

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BACKGROUND/FACTS

1.1 The Public Procurement and Disposal of Public Assets Authority (the Applicant) makes this reference over alleged serious breach of the Public Procurement and Disposal of Public Assets Act, 2003 (the Act) by the Uganda National Examinations Board (the Respondent). The facts pertaining to this reference are as follows;

- i) On 19th May 2017, the Respondent initiated the procurement for the supply of 3 units of Station Wagons (Procurement reference UNEB/SUPLS/2017-18/00028) at an estimated cost of 740,000,000 million shillings. The procurement was divided into two Lots, Lot 1, Automatic station wagons and Lot 2, Manual station wagon.
- ii) On 4th August 2017, the Contracts Committee made a decision to award the contract for the procurement of Lot 1 to Victoria Motors Ltd (the Best Evaluated Bidder or BEB) at a contract price of UGX 479,421,708, while it recommended the cancellation and retender of the procurement for Lot 2. The notice of the best evaluated bidder was displayed from 7th August 2017 to 18th August 2017.
- iii) On 18th August 2017, one of the bidders who participated in the procurement, Motorcentre East Africa Limited (the aggrieved bidder) filed a complaint for an administrative review to the Accounting Officer of the Respondent. The Accounting officer issued a decision rejecting the application for administrative review.
- iv) On 30th August 2017, the Respondent signed a contract with the BEB.

- v) On 7th September 2017, the Applicant received an application for Administrative Review from the aggrieved bidder in respect to the procurement for Lot 1. On 5th October 2017, the Applicant issued a decision upholding the administrative review application by the aggrieved bidder.
- vi) The Applicant asserts that the Respondent contravened section 90(7) (a) of the PPDA Act, 2003 on account that the Accounting Officer signed a contract with the BEB on 30th August 2017 prior to the conclusion of the administrative review period. The Applicant further asserts that the execution of a contract by the Respondent during the administrative review period was a serious breach of the PPDA Act.

2.0 REFERENCE

- 2.1 On 17th October 2017, the Applicant filed the instant reference seeking a declaration that there had been a serious breach of the Act by the Respondent in respect of the Procurement in reference because the Respondent had executed a contract with the Best Evaluated Bidder during the Administrative Review period and prior to the lapse of the display period of the Best Evaluated Bidder notice.

3.0 DISPOSAL OF THE APPLICATION.

In disposing of the Reference the Tribunal analyzed the following documents;

- (1) Reference dated 16th October 2017 filed by the Applicant and the supporting Annexures;

(2) Response from the Respondent dated 19th October 2017 filed with the Tribunal by the Respondent.

3.1 The Tribunal summoned both parties for a hearing on 6th November 2017. The Applicant was represented by Mr. John Kallemera and the Respondent was represented by Victor Rugatsira. In attendance were officials from UNEB including the Accounting Officer.

3.2 The issue formulated for resolution by the Tribunal was whether the actions of the Accounting Officer amounted to a serious breach of the Act.

4.0 SUBMISSIONS BY COUNSEL

4.1 Counsel for the Applicant submitted that a bidder has a right under section 89 of the Act to file an application for administrative review. He stated that the process of administrative review starts with the Accounting officer of a procuring and disposing entity, then to the Procurement and Disposal of Public Assets Authority (PPDA) and finally to the Tribunal. He stated that section 90(7) of the Act clearly bars an Accounting Officer from entering a contract with a provider during the administrative review period. He submitted that by signing a contract on the 30th August 2017, the Respondent was in breach of section 90(7) of the Act and thus committed a serious breach. He recalled the Tribunal decision in Application 1 of 2015 *PPDA VS Mbarara Municipal Council, Reference No.1 of 2015* wherein the Tribunal declared that the entity had committed a serious breach of the Act by signing a contract during administrative period.

4.2 Counsel prayed the Tribunal declare that there was a serious breach of the PPDA Act by the Respondent. Counsel prayed for costs and for other reliefs as the Tribunal may deem fit.

4.3 In their written response dated 19th October 2017, the Respondent argued that it

executed a contract in accordance with the law. During the hearing, the Accounting Officer called upon the Tribunal to appreciate the exceptional circumstances under which the respondent works. The Accounting Officer further stated that the Respondent had to use the funds allocated for Quarter 1 because failure to do so would have led to the funds being recalled by the Ministry of Finance, Planning and Economic Development. He went on to state that the Motorcentre East Africa Limited, the aggrieved bidder applied for administrative review in bad faith because their specifications did not meet the procurement criteria.

4.4 The respondent prayed the Tribunal to dismiss the Application.

5.0 RESOLUTION BY THE TRIBUNAL

5.1 In resolving the Application, the Tribunal considered the documents availed to it, and listened carefully to the submissions of both Counsels and the statements made by the Accounting Officer.

5.2 Section 90(7) (a) and (b) of the Act explicitly prohibits an Accounting officer from concluding a contract with a bidder during the period of Administrative Review and before the Authority makes a decision on a complaint lodged with the Authority by a dissatisfied bidder. The section does not provide for any exceptional circumstances under which a procuring and disposing entity may sign a contract during administrative review period.

- 5.3 In the instant reference the Respondent conceded that the contract was executed during the administrative review period. The Respondent however argued that the signing was done in order not to lose funds which would have been recalled by the Ministry responsible for Finance had the contract not been signed at the particular time, and that this would have negatively affected the Respondent's work.
- 5.4 The Tribunal has not been persuaded by the justification relied on by the Accounting Officer of the Respondent to flout mandatory provisions of the PPDA Act. Section 90(7) of the Act does not provide any exceptional circumstances whatsoever for contracts to be signed during an administrative review period. It is a strict provision which must be adhered to by Accounting Officers.
- 5.5 The Tribunal recalls its decision in **Reference 1/ 2015 PPDA- vs- Mbarara Municipal Council at pg. 7 and 8** in which it held as follows;-

"The Respondent's actions in concluding a contract with the best evaluated bidder during the administrative review period, was inconsistent with its statutory obligation to ensure transparency, accountability and fairness. The actions of the Respondent in hastily concluding a contract with the best evaluated bidder under procurement reference number MBAR761/SRVCS/00008 before the Authority could conclude its review and issuance of a decision under Section 90(4) of the Act in effect frustrated the purpose for which the Authority was established by usurping the statutory powers cited above, vested in the Authority"

5.6 The Tribunal has not been persuaded by the Respondent to depart from the principle established in *PPDA-VS- Mbarara Municipal Council (supra)*. The Respondent's actions of concluding a contract with the best evaluated bidder during the administrative review period contravened section 90(7) of the Act and amounted to a serious breach of the Act.

5.7 This Tribunal having found that there was a serious breach of the Act draws the attention of the Authority to this declaration and recommends that the Authority determines whether in accordance with Section 9 of the Act it should make recommendation to the Board of Directors of Uganda National Examinations Board, the appointing authority of the Accounting Officer, for appropriate disciplinary action against the Respondent's Accounting Officer.

5.8 To emphasize and deter procuring and disposing entities from flagrantly violating the Procurement laws of the Country, in exercise of the powers conferred upon the Tribunal under section 90k of the Act, the Tribunal hereby orders the Respondent to pay costs of UGX 5,000,000 to the Applicant.


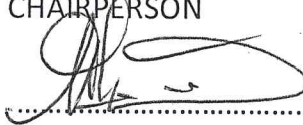
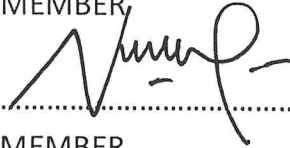
6.0 DECISION OF THE TRIBUNAL

1. The Tribunal declares that the decision to execute a contract in respect of Procurement Reference Number UNEB/SUPLS/2017-18/00028 during the administrative review period was a serious breach of the PPDA Act, 2003.

2. The Authority should consider in accordance with section 9 of the Act whether to recommend appropriate disciplinary action against the Respondent's Accounting officer by the UNEB Board of Directors.

3. The Respondent Uganda National Examinations Board is ordered to pay costs of Uganda shillings 5,000,000 to the Applicant.

DATED at Kampala this 15th day of March 2018.

SIGNED by the said OLIVE ZAALE OTETE]]]  CHAIRPERSON
SIGNED by the said DAVID KABATERAINE]]]  MEMBER
SIGNED by the said MOSES JURUA ADRIKO]]]  MEMBER
SIGNED by the said ABRAHAM NKATA]]] MEMBER
SIGNED by the said ARCHT. JOEL KATEREGGA]]] MEMBER