

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

APPLICATION NO. 40 OF 2024

BETWEEN

WINAZ COMMERCIAL INVESTMENT LTD =====APPLICANT

AND

MASINDI DISTRICT LOCAL GOVERNMENT=====RESPONDENT

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

**BEFORE: NELSON NERIMA, GEOFFREY NUWAGIRA KAKIRA,
PAUL KALUMBA, CHARITY KYARISIIMA, KETO KAYEMBA, AND
ENG. CYRUS TITUS AOMU, 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 the construction of Seed Secondary Schools and the Expansion of existing ones in selected sub-counties in Uganda.
2. The Ministry of Education and Sports earmarked Masindi District Local Government as one of the intended beneficiaries of the UGIFT program phase 3.
3. Masindi District Local Government (the Respondent) initiated a 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 using open bidding method that was advertised in the New Vision newspaper on December 27, 2023.
4. On January 29, 2023, the Respondent received bids from eight (8) bidders, and upon 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.
5. *Winaz Commercial Investment Ltd* (the Applicant) filed an administrative review complaint with the Respondent's Accounting Officer on May 13, 2024, The applicant having been dissatisfied with the decision of the Accounting Officer later applied before the Tribunal on May 22, 2024, vide Registry Application No. 26 of 2024-Winaz Commercial Investment Limited vs Masindi District Local Government, seeking to review the Respondent's decision.

6. The Tribunal rendered its decision in Registry Application No. 26 of 2024 on June 10, 2024. It found that all bids except one had expired and cancelled the entire procurement process. The Tribunal advised the Respondent to retender the procurement if it so wished.
7. The Respondent retendered 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. The Respondent published the Bid Notice in the New Vision newspaper on June 14, 2024.
8. The Respondent received eight (8) bids on July 4, 2024, namely; *Winaz Commercial Investments Ltd, Mulo Investments Ltd, P&D Traders & Contractors Ltd, Semwo Construction Company Ltd, Asfa Investment Ltd, Rhino Investments Ltd, Doxa Engineering (U) Ltd and Samka Construction Co. Ltd.*
9. Upon conclusion of the evaluation process, the Respondent issued a Notice of Best Evaluated Bidder on September 6, 2024, indicating that *Semwo Construction Company Ltd* was the successful bidder at a contract price of **UGX 2,050,311,076/= VAT Inclusive**.
10. The Applicant, aggrieved with the procurement result, did not lodge an administrative review complaint with the Accounting Officer but filed a direct application to the Tribunal on September 11, 2024, seeking to review the Respondent's decision.
11. The Application filed by the Applicant with the Tribunal also contained its submissions.
12. The Respondent filed a reply on September 17, 2024, supporting the decision to disqualify the Applicant's bid.

13. The Applicant filed a rejoinder to the Respondent's reply on September 23, 2024.

B. ORAL HEARING

1. The Tribunal held an oral hearing via Zoom on September 25, 2024. The appearances were as follows:
 - 1) Mr. Mugume Reagan, Director, represented the Applicant.
 - 2) Ms. Elizabeth Namakula, Senior State Attorney, counsel for the Respondent.
 - 3) Ms. Tappy Namulondo, Accounting Officer of the Respondent, was in attendance.
 - 4) Ms. Ibanda Pheonah Friday, Senior Procurement Officer of the Respondent, was in attendance.
 - 5) Ms. Babirye Esther, legal officer, represented the best evaluated bidder.

C. RESOLUTION

1. The Tribunal has considered the pleadings, perused the bids, the bidding document, and the submissions. The Application raised seven issues, but there were more than seven grounds for complaint. The Respondent's reply to the Application concentrated on the Applicant's alleged lack of specific experience and having been struck off the register of companies.
2. The Tribunal has framed the issues as follows:
 - 1) Whether the Application is competent?
 - 2) Whether the Applicant's bid was rightfully disqualified?
 - 3) Whether *Semwo Construction Co. Ltd* was rightfully declared as the best evaluated bidder?
 - 4) What remedies are available to the parties?

Issue No. 1:

Whether the Application is competent?

3. The Tribunal is duty-bound to inquire into the existence of the facts to decide whether it has jurisdiction. This is because jurisdiction must be acquired before judgment is given. **See Application No. 31 of 2024, JILK Construction Limited Vs Kira Municipal Council.**
4. Sections 106(9) and 115 (1)(c) of the *Public Procurement and Disposal of Public Assets Act cap. 205*, read together with regulation 9(5) of the *Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2023* allow a bidder who believes that the Accounting Officer has a conflict of interest to file a direct Application to the Tribunal without having first filed a complaint before the Accounting Officer. See **Application No. 22 of 2024- Magobe Badiru v Sironko District Local Government** and **Application No. 18 Of 2024- Kacyber Security Technologies Ltd v Mbarara City Council.**
5. The Applicant, in paragraphs I to VII at pages 2 to 5 of the Application, pleaded that the Respondent is not impartial because of the following reasons:
 - i. The Respondent's alliance with the office of the Resident District commissioner and the chairperson LCV to intimidate the Applicant's clients to deny authentic documentation
 - ii. Denial of the Applicant to have access to the evaluation report.
 - iii. The allegation in the evaluation report that the Applicant did not buy the bid document from the Entity.
 - iv. Ignoring the Applicant's communications.
 - v. Ignoring evidence during due diligence.
 - vi. Refusal to implement orders of the Tribunal to refund the Applicant's administrative review fees.
6. Based on the above grounds, the Applicant applied directly to the Tribunal under sections 106(9) and 115 (1) (c) of the *Public Procurement and Disposal of Public Assets Act*.
7. The Tribunal has recently ruled that the existence of a conflict

of interest is a question of both law and fact. To challenge administrative action successfully on personal bias, it is essential to prove that there is a “reasonable suspicion of bias” or “real likelihood of bias”. Both the real and perceived bias count when tracing conflict of interest in a transaction. It is what a reasonable person would conclude while viewing the transaction from a distance that counts. It is related to the rule against bias. **See Application No. 18 Of 2024- Kacyber Security Technologies Ltd v Mbarara City Council and Application 18 of 2021, Abasamia Hwolerane Association Ltd v. Jinja City Council.**

8. The conduct complained of should be shown to have been inconsistent, incompatible, and prejudicial to the official duties of the office bearer. It is not enough for one to state that they believe that the Accounting Officer has a conflict of interest regarding the complaint. The basis of that belief must be shown to the satisfaction of the Tribunal. There should be evidence that the person acted in favour of self-interest as opposed to public interest and that the occurrence of the conflict of interest must be ‘clear and manifest. **See Application No. 37 of 2024 MBJ Technologies Limited v Mbarara City Council.**
9. The Applicant bears the burden of proving that the Accounting Officer has a conflict of Interest. It is important that fanciful and unmeritorious allegations of bias are discouraged and that there is proper regard for the context in which the issue arises. The Applicant must adduce cogent and reasonable evidence to satisfy the Tribunal that there was, in fact, such partiality or the actual likelihood of partiality or conflict of interest. **See Application 24 of 2024, Rhino Engineering Works Limited v Otuke District Local Government, Application No. 31 of 2023.**
10. The 2nd to 6th grounds alleged by the Applicant are acts or omissions which can be grounds for an administrative review complaint but are not a basis for imputing bias or conflict of interest on the Respondent’s part or its Accounting Officer. A

mere wrong or illegal decision is not a ground for applying directly to the Tribunal.

See ***Application No. 37 of 2024 MBJ Technologies Limited v Mbarara City Council***.

11. However, the Applicant has substantiated ground No. 1. The Respondent did not deny that it acted in concert with the Resident District Commissioner and the chairperson LCV to intimidate the Applicant's clients on September 11, 2024.
12. At the hearing, the Respondent's Senior Procurement Officer conceded that the Resident District Commissioner has been closely following this procurement. Letters were being copied to the Resident District Commissioner. There is evidence that two clients of the Applicant (Patel Impex (U) Ltd and Shree Narayan Hardware Ltd) had previously written letters to confirm that the Applicant had carried out construction work for them. However, on September 11, 2024, the same clients wrote new letters to water down the previous confirmations of construction experience.
13. The Tribunal is satisfied that there are reasonable grounds for the Applicant to believe that an administrative review complaint could not be impartially handled at the Entity level. The Applicant, therefore, had a right to apply directly to the Tribunal, and the Application is competent.
14. Issue No. 1 is answered in the affirmative.

Issue No. 2:

Whether the Applicant's bid was rightfully disqualified.

15. The Notice of Best Evaluated Bidder, the minutes of the evaluation committee, and the Evaluation Report indicated that the Respondent eliminated the Applicant's bid at the technical and commercial stage of evaluation due to its non-responsiveness to the criteria on health and safety personnel,

equipment, specific experience, historical performance, and financial resources.

16. The Tribunal has carefully examined each of the reasons as detailed below:

(a) Health and Safety personnel

17. The Respondent indicated inconsistency in staff availability; the fronted health and safety personnel distanced themselves from endorsing the curriculum vitae (CV) and the Code of Conduct for Contractor's Personnel submitted by the Applicant, and the personnel had not pursued a Health and Safety Management certificate.
18. Item 6.1[Personnel and Equipment], A.6 [Personnel] of Part 1: Section 3, Evaluation Methodology and Criteria, required a bidder to demonstrate that it will have a health and safety officer with an academic qualification of a certificate in occupational health and safety.
19. The Applicant proposed Mr. Nuwagyira William as a health and safety officer. The qualifications submitted were a Bachelor of Civil Engineering and a certificate of occupational health and safety training, conducted on November 2, 2020.
20. The minimum duration of study for the award of an academic certificate is one year. See Part III of Schedule 3 to the *Universities and Other Tertiary Institutions (Equating of Degrees, Diplomas and Certificates) Regulations, S.I No. 62 of 2007*.
21. A certificate awarded after a one-day training is not an academic certificate in occupational health and safety.
22. The Applicant's bid was rightfully eliminated because it did not meet the criteria for the availability of a qualified health and safety officer.

23. There is no need to delve into whether or not the proposed personnel distanced himself from endorsing the CV and code of conduct since he was not qualified in the first place.

b) General Site Foreman

24. Item 6.1 [Personnel and Equipment] A.2 [Personnel] of Part 1: Section 3, Evaluation Methodology and Criteria, required a bidder to demonstrate that it will have a General Site Foreman with an academic qualification of a Higher Diploma in Civil Engineering.
25. The Respondent indicated that *the fronted General Site Foreman's* contact reflected on Form 2: CV of Proposed Personnel was & is still INACCESSIBLE for *confirmation* of personnel availability.
26. The Applicant proposed Tumwebaze Immaculate as the General Site Foreman and indicated her telephone number on Form 2 (CV). She met the minimum qualifications since she holds a Bachelor's degree in Civil Engineering.
27. Regulation 26 of the *Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities) Regulations, 2023* provides that a procuring and disposing entity may undertake due diligence on a bid, at any time, from the commencement of the evaluation process to before the signing of the contract and that this test covers any area of operation of a provider or any area of the bid that the procuring and disposing entity determines requires verification or checking, in exercising due care in a procurement or disposal process.
28. However, due diligence must be carried out fairly. The Evaluation Committee determined that the Applicant's bid was non-responsive to the criteria for a General Site Foreman merely because the telephone contact was inaccessible. It is not indicated how many times the Respondent called the telephone number. In the interest of fairness, the Evaluation Committee should have contacted the bidder to clarify how to access the proposed General Site Foreman.

29. The Respondent erred when it eliminated the Applicant's bid because the proposed General Site Foreman's contact was inaccessible.

c) Equipment

30. Item 6.1[Personnel and Equipment] B.2 [Equipment] of Part 1: Section 3, Evaluation Methodology and Criteria, required a bidder to demonstrate that it shall have access to the key equipment listed (either by ownership, lease, or hire).
31. The Applicant submitted a receipt from *Joexek Service Ltd* to demonstrate that it had purchased a material hoist on January 3, 2021.
32. The Respondent indicated that *the Contact on receipts of firm-owned Equipment from Joxek Service Ltd. was INACCESSIBLE for verification of Ownership.*
33. However, as discussed in paragraph 28 above, due diligence must be carried out fairly. It is not indicated how many times the Respondent called the telephone number. In the interest of fairness, the Evaluation Committee should have contacted the bidder for information on how to access the supplier and could also have asked to view the equipment.
34. The Respondent erred when it eliminated the Applicant's bid on the ground that *the Contact on receipts of Firm-owned Equipment from Joxek Service Ltd was INACCESSIBLE for verification of Ownership.*

d) Lack of Specific Experience

35. Item 6.2.8 [Specific Experience] of Part 1: Section 3, Evaluation Methodology and Criteria required a bidder to have participated as a contractor, management contractor, or subcontractor in at least two contracts within the last five years, each with a value of at least UGX 1,500,000,000 that have been successfully and

substantially completed (at least 70 % complete) and that are similar to the proposed works.

36. The Applicant submitted two contracts to prove specific experience:
 - (i) Phased Construction (Basement, ground and first floor of a Commercial complex - Plot 55 Port Bell - Masindi, for PATEL IMPEX (U) LTD at UGX. 2,545,022,800.
 - (ii) Design and construction of a 3-floor hardware complex at Plot 24 Buruli Block 4 - Masindi for SHREE NAANARYN HARDWARE LTD at UGX. 1,930,020,130.
37. However, during due diligence, which was conducted by phone on August 23, 2024, the proprietors of the above companies reported that the Applicant provided only labour; payment for the labour offered was effected on a cash basis; all construction materials were provided by the Proprietors/Clients; and that the Applicant's director was an engineer for the projects.
38. On August 21, 2024, the Respondent's Accounting Officer wrote to the proprietors of the said clients to verify the past work performed.
39. On September 2, 2024, the clients' proprietors wrote to the Respondent's Accounting Officer to state that the Applicant was the bonafide contractor for the said works.
40. However, on September 11, 2024, the same proprietors wrote further letters to the Accounting Officer. They stated that the Applicant's director was an engineer on site, that only labour in the construction was offered and paid for in cash, and that all the construction materials on the project were provided solely by the clients.
41. The Tribunal noted that the letters of September 11, 2024, were written after the evaluation had been completed on August 30, 2024, and a Notice of Best Evaluated Bidder was issued on

September 6, 2024. Therefore, the said letters were superfluous and inconsequential.

42. The Applicant vehemently denied the allegation that it provided only labour and was paid in cash. According to the Applicant, its director provided labour in a professional capacity as an engineer and his payments were independent from the Applicant's payment terms. The Applicant has, however, not furnished proof that its director was hired in his capacity as an engineer.
43. On page 12 of the Application, the applicant also made a submission contrary to the claim that the two contracts were performed as stated in the agreements. The Applicant introduces a new consideration that the contractor was not paid on a cash basis only but also through the exchange of "prime immovable property". The property or its value was not disclosed.
44. The Tribunal concluded that the purported contracts with PATEL IMPEX (U) LTD and SHREE NAANARYN HARDWARE LTD were questionable. It is apparent that the parties had a separate understanding, which is not reflected in the purported contracts.
45. The Applicant bears the burden of proof to prove the alleged specific experience. The evidence on record casts serious doubt that the applicant executed those contracts as alleged.
46. Therefore Respondent did not err in determining that the Applicant was non-responsive to the criteria for specific experience.

e) Submission of audited accounts

47. Item 6.2.4 [Historical Financial Performance] of Part 1: Section 3, Evaluation Methodology and Criteria required a bidder to submit audited accounts or other financial statements acceptable to the Employer for the last three years to demonstrate the current

soundness of the bidder's financial position and its long-term profitability.

48. The Respondent determined that the Applicant only submitted two sets of audited books of accounts (May 2022/2023 and May 2023/2024), contrary to the required three years.
49. It is correct that the Applicant submitted books of account for two years: the year ended 31 May 2024 and the year ended 31 May 2023.
50. The Applicant was, therefore, not responsive to the requirement to submit audited books of account for the last three years.
51. The Respondent did not err when it determined that the Applicant was non-responsive to the requirement to submit audited books of account for three years.

f) Financial Resources

52. Item 6.2.6 [Financial Resources] of Part 1: Section 3, Evaluation Methodology and Criteria required a bidder to demonstrate a cash flow of UG 1,500,000,000 through Form 8 and a line of credit.
53. The Applicant submitted form 8 and a letter from PostBank indicating that the Applicant was a customer at the bank with an account number 1630068000243; that it had access to credit facilities of up to UGX 1,500,000,000.
54. When the Respondent asked Post Bank to verify the letter during due diligence, an unidentified person at the bank made a hand written endorsement that *"The account indicated in this letter doesn't exist at PostBank Uganda (1630068000243)"*.
55. The Respondent determined as follows: *"On due diligence, an amended Access to Line of credit of Ugx 1,500,000,000 was issued by Post Bank Uganda on Account no. 1630017000243 on 26th*

August 2024 and submitted to the Procurement & Disposal Unit by the Director of the Company.

Access to Line of Credit of Ugx 1,500,000,000 from Post Bank Uganda to the Company dated 26th June 2024 was issued on a NON-EXISTENT account, No: 1630068000243. Therefore, the Bidder had NO access to a Line of credit”.

56. The bank did not deny the authenticity of the letter. The only issue was the citation of a wrong account number. There is no dispute that the bank had written a letter to confirm access to a line of credit to the Applicant. The mistake in the account number could have been cured through clarification or waiver. Indeed, as indicated in the evaluation report, the bank issued another letter with the correct account number.
57. The Respondent erred when it eliminated the Applicant’s bid on account of lack of access to a line of credit.

g) Striking the company off the register

58. The Respondent claimed that the due diligence exercise noted that the company featured on the struck-off list of companies at Uganda Registration Services Bureau dated 30 August 2023.
59. The Applicant duly submitted a certificate of incorporation and passed the eligibility criteria. The Respondent did not conduct an official search with the Registrar of Companies to determine that the Applicant had been struck off as of August 2024. The allegation of striking off was based on an old 2023 unverified document.
60. The Respondent erred when it disqualified the Applicant’s bid on the ground that it had been struck off.

Issue No. 3:

Whether Semwo Construction Co. Ltd was rightfully declared as the best evaluated bidder?

61. The Applicant complains that:
- a) Due diligence was never carried out on the best-evaluated bidder.
 - b) The best-evaluated bidder was awarded on an arithmetically corrected bid price contrary to the price read out during the bid opening
62. The Tribunal shall proceed to analyse the evidence to determine whether the Respondent erred as alleged.

a) Due diligence

63. The Respondent averred that due diligence was conducted “from precedence on past performance”. There was no specific due diligence on the best-evaluated bidder. The Tribunal has seen the report on due diligence dated August 23, 2023. The report merely lists the projects submitted as experience, but there is no indication that the Respondent conducted due diligence on *Semwo Construction Co. Ltd.*
64. However, due diligence is not a legal requirement. It can be carried out at any stage. Failure to carry out due diligence may be inadvisable, but it is not fatal to the procurement process.
65. ITB 39 of the Bidding Document requires post qualification to determine whether the best-evaluated bidder is qualified to perform the contract satisfactorily. *Regulation 11 of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2023* requires post-qualification to be carried out on the best-evaluated bidder in accordance with the criteria in the bidding document. Unfortunately, the bidding document in the instant case did not specify any post-qualification criteria.

b) Correction of bid price

66. The bid price of *Semwo Construction Co. Ltd.* was **UGX. 2,083,772,579.**

67. The evaluation report indicates that the bid price was corrected and changed to UGX. 2,050,311,076, which was the final award price.
68. ITB 32.4 of the Bidding Document permits the correction of arithmetic errors, subject to the bidder's acceptance of the correction.
69. Regulation 21(2)(a) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014* specifically provided for the correction of arithmetic errors.
70. Regulation 21 of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2023* does not specifically provide for correcting arithmetic errors. However, regulation 21 (1) (c) allows the Evaluation Committee to make adjustments for any deviation that is not a material deviation, using Regulation 7. Regulation 7 permits the correction of non-conformities and omissions which are not material.
71. Regulation 21(2) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2023* mandates the Evaluation Committee to conduct a financial comparison of the bids to determine whether the financial bids are complete and make adjustments for any deviation that is not a material deviation using regulation 7.
72. Regulation 12 (1) (c) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2023* requires the Evaluation report to indicate the evaluated price of each bid, following any corrections or adjustments to the price.
73. Form 14 for the Evaluation Report under technical compliance method and Form 16 for the Technical Evaluation Report under the Quality and Cost Based Evaluation as prescribed under the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2023*, still contains the following phrase “describe

the correction of **any arithmetic errors**, application of any discounts, adjustments made for any nonmaterial nonconformities, errors or omissions, conversion to a common currency and application of any margin of preference”.

74. Therefore, in determining whether the financial bids are complete, an Evaluation Committee may subject financial proposals to verification to ascertain the accuracy of unit prices, quantities, total prices, words, and figures used. Where non-conformities and omissions are detected in the financial bid, then the Evaluation Committee may determine that the financial bid is not complete and then go ahead to subject it to the procedure prescribed in regulation 7 in accordance with the instructions to bidders in the bidding document.
75. The wide discretion given to the Evaluation Committee under regulations 7 and 21 of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014* is wide enough to cover the correction of arithmetic errors.
76. In the instant case, the details of the arithmetic error are not specified in the Evaluation Report. However, on August 8, 2024, the Secretary of the Evaluation Committee wrote to *Semwo Construction Co. Ltd.* seeking consent to an arithmetic correction of the bid price from UGX. 2,083,772,579 to UGX. 2,050,311,076. There is no reply on file from the bidder. However, the bidder has not complained and can be taken to have acceded to the correction. The irregularity, if any, is not fatal.
77. Issue No. 3 is resolved in the affirmative.

Issue no. 4:

What remedies are available to the parties?

78. The Applicant was not responsive to the requirement for a health and safety officer, specific experience, and audited

accounts. To that extent, the applicant's bid was rightfully disqualified.

79. The alleged non-refund of administrative review fees as ordered by the Tribunal in Application No. 26 of 2024 is a matter for enforcement but not re-litigation in this Application.
80. The Applicant is not entitled to any remedy.

D. **DISPOSITION**

1. The Application is dismissed.
2. The Respondent may continue with the procurement to its logical conclusion.
3. The Tribunal's suspension order dated September 12, 2024, is vacated.
4. Each Party is to bear its own costs.

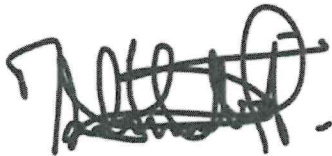
Dated at Kampala this 1st day of October, 2024.



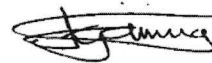
**NELSON NERIMA
MEMBER**



**GEOFFREY NUWAGIRA KAKIRA
MEMBER**



**PAUL KALUMBA
MEMBER**



**CHARITY KYARISIIMA
MEMBER**



**KETO KAYEMBA
MEMBER**



**ENG. CYRUS TITUS AOMU
MEMBER**