

THE REPUBLIC OF UGANDA

**IN THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC
ASSETS APPEALS TRIBUNAL AT KAMPALA**

REGISTRY APPLICATION NO. 07 OF 2023

BETWEEN

**JB UNITED CIVIL ENGINEERING
& BUILDING CONTRACTORS LIMITED ::::::::::::::: APPLICANT**

AND

**ADJUMANI DISTRICT
LOCAL GOVERNMENT ::::::::::::::: RESPONDENT**

**APPLICATION FOR REVIEW IN RESPECT OF THE DECISION OF
ADJUMANI DISTRICT LOCAL GOVERNMENT IN THE
PROCUREMENT FOR REHABILITATION OF KULUKULU - ZOKA
ROAD (20.59KM) WITH PROCUREMENT REFERENCE NUMBER
ADJU504/WRKS/2022 - 2023/00014- LOT 1, UNDER THE
UGANDA SUPPORT TO MUNICIPAL INFRASTRUCTURE
DEVELOPMENT - ADDITIONAL FINANCING (USMID-AF) PROGRAM,
USING OPEN DOMESTIC BIDDING METHOD**

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



A. BRIEF FACTS

1. Adjumani District Local Government (the respondent) initiated a procurement Rehabilitation of Kulukulu – Zoka Road (20.59Km) with Procurement Reference Number ADJU504/WRKS/2022 – 2023/00014- Lot 1, under the Uganda Support to Municipal Infrastructure Development – Additional Financing (USMID-AF) Program, using Open Domestic Bidding Method. The Bid Notice was published in the New Vision Newspaper December 29, 2022, on page 26.
2. Eight (08) bidders namely *JB United Civil Engineering & Building Contractors Limited* (the Applicant), *Jubilee Real Estates Limited*, *BLD Consults (U) Limited*, *Kol Services Limited*, *Angich Enterprises Limited*, *Azu Properties Limited & Nippon Parts (U) Limited*, *Bukos Engineering Services Limited* and *Rock Trust Bridges & Roads Limited/Rock Trust Contractors (U) Limited* submitted bids for Lot 1 on January 20, 2023.
3. Upon completion of the evaluation process, the Respondent displayed the Best Evaluated Bidder Notice on February 2, 2023, with a removal date of February 15, 2023, in which BLD Consults (U) Limited, was declared the Best Evaluated Bidder with a contract price of UGX 2,231,214,560/= VAT inclusive.
4. The Best Evaluated Bidder Notice did not indicate why the Applicant was disqualified and the stage at which it's bid failed, the Notice omitted to indicate particulars of the Applicant.
5. *Jubilee Real Estates Limited*, one of the unsuccessful bidders being dissatisfied by the evaluation process sought administrative review of the entire procurement process before the Accounting Officer on February 9, 2023, contending that a Quality Assurance Management Plan was not a mandatory requirement.
6. On February 9, 2023, the Accounting Officer of the Respondent appointed an Administrative Review Committee to look into the complaint of *Jubilee Real Estates Limited*.

7. The Accounting Officer in a letter dated February 20, 2023, rendered an administrative review decision on the complaint of *Jubilee Real Estates Limited* and ordered for a re-valuation of bids.
8. On the other hand, the Applicant(,JB United Civil Engineering Ltd) being dissatisfied by the evaluation process sought administrative review of the entire procurement process before the Accounting Officer dated February 13, 2023 but received on February 14, 2023. The complaint was premised on 3 (three) grounds i.e that the Applicant did not appear in the Notice of Best Evaluated Bidder; that the Notice of Best Evaluated Bidder was simply displayed on the entity's notice board but not communicated to the bidders; and that the award was made to a bidder who quoted a higher price.
9. The Accounting Officer in a letter dated February 23, 2023, did not find merit in the Applicant's complaint and rejected it.
10. The Applicant being dissatisfied with the decision of the Accounting Officer, filed this Application with the Tribunal by letter on March 3, 2023, seeking to review the decision of the Respondent.
11. The Respondent filed a response on March 17, 2023 in which it opposed the application and prayed that it be dismissed with costs. J

B. SUBMISSIONS

Applicant

1. The Applicant, through *Tumusiime, Kabega & Co. Advocates* submitted that the best evaluated bidder notice was displayed without the Applicant's name contrary to regulation 4(3) (f) of the *Public Procurement and Disposal of Public Assets (Tribunal) (Contracts) Regulations* which requires the Notice of Best Evaluated Bidder to state the unsuccessful bidders and the stage at which their bids failed or were eliminated.

2. Counsel submitted that the alleged arithmetic error in the bid of the Best Evaluated Bidder is a material deviation and its rectification was contrary to regulation 75(3) of the *Public Procurement and Disposal of Public Assets (Local Governments) Regulations 2016*. That the failure to communicate the said rectification was contrary to regulation 4(3)9f) of the *Public Procurement and Disposal of Public Assets (Tribunal) (Contracts) Regulations*.
3. Counsel further submitted that it was contrary to section 57(3) of the *Public Procurement and Disposal of Public Assets Act* for the Respondent to display the Notice of Best Evaluated bidder only on the notice board and did not communicate it to the Applicant.
4. Counsel prayed that the Tribunal do set aside the decision of the administrative review committee recommending the award. It was prayed in the alternative that the Tribunal do issue guidelines and timelines for re-evaluation of the bids.

Respondent

5. The Respondent averred that there was an arithmetic error in the bid of the best evaluated bidder, which was corrected in accordance with the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*. d
6. That it was not irregular or unlawful to display the Notice of Best Evaluated Bidder on the district notice board, which was lawful under regulation 85 (3) of *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*.
7. That the inadvertent omission to include all bidders in the Notice of Best Evaluated Bidder together with the corresponding reason(s) for rejection or approval of their bids did not justify nullification of the entire procurement process. That the error was immediately corrected when it was discovered.

8. That the principles regulating conduct of a procurement process were fully adhered to and no injustice was visited upon any bidder during the process or at all.
9. The Respondent prayed that the Application for Administrative Review be dismissed.

Best Evaluated Bidder

10. The Best Evaluated Bidder, through *Okua & Associates* submitted that section 57 of the *Public Procurement and Disposal of Public Assets Act* merely permits electronic communications but does not make it mandatory to electronically transmit all or any communications to bidders.
11. That the omission of the Applicant's name from the Notice of Best Evaluated Bidder was detected and rectified.
12. That the arithmetic errors in the bid were lawfully corrected under the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*.

C. ORAL HEARING

1. The Tribunal conducted an oral hearing on 22nd March 2023.
2. The appearances and representations were as follows:
Odongo Jimmy, the Project Manager of the Applicant appeared for the Applicant.
Leku Deo Maiku, Head of the Procuring and Disposing Unit of the Respondent appeared for the Respondent.
Counsel Mike Okua represented the Best Evaluated Bidder.

In attendance were;

Daniel Otyang, the Administrator of the Applicant, Ambaku Daniel Bera the Managing Director and Apako Fortunate.H the Director of the Best Evaluated Bidder (BLD Consults (U) Limited).

D. RESOLUTION

1. From a reading of the application response and after considering the written and oral submission, the following issues arise for determination:
 - 1) Whether the format of the Application is competent?
 - 2) Whether the Application is moot?
 - 3) Whether the Respondent erred when it omitted to indicate the stage and reasons for which the Applicant's bid was disqualified?
 - 4) Whether the Respondent erred in law and fact when it did not send a copy of the Notice of Best Evaluated Bidder to the Applicant?
 - 5) Whether the Respondent erred when it requested a clarification of an arithmetic error in the bid price of BLD Consults (U) Limited.
 - 6) Whether the Respondent erred in law and fact when it omitted to notify other bidders of the arithmetic correction to the bid of BLD Consults (U) Limited?
 - 7) 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. 4 of 2023- Mixjet Flight Support Fze Vs. Uganda National**

***Airlines Company Limited and Application No. 1 of 2023
Apple Properties Ltd v UHRC.***


4. The Tribunal should therefore consider the substance of the Application since it sets out the complaint of the Applicant and the remedies sought.

5. **Issue No. 1 is resolved in the affirmative.**

Issue No. 2:

Whether the Application is moot?

6. According to the Notice of Best Evaluated Bidder dated February 2, 2023, the bid of *Jubilee Real Estates Limited* was unsuccessful because “*the firm did not attach Quality Assurance Management Plan*”. *Jubilee Real Estates Limited*, being dissatisfied by the evaluation process sought administrative review of the entire procurement process before the Accounting Officer on February 9, 2023, contending that a Quality Assurance Management Plan was not a mandatory requirement.

7. On February 9, 2023, the Accounting Officer of the Respondent appointed an Administrative Review Committee comprising Mamawi Godfrey, Yuma Stephen and Izakare K. Richard. 

8. The Accounting Officer in a letter dated February 20, 2023, rendered an administrative review decision on the complaint of *Jubilee Real Estates Limited* and ordered for a re-valuation of bids. The decision is as follows;

We would like to admit that the Quality Assurance Management Plan (QAMP) was not mandatory or applicable in forming part of the bid as per the requirements in Part 1 Section 2 ITB 15.1(i) and Part 1 Section 3 of the Evaluation Methodology and criteria.

Based on Sec. 139 (2) of LG PPDA Regulation 2006, office of the undersigned constituted Administrative Review Committee (ARC) whose findings and recommendation was that was not in the evaluation criteria.

Re-evaluation Committee have been appointed to handle the matter and any other issues at 10 the criteria leaving out QAMP”

9. The above letter purports to be an administrative review decision. The decision letter is addressed to the bidder who made the complaint, indicates the reasons for the decision taken and the corrective measure to be taken. To the extent that the Accounting Officer ordered a re-evaluation, the impugned evaluation and Notice of Best Evaluated Bidder which the current Applicant complains about would thereby have been set aside and no longer exist. That would have rendered this application moot. However, the purported decision was rendered out of time and illegally as discussed below.
10. 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.
11. *Jubilee Real Estates Limited* applied for administrative review before the Accounting Officer of the Respondent on February 9, 2023. The ten days within which the Accounting Officer was required to make and communicate a decision started running on February 10, 2023 and expired on February 19, 2023. The Respondent's Accounting Officer purported to make a decision dated February 20, 2023. The letter has an endorsement indicating that it was received on February 28, 2023. The recipient did not however indicate his/her name or designation. The purported decision made on February 20, 2023 and communicated on February 28, 2023 was outside the statutory timeline was a nullity. See: ***Application No. 1 of 2023- Apple Properties Ltd v Uganda Human Rights Commission and Application No. 4 of 2023- Mixjet Flight Support Fze Vs. Uganda National Airlines Company Limited.***

12. On February 9, 2023, the Accounting Officer of the Respondent had appointed an Administrative Review Committee but he wrote a decision on February 20, 2023 before the committee issued its report.
13. The Administrative Review Committee purported to conduct a re-evaluation of the bids and issued a "REVIEW OF EVALUATION REPORT UNDER THE TECHNICAL COMPLIANCE SELECTION EVALUATION METHOD" dated February 22, 2023.
14. In another letter of the Accounting Officer to *Jubilee Real Estates Limited* dated February 27, 2023, but received on February 28, 2023, the Accounting Officer forwarded the purported report.
15. The purported re-evaluation report and the Accounting Officer's letter of February 27, 2023 were illegal.
16. The statutory time for rendering a decision had already passed as discussed above. The Accounting Officer was in any case *functus officio*, having written a purported decision on February 20, 2023. He could not lawfully make another decision on February 27, 2023. d
17. The Administrative Review Committee had no power to conduct a re-evaluation of bids as they did. Under regulation 139 of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, the role of the Administrative Review Committee is to review the complaint and submit its recommendation to the Accounting Officer.
18. To the extent that the purported administrative review decisions dated February 20, 2023 and February 27, 2023 were a nullity, the impugned evaluation and Notice of Best Evaluated bidder still exist. Therefore, this Application is not moot.

19. **Issue no. 2 is answered in the negative.**

Issue No. 3:

Whether the Respondent erred when it omitted to indicate the stage and reasons for which the Applicant's bid was disqualified?

20. The Respondent concedes that there was an omission to include all bidders in the Notice of Best Evaluated Bidder together with the corresponding reasons for rejection of their bids. The Respondent contends that the omission was inadvertent and did not affect any stage of the evaluation process or the outcome of the evaluation process. That the same error was corrected.

21. The Applicant relies on regulation 4(3)(f) of the *Public Procurement and Disposal of Public Assets (Contracts) Regulations 2014* which requires that the notice of best evaluated bidder to state the unsuccessful bidders and the stage at which their bids failed or were eliminated. However, those regulations apply to central government procuring and disposing entities. They do not apply to local governments like the Respondent herein. The applicable regulations are the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* which however do not have a requirement for the notice of best evaluated bidder to state the unsuccessful bidders and the stage at which their bids failed or were eliminated.

22. However, ITB 45 of the Bidding Document provides that the bidder shall be provided with information on the reasons for the failure of its bid in the notice of best evaluated bidder. ITB 45 was not complied with. The omission was an irregularity.


23. To that extent, the respondent erred when it omitted to indicate the stage and reasons for which the Applicant's bid was disqualified.

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

Issue No. 4:

Whether the Respondent erred when it did not send a copy of the notice of best evaluated bidder to the Applicant?

25. Regulation 85 of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* provides as follows:
- (1) A procuring and disposing entity shall, within five days of the decision of the contracts committee to award a contract, display a notice of the best evaluated bidder.
 - (2) A notice of the best evaluated bidder shall not amount to a contract.
 - (3) A notice of best evaluated bidder shall be displayed on a procuring and disposing entity's notice board and may be posted on the Authority's website.
 - (4) A notice of best evaluated bidder shall be published for a minimum of—
 - (a) ten working days prior to contract award in the case of open or restricted bidding; and
 - (b) ten working days prior to contract award, in the case of quotations and proposals procurement or direct procurement.
 - (5) A notice of best evaluated bidder shall, at the time it is displayed in accordance with sub-regulation (6), be sent to all bidders who participated in the procurement.
 - (6) Where a decision to award a contract is changed after the publication of a notice of best evaluated bidder, a new notice of best evaluated bidder shall be displayed, in accordance with this regulation, prior to contract award or placement.
 - (7) This regulation shall not apply to micro procurement and procurement in emergency circumstances, irrespective of the procurement method used.
26. Regulation 85 (3) requires the notice of best evaluated bidder to be displayed on the entity's notice board, which was done in the instant case. Posting the notice of best evaluated bidder on the website of the Public Procurement and Disposal of Public Assets Authority is permitted under regulation 85(3) but it is not mandatory.

27. Regulation 85 (5) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* requires communication of the Notice of Best Evaluated Bidder to individual bidders who participated in the procurement. However, section 57(3) of the *Public Procurement and Disposal of Public Assets Act* which was cited by the Applicant does not require communication of the notice of best evaluated bidder to individual bidders as claimed. The section merely permits electronic communications generally.
28. Regulation 85 of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* requires display of a notice of best evaluated bidder. The regulations do not contain a provision that requires the procuring and disposing entity to give reasons why the unsuccessful bidders failed and the stage at which their bids failed or were eliminated.
29. However, ITB 41.2 of the Bidding Document requires that the Procuring and Disposing Entity shall, within five working days after the decision of the Contracts Committee to award a contract, deliver a copy of the notice to all bidders who participated in the bidding process, place the notice on the notice board for ten working days, and publish it on the website of the Public Procurement and Disposal of Public Assets Authority. In the instant case, a copy of the notice of best evaluated bidder was not delivered to all bidders who participated in the bidding process, and was not published it on the website of the Public Procurement and Disposal of Public Assets Authority. 
30. To that extent, the Respondent erred in when it omitted to deliver a copy of the notice of best evaluated bidder to all bidders who participated in the bidding process, and to publish it on the website of the Public Procurement and Disposal of Public Assets Authority.
31. **Issue No. 4 is resolved in the affirmative.**

Issue No. 5:

Whether the Respondent erred when it requested a clarification of an arithmetic error in the bid price of BLD Consults (U) Limited.

32. Correction of arithmetic errors is governed by regulation 74 of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* which provides as follows:
- (1) *The evaluation committee may request the clarification of information or the submission of documentation from a bidder, which relate to—*
 - (a) *non conformity or omission, which is not material; or*
 - (b) *the correction of arithmetical errors.*
 - (2) *A clarification shall not seek and the bidder shall not be permitted to—*
 - (a) *alter or amend the bid price except to correct errors;*
 - (b) *change the substance of the terms and conditions of the bid ; or*
 - (c) *substantially alter anything which forms a crucial or deciding factor in the evaluation of the bid.*
 - (3) *A request for clarification, including the correction of arithmetic errors, shall be addressed to a bidder in writing by the procuring and disposing entity.*
 - (4) *A request for clarification shall be signed and sent to a bidder by the chairperson of the evaluation committee and all requests for clarifications shall be copied to all bidders for information purposes only and noted in the evaluation report.*
 - (5) *A bidder shall be instructed to respond to clarifications in writing within a specified time.*
 - (6) *The head of the procurement and disposal unit shall ensure that all responses are promptly forwarded to the chairperson of the evaluation committee.*
 - (7) *Where a bidder fails to respond to a request for clarification his or her bid may be rejected.*
 - (8) *For the avoidance of doubt requests for clarification shall not be permitted to become negotiations which shall only be carried out by the negotiation team after the determination of*

the best evaluated bid, but before an award decision is made.

33. The above regulation 74 (1) (b) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* and ITB 30.1 of the Bidding Document permits the evaluation committee to request the clarification of information or the submission of documentation from a bidder, which relate to the correction of arithmetical errors, but subject to the procedures and exceptions stipulated in regulation 74 and the Bidding Document.
34. By a letter dated January 27, 2023, the chairman of the evaluation committee notified *BLD Consults (U) Limited* that the committee had detected an arithmetic error in their bills of quantities amounting to UGX 79,205,440 making the corrected bid price to be UGX 2,231,214,560 instead of the original UGX 2,310,420,000. The bidder was requested to respond to this correction. *BLD Consults (U) Limited* accepted the correction by letter dated January 30, 2023.
35. The Respondent did not err when it conducted an arithmetic correction to the bid of *BLD Consults (U) Limited*'s bid. dx
36. **Issue No. 5 is resolved in the negative.**

Issue No. 6:

Whether the Respondent erred when it omitted to notify other bidders of the arithmetic correction to the bid of BLD Consults (U) Limited?

37. Regulation 74 of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* does impose an obligation on the Respondent to copy all requests for clarifications to all bidders for information purposes only and noted in the evaluation report. In the instant case that provision was not complied with.
38. Furthermore, ITB 30.1 of the Bidding Document provides that the Procuring and Disposing Entity's request for clarification

and the bidder's response shall be copied to all bidders for information purposes. In the instant case ITB 30.1 was not complied with.

39. To that extent, the Respondent erred when it failed to copy the request for clarification and the bidder's response to all bidders for information purposes.
40. **Issue No. 6 is resolved in the affirmative.**

Issue No. 6:

What remedies are available to the parties?

41. This Tribunal is a merits review body and has wide powers to set aside the original decision and substitute it with a new decision of its own. Implicit within such a power is the authority to consider both the lawfulness of the procurement decision it is reviewing and the facts going to the exercise of discretion, whether raised by the Applicant or not, provided all interested parties are provided with an opportunity to present their case (the right to be heard), are notified in advance that a decision is to be made on the basis of that material and are given an opportunity to respond (procedural fairness), determine the matter in an unbiased manner (an absence of bias) and give reasons for the decision. See: ***Arua Municipal Council v Arua United Transporters' SACCO, High Court at Arua C.A 25 of 2017*** and ***Application No. 4 of 2023-Mixjet Flight Support Fze Vs. Uganda National Airlines Company Limited.***
42. In response to the complaint of *Jubilee Real Estates Limited*, the Accounting Officer of the Respondent conceded that the Quality Assurance Management Plan (QAMP) was not mandatory or applicable.
43. However, that decision was rendered out of time and was a nullity as resolved under Issue No. 2. That notwithstanding, the Tribunal agrees that the Quality Assurance Management Plan (QAMP) was not required as one of the documents comprising

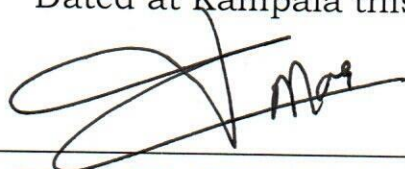
the bid within the meaning of ITB 15 of Section 1 of the Bidding Document, or the Evaluation Methodology and Criteria in Section 3 of the Bidding Document.

44. The original evaluation committee erred when it applied the Quality Assurance Management Plan (QAMP) as a mandatory document. However, there has been no valid re-evaluation. There is no record of the constitution of the re-evaluation committee.
45. The power to approve and appoint an evaluation committee is vested in the Contracts Committee and not the Accounting Officer. The Accounting Officer has administrative power through his procurement and disposal unit to recommend the composition of the evaluation committee but has no power to approve the said nomination. See regulation 17(1)(b) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* and sections 28(1)(b) and 32(a) of the *Public Procurement and Disposal of Public Assets Act*.
46. The purported re-evaluation report of February 22, 2023 conducted without jurisdiction and therefore a nullity and of no legal consequence.
47. The appropriate course of action is a lawful re-evaluation of the bids.

E. DISPOSITION

1. The Application is allowed in part.
2. The purported re-evaluation report dated February 22, 2023 is set aside.
3. The Respondent is directed to constitute an evaluation committee to re-evaluate the bids in a manner consistent with the law, the bidding document and the decision of the Tribunal.
4. The re-evaluation in No. 3 above shall be conducted within ten working days from the date of this decision.
5. The Tribunal's suspension order dated March 7, 2023, is vacated.
6. The Respondent shall refund the Applicant's administrative review fees.
7. Each party to bear its own costs.

Dated at Kampala this **27th** day of **March 2023**.



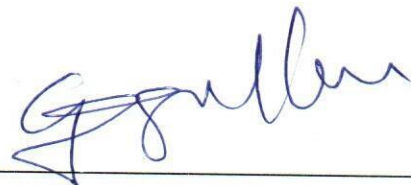
FRANCIS GIMARA, S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER