

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

APPLICATION NO. 5 OF 2023

BETWEEN

**LIRA SMOKED AND SILVER FISH VENDORS
COOPERATIVE SOCIETY LIMITED===== APPLICANT**

AND

LIRA CITY COUNCIL =====RESPONDENT

**APPLICATION FOR REVIEW IN RESPECT OF THE PROCUREMENT FOR
REVENUE MANAGEMENT SERVICES FOR LIRA MAIN MARKET UNDER
PROCUREMENT REFERENCE NUMBERS LIRA858/REVS/222-
23/00009, LIRA858/REVS/222-23/00004, AND LIRA858/REVS/222-
23/00008.**

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

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. On 16th January 2023, the Respondent invited sealed bids for numerous procurements. This Application is however concerned with 3 procurements namely:
 - a) *Collection of revenue from Bicycle and Motor Cycle Parking Yard under Procurement Reference Number LIRA 858/Rev/22-23/00008*
 - b) *Collection of revenue from Public Convenience in the main market under Procurement Reference Number LIRA 858/Rev/22-23/00004*
 - c) *Collection of revenue from Market Gate under Procurement Reference Number LIRA 858/Rev/22-23/00009*
2. The bidding document for Collection of revenue from Bicycle and Motor Cycle Parking Yard was issued on 19th and 20th January 2023 to which 4 bidders namely *Ebue Technical Services, Obanga Amio Enterprises Ltd, Aglomon Investment Ltd and Lira Smoked and Silver Fish Vendors Sacco Ltd (the Applicant)* responded to the invitation on 27th January 2023.
3. The Evaluation Committee recommended that the contract for the Collection of revenue from Bicycle and Motor Cycle Parking Yard, be awarded to *Obanga Amio Enterprises Ltd* as the Best Evaluated Bidder at a total contract price of UGX 990,000/= per month VAT exclusive.
4. The Evaluation Report for Collection of revenue from Bicycle and Motor Cycle Parking Yard also indicated that *Lira Smoked and Silver Fish Vendors Sacco Ltd (the Applicant)* was disqualified at the Preliminary Stage for 3 reasons i.e that it did not declare the nationality, did not declare that they didn't have conflict of interest, and did not declare that the company was not suspended by Public Procurement and Disposal of Public Assets Authority.
5. The Respondent issued a contract award letter to *Obanga Amio Enterprises Ltd* on 15th February 2023 for a total contract price of

UGX 990,000/= per month for the period 17th February 2023 to 30th June 2023.

6. Regarding the procurement for collection of revenue from public convenience in the main market under Procurement Reference Number LIRA 858/Rev/22-23/00004, 4 bidders namely *Buu-Lepu Foundation Ltd*, *Lira Municipality Market Vendors Association*, *S.B Engineering Construction Ltd* and *Lira Smoked and Silver Fish Vendors Sacco Ltd (the Applicant)* responded to the invitation on 27th January 2023.
7. Upon conclusion of the evaluation process, *Buu-Lepu Foundation Ltd* was recommended for award of contract as the Best Evaluated at a Total contract price of **UGX 2,750,000/=** per month VAT exclusive.
8. The Evaluation Report indicated that *Lira Smoked and Silver Fish Vendors Sacco Ltd* (the Applicant) was disqualified at the Preliminary Stage for 3 reasons i.e that it did not declare the nationality, did not declare that they didn't have conflict of interest, and did not declare that the company was not suspended by Public Procurement and Disposal of Public Assets Authority.
9. The Respondent issued a contract award letter for collection of revenue from public convenience in the main market to *Buu-Lepu Foundation Ltd* on 15th February 2023.
10. Regarding the **procurement for Collection of revenue from Market Gate under Procurement Reference Number LIRA 858/Rev/22-23/00008**, 2 bidders namely *Lira Municipality Market Vendors Association*, and *Lira Smoked and Silver Fish Vendors Sacco Ltd* (the Applicant) responded to the invitation on 27th January 2023.
11. *Lira Municipality Market Vendors Association* was recommended for award of contract as the Best Evaluated at a total contract price of UGX 35,650,000/= per month VAT exclusive.
12. The Evaluation Report indicated that *Lira Smoked and Silver Fish Vendors Sacco Ltd (the Applicant)* was disqualified at the Preliminary Stage for 3 reasons i.e. that it did not declare the nationality, did not

declare that they didn't have conflict of interest, and did not declare that the company was not suspended by Public Procurement and Disposal of Public Assets Authority.

13. On 9th February 2023, the contract awards to the three best evaluated bidders in the 3 different captioned procurements were challenged by the Applicant through an omnibus administrative review process before the Accounting Officer of the Respondent.
14. In a letter dated 14th February 2023 but received on 17th February 2023, the Accounting Officer responded to the Applicant's complaint stating that it had no merit and was therefore unsuccessful.
15. On 17th February 2023, the Applicant lodged this instant application before the Tribunal being dissatisfied with the whole decision and justification of the Respondent for dismissing its complaint.

B. APPLICATION TO THE TRIBUNAL

1. The Applicant contested the decision to eliminate its bid stating that it had already been prequalified and found responsive so there was no need to subject the bidders to the same process.
2. The Applicant averred that its bid contained a Public Procurement and Disposal of Public Assets Authority Certificate which clearly indicated that it was registered and that such registration implied that it was not suspended by Public Procurement and Disposal of Public Assets Authority since the Authority did not issue certificates to suspended firms.
3. The Applicant contended that this was a small scale local contract of service and that therefore was no need to attach a Declaration of Nationality since it was through a Selective Bidding Process of local firms locally registered in Uganda.
4. The Applicant argued that it strongly believed that the criteria for evaluation was unfairly used against it to defeat the procurement principles in section 43 of the Public Procurement and Disposal of Public Assets Authority Act, 2003 (as amended) of economy and

efficiency which led to the declaration of a Best Evaluated Bidder whose bid price was lower than that of the Applicant.

5. The Applicant contended that the current policies prohibit award of revenue collection services from the markets to other bidders save for the cooperatives of vendors yet the Best Evaluated Bidders were the prohibited companies and other cooperatives which were not of the vendors in Lira Main Market.
6. The Applicant prayed that the Tribunal addresses its arguments on the current procurement policy and finds merit in its application.

C. REPLY TO THE APPLICATION

1. The Respondent submitted its administrative review decision as the response to the Application.
2. The Respondent contended that the criteria for evaluation was clearly stated in the standard bidding document issued to all providers to respond to however, the Applicant failed to respond and was disqualified.
3. The Respondent averred that the Applicant having failed to meet the requirements listed in the bid document, the Applicant could not proceed to the financial comparison stage and therefore, their bid price alone could not qualify them as the Best Evaluated Bidder.
4. The Respondent contended that due to the laxity of the Applicant to provide the necessary requirements and failure to follow instructions of the bidding document, the Respondent cannot be faulted for rejecting the Applicant's bid.
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

1. The Tribunal held an oral hearing on 13th **March 2023** via zoom

software. The appearances were as follows:

1. Counsel Kwotek Geoffrey and Kakona Joel Geoffrey represented the Applicant.
2. The Respondent was represented by Tibihika Theophilus, the Town Clerk Lira City.
3. *Obanga Amio Enterprises Ltd* was represented by the Secretary Mr. Oku Daniel
4. *Buu-Lepu Foundation Ltd* was represented by the Managing Director Mr. Odongo Louis Gerald
5. *Lira Municipality Market Vendors Association* was represented by the Director Mr. Olepo Pascol.
6. None of the parties filed written submissions. However, the Applicant and Respondent highlighted their cases as stated in the Application and Response respectively.
7. The best evaluated bidders associated themselves with the submissions of the Respondent.
8. The Applicant, Respondent and best evaluated bidders also responded to the questions put the Tribunal for clarification.
9. The Tribunal has considered the pleadings, submissions, the bids and the respective procurement action files.

E. RESOLUTION BY THE TRIBUNAL

1. The parties did not frame any issues for determination. However, having considered the pleadings and the submissions of the parties, the Tribunal has framed the following issues:
 - i. *Whether the format of the Application is competent?*
 - ii. *Whether the Respondent erred in law when it disqualified the Applicant's bid in the 3 procurements?*
 - iii. *Whether the award of contracts to the best evaluated bidders was lawful.*
 - iv. *What remedies are available to the parties?*

Resolution of Issues

Issue 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 versus UHRC and Application No. 41 of 2022- Orungo Market Vendors Association versus Amuria District Local Government.**
4. The Tribunal therefore proceeded to consider the merits of the Application since it sets out the complaint of the Applicant and the remedies sought.

Issue 2

Whether the Respondent erred in law when it disqualified the Applicant's bid in the 3 procurements?

5. The Applicant's bids were disqualified at the preliminary stage of evaluation for 3 reasons i.e. that it did not declare the nationality, did not declare that they didn't have conflict of interest, and did not declare that the company was not suspended by Public Procurement and Disposal of Public Assets Authority.
6. In resolving this dispute, the Tribunal as always will be guided by the provisions of the Public Procurement and Disposal of Public Assets Authority Act, its Regulations, and relevant previous decisions of the Tribunal and courts of judicature. Firstly, it is of great importance to note that in ***Arua Municipal Council v Arua United Transporters' SACCO C.A 25 of 2017***, Justice Mubiru held as follows:
"...All bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document. There should be no undisclosed preferences, no secret preferences and no discussions or decisions made, except above-board."

7. A procuring and disposing entity's determination of a bid's compliance and responsiveness shall be based on the contents of the bid as per regulation 73(1) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*.
8. Regulation 73(2) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* states as follows:
"A substantially compliant and responsive bid shall be one that conforms to all the instructions, requirements, terms and conditions of the bid documents without material deviation, or omission".
9. A procuring and disposing entity's determination of a bid's compliance and responsiveness shall be based on the contents of the bid. Further, substantially compliant and responsive bid shall be one that conforms to all the instructions, requirements, terms and conditions of the bid documents without material deviation, or omission. See regulation 73(1) and 73(2) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*.
10. Eligibility requirements are stipulated in regulation 45 of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* which provides as follows:
 - (1) Participation by bidders in public procurement and disposal shall be open on equal terms to bidders who meet the minimum eligibility requirements that are—
 - (a) a bidder has the legal capacity to enter into a contract;
 - (b) a bidder is not—
 - (i) insolvent;
 - (ii) in receivership;
 - (iii) bankrupt; or
 - (iv) being wound up;
 - (c) a copy of the bidder's income tax clearance certificate or its equivalent;
 - (d) a copy of the bidder's Value Added Tax registration or its equivalent;

- (e) *a signed statement that the bidder does not have a conflict of interest in the subject of the procurement; and*
 - (f) *any other relevant documents or statements contained in the bid documents.*
 - (4) *A contracts committee shall verify the accuracy, validity and authenticity of the eligibility documents provided by a bidder¹.*
 - (5) *Verification of eligibility shall form an integral part of the preliminary examination to be met by a bidder.*
 - (6) *Notwithstanding sub-regulation (2), where eligibility has been verified as part of a pre-qualification process, the bid documents shall not require documentary evidence of eligibility; and verification of eligibility shall not form part of the preliminary examination.*
 - (7) *Bid documents shall state that any bidder whose circumstances in relation to eligibility change during a procurement or contract management process shall immediately inform the procuring and disposing entity.*
 - (8) *Eligibility shall always be evaluated on a pass or fail basis and any bid which fails the eligibility examination shall be rejected and not evaluated further.*
 - (9) *Subject to regulations 75 and 81(5) but notwithstanding sub regulation (8), where the omission of any documentary evidence to certify eligibility is determined to be a non-material omission, the evaluation committee may request a bidder to submit that documentation as a clarification*
11. From a reading of regulation 41(1) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, the mandatory eligibility documents are
- a) a copy of the bidder's income tax clearance certificate or its equivalent

¹ Sub-regulation (2) was erroneously numbered as (4)

- b) a copy of the bidder's Value Added Tax registration or its equivalent;
 - c) a signed statement that the bidder does not have a conflict of interest in the subject of the procurement; and
 - d) any other relevant documents or statements contained in the bid documents.
12. In the instant case, the Respondent prescribed the Eligibility Criteria at page 8 of the bidding document as follows:
13. The Respondent also prescribed the mandatory eligibility documents at page 9 of the bidding document as follows:
14. The bidding document did not require bidders to submit separate documents to declare the nationality of the bidder; that the bidder does not have a conflict of interest, and that they are not under suspension by the Public Procurement and Disposal of Public Assets Authority. No formats were prescribed to for declaration of no conflict of interest; nationality; and non-suspension by the Public Procurement and Disposal of Public Assets Authority.
15. However, the bid submission sheet in the bidding document included a paragraph to the effect that they offer to provide the services described in the attached statement of Requirements, in accordance with the terms and conditions stated in the invitation to bid and confirm that they are eligible to participate in public procurement and meet the eligibility criteria specified in Part 1: Bidding procedures of the invitation to Bid. The Applicant, and other bidders, signed the bid submission sheet as prescribed. da
16. It is our view that the Applicant having indicated in its duly signed off bid submission sheet, that they are *eligible to participate in public procurement and meet the eligibility criteria specified in Part 1: Bidding procedures of the invitation to Bid*; was sufficient declaration that the stated eligibility criteria were met, in the absence of any specific format for the said declaration or a requirement for proof of such eligibility provided in the bidding document. See **Application No.41 of 2022 Orungo Market**

***Vendors Association v Amuria District Local Government,
page 9 para 19.***

17. We cannot fault the Applicant for the insufficiency in the bidding document. In the absence of clear provisions inform of instruction to bidders on conflict of interest, we find that the declaration by the Applicant in its Bid submission sheet that they meet the eligibility criteria specified in Part 1: Bidding procedures of the invitation to Bid is sufficient.
18. In any event, as provided under regulation 45 (9) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, the evaluation committee also had a discretion to determine that the omission of any documentary evidence to certify eligibility was a non-material omission, and request a bidder to submit that documentation as a clarification.
19. The Respondent also had an opportunity to carry out due diligence on the truthfulness of the eligibility declaration. In addition, regulation 45 (4) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* requires the contracts committee to verify the accuracy, validity and authenticity of the eligibility documents provided by a bidder, if any.
20. The Respondent therefore erroneously disqualified the Applicant's bid at the preliminary stage of evaluation in the 3 procurements. dx
21. Issue No. 2 is resolved in the affirmative.

Issue 3:

Whether the award of contracts to the best evaluated bidders was lawful?

22. The gravamen of the instant issue is the Applicant's contention that the current government policies prohibit the award of revenue collection services from markets to other bidders save for the cooperatives of the vendors. The Applicant averred that the Best Evaluated Bidders in the instant impugned procurement were the

prohibited companies and other cooperatives not of the vendors in Lira Main Market.

23. Firstly, section 52 of the *Public Procurement and Disposal of Public Assets Act* provides that a contract shall be awarded to the bidder with the best evaluated offer ascertained on the basis of the methodology and criteria detailed in the bidding document.
24. Nevertheless, regulation 53 (1) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* states that the procurement of works, services and supplies, may be subject to a reservation scheme. The main objective of a reservation scheme is the development of a target group and community, by reserving certain public procurement contracts for such groups and communities.
25. As per regulation 53 (7) of the *Local Governments (Public Procurement and Disposal of Public Assets Authority) Regulations, 2006*, a procurement under a reservation scheme shall, at all times, be based on—
 - a) *competition among the eligible providers; and*
 - b) *qualification of a provider to satisfy fully the requirements of each procurement activity.*
26. The Tribunal's attention was drawn to the *Government Policy Decision on the Development and Management of Markets in the City Municipalities and Towns* dated 17th September 2007 and *Policy on Sell of Market's Land Development and Management in the City, Municipality and Towns* dated 23rd December 2010. The purpose of this policy has previously been explained in ***Arua Kubala Park Operators and Market Vendors SACCO versus Public Procurement and Disposal of Public Assets Authority, Application 4 of 2015*** wherein it stated that the purpose was to prioritise the rights of sitting tenants who owned and operated stalls

and kiosks in existing markets in the development and management of those markets.

27. To benefit from the policy however, it is a requirement for stall holders and kiosk owners in the markets to register associations or cooperatives. The Respondent was therefore duty bound to take the government policy into account when drafting the evaluation criteria.
28. In ***Arua-Kubala Park Operators & Market Vendors SACCO versus Public Procurement and Disposal of Public Assets Authority & Arua Municipal Council Application 9 of 2016***, this Tribunal stressed that any procuring or disposing entity putting out a bid for the development or management of a market must take into account this government policy and should not ignore the policy simply because there exists no registered association or cooperative in a particular market.
29. At the hearing of this Application, the Tribunal was informed that there are 14 vendors' associations in Lira Main Market. There is however no indication that the Respondent took into account the government policy on markets when drafting the bidding document and during the evaluation of the bids.
30. The Tribunal has also noted with concern that the Respondent purported to issue contract award letters on 15th February 2023, during the period of administrative review. Section 89 (11) (b) of the *Public Procurement and Disposal of Public Assets Act, 2003* provides that an Accounting Officer shall not enter into a contract with a provider— (i) during the administrative review period; (ii) before the expiry of time period required for giving notice under subsection (10); or (iii) where the matter is referred to the Tribunal, before the Tribunal makes a decision.

31. The Applicant applied for administrative review to the Respondent's Accounting Officer on 7th February, 2023. The Accounting Officer rendered a decision on 14th February, 2023. Under section 89 (1) of the *Public Procurement and Disposal of Public Assets Act*, 2003, where a bidder intends to make an application to the Tribunal under subsection (8) or (9), the bidder shall give the Accounting Officer notice within five working days after the expiry of the period specified in subsection (3) (b) or subsection (7), as the case may be. In the instant case, the Applicant had a right to give notice of intention to appeal to the Tribunal within five working days from the date of the decision on 14th February, 2023. The five working days started running on 15th February 2023 and would have expired on 21st February, 2023. The purported contract award letters on 15th February 2023 were therefore illegally issued within the period of administrative review and are null and void.

32. Issue no. 3 is resolved in the negative.

Issue no. 4:

What remedies are available to the parties

33. The Tribunal has determined that the bidding document was inadequate; the Applicant was wrongly disqualified; and the contract awards to the best evaluated bidders were illegal. Upon perusal of the procurement action file, the Tribunal has also observed that there are no minutes of the contracts committee meeting which purportedly made the awards. There is also no submission from the Procurement and Disposal Unit to the Contracts Committee. In the circumstances, the best course of action is to cancel the procurement.

F. DISPOSITION

1. The Application is allowed.
2. The Decision of the Accounting Officer dated 14th February 2023 is set aside.
3. The Contract award letters issued by the Respondent to *Obanga Amio Enterprises Ltd, Buu-Lepu Foundation Ltd and Lira Municipality Market Vendors Association* are cancelled and set aside with immediate effect.
4. The three (03) impugned procurements to wit *collection of revenue from Bicycle and Motor Cycle Parking Yard under Procurement Reference Number LIRA 858/Rev/22-23/00008, collection of revenue from Public Convenience in the main market under Procurement Reference Number LIRA 858/Rev/22-23/00004 and collection of revenue from Market Gate under Procurement Reference Number LIRA 858/Rev/22-23/00008* are hereby cancelled. The Respondent may retender the procurements if it so wishes.
5. The Respondent should refund the administrative fees paid to it by the Applicant.
6. The Tribunal's suspension order dated 17th February 2023 is vacated.
7. Each party should bear own costs.

Dated at Kampala this **15th** day of **March 2023**.

FRANCIS GIMARA
CHAIRPERSON

NELSON NERIMA
MEMBER

THOMAS BROOKES ISANGA
MEMBER

GEOFFREY NUWAGIRA KAKIRA
MEMBER

PAUL KALUMBA
MEMBER

CHARITY KYARISIIMA
MEMBER