

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

REGISTRY APPLICATION NO. 28 OF 2023

BETWEEN

REXCO LIMITED:APPLICANT

AND

**KATAKWI DISTRICT
LOCAL GOVERNMENT: RESPONDENT**

**APPLICATION FOR REVIEW OF THE DECISION OF KATAKWI
DISTRICT LOCAL GOVERNMENT IN RESPECT OF THE
PROCUREMENT FOR CONSTRUCTION OF A STAFF HOUSE AT
KORITOK HC II VIDE PROCUREMENT REF NO.
KATA857/WRKS/23-24/00002**

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

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. Katakwi District Local Government (the Respondent) invited bids for the construction of a staff house at Koritok HC II vide procurement Ref No.KATA857/WRKS/23-24/00002 using open domestic bidding method on August 7, 2023.
2. Bids were received from 7 bidders namely; *Rexco Limited* (the Applicant), *Jojohe Agencies Ltd*, *Eryan Business Solutions*, *Grace Developer Ltd*, *Pegions Investment Ltd*, *Mangron Investment Ltd* and *Jererwe Construction Suppliers (U) Ltd*.
3. Upon conclusion of evaluation and adjudication process, the Respondent awarded the contract to *Jererwe Construction Suppliers (U) Ltd* at a contract price of UGX 159,882, 532/= VAT exclusive. The Notice of Best Evaluated Bidder was displayed on October 20, 2023 with a removal date of October 30, 2023.
4. The Notice of Best Evaluated Bidder indicated that the Applicant's bid failed because the bidder didn't have a valid Trading License.
5. The Applicant being dissatisfied with the procurement process, applied for administrative review before the Accounting Officer on October 27, 2023.
6. The Applicant complained on 3 grounds, to wit, that the trading license was still valid at the time of bid submission; that the Notice of Best Evaluated Bidder was received 5 days after display; and that the best evaluated bidder had been asked to consent to unspecified arithmetic errors during evaluation.
7. The Accounting Officer appointed an Administrative Review Committee which issued a report on November 1, 2023. The Administrative Review Committee found merit in the first

ground but found no merit in the second and third grounds of the complaint.

8. The Administrative Review Committee also re-examined the bids and determined that the Applicant's bid was non-complaint because the bidder did not declare the nationality; and the bidder's lease agreement for the dumper truck had expired.
9. The Accounting Officer communicated the findings of the administrative review committee to the Applicant on November 6, 2023.
10. The Applicant then filed the instant application with the Tribunal on November 16, 2023, seeking to review the decision of the Respondent.
11. The Application raised the following 2 issues for determination by the Tribunal:
 - i. *Whether the respondent erred in law when it found that the Applicant did not have a valid trading licence*
 - ii. *Whether the Respondent erred in law when it introduced reasons not raised by the Procurement and Disposal Unit nor the Applicant?*
 - iii. *What remedies are available to the parties?*
12. The Respondent filed a response to oppose the Application. The Respondent averred that the delay to communicate the notice of best evaluated bidder did not prejudice the Applicant or any other bidder; it was lawful for the Evaluation Committee to seek clarification from bidders on arithmetic error; and no law or procedure was breached in the entire evaluation process.

B. SUBMISSIONS

1. The Applicant filed written submissions through *Mbeeta, Kamya & co. Advocates*.

2. Counsel submitted that the Accounting Officer upheld the Applicant's complaint that her trading license was valid but introduced new reasons for the rejection of the bid which reasons were false. There was discrimination, unfair treatment and departure from the principles of natural justice.

C. ORAL HEARING

1. The Tribunal held an online hearing on November 29, 2023. The appearances were as follows:
 - 1) Mugabi Edward as Counsel for the Applicant. In attendance were Mr. Mwima Moses the Managing Director and Eilor Richard the Procurement Officer of the Applicant.
 - 2) Jamada Kaugule the Head of Procurement and Disposal Unit represented the Respondent
 - 3) *Jererwe Construction Suppliers (U) Ltd* the best evaluated bidder did not attend the hearing despite being invited to do so by the Tribunal.

D. RESOLUTION

1. The Application raised 3 issues for determination by the Tribunal. However, in view of the submissions, the clarifications at the hearing, and the initial complaint to the Accounting Officer, the issues have been reframed as follows:
 - i. *Whether the Respondent's Accounting Officer made an administrative review decision?*
 - ii. *Whether the Respondent erred when it found that the Applicant did not have a valid Trading License?*
 - iii. *Whether the Respondent erred in law when it introduced new reasons for failure of the Applicant's bid in the administrative review decision?*
 - iv. *Whether the Applicant's bid was compliant with respect to nationality and access to a dumper truck?*
 - v. *Whether the Respondent erred when it asked the bidders to consent to correction of unspecified arithmetic errors during*

evaluation?

- vi. *Whether the Respondent failed to communicate the notice of best evaluated bidder to the Applicant within the prescribed time?*

- vii. *What remedies are available to the parties?*

Issue no. 1:

Whether the Respondent's Accounting Officer made an administrative review decision?

- 2. The Applicant being dissatisfied with the procurement process, applied for administrative review before the Accounting Officer on October 27, 2023.

- 3. The Accounting Officer appointed an administrative review committee which submitted its report to him on November 1, 2023. By a letter dated November 6, 2023, the Accounting Officer communicated the findings of the administrative review committee to the Applicant.

- 4. Under section 89 (7) of the *Public Procurement and Disposal of Public Assets Act*, the Accounting Officer must make a decision on the complaint, reasons for the decision and corrective measures. The procedure under regulations 139 of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* requires the Accounting Officer to first suspend the procurement or disposal process, then constitute an administrative review committee of three persons with the requisite technical expertise on the subject of the complaint, to review and advise on the complaint. The administrative review committee submits its recommendation to the Accounting Officer. Based on the administrative review committee report, the Accounting Officer must advise the complainant in writing and the recommendation should indicate whether there is merit in the complaint; the reasons for the recommendation; and any corrective measures to be taken. The Accounting Officer must submit a copy of the report to the Authority.

5. In the instant case, the Accounting Officer did not explicitly make a decision. He did not apply his own mind to the complaint. He merely communicated the findings of the administrative review committee. Under the law, the report of the administrative review committee is advisory. The final decision must be made by the Accounting Officer.
6. The Accounting Officer apparently abdicated his responsibility and clothed the administrative review committee with decision making powers which it did not have.
7. There is therefore no decision of the Accounting Officer within the meaning of section 89 (7) of the *Public Procurement and Disposal of Public Assets Act* and regulation 139 of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*.
8. In the absence of a decision by the Accounting Officer, the Tribunal still has jurisdiction to entertain the Application as if filed under section 89 (8) of the *Public Procurement and Disposal of Public Assets Act*. Section 89 (8) allows an application to be filed by an aggrieved bidder where the Accounting Officer fails to make a decision within ten days of receipt of a complaint.
9. The Tribunal will accordingly invoke its jurisdiction under section 89 (8) of the *Public Procurement and Disposal of Public Assets Act*.

See: **APPLICATION NO. 12 OF 2021-ABASAMIA HWOLERANE ASSOCIATION LTD v JINJA CITY COUNCIL.**

10. **Issue no. 1 is resolved in the negative.**

Issue No. 2:

Whether the Respondent erred when it found that the Applicant did not have a valid Trading License?

11. Part 1: Section 3, Evaluation Methodology and Eligibility Criteria, 3.2 (a) stated that the eligibility requirements shall be determined in accordance with ITB Clause 4 and that the

documentation required to provide evidence of eligibility shall be:- “ A certificate of registration issued by the Authority for bidders currently registered with the Authority or **a copy of the bidder's valid trading license or equivalent and a copy of the bidder's certificate of registration or equivalent for bidders not currently registered with the Authority**”. See pages 34 of 142 of the bidding document.

12. Submission of a certificate of registration issued by the Authority was an alternative to submitting a valid trading license and certificate of registration (incorporation).
13. The Applicant's bid included a PPDA Register of Providers Certificate of Registration valid for the period 23 August 2023 to August 23, 2024. The Applicant therefore satisfied the eligibility criteria above and the Trading License/certificate of registration/incorporation were a surplus requirement.
14. The Applicant also submitted a Trading Licence certificate No. TLC:20221162915 issued on 06/10/2022 by Kampala Capital City Authority with an expiry date of October 6, 2023. The Applicant submitted a certificate of Incorporation issued on August 21, 2017, by the Registrar of Companies. The Trading License was valid by the bid submission deadline which was September 4, 2023.
15. It is therefore our finding that the Applicant had a valid trading licence and PPDA Register of Providers Certificate of Registration and therefore satisfied the eligibility criteria relating to registration.
16. **Issue no. 2 is resolved in the affirmative.**
Issue no. 3:
Whether the Respondent erred in law when it introduced new reasons for failure of the Applicant's bid in the administrative review decision?
17. The Applicant being dissatisfied with the procurement process, applied for administrative review before the Accounting Officer

on October 27, 2023.

18. The Applicant complained on 3 grounds, to wit, that the trading license was still valid at the time of bid submission; that the Notice of Best Evaluated Bidder was received 5 days after display; and that the Best Evaluated Bidder had been asked to consent to unspecified arithmetic errors during evaluation.
19. The Administrative Review Committee found merit in the first ground but found no merit in the second and third grounds of the complaint.
20. The Administrative Review Committee also purported to re-examine the bids and determined that the Applicant's bid was non-complaint because the bidder did not declare its nationality; and the bidder's lease agreement for the dumper truck had expired.
21. Section 89 (1) of the *Public Procurement and Disposal of Public Assets Act* and regulation 136 of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations* allow a bidder who is aggrieved by a decision of a procuring and disposing entity to make a complaint to the Accounting Officer. Sections 26 (1) (h) and 89 (7) of the *Public Procurement and Disposal of Public Assets Act* and regulation 139 (5) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations* require the Accounting Officer to investigate the complaint and make a decision in writing, which must contain reasons for the decision, and corrective measures.
22. Relatedly, regulation 139(1)-(4) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* authorises an Accounting Officer to constitute an administrative review committee to review and advise on the complaint and during such a review, to consider; (i) the information and evidence contained in the application; (ii) the information in the records kept by a secretary contracts committee; (iii) information provided by staff of a procuring and disposing entity (iv) information provided by the other bidders; and (v) any other relevant information.

23. The scope of investigation under regulation 139 of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, is expansive enough to consider all pertinent matters in the impugned procurement, whether raised by the complainant or not.
24. The Administrative Review Committee was therefore entitled to look into compliance with all the evaluation criteria. The Administrative Review Committee was also entitled to disagree with the Evaluation Committee's finding that the Applicant's bid was compliant regarding declaration of nationality and access to a dumper truck had expired. The Administrative Review Committee therefore made a finding that the Applicant's bid was non-compliant because the bidder did not declare its nationality; and the lease agreement for the dumper truck had expired.
25. Whereas the administrative review committee and the Accounting Officer are free to consider all relevant matters whether raised in the complaint or not, it is not proper for them to usurp the powers of the evaluation committee under sections 37 and 38 of the *Public Procurement and Disposal of Public Assets Act*. The declaration that a bid is compliant or non-compliant is a preserve of the evaluation committee. Where an Accounting Officer finds that the evaluation committee erred in declaring a bidder to be compliant or non-compliant, he or she should set aside the resultant contract award and remit the matter back to the evaluation committee for proper re-evaluation. The Respondent's Accounting Officer therefore erred when he adopted as final, a recommendation that the Applicant's bid was non-compliant. As a corrective measure, the Accounting Officer should have set aside the contract award and remitted the procurement to the Evaluation Committee for re-evaluation of the bids in accordance with the findings of the administrative review.
26. **Issue no. 3 is resolved in the affirmative.**

Issue no. 4:

Whether the Applicant's bid was compliant with respect to nationality and access to a dumper truck?

27. In exercising the powers of the Tribunal to conduct a merits review into the decision of the Respondent and the entire procurement process pursuant to section 91I of the *Public Procurement and Disposal of Public Assets Act*, we reviewed the Applicant's bid to determine whether the bid was non-compliant with respect to declaring the nationality of the bidder and access to a dumper truck.
28. Section 3.2(c) of the eligibility criteria at page 34 of the bidding document required a bidder to submit a declaration in the bid submission sheet of the nationality of the bidder. The format of the bid submission sheet provided for in part 1, section 4, Bidding Forms at page 51 of the bidding document does not however contain a declaration of the nationality of the bidder.
29. The Applicant reproduced the format of the bid submission sheet contained in the bidding document. We are therefore unable to fault the Applicant for omitting to include a declaration of the nationality of the bidder since the bid submission sheet format provided did not include that statement.
30. Part 1, Section 3, evaluation methodology and criteria, C-Detailed Evaluation criteria, 6.1 Personnel and Equipment, B. Equipment Item 1(in the table) at page 36 of the bidding document required a bidder to, "*demonstrate that it shall have access to the key equipment listed hereafter (either by ownership, lease, hire): Attach documentary evidence of ownership, lease, hire such as registration books, agreements or memoranda or purchase order).....Equipment Type and Description/ Capacity....Dump Trucks (10-20 Ton Capacity)*". The requirement for access to the dump truck was futuristic. There was no requirement that the bidder must have immediate access to the equipment at the time of bidding.

31. The Applicant attached a lease agreement between itself and Esau Mukwanga Kamyia dated August 3, 2022 for the lease of a Dumper Truck UAZ 355G. The agreement contained terms and conditions to the effect that *“this lease agreement is valid for a period of 1 (One) year from date of signing. However the agreement is subject to renewal depending on the mutual understanding between the two parties....That; the lessor shall make available the Dump truck on request by the lessee”*. The Agreement with a validity period of 1 year commenced on August 4, 2022 and expired on August 3, 2023.
32. By the date of the bid submission deadline on September 4, 2023, the impugned lease agreement between the Applicant and Esau Mukwanga Kamyia had already expired without proof of renewal, and the said dumper truck was no longer available to the Applicant. There was no proof that the Applicant would have access to the dumper truck of Esau Mukwanga Kamyia after contract award.
33. However, the Applicant also submitted a letter from one Henry Sseruwagi dated September 24, 2022, and stating a commitment to provide a dumper truck reg. no. UAM 728C on terms and conditions to be drawn per site/project. A copy of the registration book in the name of Henry Sseruwagi was attached. From the bidding document and in the hearing it was clear that the requirement was for one dumper truck. It is our finding that these documents demonstrated that the bidder *shall have access* to the said one dumper truck.
34. **Issue no. 4 is resolved in the affirmative.**

Issue no. 5:

Whether the Respondent erred when it asked the bidders to consent to correction of unspecified arithmetic errors during evaluation?

35. Regulation 74 of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* permit an evaluation committee to request for clarification of information

from a bidder which relates to the correction of arithmetic errors. ITB 32 of the Bidding Document also permitted correction of arithmetic errors with the consent of the bidder.

36. On October 16, 2023, the chairperson of the Evaluation Committee wrote a letter to 4 bidders seeking consent to correction of arithmetic errors in the bills of quantities observed by the evaluation committee. The letter was addressed to the 4 bidders; *Jererwe Construction Suppliers (U) Ltd; Mangron Investments Ltd; Jojoh Agencies Ltd; and Eryan Business Solutions Ltd*, and copied to 3 other bidders; Rexco Limited (the Applicant), *Pegions Investments Limited* and *Grace Developers Limited*.
37. The letter of October 16, 2023 from the chairperson of the Evaluation Committee to the bidders whose bills of quantities allegedly had errors, did not specifically state the arithmetic error for each bidder. The Respondent also did not state in the letter the specific corrections made for each bidder's bills of quantities and the effect of the correction on each bidder's bid price.
38. *Jerewe Construction Suppliers (U) Limited* responded to the letter on October 16, 2023 and consented to the unspecified corrections.
39. The purported request for corrections did not specify the bidders whose bids had arithmetic errors; and the errors to be corrected.
40. The blanket request to bidders for consent to correction of arithmetic errors with no specific details on the errors as provided for in the bidding document, and the purported open consent to the corrections of the errors by *Jerewe Construction Suppliers (U) Limited* were therefore illegal.
41. **Issue no. 5 is resolved in the affirmative.**

Issue no. 6:

Whether the Respondent failed to communicate the Notice of Best Evaluated Bidder to the Applicant within the prescribed time?

42. Regulation 85 (1) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* requires a procuring and disposing entity to display a notice of the best evaluated bidder within **five days** of the decision of the contracts committee to award a contract. Regulation 85 (5) provides that a notice of best evaluated bidder shall, at the time it is displayed, be sent to all bidders who participated in the procurement.
43. ITB 41.2 of the bidding document requires the procuring and disposing entity to issue a notice of best evaluated bidder within **five working days** after the decision of the Contracts Committee to award a contract.
44. ITB 41.2 is inconsistent with regulation 85 (1) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* to the extent that it provides for display of the notice within *five working days* instead of *five days in the regulations*. Therefore, the 5 days prescribed in the regulations takes precedence over the 5 working days in the bidding document.
45. The Contracts Committee made the contract award decision on October 19, 2023. The five days for display and delivery of the notice of best evaluated bidder started to run on October 20, 2023. The notice of best evaluated bidder was displayed within time on October 20, 2023. However, the notice was not delivered to the Applicant immediately upon display but was sent to the Applicant by email on October 25, 2023.
46. The Tribunal has also noted that the notice of best evaluated bidder was displayed on October 20, 2023 with a removal date of October 30, 2023 which was less than the mandatory 10 working days provided under regulation 85 (4) of the *Local Governments (Public Procurement and Disposal of Public Assets)*

Regulations, 2006. However, the Applicant was not prejudiced as its complaint was made to the Accounting Officer within the prescribed period.

47. The display of the notice of best evaluated bidder was in accordance with the law. However, the delivery of the notice of best evaluated bidder to the Applicant was not in accordance with regulation 85 of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* and ITB 41.2. However, as observed above, no prejudice was caused to the Applicant.

48. **Issue no. 6 is resolved in the affirmative.**

Issue no. 7:

What remedies are available to the parties?

49. In view of the errors and omissions of the Evaluation Committee, Administrative Review Committee, and the Accounting Officer, the procurement shall be remitted back for re-evaluation.

E. DISPOSITION

1. The Application is allowed.
2. The Respondent is directed to re-evaluate the bids for the procurement for the construction of a staff house at Koritok Health Centre II in a manner not inconsistent with this decision, the bidding document and the law.
3. The re-evaluation in no. 2 above must be completed within ten (10) working days from the date of this decision.
4. The Respondent shall refund the Applicant's administrative review fees.
5. The Tribunal's suspension order dated November 16, 2023, is vacated.
6. Each party shall bear its own costs.

Dated at Kampala this 7th day of December, 2023.



FRANCIS GIMARA S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



**PAUL KALUMBA
MEMBER**



**CHARITY KYARISIIMA
MEMBER**



**KETO KAYEMBA
MEMBER**