

**THE REPUBLIC OF UGANDA**  
**IN THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS**  
**APPEALS TRIBUNAL AT KAMPALA**  
**APPLICATION NO. 37 OF 2022**

**BETWEEN**

**VISION SCIENTIFIC & ENGINEERING LIMITED::::::::::::: APPLICANT**

**AND**

- 1. MAKERERE UNIVERSITY**
- 2. PALIN CORPORATION LIMITED::::::::::::: RESPONDENTS**

**APPLICATION FOR REVIEW OF THE DECISION OF THE ACCOUNTING OFFICER OF MAKERERE UNIVERSITY IN RESPECT OF THE PROCUREMENT FOR THE SUPPLY, DELIVERY AND INSTALLATION OF A Q-TOF LC/MS SYSTEM WITH ITS ACCOMPANYING COMPONENTS UNDER PRESIDE PROJECT, COLLEGE OF VETERINARY MEDICINE, ANIMAL RESOURCES AND BIO SECURITY VIDE PROCUREMENT REF. MAK/SPLS/2021-22/00765**

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

**A. BRIEF FACTS**

1. Makerere University, (the 1<sup>st</sup> Respondent), initiated a procurement for the supply, delivery and installation of a Q-TOF LC/MS System with its accompanying components under PRESIDE project, College of Veterinary Medicine, Animal Resources and Bio Security vide Procurement reference no. MAK/SPLS/2021-22/00765 using Open Domestic Method of procurement, it was published in the New Vision Newspaper on Friday, May 27, 2022.
2. Bids were received from 7 bidders namely; *Qualichem Uganda Limited, Palin Corporation, Joh. Achelis Ltd, Vision Scientific & Engineering Ltd, Rima (E.A) Ltd, Prepaid Meters Ltd and Smakk International Ltd* on Friday, June 24, 2022.
3. At preliminary examination, *M/s. Qualichem Uganda Limited; M/s. Palin Corporation Limited; M/s. Joh. Achelis Limited; M/s. Vision Scientific Limited M/s. Rima Uganda Limited; M/s. Prepaid Meters Limited; and M/s. Smakk International Limited* were found administratively compliant qualifying them for the next stage of evaluation
4. At detailed technical evaluation, *M/s. Palin Corporation Limited; M/s. JohAchelis Limited; and M/s. Rima E.A Limited* were found responsive to the commercial and technical criteria and were considered for financial evaluation while *M/s. Smakk International Limited, Prepaid Meters Uganda Limited, Qualichem Uganda Limited and Vision Scientific Limited* were non-responsive to the technical criteria and were therefore eliminated from further evaluation. *Vision Scientific Limited* did not submit 2 contracts of supply of similar equipment each equivalent to UGX: 1,500,000,000 in Uganda. *Prepaid Meters Uganda Limited* did not submit 2 contracts of supply of similar equipment each equivalent to UGX: 1,500,000,000 in Uganda. *Qualichem Uganda Limited* did not submit Audited Books of Accounts for the last three financial years i.e. 2018,2019 and 2020 and did not submit 2 contracts of supply of similar equipment each equivalent to UGX:



1,500,000,000. *Smakk International Limited* did not submit 2 contracts of supply of similar equipment each equivalent to UGX: 1,500,000,000.

5. The best evaluated bid for Supply, Delivery and Installation of Q-TOF LC/MS System with its accompanying Components under Preside Project, College of Veterinary Medicine, Animal Resources and Bio-Security was awarded to to *M/s Palin Corporation Limited* at a total evaluated contract price of UGX 2,473,431,133.6.
6. The Notice of Best Evaluated Bidder was displayed on Tuesday, August 2, 2022 with a removal date of August 15, 2022. The Notice indicated that the Applicant was disqualified at the Technical Evaluation Stage for failing to provide two contracts of supply of similar equipment equivalent to UGX 1,500,000,000 each.
7. The Applicant being dissatisfied with the evaluation process, applied for administrative review before the Accounting Officer on August 12, 2022. The Applicant complained that the best evaluated bidder did not have the experience of supplying a LCMSMS or a GCMSMS. Further, that the award was not in compliance with the principle of value for money.
8. The Accounting Officer in a letter dated *August 19, 2022* dismissed the Applicant's Compliant on the grounds that there was no evidence of payment of prescribed fees. The Applicant received the letter on *August 24, 2022*.
9. The Applicant being dissatisfied with the decision of the Accounting Officer, filed Application No. 27 of 2022 with the Tribunal on *August 31, 2022*.
10. The Tribunal heard Application No. 27 and rendered a decision dated September 27, 2022, in which it set aside the decision of the Accounting Officer dated August 19, 2022, directed the 1<sup>st</sup> Respondent to guide the Applicant in writing on the amount and

mode of payment of the administrative review fees within two days and upon payment of such fees, hear and consider the Applicant's compliant and any submissions thereto, and make a decision in writing no later than 10 (ten) days from September 27, 2022.

11. The Accounting Officer of Makerere University constituted an administrative review committee which rendered a report dated September 29 2022 with a finding that the complaint had no merit. It was also observed that the Applicant had failed to extend the validity of its bid. They recommended that the application be dismissed.
12. The Accounting Officer made and communicated a decision regarding the Applicant's compliant on September 30, 2022. The Accounting Officer informed the Applicant that its Complaint lacked merit and was dismissed.
13. The Applicant notified the Accounting Officer of its intention to apply to the Tribunal for the review of Accounting Officer's decision in a letter dated October 5, 2022.

**B. APPLICATION TO THE TRIBUNAL**

1. The Applicant filed the instant Application in the Tribunal on October 7, 2022, seeking to review the decision of the Accounting Officer. The Applicant named Makerere University and Palin Corporation Ltd as 1<sup>st</sup> and 2<sup>nd</sup> Respondents to the Application respectively.
2. That the Accounting Officer's decision dated September 30, 2022, did not take into consideration the additional submissions made by the Applicant.
3. That the 2<sup>nd</sup> Respondent did not meet the requirements of the bidding document and should not have been awarded the contract.



4. That the Accounting Officer erred in law and fact when he made a finding to the effect that the Applicant no longer had a valid bid. The 1<sup>st</sup> Respondent requested the Applicant to extend the validity of its bid and bid security on September 2, 2022. On September 7, 2022, the Applicant extended the validity of its bid to Friday, December 30, 2022.
5. The 1<sup>st</sup> Respondent received the Applicant's bid validity extension letter on September 7, 2022.
6. On September 19, 2022, the Applicant's Bankers Exim Bank (U) Limited extended the validity of the bid security from September 23 2022 to December 30 2022. The 1<sup>st</sup> Respondent received the Applicant's bid security validity extension letter on September 21, 2022.
7. That the 1<sup>st</sup> Respondent had already made up its mind on dismissing the Applicant's compliant resulting into the deliberate misstatement of facts regarding validity of the Applicant's bid, bid security and omission to review additional submissions made by the Applicant.
8. The Application raised the following issues:
  - 1) Whether the Accounting Officer of the 1<sup>st</sup> Respondent erred in fact and law when he found that the Applicant had no valid bid at the time of reviewing the Applicant's complaint.
  - 2) Whether the 2<sup>nd</sup> Respondent's bid complied with the requirements of the Standard Bidding Document issued by the 1<sup>st</sup> Respondent.
  - 3) Whether the 1<sup>st</sup> Respondent erred in fact and law when found that the bid of the 2<sup>nd</sup> Respondent substantially compliant and responsive, resulting into an award of contract
  - 4) What remedies are available to the Applicant?
9. The Applicant seeks the following declaratory orders from the Tribunal:

- 1) That the Applicant had a valid bid and bid security up to 30<sup>th</sup> December 2022.
- 2) That the 2<sup>nd</sup> Respondent's bid was non responsive to the requirements of the Standard Bidding Document issued by the 1<sup>st</sup> Respondent
- 3) That the award of contract to the 2<sup>nd</sup> Respondent by the 1<sup>st</sup> Respondent is erroneous and a nullity.
- 4) An order that the procurement process in MAK/SPLS/2021-22/00765 be cancelled and retendered by the entity.
- 5) An order for the refund of the Administrative review fees paid by the Applicant
- 6) Costs of the Application be awarded to the Applicant

**C. 1<sup>ST</sup> RESPONDENT'S RESPONSE**

1. The 1<sup>st</sup> Respondent filed a response through the Makerere University Directorate of Legal Affairs.
2. According to the 1<sup>st</sup> Respondent, the Applicant was disqualified for failing to fully comply with the requirements in the solicitation documents, vide failure to provide two contracts of supply of similar equipment each equivalent to UGX 1,500,000,000. The Applicant applied for administrative review before the Accounting Officer on August 12, 2022 but did not pay the requisite fees. The Applicant later applied for review before the Tribunal.
3. The Tribunal in its decision dated September 27, 2022 ordered the Accounting Officer of the 1 Respondent to guide the Applicant on the requisite fees to be paid and consider the complaint, make a decision and communicate the decision within 10 days from the date of the above said Tribunal decision.
4. The Accounting Officer appointed a Committee to conduct the administrative review of the whole process vis a vie the Applicant's complaint., and received additional submissions from the Applicants on the 30 of September 2022.



5. The Accounting Officer received a report from the Committee on the administrative review on September 30, 2022. The Accounting officer considered the report of the committee on the administrative review and the additional submissions of the Applicant.
6. The Accounting Officer then made and communicated the decision to the Applicant on September 30, 2022.
7. At the time of the administrative review, the 1<sup>st</sup> Respondent had no record of the bid validity and bid security extension.
8. On September 7, 2022, a representative of the Applicant came to the 1<sup>st</sup> Respondent's Procurement and Disposal Unit with 2 copies of the bid validity and security extension letter. Upon receipt of the Applicant's documents, it was discovered that the required bid security/ guarantee was not attached to the extension letters. The Applicant's representative was requested to bring the extension together with the bid security/ guarantee.
9. The Applicants representative decided to take both letters without leaving a copy with the 1<sup>st</sup> Respondent.
10. The Applicant brought the bid security/ guarantee on September 21, 2022 which is in the record without the extension of the bid validity.
11. The 2<sup>nd</sup> Respondent met the minimum requirements in the Solicitation document.
12. The 1<sup>st</sup> Respondent prayed for dismissal of the Application with costs.

**D. 2<sup>ND</sup> RESPONDENT'S RESPONSE**

1. The 2<sup>nd</sup> Respondent filed a response through Amber Solicitors & Advocates.
2. The 2<sup>nd</sup> Respondent avers that it qualified as the best throughout all the criteria as specified in the bid documents and the evaluation process including the preliminary examination, the technical evaluation, the commercial and technical eligibility and compliance and the financial comparison leading to the inevitable award and notification as the Best Evaluated Bidder.
3. That the 1<sup>st</sup> Respondent as a procuring and disposing entity considered the bids presented by the bidders in accordance with the law, regulations, and guidelines, provisions of the standard bidding documents and best practices to arrive at the 2<sup>nd</sup> Respondent as the Best Evaluated Bidder.
4. The 2<sup>nd</sup> Respondent denies any wrong-doing or any liability and contends that the application is an abuse of the Tribunal's process, brought in bad faith.
5. The 2<sup>nd</sup> Respondent contends that the Applicant is not entitled to the reliefs sought by the Applicant in and prays that the Application be dismissed with costs.

**E. APPLICANT'S WRITTEN SUBMISSIONS**

***Issue (1)- Whether the Accounting Officer of the 1st Respondent erred in fact and law when he found that the Applicant had no valid bid at the time of reviewing the Applicant's complaint.***

1. The Applicant contended that it extended the validity of its bid on September 7, 2022 and this was received by the 1<sup>st</sup> Respondent's Procurement and Disposal Unit on the same day. That proof of the acknowledgement and extension was attached to the Application and has not been controverted by the 1<sup>st</sup> Respondent.



2. The 1<sup>st</sup> Respondent bears the evidential burden to prove that it had no record of the Applicant's bid validity by September 27, 2022 when the Accounting Officer appointed the Administrative Review Committee. The 1<sup>st</sup> Respondent has not discharged that burden.
3. That the Applicant's bid security was extended by the Applicant's Bank on September 19, 2022 and received by the 1<sup>st</sup> Respondent on September 21, 2022. The validity of the Applicant's bid is not dependent on the validity of the bid security, which can be extended at any one time within the spirit of regulation 53(3) and (5) of the *Public Procurement and Disposal of Public Assets (Rules and Methods of procurement) Regulations 2014*.
4. The Applicant relied on the decision of the Tribunal in ***Kasokoso Services Limited vs. Jinja School of Nursing and Midwifery, Application No. 13 of 2021***.

***Issue (2)- Whether the 2nd Respondent's bid complied with the Requirements of the Standard Bidding Document issued by the 1st Respondent.***

5. The 2<sup>nd</sup> Respondent's bid did not comply with the specific experience condition that required 2 contracts of supply of similar equipment equivalent to Ugx 1,500,000,000/= each in the last five years.
6. The Applicant relied on the decision of the Tribunal in ***GAT Consults Ltd and Lee Construction Ltd (JV) vs PPDA & Ministry of Water and Environment, Application No.6 of 2021*** and ***Samanga Elcompus JV vs UEDCL, Application No.4 of 2021*** where it was held that similarity means evidence[sic] which [is]similar but not necessarily identical or same as.
7. That the literal meaning of the adjective "similar" means having a resemblance in appearance, character, or quantity, without being identical. In the context of this procurement, the Applicant

understood the specific experience regarding "similarity" in two contexts i.e. 1. scope, nature/functionality and complexity/technology of the equipment supplied to the current supply being tendered for and; 2. similarity in terms of value.

8. That the 1<sup>st</sup> Respondent narrowed the definition of similarity to only **technology** which in the Applicant's opinion is subjective and couched to favor the 2<sup>nd</sup> Respondent.
9. That going by the unduly subjective and restrictive definition of similarity adopted by the 1<sup>st</sup> Respondent, both contracts submitted by the 2<sup>nd</sup> Respondent do not meet the similarity test applied objectively or subjectively.
10. That the 1<sup>st</sup> Respondent's definition of supply of similar equipment" should be interpreted to mean applicability of both Spectrophotometry and chromatography principles / technologies or jointly.
11. That the 1<sup>st</sup> Respondent is therefore in this spirit, estopped from departing from its understanding of the similarity as explained in its administrative review report in accordance with section 114 of the Evidence Act.
12. That 2<sup>nd</sup> Respondent's evidence of specific experience was neither similar in terms of monetary value nor technical nature broken down into scope, nature/functionality and complexity/technology.
13. The equipment that the 2<sup>nd</sup> Respondent showed as being supplied to UNBS does not in any way jointly apply spectrophotometry and chromatography principles / technologies.
14. The UNBS contract value amounts to USD 2,130,415.90 for the supply of various instruments totaling to 72 in number, under 4 lots namely measurement equipment (A), measurement equipment (B) and weighing balances, Supporting Equipment and general laboratory equipment stated in the Tender Ref No. PRQ 20200172.



15. That the current procurement of the Q-TOF LCMSMS is for a single instrument; the value is not similar in nature.
16. In relation to the similarity in scope, nature/functionality and complexity/technology, the equipment to be supplied to the 1<sup>st</sup> Respondent requires and deals with molecular ionization. What the 2<sup>nd</sup> Respondent is set to supply to UNBS relates to only GC (Gas Chromatography); HPLC (High-Performance Liquid Chromatography), UV-Vis (Ultra Violet Visible Spectroscopy) & XRF (a bulk elemental analysis technique depending on the energy of the emitted x-ray and the sample composition). These do not relate to GCMSMS (Gas Chromatography coupled with a Mass Spectrometer) or LCMSMS (Liquid Chromatography coupled with a Mass Spectrometer).
17. The 1<sup>st</sup> Respondent's determination that the experience required should be of any other analytical equipment that uses spectrophotometry and chromatography principles/technologies as the subject of procurement is very subjective and selective to favour the successful bidder.
18. That the UNBS equipment only complied with the limb dealing with only HPLC and not LCMSMS technologies on the technical angle.
19. The 2<sup>nd</sup> Respondent's evidence of specific experience did not meet the similarity requirement in terms of both monetary value and technical nature i.e. scope, nature/functionality and complexity/technology.
20. That the Applicant has no qualms with the value of UGX 2.19B for the supply to the Ministry of Energy and Mineral Development. The challenge is on the similarity component in terms of scope, nature/functionality and complexity/technology.

21. That the said tender focused on the ICP-OES Spectrometer where the principle of operation used by the equipment measures the amount of emitted light at each wavelength and uses this information to calculate the concentration of respective elements in the sample. The supply of the ARCOS - Simultaneous ICP-OES Spectrometer does not meet and fit the description of the equipment that uses both Spectrophotometry and chromatography principles/technologies as indicated in the 1<sup>st</sup> Respondent's response to the Tribunal. The ICP-OES Spectrometer does not use chromatography principles/techniques based on molecular characteristics and interaction type use mechanisms of ion exchange, surface adsorption, partition, and size exclusion or even by extension other chromatography techniques.
22. That partial compliance is not and cannot be deemed compliance with the requirement of similarity.  
***Issue (3)-whether the 1<sup>st</sup> Respondent erred in fact and law when it found that the bid of the 2<sup>nd</sup> Respondent was substantially compliant and responsive, resulting into an award of contract***
23. The 2<sup>nd</sup> Respondent's bid was not substantially compliant and responsive to the detailed evaluation criteria, commercial criteria, specific experience as required in the bidding document.
24. The 2<sup>nd</sup> Respondent's bid ought to have been rejected by the 1<sup>st</sup> Respondent as stated in Instructions to bidders 30.3 of the Bidding document.
25. That the Instructions to bidders in 38.1 to 38.3 of the Bidding document required a post qualification exercise to be conducted. The 2<sup>nd</sup> Respondent made modifications to the Bidding Document by changing the wording on post qualification to be discretionary with use of "May". This alteration was made without prior written approval of the PPDA (the Authority), in contravention of regulation 28(3) and (4) of the *Public Procurement and Disposal of*



*Public Assets (Procuring and Disposing Entities) Regulations 2014*. The 1<sup>st</sup> Respondent opted not to undertake a mandatory post qualification on the 2<sup>nd</sup> Respondent, which is a departure from the evaluation criteria contrary to section 71 (3) of the *Public Procurement and Disposal of Public Assets Act and Regulations 7(1) and (2) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014*.

26. That had the post qualification been undertaken on the 2<sup>nd</sup> Respondent, it would have revealed that the Ministry of Energy and Mineral Development and UNBS contracts relied upon, especially the UNBS Contract had not yet been executed to date having been signed on March 20, 2022 and that both contracts were not similar in terms of technology to the one being tendered for. The 1<sup>st</sup> Respondent would have found that the 2<sup>nd</sup> Respondent had no capacity to execute the procurement.
27. That where unauthorized deviations from the standard bidding document are undertaken, the Tribunal cancelled the entire procurement process as it did in ***CFAO Motors Uganda Limited vs National Forestry Authority, Application No.16 of 2022***.
28. That where both the Best Evaluated Bidder and the Applicant are not qualified for the award of Contract, the Tribunal has cancelled the entire procurement process as decided in ***My Maka Group Limited vs Uganda National Bureau of Standards, Application No.9 of 2021***.
29. The Applicant prayed that the procurement process is cancelled and the administrative review fees paid by the Applicant to the 1<sup>st</sup> Respondent be refunded.

**F. 1<sup>ST</sup> RESPONDENT'S SUBMISIONS**

1. On issue no.1, the 2<sup>nd</sup> Respondent submitted that the Applicant approached the 1<sup>st</sup> Respondent with a letter extending the bid

validity it had been requested. The representative of the Applicant upon arrival at the 1<sup>st</sup> Respondents Procurement office was notified that they should submit the bid security together with the extension. In the meantime, the extension had been stamped by the officer at the 1<sup>st</sup> Respondent's premises. The Applicant's representative was given all the extension letters and she left the 1<sup>st</sup> Respondent's premises to go and comply with the request.

2. The Applicant has never submitted the extensions in its bids and the 1<sup>st</sup> Respondent doesn't have any copy of the extension of the bid validity by the Applicant in MAK/SPLS/2021-2022/00819 and MAK/SPLS/2021-22/00765- as they were handled at the administrative review.
3. That further, the Applicant has not suffered any loss due to absence of the extension of the bid validity on file. The Accounting officer considered the Application delivered a decision within the Stipulated time as ordered by this honorable Tribunal on September 21, 2022.
4. On issue no. 2, the 1<sup>st</sup> Respondent submitted that the Applicant did not comply with the minimum requirement of proof of (2) contracts of supply of similar equipment equivalent to UGX 1,500,000,000 each in the last 5 years. The Applicant did not satisfy the monetary requirements of the contracts to be attached as proof of supply.
5. That the 2<sup>nd</sup> Respondent complied with the requirements in the Standard Bidding Document.
6. The 1<sup>st</sup> Respondent relied on ***Samanga Elcompus ju v UEDCL, Application no. 17 of 2021***, where the Tribunal defined similarity to mean evidence which is similar but not necessarily identical or the same as is.
7. That the 2<sup>nd</sup> Respondent has previous experience of supply of analytical equipment which use chromatography and spectrometry principles such as Gas Chromatograph (GC), UV Vis



- spectrophotometer, near-infrared spectrophotometer, High-performance Liquid Chromatography (HPLC), X-ray Florescence Spectrophotometer and Inductively coupled plasma - optical emission spectrometry (ICP-OES). That this equipment is similar in function but with variations in the mode of action, what they detect, and the sensitivity.
8. The 1<sup>st</sup> Respondent made a detailed comparison of the equipment in an effort to show the similarities with the subject matter of the procurement.
  9. On issue 3, the 1<sup>st</sup> Respondent submitted that the 2<sup>nd</sup> Respondent's bid was compliant and responsive to the 1<sup>st</sup> Respondent's requirements.
  10. With respect to post qualification, the 1<sup>st</sup> Respondent submitted that when the notice of best evaluated bidder was issued to the bidders, the Applicant applied for administrative review on August 12, 2022 and later filed an application before the Tribunal vide Application No. 27 of 2022.
  11. That on September 21, 2022 the Tribunal made orders which the 1<sup>st</sup> Respondent complied with and an administrative review of the Applicant's complaint was conducted and concluded. Thereafter the Applicant issued a notice of intention to file an application to the tribunal on October 5, 2022. The Applicant filed this application on October 7, 2022 challenging the decision of the Accounting Officer and the process of evaluation in which the 2<sup>nd</sup> Respondent was the best evaluated bidder. The procurement process was suspended on October 7, 2022.
  12. That the 2<sup>nd</sup> Respondent has not been issued a contract nor have there been any engagements between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents relating to the procurement vide MAK/SPLS/2021-22/00765. Since the matter has not been concluded before the Tribunal, the 1<sup>st</sup> Respondent cannot conduct the post evaluation exercise. That it is not true that the 1<sup>st</sup> Respondent opted not to conduct a post-

qualification exercise. It is premature to assume that the 1<sup>st</sup> Respondent shall not conduct the same.

13. Further, that the Applicant has raised this matter as an afterthought and in bad faith.
14. The 1<sup>st</sup> Respondent prayed that the Tribunal dismisses the Application with costs.

#### **G. ORAL HEARING**

1. The Tribunal conducted an oral hearing on October 21, 2022 via the zoom videoconferencing software.
2. The representation was as follows:
  - 1) Ezra Mugabi, counsel of the Applicant.
  - 2) Natukunda Phiona Leticia, counsel for the 1<sup>st</sup> Respondent.
  - 3) Samuel Ejoku Oonyu, Company Secretary of the 1<sup>st</sup> Respondent
3. In attendance were the following:
  - 1) David Odour Technical Director of the Applicant.
  - 2) Prem Kishore Babu Kumarad, Chief Executive Officer of the Applicant.
  - 3) Angella Nyinimuntu representative of the Applicant.
  - 4) Agaba Paul, Manager Procurement and Dr. Ssekatawa Kenneth, from the 1<sup>st</sup> Respondent.
  - 5) Biron Nuwamanya Technical Sales Manager of the 2<sup>nd</sup> Respondent.
3. At the hearing, the Applicant presented an expert, David Odour, to render an opinion on the subject matter of the procurement. He stated that he holds a master's degree and a bachelor's degree in both analytical chemistry and bio chemistry, with 15 years' experience working with analytical instruments. He currently work with Vision Scientific as the Technical Director for the past 7 years in charge of the technical instrumentation part of the business under which we offer analytical solutions in different areas of analysis. One area was research and analytics material science, pharmaceutical food and feed and the wider scope of analysis.



4. That the procurement process by the 1<sup>st</sup> Respondent in question being the LCMS system means Liquid Chromatography Mass spectrometer System whereas the 2<sup>nd</sup> Respondent's submission of prior supply was for the gas chromatography system, high performance liquid chromatography system, spectrometer and x-ray fluorescence stems.
5. That the contract for UNBS is the HPLC which does not form part of the instrument that is under procurement by the 1<sup>st</sup> Respondent which is LCMS system. The HPLC is used as a part of the introductory part of the MS system but in no way does it form a complete part of the MSS system. The HPLC system that was supplied to UNBS only forms about 8%-10 % of the total value of the a normal LCMS system. In view of functionality and in view of the complexity of the instrument under procurement by the 1<sup>st</sup> Respondent they are not similar.
6. The 1<sup>st</sup> Respondent also presented Dr. Ssekatawa Kenneth as an expert to render an opinion on the subject matter of the procurement. He stated that he is a research scientist at Makerere University. He majored in bio nanotechnology, material sciences and molecular biology. He has a PHD in bio nanotechnology, material science and molecular biology.
7. According to him, the subject matter of the procurement is equipment for high performance liquid chromatography coupled with a mass spectrometer (LCMS). The liquid chromatography (LC) and mass spectrometer (MS), separately, can be used to perform the same function as the LCMS. However, HPLC coupled with a *mass spec* is more sensitive. Its detection limit is extended. It can detect things which cannot be detected by HPLC alone. For example the two equipment are used in pharmaceutical industries to detect any drug contaminants. They are used in food and beverages to detect any contaminants such as pesticides, antibiotics and so many others. The LC used together with the MS serve the same purpose but the main difference is that when you combine an HPLC with a



*mass spec* it becomes superior in functionality. Both LCMS and HPLC use the same technology known as chromatography. Both LCMS and MS use the same technology known as mass spectrometer. When you combine HPLC and a *mass spec* it becomes more sensitive and its detection limit is increased. That's the main difference but they serve the same functions.

8. The parties and their counsel also highlighted their written submissions and responded to questions put by the Tribunal.

#### H. **RESOLUTION**

**Issue No.1: Whether the Accounting Officer of the 1<sup>st</sup> Respondent erred in fact and law when he found that the Applicant had no valid bid at the time of reviewing the Applicant's complaint.**

1. It is trite law that an applicant for administrative review under section 89 of the *Public Procurement and Disposal of Public Assets Act* must be a bidder.
2. The Applicant in its Application, attached a letter dated September 7, 2022, Ref VSE/ADMIN/004 in which it extended the validity of its bid from September 23, 2022 to December 30, 2022. This letter bears a stamp of the Procurement and Disposal Unit of Makerere University and indicates that it was received on September 7, 2022.
3. The Applicant also attached a letter from Exim Bank (Uganda) Limited, addressed to the Manager PDU, Makerere University, dated September 19, 2022, Ref EBUL/174/BG/2022-Extension, in which validity of Bank Guarantee No. EBUL/174/BG/2022 for UGX 70,000,000/= was extended from September 23, 2022 to December 30, 2022. This letter bears a stamp of the Procurement and Disposal Unit of Makerere University and indicates that it was received on September 21, 2022.
4. The 1<sup>st</sup> Respondent contends that at the time of the administrative review it had no record of the Applicant's Bid Validity. That on



September 7, 2022 a representative of the Applicant delivered the bid validity and security extension letter but the bid security was not attached. That the Applicant's representative decided to take both letters without leaving a copy with the 1<sup>st</sup> Respondent. That the Applicant brought the bid security on September 21, 2022 without the existence of the bid validity.

5. The 1<sup>st</sup> Respondent has not challenged the attached letter of bid extension by the Applicant, which bears the 1<sup>st</sup> Respondent's stamp. The inability to trace the record does not negate the fact that the bid and bid security extension letters were duly submitted to the 1<sup>st</sup> Respondent.
6. **Issue no. 1 is resolved in the affirmative.**

**Issue No.2: Whether the 2<sup>nd</sup> Respondent's bid complied with the Requirements of the Standard Bidding Document issued by the 1<sup>st</sup> Respondent?**

7. Page 3 of the bidding document indicated the subject matter of this procurement to be the supply, delivery and installation/commissioning of Q-TOF LC/MS System with its accompanying components
8. The Bidding document required bidders to submit documents evidencing specific experience by way of 2 contracts of supply of similar equipment equivalent to Ugx 1,500,000,000/= each in the last five years. *See Evaluation Criteria and Methodology, Part 1: Section 2 Bid Data Sheet (e) Specific Experience* on page 37 of the bidding document issued by the Respondent.
9. For Specific Experience, Palin Corporation (2<sup>nd</sup> Respondent) attached the following documents;
  - a) A contract for the supply, delivery, installation, commissioning and training and after sales services for decentralised laboratory

equipment for Uganda National Bureau of Standards (UNBS). Tender Ref No. PRQ 20200172. Amount is USD 2,130, 415.90 The Contract was signed on March 30, 2022.

- b) A contract for the supply and installation of assorted laboratory equipment for the phytosanitary laboratories at Namalere, Procurement Reference No: MAAIF-AVCP/SUPLS/2020-21/00044 between *Ministry of Agriculture, Animal Industry and Fisheries* and *M/s Palin Corporation Ltd*, was dated 20<sup>th</sup> day of August 2021. Its contract price is UGX 1,348,422,653/= VAT Exclusive. The applicable VAT was stated to be UGX 108,266,220/=. The Contract was signed by the Permanent Secretary MAAIF in presence of Fred Mayanja, the NDC/AVCP. SMITH Edoni the Chief Operating Officer and Rhona Kyomuhendo, the Sales Administrator signed on behalf of Palin. See sheets No. 128-129.
- c) A contract for the supply and installation of fertilizer analytical equipment Lot 1, Procurement Reference No: MAAIF-ACDP/SUPLS/2019-20/000262 between *Ministry of Agriculture, Animal Industry and Fisheries* and *M/s Palin Corporation Ltd*, was dated 29<sup>th</sup> day of June 2020. Its contract price is UGX 1,428,603,958/= VAT Exclusive. The Contract was signed by Pius Wakabi Kasajja, the Permanent Secretary MAAIF in presence of Stephen Ojangole, the D/Project Coordinator. SMITH Joseph Edoni the Chief Operating Officer and Rhona Kyomuhendo, the Sales Administrator signed on behalf of Palin.
- d) A contract for the supply, installation, and testing of equipment for laboratory analysis of samples from mineral exploration at the Directorate of Geological Survey and Mines in Entebbe between *Ministry of Energy and Mineral Development* and *M/s Palin Corporation Ltd*, Procurement Reference No: MEMD/SUPLS/17-18/00095/DGSM It bears a stamp of the 2<sup>nd</sup> Respondent dated 16 May 2018. The Contract has been signed on 9<sup>th</sup> day of May 2018. Its contract price is UGX 2,199,081,351/= VAT inclusive.



10. In Table 2 of the Evaluation Committee report, Palin Corporation Ltd was marked as responsive to the requirement to submit documents evidencing specific experience by way of 2 contracts of supply of similar equipment equivalent to Ugx 1,500,000,000/= each in the last five years. The evaluation report does not however indicate which specific two contracts were found to meet the criteria.
11. The administrative review committee appointed by the Accounting Officer determined that the following 2 contracts submitted by Palin Corporation Ltd were similar to the subject of procurement:
  - 1) Supply, delivery, installation, commissioning and training and after-sales services for laboratory equipment to Uganda National Bureau of Standards (UNBS).
  - 2) Supply, installation, and testing of equipment for laboratory analysis of samples from mineral exploration at the Directorate of Geological Survey and Mines, in the Ministry of Energy and Mineral Development.
12. The crux of the Applicant's claim is that the supplies in the said two contracts submitted by *M/s Palin Corporation Ltd.* are not similar to the subject matter of the procurement.
13. This procurement is for the supply of a Q-TOF LC/MS System with its accompanying components under PRESIDE project, to College of Veterinary Medicine, Animal Resources and Bio Security.
14. According to the Respondent, the procurement was for analytical equipment which combines liquid chromatography (LC) with mass spectrometry (MS).
15. The Applicant has gone to great lengths to argue that in relation to the similarity in scope, nature/functionality and complexity/technology, the equipment to be supplied to the 1<sup>st</sup> Respondent requires and deals with molecular ionization. That what Palin Corporation Ltd is set to supply to UNBS relates to only GC (Gas Chromatography); HPLC (High-Performance Liquid



Chromatography), UV-Vis (Ultra Violet Visible Spectroscopy) & XRF (a bulk elemental analysis technique depending on the energy of the emitted x-ray and the sample composition). That these do not relate to GCMSMS (Gas Chromatography coupled with a Mass Spectrometer) or LCMSMS (Liquid Chromatography coupled with a Mass Spectrometer). That the 1<sup>st</sup> Respondent's determination that the experience required should be of any other analytical equipment that uses spectrophotometry and chromatography principles/technologies is very subjective and selective to favour the successful bidder.

16. The Tribunal does not agree with the Applicant that the previous contracts showing specific experience must be for supplies of analytical equipment which combines liquid chromatography (LC) with mass spectrometry (MS), in the same way as in the subject of the present procurement. It is enough if there are some similar aspects. In this case, the Entity determined that the contracts submitted by *Palin Corporation Ltd* were for supplies of analytical equipment which uses spectrophotometry and chromatography principles/technologies. That is a reasonable interpretation of similarity and is not subjective as claimed by the Applicant.
  
17. The 1<sup>st</sup> Respondent was best placed to determine how the objectives of the procurement could be met in accordance with the evaluation criteria set out in the bidding document. They exercised a discretion reasonably in the interpretation of similarity of equipment under the circumstances.

See: ***Application no. 5 of 2022-Libra Court Bailiffs & Auctioneers v National Water and Sewerage Corporation.***

18. An entity is entitled to exercise discretion in determining how to achieve the objectives of a given procurement.

See: ***Application no. 11 of 2020-Egis Road Operations SA v Public Procurement and Disposal of Public Assets Authority; Uganda National Roads Authority & China Communications***



**Construction Company Ltd & CCCC Investment company Ltd Consortium.**

19. In **Application no.4 of 2021-Samanga Elcomplus JV v Public Procurement and Disposal of Public Assets Authority (PPDA) & Uganda Electricity Distribution Company Limited (UEDCL)**, the Tribunal had occasion to give guidance on the interpretation of “similarity” for purposes of determining experience. The procurement for design, supply, installation and commissioning of a remote power monitoring and control system The evaluation criteria had requirements for firm experience ie
- Ten (10) years’ experience in Design, supply and implementation of power network control systems.
  - Successful completion of at least four (4) similar projects; with copies of completion certificates attached.
20. The Tribunal held that it was not a requirement of the evaluation criteria that the previous projects must be identical to a *national power distribution network* control system. It is enough that the bidder has experience in at least four (4) projects with some aspects which are similar (but not necessarily identical or the same as) to a power network control system.
21. An overly narrow interpretation of similarity can stifle competition. Section 43 (c) of the *Public Procurement and Disposal of Public Assets Act* which requires all public procurement and disposal to be conducted in accordance with the principle of maximisation of competition and ensuring value for money.
22. The Tribunal does not also accept the argument of the Applicant that the contract with UNBS had not yet been performed. The Bidding Document required bidders to submit documents evidencing specific experience by way of 2 contracts of supply of similar equipment equivalent to Ugx 1,500,000,000/= each in the last five years. The criterion is satisfied by submission of the

relevant contracts. Contract management or performance was not part of the criteria at this stage.

23. **Issue no. 2 is resolved in the negative.**

**Issue No. 3: Whether the 1<sup>st</sup> Respondent erred in fact and law when it found that the bid of the 2<sup>nd</sup> Respondent was substantially compliant and responsive, resulting into an award of contract**

24. The Tribunal has not found merit in the Applicant's complaint that the 2<sup>nd</sup> Respondent did not submit documents evidencing specific experience by way of 2 contracts of supply of similar equipment equivalent to Ugx 1,500,000,000/= each in the last five years.
25. The Evaluation Committee issued the Evaluation Report on July 27, 2022. The Contracts Committee at its 332<sup>nd</sup> meeting on August 2, 2022 approved the Evaluation Report and made an award of contract to the 2<sup>nd</sup> Respondent.
26. The Applicant further complains that the 1<sup>st</sup> Respondent opted not to undertake a mandatory post qualification on the 2<sup>nd</sup> Respondent.
27. Regulation 34 (1) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014* requires an Evaluation Committee to undertake a post qualification evaluation to confirm whether the best evaluated bidder has the capacity and the resources to effectively execute a procurement for the procuring and disposing entity.
28. The post qualification evaluation is undertaken to confirm— (a) the experience and performance of the bidder, with regard to similar assignments; (b) the capacity of the bidder with respect to equipment and facilities; (c) the qualifications and experience of the personnel of the bidder; (d) for a bid to procure non-consultancy services or works, that the bidder has the capacity to supervise or manage the



performance of the non-consultancy services or works, as the case may be, based on the qualifications of the supervisory or management staff of the bidder and the number and deployment of the staff; (e) the financial capability to perform the assignment; (f) the facilities or representation at or near the location to be used for the performance of the assignment; and (g) any other relevant criteria.

29. The criteria for post qualification evaluation must be limited to that which is necessary for the procurement and shall not be restrictive.
30. Where the best evaluated bidder does not meet the post qualification evaluation criteria, the evaluation committee must record this in the evaluation report and the exercise is then undertaken for the next best evaluated bidder.
31. For purposes of post qualification evaluation, an evaluation committee may request a bidder for independent references and the results from the references may be used to determine the award of contract. An evaluation committee must verify such information provided.
32. Where the Evaluation Committee determines that the best evaluated bidder no longer meets the pre-qualification requirements, it may recommend that the contract is not awarded to the best evaluated bidder.
33. The *Instructions to Bidders* (ITB) nos. 38.1, 38.2 and 38.3 of the Bidding Document required a post qualification exercise to be conducted.
34. The Evaluation Report makes no reference to any post qualification conducted on the 2<sup>nd</sup> Respondent during the evaluation process.
35. The 1<sup>st</sup> Respondent averred in its submissions that when the best evaluated bidder notice was issued, the Applicant applied for administrative review and later filed an application before the

Tribunal. That the procurement process was suspended and the 2<sup>nd</sup> Respondent hasn't been issued a contract. That since the matter has not been concluded before the Tribunal, the 1<sup>st</sup> Respondent cannot conduct the post qualification exercise.

36. With due respect, the post qualification exercise had to be conducted by the Evaluation Committee prior to issuing an Evaluation Report. It was premature for the Evaluation Committee to make a recommendation for award of contract and for the Contracts Committee to make the award in the absence of a post qualification.
37. The Respondent therefore erred in law when it failed to conduct post qualification on the 2<sup>nd</sup> Respondent prior to award of contract. The subsequent applications for administrative review and applications to the Tribunal were all done after the contract award decision. Those proceedings are therefore not a valid reason for failure to conduct the mandatory post qualification. Under regulation 31 of the *Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities) Regulations, 2014*, due diligence may be conducted at any time. However, post qualification must be conducted strictly at the stage prescribed in regulation 34 of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014*. Post qualification cannot be conducted on the best evaluated bidder after contract award by the Contracts Committee.
38. **Issue no. 3 is resolved partially in favour of the Applicant.**

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

39. The Tribunal has not found merit in the Applicant's complaint that the 2<sup>nd</sup> Respondent did not submit documents evidencing specific experience by way of 2 contracts of supply of similar equipment equivalent to Ugx 1,500,000,000/= each in the last five years. responsive.
40. However, the 1<sup>st</sup> Respondent erred in law when it failed to conduct a post qualification on the 2<sup>nd</sup> Respondent.



41. To that extent, the evaluation of the 2<sup>nd</sup> Respondent's bid was incomplete.
42. An award of contract is liable to be set aside if post qualification was not conducted as required by the bidding document and regulation 34(1) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014*.

See: ***Application no. 13 of 2021- Kasokoso Services Limited v Jinja School of Nursing and Midwifery.***

43. The procurement will therefore be remitted back to the 1<sup>st</sup> Respondent for completion of evaluation.

**I. DISPOSITION**

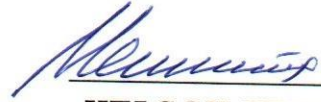
1. The Application is allowed in part.
2. The decision of the 1<sup>st</sup> Respondent's Accounting Officer dated September 30, 2022 is set aside.
3. The decision of the 1<sup>st</sup> Respondent's Contracts Committee dated August 2, 2022 to award the contract for Supply, Delivery and Installation of Q-TOF LC/MS System with its accompanying Components under Preside Project, College of Veterinary Medicine, Animal Resources and Bio-Security, to *M/s Palin Corporation Limited*, is set aside.
4. The procurement is remitted back to the 1<sup>st</sup> Respondent to complete the evaluation in a manner not inconsistent with the decision of the Tribunal, the law and the bidding document.
5. The 1<sup>st</sup> Respondent shall refund the Applicant's administrative review fees.
6. Each party shall bear its own costs.



Dated at Kampala this 28<sup>th</sup> 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**