

THE REPUBLIC OF UGANDA

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

APPLICATION NO 22 OF 2018

APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT TO THE PROCUREMENT FOR MANAGEMENT OF REVENUE COLLECTION FROM STREET PARKING DIVISIONS A & B OF ENTEBBE MUNICIPAL COUNCIL FOR FINANCIAL YEAR 2018.

APPLICANT: BASIMA CONSULT LTD

1ST RESPONDENT: ENTEBBE MUNICIPAL COUNCIL

**2ND RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
AUTHORITY.**

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

DECISION OF THE PPDA APPEALS TRIBUNAL

10 BRIEF FACTS

- 1.1 On 2nd May 2018, Entebbe Municipal Council Division A (the Entity) initiated the procurement for management and collection of revenue from street parking for Division A at an estimated cost of UGX 12,000,000 for twelve months.
- 1.2 On 4th May 2018, the Entity initiated the procurement for management and collection of revenue from street parking for Division B at an estimated cost of UGX 28,000,000 for twelve months.
- 1.3 On 22nd May 2018, the bid notice was published in the New Vision Newspaper with a deadline for submission of bids on 11th June 2018.
- 1.4 On 11 June 2018, three bidders submitted bids which were opened and prices read out as follows: Skype Transport Services Ltd UGX 3,700,000, Basima Consult Ltd (the applicant) UGX 3,850,000 and Dreams Restaurant and Catering Services UGX 3,450,000.
- 1.5 The Evaluation Committee Report dated 21st June 2018, indicated that Dreams Restaurant and Catering Services Ltd failed at preliminary stage while the applicant and Skype Transport Services Ltd were responsive to both the preliminary evaluation criteria and detailed technical evaluation and proceeded to financial comparison.
- 1.6 The Evaluation Committee report indicated that upon carrying out due diligence on the Applicant, as the best evaluated bidder, Walukuba/Masese Division informed the Entity that the Applicant mismanaged its contractual obligations with Jinja Municipal Council and it engaged in forgery of receipts

and accordingly the Applicant was recommended for immediate suspension to the Accounting Officer, Jinja Municipal Council.

- 1.7 On 25th June 2018, the Contracts Committee approved the Evaluation Committee's recommendation and awarded the contract to Skype Transport Services Ltd at UGX 3,700,000 inclusive of all taxes.
- 1.8 On 25th June 2018, the Notice of the Best Evaluated Bidder was displayed with the removal date of 6th July 2018.
- 1.9 On 3rd July 2018, the Applicant filed for administrative review to the Accounting Officer.
- 1.10 On 17th June 2018, the Accounting Officer dismissed the application on grounds that the Entity did not find merit in the application.
- 1.11 On 24th July 2018, the Applicant filed for administrative review to the Authority. On 24th August 2018, the Authority issued its decision wherein it upheld the application for administrative review and advised the Entity to re-evaluate the bids in accordance with the evaluation criteria in the bidding document.
- 1.12 On 5th September 2018, the Applicant being dissatisfied with the Authority'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 6th September 2018, the Applicant filed an application to the Tribunal challenging the Authority's decision.
- 2.2 The grounds for application to the Tribunal were as follows:

- i. *That the 2nd Respondent erred having found Skype Transport Services Ltd, non-compliant and that the Applicant was the best evaluated bidder having passed all the evaluation stages as per evaluation report was not correct to advice on re-evaluation of the bids.*
- ii. *That the 2nd Respondent erred having upheld the Applicant's application for administrative review, it did not grant the remedy sought i.e. declaring/recommending it the best evaluated bidder and instead ordered re-evaluation of bids.*
- iii. *The 2nd Respondent erred having been found to be the best evaluated bidder by the entity having passed all evaluation stages as per Evaluation Report should not be accordingly confirmed as such.*
- iv. *What remedies are available?*

3.0 DISPOSAL OF APPLICATION

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

- 1) The Applicant's Application to the Tribunal dated 6th September 2018, annexes to the Application, the written and oral submissions.
- 2) The Authority's response to the Application dated 11th September 2018, annexes to the response, and the written and oral submissions.

3.2 The Tribunal conducted a hearing for the Parties on 19th September 2018. The Applicant was represented by Mr. Byamugisha G.K; the 1st Respondent was represented by Mr. Kato Ali Hassen; the 2nd Respondent was represented by Mr. John Kallemera. In attendance were representatives of the Parties.

4.0 ISSUES

4.1 The issues for determination by the Tribunal were agreed as follows:

- a) Whether PPDA was right to advise the entity to re-evaluate the bids instead of declaring the Applicant the Best Evaluated Bidder and awarding the contract.
- b) What remedies are available?

5.0 PRELIMINARY OBJECTION

- 5.1 Counsel for the 2nd Respondent raised a preliminary objection to the effect that the 2nd Respondent should not be a party to this proceedings.
- 5.2 Counsel for the 2nd Respondent argued that it made a decision which is being challenged before the Tribunal in a quasi- judicial capacity. That administrative review process has three (3) tiers namely the Accounting Officer level, the Authority level and the Tribunal level. That if a bidder is dissatisfied with the decision of the Accounting Officer, it should sue the Entity but not the Authority. He argued that the 1st Respondent is responsible for managing all procurement process initiated by it, therefore the appropriate parties to this Application are the Applicant and the 1st Respondent.
- 5.3 Counsel for the 2nd Respondent prayed that the 2nd Respondent be struck out as a party to this proceeding before the Tribunal with no orders to costs.
- 5.4 In reply, Counsel for the Applicant argued that it is a procedure in this Tribunal to include the 2nd Respondent as a party to all appeals. Counsel for the Applicant prayed that this Tribunal finds no merit in this preliminary objection and the same be overruled.
- 5.5 Tribunal directed the parties to proceed with submission on the merits of the application and deferring the ruling on the preliminary objection for the decision of the Tribunal.

6.0 SUBMISSIONS BY COUNSEL

- 6.1 Counsel for the Applicant submitted considered all the issues raised together. He submitted that the Authority found the Applicant most responsive and yet advised the entity to re-evaluate the bids.
- 6.2 Counsel for the Applicant submitted that the Evaluation Committee of the 1st Respondent noted that the applicant had emerged the best evaluated bidder, and that this decision was withdrawn following the due diligence test

which found that the applicant had not fulfilled its contractual obligations. For that matter, there was no merit under this claim.

- 6.3 Counsel for the Applicant further submitted that the 2nd Respondent made two findings; first, that Skype Transport Services Ltd, who was declared Best Evaluated Bidder by the Entity did not meet the requirements on experience and qualification therefore it was non-compliant; second, that due diligence was not one of the requirements of the bid document. On the issue of due diligence, Counsel further submitted that due diligence carried out in Jinja Municipal Council by the Entity on the Applicant was irregular because the Applicant had taken Jinja Municipal Council to the High Court and the Applicant did not include Jinja Municipal Council as a referee in its bid to the Entity. Counsel submitted that since the purported best evaluated bidder Skype Transport Services Ltd stands disqualified for being non-compliant, and having found that due diligence was not one of the conditions in the bid document then, the Applicant remains the best evaluated bidder as per evaluation report.
- 6.4 Counsel for the Applicant submitted that it is not necessary to re-evaluate the bids. Section 25 of the PPDA Act, 2003 does not limit the powers of the 2nd Respondent. It only enumerates the functions and powers of the procuring and disposing entity. Therefore it is not a good reason for the Authority to decline to give a remedy. He further submitted that Section 91 (2) (b) of the Act empowers the Authority to annul in whole or in part an unlawful act and decision made by the procuring and disposing entity. This read together with Section 8 (1) (e) of the same Act, the Authority has powers to act upon complaints in respect of any procurement or disposal activity following the procedure in Section 91 of the Act. He thus submitted that it is not true that PPDA lacks the mandate to make such a declaration. He also submitted that the Tribunal has the mandate to make such a declaration and prayed that the Tribunal declares the Applicant as the best evaluated bidder and order the Entity to finalise the process of awarding the contract to the Applicant.
- 6.5 Counsel for the Applicant prayed that this Application be allowed with costs.
- 6.6 Counsel for the 2nd Respondent submitted that it is the responsibility of the Entity to manage its procurement. He submitted that Section 25 (1) of the PPDA Act, 2003 provides for powers of a procuring and disposing entity in the management of all procurement and disposal activities within its jurisdiction. He submitted that section 38 of the PPDA Act, 2003 provides for the

independence of the Accounting Officer, the Contracts Committee, the Procurement and Disposal Unit, the User Department and the Evaluation Committee in the performance of procurement functions. Section 28 of the PPDA Act, 2003 provides that the decision to award a contract is vested in the Contracts Committee. He thus submitted that if the 2nd Respondent was to declare the Applicant as the best evaluated bidder, it would be breach of the above cited provisions of the Act.

6.7 Counsel for the 2nd Respondent prayed that this Application be dismissed with each party bearing its own costs.

6.8 Counsel for the 1st Respondent submitted that he reiterated what is included in his written submission. He also associated himself with the submissions of the 2nd Respondent.

6.9 Counsel for the 1st Respondent prayed that this Application to this Tribunal fails and no orders to costs.

REJOINDER

6.10 Counsel for the Applicant submitted that the Entity should be ordered to give the contract to the Applicant.

6.11 Counsel for the Applicant submitted that Section 25 of the Act does not bar the Authority from declaring the Applicant as the Best Evaluated Bidder.

7.0 RESOLUTION BY THE TRIBUNAL

7.1. Preliminary objection (whether the 2nd Respondent (Authority) is a proper party to the proceedings before the Tribunal).

7.2 The Tribunal considered the submissions from Counsel for the 2nd Respondent and Counsel for the Applicant in respect to the preliminary objection. The Tribunal in reaching a decision on the preliminary objection relied on the case of *Obi Vendors Association Savings and Credit Vs PPDA & Arua Municipal Council, Application No. 11 of 2016*, in which we held as follows:

“Article 126 (1) of the Constitution provide that ‘Judicial Power is derived from the people and shall be exercised by the Courts established under the Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people’. Article 129 of the

Constitution mandates the Courts of Judicature to exercise judicial power of Uganda and subsection (d) of the Article provides for creation of subordinate Courts established by Parliament under the law.

Reading these provisions together, it is clear that the exercise of judicial power in any form other than by the Courts of judicature established in the Constitution must be provided for in an Act of Parliament which specifies and delimits the power of such subordinate Court or Tribunal. An example of the creation of a subordinate Court is **Part VIIA of the Act** which sets up this Tribunal.

Section 91 of the Act defines the powers, mandate, composition and the exercise of powers by the Tribunal and specifically provides in **Section 91D (3) of the Act**, that, 'the Tribunal shall have the assistance available to the Court in carrying out its lawful writs, process, orders, rules, decrees or commands'.

In stark contrast however Section 5 (2) of the Act which provides for the creation of the Authority merely provides that the Authority shall be capable of suing and being sued. Section 80 of the Act confers various powers on the Authority; however it is notable that these powers are not clothed with Judicial Authority; instead these powers give the Authority investigation and administrative, disciplinary powers but not '**Judicial Power**' which as already discussed is expressly conferred in the Statute creating the adjudicative body. The exercise of power by the Authority under section 90 of the Act is merely an exercise of administrative and regulatory power but not judicial power, because Parliament did not intend to confer such power on the Authority.

Further if Parliament intended for the Authority to be a subordinate Court or body exercising judicial power it would have done so using express language defining the limits of the exercise of the powers as well as the composition of the body exercising those powers vested in the Authority, their qualifications and skills set as it did when creating this Tribunal under Part VIIA of the Act.

It should be noted that under Section 91(1) of the Act, a bidder who is aggrieved by a decision made by the Authority under Section 91 (4) of the Act may make an application to the Tribunal for a review of the decision of the Authority. It follows that once an application for review is filed with the Tribunal, the Tribunal as a matter of course has to critically examine the

decision of the Authority to determine whether in making its decision, the Authority correctly applied the law to the facts. Where the Tribunal finds issues with the decision, or clarify any points in order to assist the Tribunal come up with its decision is naturally the Authority, and no one else”.

- 7.3 The Tribunal therefore finds that for the proper determination of the grounds raised by an Applicant for the review of the Authority’s decision, the Authority must appear as a party to explain or defend its decision. The preliminary objection is accordingly overruled.
- 7.4 Turning to the issues raised in this application since the Applicant and Respondents decided to argue all the issues raised together, the Tribunal shall resolve all the issues raised together.
- 7.5 In respect to issue 1, the Tribunal is in agreement with the submissions by Counsels for the 1st Respondent and 2nd Respondent that it is the preserve of the Entity to declare a bidder the best evaluated bidder. Section 26 (1) (e) of the PPDA Act, 2003 provides that ***“the Accounting Officer of a procuring and disposing entity has the overall responsibility for the execution of the procurement and disposal process in the procuring and disposing entity, and in particular, shall be responsible for communicating award decisions”.***
- 7.6 The Tribunal finds that in accordance with Section 26 (1) (e) of the Act and other provisions of the law cited by Counsels for the 1st Respondent and 2nd Respondent respectively, neither the Authority nor the Tribunal has the mandate to declare a bidder best evaluated bidder. It is the Accounting Officer of the Entity who has the powers to declare a bidder best evaluated bidder. The Authority was therefore right to decline to declare the Applicant as the best evaluated bidder.
- 7.7 The Tribunal finds that the 1st Respondent upheld the application of the applicant, but did not make an order for a refund of the administrative review fees of the Applicant in accordance with Regulation 11 (2) of the PPDA (Administrative Review) Regulations, 2014, S.I 16 of 2014. The 1st Respondent should have made an order for refund of administrative review fees.
- 7.8 Before we take leave of this Application, the Tribunal observes that the due diligence carried out by the entity on the Applicant, specifically with respect to

Applicant's work in Jinja was done in an unfair manner. First, the Applicant never included Jinja Municipal Council as a referee its bid; secondly the Applicant had sued Jinja Municipal Council in High Court. The Tribunal notes that it was unfair for the entity to expect that Jinja Municipal Council would give a fair recommendation to the Applicant in the circumstances.

8.0 **DECISION OF THE TRIBUNAL**

1. The preliminary objection is overruled.
2. The Application is dismissed.
3. The decision of the Authority is affirmed.
4. The Entity is directed to refund the Administrative Review fees paid at the Entity level to the Applicant.
5. Each party shall bear its own costs.

SIGNED and sealed this 21st day of September, 2018 by the said

OLIVE ZAALE OTETE


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CHAIRPERSON

MOSES JURUA ADRIKO-SC


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MEMBER

ABRAHAM NKATA


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MEMBER

DAVID KABATERAINE


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MEMBER