

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

APPLICATION NO. 6 OF 2022

BETWEEN

**TECHNOLOGY ASSOCIATES LIMITED IN CONSORTIUM WITH
COMVIVA TECHNOLOGIES LIMITED =====APPLICANT**

AND

POST BANK UGANDA LIMITED =====RESPONDENT

**APPLICATION FOR REVIEW IN RESPECT OF THE PROCUREMENT FOR
THE SUPPLY, INSTALLATION AND COMMISSIONING OF AN E-WALLET
SOLUTION UNDER PROCUREMENT REFERENCE NUMBER
PBU/NCONS/2021/00002**

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

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. On 30th March 2021, Postbank Uganda Limited (The Respondent/Entity) issued a call for bids for the supply, installation and commissioning of an E-wallet Solution using Open International Procurement Method under Procurement Ref No: PBU/NCONS/2021/00002.
2. On 17th May 2021, bids were received from 8 bidders namely; *Technology Associates Limited in Consortium with Comviva Technologies Ltd*(the Applicant), *Sybyl Limited*, *Service & Computer Industries (SCI) JV Moddefin*, *Blue Crane Communications JV DSCC Technology Limited*, *Computech (U) Ltd*, *Four Corners Transform Ltd* *InfrasofTech*, and *MFI Document Soutions JV Panamax Inc.* in respect to the subject procurement.
3. On 5th August 2021, the Respondent published a notice to bidders following technical evaluation with a removal date of August 13, 2021. The notice indicated that *Technology Associates Limited in Consortium with Comviva Technologies Ltd* (the Applicant) was eliminated at the technical stage having scored below the required minimum score of 75. The notice of the results of the technical evaluation listed the bidders who had not progressed to the financial evaluation stage.
4. On 16th August 2021, the Applicant, being aggrieved by the decision of the evaluation committee, made an administrative review application to the Accounting Officer of the Respondent. One of the grounds of the application was that one of the bidders, *Sybyl Limited* was not properly evaluated during the preliminary evaluation stage because it had never implemented the proposed solution anywhere.

5. On 27th August 2021, the Accounting Officer issued a decision dismissing the Applicant's application. The Respondent having disposed of the Complaint by the Applicant, proceeded with the procurement process in absence of an appeal by the Applicant.
6. On 1st February 2022, the Respondent published the Best Evaluated Bidder Notice a with a removal date of February 17, 2022, naming Sybyl Limited as the Best Evaluated Bidder with a contract price of UGX. 11,305,316,264.52.
7. On 11th February 2022, the Applicant made an administrative review application to the Accounting Officer being aggrieved by the decision of the Respondent. The main ground of the application was that the named Best Evaluated Bidder, Sybyl Limited does not have any experience in the supply, installation and commissioning of an e-wallet solution and that therefore, its bid ought to have been disqualified at the post qualification stage of evaluation.
8. On 22nd February 2022, the Applicant was issued a decision of the Accounting Officer. On 23rd February 2022, the Applicant gave notice of its intention to appeal to the Tribunal on account that the Accounting Officer did not make the administrative review decision within the statutory timeframe.
9. On 3rd March 2022, the Applicant applied to the Tribunal for administrative review being aggrieved by the decision contained in the best evaluated bidder notice and the failure of the Accounting Officer to make the administrative review decision within the prescribed statutory timeframe.

B. APPLICATION TO THE TRIBUNAL

1. The Applicant contended that the Respondent's Accounting Officer erred in law when he did not communicate the administrative review decision dated 18th February 2022 within the prescribed statutory timeframe, and this rendered the decision null and void.

2. The Applicant averred that the Entity erred in law when it did not disqualify the Best Evaluated Bidder's bid at the post qualification stage of evaluation on account that the Best Evaluated Bidder does not have any experience in the supply, installation and commissioning of an e-wallet solution.
3. The Applicant further averred that the Entity erred in law by not providing for any evaluation criteria in the bidding document for the experience and qualifications of the key personnel of the Best Evaluated Bidder.
4. The Applicant argued that the Respondent Entity erred in law by making unlawful modifications to the standard bidding document issued by the Authority for the procurement of non-consultancy services.
5. The Applicant prayed that the procurement process be cancelled on account of the various anomalies and unlawful provisions in the bidding document and the unlawful post qualification evaluation of the best evaluated bidder. Further that the Entity should be advised to conduct a re-tender of the procurement using a bidding document that has revised requirements taking into account the anomalies mentioned in this application.
6. The Applicant also prayed for a refund of the administrative review fees and for costs of this application.

C. REPLY TO THE APPLICATION

The Respondent

1. The Respondent raised a preliminary objection that the application is incurably defective for having been filed out of time, an abuse of Tribunal process and that it should be struck out with costs in accordance with section 89 (3) (b) of the **Public Procurement and Disposal of Public Assets Act**, 2003 as amended.

2. The Respondent averred that the decision of the Accounting Officer dated 18th February 2022 was inconsequential since the Accounting Officer was under no legal obligation to determine the matter as the Applicant's complaint dated 10th February 2022 was incompetent, null and void. The Respondent averred that the Applicant ought to have brought the application in accordance with section 91I (2) (a) of the **Public Procurement and Disposal of Public Assets Act** , 2003 as amended.
3. The Respondent contended that the Applicant lacks locus to bring this application before the Tribunal. More so, that the Tribunal lacks jurisdiction to hear similar issues previously raised in the application of 16th August 2021 and decided upon by the Accounting Officer and since the Applicant had filed its application out of time.
4. The Respondent further averred that the experience of the bidders was tested through the Evaluation Methodology and Criteria as stated in the bidding document. That the Applicant's claim is based on an erroneous interpretation of the clear words of the bidding document. That the documents provided by PPDA operate as a guide to procuring and disposing entities and only restrict removal or deviation from the standard documents provided by the Authority but does not prohibit addition of evaluation methodology and criteria.
5. The Respondent contended that the Applicant had not illustrated how it had been disadvantaged or inconvenienced in any way during the proceedings nor highlighted any fatal breaches which warrant cancellation of the procurement process and re-tendering of the procurement.
6. The Respondent prayed that the Tribunal dismisses the application with costs.

The Best Evaluated Bidder

7. The Tribunal also invited *Sybyl Limited*, the best evaluated bidder to make a response as an interested party.

8. *Sybyl Limited* as the Best Evaluated Bidder did not file any response to the Application but was served with all documents relating to this Application.

D. THE ORAL HEARING

The Tribunal held an oral hearing on 21st March 2022 via zoom software. The appearances were as follows:

1. John Kalemera, the Applicant's lawyer; Wycliffe Omondi, the Applicant's authorised representative and Ivan Narinda, the Legal Officer represented the Applicant.
2. The Respondent was represented by Mr. Julius Kakeeto, the Managing Director/Accounting Officer; Mr. Andrew Kabeera, the Executive Director; Mrs. Justine Tumuheki Wabwire, the Company Secretary; Mr. Kawuki Kenneth, Manager Procurement; Mr. Emmanuel Partaker, the Manager Legal Services & Counsel for the Respondent; and Mrs. Teddy Namasinga Lubowa, the Senior Legal Officer & Counsel for the Respondent.
3. The Best Evaluated Bidder was represented by Vijay Kanumuru, the Executive Director; Gigi Abraham, the General Manager; and Deus Mugabe, Counsel for the Best Evaluated Bidder.

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 Respondent's Accounting Officer erred in law when he did not communicate the administrative review decision dated 18th February 2022 within the prescribed statutory timeframe which rendered the decision null and void.

2. The Applicant averred that the Entity erred in law when it did not disqualify the Best Evaluated Bidder's bid at the post qualification stage of evaluation on account that the Best Evaluated Bidder does not have any experience in the supply, installation and commissioning of an e-wallet solution.
3. The Applicant further averred that the Entity erred in law by not providing for any evaluation criteria in the bidding document for the experience and qualifications of the key personnel of the Best Evaluated Bidder.
4. The Applicant argued that the Respondent erred in law by making unlawful modifications to the standard bidding document issued by the Authority for the procurement of non-consultancy services.
5. The Applicant prayed that the procurement process be cancelled on account of the various anomalies and unlawful provisions in the bidding document and the unlawful post qualification evaluation of the best evaluated bidder. Further that the Entity should be advised to conduct a re-tender of the procurement using a bidding document that has revised requirements taking into account the anomalies mentioned in this application.
6. The Applicant also prayed for a refund of the administrative review fees and for costs of this application.

Respondent

1. The Respondent raised a preliminary objection that the application is incurably defective for having been filed out of time, an abuse of Tribunal process and that it should be struck out with costs in accordance with section 89 (3) (b) of the PPDA Act, 2003 as amended.
2. The Respondent averred that the decision of the Accounting Officer dated 18th February 2022 was inconsequential since the Accounting Officer was under no legal obligation to determine the matter as the Applicant's complaint dated 10th February 2022 was incompetent,

null and void. The Respondent averred that the Applicant ought to have brought the application in accordance with section 91I (2) (a) of the **Public Procurement and Disposal of Public Assets Act , 2003** as amended.

3. The Respondent contended that the Applicant lacks locus to bring this application before the Tribunal. More so, that the Tribunal lacks jurisdiction to hear similar issues previously raised in the application of 16th August 2021 and decided upon by the Accounting Officer and since the Applicant had filed its application out of time.
4. The Respondent further averred that the experience of the bidders was tested through the Evaluation Methodology and Criteria as stated in the bidding document. That the Applicant's claim is based on an erroneous interpretation of the clear words of the bidding document.
5. That the documents provided by PPDA operate as a guide to procuring and disposing entities and only restrict removal or deviation from the standard documents provided by the Authority but does not prohibit addition of evaluation methodology and criteria.
6. The Respondent contended that the Applicant had not illustrated how it had been disadvantaged or inconvenienced in any way during the proceedings nor highlighted any fatal breaches which warrant cancellation of the procurement process and re-tendering of the procurement.
7. The Respondent prayed that the Tribunal dismisses the application with costs.

The Best Evaluated Bidder

8. The Tribunal also invited *Sybyl Limited*, the best evaluated bidder to make a response as an interested party. The Best Evaluated Bidder agreed with the decision of the Entity in opposing the Application.

F. RESOLUTION BY THE TRIBUNAL

Issues

We now revert to the substantive issues in this application:

- i. Whether the Accounting Officer erred in law when he did not communicate the administrative review decision dated 18th February 2022 within the prescribed statutory timeframe?*
- ii. Whether the Respondent Entity erred in law when it did not disqualify the Best Evaluated Bidder's bid at the post qualification stage of evaluation on account that the Best Evaluated Bidder does not have any experience in the supply, installation and commissioning of an e-wallet solution?*
- iii. Whether the Respondent Entity erred in law by not providing for any evaluation criteria in the bidding document for the experience and qualifications of the key personnel and by not appropriately evaluating the key personnel of the Best Evaluated Bidder?*
- iv. Whether the Respondent Entity erred in law by making unlawful modifications to the standard bidding document issued by PPDA for the procurement of non-consultancy services?*
- v. What remedies are available to the Parties?*

Preliminary Objection

1. The Respondent raised a preliminary objection that the application is incurably defective for having been filed out of time, an abuse of Tribunal process and that it should be struck out with costs.
2. The preliminary objection was premised on section 89 (3) (b) of the **Public Procurement and Disposal of Public Assets Act** as amended that requires a complaint against a procuring and disposing entity to the Accounting Officer to 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. The Respondent averred that the Applicant first became aware of the circumstances that gave rise to its complaint on 5th August 2021 when the notice of non-responsiveness to the minimum technical

requirement for the procurement was published. That in a two-stage method of procurement as was in this case, the Applicant's bid failed at the first stage where its technical bid was opened and evaluated and declared non-responsive.

4. The Respondent averred that the Applicant lodged a complaint with the Accounting Officer on 16th August 2021 and the Accounting Officer dismissed the same on 27th August 2021. That the Applicant having been dissatisfied with that decision, ought to have lodged an application with the Tribunal within ten working days from the date of receipt of that decision as per section 91I (2)(a) of the **Public Procurement and Disposal of Public Assets Act** . That the said ten days commenced on 27th August 2021 and lapsed on 9th September 2021. That an application filed on 3rd March 2022 by the Applicant is therefore incurably defective and out of time.
5. The Respondent argued that the instant application is not challenging the financial evaluation report but rather the technical evaluation report which had been overtaken by events.
6. That therefore, the Tribunal lacks jurisdiction to inquire into the merits of this Application and time limits set by the **Public Procurement and Disposal of Public Assets Act** cannot be extended.
7. The Respondent prayed that the Tribunal be pleased to find that the applicant's application is incompetent since it was brought out of time in contravention of section 91I(2)(a) of the **Public Procurement and Disposal of Public Assets Act**, thereby extinguishing the Tribunal's jurisdiction; and thus be dismissed with costs.

Resolution on the Preliminary Objection

8. The Tribunal has carefully considered the points of law raised by the Respondent against the application brought by the Applicant.
9. **Section 89 (3) of the Public Procurement and Disposal of Public Assets Act** as amended 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.*

10. In **VCON Construction (U) Ltd versus Uganda Development Bank Application 22 of 2021**, the Tribunal held that a bidder can apply for administrative review at any stage of the procurement process but in any case, within 10 working days from the date when the bidder first became aware of the circumstances giving rise to the complaint.
11. Under the **Public Procurement and Disposal of Public Assets Act** section 89(1-2) “*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*”. “*A bidder may also seek administrative review for any omission or breach by a procuring and disposing entity, of this Act, regulations or guidelines made under this Act or any provision of the bidding documents*”.
12. In procurement practice usually, a bidder first becomes aware or is assumed to have become aware of the circumstances that give rise to a complaint during the bidding process before submission of bids/proposals and after the Accounting officer has issued a decision on the results of evaluation process. Under Regulation 4 (1) of the **Public Procurement and Disposal of Public Assets (Contracts) Regulations, 2014** provides three (3) circumstances where a bidder may raise a complaint after evaluation process that is to say:
 - (i) from the date of delivery of a copy of the notice of best evaluated bidder to all bidders who participated in the bidding process, with proof of such delivery or;*
 - (ii) from the date of display of the said notice on the notice board of the procuring and disposing entity or;*

- (iii) from the date of *publication of the notice on the website of the Authority*.
13. The Applicant contends that its current grievance stems from the publication of the Best Evaluated Bidder Notice on 1st February 2022 and the later decision of the Accounting Officer dismissing its application that was issued on 22nd February 2022.
14. The Respondent's contention is that the Applicant first became aware of the circumstances that gave rise to its complaint on 5th August 2021 when the Notice of Non-Responsiveness to the minimum technical requirement was first published.
15. The Tribunal has carefully read the Applicant's application dated 3rd March 2022 and its submissions dated 11th March 2022 paying particular attention to the issues and prayers raised by the Applicant.
16. On 16th August 2021, the Applicant applied to the Accounting Officer for Administrative Review on grounds that;
- a) The bidding document did not provide sufficient clarity on the scores to be applied to technical specifications to the detriment of their proposal.
 - b) The technical evaluation of the proposed solutions could not be completed without a product demonstration in order to validate submissions contained in the proposals and;
 - c) The proposal of *Sybyl Limited* was not properly evaluated at the preliminary examination stage since the bidder had never implemented such a solution anywhere and could not therefore qualify as a bidder.
17. The Accounting Officer of the Respondent made and communicated a decision regarding the Complaint of the Applicant on 27th August 2021, in which he dismissed the Complaint for being devoid of merit.
18. Under **Section 89(7) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021**, the Accounting

Officer shall make and communicate a decision within ten (10) days of receipt of a compliant. Therefore, the Accounting Officer was bound to communicate his decision on or before the 26th of August 2021. However, the Respondent's Accounting Officer purported to issue his decision in a letter dated 27th August 2021.

19. The Tribunal has previously held that the days stipulated under section 89(7) are not working days. (***Elite Chemicals Limited Vs. Uganda Coffee Development Authority, PAT application No. 1 of 2022, VCON Construction (U) Limited Vs. Makerere University PAT application No. 3 of 2022 and JV Kadac-Globaltec V Uganda Prisons Service, Application No. 4 of 2022***) The purported decision of the Accounting Officer was therefore issued out of time and was a blatant breach of the law. The purported decision of the Accounting Officer was no decision at all, it was null and void.
20. Under **section 89(8) of the Public Procurement and Disposal of Public Assets Act** as amended, where an Accounting Officer does not make a decision within the specified period, a bidder may make an application to the Tribunal.
21. Under **section 91 I (2) (b), of the Public Procurement and Disposal of Public Assets Act** as amended, such application to the Tribunal shall be made within ten (10) days from the date of expiry of the period within which the Accounting Officer should have communicated his decision.
22. In the instant case the ten (10) days started running from 27th August 2021 and ended on 6th September 2021. The Applicant, therefore, should have submitted the application to the Tribunal on or before 6th September 2021. The Applicant having not filed an application with the Tribunal on 6th September 2021 meant that the Applicant agreed with the reasons advanced for the non-responsiveness of its bid to the technical requirements as stated in the notice to bidders following technical evaluation that was displayed by the Respondent on August 5, 2021.

23. When the Best Evaluated Bidder Notice was displayed by the Respondent on 1st February 2022, the Applicant filed an application with the Accounting Officer of the Entity on February 11, 2022 on grounds that:
- a) The Accounting Officer of the Respondent erred in law when he made and communicated an administrative review decision out of time rendering the decision null and void
 - b) The best evaluated bidder did not have the required experience and therefore its bid should have been disqualified at the post qualification stage and;
 - c) The bidding document did not provide an evaluation criteria for experience and qualifications of key personnel contrary to statutory provisions and that the proposed key personnel of the best evaluated bidder were not evaluated

The Accounting Officer of the Respondent made a decision on February 18, 2022 and communicated the said decision regarding the Complaint to the Applicant on February 22, 2022, in which he dismissed the Complaint for being devoid of merit.

24. The Accounting Officer was bound to make communicate his decision on or before the 21st of February, 2022. The decision was made on February 18, 2022 but communicated to the Applicant on February 22, 2022. The impugned decision was time barred, a blatant breach of the law and no decision at all.
25. It is important to note that **section 89(8) of the Public Procurement and Disposal of Public Assets Act as amended** requires the Accounting Officer to not only make a decision within the stated statutory timeline but to simultaneously communicate by way of service upon or transmission or delivery of the said decision to the Applicant. The date of communication is therefore deemed to be the date when the decision made was delivered to the Applicant. Procuring and disposing entities should as a matter of prudence, secure proof of delivery of the decision to the affected Applicant.

26. **Section 3 of the Public Procurement and Disposal of Public Assets Act 2003** defines a bidder as “*a physical or artificial person intending to participate or participating in public procurement or disposal proceedings*”. The said procurement process means “*the successive stages in the procurement cycle including planning, choice of procedure, measures to solicit offers from bidders, examination and evaluation of those offers, award of contract, and contract management*”.
27. Therefore a person remains a bidder until the successive stages in the procurement cycle such as examination and evaluation of bids, award of contract, and contract management are completed, with exception of instances where the validity of the bid in question has expired without extension as provided for in the law.
28. The fact that an Applicant’s bid was found to be non-responsive to the technical requirements of a bid as indicated in a displayed notice to bidders following technical evaluation, does not mean that the Applicant effectively ceased to be a bidder in the procurement process. The Applicant was within its rights and legally mandated under **Section 89(1) of the Public Procurement and Disposal of Public Assets Act as amended**, to make a complaint to the Accounting Officer of the Respondent in the event it was aggrieved by the decision of the Respondent following display of the best evaluated bidder notice on February 1, 2022.
29. The Accounting Officer was therefore obliged to make and communicate a decision regarding the Application filed by the Applicant within the stated statutory timelines. The Accounting Officer was not *functus Officio* in making and communicating a decision following the Complaint filed on 11th February, 2022.
30. The instant application filed with the Tribunal on 3rd March , 2022 was therefore competently filed within the ten days prescribed under **Section 91I (2)(b) of the Public Procurement and Disposal of Public Assets Act as amended**. The Tribunal is therefore clothed

with the jurisdiction to hear the said Application.

31. **The preliminary objection is therefore overruled.**

Resolution of substantive Issues

Issue 1:

Whether the Accounting Officer erred in law when he did not communicate the administrative review decision dated 18th February 2022 within the prescribed statutory timeframe?

32. We have already found that the Accounting Officer was bound to make and communicate his decision on or before the 21st of February, 2022. The decision made on 18th February, 2022 but communicated to the Applicant on 22nd February, 2022 was time barred, a blatant breach of the law and no decision at all.

33. **The Tribunal answers this issue in the affirmative.**

Issue 2:

Whether the Respondent erred in law when it did not disqualify the Best Evaluated Bidder's bid at the post qualification stage of evaluation on account that the Best Evaluated Bidder does not have any experience in the supply, installation and commissioning of an e-wallet solution?

34. **Regulation 7(1) and (2) of the Public Procurement & Disposal of Public Assets (Evaluation) Regulations, 2014** states that the evaluation of a bid, shall be conducted in accordance with the evaluation criteria stated in the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non Consultancy Services) Regulations, 2014* and in the bidding document and that an evaluation committee shall not, during an evaluation, make an amendment or addition to the evaluation criteria stated in the bidding document, and shall not use any other criteria other than the criteria stated in the bidding document.

35. **Regulation 37 (1) and 37(2) of the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non Consultancy Services) Regulations, 2014** states that the evaluation criteria to be used shall be stated in the solicitation document and the evaluation shall be conducted in accordance with the criteria without any amendments to the criteria and that the evaluation criteria shall be used to assess compliance with the statement of requirements, the ability to perform the proposed contract and the ability to meet the objectives of the procurement.
36. The detailed evaluation criteria for post qualification in this impugned procurement is deduced from the Standard Bidding Document in Section 3, Part 1, section3, E on page 33 which required a Post Qualification exercise to be undertaken on the Best Evaluated Bidder to determine whether the bidder has the capacity and financial resources to execute the procurement.
37. ITB 36.1 to 36.3 of the bidding document are instructive to bidders on how post qualification is conducted and states as follows;
- 36.1.** *The Procuring and Disposing Entity shall determine to its satisfaction whether the Bidder that is selected as having submitted the best evaluated bid is qualified to perform the Contract satisfactorily.*
- 36.2.** *The determination shall be based upon an examination of the documentary evidence of the Bidder's qualifications submitted by the Bidder, pursuant to ITB Clause 5, to clarifications in accordance with ITB Clause 27 and the qualification criteria indicated in Section 3, Evaluation Methodology and Criteria. Factors not included in Section 3 shall not be used in the evaluation of the Bidder's qualifications.*
- 36.3.** *An affirmative determination shall be a prerequisite for award of the Contract to the Bidder. A negative determination shall result in disqualification of the bid, in which event the Procuring and Disposing Entity shall proceed to the next best evaluated bid to make a similar determination of that Bidder's capabilities to perform satisfactorily*

38. The post qualification evaluation criteria was silent on the modalities on how to ascertain the said capacity and financial resources. Where there is uncertainty or ambiguity, it is prudent that the objective test is applied.
39. **Regulation 34(2) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014** provides guidance to the Procuring and Disposing Entity on what should be confirmed at the post qualification stage. There is a format provided in the Regulations under the evaluation report (Form 17), for reporting whether a bidder is responsive to post qualification exercise or not. The form requires a brief narrative on the result of the post qualification. Detailed justification with reasons is required if the bidder was disqualified. We further noted that ITB 36.3 of the bidding document only requires an affirmative determination and not a detailed account or narrative of the evaluation, as prerequisite for award of the Contract to the Bidder.
40. The best procurement practice would dictate that where the bidding document or evaluation criteria is silent on the modalities of conducting post qualification or ambiguous on the same, then the indicative factors listed in **Regulation 34(2)(a)-(g) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014** should guide the evaluation committee in conducting post qualification. Such a practice however prudent, would amount to an illicit amendment or addition to the evaluation criteria stated in the bidding document contrary to **section 71(3) of the Public Procurement and Disposal of Public Assets Act 2003, Reg 7(1) and (2) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014**.
41. More so, breach of best practices is no longer a ground or basis of seeking administrative review following the amendment of **Section 89(1) of the Public Procurement and Disposal of Public Assets Act 2003** by the **Section 89(2) of the Public Procurement and Disposal of Public Assets Act** as amended.

42. The Tribunal has in its recent decision guided that what is not expressly provided for in evaluation criteria stated in the bidding document cannot be imported and should not be imported by the Evaluation committee, even if it is stated in the law. See **Application No.05 of 2022 Libra Court Bailifs & Auctioneers VS NWSC, para 24, page 13.**
43. We have perused the procurement action file and found the Evaluation Report dated January 27, 2022 on page 2 of 7 indicates that Sybyl Limited was subjected to post qualification evaluation and states as follows;
- “(1) **Sybyl Limited** was evaluated against the qualification criteria stated in the bidding document.*
- (2) The annual turnover of the bidder (**Sybyl Limited**) is more than twice their bid price therefore the bidder has capacity and financial resources to execute the procurement.*
- (3) On the basis of the qualification criteria stated, **Sybyl Limited** is qualified”.*
44. We also examined the minutes of the Evaluation Committee dated January 27, 2022 on page 2 of 3, No.2 on post qualification states as follows;
- “**Sybyl Limited** was evaluated against the qualification criteria stated in the bidding document.*
- Regarding the capacity of the bidder (Sybyl Limited), it was noted in the technical evaluation that the bidder has the technical expertise and total commitment from the manufacturer. As such, Sybyl limited can execute the procurement.*
- Under financial resources, it was noted that the annual turnover of the bidder (**Sybyl Limited**) is more than twice their bid price therefore the bidder has financial resources to execute the procurement. Additionally the Sybyl Limited has executed contracts of similar value.*

On the basis of the qualification criteria stated, Sybyl Limited is qualified”.

45. Therefore, where the minutes of the evaluation committee provide a detailed narrative and the text in the evaluation report only makes an affirmative determination that the bidder has satisfied the criteria, then the Tribunal cannot make a finding to the contrary. This is because the minutes of an evaluation committee meeting shall be an annex to the evaluation report and form part of the records of the procurement for which the evaluation is conducted as per **Reg 5 (11) and 5(12) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014**
46. Upon the recommendation of the Contracts Committee in its meeting held on 28th September 2021, the consideration of the report on financial comparison stage was deferred for reasons that *inter alia*, included, the need for due diligence prior to submission for contract award. The Respondent went ahead to undertake due diligence on the references of the best evaluated bidder and were satisfied with the technical capacity of the bidder.
47. The conduct of due diligence is not part of the post qualification evaluation criteria but a discretion of the procuring and disposing entity to carry out a due diligence test on a bidder or a bid may at any time during a procurement and disposal process for the purpose of exercising due care in a procurement or disposal process pursuant to **Regulation 31(1) and 31(2) of Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities) Regulations, 2014**. The due diligence test conducted on Safaricom and KCB-Kenya Ltd as manufacturer customer references of the Best evaluated Bidder’s bid was therefore proper.
48. In ***Arua Municipal Council v Arua United Transporters’ SACCO C.A 25 of 2017***, Justice Mubiru held as follows:
“...All bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should

not be rejected for reasons other than those specifically stipulated in the solicitation document. There should be no undisclosed preferences, no secret preferences and no discussions or decisions made, except above-board.”

49. In *Roko Construction Ltd v PPDA & National Drug Authority Application 4 of 2017*, the Tribunal held that:

“A substantially compliant bid and responsive bid is one that conforms to all the terms and conditions and specifications of the bidding document without material deviations, reservation or omission.”

50. We are therefore satisfied that post qualification evaluation was reasonably conducted on the best evaluated bidder under the circumstances. We have further, not found any proof that the Respondent deviated from the stated evaluation criteria or adopted a criteria different from what was provided for in the bidding document.

51. **The Tribunal resolves this issue in the negative.**

Issue 3:

Whether the Respondent Entity erred in law by not providing for any evaluation criteria in the bidding document for the experience and qualifications of the key personnel and by not appropriately evaluating the key personnel of the Best Evaluated Bidder?

Issue 4:

Whether the Respondent Entity erred in law by making unlawful modifications to the standard bidding document issued by PPDA for the procurement of non-consultancy services?

52. On 16th August 2021, the Applicant applied to the Accounting Officer for Administrative Review on grounds inter alia that the bidding document did not provide sufficient clarity on the scores to be applied to technical specifications to the detriment of their proposal.

53. The application for administrative review was dismissed on 27th August 2021. The Applicant did not appeal to this Tribunal.
54. Litigation and administrative review in respect of any cause of action cannot be conducted in instalments. The cause of action relating to the propriety bidding document was the subject of a previous complaint to the Accounting Officer.
55. The Applicant cannot, at this stage, raise new complaints with respect to the propriety of the bidding document.
56. Even an intending bidder, the Applicant did not object to the insufficiency or lack thereof, of the bidding document in as far as the evaluation criteria of experience and qualifications of key personnel is concerned.
57. The Applicant did not also complain about the alleged unlawful modifications to the standard bidding document issued by PPDA for the procurement of non-consultancy services.
58. The Applicant submitted a bid using the impugned bidding document and cannot challenge the criteria in the bidding document after bid submission. See the Tribunal decision in ***Engineering Solutions (U) Ltd vs Ministry of Water and Environment, Application No.24 of 2021.***
59. In the premises the grounds in issues no. 3 and no. 4 are misconceived and are accordingly struck out.

Issue 5:

What remedies are available to the Parties?

60. The Tribunal finds that since the Application has failed on all the substantive grounds, the Applicant is thus not entitled to any remedy.

G. DISPOSITION

1. The Application is dismissed.
2. The procurement may proceed to its logical conclusion.
3. The Tribunal's suspension order dated 4th March 2022 is vacated.
4. Each Party to bear its costs in this procurement process.


Dated at Kampala this **24th** day of **March 2022**.



FRANCIS GIMARA S.C
CHAIRPERSON



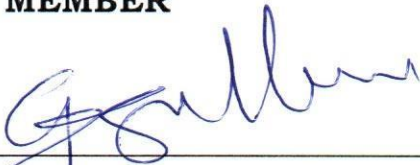
NELSON NERIMA
MEMBER



PATRICIA K. ASIIMWE
MEMBER



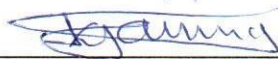
THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER