

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

APPLICATION NO. 12 OF 2022

BETWEEN

**MBALE UNITED TRUCKS AND PICKUPS DRIVERS COOPERATIVE
SAVINGS AND CREDIT SOCIETY LIMITED ::::::::::::::::::::APPLICANT**

AND

MBALE CITY COUNCIL ::::::::::::::::::::RESPONDENT

**APPLICATION FOR ADMINISTRATIVE REVIEW IN RESPECT OF THE
PROCUREMENT FOR COLLECTION OF REVENUE FROM
VEHICLES/TRUCKS LOADING AND OFFLOADING IN MBALE EXCEPT
FOR JUBA STAGE IN NAKALOKE**

**BEFORE: PATRICIA K. ASIIMWE; THOMAS BROOKES ISANGA;
GEOFFREY NUWAGIRA KAKIRA; PAUL KALUMBA; AND CHARITY
KYARISIIMA, MEMBERS**

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. On 4th March 2022 Mbale City Council, (the Respondent) issued a call for bids through a notice published in the New Vision newspaper for the collection of revenue from vehicles/trucks loading and offloading in Mbale City except Juba stage in Nakaloke, under Procurement Ref. No. MBAL856/SRVCS/21-22/00036 using the Open National Bidding method of procurement.
2. Two bidders purchased the bidding documents: Mbale City Tipper Drivers and Owners and Mbale United Trucks and Pickups Drivers Cooperatives Savings and Credit Society Limited (the Applicant).
3. On 21st March 2022, the Applicant applied to the accounting officer of the Respondent for administrative review on the ground that the bidding documents are discriminatory and/ or accord unfair advantage to certain bidders against others.
4. On 24th March 2022 the accounting officer appointed an ad hoc committee to handle the application for administrative review.
5. On 29th March 2022, the bids of the two bidders who purchased the bidding documents were received and opened by the Respondent.
6. On 5th April 2022, the Applicant applied to the Tribunal for administrative review on the ground that the Respondent erred in law when it issued discriminatory bidding documents and sought to rely on discriminatory qualification criterion.

7. In a letter dated 5th April 2022 but received by the Respondent on the 7th of April 2022, the members of the ad hoc administrative review committee that had been appointed by the accounting officer of the respondent, submitted their findings to the accounting officer. The committee found that paragraph 5.1 (d) of the evaluation criteria was discriminatory in nature. The committee, however, found that ITB 12.1 (f) of the bidding documents was not discriminatory. The committee recommended that the procurement process follows either direct procurement or selective bidding in accordance with the Guidelines issued by the Ministry of Local Government for the Management Services for Public Vehicles.

B. REPLY TO THE APPLICATION

The Respondent

8. In a letter dated 7th April 2022, the respondent stated that the entity reviewed the application for administrative review and found merit in it. The respondent further stated that the ad hoc administrative review committee advised as follows:
- i. That the bidding document was discriminatory.
 - ii. That the criterion justifying inclusion of debt as a requirement was fair, considering that the primary purpose of tendering out such revenue sources is for collection of revenue for the Council.
 - iii. That they received the compliant, however, the delay to respond was due to the fact that applications for administrative review are usually received after the display of the notice of the best evaluated bidder in accordance with Regulation 137 of the Local Government PPDA Regulations 2006.
 - iv. The procurement process follows either direct procurement or selective bidding as stated in the guidelines for Management of Vehicles Parking Area.

C. THE ORAL HEARING

The Tribunal held an oral hearing on 21st April 2022 using the Zoom online platform. The appearances were as follows:

1. Counsel Nangulu Eddie and Rebecca Kisakye represented the Applicant. In attendance were Directors of the Applicant, Mr. Mudebo Godfrey, Mr. Nambasi Sam, Mr. Wambede Eddy and Mr. Welishe Aman.
2. Senior Procurement Officer Mr. Stuma Fredricks represented the Respondent.

D. SUBMISSIONS

The parties' written and oral submissions were as follows:

Applicant

1. The Applicant stated that the bidding documents had discriminatory evaluation criteria contrary to the provisions of the Public Procurement and Disposal of Public Assets Act.
2. That paragraph 5. 1 (d) of the Evaluation criteria under Section 3 of the bidding document exempts new SACCOs from presenting experience in the collection of revenue of a similar nature while other bidders are required to demonstrate experience of a similar nature.
3. That paragraph 5.1 (d) of the evaluation criteria contravenes sections 44, 45 and 46 of the PPDA Act. The criterion gives new SACCOs unfair advantage in the bidding process by exempting them from meeting a standard bidding prerequisite and in effect limits/minimises competition.
4. The applicant also noted that the ad hoc committee appointed by the accounting officer of the respondent found that the criterion

was discriminatory.

5. Further, ITB 12 (f) of the bidding document disqualifies potential bidders from participating in the bidding process on grounds of previous debt thereby unfairly exempting such bidders.
6. That the criterion does not describe what amounts to debt and how such debt is determined and confirmed by the respondent thus making the criterion offensive to the rules of transparency and fairness and competition.
7. That for indebtedness to result in disqualification of a bidder, such debt should be ascertained and verified. In addition, the alleged debt should have been subjected to confirmation through a trial or judicious process that evaluates the exact obligations of the parties, circumstances of the breach and possible defences.
8. The Applicant prayed for a declaration that the bidding document offends the Public Procurement and Disposal of Public Assets Act, that the said provisions be struck out, punitive damages, general damages and costs of the application. In the alternative the applicant prayed for a re-tender with new non-discriminatory bidding document punitive damages against the respondent general damages and costs of the application.
9. The Applicant duly filed a complaint with the accounting officer, however, the accounting officer failed and or neglected to determine the complaint within the statutory time frame of 10 days.

Respondent

The Respondent did not file written submissions, however, at the hearing, the respondent's representative stated as follows:

10. That the accounting officer appointed an ad hoc administrative review committee which found that paragraph 5.1 (d) of the evaluation criteria was discriminatory.
11. The procurement in question is for collection of revenue for the City Council. The council therefore does not want to deal with

firms whose record is not clear hence the need to ensure that bidders are not indebted.

12. The Respondent admitted that there was a delay in responding to the applicant's application for administrative review because the entity thought that the application was premature since the procurement had not reached the stage of display of the notice of best evaluated bidder.

F. RESOLUTION BY THE TRIBUNAL

The Tribunal has framed the issues for resolution as follows:

Issues:

- 1) Whether the Accounting Officer of the Respondent erred in law and fact when he failed to make and communicate a decision following receipt of a complaint.
- 2) Whether the Respondent erred in law and fact when it failed to suspend the procurement process and proceeded to receive and open bids submitted.
- 3) Whether the bidding document's exemption of new SACCOS from the requirement for experience is discriminatory.
- 4) Whether the bidding document's disqualification of providers who are indebted to the Respondent or elsewhere is discriminatory
- 5) What remedies are available to the parties?

Issue 1:

Whether the accounting officer of the Respondent erred in law and fact when it failed to make and communicate a decision following receipt of a complaint

1. The ad hoc administrative review committee appointed by the accounting officer of the Respondent in their report stated that they were surprised that the applicant submitted its application for administrative review prior to the display of the Notice of the Best Evaluated Bidder contrary to Regulation 137 of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006 provides as follows:

A bidder shall submit an application for administrative review within ten working days after the date of display of the award on a public notice.

2. The Respondent stated at the hearing that the delay in responding to the application for administrative review was because the application was made prior to the display of the Notice of the Best Evaluated Bidder. It was after consultation that the accounting officer proceeded to handle the application.
3. With due respect, an application for administrative review can be made by any bidder who is aggrieved by a decision, omission or breach of a procuring and disposing entity during the procurement or disposal process at any time as provided for under the law.
4. Under section 89 (1) and (2) of the **Public Procurement and Disposal of Public Assets (Amendment) Act, 2021**: 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 the Act, regulations or guidelines made under the Act or any provision of the bidding documents.
5. 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*”. 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*”.
6. Under section 89(3) (b) of the **Public Procurement and Disposal of Public Assets Act**, the application shall be made within **ten working days** from the date the bidder first becomes aware of the circumstances that give rise to the complaint.

7. The Respondent called for bids on 4th March 2022. The applicant states that they purchased the bidding documents on 14th March 2022. It can therefore be assumed that the Applicant first became aware of the offending provisions on the date it purchased the bidding documents. Therefore, the ten working days started running from the 15th of March 2022. The Applicant filed a complaint with the Respondent on 21st March 2022, which was within the ten working day window provided for under section 89(3) (b) of the **Public Procurement and Disposal of Public Assets (Amendment) Act, 2021**. The application was therefore competent before the Accounting Officer.

8. Section 89 of the **Public Procurement and Disposal of Public Assets (Amendment) Act, 2021** does not limit applications for administrative review to only the period after display of the best evaluated bidder notice. Therefore, regulation 137 of the Local Government (**Public Procurement and Disposal of Public Assets**) Regulations, 2006 is merely an enabling provision for complaints premised on a notice of best evaluated bidder notice. The regulation does not fetter the right of a bidder or intending bidder to apply for administrative review on any ground during the procurement process under section 89 of the **Public Procurement and Disposal of Public Assets Act**.

9. Under section 89 (7) of the *Public Procurement and Disposal of Public Assets Act*, the accounting officer has ten days within which to make and communicate a decision. The Applicant filed a complaint with the Respondent on 21st March 2022. The ten days for making and communicating a decision expired on 31st March 2022. The period within which the accounting officer should have issued his decision expired without him communicating his decision. Failure by the Accounting Officer to communicate his decision was a blatant breach of the law.

10. The Accounting Officer of the Respondent therefore erred when he failed to make and communicate a decision within ten days after receipt of the complaint.

Issue no. 1 is answered in the affirmative.

Issue 2:

Whether the Respondent erred in law and fact when it failed to suspend the procurement process and proceeded to receive and open bids submitted

11. Under section 89 (5) of the *Public Procurement and Disposal of Public Assets Act* as amended, provides that “On receipt of a complaint, the accounting officer shall immediately suspend the procurement and disposal process...”
12. The above provision is coached in mandatory terms. The accounting officer received the applicant’s compliant on 22nd March 2022. However, the respondent proceeded to receive and open bids on 29th March 2022: seven days after receipt of the complaint. The Respondent therefore did not suspend the procurement process but instead proceeded with the procurement process contrary to section 89 (5) of the *Public Procurement and Disposal of Public Assets Act* as amended.
13. The Tribunal held in ***Appl. No. 21 of 2022, Engineering Solutions Uganda Ltd V. Ministry of Water and Environment***, that failure to suspend the procurement within 2 days from the date when the complaint was received was dilatory and inordinate delay on the part of the accounting officer.
14. In the present application, the Accounting Officer of the Respondent therefore erred in law and in fact when he failed to suspend the procurement process on receipt of the complaint from the Applicant contrary to section 89(3) (b) of the *Public Procurement and Disposal of Public Assets Act*.

The Tribunal therefore answers this issue in the affirmative.

Issue 3:

Whether the bidding document's exemption of new SACCOS from the requirement for experience is discriminatory.

15. The Applicant argued that paragraph 5.1 (d) of the evaluation methodology and criteria under section 3 of the Bidding document is discriminatory. The paragraph states as follows:
*Experience of the firm/ managers in the collection [of] revenue of the similar nature. **(Bidders will be required to submit copies of contract agreements/local purchase orders/reference letters or receipts as evidence) NOT APPLICABLE TWO NEW SACCO'S.***
16. The application to the accounting officer and to this Tribunal contends that the above criterion is discriminatory.
17. Section 43 (a) of the *Public Procurement and Disposal of Public Assets Act 2003* requires that all public procurement and disposal shall be conducted in accordance with the basic principles of public procurement and disposal which include non-discrimination.
18. Section 44 of the *Public Procurement and Disposal of Public Assets Act 2003* provides that a bidder shall not be excluded from participating in public procurement and disposal process on the basis of nationality, race, religion, gender or any other criteria not related to qualification, except to the extent provided by the Act.
19. The impugned procurement used Open National (*Domestic*) Bidding method of procurement to call bids. This procurement method is provided for under Section 80 of the *Public Procurement and Disposal of Public Assets Act*. Section 80 (2) defines "Open

Domestic bidding” as a “*procurement method which is open to participation **on equal terms by all providers** through advertisement of the procurement opportunity.*”

20. Regulation 45 of the Local Government (Public Procurement and Disposal of Public Assets) Regulations 19 of 2006, provides that “participation by bidders in public procurement and disposal shall be open on equal terms to bidders who meet the minimum eligibility requirements.”
21. The exemption of new SACCOS from the requirement for experience is not based on nationality, race, religion or gender. It is a criterion related to qualification. A bidder who does not meet qualification criteria cannot challenge them on the ground that he is being discriminated against. However, once an entity sets qualification criteria, they should apply to all bidders on equal terms without discrimination. To the extent that the “new” SACCOS were exempted from the requirement for experience, the criterion discriminated against providers who are not “new” SACCOS.
22. In the case of ***Galleria in Africa Ltd versus Uganda Electricity Distribution Company Ltd (Civil Appeal-2017) [2018] UGSC 19***, the Supreme Court held that, “.....*there’s no way the Act can regulate practices in respect of public procurement and disposal of public assets unless if the provisions are adhered to strictly to the letter. The provisions cannot be directory merely. They are for all purposes and intents mandatory and noncompliance with them makes the proceedings fatal....*”.
23. In this case the bidding document provides for evaluation criteria which applies to some bidders and does not apply to other bidders. Paragraph 5.1 (d) of the evaluation criteria only applies to “old” providers in the collection of revenue and “old” SACCOS but does not apply to providers who are “new SACCOS”.

24. This criterion is therefore discriminatory against providers that are not “new” SACCOs, and therefore contrary to sections 43 (a), 44, and 80(2) of the *Public Procurement and Disposal of Public Assets Act* and Regulations 45 of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006.

The Tribunal therefore answers this issue in the affirmative.

Issue 4:

Whether the bidding document’s disqualification of providers who are indebted to the Respondent or elsewhere is discriminatory

25. The Applicant argued that ITB 12.1 (f) of the Bid Data Sheet, list the following as the additional documents comprising the bid is discriminatory:

FIRMS THAT ARE INDEBTED TO THIS COUNCIL SHALL BE DISQUALIFIED DURING EVALUATION. LETTERS OF CLEARANCE MUST BE OBTAINED FROM THE CITY FINANCE OFFICER FOR FIRMS THAT HAVE COLLECTED ON BEHALF OF THE COUNCIL BEFORE

26. Paragraph 5.1 (d) of the evaluation criteria under section 3: Evaluation Methodology and Criteria, of the Bidding document provides as follows:

Evidence of good performance in collection of revenue in previous transactions. Firms that are indebted in their previous transactions elsewhere or to this council shall be disqualified during evaluation. Letters of clearance must be obtained from the city finance officer for firms that have collected on behalf of council before.

27. The objective of this procurement was to get a provider to collect revenue.

28. The Respondent was entitled to determine how best to achieve the objective of the procurement.
29. We cannot fault the Respondent for determining that a provider who has defaulted on his obligations under a previous revenue collection contract should not be awarded the tender.
30. As long as this criterion is applied to all providers whether new or old, we do not find it to be discriminatory.

Obiter Dictum:

31. The Tribunal has however noted that much as the criterion on indebtedness was not discriminatory, the criterion was not clear.
32. Section 71 (2) of the PPDA Act states that “All solicitation documents shall fully and comprehensively detail the evaluation methodology and criteria which shall apply.”
33. Under paragraph 5.1 (e) of Section 3 on the Evaluation Criteria, *“firms that are indebted in their previous transactions elsewhere or to this council shall be disqualified during evaluation”*. This criterion was not detailed enough. It is not clear what amounts to debt and how the bidders will be evaluated under this criterion.
34. Evaluation criteria should be fully and comprehensively detailed in the solicitation documents in accordance with section 71 (2) of the PPDA Act.

The Tribunal therefore answers this issue in the negative.

Issue 5:

What remedies are available to the parties?

35. The Tribunal has found that the bidding document’s exemption of new SACCOS from the requirement for experience is

discriminatory. Bids have already been submitted and opened under the impugned document. The Respondent concedes that the impugned criterion is discriminatory.


36. In the circumstances, the procurement cannot proceed and shall be cancelled.

G. DISPOSITION

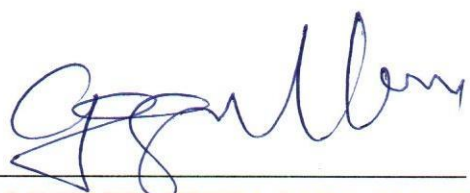
The Application is partly allowed.

1. The procurement process is cancelled.
2. The Entity may retender the procurement if it so wishes.
3. The Tribunal's suspension order dated April 5, 2022 is vacated.
4. The Respondent shall refund the Applicant's Administrative review fees.
5. Each party should bear its own costs.


Dated at Kampala this 4th May 2022.



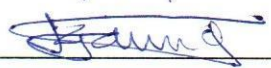
PATRICIA K. ASIIMWE
MEMBER




GEOFFREY NUWAGIRA KAKIRA
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THOMAS BROOKES ISANGA
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CHARITY KYARISIIMA
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PAUL KALUMBA
MEMBER