

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

APPLICATION NO. 17 OF 2022

BETWEEN

MBJ TECHNOLOGIES LIMITED:.....:APPLICANT

AND

- 1. MBARARA CITY**
- 2. UB CONSULTING ENGINEERS LTD IN JV WITH
PROFESSIONAL ENGINEERING CONSULTANTS LTD**
- 3. JOADAH CONSULT LTD:.....:RESPONDENTS**

**APPLICATION FOR ADMINISTRATIVE REVIEW IN RESPECT OF THE
PROCUREMENT BY MBARARA CITY FOR THE PROVISION OF
CONSULTANCY SERVICES FOR SUPERVISION OF ROADWORKS
[KYAMUGORANI ROAD- 2.02KM, MUNICIPAL ACCESS ROAD-
0.1KM, MOSQUE ROAD-0.55KM, LOWER CIRCULAR ROAD-0.8KM
AND RUHARA ROAD-0.47KM], PROCUREMENT REF NO: MCC
825/USMID/SRVCS/20-21/00001 CLUSTER 6**

**BEFORE: FRANCIS GIMARA SC, CHAIRPERSON; NELSON NERIMA;
PATRICIA KAHIGI ASIIMWE; GEOFFREY NUWAGABA KAKIRA;
PAUL KALUMBA; AND CHARITY KYARISIIMA, MEMBERS**

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. Mbarara City Council (the Respondent), initiated a procurement for the provision of consultancy services for supervision of roadworks [Kyamugorani Road- 2.02km, Municipal Access Road-0.1km, Mosque Road-0.55km, Lower Circular Road-0.8km and Ruhara Road-0.47km], Procurement Ref No: MCC 825/USMID/SRVCS/20-21/00001 Cluster 6 using Open National Bidding Method. The bid notice was published in the *New Vision Newspaper*, on February 10, 2022.
2. A pre-bid meeting was conducted on February 17, 2022 where site visits were also conducted. The deadline for bid submission was extended from March 1, 2022 to March 15, 2022.
3. Bids were received from 4 bidders namely MBJ Technologies Ltd, Air; Water and Earth (AWE); UB Consulting Engineers Ltd JV Professional Engineering Consultants Ltd; and Joadah Consult Ltd on 15th March, 2022.
4. Upon completion of the technical evaluation process, a Notice of Best Evaluated Bidder was issued on 6th April, 2022 with a removal date of 20th April, 2022. The Notice indicated that Best Evaluated Bidders whose proposals should be opened for further evaluation were MBJ Technologies Ltd, UB Consulting Engineers Ltd JV Professional Engineering Consultants Ltd and Joadah Consult Ltd. The Notice also indicated that Air, Water and Earth (AWE) was disqualified for having scored 65%, below the required minimum score of 80%.
5. The financial proposals of MBJ Technologies Ltd, UB Consulting Engineers Ltd and JV Professional Engineering Consultants Ltd and Joadah Consult were opened and details read out on 28th April, 2022 indicated that UB Consulting Engineers Ltd in Joint Venture with Professional Engineering Consultants Ltd had a financial proposal of UGX 716,000,000/=; UB Consulting Engineers Ltd in Joint Venture

with Professional Engineering Consultants Ltd had a financial proposal of UGX 1,678,620,000/=; and Joadah Consult had a financial proposal of UGX 1,159,000,000/=.

6. Upon completion of the evaluation of the financial proposals, the 1st Respondent issued a Notice of Best Evaluated Bidder on May 12th 2022 with a removal date of 25th May 2022. The Notice indicated that the Best Evaluated Bidder was UB Consulting Engineers Ltd in Joint Venture with Professional Engineering Consultants Ltd (the 2nd Respondent) with a total contract price of UGX 1,441,020,000/=.
7. The Notice of the Best Evaluated Bidder indicated that the Applicant's combined technical and financial score was 84.8% which was lower than the 85.14% that was scored by the Best Evaluated Bidder.
8. On 23 May 2022, the Applicant submitted an application for administrative review to the Accounting Officer of the 1st Respondent. The Applicant complained about the manner of opening financial proposals; the arithmetic correction of the 2nd Respondent's financial bid and failure to send the notice of best evaluated bidder to all bidders at the time of display of the Notice the Best Evaluated Bidder.
9. On 2nd June 2022, the 1st Respondent's Accounting Officer constituted an administrative review committee to handle the administrative review application. In a report issued on 8th June 2022, the committee found merit in the complaint about failure to send notice of best evaluated bidder to all bidders at the time of display of the notice. The committee did not find merit in the rest of the complaints. ✓
10. In a letter dated 8th June 2022, the Accounting Officer of the 1st Respondent agreed with the administrative review committee that the notice of best evaluated bidder should have been sent to all bidders at the time of display. That the display of notice of best evaluated bidder was done on 12th May 2022

but sent to the participating bidders on 21st May 2022. The Accounting Officer therefore upheld the recommendation of the administrative review committee and decided to give another 10 working days of display with effect from 10th June 2022.

11. A second Notice of Notice of Best Evaluated Bidder was issued on 10th June, 2022 with a removal date of 23rd June, 2022. The Notice contained similar contents as the earlier one issued on 12th May, 2022.
12. The Applicant, being dissatisfied with the decision of the Accounting Officer, filed the instant application with the Tribunal on 17th June, 2022 Under Section 89 (8) and (9), Section 91 L (1) (a), (b) and (C) of the Public procurement and Disposal of Public Assets Act, 2003 as amended and Regulation 6 of the Public Procurement (Tribunal) (Procedure) Regulations 2016, seeking review of the decision of the Accounting Officer. The application raised 2 issues for determination by the Tribunal:
 - 1) *Whether the 1st Respondent's display of the Best Evaluated Bidder Notice flouted the procurement laws*
 - 2) *Whether the 1st Respondent erred in adopting an arithmetic error that did not disclose the source of arithmetic error as required by the ITB, showing item, Rate Quantity and amount of the arithmetic error thereby disadvantaging other bidders*
 - 3) *What remedies are available to the parties*
13. In a response filed on 22nd June 2022, the 1st Respondent averred that no notice of the complaint was served on the Accounting Officer; the best evaluated bidder notice was displayed in accordance with the law; and that the arithmetic errors did not contain any material deviation and were corrected in accordance with the law.
14. In a response filed on 27th June 2022, the 2nd respondent averred that in correcting arithmetic errors, the evaluation committee executed its mandate in accordance with ITB 31.4 and regulation 57 of S.I No. 10 of 2014.

15. The 3rd Respondent did not file any submissions in response to the Application and did not attend the hearing

C. THE ORAL HEARING

1. The Tribunal held an oral hearing on 5th July 2022 using the Zoom online platform. The appearances were as follows:
 - 1) Samuel Kakande and Kenneth Atukwatse, counsel for the Applicant.
 - 2) Phillip Kakuru, a director of the Applicant, attended.
 - 3) Timothy Arinaitwe, counsel for the Applicant.
 - 4) Assy Abirebe the City Clerk, Edgar Atwine the Head Procurement and Disposal Unit, Ketijo Merina Head Works and Engineering, attended for the 1st Respondent.
 - 5) Albert Mukasa, counsel for the 2nd Respondent.
 - 6) David Kaddu, the Authorized Representative of the 2nd Respondent and Charles Bakakiri, Head Engineering Division of the 2nd Respondent attended.

D. SUBMISSIONS

1. The parties highlighted their written submissions as follows:

Applicant

2. On issue no. 1, counsel for the Applicant submitted that the notice of best evaluated bidder was not displayed and sent to all bidders at the time of display, contrary to regulation 85 (5) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*.
3. On issue no. 2 counsel for the Applicant sought to amend it to read, "*Whether the second defendant's bid was non-responsive?*". Counsel submitted that the effect of the correction of the arithmetical error was that there was a change in the best combined score, with the 2nd Respondent emerging best instead of the Applicant who was the lowest bidder. That rectification of errors prejudiced other bidders.

1st Respondent

4. On issue no. 1, counsel for the 1st Respondent submitted that the decision of the Accounting Officer that the notice of best evaluated bidder be displayed again was a corrective measure pursuant to regulation 139(5) (c) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* and section 89(7) of the *Public Procurement and Disposal of Public Assets Act*. That redress has been granted to the Applicant.
5. On issue no. 2, counsel submitted that the change of issue prejudices the 1st respondent as it has not had the opportunity to defend itself on the same.
6. Counsel submitted that the correction of the arithmetic error was done in accordance with the law and the bidding document. Counsel relied on regulations 74 (3),(4),(5); 75(2) and 80 (3) (b) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* and ITBs 29.1 and 30.2.
7. The 2nd Respondent associated itself with the submissions of the 1st Respondent.

F. RESOLUTION BY THE TRIBUNAL

Preliminary issue

1. The Tribunal asked the parties to address it on whether the decision of the Accounting Officer was made and communicated within the time stipulated in the *Public Procurement and Disposal of Public Assets Act* as amended. The Tribunal also asked the parties to address it on whether this Application was made within the time stipulated in the *Public Procurement and Disposal of Public Assets Act* as amended. We have duly considered the submissions made by the parties and their counsel.

2. The Tribunal is duty bound to inquire into the existence of the facts in order to decide whether it has jurisdiction. This is because jurisdiction must be acquired before judgment is given. See decision in ***K-Solutions Limited Vs. Ministry of Energy and Mineral Development, Application No.16 of 2021***
3. On 23rd May 2022, the Applicant applied to the Accounting Officer for Administrative Review.
4. Under Section 89 (7) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021, the Accounting Officer must make and communicate a decision within ten (10) days of receipt of a complaint. Therefore, the Accounting Officer was bound to communicate his decision on or before the 2nd of June 2022. However, the 1st Respondent's Accounting Officer purported to issue his decision in a letter dated 8th June 2022. The purported decision of the Accounting Officer was therefore issued out of time.
5. In the case of ***Super Taste Ltd V Bank of Uganda, Application No. 33 of 2021***, this Tribunal held that a decision issued out of time is "a blatant breach of the law and no decision at all." The purported decision of the Accounting Officer was therefore null and void.
6. 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. 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.
7. The days contemplated under sections 89 (8) and 91I (2) (b) of the Public Procurement and Disposal of Public Assets Act as

amended are not *working days* but calendar days. See **Application No.04 of 2022 JV KADAC-GLOBETEC VS Uganda Prison Services.**

8. In the instant case, the ten (10) days started running from 3rd June 2022 and expired on 12th June 2022, which was a Sunday. The next working day was Monday 13th June 2022. The Applicant, therefore, should have submitted the application to the Tribunal on or before 13th June 2022. The Applicant filed this application to the Tribunal on 17th June 2022 and was therefore time barred.
9. The Tribunal has previously held that the provisions in the *Public Procurement and Disposal of Public Assets Act* are mandatory. See **Super Taste Ltd V Bank of Uganda, Application No. 33 of 2021**, and **APA Insurance Uganda Limited V. Uganda National Roads Authority, Application No. 2 of 2022.**
10. The Tribunal relies on the Supreme Court decision in **Galleria in Africa Ltd versus Uganda Electricity Distribution Company Ltd (Civil Appeal-2017) [2018] UGSC 19** where 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”.
11. Counsel for the Applicant submitted that this application was premised on section 91I (1) (b) of the Public Procurement and Disposal of Public Assets Act as amended, which has no time limit.
12. Counsel relied on **Application No. 20 of 2021-Obon Infrastructure Development JV v Mbarara City & Another.**

13. 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 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.
14. With respect we do not agree that the Applicant is "a person" envisaged under section 91I (1) (b) of the *Public Procurement and Disposal of Public Assets Act, 2003* as amended by Act 15 of 2021. The Applicant applied for administrative review to the Accounting Officer as a bidder. Being dissatisfied with the decision of the Accounting Officer, the Applicant filed the instant application before the Tribunal. The Applicant is still a bidder as defined under section 3, section 89 (1), (2), and section 91I (1) (a) of the *Public Procurement and Disposal of Public Assets Act, 2003* as amended by Act 15 of 2021. This application does not qualify as an application to the Tribunal under section 91I (1)(b) of the *Public Procurement and Disposal of Public Assets Act, 2003* as amended by Act 15 of 2021.

15. In ***Tribunal Application No. 9 of 2020- K-Solutions Limited versus Attorney General and Public Procurement and Disposal of Public Assets Authority***, the Applicant's bid had expired and their counsel contended that the Applicant had filed the application not as a bidder but as *any person whose rights are adversely affected by a decision made by the Authority*, pursuant to the then section 91I (3) of the *Public Procurement and Disposal of Public Assets Authority Act*. The Tribunal did not agree. The Applicant had applied, as a bidder, to the Authority for administrative review challenging the refusal of the Accounting Officer to handle the complaint. We held that, being aggrieved by the Authority's decision, the Applicant could only appeal to the Tribunal as a bidder under the then section 91 I (1) of the *Public Procurement and Disposal of Public Assets Authority Act*.
16. It is our finding that having failed to make an application to the Tribunal as a bidder within the time prescribed under section 91I (1) (b) of the *Public Procurement and Disposal of Public Assets Act* as amended, the Applicant cannot now turn around and purport to appeal as *a person whose rights are adversely affected by a decision made by the Accounting Officer* as envisaged under section 91I (1) (b). An Applicant to the Tribunal under section 91I (1) (b) cannot have two or interchangeable faces; one as a bidder and at the same time as *a person whose rights are adversely affected by a decision made by the Accounting Officer*.
17. Regarding the case of ***Application No. 20 of 2021-Obon Infrastructure Development JV v Mbarara City & Another*** which was relied upon by counsel for the Applicant, we wish to note that that the Applicant deliberately avoided to reveal that the said decision was appealed, and reversed by the High Court vide Civil Appeal no. 45 of 2021- *Mbarara City & MBJ Technologies Limited versus Obon Infrastructures Development JV*; in which the Applicant was the 2nd Appellant.
18. The import of the High Court Decision Civil Appeal No. 45 of 2021- *Mbarara City & MBJ Technologies Limited versus Obon Infrastructures Development JV*, the High Court at pages 19-20, is

that section 91I(1) (b) of the *Public Procurement and Disposal of Public Assets Act, 2003* does not apply and cannot be taken benefit of, by a bidder.

19. Counsel for the 1st Respondent also made reference to the constitutional provision on technicalities. Article 126 (2) (e) of the Constitution requires that *substantive justice be administered without undue regard to technicalities, but subject to the law*. Article 126(2) (e) of the Constitution is *no license for ignoring the existing law*.

See: Kasirye, Byaruhanga and Co Advocates v Uganda Development Bank, SCCA No. 2 of 1997.

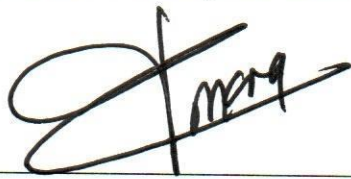
20. We have no residual or inherent jurisdiction to enlarge a period laid down by statute. See: ***Makula International Ltd versus Cardinal Nsubuga & Another Civil Appeal No. 4 of 1981***. Also, see Tribunal ***Application no. 14 of 2022-Samanga Solutions Limited versus Uganda Wildlife Authority***.
21. The Tribunal has determined that this application is time barred, and we do not have jurisdiction to inquire into its merits.

✓

G. DISPOSITION

1. This Application is struck out.
2. The Tribunal's suspension order dated 20th June 2022 is vacated.
3. Each party to bear its own costs.

Dated at Kampala this 8th day of July, 2022.




**FRANCIS GIMARA, SC
CHAIRPERSON**



**NELSON NERIMA
MEMBER**



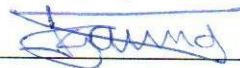
**PATRICIA KAHIGI ASIIMWE
MEMBER**



**GEOFFREY NUWAGIRA KAKIRA
MEMBER**



**PAUL KALUMBA
MEMBER**



**CHARITY KYARISIIMA
MEMBER**