

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

APPLICATION NO. 26 OF 2024

BETWEEN

WINAZ COMMERCIAL INVESTMENT LIMITED:.....APPLICANT

AND

MASINDI DISTRICT LOCAL GOVERNMENT :.....RESPONDENT

**APPLICATION FOR REVIEW IN RESPECT OF THE
PROCUREMENT FOR THE CONSTRUCTION OF FACILITIES AT
ST. ANDREA KAAHWA SECONDARY SCHOOL IN LABONGO SUB
COUNTY IN MASINDI DISTRICT UNDER PROCUREMENT
REFERENCE NUMBER: MOES-MASINDI /UGIFT/WRKS/2023-
24/00002**

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

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. The Government of Uganda received a loan from the World Bank to fund the Intergovernmental Fiscal Transfer (UGIFT) program for construction of Seed Secondary Schools and Expansion of existing ones in selected sub counties in Uganda.
2. Masindi District Local Government was earmarked as one of the intended beneficiaries of the UGIFT program phase 3 by the Ministry of Education and Sports.
3. Masindi District Local Government (the **Respondent**) initiated a tender for construction of facilities at St. Andrea Kaahwa Secondary School in Labongo Sub County in Masindi District under Procurement Reference Number: MOES-MASINDI /UGIFT/WRKS/2023-24/00002 using open bidding method that was advertised in the New Vision newspaper on December 27, 2023.
4. On January 29, 2024, the Respondent received bids from eight (8) bidders namely; Winaz Commercial Investments Ltd (the **Applicant**), MITA Engineering & Logistics Ltd, Imperial Construction Technical Services Ltd, P&D Traders & Contractors Ltd, Karango Construction & Engineering Co. Ltd, Frabed Builders Ltd, Omega (u) Ltd, Baisonga & Sons Co. Ltd and Semwo Construction Company Ltd.
5. Upon the conclusion of the evaluation process, the Respondent issued a Notice of Best Evaluated Bidder on April 29, 2024, indicating that *MITA Engineering & Logistics Ltd* was the successful bidder at a contract price of UGX. 1,781,387,000/= VAT inclusive.
6. The Notice of Best Evaluated Bidder indicated that the Applicant's bid failed because the Applicant "altered bills of quantities".

7. The Applicant filed an administrative review complaint with the Accounting Officer of the Respondent on May 13, 2024. The grounds of the complaint were that the Applicant purchased the impugned solicitation documents from the Respondent; the non-conformities should have been cured by clarification; the Notice of Best Evaluated Bidder was issued after expiry of bids; that the best evaluated bidder did not pay for the bidding document; and that the best evaluated bidder never visited the site.
8. The Accounting Officer of the Respondent by two letters dated May 17, 2024, dismissed the complaint for being out of time, and for alleged failure to pay administrative review fees respectively.
9. The Applicant being aggrieved by the decision of the Accounting Officer, filed the instant application with the Tribunal on May 22, 2024, seeking to review the decision of the Respondent.
10. The Respondent filed a reply on May 27, 2024. The Respondent contended that the Applicant's complaint was dismissed for non-payment of administrative review fees. That the alterations of the bills of quantities by the Applicant were substantial, would affect the scope and derail the intended usage.
11. The Best Evaluated Bidder also filed a response contending that it complied with all the requirements.

B. ORAL HEARING

1. The Tribunal conducted an oral hearing via zoom on June 5, 2024.
2. The appearances were as follows:
 - 1) Mr. Mugume Reagan-Director of the Applicant.

- 2) Ms. Sanyu Phionah-Accounting Officer of the Respondent.
- 3) In attendance was Mr. Byarugaba Godfrey, Head PDU; Ms. Ibanda Pheonah Friday, Procurement Officer; Mr. Henry Kisitu, Regional Engineer for the Ministry of Education and Sports; Mr. Bahemuka Godfrey, Chairperson Contracts Committee; and Mr. Sunday Joseph, District Engineer.
- 4) Mr. Jotham Taremwa-C.E.O of the Best evaluated Bidder.
- 5) Mr. Ivan Musinguzi, counsel for the Best Evaluated Bidder.

C. RESOLUTION

1. The Application did not frame any issues for determination by the Tribunal. However, in view of the pleadings and submissions, the issues have been framed as follows:
 - 1) Whether the Accounting Officer of the Respondent erred when she dismissed the Applicant's complaint for non-payment of administrative review fees?
 - 2) Whether the award of the contract to *MITA Engineering & Logistics Ltd* is valid?
 - 3) Whether the Respondent erred when it disqualified the Applicant's bid?
 - 4) Whether the award of the contract to *MITA Engineering & Logistics Ltd* is valid?
 - 5) 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 Accounting Officer of the Respondent erred when she dismissed the Applicant's complaint for non-payment of administrative review fees?
3. The Applicant filed its administrative review complaint with the Accounting Officer of the Respondent on May 13, 2024. The Respondent's Accounting Officer dismissed the complaint vide two separate letters. The first letter stated that the application

was received beyond the statutory days of display of the Notice of Best Evaluated Bidder.

4. The Respondent issued a Notice of Best Evaluated Bidder on April 29, 2024 but communicated the Notice of Best Evaluated Bidder by electronic means to all bidders in the impugned procurement on Thursday, May 2, 2024 at 11:26am.
5. It therefore follows that the Applicant only became aware of the circumstances that gave rise to the complaint on May 2, 2024. The ten working days, in terms of filing a complaint to the Accounting Officer of the Respondent commenced on **May 3, 2024** and expired on **May 17, 2024**. The Applicant's complaint to the Accounting Officer of the Respondent filed on **May 13, 2024**, was therefore within the statutory timeframes.
6. The filing of a complaint to the Accounting Officer of the procuring and disposing entity is not dependant on or determined by the expiry of the display periods but is determined by the date when the bidder first becomes aware or ought to have become aware of the circumstances that give rise to the complaint. See section 89(3)(b) of the **Public Procurement and Disposal of Public Assets Act 2003** read together with regulation 4(4) of the **Public Procurement and Disposal of Public Assets (Administrative Review) Regulations 2023**.
7. It was therefore erroneous for the Accounting Officer of the Respondent to dismiss the Applicant's complaint on the ground that it was filed after the expiry of the deadline for display indicated on the Notice of Best Evaluated Bidder.
8. Secondly, we observed that the Accounting Officer of the Respondent also issued a letter dated May 17, 2024 stating another reason for dismissal of the complaint (i.e.) non-payment of prescribed fees.
9. An Accounting Officer has a duty to guide a complainant on the prescribed administrative review fees and the mode of payment

thereof upon receipt of the complaint. The Accounting Officer must also give a complainant a reasonable timeline within which to pay the said fees. See: **Application No. 16 of 2024-Nam Terminal Consults Ltd v Mbale District Local Government.**

10. By a letter dated May 13, 2024, the Applicant requested the Respondent's Accounting Officer for guidance on the administrative review fees to be paid. In a letter dated May 13, 2024, the Accounting Officer of the Respondent guided the Applicant on the modalities of payment of administrative review fees. However, the letter is silent on the amount of fees payable, and the time within which the Applicant should pay the fees. The last paragraph of the letter stated, "*you are urged to be mindful of the requirement to act within specified number of days*". In our view, this was not helpful to the complainant. To that extent, the Accounting Officer erred when she failed to guide the Applicant on the fees amount, and the time given to the Applicant to pay.
11. On May 17, 2024, three days after the date of the purported guidance, the Accounting Officer proceeded to dismiss complaint without investigation. The Applicant paid the administrative review fees on May 20, 2024 after its complaint had been dismissed.
12. With due respect, the Accounting Officer had ten days from receipt of the complaint to make and communicate a decision under section 89(7) of the **Public Procurement and Disposal of Public Assets Act** and regulation 8 of the **Public Procurement and Disposal of Public Assets (Administrative Review) Regulations 2023**. The said days commenced on **May 14, 2024** and would expire on **May 23, 2024**.
13. By the time the Accounting Officer purported to dismiss the Applicant's Complaint on May 17, 2024, there was still ample time of 6 more days to make the decision regarding the Applicant's complaint. The hurried dismissal of the complaint within 3 days of an ineffective "guidance" was contrary to the

cardinal principles of fairness and transparency enshrined in the **Public Procurement and Disposal of Public Assets Act**.

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. 16 of 2024-Nam Terminal Consults Ltd v Mbale District Local Government, Application No, 1 of 2023**.
15. The Accounting Officer of the Respondent therefore erred when she purported to dismiss the Applicant's complaint for non-payment of prescribed administrative review fees.
16. **Issue no. 1 is resolved in the affirmative.**
Issue No. 2:
Whether the award of the contract to MITA Engineering & Logistics Ltd is valid?
17. The Applicant has raised a question of law that the Notice of Best Evaluated Bidder was issued after expiry of bids; and therefore, the whole process was illegal.
18. The Tribunal observed that the bids were valid up to April 19, 2024.
19. Regulation 62 (1), (2) and (5) of the **Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2023** provides that the bidding documents shall state the date up to which a bid shall be valid; and that a bid shall remain valid until the close of business on the last day of the validity period. Where an extension to the bid validity period becomes necessary, a bidder shall be requested in writing, before the expiry of validity of their bid, to extend the validity for a specified period.

20. In the instant case, the bidders were not requested to extend the validity of their bids before expiry.
21. Under regulation 62 (6) of the ***Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2023*** a bidder may on his or her own discretion extend the bid validity period where the procuring and disposing entity delays to request the bidder to extend the bid and the bid validity period is likely to expire before the completion of the procurement process. By a letter dated April 15, 2024, the Applicant accordingly voluntarily extended its bid validity period for two months. By another letter dated May 14, 2024, the Applicant purported to again extend its bid validity period for two months. The second letter was superfluous since the Applicant had already extended its bid validity period.
22. On May 14, 2024, the Accounting Officer purported to request bidders to extend the *bid security period*; which can be interpreted to refer to extension of bid security only. In any case, the purported request was made after expiry of the bids.
23. The evaluation report (April 22, 2024); the Contracts Committee award; and the Notice of Best Evaluated Bidder (April 29, 2024) were outside the bid validity of all bidders, except the Applicant. It was not lawful to evaluate expired bids or to award a contract to a bidder whose bid had expired. At the hearing, the head of the Respondent's Procurement and Disposal Unit rightly conceded that it is not lawful to sign a contract with a best evaluated bidder whose bid has expired.
24. Once a bid expires there is no bidder. See: ***Application No. 3 of 2022- Vcon Construction (U) Limited v Makerere University***.
25. In the premises, the contract award and the Notice of Best Evaluated Bidder was invalid for the reasons stated above.
26. **Issue No. 2 is resolved in the negative.**

Issue No.3:

What remedies are available to the parties ?

27. Having found that there are all bids except one expired, the procurement will be cancelled. There is therefore no need to delve into the merits of the disqualification of the Applicant's bid. To do so would be moot and an exercise in futility. However, since issue no. 1 has been resolved in favour of the Applicant, and the failure to extend bids in time was occasioned by the neglect of the Respondent, the Applicant's administrative review fees will be refunded. In the interest of fairness, the Respondent cannot be allowed to benefit from its own wrong or to be unjustly enriched by retaining the Applicant's administrative review fees.

D. DISPOSITION

1. The procurement for the construction of facilities at St. Andrea Kaahwa Secondary School in Labongo Sub County in Masindi District under Procurement Reference Number: MOES-MASINDI /UGIFT/WRKS/2023-24/00002, is cancelled.
2. The Respondent may re-tender the procurement if it so wishes.
3. The Respondent shall refund the Applicant's administrative review fees.
4. The Tribunal's suspension order dated May 22, 2024, is vacated.
5. Each party shall bear its own costs.

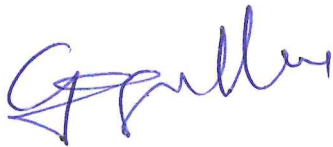
Dated at Kampala this 10th day of June 2024.



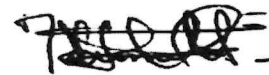
**NELSON NERIMA
MEMBER**




**ENG. THOMAS BROOKES ISANGA
MEMBER**



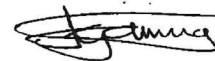
**GEOFFREY NUWAGIRA KAKIRA
MEMBER**



**PAUL KALUMBA
MEMBER**



**KETO KAYEMBA
MEMBER**



**CHARITY KYARISIIMA
MEMBER**