

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

APPLICATION NO. 15 OF 2021

BETWEEN

BEAUTIFUL ENGINEERING & EQUIPMENT LTD=====APPLICANT

AND

**UGANDA ELECTRICITY TRANSMISSION
COMPANY LIMITED=====RESPONDENT**

**APPLICATION FOR REVIEW IN RESPECT OF THE PROCUREMENT FOR THE
SUPPLY OF TRANSFORMER OIL UNDER PROCUREMENT REFERENCE NO.
UETCL/SUPLS/2020-21/00261.**

**BEFORE: FRANCIS GIMARA S.C, CHAIRPERSON; NELSON NERIMA;
THOMAS BROOKES ISANGA AND PAUL KALUMBA, MEMBERS**

DECISION OF THE TRIBUNAL

A. Brief Facts

1. On 1st April 2021, Uganda Electricity Transmission Company Limited (the Respondent) advertised (issued an Invitation to bid under open domestic bidding under procurement notice UETCL/SUPLS/2020-21/00261), a procurement for supply of Transformer Oil in the New Vision Newspaper.
2. On 28th April 2021, the Respondent received bids from five (5) bidders. The evaluation process was concluded with the publication of the Best Evaluated Bidder (BEB) Notice dated on 23rd July 2021, which indicated that Senah International Limited was the best evaluated bidder with a contract price of UGX 238, 171, 200/=.
3. It was stated in the BEB Notice that Beautiful Engineering & Equipment Limited (the Applicant) failed at the preliminary stage of evaluation and the reason was that it did not satisfy the commercial requirements of the evaluation criteria.
4. On 29th July 2021, the Applicant wrote to the Manager, Procurement and Disposal Unit of the Respondent, indicating that they disagreed with the reasons advanced for disqualification of their bid and requested that the conclusions of the Respondent be reconsidered.
5. In an undated letter referenced SM/ac/03/08, the Manager of the Procurement and Disposal Unit of the Respondent responded to the Applicant's letter and disagreed with the submissions of the Applicant.
6. On 10th August 2021, the Applicant then wrote to the Public Procurement and Disposal of Public Assets Authority (PPDA) requesting for an administrative review but were advised by the Authority on 13th August 2021 to lodge the Application before the Tribunal in light of the amendment introduced by the Public Procurement and Disposal of Public Assets (Amendment) Act, 2021.
7. On 2nd September 2021, the Applicant filed the instant Application before the Tribunal to challenge the outcome of the entire procurement process.

B. Application to the Tribunal

1. The Applicant avers that the Respondent improperly exercised its powers and mandate under the law in its disqualification of the Applicant's bid and that the rejection of its bid was irregular. That the actions of the Respondent were *malafide*

since it involved improper exercise of power or abuse of discretion.

2. That the Respondent was estopped from rejecting the Applicant's use of letters of credit after admitting that the Applicant could use the same.
3. The Applicant contends that it did not impose the letters of credit terms on the Respondent by force but that the Respondent had a choice to offer the Applicant an opportunity should they accept the 3% discount that was indicated as conditional should they accept the payment by letters of credit terms.
4. The Applicant prayed for corrective measures for the Tribunal to instruct the Respondent to suspend the procurement process until the administrative review process is complete; to carry out a re-evaluation of bid with the Applicant's participation and involvement; and for costs of this application to be provided for.
5. That there is no major difference in the procedure of payment prescribed in the General Conditions of Contract and that of a letter of credit that would entitle the Respondent to out rightly reject the Applicant's bid.
6. The Applicant named Uganda Electricity Transmission Company Ltd as the Respondent to the Application.

C. Reply to the Application

7. The Respondent argues that the Applicant is not entitled to the reliefs it seeks from the Tribunal.
8. The Respondent submitted that it shall raise preliminary points of law at the commencement of the hearing and apply to have the Application struck out or dismissed with costs on the ground that the Application did not disclose a cause of action against the Respondent; it was premature/misleading since the Accounting Officer had not made a decision in the matter; it was frivolous, misconceived, bad and barred in law; and that it was an abuse of the Tribunal's process.

9. That Senah International Limited was rightfully evaluated as Best Evaluated Bidder.
10. That the Applicant's bid was non-responsive to the commercial terms of the solicitation document. That the Applicant's introduction of Letters of Credit in its bid was an outright rejection of the provisions contained in the bidding document.
11. The Respondent contends falsehood on the part of the Applicant that a representation had been made accepting the introduction of letters of credit. That the Applicant was referring to a different meeting with different subject matter.
12. That the Applicant has not made any application to the Accounting Officer seeking administrative review and so had been brought in abuse of the Tribunal's processes.
13. That the Application is baseless and prayed that the Tribunal dismiss it with costs.

Rejoinder

14. The Applicant in rejoinder averred that it is on record that it made an application to the Respondent's Accounting Officer for administrative review. The Applicant made reference to paragraph 7 and Annexure H of the Application.
15. The Applicant argued that Section 89 of the PPDA Act on payment of administrative review fees is not mandatory since it does not provide a sanction. That the Tribunal has the discretion to permit a litigant to pay the fees in deficit.
16. That the conclusion arrived at by the Respondent was uninformed of the said provisions of the law, biased and as such wrong and misleading. That **Section 91I (1) of the Public Procurement and Disposal of Public Assets (Amendment) Act 2021** provides the persons with locus to apply to the Tribunal to review a decision of a procuring and disposing entity and that the Applicant falls within the provisions of **Section 91I (1) (a) of the Public Procurement and Disposal of Public Assets Act** as amended by **Act 15 of 2021**.

D The oral hearing

1. The Tribunal held an oral hearing on 21st September 2021 via zoom software. The appearances were as follows:
2. Counsel Annet Nanfuma (holding brief for Hon. Medard Lubega Ssegona) represented the Applicant. Guster Bukenya, the Managing Director, Douglas Kayongo, the General Manager and Kiiza Job, the Head of Projects of the Applicant attended.
3. The Respondent was represented by Mr. Edward Rwabushenyi, the in-house legal counsel. Carol Atuhairi, the Procurement Officer of the Respondent, attended.
4. The Best Evaluated Bidder did not attend the oral hearing.

E. Submissions

During the oral hearing, the Applicant and Respondent adopted their written submissions.

Applicant

1. The Applicant adopted its written submissions as well as its submissions in rejoinder.
2. The Applicant prayed for the Tribunal to consider its written submissions and the prayers therein.

Respondent

1. The Respondent adopted its written submissions and the prayers therein.
2. The Respondent reiterated its submissions that the Application brought before the Tribunal is immature. That the PPDA Act as amended provides the process for administrative review with the first step being an application to the Accounting Officer. That the Applicant instead first went to the PPDA Authority instead of the Accounting Officer. That the Applicant's failure to apply to the Accounting Officer prior to its application to the Tribunal was wrong and that therefore this Application is improperly brought before the Tribunal.

3. That the Application be struck out or dismissed with costs on the ground that the Application did not disclose a cause of action against the Respondent; it was premature/misleading since the Accounting Officer had not made a decision in the matter; it was frivolous, misconceived, bad and barred in law; and that it was an abuse of the Tribunal's process.

F. RESOLUTION BY THE TRIBUNAL

Preliminary Objection

1. The Tribunal has considered the submissions of all parties. The Tribunal will deal first with the preliminary points of law raised.
2. The Respondent at paragraph 5(a)-(d) of its Statement of Defence, raised preliminary points of law regarding the competence of the Application and reiterated the objections at the hearing. The preliminary points of law are: -
 - (i) *The Applicant did not apply to the Accounting Officer for review and as such there is no decision to review.*
 - (ii) *The Applicant did not pay the requisite fees for review by the Accounting Officer.*
 - (iii) *The Applicant did not commence this application within 10 working days from the date of the alleged breaches.*
3. In light of the preliminary objection, the Tribunal has opted to assess whether there is a valid and competent Application before the Tribunal. We have reviewed the Applicant's submissions in support of the Application, Respondent's submissions and the Applicant's submissions in rejoinder.
4. **Section 89 (1) of the Public Procurement and Disposal of Public Assets Act** as amended by **Act 15 of 2021 2021** states that "*A bidder who is aggrieved by a decision of a procuring and disposing entity may make a complaint to the Accounting Officer of the procuring and disposing entity*"
5. **Section 89(3) of the Public Procurement and Disposal of Public Assets** as amended by **Act 15 of 2021 2021** states that *a complaint against a procuring and disposing entity shall:*

- a) *be in writing and shall be submitted to the Accounting Officer of the procuring and disposing entity on payment of the fees prescribed;*
 - b) *be made within ten working days after the date the bidder first becomes aware or ought to have become aware of the circumstances that give rise to the complaint.*
6. **Regulation 4(1) of the Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014** on eligibility to file a complaint to the Accounting Officer states as follows: *“A bidder who is aggrieved by a decision of a procuring and disposing entity shall make a complaint to the Accounting Officer”.*
7. **Regulation 4(2) of the Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014** is emphatic on the constituents of a complaint and it states as follows:
- The complaint made under sub regulation (1) shall indicate—*
- a) *the name and contact details of the bidder or the person representing the bidder;*
 - b) *the procurement or disposal requirement to which the complaint relates;*
 - c) *the substantive and factual grounds of the complaint, including—*
 - (i) the provision of the Act or regulations made under the Act which are the subject of the breach or omission by the procuring and disposing entity; and*
 - (ii) where known, the names of the person involved in the subject of the complaint, the events and the facts that constitute the complaint;*
 - d) *the corrective measures requested by the bidder;*
 - e) *the documentary evidence and any other evidence, relevant to the complaint, that is in the possession of the bidder; and*
 - f) *any other information relevant to the complaint.*
8. The Accounting Officer is mandated, within ten days of receipt of a complaint, to make and communicate a decision in writing, addressed to the bidder who made the complaint and indicate the reasons for the decision taken and the corrective measure to be taken, if any as per **Section 89(7) of the Public Procurement and Disposal of Public Assets Act** as amended by **Act 15 of 2021** and **Regulation 6(3) of the Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014.**

9. Where no decision is made by an Accounting Officer within ten days of receipt of a complaint, or where a bidder is not satisfied with the decision made by the Accounting Officer, the bidder has the discretion to make an application to the Tribunal in accordance with Part VIIA of the Act. This position is espoused by **Section 89(8) of the Public Procurement and Disposal of Public Assets Act** as amended by **Act 15 of 2021** and the recent decision of the Tribunal in of *Abasamia Hwolerane Association Ltd vs. Jinja City Council (JCC) Application No. 12 of 2021*.
10. Under **Regulations 6(1)(a) and 6(2) of the Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014**, the Accounting Officer shall not investigate a complaint where the complaint does not fulfil the requirement of regulation 4 and section 90(1a) of the Act;
11. We note that **section 90(1a) of the Public Procurement and Disposal of Public Assets Act 2003 (Act No 1 of 2003)** as quoted in **Regulation 6(1)(a) of the Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014** was repealed by **section 34 of the of the Public Procurement and Disposal of Public Assets (Amendment) Act 2021**.
12. However, the gist of the cited regulations is that a bidder who is aggrieved by a decision of an entity must make a compliant in writing which must be submitted to the Accounting Officer of the entity on payment of the fees prescribed.
13. **Section 3 of the Public Procurement and Disposal of Public Assets Act 2003** defines an “Accounting Officer” to mean—
 - a) *an Accounting Officer appointed as such by the Secretary to the Treasury*
 - b) *a person appointed under an Act of Parliament or under an instrument of appointment made under an Act of Parliament, including the Companies Act, to perform the functions of Accounting Officer of a procuring and disposing entity; or*
 - c) *a person appointed to perform the functions of Accounting Officer of an entity not being of Government, to which section 2(1)(d) applies;*

14. The Applicant in its letter dated 29th July 2021 wrote to the Manager, Procurement and Disposal Unit of the Respondent, indicating that they disagreed with the reasons advanced for disqualification of their bid in the Notice of Best Evaluated Bidder (NOBEB) and requested that the conclusion of the Respondent be reconsidered
15. The Tribunal finds that the letter dated 29th July 2021 was not a complaint properly so called for purposes of administrative review as contemplated in the Act. The letter was addressed to the **Manager, Procurement and Disposal Unit** of the Respondent and not the **Accounting Officer** of the Respondent.
16. There can be no confusion between the office of the Head, Procurement and Disposal Unit and the Accounting Officer of a procuring and disposing entity. This is because **section 27 of the Public Procurement and Disposal of Public Assets Act 2003** states the composition of a procuring and disposing entity to be made of:
 - a) *an Accounting Officer defined in section 3;*
 - b) *a Contracts Committee;*
 - c) *a Procurement and Disposal Unit;*
 - d) *a User Department as defined in section 3; and*
 - e) *an Evaluation Committee*
17. While an Accounting Officer defined in section 3 is established under **section 26 of the Public Procurement and Disposal of Public Assets Act 2003**, the Procurement and Disposal Unit is established under **section 30 of the Public Procurement and Disposal of Public Assets Act 2003**.
18. The powers and functions of the Accounting Officer are set out in **section 26(1) - (5) of the Public Procurement and Disposal of Public Assets Act 2003 (Act No 1 of 2003)**. The said powers and functions are distinct and bear no semblance to the powers of the Procurement and Disposal Unit set out in **section 25(1) and 31 of the Public Procurement and Disposal of Public Assets Act 2003**.
19. **Section 26(1)(h) & (i) of the Public Procurement and Disposal of Public Assets Act 2003** is emphatic that the Accounting officer is amongst other duties, in charge of “*investigating complaints by providers*” and “*submitting a copy of any complaints and reports of the findings to the Authority*”. This mandate is further

fortified by the wording of **Sections 89(1), 89(3)(a), 89(5), 89(6) and 89(7) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021**. Only the Accounting Officer can perform the functions in the cited sections, while investigating complaints by providers.

20. The Applicant's letter of 29th July 2021 was addressed to the wrong office for purposes of an Administrative Review. This omission is further exacerbated by the non-payment Administrative Review fees or non-accompaniment of the Application with proof of payment of the fees prescribed.
21. Annexure "H" to the Application, which the Applicant's counsel relied on, is not an application for Administrative Review to the Accounting Officer of the Respondent. It is a purported "application for administrative review" to the Public Procurement and Disposal of Public Assets Authority dated 10th August 2021. The Authority correctly advised the Applicant in a letter dated 13th August 2021 that following commencement of the PPDA (Amendment) Act 2021, the Authority ceased handling applications for administrative review.
22. Had the Application been addressed to the correct office, then payment of fees prescribed would have been made or the Entity would have been under a duty to advise the Applicant on the modalities of payment of the said fees as the Tribunal has held in *Obon Infrastructure Development JV vs. PPDA & Mbarara City, Application No. 5 of 2021, Samanga Elcomplus JV vs. PPDA & Uganda Electricity Distribution Company Limited, Application No.4 of 2021*.
23. It is clear that the Applicant's purported application to the Manager, Procurement and Disposal Unit of the Respondent and later to the Public Procurement and Disposal of Public Assets Authority were not valid and competent applications to the Accounting Officer for administrative review as required by section 89 of the **Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021**. Without a valid and competent compliant, there is no way the Tribunal can exercise its jurisdiction to hear the Application.
24. There are only four instances under which the Tribunal can exercise its jurisdiction. These instances are provided for under **sections 89(8) and 89(9)**, read together with **section 91I(1)(a)-c) of the Public Procurement and Disposal of Public Assets (Amendment) Act 2021** namely;

- a) *Where an Accounting Officer does not make a decision or communicate a decision within the period specified in subsection (7), or*
 - b) *where a bidder is not satisfied with the decision made by the Accounting Officer under section 89(8), or*
 - c) *Where a bidder believes that the Accounting Officer has a conflict of interest in respect of the complaint, omission or breach that would be made under this section; or*
 - d) *where a Bidder believes that the matter cannot be handled impartially by the procuring and disposing entity.*
25. It is very clear that the Applicant did not seek the Tribunal's review powers under or pursuant to any of the aforementioned four instances. The Tribunal cannot therefore exercise its jurisdiction in this Application.
26. In this respect, the Tribunal is guided by the case of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1* where Justice Nyarangi JA (as he then was) held
- "I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, court has no power to make one more step. Where court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction."*
27. The Court of Appeal of Kenya proceeded to define jurisdiction and its source as follows:
- If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or Tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."*
28. The Supreme Court in *Galleria in Africa Ltd vs. Uganda Electricity Distribution Company Ltd (Civil Appeal-2017) [2018] UGSC 19* 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”.

29. Further, the Tribunal in its decision in ***Hoima Taxi/Bus Owners and Drivers Saving and Credit Cooperative Society Vs PPDA Application No.5 of 2014*** where it was held that “*Part VII of the Act shows that a bidder who is aggrieved by the decision of the entity shall first lodge a claim with the Accounting Officer of the Entity. That all sections that come after section 90 deal with the procedure stated by lodging a compliant with the Accounting officer of the entity in the present case, the applicant never filed a complaint with the Accounting Officer under Section 90 of the Act and as such the issue was answered in the negative*”
30. The Tribunal finds that an Application brought before it without a complaint having been lodged before the Accounting Officer of the Respondent is incurably defective and incompetent.
31. **The Tribunal upholds the preliminary objection and strikes out the Application.**
32. Having so decided, the Tribunal cannot delve into the merits of the case.

G. DISPOSITION

1. The preliminary objection is upheld.
2. The Application is struck out.
3. The procurement process should resume and be concluded in accordance with the law.
4. The Tribunal’s suspension order dated 2nd September 2021 is vacated.
5. Each Party to bear its own costs.

Dated at Kampala this 22nd day of September 2021.



FRANCIS GIMARA, S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



THOMAS BROOKES ISANGA
MEMBER



PAUL KALUMBA
MEMBER