

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

REGISTRY APPLICATION NO. 4 OF 2023

BETWEEN

MIXJET FLIGHT SUPPORT FZE::: APPLICANT

AND

**UGANDA NATIONAL AIRLINES COMPANY
LIMITED:::RESPONDENT**

**APPLICATION FOR REVIEW OF THE DECISION OF UGANDA
NATIONAL AIRLINES IN RESPECT OF THE PROCUREMENT OF
AVIATION FUEL AND INFLIGHT SUPPORT USING OPEN
INTERNATIONAL BIDDING METHOD UNDER PROCUREMENT
REFERENCE NUMBER UNACL/SUPLS/22-23/00020**

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

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A. BRIEF FACTS

1. The Respondent invited sealed bids for the procurement of supply of aviation fuel and inflight support using open international bidding method under Procurement Reference Number UNACL/SUPLS/22-23/00020 on November 8, 2022, advertised in the New Vision Newspaper on page 27 and in the East African Newspaper on November 12, 2022.
2. The bidding document was issued to 10 bidders namely *Norble Petroleum and Logistics Ltd, Associated Energy Group, LLC, Mixjet Flight Support FZE, SKA International Group, Tristar Energy Limited, VIVO Energy (U) Limited, Kencor Petroleum Limited, PUMA Energy (Aviation) S.A, Zenith Oil Terminals Limited and Global Aviation Energies.*
3. The bidding was closed on Tuesday, November 29, 2022 at 12:00 pm with four (4) bidder namely, *Norble Petroleum and Logistics Ltd, Mixjet Flight Support FZE, VIVO Energy (U) Limited, PUMA Energy (Aviation) S.A, and Zenith Oil Terminals Limited* responding to the invitation for Lot -1.
4. For Lot 2, there were 4 bidders who responded to the invitation namely *Norble Petroleum and Logistics Ltd, Mixjet Flight Support FZE, PUMA Energy (Aviation) S.A, Associated Energy Group, LLC and Zenith Oil Terminals Limited.*
5. Upon conclusion of the evaluation process, the Best Evaluated Bidder Notice was displayed on January 25, 2022 with a date of removal indicated as January 27, 2022.
6. The Notice indicated that *Vivo Energy (U) Limited* was the Best Evaluated Bidder at a total contract price of USD 12, 254, 758 for Lot -1. The Notice also indicated that *Associated Energy Group, LLC* was the Best Evaluated Bidder at a total contract price of USD 17, 278, 287 for Lot -2.
7. The Notice indicated that *Mixjet Flight Support FZE*(the Applicant) was disqualified at the Preliminary Stage for *Lack of evidence of payment of business taxes in the Country of Origin*

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/Operation; Non submission of a Registered/Notarized Power of attorney; non-submission of a 3rd party aviation liability insurance; Lack of a copy/statement of Bidder's Health, Safety and Environmental (HSE) policy; No evidence of current participation in AFRAA Joint Fuel Supply Project (AFRAA award letter); and No proof of authorization to supply Jet A-1 fuel in Entebbe International Airport.

8. The Contract award to both *Vivo Energy (U) Limited* and *Associated Energy Group, LLC* was challenged by the Applicant through administrative review process before the Accounting Officer of the Respondent on January 27, 2023.
9. In a decision dated 9th day of February 2023, the Accounting Officer of the Respondent dismissed the Applicant's compliant on the grounds that the Complaint although received within the prescribed period, did not comply with the provisions of section 89 (3)(a) of the **Public Procurement and Disposal of Public Assets Act**. That the Complaint was not dated, has no addressee and name of the person representing the bidder and that the Complainant did not pay the prescribed fees.
10. The Applicant being dissatisfied with the decision of the Accounting Officer, lodged the instant application with the Tribunal on February 13, 2023, seeking to review the decision of the Respondent. The application was made by letter.
11. The Application listed the following grounds for the appeal:
 - 1) *The bid notice for the said services was issued on the 8th of November 2023 under open international bidding. But, in the same document Entebbe station was excluded from international bidding. Meaning there were preset conditions designed to fail us. (SIC).*
 - 2) *The reasons given for our disqualification were not true. And our response clearly disputed them. (SIC).*
 - 3) *Our appeal to Uganda Airlines was sent in an email that was*

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dated and they also responded to the appeal confirming receipt. But we were given the reason that the appeal was not dated. (SIC).

B. RESPONSE TO THE APPLICATION

1. The Respondent through its Legal Department filed a response on February 21, 2023 and averred as follows:
2. The bid required evidence of payment of taxes in country of origin, but no evidence was submitted of the applicant's status.
3. The bid document required notarised Powers of Attorney to foreign bidders. The Applicant did not comply. Sole proprietorship is not exempted from Powers of Attorney for third party transactions.
4. The International Air Transport Association (IATA) requires Third-Party Insurance for fuel suppliers in aviation of up to USD 1 Billion. The Applicant never submitted the evidence. This was a formal bidding process and even if the Applicant had been a supplier to the Respondent, the Evaluation Committee could not assume anything without evidence.
5. The requirement for an HSE policy is applicable to all fuel suppliers internationally. This was required for the bidder not for his/her partners. There was non-compliance.
6. There was no Evidence of current participation in African Airlines Association (AFRAA) joint fuel supply project. The Applicant never participated last year. The submission made was after bid opening and his submission could not be considered.
7. There was no proof of authorization to supply fuel at Entebbe. The Uganda Civil Aviation Authority (UCAA) certifies all fuel suppliers at Entebbe International Airport. The certification was not submitted as required by the regulator as indicated in the bid document.

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8. The Respondent prayed that the Tribunal do dismiss the application for lack of merit and uphold the recommendations of the Evaluation Report and decision of the Contracts Committee and that of the Accounting Officer.

C. APPLICANT'S SUBMISSIONS

1. The Applicant filed written submissions through M/S *Muhumuza, Kateeba & Co. Advocates*.
2. Counsel submitted that although some of the matters raised in the submissions were not raised in the application, the Tribunal is not obliged to limit its determination to the case or substantive issues raised by the parties. As an external administrative merits review tribunal, the Tribunal reviews material that was before the primary decision maker, including that which ought to have been before it. He relied on ***High Court Civil Appeal No. 6 of 2016 Public Procurement and Disposal of Public Assets Authority v Peace Gloria***.
3. Counsel also cited ***High Court Civil Appeal No. 3 of 2016 Public Procurement and Disposal of Public Assets v Pawor Park Operators and Market Vendors SACCO and Tribunal Application No. 1 of 2023- Apple Properties Limited v. UHRC***.

Dismissal of the Applicant's administrative review application

4. Counsel submitted that the Respondent recognised the existence of the complaint in the administrative review decision of the Respondent's Accounting Officer dated February 9th, 2023, in the letter of January 30th, 2023 which notified the Applicant of the suspension of the procurement process, and in the Respondent's reply to this application. Counsel submitted that the Respondent is precluded from disputing the date, author and addressee of the Applicant's administrative review application based on the principle of approbation and reprobation.

5. That the email from the Applicant specified the date (January 27, 2023); the subject; and the addressees including Jenifer Bamuturaki. The complaint which was attached to the email and was signed by the authorized representative of the Applicant and endorsed with the Applicant's stamp. The complaint by the Applicant fulfilled the key requirements of Section 89 (3) of the **Public Procurement and Disposal of Public Assets Act** because it was in writing, submitted to the Accounting Officer of the Respondent, and made within the prescribed period of ten (10) working days.
6. With regard to the payment of administrative review fees, the Respondent did not advise the Applicant on where and how to pay the administrative review fees. He cited **Vision Scientific & Engineering Limited v. Makerere University, Tribunal Application No. 27 of 2022.**

Reasons for disqualification of the Applicant's bid

7. Item 3.2 (b) of the Evaluation Methodology and Criteria in the bidding document requires evidence of payment of business taxes in the country of origin / operation e.g operational license, tax clearance certificate, social security contribution e.t.c. This requirement in the bidding document is ambiguous, but that nonetheless the Applicant met this criterion. It does not state the period for which evidence of payment of business taxes is required. It is contradictory regarding the nature or meaning of business taxes and evidence of payment of business taxes. The criterion refers to payment of business taxes, however the examples given of the evidence of payment of business taxes include operational license and social security contribution which are not taxes. The Applicant submitted in its bid a Certificate of Registration for Value Added Tax in the United Arab Emirates. The submission of a certificate of registration for value added tax in the country of origin of the Applicant meets the criterion in item 3.2 (b). Item 3.2 (c) of the Evaluation Methodology and Criteria requires bidders to submit a registered / notarized powers of attorney.

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8. ITB 22.2 of the bidding document provides that the original and all copies of the bid shall be typed or written in indelible ink and shall be signed by a person duly authorized to sign on behalf of the bidder. ITB 22.2 further provides that the authorisation shall consist of a power of attorney which if signed in Uganda shall be registered and if signed outside Uganda shall be notarized and shall be attached to the bid. The Applicant substantially met the requirement for authorisation to sign a bid. The Applicant submitted in its bid a power of attorney executed on 24th November 2022 appointing and authorizing Mr. Mohamad Muneer Khalifeh to be its lawful attorney for all matters relating to submission of its bid to the Respondent. Mr. Mohamad Muneer Khalifeh signed and submitted the bid on behalf of the Applicant. With regard to the failure to register / notarize the power of attorney in the Applicant's bid, this is not a material deviation. In the circumstances, the Respondent should have requested the Applicant to have the power of attorney notarized in accordance with Regulation 10 of the **Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014**.
9. The failure to register / notarize a power of attorney does not fall under any of the categories / circumstances that give rise to a material deviation.
10. The failure to register or notarise a power of attorney does not invalidate the instrument, and there is no provision in the regulatory framework of Uganda that states that a power of attorney in a bid can only be valid if it is notarised or registered. With or without registration or notarization, a power of attorney is a valid document authorising a done to act on behalf of the donor of the instrument. The content and validity of a power of attorney are not altered or affected in any manner whatsoever by notarising or registering the instrument.
11. Counsel cited **CATIC v. Public Procurement and Disposal of Public Assets Authority, Tribunal Application No. 1 of 2016**.

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12. Item 3.2 (h) of the Evaluation Methodology and Criteria requires 3rd party aviation liability insurance (USD 500M – USD 1BN).
13. The Respondent erroneously included the requirement for 3rd party liability insurance in the Evaluation Methodology and Criteria for proof of eligibility to bid. A provider can only be required to obtain insurance for supplies after executing a contract with an Entity, and not before that. It is only after execution of a contract that a provider can obtain insurance for a requirement specified in a contract. Prior to executing a contract, there is no subject matter to be insured. It is for this reason that the provisions for insurance are contained in the conditions of contract in the bidding document. Counsel cited Clause 25 of the General Conditions of Contract in the bidding document and Clause 25 of the Special Conditions of Contract.
14. Item 4 (b) of the Evaluation Methodology and Criteria provides for the administrative compliance criterion of a copy / statement of Bidder's Health, Safety and Environmental (HSE) Certification. The Applicant's bid was disqualified for lack of a copy / statement of Bidder's Health, Safety and Environmental (HSE) policy. The Applicant was disqualified for an evaluation criterion that is not provided for in the bidding document. The bidding document did not require bidders to provide a Health, Safety and Environmental (HSE) policy. The requirement is for Health, Safety and Environmental (HSE) Certification. This was an unlawful application of an evaluation criteria contrary to section 71 (3) of the **Public Procurement and Disposal of Public Assets Act** and regulation 7 (2) of the **Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014.**
15. Without prejudice to the above, counsel submitted that the criterion in item 4 (b) of the Evaluation Methodology and Criteria is erroneous. Health, Safety and Environmental certificates are awarded to individuals after completing a training course, and not to a company. Therefore, if a requirement is for submission of Health, Safety and Environment certificates, it should specify the key personnel of

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a bidder that should have these certificates, as is commonly done in high value procurements for works.

16. Item 3.2 (i) of the Evaluation Methodology and Criteria requires evidence of current participation in African Airlines Association (AFRAA) Joint Fuel Supply Project i.e AFRAA award letter. This requirement contravenes the factors governing the use of open international bidding, given that it limits participation of providers, it does not have equal terms for all providers, and it specifically limits participation of foreign providers by requiring bidders to be current participants in the AFRAA Joint Fuel Supply Project.
17. That an Entity conducting a procurement process using the open international bidding method is precluded by section 81 (1) of the **Public Procurement and Disposal of Public Assets Act**, from using restrictive evaluation criteria, such as the requirement in item 3.2 (i) of the Evaluation Methodology and Criteria. Counsel also cited section 46 of the **Public Procurement and Disposal of Public Assets Act**, and regulation 7 (4) of the **Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014**.
18. Item 4 (d) of the Evaluation Methodology and Criteria requires for Lot 1 proof of authorization to supply Jet A – 1 fuel in Entebbe International Airport. The requirement did not specify the period of authorization, the type of proof or the source of proof. The Applicant is in the business of supplying Jet A – 1 fuel at various airports around the world, including Entebbe International Airport. In the reply to the application, the Respondent states that the Applicant is well known to them and he has been supplying aviation fuel for over three years under contract. d
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19. If the Respondent needed any further proof, it should have sought for clarification and additional documentation from the Applicant in accordance with Regulation 10 and 11 of the **Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014**.

20. Additionally, the Respondent could have carried out a due diligence to confirm the authorization of the Applicant to supply Jet A – 1 fuel at Entebbe International Airport in accordance with Regulation 31 of the **Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities) Regulations, 2014**.
21. In addition, counsel faulted the Respondent for illegally altering the standard bidding document issued by the Authority.
22. In ITBs 1.2 and 1.3 of the bidding document, the text of the instructions to bidders in the Standard Bidding Document for supplies was altered to provide that the bid comprises of Lot 1 and 2, that bidders of Lot 1 shall be local suppliers from Uganda and original Jet A – 1 fuel manufacturers, and that Lot 2 is open to all bidders.
23. Items 3.2 (a) to (i) and 4 of the Evaluation Methodology and Criteria in the bidding document are all alterations and changes to item 3.2 in the Standard Bidding Document issued by the Authority in contravention of Regulation 23 (3) (d) which only permits modification in accordance with the options available on the documents. The Statement of Requirements in the bidding document does not include any of the prescribed forms in the Standard Bidding Document issued by the Authority.
24. Finally, counsel faulted the Respondent for indicating in the Notice of Best Evaluated Bidder that the Respondent intends to place a contract with the Best Evaluated Bidder one (1) working day from the date of display. The date for display is January 25, 2023 and the date for removal is January 27, 2023. Counsel cited sections 76 (2) (a) and 76 (3) of the **Public Procurement and Disposal of Public Assets Act** and regulation 5 of the **Public Procurement and Disposal of Public Assets (Contracts) Regulations, 2014**.
25. Counsel prayed for cancellation of the procurement.

D. ORAL HEARING

1. The Tribunal conducted a hearing of the Application on March 6, 2023. The appearances were as follows:
2. APPLICANT: John Kallemera as Counsel. David Mashanga represented the Applicant.
3. RESPONDENT: Jenifer Bamuturaki-Accounting Officer/Chief Executive Officer; Bisereko Kyomuhendo-Company Secretary; Alex Odwong-Manager PDU.
4. ASSOCIATED ENERGY GROUP, LLC: D. Waliggo- Project Manager, Sales-Africa.
5. VIVO ENERGY UGANDA LIMITED: Aupata Jemimmah- Commercial Manager; Francis Kayoki- Account Manager
6. The parties and counsel highlighted their cases.
7. The representatives of the best evaluated bidders adopted the contents of their respective bids.

E. RESOLUTION BY THE TRIBUNAL

1. Having considered the Application, response and submissions, the following issues arise for consideration by the Tribunal:
 - 1) Whether the format of the Application is competent
 - 2) Whether there was a valid complaint before the Accounting Officer of the Respondent.
 - 3) Whether the decision of the Accounting Officer of the Respondent is valid.
 - 4) Whether the Respondent erred when it disqualified the Applicant's bid.
 - 5) What remedies are available to the parties.

Issue No. 1: Whether the format of the Application is competent

2. The Application (by way of letter) did not follow or comply with the prescribed format provided for in the **Public Procurement and Disposal of Public Assets (Tribunal) (Procedure) Regulations 2016**.
3. The Tribunal has earlier on held that non-conformity with a particular form does not render a document void. Regard must be made to considering the substance rather than the form. See **section 43 of the Interpretation Act, Application No. 1 of 2023 Apple Properties Ltd v UHRC and Application No. 41 of 2022- Orungo Market Vendors Association v Amuria District Local Government**.
4. The instant Application sets out the material facts of the complaint and the grievances of the Applicant.
5. The Tribunal shall therefore consider the merits of the Application.
6. **Issue no. 1 is answered in the affirmative.**

Issue No.2: Whether there was a valid complaint before the Accounting Officer of the Respondent.

7. Section 89(1) of the **Public Procurement and Disposal of Public Assets Act** provides 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.
8. Section 89(3) of the **Public Procurement and Disposal of Public Assets Act** provides that a complaint against a procuring and disposing entity shall— (a) be in writing and shall be submitted to the Accounting Officer, of the procuring and disposing entity on payment of the fees prescribed; (b) be made within ten working days after the date the bidder first

becomes aware or ought to have become aware of the circumstances that give rise to the complaint.

9. Regulation 4 of the **Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014** provides as follows:

(1) *A bidder who is aggrieved by a decision of a procuring and disposing entity shall make a complaint to the Accounting Officer.*

(2) *The complaint made under sub-regulation (1) shall indicate—*

(a) *the name and contact details of the bidder or the person representing the bidder;*

(b) *the procurement or disposal requirement to which the complaint relates;*

(c) *the substantive and factual grounds of the complaint, including—*

(i) *the provision of the Act or regulations made under the Act which are the subject of the breach or omission by the procuring and disposing entity; and*

(ii) *where known, the names of the person involved in the subject of the complaint, the events and the facts that constitute the complaint;*

(d) *the corrective measures requested by the bidder;*

(e) *the documentary evidence and any other evidence, relevant to the complaint, that is in the possession of the bidder; and*

(f) *any other information relevant to the complaint.*

10. The complaint herein was sent by email on January 27 2023 at 1.04 p.m from Shukri Khalifa using the email shukri@mixject.aero to Owere Becholas at b.owere@ugandairlines.com. The email was copied to Alex Odwong at a.odwong@ugandairlines.com and Jennifer Bamuturaki at b.jenifer@ugandairlines.com. Mr. Owere is a Procurement Officer of the Respondent. Mr. Ogwang is the Procurement Manager of the respondent. Ms. Bamuturaki is the Accounting Officer of the Respondent. Receipt of the email was acknowledged on January 27, 2023 at 3:42pm by Owere Becholas.

11. ITB 1.3(a) and 10.3 of the bidding document required all correspondence and documents relating to the bid exchanged by the bidder and the Procuring and Disposing Entity, to be in writing.
12. Under sections 2(1) and 95B of the **Public Procurement and Disposal of Public Assets Act** read together with section 5(4) (a) and (b) of the **Electronic Transactions Act, 2011**, electronic messages are deemed to be "writing".
13. Therefore, the email sent by the Applicant on January 27, 2023 at 3:12pm, whose receipt was acknowledged on January 27, 2023 at 3:42 pm was a written communication. Also see **Application No.13 of 2021- Kasokosoko Services Ltd vs Jinja School of Nursing and Midwifery**.
14. We have reviewed the contents of the email to which the alleged complaint was attached. The complaint was signed and stamped with the stamp of the applicant. The person who signed the complaint is not named but the signature is similar to the signature in the bid submission sheet of the Applicant. The complaint detailed specific objections to the reasons given for the disqualification of its bid. Those objections were substantive and factual grounds of the complaint. The subject of the procurement was known and it is indicated as having arisen from the Notice of Best Evaluated Bidder that was sent to the Applicant on January 25, 2023. The Respondent's Accounting Officer and her staff do not deny receipt of the complaint by email. Indeed, the Respondent acted on the complaint by immediately suspending the procurement process.
15. Regulation 11 of the **Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014** provides that the fees in the second column of the Schedule to the regulations shall be paid to a procuring and disposing entity, for the administrative review for a procurement or disposal of a value specified in the first column.

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16. The Public Procurement and Disposal of Public Assets Authority issued Circular No. 3 of 2015 on *Procedure for Administrative Review by the Accounting Officers*. The circular guided that on receipt of an application for Administrative Review, the Accounting Officer should advise the complainants on the required Administrative Review fees and where to pay the said fees.
17. The Applicant herein applied to the Respondent's Accounting Officer for administrative review on January 27, 2022. No administrative review fees were paid.
18. An Accounting Officer is duty-bound to advise a complainant on the prescribed Administrative Review fees and where to pay the said fees, upon receipt of a Compliant.
19. The Respondent's Accounting Officer ought to have automatically guided the Applicant on the prescribed administrative review fees and the mode of payment thereof. See: ***Applications No. 26 and 27 of 2022- Vision Scientific & Engineering Limited v Makerere University; Application No. 28 of 2022-Frida B. Kwikiriza v Buliisa District Local Government; Application No. 1 of 2023- Apple Properties Ltd v Uganda Human Rights Commission; and High Court Civil Appeal no. 93 of 2020- Mbarara University of Science & Technology v Public Procurement and Disposal of Public Assets Authority & Steam Investments (U) Ltd.***
20. This Tribunal has been consistent on the principle that late payment of administrative review fees is not necessarily fatal, and that even actual non-payment of court fees has been held not to be fatal so long as the proper fees can be assessed and paid. See: ***Samanga Elcomplus JV v Uganda Electricity Distribution Company Limited, Application No. 17 of 2021; Vcon Construction Ltd Vs Uganda Development Bank, Application No.22 of 2021, Samanga Elcomplus Jv v. Uganda Electricity Distribution Company Limited, Application No. 17 of 2021; Kasokoso Services Limited v Jinja School of Nursing And Midwifery, Application No. 13***


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of 2021; and Application No. 28 of 2022-Frida B. Kwikiriza v Buliisa District Local Government.

21. The Tribunal therefore does not agree with the dismissal of the complaint by the Respondent's Accounting Officer on the ground that the Complaint was not dated, has no addressee and name of the person representing the bidder and that the Complainant did not pay the prescribed fees.
22. The compliant of the Applicant substantially complied with the requirements of section 89(3)(a) of the **Public Procurement and Disposal of Public Assets Act** and regulation 4 of the **Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014**. There was a valid complaint before the Accounting Officer.
23. **Issue no. 2 is answered in the affirmative.**

Issue no. 3:

Whether the decision of the Accounting Officer of the Respondent is valid.

24. Section 89(7) of the **Public Procurement and Disposal of Public Assets Act** requires the Accounting Officer to make and communicate an administrative review decision within **ten days** from the date of receipt of the application. 
25. The Applicant applied for administrative review before the Accounting Officer of the Respondent on January 27, 2023. The ten days within which the Accounting Officer was required to make and communicate a decision started running on January 28, 2023 and expired on February 6, 2023. The Respondent's Accounting Officer purported to make a decision dated February 9, 2023. The purported decision made outside the statutory timeline was a nullity. See: **Application No. 1 of 2023- Apple Properties Ltd v Uganda Human Rights Commission**.
26. The provisions of section 89(7) of the **Public Procurement and Disposal of Public Assets Act** are mandatory. The Accounting

Officer of the Respondent therefore erred in law when she failed or omitted to make and communicate a decision on the Complaint filed by the Applicant within the timelines set by law.

27. Under sections 91I(1)(b) and 89 (8) of the **Public Procurement and Disposal of Public Assets Act**, where the Accounting Officer fails to make and communicate a decision, the aggrieved bidder must file an application before this Tribunal within ten days after the expiry of the ten days stipulated under section 89 (7).
28. The ten days started running on February 7, 2023 and would expire on February 16, 2023. The Applicant was within its statutory rights to file the instant application with the Tribunal on February 13, 2023.
29. **Issue no. 3 is answered in the negative.**
Issue no. 4:
Whether the Respondent erred when it disqualified the Applicant's bid.
30. The Applicant's bid was disqualified at the Preliminary Stage for *Lack of evidence of payment of business taxes in the Country of Origin / Operation; Non submission of a Registered/Notarized Power of attorney; non-submission of a 3rd party aviation liability insurance; Lack of a copy/statement of Bidder's Health, Safety and Environmental (HSE) policy; No evidence of current participation in AFRAA Joint Fuel Supply Project (AFRAA award letter); and No proof of authorization to supply Jet A-1 fuel in Entebbe International Airport.*
31. Under the Preliminary Examination Criteria in part 1, section 3 (Evaluation Methodology and Criteria) at page 24 of the bidding document, the documents required to prove eligibility were specified.
These are:
- (a) A copy of the Bidder's Certificate of registration/incorporation;
 - (b) Evidence of payment of business taxes in the country of origin/operation e.g operational license, tax clearance certificate, social security contribution e.t.c;

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- (c) Registered/notarized powers of attorney;
- (d) Signed code of ethical conduct in business for bidders and providers;
- (e) Signed beneficial ownership declaration form;
- (f) A copy of the bidder's tax registration certificate;
- (g) Evidence of payment of non-refundable bidding fee of USD 100;
- (h) 3rd party aviation liability insurance (USD 500 million -USD 1 billion);
- (i) Evidence of participation in African Airlines Association (AFRAA) Joint Fuel Supply Project i.e AFRAA award letter;
- (j) A statement in the bid submission sheet that the bidder meets the eligibility criteria stated in ITB 4.1;and
- (k) A declaration in the bid submission sheet of nationality of the bidder.

32. However, regulation 17(2) of the **Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014**, ITB 4.1, Section 3.1 of the Evaluation methodology and criteria of the bidding document, provides that a bidder shall be eligible where-

- (a) the bidder has the legal capacity to enter into a contract with the procuring and disposing entity;
- (b) the bidder is not insolvent, in receivership, bankrupt or being wound up;
- (c) the business activities of the bidder are not suspended;
- (d) the bidder is not the subject of legal proceedings for any of the circumstances mentioned in paragraph (b);
- (e) the bidder fulfilled the obligations to pay taxes and social security contributions in Uganda;
- (f) the bidder does not have a conflict of interest in relation to the subject of the procurement;
- (g) the bidder is not suspended by the Authority; and
- (h) the bidder is not a member of the procuring and disposing entity as defined in section 91U of the Act.

33. The requirements in section 3.2 (c); (d); (e); (f); (g); (h); (i); and (j); of the evaluation methodology criteria are not eligibility requirements. Some of them may fall under administrative,

commercial or technical criteria, but not eligibility criteria. To that extent the Respondent erred when it disqualified the Applicant's bid on account of non-submission of registered/notarized powers of attorney; 3rd party aviation liability insurance (USD 500 million -USD 1 billion); and evidence of participation in African Airlines Association (AFRAA) Joint Fuel Supply Project under the eligibility requirements.

34. However, fulfilment of obligations to pay taxes and social security contributions is a lawful eligibility criteria. Item 3.2 (b) of the Evaluation Methodology and Criteria requires *evidence of payment of business taxes in the country of origin / operation e.g operational license, tax clearance certificate, social security contribution e.t.c.*
35. The plain meaning of the criteria as drafted in the Respondent's bidding document is that payment of taxes in the country of origin can be evidence by, among others, *operational license, tax clearance certificate, social security contribution e.t.c.* Apparently, payment for an operational licence, social security contributions and related payments were all categorised as "taxes", which was thereby given a broad meaning.
36. The Applicant submitted a licence certificate issued by Government of Sharjah, Saif Zone. The License authorises the Applicant to engage in specified aviation services for the period January 1, 2022 to December 22, 2022. The licence certificate submitted by the Applicant is an operational licence within the meaning of Item 3.2 (b) of the Evaluation Methodology and Criteria. ↓
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37. In the circumstances, the Tribunal does not find it necessary to determine whether there was compliance with other requirements which were illegally included in the eligibility criteria, contrary to Regulation 23 (3)(d) of Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014.

38. Be that as it may, the Tribunal has also noted that the Respondent did not treat the bidders equally when applying the purported eligibility requirements. For instance, Item 3.2 (h) of the Evaluation Methodology and Criteria requires the bidder to submit 3rd party aviation liability insurance (USD 500 million-USD 1 billion). The Applicant did not submit evidence of a 3rd party aviation liability insurance (USD 500 million-USD 1 billion). *Vivo Energy (U) Limited* submitted a public liability insurance policy with an occurrence and aggregate limit of USD 5,000,000. The Evaluation committee evaluated the bidder as compliant with the requirement. Similarly, *Vivo Energy (U) Limited* did not submit evidence of *current participation in AFRAA Joint Fuel Supply Project*. The Evaluation committee evaluated the bidder as compliant with the requirement but there is no explanation in the evaluation report.
39. *Associated Energy Group, LLC* did not submit *Evidence of payment of business taxes in the Country of Origin*. They submitted a *Request for Tax Payer Number and Certification*, IRS Form W9. This Form by itself is not evidence of payment of business tax in country of origin (USA). However, the Evaluation committee evaluated the bidder as compliant with the requirement but gave no explanation in the evaluation report.
40. *Associated Energy Group, LLC* submitted a certificate of liability insurance with an occurrence and general aggregate limit of only USD 25,000,000 for commercial general liability. The Evaluation committee evaluated the bidder as compliant with the requirement.
41. *Associated Energy Group, LLC* did not also submit evidence of *experience in supplying similar or related products*. The Administrative Compliance Evaluation Criteria did not elaborate the means and mode of proof of experience. The Technical Criteria did not focus on experience of a bidder. However, the bidder listed 21 aircraft operators as clients. In a letter dated December 14, 2022, the Respondent's evaluation committee requested *Associated Energy Group, LLC* to provide "*further and*

*better particulars in form of documentation to clarify the number of clients and destinations you indicated in your submission". In a letter dated December 19, 2022, Associated Energy Group, LLC responded by stating that they provide a suite of ancillary solutions such as fuel management, international trip planning, tax recovery services, carnet card benefits and more. They attached supply agreements, a location agreement an aviation fuel supply tender and a company brochure. The request for clarification was unlawful since the omission was a material deviation within the meaning of regulation 10(2) of the **Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014**.*

42. The discriminatory treatment of bidders and unfair favouring of the best evaluated bidders was contrary to the provisions of Part IV of the **Public Procurement and Disposal of Public Assets Act**, which requires all public procurement and disposal must be conducted in accordance with the basic principles of — (a) non-discrimination; (b) transparency, accountability and fairness; (c) maximisation of competition and ensuring value for money; (d) confidentiality; (e) economy and efficiency; and (f) promotion of ethics.

43. **Issue no. 3 is resolved in the affirmative.**

Issue no. 4:

What remedies are available to the parties

44. The Tribunal has determined that the Respondent erroneously stipulated eligibility criteria which do not belong to eligibility requirements. The Tribunal has also determined that there was unequal treatment of the bidders in the impugned procurement. Even the purported best evaluated bidders did not qualify for the awards made.



45. In the circumstances the procurement will be cancelled.

46. The Applicant's counsel also raised the issue of alleged unlawful modification of the standard bidding document by the Respondent. The Respondent conceded that it had altered the

standard bidding document issued by the Public Procurement and Disposal of Public Assets Authority. However, the Respondent averred that it obtained accreditation for an alternative system. The Tribunal directed the Respondent to submit proof of the accreditation by email.

47. On March 6 2023 at 4.55 p.m, the Respondent submitted by email a letter from the Public Procurement and Disposal of Public Assets Authority dated July 6, 2022. The letter makes reference to the Respondent's letter dated June 7, 2022 requesting for modification of the accreditation that was granted to the Entity to include additional areas which were listed. One of the areas listed is Procurement of aviation fuel and lubricants by obtaining quotations from the African Airlines Association (AFRAA) approved list of providers.
48. The letter from the Public Procurement and Disposal of Public Assets Authority further informs the Respondent that the Board of Directors at its meeting held on July 5, 2022 considered the application for accreditation as modified and attached as Annex 1 for period of two years ending July 2024. With respect to aviation fuel and lubricants, the Entity was to obtain quotations from the African Airlines Association (AFRAA) approved list of providers with the best and final offer issued with a contract after negotiations on trade terms and price.
49. The procedure would include;
- 1) Annual participation in the AFRAA fuel tender by the designated Airlines Team;
 - 2) Presentation of the AFRAA report to the contracts committee by the designated team attending AFRAA recommending the companies to work with in the various Airports based on the AFRAA negotiated prices;
 - 3) Contract award by Contract's committee to the suppliers per Airport the company will operate in;
 - 4) Contract negotiations;
 - 5) Contract signing for a given period of time renewable as case may be determined under negotiations;

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- 6) Payment of security deposit or bank guarantee of its part of the contract;
 - 7) Contract Execution.
 - 8) The above process of presentation of reports by the fuel team to the Contracts Committee to be followed for all additional routes and Airports with benchmark to the AFRAA tender prices before contract award.
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50. The approval was also subject to submission of the all simplified bidding documents to the Authority for approval within one month from the date of receipt of the letter and if no response was received, the accreditation would be revoked.
 51. The Tribunal has not been furnished with the original accreditation which was being modified in the letter from the Public Procurement and Disposal of Public Assets Authority dated July 6, 2022. There is no evidence as to whether the simplified bidding documents referred to were submitted to the Authority for approval within one month as required.
 52. There is no evidence as to whether the procedures listed were complied with. 
 53. The Applicant has not had an opportunity to respond to the purported accreditation submitted by the Respondent. 
 54. Under section 40A of the **Public Procurement and Disposal of Public Assets Act**, a procuring and disposing entity may apply to the Authority for accreditation of an alternative system, subject to the conditions specified in the provision. Without such accreditation, it is unlawful to modify the standard bidding document issued by the Authority. See: **CFAO Motors (U) Ltd v National Forestry Authority, Application No. 16 of 2022.**
 55. The issue of alleged unlawful modification of the bidding document at issue was raised for the first time during the Applicant's counsel's submissions. The Applicant did not challenge the bidding document prior to bidding. Although the

Tribunal has jurisdiction to adjudicate the matter as a merits review body, there is insufficient material and arguments to enable us decide the matter one way or the other. The Tribunal is therefore unable at this time to pronounced itself on the alleged unlawful modification of the standard bidding document issued by the Public Procurement and Disposal of Public Assets Authority.

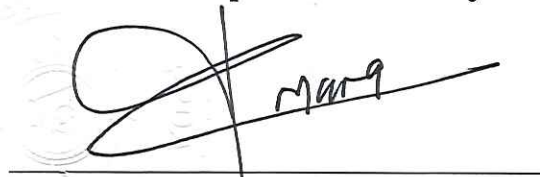
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F. DISPOSITION

1. The Application is allowed.
2. The Decision of the Accounting Officer of the Respondent dated February 9, 2023, is a nullity and is set aside.
3. The procurement for supply of aviation fuel and inflight support under Procurement Reference Number UNACL/SUPLS/22-23/00020, is cancelled.
4. The Respondent may re-tender the procurement if it so wishes.
5. The Tribunal's suspension order dated February 14, 2023, is vacated.
6. Each party shall bear its own costs.

Dated at Kampala this 7th day of March, 2023.



FRANCIS GIMARA S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



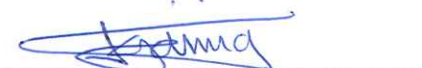
ENG. THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER