

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

APPLICATION NO. 19 OF 2024

BETWEEN

MBARARA CITY TRUCK OWNERS,
DRIVERS & LOADERS
COOPERATIVE SOCIETY LIMITED ::::::::::::::::::::APPLICANT

AND

MBARARA CITY COUNCIL ::::::::::::::::::::RESPONDENT

**APPLICATION FOR REVIEW IN RESPECT OF THE
PROCUREMENT FOR THE COLLECTION OF REVENUE FROM
LORRY PARK FEES (LOADING AND OFFLOADING) IN NORTH
DIVISION AND SOUTH DIVISION FOR THE PERIOD APRIL 2024-
JUNE 2024 UNDER PROCUREMENT REFERENCE NO.
MBAR609/NON-CONS/2023-2024/00010**

**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. Mbarara City Council (the Respondent) initiated a tender for the collection of revenue from lorry park fees (loading and offloading) in north division and south division for the period April 2024-June 2024 under procurement reference number: MBAR609/NON-CONS/2023-2024/00010 on February 19 2024, using open the domestic bidding method.
2. Two (2) bidders namely; *Mbarara City Truck Owners Drivers & Loaders Cooperative Ltd* and *Ankole United Truck Owners Drivers Cooperative Society Ltd* submitted bids
3. Upon the conclusion of the evaluation process, the Respondent issued a Notice of Best Evaluated Bidder on March 20, 2024, indicating a NIL return on the best evaluated bidder since none of the bidders was successful during the evaluation of bids.
4. The Notice of Best Evaluated Bidder indicated that the bid of *Mbarara City Truck Owners Drivers & Loaders Cooperative Ltd*, (the Applicant) was disqualified because the bidder:
 - *“Did not attach registered powers of attorney*
 - *Did not attach a list of directors/proprietors and their photographs as was required”.*
5. The Notice of Best Evaluated Bidder indicated that the bid of *Ankole United Truck Owners Drivers Cooperative Society Ltd* was disqualified because it *“refused to take up the same revenue source awarded to her as per award letter dated 10th November 2023”.*
6. The Applicant was dissatisfied with the procurement process and filed an administrative review complaint before the Accounting Officer of the Respondent on March 26, 2024.
7. The Accounting Officer of the Respondent did not make and communicate a decision regarding the complaint.

B. APPLICATION TO THE TRIBUNAL

1. The Applicant having received no response to its complaint filed the present Application No. 19 of 2024 with the Tribunal on April 9, 2024.
2. The Applicant faults the Accounting Officer of the Respondent for failure to provide guidance on payment of administrative review fees.
3. The Applicant concedes that it did not submit a power of attorney and list of directors/proprietors and their photographs as was required because it was misled by the language used in the bidding document. That a co-operative society uses a resolution to authorize the chairperson to sign documents and the resolution is registered with the Registrar of Co-operatives. That the missing documents were eligibility documents which should have been requested through clarification.

C. RESPONSE TO THE APPLICATION

1. The Application is premature as the Applicant did not give to the Accounting Officer notice of its intention to file this application with the Tribunal. Had the Applicant given prior notice of the intended application the Respondent would have discovered that the City Town Clerk had inadvertently forgotten to advise on the administrative review fees and taken corrective measures within five working days preceding the filing of this application.
2. By failing to raise a red flag and/or challenge the bidding document and the criteria set out therein, and submitting its bid, the Applicant willingly subjected itself to be evaluated based on the same criteria and accordingly acquiesced in its

right to challenge the same after its bid was rejected for being non-responsive.

3. The bid of the Applicant was rejected for being non- responsive to the evaluation criteria as detailed in the Best Evaluated Bidder Notice.

D. ORAL HEARING

1. The Tribunal conducted an oral hearing via zoom on April 26, 2024.
2. The appearances were as follows:

Mr. Ddembe Shaffiq appeared for the Applicant and Counsel Alauterio Ntegyereize, the Senior Legal Officer of Mbarara city council appeared for the Respondent.

Mr. Mwesigwa Sam Tomson appeared for the Interested Party (AUTOD Cooperative Society Ltd).

In attendance was Ms. Dinah Mwije, the Head of Procuring and Disposing Unit of the Respondent.

E. RESOLUTION

1. The Application framed three issues but in view of the pleadings and submissions, the issues have been recast for clarity as follows:
 - 1) Whether the Application is competent?
 - 2) Whether Accounting Officer of the Respondent erred in law when he omitted to guide the Applicant on payment of administrative review fees and also failed to make and communicate a decision regarding the Complaint within statutory timelines?
 - 3) Whether the evaluation was lawfully conducted by the evaluation committee of the Respondent?
 - 4) What remedies are available to the parties?
2. The Tribunal has carefully considered the pleadings, submissions, procurement action file and the bids.

Issue No. 1:

Whether the Application is competent?

3. The Respondent raised an objection that the Application is premature as the Applicant did not give to the Accounting Officer notice of its intention to file this application.
4. Section 89(1) of the *Public Procurement and Disposal of Public Assets Act* provides that where a bidder intends to make an application to the Tribunal under subsection (8) or (9), the bidder shall give the Accounting Officer notice within five working days after the expiry of the period specified in subsection (3) (b) or subsection (7), as the case may be.
5. The Tribunal has previously relied on the Supreme Court decision in ***Kampala Capital City Authority v Kabandize and 20 others, Supreme Court Civil Appeal No. 13 of 2014***, to hold that failure to serve statutory notice does not

vitiates the proceedings. Perhaps failure to serve notice may be a relevant factor to consider when deciding whether to award costs or not but nonservice of notice cannot vitiate the jurisdiction of the Tribunal. See ***Application No. 2 of 2022, APA Insurance Uganda Ltd v Uganda National Roads Authority; Application No. 7 of 2021, Elite Chemicals Ltd vs Uganda Coffee Development Authority; and Applications No. 15, 17 and 18 of 2023- EAA Company Ltd & Others v Uganda National Bureau of Standards & Others.***

6. The failure to give notice under section 89(10) of the *Public Procurement and Disposal of Public Assets Act* does not vitiate the jurisdiction of the Tribunal or render the Application incompetent.
7. **Issue no. 1 is resolved in the affirmative.**

Issue No.2:

Whether Accounting Officer of the Respondent erred in law when he omitted to guide the Applicant on payment of administrative review fees and also failed to make and communicate a decision regarding the Complaint within statutory timelines?

8. 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".
9. 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.
10. 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.

11. 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.
12. 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 Complainant. See: ***Application No. 16 of 2024-Nam Terminal Consults v Mbale DLG.***
13. The Applicant applied to the Respondent's Accounting Officer for administrative review on March 26, 2024. No administrative review fees were paid. On April 2, 2024, the Applicant wrote to the Accounting Officer of the Respondent, requesting to be guided on payment of administrative review fees. No response was made to the said request.
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 vs Uganda Electricity Distribution Company Limited; and Application No. 28 of 2022-Frida B. Kwikiriza v Buliisa District Local Government.***
15. 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. To that extent, the Respondent's Accounting Officer erred.

16. The Accounting Officer had 10 days from March 26, 2024, to make and communicate a decision regarding the Complaint. The said days commenced on March 27, 2024 and elapsed on April 5, 2024. See section 89(7) of the *Public Procurement and Disposal of Public Assets Act*.
17. The Respondent's Accounting Officer did not communicate a decision by April 5, 2024, in breach of the law. To that extent again, the Accounting Officer erred.
18. Where an Accounting Officer fails to make and communicate a decision within ten days, the complainant has a right to apply to the Tribunal within another ten days under sections 89(8) and 91I(2) (b) of the *Public Procurement and Disposal of Public Assets Act*.
19. The Applicant was therefore within its statutory rights to file this application with the Tribunal on April 9, 2024.
20. **Issue no. 2 is resolved in the affirmative.**

Issue No. 3:

Whether the evaluation was lawfully conducted by the evaluation committee of the Respondent.

8. The evaluation criteria in the Bidding Document was stated at page 5 as follows;

EVALUATION OF PROPOSALS FOR COLLECTION OF REVENUE FROM LORRY PARK FEES (LOADING AND OFF LOADING) IN NORTH DIVISION AND SOUTH DIVISIONS (PERIOD FROM APRIL 2024-JUNE 2024)

- i. *Proper address (Name, Telephone contact and Physical Address)*
- ii. *Attachment of an original receipt in the proposal document as evidence of having paid a non-refundable fee for obtaining the bid document.*
- iii. *The bidder MUST be able to identify him/herself with either a copy of the passport, driving permit, valid identity card preferably a national Identity Card.*

- iv. Bidders must attach 2 recent passport photographs
- v. Bidders must submit one copy marked "Original"
- vi. All pages of the bid document should be signed by the applicant in an original form
- vii. Only copies of the bid documents bearing the Original Stamp of the Head Procurement and Disposal Unit- Mbarara City Council will be accepted.
- viii. For Collection of Revenue from Lorry Park Fees (Loading and Off Loading) in North Division and South Divisions only registered cooperative societies formed by Truck owners and drivers within this revenue source should apply
- ix. Submit At least one letter of recommendation from previous clients (Should be original, addressed to the Head Procurement and Disposal Unit Mbarara City Council and should be written within the bidding period)
- x. For cooperatives, Associations and Companies, the following legal documents are a must in addition to the above.
 - a) A copy of valid trading license for the year 2023;
 - b) A copy of valid certificate of registration or equivalent
 - c) A copy of registered powers of Attorney
 - d) A list of directors / proprietors and their photographs for all bidders.
 - e) Bank Statement for two months of January 2024 and February 2024
 - f) A copy of current Income Tax Clearance addressed to Mbarara City Council Note that all the legal documents submitted by cooperatives, Associations and Companies will be subjected to verification by the relevant issuing Authorities.
- xi. The highest priced bidder who fulfils all the above criteria shall be awarded the Contract.

9. The Notice of Best Evaluated Bidder indicated that the bid of Mbarara City Truck Owners Drivers & Loaders Cooperative Ltd, (the Applicant)' was disqualified because the bidder:
- "Did not attach registered powers of attorney
 - Did not attach a list of directors/proprietors and their photographs as was required".

10. The Bidding Document did not specify which part of the evaluation criteria was for be used to determine responsiveness to preliminary examination or administrative compliance or technical responsiveness but on page 2 it clearly stated as follows;

Preparation of Proposals: You are requested to quote for the services by completing, signing and returning.

1. the proposals Submission Sheet in this Part 1:

2. the list of Services and Price Schedule in Part 2

3. the documents evidencing your eligibility, as listed below:

You are advised to carefully read the complete Request for Proposals document, including the special conditions of Contract in Part 3: Contract, before preparing your quotation. The standard forms in this RFP may be retyped for completion but the Bidder is responsible for their accurate reproduction.

11. Our understanding is that the documents evidencing eligibility referred to are the documents listed in x(a)-(f) in the evaluation criteria. See *regulation 17(3) (d) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2023*. At the hearing, the head of the Respondent's Procurement and Disposal Unit conceded that the said documents are eligibility documents.
12. 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 or explain through clarification. See regulations 6 and 17(6) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2023*; **Application No. 16 of 2024-Nam Terminal Consults v Mbale DLG**; and **Application No. 12 of 2024- Juan Carlos Surace Ltd v Masindi District Local Government**.

13. The Respondent was required to request the Applicant, through clarification, to submit the registered power of attorney and list of directors/proprietors and their photographs, or an explanation as to why the documents were not submitted/not applicable.
14. In Application no. 22 of 2022-***Mbarara City South Boda Boda Operators Sacco v Mbarara City Council***, this Tribunal applied the provisions of the *Co-operative Societies Act* and held that an application signed by the chairman was valid.
15. The Tribunal accepts the Applicant's explanation that a resolution authorizing the chairperson to sign contracts in districts, cities and other areas, and which was duly registered with the Registrar of Co-operative Societies, could suffice in lieu of the power of attorney. The non-submission of a registered power of attorney was not fatal.
16. If the Respondent had asked for clarification, the Applicant would have provided the resolution and explained why a power of attorney was not applicable. The Applicant could also have provided the list of directors and their photographs.
17. To that extent in the instant case, the Respondent erred and acted in breach of regulations 6 and 17(6) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2023*.
18. The Tribunal also noted that the bid of *Ankole United Truck Owners Drivers Cooperative Society Ltd* was disqualified because it "refused to take up the same revenue source awarded to her as per award letter dated 10th November 2023". With due respect, there was no criterion for determining whether or not a bidder had previously refused to take up a revenue source or defaulted.
19. Section 71 (3) of the *Public Procurement and Disposal of Public Assets Act* provides that no evaluation criteria other than that stated in the bidding documents shall be taken into account. Regulation 5 of the *Public Procurement and Disposal of Public*

Assets (Evaluation) Regulations 2023 provides that the evaluation of bids shall be conducted in accordance with the evaluation criteria specified in the bidding documents; and an Evaluation Committee is prohibited from making amendment to the evaluation criteria stated in the bidding document, or using any other criteria other than the criteria specified in the bidding document.

20. In the result, the evaluation committee erred when it disqualified the bid of *Ankole United Truck Owners Drivers Cooperative Society Ltd* when there were no criteria for determining whether or not a bidder had previously refused to take up a revenue source or defaulted. The only comparable criterion was the submission of at least one letter of recommendation from previous clients, and both bidders apparently submitted the said letters.

21. **Issue no. 3 is resolved in the affirmative.**

Issue No. 4:

What remedies are available to the parties?

22. Having found that the Respondent erred in the evaluation of the bids, the procurement shall be remitted back to the Respondent for re-evaluation.

Obiter Dicta

23. We noted that the procurement was for revenue collection for a period of three months. However, the Bidding Document prescribed a bid validity period of 120 working days. A bid validity period should be reasonable to afford enough time for evaluation, post-qualification, negotiations, contract award, administrative review, contract preparation, and approval. See regulation 62(3) of the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations 2023*.

24. In the instant procurement, the prescribed bid validity period of 120 working days is excessive in view of the duration of the proposed contract and the fact that the procurement is not complex.

It is hoped that the Entity will take note of these observations and take greater care in future when prescribing a bid validity period.

F. DISPOSITION

1. The Application is allowed.
2. The Respondent is directed to re-evaluate the bids in the impugned procurement in a manner not inconsistent with the decision of the Tribunal, the Bidding Document and the law.
3. The re-evaluation in No. 2 above shall be completed within 10 working days from the date of this decision.
4. The Tribunal's suspension order dated April 9, 2024, is vacated.
5. Each party shall bear its own costs.

Dated at Kampala this 2nd day of May, 2024.



FRANCIS GIMARA S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



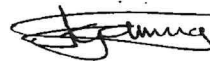
THOMAS BROOKES ISANGA
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PAUL KALUMBA
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CHARITY KYARISIIMA
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