

THE REPUBLIC OF UGANDA

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

APPLICATION NO. 3 OF 2020

APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT TO THE TENDER FOR CONSTRUCTION OF A STORIED CLASSROOM BLOCK AT TRINITY COLLEGE NABBINGO, WAKISO DISTRICT.

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APPLICANT: CUBEROOT LIMITED

1<sup>ST</sup> RESPONDENT: TRINITY COLLEGE NABBINGO

2<sup>ND</sup> RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC  
ASSETS AUTHORITY

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

## SUMMARY DECISION

### 1.0 BRIEF FACTS

- 1.1 On 27<sup>th</sup> June 2019, the 1<sup>st</sup> Respondent advertised in the New Vision newspaper a Bid Notice in respect of construction works for a storied classroom block.
- 1.2 On 26<sup>th</sup> July 2019, the Applicant submitted its bid in response to the bid notice.
- 1.3 The 1<sup>st</sup> Respondent evaluated the bids and on the 31<sup>st</sup> October 2019 informed the Applicant that Kimu Construction Company Limited was the best evaluated bidder (BEB) for the impugned procurement.
- 1.4 On 7<sup>th</sup> November 2019, the 1<sup>st</sup> Respondent in a letter dated 5<sup>th</sup> November 2019 communicated to the Applicant the reasons for disqualification.
- 1.5 On 9<sup>th</sup> November 2019, the Applicant lodged an Administrative Review complaint to the Accounting Officer of the 1<sup>st</sup> Respondent.
- 1.6 On 26<sup>th</sup> November 2019, the Accounting Officer of the 1<sup>st</sup> Respondent rejected the Administrative Review complaint by the Applicant.

- 1.7 On 6<sup>th</sup> December 2019, the Applicant lodged an Administrative Review complaint to the Permanent Secretary, Ministry of Education and Sports.
- 1.8 The Permanent Secretary, Ministry of Education and Sports did not render a decision within twenty-one working days, prompting the Applicant to file an application for Administrative Review to the 2<sup>nd</sup> Respondent on 15<sup>th</sup> January 2020.
- 1.9 On 5<sup>th</sup> February 2020 the 2<sup>nd</sup> Respondent handled the application but declined to handle the Applicant's complaint. In rejecting the application, the Authority held that the Applicant was not a bidder.
- 1.10 Being dissatisfied with the decision of the 2<sup>nd</sup> Respondent, on 18<sup>th</sup> February, 2020, the Applicant filed this Application before the Tribunal.

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

- 2.1 On 18<sup>th</sup> February 2020, the Applicant applied to the Tribunal for a review of the 2<sup>nd</sup> Respondent's decision.
- 2.2 In its application, the Applicant complained that the 2<sup>nd</sup> Respondent erred in law when they failed to cancel/ nullify the procurement process that culminated in issuance of a contract to Kimu Construction Company, (the BEB) on 12<sup>th</sup> December 2019, notwithstanding their determination that there were no valid bids under this impugned procurement activity. The Applicant also complained that the 2<sup>nd</sup> Respondent erred in law when they failed to order for a refund of the administrative review fees paid by the Applicant which they contended exceeded the applicable fees payable as prescribed in the

Procurement and Disposal Guideline for Schools in Uganda, Guideline Reference 5/2014 issued by the said 2<sup>nd</sup> Respondent on 3<sup>rd</sup> March 2014..

### 3.0 DISPOSAL OF APPLICATION

3.1 In disposing of the Application for review, the Tribunal analyzed the following:-

- (i) The Applicant's Application to the Tribunal dated 17<sup>th</sup> February 2020, Annexes to the Application, and their written and oral submissions.
- (ii) The 1<sup>st</sup> Respondent's response to the Application, Annexes to the response, the written and oral submissions.
- (iii) The 2<sup>nd</sup> Respondents response to the Application together with its written and oral submissions.

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3.2 The Tribunal conducted a hearing for the Parties on 2<sup>nd</sup> March 2020. The Applicant was represented by Mr. John Kamarabe and Mr. Robert Kifunga, the 1<sup>st</sup> Respondent was represented by Ms. Barbara Akullo Aboke and Ms. Miriam Kasibante, the 2<sup>nd</sup> Respondent was represented by Mr. John Kallemera. The BEB was represented by Mr. Arthur Mpeirwe.

### 4.0 SUMMARY RULING

4.1 In accordance with the PPDA Act, 2003 the Tribunal delivered a summary of this ruling on Tuesday 3<sup>rd</sup> March, 2020. What follows is the detailed reasoning in support of our decision.

## 5.0 ISSUES

Three issues below were for determination by the Tribunal-

**Issue No. 1:** Whether the procurement process and the contract signed by the 1<sup>st</sup> Respondent and the BEB, Kimu Construction Company should be nullified.

**Issue No.2:** Whether the Applicant is entitled to refund of administrative review fees and excessive fees demanded and paid to the 1<sup>st</sup> Respondent.

**Issue No.3:** Whether the Applicant is entitled to costs, general damages for inconvenience

## 6.0 PRELIMINARY OBJECTION

6.1. Counsel for the 2<sup>nd</sup> Respondent raised a preliminary objection that the application is incurably defective on account that the Applicant was not a bidder and had no locus to make an administrative review application to the Tribunal. Counsel submitted that section 91I (1) of the Public Procurement and Disposal of Public Assets Act, 2003 (PPDA Act, 2003) provided that a bidder who was aggrieved by a decision made by the Authority under section 91 (4) may make an application to the Tribunal for a review of the decision of the Authority.

6.2 Counsel submitted that the Applicant was no longer a bidder when it filed Application No. 3 of 2020 before the Tribunal. Counsel submitted that the 2<sup>nd</sup> Respondent computed the Applicant's bid validity period and established that



the Applicant's bid expired on 21<sup>st</sup> October 2019 and that there had been no extension of the bid validity period.

- 6.3 Counsel further submitted that Section 3 of the PPDA Act, 2003 as amended defined a bidder as a physical or artificial person intending to participate or participating in public procurement proceedings. Counsel submitted that because the Applicant was not a bidder in the impugned procurement process, it lost its right to be heard and therefore it was statutorily barred from making an administrative review application to the Tribunal. Counsel prayed that for the above reasons, the preliminary objection is upheld and that the application is struck out with each party bearing its own costs.
- 6.4 To buttress the arguments above, Counsel cited the case of Electoral Commission Vs Zhang Hao & Anor, High Court Civil Appeal No. 068 of 2018 in which the High Court held that an Applicant with an expired bid ceased to have locus to file an Application before the Tribunal.
- 6.5 The Tribunal asked the parties to present the merits of the Application, saving the ruling on the Preliminary Objection to be in the decision of the Tribunal on the Application.
- 6.6 The Tribunal considered the arguments and authorities cited by Counsel on the issue as to whether the Applicant in the instant application had locus standi to lodge this application before the Tribunal given that its bid had expired on 21<sup>st</sup> October 2019. Determination of the preliminary objection must begin with an understanding of what locus standi means; - In Njau & others-vs- City Council of Nairobi (1976-1985)1EA 397 at 407, the court held as follows, *“the issue of locus standi means a place of standing. It means a right to appear in Court conversely to say that a person has no locus standi*

*means that he has no right to appear or be heard in specified proceedings.*

The question of whether a party has standing to appear before the Tribunal must be considered upon examination of the pleadings and all other relevant material, and thereafter a summary determination is made whether the appeal is one that must be heard. As narrated in the brief facts above the 2<sup>nd</sup> Respondent in exercise of its appellate mandate considered the appeal lodged by the Applicant and in its letter dated 5<sup>th</sup> February 2020, communicating its decision to the Applicant stated as follows; *“In accordance with section 91(4) of the PPDA Act 2003, the Authority considered the application for Administrative Review and noted a preliminary point that was raised by the Applicant at the hearing held on 29<sup>th</sup> January 2020 in respect of validity of the bids at paragraphs (1) (3) and (4) the 2<sup>nd</sup> Respondent held as follows; (1) The bidding document issued to bidders required bids to be valid for a period of 60 working days from the date fixed for the bid submission deadline, (3) The Applicant confirmed at the hearing that the Entity did not request bidders to extend its bid validities, (4) The Authority computed the validity of the bids from the date of bid submission and found that the bids had expired on 21<sup>st</sup> October 2019.”*

- 6.7 What clearly emerges from the 2<sup>nd</sup> Respondents communication to the Applicant was, that the 2<sup>nd</sup> Respondent conducted a thorough review of the ***validity of all the bids (emphasis ours)*** in the impugned procurement before they rejected the application for administrative review filed by the Applicant. Whilst the 2<sup>nd</sup> Respondent correctly found that the Applicants bid had expired, it confounds us that they failed to apply the same reasoning to the Best Evaluated Bidder’s bid. Whilst it is not in doubt that an Applicant with an expired bid ceases to have capacity to institute an application for Administrative Review, the 2<sup>nd</sup> Respondent could not apply that finding selectively to omit the best evaluated bid in the procurement process. In doing

so the 2<sup>nd</sup> Respondent in effect permitted the procurement process to proceed in favour of and a contract to be executed with a non- bidder (the BEB), thus compounding the illegality for which the Applicant is faulted. It would have been instructive at the stage when the 2<sup>nd</sup> Respondent made the finding that the Applicant had no locus standi, to recall its mandate as an external merits review body whose role was explained by Justice Stephen Mubiru in HCCA 4/ 16 PPDA-VS- BAZAAR ARUA BUS OPERATORS COOPERATIVE SOCIETY LTD ,as follows at pg 6 of his judgement;- *“Merits review is the process by which a person or body other than the primary decision maker, reconsiders the facts , law and policy aspects of the original decision and determines the correct decision, if there is only one , or the preferable decision, if there is more than one correct decision. Merits review involves standing in the shoes of the original decision maker, reconsidering the facts law and policy aspects of the original decision. In a merits review the whole decision is made again on the facts”*. As can be clearly inferred from the learned judges holding, it was erroneous for the 2<sup>nd</sup> Respondent to mechanically and selectively apply the finding that bids had expired to the Applicant only and therefore, conveniently dispose of the appeal. It also failed to live to its own objective of ensuring fairness and non-discriminatory practices embedded in Section 6 (a) of the Act. In doing so the 2<sup>nd</sup> Respondent abdicated its mandate as an external merits review quasi- judicial body, it arrived at a totally unfair and irrational decision on the narrow legalistic premise of locus standi, which could not be relied on to reject the instant appeal to the Tribunal after the Applicant opted to exercise their statutory right of appeal against the biased ruling made by the 2<sup>nd</sup> Respondent.

6.8 For the reasons above the preliminary objection is overruled.

#### 7.0 DISPOSAL OF THE APPLICATION



- 7.1 Submitting on the first issue, Counsel for the Applicant argued that the 2<sup>nd</sup> Respondent erred when they neglected or omitted to nullify the contract executed on 12<sup>th</sup> December 2019 between the BEB and the 1<sup>st</sup> Respondent after holding that the bid validity period of all the bidders had expired on 21<sup>st</sup> October 2019.
- 7.2 Counsel for the Applicant cited section 7(r) of the PPDA Act, 2003 (as amended) which confers upon the 2<sup>nd</sup> Respondent an obligation to administer and enforce compliance with the provisions of the Act. Counsel submitted that in accordance with the said section, the 2<sup>nd</sup> Respondent ought to have exercised her discretion to nullify the illegally procured contract.
- 7.3 Counsel for the Applicant referred the Tribunal to Roko Construction Limited Vs PPDA & Seyani Brothers Ltd, Civil Appeal No. 59 of 2019 in which the High Court held that: -an illegally procured contract under the PPDA Act cannot be defended and that no provision in the Act or Regulations could bar the Tribunal and court from addressing an illegality once brought to the attention of court.
- 7.4 Counsel submitted that under Guideline No. 14.1.3 of the PPDA Guideline for Schools in Uganda, 5/ 2014, the Applicant ought to have paid UGX. 30,000/= as Administrative Review fees but instead, the Applicant paid UGX. 5,000,000/=. Counsel referred the Tribunal to Obed Tashobya Vs DFCU (HCT-00-CC-CS) [2007] UGCOMM 45 (8 May 2017) in which the High Court held that if a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake. Counsel prayed that the Tribunal orders a refund by the 1<sup>st</sup> Respondent of the excessive administrative review fees paid by the Applicant.

- 7.5 Counsel argued that the Applicant had fulfilled all her obligations under the procurement laws of Uganda and had been illegally disqualified on ground of non-Value Added Tax registration which by virtue of Circular No.1 of 2015 issued by the 2<sup>nd</sup> Respondent was no longer a requirement, he submitted that coupled with the fact that there had been a finding by the 1<sup>st</sup> Respondent that there were no valid bids due to the 1<sup>st</sup> Respondent's failure to request the bidders to extend bid validity period, rendered the entire procurement process a sham to the detriment of the Applicant whose participation had caused them grave inconvenience and therefore, the Applicant ought to be compensated for the expenses they had incurred and awarded damages for the inconvenience that they had suffered.
- 7.6 In reply, Counsel for the 1<sup>st</sup> Respondent submitted that the 2<sup>nd</sup> Respondent could not nullify the procurement process, because its hands were tied by the fact that upon expiry of the validity of all the bids in the instant procurement, the Applicant was not a bidder to whom such remedy could be granted, and therefore the contract signed by the BEB, could not be challenged or impugned by the Applicant.
- 7.7 With regard to the prayer for costs and general damages for inconvenience, Counsel submitted that Section 91K (1) (a-e) of the PPDA Act, 2003 provided for the powers of the Tribunal. Counsel further submitted that the only monetary award the Tribunal could grant to any party was an order for costs under Section 91K (1) (d) of the PPDA Act, 2003 and therefore for this reason the Applicant is not entitled to an award of damages as the award of the same is not within the purview of this honourable Tribunal.
- 7.8 In reply, Counsel for the 2<sup>nd</sup> Respondent submitted that it did not consider any matter regarding the merits of the application or the conduct of the

procurement process because the Applicant had no legal standing to make administrative review application.

- 7.9 Counsel for the 2<sup>nd</sup> Respondent further submitted that its decision is supported by Regulation 9(1) (a) of the PPDA (Administrative Review) Regulations SI No. 16 of 2014 which provides that the Authority shall not investigate a complaint where it determines that the complainant is not a bidder in respect of the procurement process for which the complaint is made. Counsel submitted that this application lacks merit and it should be dismissed with each party bearing its own costs.
- 7.10 Counsel for the BEB, submitted that the Best Evaluated Bidder was a bona-fide provider notwithstanding that it had signed a contract with the 1<sup>st</sup> Respondent when its bid validity had expired. Counsel cast blame on the 1<sup>st</sup> Respondent for not requesting and obtaining extension of the validity period of the bids and threatened to institute proceedings against the 1<sup>st</sup> Respondent in the event that the Tribunal nullified the contract. Counsel conceded that the Contract between the 1<sup>st</sup> Respondent and the BEB had been executed within the Administrative Review period. In conclusion Counsel submitted that the Applicant did not have locus before the Tribunal.
- 7.11 The Tribunal has in 6.8 above ruled on the preliminary issue concerning locus standi, what remains for determination are the questions relating to whether the contract signed by the BEB during the administrative review period was valid and remedies the parties may be entitled to.
- 7.12 *Section 90(7) of the Public Procurement and Disposal of Public Assets Act, 2003 (as amended)* provides: - *“Subject to Part VIIA of this Act, a contract shall not be entered into by an Accounting Officer with a provider- (a) during the*

*period of administrative review; (b) before the Authority makes a final decision in respect of a complaint lodged with the Authority under subsection (3) or before a decision is made in accordance with Part VIIA of this Act.”*

7.13 Section 91 I (7) provides that the Tribunal shall issue its decision within a period of not more than ten working days after receiving an application for review. The 1<sup>st</sup> Respondent executed a contract with the BEB on 12<sup>th</sup> December 2019, before the Applicant or other bidder in the impugned process had exhausted their statutory right of administrative review before the Authority and the Tribunal contrary to section 90(7) of the Act, the 1<sup>st</sup> Respondents actions therefore were contrary to the law and void abinitio. In *HCCA 59/2017, Roko Construction Ltd-vs- PPDA & Another, Lady Justice Lydia Mugambe* at ppg15 of her judgement, inter-alia considered a contract executed during the administrative review period, she held with respect to that issue as follows; - *“An illegally procured contract under the parent statute cannot be successfully defended by any section under the Regulations. No provision in the regulations and the parent statute could bar the Tribunal and this court from addressing an illegality once brought to its attention. In Makula International –vs- Cardinal Nsubuga Civil Appeal 4/1981, it was held that “a court of law cannot sanction that which is illegal. Illegality once brought to the attention of court overrides all questions of pleadings, including any admission thereon. No court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court.*

7.15 Applying the binding restatement of the law in Roko supra, the Tribunal cancels and sets aside the illegally procured contract and executed between the BEB and the 1<sup>st</sup> Respondent.



7.16 Turning to the issue of the administrative review fees paid by the Applicant, we note that *Guideline 14.1.3 of the PPDA Procurement and Disposal Guideline for Schools in Uganda 2014* provides that an application for administrative review to the Accounting Officer will be accompanied by a fee of UGX 30,000/= which is refundable if the application for administrative review is upheld. The Applicant stated that they paid UGX 5,000,000/= as administrative review fees to the 1<sup>st</sup> Respondent, this assertion was not denied or controverted by the said Respondent. Regulation 11(2) of The Public Procurement and Disposal of Public Assets (Administrative Review) Regulations 16/2014 makes it mandatory for an Accounting Officer to refund administrative fees paid by an Applicant where an application for Administrative Review is upheld. The Tribunal therefore accordingly find that the Applicant is entitled to the refund of the administrative review fees.

7.17 For the reasons above this application is upheld and has succeeded in part.

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#### 8.0 DECISION OF THE TRIBUNAL

1. The preliminary objection is overruled.
2. The Application succeeds in part.
3. The Contract awarded to Kimu Construction Company Limited (Best Evaluated Bidder) by the 1<sup>st</sup> Respondent is illegal and void ab initio. Therefore, the contract is cancelled and set aside.
4. The 1<sup>st</sup> Respondent must refund all the administrative review fees paid by the Applicant.




5. Each party to bear its own costs.

DATED at Kampala this 10<sup>th</sup> day of May 2020

SIGNED by the said ]   
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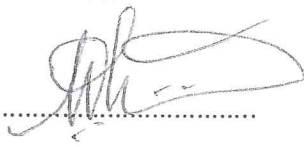
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