corresponding financial institution for Demand Guarantees.

2.3 The Applicant is seeking that the Tribunal declares the requirement for a declaration from a corresponding bank in Uganda to honour the bid security on behalf of the issuing bank illegal for derogating from the Uniform Rules for Demand Guarantees.

3.0 DISPOSAL OF APPLICATION

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

- (1) The Applicant's Application to the Tribunal, Annexes to the Application and oral submissions.
 - (2) The Authority's response to the Application, Annexes to the response and oral submissions.
- 3.1 The Tribunal conducted a hearing for the Parties on 16th March 2016. The Applicant was represented by Ms. Lillian Kiiza while the Authority was represented by Mr. John Kallemera. In attendance was Dr. Naddumba, the Accounting Officer of the Entity.
- 3.2 In accordance with the timelines in Section 91 I (7) of the Act the Tribunal issued a summary Decision on the 19th March 2016. This is now the detailed Decision of the Tribunal.

4.0 ISSUES RAISED BEFORE THE HEARING OF THE PARTIES

4.1 The Entity, by letter dated 9th March 2016 informed the Tribunal that it had cancelled the procurement following the recommendation of the Authority contained in the Authority's administrative review decision. The Tribunal asked the parties whether this act had any effect on the Application before the Tribunal. There was no objection from either party to the Tribunal handling the Application in spite of the cancellation of the procurement. The Tribunal noted that the Applicant acquired a right of appeal against the

decision of the Authority under Section 91(5) of the Act and therefore proceeded to hear the Application.

4.2 The Tribunal informed the parties that it had noted that the Authority's response to the Application was in essence a preliminary objection. The Authority in its response raised an issue to wit, ***"the ground raised by the Applicant before the Tribunal was never raised during administrative review to the Accounting Officer or to the Authority"***. The response did not address the merits of the Application. The Tribunal chose to treat the Authority's response as a preliminary objection.

4.3 The Tribunal framed the issues for determination as follows;

(1) Whether the requirement in the Bid Data Sheet that Bidders who use banks domiciled outside the employer's country must secure along with the bid security a declaration from a correspondent bank in Uganda that it will honour the bid security on behalf of the issuing bank, was a derogation from the Uniform Rules for Demand Guarantee ICC Publication 758, rendering the requirement void ab initio.

(2) Whether the Tribunal has power to declare a provision in a Standard Bidding Document null and void.

(3) Remedies.

5.0 SUBMISSIONS BY COUNSEL

5.1 On the preliminary objection, Counsel for the Authority stated that the Applicant has raised only one ground before the Tribunal which is essentially that because the Entity subjected the bid security to the Uniform Rules for Demand Guarantee ICC Publication 758, the requirement to have the declaration from a correspondent bank in Uganda to honour the bid security on behalf of the issuing bank was void ab initio and could not be implemented.

5.2 He submitted that the ground raised by the Applicant before the Tribunal was neither raised during administrative review to the Accounting Officer nor to

the Authority. He asserted that this is a fresh issue. He cited section 90(3) of the PPDA Act which allows an unsatisfied bidder to make an application for administrative review to the Authority if the applicant is not satisfied with the decision of the Accounting officer. In the present matter, Counsel submitted that the Accounting Officer did not make any decision on the ground raised before the Tribunal. He cited the Tribunal decision of **Hoima Taxi Bus Operators versus PPDA, Application 5 of 2014** where the Tribunal decided that the administrative review process under the Act and the Regulations was a stage by stage process and that a bidder can only apply for review to the Authority based on a decision of the Accounting Officer. Counsel submitted that the Application is untenable. He prayed the Tribunal to dismiss the Application.

- 5.3 In response, Counsel for the Applicant submitted that the ground raised by the Applicant before the Tribunal was raised during the administrative review before the Authority. She referred the Tribunal to the decision of the Authority where the Authority stated that it had reviewed the International Chamber of Commerce Uniform Rules for Demand Guarantees Publication 758 and had found that the rules are silent to the requirement to have a corresponding financial institution for demand guarantees. Counsel submitted that the Authority went ahead and decided that the Applicant did not comply with the requirement in the bidding document and did not have a corresponding financial institution in Uganda to honour the bid security on behalf of the issuing bank at the point of bid submission. Counsel stated that it was not therefore true that the matter was not raised at the Authority level since it is addressed in the Authority's decision.
- 5.4 In rejoinder to the Applicant's submission on the preliminary objection, Counsel for the Respondent submitted that the Authority's decision was not on the ICC Uniform Rules; that the Authority raised the issue on uniform rules as obiter dicta. He restated his assertion that the issue raised by the Applicant before the Tribunal was never raised with the Accounting Officer nor the Authority and that the Application should be dismissed.
- 5.5 The ruling on the preliminary objection was deferred and the Tribunal allowed the parties to submit on the merits of the Application.

- 5.6 Counsel for the Applicant submitted that the requirement to have the declaration from a correspondent bank in Uganda to honour the bid security on behalf of the issuing bank was contrary to articles 14 and 15 of International Chamber of Commerce Uniform Rules for Demand Guarantees Publication 758 (ICC URDG Rules), and hence void ab initio.
- 5.7 Counsel for the Applicant submitted that under articles 14 and 15 of the ICC URDG Rules, a presentation for demand is made only to the guarantor i.e. the institution that issued the guarantee, and not to a third party. Counsel further submitted that under the Rules, only a guarantor is supposed to honour the demand, and not a third party. She stated that under the same rules, a demand is presented to the guarantor and not to a third party, in this case the correspondent bank. Counsel contended that the requirement for a correspondent bank to honour the demand on behalf of the guarantor is akin to requiring a third party to honour the demand, a situation not contemplated under the ICC URDG Rules. She stated that the requirement for a correspondent bank to honour the bid security on behalf of the guarantor is therefore illegal.
- 5.8 Counsel for the Applicant cited the case of *Makula International Ltd v. His Eminence Cardinal Nsubuga & Another [1982] HCB 11*, where it was held that a court of law cannot sanction what is illegal and illegality once brought to the attention of court overrides all questions of pleadings, including any admissions made therein. She prayed the Tribunal to declare the requirement in the Bid Data Sheet illegal.
- 5.9 In response, Counsel for the Authority submitted that the impugned requirement is similar to that contained in the standard bidding document issued by the Authority in exercise of its power under section 62(1) of the PPDA Act. He asserted that the Tribunal lacks power to nullify a provision of a standard bidding document issued by the Authority or an entity. He stated that under section 91I (6) of the PPDA Act, the Tribunal's power is limited to only reviewing decisions of the Authority.
- 5.10 With respect to the ICC URDG Rules, Counsel for the Authority submitted that the Applicant had failed to direct the Tribunal to a provision in the ICC URDG

rules that was contravened by the impugned requirement. He submitted that the ICC URDG Rules are silent on the issue of correspondent financial institutions for demand guarantees.

5.11 In rejoinder to the submissions of the Authority, Counsel for the Applicant stated that the Tribunal has authority to review a decision of the Authority. That the Applicant has applied to the Tribunal to review the decision of the Authority with respect to the impugned requirement.

5.12 In response to the Authority's submission that its decision on the URDG rules was obiter dicta, Counsel for the Applicant refuted the assertion. She contended that the Authority made a decision on the ground raised before the Tribunal. On the submission by the Authority that the URDG rules are silent on the issue of corresponding banks, Counsel for the Applicant argued that if the rules are silent, then the impugned requirement is contrary to articles 14 and 15 and therefore null and void.

6.0 RESOLUTION BY THE TRIBUNAL

6.1 The Tribunal will deal with the preliminary objection first. The objection is that the ground raised by the Applicant before the Tribunal was neither raised during administrative review to the Accounting Officer nor to the Authority. He asserted that this is a fresh issue.

6.2 The Tribunal perused the Application for administrative review to the Accounting officer and noted that one of the grounds for review was the rejection of the Applicant's bid on grounds that it was given by a foreign bank without a declaration from a corresponding Uganda Bank as required by ITB 21.2.

6.3 In the Application to the Authority for review of the Accounting Officer's decision dated 13th January 2016, the ground that the requirement for a declaration from a corresponding bank was contrary to the ICC URDG Rules was not specifically stated by the Applicant. However a reading of the Authority's decision shows that this matter was raised during the hearing. On page 2 of the Authority's decision dated 12th February 2016, the Authority on ground one stated thus:

"v) *The complainant submitted at the hearing that the requirement of having corresponding financial institution in Uganda was contrary to the International Chamber of Commerce (ICC) Uniform Rules for Demand Guarantees (URDG 758).*

vi) *The Authority reviewed the URDG and found that they are silent to have a corresponding financial institution for demand guarantees.*

vii) *The Authority found that Greco International Limited (Applicant) did not comply with the requirement in the bidding document and did not have a corresponding financial institution in Uganda to honour the bid security on behalf of the issuing bank at the point of bid submission".*

- 6.4 The Tribunal finds that while the ground was not specifically pleaded in the Application, it was raised at the hearing and the Authority ruled on it in its decision on ground one.
- 6.5 Counsel for the Authority submitted that the Authority discussed the issue of URDG rules obiter dictum. He submitted that the decision of the Authority on ground one was not on the Uniform Rules for Demand Guarantees.
- 6.6 Obiter dictum was discussed in the case of ***Paul Nyamarere versus Uganda Electricity Board (In Liquidation) Civil Appeal No. 55 of 2008*** which relying on Black's Law Dictionary defined obiter dictum as a "remark made or expressed by a judge, in his decision upon cause 'by the way'- that is incidentally or collaterally, and not directly upon the question before the court; or on any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy or suggestion". The court held that obiter dictum is something said in passing and does not constitute the ratio decidendi in the case. It is not binding on any court though it is persuasive where relevant.
- 6.7 Applying the test on obiter dictum in the case cited above, the Tribunal finds that the issue of the ICC URDG rules was not a remark expressed by the Authority in passing. The record shows that the issue was raised by the Applicant at the hearing of the Administrative review decision before the Authority. The Authority in its decision stated that "*the Authority reviewed the*

URDG and found that they are silent to have a corresponding financial institution for demand guarantees.” The Tribunal therefore finds that while the Authority did not extensively discuss the URDG Rules in its decision, it nevertheless reviewed URGD Rules and made a finding on the issue after it was raised by the Applicant during the hearing. The issue does not appear as an observation in the Authority’s decision; rather it is contained in its decision on ground one.

- 6.8 It therefore follows that, the Tribunal overrules the preliminary objection. The Tribunal is also of the view that the ground raised by the Applicant introduces a significant point which calls for the Tribunal’s guidance; on SBD’s which apply the URGD rules to the procurement.
- 6.9 Turning to the main issue before the Tribunal to wit “Whether the requirement in the Bid Data Sheet (BDS) that Bidders who use banks domiciled outside the employer’s country must secure along with the bid security a declaration from a correspondent bank in Uganda that it will honour the bid security on behalf of the issuing bank, was a derogation from the Uniform Rules for Demand Guarantee ICC Publication 758, and therefore void ab initio”, the Tribunal finds as follows:
- 6.10 The Tribunal observes that the bidding document under Part 1: Section 1 Instruction to Bidders, Clause 21.2 (b) required the bid security to be issued by a reputable financial institution selected by the bidder from an eligible country. If the issuing institution is located outside Uganda, it shall have a correspondent financial institution in Uganda to make it enforceable. In Part 1 Section 2 of the Bid Data Sheet ITB 21.2, bidders who use banks domiciled in the employer’s country must secure along with the bid security, a declaration from a correspondent bank in Uganda that it will honour the bid security on behalf of the issuing bank.
- 6.11 The Tribunal finds that the requirement introduced by the Entity in the BDS i.e. the requirement to secure a declaration from the correspondent bank in Uganda is inconsistent with Section 21.2 (b) of the ITB which provided that *“if the issuing bank is located outside Uganda, it shall have a correspondent financial institution located in Uganda to make it enforceable”*. The requirement in the BDS is also inconsistent with the spirit of the ICC URDG rules which provide for counter guarantors to sign an undertaking to provide

payment upon presentation of a complying demand issued in favour of a party. The Tribunal therefore takes issue with the Authority for having overlooked this anomaly.

6.12 Under the URDG Rules, a bid security (guarantee) is issued by a guarantor in favour of a beneficiary (the entity). The rules also provide for a counter guarantor who is defined as a party issuing a counter guarantee in favour of a guarantee or another counter guarantor.

6.13 The Tribunal is of the firm view that by requiring a mere signed declaration from a corresponding local bank instead of a counter guarantee from a local bank in Uganda, the Entity weakened the effect the URDG rules which require a bidder to issue an enforceable instrument. In other words the introduction of the requirement of a mere declaration as opposed to a counter guarantee placed the Entity at the peril in the event that the bidder failed to comply with the bid requirement.

6.14 In spite of the finding by the Tribunal that the impugned requirement is inconsistent with the URDG Rules, the Tribunal finds that the requirement in the BDS does not amount to an illegality. The Tribunal accordingly declines to declare the impugned requirement illegal as prayed by the Applicant.

6.15 On the second issue "Whether the Tribunal has power to declare a provision in a Standard Bidding Document null and void?" the Tribunal finds that under Section 91(5) (b) of the Act it may direct the concerned procuring and disposing entity, with respect to anything to be done or redone in the procurement or disposal process. Construing this Section the Tribunal's powers extend to giving directions concerning Entities in the procurement and disposal process.

6.16 In this case the Tribunal saw no need to declare the SBD illegal because the Entity modified the SBD by introducing the requirement that had the effect of watering down the URGD Rules.

7.0 DECISION OF THE TRIBUNAL

1. The Tribunal dismisses the Application.

2. The Tribunal upholds the Decision of the Authority in part.
3. Each Party shall bear its costs.

DATED this 20th Day of April 2016