

THE REPUBLIC OF UGANDA

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

REGISTRY APPLICATION NO. 38 OF 2022

BETWEEN

PRINCIPAL COMPANY LIMITED=====APPLICANT

AND

**MINISTRY OF DEFENCE AND
VETERANS AFFAIRS=====RESPONDENT**

**APPLICATION FOR REVIEW OF THE DECISION OF THE
MINISTRY OF DEFENCE AND VETERANS AFFAIRS DISPOSING
ENTITY IN RESPECT OF THE PROCUREMENT FOR SUPPLY OF
VARIOUS CLOTHING ITEMS UNDER FRAMEWORK CONTRACTS
FOR 2 YEARS UNDER PROCUREMENT NO. MD/SUPLS/21-
22/00204**

**BEFORE: NELSON NERIMA; THOMAS BROOKES ISANGA;
GEOFFREY NUWAGIRA KAKIRA, AND CHARITY KYARISIIMA;
MEMBERS**

A. Brief Facts

1. The Ministry of Defence and Veteran Affairs (the Respondent) initiated a procurement for supply of various clothing items under Framework Contracts for 2 years using the restricted domestic bidding method of procurement on July 7, 2022 under Procurement No. MD/SUPLS/21-22/00204. The bidding document was issued to 45 bidders.
2. 32 bidders responded to the invitation by the Respondent, amongst whom was the Applicant who submitted its bid for Lot 2 (winter trench overcoat) and Lot 6 (Military Blankets).
3. Upon conclusion of the evaluation process, the Respondent displayed the Notice of Best Evaluated Bidder for the various lots on September 13, 2022 with a removal date of September 26, 2022.
4. For Lot 2, the Notice of Best Evaluated Bidder indicated that Riverwood Logistics Ltd was the Best Evaluated Bidder with a contract unit price of UGX 421,480/= VAT Exclusive. The Notice of Best Evaluated Bidder further indicated that the Applicant was disqualified at the preliminary stage on the ground that *The Signature on powers of attorney was different from the signature in the bid document.*
5. The Applicant being dissatisfied with the evaluation process, applied for administrative review before the Accounting Officer on September 26, 2022. The complaint was based on two grounds i.e that the Applicant should not have been disqualified on the ground of inconsistency in signatures; and failure to furnish the Applicant with a copy of the Notice of Best Evaluated Bidder.
6. The Accounting Officer communicated a decision on whereby the decisions of the Evaluation Committee and the Contracts Committee were upheld.

B. Application to the Tribunal

7. The Applicant then filed the instant application with the Tribunal on October 20, 2022, under section 89(8) of the *Public Procurement and Disposal of Public Assets Act* on account of the failure of the Accounting Officer to make a decision within the statutory time frame.
8. The Application is based on three grounds, *viz:*
 - 1) *The Accounting Officer of the Respondent erred in law when she did not communicate the administrative review decision within the statutory timeframe.*
 - 2) *The Applicant's signature of its bid is in accordance with the instructions in the bidding document and therefore it was erroneous for the Respondent to disqualify the Applicant's bid.*
 - 3) *The Entity did not provide the Applicant with the Best Evaluated Bidder Notice in contravention of the statutory provisions.*
9. The Respondent filed a reply in which it raised two preliminary objections i.e that the Application is premature due to non-service of a statutory notice to the Accounting Officer; and is time barred.
10. The Respondent admitted that it did not communicate the administrative review decision within the statutory timeframe because of the routine exigencies of the Entity's work, but that the applicant was not prejudiced as its right to apply to the Tribunal was not fettered.
11. The Respondent averred that the inconsistencies in the Applicant's bid were a material deviation which could not be cured by clarification.

12. The Respondent further contended that the failure to provide the applicant with the Notice of Best Evaluated Bidder was an inadvertent nonfatal oversight and no prejudice was occasioned to the Applicant.

C. Submissions

Applicant

13. The Applicant filed submissions through *Muhumuza, Kateeba & Co. Advocates*.
14. On the omission to serve a statutory notice, counsel for the Applicant submitted that the Respondent is precluded from making this preliminary objection on the basis of the principle of approbation and reprobation. The Respondent concedes that it did not communicate the decision within the statutory timeframe. The Respondent claims that it was lawful for it not to make and communicate the administrative review decision within the statutory period while at the same time it is asserting that the Applicant filed the application outside the statutory period.
15. The failure of the Accounting Officer to make and communicate a decision within ten days prescribed in section 89 (7) of the *Public Procurement and Disposal of Public Assets Act* caused great prejudice on account that upon receipt of the decision; the Applicant may have opted to take no further steps and could have avoided extra fees and costs associated with making an appeal to the Tribunal. The Respondent does not have the option of ignoring section 89 (7) or failing to comply with it on the premise that there will be no prejudice to the Applicant.
16. Instructions to Bidders (ITB) 12.1 (1) of the bidding document requires a bidder to submit the bid submission sheet using

the form provided in Section 4, bidding forms which should be filled in with an authorised signature. The requirements for the authorised signature are provided in ITB 22. The power of attorney does not authorise a signature. It authorises a specific person or persons to perform the required acts on behalf of the bidder for the transactions to be undertaken with the Respondent. ITBs 12.1 (1) and 22.2 require that the person who signs the bid submission sheet must be the person authorised to do so through a registered power of attorney.

17. The Applicant submitted a bid for the impugned procurement which included a registered power of attorney in accordance with the requirements in ITB 22.2 of the bidding document.
18. The Applicant's power of attorney provides that *Mr. Denis Kamujanduzi* is authorised to sign bids, undertake negotiations, sign contracts as well as handle all other incidental matters, on behalf of the Applicant. The format of the bid submission sheet in the bidding document indicates the signature and name of the person authorised to sign the bid on behalf of a bidder. In the Applicant's bid for the impugned procurement, *Mr. Denis Kamujanduzi* signed the bid submission sheet and stated his full name under his signature.
19. The bidding document for the impugned procurement does not permit the Entity to disqualify a bidder on the ground that a signature in the power of attorney does not match a signature in the bid. A bidder can only be disqualified if the person granted the powers of attorney is different from the person who signs the bid submission sheet or the bid.
20. If during the evaluation process there was any doubt about the signatures of the authorised representative, the Evaluation Committee should have written to the Applicant requesting for clarification. There is no requirement for a

power of attorney to include a signature of the authorized representative. The requirement is that they must be signed by the donor.

21. The Applicant was never furnished with a copy of the Notice of Best Evaluated Bidder and only got to know about the said notice when its authorised representative visited the Entity's premises and perused its procurement and disposal notice board. The failure of the Entity to furnish the Applicant with the Notice of Best Evaluated Bidder was a breach of regulation 4 (1) (a) of the *Public Procurement and Disposal of Public Assets Act (Contracts) Regulations*. It also contravened section 45 of the *Public Procurement and Disposal of Public Assets Act* which provides that all procurements shall be conducted in a manner which promotes fairness, accountability and transparency. Counsel prayed that the Respondent should be directed to conduct a re - evaluation of the bids; that the Applicant's administrative review fees be refunded; and that each party bears its own costs.

Respondent

22. The Respondent reiterated its contention that this Application is premature, malafide, manifestly time barred, incurably defective and incompetent.
23. That the principle of approbation and reprobation is about making choices in the application of an instrument and that the person's original choice must later be inconsistent with the earlier choice for the principle to apply. That there is no iota of choices that the Respondent makes in the instruments relied on in the answer to the application. Whereas the Respondent does make reference to the PPDA laws and Regulations and indeed makes commendation (approbation) of the same, nowhere whatsoever does it disapprove (reprobate) the same.

24. That the doctrine of approbation and reprobation only applies to the conduct of the parties and does not operate against the provisions of a statute.
25. That the non-communication of the Respondent's findings to the Applicant was inadvertent and the Applicant was not prejudiced since it duly exercised its right to apply for administrative review before the Tribunal as provided under Section 89(8) of the *Public Procurement and Disposal of Public Assets Act* in absence of the communication from the Accounting Officer.
26. That the requirement to file an Application to the Tribunal within the prescribed time frame is a creature of a statute under Section 91I (2) (b) of the *Public Procurement and Disposal of Public Assets Act*, is mandatory and cannot be circumvented by the reliance on the principle of approbation and reprobation.
27. Further, the requirement of the bidder to give the Accounting Officer five working days' notice after expiry of the ten days prescribed for decision and communication by the Accounting Officer prior to making an Application to the Tribunal is mandatory and must be complied with.
28. That the failure by the Accounting officer to communicate the decision of the administrative review inadvertently occasioned by the hyper routine exigencies of the nature of the Ministry of Defence and Veteran Affairs. That this is a plausible mitigating factor in the circumstances. Further, that the said faltering, in no way caused injury to the Applicant.
29. That ITB 12.1 (l) and 22.2 of the Entity's bidding document required the Bidders bidding documents to be signed by the person authorised using the authorised signature. The requirement for signature and the requirement for name are separately provided in ITB 12.1 (l) (signature) and ITB 22.2 (name).

30. That the Applicant's signature on the power of attorney is additional evidence to the identity of the donee. Where the signature of the donee on the power of attorney differs fundamentally from that of the authorised signatory on the bid documents, then the identity of the person the Entity is dealing with becomes an issue of great concern.
31. While the power of attorney was given to *Denis Kamujanduzi*, the bid submission sheet (bid) was signed by a one *Kamujanduzi Denis* with a different signature from the specimen signature on the power of attorney. *Denis Kamujanduzi* and *Kamujanduzi Denis* are two separate and different persons with two different signatures; and as such the Applicant's bid was signed by a person without power of attorney.
32. Under Regulation 22 (3) (c) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations*, a bid is administratively non-compliant where the signature and authorisation to submit the bid is not in accordance with the instructions in the bidding document. The failure of the Applicant's bid to comply with ITB 21.1 (l) and 22.2 of the bidding document on account of the inconsistencies in the signatures on the bid and the power of attorney made the bid substantially non-compliant under ITB 30.2 (b) of the bidding document and was a valid ground for rejection of the bid in accordance with ITB 30.3. Accordingly, pursuant to Regulation 22 (4) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations* the Applicant's bid was rejected for being administratively-non compliant and non-responsive to the bidding document.
33. The requirement to request for clarification under Regulation 10 (1) and (2) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations* is discretionary. This is only

permissible where the non-conformity or an omission in the bid is not a material deviation. The Respondent found inconsistencies in the Applicant's bid as material deviation, thus making the bid substantially non-compliant and as such it was not erroneous for the Entity to disqualify the Applicant's bid.

34. The Applicant's signature of its bid was not in accordance with the instructions in the bidding document and therefore it was not erroneous for the Entity to disqualify the Applicant's bid.
35. The Respondent displayed the Notice of Best Evaluated Bidder on its notice board on September 13, 2022 in accordance with Regulation 4(1) (b) of the *Public Procurement and Disposal of Public Assets (Contracts) Regulations*.
36. The Applicant was not disadvantaged in any way since it was able to seek redress in a timely manner by applying for Administrative Review before the Accounting Officer.
37. The Respondent prayed that the Application be dismissed with costs.

D. Oral hearing

The Tribunal held an oral hearing on 3rd November, 2022 via *zoom* software. The appearances were as follows:

Counsel John Kallemera appeared for the Applicant and Brig. General Aloysius Kagoro, the Legal Officer of Ministry of Defence and Veteran Affairs (MODVA) appeared for the Respondent.

In attendance were;

Ian Walker the Managing Director and Med Mwiri the Sales and Marketing Manager of the Applicant.

Edith Buturo the Accounting Officer of the Respondent, Aminata Oduka the Assistant Secretary MODVA, Major TK Kyatuka Assistant Legal Officer MODVA, Lt. Anselm Kiiza Assistant Legal Officer MODVA, Lt. Saddam Kyamanywa Assistant Legal Officer MODVA, Juliet Sanyu Mugenyi Assistant Legal Officer MODVA, Isaac Kyaligonza HPDU MODVA and Caleb Tumugumye Procurement Officer MODVA.

E. Resolution

1. The Applicant raised the following three substantive issues for determination by the Tribunal. However, in view of the preliminary objections raised and submitted upon, we have recast the issues as follows;
 - 1) Whether the Application is premature due to non-service of a statutory notice to the Accounting Officer?
 - 2) Whether the Application is time barred?
 - 3) Whether the Accounting Officer of the Respondent erred in law when she did not communicate the administrative review decision within the statutory timeframe?
 - 4) Whether the Applicant's signature of its bid is in accordance with the instructions in the bidding document and therefore it was erroneous for the Respondent to disqualify the Applicant's bid?
 - 5) Whether the Respondent did not provide the Applicant with a copy of the Notice of Best Evaluated Bidder in contravention of the statutory provisions?
 - 6) What remedies are available to the parties?

Issue 1:

Whether the Application is premature due to non-service of a statutory notice to the Accounting Officer?

2. Section 89 (10) of the *Public Procurement and Disposal of Public Assets Act* provides as follows:

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.

3. The Applicant concedes that it did not serve the notice.
4. The Tribunal has consistently held that non service of a statutory notice to the Accounting Officer is not fatal, and does not vitiate the Tribunal's jurisdiction. Non-service of a notice is a technicality which can be dispensed with under article 126 (2)(e) of the Constitution
5. See: ***Elite Chemicals Limited v Uganda Coffee Development Authority, Application no. 7 of 2021***; and ***APA Insurance v Uganda National Roads Authority, Application No.02 of 2022***.
6. **Issue no. 1 is answered in the negative.**

Issue 2:

Whether the Application is time barred?

7. The Applicant being dissatisfied with the evaluation process, applied for administrative review before the Accounting Officer on Monday September 26, 2022.
8. In accordance with section 89 (7) of the *Public Procurement and Disposal of Public Assets Act*, the Accounting Officer of the Respondent was obligated to make and communicate a decision regarding the Complaint within ten days from September 26, 2022 when the Respondent received the Applicant's Complaint. The Accounting Officer therefore ought to have made and communicated her decision on or before Thursday, October 6, 2022.

9. The Accounting Officer however purported to communicate a decision in a letter dated **October 21, 2022**. That decision was out of time, in breach of the law and of no legal consequence. See ***Applications No. 26 and 27 of 2022- Vision Scientific & Engineering Limited v Makerere University; Meera Investments Limited v URA & Numani Mubiakulamusa, Application No.18 of 2022; Sanlam General Insurance v UNRA, Application No.29 of 2021, and Mugabi David v Sembabule District Local Government, Application no. 24 of 2022.***
10. Where an Accounting Officer does not make or communicate a decision within ten days of receipt of the complaint, the complainant has a right to make an application to the Tribunal within ten days of the expiry of the period given for the Accounting Officer to make and communicate a decision. See sections 89(8) and 91I (2) (b) of the *Public Procurement and Disposal of Public Assets Act*.
11. The ten days started to run on Friday October 7, 2022 and would have expired on Sunday October 16, 2022. Sunday is an excluded day in accordance with section 34(1)(b) of the *Interpretation Act*. The ten days within which to file the Application in the Tribunal therefore expired on the next working day which was Monday October 17, 2022.
12. The Tribunal has no inherent powers under the *Public Procurement and Disposal of Public Assets Act 2003 as amended* to enlarge or extend time limits stated in the procurement and disposal statute. The jurisdiction of the Tribunal is extinguished as far as the matter is concerned. See ***JV AGT S.P.A & Zhucheng Dingcheng Machinery Co. Ltd Vs. Private Sector Foundation Uganda, Application No. 29 of 2022, Pages 14-15.***
13. The Tribunal has in its previous decisions affirmed that the time limits in the *Public Procurement and Disposal of Public Assets Act* were set for a purpose, are couched in mandatory

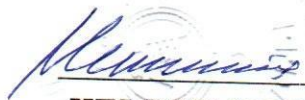
terms, are a matter of substantive law and must be strictly complied with. They are not mere technicalities.

14. Once a party fails to move within the time set by law, the jurisdiction of the Tribunal is extinguished as far as the matter is concerned. See ***Sanlam General Insurance vs UNRA, Application No.29 of 2021*** and ***Mugabi David v Sembabule District Local Government, Application no. 24 of 2022.***
15. The instant Application filed on Thursday October 20, 2022 was therefore filed 3 days out of time. The Application is therefore time barred and the tribunal has no jurisdiction to hear it.
16. **Issue no. 2 is resolved in the affirmative.**
17. As a result, there is no need to delve further into the merits of the Application.

F. Disposition

1. The Application is struck out.
2. The Tribunal's suspension order dated October 20, 2022 is vacated.
3. Each party to bear its own costs.

Dated at Kampala this 11th day of November, 2022.



NELSON NERIMA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



THOMAS BROOKES ISANGA
MEMBER



CHARITY KYARISIIMA
MEMBER