

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

APPLICATION NO. 2 OF 2022

BETWEEN

APA INSURANCE UGANDA LIMITED ::::::::::::::::::::::::::: APPLICANT

AND

UGANDA NATIONAL ROADS AUTHORITY ::::::::::::::::::::::::::: RESPONDENT

**APPLICATION FOR REVIEW OF THE DECISION OF THE ACCOUNTING
OFFICER OF UGANDA NATIONAL ROADS AUTHORITY IN RESPECT OF
THE PROCUREMENT FOR PROVISION OF COMPREHENSIVE
INSURANCE SERVICES FOR MOTOR VEHICLES AND ROAD
EQUIPMENT FOR A PERIOD OF THREE YEARS UNDER PROCUREMENT
REFERENCE NUMBER UNRA/NCONS/20-21/00147**

**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 13th February 2020 the Respondent initiated a procurement for the Provision of Comprehensive Insurance Services for Motor Vehicles and Road Equipment for a Period of Three Years using the open domestic bidding method of procurement.
2. The Applicant together with five (5) other bidders submitted their Bids to the Respondent and the Bidding closed on 29th September 2021.
3. A best evaluated bidder notice was issued on 13th December 2021 which indicated that M/s NIC General Insurance Company Limited was the Best Evaluated Bidder for the Provision of Comprehensive Insurance Services for Motor Vehicles and Road Equipment for a Period of Three Years at an evaluated annual total price of UGX. 5,044,428,852/= (Uganda Shillings; Five Billion Forty Four Million Four Hundred twenty eight thousand eight hundred fifty two only) inclusive of all applicable taxes.
4. The best evaluated bidder notice also indicated the unsuccessful bidders and the reasons thereof. In respect of the Applicant, it was stated that the bidder committed to obtain a performance security of UGX. 250,000,000 which was less than 10 % of their bid price of UGX 3,935,054,627.71/=. That ITB 13.1 (f) required the amount of the performance security to be 10 % of the contract price.
5. On 20th December, 2021 the Applicant submitted an application to the Accounting Officer of the Respondent for Administrative Review indicating that the Respondent had wrongfully found it non-compliant on the basis of not committing to furnish a Performance Security that was not 10% of the Total Annual Premium amount, without seeking clarification from it. The Applicant stated that it was

willing to furnish a performance security of 10 % of UGX 3,935,054,627.71/= which is UGX. 393,505,462.8.

6. The Accounting Officer of the Respondent dismissed the Application on 6th January 2022. The Applicant, however, avers that it received the decision on 12th January 2022.
7. The Applicant being dissatisfied with the decision of the Accounting Officer of the Respondent lodged the instant application with the Tribunal on 13th January 2022.
8. The Application did not frame any issues for determination by the Tribunal. The issues stated are in the form of prayers i.e.

ii) APA Insurance be given a chance to correct the arithmetic error of the performance security as per Statutory Instrument 2014 No. 6 Section 10 (2) (b). [sic]

iii) APA Insurance bid be considered and a contract accordingly awarded to us since we were the lowest bidder to achieve value for money by saving tax payer's money worth UGX 1,109,374,224.3 while utilizing the same services with APA Insurance . [sic]

B. RESPONSE TO THE APPLICATION

1. The Respondent raised an objection that this application is not properly brought before the Tribunal and is premature for failure to comply with section 89(10) of the *Public Procurement and Disposal of Public Assets Act* as amended by Act 15 of 2021.
2. In respect of the merits of the application the Respondent contended that ITB 13.1 (f) required the bidder to commit to submit the Performance Security required and the amount stated in the bidding document. That the bidder indicated in its bid a proposed Total

Annual Premium of UGX. 3,935,054,627.71 inclusive of taxes. The Bidding Document required the performance security amount to be a figure which is 10% of the proposed Total Annual Premium, which in this case ought to have been UGX. 393,505,462.77. However, the Applicant in its statement in the Bid Submission Sheet (f) indicated that the Bidder shall provide a Performance Security of UGX. 250,000,000. The said amount did not comply with the 10% requirement under ITB 13.1 f.

3. That this non-conformity could not be cured under the guise of correction of arithmetic errors or seeking clarification because the non-conformity amounted to a material deviation whose correction would change the substance and terms and conditions of the bid. It would equally substantially alter something that forms a crucial or deciding factor in the evaluation of the bid thereby offending the law.
4. That the error in the subject of procurement in para 36.1 of the General Conditions of Contract (GCC) does not negate the requirement for the bidder to provide 10% performance security and cannot be used to justify the bidder's nonconformity.
5. That the evaluation of all bids inclusive of the Applicant's bid was done in accordance with the evaluation criteria stated in the bidding document. The disqualification of the Applicant's bid on grounds of material deviation from the statement of requirements was done in accordance with the law. The Respondent contends that the present Application is devoid of merit, is frivolous, and, vexatious.
6. The Respondent prayed that the Application be dismissed and costs be awarded to the Respondent.

C. SUBMISSIONS

Applicant

1. In response to the preliminary objection, counsel for the Applicant submitted that under section 89(10) of the *Public Procurement and*

*Disposal of Public Assets Act as amended by Act 15 of 2021 does not affect the Applicant's rights of audience before the Tribunal and is a mere technicality which can be cured under article 126 (2)(e) of the Constitution. Counsel further argued that the Respondent deliberately delayed to communicate its decision to the Applicant, having communicated its decision to the Applicant two days to the expiry of the Applicant's period within which to appeal to the Tribunal. Counsel relied on the case of **Roko Construction Limited vs Public Procurement and Disposal of Public Assets Authority & Ors H.C.C.A No. 59 of 2017** where it was held that to use filing time restrictions to throw out the appeal on a preliminary objection without addressing the substantive issues of illegality that the appeal raises would amount to a miscarriage of justice to the prejudice of the Appellant. It would also be to use technicalities to defeat substantive justice contrary to article 126 (2) (e) of the Constitution.*

2. In respect to the merits, issue 1, counsel submitted that the Evaluation Committee erred in disqualifying the Applicant's bid at the preliminary stage yet the Applicant's bid was substantially responsive and compliant, moreover the lowest of all. That the non-conformity was just an arithmetic error in the calculation of the commitment of the performance security which could be rectified, corrected or clarified.
3. In respect to issue 2, counsel submitted the variation in the commitment performance security value as against the total bid price of the applicant was an arithmetic error which could be corrected or clarified without any effect or prejudice or substitution of the bid price or documents submitted by the Applicant or the other bidders. Counsel relied on regulation 14 of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations* and ITB 27.1 and 29.1 of the bidding document.

4. Counsel submitted that the figure variation of the commitment of performance security from the percentage of the total bid price was not a material deviation to justify the disqualification of the Applicant. Counsel relied on regulation 11(4) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations* and ITB 27.1 and 29.1 of the bidding document. Counsel also cited the Indian case of **M/s. Tarmac-Tapi vs Union of India & Others OWP No. 657 of 2014** and Application No. 1 of 2016; ***China National Aero-Technology International Engineering Corporation versus Public Procurement and Disposal of Public Assets Authority***.
5. Counsel further submitted that public procurements must be conducted in a manner that promotes transparency, accountability, fairness, maximum competition, economy, efficiency, and, value for money as required under sections 45, 46, and 48 of the *Public Procurement and Disposal of Public Assets Act*. That the Respondent breached those principles when it disqualified the Applicant's bid. Counsel relied on Application No. 1 of 2016; ***China National Aero-Technology International Engineering Corporation versus Public Procurement and Disposal of Public Assets Authority***.
6. Based on the foregoing submissions, counsel prayed that the Tribunal;
 - a) Allows the application and set aside the decision of the accounting officer
 - b) Orders the Entity to permit the Applicant to correct the arithmetic error on the commitment performance security to conform to the 10% of its bid price
 - c) Orders the cancellation of the Best Evaluated Bidder Notice
 - d) Order the re-evaluation of the bids.
 - e) Orders a refund of administrative fees paid by the Applicant
 - f) Awards costs of the application to the Applicant.

Respondent

7. On the preliminary objection, counsel submitted that the bidder received the communication from the Accounting Officer regarding the Administrative review on 6th January 2022. The bidder did not issue the required five days' notice to the Accounting Officer but instead proceeded directly to make an appeal to the Tribunal on 13th January 2022.
8. Regarding the merits, counsel contended that the submission of the Applicant regarding performance security did not comply with the 10% requirement under ITB 13.1 (f).
9. That the omission was a material deviation and any attempt to cure it through clarification would have been contrary to regulations 9, 10, and 11 of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations*.
10. That the performance security amount the bidder indicated in its bid was inconsistent with ITB 13.1 (f) and therefore its bid was substantially noncompliant to the terms, conditions, and, requirements of the bidding document and this nonconformity is not an arithmetic error within the provisions of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations*.
11. That the Respondent in conducting the evaluation complied with the processes enshrined under the law as discussed above and acted with transparency, fairness with the aim of promoting economy, efficiency, and value for money in accordance with section 43 of the *Public Procurement and Disposal of Public Assets Act*.
12. Counsel, therefore, prayed that the Tribunal affirms the decision of the Respondent and dismisses this Application with costs to the Respondent.

D. THE ORAL HEARING

1. The Tribunal held an oral hearing on 3rd February 2022 via zoom software. The appearances were as follows:
 - (1) Ms. Rebecca Nakiranda of Nakiranda & Co. Advocates represented the Applicant.
 - (2) Mr. Stephen Kakembo, Agency Manager of the Applicant and Mr. Moses Ssozi, Business Development Manager were present.
 - (3) Mr. Henry Muhangi and Ms. Joan Kyomugisha of the Respondent's Directorate of Legal Services represented the Respondent.
 - (4) The Best Evaluated Bidder was represented by Mr. Bayo Folayan, Managing Director, Mrs. Jocelyn Ucanda, Head Marketing; and Mr. Elias Edu, Company Secretary.
2. The parties expounded their respective cases and responded to the questions put by the Tribunal.
3. The Best Evaluated Bidder associated themselves with the submissions of the Respondent.

E. RESOLUTION BY THE TRIBUNAL

1. The Application did not raise any specific issues for determination by the Tribunal. However, owing to the points of law which touch on the jurisdiction of the Tribunal, we have framed the points of law as issues no. 1 and 2. The issues for determination are accordingly recast as follows:

- 1) Whether the Application is premature for failure to give notice.
- 2) Whether the Application is time barred.

PPDA Appeals Tribunal Decision for Application No. 02 of 2022

- 3) Whether the Respondent erred when it disqualified the Applicant's bid for proposing a performance security less than 10 % of its bid price.
- 4) What remedies are available to the parties.

Issue 1:

Whether the Application is premature for failure to give notice

2. Section 89 (10) of the *Public Procurement and Disposal of Public Assets Act* as amended by Act 15 of 2021 provides as follows:
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 after the expiry of the period specified in subsection (3) (b) or subsection (7), as the case may be.
3. The Applicant concedes that it did not serve the notice.
4. The Tribunal has had occasion to consider this issue in **APPLICATION No. 7 OF 2021-ELITE CHEMICALS LIMITED versus UGANDA COFFEE DEVELOPMENT AUTHORITY**. We relied on ***Kampala Capital City Authority vs Kabandize and 20 Others, Supreme Court Civil Appeal No. 13 of 2014***. The position of the law is that failure to serve statutory notice does not vitiate the proceedings. Perhaps failure to serve notice may be a relevant factor to consider when deciding whether to award costs. But non service of a notice cannot vitiate the jurisdiction of the Tribunal.
5. We agree that non-service of a notice is a technicality which can be dispensed with under article 126 (2)(e) of the Constitution
6. The first preliminary objection is overruled.
7. **Issue no. 1 is answered in the negative.**

Issue 2:

Whether the Application is time barred

8. There are only five instances under which the Tribunal can exercise its jurisdiction. These instances are provided for under sections 89(8), 89(9) and 91I(1)(a), (b) and (c) of the *Public Procurement and Disposal of Public Assets Act, 2003* as amended by Act 15 of 2021 namely:
 - a) *under sections 89 (8) and 91I(1)(a), where an Accounting Officer does not make a decision or communicate a decision within ten working days as required under section 89(7), or;*
 - b) *under section 91I(1)(a), where a bidder is not satisfied with the decision made by the Accounting Officer under section 89(7), or;*
 - c) *under section 91I(1)(b), where a person's rights are adversely affected by a decision made by the Accounting Officer, or;*
 - d) *under sections 89(9) and 91I(1)(c), where a bidder believes that the Accounting Officer has a conflict of interest in respect of the complaint, omission or breach; or*
 - e) *under sections 89(9) and 91I(1)(c), where a bidder believes that the matter cannot be handled impartially by the procuring and disposing entity.*
9. In the instant case, the Applicant applied for administrative review to the Respondent's Accounting Officer on 20th December 2021.
10. Section 89(7) of the *Public Procurement and Disposal of Public Assets Act* as amended by Act 15 of 2021 requires the Accounting Officer to make and communicate a decision within ten days of receipt of a compliant. The Accounting Officer was, therefore, duty bound to make and communicate a decision on or before 30th December 2021.
11. The Accounting Officer made a "decision" on 6th January 2022. Such a decision made and communicated after 30th December 2021 was a blatant breach of the law and a nullity. Once the ten days prescribed in section 89 (7) lapse, the Accounting Officer ceases to have any

jurisdiction over that administrative review, unless he or she is subsequently directed otherwise by the Tribunal or a court of competent jurisdiction to handle the review *de novo*. An Applicant who is still interested in a remedy should thereafter invoke the jurisdiction of the Tribunal under sections 89 (8) and 91I(2)(b) of the *Public Procurement and Disposal of Public Assets Act* as amended by Act 15 of 2021.

12. A purported decision of the Accounting Officer made outside the statutory period is a nullity and cannot be the basis of an appeal to this Tribunal under section 91I(2)(a) of the *Public Procurement and Disposal of Public Assets Act* as amended by Act 15 of 2021.
13. The timelines in the *Public Procurement and Disposal of Public Assets Act* as amended by Act 15 of 2021 are mandatory. We have consistently relied on the Court decision of ***Galleria in Africa Ltd v Uganda Electricity Distribution Company Ltd (Civil Appeal No. 08 of 2017) [2018] UGSC 19*** where Mwondha, JSC held that;

*“The objectives of the Act are clear from the long title already reproduced in this judgment as to formulate policies and regulate practices in respect of public procurement and disposal activities among others. The provision for a written contract is an indication that without it, the obligations of each party have not been spelt out and if the party proceeds to implement, the implementation will be premature. **So 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 non-compliance with them makes the proceedings fatal”.***

14. Section 89 (8) of the *Public Procurement and Disposal of Public Assets Act* as amended by Act 15 of 2021 provides that where an Accounting Officer does not make and communicate a decision within the period specified in subsection (7) [i.e. within ten days], the bidder may make

an application to the Tribunal, in accordance with Part VIIA of the Act.

15. Section 91I(2)(b) of the *Public Procurement and Disposal of Public Assets Act* as amended by Act 15 of 2021 provides that an application to the Tribunal under section 89(8) [failure to make and communicate a decision] shall be made within ten days from the date of expiry of the period specified in the section.
16. It, therefore, follows that the Accounting Officer having not made a decision on or by 30th December 2021, the Applicant ought to have made an application to the Tribunal within 10 calendar days, in accordance with Part VIIA of the Act.
17. The Tribunal has given guidance on this issue in previous decisions like **APPLICATION NO. 29 OF 2021- SANLAM GENERAL INSURANCE (U) LIMITED v UGANDA NATIONAL ROADS AUTHORITY; APPLICATION NO. 33 OF 2021- SUPER TASTE LIMITED versus BANK OF UGANDA;** and **APPLICATION NO. 1 OF 2022-ELITE CHEMICALS LIMITED versus UGANDA COFFEE DEVELOPMENT AUTHORITY.**
18. In the instant case, the Applicant should have lodged this instant application within 10 calendar days from 30th December, 2021 which was the last day for the Accounting Officer to make and communicate a decision. The 10 days expired on 9th January, 2022. Therefore, the application lodged with the Tribunal on 13th January 2022 was lodged out of time.
19. Section 71A of the *Public Procurement and Disposal of Public Assets Act* as amended by Act 15 of 2021 provides that *A procurement process and each stage of the procurement process shall be completed within the period prescribed in the regulations made under this Act.* It is therefore imperative that there is strict adherence to the statutory timelines provided for in the procurement process, including the administrative review.

20. During administrative review, the Accounting Officer is required to immediately suspend the procurement or disposal process, as the case may be, under section 89 (5) of the *Public Procurement and Disposal of Public Assets Act* as amended by Act 15 of 2021. The Accounting Officer is also required to request the bidders to extend the period of the bid validity and bid security for the duration of the suspension, under section 89 (6) of the *Public Procurement and Disposal of Public Assets Act* as amended by Act 15 of 2021.
21. Suspension of a procurement process and extension of bids and bid securities cost time and money. Public projects are at stake. Public finances are also subject to budget cycles. Bidders would also like to know the outcome of the procurement process. Any failure to strictly abide by the statutory timelines would therefore be contrary to the letter, spirit and objectives of the *Public Procurement and Disposal of Public Assets Act* as amended.
22. Time limits set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with. See: ***Uganda Revenue Authority v Uganda Consolidated Properties Ltd (Civil Appeal-2000/31) [2000] UGCA 2.***
23. Timelines within the procurement statute were set for a purpose and are couched in mandatory terms. There is no enabling provision within the *Public Procurement and Disposal of Public Assets Act* that accords the Tribunal power to enlarge or extend time. Once a party fails to move within the time set by law, the jurisdiction of the Tribunal is extinguished as far as the matter is concerned.
24. 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.
25. This precedent was authoritatively relied on by the Supreme Court of Uganda in ***Sitenda Sebalu versus Sam K. Njuba & Another***
PPDA Appeals Tribunal Decision for Application No. 02 of 2022

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.

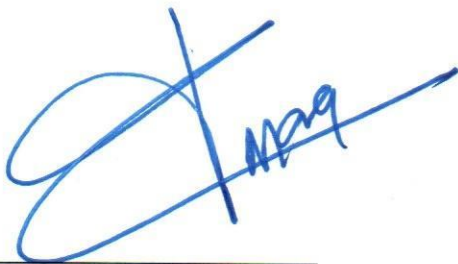
26. In conclusion, the Application lodged with the Tribunal on 13th January 2022 was therefore filed out of time and the Tribunal has no jurisdiction to entertain it. The Application is incompetent.
27. In the circumstances we shall not determine the merits of the Application.
28. **Issue no. 2 is answered in the negative.**

F. DISPOSITION

1. The Application is struck out.
2. The Tribunal's suspension order dated 14th January, 2022 is vacated.
3. The Respondent may proceed with the procurement process to its logical conclusion.
4. Each party to bear its own costs.

d

Dated at Kampala this 4th day of February, 2022.



FRANCIS GIMARA S.C
CHAIRPERSON



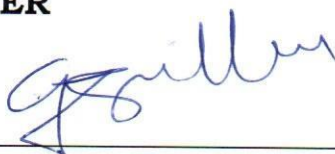
NELSON NERIMA
MEMBER



PATRICIA ASIMWE
MEMBER



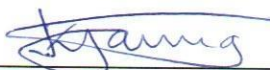
THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER