

THE REPUBLIC OF UGANDA

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

APPLICATION NO 14 OF 2017

**APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT
AND DISPOSAL OF PUBLIC ASSETS AUTHORITY AND THE ENTITY IN RESPECT TO
TENDER FOR KUBALA MAIN MARKET**

APPLICANT: OBI VENDORS ASSOCIATION SAVINGS AND CREDIT

**1ST RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC
ASSETS AUTHORITY**

2ND RESPONDENT: ARUA DISTRICT LOCAL GOVERNMENT

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

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS

1.1 On 29th April 2017, Arua District local government invited all registered market vendors to bid for management services of markets, taxi parks, produce fee and landing sites. The invitation indicated that first priority was to be given to registered market vendors associations.

1.2 All the four bidders who were issued with the bidding document submitted bids on 11th May 2017 in respect to the management of Kubala market. These were Kubala Gangu Livestock Joint Vendors SACCO, Obi Vendors Association Savings and Credit, (the Applicant), Kubala General Market Vendors and Kubala Market Vendors SACCO.

1.3 On 22nd May 2017, the evaluation of bids was conducted using the technical compliance selection method. The Applicant was found non responsive on the requirement of experience in providing services of revenue collection and evidence of up to date payment as per contract payments.

1.4 On 24th May 2017, the Contracts Committee awarded the contract for management of Kubala Market to Kubala Gangu Livestock Joint Vendors SACCO and the Notice of Best Evaluated Bidder (NBEB) was displayed on 26th May 2017.

1.5 On 6th June 2017, the Applicant applied for administrative review to the Accounting officer of Arua District Local Government (the Entity). The Accounting Officer issued a decision on 26th June 2017 rejecting the complaint for administrative review.

1.6 The Applicant was dissatisfied with the decision of the Accounting Officer and on 12th July 2017, filed a complaint to the Authority. The Authority issued its decision on 9th August 2017 rejecting the complaint.

1.7 The Applicant was dissatisfied with the decision of the Authority, hence this Application to the Tribunal challenging the Authority's decision.

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION

2.1 The Application to the Tribunal was filed on 28th August 2017 on the following grounds:

2.1.1 *Whether the entity customized the bid documents for management of parks for use in the bid for markets instead of using the standard bid document issued by the Authority.*

2.1.2 *Whether selective bidding was properly used in line with the Government Policy decision on management of markets and whether the entity was right to eliminate the Applicant on ground of experience.*

2.2 The Applicant prayed the Tribunal to allow the Application and to award costs to the Applicant.

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 dated 25th August 2017, annexes to the Application, the written and oral submissions.
- 2) The Authority's response to the Application dated 30th August 2017, annexes to the response, and oral submissions.

3.1 The Tribunal conducted a hearing for the Parties on 7th September 2017. The Applicant was represented by Waiswa Ramadhan while the Authority was represented by John Kallemera.

4.0 SUMMARY RULING

4.1 In accordance with the PPDA Act, 2003 the Tribunal delivered a summary of its ruling on 11th September 2017. What follows is the detailed reasoning in support of the decision of the Tribunal.

5.0 ISSUES

5.1 Three (3) issues were formulated for resolution by the Tribunal as follows:-

1. *Whether the Authority erred in law and fact to uphold that the Entity customised the bid document for management of parks for use in the bid for markets instead of using the Standard Bidding Document issued by the Authority?*
2. *Whether the Authority erred in law and fact to uphold that the selective bidding method was properly used in line with the government policy decision on management of markets and whether the Entity was right to eliminate the Applicant on the ground of experience?*
3. *What remedies are available to the parties?*

6.0 SUBMISSIONS BY COUNSEL

6.1 On the first issue, to wit, *whether the Authority erred in law and fact to uphold that the Entity customised the bid document for management of parks for use in the bid for markets instead of using the Standard Bidding Document issued by the Authority*, Counsel for the Applicant submitted that the bidding document used in the impugned procurement was approved by the Authority contrary to Section 7(d) of the PPDA Act that mandates the Authority to prepare, update and issue, among others, authorised bidding documents to procuring and disposing entities. He submitted that the bid document issued by the entity was customised for a different purpose to bar other associations from managing their markets; hence, denying them the enjoyment of the Government Policy decision on management of markets issued in 2007. Counsel further argued that the Entity developed a Bidding Document without legal mandate, in the alternative the entity does not have authority to amend substantially bidding documents. Counsel relied on the ruling of the Tribunal in ***Application 4 of 2015, Arua Kubala Versus PPDA***, upheld by the High Court in Civil Appeal No. 5/2016, which was to the effect that under *Regulation 48 of the Local Governments (PPDA) Regulations, 2006*, customization of a bidding document by a procuring and disposing entity

may be in respect to only minor or cosmetic changes such as name and address, addition of logo, or any other form of identification of a procuring and disposing entity. He argued that in the instant procurement, the bidding document required a recommendation from the sub county chief that is totally unfounded in the standard bidding document issued by the Authority for management of Parks; and that the Authority in its decision approved the bidding document in total disregard of the Tribunal and High Court decisions. He prayed the Tribunal to find that the bidding process for markets was based on an illegally customised document and to declare the procurement a nullity.

- 6.2 On the second issue, *whether the Authority erred in law and fact to uphold that the selective bidding method was properly used in line with the government policy decision on management of markets and whether the Entity was right to eliminate the Applicant on the ground of experience*, Counsel for the Applicant submitted that the entity was wrong to eliminate the Applicant on the ground of lack of experience stating that this was contrary to *Regulation 38 (5) (c) and (d) of the Local Government (PPDA) Regulations, 2006*. Counsel stated that on the basis of this regulation, a bidder could only be eliminated on account of value for money and not lack of experience.
- 6.3 On the basis of the submissions, Counsel prayed the Tribunal to allow the Application, to award costs and order a refund of the administrative review fees.
- 6.4 In response to the first issue *whether the Authority erred in law and fact to uphold that the Entity customised the bid document for management of parks for use in the bid for markets instead of using the Standard Bidding Document issued by the Authority*, Mr. John Kallemera, Counsel for the Authority submitted that the Applicant had dropped this issue at the administrative review hearing before the entity and also before the Authority, and that therefore the Applicant was precluded from raising this issue before the Tribunal, since the Authority did not consider the merits of the issue when the Applicant was before the Authority. Counsel contended that the Tribunal should not permit the Applicant to raise the issue before it.

- 6.5 Further on the same issue, without prejudice to the argument that customizing bid documents should not be entertained by the Tribunal, Counsel for the 1st Respondent submitted that the Authority approved the bidding document for the procurement of management services for markets. Counsel prayed that this ground be dismissed for want of merit.
- 6.6 In response to the second issue *whether the Authority erred in law and fact to uphold that the selective bidding method was properly used in line with the government policy decision on management of markets and whether the Entity was right to eliminate the Applicant on the ground of experience*, Counsel submitted that according to the evaluation report of the entity, the Applicant was not responsive to the requirement of experience in providing services of revenue collection and evidence of up to date payment as per contract terms. He further submitted that with respect to experience, the Evaluation Committee in their report noted that the Applicant submitted copies of receipts as evidence of providing services of revenue collection by Victor Toko, an individual who is different from the Association. He stated that the 1st Respondent was right to find that the Applicant did not possess experience or submit evidence of the same, and asked the Tribunal to resolve this issue in the affirmative.
- 6.7 Counsel for the Authority prayed that the Tribunal should dismiss the application for lack of merit and to award costs.

7.0 **RESOLUTION BY THE TRIBUNAL**

- 7.1 The Tribunal will resolve the issues in the same order as raised by the Parties.
- 7.2 Issue 1: *Whether the Authority erred in law and fact to uphold that the Entity customised the bid document for management of parks for use in the bid for markets instead of using the Standard Bidding Document issued by the Authority*
- 7.3 On the issue of customizing the bid document for management of parks for use in the bid for revenue collection in markets, the Tribunal recalls, and

maintains its decision in respect to a similar issue in ***Application 4 of 2015, Arua Kubala Park Operators and Market Vendors Sacco Versus Public Procurement and Disposal of Public Assets Authority***, which decision was upheld by Justice Stephen Mubiru of the High Court in *Public Procurement and Disposal of Public Assets Authority Versus Arua Kubala Park Operators and Market Vendors Cooperative Society Limited, Civil Appeal No 0005 of 2016* and *Public Procurement and Disposal of Public Assets Authority Versus Peace Gloria Civil Appeal No 0006 of 2016*.

- 7.4 In *Application 4 of 2015*, the Authority in its decision had invoked Regulation 48 of the Local Governments (PPDA) Regulations 2006 in aid of its directive to Arua District Local Government 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. The Tribunal decided that the wording of Section 48 of the PPDA Act, 2003 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; and that to advocate for such a broad reading of the parameters of Regulation 48 of the Local Government (PPDA) Regulations 2006/SI 39 of 2006 would be sanctioning an abdication of the Authority’s cardinal roles provided in Section 7 (1) (d) and (e) of the Act which provides, inter alia, that the Authority shall prepare, update and issue authorized versions of the standardized bidding documents, procedural forms and any other attendant documents to procuring and disposing entities.
- 7.5 In that same *Application 4 of 2015*, the Tribunal urged the Authority 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.
- 7.6 The Tribunal finds, as it did in *Application 4 of 2015*, that the bidding process initiated by Arua District Local Government pursuant to the bidding document issued for the management of Kubala Main Market is void and a thus a nullity.

- 7.7 On the argument by the Authority that the issue of customizing a bid document was not considered at both the Entity and Authority level and that therefore it should not be entertained by the Tribunal, the Tribunal recalls the decisions of Justice Stephen Mubiru on the matter in *Public Procurement and Disposal of Public Assets Authority Versus Arua Kubala Park Operators and Market Vendors Cooperative Society Limited, Civil Appeal No 0005 of 2016* and *Public Procurement and Disposal of Public Assets Authority Versus Peace Gloria Civil Appeal No 0006 of 2016* both of which arose from appeals against the two decisions of the PPDA Appeals Tribunal. Justice Mubiru at pages 22 and 23 held that the Tribunal in performing its administrative review role functions more like a court at first instance, and therefore has wide powers to investigate and determine a matter before it; it should not be limited by rules normally applicable to courts. On the basis of this decision, the Tribunal has authority to consider the issue of customization of bid documents raised by the Applicant in this Application.
- 7.8 **Issue 2:** *Whether the Authority erred in law and fact to uphold that the selective bidding was properly used in line with the government policy decision on management of markets and whether the Entity was right to eliminate the Applicant on the ground of experience.*
- 7.9 Having found that the bidding document on which the impugned procurement process was based was void, the Tribunal did not delve into the merits of this issue.

8.0 DECISION OF THE TRIBUNAL

1. The Application is allowed and the decision of the Authority is set aside.
2. The Procurement activity be re-advertised if the Entity so wishes, using Standard Bidding Document for markets issued by the Authority.
3. The Administrative Review fees paid by the Applicant at the Entity level be refunded to the Applicant.

4. The taxed reasonable expenses incurred by the Applicant to be borne by the Authority.

SIGNED and sealed this 18th day of Dec, 2017 by the said

OLIVE ZAALE OTETE


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CHAIRPERSON

MOSES JURUA ADRIKO


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MEMBER

ABRAHAM NKATA


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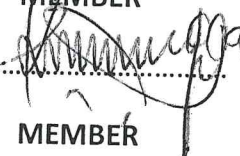
MEMBER

DAVID KABATERAINE


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MEMBER

ARCHT JOEL KATEREGGA


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MEMBER