

**THE REPUBLIC OF UGANDA**

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

**APPLICATION NO.16 OF 2019**

**APPLICATION FOR ADMINISTRATIVE REVIEW OF THE DECISION OF PUBLIC  
PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT OF  
'PROCUREMENT OF OFFICE SPACE FOR THE LEADERSHIP CODE TRIBUNAL REF:  
DEI/NONCONS/18-19/00026.'**

**APPLICANT: DIRECTORATE OF ETHICS AND INTEGRITY**

**1<sup>ST</sup> RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC  
ASSETS AUTHORITY (PPDA).**

**2<sup>ND</sup> RESPONDENT: ECLIPSE PROPERTIES LIMITED**

**Before: (OLIVE ZAALE OTETE (CHAIRPERSON), MOSES JURUA ADRIKO SC.  
(MEMBER), ABRAHAM NKATA (MEMBER), DAVID KABATAIRAINI (MEMBER) AND  
ENG. THOMAS BROOKES ISANGA, MEMBER)**

## DECISION OF THE TRIBUNAL

### 1.0 BACKGROUND/FACTS

- 1.1 On 22<sup>nd</sup> January 2019, the Directorate of Ethics and Integrity (Entity) initiated the procurement activity for office space for the Leadership Code Tribunal at an estimated cost of UGX 600,000,000 per year.
- 1.2 On 31<sup>st</sup> January 2019, the Contracts Committee approved the use of the open bidding method for the procurement.
- 1.3 On 25<sup>th</sup> February 2019, the Entity published the bid notice in the New Vision Newspaper with a bid closing date of 27<sup>th</sup> March 2019.
- 1.4 On 27<sup>th</sup> March 2019, two firms submitted bids which were opened, prices read out and evaluated.
- 1.5 On 5<sup>th</sup> April 2019, the Contracts Committee awarded the contract to Eclipse Properties Limited at UGX 50,382,400 per month.
- 1.6 On 8<sup>th</sup> April 2019, the notice of the best evaluated bidder was displayed with a removal date of 23<sup>rd</sup> April 2019.
- 1.7 On 16<sup>th</sup> May 2019, the Applicant received a letter from the Entity dated 15<sup>th</sup> May 2019 communicating the cancellation of the procurement on grounds that there was limited competition.
- 1.8 On 21<sup>st</sup> May 2019, the Applicant applied for administrative review to the Accounting Officer.
- 1.9 On 23<sup>rd</sup> May 2019, the Entity re-tendered the procurement activity using the quotation method with a bid submission period of five (5) days.
- 1.10 On 17<sup>th</sup> June 2019, the Accounting Officer issued the decision rejecting the application for administrative review.
- 1.11 On 24<sup>th</sup> June 2019, the Applicant applied for administrative review to the Authority.
- 1.12 On 17<sup>th</sup> July 2019, the Authority issued a decision upholding the application for administrative review.

1.13 The Applicant being dissatisfied with the Authority's decision, on 30<sup>th</sup> July, 2019 filed this Application before the Tribunal.

## **2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION**

2.1 On 30<sup>th</sup> July, 2019 the Applicant lodged with the Public Procurement and Disposal of Public Assets Appeals Tribunal (the Tribunal) an application for review of the Authority's decision dated 17<sup>th</sup> July, 2019 listing three issues of appeal.

2.2 The Applicant prayed that the decision made by PPDA on 17<sup>th</sup> July 2019, advising the Applicant to proceed with the procurement where Eclipse Properties Limited was awarded the contract be set aside.

## **3.0 DISPOSAL OF APPLICATION**

3.1 In disposing of the application, the Tribunal analyzed the following documents-

- 1) The Application lodged with the Tribunal and appendices attached thereto dated 30<sup>th</sup> July, 2019.
- 2) Written response to the Applicant's application by the Authority and Annexes attached to the response dated 1<sup>st</sup> August 2019;
- 3) The Applicant's written submissions and Annexes to the submissions dated 5<sup>th</sup> August 2019;
- 4) The 2<sup>nd</sup> Respondent's (the Best Evaluated Bidder (BEB) written submission dated 9<sup>th</sup> August 2019, of the impugned procurement.

3.2 The Tribunal conducted a hearing for the parties on 12<sup>th</sup> August, 2019. The parties were represented by Mr Uwizera Franklin.B. for the Applicant; Ms. Sheila Abamu, for the 1<sup>st</sup> Respondent and Mr. Innocent Wanambugo for the 2<sup>nd</sup> Respondent.

## **4.0 ISSUES**

*Issue No. 1: Whether the Authority erred in law and fact when it considered an administrative review application based on a cancelled procurement*

process. *Issue No. 2:* Whether the Authority erred in law and fact when it directed the entity to re-instate a cancelled procurement process.

*Issue No. 3:* Whether the Authority erred in law and fact when it made an administrative review decision regarding a procurement reference No. PR: DEI/NCONS/18-19/00040 based on a complaint by an Applicant who was not a bidder.

*Issue No.4:* What remedies are available?

## 5.0 SUBMISSION BY THE PARTIES

5.1 In respect to the first issue, Counsel for the Applicant submitted that the Applicant is vested with discretion by law to cancel a procurement process for whatever reason they may have which discretion was properly exercised in accordance with Section 75 of the Act. Counsel relied on Section 25 of the PPDA Act, 2003 which provides for the powers of a procuring and disposing entity. He further relied on Section 38 of the PPDA Act, 2003 which provides for the independence in performance of functions by the Accounting Officer, the Contracts Committee, the Procurement and Disposal Unit, the User Department and the Evaluation Committee in procurement and disposal processes. Counsel further submitted that Section 75 of the Act should be read together with Section 25 and Section 38 of the Act to come to conclude that the Entity has powers to cancel a procurement process.

5.2 Counsel for the Applicant cited Regulation 8 of the PPDA (Evaluation) Regulations, SI No. 9 of 2014 which provides that an entity may accept a single bid or a limited number of bids. He argued this provision is not mandatory and vests discretion on the Applicant to cancel a procurement process. Counsel further relied on the case of *Karangwa Vs Kulanju, Civil Appeal No. 3 of 2016, UGCOMMC 91*, Justice Madrama held, in reference to language in legislation (Contracts Act 2010) that; *Imperative language for instance by use of the word*



*'shall' makes what is prescribed mandatory. On the other hand, by using the word 'may', the provision is permissive and may not be followed'.* He submitted that the PPDA (Evaluation) Regulations do not prevent the Applicant from cancelling the procurement process on grounds of limited competition nor do they impose positive obligation on the Applicant.

- 5.3 Counsel for the Applicant further submitted that the Applicant's Contracts Committee cancelled the procurement in a meeting vide minutes dated 14<sup>th</sup> May 2019, upon the request of the Procurement and Disposal Unit of the Applicant without condition. This shows the decision was taken with due process and consideration of the material issues affecting the particular procurement. He further averred that the Applicant in a letter dated 15<sup>th</sup> May 2019, informed the 2<sup>nd</sup> Respondent that it was eligible to participate in the new procurement process but they elected not to participate.
- 5.4 Counsel for the Applicant submitted that the procurement activity was cancelled prior to filing for administrative review by the 2<sup>nd</sup> Respondent and at the material time when the 2<sup>nd</sup> Respondent filed for administrative review with the 1<sup>st</sup> Respondent, there was no valid bid since the procurement process had been cancelled through a communication to the 2<sup>nd</sup> Respondent by the Applicant in a letter dated 15<sup>th</sup> May 2019.
- 5.5 In respect to the second issue, Counsel for the Applicant submitted that pursuant to Section 75 of the PPDA Act, 2003 the cancellation of a procurement process is the discretion of the Procuring and Disposing Entity and the Authority therefore has no right to re-instate a cancelled procurement process. He relied on the case of ***Arua Kubala Park Operators and Market Vendors Association Vs PPDA, Application No. 1 of 2014*** where the Tribunal decided that *'to maintain independence in the execution of procurement and*

*disposal functions as envisaged under section 38 of the Act, the Authority should not order a procuring and disposing entity to re-tender’.*

- 5.6 In respect to the third issue, Counsel for the Applicant submitted that Section 89 (1) of the PPDA Act, 2003 provides that *‘a bidder may seek for administrative review for any breach by a procuring and disposing entity of this Act, or any regulations or guidelines made under this Act or of the provisions of the bidding document’.* Therefore, an Applicant in respect to an administrative review application must be a bidder prior to the filing of a review application. He submitted that the 1<sup>st</sup> Respondent had no legal right to cancel the new procurement process since the complainant was not a bidder in the new procurement process and did not initiate administrative review complaint in respect to the new procurement process.
- 5.7 Counsel for the Applicant submitted that in the circumstances, the Tribunal should issue orders setting aside the decision of the 1<sup>st</sup> Respondent, declare that the Applicant properly exercised its discretion in deciding to cancel the procurement process. In addition, the Tribunal should re-instate procurement Ref. DEI/NCONS/18-19/00040 and permit the Applicant to proceed with the same and no order as to costs.
- 5.8 In respect to the first issue, Counsel for the 1<sup>st</sup> Respondent submitted that on 30<sup>th</sup> May 2019, the 2<sup>nd</sup> Respondent applied for administrative review to the Accounting Officer of the Applicant in respect to the cancellation of the impugned procurement process and was handled by the Accounting Officer wherein he rejected the application for administrative review complaint. The 2<sup>nd</sup> Respondent being dissatisfied with the Accounting Officer’s decision applied for administrative review to the 1<sup>st</sup> Respondent in respect to the impugned procurement process in accordance with Section 90 (3) (b) of the PPDA Act, 2003. Counsel submitted that the 1<sup>st</sup> Respondent’s decision was

therefore as a result of an appeal by the 2<sup>nd</sup> Respondent against the Applicant's decision issued on 17<sup>th</sup> June 2019 in accordance with the provisions of Section 91 of the PPDA Act, 2003.

- 5.9 In respect to the second issue, Counsel for the 1<sup>st</sup> Respondent submitted that the 1<sup>st</sup> Respondent's decision to re-instate the procurement process was premised on the fact that there was no justification for the Entity to cancel the procurement process. She further submitted that the Entity breached the law when it did not suspend the procurement process upon receipt of the 2<sup>nd</sup> Respondent's application for administrative review, which challenged the cancellation of the procurement process and therefore the new procurement process was null and void.
- 5.10 In respect to the third issue, Counsel for the 1<sup>st</sup> Respondent submitted that the 2<sup>nd</sup> Respondent participated in the procurement process Ref. No. DEI/NCONS/18-19/00026 and was awarded a contract by the Applicant's Contracts Committee on 5<sup>th</sup> April 2019 and the award of contract was further communicated by the Applicant to the 2<sup>nd</sup> Respondent in the notice of the best evaluated bidder displayed on 8<sup>th</sup> April 2019 with a removal date of 23<sup>rd</sup> April 2019. She further submitted that the 1<sup>st</sup> Respondent in its decision found that the Applicant erroneously cancelled the procurement process Ref. No. DEI/NCONS/18-19/00026 and therefore as a result the new procurement process Ref. No. DEI/NCONS/18-19/00040 was null and void. She further submitted that the cancellation of the procurement process was null and void because it was done in contravention of section 75 of the PPDA Act which provides that cancellation may only happen to award of the contract, yet in the instant case the Applicant cancelled the procurement process after the award of contract by the Contracts Committee.
- 5.11 Counsel for the 1<sup>st</sup> Respondent submitted that the application lacks merit and should be dismissed with no order to costs to the 1<sup>st</sup> Respondent.



- 5.12 In respect to the first issue, Counsel for the 2<sup>nd</sup> Respondent submitted that Section 5 of the PPDA Act, 2003 establishes the PPDA (Authority) as an autonomous body Under section 6 (a), the Authority is mandated to ensure the application of fair, competitive, transparent, non-discriminatory and value for money procurement and disposal standards and practices. He submitted that the Authority in exercise of its vested mandate and powers under the above provisions entertained a complaint from the 2<sup>nd</sup> Respondent following the illegal and unjustifiable cancellation of the impugned procurement process.
- 5.13 Counsel further submitted that the Applicant's letter dated 15<sup>th</sup> May 2019, indicated that the Procuring and Disposing Entity cancelled the procurement under Section 75 of the PPDA Act, 2003 on grounds of limited competition since only two bids were received at the closure of the bidding period. He submitted that the Applicant's Contracts Committee approved the recommendations of the Evaluation Committee to award the contract to the 2<sup>nd</sup> Respondent and a communication to that effect was in the notice of the best evaluated bidder. It was therefore illegal for the Applicant to cancel the procurement process after the award of contract.
- 5.14 Counsel for the 2<sup>nd</sup> Respondent relied on the case of ***Arua Municipal Council Vs Arua United Transporters SACCO, Civil Appeal No. 0025 of 2017***, Justice Mubiru at page 8 stated that '*All public procurement must conform to the three pillars of Integrity, Transparency and Accountability, Decision making criteria at all states must be clear, justifiable and objective*'. He submitted that whereas Section 75 of the PPDA Act, 2003 gives the Entity powers to reject any bid or bids at any time prior to the award of a contract, the Entity in exercise of its discretionary powers under this section must act fairly and



judiciously based on sound principles and its decision must be justifiable and objective in the circumstances.

5.15 In respect to the second issue, Counsel for the 2<sup>nd</sup> Respondent submitted that the discretion given to the Entity is not absolute. That discretion can be interfered with in order to prevent the Entity from unilaterally and unfairly departing from the procedures put in place for the attainment of the objectives of the three pillars of integrity, transparency and accountability. He further submitted that the Entity abused the discretion by arbitrarily and unilaterally cancelling the procurement process illegally and without justification.

5.16 In respect to the third issue, Counsel for the 2<sup>nd</sup> Respondent submitted that Section 90 (2) (a) of the PPDA Act, 2003 provides that on receiving a complaint and the prescribed fee, the Accounting Officer shall immediately suspend the procurement process. He submitted that on 21<sup>st</sup> May 2019, the 2<sup>nd</sup> Respondent applied to the Entity for administrative review but despite receipt of the complaint from the 2<sup>nd</sup> Respondent, on 23<sup>rd</sup> May 2019, the Applicant without making changes in the required specification proceeded and issued quotations (vide Procurement Reference No. DEI/NCONS/18-19/00040) which is a less competitive method of procurement through e-mails to different bidders including the 2<sup>nd</sup> Respondent and requested them to submit new bids under the quotation bidding method. He further submitted that whereas the 2<sup>nd</sup> Respondent was not a bidder in the new procurement process, it was an interested party because the entity had cancelled its award and arbitrarily proceeded with another procurement process in respect of the same subject matter.

5.17 Counsel for the 2<sup>nd</sup> Respondent submitted that the cancellation of the procurement process was not justified, the 2<sup>nd</sup> Respondent prays that the

decision of the Authority dated 17<sup>th</sup> July 2019 and all its orders be upheld and the application be dismissed for want of merit and the Applicant pays costs to the 2<sup>nd</sup> Respondent.

## 6.0 RESOLUTION OF ISSUES BY THE TRIBUNAL

*Issue No. 1: Whether the Authority erred in law and fact when it considered an administrative review application based on a cancelled procurement process.*

- 6.1 The Tribunal considered Section 75 of the PPDA Act, 2003 which states that a procuring and disposing entity may reject any or all the bids at any time prior to the award of a contract.
- 6.2 Section 3 of the PPDA Act, 2003 which defines award to mean '*a decision by a district contracts committee established under the Local Governments Act, Cap 243 or Contracts Committee provided for in paragraph (b) of section 24, or any other subsidiary body of a procuring and disposing entity to which a Contracts Committee or a district contracts committee may delegate powers of adjudication and award within a specified financial threshold to determine the successful bidder*'.
- 6.3 The Tribunal considered Regulation 4 (1) of the PPDA (Contracts) Regulations/SI No. 14 of 2014 which states that a procuring and disposing entity shall, within five working days after the decision of the contracts committee to award a contract display a notice of best evaluated bidder on the notice board of the procuring and disposing entity.
- 6.4 The Tribunal also recalls its decision in ***DOTT Services Ltd Vs PPDA & UNRA, Application No. 3 of 2017***, where the Tribunal held that the Accounting Officer of the Entity could only exercise powers under Section 75 of the Act, during the evaluation of bids stage and prior to a declaration of best evaluated

bidder by the Contracts Committee. After the Contracts Committee has awarded the contract to the Best Evaluated Bidder, the stage at which the Accounting Officer can exercise their powers to reject all bids ceases.

6.5 The Tribunal finds that in the instant case, the Applicant displayed notice of the best evaluated bidder on 8<sup>th</sup> April 2019 with a removal date of 23<sup>rd</sup> April 2019. The Accounting Officer therefore was not clothed with the powers to cancel the procurement process after the notice of the best evaluated bidder is displayed.

6.6 The Tribunal further examined Section 90 (3) of the PPDA Act, 2003 which provides that where a bidder is not satisfied with the decision of the Accounting Officer, the bidder may make a complaint to the Authority within ten working days from the date of communication of the decision by the Accounting Officer.

6.7 The Tribunal established that on 21<sup>st</sup> May 2019, the 2<sup>nd</sup> Respondent applied to the Applicant for administrative review and on 17<sup>th</sup> June 2019, the Accounting Officer of the Applicant issued a decision rejecting the complaint by the 2<sup>nd</sup> Respondent for administrative review. The 2<sup>nd</sup> Respondent being dissatisfied with the Accounting Officer's decision, filed for administrative review to the Authority. The Tribunal therefore, finds that the Authority rightly considered in accordance with the provisions of the PPDA Act, 2003 an administrative review application based on a cancelled procurement process because it is the cancellation of the impugned procurement which the 2<sup>nd</sup> Respondent challenged before the 1<sup>st</sup> Respondent.

*Issue No. 2: Whether the Authority erred in law and fact when it directed the entity to re-instate a cancelled procurement process.*

6.8 The Tribunal considered Section 91 (4) of the PPDA act, 2003 which states that the Authority shall issue its decision within twenty-one working days after



receiving the complaint, stating the reasons for its decision and remedies granted, if any.

6.9 The Tribunal also considered Section 7 (1) (r) of the PPDA Act, 2003 which provides that the functions of the Authority are to administer and enforce compliance with all provisions of this Act, regulations and guidelines issued under this Act.

6.10 The Tribunal finds that in accordance with the above cited provisions of the Act, the Authority is mandated to direct the entity to re-instate a cancelled procurement process, having found that the cancellation was done in contravention of the PPDA Act.

*Issue No. 3: Whether the Authority erred in law and fact when it made an administrative review decision regarding a procurement reference No. PR: DEI/NCONS/18-19/00040 based on a complaint by an Applicant who was not a bidder.*

6.11 The Tribunal established that the 2<sup>nd</sup> Respondent filed administrative review complaint before the Applicant on 21<sup>st</sup> May 2019 challenging the decision to cancel the impugned procurement and on 23<sup>rd</sup> May 2019, the Entity initiated a new procurement process in respect to the same subject matter. The Tribunal finds that the new procurement process was initiated during the administrative review period contrary to the law. Furthermore, in the administrative review complaint to the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent at page 3 stated that *'It is therefore our humble request and prayer that your Authority quashes the Entity's decision to cancel the earlier award decision and direct the entity to re-instate our award as corrective action. Accordingly, the new procurement process should be declared irregular and thus be cancelled'*.



6.12 The Tribunal considered Section 7 (1) (r) of the PPDA Act, 2003 which provides that the functions of the Authority are to administer and enforce compliance with all provisions of this Act, regulations and guidelines issued under this Act.

6.13 The Tribunal finds that since the 1<sup>st</sup> Respondent had issued a decision to reinstate the impugned procurement in the complaint filed by the 2<sup>nd</sup> Respondent, it was proper and in accordance with the law for it to cancel the new procurement process to avoid two parallel procurement processes running at the same time.

6.14 Issue No. 4 is about remedies available to parties. For remedies, see 7.0 below of the decision. On the whole, this application is rejected on all issues raised.

#### 7.0 DECISION OF THE TRIBUNAL

1. The Application is dismissed.
2. The decision of the Authority is affirmed.
3. Each party to bear its own costs.

SIGNED, SEALED and dated this 13<sup>th</sup> day of August, 2019 by the said;

1. OLIVE ZAALE OTETE

  
.....

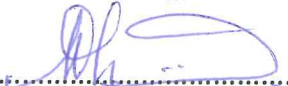
CHAIRPERSON

2. MOSES JURUA ADRIKO- SC.

  
.....

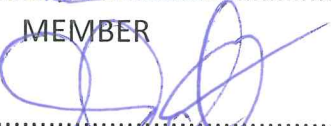
MEMBER

3. DAVID KABATAIRAINI

  
.....

MEMBER

4. ABRAHAM NKATA

  
.....

MEMBER

5. ENG. THOMAS BROOKES ISANGA

  
.....

MEMBER