

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

APPLICATION NO. 46 OF 2022

BETWEEN

**WORLD STANDARDIZATION CERTIFICATION &
TESTING GROUP (SHENZHEN) CO. 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 for General Goods under Procurement Ref No. **UNBS/NCONS/2021-2022/00006** using Open International Bidding Method. (Hereinafter referred to as the "impugned procurement.")
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, Quality Inspection Services Inc Japan, TUV Nord Egypt, Sunchine Quality Control Technology Services Co Ltd, World Standization Certification & Testing Group (Shenzen) Co. Ltd(the Applicant), 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. *Intertek International Ltd* one of the bidders, being dissatisfied by the outcome of the evaluation process sought administrative review of the entire procurement process by first filing a Complaint before the Accounting Officer on **September 19, 2022** and later by applying for an administrative review before the Tribunal, of the decision that had been made by the Accounting Officer, through Application No. 35 of 2022 on **October 3, 2022**
5. The Tribunal in its decision dated October 24th 2022, found that *Intertek International Ltd*' s bid was unfairly disqualified. The Tribunal remitted the procurement back to the Respondent, for re-evaluation in a manner consistent with the law and decision of the Tribunal.

6. The Respondent conducted a re-evaluation as directed by the Tribunal and displayed the Best Evaluated Bidder Notice on November 14, 2022 with a removal date of November 28, 2022. The notice indicated that 5 Bidders namely; *SGS Societe Generale de Surveillance SA, TUV Rhienland Middle East FZE, Helsman Quality & Technical Services Co. Ltd, Intertek International Ltd, and Bureau Veritas Uganda Ltd* were declared the Best Evaluated Bidders.
7. The Respondent on 18th September 2022 withdrew the Notice of Best Evaluated Bidder that had been issued on November 14, 2022 and substituted it with a new Notice of Best Evaluated Bidder with a removal date of December 4, 2022. The notice indicates that 6 Bidders namely; *SGS Societe Generale de Surveillance SA, TUV Rhienland Middle East FZE, Helsman Quality & Technical Services Co. Ltd, Intertek International Ltd, Bureau Veritas Uganda Ltd and Quality Inspection Services Inc. Japan* were declared the Best Evaluated Bidders.
8. The NOBEB indicated that the Applicant's bid failed at the preliminary stage of evaluation on two (2) grounds that, the submitted audited books of accounts statements were incomplete, had no comparison between current and previous year and that no membership certificate for IFIA/TIC was attached.
9. The Applicant being dissatisfied with the evaluation process, applied for administrative review before the Accounting Officer on November 24, 2022. The Respondent received the Compliant by embossing its Stamp on the Applicant's copy of the letter indicating that the Compliant was received on November 24, 2022, at 3:41pm.
10. Before the Applicant's process server a one Mukamarinda Angella would exit the premises of the Respondent, she was asked by the respondent's personnel to return to the Respondent's Offices where the Bankers' Cheque that had been submitted together with the Compliant were returned to the process server on the grounds that the amount stated in the cheque was insufficient to satisfy the threshold of prescribed fees for purposes of an administrative review compliant.

11. The Respondent upon return of the said cheque, retracted from her a copy with acknowledgement of receipt, made handwritten inscription indicating concealing receipt before handing it back to of the Applicant's process server Mukamarinda Angella.
12. Based on the actions of the Respondent in processing the Applicant's Complaint, the Applicant averred that it believed that the Accounting Officer of the Respondent had a conflict of interest in respect of the November 24, 2022 complaint and that its complaint could not be impartially handled by the Respondent.
13. Aggrieved by the actions of the Respondent, the Applicant therefore filed the instant application with the filed the instant Application on **December 2, 2022**, to PPDA Appeals Tribunal, under Sections 91I and 89 (9) of the PPDA Act, 2003 (as amended).

B. APPLICATION TO THE TRIBUNAL

1. The Applicant contended that the Respondent erred in law when it refused to accept service of the Applicant's administrative review application in the impugned procurement on November 24, 2022 yet the Accounting Officer of the Respondent was obligated to receive the application, to immediately suspend the procurement process, and to make a decision on the application within ten days in accordance with Section 89 (5) and (7) of the PPDA Act, 2003 (as amended).
2. The Applicant argued that the Respondent erroneously and unlawfully disqualified the Applicant's bid based on a criteria that was not provided for in the bidding document for the impugned procurement. That the disqualification of its bid based on the premise that it's "*Audited books of accounts statements attached are incomplete, no comparison between current and previous financial year*", implied that bidding document required the Applicant to submit audited books of accounts which include a comparison between the current and previous financial years.
3. That the evaluation criteria in the bidding document only required a bidder to provide certified audited books of accounts with a

positive Return on Investment (ROI) performed by qualified competent auditing firm fully licenced with the current licence for the last 5 years (2017 to date) and no other evaluation criterion in the bidding document for audited books of accounts statements.

4. The Applicant contended that there was no requirement in the bidding document for the audited books of accounts to include a comparison between current and previous financial year. The Applicant cited pages 485, 549, 493, 506, 519, 532, and 545 of its bid to show that it duly complied with the requirements. The Applicant relied on the decisions of the Tribunal in ***Application No. 18 of 2018 Roko Construction Ltd & Roko Construction (Rwanda) Ltd JV v. PPDA and Seyani Brothers and Co. (U) and Parbat Siyani Construction Ltd*** and ***Application No. 8 of 2021 Elite Chemicals Limited v. Uganda Coffee Development Authority*** to buttress its arguments.
5. The Applicant further contended that one of the best evaluated bidders Helsmans Quality & Technical Services Co. Ltd, did not meet the required eligibility requirement of successful implementation of PVoC for general goods or similar services in at least three contracts in the last five years (2107 to date). That consequently, the bid of *Helsmans Quality & Technical Services Co. Ltd* ought to have been disqualified at the preliminary evaluation stage for failing to meet the criteria in item 3.2 (iii) of the evaluation criteria in the bidding document.
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 BY THE RESPONDENT

1. The Respondent contended that the Applicant's bid did not meet the requirements of the bidding document. That the Applicant clearly indicated in its communications to the Respondent that it did not possess a TIC Membership and that the Applicant presented incomplete audited books of accounts statements that were non-compliant to the preliminary evaluation criteria of the bidding document.

2. The Respondent argued that the Applicant's Bid Validity Period expired before completion of the procurement process. That despite having received a request to extend the validity of its bid to 30th October 2022, the Applicant did not respond and did not extend the validity of its bid. The said bid was therefore rightly rejected in accordance with ITB 30.
3. The Respondent averred that it did not receive any written Compliant addressed to the Accounting Officer from the Applicant as prescribed under section 89 of the PPDA Act, 2003 and the PPDA (Administrative Review) Regulations No.16 of 2014 since the prescribed fees of UGX. 15,000,000 a non-negotiable condition precedent for the Accounting Officer to hear the Complaint was not paid.
4. The Respondent contended that the Applicant had no cause of action and basis to lodge the instant appeal before the Tribunal. The Respondent prayed for the Application to be dismissed with costs and that the procurement process be allowed to continue.

D. REPLY TO THE APPLICATION BY HELSMANS QUALITY & TECHNICAL SERVICES CO. LTD AS ONE OF THE BEST EVALAUTED BIDDERS

1. Helmsman Quality and Technology Services Co. Ltd (HQTS) through its Director *Fan Xiao Feng* filed a response to the Application arguing that the instant application is malicious, without merit and being time barred.
2. HQTS contended that its bid complied with all the requirements in the solicitation documents and that despite not being privy to the evaluation process, it was confident with the responsiveness of its bid including having submitted documents evidencing its works and experience.
3. HQTS undertook to avail all required information to the Tribunal in the event that the Respondent was unable to do so on condition that HQTS is notified in advance of such a need.
4. HQTS also argued that its bid was confidential and that contents of the same ought to have been protected under Section 47(2)(b) of

the Public Procurement and Disposal of Public Assets Act 2003, as amended. HQTs implored the Tribunal to disregard this attempt at phishing and illegally obtaining information of its bid using the Tribunal.

E. THE ORAL HEARING

The Tribunal held an oral hearing on 15th December 2022 via zoom cloud meetings software. The appearances were as follows:

1. Counsel Bara Mark Shyaka represented the Applicant. In attendance was Gelvis Turyagenda, the Country Representative of the Applicant and Chidimma Ogbonna, China Representative of the Applicant.
2. The Respondent was represented by David Livingstone Ebiru - Executive Director & Accounting Officer. In attendance were Hassan Walusimbi - Legal Counsel, Eng. John Paul Musimami - The Deputy Executive Director Compliance and Chairperson Contracts Committee, Mr. Hakim Mufumbiro- Mmember, Contracts Committee, Mr. Johnson Ssubi - Member Contracts Committee, Margret Tushemeirwe - Member Contracts Committee, Samuel Tumwesigye- Member Evaluation Committee and Principal Inspector-International & Regional Inspection Division, Doreen Nanvule - Member Evaluation Committee, Namara Innocent-PVOC Contract Manager, Richard Godfrey Babalanda - Head Procurement Unit, Caroline Komubigo, Amos Aluma Jabo, Grace Nabagereka and Rashid Ssevuma from the Procurement Unit.
3. The Best Evaluated Bidders attended the hearing, with the following representatives;
 - i) Valerie Wagner-Head of New Market and Global Projects- TUV Rheinland;
 - ii) Douglas Nyamori-Regional Manager-Intertek (EA) together with Moses Mugabi- Sales Manager -Intertek Uganda Office
 - iii) Edwin Kabuleeta -GSIT/VOC Manager Bureau Veritas Uganda, Elizabeth Karokora - Compliance Coordinator Bureau Veritas;
 - iv) Cherry Huang -Business Development Manager-Helmsman Quality and Technology Services Co. Ltd together with Betsey Zhou from Helmsman Quality and Technology Services Co. Ltd.

- v) Hellen Achieng- Manager SGS together with Barbra Sayuni - Operations Manager - SGS

F. SUBMISSIONS

1. During the oral hearing, the Applicant adopted and made further highlights of its written submissions while the Respondent made oral submissions and also adopted its written submissions.
2. *Helmsman Quality and Technology Services Co.,Ltd (HQTS)* reiterated contents of its filed written submissions.
3. The Representatives of the other respective four Best Evaluated Bidders stated that they filed no response to the Application and that they had no comments regarding the instant Application. The 6th Best evaluated bidder *Quality Inspection Services Inc. Japan*, though invited did not attend the hearing nor did they make any written submission
4. The Parties also provided clarifications to the Tribunal.

G. RESOLUTION BY THE TRIBUNAL

Issues

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

- 1) *Whether there is a competent Application before the Tribunal*
- 2) *Whether the Respondent erred in law when it refused to accept service of the Applicant's administrative review application in the impugned procurement*
- 3) *Whether the Entity erroneously and unlawfully disqualified the Applicant's bid based on criteria that was not provided for in the bidding document for the impugned procurement*
- 4) *Whether the bid of Helmsmans Quality & Technical Services Co. Ltd, which is one of the best evaluated bidders, does not meet the required eligibility requirement of successful implementation of PVoC for general goods or similar services in at least three contracts in the last five years (2107 – to date).*
- 5) *What remedies are available to the parties?*

Resolution of Issues Raised

Issue 1

Issue No.1. Whether there is a competent Application before the Tribunal

1. The Tribunal has considered the submissions of all parties. The Tribunal will first deal with the point of law raised by the Respondent.
2. The Respondent at paragraph 2.1 of its Response to the Application stated that the Applicant's bid had expired before the completion of the procurement process. That the Applicant had not responded to requests from the Respondent for its bid validity to be extended to October 30th 2022.
3. The Tribunal held in ***Beautiful Engineering & Equipment Ltd vs. Uganda Electricity Transmission Company Limited Application No. 15 of 2021*** that it is duty bound to inquire into the existence of the facts in order to decide whether it has jurisdiction. This is because Jurisdiction must be acquired before judgment is given. As such, the Tribunal must inquire into the facts of whether the Applicant has locus to file an Application before it and secondly whether the Tribunal is seized or clothed with Jurisdiction to interrogate the merits of Application before it.
4. The pertinent question to be determined by the Tribunal at this point therefore is whether there is a valid and competent Application before the Tribunal. 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.** See ***Application No.31 of 2022 Kafophan and SIAAP Consortium vs Ministry of Agriculture Animal Industry and Fisheries & Youth Alive Uganda***

5. 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.*
6. Regarding Locus of the Applicant, Section 89 (1) of the Public Procurement and Disposal of Public Assets Act 2003 as amended states that "*a bidder who is aggrieved by a decision of a procuring and disposing entity may make a complaint to the Accounting Officer of the procuring and disposing entity*".
7. **Regulations 4(1) and 4(2) of the Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014 provide ample guidance on whom a complaint must be addressed to and what a valid complaint is made of .**
8. Section 89 (1) of the Public Procurement and Disposal of Public Assets Act 2003 as amended by Act 15 of 2021 is meant to provide administrative relief to a bidder who is aggrieved by a decision of a procuring and disposing entity.
9. **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.
10. **The import of the cited provisions is to the effect that only a bidder may file a complaint for administrative review before the Accounting Officer under Section 89(3) of the Public Procurement and Disposal of Public Assets Act 2003** and where there is belief that the Accounting Officer has a conflict of interest or that the matter cannot be handled impartially by the procuring and disposing entity as is the claim in this instant application, then the bidder may file an application directly to the Tribunal for determination of the complaint, omission or breach.

11. A bidder for purposes of public procurement and disposal in Uganda is defined under section 3 of the Public Procurement and Disposal of Public Assets Act 2003 as a physical or artificial person intending to participate or participating in public procurement or disposal proceedings.
12. Participation in public procurement or disposal proceedings is guaranteed by the validity of a bid. As such Bid validity or validity of a bid refers to the validity of a bidder's offer, be it a bid or a proposal. The bid validity period is the period within which a bidder agrees to keep their offer legally binding. See Reg 52 of the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014* and **Application No.13 of 2021 Kasokosoko Services Ltd vs Jinja School of Nursing and Midwifery.**
13. Bid extension is provided for under *Regulation 52(5) of the PPDA (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014*. The provision is to the effect that where an extension to the bid validity period becomes necessary, a bidder shall be requested by a procuring and disposing entity in writing before the expiry of the validity of their bid, to extend the bid validity for a specified period beyond what is stated in the bidding document. It is worthy to note that requests for extension of bid validity applies to all bidders in a procurement process and it is not exclusive to a single bidder. **See Application No.16 of 2021 K-Solutions Ltd vs Ministry of Energy and Mineral Development, Application No.10 of 2021.** Furthermore *Regulation 52(7) of the PPDA (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014* provides for discretion of a bidder to extend bid validity or not.
14. In the instant application, Godfrey Babalanda the Principal Procurement Officer of the Respondent in an email addressed to all bidders on August 11, 2022 at 4:25pm, requested all bidders to extend the validity of their bids to October 30, 2022. The email stated as follows;

“Reference is made to the procurement for the Provision of Pre Export verification of Conformity- Provision of PVC Services Providers-General Goods vide Procurement Reference No. UNBS/NCONS/2021-2022/00006

This is to sincerely apologize for the delay of the process due to un avoidable circumstances.

You are therefore requested to extend the bid validities of your bids to October 30, 2022 to enable the full completion of the procurement process and award of contracts to the Best Evaluated Bidders.

Kindly respond using the same media on your company headed papers and fully signed by the power of attorney”

See R5 to the Respondent’s Reply to the Application and also a screenshot of the email shared by the Applicant’s Gelvis Turyagyenda with the Tribunal through email of tgelvis@hotmail.com on December 15, 2022 at 6:25PM.

15. The Applicant’s Adaobi Ogbonna using the email address ada@wsct-cert.com on Friday, August 19, 2022 at 13:14pm addressed to Godfrey Babalanda the Principal Procurement Officer of the Respondent responded as follows;

“Dear Sir,

We have attached the acknowledgement letter for this email in the attachment as requested.

Please may I ask if there is a deadline for the extension of this bid validity?

Hope to hear from you soon.

*Best Regards
Adaobi Ogbonna”*

See R6 to the Respondent’s Reply to the Application and also a screenshot of the email shared by the Applicant’s Gelvis Turyagyenda with the Tribunal through email of tgelvis@hotmail.com on December 15, 2022 at 6:25PM.

16. The Applicant’s *Musoke Gyavira* as its authorised representative sent a letter of acknowledgement on what appears to be a

letterhead of the Applicant. The letter is undated and is addressed to no one in particular. It however reads as follows;

"LETTER OF ACKNOWLEDGEMENT

This is to acknowledge that we have received the email from UNBS instructing us to extend the bid validity to October 30, 2022. This is in order to enable the full completion of the procurement process and award of contract to evaluated bidders.

This instruction is well received and we will do as instructed
Sincerely

Musoke Gyavira
(WSCT Authorised Representative)

There is no further communication from the Applicant to the Respondent regarding the extension of the validity of its bid. The Applicant in its written submissions to the Tribunal only argued that the Respondent by email on 11th August 2022 requested bidders to extend the validities of their bids to 30th October 2022. There is no other request for extension of the bid validity issued by the Respondent.

17. The Applicant therefore argued that as a consequence, the Best Evaluated Bidder Notice displayed in November 2022 was inconsequential since all the bids had expired and the procurement process had effectively terminated.
18. Even when given an opportunity to adduce evidence to prove that the Applicant had extended validity of its bid post the August 11, 2022 email to October 30, 2022, the Applicant did not adduce any evidence to show that its bid validity was extended to October 20, 2022. None of the 6 attachments by the Applicant shared with the Tribunal contained proof of extension of bid validity.
19. It therefore follows that in the absence of any extension of bid validity from the Applicant, the Applicant's bid therefore expired on August 28, 2022.
20. The Tribunal has consistently held that a bidder whose bid validity has expired is no longer a bidder. Such a person has no locus to file a complaint before the Accounting Officer or an Application before the Tribunal. **See Application No.16 of 2021 K-Solutions Ltd vs**

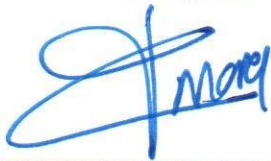
Ministry of Energy and Mineral Development, Application No.10 of 2021 and Acacia Place Limited vs PPDA and EC

21. Having not extended the validity of its bid up to October 30, 2022 or any other period thereafter implies that by the time the Applicant purported to file a complaint before the Accounting Officer on 24th November 2022, it was no longer a bidder. It had no locus standi to file a complaint before the Accounting Officer and consequently no locus standi to file an Application for Administration Review before the Tribunal on account of expired bid.
22. The digest of our findings is that the Applicant had no locus standi to file before the Tribunal. The Application is incurably defective and incompetent. The jurisdiction of the Tribunal is extinguished at this point in as far as the matter is concerned.
23. In the result, there is no need to delve further into the merits of the Application.

H. DISPOSITION OF THE TRIBUNAL

- 1) The Application is struck out.
- 2) The Tribunal's suspension order dated December 2, 2022 is vacated.
- 3) The Respondent may continue with the procurement process to its logical conclusion.
- 4) Each party to bear its own costs.

Dated at Kampala this **22nd** day of December 2022.



FRANCIS GIMARA S.C
CHAIRPERSON



THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER