

THE REPUBLIC OF UGANDA

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

APPLICATION NO 11 OF 2019

APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT OF A DECISION TO SUSPEND BARON SERVICES INC. FROM PARTICIPATING IN PUBLIC PROCUREMENT AND DISPOSAL PROCEEDINGS FOR THREE (3) YEARS.

APPLICANT: BARON SERVICES INC.

RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY [PPDA]

(Before: DAVID KABATERAINE-CHAIRPERSON, ABRAHAM NKATA- MEMBER AND ENG. ISANGA THOMAS BROOKES-MEMBER.)

1. Facts:

- 1.1 On 16th January, 2019, PPDA received a letter from Uganda National Meteorological Authority [Entity] recommending suspension of Baron Services Inc. for having submitted a forged bid guarantee purportedly issued by Standard Chartered Bank (U) Limited in a bid for procurement of a C-band dual polarisation weather radar.
- 1.2 PPDA commenced its investigation to ascertain the authenticity of the alleged forged Bid Guarantee Ref. No. UGBG080880 dated 28th February, 2017 in the sum of Ug. Shs. 210,000,000/- from Standard Chartered Bank (U) Limited by a letter to the Bank dated 18th January, 2019.
- 1.3 On 24th January, 2019 the Bank wrote a letter to PPDA in response to the inquiry stating that the said bid guarantee had not been issued by it.
- 1.4 On 31st January, 2019, PPDA notified Baron Services (the applicant) of the recommendation by Uganda Meteorological Authority to suspend it from public procurement on the grounds mentioned and requested the applicant to submit any information or evidence in defence. PPDA also invited the applicant to attend a hearing on 14th February, 2019. Accompanying the notification letter were the letter recommending suspension, letter seeking verification of the bid guarantee from standard Chartered Bank by PPDA and a response of the bank.
- 1.5 The applicant filed its defence on 7th February, 2019 and additional information on 20th February, 2019 wherein it stated that its bid was submitted to the Entity on 28th February, 2019 through an Agent, Bright and Emmy Development Agency Limited. The applicant denied knowledge of the questioned bid guarantee. It came to realise that the agent had already submitted a bid guarantee when the genuine/ legitimate one was presented at the Entity. Upon realising this, the applicant terminated the agency relationship with Bright & Emmy Development Agency Limited. On 28th June, 2018 and instituted a criminal case against the agent on 15th February, 2019.
- 1.6 On 13th May, 2019 PPDA made a decision to suspend the applicant for three years effective 13th May, 2019 for breach of the Code of Ethical Conduct of Providers. On 31st May, 2019. The applicant being dissatisfied with the

decision of PPDA appealed to the Tribunal seeking orders that the suspension be set aside.

2. Issues

1. Whether the Respondent erred in law and fact when it failed to properly evaluate evidence adduced before it by the applicant.
2. Whether the Respondent erred in law and in fact when it failed to give the applicant an opportunity to challenge the findings arising from the respondent's investigations.
3. Whether the respondent erred in law and fact in meting out a three years suspension to the applicant.
4. Whether the applicant's suspension should be lifted.

3. Submission by parties

- 3.1 At the hearing of the application on 14th June, 2019, the applicant was represented by three counsel; Batanda Gerald, Ian Mutibwa and Rachel Kembabazi. The respondent was represented by John Kallemera.
- 3.2 Counsel for the applicant adopted the facts as presented in 1 above and submitted on the issues as here under;

With regard to the first issue, Counsel Batanda for the applicant submitted that in response to the request in the notification of a recommendation to suspend the applicant from procurement proceedings, the applicant submitted in its defence a Sales Representation Agreement between the applicant and Bright and Emmy Development Agency Limited, Standard Chartered bid Bond Letter of Guarantee for Ug. Shs. 210,000,000/- Ref: 323020076173-FX dated 27th Feb. 2018, a termination agreement of the agency dated 28th June, 2018, Applicant's Manufacturer's Authorization to the agent to submit a bid on its behalf and a Power of Attorney to Mr. Rob Baron to be a true and lawful Attorney, to act on its behalf for a bid to the Entity and finally email correspondences. Counsel expressed shock as to how the decision was arrived at by the Board of the respondent to suspend the applicant without giving any reason why they reached their decision and showing how their evidence as adduced was evaluated against the allegations and the finding of the investigation carried out. That the decision to simply state that the applicant's defence was considered was not sufficient to justify the decision; he contended. Counsel concluded that such approach infringed the right to fair hearing under *articles 28 and 42 of the 1995 Constitution of Uganda*. Because the decision never provided reasons showing

how evidence was evaluated, how and why they reached a decision; the decision was unfair, unjust and ought to be set aside. Counsel further contended that suspension action should have been visited on the agent, Bright and Emmy Development Agency Ltd for breaching the Code the Code of Ethical Conduct for Bidders and Providers. Counsel relied on a holding in the case of *Poyser and Mills Arbitration [1963]1 All ER 612* which stated *inter alia* that; “ *decision makers invariably do have a duty to give reasons for their administrative decisions....*”. Counsel also cited another English case of *R v Immigration Appeal Tribunal ex parte Khan [1983]QB 790* at page 794 on the same point.

3.3 According to Kallemera, Counsel for the respondent, the decision of the respondent is clear in content proof enough that it was derived from evidence adduced by the applicant and that gathered during its investigations. The reasons by the respondent were clearly stated in its decision and the arguments by the applicant to the contrary should be disregarded. Kallemera cited the paragraphs of the letter communicating the decision of the respondent dated 13th May, 2019 to prove existence of reasons. He submitted that paragraphs one and two of the respondent's letter were to the effect that the respondent received a recommendation to suspend the applicant and a defence from the applicant. Paragraph three was to the effect that the respondent investigated the recommendation and came up with a finding that the applicant submitted a forged bid guarantee which amounted to uttering a false document and was in breach of the Ethical Code of Conduct for Bidders and Providers.

3.5 With regard to the second issue, Counsel Batanda submitted that the applicant was not given an opportunity to challenge and / or contradict the alleged evidence from the investigations done by the respondent. Counsel submitted that the applicant was not heard during investigations, was not heard after investigations but was only asked to respond to the allegations. He submitted that had the applicant been given an opportunity to rebut the findings of the investigations, may be the story could have been different.

3.6 In response, Kallemera submitted that the applicant was accorded his right to fair hearing as the law requires when he was notified of the recommendation for its suspension and was given the letter of recommendation, the letter to the bank seeking to verify the status of the bid guarantee and the response from the bank stating that the questioned bid guarantee had not been issued by it., The applicant was further asked to submit any information or evidence in defence of the said allegation of submitting a forged bid guarantee. Counsel further submitted that the applicant exercised fully his right to be heard when he filed a defence first on 7th February, 2019, attended the hearing on 14th February, 2019

and requested and was allowed to file further defence on 19th February, 2019. He prayed that this issue also be resolved in the negative.

3.7 Counsel for the applicant Ian Mutibwa submitted on the issue and argued that because the applicant was not aware that its agent Bright and Emmy Development Agency Limited had submitted on its behalf a forged bid guarantee without knowledge and authorization, such could not be used to suspend the applicant but rather to punish the agent. He further invited the Tribunal to consider the fact that the applicant processing a bid guarantee on top of the one submitted by the agent was justification enough of the applicant's innocence in as far as violating the Code of Ethics for Bidders and Providers was concerned. Basing on the argument, he prayed that the suspension be set aside.

3.8 Kallemera maintained that the suspension was lawfully made and should be affirmed and confirmed by the Tribunal. He invited the Tribunal to consider his submissions on the preceding issues and resolve this issue in the negative as well. Counsel Kallemera submitted that the bid submitted by the applicant on 28th February 2018 included a Power of Attorney executed by the applicant in favour of a one Rob Baron appointing him to bid and carry on all activities with the Entity. That the Bid submission Sheet was signed by Baron, the undertaking to abide by the Code of Ethical Conduct for Bidders and Providers was made by Baron on behalf of the applicant. He submitted that when a forged bid guarantee is found in the bid of the applicant as submitted by its Attorney Baron, the only justifiable conclusion would be that such forgery be attributed to the applicant. To say that the bid guarantee was submitted by an agent Bright and Emmy without the knowledge of the applicant was an understatement. In any case, the agent was not authorized to bid but to deliver the bid and therefore the issue of agency-principal relationship would not arise.

4. Resolution of Issues

The Tribunal in resolving the issues relied on the pleadings and annexures attached, the written and oral submissions of parties, relevant legislation and case law.

4.1 Issue One, Evaluation of Evidence: The Tribunal agrees with the submissions by counsel for the respondent and maintains that the decision of the respondent has sufficient reasons justifying its conclusion. Analysing the contents of the letter communicating the decision, it is clear that the respondent considered the recommendation to suspend the applicant by the Entity, the defence of the applicant and its own investigations carried out on the questioned bid guarantee.

It is not disputed that the respondent sought the opinion of the bank on the suspected bid guarantee and got a response which was not denied by the applicant that the bid guarantee submitted in the applicant's bid was forged. This admission of such a fact does not call for any special evaluation that the applicant may have expected but rather a conviction upon the plea of guilty.

4.2 Issue Two, Fair Hearing: It is the Tribunal's position that the applicant was accorded a right to fair hearing in accordance with section 8 (1) (f) and 94 (a) of the PPDA Act, 2003 and *Regn. 14 (1) (a) & (b) of the PPDA (Regulations) S I No. /2014.*

From the record of pleadings, PPDA notified the applicant of the recommendation to suspend it, the reasons for the recommendation were both in the notification and the letter from Uganda National Meteorological Authority that was attached to the notification. Also attached to the letter of notification were the questioned bid guarantee allegedly issued by the applicant, a letter to the bank by the respondent seeking to verify the authenticity of the bid guarantee and a letter from the bank stating that the said bid guarantee was not issued by them and could not be verified. The applicant was asked to submit information or evidence in defence of the allegations and to attend the hearing. The applicant filed a defence and additional evidence and also attended the hearing and it is after the hearing that the respondent made its decision. What PPDA did was in total compliance with the law and the Tribunal does not find fault with the respondent on this issue. It is resolved in the negative.

4.3 Issue Three, Suspension of the Applicant: To determine propriety and

Justification of the suspension meted out on the applicant by the respondent, there's need to get a clear distinction between the roles and responsibilities of Rob Baron, the Attorney; and Bright and Emmy Development Agency Limited, the agent appointed by the applicant for purposes of the procurement of a C-band dual polarisation weather radar.

4.4 The Power of Attorney executed in favour of Mr. Rob Baron by the applicant on 22nd February, 2018 was very particular and precise; it gave Rob Baron powers to *"bid and carry on all bidding activities with Uganda National Meteorological Authority, to hold and have into his possession the bidding documents and all other documents in respect to the contract for supply, installation and commissioning of a one dual polarisation c- band weather radar and to sign and execute all instruments for and in the name of the company.."*

- 4.5 For all purpose and intents, Rob Baron was the lawful Attorney to bid and carry on all bidding activities, hold and have in their possession the bidding documents, enter and/or execute all contracts with the Entity. Indeed, he lawfully signed all the documents of the bid to wit; Bid submission Sheet and the Code of Ethical Conduct for Bidders and Suppliers. Anything in the bid, he owned it, and any illegalities or irregularities in the bid would be attributed to the applicant because he was acting for the applicant.
- 4.6 The agency agreement executed between the applicant and Bright and Emmy Development Agency Limited on 27th January, 2018 was specifically titled "*Sales Representation Agreement*". It was not authorising the agent to prepare and or submit a bid on behalf of the applicant. The Tribunal would wish to state therefore that the applicant cannot and should not call Bright and Emmy Development Agency Limited its agent when it comes to this very procurement basing on the agency agreement.
- 4.7 On 28th February, 2018 the applicant issued the agent with a manufacturer's authorisation to submit a bid in relation to the bidding document indicated only by reference number, UNMA/SUPLS/17-18/00016. According to this Manufacturer's Authorisation, the applicant's purpose was to provide supplies and to subsequently negotiate and sign a contract. This is the document the company relied upon to show that the agent had been appointed to submit a bid on their behalf. The applicant had nothing to say about the power of attorney executed in favour of Ron Baron. Looking at the heading and content of this authorisation, such cannot amount to authorisation to submit a bid on behalf of the applicant. In actual sense, it amounts to a recommendation of the agent to submit its own bid to the Entity with assurance that the agent will have access to the required supplies from a credible manufacturer.
- 4.8 For the applicant to argue that the agent submitted a bid on its behalf would not be proper. The agent merely delivered the bid but the bid was actually submitted by the one who prepared it; Rob Baron, the duly appointed Attorney of the applicant. Anything right or wrong was attributed to the applicant through its Attorney not its agent. The forged Bid Guarantee found in the bid of the applicant would therefore be presumed to have been submitted by the applicant through its lawful Attorney. Suspending such an applicant would and was proper since it

violated the Code of Conduct for Bidders and Providers which it had undertaken to abide by. Basing on the above, the Tribunal resolves this issue in the negative.

4.9 Issue Four, Remedies: Having resolved all the issues in the negative, this application would be and is hereby dismissed.

5. Decision of Tribunal

1. This application is dismissed.
2. The Tribunal upholds the decision of the Respondent and affirms the suspension of the applicant.
3. Each party shall bear its own costs.

DATED and SIGNED at Kampala this 17th day of June, 2019.

1. DAVID KABATERAINE

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CHAIRPERSON

2. ABRAHAM NKATA

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MEMBER

3. ENG. THOMAS ISANGA BROOKES

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MEMBER