

THE REPUBLIC OF UGANDA

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

APPLICATION NO 1 OF 2020

APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT TO THE TENDER FOR REVENUE COLLECTION FROM SALT LAKE MARKET IN KATWE KABATORO TOWN COUNCIL FOR FY 2019/2020'.

APPLICANT: KIMBULU INVESTMENTS LTD

**1ST RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC
ASSETS AUTHORITY**

2ND RESPONDENT: KASESE DISTRICT LOCAL GOVERNMENT

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

DETAILED DECISION OF THE TRIBUNAL,

1.0 BRIEF FACTS

1. On 21st May 2019, Kasese District Local Government (2nd Respondent) published a bid notice in the New Vision newspaper for the management of, and revenue collection from Salt Lake market in Katwe-Kabatoro Town Council for the Financial Year 2019/2020.
2. On 11th June, four firms submitted bids which were opened, and prices read out as follows: Kimbulu Investments Limited, 705,000,000; Mupala Agency Limited, 684,000,000; Amwet Investments Limited, 708,000,000; and Butiini Associates Limited, 580,000,000.
3. The Evaluation Committee recommended award of the contract to Butiini Associates Limited at UGX 580,000,000, and on 21st June 2019, the Contracts Committee awarded the contract to Butiini Associates Limited at UGX 580,000,000.
4. On 24th June 2019, the notice of best evaluated bidder was displayed with a removal date of 5th July 2019.
5. Dissatisfied with the decision of the Contracts Committee to award the contract to Butiini Associates Limited, on 17th July 2019, Amwet Investments Limited applied for administrative review to the Accounting Officer on grounds: (i) it was the highest bidder and the best evaluated bidder but the Contracts Committee awarded the contract to the lowest bidder, Butiini Associates Limited, contrary to regulation 133(19) of the Local Government (PPDA) Regulations, 2006; (ii) the Contract Committee did not adhere to the best practices in awarding the contract to Butiini Associates Limited; (iii) the Contract Committee and the Evaluation Committee did not follow the evaluation criteria stated in the Bidding document.
6. By administrative review report dated 3rd July 2019, the Accounting Officer revoked the award of the contract to Butiini Associates Limited and recommended award to be made to Amwet Investments Limited.

7. Dissatisfied with the Accounting Officer's decision, Butiini Associates Limited applied for administrative review to the Authority. On 19th August 2019, the Authority issued a decision upholding the application for administrative review and ordered a re-evaluation of the bids.
8. The re-evaluation was done, and a series of disagreements followed between the Evaluation Committee and the Contracts Committee which shall not be elaborated.
9. On 26th September 2019, the Contracts Committee awarded the contract to Amwet Investments Limited at UGX 708,000,000. On 27th September 2019, the notice of the best evaluated bidder was displayed with a removal date of 11th October 2019.
10. On 10th October 2019, Kimbulu Investments Ltd (Applicant) applied for administrative review to the Accounting Officer of the 2nd Respondent, seeking to set aside the best evaluated bidder notice declaring Amwet Investments Limited as the best evaluated bidder and declare Butiini Associates Limited as the best evaluated bidder, but the application by Kimbulu Investments was rejected by the Accounting Officer.
11. On 15th October 2019, the 2nd Respondent wrote to Amwet Investments Limited notifying the bidder of the award and on the same date Amwet Investments Limited accepted the award.
12. On 7th November 2019, Kimbulu Investments Limited applied for administrative review to the Authority and raised five grounds. Two of the grounds which are relevant to this Application are reproduced here below:
 - (a) *Following the administrative review at the entity level, the entity went ahead and awarded the contract to Amwet Investments Limited on 15th October 2019 contrary to regulation 139(5) of the Local Governments (PPDA) Regulations 2006;*
 - (b) *The District Contracts Committee chaired by Mr. Katswera Joseph on 13th September 2019 awarded the contract to Butiini Associates Limited at*

UGX 580,000,000 but the Chief Administrative Officer designated Mr Bwambale Wilberforce to preside at a Contracts Committee Meeting held on 26th September 2019 without a notification from the Contracts Committee Chairperson Mr Joseph Katswera in contravention of regulation 19(1) of the Local Governments (PPDA) Regulations, 2006;

13. On 22nd November 2019, the Entity submitted the procurement file to the Authority together with the signed contract between Kasese District Local Government and Amwet Investments Limited.
14. On the ground, *whether the entity proceeded with the procurement process and contracted Amwet Investments Limited during the administrative review period*, the Authority found that the signing of the contract by the 2nd Respondent was done during the administrative review period contrary to section 90(7) of the PPDA Act, 2003, which provides that a contract shall not be entered into by an Accounting Officer with a provider during the administrative review period. The Authority condemned the unlawful act and decided it would refer the breach of section 90(7) of the PPDA Act to the PPDA Appeals Tribunal under section 91J (1) of the Act.
15. On the ground, *the District Contracts Committee chaired by Mr. Katswera Joseph on 13th September 2019 awarded the contract to Butiini Associates Limited at UGX 580,000,000 but the Chief Administrative Officer designated Mr Bwambale Wilberforce to preside at a Contracts Committee Meeting held on 26th September 2019 without a notification from the Contracts Committee Chairperson Mr Joseph Katswera in contravention of regulation 19(1) of the Local Governments (PPDA) Regulations, 2006*, the Authority found that the designation of Mr Bwambale Wilberforce by the Chief Administrative Officer of the 2nd Respondent as Chairperson of the Contracts Committee, and the decision of the Contracts Committee meeting held on 26th September 2019

16. were in accordance with regulation 19(2) of the Local Government (PPDA) Regulations, 2006.
 17. By a decision dated 5th November 2019 (sic), the Authority rejected the application of the Applicant, notwithstanding that it had found that the contract was signed in contravention of section 90(7) of the PPDA Act, 2003.
 18. The Authority's decision was dated 5th November 2019, but on being notified of the error in the date of its decision by the Applicant, in its reply dated 19th December 2019, the Authority acknowledged the error and advised that it should have been 5th December 2019, but that all the contents of the decision remained the same.
 19. The Applicant being dissatisfied with the Authority's decision, on 21st January 2020 filed this Application before the Tribunal.
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2.0 DISPOSAL OF APPLICATION

1. In disposing of the application for review, the Tribunal analysed the following documents-
 - 1) The Application lodged with the Tribunal and appendices attached thereto dated 20th January 2020;
 - 2) Written response to the Applicant's application by the Authority and Annexes attached to the response received by the Tribunal on 24th January 2020;
 - 3) The Applicant's written submissions and Annexes to the submissions dated;
 - 4) The 2nd Respondent's response dated 24th January 2020;
 - 5) The Best Evaluated Bidder's submissions dated 29th January 2020

2. The Tribunal conducted a hearing for the parties on 3rd February 2020. The parties were represented by Mr. Otto Michael Gulamali for the Applicant, Ms. Sheila Nakiwala for the 1st Respondent and Mr. Samuel Kiriaghe for the 2nd Respondent.

3.0 ISSUES

The issues for which the Applicant sought determination of the Tribunal were:

1. *Whether the Authority erred in law and fact when it failed to declare a contract between Kasese District Local Government and Amwet Investments Ltd a nullity.*
2. *Whether the Authority erred in law and fact when it failed to find that the Accounting Officer had no authority to designate a member of the Contracts Committee to chair the Contracts Committee meeting when there was a substantive Chairperson of the Contracts Committee.*

4.0 PRELIMINARY OBJECTION

1. At the hearing before the Tribunal held on 3rd February 2020, Counsel for the 1st Respondent raised a preliminary objection to the effect that the application to the Tribunal was filed outside the statutory time limit provided for under Section 91L (1) (c) of the PPDA Act, 2003. Counsel submitted that under the aforementioned provision, an application to the Tribunal for review of a decision of the Authority made under Section 91I shall be lodged with the Tribunal within ten working days of being served by the Authority with its decision.
2. Counsel submitted that the decision of the Authority in respect to the impugned procurement was dated on 5th December 2019. The Applicant was served with the same decision that was issued to the Chief Administrative Officer of the 2nd Respondent and on 16th December 2019, the 1st Respondent

received a letter from the Applicant stating that the issue letter from the Authority in communicating the administrative review decision was dated erroneously 5th November 2019.

3. Counsel submitted that on 19th December 2019 the 1st Respondent informed the Applicant that the issue letter of the Authority addressed to it was erroneously dated 5th November 2019 instead of 5th December 2019 and that the rest of the content of the decision issued by the Authority remains unchanged.
4. Counsel further submitted that the Applicant received the decision of the Authority prior to 10th December 2019 since in its acknowledgement letter dated 10th December 2019, addressed to the Authority seeking to rectify the anomaly it cited the date of the decision. Counsel submitted that the date the Applicant received the Authority's decision had inconsistencies and notwithstanding the inconsistencies in the dates, whichever date is taken, the Application was filed out of the statutory time and therefore, the Application should be dismissed by the Tribunal.
5. Counsel for the 2nd Respondent associated himself with the submission by the Counsel for the 1st Respondent that the application was filed out of time. Counsel submitted that the Applicant's Application to the Tribunal clearly shows that the said Application was filed on 21st January 2020 and the copy of the Authority's decision attached on the said Application as 'Annexure I' shows clearly the Applicant acknowledged receipt thereof on the 17th December 2019 through the Applicant's representative, a one Kimbulu Victory. The Applicant filed this Application to the Tribunal out of the statutory timeframe of ten working days and therefore the application should be dismissed and struck out by the Tribunal.

6. In reply, Counsel for the Applicant submitted that the 1st Respondent corrected the anomaly of the date in its decision on 19th December 2019 and the computation of the statutory time within which to file a decision started on 19th December 2019 when the anomaly on the date was corrected by the Authority. Counsel submitted therefore that the Application was filed within the statutory ten working days after taking into consideration the vacation period of the Tribunal. Counsel prayed that the preliminary objection be overruled.
7. The Tribunal asked the parties to present the merits of the Application, saving the ruling on the Preliminary Objections to be in the main decision.

5.0 SUBMISSIONS

1. All parties filed written responses and submissions and were also heard by the Tribunal on all issues raised at the hearing of the Application on 3rd January 2020.
2. During the hearing, Counsel for the Applicant abandoned the first issue and submitted only in respect to the second issue of the application. He submitted that the Tribunal should recall its decision in *Kimbulu Investments Ltd Vs PPDA & Kasese District Local Government, Application No. 20 of 2019* where the Tribunal decided that the Contracts Committee meeting of 26th September 2019 was illegal and contravened Regulation 19 (2) of the Local Governments (PPDA) Regulations, 2006 therefore, the resultant award of the contract was null and void. Counsel submitted that the Contracts Committee that was found by the Tribunal in Application No. 20 of 2019, as illegally constituted, is the same contracts Committee that awarded the contract to Amwet Investments Limited in the instant Application before the Tribunal. Counsel for

the Applicant therefore prayed that this Tribunal accordingly declares the Contracts Committee meeting of 26th September 2019 illegal and the contract signed between the 2nd Respondent and Amwet Investments Ltd be declared null and void.

3. In reply, Counsel for the 1st Respondent submitted that the Authority duly decided that Mr. Wilberforce Bwambale was legally designated by the Chief Administrative Officer as Chairperson Contracts Committee in accordance with Regulation 19(1) and (2) of the Local Governments (PPDA) Regulations, 2006 and that therefore the decision of the Contracts Committee meeting of 26th September 2019 in respect to the award of the contract to Amwet Investments Ltd was legally made. Counsel submitted that this ground should be resolved in the negative and accordingly the application be dismissed with each party bearing its own costs.

4. Counsel for the 2nd Respondent submitted that the Applicant did not attach several documents referred to in its application to the Tribunal, which denied the 2nd Respondent a right to a fair hearing and for this reason therefore, the application must be dismissed.

5. In rejoinder, Counsel for the Applicant submitted that the documents not attached as Annexure in the Application be expunged from records and that they will not be relied upon. Both Counsel for the 1st and 2nd Respondents did not object to the submission by the Applicant that the references to the documents not attached to the Application be expunged from the record. He prayed that the application succeeds.

6.0 RESOLUTION OF ISSUES BY THE TRIBUNAL

1 Preliminary Objection

The preliminary objection was to the effect that the current Application filed with the Tribunal on 21st January 2020, was outside the statutory time limit of ten working days from the date when the applicant received the decision of the Authority.

The Tribunal notes that the Authority's decision in respect to the application filed by Applicant, which was served onto the Applicant was dated 5th November 2019. The Applicant, by letter to the Authority dated 10th December 2019 notified the Authority that its decision had an error in the date i.e. it was dated 5th November 2019, instead of 5th December 2019. By letter dated 19th December to the Applicant, the Authority clarified to the Applicant that the correct date of its decision is 5th December 2019, and not 5th November 2019, but that the contents of the decision remained the same.

2. The Tribunal agrees with the submission of the Applicant that since the Authority clarified the correct date of the decision on 19th December, 2019, the time for reckoning the days when the application to the Tribunal should be filed by the Applicant should start on 19th December, 2019, when the Authority made the clarification. The benefit for the confusion in the dates of the decision should go to the Applicant. Taking into account the Tribunal vacation days which are not taken into account in the calculation of time, the Tribunal finds that the Application was filed in time. The preliminary objection is overruled.

Whether the Authority erred in law and fact when it failed to find that the Accounting Officer had no authority to designate a member of the Contracts Committee to chair the Contracts Committee meeting when there was a substantive Chairperson of the Contracts Committee.

3. The Tribunal recalls its decision in *Kimbulu Investments Ltd versus Public Procurement and Disposal of Public Assets Authority and Kasese District Local Government, Application 20 of 2019*, where it found that Mr.Bwambale

Wilberforce was unlawfully designated by the Accounting Officer of the 2nd Respondent to preside at the meeting of 26th September 2019 and the subsequent decision arrived at the said meeting of 26th September 2019 is therefore, null and void’.

4. The Tribunal notes that it is the same Contracts Committee, chaired by the same Mr Wilberforce Bwambale that awarded the contract to Amwet Investments Limited, the award that is being contested by the Applicant in the instant Application.
5. The Tribunal accordingly finds that the award to Amwet Investments Limited, made by an illegally constituted Contracts Committee is null and void, and the resultant contract signed following the award is void ab initio.

7.0 DECISION OF THE TRIBUNAL

1. The preliminary objection is overruled.
2. The Application succeeds.
3. The decision of the Authority is set aside.
4. The Contracts Committee meeting of 26th September 2019 was illegally constituted for it was called in contravention of Regulation 19 (2) of the Local Governments (PPDA) Regulations, 2006, and therefore the resultant award of contract to Amwet Investments Ltd was null and void.
5. The Applicant is awarded a refund of transport and accommodation costs by the 2nd Respondent subject to taxation by the Acting Registrar, PPDA Appeals Tribunal.
6. Each party to bears its own legal costs.

SIGNED and Sealed this 4th February 2020 by

1. OLIVE ZAALE OTETE

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CHAIRPERSON

2. ABRAHAM NKATA

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MEMBER

3. DAVID KABATERAINE

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MEMBER

4. ENG. THOMAS BROOKES ISANGA]

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MEMBER