

THE REPUBLIC OF UGANDA

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

APPLICATION NO.12 OF 2018

**APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT
AND DISPOSAL OF PUBLIC ASSETS AUTHORITY TO SUSPEND UNIVERSAL FOR
GENERAL CONSTRUCTION & TRADING CO LTD FROM PARTICIPATING IN
PUBLIC PROCUREMENT**

**APPLICANT: UNIVERSAL FOR GENERAL CONSTRUCTION & TRADING
CO. LTD**

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

(Before: OLIVE ZAALE OTETE- CHAIRPERSON, MOSES JURUA ADRIKO SC - MEMBER, DAVID KABATERAINE-MEMBER and ABRAHAM NKATA- MEMBER)

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BACKGROUND/FACTS

- 1.1 The Government of the Republic of Uganda through the Ministry of Education and Sports ['MOES'] received a grant towards the Uganda Teacher and School, Effectiveness Project under which it advertised a tender for the construction works of facilities in 55 schools under twelve lots.
- 1.2 On 25th February 2016, the Applicant engaged a consultant trading as Makman Logistics Services Limited ('Makman') to prepare tender documents and submit the bid on its behalf in the said procurement activity.
- 1.3 The Applicant availed Makman its company profile and recommendation letters from previous clients to facilitate it in the process of preparing the bid documents.
- 1.4 On 14th July 2017, MOES recommended to PPDA that the Applicant be suspended for submission of forged documents in its bid for a tender for construction of facilities in 55 selected primary schools in Uganda under the Global Partnership for Education.
- 1.5 On 3rd August 2017, the Authority verified with the International Organization for Migration (IOM) the documents submitted by the Applicant in the said procurement process.
- 1.6 On 15th August 2017, IOM informed the Authority that the documents submitted by the Applicant in the procurement process were not issued by IOM.

- 1.7 On 23rd August 2017, the Applicant was notified in accordance with the regulation 14 (1) (a) and (b) of the PPDA Regulations, SI 6/2014 of the Ministry's recommendation to the Respondent to suspend it and further to submit to the Respondent information or evidence in its defence.
- 1.8 On 2nd January 2018, the Applicant was invited for a formal hearing in relation to the investigations carried out by the Respondent.
- 1.9 On 23rd May 2018, the Respondent suspended Universal for General Construction & Trading Company Limited for a period of two years effective 18th May 2018.
- 1.10 On 8th June 2018, the Applicant being dissatisfied with the Respondent's decision filed this Application before the Tribunal challenging the Authority's decision.

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION

- 2.1 On 8th June 2018, the Applicant lodged an application for review of the Authority's decision dated 23rd May 2018 listing four (4) grounds of appeal with the Public Procurement and Disposal of Public Assets Appeals Tribunal (the Tribunal) seeking to have the decision of the Authority reviewed as follows:-
 1. *That the PPDA erred in law and fact when it reached a decision without conducting a full investigation/inquiry into the matter in total breach of the principles of natural justice*
 2. *That the two (2) year period of suspension issued to the Applicant effective 18th May 2018 is prejudicial and harsh to the Applicant considering the fact that the Applicant was blacklisted in July 2017.*
 3. *That the PPDA erred in law and fact when it issued a harsh and prejudicial penalty of two (2) years suspension against the*

Applicant effective the 18th May 2018 yet it had blacklisted the Applicant in July 2017.

4. *That the PPDA Authority failed to properly evaluate the evidence on record thereby reaching a wrong conclusion.*

2.2 On 11th June 2018, the Tribunal wrote to the Authority (letter copied to Applicant) requesting to provide the Tribunal with:

- (1) written response to the allegations or grounds of appeal;
- (2) record of proceedings;
- (3) notice of the decision that was given to the Applicant;
- (4) all documents that the Authority relied on to arrive at its decision.

2.3 In the same letter, the Tribunal directed both parties to file with the Tribunal written submissions and any rejoinder to the submissions. This was done and the submissions were served on the respective parties.

3.0 **DISPOSAL OF APPLICATION**

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

- (1) The Application lodged with the Tribunal and appendices attached thereto dated 8th June 2018.
- (2) The Applicant's written submissions and Annexes to the submissions;
- (3) Written response and written submissions to the Applicant's application by the Authority and Annexes attached to the response and the submissions;

3.1 The Tribunal conducted a hearing for the parties on 21st June 2018. The Applicant was represented by Mr. Charles Owor and Mr. Herbert Arinda. The Authority was represented by Mr. John Kalemera.

4.0 **SUMMARY RULING**

4.1 In accordance with Section 91I (7) of the PPDA Act 2003 (the Act), the Tribunal delivered a summary of this ruling on the 23rd day of June 2018. What follows is the detailed reasoning in support of the Tribunal's decision.

5.0 **ISSUES**

5.1 The Tribunal, having regard to the issues in the written submissions of the Parties, consolidated the issues for determination by the Tribunal as follows:

1. *Whether the Authority's decision to suspend the Applicant was reached in breach of the principles of natural justice?*
2. *Whether the Authority properly evaluated the evidence on record prior to making the decision to suspend the Applicant.*
3. *Remedies available to the Applicant.*

6.0 **SUBMISSIONS BY COUNSEL**

6.1 In their written submissions, the Applicant argued that the right to obtain a fair hearing before any administrative body was granted in Articles 28 and 42 of the Constitution of the Republic of Uganda. Counsel argued that both articles guaranteed the Applicant due process before the Authority. Relying on various authorities including **Constitutional Appeal 2/2007 John Ken Lukyamuzi –vs- Attorney General and Electoral Commission.** Counsel argued that the Applicant was not accorded the right to a fair hearing because the Applicant could not find any record of an investigation carried out by the Authority from the documentation adduced at the hearing when in fact the Authority relied on the conduct of such an investigation as one of the reasons for arriving at the decision to suspend the Applicant. The Applicant also complained that the actions for which they had been suspended were the actions of Makman who had exceeded the authority conferred on them in a memorandum of understanding executed between the Applicant and

Makman. The Applicant's Counsel complained that submission of the forged certificates to the MoES was outside the scope of authority granted to Makman and therefore the consequences of Makman's action ought not to be visited upon the Applicant. Counsel pointed out that none of the officials of Makman were called to give factual evidence and the basis of the Authority's decision was questionable in view of this omission. Counsel submitted that had the Authority conducted a proper investigation including interview of the Applicant's officials and had they been cognizant of the pending arbitral proceedings between Makman and themselves it was most likely that the Authority would have arrived at a different decision. Counsel prayed that the Tribunal finds this issue in the affirmative and sets aside the Authority's decision.

- 6.2 With respect to the second issue Counsel for the Applicant argued that the two year suspension period handed down by the Authority was both harsh and prejudicial taking into account that the Applicant had been effectively blacklisted in July 2017 and had not been able to transact business since that date. Counsel argued that the Applicant had already served a 10 months "punishment period" before the formal decision to suspend the Applicant by the Authority was made on 23rd May 2018. In view of the prior blacklisting of the Applicant the two (2) year suspension was harsh and prejudicial in the circumstances.
- 6.3 With respect to issue 3, Counsel for the Applicant argued that given the fact that the Authority had failed to evaluate the evidence on record and disregarded the unauthorized role Makman played in the procurement process, they were entitled to an order from the Tribunal setting aside the suspension and in the alternative if the suspension was confirmed the period of such suspension should be backdated to run from July 2017 and not 18th May 2018.

6.4 In response to the submissions made by Counsel for the Applicant, Counsel for the Authority submitted on the 1st and 2nd issues concurrently as follows:

6.5 That by letter dated 23rd August 2017, the Applicant was notified of the communication received by the Authority from MOES, recommending suspension of the Applicant. In accordance with Regulation 14 (1) (a) and (b) of the PPDA Regulations SI 6/2014, the Authority requested the Applicant to submit any evidence in support of its defence. Subsequently the Applicant was invited for a hearing by way of an advert in the New Vision Newspaper dated 2nd January 2018. The Respondent submitted its response by way of letter dated 11th January 2018 from its advocates and attended a suspension hearing, together with their advocates on 12th January 2018. The Authority argued that the Respondent's defence was taken into account before arriving at the final decision to suspend the Applicant. Counsel also drew the attention of the Tribunal to the investigation carried out by the Authority to verify the certificates of final acceptance allegedly issued by IOM purportedly certifying completion of two (2) projects in South Sudan which the Applicant had sought to rely on in their bid to the MOES. Counsel submitted that due process had been accorded to the Applicant prior to the Authority arriving at the decision to suspend the Applicant.

6.6 Counsel invited the Tribunal to dismiss the application in light of the arguments summarized in 6.5 above.

7.0 **RESOLUTION BY THE TRIBUNAL**

7.1 The Tribunal has carefully considered both the written and oral submissions of both Counsel on this issue.

7.2 In both the written and oral submissions, Counsel for the Applicant maintained that the Authority did not properly investigate the case, that

the Applicant was not accorded a fair hearing and finally having regard to the facts, the Authority's decision to suspend the Applicant was harsh and prejudicial having due regard to all the circumstances of the case.

7.3 The Power of the Authority to conduct an investigation upon receipt of a recommendation to suspend a bidder can be found in ***Sections 8 and 94 of the Public Procurement and Disposal of Public Assets Act, 2003 (the Act)***.

7.4 The manner and procedure in which the Authority conducts an investigation is stipulated in ***the Public Procurement and Disposal of Public Assets Regulations No 6 of 2014, which provides as follows;***
"14. Investigations by the Authority.

(1). Upon receipt of a recommendation to suspend a provider, the Authority shall immediately:

(a) notify the provider, giving full details of the recommendation and invite the provider to submit information or evidence in defence; and

(b) Institute an investigation.

(2) Notwithstanding sub regulation (1) (b), the Authority may suspend a provider without conducting investigations, where a recommendation for suspension is a result of an investigation conducted by a competent authority or suspension by an international agency of which Uganda is a member.

(3) In investigating the complaint, the Authority shall consider, as appropriate:-

(a) the information contained in the recommendation;

(b) the information provided by the procuring and disposing entity which makes a recommendation for suspension;

- (c) *the information provided by the procuring and disposing entity responsible for the relevant procurement or disposal;*
 - (d) *any information submitted by a provider;*
and
 - (e) *any other relevant information.*

- (4) *A provider who is the subject of a recommendation for suspension, shall be permitted to submit evidence:-*
 - (a) *in person or through a representative*
 - (b) *through presentation of witnesses ;or*
 - (c) *in writing*

- (5) *The Authority shall issue its decision on a recommendation to suspend a provider, in writing, within twenty one working days from the date of receipt of the recommendation.*

- (6) *A decision made under this regulation shall indicate whether the recommendation for suspension is upheld or rejected, the reasons for the decision and details of the suspension, where imposed."*

7.5 From the evidence adduced before the Tribunal, it is clear that the Authority took steps to investigate the recommendation for suspension made by MOES.

7.6 On 3rd August 2017, the Authority wrote to IOM to confirm whether the Applicant undertook civil works for:-

- (a) Construction of DNPI Training Academy at Juba County Central Equatorial State South Sudan; and
- (b) Construction of 8 classroom blocks, laboratory and dormitories for Mayenbuni Secondary School for boys. The Applicant had cited these projects as completed projects it had undertaken in support of its bid to the MOES.

- 7.7 By letter dated 15th August 2017 addressed to the Authority, IOM clarified that it had not issued the impugned completion certificates which had been presented to MOES by the Applicant in support of its bid. The Applicant however claimed that the forged certificates were presented by Makman with whom it had entered into a Memorandum of Understanding in 2016 prior to commencement of the bidding process. The Tribunal perused the Memorandum of Understanding dated 25th day of February 2016 between the Applicant and Makman as well as the Power of Attorney issued by the Applicant to Mr. Samuel Belay Haile on the same day, which gave the said donee extensive powers to represent and act for and on behalf of the Applicant including submission and execution of all manner of tender documents. The letter of bid dated 5th May 2016 was duly signed by Mr. Hailee and under paragraph (o) thereof certified that the Applicant had taken steps to ensure that *“no person acting for us or on our behalf will engage in any type of fraud or corruption”*. The Tribunal also noted that the donee of the powers of attorney signed the **Code of Ethical Conduct in Business for Bidders and Providers** issued under **Section 93 of the Act**. The code inter-alia enjoins bidders to desist from misrepresenting facts in order to induce a procurement process or the execution of a contract to the detriment of the Procuring and Disposing Entity; or utter false documents.
- 7.8 Having duly appointed an agent and vesting the agent with extensive powers as described in the preceding paragraph it is astonishing that the Applicant would turn around and disavow the deceitful actions of their agent. The principal i.e. the Applicant is bound by the actions of their agent if such agent was acting within the boundaries of their ostensible authority. In arriving at this holding, we recall the binding decision of the Supreme Court of Uganda in **SCCA 4/2006 Fredrick Zaabwe-vs- Orient Bank Ltd and 5 others at ppq 74** in which the apex court of the land held as follows;- *“ Power of Attorney creates a fiduciary relationship between the donor or the principal and the donee of the power or the*

agent. In law, the consequence is a voluntary relationship between the two parties whereby one, the agent is authorized by express or implied consent to act on behalf of the other called the principal. The authorized acts of the agent are considered to be the acts of the principal who is entitled to the benefits or responsibilities for the liabilities, if any, arising from the decisions, acts, and consents of the agent as the holder of the power of attorney. In any event it is unlikely that the Applicant would not have sought to take the benefit of any contract awarded under the bidding process in the event that the Ministry of Education evaluation committee had performed a cursory job when it scrutinized the bids for the procurement. The Tribunal is not persuaded by the Applicants argument that it was unaware of, or had not sanctioned presentment of false certification by its agent to MOES.

- 7.9 We now turn to address the argument presented by the Applicant that it had not been accorded a fair hearing by the Authority, the chronology of events is as follows;
- 7.10 By letter dated 23rd August 2017, the Authority notified the Applicant of the recommendation submitted to the Authority by MOES requesting the Authority to take appropriate action under regulations 12 & 13 of the PPDA Regulations SI 6/2014 against the Applicant because it had misrepresented facts in its bidding documents which the Entity had unearthed during a due diligence process.
- 7.11 As narrated earlier the Applicant responded to the communication and submitted its defence before appearing before the Authority at the scheduled suspension hearing held on 12th January 2018. The Applicant was represented by Advocates at the hearing and had opportunity to present their rebuttal to the facts presented in support of the application to have it suspended.

- 7.12 The Tribunal is satisfied as is apparent from the chronology of events and the actions of the parties reproduced above that:-
- (a) The Authority conducted sufficient investigations.
 - (b) The Applicant was given sufficient time and ample opportunity to present evidence to rebut the recommendation to the Authority by MOES to suspend them.
 - (c) The Applicant was accorded a fair hearing.

8.0 REMEDIES AVAILABLE TO THE PARTIES

- 8.1 The Tribunal has already found that the Authority has powers under Section 94 of the Act to suspend providers. The Authority is empowered by law to determine the period of suspension of a provider. The Authority in a document approved by its Board of Directors has laid down guidelines for periods of suspension.
- 8.2 In the instant case the Authority has found that the Applicant submitted forged certificates of final acceptance (CFA) documents purportedly issued by the International Organization for Migration (IOM) in its bid document.
- 8.3 As we have held previously in M/s Akaaba Enterprises Ltd –vs- PPDA Application 2/14 *“Uttering false documents is completely at variance with the basic principles and ethics of public procurement and disposal. It cannot be over emphasized that forgery is a very serious offence attracting grave criminal liability and a scourge which must be combated in all spheres of our society.”*
- 8.4 The Tribunal is satisfied that the Applicant tendered forged Certificates of Final Acceptance documents in its bid and finds that the suspension of two years was appropriate.

9.0 **DECISION OF THE TRIBUNAL**

1. The Application is dismissed.
2. The Tribunal affirms the decision of the Authority to suspend the Applicant from participating in public procurement for a period of two years.
3. Each party to bear its own costs.

DATED at Kampala this^{15th} day of October 2018.

SIGNED by the said]
OLIVE ZAALE OTETE] CHAIRPERSON

SIGNED by the said]
MOSES JURUA ADRIKO SC] MEMBER

SIGNED by the said]
DAVID KABATERAINE] MEMBER

SIGNED by the said]
ABRAHAM NKATA] MEMBER