

**THE REPUBLIC OF UGANDA
PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
APPEALS TRIBUNAL**

APPLICATION NO. 15 OF 2022

BETWEEN

EARTH SAVERS MOVEMENT UGANDA CHAPTER:.....:APPLICANT

AND

UGANDA ELECTRICITY TRANSMISSION

COMPANY LIMITED :.....: RESPONDENT

**APPLICATION FOR ADMINISTRATIVE REVIEW IN RESPECT OF THE
PROCUREMENT OF NGO SUPPORT FOR SUSTAINABLE
RESETTLEMENT IN COMMUNITY DEVELOPMENT, LIVELIHOOD
ENHANCEMENT AND VULNERABLE SUPPORT PROCUREMENT
REFERENCE NUMBER: UETCL/CONS/2019-20/00008**

**BEFORE: PATRICIA K. ASIIMWE, NELSON NERIMA, THOMAS
BROOKES ISANGA AND CHARITY KYARISIIMA; MEMBERS.**

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. On 6th July 2020 Uganda Electricity Transmission Company Limited issued a Request for Expression of Interest notice in the New Vision newspaper for the procurement of Non-Governmental Organisation (NGO) support services in the sustainable resettlement of community development, livelihood enhancement and vulnerable support, Procurement Reference No. UETCL/CONS/2019-2020/00008.
2. Six bidders submitted their Expressions of Interest in the procurement namely; Adriot Consult International, Earth Savers Movement Uganda Chapter, Community Vision Uganda, Community Care for Development Uganda, Habitat for Community Uganda and Centre for Research and Sustainable Solutions.
3. The bids were evaluated and 3 of the 6 bidders were disqualified. Earth Savers Movement Uganda Chapter (the Applicant), Habitat for Community Uganda and Centre for Research and Sustainable Solutions (CRSS) were recommended for shortlisting.
4. On 30th November 20212020, the three shortlisted bidders were issued with the Request for Proposals Bidding document. The procurement was divided into 5 lots namely Lot 1- Gulu-Agago Project, Lot 2-Kole-Gulu-Nebbi-Arua Project, Lot -3 -Mirama-Kabale Project, Lot 4-Masaka-Mbarara Project, and Lot 5-Mutundwe-Entebbe. The three shortlisted bidders submitted their bids which were received by the entity on 6th January 2021.
5. As was required under the bidding document, the bidders indicated that their bids would remain valid until 6th July 2021.
6. The proposals were evaluated, and the notices of Best Evaluated Bidder were displayed on 29th April 2022. The notices indicated Centre for Research and Sustainable Solutions as the best Evaluated Bidder for lots 1, 2, 3, and 4 each at a contract price

of UGX. 170,859,280. Habitat for Community Uganda was displayed as the best-evaluated bidder for lot 5 at a contract price of UGX. 72,587,196.

7. The Notices of Best Evaluated Bidder indicated that the applicant failed at the preliminary Evaluation stage because the bidder did not have an NGO operating Permit or Trading Licence.
8. On 10th May 2022, the Applicant being dissatisfied with the decision of the Respondent filed a complaint directly to the Tribunal.

B. Application to the Tribunal

9. The applicant raised the following grounds:
 - a) The advert that appeared in the New Vision Newspaper of Thursday 9th July 2020 did not state having an NGO operating permit, or a trading licence as required.
 - b) There was no probe as to whether the applicant has a trading licence.
 - c) That Centre for Research and Sustainable Solutions Ltd which was the best-evaluated bidder for 4 lots, did not submit an NGO operating permit since the company is not listed on the updated list of NGOs from the National Bureau of Non-Governmental Organisations.
 - d) That Habitat for Humanity Uganda, the best evaluated bidder for lot 5 should not have been evaluated because they submitted 'other' bid documents at the time of bid opening and that the presiding officer put this fact on record.
 - e) That the Applicant was fraudulently excluded from the procurement process.

C. REPLY TO THE APPLICATION

10. The Respondent averred that the application was premature and misleading because the accounting officer did not make a decision to which the Applicant seeks review.
11. The application is frivolous, misconceived and barred in law since

the applicant did not apply to the accounting officer for administrative review.

12. The applicant did not lodge the complaint within 10 working days from the date of the alleged breaches.

D. THE ORAL HEARING

The Tribunal held a hearing on 27th May 2022 using the Zoom online platform. The appearances were as follows:

1. Counsel Madinah Kabagenyi represented the Applicant.
2. Edward Rwabushenyi Senior legal Officer Uganda Electricity Transmission Company Limited represented the Respondent.
3. The Best Evaluated Bidders:
 - a) LOT 1 – 4 - Centre for Research and Sustainable Solutions represented by Counsel Obed Mwebesa and Beyanga Benjamin.
 - b) Lot 5 - Habitat for Community Uganda represented by Fred Mukholi

E. SUBMISSIONS

The parties' written and oral submissions were as follows:

Applicant

1. Counsel for the Applicant submitted that the Applicant was wrongfully disqualified for failure to submit a trading licence and yet the Applicant qualified and was shortlisted under the Request for Expression of Interest stage of the procurement process.
2. That the best-evaluated bidder for lot 5-Habitat for Community Uganda submitted their bid documents late, after the time for bid submission had elapsed.
3. The Applicant opted not to apply to the accounting officer for administrative review because the entity was the very one that had "messed up the process."

The Respondent

4. The respondent raised the preliminary issues as follows:

5. That the Application was premature because the Applicant did not apply to the accounting officer for administrative review contrary to sections 89(1) and (2) of the Public Procurement and Disposal of Public Assets Act 2003 as amended. The Applicant should have filed an application for administrative review with the accounting officer and paid the requisite fees in accordance with section 89 (3) (a) of the Public Procurement and Disposal of Public Assets Act 2003 as amended.
6. That the Applicant can only file the application with the Tribunal where the accounting officer does not make a decision or communicate a decision within 10 days of receiving a complaint from a bidder.
7. Under section 89(9) and section 91I(1) an applicant may apply directly to the Tribunal for administrative Review in cases where the applicant believes that the accounting officer has a conflict of interest. That the applicant fell short of showing how the respondent's accounting officer is conflicted or why the applicant believes that the respondent cannot handle the matter impartially.
8. The Applicant filed the Application to the Tribunal one day late. Under section 91I (2) (c), the application should be made within 10 days from when the omission or breach is alleged to have taken place. The applicant became aware of the alleged breach on 29th April 2022 when the best-evaluated bidder notice was displayed. The complaint was filed on 10th May, one day out of time.
9. That under section 89(10) of the Public Procurement and Disposal of Public Assets Act 2003 as amended, where a bidder intends to make an application to the Tribunal, the bidder shall give the accounting officer notice. The Respondent averred that the applicant erroneously disregarded the requirement to give notice.
10. The bidding document provided for the mandatory requirement that the bidder is registered as an NGO. The Applicant is not an

NGO and thus would never emerge as the best evaluated bidder.

The Best Evaluated Bidders:

- a) The representative of Centre for Research and Sustainable Solutions the bidder submitted that they participated in the bidding process and satisfied all the requirements.

- a. The representative of Habitat for Community Uganda stated that they submitted the original bid within the stipulated time. They did however submit copies of the original bid after the time of closure of bid submission, and they were clearly marked 'copy'. They further submitted that in the event of any discrepancy between the original and the copies the original will take precedence.

F. SUMMARY DECISION

On 30th May 2022, the Tribunal issued a summary disposition whereby we struck out this Application. We now issue our detailed decision.

G. RESOLUTION BY THE TRIBUNAL

Preliminary issue:

The Tribunal deems it necessary to resolve the preliminary points of law which the Tribunal has framed as one main issue with sub issues as follows:

Whether the Application is competent before the Tribunal:

- a) Whether the application was filed in time
- b) Whether the applicant has *Locus standi* to file the present Application before the Tribunal
- c) Whether the Applicant's failure to give notice to the respondent's accounting officer renders the application incompetent

Resolution of the Issues:

Whether the Application is competent before the Tribunal:

- a) Whether the application was filed in time
1. In the instant case, the Application was made directly to the Tribunal. The applicant in its application stated that they did not apply to the accounting officer for administrative review “since they are the ones who messed up the process.”
 2. Under **section 89 (9) of the Public Procurement and Disposal of Public Assets Act of 2003 as amended by Act No. 15 of 2021**, where a bidder believes that the Accounting Officer has a conflict of interest in respect of the complaint, commission or breach that would be made under this section or that the matter cannot be handled impartially by the procuring and disposing entity, the bidder shall make an application to the Tribunal for determination of the complaint, omission or breach.
 3. Under **section 91I(2) (c), of the Public Procurement and Disposal of Public Assets Act** as amended an application made under section 89 (9) shall be made within ten days from the date when the omission or the breach by the procuring and disposing entity is alleged to have taken place.
 4. In the instant application, the notices of the best evaluated bidder indicating Centre for Research and Sustainable Solutions and Habitat for Community Uganda as the best evaluated bidders for lots 1-4 and lot 5 respectively, were displayed and sent to all bidders on 29th April 2022.
 5. The alleged breach or omission, therefore, took place on 29th April 2022, since that is when the decision of the entity was officially communicated to the public and copy communicated to all bidders. The applicant had ten days from this date within which to file the present application. The ten days expired on 9th May 2022. The Applicant filed this application on the 10th of May 2022. The present application was therefore filed out of time.
 6. The Tribunal has previously held that the provisions in the Public Procurement and Disposal of Public Assets Act are mandatory. See ***Super Taste Ltd V Bank of Uganda, Application No. 33***

of 2021, and *Apa Insurance Uganda Limited V. Uganda National Roads Authority, Application No. 2 of 2022.*

7. The Tribunal relies on the Supreme Court decision in ***Galleria in Africa Ltd versus Uganda Electricity Distribution Company Ltd (Civil Appeal-2017) [2018] UGSC 19*** where court held that:
“.....there’s no way the Act can regulate practices in respect of public procurement and disposal of public assets unless if the provisions are adhered to strictly to the letter. The provisions cannot be directory merely. They are for all purposes and intents mandatory and noncompliance with them makes the proceedings fatal. Procurement and Disposal activities are processes; one cannot move to another stage of the processes without fulfilling the first one”.
8. ***In the case of Makula International Ltd versus Cardinal Nsubuga & Another Civil Appeal No. 4 of 1981***, court held that it is well established that a court has no residual or inherent jurisdiction to enlarge a period laid down by statute.
9. The Tribunal, therefore, finds that the application to the Tribunal was time barred, and the Tribunal does not have jurisdiction over this application.
- b) Whether the applicant has *Locus standi* to file the present Application before the Tribunal
 - i) Whether the applicant has Valid Bid:
10. Under **section 89 (9) of the Public Procurement and Disposal of Public Assets Act as amended**, a bidder may apply directly to the Tribunal where a bidder believes that the Accounting Officer has a conflict of interest or that the procuring and disposing entity will not be impartial in handling the matter.
11. Under section 3 of the Public Procurement and Disposal of Public Assets Act as amended, a bidder is a physical or artificial person intending to participate or participating in public procurement or disposal proceedings.

12. Under section 3 for an applicant to have *locus standi* under **section 89 (9) of the Public Procurement and Disposal of Public Assets Act as amended**, the applicant must be a person physical or artificial either:
 - a) intending to participate, or
 - b) participating in public procurement or disposal proceedings.
13. The Applicant does not fall under 12(a) above since they submitted a bid. The issue is whether they fall under 12 (b).
14. Under Regulation 52 (5) of the **Public Procurement and Disposal of Public Assets Regulations (Rules and Methods) For Procurement of Supplies, Works and Non- Consultancy Services) Regulations, No. 8 of 2014** a procuring and disposing entity may where necessary, request a bidder in writing, before the expiry of the validity of their bid, to extend the validity for a specified period to complete the evaluation process, contract award and signature.
15. The Applicant's bid was valid up to 6th July 2021. The Tribunal has been furnished with evidence indicating that Centre for Research and Sustainable Solutions and Habitat for Community Uganda were requested by the respondent to extend their bid validity and did extend their bid validity. However, the Tribunal has not been furnished with evidence indicating that the Applicant was requested by the respondent to extend its bid validity and extended its bid validity. The Applicant's bid, therefore, expired on 6th July 2021.
16. Therefore, at the time of filing its application, the Applicant was no longer participating in the procurement proceedings and therefore not a bidder. The applicant, therefore, had no *locus standi* to file the present application under section 89 (9) of the Public Procurement and Disposal of Public Assets Act as amended.

17. The Tribunal handled a similar matter in the case of **K- Solutions Ltd Vs. Ministry of Energy and Mineral Development Application No. 16 of 2021**. The Tribunal held that the applicant whose bid had expired had no *locus standi* to apply for administrative review.
18. The Tribunal, therefore, finds that the Applicant had no *locus standi* to file the present application because its bid had expired at the time of filing the present application.
 - ii) Whether there is belief that that the Accounting Officer has a Conflict of Interest
19. The applicant in its application stated that it opted not to apply for administrative review at the level of the accounting officer because “they are the very ones who messed up the process.”
20. Under **section 89 (9) of the Public Procurement and Disposal of Public Assets Act as amended**, where a bidder believes that the Accounting Officer has a conflict of interest in respect of the complaint, commission or breach that would be made under this section or that the matter cannot be handled impartially by the procuring and disposing entity, the bidder shall make an application to the Tribunal for determination of the complaint, omission or breach.
21. Under the above provision a bidder may apply for administrative review directly to the Tribunal where the bidder believes that:
 - a) the accounting officer has a conflict of interest, or
 - b) the matter cannot be handled impartially by the procuring and disposing entity.
22. The Tribunal considered the issue of conflict of interest in **Tribunal Application No. 18 of 2021 between Abasamia Hwolerane Association Ltd and Jinja City Council**. The Tribunal stated that allegations of conflict of interest of the Accounting Officer in respect of the complaint, omission or

breach or partiality by the procuring and disposing entity in handling a matter must be pleaded and proved.

23. In this case the applicant has not pleaded any facts or adduced any evidence to prove that the accounting officer of the respondent has a conflict of interest in the matter.
24. In the same matter, (Tribunal Application No. 18 of 2021 between Abasamia Hwolerane Association Ltd and Jinja City Council) the Tribunal handled the issue of impartiality. In that matter the Tribunal relied on the case of **Mohammed Oladapo Ojengbede v. M. O. Esan (Loja-Oke)** (S.C. 132/1991) [2001] NGSC 58 where the supreme court held that "... in cases involving allegations of bias or real likelihood of bias, there must be cogent and reasonable evidence to satisfy the court that there was, in fact, such bias or real likelihood of bias as alleged."
25. The Applicant has not proved cogent and reasonable evidence to show that the complaint, commission or breach could not be handled by the procuring and disposing entity impartially. The Applicant, therefore, has no locus standi to file an application under section 89 (9) of the Public Procurement and Disposal of Public Assets Act as amended.
 - c) Whether the Applicant's failure to give notice to the respondent's accounting officer renders the application incompetent
26. The respondent argued that the Applicant did not comply with Section 89(10) of the Public Procurement and Disposal of Public Assets Act as amended and therefore the application should be struck out. Section 89 (10) of the PPDA Act provides that "Where a bidder intends to make an application to the Tribunal under subsection (8) or (9), the bidder shall give the Accounting Officer notice within five working days ...".
27. The Tribunal handled the issue of failure to give notice under section 89 (10) of the Public Procurement and Disposal of Public Assets Act as amended in **Tribunal Application No. 8 of 2021 between Elite Chemicals Limited and Uganda Coffee Development Authority**. The Tribunal relied on the case of


Kampala Capital City Authority Vs Kabandize and 20 Others, Supreme Court Civil Appeal No. 13 of 2014 and held that “it is now settled law that failure to serve statutory notice does not vitiate the proceedings.”

28. The Tribunal, therefore, finds that the application before the Tribunal is incompetent.
29. Since the application is incompetent, the Tribunal has not deemed it necessary to delve into the substantive issues.


DISPOSITION

1. This Application lodged on 10th May 2022, was filed out of time.
2. The applicant’s bid had expired at the time of filing the application, therefore, the applicant has no locus to file the instant application before the Tribunal.
3. The Applicant did not have locus standi to file the instant application before the Tribunal under section 89 (9) of the PPDA Act, 2003.
4. For the reasons stated above, this Application is incompetent and is struck out.
5. The Tribunal’s suspension order dated 23rd May 2022, is vacated.
6. Each party shall bear its own costs.


Dated at Kampala this 7/06/ 2022.



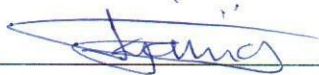
PATRICIA K. ASIIMWE
MEMBER



NELSON NERIMA
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THOMAS ISANGA BROOKES
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CHARITY KYARISIIMA
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