

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

APPLICATION NO. 22 OF 2023

BETWEEN

- 1. IRON INVESTMENT AND CONSTRUCTION LTD**
- 2. SMART BUSINESS ARUA ENTREPRISES LTD**
- 3. ORIA AND SONS INVESTMENT LTD:.....:APPLICANTS**

AND

MINISTRY OF WATER AND ENVIRONMENT:.....:RESPONDENT

APPLICATION FOR REVIEW OF THE DECISION OF MINISTRY OF WATER AND ENVIRONMENT IN RESPECT OF THE EXTENSION OF CONTRACT FOR THE PURCHASE FIREWOOD FROM UGANDAN LAND OWNERS FOR SUPPLY TO PERSONS WITH SPECIAL NEEDS WITHIN REFUGEE SETTLEMENTS UNDER PROCUREMENT REFERENCE NO. MWE/SUPLS/2022-2023/00012

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

A. BRIEF FACTS

1. The Ministry of Water and Environment (the Respondent) initiated a procurement for the supply of an estimated 162,182m³ of eucalyptus Firewood per annum to 22 refugee settlements in 11 districts.
2. The procurement's objective is to facilitate the purchase firewood from Ugandan land owners for supply to Persons with Special Needs within refugee settlements and is intended to benefit Persons with Special needs in Selected Refugee Settlement under the Investing in Forests and Protected Areas for Climate Smart Development (IFPA-CD) Project with funding from the World Bank, vide RFB Reference No. MWE/SUPLS/2022-2023/00012.
3. The Specific Procurement Notice was published in the *New Vision* and *Daily Monitor* newspapers on February 6 and 7 2023 respectively.
4. Bids were received from 127 bidders, amongst which ***Iron Investment & Construction Limited*** submitted a bid for lot 3-Yumbe, Koboko and Moyo Districts, ***Smart Business Arua Enterprises Limited*** submitted bids for lot 2- Terego and Madi Okollo Districts & Lot 5-Kyegegwa and Kamwenge Districts respectively while ***Oria Sons Investment Limited*** submitted bids for lot 1- Adjumani and Lamwo Districts & Lot 4- Kiryadongo and Kikuube Districts respectively, in the impugned procurement.
5. The Respondent displayed the Best Evaluated Bidder (BEB) Notice on August 14, 2023 with a removal date of August 25, 2023. The BEB Notice was also sent to all bidders through email. The BEB Notice indicated the stage at which Applicants were unsuccessful and reasons for their respective disqualification.

6. The Applicants namely; *Iron Investment & Construction Limited, Smart Business Arua Enterprises Limited and Oriá Sons Investment Limited* being dissatisfied with the procurement process, **jointly** filed a procurement related complaint with the Respondent by email through their Lawyer *Buga & Co Advocates* on August 20, 2023.
7. Having not received a reply to their Complaint, the Applicants filed the instant application directly with the Tribunal on September 9, 2023.

B. APPLICANTS' SUBMISSIONS

Issue 1.

The Respondent's Accounting Officer erred in law and fact when he failed to communicate his decision for Administrative review within the statutory time limit

1. Under section 89(7) of the *Public Procurement and Disposal of Public Assets Act* an Accounting Officer is duty bound to make and communicate a decision on the complaint within 10 days of receipt of an application, with reasons for the decision taken and corrective measures to be taken if any.
2. The Applicants lodged their complaint via the email address pdu@mwe.go.ug; mwesigwacatherine62@yahoo.com. The said email was provided and indicated in the bidding document under ITB: 7.1.
3. The Applicants however conceded that they had belatedly noted that under ITB 47, a specific email address was provided for lodging complaints regarding the procurement process.
4. That it is however, in dispute that the Applicants filed a complaint. The only issue is that it was not filed on the email designated for complaints. The complaint was sent on an email that belonged to the same entity and therefore, there is nothing irregular about it. The designation of the emails in the ITB was merely for administrative purposes, and as such misfiling via

another email is a mere technicality that should not be used to deny the Applicants justice.

5. It is reasonably expected that the recipient would have exercised prudence and forwarded it to the correct person (Accounting Officer) in the entity.
6. Under sections 89(8) and 91I (1) (a) of the *Public Procurement and Disposal of Public Assets Act*, this Tribunal has a jurisdiction to review the complaint for the first time where the Accounting Officer fails to render a decision.

Ground II:

The evaluation of all successful bidders in Lot 1, 2, 3 and 5 was not done in accordance with the bidding document under the post qualification Criteria (ITB 36.1)b

7. The Evaluation Committee found the experiences of the Applicants not sufficient and yet held the best evaluated bidders who presented similar documentation as the Applicants to be satisfactory.
8. Section III part 3(b) of the ITB required the bidders to submit proof of experience, but was silent on what amounts to proof thereof. Such a contract must be accompanied with proof of execution and completion of the performance of the contract.
9. Further, Section III part 3(b) of the ITB requires the bidders to demonstrate operational experience.
10. The above requirements give a latitude of criteria and the Applicants and indeed the best evaluated bidders submitted their bids in accordance with the above requirements. It is thus surprising how the Evaluation Committee arrived at the conclusion as it did.

11. The third Applicant submitted its bid under Lot one, the second Applicant presented its bid under Lot 2 and 5 and the first Applicant presented its bid under Lot 3.
12. In the notice of best evaluated bidders, the Applicants were found to lack the relevant experiences and yet the best evaluated bidders equally submitted similar proof of experience. The evaluation was marred with inconsistencies, for instance, Muluk Investment Ltd the best evaluated bidder in Lot 1 turned out to lack experience in Lot 3.
13. The Respondents declined to serve the applicants with a copy of the evaluation report.
14. There were glaring irregularities in the evaluation process and it is apparent that the Evaluation Committee set different standards for the bidders.
15. The Applicants prayed that this Tribunal cancels the procurement process.

C. RESPONDENT'S SUBMISSIONS

Issue 1:

Whether the Respondent's Accounting Officer erred in law and fact when he failed to communicate his decision for administrative review within the statutory time limits contrary to section 89 (7) of the Public Procurement and Disposal of Public Assets Act

1. At no material time did the Respondent receive a complaint for Administrative Review from the Applicants to enable the Respondent's Accounting Officer make and communicate a decision to the Applicants in accordance with the law.

2. In the bidding document, the Respondent provided under ITB 7.1 email addresses for clarification for bid purposes only. These addresses are: pdu@mwe.go.ug; mwesigwacatherine62@yahoo.com and issakatwesige@gmail.com. These addresses were specific for that purpose and after deadline for bid submissions, these address's purpose is suspended until they are put for further use on future procurement.
3. Under ITB 47 of the issued Bidding Document, a specific email address is provided to all bidders for lodging procurement related complaints. This email address is: ps@mwe.go.ug.
4. It is indeed undisputed and admitted fact by the Applicants that no complaint was ever sent to the said email address ie. ps@mwe.go.ug.

Issue 2:

Whether the evaluation of all the successful bidders in Lot 1,2,3 and 5 was done in accordance with the bidding documents under the post qualification (ITB 36.1b)

5. The evaluation of all the successful bidders in Lot 1, 2, 3 and 5 was in accordance with the bidding documents under the posts qualification as detailed in ITB 36.1b.
6. Section III of the bidding document provides for evaluation and qualification criteria.
7. Section III part 3(b) states clearly the post qualification criteria.
8. The Respondent strictly followed the laid evaluation criteria as agreed and accepted by all the bidders in the letter of bid. Considering the argument of the Applicants, amounts to a deviation from what is stipulated in the bidding document thus, introducing their own terms and conditions against the provisions of the bidding document and the laws.

9. ITB 26 provides for confidentiality in the evaluation and comparison of bids during the procurement process. The Applicant's quest to have an evaluation report at this stage is not only illegal but absurd.
10. The Respondent therefore submits that this Application lacks merit and should be dismissed with costs against each Applicant.

D. ORAL HEARING

1. The Tribunal held an oral hearing on September 22, 2023. The appearances were as follows:
 - 1) Pario Nick and Sadam Hassein, counsel for the Applicant.
 - 2) Hillary Ebila, state attorney, counsel for the Respondent.
2. In attendance were the following;
 - 1) Ezama Ham Muzamir, director of the 1st Applicant.
 - 2) Andama Solo, director of the 2nd Applicant.
 - 3) Tabani Abibu Nasuru, director of the 3rd Applicant.
 - 4) Valence Arineitwe, principal Forest Officer of the Respondent
 - 5) Kateregga John, Principal Procurement Officer of the Respondent.
 - 6) Catherine Nabuwufu, Procurement Specialist of the Respondent.

E. RESOLUTION

1. The Application raised 2 issues for determination by the Tribunal. However, in view of the pleadings and submissions of the parties, the following issues have been framed for resolution by the Tribunal.
 - 1) *Whether the Applicants submitted an administrative review complaint before the Accounting Officer of the Respondent?*

- 2) *If so, whether the Respondent's Accounting Officer erred when he failed to communicate his administrative review decision with the statutory timelines?*
- 3) *Whether the Applicants' Application before the Tribunal is competent?*
- 4) *Whether the evaluation of all the successful bidders in lot 1, 2, 3 and 5 was conducted in accordance with the bidding document?*
- 5) What remedies are available to the parties?

Issue no. 1:

Whether the Applicants submitted an administrative review complaint before the Accounting Officer of the Respondent?

2. The law and practice regarding the lodging and handling of administrative review complaints before an accounting officer is well stated in sections 89(1) and 89(3) of the *Public Procurement and Disposal of Public Assets Act* read together with Regulation 4(1), 4(2), 6(1)(a) and 6(2) of the *Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014*. See ***Beautiful Engineering & Equipment Ltd v Uganda Electricity Transmission Company Limited Application No. 15 of 2021***.
3. The Applicants contend that they duly filed a complaint before the Accounting Officer of the Respondent on August 20, 2023 and that there was no response made to their complaint. The Respondent averred in its response to the Applicant that it had never received any complaint as alleged by the Applicants.
4. We examined the documents submitted by both parties to the Tribunal and observed the following;
 - a) Section II-Bid Data Sheet (BDS) on ITB 7.1 at page 37 of the Bidding document stated as follows;

For clarification of Bid purposes only, the Procuring Agency's address is:

*Attention: **Head/Procurement and Disposal Unit***

*Address: **Plot 3-7 Kabalega Crescent Road, Luzira***

*Floor/ Room number: **PDU Office on ground floor***

*City: **Kampala***

*Country: **Uganda***

*Email address: pdu@mwe.go.ug and copy to mwesigwacatherine62@yahoo.com **and** issakatwesige@gmail.com*

Requests for clarification shall be received by the Procuring Agency no later than: 7 business days before the submission deadline

Web page: www.mwe.go.ug

- b) The Applicants' lawyer used his email address bugaguilt@gmail.com to send an email including an attachment to pdu@mwe.go.ug; phoebelaker@gmail.com and smartbiz1015@gmail.com.
- c) The procedures for making a procurement related compliant were specified in the BDS as specified in ITB 47 on page 33 of the bidding document.
- d) Section II-Bid Data Sheet (BDS) on page 40 provided an elaborate procedure for making a procurement related compliant. It stated as follows;
The procedures for making a Procurement-related Complaint are detailed in Annex III of the Procurement Regulations for IPF Borrowers. If a Bidder wishes to make a Procurement-related Complaint, the Bidder shall submit its complaint in writing (by the quickest means available that is either by email or fax), to:

Title/position: Permanent Secretary

Procuring Agency: Ministry of water and Environment

Email address: ps@mwe.go.ug

5. Any information or document that may be submitted by a bidder, in a procurement or disposal process, may be communicated or submitted by using electronic means as per section 95B of *Public Procurement and Disposal of Public Assets Act*. Also see sections 2(1) and 5(4)(a) and (b) of the *Electronic Transactions Act 2011*.
6. The bidding document itself in Section 1, Instruction to Bidders Clause 1.2 (a), recognizes communications in written form to include e-mail with proof of receipt.
7. The Applicants' lawyers *Buga & Co Advocates* sent the procurement related compliant to the email address pdu@mwe.go.ug, one of the designated email addresses for purposes of seeking clarifications of bid under ITB 7.1. instead of sending the compliant to ps@mwe.go.ug as stipulated under ITB 47 as stipulated in Section II-Bid Data Sheet (BDS) on page 40 of the Bidding Document.
8. In ***Dian GF International Ltd v Damco Logistics Ltd & Trantrack*** (Civil Suit No. 161 of 2010), the Honourable Justice Christopher Madrama (as he then was) held that High Court that *E-mails are composed of a "header" and "body". While the body of the email contains the individual text composed by the sender, the header listing the sender's name and address, the recipient's user name and address, the transmission date and time and the subject matter of the mailing.*
9. An email communication becomes effective at the time when the email and its attachments were successfully transmitted from the sender and where a wrong email address is used, the question on receipt or propriety of the receipt of the email can't arise because there was no email sent to the intended recipient and none could be received. See ***Aponye House Ltd v URA, Application No. 10 of 2023; Mugrewa Fred v. Sembabule District Local Government Application No. 23 of 2023*** and

***Kasokoso v Jinja School of Nursing and Midwifery,
Application No 13 of 2021***

10. However, in the instant Application, we observed that the email that the Applicants' lawyers sent to the Procurement and Disposal Unit on August 20, 2023 at 2:52 PM contained an attachment with the subject **Administrative review vide procurement reference No. MWE/SUPLS/2022-2023/00012**. The attachment was a letter dated August 20, 2023 addressed to the Permanent Secretary of Ministry of Water and Environment through the Head/Procurement and Disposal Unit of Ministry of Water and Environment.
11. It is our finding that the attachment to the email clearly obligated the Head of Procurement and Disposal Unit of Ministry of Water and Environment to transmit to and bring the letter to the attention of Permanent Secretary of Ministry of Water and Environment. As espoused in ***Dian GF International Ltd v Damco Logistics Ltd & Trantrack***, an email cannot be separated from its subject matter, body and attachments.
12. Secondly, a purposive reading of functions of the Procurement and Disposal Unit under section 31(a) and 31(q) of the *Public Procurement and Disposal of Public Assets Act* is that the head of the procurement and disposal unit has a duty to manage all procurement activities of the entity with exception of adjudication and contract awards and to co-ordinate the procurement activities of all the departments of the entity. Transmitting letters addressed to the Accounting Officer but routed through the Procurement and Disposal Unit is one of the procurement activities managed and coordinated by the Procurement and Disposal Unit.
13. The distinction between the instant application and the decision of the Tribunal in ***Beautiful Engineering & Equipment Ltd*** is that in that case the compliant was addressed to the Manager or head of the Procurement and Disposal Unit of Uganda

Electricity Transmission Company Limited. In the instant application, the compliant is rightfully addressed to the Accounting Officer or Permanent Secretary of Ministry of water and Environment but routed through or actioned for submission through the Head/Procurement and Disposal Unit of Ministry of Water and Environment. The case of ***Beautiful Engineering & Equipment Ltd*** decision is therefore, not applicable to the instant Application.

14. Lastly, the Respondent has not denied receipt of the compliant or denied the existence or ownership of the email address pdu@mwe.go.ug. The Respondent only claimed at the hearing that they saw the email afterwards when the days for responding to the complaint by Accounting had passed, but that does not negate the fact that the email was duly sent. The Tribunal at the hearing requested for information on dates when the Respondent took notice of the email and actions they took, but such information was not provided.
15. The Applicants therefore filed a complaint before the Accounting Officer of the Respondent.
16. **Issue no. 1 is answered in the affirmative.**

Issue no. 2:

If so, whether the Respondent's Accounting Officer erred when he failed to communicate his administrative review decision with the statutory timelines?

17. Section II-Bid Data Sheet (BDS) on page 40 provided an elaborate procedure for making a procurement related compliant and further emphasized that the *procedures for making a Procurement-related Complaint are detailed in Annex III of the Procurement Regulations for IPF Borrowers*.
18. The Tribunal in ***Terra Vital Consortium vs Ministry of Lands Housing and Urban Development, Application No.16 of 2023***, compared timelines provided for in paragraph 3.1.(c) of

Annex III of the Procurement Regulations for IPF Borrowers and section 89(3)(b) of the *Public Procurement and Disposal of Public Assets Act* in relation to time within which the Accounting Officer should respond to a Complaint and held that the 15 (business days) timeline provided for under *Annex III of the Procurement Regulations for IPF Borrowers* prevails over the timeline of 10 days stipulated in the *Public Procurement and Disposal of Public Assets Act* .

19. The Accounting Officer of the Respondent therefore had 15 (business days) from date of receipt of complaint that is from August 20, 2023. The time of reckoning began on August 21, 2023 and elapsed on September 8, 2023.
20. The Respondent has admitted in its submissions that it has not made a decision to date. The Accounting Officer therefore erred in law and fact when he omitted to make an administrative review decision within 15 (business days) from receipt of the Applicants' Complaint.
21. **Issue no. 2 is answered in the affirmative.**

Issue no. 3:

Whether the Applicants' Application before the Tribunal is competent?

22. Under sections 91(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).
23. As found under issue no. 2, the time for making a decision lapsed on September 8, 2023. The ten days for applying to the Tribunal started running on September 9, 2023 and would have expired on September 18, 2023. The Applicants were therefore within their statutory rights to file the Application in

the Tribunal on September 9, 2023.

24. The Respondent has also faulted the Applicants for filing a joint application yet they were separate bidders.
25. We agree that each bidder's complaints must be the subject of a separate application to the Accounting Officer or the Tribunal. Bidders who are not in a joint venture or consortium cannot purport to make a joint complaint since each bid is independent.
26. However, under Order 1 rule 9 C.P.R, no suit shall be defeated by reason of misjoinder or non joinder of parties, parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.
27. Nevertheless, the joinder of Applicants should not be used to evade application or filing fees before the Accounting Officer or the Tribunal. In the instant case, there are three Applicants but filing fees were paid for one application.
28. The Applicants shall be directed to pay the balance of the filing fees.
29. **Issue no. 3 is resolved in the affirmative.**

Issue No. 4:

Whether the evaluation of all the successful bidders in lot 1, 2, 3 and 5 was conducted in accordance with the bidding document

30. The Applicants complained that the Evaluation Committee found the experiences of the Applicants not sufficient and yet held the best evaluated bidders who presented similar documentation as the Applicants to be satisfactory.
31. The Applicant also decried the failure of the Respondent to avail

it with a copy of the evaluation report.

32. The Tribunal has clarified that section 89 (4) of the *Public Procurement and Disposal of Public Assets Act* does not require an Entity to avail the evaluation report as suggested by the Applicant but instead refers to a report indicating the reasons for rejection of the bidder and the stage at which the bidder was rejected. This means that the Entity is only duty bound to avail a report which contains the information specified in section 89(4) of the *Public Procurement and Disposal of Public Assets Act*. The Entity need not avail the entire evaluation committee report to the aggrieved bidder. See ***GAT Consults Ltd v National Water and Sewerage Corporation, Application No. 30 of 2021, Page 17, para 15-17*** and ***VCON Construction (U) Ltd vs Uganda Development Bank, Application No. 22 of 2021***.
33. Regulation 5.50 of the *World Bank Procurement Regulations for IPF Borrowers* states that the evaluation criteria and methodology shall be specified in detail in the request for the bids/request for proposals documents.
34. The Evaluation Criteria is stipulated in Section III-Evaluation and Qualification Criteria at pages 42-44 of the bidding document. Regarding specific experience, the criteria provides as follows:
*The Bidder shall demonstrate that it has successfully completed at least two (2) contracts within the last five years prior to bid submission deadline, **each** with a value of at least the amount stated in the Post Qualification table below; that have been successfully and substantially completed and that are similar in nature and complexity (firewood, wooden poles, timber, Tree seedlings etc) as a main contractor to the goods it offers to supply and the related services. For a joint venture, this requirement may be met by all members combined.*
Bidders will be evaluated to confirm that they meet the requirements stated in the Financial and Specific Experience

table below;

Financial Capacity and Specific Experience table.

| Lot | Financial Capacity Annual Turn over | Specific Experience of at least 2 contracts in the past (5) five years | |
|------------|---|---|--|
| | (Ugandan Shillings or a freely convertible currency) | No. of contracts (n) | Value of each contract (v) or one contract with value equal to or above n X V |
| Lot 1 | 2 billion | 2 | 1 billion |
| Lot 2 | 2 billion | 2 | 1 billion |
| Lot 3 | 4 billion | 2 | 2 billion |
| Lot 4 | 1.5 billion | 2 | 0.75 billion |
| Lot 5 | 1.5 billion | 2 | 0.75 billion |

Bidders should have demonstrated operational experience in the following;

- i. Procuring agricultural commodities or forest products in bulk from producers in rural*
- ii. Conducting conformity checks and quality control of such commodities and products;*
- iii. Designing and managing supplier payment systems for such commodities and products, preferably including digital records with supplier geo-referencing;*
- iv. Working with District government technical staff to ensure compliance with prevailing regulations on sourcing, verification and transport of such commodities and products;*
- v. Managing goods vehicle fleets involved in bulk haulage, with appropriate tracking and monitoring to ensure timely and accurate delivery.*

vi. *Managing complex logistical projects involving procurement, loading, handling, transport and delivery.*

(c):

*For firms registered in Uganda, provide evidence of;
Valid Income tax clearance 2022 addressed to the Entity
Valid Trading Licence (2022)*

35. As a merits review Tribunal, we have carefully perused the respective bids of the Applicants and observed as follows:

Iron Investments and Construction Ltd

36. The bidder was disqualified at the preliminary stage of evaluation. The bidder simply reproduced and attached the technical specifications and standards for the firewood form as provided for in the bidding document (*Section VII Schedule of Requirements* on page 69). The bidder did not fill in its offered technical specifications.
37. Mere non conformity with the specific form of bid submission sheet provided for in the standard bidding document issued by the Respondent does not render the bid submission sheet void. See *Application No.13 of 2021 Kasokosoko Services Ltd v Jinja School of Nursing and Midwifery*; and section 43 of the *Interpretation Act*.
38. In ***Application no. 41 of 2022, Orungo Market Vendors Association v Amuria District Local Government***, the bid submission sheet used by the Applicant was, in form, different from the one provided for in the standard bidding document issued by the Respondent. However, the Applicant had clearly stated its bid price. The Applicant had also enclosed the entire standard bidding document, including Part 1, Bidding Procedures at page 6 which stated a bid validity up to January 2, 2023. All pages were signed and stamped by the Applicant. The Applicant therefore adopted the bid validity period as stated in the Bidding document. The Tribunal decided that the Respondent erred when it disqualified the Applicant's bid for

not indicating bid validity date in its bid submission sheet. That the Respondent erred when it prioritized form over substance.

39. In the instant case, Clause (f) of the Letter of Bid (bid submission sheet) in the bidding document stated thus; *“Conformity: We offer to supply, in conformity with the RFB document and in accordance with Section VII- Schedule of Requirements, the following Goods:.....”* The Schedule of Requirements had listed the detailed technical specifications of all the five lots.
40. However, in the instant case, the bidder did not include that general statement in its bid submission sheet to indicate acceptance of all the requirements.
41. The bidder instead used a different conformity statement in its bid submission sheet ie *“Conformity: We offer to execute in conformity with the Bidding Document and in accordance with the **completion schedule** specified in the Statement of Requirements and the terms and conditions of the Bidding Document, the following: Supply of Eucalyptus Firewood for persons with Specific Needs in Selected Refugee Settlements. LOT 03”*.
42. The bidder did not also sign the relevant page of the technical specification to signify acceptance thereof.
43. The Respondent was therefore, rightfully, unable to determine whether the bidder accepted or complied with all the requirement relating to technical specifications for the firewood as specified in the bidding document.
44. The bid was therefore unresponsive to the requirements of the standard bidding documents contrary to ITB 29.2.

Smart Business Arua Enterprise Ltd

45. The bidder was unsuccessful for Lot 5 (Kyegegwa & Kamwenge Districts) on account of insufficient specific experience. The bidder did not demonstrate that it had successfully completed at least 2 contracts within the last 5 years prior to the bid submission, each with a value of 0.75 billion.
46. The expected financial capacity by way of annual turnover was UGX 2 billion for Lot 2 and 1.5 billion for lot 5 respectively. The bidder in its Audited Financial Statements, had an annual turnover for the year 2022 being UGX 1,379,804,389/=, for the year 2021 being UGX 860,711,343/=, for the year 2020 being UGX 508,159,343/= representing a turnover total of UGX 2,748,675,075/=. The turnover of the firm was below the financial capacity threshold for both Lots 2 and 5.
47. The experience submitted by the bidder that was substantially completed similar in nature and complexity (firewood, wooden poles, timber, tree seedlings etc) did not have any single contract with an individual value of UGX 1 billion for Lot 2 and UGX 0.75 billion for lot 5 in the last 5 years. The other contracts related to supply of services and supplies unrelated (not similar in nature and complexity) to the instant procurement.
- a) The supply of eucalyptus poles for construction to Lutheran World Federation Moyo Field Office on April 4, 2017 had a value of UGX 59, 520,000/=. This was outside the last 5 years ceiling from 23 March 2023 being the bid submission deadline.
- b) The supply of assorted tree seeds -Teak, Gmalena and Callindra to Lutheran World Federation Moyo Field Office on March 30, 2018 had a value of only UGX 12,000,000/=
- c) The supply of paw paw to Lutheran World Federation Moyo Field Office in June 2019 had a value of UGX 8,000,000/=. This did not meet the similarity requirement in nature and complexity.

- d) The supply of red apple guava fruit seedlings to Lutheran World Federation Moyo Field Office in June 2019 had a value of only UGX 25,000,000/=.
 - e) The supply of assorted tree seeds to Norwegian Refugee Council in October 2019 had a value of only UGX 9,030,000/=.
 - f) The supply of assorted tree seeds to Yumbe District Local Government in December 2019 had a value of only UGX 40,000,000/=.
 - g) The supply of seedlings to Uganda Red Cross Society Yumbe in April 2019 had a value of only UGX 11,260,000/=.
 - h) The supply of tree seedlings to Dan Church Aid-DCA Arua Office in August 2020 had a value of only UGX 7,600,000/=.
 - i) The supply of round poles (eucalyptus) to Bidibidi refugee Settlement in October 2020 had a value of only UGX 32,000,000/=.
 - j) The supply of construction poles to UNHCR sub office Arua in December 21, 2021 had a value of only UGX 168,097,682/=.
48. The bidder did not have the specific experience required for Lots 2 and 5 and was therefore rightfully disqualified at the post qualification stage.

Oria and Sons Investment Ltd

- 49. The bidder submitted bids for Lot 1- Adjumani and Lamwo Districts & Lot 4- Kiryadongo and Kikuube Districts respectively.
- 50. The bidder submitted audited books of accounts for only the years 2020 and 2021 and yet the bid requirement was submission of financial statements for the last 3 years prior to bid submission deadline.

51. The expected financial capacity by way of annual turnover was UGX 2 billion for Lot 1 and 1.5 billion for Lot 4 respectively. The bidder in its Audited Financial Statements, had an annual turnover for the year 2021 being UGX 2,001,862,340/=, for the year 2020 being UGX 1,208,159,343/= representing a turnover total of UGX 3,204,096,394/=. The turnover of the firm was below the financial capacity threshold for both Lots 1 and 4.
52. Regarding specific experience, the bidder did not submit any contract similar in nature and complexity (firewood, wooden poles, timber, Tree seedlings etc).
53. We found that the contracts for *supply of Oranges, Mangoes, papaya and Bambo for Welthungerhilfe worth UGX 30,550,000 in 2021* did not meet the similarity requirement in nature and complexity. The contract for the *supply of construction poles to Palabek UNHCR Lamwo Field Office worth UGX. 81,007,000 in 2022* met the similarity requirement in nature and complexity. However, none of the contracts submitted met the specific experience supply value or threshold for both Lots 1 and 4.
54. The bidder did not have the financial capability and specific experience required for Lot 1 and 4 respectively and was therefore rightfully disqualified at the post qualification stage.
55. At the hearing, counsel for the Applicants conceded that the allegation that the best evaluated bidders presented similar documentation as the Applicants was based on speculation and had no evidence to support it.
56. **Issue no. 4 is answered in the affirmative.**

Issue No. 5: What remedies are available to the parties

57. In light of our findings above, had the Accounting Officer of the Respondent investigated the Applicants' complaint on merit, the outcome of the investigations would not change the outcome of the procurement process.

58. The Applicants having failed to prove the substantive grounds of its application, the Application fails and the Applicant is not entitled to any relief.

F. DISPOSITION

1. The Application is dismissed.
2. The Respondent is at liberty to continue with and complete the procurement process.
3. The Tribunal's suspension order dated September 11, 2023, is vacated.
4. The Applicants are directed to pay Shs. 600,000 as the balance of the filing fees in the Tribunal for this Application.
5. Each party to bear its own costs.

Dated at Kampala this 29th day of September, 2023.



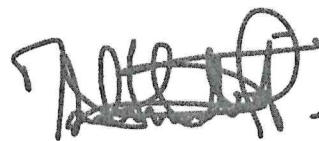
**NELSON NERIMA
MEMBER**



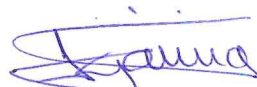
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