

THE REPUBLIC OF UGANDA
PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
APPEALS TRIBUNAL
APPLICATION NO. 29 OF 2024

BETWEEN

CLEAR VIEW INVESTMENTS LTD:::APPLICANT

AND

MBARARA UNIVERSITY SCHOOL
OF SCIENCE AND TECHNOLOGY (MUST):::::::::::::::::::::::::::::::::RESPONDENT

APPLICATION FOR REVIEW IN RESPECT OF THE
PROCUREMENT FOR THE PROVISION OF CLEANING SERVICES
TO UNIVERSITY BUILDINGS UNDER FRAMEWORK CONTRACT
FOR A PERIOD OF EIGHTEEN (18) MONTHS UNDER
PROCUREMENT REFERENCE NUMBER: MUST/NCSRVCS/2022-
2023/07179

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

DETAILED DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. Mbarara University School of Science and Technology (MUST) (the **Respondent**) initiated a procurement for the provision of cleaning services to the university buildings under framework contract for a period of eighteen (18) months under Procurement Reference Number: MUST/NCSRVCS/2022-2023/07179, in 4 lots on May 8, 2023
2. The Respondent received bids from eight (8) bidders namely, *Clear View Investments Ltd* (the **Applicant**), *Brainstorm Mbarara (U) Ltd*, *Mop Clean Services Ltd*, *A&M Clean Services Ltd*, *ATA Grace Cleaning Services*, *Tamu Cleaning Services*, *Swift Waste Masters Ltd* and *Almid Clean services Ltd*.
3. Upon conclusion of the evaluation process, the Respondent issued a Notice of Best Evaluated Bidder on July 25, 2023, indicating that *Clear View Investments Ltd* was the successful bidder at a contract price of Ugx 145,717,1020/= for Lot 1, UGX 88,039,800/= for Lot 2 while *Brainstorm Mbarara (U) Ltd*, was the successful bidder at a contract price of Ugx 80,712,000/= for Lot 3, UGX 74,340,000/= for Lot 4.
4. *Tamu Cleaning Services* (one of the unsuccessful bidders) through its lawyers *Ahimbisibwe & Agaba Co. Advocates* filed an administrative review complaint with the Accounting Officer of the Respondent on August 2, 2023, challenging the award of contract to *Clear View Investments Ltd* and *Brainstorm Mbarara (U) Ltd*.
5. The Accounting Officer of the Respondent by a letter to *Ahimbisibwe & Agaba Co. Advocates* dated August 16, 2023, upheld the complaint by *Tamu Cleaning Services* and ordered for a re-evaluation of the bids to be conducted by a different evaluation committee.

6. A re-evaluation of the bids was undertaken by a newly appointed evaluation committee on September 26, 2023.
7. Upon conclusion of the re-evaluation process, the Respondent issued a Notice of Best Evaluated Bidder on April 29, 2024, indicating that *Tamu Cleaning Services* was the successful bidder at a contract price of UGX 123,903,468/= for Lot 1, UGX 51,719,400/= for lot 4 while *ATA Grace Cleaning Services*, was the successful bidder at a contract price of UGX 86,577,480/= for Lot 2, UGX 83,951,100/= for Lot 3.
8. *Clear View Investments Ltd (Applicant)* through its lawyers (*Alvarez Advocates*) filed an administrative review complaint with the Accounting Officer of the Respondent on May 9, 2024, challenging the award of contract to *Tamu Cleaning Services* and *ATA Grace Cleaning Services*.
9. The Accounting Officer of the Respondent made and communicated a decision to *Alvarez Advocates* regarding the Complaint lodged by *Clear View Investments Ltd* through email on May 24, 2024. A physical copy of the decision was served upon the Applicant on May 28, 2024.
10. The Accounting Officer of the Respondent in his decision, dismissed the Complaint.
11. The Applicant being aggrieved by the decision of the Accounting Officer of the Respondent, filed the instant Application No. 29 of 2024 with the Tribunal on May 31, 2024, for the determination of its complaint.

B. APPLICANT'S SUBMISSIONS

1. In reply to the Respondent's preliminary objection raised in its response filed on June 11, 2024, the Applicant submits that whereas the Accounting Officer's decision dated August 16, 2023 was addressed to M/s Ahimbisibwe & Agaba Co Advocates, it was not copied to the Applicant. Furthermore,

there is nothing on record to prove that it received or was served with the said decision.

2. Turning to the merits of the Application, the Applicant submits that the Respondent was bound by its own bidding documentation i.e., clause 27.1 of the ITB to copy all other bidders whilst seeking clarification from a bidder. Therefore, the failure by the Respondent to adhere to the clear wording of clause 27.1 of the ITB when it sought clarification from Tamu Cleaning Services Ltd and ATA Grace Services Limited rendered the bidding process flawed.
3. The Applicant submits that whereas the Respondent attempted to explain the delay to deliver the decision within the mandatory ten days, this attempt to explain away and circumvent the strict timelines stipulated by law is not only illogical but has no basis in law. To permit the Respondent to explain would be a flagrant breach of the law as the Respondent cannot arrogate upon itself the duty to expand the time set in the law.
4. The Applicant further submits that at evaluation of its bid, the first evaluation committee in its meeting dated July 19, 2023 took note that the Applicant did not have the mandatory 5 years of post-incorporation experience but nonetheless agreed to waive this requirement. Therefore, the Respondent was bound by this waiver and could not later turn around to find that it did not meet the said requirement.

C. RESPONDENT'S SUBMISSIONS

1. The Respondent submits that the instant Application is time barred since it revolves around a decision made by its Accounting Officer on August 16, 2023 following an Administrative Review application by M/s Tamu Cleaning Services Ltd dated August 28, 2023. The Applicant having failed to review the said decision within the stipulated timeframe renders the instant application untimely and invalid.

2. The Respondent submits that its decision was delivered within the statutory ten (10) day timeframe. The delay in delivery of the decision was as a result of a public holiday and internal processing issues.
3. With respect to the contention that the evaluation committee was not properly constituted, the Respondent submits that the committee was chaired by Mr. Ivan Muhebwa a qualified lawyer by profession despite holding the title of legal clerk with the Respondent.
4. In response to the Applicant's submissions that it was estopped from departing from the waiver it granted it, the Respondent submits that this was a deviation material in nature and disadvantageous to other bidders who met the requirement. The waiver was therefore unlawful.
5. With respect to the procedure adopted during clarifications, the Respondent submits that the procedure it adopted in seeking clarifications was in line with the PPDA Act and did not prejudice the Applicant.

D. SUBMISSIONS BY TAMU CLEANING SERVICES AS AN INTERESTED PARTY

1. The interested party, (Tamu Cleaning Services) submits that the instant Application is incompetent owing to the fact that it was filed outside the timelines prescribed by the *Public Procurement and Disposal of Public Assets Act, 2003* (as amended).
2. The interested party submits that whereas the Applicant contends that it was granted a waiver in respect of its lack of the requisite experience, regulation 5 (1) and (2) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2023* bar an evaluation committee from amending or varying the evaluation criteria set out in the bidding document. The waiver was therefore a contravention of the law, bidding documents and also unfair to the other bidders.

3. The interested party further submits that it rightfully followed the required bidding process and had the requirements to emerge as the Best Evaluated Bidder.

E. SUBMISSIONS BY ATA GRACE CLEANING SERVICES AS ANOTHER INTERESTED PARTY

1. The other interested party, (ATA Grace Cleaning Services) submits that the instant Application is incompetent owing to the fact that it was filed outside the timelines prescribed by the *Public Procurement and Disposal of Public Assets Act, 2003* (as amended).
2. The interested party further submits that whereas it is the Applicant's case that the Contracts Committee did not have a lawyer, the committee was indeed properly constituted by virtue of the fact that Mr. Ivan Muhebwa, a lawyer by profession was its chairperson.
3. The interested party further submits that the Respondent was right to find that the Applicant did not have the requisite experience. The waiver that had earlier on been granted was a material deviation in so far as it was disadvantageous to the other bidders.

F. ORAL HEARING

1. The Tribunal held an oral hearing on June 20, 2024, via Zoom videoconferencing application. The appearances were as follows:
 - 1) Mr. Patrick Alunga Alvarez represented the Applicant as Counsel. In attendance were Boaz Nkamwesiga the Managing Director of the Applicant.
 - 2) Mr. Timothy Mugunya Ndiana represented the Respondent as Legal Advisor and Counsel. In attendance were Byaruhanga Melchoir, Ndyaguma Francis, Joseph Byarugaba-Member of Evaluation Stage, Karuhanga Stephen- Senior Procurement

Officer, Muhereza Innocent-Member of Contracts Committee,
Ivan Nuhebwa of the Respondent

- 3) Edgar Ayebazibwe, Kitimbo Shamira, Nahabwe Sonia from Mwesigwa Rukutana & Co Advocates as Counsel for Tamu Cleaning Services. In attendance was Tumwebaze Ben the Managing Director of Tamu Cleaning Services as interested party.
- 4) Emmanuel Twareburebwe as Counsel for *ATA Grace Cleaning Services*. In attendance was *Allen Tumusiime* as the Authorised Representative of *ATA Grace Cleaning Services*

G. RESOLUTION

1. The Application and the Response to the Application raised 4 grounds or issues that the Tribunal has framed as follows;
 - 1) *Whether the instant application was filed before the Tribunal within statutory timelines?*
 - 2) *Whether the Respondent in seeking clarification was obliged to copy all bidders in the communication while seeking clarification from a particular bidder?*
 - 3) *Whether the Administrative review decision of the Respondent was rendered within the time stipulated in the law?*
 - 4) *Whether the Respondent was estopped from asserting a different position after granting the Applicant a waiver on the 5 years' experience post incorporation during evaluation stage?*
 - 5) *What remedies are available to the parties?*

Issue No. 1:

Whether the instant application was filed before the Tribunal within statutory timelines?

1. The Applicant through its lawyers *Alvarez Advocates* filed an administrative review complaint with the Accounting Officer of the Respondent on May 9, 2024, challenging the award of contract to *Tamu Cleaning Services Ltd* and *ATA Grace Cleaning Services Ltd*.

2. 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 receipt of the complaint.
3. The time of reckoning for investigating, making and communicating an administrative review decision by the Respondent's Accounting Officer for a complaint lodged on May 9, 2024, commenced on **May 10, 2024**, and lapsed on **May 19, 2024**.
4. It is trite to note that May 19, 2024, being a Sunday and the last day of the period on which the Respondent's Accounting Officer ought to have made and communicated a decision to the Applicant, is an "excluded day" in computation of time. Accordingly, the following day May 20, 2024, being a Monday and a working day becomes the last day for the Respondent's Accounting Officer to have made and communicated a decision to the Applicant. See section 34(b) of the ***Interpretation Act, Cap 3*** and ***Application No. 33 of 2021, Super Taste Limited v Bank of Uganda, page 10, para 14***.
5. The fact that the Accounting Officer of the Respondent received the Applicant's complaint on his desk on May 14, 2024, owing to an internal organisational oversight between the Respondent's Records Office and Office of the Accounting Officer is no justification for non-compliance with a statutory obligation.
6. It is our finding that the Accounting Officer's decision made and communicated to the Applicant electronically on May 24, 2024, was made in breach of the law and is no decision at all. See Section 89(7) of the *Public Procurement and Disposal of Public Assets Act 2003*.
7. The law prescribes that where an Accounting Officer does not make a decision or communicate a decision within the period specified in subsection (7), the bidder may make an application to the Tribunal, in accordance with Part VIIA of this Act and

specifically within ten days from the date of expiry of the period within which the Accounting Officer ought to have made and communicated his administrative review decision. See sections **89(8), 91I (1) (a) and 91I (2)(b) of the *Public Procurement and Disposal of Public Assets Act 2003***.

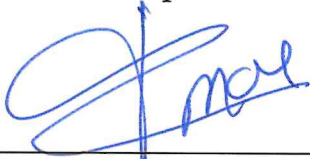
8. The time of reckoning commenced on **May 21, 2024** and lapsed on **May 30, 2024**.
9. At the hearing, the Applicant argued that the time for filing an application can only commence from the date a notice of intention to file an application is served upon the Accounting Officer of the Respondent.
10. As such, the Applicant contends that, having given the Respondent's Accounting Officer notice of intention to file an application to the Tribunal on May 27, 2024, the time of reckoning ought to have commenced on May 28, 2024 and lapsed on June 6, 2024. The instant application would then have been filed on time for all intents and purposes
11. A bidder who intends to make an application to the Tribunal under subsection (8) or (9) is required to give the Accounting Officer notice within five working days after the expiry of the period specified within which Accounting Officer ought to have made and communicated a decision to the complaint. See section **89(10)** of the ***Public Procurement and Disposal of Public Assets Act 2003*** and regulation **9(2)** of the ***Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2023***.
12. The service of notice on the Accounting Officer has no bearing on the timelines within which the Applicant ought to file an Application with the Tribunal as prescribed in section **91I(2)(a)-(c)** of the ***Public Procurement and Disposal of Public Assets Act 2003***. This is because failure to file a notice with the Accounting Officer does not vitiate the jurisdiction of the Tribunal.

13. It is erroneous and legally untenable for the Applicant to contend that the computation of time within which to file an application to the Tribunal should be cognizant of the time within which notice of intention to file an application is served on an Accounting Officer. The statutory limitation period continues to run before and after notice of intention to appeal to the Tribunal.
14. 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 time. 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 ***Eclipse Edisoil JVC Ltd vs Napak District Local Government, High Court (Civil Appeal) No. 05 of 2024***, (arising out of Tribunal Application No. 33 of 2023- *Eclipse Edisoil JVC Ltd vs Napak District Local Government*) and **Application No. 25 Of 2024- Achelis Uganda Ltd Vs Ministry of Lands, Housing and Urban Development**.
15. The instant Application lodged with the Tribunal on **May 31, 2023**, would therefore be out of time prescribed under sections **89 (8)** and **911 (2) (b)** of the ***Public Procurement and Disposal of Public Assets Act 2003***.
16. It is our finding that 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 May 31, 2024, is vacated.
3. Each party shall bear its own costs.

Dated at Kampala this 24th day of June 2024.



FRANCIS GIMARA S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



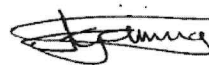
ENG. THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER



KETO KAYEMBA
MEMBER