

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

APPLICATION NO. 1 OF 2024

BETWEEN

PYNET TECHNOLOGIES SMC LTD:.....APPLICANT

AND

**MINISTRY OF LANDS, HOUSING
AND URBAN DEVELOPMENT:.....RESPONDENT**

**APPLICATION FOR REVIEW IN RESPECT OF THE
PROCUREMENT OF ASSORTED INFORMATION AND
COMMUNICATION TECHNOLOGY (ICT) EQUIPMENT FOR
MINISTRY ZONAL OFFICES (MZOS), MINISTRY OF LANDS
HOUSING AND URBAN DEVELOPMENT, NATIONAL LAND
INFORMATION CENTRE (NLIC), MAKERERE UNIVERSITY
DEPARTMENT OF GEOMATICS AND LAND MANAGEMENT
(DMLG), SURVEYS AND MAPPING DEPARTMENT (SMD) AND
INSTITUTE OF SURVEY AND LAND MANAGEMENT (ISLM) UNDER
CEDP-AF LOT 2, UNDER PROCUREMENT REFERENCE NO.
MLHUD/CEDP-AF/SUPLS/22-23/00084**

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

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. Ministry of Lands Housing and Urban Development (the **Respondent**) received funding from the World Bank under the Competitiveness and Enterprise Development Project (CEDP) and initiated a tender for the procurement of assorted information and communication technology (ICT) equipment for ministry zonal offices (MZOs), Ministry of Lands Housing and Urban Development. National Land Information Centre (NLIC), Makerere University Department of Geomatics and Land Management (DMLG), Surveys and Mapping Department (SMD) and Institute of Survey and Land Management (ISLM) under CEDP-AF **LOT 2- General Printers**, Procurement Reference No: MLHUD/CEDP-AF/SUPLS/22-23/00084.
2. Six bidders submitted bids for Lot 2, namely *Supply Masters Ltd, Copy Cat (U) Ltd, Pynet Technologies SMC Ltd* (the **Applicant**), *Weplink Ltd, Access IT Ltd* and *MFI Document Solutions Ltd*.
3. Upon conclusion of the evaluation and adjudication process, the Respondent issued a Notification of Intention to Award by email on November 3, 2023 at 4:00pm.
4. The Notification named the successful bidder as *MFI Document Solutions Ltd* at a contract price of USD \$ 969,600.
5. The Notification indicated that *Pynet Technologies SMC Ltd's* bid was unsuccessful for 2 reasons namely;
 - (i) *Pynet submitted a bid security with expiry date of 23rd October 2023 instead of the required expiry date of 17th November 2023.*
 - (ii) *Pynet Technologies SMC Ltd submitted a Manufacturer's Authorization Form from Kyocera which was found to be fake hence a nullity.*
6. The Applicant being dissatisfied by the reasons advanced in the Notification, filed a complaint before the Accounting Officer of the Respondent on **November 15, 2023**.

7. The Accounting Officer acknowledged receipt of the procurement related compliant on **November 16, 2023**.
8. The Accounting Officer issued a decision dated **December 5, 2023** regarding the Applicant's complaint but communicated the same to the Applicant on **December 7, 2023**.
9. The Applicant being dissatisfied by the decision of the Accounting Officer of the Respondent filed the instant application with the Tribunal on **January 2, 2024**, seeking to review the said decision.

B. APPLICANT'S SUBMISSIONS

1. The Applicant filed written submissions through *Wanambugo & Co. Advocates*.
2. Counsel submitted that the Respondent cherry-picked contents of the Applicant's Bid security. That the last paragraph on page 1 of the bid security in paragraph (ii) clearly stated that the guarantee would expire after 28 days after the end of the bid validity period and that on the 1st paragraph of page 2, it stated that the security would remain in force from 22nd June 2023 up to October 23, 2023 at 4:00pm.
3. Counsel relied on ***Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98*** and contended that in light of such glaring inconsistency, the bid security ought to have been read as a whole.
4. Counsel contended that the Evaluation Committee ought to have treated the inconsistency as a non-material deviation and requested the Applicant to rectify the deviation by submitting a correct bid security pursuant to ITB 30.2 of the bidding document since the infractions were actions of a 3rd party (the financial institution) not being the bidder itself.
5. Regarding the Manufacturer's Authorisation Form, Counsel contended that the Applicant submitted an equipment authorisation letter from *Microfiche Technologies LLC* which was itself authorised by *Kyocera Mita Corporation* to grant such equipment authorisations and as such, the Applicant complied with ITB 17.2(a) and the evaluation criteria stated in the bidding document.

6. Counsel contended that a finding to the effect that it submitted a Manufacturer's Authorisation Form which was not genuine and a nullity was a blatant departure from the evaluation criteria stated in the bidding document. He argued that the Respondent ought to have cleared its doubt regarding the Applicant's Manufacturer's Authorisation Form by seeking clarification from the Applicant pursuant to ITB 4.9.
7. The Applicant while relying on the Tribunal's decisions in ***Applications No. 7 and 8 of 2021, Elite Chemicals Ltd vs. Uganda Coffee Development Authority***, submitted that the evaluation committee had no powers or expertise to investigate a purported forgery.
8. The Applicant therefore prayed that the Tribunal sets aside the decision of the Respondent and orders for a re-evaluation of the bids. The Applicant also prayed for costs of the Application

C. RESPONDENT'S SUBMISSIONS

1. The Respondent filed written submissions.
2. The Respondent raised a preliminary objection to the effect that the Application was filed out of time.
3. The Respondent contended that the bid security submitted by the Applicant had an expiry date of October 23, 2023 instead of the required date of November 17, 2023 contrary to ITBs 18.1 19.1, 19.3 and Section II of the Bid Data Sheet.
4. Regarding the Manufacturer's Authorisation Form, the Respondent contended that the Applicant failed to meet the requirements of the form in Section 3, Evaluation and Qualification Criteria under ITB 37.1 (e).
5. The Respondent averred that upon receipt of the Applicant's compliant, it promptly made a decision on 5th December 2023 but had to subject the decision to approval of the World Bank pursuant to World Bank regulation Reg 5.92, which process was completed on 6th December 2023. The Respondent could only communicate a World Bank approved decision to the Applicant as it did on December 7th, 2023

6. The Respondent prayed that the Application be dismissed with costs.

D. BEST EVALUATED BIDDER'S SUBMISSIONS

1. The Best Evaluated Bidder MFI Document Solutions Ltd filed written submissions through *Stanley Omony & Co. Advocates*.
2. Counsel raised a preliminary objection contending that the Application is incompetent and ought to have been struck out on account that it was time barred and contrary to **section 911 (2) (b)** of the ***Public Procurement and Disposal of Public Assets Act***.
3. The Best Evaluated Bidder submitted in the alternative that the Applicant's bid security did not conform to all the terms, conditions and specifications of the bidding document and was therefore rightly rejected.
4. Regarding the Manufacturer's Authorisation Form, the Best Evaluated Bidder contended that the impugned Manufacturer's Authorisation Form submitted by the Applicant was rightfully rejected for having been in contravention of the requirements of Section III Evaluation and Qualification Criteria, Part 3.1, ITB 37.1 (e) of the Bidding Document
5. Counsel prayed that the Application be "struck out and/or dismissed with costs.

E. APPLICANT'S SUBMISSIONS IN REJOINDER

1. In rejoinder, Counsel for the Applicant adopted its written submissions on bid security and Manufacturer's Authorisation Form.
2. In reply to the preliminary objection, the Applicant contended that even when it had received the Accounting Officer's response on December 7, 2023, it further received an email from the World Bank Team acknowledging receipt of its compliant and directing the Respondent to respond to the Complaint.
3. The Applicant contended that the continuous mishap in communication from the Respondent and World Bank caused

confusion as to the finality of actions of the Respondent regarding resolution of procurement related complaints.

4. The Applicant further submitted that on Friday 22nd December 2023, it attempted to file its application with the Tribunal seeking for review but because of the festive season, the Tribunal Registry was closed and thus could not be received till 2nd January 2024 when the Registry was reopened to the public.
5. That by the date of 22nd December 2023, the Applicant was ready with its application to the Tribunal and this was within 10 working days from the date of the decision of the Accounting Officer. The Applicant urged the Tribunal to take judicial notice of the fact that the festive periods are always taken into account when computing time.
6. The Applicant prayed for the point of law to be dismissed.

F. ORAL HEARING

1. The Tribunal held an oral hearing on January 15, 2024 via Zoom videoconferencing. The appearances were as follows:
 - 1) Mr. Innocent Wanambugo as Counsel for the Applicant. Fred Edward Businge a Sales Executive and Holder of powers of Attorney, and Karenzi Vivian an Administrator were also in attendance.
 - 2) Meke Jane Margaret, Head Procurement and Disposal Unit, John Obore a Procurement Specialist represented the Respondent. Toko Godfrey a cartographer, Oput Richard a Technical Advisor, Daniel Muwanguzi the ICT Officer and Richard Ahimbisibwe a Senior Procurement Officer were also in attendance
 - 3) Mr. Stanley Omony as counsel for the best evaluated bidder. Mr. Animesh Solanki the Managing Director, Jijin Nair the Product Head-Imaging and Moses Abooga the Account Relationship Manager of the Best Evaluated Bidder were also in attendance.

G. 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 Application before the Tribunal is competent?
 - 2) Whether the Respondent erred when it disqualified the Applicant's bid?
 - 3) What remedies are available to the parties?

Issue No.1:

Whether the Application before the Tribunal is competent?

1. The competence of the Application is, *inter alia*, premised on the determination of whether the Application was filed within time. See ***Application No.33 of 2023 Eclipse Edisoil JVC Ltd vs Napak District Local Government, Far Gostar Bistoon u Uganda Electricity Transmission Company Limited, Application No. 2 of 2023***
2. Section 89(3)(b) of the *Public Procurement and Disposal of Public Assets Act* requires a complaint to be submitted to the Accounting Officer within ten working days after the date the bidder first becomes aware or ought to have become aware of the circumstances that give rise to the complaint.
3. Under paragraph 3.1 (c) of Annex III to the *World Bank Procurement Regulations for Investment Project Financing (IPF) Borrowers November 2020* at page 62, the Borrower is mandatorily required to do the following upon receipt of the Complaint;
 - (i) In writing, acknowledge the receipt of the Complaint within three (3) Business Days. This acknowledgement was done on **November 16, 2023** (See *ANNEX B to the Application*) and;
 - (ii) Review the Complaint and respond to the complaint, not later than fifteen (15) Business Days from the date of receipt thereof.
5. However, Section 89(7) of the *Public Procurement and Disposal of Public Assets Act* requires the Accounting Officer to make and communicate a decision within ten days from that date of receipt of the complaint.

6. Therefore, in view of the provisions of section 4 (1) of the *Public Procurement and Disposal of Public Assets Act*, we find that the time given for the Accounting Officer to make and communicate a decision as stipulated in the World Bank Procurement Regulations for Investment Project Financing (IPF) Borrowers November 2020 i.e., (15) Business Days from receipt of the complaint must prevail over the timeline of ten (10) days stipulated in section 89(7) of the *Public Procurement and Disposal of Public Assets Act*.
7. The Applicant submitted a complaint on **November 15, 2023**. The 15 Business Days for making and communicating a decision by the Accounting Officer started to run on **November 16, 2023** and elapsed on **December 6, 2023**.
8. The Accounting Officer made a decision on **December 5, 2023** but communicated the decision by email to the Applicant on December 7, 2023. A decision made by the Accounting Officer outside the statutory timelines is no decision at all and is a nullity. **See Application No. 34 Of 2023- Exposed Label Limited Vs. Uganda Civil Aviation Authority.**
9. Under sections 89 (8) and 91(2) (b) of the *Public Procurement and Disposal of Public Assets Act*, where an Accounting Officer does not make a decision within the stipulated timeframes, the bidder may make an application to the Tribunal in accordance with *Part VIIA* of the *Public Procurement and Disposal of Public Assets Act*, within ten (10) days from the date of expiry of the stipulated period.
10. The ten days within which the Applicant could make an application to the Tribunal started running on **December 7, 2023** and expired on **December 16, 2023**. The business of the Tribunal is transacted at the Tribunal offices between 8:00am and 5:00 pm on official working days as stated in regulation 3(1) of the ***Public Procurement and Disposal of Public Assets (Tribunal) (Procedure) Regulations, 2016***.
11. The application could not be filed at the Tribunal's Secretariat on **December 16, 2023** being a Saturday and not an official working day. The next working day when the Application ought to have been filed was **Monday, December 18, 2023**.

12. For the record, the Secretariat processed and received *Application No. 35 of 2023, Passionate Ventures SMC Uganda Ltd vs Bulambuli District Local Government* on Friday, December 22, 2023 at 16:45 hours. The decision in the said application was rendered by the Tribunal on January 10, 2024.
13. Had the Applicant been prudent enough, it would have filed the Application using electronic means on the Tribunal's official email address, so as to beat the statutory deadline. Unfortunately, this was not done. See section 95B of the ***Public Procurement and Disposal of Public Assets Act***.
14. The instant Application lodged with the Tribunal **January 2, 2024**, was therefore out of time prescribed under sections 89 (8) and 911 (2) (b) of the ***Public Procurement and Disposal of Public Assets Act***.
15. The Applicant made an allegation in its written submissions that it attempted to file the Application with the Secretariat on Friday, December 22, 2023 but found that the Secretariat had closed for Christmas. These allegations are false, baseless, without evidence, and are therefore rejected. In any case, even if the Applicant had filed the Application on December 22, 2023 as alleged, it would still have been out of time.
16. Timelines within the procurement statute were set for a purpose and are couched in mandatory terms. There is no enabling provision within the Public Procurement and Disposal of Public Assets Act that accords the Tribunal power to enlarge or extend the timelines set therein. Once a party fails to move within the time set by law, the jurisdiction of the Tribunal is extinguished as far as the matter is concerned. See ***Application No.33 of 2023 Eclipse Edisoil JVC Ltd vs Napak District Local Government and Application 16 of 2023, Vital Capital Investments Limited and 2 Others v Ministry of Housing and Urban Development***.
17. The Application is time barred and incompetent. In the circumstances we shall not delve into the merits of the Application.

H. DISPOSITION

1. The Application is struck out.
2. The Tribunal's suspension order dated January 3, 2024, is vacated.
3. Each party to bear its own costs.

Dated at Kampala this 18th day of January, 2024.



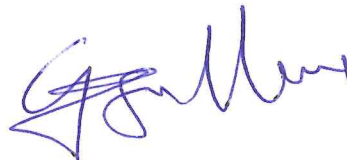
FRANCIS GIMARA S.C
CHAIRPERSON



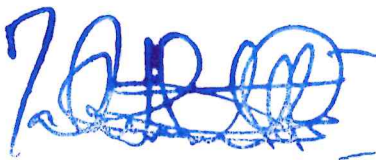
NELSON NERIMA
MEMBER



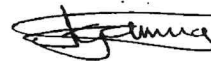
THOMAS BROOKES ISANGA
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GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER



KETO KAYEMBA
MEMBER