

THE REPUBLIC OF UGANDA

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

APPLICATION NO 4 OF 2018

APPLICANT: MAC EAST AFRICA LIMITED

1ST RESPONDENT: MINISTRY OF AGRICULTURE, ANIMAL INDUSTRY AND FISHERIES

2ND RESPONDENT: MOTOCARE UGANDA LIMITED

FACTS

1. On 21st July 2017, the Ministry of Agriculture, Animal Industry and Fisheries (MAAIF) advertised the bid notice for 64 motor vehicles (Lot 1) and 843 motorcycles (Lot 2) with the deadline for bid submission on 1st September 2017.
2. On 8th September 2017, the Entity received and opened seven bids under Lot 1 with the following prices; Cooper Motors Corporation Ltd UGX 8,953,600,000 DDP, Victoria Motors Ltd USD 2,475,072 DDP, Motorcare Uganda Ltd USD 2,621,332 DDP, Toyota Uganda Ltd UGX 11,619,121,768 DDP, Ashland Motors Africa Ltd UGX 11,334,038,400 DDP, MAC East Africa Ltd UGX 11,500,313,600 DAP and Ndovu Motors Ltd UGX 8,662,118,400 DDP.
3. The Evaluation Report dated 18th October 2017 recommended award of contract to supply 64 motor vehicles to Motorcare Uganda Ltd at UGX 6,244,190,304 and the recommendation was approved by the Contracts Committee on 19th October 2017.
4. On 6th November 2017, the Entity displayed the Notice of Best Evaluated Bidder for Lot 1 with a date of removal of 17th November 2017.

5. On 15th November 2017, MAC East Africa Ltd and Cooper Motors Corporation Ltd applied to the Entity for administrative review before the Accounting Officer in respect to award of contract for supply of motor vehicles.
6. On 6th December 2017, the Accounting Officer informed MAC East Africa Ltd and Cooper Motors Corporation Ltd that the issues raised required re-evaluation of all bids after seeking no objection of the Donor (IFAD) on the outcome of the administrative review process and the Entity advised that it would inform all the bidders of the way forward on receipt of IFAD's response.
7. On 19th December 2017, Motorcare Uganda Ltd complained to the Authority that decision taken by the Accounting Officer on administrative review of the above procurement was not clear and requested it to intervene and ensure that the procurement process is handled in a fair and transparent manner.
8. On 6th February 2018, the Authority issued a decision recommending that the Entity proceeds with the procurement for supply of the 64 motor vehicles (Lot 1) to its logical conclusion.
9. On 6th March 2018, the Applicant filed this application to the Tribunal alleging that the Authority recommended the procurement to proceed so in the circumstances, the Authority cannot handle a review impartially.

ISSUES

Issue No.1: Whether the Accounting Officer of the 1st Respondent erred in law by failing to timely issue a final decision on the application for administrative review.

Issue No.2: Whether the Bid price quoted by the 2nd Respondent was a deviation/departure from the requirements specified in the bidding documents.

Issue No.3: Whether allowing the 2nd Respondent to disaggregate taxes and the cost of registration and number plates as well as inland travel to the delivery point amounted to a deviation from the evaluation and comparison methodology.

Issue No.4: Whether allowing the 2nd Respondent to disaggregate taxes and the cost of registration and number plates as well as inland travel to the delivery point amounted to a change of prices/ substance of the bid by Motorcare Uganda Ltd and the Entity.

Issue No.5: Whether the award of the contract to the 2nd Respondent was a deviation from the award criteria.

Issue No.6: Whether the bid of the 2nd Respondent should be rejected for being non-responsive to the bidding documents.

Issue No. 7: What remedies are available to the parties.

HEARING

At the hearing held on the 20th March 2018, Mr Nelson Nerima appeared for the Applicant while Mr Fred Makada appeared for the Second Respondent . The first Respondent was represented by its accounting officer and other officials.

The Tribunal invited Counsel for both parties to address it on two co-related issues (a) Whether the Tribunal had jurisdiction to hear the application (b) if so, whether the Application had been filed within the prescribed time for administrative review under Part VII and Part VIIA of the Act.

SUBMISSIONS BY COUNSEL

On the first issue as to whether the Tribunal had jurisdiction to hear the Application, Counsel for the Applicant argued that the Tribunal had jurisdiction to hear the matter because his application was brought under section 91I (2) which allows a bidder to file an application to the Tribunal where the bidder is of the view that the matter cannot be handled impartially by the Authority. Counsel cited regulation 10(c) of the PPDA (Administrative Review) Regulations S.I 16 of 2014 in support of his contention that it was sufficient for a bidder to allege bias by the Authority and nothing more in order to vest this Tribunal with jurisdiction notwithstanding an absence of a formal complaint by the bidder to the Authority.

With respect to time, Counsel argued that section 91I (2) falls outside the prescribed time limits set out of Part VII and VIIA of the Act. He concluded that the Tribunal had jurisdiction to hear the matter.

Counsel for the Second respondent argued that the Applicant had filed a complaint before the Accounting Officer and the Accounting Officer had rendered a decision on 6th December 2017. Therefore the Applicant ought to have complied with the provisions of section 90(3) and filed a complaint to the Authority within 10 working days of the decision of the Accounting Officer. He invited the Tribunal to summarily dismiss the Application.

In responding to these issues, MAAIF relied on their letter dated 6th December 2017 to state that they had made a decision advising all bidders that the entity would conduct a re-evaluation of all the bids upon receiving a no objection from the Funder IFAD. The entity informed the Tribunal that they had now received a response from IFAD granting the loan extension. The Accounting Officer observed that the entity would now proceed with the procurement because IFAD had advised that the gaps identified by the Administrative review Committee were minor.

The Tribunal listened carefully to the submissions made by Counsels for the Applicant and the Respondent and the 1st respondent's submission on the procurement process.

OBSERVATIONS BY THE TRIBUNAL

1. Glaring inconsistencies in the documents before the Tribunal:

- (a) Accounting officer's letter dated 6th December 2017 is ambiguous and thus caused confusion among bidders as to what options they had including pursuing administrative review remedies under Chapter VII and VIIA of the Act. Owing to the ambiguity of the said letter, even the BEB, Motor Care filed a complaint to the PPDA.
- (b) The PPDA Report dated 6th February 2018 identified gaps in the bid document, gaps in the procurement process and gaps in the evaluation report but the final decision and direction to the entity is inconsistent with its findings.
- (c) The Report of the administrative review team constituted by the Accounting Officer dated December 2017 recommended to the Accounting officer, among others, that
 - (a) the Accounting Officer either considers re-evaluating the bids in consultation with

IFAD in accordance with the Solicitation documents or (b) cancels the procurement process and retender it. The Accounting officer disregarded the recommendations of the administrative review report because to-date, there is no evidence that the procurement was cancelled or that a re-evaluation process was conducted.

At the hearing, the Tribunal noted the following:

- (a) Conflicting oral accounts from MAAIF officers present at the hearing as to whether there was a re-evaluation process;
- (b) Bidders did not receive any communication from the Accounting Officer about the decisions made by IFAD on the Accounting Officer's request for a no objection to the re-evaluation of the bids, contrary to section 45 of the Act, and contrary to his own communication to all bidders in the letter dated 6th December 2017.
- (c) The Accounting officer did not communicate the findings and decision of PPDA investigation report dated 6th February 2018 to the bidders which recommended the procurement process to continue, in effect reversing the Accounting officer's decision to re-evaluate the bids.

Taking into account the findings above, the Tribunal is not satisfied that the entity managed the procurement process in accordance with their statutory mandate contrary to section 25 of the Act.

In the same vein, the Tribunal is not satisfied that the entity managed the process in accordance with the basic procurement principles enshrined in Part IV of the Act.

Notwithstanding the above findings, the Tribunal notes that the Applicant filed a complaint for administrative review to the Accounting officer on 15th November 2017. The Accounting officer made a decision on the complaint on 6th December 2017. Under section 90(3) the Applicant ought to have filed a complaint against the Accounting Officer's decision to PPDA within 10 working days from the date of receipt of the decision of the Accounting Officer.

The instant application however was filed at the Tribunal on 6th March 2018. From the foregoing it is clear that the Applicant omitted to file a complaint with the PPDA in time and instead opted to file the instant application out of time at the Tribunal.

The PPDA Act does not give the Tribunal residual or inherent jurisdiction to enlarge a period of time laid down by Statute. See Makula International Versus His Eminence Cardinal Nsubuga and Another Civil Appeal 4 of 1981 reported at 1982 HCB pg. 11.

Decision

Having made the observations above, the Tribunal declines to consider the merits of the application because the Applicant did not comply with the provisions of Part VII and Part VIIA of the Act which prescribe the procedure and timelines for making an application for administrative review.

We make no orders as to costs.

SIGNED by
OLIVE ZAALE OTETE

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] CHAIRPERSON

SIGNED by
DAVID KABATERAINE

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] MEMBER

SIGNED by
MOSES JURUA ADRIKO

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] MEMBER

SIGNED by
ABRAHAM NKATA

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] MEMBER