

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

APPLICATION NO. 23 OF 2023

BETWEEN

MBARARA CITY UNITED BIKADDE MARKET

VENDORS ASSOCIATION LTD:.....APPLICANT



AND

MBARARA CITY COUNCIL:.....RESPONDENT

**APPLICATION FOR REVIEW IN RESPECT OF THE
PROCUREMENT FOR COLLECTION OF REVENUE FROM
NYAMITYOBORA BIKADDE WEEKLY MARKET UNDER
PROCUREMENT REFERENCE NO. MBAR 609/SVCS/2023-
2024/001**

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

A. BRIEF FACTS

1. Mbarara City Council (the Respondent) initiated a procurement for collection of revenue from Nyamityobora Bikadde weekly market under procurement reference No. Mbar 609/Svcs/2023-2024/001, using open bidding method on 17th of August 2023.
2. Bids were received from 5 bidders namely *Mbarara City Bikadde Market Vendors Association Limited* (the Applicant), *TIBS Multiple Co. Limited*, *Lubega Derick*, *Kyantuu Francis* and *Nyamityobora Bikadde Vendors Cooperative Society Limited* on September 6, 2023.
3. Upon conclusion of evaluation and adjudication process, the Respondent awarded the Contract to Lubega Derick at a contract price of UGX 11,242,400/= per month. The Notice of Best Evaluated Bidder was displayed on September 29, 2023 with a removal date of October 13, 2023.
4. The Applicant being dissatisfied with the procurement process, applied for administrative review before the Accounting Officer on October 2, 2023.
5. The Applicant's complaint to the Accounting Officer of the Respondent was premised on four grounds i.e;
 - a) The Applicant's bid price was far higher than the reserve price;
 - b) The bid price of the best evaluated bidder was too high considering the reserve price;
 - c) There was non-compliance with the evaluation criteria which required that co-operatives and associations be given priority for bigger markets;
 - d) There was non-compliance with the directives from the Minister of Local Governments that vendors' associations should be given priority to manage markets.
6. The Accounting Officer of the Respondent did not respond to the Applicant's complaint.
7. The Applicant then filed the instant application with the Tribunal on October 17, 2023, to review the decision of the

Respondent.

8. The Respondent responded to the Application and contended as follows:
 - a) The policy on development of markets has outlived its usefulness as circumstances on the ground are different and the Entity aims at getting a competent bidder who will help it raise revenue.
 - b) The City Town Clerk did not receive a complaint from the Applicant.
 - c) Whereas the Applicant's bid price was Shs. 9,250,000, the bid price of Lubega Derick was higher at Shs. 11,242,400.

B. APPLICANT'S SUBMISSIONS

1. The Applicant filed written submissions through *Ngaruye Ruhindi, Spencer & Co. Advocates*.
2. Counsel submitted that the bid price of Lubega Derick was astronomically high and unrealistic.
3. The bid document stated that for markets whose reserve price was above shs. 4,000,000 priority would be given to co-operatives and associations. The Government policy on management of markets is mandatory and still in force. The Respondent's statement that the policy has outlived its usefulness borders on contempt of the Presidential directives.
4. The Applicant was a registered association and met all the requirements of the bid document and offered a good price far higher than the reserve price of shs. 8,712,000.
5. Lubega Derick who was awarded the tender is unknown to the community in Mbarara City. He did not attend the bid opening. The phone number on his bid document is registered in the name of someone else who was supplying tea and eats to Mbarara City South Division.
6. Counsel prayed that Lubega Derick be summoned to appear so that the "veil is lifted" and his existence be ascertained.

C. RESPONDENT'S SUBMISSIONS

1. The Respondent filed written submissions through the Legal Unit, Mbarara City Council.
2. Counsel submitted that the Respondent used open domestic bidding which was open to any competent member of the public.
3. The Applicant knew that it was participating in an open bidding competition but did not complain until Lubega Derick was declared the best evaluated bidder.
4. The Government policy on development of markets relied on by the Applicant has outlived its usefulness as circumstances on the ground are different and have since changed. The policies were issued under the Markets act cap. 94 which has been repealed by the Markets Act 2023.
5. The policies are not statutory instruments and were not saved by the new legal regime on markets.
6. Counsel further submitted that contempt only applies to court order.
7. Counsel prayed that the Application be dismissed with costs.

D. BEST EVALUATED BIDDER'S SUBMISSIONS

1. The Best Evaluated Bidder Lubega Derick filed written submissions through Ahimbisibwe & Co. *Advocates*.
2. Counsel submitted his client met all the pre-conditions and followed all the procurement procedures. That if the decision of the entity is revised or reversed his client would suffer dire financial consequences.
3. That the Application is not based on any merit but intended to frustrate his client as many other bidders which were associations never succeeded but they respected the decision of the Entity.
4. Counsel prayed that the Application be "disregarded" and his client maintained as the best evaluated bidder.

E. ORAL HEARING

1. The Tribunal held an oral hearing on October 31, 2023 via Zoom videoconferencing. The appearances were as follows:
 - 1) Mr. Paddy Vincent from Ngaruye Ruhindi, Spenser & Co Advocates represented the Applicant. Bintukwanga Ronald Kiggundu and Komugisha Loice as directors of the Applicant were also in attendance.
 - 2) Mr. Alauterio Ntegyereize, Senior Legal Officer and Kobusingye Lillian the Deputy City Clerk represented the Respondent.
 - 3) Mr. Derrick Lubega represented himself as the best evaluated bidder. Saison Asimwe the manager of the Best Evaluated Bidder was also in attendance.

F. RESOLUTION

1. The Application was by letter and did not frame any grounds or issues. In view of the submissions, the Tribunal has framed the following issues;
 - 1) Whether the Respondent's Accounting Officer failed to communicate his decision on administrative review with the statutory timelines?
 - 2) Whether the Respondent erred when it did not apply the Government policy and evaluation criteria to give priority to vendors' co-operatives and associations?
 - 3) Whether the bid prices of the bidders were evaluated according to the bidding document?
 - 4) What remedies are available to the parties?

Issue No. 1:

Whether the Respondent's Accounting Officer failed to communicate his decision on administrative review with the statutory timelines?

2. The Applicant's complaint to the Accounting Officer is

endorsed with a stamp indicating that it was received by the Central registry of Mbarara City on October 2, 2023. An Accounting Officer is duty bound to make and communicate a decision within 10 days upon receipt of a complaint from a bidder. See section 89(7) of the *Public Procurement and Disposal of Public Assets Act*.

3. Having received the Applicant's complaint on October 2, 2023, the Accounting Officer ought to have investigated the complaint, made and communicated his/her decision on the complaint by or before October 12, 2023. At the hearing the Deputy Town Clerk conceded that the complaint was duly received but reached her desk after the time for making a decision had expired. It is not in dispute that the Accounting Officer of the Respondent did not respond to the complaint.
4. Failure or omission by the Accounting Officer to make and communicate an administrative review decision within statutory timelines, upon receipt of a complaint is a blatant breach of the law. See *Application No. 22 of 2023- Iron Investment and Construction Ltd & Others, Smart Business Arua Enterprises Ltd & Oria and Sons Investment Ltd v Ministry Of Water and Environment*.
5. **Issue no. 1 is answered in the affirmative.**

Issue No.2:

Whether the Respondent erred when it did not apply the Government policy and evaluation criteria to give priority to vendors' co-operatives and associations?

6. In circulars dated September 17, 2007 and December 23, 2010 to district chairpersons, mayors of municipalities and chairpersons of Town Councils, the Minister of Local Government communicated a Government policy which *inter alia* required that the sitting tenants in the markets shall register under their associations and be given the first priority to redevelop and manage the markets.
7. The Minister issued the policy directives under section 95 of the *Local Governments Act* and section 2 of the now repealed *Markets Act* cap 94. Section 95 of the *Local Governments Act* provides that *the coordination of and advocacy for local*

governments shall be the responsibility of the Ministry responsible for local governments.

8. Regulation 11 (1) of the Local Governments (*Public Procurement and Disposal of Public Assets*) Regulations 2006 provides that *the Ministry responsible for local governments shall be responsible for the coordination and advocacy of the procurement functions of local governments with a view to ensuring the harmonisation and implementation of national standards.*
9. Clearly, the Minister had statutory power to issue the policy directives under section 95 of the *Local Governments Act* and Regulation 11 (1) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations 2006.*
10. However, section 2 of the repealed *Markets Act cap. 94* empowered the Minister to make rules which shall apply to markets generally or any specified markets. Section 14 of the *Interpretation Act cap. 3* provides that where any Act confers on the President, a Minister or any other authority, a power to make or a power exercisable by making proclamations, rules, regulations, byelaws, statutory orders or statutory instruments, any document by which that power is exercised shall be known as a statutory instrument, and the provisions of this Act shall apply to it accordingly. The Minister of Local Government did not issue a statutory instrument to implement the impugned policy.
11. Therefore, section 2 of the *Markets Act cap. 94* was inapplicable to the policy. Nevertheless, the policy directives are valid under the above cited section 95 of the *Local Governments Act* and regulation 11 (1) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations 2006.*
12. The Applicant contends that having submitted a bid for a market whose reserve price is above UGX 4,000,000, it should have been given priority in award of contract in accordance

with the Government policy on development and management of markets in cities, municipalities and towns.

13. In ***Arua Kubala Park Operators and Market Vendors Cooperative Society Ltd vs PPDA, Application No. 4 of 2015***, the Tribunal dealt with the Government Policy on Markets at para 6.3 on page 11 observed as follows, “In a nutshell the purpose of the Government Policy on Markets was to prioritize the rights of sitting tenants who owned and operated stalls and kiosks in existing markets in the development and management of those markets. To benefit from the Policy decision however, it is a requirement that the stall holders and kiosk owners in the markets register associations or cooperative.....” It follows therefore that any Procuring and Disposing Entity (PDE) putting out a bid for the development or management of a market must take into account this Government Policy in drafting of the procurement requirements and bidding document. A PDE cannot and should not ignore this Policy simply because there exists no registered association or cooperative in a particular market”.
16. In para 6.9, page 13 of the decision of *Application No. 4 of 2015* referred to above, the Tribunal held that “The Government Policy requires that the Policy be followed in the development and management of markets. Arua DLG, and other procuring and disposing entities for that matter, are therefore not at liberty to ignore the Policy when procuring services for development or management of markets”.
17. The position of the Tribunal on the Government policy on development and management of markets in cities, municipalities and towns in *Application No. 4 of 2015* was upheld on appeal by Hon Justice Stephen Mubiru in ***Arua Kubala Park Operators and Market Vendors Cooperative Society Ltd (Miscellaneous Cause 3 of 2016) [2018] UGHCCD 6***. The High Court emphasised that where an official exercises a discretionary power on direction or at the behest of some other person or body. An official may have regard to government policy but must apply their mind to the question and the decision must be their decision.

18. In **Application No. 5 of 2015; Pawor Park Operators and Market vendors SACCO v PPDA**, the Tribunal while dealing with Government Policy on management of markets resonated as follows:

“We shall start with the Government Policy Decision on the Development and Management of Markets in the City, Municipalities and Towns, dated 17th September 2007, issued by the Ministry of Local Government. The main thrust of this Policy is that the sitting tenants who own stalls (emidala) kiosks etc. in the markets shall all register under their associations and that the registered market vendors shall be given the first priority to redevelop and manage the markets.

The Policy Guideline was intended to help Kampala City Council and other local governments resolve the disputes over the management and redevelopment of the markets in Kampala City and other local governments and to allow market vendors and other stakeholders to settle down on their work.

In a nutshell the purpose of the Government Policy on Markets was to prioritize the rights of sitting tenants who owned and operated stalls and kiosks in existing markets. To derive benefit under the policy, it is a requirement that the stall holders and kiosk owners in the markets register associations. After registering such associations the market vendors and kiosk owners were free to redevelop and manage their markets provided they could mobilize funds and had capacity to develop markets”.

19. The position of the Tribunal in **Application No. 5 of 2015** was upheld on appeal by Hon Justice Stephen Mubiru in *Public Procurement and Disposal of Public Assets Authority v Pawor Park Operators and Market vendors SACCO (Civil Appeal No. 3 of 2016) [2017] UGHCCD 12 (23 February 2017)*.
20. The Tribunal has also guided that procuring and disposing entities issuing out tenders for the development or management of a market must consider the government policy even when the vendors are not a registered association of vendors. See **Application No.5 of 2023, Lira Smoked**

and Silver Fish Vendors Co-operative Society Ltd v Lira City Council.

21. Though administrative review tribunals like this Tribunal, are not bound by policy, it is imperative that they apply ministerial policy unless the policy is unlawful or there are cogent reasons to the contrary. See ***Drake v Minister for Immigration and Ethnic Affairs [1979] 24 ALR 577.***
22. Section 3 of the *Public Procurement and Disposal of Public Assets Act* defines a bidder to mean a physical or artificial person intending to participate or participating in a public procurement.
23. The evaluation criteria were stated on page 5 of the bidding document specifically items (i) to (xii). The gravamen of the instant application rotates around items (vii), (viii) and (xi) which state as follows:
 - (vii) The best priced proposal which is substantially Compliant & Responsive will be recommended as the best evaluated proposal.*
 - (viii) Unrealistic bid Price above the reserve price will not be accepted.*
 - (ix) Cooperatives and Associations shall be given a priority for bigger Markets (whose reserve price is UGX 4,000,000 and above) provided they meet the prescribed criteria.*
24. Items (iii) and (v) of evaluation criteria as stated at page 5 of the bidding document required a bidder to identify him/herself with either a copy of the passport, driving permit, valid identity card preferably a national Identity Card and further to attach 2 recent passport photographs.
25. Our understanding of Items (iii) and (v) of evaluation criteria read in line with section 3 of the Act is that the Respondent contemplated and envisioned physical persons also applying for the tender.

26. However, item (xi) of the evaluation criteria stated that co-operatives and associations shall be given a priority for bigger markets (whose reserve price is shs. 4,000,000 and above) provided they meet the prescribed criteria.
27. Section 52 of the *Public Procurement and Disposal of Public Assets Act 2003* stipulates that a contract is awarded to the best evaluated bidder ascertained based on the methodology and criteria in the bidding documents. Section 71 (3) of the *Public Procurement and Disposal of Public Assets Act* states that no evaluation criteria other than stated in the bidding documents shall be taken into account. Regulation 78 (3) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations 2006* provides that the detailed evaluation shall compare the details of the bid received with the terms, conditions and evaluation criteria stated in the bidding documents.
28. The Respondent having set item (xi) of the evaluation criteria as per Government policy, it had to apply that criteria during evaluation.
29. Although other persons who are not vendors' cooperatives and associations were free to bid, the Respondent was under an obligation to apply the criteria to give priority to such vendors' co-operatives and associations. Our understanding of priority is that vendors' co-operatives and associations must be given preference, subject to their bids being substantially compliant to the requirements of the bidding document, and meeting the reserve price. Bid price is not the only determining factor. Although maximisation of revenue is an important objective of a revenue collection procurement, other factors like Government policy must be considered as equally important.
30. At the hearing, the Deputy Town Clerk submitted that the criteria to give priority to vendors' Cooperatives and Associations was erroneous. With due respect, we do not agree. The evaluation report had to demonstrate how priority was given to vendors' co-operatives and associations in accordance with the evaluation criteria stated in the bidding document. There is no evidence that this criterion was applied during evaluation of the bids. The criterion was simply ignored.

31. To that extent, the Respondent erred.
32. **Issue no. 2 is resolved in the affirmative.**

Issue no. 3:

Whether the bid prices of the bidders were evaluated according to the bidding document?

33. The Applicant alleged that Lubega Derick's bid price of Shs. 11,242,400 was too high considering the reserve price of Shs. 8,712,200. Counsel therefore submitted that the bid price of Lubega Derick was "astronomically high and unrealistic" and did not demonstrate persuasively to the Tribunal the basis for this assertion.
34. Section 25 of the *Markets Act, 2023* empowers the administrative authority to collect market fees in accordance with any other written law, and this duty can be delegated to other persons. The delegation can be achieved through a procurement process in accordance with the provisions of the *Public Procurement and Disposal of Public Assets Act*.
35. Local Governments are legally empowered to control, regulate, and raise revenues from activities within their jurisdiction and should maximise collection of revenue from a particular revenue source. See ***Application No. 13 of 2023- Rehma Engineering Company Limited v Arua City Council***.
36. In the instant case, evaluation criteria no. (vii) states that *unrealistic bid Price above the reserve price will not be accepted*. In accordance with the already cited provisions of section 52 and 71 (3) of the *Public Procurement and Disposal of Public Assets Act*; and regulation 78 (3) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations 2006*, the Respondent was duty bound to apply this criterion, unless waived.
37. The evaluation report had to demonstrate how the bid prices of the bidders were assessed to determine whether they are realistic (as per that evaluation criterion) in view of the revenue source. There is no evidence that this criterion was applied during evaluation of the bid prices of the Applicant,

the best evaluated bidder and the other bidders. This criterion was simply ignored. To that extent, the Respondent erred.

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

Issue No. 4:

What remedies are available to the parties?

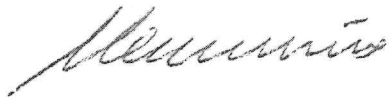
39. The Tribunal has found that the Respondent failed to apply the Government policy and evaluation criterion to give priority to vendors' co-operatives and associations. The Respondent also failed to apply evaluation criterion relating to assessment of whether the bid prices were unrealistic.
40. The Applicant prayed for an order that it be awarded the tender for collection of revenue from Nyamityobora Bikadde weekly market. However, it is not the function of this Tribunal to evaluate bids or award tenders.
41. The Tribunal shall therefore remit the procurement back to the Entity for re-evaluation.
42. The Applicant also made an allegation that Lubega Derick who was awarded the tender is "unknown to the community in Mbarara City". Counsel elaborated on this allegation by making factual allegations in his written submissions. With due respect, these allegations were not based on any evaluation criteria or law. The allegations were not raised either in the complaint to the Accounting Officer or in the Application to this Tribunal. There is no allegation or evidence that Lubega Derick was not an eligible bidder. Being "*unknown to the community in Mbarara City*" is completely irrelevant to the evaluation criteria and eligibility requirements. These allegations are rejected.

G. DISPOSITION

1. The Application is allowed in part.
2. The award of the contract to Lubega Derick for collection of revenue from Nyamityobora Bikadde weekly market, is set aside.

3. The Respondent is directed to re-evaluate the bids for collection of revenue from Nyamityobora Bikadde weekly market in a manner not inconsistent with this decision, the bidding document and the law.
4. The re-evaluation in no. 3 above shall be completed within 10 (ten) working days from the date of this decision.
5. The Tribunal's suspension order dated October 17, 2023, is vacated.
6. Each party to bear its own costs.

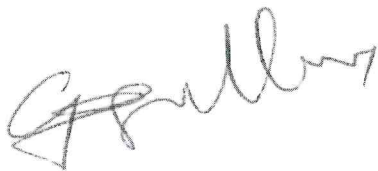
Dated at Kampala this 6th day of November, 2023.



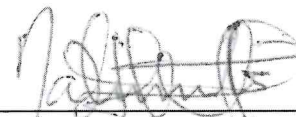
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