

THE REPUBLIC OF UGANDA

PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY APPEALS

TRIBUNAL

(PPDA APPEALS TRIBUNAL)

REFERENCE NO. 1 OF 2019

REFERENCE OVER SERIOUS BREACH OF THE PPDA ACT 2003 BY THE DIRECTORATE OF ETHICS AND INTEGRITY IN RESPECT OF PROCUREMENT OF MOTOR VEHICLES LOT 2-TWO DOUBLE CABIN PICK UPS (DEI/SUPLS/18-19/00032)

APPLICANT

PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
AUTHORITY

RESPONDENT:

DIRECTORATE OF ETHICS AND INTEGRITY

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

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BACKGROUND/FACTS

- 1.1 On 3rd April 2019, the Respondent initiated the procurement process for the supply of 2 double cabin pickups (Lot 2) at an estimated cost of UGX 200 million.
- 1.2 On 5th April 2019, the bid notice was advertised in the New Vision newspaper with a deadline for bid submission of 9th May 2019 which was later extended to 14th May 2019.
- 1.3 On 14th May 2019, four bids were submitted and opened on the same day. The bidders were; Victoria Motors Limited, Toyota (U) Limited, Cooper Motor Corporation and Motorcare (U) Limited.
- 1.4 On 11th June 2019, the Contracts Committee of the Respondent recommended the award for the contract to Toyota Uganda Limited at a cost of UGX 382,094,040 inclusive of applicable taxes.
- 1.5 On 11th June 2019, the Notice of the Best Evaluated Bidder was displayed with a removal date 24th June 2019 indicating Toyota Uganda Limited as the Best Evaluated Bidder at an estimated cost of UGX 382,094,040.
- 1.6 On 19th June 2019, Motorcare Uganda Limited applied for administrative review to the Accounting Officer of the Respondent who issued his decision on 24th June 2019 rejecting the application. The Applicant received a copy of the Accounting Officer's decision on 27th June 2019.

- 1.7 On 4th July 2019, by letter dated 3rd July 2019, the Applicant notified the Respondent of the application for administrative review by Motorcare Uganda Limited and at the same time instructed the Respondent to suspend any further action in respect to the procurement process.
- 1.8 On 11th July 2019, the Applicant conducted an administrative review hearing which was attended by the Respondent and Motorcare Uganda Limited.
- 1.9 On 25th June 2019, the Respondent signed a contract with Toyota Uganda Limited in respect to the impugned procurement.
- 1.10 On 26th July 2019, the Applicant upheld the administrative review application of Motorcare Uganda Limited. However, the Applicant declined to direct the Respondent to carry out corrective action of re-evaluation because the Respondent had signed a contract with Toyota Uganda Limited in respect to the impugned procurement on 25th June 2019.

2.0 REFERENCE

- 2.1 On 9th August 2019, the Authority 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 entered into a contract with the Best Evaluated Bidder during the administrative review period.

2.2 On 12th August 2019, the Tribunal issued summons to the Respondent to file a written response to the Reference. The Respondent filed a detailed response with the Tribunal on 15th August 2019.

3.0 DISPOSAL OF THE REFERENCE

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

- (1) *Reference dated 9th August 2019 filed by the Applicant and supporting annexes;*
- (2) *Response dated 15th August 2019 filed by the Respondent.*

3.2 The Tribunal conducted a hearing for the parties on 22nd August 2019. The Applicant was represented by Mr. John Kallemera and the Respondent was represented by Mr. Uwizera Franklin Bukorwe a State Attorney.

3.3 Two issues were formulated for resolution by the Tribunal as follows:

- (a) Whether the Accounting Officer of the Respondent entering into a contract with the Best Evaluated Bidder during the administrative review period amounted to a serious breach of the Act.
- (b) Remedies

4.0 SUBMISSIONS BY COUNSEL

4.1 Counsel for the Applicant submitted that the Respondent signed contract with the Best Evaluated Bidder during administrative review period in breach of Section 90 (7) of the Act. He submitted that on 24th June 2019, the Respondent issued out an administrative review decision rejecting the complaint for

- (a) a decision by the Contracts Committee, where the Contracts Committee is unable to meet;
- (b) a notice of best evaluated bidder; or
- (c) applying the period specified in Regulation 5.

Counsel submitted that the Accounting Officer of the Respondent signed the contract with the Best Evaluated Bidder because there was an emergency situation that the funds earmarked for purchasing the two double cabin pickups would be returned to the Ministry of Finance, Planning and Economic Development if not utilized at the end of the Financial Year 2018/2019. Since the Financial Year was ending, the Respondent had to spend the funds as emergency situation which is envisaged under Regulation 7 (2) of the PPDA (Contracts) Regulation/SI No. 14 of 2014.

4.5 Regarding the issue of costs, Counsel relied on the case of *Public Procurement and Disposal of Public Assets Authority Vs Arua Kubala Park Operators and Market Vendors Cooperative Society Limited, High Court Civil Appeal No. 5 of 2015* where Justice Stephen Mubiru held that prima facie, parties before the PPDA Tribunal ought to bear their own costs, unless in particular instances, in the proper exercise of discretion, the PPDA Tribunal considers otherwise. The PPDA Tribunal should make such awards only if satisfied that it is fair to do so, having regard to whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as; failing to comply with an order or direction of the Tribunal without reasonable excuse, failing to comply with PPDA Act, the Regulations, Rules or any other enabling enactment, seeking unnecessary or avoidable adjournments, causing unnecessary or avoidable, attempting to deceive another party or the Tribunal,

the nature and complexity of proceeding, a party who makes an application that has no tenable basis in fact or law or otherwise conducting the proceeding vexatiously. Counsel submitted that if the Tribunal finds the Respondent for serious breach of the Act, the Respondent should not be condemned to costs because the Respondent conducted itself properly before the proceedings before the Tribunal.

5.0 RESOLUTION BY THE TRIBUNAL

- 5.1 In resolving the Application, the Tribunal considered the documents availed to it, and made reference to the submission by both parties.
- 5.2 Section 90 (3) of the Act 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.
- 5.3 Section 90(7) (a) and (b) of the Act prohibits an Accounting officer from entering into a contract with a bidder during the period of administrative review, set out in Part VII of the Act.
- 5.4 The Tribunal established that on 19th June 2019, Motorcare Uganda Limited applied for administrative review to the Accounting Officer of the Respondent and on 24th June 2019, the Respondent issued a decision in respect to the application for administrative review by Motorcare Uganda Limited. On the 25th June 2019, after issuing a decision, the Accounting Officer signed a contract with the Best Evaluated Bidder without observing the ten working days window provided under Section 90(3) of the Act.

The Tribunal further established that a copy of the decision of the Accounting Officer was received by the Authority on 27th June 2019; which was two days after the Respondent had signed a contract with the Best Evaluated Bidder. The Act provides under Section 90 (4) that a decision of an Accounting Officer made under section 90 (2) (b) is subject to a review by the Authority. The Accounting Officer can only go ahead to implement his/her decision after the Authority fails to pronounce itself on the decision of the Accounting Officer within the time given under section 90 (4); this is provided for under Section 90 (5) of the Act.

In the impugned procurement the Accounting Officer signed a contract with the Best Evaluated Bidder before submitting her decision, reached under Section 90 (2) (b), to the Authority. Clearly, there was failure on the part of the Accounting Officer to act as the law obligates one to act under Sections 90 (3), 90 (4), 90 (5) and 90 (7).

As was emphasized by the Supreme Court of Uganda in the case of *Galleria In Africa Limited Vs Uganda Electricity Distribution Company Limited (See Civil Appeal No. 08 Of 2017)*, it was held that procurement and disposal activities are processes, one cannot move to another stage of the processes without fulfilling the first one as set out in the Act and the attendant Regulations. The provisions of the Act are for all purposes and intents mandatory and non-compliance with them makes the proceedings fatal.

The Tribunal accordingly finds that there was serious breach of the PPDA Act, 2003 by the Respondent in respect of the impugned procurement on account that the Entity entered into a contract during the administrative review period.

- 5.5 The Tribunal also relied on the above case of *Public Procurement and Disposal of Public Assets Authority Vs Arua Kubala Park Operators and Market Vendors Cooperative Society Limited, High Court Civil Appeal No. 5 of 2015* cited by the

Counsel for the Respondent. Having considered the facts in the instant Reference, the Tribunal finds that the Applicant did not satisfactorily give reasons why the Tribunal should award costs in this Reference. Accordingly, the Tribunal declines to award costs in this Reference.

6.0 **DECISION OF THE TRIBUNAL**

1. The Tribunal makes a declaration that there was serious breach of the PPDA Act, 2003 by the Respondent in respect of the impugned procurement on account that the Entity signed a contract with the Best Evaluated Bidder during the administrative review period.
2. Each Party shall bear its own costs

Dated at Kampala this 30th day ofAugust..... 2019.

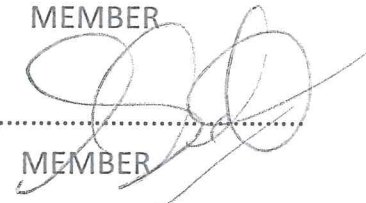
SIGNED by the said
OLIVE ZAALE OTETE


.....
CHAIRPERSON

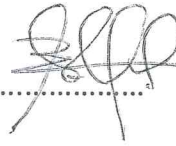
SIGNED by the said
DAVID KABATEREINE


.....
MEMBER

SIGNED by the said
ABRAHAM NKATA


.....
MEMBER

SIGNED by the said
ENG. THOMAS BROOKES ISANGA


.....
MEMBER