

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

APPLICATION NO. 2 OF 2023

BETWEEN

FARA GOSTAR BISTOON=====APPLICANT

AND

**UGANDA ELECTRICITY TRANSMISSION
COMPANY LIMITED =====RESPONDENT**

**APPLICATION FOR REVIEW IN RESPECT OF THE PROCUREMENT FOR
SUPPLY OF FIVE (05) 132KV DOUBLE CIRCUIT TRANSMISSION LINE
MONOPOLE TOWERS; PROCUREMENT REFERENCE NUMBER
UETCL/SS/2020-2021/00447.**

**BEFORE: FRANCIS GIMARA S.C, CHAIRPERSON; NELSON NERIMA;
THOMAS BROOKES ISANGA AND CHARITY KYARISIIMA, MEMBERS**

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. On 19th May 2022, the Respondent invited sealed bids for the procurement for supply of five (05) 132kv double circuit transmission line Monopole Towers.
2. The bidding document was issued to 16 bidders of which only 4 bidders namely *Fara Gostar Bistoon*(the Applicant), *Precise Engineering Services Limited*, *Citic Construction Ltd* and *Coreplus Logistics Ltd* submitted bids by the closing date of June 29, 2022
3. Upon conclusion of the evaluation process, the Best Evaluated Bidder Notice was displayed on October 4, 2022 with a date of removal being October 17, 2022. The Notice indicated that *Fara Gostar Bistoon* was the Best Evaluated Bidder at a Total contract price of UGX 2,829,588,800/= tax inclusive.
4. The Contract award to *Fara Gostar Bistoon* was challenged *Precise Engineering Services Limited* through administrative review process before the Accounting Officer of the Respondent on 18th October 2022 and later before the Tribunal in Application No. 43 of 2022.
5. In a decision dated 28th November 2022, the Tribunal allowed the Application by *Precise Engineering Services Limited*, set aside the administrative review decision of the Accounting Officer dated October 31, 2022, and remitted back the entire procurement process for re-evaluation in a manner consistent with the law within ten days from 28th day of November 2022.
6. On 17th December 2022, the Applicant wrote a letter to the Respondent reminding them of the deadline set by the Tribunal that had passed on 10th December 2022 and prayed for the re-evaluation process to be fast tracked.
7. On 20th December 2022, the Respondent's Contracts Committee received reviewed and approved the cancellation of the subject procurement on the basis that the purpose of the technical re-evaluation would not be achieved given the ambiguities in the Statement of Requirements. The Committee recommended that the procurement be retendered with a clear Statement of Requirements.

8. On 27th December 2022, the Respondent notified all the bidders of the cancellation of the procurement in accordance with ITB 40 of the bidding document.
9. On 25th January 2023, the Applicant being aggrieved by the decision of the Respondent, filed the instant application with the Tribunal, seeking to review the cancellation.

B. APPLICATION TO THE TRIBUNAL

1. The Applicant contested the decision to cancel the procurement and requested the Tribunal to ensure that the Respondent follows the Tribunal decision for it to undertake a re-evaluation and that the two (02) bidders who were assumed to be affected by the technical ambiguity to be evaluated against the criteria set for post qualification.
2. The Applicant averred that it has incurred an expense of approximately US\$ 61,800 as a result of participating twice in the tender and that participating a third time would imply that they would have to recover these costs which would make their bid price less competitive.
3. The Applicant prayed that the Tribunal finds merit in the application and for costs of the application and to nullify the cancellation of the procurement.

C. REPLY TO THE APPLICATION

1. The Respondent contended that the Applicant did not have a cause of action against it and that the application is an abuse of the Tribunal's process as it was not commenced within ten working days from the date of the alleged breaches.
2. The Respondent averred that the application is premature and misleading as the Respondent's Accounting Officer did not make any decision in this matter for which the Applicant seeks review.
3. The Respondent contended that the application is incompetent and incurable defective for being lodged in this Honourable Tribunal

without a complaint having been lodged with the Respondent's Accounting Officer.

4. The Respondent averred that the entire cost claimed by the Applicant is in bad faith and aimed at depriving it of the public funds it holds; that it cannot be faulted for following the guidance of the law and the Tribunal at arriving at its decision to cancel the procurement process.
5. The Respondent prayed that the Tribunal finds that the Applicant is not entitled to the remedies and prayers sought and that the Application be dismissed.

D THE ORAL HEARING

The Tribunal held an oral hearing on **7th February 2023** via zoom software. The appearances were as follows:

1. **Mr. Amir Ramineh**, the Project Manager and Head of Department for International Projects represented the Applicant.
2. The Respondent was represented by **Mr. Anyuru Simon**, the Acting Senior Legal Officer; **Mr. Edward Rwabushenyi**, the Principal Legal Officer; **Mr. Samuel Otedor**, the Senior Civil Engineer; and **Mr. Julian Nabasa.**, the Procurement Officer

E. SUBMISSIONS

During the oral hearing, the Applicant and Respondent highlighted their written submissions and made oral arguments before the members of the Tribunal.

Applicant

1. The Applicant contested the decision to cancel the procurement and requested the Tribunal to ensure that the Respondent follows the Tribunal decision for it to undertake a re-evaluation and that the two (02) bidders who were assumed to be affected by the technical ambiguity to be evaluated against the criteria set for post qualification.
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approximately US\$ 61,800 as a result of participating twice in the tender and that participating a third time would imply that they would have to recover these costs which would make their bid price less competitive.

3. The Applicant prayed that the Tribunal finds merit in the application and for costs of the application and to nullify the cancellation of the procurement.

Respondent

1. The Respondent contended that the Applicant did not have a cause of action against it and that the application is an abuse of the Tribunal's process as it was not commenced within ten working days from the date of the alleged breaches.
2. The Respondent averred that the application is premature and misleading as the Respondent's Accounting Officer did not make any decision in this matter for which the Applicant seeks review.
3. The Respondent contended that the application is incompetent and incurable defective for being lodged in this Honourable Tribunal without a complaint having been lodged with the Respondent's Accounting Officer.
4. The Respondent averred that the entire cost claimed by the Applicant is in bad faith and aimed at depriving it of the public funds it holds; that it cannot be faulted for following the guidance of the law and the Tribunal at arriving at its decision to cancel the procurement process.
5. The Respondent prayed that the Tribunal finds that the Applicant is not entitled to the remedies and prayers sought and that the Application be dismissed.

F. RESOLUTION BY THE TRIBUNAL

Issues

We now revert to the substantive issues in this application:

- i Whether there is a competent application before the Tribunal?
- ii Whether there was a lawful cancellation of the procurement process?

iii What remedies are available to the parties?

Resolution of Issues

Issue 1

Whether there is a competent application before the Tribunal?

1. 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 has locus standi 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 versus Ministry of Agriculture Animal Industry and Fisheries & Youth Alive Uganda**
2. The Tribunal is duty bound to inquire into the existence of the facts in order to decide whether it has jurisdiction. This is because jurisdiction must be acquired before judgment is given. See **World Standardization Certification & Testing Group (Shenzen) Co. Ltd Vs. Uganda National Bureau of Standards, Application No. 46 of 2022.**
3. In determining whether the Applicant has *locus standi* to enable a competent application being brought before this Tribunal, we are guided by whether the Applicant has legal standing to appear before and seek recourse from this Tribunal. For purposes of procurement disputes such as in this instance, the first step is to ascertain whether the Applicant is a 'bidder' properly so called.
4. Participation in public procurement or disposal proceedings is guaranteed by the validity of a bid. The bid validity period is the period within which a bidder agrees to keep their offer legally binding. See Regulation 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.46 of 2022 World Standardization Certification & Testing Group (Shenzen) Co. Ltd vs Uganda National Bureau of Standards. Application No.13 of 2021 Kasokosoko Services Ltd vs Jinja School of Nursing and Midwifery.**

5. From the Tribunal's perusal of the procurement file submitted by the Respondent, together with the confirmations obtained from both parties during the oral hearing, the bid validity expiration date for all bids submitted was 31st January 2023. The Tribunal notes that the Applicant filed this application on 25th January 2023 before the expiry of its bid on 31st January 2023. However, the said bid expired on 31st January 2023 prior to the oral hearing which took place on 7th February 2023.
6. According to **Section 89(5) and 89(11) (a) of the Public Procurement and Disposal of Public Assets Act 2003 and Regulation 52(5) of the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014**, 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.
7. We have not seen any record of the Respondent requesting the bidders to extend validity of their bid. There is no record to show that any of the bidders extended bid validity beyond 31st January 2023. Therefore, there are no valid bids upon which the Tribunal can base to adjudicate and review a compliant arising out of the procurement process. We find that it will be an exercise in futility and legally moot as expiry of the bid validity means that one is no longer regarded as a 'bidder'.
8. Regarding the objection that the Application is incompetent and incurably defective for being lodged in this Tribunal without a complaint having been lodged with the Respondent's Accounting Officer, it is our finding that the cancellation decision of **December 27, 2022**, was not an administrative review decision made in reply to the complaint of **December 17, 2022** but an independent action and decision of the Respondent arising out of the impugned procurement process.
9. The instant application was made under section 91I of the *Public Procurement and Disposal of Public Assets Act 2003*.
10. For an Applicant to have locus standi before the Tribunal under section 91I (1) (b) of the *Public Procurement and Disposal of Public*

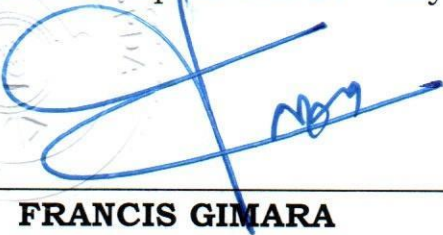
Assets Act 2003, the Applicant must be aggrieved by an administrative review decision made by the Accounting Officer of the procuring and disposing entity under section 89(7).

11. For an Applicant to come direct to the Tribunal under section 91I(1)(c) of the *Public Procurement and Disposal of Public Assets Act 2003* without first applying for administrative review before the Accounting Officer, the Applicant must demonstrate that the accounting officer has a conflict of interest in the matter. Unfortunately, the Applicant did not plead facts relevant to establish locus under the cited sections.
12. In the premises, this Application made direct to the Tribunal without the Applicant first having made a complaint to the Accounting officer is incompetent. See: ***Kafophan Siap Consortium v Ministry of Agriculture, Animal Industry and Fisheries & Youth Alive Uganda, Application No. 31 of 2022.***
13. **Issue no. 1 is therefore resolved in the negative. The Application is incompetent and will be struck out. There is no need for the Tribunal to delve into the merits of the matter.**

G. DISPOSITION

1. The Application is struck out.
2. The suspension order dated 25th January 2023 is vacated.
3. Each party should bear own costs

Dated at Kampala this **17th** day of **February 2023**.



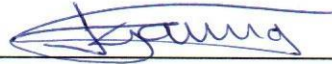
**FRANCIS GIMARA
CHAIRPERSON**



**NELSON NERIMA
MEMBER**



**THOMAS BROOKES ISANGA
MEMBER**



**CHARITY KYARISIIMA
MEMBER**