

THE REPUBLIC OF UGANDA

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

APPLICATION NO 24 OF 2018

**APPLICATION FOR ADMINISTRATIVE REVIEW OF THE PROCUREMENT
PROCESS FOR CONSTRUCTION OF A MULTIPURPOSE BUILDING FOR CANCER
TREATMENT AND RESEARCH, PROCUREMENT REF: NO.UCI/WRKS/2017-
18/00057**

**APPLICANT: SADEEM AL KUWAIT GENERAL TRADING
& CONSTRUCTION Co. & DOTT SERVICES LTD JV**

RESPONDENTS: 1. UGANDA CANCER INSTITUTE

**2. PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
AUTHORITY**

**(CORAM: OLIVE ZAALE OTETE- CHAIRPERSON, MOSES JURUA ADRIKO-SC- MEMBER,
DAVID KABATERAINE-MEMBER, ABRAHAM NKATA- MEMBER, ENG. THOMAS
ISANGA BROOKES-MEMBER.**

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS

- 1.1 On 21st June 2018, Uganda Cancer Institute (Entity) advertised in the New Vision Newspaper for tenders for construction of a multi-purpose building for Cancer Treatment and Research under Procurement Reference No. UCI/WRKS/2017-18/00057 and on 24th August 2018 issued the bidding documents for this procurement.
- 1.2 Seventeen (17) firms, including Sadeem Al Kuwait General Trading and Construction Co. and Dott Services Ltd JV (the Applicant), submitted bids in response to the tender advertisement.
- 1.3 On 30th October 2018, the 1st Respondent posted a Best Evaluated Bidder (BEB) notice on its Notice Board, with a removal date of 12th November 2018, indicating Roko Construction Limited as the BEB at a price of US \$13,627,477. Upon inquiry, the Applicants were informed by the 1st Respondent that their bid was disqualified because the Applicant's bid security which was issued by Standard Chartered Bank had an expiry date of 22nd February 2018, instead of 22nd February 2019.
- 1.4 On 9th November, 2018, the Applicant applied for administrative review to the Accounting Officer and on the 12th November, 2108, the Accounting Officer issued its decision dismissing the Applicant's application.
- 1.5 On 14th November, 2018, the Applicant being dissatisfied with the decision of the Accounting Officer filed for administrative review to the Authority.
- 1.6 On 27th November, 2018, the Authority issued a decision that the Applicant's complaint should be handled in accordance with the African Development Bank Rules and Procedure for Procurement of Goods and Works.
- 1.7 The Applicant being dissatisfied with the decision of the Authority decision filed this Application before the Tribunal on 29th November, 2018.

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION.

2.1 On 29th November 2018, the Applicant filed an Application with the Tribunal for review of the Authority's decision.

2.2 The grounds for the Application to the Tribunal were:

1. The 1st and 2nd Respondents erred in fact and law when they rejected the Applicant's application for administrative review complaint in so far as the Applicants had the lowest bid price of US\$ 13,539,809.63, lower than Roko Construction Ltd (BEB), whose bid price was US\$ 13,627,447 and therefore, the Applicant should have been declared the BEB under sections 43 (b), (c), (e) and (f), 45, 46 and 48 of the PPDA Act and Regulation 30 (6) of the Statutory Instrument No. 9 of 2014, PPDA (Evaluation) Regulations.
2. The 2nd Respondent erred in law and fact when having found that the bid of the Applicant should have been a matter of clarification by the Evaluation Committee since it could not have expired on 22nd February 2018, before the issuance date, however, failed to allow the Applicant's complaint and to direct the 1st Respondent to request the Applicant to correct the said error of dates, as provided for under Regulation 11 (1) and (4) of SI No. 9 of 2014, PPDA (Evaluation) Regulations and Clause 27.1 of Section 1-Instruction to Bidders, under the Standard Bidding Document.
3. The 2nd Respondent erred in law and fact when it relied on an alleged preliminary objection of the 1st Respondent to the 2nd Respondent dated 19th November 2018, which was neither pleaded by the 1st Respondent nor brought to the attention of the Applicant even at the hearing of the complaint on 22nd November 2018 and therefore the Applicant was deprived of its rights to a fair hearing by the 2nd Respondent, contrary to the provisions of Articles 28 and 42 of the Constitution of the Republic of Uganda.
4. The 2nd Respondent erred in law and fact when it decided that the **African Development Bank Rules and Procedures for Procurement of Goods and Works, May 2008, Revised July 2012**) (AfDB Rules) and the Fund's Standard Bidding Documents took precedence over the PPDA Act and Regulations, contrary to the provisions of section 4A(2) of the PPDA Act, whereas the PPDA

Act and PPDA Regulations were fully applicable to the instant case and should have been followed to the letter.

5. The 1st Respondent erred in law and fact when it failed to provide to the Applicant the following information; a summary of the evaluation process; a comparison of tenders, proposals, quotation, including the evaluation criteria used contrary to the provisions of Section 89 (2) PPDA Act, 2003.
6. Prayers for a declaration that that the Applicant's bid is the lowest evaluated bid; that the Applicant is the best evaluated bidder; the Applicant be allowed to correct the expiry date on the bid security to 22nd February 2019; costs of the Application to be paid by the 1st and 2nd Respondents and an interim order for the stay of the procurement process pending disposal of the Application by the Tribunal.

3.0 DISPOSAL OF APPLICATION

- 3.1 The Tribunal analyzed the Applicant's Application to the Tribunal dated 29th November, 2018; Annexes to the Application, the written and oral submissions; the 1st Respondent's response to the Application dated 4th December 2018; and the 2nd Respondent's response to the Application dated 29th May, 2018, Annexes to the response, written and oral submissions.
- 3.2 The Tribunal conducted a hearing for the Parties on 12th December 2018. The Applicant was represented by Mr. James Kyazze. Mr. Oburu Odoi Jimmy and Mr. David Kaggwa represented the 1st Respondent. The 2nd Respondent was represented by Mr. John Kallemera while Mr. Harimwomugasho Francis and Ms. Diana Kasabiiti represented Roko Construction Limited, the Best Evaluated Bidder.

4.0 SUMMARY RULING

- 4.1 In accordance with section 91I (7) of the PPDA Act, 2003, the Tribunal delivered a summary of this ruling on the 13th December 2018. What follows is the detailed reasoning in support of the Tribunal's decision.

5.0 ISSUES

5.1 The issues for resolution by the Tribunal were as follows:

1. *Whether the 1st and 2nd Respondents erred in fact and law when they rejected the Applicant's Application for administrative review complaint in so far as the Applicants had the lowest bid price of US\$ 13,539,809.63, lower than Roko Construction Ltd, whose bid price was US\$ 13,627,447 and therefore the Applicant should have been declared the Best Evaluated Bidder under Sections 43 (b), (c), (e) and (f), 45, 46 and 48 of the PPDA Act and Regulation 30 (6) of the Statutory Instrument No. 9 of 2014, PPDA (Evaluation) Regulations.*
2. *Whether the 2nd Respondent erred in law and fact when having found that the bid of the Applicants should have been a matter of clarification by the Evaluation Committee since it could not have expired on 22nd February 2018, before the issuance date, failed to allow the Applicants' complaint and to direct the 1st Respondent to request the Applicants to correct the said error of dates, as provided for under Regulation 11 (1) and (4) of SI No. 9 of 2014, PPDA (Evaluation) Regulations and Clause 27.1 of Section 1-Instruction to Bidders, under the Standard Bidding Document.*
3. *Whether the 2nd Respondent erred in law and fact when it relied on an alleged preliminary objection of the 1st Respondent to the 2nd Respondent dated 19th November 2018, which was neither pleaded by the 1st Respondent nor brought to the attention of the Applicants even at the hearing of the complaint on 22nd November 2018 and therefore the Applicants were deprived of their rights to a fair hearing by the 2nd Respondent, contrary to the provisions of Articles 28 and 42 of the Constitution of the Republic of Uganda.*
4. *Whether the 2nd Respondent erred in law and fact when it decided that the African Development Fund's Rules and Procedures (Procurement of Goods and Works, May 2008, revised July 2012) and the Fund's Standard Bidding Documents took precedence over the PPDA Act and Regulations, contrary to the provisions of section 4A (2) of the PPDA Act, whereas the PPDA Act and PPDA Regulations were fully applicable to the instant case and should have been followed to the letter.*
5. *Whether the 1st Respondent erred in law and fact when it failed to provide to the Applicants with a summary of the evaluation process; a comparison of tenders,*

proposals, quotation, including the evaluation criteria used contrary to the provisions of Section 89 (2) PPDA Act, 2003.

6. Remedies

6.0 Submissions by Counsel

6.1 Preliminary Objection

6.2 Counsel for the 2nd Respondent raised a preliminary objection i.e. that the application is untenable on account that the procurement process was conducted under the AfDB Rules and that the administrative review process as provided for under the PPDA Act, 2003 is not applicable to the impugned procurement. Counsel submitted that Section 7.02 of the Loan Agreement between the Republic of Uganda and the African Development Fund provides that the procurement of works shall be carried out in accordance with the Fund's Rules and Procedures for Procurement of Goods and Works, May 2008, Revised July 2012, (AFDB Rules), and specifically, for procurement for works above UA 3.0 million, by using the International Competitive Bidding (ICB). Counsel submitted that the ICB method of procurement is not provided for under the PPDA Act, 2003 and therefore this creates a conflict between the Act and the Loan Agreement, hence section 4 (1) of the Act is applicable and the Loan Agreement prevails over the Act, rendering the Act inapplicable. He further submitted that the administrative review process under the PPDA Act conflicts with the obligation of the Republic of Uganda under the Loan Agreement to use International Competitive Bidding in accordance with the AFDB Rules. He cited *Dolomite Engineering Services Limited v. Attorney General and Public Procurement and Disposal of Public Assets Authority High Court Civil Suit No. 599 of 2014*, where the learned trial judge considered the issue of solely applying the African Development Bank Rules and Procedures for Procurement of Goods and Works (AfDB Rules). Counsel stated that in that case, it was decided that the AFDB Rules provide for a different method of administrative review under which bidders can send their complaints to the AfDB; that it was further decided that it was proper for the procurement process to be solely conducted under the AfDB Rules because this was provided for under section 4 of the PPDA Act. In conclusion he asked the Tribunal to uphold the preliminary objection and find that the PPDA law is

inapplicable to this procurement and dismiss the application with each party to bear its costs.

- 6.3 In reply, Counsel for the Applicant agreed with Counsel for the 2nd Respondent that the impugned procurement was conducted in accordance with the AfDB Rules. Counsel for the Applicant quoted Rule 1.11 of the AfDB Rules which provides for review procedures in Appendix 1 of the AfDB Rules. He further referred the Tribunal to paragraph 2 (c) of Appendix 1 which provides for the receipt, evaluation and award by the borrower subject to receipt of the Bank's no objection to the award. Counsel further referred the Tribunal to paragraph 2 (e) of Appendix 1 of the AfDB Rules which provides that if after publication of the results of evaluation, the Borrower receives protests or complaints from bidders, a copy of the complaint and a copy of the Borrower's response shall be sent to the Bank for information. Counsel interpreted this rule to mean that where there is a complaint, such complaint or protest must be referred to the Borrower (Government of Uganda) for resolution, hence, the PPDA Act, 2003 is applicable to the review process. He asserted that there is no conflict between the Act and the Loan Agreement and AfDB Rules; and therefore, the Tribunal has jurisdiction to handle the administrative review in this procurement.
- 6.4 Counsel for the 1st Respondent and Counsel for the BEB associated themselves with the arguments made by the Counsel for the 2nd Respondent.
- 6.5 After a short adjournment, the Tribunal directed the parties to submit on the merits of the Application, saving the ruling on the preliminary objection to be with that of the substantive application.

Submission on the merits

- 6.6 Counsel for the Applicant submitted in summary on the issues as follows-
- 1) The 1st Respondent contravened ITB 27 of the Standard Bidding Document (SBD) when it failed to seek clarification from the Bidder regarding the date on the Bid Security disregarding clearly applicable provisions of Regulations 10, 11 and 18 (5) of the PPDA (Evaluation) Regulations/SI No. 9 of 2014.
 - 2) The Entity denied the Applicant a fair hearing when it failed to avail the Applicant a summary of the evaluation process, a comparison of tenders,

proposal, and quotations including the evaluation criteria contrary to Section 89 (2) of the Act.

- 3) The Authority determined the Applicant's complaint on the preliminary objection that the Act was inapplicable to the complaint without giving the Applicant a hearing.
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- 6.7 In response, Counsel for the 1st Respondent submitted that the Entity did not need to seek clarification since the Bid Security was a nullity; the 1st Respondent was not under obligation to avail the documents provided for in Section 89 of the Act since the PPDA Act was not applicable to this procurement and the Applicant was aware at all times that the AFDB Rules applied to the procurement and therefore, were accorded a fair hearing.
 - 6.8 In response, Counsel for the 2nd Respondent submitted that the Authority did not handle the merits of the complaint because in its view the PPDA law was inapplicable. With respect to the finding by the Authority on issue of not seeking clarification from the Bidder on the bid security, Counsel for the 2nd Respondent submitted that this was incidental to the main decision which declared that the Act was not applicable to this Application.
 - 6.9 Counsel for the BEB associated themselves with the submissions of the 1st and 2nd Respondents.
 - 7.0 **Resolution by the Tribunal**
 - 7.1 **Ruling on the preliminary objection.**
 - 7.2 The gist of the preliminary objection was that the impugned procurement process was concluded under the AfDB Rules and the administrative review process before the Tribunal as provided for under the PPDA Act is not applicable to this procurement. Counsel for the 2nd Respondent argued that because the Loan Agreement provided for procurement of the works using the International Competitive method, a method not provided for under the PPDA Act, this created a conflict and thus rendered the administrative review process under the PPDA Act inapplicable.

- 7.3 To determine the issue raised in the preliminary objection, the Tribunal considered section 4 of the Act, which provides for international obligations. For ease of reference, the section is reproduced here-below:

'4. International obligations.

(1) Where this Act conflicts with an obligation of the Republic of Uganda arising out of an agreement with one or more states, or with an international organization, the provisions of the agreement shall prevail over this Act'.

- 7.4 The Tribunal did not find any conflict between the Act and Uganda's obligations under the Loan Agreement dated 6th October 2015, between the Republic of Uganda and the African Development Fund, for Section 4 (1) of the Act to become applicable and therefore, oust application of the Act and the administrative review process under the Act. For there to be an ouster of the Act, there must be express conflict between the obligations arising out of an Agreement and the provisions of the PPDA Act. The Tribunal closely examined the Loan Agreement and established that the obligations of Uganda in the said Agreement are clearly spelt out in *Articles III (repayment of the Principal, service charge, commitment charge and dates of payment); Article IV (conditions precedent to entry into force) and Article V (conditions precedent to first disbursement, other conditions and undertaking)*. Article VII quoted by Counsel for the 2nd respondent simply describes how the procurement of the works will be done, the Rules to be followed and the different methods of procurement to be used for the different values of civil works. The Tribunal is unable to accept Counsel for the 2nd Respondent's argument that a procurement method prescribed by the Loan Agreement qualifies to be an obligation of Uganda under the Agreement. It is the Tribunal's firm view that there was no conflict between the PPDA Act and any obligation of Uganda under the Loan Agreement to render the administrative review process under the Act inapplicable to the current Application before the Tribunal.
- 7.5 In addition to our findings in 7.4 above, the Tribunal was persuaded by the submission of Counsel for the Applicant that the AfDB rules under which the impugned procurement process was being conducted did not oust the administrative review process under the PPDA Act. **Rule 2 (e) Appendix 1** of the AfDB Rules provides for referral of procurement complaints or protests to the Borrower (Republic of Uganda), with the Bank only receiving a copy of the

complaint and a copy of the Borrower's response for information. The Tribunal also finds that under **Rule 2 (f) of Appendix 1** of the AfDB Rules, the Borrower is obliged to provide detailed reasoning of the outcome of the complaint to the Bank. Applying the above two rules, the Borrower has full responsibility to handle and resolve complaints or protests arising from the procurement process. The only framework in Uganda for handling procurement complaints or protests is provided for under Part VII and VIIA of the PPDA Act and Regulations. Therefore, the Tribunal has jurisdiction to hear and dispose this Application.

7.6 The Tribunal considered the case of ***Dolomite Engineering Services Limited v. Attorney General and Public Procurement and Disposal of Public Assets Authority High Court Civil Suit No. 599 of 2014***, quoted by Counsel for the 2nd Respondent, where the Judge held that the AfDB Rules are applicable to the administrative review process challenging a procurement. There is no inconsistency between the decision in the Dolomite case and the Tribunal finding that AfDB Rules are applicable to resolution of complaints arising out of the procurement process in the instant Application.

Tribunal decision on Issues 1 and 2

7.7 These two issues were handled concurrently, starting with issue 2, relating to clarification of the Applicant's bid. On the issue that the Entity failed to seek clarification from the Bidder in regard to the date on the Bid Security, the Tribunal departs from the finding of the Authority that ***"the Bid Security of the Applicant ought to have been a matter of clarification by the Evaluation Committee since it could not have expired on 22nd February, 2018, before the issuance date"***. ITB 27.1 of the Standard Bidding Document (SBD) in respect to clarification of bids provides that to assist in the examination, evaluation and comparison of the bids, and qualification of the bidders, the employer (entity) may at its discretion ask any bidder for a clarification of its bid. It further provides that ***'no change in the prices or substance of the bid shall be sought, offered or permitted except to confirm the correction of arithmetic errors discovered by the employer in the evaluation of the bids, in accordance with ITB 29'***. ITB 28.2 in respect to determination of responsiveness of bids, provides that a substantially responsive bid is one that meets the requirements of the bidding document without material deviation, reservation or omission. Deviation is

defined as a departure from the requirements specified in the bidding document. An Invalid date on expiry of bid security was a material deviation within the meaning of *ITB 28.2* and could not therefore be clarified. To seek clarification on such a material deviation would have been contrary to *ITB 28.5* of the SBD which provides that if a bid is not substantially responsive to the requirements of the bidding document, it shall be rejected by the employer and may not subsequently be made responsive by correction of the material deviation, reservation or omission. Seeking clarification would have also contravened *ITB 27* which prohibits altering of bids and rules *2.46 and Rule 2.48 of the AfDB Rules and Procedures*.

The Tribunal finds that the 1st Respondent's decision to reject the Applicant's bid was lawful.

Decision on issues 3 and 5

- 7.8 The Tribunal finds that the 1st Respondent was in breach of Section 89 of the Act when it failed to avail the Applicant with the documents provided in Section 89 (2) of the Act. Consequently, the Entity denied the Applicant the right to fair hearing.

Decision on issue 4

- 7.9 The Tribunal decision on the preliminary objection has addressed this issue.

8.0 DECISION OF THE TRIBUNAL

1. The Application succeeds in part.
2. The preliminary objection is overruled. The Tribunal finds that it has jurisdiction to entertain this application.
3. The Tribunal finds that the Applicant was denied documents contrary to section 89 of the Act thereby denying the them a right to a fair hearing.
4. The Tribunal declines to grant the Applicant's request in the Application to correct the expiry date in the bid security because to do so would tantamount to altering bids contrary to rules 2.46 and 2.48 of the AfDB Rules as well as ITB Clause 27 of the Standard Bidding Document.
5. The Entity may proceed with the procurement process to its logical conclusion.

6. The Entity is directed to refund to the Applicant the administrative review fees paid to the Entity by the Applicant.
7. Each party to bear its own costs.

SIGNED and sealed this 13th day of December 2018 by the said,

1. OLIVE ZAALE OTETE

].....
] **CHAIRPERSON**

2. MOSES JURUA ADRIKO

].....
] **MEMBER**

3. ABRAHAM NKATA

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] **MEMBER**

4. DAVID KABATERAINE

].....
] **MEMBER**

2. ENG. THOMAS ISANGA BROOKES

].....
] **MEMBER**