

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

APPLICATION NO. 35 OF 2022

BETWEEN

INTERTEK INTERNATIONAL LTD =====APPLICANT

AND

UGANDA NATIONAL BUREAU OF STANDARDS=====RESPONDENT

**APPLICATION FOR REVIEW OF THE DECISION OF THE
ACCOUNTING OFFICER OF UGANDA NATIONAL BUREAU OF
STANDARDS IN RESPECT OF THE PROCUREMENT OF NON-
CONSULTANCY SERVICES FOR PRE-EXPORT VERIFICATION OF
CONFORMITY-PROVISION OF PVOC SERVICE PROVIDERS-GENERAL
GOODS UNDER PROCUREMENT REF NO. UNBS/NCONS/2021-
2022/00006**

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

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. The Respondent invited the bids from competent firms for a procurement of non-consultancy services for pre-export verification of conformity-provision of PVoC Service Providers-General Goods under Procurement Ref No. **UNBS/NCONS/2021-2022/00006** using Open International Bidding Method.
2. Bids were received from **12 bidders** namely *SGS Societe Generale de Surveillance SA, TUV Rhienland Middle East FZE, Helsman Quality & Technical Services Co. Ltd, Bureau Veritas Uganda Ltd, Intertek International Ltd* (the Applicant), *Quality Inspection Services Inc Japan, TUV Nord Egypt, Sunchine Quality Control Technology Services Co Ltd, World Standization Certification & Testing Group (Shenzen) Co. Ltd, China Certification & Inspection Group Inspection Co. Ltd, Applus Norcontrol SLU* and *Alberk QA Internal Technical*.
3. The Notice of Best Evaluated Bidder (NOBEB) was displayed on September 13, 2022 with a removal date of September 27, 2022, indicating that 4 Bidders namely *SGS Societe Generale de Surveillance SA, TUV Rhienland Middle East FZE, Helsman Quality & Technical Services Co. Ltd*, and *Bureau Veritas Uganda Ltd* are the Best Evaluated Bidders.
4. The NOBEB further indicated that the Applicant's bid failed at the due diligence level on the grounds that the Applicant **issued COCs without test reports for about 20 samples. Penalty for noncompliance has failed to be settled.**
5. The Applicant being dissatisfied with the evaluation process, applied for administrative review before the Accounting Officer of the Respondent on **September 19, 2022.**
6. The Accounting Officer replied to the said Complaint on September 28, 2022 dismissing the Complaint.
7. The Applicant being dissatisfied with the decision of the Accounting Officer, filed the instant Application on **October 3,**

2022, to PPDA Appeals Tribunal seeking to review the decision of the Respondent.

B. APPLICATION TO THE TRIBUNAL

1. The Applicant argued that the performance assessment parameters (as indicated in the decision) which were purportedly used by the Respondent in the post-qualification due diligence amounted to the introduction of new evaluation criteria, contrary to the bidding document as indicated in the Instructions to the Bidders Part 1, Section 3, under ITB 6 (Technical Criteria), pages 25-27 and Regulation 7(2) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014.
2. The Applicant contended that its ability to perform the proposed contract had already been assessed under the technical evaluation as indicated in the Instructions to the Bidders Part 1, Section 3, under ITB 6 (Technical Criteria), pages 25-27, and that it had passed the said assessment
3. The Applicant averred that its disqualification during post-qualification due diligence on the ground of alleged non-payment of a penalty amounted to the use of a factor not included in Section 3 of the Bidding document, contrary to Instructions to the Bidders, Part 1, Section 1, under ITB 36.2 (post qualification of the bidder), page 17 and Instructions to the Bidders Part 1, Section 1, under ITB 28.1 (compliance and responsiveness of Bids) at page 14, of the bidding document.
4. It was the Applicant's argument that indebtedness was not part of the post-qualification due diligence and/or evaluation criteria as indicated in Instructions to the Bidders, Part 1, Section 3, under ITB 10.1, E (Due diligence), page 28.
5. The Applicant argued that the Respondent issued a recommendation letter on 13th October 2021 to the Applicant in support of the Applicant's Bid and that the alleged 22 Certificates of Conformity reviewed for the period January and February 2020 by the Respondent, represent a *de minimis* 1.2% of the entire successful performance by the Applicant for that period.

6. The Applicant named Uganda National Bureau of Standards as the Respondent to the Application and prayed for costs to be awarded to the Applicant.

C. REPLY TO THE APPLICATION

1. The Respondent contended that the guidance by the Contracts Committee sitting on 3rd August 2022, to conduct a due diligence on all bidders that had passed post qualification before issuance of best evaluated bidder notice and final award of contract was in line with Clause 31(1) (2) of the PPDA (Procuring and Disposing Entities) regulations S.1 no.7 of the 2014.
2. The Respondent further argued that conclusion of the due diligence exercise revealed that Applicant had a running contract with the Respondent in which it unlawfully issued over 20 Certificates of Conformity without test reports and further failed to pay the penalty of USD 220,000 as per the contracted terms.
3. The Respondent argued that the Contracts Committee sitting on 13th September 2022 rightfully disqualified the Applicant from award of the contract for having issued Certificate of Conformity without test reports and failing to pay penalty of US Dollar 220,000 that amounted to non-performance of the contract terms and a demonstration by the claimant of its inability to fulfil the requirements of the existing contract with the Respondent.
4. It's the Respondent's contention that the due diligence exercise was not an introduction of a new criteria since Part 1 Section 3E of Bidding Document already included a requirement of proof of successful implementation PVoC Services in the named countries and a demonstration of capacity to satisfactorily support and maintain the PVoC service.
5. The Respondent prayed that Tribunal uphold the decision of the Accounting Officer in dismissing the Application and that the procurement be allowed to proceed to its logical conclusion.

D. THE ORAL HEARING

The Tribunal held an oral hearing on 18th October 2022 via zoom

cloud meetings software. The appearances were as follows:

1. Counsel Tom Magezi assisted by Aretha Uwera represented the Applicant. In attendance was Thiery Metzger Director for Africa, Christine Owino, Director Uganda, Douglas Nyamori-Regional Manager Intertek (EA), Mr. Moses Mugabi, the Sales Manager of the Applicant.
2. The Respondent was represented by David Livingstone Ebiru - Executive Director & Accounting Officer. In attendance were Hassan Walusimbi - Legal Counsel, Godfrey Beyagala the Principal Accountant, Innocent Namara the PVOC Contract Manager, Eng. John Paul Musimami - The Deputy Executive Director Compliance and Chairperson Contracts Committee, Mr. Johnson Ssubi - Member Contracts Committee, Margret Tushemeirwe - Member Contracts Committee, Samuel Tumwesigye- Member Evaluation Committee, Simon Peter Mulindwa - Member Evaluation Committee, Doreen Nanvule - Member Evaluation Committee, Richard Godfrey Babalanda - Head Procurement Unit, Amos Aluma, Grace Nabagereka and Rashid Ssevuma from the Procurement Unit.
3. The Best Evaluated Bidders, the following representatives attended the hearing;
 - i) Valerie Wagner-Head of New Market and Global Projects- TÜV Rheinland, Muhammad Asif, Regional Director IMEA, TÜV Rheinland together with Fares Naouri Senior Vice President TÜV Rheinland;
 - ii) Edwin Kabuleeta -GSIT/VOC Manager Bureau Veritas Uganda, Eric Njenga - Operations Manager Bureau Veritas;
 - iii) Cherry Huang -Business Development Manager-Helmsman Quality and Technology Services Co. Ltd together with Jennifer Chen - Senior Vice President from Helmsman Quality and Technology Services Co. Ltd.
 - iv) Kanvaly Bamba, Country Manager, Hellen Achieng- Manager SGS together with Barbra Sayuni - Operations Manager - SGS

E. SUBMISSIONS

During the oral hearing, the Applicant and Respondent adopted and made further highlights of their written submissions. The Parties also

provided clarifications to the Tribunal.

Applicant

1. The Applicant argued that the Contracts Committee erred in law and fact (illegality) when it amended the recommendation of the Evaluation Committee. The Applicant submitted that the amendment of the recommendation of the Evaluation Committee was contrary to the law and a violation of the provisions of Section 33 of the Public Procurement and Disposal of Public Assets Act.
2. The Applicant further submitted that the role of the Contracts Committee is to approve or disapprove the entire recommendation of the Evaluation Committee as stated in Section 33 of the Public Procurement and Disposal of Public Assets Act. The Applicant relied on the decision of **Impiger Technologies Private Limited Versus Higher Education Students Financing Board; Application Number 25 of 2022, paragraph 58**
3. The Applicant contended that the violation of Section 33 of the Public Procurement and Disposal of Public Assets Act is an illegality, for which a Court or Tribunal cannot sanction. The decision in **Makula International Limited Versus His Eminence Cardinal Nsubuga and Anor Court of Civil Appeal No. 4 of 1981** was cited to buttress the submission.
4. The Applicant argued that purpose of post-qualification due diligence is to confirm that the documents or information submitted by the Applicant as a successful bidder is accurate and authentic with respect to the Applicant's capacity and financial resources to execute the current procurement, prior to the award of the contract as per Instructions to the Bidders Part 1, Section 3, under ITB 10.1, Section E (Due Diligence), pages 28 and that post-qualification due diligence is restricted to the documents and information contained in the Applicant's Bid.
5. The Applicant contended that the alleged non-payment of penalty was not an evaluation criteria stated in the bidding document and that disqualification of the Applicant on account of non-payment of a penalty at the post-qualification due diligence stage.

6. That the reliance on non-payment of the penalty amounted to an amendment or addition or introduction of new evaluation criteria at the post-qualification due diligence stage, contrary to the bidding document, contrary to Section 71 (3) of the PPDA Act and Regulation 7(2) of the public procurement and Disposal of Public Assets (Evaluation) Regulations, 2014. The Applicant relied on the decision in **Mbale United Trucks and Pickups Drivers Cooperative Savings and Credit Society Limited Versus Mbale City Council PPDA Appeals Tribunal Application No 12 of 2022**.
7. The Applicant relied on the High Court of Uganda in **MBJ Technologies Limited Versus PPDA, Mbarara City and Anor Miscellaneous Cause Number 171 of 2021** and the Tribunal's decision of **Coil Limited Versus PPDA and Uganda National Roads Authority, Application Number 3 of 2021** to submit that the decision of the Contract's Committee that changed the status of the Applicant as a best-evaluated bidder to otherwise without according to the Applicant a right to be heard was substantially and procedurally improper and void
8. The Applicant prayed that the Respondent's decision dated 28th September 2022 disqualifying the Applicant during post-qualification due diligence be set aside.

The Respondent

1. The Respondent adopted its written reply to the Application in submissions.
2. The Respondent highlighted the objectives of the PVoC program as a Conformity Assessment program applied to commodities in the respective exporting countries to ensure their compliance with the applicable Ugandan compulsory standards for mandatory application in accordance with the UNBS Act as amended.
3. The Respondent re-emphasised its role in the PVoC program in ensuring that only quality commodities gain entry into Uganda so as to seamlessly execute its mandate of protecting consumer health and safety as well as the environment in addition to protecting fair trade practices.

4. The respondent highlighted the role of the inspecting companies as PVoC Agent firms in undertaking conformity assessment activities in the country of origin of the commodities being imported into Uganda.
5. The Respondent prayed that the Tribunal dismisses the Application with costs.

Best Evaluated Bidders

1. The Representatives of the respective Best Evaluated Bidders stated that they had no comments regarding the instant Application.

F. RESOLUTION BY THE TRIBUNAL

Issues

The Applicant raised 3 issues for determination by the Tribunal, which have been recast as follows;

- 1) *Whether the post-qualification due diligence parameters used by the Respondent to disqualify the Applicant were contrary to the Bidding Document and the Law?*
- 2) *Whether the Respondent erred in law and fact when it disqualified the Applicant at post-qualification due diligence without affording the Applicant a hearing?*
- 3) *Whether the Respondent erred in law and fact when it amended or added to the evaluation criteria?*
- 4) *What remedies are available to the parties?*

Resolution of Issues Raised

Issue 1

Issue No.1. Whether the post qualification due diligence parameters used by the Respondent to disqualify the Applicant were contrary to the Bidding Document and Law

1. The evaluation methodology used in the evaluation of bids was the Quality and Cost Based Selection (QCBS) Methodology and the entire evaluation criteria in this procurement was stated in Part 1, Section 3, Evaluation Methodology, summary of Methodology, 2.2(a)-(c) on page 23 of the bidding document.

2. The bidding document was emphatic that the determination of the best evaluated bid was dependent on bids that technically scored 75% or more. The successful bids would be recommended for award of contract. See Paragraph 10.1, Part 1, Section 3, Evaluation Methodology, Determination of Best Evaluated Bid or Bids on page 28.
3. The summary of the procurement process provided by the Respondent RE5, at Paragraph 6.2 on page 4 read together with the *Evaluation Report as printed off the eGP Platform on October 17, 2022 at 11:26am* on page 38 of 97; all indicated that the Applicant was ranked 2nd in the detailed technical evaluation stage having scored 82.8 and therefore passed. At this stage, the Applicant ought to have been recommended for the award of contract.
4. We noted that two diligence exercises were conducted. One in May 2022 and another in September 2022.
 - a) The due diligence conducted between May 3, 2022 to May 20, 2022 in RE7, focused on presence of physical office, availability of qualified staff and inspectors, ICT Infrastructure, presence of laboratory infrastructure and testing capabilities and availability of quality assurance systems, including accreditations of inspection and testing services.
 - b) The Due Diligence report dated 3rd May to 20th May 2022 recommended 5 Bidders namely **SGS Societe Generale de Surveillance SA, TUV Rhenland Middle East FZE, Bureau Veritas Uganda Ltd, Intertek International Ltd** (the Applicant) and **Quality Inspection Services Inc Japan**, for award of Contract.
 - c) The September 12, 2022 Due Diligence Report, Annexure RE6 to the Respondent's Response to the Application, focused on two areas – (i) *verification of physical presence and capacity in PRC (People's Republic of China) of the successful bidders, and (ii) performance evaluation of all the successful bidders on previous and/or current contracts for provision of PVOC for general goods.* For bidders with *no running contracts with UNBS, the Evaluation*

Committee wrote *requests for confirmation of performance on the submitted contracts to the respective referees*. See Response by the Evaluation Committee on page 2

- d) The September 12, 2022 Report recommended that 6 bidders namely **SGS Societe Generale de Surveillance SA, TUV Rhienland Middle East FZE, Bureau Veritas Uganda Ltd, Intertek International Ltd** (the Applicant), **Quality Inspection Services Inc Japan** and **Helsman Quality & Technical Services Co. Ltd**, for award of Contract. See *Conclusion and Recommendation Paragraph 2 named bidders (a)-(f) of September 12, 2022 Due Diligence Report on page 2*.
5. The Evaluation Committee based on the two due diligence reports, recommended the Applicant to the Contracts Committee for award of contract as one of the best evaluated bidders. The summary of the procurement process provided by the Respondent- Annexure RE5, at 8.0-8.2 on pages 5 to 6 states that the Contracts Committee by majority decision, approved recommendation of the Evaluation Committee and awarded contracts to 4 out of 6 companies. The Applicant was one of those companies who were not awarded the contract.
6. We also note that the Respondent having issued a recommendation letter on 13th October 2021 during the bidding stage to the Applicant in support of the Applicant's Bid to this very procurement, could not at the same time purport poor performance on the previous contract.
7. We respectfully disagree with the reasoning and arguments of the Respondent's Eng. John Paul Musimami (the Deputy Executive Director Compliance and) the Chairperson Contracts Committee and Richard Godfrey Babalanda the Head Procurement and Disposal Unit that there was no disagreement between the Contracts Committee and the PDU.
8. There was no submission by the PDU to the Contracts Committee, recommending the disqualification of the Applicant's bid. Instead the submission to the Contracts Committee was for the recommendation of 6 bidders namely **SGS Societe Generale de Surveillance SA, TUV Rhienland Middle East FZE, Bureau Veritas Uganda Ltd, Intertek International Ltd** (the Applicant),

Quality Inspection Services Inc Japan and Helsman Quality & Technical Services Co. Ltd, for award of Contract.

9. At that point, the Contracts Committee had to either approve or disapprove the entire recommendation. Where the Contracts Committee was not satisfied with some aspects of the recommendation as it had in the instant procurement, with the recommendation of the Applicant, it had only two courses of action; either to return the submission to the PDU for review giving written reasons for its disagreement or to request for independent advice from the Authority. See *Section 33(1)(a) & (b) of the PPDA Act 2003. Impiger Technologies Decision in Application No.25 of 2022 at pages 17, para 55*
10. It is our finding that the Contracts Committee had no powers to *cherry pick* one recommendation of the Evaluation Report against the others. The recommendations of the Evaluation Report should be unexpurgated by Contracts Committee.
11. Since the Evaluation Committee found the Applicant's bid to be responsive to the evaluation methodology and criteria, the contracts committee therefore exceeded its legal mandate and erred in law when it opted to partially approve parts of the evaluation committee.
12. The reasons adopted by the Contracts Committee in the rejection of the Applicant's bid were a departure from the requirements of the bidding document and contrary to *section 71(2) & (3) of the PPDA Act 2003, Reg 7(2) of the PPDA (Evaluation) Regulations 2014. See Elite Chemicals Ltd vs Uganda Coffee Development Authority, Applications No. 7& 8 of 2021.*
13. **This issue is resolved in the affirmative**

Issue No.2. Whether the Respondent erred in law and fact when it disqualified the Applicant at post qualification due diligence without affording the Applicant a hearing.
14. The High Court in ***UNRA vs COIL (U) Ltd, Civil Appeal No. 24 of 2021*** (in an appeal from the decision of this Tribunal in ***COIL (U) Ltd vs PPDA & UNRA, Application No. 3 of 2021***) in a decision

of **Emmanuel Baguma J** issued on February 25, 2022 (pages 6-7) held as follows;

Due diligence basically involves a party making inquiries and does not in any way involve hearing of parties. The Party carrying out due diligence can execute the same without even the knowledge of the party being investigated. ...Due diligence by its very nature is not a hearing but an inquiry, checking or independent verification about the bidder.... there was no violation of a right to fair hearing as the same never existed. One does not have a right to be heard during due diligence process.

15. The Tribunal is further guided by the case of **Simon Gakuo versus Kenyatta University & 2 others Misc. Civil Application 34 of 2009** where it was held that:

“The audi alteram partem rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the court room situations...Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view.”

16. In light of the aforementioned guidance from the High Courts of Uganda and Kenya, the Tribunal finds that the Applicant did not have a right to be heard during due diligence process.

17. **This issue is resolved in the negative**

Issue No.3. Whether the Respondent erred in law and fact when it amended or added to the evaluation criteria

18. The evaluation methodology used in the evaluation of bids was the Quality and Cost Based Selection (QCBS) Methodology. The methodology stated that the evaluation as to be conducted in three sequential stages of preliminary examination, detailed evaluation and financial comparison. See Part 1, Section 3, Evaluation Methodology, summary of Methodology, 2.2(a)-(c) on page 23 of the bidding document-RE1.

19. Part 1, Section 3, Evaluation Methodology, E- Due Diligence, 1-7 on page 28 of the bidding document stated parameters for the conduct of post qualification on the Best Evaluated Bidders in order to confirm whether the bidders had capacity and financial resources to execute the procurement and parameters to be used in the confirmation
20. At the hearing, the Respondent was emphatic that the post qualification was taken as due diligence. As such the activities conducted between May 3 to 20th 2022 in RE7 and the September 12, 2022 Due Diligence Report RE6 were a post qualification exercise in accordance with the bidding document. It therefore contended that there was no departure from the evaluation criteria.
21. **Regulation 31 (1) and (2) of the PPDA (PDE) Regulations S.I No. 7 of 2014**, permits a procuring and disposing entity, at any time during a procurement and disposal process, to carry out a due diligence test on a bidder or a bid and that the due diligence test shall cover any area of operation of a provider or any area of the bid that the procuring and disposing entity in exercising due care in a procurement or disposal process.
22. The Tribunal has referred to its previous decision in **Elite Chemicals Limited versus Uganda Coffee Development Authority Application No. 8 of 2021** where it held that:

“...the qualification of the best evaluated bidder speaks to the present or current capacity based on the criteria in the bidding document. To extend post qualification or due diligence to historical compliance would amount to an unlawful departure from the evaluation criteria, which is prohibited by section 71 of the PPDA Act and Regulation 7 of the PPDA (Evaluation) Regulations...”
23. The said due diligence exercise conducted under the auspices of *the PPDA (PDE) Regulations S.I No. 7 of 2014*, does not extend to a procurement process whose Evaluation Methodology and Criteria is expressly stated in a Bidding Document as is the case in this instant Application. The findings of such a due diligence exercise, as in the instant case where the Respondent even provided

evidence in form of a recommendation letter to the Applicant in regard to a previous contract performance, should not be relied upon by a procuring and disposing entity to disqualify a bid prior to contract award. To do so, would permit the procuring and disposing entity to disqualify a bidder based on evaluation criteria that was not stated in a bidding document contrary to section 71(3) of the *Public Procurement and Disposal of Public Assets Act 2003(as amended)*.

24. Exercising due care in a procurement or disposal process through the conduct of a due diligence should not result into an interference in the discretions of the Accounting Officer Contracts Committee, Procurement and Disposal Unit, the user department and the evaluation committee in the independent performance of their functions under the Act, in the spirit of section 38 of *Public Procurement and Disposal of Public Assets Act 2003(as amended)*.
25. Nonetheless, we did not find any amendment or addition to the evaluation criteria.
26. **This issue is resolved in the negative.**

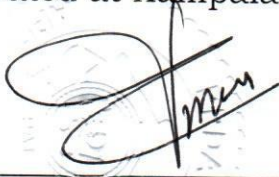
Issue No.4. What remedies are available to the parties

27. Having found that the disqualification of the Applicant's bid was erroneous, the matter should be remitted back to the Respondent for further proceedings not inconsistent with the decision of the Tribunal.

G. DISPOSITION OF THE TRIBUNAL

1. The Application is allowed.
2. The decision of the Accounting Officer dated September 28, 2022 is set aside.
3. The Respondent is directed to determine the next and appropriate course of action, within the confines of Sections 28(1)(a), 29 (c) and 33 of the PPDA Act 2003 and in a manner consistent with the decision of the Tribunal.
4. The determination in (3) above must be made within 10 days of the date of the decision of the Tribunal
5. The Tribunal's suspension order dated October 3, 2022 is vacated.
6. The administrative review fees paid by the Applicant be refunded.
7. Each party to bear its own costs.


Dated at Kampala this 24th day of October 2022.




FRANCIS GIMARA S.C
CHAIRPERSON



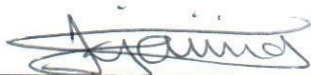
THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER