

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

APPLICATION NO. 16 OF 2024

BETWEEN

NAM TERMINAL CONSULTS LTD :::::::::::::::::::::::::::::::APPLICANT

AND

MBALE DISTRICT LOCAL GOVERNMENT::::::::::::::::::::::::::RESPONDENT

**APPLICATION FOR REVIEW IN RESPECT OF THE
PROCUREMENT FOR THE CONSTRUCTION OF AN OUTPATIENT
DEPARTMENT (OPD) AT LWABOBA HEALTH CENTRE III IN
BUNAMBUTYE SUB COUNTY IN MBALE DISTRICT LOCAL
GOVERNMENT UNDER PROCUREMENT REFERENCE NUMBER:
MBAL891/WORKS/23-24/00014**

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

DETAILED DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. Mbale District Local Government (the **Respondent**) initiated a tender for the construction of an Outpatient Department (OPD) at Lwaboba Health Centre III in Bunambutye Sub County in Mbale District Local Government under procurement reference number: MBAL891/WORKS/23-24/00014 using open domestic bidding method.
2. Four (4) bidders namely; *Nam Terminal Consults Ltd* (the **Applicant**), *Namugabwe General Construction Company Ltd*, *Deha Investees Ltd* and *Polmac Uganda Ltd* submitted bids on March 1, 2024.
3. Upon the conclusion of the evaluation process, the Respondent issued a Notice of Best Evaluated Bidder on March 21, 2024 indicating that *Namugabwe General Construction Company Ltd* was the best evaluated bidder at a contract price of UGX. 353,877,543/=.
4. The Best Evaluated Bidder Notice displayed on March 21, 2024 indicated that the Applicant's bid was disqualified for the following reasons;
 - *Did not attach evidence of certificate for the payment of NSSF contributions for the company workers as it was a requirement in the bid document.*
 - *Did not specify the bid validity period of 120 working days in the bid submission sheet as it was a requirement in the bid document.*
 - *Submitted a Bid security of UGX. 4,000,000/= instead of UGX. 4,500,000/= as per the advert and the bid document in pages 5 of 184, 6 of 184 and 32 of 184.*
5. The Applicant was dissatisfied with the outcome of the procurement process and filed an administrative review complaint with the Accounting Officer on March 25, 2024

6. The Accounting Officer of the Respondent dismissed the Applicant's complaint on March 27, 2024.
7. The Applicant being aggrieved by the decision of the Accounting Officer, filed the instant application with the Tribunal on April 4, 2024 seeking to review the decision of the Respondent.
8. The Applicant's complaint is fourfold:
 - 1) The Accounting Officer failed to perform his duty to guide and advise on payment of administrative review fees.
 - 2) The Applicant submitted evidence of payment of NSSF contributions.
 - 3) The bid submission sheet stated that the bid shall be valid until the date specified in ITB 19.1, and therefore adopted the stipulated 120 days by reference.
 - 4) The Respondent misled the Applicant when it emailed a bidding document which indicated that the bid security was UGX. 4,000,000/= instead of UGX. 4,500,000/=.
9. The Respondent opposed the Application on vide a reply filed on April 9, 2024.

B. THE ORAL HEARING

1. The Tribunal held an online hearing on April 15, 2024. The appearances were as follows:

Counsel Mayeku Denis appeared for the Applicant and Luke Lokuda the Chief Administrative Officer of Mbale District Local Government represented the Respondent.

In attendance were:

Mr. Masaba Ekonia, the Director of NAM Terminal Consults Ltd and Ariko Opaire Samuel, the Head Procuring and Disposing Unit of the Respondent.

C. RESOLUTION

1. The Tribunal has considered the Application, the response, the procurement action file and the submissions of the parties.
2. Considering the facts deduced from the pleadings and submissions, the issues are re-framed as follows:
 - 1) Whether the Respondent's Accounting Officer erred when he dismissed the Applicant's complaint due to non-payment of administrative review fees?
 - 2) Whether the Respondent erred when it disqualified the Applicant's bid on the basis that the bidder did not attach evidence of certificate for the payment of NSSF contributions for the company workers?
 - 3) Whether the Respondent erred when it disqualified the Applicant's bid on the basis that the bidder did not specify the bid validity period of 120 working days in the bid submission sheet?
 - 4) Whether the Respondent erred when it disqualified the Applicant's bid on the basis that the Applicant submitted a Bid security of UGX. 4,000,000/= instead of UGX. 4,500,000/=?
 - 5) What remedies are available to the parties?

Issue No.2:

Whether the Respondent's Accounting Officer erred when he dismissed the Applicant's complaint due to non-payment of administrative review fees?

3. Section 89 (1) of the *Public Procurement and Disposal of Public Assets Act* states that "A bidder who is aggrieved by a decision of a Procuring and Disposing Entity may make a complaint to the Accounting Officer of the procuring and disposing entity".
4. Section 89 (3)(a) of the *Public Procurement and Disposal of Public Assets Act* requires a complaint against a Procuring and Disposing Entity to be in writing and submitted to the Accounting Officer, of the Procuring and Disposing Entity on payment of the fees prescribed.

5. Regulation 10(2) of the *Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2023* provides that the fees in the second column of the Schedule to the regulations shall be paid to a procuring and disposing entity, for the administrative review for a procurement or disposal of a value specified in the second column.
6. Regulation 7(4) of the *Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2023* provides that an Accounting Officer shall not investigate a complaint where the fees for administrative review prescribed under regulation 10 are not paid to the procuring and disposing entity.
7. However, in view of the cardinal principles of transparency and fairness enshrined in the *Public Procurement and Disposal of Public Assets Act*, an Accounting Officer should not declare that a complainant has failed to pay administrative review fees unless the said complainant has been so guided.
8. ITB 48.2 (d) of the Bidding Document provides that the PDE shall promptly provide a bidder who seeks administrative review with the details of the applicable administrative review fees and the account to which the fees are to be paid.
9. The Public Procurement and Disposal of Public Assets Authority issued Guideline Reference No. 7 of 2024 on Procedure for Administrative Review by the Accounting Officers. The circular guided that on receipt of an application for Administrative Review, the Accounting Officer should advise the complainants on the required Administrative Review fees and where to pay the said fees. See guidelines 1 and 2 of Guideline Reference No. 7 of 2024.
10. The Applicant applied to the Respondent's Accounting Officer for administrative review on March 25, 2024. No administrative review fees were paid.

11. An Accounting Officer is duty-bound to advise a complainant on the prescribed Administrative Review fees and where to pay the said fees, upon receipt of a Compliant.
12. The Respondent's Accounting Officer ought to have immediately guided the Applicant on the prescribed administrative review fees and the mode of payment thereof upon receipt of the complaint. See: ***Applications No. 26 and 27 of 2022- Vision Scientific & Engineering Limited v Makerere University, and Application No. 28 of 2022-Frida B. Kwikiriza v Buliisa District Local Government.***
13. Instead, the Respondent's Accounting Officer dismissed the Complaint on March 27, 2024, two days after receipt of the complaint, for non-payment of Administrative Review Fees.
14. This Tribunal has been consistent on the principle that late payment of administrative review 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, 1 of 2023-Apple Properties v Uganda Human Rights Commission; Application No.17 of 2021-Samanga Elcomplus JV v Uganda Electricity Distribution Company Limited; Application No. 22 of 2021-Vcon Construction Ltd v Uganda Development Bank; Application No. 17 of 2021- Samanga Elcomplus JV v Uganda Electricity Distribution Company Limited; Application No. 17 of 2021-Kasokoso Services Limited v Jinja School of Nursing and Midwifery; and Application No. 28 of 2022-Frida B. Kwikiriza v Buliisa District Local Government.***
15. In the instant case, the Respondent's Accounting Officer rendered a purported decision to dismiss the complaint even before guiding the Applicant on the prescribed Administrative Review fees and where to pay the said fees, upon receipt of a Compliant.

We hasten to add that the duty to guide the Applicant would include the prescription of a reasonable timeline within which the payment ought to be paid by the Applicant. To that extent, the Respondent erred.

16. **Issue no. 1 is resolved in the affirmative.**

Issue No. 2:

Whether the Respondent erred when it disqualified the Applicant's bid on the basis that the bidder did not attach evidence of certificate for the payment of NSSF contributions for the company workers?

17. Part 1 of Section 3B(d) of the Bidding Document (under Eligibility Criteria) required bidders to submit documentation to show *fulfilment of obligations to pay taxes and social security contributions in Uganda where applicable and attach evidence of certificate for the payment of NSSF contributions for the company workers*. ITB 4.1 (e) of the Bidding Document also lists fulfilment of obligations to pay social security contributions as an eligibility criteria.
18. We noted that documentation to show fulfilment of obligations to pay social security contributions in Uganda was required "*where applicable*". This implies that under the applicable legislation, the obligation to register and make NSSF contributions may be inapplicable to some bidders. Although the criterion refers to evidence of a certificate for the payment of NSSF contributions for the company "workers", the NSSF Act requires contributions for "employees". Not all "workers" are necessarily "employees".
19. The criterion did not also specify the period for which evidence of payment of NSSF contributions was required.
20. We have perused the Applicant's bid and noted that the Applicant did not submit any evidence of a certificate for the payment of NSSF contributions for the company workers.

21. At the time of making an administrative review complaint to the Accounting Officer, the Applicant purported to submit a National Social Security Fund Clearance Certificate No. 00035366.
22. The Respondent contends that the certificate was submitted belatedly at the time of filing an administrative review complaint by the Applicant and had also expired.
23. A bidder is eligible under preliminary examination where the bidder has fulfilled the tax and social security obligations applicable in Uganda. See regulation 17(2) (d) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2023*.
24. A document to prove fulfilment of social security obligations is an eligibility document under regulation 17(3) (d) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2023*; Section 3B (d) of the Bidding Document; and ITB 4.1 (e) of the Bidding Document.
25. Non-submission of an eligibility document is not fatal because the procuring and disposing entity is obligated to request a bidder to submit the said document through clarification. See regulation 17(6) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2023* and **Application No. 12 of 2024- Juan Carlos Surace Ltd V Masindi District Local Government**.
26. The Respondent was required to request the Applicant, through clarification, to submit the document to prove fulfilment of social security obligations, or an explanation of why the requirement was not applicable.

The questions as to whether the NSSF Clearance Certificate attached to the Complaint was valid or not could only be answered if the Applicant was requested to submit the same

and it was consequentially subjected to evaluation. At this stage, the Tribunal cannot delve into the materiality of the said NSSF Clearance Certificate.

27. To that extent, the Respondent erred and acted in breach of regulation 17(6) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2023*.

28. **Issue no. 2 is resolved in the affirmative.**

Issue No. 3:

Whether the Respondent erred when it disqualified the Applicant's bid on the basis that the bidder did not specify the bid validity period of 120 working days in the bid submission sheet?

29. ITB 19.1 of the Bidding Document states that "*Bids shall remain valid until the date specified in the BDS. A bid valid for a shorter period shall be rejected by the PDE as non-compliant while a bid valid for a longer period than the date specified in the BDS shall not be rejected but shall only be valid until the date in the BDS*"

30. Section 2 of the Bid Data Sheet indicates that the bids must be valid for 120 days until July 20, 2024.

31. The Applicant's bid submission Sheet at para 6 stated that "*Our bid shall be valid until the date specified in ITB 19.1 and it shall remain binding upon us and maybe accepted at any time before that date;*"

32. There was no specific or express requirement that the bidders should state the exact date of bid validity. It is our finding that paragraph 6 of the Applicant's bid provided sufficient affirmation as to the validity of the Applicant's bid.

33. In ***Application no. 41 of 2022, Orungo Market Vendors Association v Amuria District Local Government*** the

Applicant 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.

34. In the instant case, there is no doubt that the Applicant fully adopted the bid validity period prescribed in the Bidding document. The Respondent therefore erred when it disqualified the Applicant's bid on the basis that the bidder did not specify the bid validity period of 120 working days in the bid submission sheet.
35. **Issue no. 3 is resolved in the affirmative.**

Issue no. 4:

Whether the Respondent erred when it disqualified the Applicant's bid on the basis that the Applicant submitted a Bid security of UGX. 4,000,000/= instead of UGX. 4,500,000/=?

36. The Bidding Document in the procurement action file required a bid security of UGX. 4,500,000/=. The Bid Notice also indicates that the bid security required was UGX. 4,500,000/=.
37. The Applicant has alleged that the Bid Notice and Bidding Document issued by the Respondent on 14th and 26th February 2024 by email, all indicate that the required bid security was UGX. 4,000,000/=.
38. The Applicant therefore avers that it was misled by the Respondent to submit a bid security of UGX. 4,000,000/= vide emails dated February 14, 2024 at 9.24 a.m and February 26, 2024 at 11.25 a.m.
39. The burden of proof is on the Applicant to prove the allegation that it was issued with a misleading bidding document.

40. We have carefully scrutinised the Applicant's bid and noted that the Applicant officially paid for the bidding document vide a receipt issued on February 26, 2024 at 2.18.17 p.m.
41. The first allegedly misleading bidding document was emailed to the Applicant on February 14, 2024 at 9.25 a.m. The second allegedly misleading bidding document was emailed to the Applicant on February 26 2024 at 11:25 a.m. It is not possible that an official bidding document was issued to the Applicant on February 14 2024 at 9.25 a.m or on February 26 at 11.25 a.m, yet the Applicant purchased the bidding document on February 26 2024 at 2.18.17 p.m. We take the view that if any misleading documents were shared with the Applicant (if at all) prior to purchase of the bidding document, the said documents were not official, and therefore not binding on the Respondent.
42. Section 57 (1) of the *Public Procurement and Disposal of Public Assets Act* requires that all communication between a procuring and disposing entity, bidder, or provider, shall be in writing, and may be transmitted electronically; communication in any other form must be referred to and confirmed in writing. The procedure for purchasing a bidding document is prescribed in regulation 57 of the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2023*. The Applicant has not corroborated its allegations by adducing evidence of any correspondence for the issue of the alleged misleading bidding document after making payment therefor.
43. The Tribunal has determined that on a balance of probabilities, the bid security required was UGX. 4,500,000/= as indicated in the bid notice and bidding document in the procurement action file. The Applicant's bid was not responsive to the requirement for a bid security of UGX. 4,500,000/=.
44. Regulation 19 (4) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2023* provides that a bid which is not substantially responsive to the minimum requirement of the detailed evaluation shall be rejected at the

detailed evaluation stage. The Applicant's bid was therefore rightly disqualified.

45. The upshot of our finding is that the Respondent did not err when it disqualified the Applicant's bid on the basis that the Applicant submitted a Bid security of UGX. 4,000,000/= instead of UGX. 4,500,000/=.
46. **Issue no. 4 is resolved in the negative.**
Issue No. 5:
What remedies are available to the parties
47. Having found that the Applicant's bid was not responsive to the requirement for a bid security of UGX. 4,500,000, the bid was rightly disqualified.
48. The Applicant is not entitled to any remedy.

D. DISPOSITION

1. The Application is dismissed.
2. The Tribunal's suspension order dated April 4, 2024, is vacated.
3. Each party shall bear its own costs.

Dated at Kampala this 22nd day of April, 2024.



FRANCIS GIMARA S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



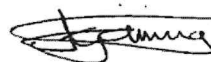
THOMAS BROOKES ISANGA
MEMBER



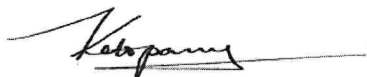
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MEMBER



CHARITY KYARISIIMA
MEMBER



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