



## **DECISION OF THE TRIBUNAL**

### **A. BRIEF FACTS**

1. Mbarara City Council (the Respondent) initiated a procurement for collection of revenue from Lorry Parking Fees (Loading and Offloading) under Procurement Reference No. MBAR/609/SRVCS/2023-2024/0001 using Open Domestic Bidding method on August 17, 2023.
2. Bids were received from 2 bidders namely Basima Consult Limited (the Applicant) and Ankole United Truck Owners and Drivers Cooperative Society Limited on September 6, 2023.
3. Upon conclusion of the evaluation and adjudication process, the Respondent awarded the Contract to Ankole United Truck Owners and Drivers Cooperative Society Limited (the best evaluated bidder) at a contract price of UGX 20,320,000/= per month. The Notice of Best Evaluated (NOBEB) 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 to which no response was made by the Respondent.
5. The Applicant then filed the instant application with the Tribunal on October 19, 2023, being aggrieved by the inaction of the Respondent.

### **B. APPLICATION TO THE TRIBUNAL**

1. The Applicant averred that it submitted its bid on 6<sup>th</sup> September, 2023 which was accompanied by a bid security in the form of a certified cheque No. 000449 dated 5<sup>th</sup> September, 2023 from Stanbic Bank. That it is this bid security that was read out on 6<sup>th</sup> September, 2023 in the presence of the Applicant's representative during bid opening.

2. The Applicant averred that despite its requests to be availed with a copy of the record of bid opening, the same has never been availed. Furthermore, that whereas the NOBEB indicates that the Applicant submitted a forged bid security from Equity Bank, this is false.
3. The above notwithstanding, the Applicant averred that the bid documents given to it did not list bid securities as one of the considerations in the evaluation criteria. Furthermore, that the bid documents did not indicate the format of the bid security required, the institution it should come from and the period of validity. Additionally, that the amount mentioned in the bid security was higher than the PPDA guidelines on bid security. Therefore, the Respondent's evaluation committee used evaluation criteria which was not stated in the bidding documents when it relied on the bid securities.
4. It was further averred that the best evaluated bidder —Ankole United Truck Owners & Drivers Cooperative Society Limited did not meet the evaluation criteria because it was incorporated last year and as such did not possess the required experience in a related service.
5. The Applicant avowed that the above issues were raised in its complaint to the Accounting Officer of the Respondent on 2<sup>nd</sup> October, 2023. However, the same has never been responded to within the ten (10) days statutory timeframe as provided for under the *Public Procurement and Disposal of Public Assets Act*, 2003 (as amended).
6. The Applicant accordingly filed the instant application under section 91I (1) (a) of the *Public Procurement and Disposal of Public Assets Act*, 2003 (as amended) and prayed for the following orders:
  - a) A declaration that Ankole United Truck Owners & Drivers Cooperative Society Limited was not substantially compliant and not responsive to the requirement in the bid document and it should not be recommended as the best evaluated bidder.
  - b) A declaration that the Applicant was substantially compliant and responsive to the requirements in the bid document and should be recommended as the Best Evaluated Bidder.

c) Damages and costs of the application.

### **C. RESPONDENT'S REPLY TO THE APPLICATION**

1. The Respondent averred that contrary to the Applicant's claims, the invitation to bid provided for a bid security as a requirement. In accordance with this requirement, the Applicant presented a bid security/guarantee of UGX 3,655,300/- dated 31<sup>st</sup> August, 2023 purportedly from Equity Bank while Ankole United Truck Owners & Drivers Cooperative Society Limited submitted a cheque of the same amount payable by Centenary Rural Development Bank. The Respondent averred that it conducted a due diligence by seeking verification of the bid securities from the respective banks.
2. That during this exercise, Equity Bank denied having issued the said bid security while Centenary Rural Development Bank confirmed having issued the cheque submitted by the BEB. It was further averred by the Respondent that the Applicant also bid for enforcement of Hotel Tax in Mbarara City South Division, for which it also issued a forged bid security of UGX 3,450,000/-. The Respondent accordingly denied knowledge of Cheque No. 000449 of Stanbic Bank.
3. The Respondent averred that it is on the basis of the foregoing that Ankole United Truck Owners & Drivers Cooperative Society Limited was declared the best evaluated bidder.
4. The Respondent admitted receiving the Applicant's complaint but went on to add that it responded to the same vide a letter dated 4<sup>th</sup> October, 2023 couriered through DHL courier service. In the said letter, it advised the Applicant to liaise with its revenue department to get an assessment and pay for the administrative review fees. The Respondent further averred that the said fees were never paid. The Respondent accordingly prayed that the Application be dismissed with costs.

### **D. THE ORAL HEARING**

The Tribunal held an online hearing on 2<sup>nd</sup> November, 2023. The appearances were as follows:

1. Mr. Ddembe Shaffiq represented the Applicant.

2. Counsel Alauterio Ntegyereize, the Senior Legal officer of the Respondent represented the Respondent.
3. Mr. Sam Tomson Mwesigwa, Secretary- Ankole Truck Owners and Drivers Cooperative Society Ltd represented the Best Evaluated Bidder.

#### **E. SUBMISSIONS BY THE PARTIES**

The Applicant and Respondent adopted the arguments made in their pleadings to the Tribunal.

#### **F. RESOLUTION OF ISSUES RAISED IN THE APPLICATION**

1. The Application raised 6 issues for determination by the Tribunal. However, owing to the pleadings filed by the parties in this Application, the issues have been reframed as follows:
  - 1) Whether the Respondent erred in law and fact when it failed or omitted to avail a copy of the record of bid opening to the Applicant?
  - 2) Whether the Respondent erred in law and fact when it failed to display the record of bid opening?
  - 3) Whether the Respondent's Accounting Officer erred when he failed to communicate his decision for administrative review within the statutory timelines?
  - 4) Whether the Respondent erred in law and fact when it declared the Applicant's bid non responsive to the requirements of the bidding document ?
  - 5) What remedies are available to the parties?

**Issue No. 1:**

**Whether the Respondent's Accounting Officer erred in law and fact when he failed or omitted to avail a copy of the the record of bid opening to the Applicant?**

2. Pursuant to regulation 71(12) and 71(13) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, a bidder or representative of a bidder may be availed a copy of the record of bid opening that has been signed by the chairperson and countersigned by the secretary, upon request, and on payment of a prescribed fee.
3. Whereas the Applicant requested for the said record on September 11, 2023, there is no evidence led by the Applicant to show that its request was accompanied by payment of the prescribed fee.
4. However, in accordance with the principles of fairness and transparency, the Respondent's Accounting Officer should have guided the Applicant on the prescribed fees and modalities for payment thereof. Instead, the Respondent simply ignored the Applicant's letter. This Tribunal has been consistent on the principle that late payment of fees is not necessarily fatal, and that even actual non-payment of court fees has been held not to be fatal so long as the proper fees can be assessed and paid. See: *Application No.4 of 2023 Mixjet Flight Support FZE vs Uganda National Airlines Company Ltd.*

**Issue No. 2:**

**Whether the Respondent erred in law and fact when it failed to display the record of bid opening?**

5. Regulation 71(13) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* obligates the Respondent to post the record of the bid opening on the procuring and disposing entity's notice board within two working days of opening and display the same for ten working days.
6. The Application did not substantiate the allegation that the that the record of bid opening was not displayed on the said notice board or that even when it was displayed, the display was short of the statutory period stipulated for such displays.

7. **This issue is resolved in the negative.**

**Issue No. 3:**

**Whether the Respondent's Accounting Officer erred when he failed to communicate his decision for administrative review within the statutory timelines?**

8. 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 2003*.
9. Having received the Applicant's complaint on October 2, 2023, the Accounting Officer ought to have investigated the compliant, made and communicated his decision on the compliant by or before October 12, 2023.
10. However, on October 4, 2023, the Accounting Officer in a letter addressed to the Applicant, purported to guide the Applicant on the modalities for payment of prescribed fees for purposes of administrative review. The letter was purportedly delivered by courier (DHL courier services)
11. We have seen the alleged proof of delivery and are not satisfied that the letter was delivered to the Applicant. The purported delivery slip does not contain the name and physical address of the consignee. There is no acknowledgement of receipt of the document.
12. The Applicant's complaint was on its letter head, which indicated the Applicant's e mail addresses. There is no explanation as to why the letter was not sent by email.
13. The Tribunal has however, guided that non-payment or delayed payment of administrative review fees is not fatal as long as actual fees can be assessed and paid. See ***Application No. 4 of 2023, Mixjet flight support FZE v Uganda National Airlines Company Limited.***
14. We do not agree with the Respondent's argument that once the best evaluated bidder notice expired before the Applicant paying administrative review fees, it was at liberty to continue with the procurement process.

15. The Respondent is duty bound to immediately suspend a procurement process upon receipt of a complaint, until the Accounting Officer makes and communicates a decision within 10 days from the date of receipt of the said complaint. See Section 89(5) and (7) of the *Public Procurement and Disposal of Public Assets Act 2003*.
16. The duty to make and communicate an administrative review decision is not waived and is not dependent on receipt of administrative review fees.
17. The Accounting Officer was therefore duty bound to make and communicate an administrative review decision within the days starting on October 3, 2023 and lapsing on October 12, 2023.
18. 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, Smart Business Arua Entreprises Ltd & Oria and Sons Investment Ltd Vs. Ministry Of Water and Environment***.
19. **Issue no. 3 is answered in the affirmative.**

**Issue No. 4:**

**Whether the Respondent erred in law and fact when it declared the Applicant's bid non responsive to the requirements of the bidding document (merging issues 3, 4 and 6 of the Application)?**

20. A Bid notice is construed as part of a bidding document. See Section 3 of the PPDA Act 2003 and ***Application No. 30 of 2022- Nalu Tour and Travel Limited v Jinja City Council***.
21. The Bid notice in the instant application was published in the new vision newspaper of August 17, 2023 at page 38. The notice listed collection of revenue from Lorry Parking Fees (Loading and Offloading) from south and north divisions under Category A (Markets, Loading Fees, Hotel tax and slaughter) with a reserve fee of Ugx 20,307,000/= per month and bid security of Ugx 3,655,3000/=.



22. The evaluation criteria was stated on page 5 of the bidding document. The evaluation criteria did not specifically state the requirement of a bid security. Item (vii) of the evaluation criteria stated that the *best priced proposal which is substantially Compliant & Responsive will be recommended as the best evaluated proposal.*
23. The bidding document did not define what substantially compliant and responsive meant but guidance is given by the law to the effect that the determination of a bid's compliance and responsiveness shall be based on the contents of the bid and that a substantially compliant and responsive bid is one that conforms to all the instructions, requirements, terms and conditions of the bidding document without material deviation, or omission. The penalty for a bid that is not substantially compliant and responsive to the bidding document is outright rejection. See regulations 73 (1)-(3) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, and **Application No. 4 of 2017- Roko Construction Ltd Vs. PPDA and National Drug Authority.**
24. Having stated in the bid notice that a bid security of Ugx 3,655,3000/= was required for the impugned tender category, the Applicant was bound to avail a bid security and the respondent had the discretion to carry out a due diligence test on the bid securities submitted as a way of exercising its obligation of due care in a procurement process. See Regulations 59 (1)-(3) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006.*
25. Once the due diligence exercise revealed that the bid security submitted by the Applicant dated 31 August 2023, No. BBG100401562 by Equity Bank for procurement reference number MBAR 609/SVCS/2023-2024/001, Lorry Parking Fees (Loading and Offloading), were denied as having been issued by the said bank in a letter dated September 19, 2023, then the bid of the Applicant could not be substantially compliant and responsive to the bidding document and was liable to be rejected as per regulation 73 (3) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006.*
26. We further emphasize that the purpose of a bid security is to ensure that a bidder abides by the terms of its bid and the terms

of the bidding document for the benefit of the procuring and disposing entity. See **Application No. 13 of 2021- Kasokosoko Services Ltd vs Jinja School of Nursing and Midwifery**

27. It therefore follows that even failure to submit a bid security or submitting a false bid security by the Applicant is inconsistent with the bidding document and in a substantial way, limits the rights of the procuring and disposing entity or the obligations of the bidder under the procurement. The Respondent therefore rightfully rejected the bid of the applicant.
28. The Applicant's contest of the legality of the bid security for being over and above the PPDA guidelines and for lack of format could have been best addressed by seeking clarification from the Respondent before bid submission. The bid document clearly stated that *any queries should be addressed to **Head Procurement and Disposal Unit** at the address given above.*
29. Allowing the Applicant to challenge the criteria in the bidding document after having submitted a bid without objection, is inconsistent with the doctrine of approbation and reprobation, which bars a person from taking inconsistent positions in legal proceedings or actions. The said grounds challenging the propriety of the requirement for a bid security and its lack of format cannot be allowed to stand and are accordingly rejected. See **Application No. 6 of 2022, Technology Associates Limited in Consortium with Comviva Technology Limited v Post Bank Uganda Limited, paras 55-58, page 22.**
30. **This issue is answered in the negative**

**Issue No.5 :**

**Whether the Respondent erred in law and fact when it declared Ankole United Truck Owners and Drivers Cooperative Society Limited as the best evaluated bidder (deduced from issues 5 of the Application)?**

31. The Applicant has not adduced any evidence to show that the best evaluated bidder's bid was not substantially compliant & responsive to the bidding document.
32. We however, perused the bid submitted by *Ankole United Truck Owners and Drivers Cooperative Society Limited* and observed that it contained the following:

- (i) Indicated its proper address stating its name as *Ankole United Truck Owners and Drivers Cooperative Society Limited, Tel no.+256(0)701 386744, .+256(0)702 917161, +256(0)751 927869 and its physical address as Muti Village, Nyamityobara Ward, High Street, South Division. See pages 9, 12 of the bid.*
- (ii) It attached an original receipt No. 279837 from Housing Finance Bank dated 21/08/2023 as evidence of having paid as evidence of having paid nonrefundable fee for obtaining the bid document
- (iii) The bidder attached national IDs of Ssemwogerere Benjamin Badiru, Kiiza Micheal, who are indicted as its directors on page 10, 11 and 16 of the bid. The bidder also attached its probationary Certificate of registration No. P.9269/RCS valid until 17/11/2024. Issued by the Registrar of Cooperatives. Page 13 of the bid
- (iv) The bidder attached recommendation letters from Division Town Clerk Mbarara City South dated August 28, 2023, addressed to the Head PDU Mbarara City confirming that the bidder was appointed as agent in collection of loading and offloading fees from lorries effective July 1, 2023, for one month on page 36. A corresponding Contract dated June 28, 2023 is attached on page 38 in proof of working experience in similar related services.
- (v) The bidder attached 2 recent passport photographs on page 4 of the bid.
- (vi) Submitted its bid marked **“Original”**
- (vii) Attached an original recommendation letter from Office of the Division Town Clerk Mbarara City North dated September 5, 2023, addressed to the Secretary Contracts Committee of Mbarara City recommending the bidder and indicating that the bidder diligently served Mbarara City North Division. See page 37
- (viii) The bidder attached payment receipts from page 39 to 47 of the bid, respectively dated July 4, 2023, June 30, 2023, July 18, 2023, July 10, 2023 among others in proof of clearance of tender fees for the current financial year.
- (ix) All pages of its bid document were signed by its two directors.

(x) It was appointed as agent in collection of loading and offloading fees from lorries effective July 1, 2023 for one month.

33. The Applicant has not adduced evidence to show that the bid of Ankole United Truck Owners and Drivers Cooperative Society Limited, was not substantially compliant and responsive to the bidding document and evaluation criteria. Therefore, we are unable to fault the Respondent for their determination that Ankole United Truck Owners and Drivers Cooperative Society Limited was substantially compliant and responsive to the bidding document and evaluation criteria and hence rightfully awarded the contract.

34. **This issue is resolved in the negative.**

**Issue No. 6:**

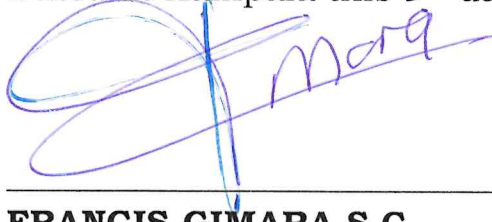
**What remedies are available to the parties?**

35. The Applicant has failed to prove the substantial grounds of the Application and is therefore not entitled to any remedy.

**G. DISPOSITION**

1. The Application is dismissed.
2. The Respondent is at liberty to continue with the procurement process.
3. The Tribunal's suspension order dated October 19, 2023, is vacated.
4. Each party to bear its own costs.

Dated at Kampala this 9<sup>th</sup> day of November, 2023.



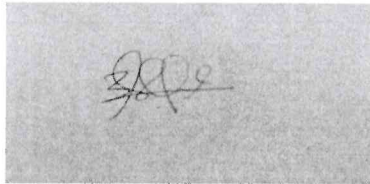
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**FRANCIS GIMARA S.C**  
**CHAIRPERSON**



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**NELSON NERIMA**  
**MEMBER**



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**THOMAS BROOKES ISANGA**  
**KAKIRA**  
**MEMBER**



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**GEOFFREY NUWAGIRA**  
**KAKIRA**  
**MEMBER**



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**PAUL KALUMBA**  
**MEMBER**



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**CHARITY KYARISIIMA**  
**MEMBER**



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**KETO KAYEMBA**  
**MEMBER**