

UGANDA / JUDGMENT

Wendi v Public Procurement & Disposal of Public Assets Authority (Application 1 of 2015) [2015] UGPPDPAAT 8 (7 May 2015)

[2015] UGPPDPAAT 8

COURT

Public Procurement and Disposal of Public Assets
Appeals Tribunal

BEFORE

Olive Zaare Otete - Chairperson, Moses Jurua
Adriko SC - Panel Member, David Kabateraine -
Panel Member, Joel Kateregga - Panel Member

CASE / FILE NUMBER

Application 1 of 2015

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THE REPUBLIC OF UGANDA**PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS APPEALS TRIBUNAL
(PPDA APPEALS TRIBUNAL)****APPLICATION N0.1 OF 2015**

APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT TO THE PROCUREMENT OF PROVIDERS FOR THE MANAGEMENT OF KABOLWA FISH LANDING MARKET, **BULIISA DISTRICT**

APPLICANT: JAMES WENDI

RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY

(Before: OLIVE ZAALE OTETE- CHAIRPERSON, MOSES JURUA ADRIKO- MEMBER, DAVID KABATERAINE-MEMBER and ARCHITECT JOEL KATEREGGA-MEMBER)

DECISION OF THE PPDA APPEALS TRIBUNAL**\$1.0\$ BACKGROUND/FACTS**

\$1.1\$ Buliisa District Local Government on 1st December 2014 invited bids for the management of Kabolwa Fish Landing Site market for the period January 2015 to June 2015 at a reserve price of UGX 600,000= per month. Two bids were $\mathbf{1}$ received; one from James Wendi (Applicant) and the other from Godfrey Balikenda. The evaluation committee

recommended award of the contract to Godfrey Balikenda at UGX 800,000= per month. The Notice of Best Evaluated Bidder (BEB) displayed from 19th to 30th December 2014 indicated that the Applicant was unsuccessful because he had a lower bid price of UGX 735,000= per month.

- \$1.2\$ Dissatisfied with the decision of the evaluation committee, the Applicant applied to the Chief Administrative Officer (Accounting Officer), Buliisa District Local Government for administrative review. The application for administrative review was rejected by the Accounting Officer on account that there was no merit in all the grounds raised by the Applicant.
- By letter dated 21st January 2015, the Applicant applied to the Public \$1.3\$ Procurement and Disposal of Public Assets Authority (Authority) for administrative review of the Accounting Officer's decision. On 25th February 2015, the Authority issued its decision in respect of the application for administrative review. The decision upheld the application by the Applicant. The Authority in its decision however noted the Applicant's bid expired on 27th January 2015 and that there was no evidence of extension of bid validity. The Authority advised Buliisa District Local Government, among others, to consider retendering the procurement since the bids had expired.
- \$1.4\$ The Applicant is not satisfied with the decision of the Authority, hence this Application for a review of the decision of the Authority.

APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION. \$2.0\$

On 21st April 2015, the Applicant lodged an application with the Public Procurement and Disposal of Public Assets Appeals Tribunal (the Tribunal)

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seeking to have the decision of the Authority reviewed for the following reasons:

- 1. The Applicant is aggrieved by the decision of the Authority directing retendering the procurement process; the Authority having upheld the Applicant's grounds of objection, the proper order by the Authority should have been to direct that the Applicant be awarded the contract *for revenue collection since the Applicant was eligible and qualified.*
- 2. During the administrative review process, the procurement process was *suspended; that it could not be argued that the Applicant's bid expired following the suspension of the bidding process by the Authority.*
- On 27th April 2015, the Tribunal wrote to the Authority (letter copied to \$2.1\$ Applicant) requesting the Authority to provide the Tribunal with:-
- \$(1)\$ written response to the allegations or grounds of appeal;
- \$(2)\$ record of proceedings;

- \$(3)\$ all documents that the Authority relied on to arrive at its decision.
- \$2.2\$ In the same letter, the Tribunal directed both parties to file with the Tribunal written submissions.

\$3.0\$ DISPOSAL OF APPLICATION

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

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- \$(1)\$ Notice of Appeal against the decision of the Authority dated 21st April 2015 and the correspondences between the Applicant and the Authority attached to the Application as Annexes.
- The Response filed by the Authority dated 28th April 2015. \$(2)\$
- The Applicant's written submissions and Annexes to the submissions. \$(3)\$
- \$(4)\$ The Respondent's written response and Annexes attached thereto, and written submissions.
- The Tribunal summoned both parties for a hearing on 7th May 2015. The \$3.1\$ Applicant was represented by Jacob Sewaali of KMA Advocates who were holding brief for M/s Kasangaki & Co Advocates. Mr. James Wendi, the Applicant attended the hearing. The Authority was represented by Mr John Kallemera and Ms. Nakiwaala Shiela.
- \$3.2\$ The issues for resolution by the Tribunal were the following:-
 1. Whether the Authority can direct Buliisa District Local government to award a contract to the Applicant.
 2. Whether the Tribunal can invoke its powers to direct Buliisa District Local *government to award a contract to the Applicant.*
 - 3. Whether the bid of the Applicant is still valid.
 - 4. Remedies

4.0 RESOLUTION OF ISSUES

Issue one (1): Whether the Authority can direct Buliisa District Local *Government to award a contract to the Applicant.*

Counsel for the Applicant argued issue 1 and 3 concurrently. The gist of \$4.1\$ Counsel's argument in both the application and in the written submissions was that having upheld the Applicant's application for administrative review,

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the proper order to have been made by the Authority should have been an order directing that the Applicant be awarded the contract for revenue collection.

- The Applicant contended that the public policy considerations of section 91 of the Public Procurement and Disposal of Public Assets Act, 2003, (the Act) to suspend procurements during administrative review period is to stop the running of timelines in the procurement process. The Applicant submitted that the suspension of the procurement process by the Authority during the administrative review process put in abeyance the timelines set in the procurement process; and that the bid validity period therefore could not be said to have expired.
- \$4.3\$ The Applicant argued, in the alternative, that the Authority had the jurisdiction to extend the bid validity period and order for re-evaluation and award of the contract to the Applicant, but that the Authority erroneously exercised or omitted to exercise the jurisdiction. Counsel quoted *regulation* 49 of the Local Government (Public Procurement and Disposal of Public Assets) Regulations S. I 19 of 2014, which inter alia, states that while determining the bid validity period, sufficient time shall be allowed to, among other things, allow the bidder to challenge the award decision before the contract is formed. Counsel further stated that regulation 49 (4) to (7) of the said regulations provides for extension of bid validity. Counsel reiterated that the Authority had the jurisdiction to extend the bid validity period to enable the Applicant to challenge the award decision before the contract is formed.
- \$4.4\$ In response, Counsel for the Authority submitted that the Authority did not have the mandate to direct Buliisa District Local Government to award the contract to the Applicant. That a procuring and disposing entity (PDE) is

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independent in the execution of its procurement and disposal functions under Section 38 of the PPDA Act 2003 and Regulation 13 of the Local Government (PPDA) Regulations, 2006.

- \$4.5\$ Counsel further submitted that Buliisa District Local Government had the mandate to award the contract for the management of Kabolwa Fish Landing Market in accordance with the procurement laws and policies; that it is therefore erroneous and/or misconceived for the Applicant to assert that the Authority should have directed that the Applicant be awarded the contract for the management/revenue collection of Kabolwa Fish Landing Market.
- \$4.6\$ On the issue of bid validity, the Authority submitted that Part 1 of the bidding procedures in the bidding document provided that the bids were to remain valid for a period of thirty (30) working days from the date of bid opening. The Applicant submitted his bid on the 16th December 2014 and the thirty (30) working days expired on the 27th January 2015, and that there was no evidence adduced of any extension of the bid validity period.

- The Authority submitted that the Applicant's bid expired on 27th January 2015. \$4.7\$ That regulation 49 (5) of the Local Government (PPDA) Regulations, 2006 provides that where an extension to the bid validity period becomes necessary, a bidder shall be requested in writing, before the expiry of validity of their bid, to extend the validity.
- 4.8 Counsel further submitted that there was no evidence that Buliisa District Local Government requested any of the bidders to extend the validity of their bids prior to the expiry of the bid validity period.

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- The Authority cited Application No. 5 of 2014 Hoima Taxi/Bus Owners and \$4.9\$ Drivers Savings and Credit Cooperative Society where the Tribunal held that the bid validity period is not frozen once a procurement process is suspended and that Regulation 49 (5) of the Local Government (PPDA) Regulations, 2006 specifically provides for how bid validity period may be extended.
- \$4.10\$ The Authority further submitted that the only method of extension of the bid validity period is as provided under regulation 49 (5) of the Local Government (PPDA) Regulations, 2006 and that administrative review proceedings do not affect in any manner whatsoever the bid validity period. That accordingly, the Applicant's bid expired on 27th January 2015 as stated in the decision of the Authority.
- The Tribunal will handle the two issues concurrently. As to whether the \$4.11\$ Authority can direct Buliisa District Local Government to award a contract to the Applicant, the Tribunal looked no further than the Act in resolving this issue. The power to award contracts has been specifically given to the Contracts Committee by section 29(c) of the Act. Section 29(c) provides that the contracts committee shall award contracts in accordance with applicable procurement or disposal procedures.
- Section 8 of the Act provides for the regulatory powers of the Authority. None \$4.12\$ of the powers specified therein includes a power to direct an entity to award a contract. The Authority is empowered by section 8(e) of the Act to act upon complaints by procuring and disposing entities, providers or any other entity or person, in respect of any procurement or disposal activity, following the procedure in section 91. Under section 91, the Authority is only empowered to suspend the procurement process during an administrative review. There is

no specific power given to the Authority under section 91 to direct the award of a contract.

- \$4.13\$ In answer to issue number 1, the Tribunal finds that the Authority could not have directed the entity to award a contract to the Applicant because the Authority possesses no such power under the Act, the power having been specifically conferred on contracts committees by section 29(c) of the Act.

- \$4.14\$ On the issue of whether the Applicant's bid was valid, the Tribunal recalled its decision in Application No. 5 of 2014 Hoima Taxi/Bus Owners and Drivers Savings and Credit Cooperative Society. In that case just like in the instant case, the Applicant argued that once the administrative review process was commenced by the Accounting officer, the procurement proceedings were suspended and the time of the bid was frozen; that the bid of the Applicant was still as valid as it was at the point of administrative review.
- \$4.15\$ The Tribunal found in Hoima (supra), and has not been persuaded in the instant Application to depart from that finding, that a bid validity period is not frozen when a procurement process is suspended. Regulation 49 (4) and (5) of the Local Government PPDA Regulations specifically provide for how bid validity period may be extended. Regulation 49(5) provides that where an extension to the bid validity period becomes necessary, a bidder shall be requested in writing, before the expiry of validity of their bid, to extend the validity for a minimum period to complete the process outlined in regulation 49 (3), which process includes the challenge by a bidder of an award decision before a contract is formed.
- 4.16 In the instant case, the Entity, Buliisa District Local Government did not request bidders to extend their bids. The standard bid document issued by 8

Buliisa District Local Government at page 6 of 39 states that bids must remain valid until 30 days from the date of bid opening. The date of bid opening is shown as 16th December 2014 and thus the bid therefore expired on 27th January 2015).

\$4.17\$ Be that as it may, the Tribunal notes that in the instant case, the bid validity period (thirty days) was not sufficient. It should be noted that regulation 49(3) (c) of the Local Government (PPDA) Regulations 2006, provides that when determining the duration of a bid validity period, sufficient time shall be allowed to a bidder to challenge the award decision before a contract is formed. It is the finding of the Tribunal that a bid validity of thirty days as was the case in the instant case is insufficient. The Tribunal advises the Authority to require procuring and disposing entities to comply with regulation 49(3) (c) of the Local Government (PPDA) Regulations 2006 when determining bid validity periods.

\$4.18\$ Issue 2. Whether the Tribunal can invoke its powers to direct Buliisa District Local Government to award a contract to the Applicant.

In their written submissions, the Applicant asked the Tribunal to reverse the decision of the Authority and to direct the Entity to award the contract to the Applicant. At the hearing, Counsel for the Applicant submitted that the Tribunal should invoke its power under section 911 (5) (b) to direct the Entity to award the contract to the Applicant. For ease of reference, section 911 (5) (b) is reproduced here below:

"911 (5) (b) In reviewing a decision before it, the Tribunal may direct the concerned procuring and disposing entity, with respect to anything to be done or redone in the procurement or disposal process."

- 4.19 In response, Counsel for the Authority argued that the Tribunal has no power under the law to direct an entity to award a contract. He reiterated his earlier submission that the power to award a contract lies with the Entity.
- 4.20 The Tribunal finds, as it has in issue 1, that the Act has specifically given the power to award contracts to the contracts committee, and no other body.
- \$4.21\$ In answer to issue number 2, the Tribunal finds that it cannot direct the entity to award a contract to the Applicant because the Tribunal possesses no such power under the Act, the power having been specifically conferred on contracts committees by section 29(c) of the Act.

\$5.0\$ REMEDIES

Counsel for the Applicant prayed that the Tribunal exercises its power under section 911 (5) (d) of the Act to award the Applicant compensation for costs incurred as a result of the unlawful decision of the Authority.

- \$5.1\$ The Authority submitted that the Application lacks merit and it should be dismissed with costs.
- \$5.2\$ Having found that the decision of the Authority advising the Entity to retender the procurement was lawful, the Tribunal declines to order the payment of compensation by the Authority to the Applicant.

DECISION OF THE TRIBUNAL

1. The Tribunal affirms the advice of the Authority to the Entity as contained in the Decision of the Authority dated 25th February 2015 as follows:

"The Authority advises the Entity to:

- i. *Consider retendering the procurement since the bids expired;*
- Refund the administrative review fees to the complainant in ii. accordance with the Local Governments (PPDA) Guideline No. 5 of 2008; and
- iii. Refund the amount paid in advance to Mr. Godfrey Balikenda since he has no contract with the Entity"
- 2. Each party shall meet its own costs.

Dated at Kampala this 7th Day of May 2015.

SIGNED by the said

OLIVE ZAALE OTETE

SIGNED by the said

MOSES JURUA ADRIKO

SIGNED by the said

DAVID KABATERAINE

SIGNED by the said

ARCHITECT JOEL KATEREGGA

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