

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

APPLICATION NO. 31 OF 2022

BETWEEN

KAFOPHAN AND SIAAP CONSORTIUM =====APPLICANT

AND

**1. MINISTRY OF AGRICULTURE ANIMAL INDUSTRY AND FISHERIES
2. YOUTH ALIVE UGANDA =====RESPONDENTS**

**APPLICATION FOR REVIEW IN RESPECT OF THE PROCUREMENT FOR
CONSULTANCY SERVICES FOR THE IMPLEMENTATION OF HIV/AIDS
AWARENESS AND ENGAGE YOUNG PEOPLE WITH RESPONSIVE
BEHAVIOR CHANGE MESSAGES THROUGH SPORTS AND CULTURAL
ACTIVITIES UNDER THE NATIONAL OIL PALM PROJECT KALANGALA
HUB UNDER PROCUREMENT REFERENCE NUMBER MAAIF-
NOPP/CONS/20-21/00016.**

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

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. On 18th May 2021, the Ministry of Agriculture, Animal Industry and Fisheries, initiated a procurement for procurement of consultancy services to implement HIV/AIDS awareness in Kalangala Hub under NOPP (National Oil Palm Project) vide procurement reference number MAAIF-NOPP/SRVCS/20-21/00016 using publication of expression of interest (EOI) and developing a shortlist method.
2. On 25th February 2022, the Applicant as a consortium responded to the bid invitation through submitting its bid. The 2nd Respondent as well submitted its bid to the 1st Respondent.
3. Upon completion of the evaluation process, Ministry of Agriculture, Animal Industry and Fisheries (the respondent) displayed the Notice of Best Evaluated Bidder (NOBEB) on September 6, 2022 in which *Youth Alive Uganda* was declared the Best Evaluated Bidder with a combined score of 93.5% at a Contract Price of UGX 613,993,191/= VAT Exclusive. The Applicant's bid was the second best evaluated bidder with a score of 91%. The date of removal of the NOBEB was September 21, 2022.
4. On 20th September 2022, the 1st Respondent issued another Notice of Best Evaluated Bidder with a removal date of 4th October 2022.
5. The NOBEB of 20th September 2022 indicated that *Youth Alive Uganda* was declared the Best Evaluated Bidder with a combined score of 94.4% at a Contract Price of UGX 613,993,191/=VAT Exclusive. The NOBEB also indicated that KOFAPHAN & SIIAP CONSORTIUM as the 2nd best evaluated bidder with 93.7% combined total score.
6. The Applicant being dissatisfied with the evaluation process, applied for administrative review directly to the Tribunal on September 20, 2022 for review of the decision of the Procuring and Disposing Entity

pursuant to sections 89(9) and 91(1)(c) of the PPDA Act 2003 as amended.

7. The Applicant pleaded that it believed that its compliant could not be handled impartially by the Procuring and Disposing Entity.
8. The Applicant named Ministry of Agriculture, Animal Industry and Fisheries and *Youth Alive Uganda* as 1st and 2nd Respondents respectively, to the Application.

B. APPLICATION TO THE TRIBUNAL

1. Relying on section 89(9) and 91I(c) of the PPDA Act, the Applicant averred that the 1st Respondent illegally and fraudulently flouted the bidding process which led to the premature illegal and fraudulent award of the bid to the 2nd Respondent.
2. The Applicant averred that the 1st Respondent deliberately avoided the site visit contrary to the requirements of the bid document, intentionally relied on the Technical evaluation results solely without the Financial evaluation results, failed to carry out the Financial evaluation, and awarded the bid to the 2nd Respondent yet the Applicant had quoted the lowest price.
3. The Applicant argued that the 2nd Respondent accepted the bid well aware that a site visit had not been conducted, that the financial evaluation had not been carried out, and that the Applicant had quoted the lowest price.
4. The Applicant prayed for a declaration that the 2nd Respondent illegally and fraudulently flouted the bidding process; that the 1st Respondent illegally, fraudulently and prematurely awarded the bid to the 2nd Respondent; an order setting aside the illegal and fraudulent award; and in the alternative an order that the contract be awarded to the Applicant. The Applicant also prayed for an award of general damages and costs.

C. REPLY TO THE APPLICATION

1. The 1st Respondent raised a preliminary objection that the application is prematurely and improperly brought before this Tribunal since the matter was not referred first to the Accounting Officer.
2. The 1st Respondent averred that the Applicant brought its application under section 89(9) of the PPDA Act contending conflict of interest and impartiality on the part of the Accounting Officer without adducing any proof of a reasonable or substantiated belief of the Accounting Officer's partiality.
3. The 1st Respondent contended that the Applicant failed to prove dishonesty on the part of the 1st Respondent with regard to its complaint that the 1st Respondent did not conduct a site visit.
4. The 1st Respondent contended that the bid in the present case involved a procurement of consultancy services which did not necessitate a site visit. That ITC 11.2 on page 10 of the RFP document was very emphatic on a pre-proposal meeting and not a site visit.
5. The 1st Respondent contended that it conducted a combined evaluation which considered both the technical and financial evaluation.
6. The 1st Respondent prayed for the application to be dismissed with costs on the ground that the Applicant failed to discharge the onus to prove its allegations to the required standards.

D. THE ORAL HEARING

The Tribunal held an oral hearing on **5th October 2022** via zoom software. The appearances were as follows:

1. Wanok Conrad represented the Applicant. Ssemakula Emmy, the supervisor SIAAP Kalangala
2. The 1st Respondent was represented by Lutaaya Meddie, Project and

Contract Manager, Ms. Lakwonyero-Ag Project Manager, Plaxade Sunday-Institution, Entrepreneur and Finance Officer, Emmanuel Mukama-Monitoring and Evaluation Manager, John Okanya-Procurement Officer, Mulinde Roger-Monitoring and Evaluation Officer and Amuza Waigo-Assistant Procurement

3. The 2nd Respondent/ Best Evaluated Bidder was represented David Oyom the Director of Programs and Charles Kimbowa the Compliance Officer

E. SUBMISSIONS

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

Applicant

1. The Applicant contended that the application is rightly brought before the Tribunal because it believed that the Accounting Officer would not impartially address its complaint.
2. The Applicant main averment was that the 1st Respondent illegally and fraudulently flouted the bidding process which led to the premature illegal and fraudulent award of the bid to the 2nd Respondent.
3. The Applicant averred that the 1st Respondent deliberately avoided the site visit contrary to the requirements of the bid document, intentionally relied on the Technical evaluation results solely without the Financial evaluation results, failed to carry out the Financial evaluation, and awarded the bid to the 2nd Respondent yet the Applicant had quoted the lowest price.
4. The Applicant argued that the 2nd Respondent accepted the bid well aware that a site visit had not been conducted, that the financial evaluation had not been carried out, and that the Applicant had quoted the lowest price.

5. At the hearing, the Applicant admitted that what is stated in its Application as *particulars of partiality of the 1st Respondent* were a typographical error that should be corrected to *particulars of impartiality of the 1st Respondent*.
6. The Applicant prayed for a declaration that the 2nd Respondent illegally and fraudulently flouted the bidding process; that the 1st Respondent illegally, fraudulently and prematurely awarded the bid to the 2nd Respondent; an order setting aside the illegal and fraudulent award; and in the alternative an order that the contract be awarded to the Applicant. The Applicant also prayed for an award of general damages and costs.

Respondents

1. The 1st Respondent raised a preliminary objection that the application is prematurely and improperly brought before this Tribunal since the matter was not referred first to the Accounting Officer. That for a matter to be brought directly to the Tribunal, the Applicant ought to have had a reasonable and substantiated belief about the partiality of the Accounting Officer.
2. The 1st Respondent averred that the Applicant brought its application under section 89(9) of the PPDA Act contending conflict of interest and impartiality on the part of the Accounting Officer without adducing any proof of a reasonable or substantiated belief of the Accounting Officer's partiality.
3. The 1st Respondent contended that the Applicant failed to prove dishonesty on the part of the 1st Respondent with regard to its complaint that the 1st Respondent did not conduct a site visit.
4. The 1st Respondent contended that the bid in the present case involved a procurement of consultancy services which did not necessitate a site visit. That ITC 11.2 on page 10 of the RFP document was very emphatic on a pre-proposal meeting and not a site visit.

5. The 1st Respondent contended that it conducted a combined evaluation which considered both the technical and financial evaluation.
6. The 1st Respondent prayed for the application to be dismissed with costs on the ground that the Applicant failed to discharge the onus to prove its allegations to the required standards.
7. The 2nd Respondent confirmed that he participated in the said procurement and emerged as the Best Evaluated Bidder having complied with all the requirements in the bidding document.

F. RESOLUTION BY THE TRIBUNAL

Issues

We now revert to the substantive issues in this application:

- i. *Whether there is a competent application before the Tribunal?*
- ii. *Whether the 1st Respondent illegally and fraudulently flouted the bidding process leading to an award of the bid to the 2nd Respondent?*
- iii. *What reliefs are available to the Parties?*

Resolution of Issues

Issue 1

Whether there is a competent application before the Tribunal?

1. The determination of the competence of the application is premised on the determination of two significant questions: **whether the applicant had locus to file this application with the Tribunal; and whether the application was filed within time.**
2. The term *locus standi* literally means a place of standing. It means a right to appear in court, and, conversely, to say that a person has no *locus standi* means that he has no right to appear or be heard

in a specified proceeding. To say that a person has no *locus standi* means the person cannot be heard, even on whether or not he has a case worth listening to. See ***Njau and Others V. City Council of Nairobi [1976–1985] 1 EA 397*** at 407.

3. **Section 89(9) of the *Public Procurement and Disposal of Public Assets Act*** provides that where a bidder believes that the Accounting Officer has a conflict of interest in respect of the complaint, omission or breach that would be made under this section or that the matter cannot be handled impartially by the procuring and disposing entity, the bidder shall make an application to the Tribunal for determination of the complaint, omission or breach.
4. **Section 91I (1)(c) of the *Public Procurement and Disposal of Public Assets Act*** provides a bidder who believes that the Accounting Officer has a conflict of interest as specified in section 89 (9) can apply to the Tribunal for review.
5. This means that an Applicant whose application is hinged on the premise or belief that the Accounting Officer has a conflict of interest or that the Accounting Officer is not impartial, has direct access to the Tribunal without having to first file a complaint before the Accounting Officer (AO). As to whether there actually exists such conflict of interest or that the Accounting Officer is not impartial, that is for the Tribunal to decide.
6. The Applicant bears the evidential burden of proving the said belief of non-impartiality of the AO or to demonstrate that it's compliant or matters arising out of the impugned procurement can't be handled impartially by the AO. See ***section 106 of the Evidence Act, Cap 6***. The requirement is however, to demonstrate a sincere belief, and the basis for that belief that the matter cannot be impartially handled by the AO. See ***SMS Construction Ltd, Farrin YYISVT Ltd & STI Joint Venture vs Ministry of Justice and Constitution Affairs, Application No.07 of 2022***.

7. The evaluation methodology criteria clearly indicated that the total technical component/score had a total possible value of weighted 70 points and that where the technical component achieves the requisite number of points, the financial proposal which has a total of weighted 30 points would be taken into account. Evaluation of the technical component would be completed prior to any financial component being considered and compared. The evaluation methodology criteria provided that upon completion of the technical and financial evaluation, the best evaluated bidder would be the bidder who scored the highest weighted combined total score (technical + financial points). *See Section 3. Evaluation Methodology and Criteria, Evaluation Process 1 & 2 and Financial Criteria on page 30-32 of the bidding document.*
8. The Best Evaluated Bidder Notice (NOBEB) of September 6, 2022 clearly indicated that *Youth Alive Uganda* had a combined total score of 93.5% while KOFAPHAN & SIIAP CONSORTIUM had a 91.0% combined total score.
9. A casual perusal of the Evaluation Methodology and Criteria in the bidding document and the NOBEB of September 6, 2022 would clearly indicate that both bidders had scored over and above the technical component and were therefore considered for evaluation of the financial component and that what was considered in the NOBEB were combined technical and financial scores of both bidders.
10. The Evaluation Report of 12th August 2022 clearly indicated that *Youth Alive Uganda* had the weighted technical score of 65.5 and a weighted financial score of 28.9 totalling a weighted combined total score of 94.4% while KOFAPHAN & SIIAP CONSORTIUM had weighted technical score of 63.7 and a weighted financial score of 30 totalling to a weighted combined total score of 93.7%.
11. In the instant case, it is our finding that the matters pleaded under *particulars of (im) partiality of the 1st Respondent* under (ii) to (v), by the Applicant are ordinary and normal processes in the evaluation of procurements commenced under publication of expression of

interest (EOI) and developing a shortlist method; were comprehensively detailed in the *Evaluation Methodology and Criteria* and therefore, cannot reasonably, be said to form the basis of belief of partiality of the AO. See *Regulations 9, 12(4), 50 and 52 of the Public Procurement and Disposal of Public Assets (Procurement of Consultancy Services) Regulations, 2014*.

12. As for *particulars of (im) partiality of the 1st Respondent* under (i), we are convinced by the Respondent's argument that ITC 11.2 indicated that a pre-proposal meeting would be held and that attendance of the same was optional. The 1st Respondent contended that the said meeting was attended on January 25, 2022 at 11:00am and attended by representatives of the Applicant (*R1 Annexure 1 in Respondent's Reply*). We are convinced that the said pre-proposal meeting was held and secondly whether held or not held that it was optional and could not have formed a crucial or deciding factor in the evaluation of the proposals in the impugned procurement.
13. Having confirmed that *Youth Alive Uganda* had a combined total score of 94.4% while *KOFAPHAN & SIIAP CONSORTIUM* had a combined total score of 93.7% as per the Evaluation Report of August 12, 2022, it is evident that the NOBEB of September 6, 2022 contained erroneous total scores of both bidders. This clerical error was an honest mistake by the 1st Respondent that even after correction did not affect the score ranking of the bidders.
14. The remedy was to rectify the clerical error by issuing a new NOBEB with the correct scores that tally with the evaluation report. This was effected in the NOBEB of September 20, 2022 and communicated to all bidders electronically made by September 20, 2022. No prejudice or injustice was suffered by the bidders by this albeit reasonable correction. See ***Abasamia Hwolarane Association Ltd vs. Jinja City Council, Application No.12 of 2021***

15. A reasonable bidder would have discerned that scores contained in the NOBEB were combined scores and that a clerical error in the NOBEB of September 6, 2022 would have to be corrected by the PDE, to tally with what was contained in the procurement records of the entity. These actions would have been clearly explained by the 1st Respondent had they been given opportunity to do so by the Applicant.
16. The Applicant paid the fees for filing the instant application with the Tribunal with Post Bank (U) Ltd on **September 19, 2022 (Ref No: URA6D36723564)** and later filed the Application with the Tribunal on **September 20, 2022** It is therefore quite clear that the Applicant had already formed the intention and taken actual steps to challenge the procurement process directly at the Tribunal. We therefore find that the belief that the 1st Respondent would have been partial in handling the Applicant's complaint about the procurement process was overly unreasonable.
17. We reiterate the view that mere vague suspicion of whimsical and unreasonable people should not be made to constitute a standard of proof of such serious complaints. Allegations of bias on imaginary basis cannot be sustained without evidence adduced to the satisfaction of the Tribunal. **See *Abasamia Hwolarane Association Ltd vs. Jinja City Council, Application No.18 of 2021***
18. The Applicant has therefore failed to discharge the said burden on proof of partiality of the AO and as such, does not have the locus standi to pursue an application filed under section 89(9) of the *Public Procurement and Disposal of Public Assets Act 2003 (As Amended)*.

a. **Whether the Application was filed within time?**

19. The instant Application is premised on Sections 89(9) and 91I(1)(c) of the *Public Procurement and Disposal of Public Assets Act* as amended by Act 15 of 2021.
20. The Applicant who files an application directly to the Tribunal on grounds of belief that that its compliant could not be handled impartially by the Procuring and Disposing Entity (PDE) must file the said application with ten (10) days from the date when the omission or breach by the procuring and disposing entity is alleged to have taken place.
21. In the instant case, the Applicant became aware of the circumstances of the alleged omission or breach by the procuring and disposing entity upon the display of the Best Evaluated Bidder Notice on September 6, 2022.
22. The time for filing the instant application commenced on **September 7, 2022** and ended on **September 17, 2022** in accordance with *section 91I (2)(c) of the Public Procurement and Disposal of Public Assets Act 2003 as amended*.
23. When Applicant filed the instant Application with the Tribunal on **September 20, 2022** at **10:12pm**, it was immaterial that the 1st Respondent had on September 20, 2022, taken steps to correct the clerical error contained in the NOBEB of September 6, 2022 at 2:03pm. The instant Applicant had already been filed and processed by the Tribunal. The new NOBEB of September 20, 2022 could not by itself extend the time and date when the Applicant became aware of or alleges the omission or breach by the procuring and disposing entity to have taken place.
24. Had the Applicant been interested in taking benefit of the amended NOBEB of September 20, 2022, it would have taken steps to either file an amendment to its application or tactically taken steps to withdraw the same but it opted not to do so and instead filed written

submissions in support of its Application on September 26, 2022 in which it raised a point of law on the issuance of the new NOBEB vis-à-vis contempt with Tribunal suspension orders (*See paragraph 3 on page 2 of the Written Submissions*).

25. The Tribunal has in its previous decisions affirmed that the time limits set in the procurement and disposal statute were set for a purpose, are couched in mandatory terms, are a matter of substantive law and not mere technicalities and must be strictly complied with. There is no enabling provision within the *Public Procurement and Disposal of Public Assets Act 2003 as amended* that accords the Tribunal power to enlarge or extend time.
26. 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. See ***Mugabi David vs Sembabule District Local Government, Application No.24 of 2022*** and ***Mugerwa Fred vs Sembabule District Local Government, Application No.23 of 2022***.
27. The instant application filed on **September 20, 2022** was therefore filed 3 days out of time and the jurisdiction of the Tribunal is extinguished at this point as far as the matter is concerned.
28. Therefore, this application is incurably defective and incompetent on the grounds of lack of *locus standi* on the part of the Applicant coupled with the fact that the application was filed out of time. As a result, there is no need to resolve the issues raised or delve further into the merits of the Application.

G. DISPOSITION

1. The Application is struck out.
2. The suspension order dated September 20, 2022 is vacated.
3. Each party should bear own costs.

Dated at Kampala this 11th day of October 2022.



FRANCIS GIMARA, S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



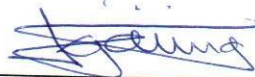
THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER