

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

APPLICATION NO. 1 OF 2022

BETWEEN

ELITE CHEMICALS LIMITED =====APPLICANT

AND

UGANDA COFFEE DEVELOPMENT AUTHORITY =====RESPONDENT

**APPLICATION FOR REVIEW IN RESPECT OF THE PROCUREMENT FOR THE
SUPPLY OF IMIDACLOPRID PESTICIDES UNDER PROCUREMENT
REFERENCE NUMBER UCDA/SUPLS/20-21/00119**

**BEFORE: FRANCIS GIMARA S.C, CHAIRPERSON; NELSON NERIMA; THOMAS
BROOKES ISANGA; GEOFFREY NUWAGIRA KAKIRA; PAUL KALUMBA;
PATRICIA ASIIMWE AND CHARITY KYARISIIMA, MEMBERS**

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. On 21st December 2020, Uganda Coffee Development Authority (The Respondent) advertised a Bid Notice in the New Vision Newspaper inviting bidders for the supply of Imidacloprid pesticide with the deadline of bid submission on 21st January 2021. Elite Chemicals Ltd (The Applicant) participated and submitted a bid to the Respondent for the above stated procurement.
2. On 26th May 2021, the Respondent displayed on its Procurement Notice Board the Notice of Best Evaluated Bidder with a removal date of 11th June 2021 in respect of the above subject procurement. The Applicant had been disqualified on the ground stating: *“Bidder failed at the preliminary stage. Bidder failed at the Ethical Code of Conduct because the bidder submitted documents with irregularities”*.
3. In a letter dated 4th June 2021, the Applicant, being dissatisfied and aggrieved by the outcome of the process as displayed in the Notice of Best Evaluated Bidder, requested Respondent’s Accounting Officer to provide information on the documents submitted which were found to have irregularities and the extent of such irregularities for purposes of instituting an administrative review application.
4. In a response letter dated 10th June 2021, Ref: UCDA/ADM/79, the Respondent’s Accounting Officer advised the Applicant on payment of Administrative Review fees but declined to provide information on the documents submitted which were found to have irregularities and the extent of such irregularities.
5. On 11th June 2021, the Applicant applied to the Respondent’s Accounting Officer for administrative review protesting the ground disclosed in the Best Evaluated Bidder Notice as the reason for its disqualification.
6. On 11th June 2021, the Accounting Officer suspended the procurement process and carried out the Administrative Review process.
7. By a letter dated 21st June 2021 and referenced UCDA/ADM/79 and

received via WhatsApp social media platform on 28th June 2021, the Accounting Officer dismissed the Applicants' application for Administrative Review.

8. On 9th July 2021, the Applicant, having been dissatisfied with the decision of the Accounting Officer, appealed to the PPDA Appeals Tribunal vide Application No. 8 of 2021.
9. On 27th July 2021, the Tribunal held a hearing for Application No. 8 of 2021 which was attended by all the parties, and delivered its decision on 29th July 2021 ordering the Entity to conduct a fresh evaluation of the bids in a manner consistent with the Tribunal's decision, the PPDA Act 2003, the Regulations, and Guidelines thereof.
10. On 29th November 2021, the Entity published a Notice of Best Evaluated Bidder after having carried out a re-evaluation of the bids. The Applicant's bid was rejected for submission of additional documents after the bid submission deadline date.
11. On 6th December 2021, the Applicant wrote a letter to the Accounting Officer requesting to be provided with the details of the additional documents submitted that altered its bid and other relevant information to aid in its application for administrative review.
12. On 7th December 2021, the Accounting Officer responded stating that the Entity rejected the Applicant's bid and reported the matter to the Public Procurement and Disposal of Public Assets Authority (PPDA). The evaluation report was also attached to the letter and shared with the Applicant.
13. On 10th December 2021, the Applicant applied for administrative review again before the Accounting Officer and paid the relevant administrative review fees. However, the Accounting Officer did not make a decision in response to the application within the statutory period.
14. On 5th January 2022, the Applicant applied to the Tribunal for administrative review being aggrieved with the procurement process.

B. APPLICATION TO THE TRIBUNAL

1. The Applicant averred that the Entity and Accounting Officer erred in law and fact when they rejected its bid on account that the bidder altered the substance of its bid when it submitted a certificate of an agrochemical dealer on 3rd August 2021 after the deadline of bid submission on 21st January 2021 in the name of another person, Ahabwe Abraham Azaria, following the expiry (on 19th February 2021) of the certificate originally submitted in the name of Joweria Chemutayi.
2. The Applicant prayed that the Tribunal find merit in its application, annul and set aside the decision of the Contracts Committee that awarded the contract for the subject procurement to M/s Trust Chemicals Ltd at UGX. 3,171,270,000 VAT inclusive following the fresh bid evaluation ordered by the Tribunal.
3. The Applicant prayed that the Tribunal orders the Entity to reinstate and implement the decision of the Contracts Committee that awarded the contract to the Applicant at UGX. 2,257,030,000 VAT inclusive at its 20th meeting held on 9th April 2021.
4. The Applicant also prayed in the alternative, that the Tribunal finds it necessary to order the Entity to re-evaluate the bids and award the contract to the successful bidder in not more than 30 working days from the date of the decision by the Tribunal. Further, that the Entity be ordered to refund the administrative review fees of the Applicant and to cover the costs of this application.

C. REPLY TO THE APPLICATION

1. The Respondent averred that the Applicant's submission of a new certificate of dealership after closure of the bids amounted to a change in the substance of its bid which prompted the Respondent to reject and report the matter to the Public Procurement and Disposal of Public Assets Authority (PPDA) in accordance with Regulation 9 (b) of the PPDA (Evaluation) Regulations 2014.
2. The Respondent argued that it acted in accordance with the Tribunal's earlier decision by carrying out a re-evaluation process and the Evaluation Committee recommended Trust Chemicals Ltd as the Best Evaluated

Bidder. That the decision to reject the Applicant's bid was proper and lawful in the circumstances.

3. The Respondent contended that the Contracts Committee considered the re-evaluation report, approved it, and awarded the contract to the Best Evaluated Bidder, Trust Chemicals Ltd.
4. The Respondent averred that the Applicant is not entitled to the remedies sought and prayed that the application be dismissed with costs.

D THE ORAL HEARING

The Tribunal held an oral hearing on 17th January 2022 via zoom software. The appearances were as follows:

1. Counsel Kakuru Luke and the Director of the Applicant, Nkoreki Chrissy Abel represented the Applicant.
2. The Respondent was represented by Richard Adubango (Counsel for the Respondent), Emmanuel Iyamulemye (Accounting Officer), Alex Rugonde Acting Manager Procurement, Paddy Wanzala Procurement Consultant, and Rachel Ayoo , the Legal Officer.
3. The Best Evaluated Bidder, Trust Chemicals Ltd was represented by the Managing Director, Bashaija Moses; Company Secretary, Akankwasa Angella, and Counsel Patrick Katabazi.

E. SUBMISSIONS

During the oral hearing, the Applicant and Respondent highlighted their written submissions and also provided clarifications to the Tribunal.

Applicant

1. The Applicant contended that the preliminary objection raised by the Respondent stating that the application was filed out of time was not backed by law. The Applicant argued that the ten days referred to in **sections 89(7)** and **91I of the PPDA Act** refer to ten working days and not ten calendar days.
2. Counsel for the Applicant further argued that in statutory interpretation, one should look at the intention of the legislator and in this case, it is to

restore public confidence in the legal system. Counsel Kakuru prayed that the Tribunal strike out the preliminary objection raised by the Respondent and proceed to hear the matter on its merits.

3. The Applicant averred that the Entity and Accounting Officer erred in law and fact when they rejected its bid on account that the bidder altered the substance of its bid when it submitted a certificate of an agrochemical dealer on 3rd August 2021 after the deadline of bid submission on 21st January 2021 in the name of another person, Ahabwe Abraham Azaria, following the expiry (on 19th February 2021) of the certificate originally submitted in the name of Joweria Chemutai.
4. The Applicant prayed that the Tribunal find merit in its application, annul and set aside the decision of the Contracts Committee that awarded the contract for the subject procurement to M/s Trust Chemicals Ltd at UGX. 3,171,270,000 VAT inclusive following the fresh bid evaluation ordered by the Tribunal.
5. The Applicant prayed that the Tribunal orders the Entity to reinstate and implement the decision of the Contracts Committee that awarded the contract to the Applicant at UGX. 2,257,030,000 VAT inclusive at its 20th meeting held on 9th April 2021.
6. The Applicant also prayed in the alternative, that the Tribunal finds it necessary to order the Entity to re-evaluate the bids and award the contract to the successful bidder in not more than 30 working days from the date of the decision by the Tribunal. Further, that the Entity be ordered to refund the administrative review fees of the Applicant and to cover the costs of this application.

Respondent

1. The Respondent raised a **preliminary objection** that the application was filed out of time. The Respondent contended that the application should have been filed within ten (10) days from the date that the Accounting Officer ought to have made and communicated his decision as per **section 89(7) of the PPDA Act**.
2. The Respondent further averred that there is no provision within the procurement law of Uganda that allows the Tribunal to enlarge time within

which to file an application and that therefore the Tribunal ought not to entertain this application.

3. The Respondent averred that the Applicant's submission of a new certificate of dealership after closure of the bids amounted to a change in the substance of its bid which prompted the Respondent to reject and report the matter to the Public Procurement and Disposal of Public Assets Authority (PPDA) in accordance with **Regulation 9 (b) of the PPDA (Evaluation) Regulations 2014**.
4. The Respondent argued that it acted in accordance with the Tribunal's earlier decision by carrying out a re-evaluation process and the Evaluation Committee recommended Trust Chemicals Ltd as the Best Evaluated Bidder. That the decision to reject the Applicant's bid was proper and lawful in the circumstances.
5. The Respondent contended that the Contracts Committee considered the re-evaluation report, approved it, and awarded the contract to the Best Evaluated Bidder, Trust Chemicals Ltd.
6. The Respondent averred that the Applicant is not entitled to the remedies sought and prayed that the application be dismissed with costs.

Best Evaluated Bidder

1. The Best Evaluated Bidder associated itself with the submissions of the Respondent and prayed that the Tribunal grants the prayers of the Respondent as requested.

F. RESOLUTION BY THE TRIBUNAL

Issues

The Tribunal deems it necessary to resolve the following preliminary point of law raised:

- i. *Whether there is a competent application for administrative review before the Tribunal?*

Resolution of Issues Raised

Issue 1

Whether there is a competent application for administrative review before the Tribunal?

1. **Section 89 (1) of the Public Procurement and Disposal of Public Assets Act, 2003** as amended by Act 15 of 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.
2. **Section 89 (3) of the Public Procurement and Disposal of Public Assets Act, 2003** as amended by Act 15 of 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.*
3. This application is premised on **sections 89(8) and 89(9)**, read together with **section 91I(1)(a)-c) of the Public Procurement and Disposal of Public Assets Act** as amended by Act 15 of 2021 and principally based on the failure of the Accounting Officer to make a decision.
4. The Tribunal notes that the Applicant made its application to the Accounting Officer of the Respondent within time on 10th December 2021. However, the Respondent's Accounting Officer did make and communicate a decision within ten days, which expired on 20th December 2021, as required by **Section 89 (7) of the Public Procurement and Disposal of Public Assets Act 2003 (as amended)**.

5. The Applicant thereafter proceeded to seek administrative review from Tribunal by filing its application on 5th January 2022. This position is espoused by **Section 89(8) of the Public Procurement and Disposal of Public Assets Act 2003 (as amended)** and the recent decision of the Tribunal in ***Abasamia Hwolerane Association Ltd versus Jinja City Council (JCC) Application No. 12 of 2021*** which are to the effect that an Applicant may seek administrative review from the Tribunal where an Accounting Officer does not make or communicate a decision within the prescribed statutory period of ten (10) days.
6. **Section 91I (2) (b) of the Public Procurement and Disposal of Public Assets Act 2003 (as amended)** provides that in cases where the Accounting Officer has not furnished a decision within the required statutory period, the application to the Tribunal shall be made within ten (10) days from the date of expiry of the period specified in Section 89 (7) of the Public Procurement and Disposal of Public Assets Act 2003 (as amended).
7. The “days” stipulated in sections **89 (7) and 89 (8) and 91I (2) (b) of the Public Procurement and Disposal of Public Assets Act 2003 (as amended)** are not “working days”. See the recent Tribunal decision in **APPLICATION NO. 33 OF 2021- SUPER TASTE LIMITED versus BANK OF UGANDA.**
8. The Tribunal finds that the time within which the Accounting Officer had to have made and communicated a decision to the Applicant expired on 20th December 2021. The ten days within which the Applicant had to apply for administrative review to the Tribunal started running from 21st December 2021 and lapsed on 30th December 2021. This rendered the last day for lodging the Application to the Tribunal being Thursday 30th December, 2021.
9. We find, therefore, that the Applicant ought to have filed its application with the Tribunal not later than Thursday 30th December, 2021 in accordance with **Section 91I (2) (b) of the Public Procurement and Disposal of Public Assets Act 2003 (as amended)**. However, the application was filed on 5th January 2022. The application was therefore filed out of time and the jurisdiction of the Tribunal is extinguished rendering the matter incompetent.
10. Having concluded that the application is incompetent for being filed out of time, a further question for the Tribunal is whether the Tribunal has power to grant extension of time to validate the application.

11. Justice Stephen Mubiru in ***Afayo Luiji & Another versus Izio Enzama*** **High Court Misc. Application No. 73 of 2017** stated that in an application for extension of time, what is required to be proved is that: -
 - a. *there is an enabling provision in the statute providing for the period within which to appeal, that allows for extension of time. In absence of such a provision, courts do not have jurisdiction to extend or enlarge the time fixed by statute.*
 - b. *the applicant was prevented by sufficient cause from taking the necessary step of filing the appeal within the period of time. Sufficient cause must relate to the inability or failure to take the particular step in time.*
 - c. *the applicant is not guilty of any unexplained, dilatory conduct resulting in an inordinate delay in lodging the appeal;*
 - d. *there is a prima facie arguable appeal; and*
 - e. *the extension will not be prejudicial to the respondent.*
12. In the present circumstances, there is no enabling provision within the **Public Procurement and Disposal of Public Assets Act 2003** that accords the Tribunal power to enlarge or extend time. The Civil Procedure Act and the Rules on time extension cannot be used in this regard, as they have no foundation under the PPDA Act 2003 to stand on. The jurisdiction of the Tribunal, it must be emphasised, is only available when the Application for Administrative Review has been filed within ten (10) days from the date of the decision of the Authority.
13. In ***Makula International Ltd versus Cardinal Nsubuga & Another Civil Appeal No. 4 of 1981***, it was held that a court has no residual or inherent jurisdiction to enlarge a period of time laid down by statute.
14. This precedent was authoritatively relied on by the Supreme Court of Uganda in ***Sitenda Sebalu versus Sam K. Njuba & Another Election Petition Appeal No. 5 of 2007*** wherein it held that if there is no statutory provision or rule, then the court has no residual or inherent jurisdiction to enlarge a period of time laid down by statute or rule.
15. The Tribunal has pronounced itself on this issue before in ***Empire Tools versus PPDA Application No. 8 of 2019*** and in ***Kiyindi Electrical & Engineering Ltd v PPDA Miscellaneous Application 1 of 2020*** where it

found that it did not have the inherent or residual jurisdiction to enlarge the time set out in Section 91 L (1) (c) of the Act and that the Tribunal Regulations are subsidiary to the Act which clearly specifies the time within which an application to the Tribunal can be filed in accordance with Section 91 L (1) (c) of the Act.

16. In this respect, the Tribunal is further guided by the case of **Owners of Motor Vessel "Lillian S" versus 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."
17. 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."
18. Indeed, the Supreme Court in **Galleria in Africa Ltd versus 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".
19. **The Tribunal answers this question in the negative. The application is incompetent for being filed out of time and the jurisdiction of the Tribunal is extinguished as far as the matter is concerned.**

G. DISPOSITION

1. The Application is incompetent and is therefore struck out.
2. The procurement process may proceed to its logical conclusion.
3. The Tribunal's suspension order dated 6th January 2022 is vacated.
4. Each Party to bear its own costs.

Dated at Kampala this 18th day of January 2022.



FRANCIS GIMARA S.C
CHAIRPERSON




NELSON NERIMA
MEMBER



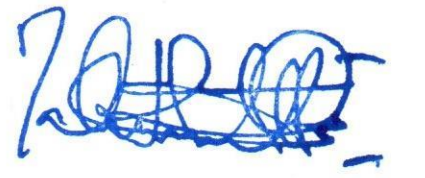
PATRICIA ASIIMWE
MEMBER



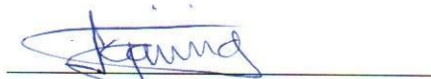
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PAUL KALUMBA
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