

THE REPUBLIC OF UGANDA

**IN THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
APPEALS TRIBUNAL AT KAMPALA
APPLICATION NO. 17 OF 2021**

SAMANGA ELCOMPLUS JV ===== APPLICANT

VERSUS

**UGANDA ELECTRICITY DISTRIBUTION
COMPANY LIMITED (UEDCL) =====RESPONDENT**

**APPLICATION FOR REVIEW OF THE DECISION OF THE ACCOUNTING
OFFICER OF UGANDA ELECTRICITY DISTRIBUTION COMPANY
LIMITED (UEDCL) IN RESPECT OF THE TENDER FOR DESIGN, SUPPLY,
INSTALLATION AND COMMISSIONING OF A REMOTE POWER
CONTROL MONITORING SYSTEM (REF: UEDCL/SUPLS/2020-21/10071)**

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

DECISION OF THE TRIBUNAL

A. Background

1. On 25th August 2020, Uganda Electricity Distribution Company Limited (UEDCL) (the Respondent/Entity) initiated the procurement for design, supply, installation and commissioning of a remote power monitoring and control system at an estimated cost of UGX 1,900,000,000.
2. On 7th October 2020, the Contracts Committee approved the use of the open international bidding procurement method, the bidding document and the evaluation committee.
3. On 8th October 2020, the Entity advertised the procurement in the *New Vision* and the *East African* newspapers with a deadline for bid submission of 11th December 2020; and the solicitation document was made available to the bidders on the same date of the advert.
4. From 2nd – 17th November 2020, the Entity conducted site visits to the different 8 (eight) territories. On 2nd December 2020, the Entity held a pre-bid meeting in the presence of bidders' representatives.
5. On 4th December 2020, the submission deadline date was extended to 19th January 2021.
6. On 19th January 2021, the Entity received, opened 7 bids from the following bidders with their respective bid prices as read out: Samanga Elcomplus JV-UGX 1,816,663,502; CYG Sunri Company Ltd- UGX 1,837,058,834; JV NR-Orion-UGX 3,163,826,267; International Energy Technik (U) Ltd-UGX 10,802,554,000; MFI Document Solutions-Etap Automation JV-UGX 4,752,780,400; Scada Innovations-Blue Crane Communications JV-UGX 1,641,816,565; Aircom System Ltd-Joohitha Power JV- UGX 3,509,273,599.
7. During the first evaluation process, out of the seven bidders, two bidders were eliminated at the preliminary evaluation stage while three bidders (including the Applicant) were eliminated at the detailed technical evaluation stage.
8. The reason given for the elimination of the Applicant's bid during the first evaluation process was that out of the six project references provided, only three had some reference on control of power supply to oil and gas pipeline systems

which do not meet requirements of implementation of a power network control system as required in the solicitation document.

9. The first evaluation report dated 5th February 2021 ranked NR-Orion JV as the lowest price bid with an evaluated total of UGX 3,163,826,202 inclusive of taxes.
10. On 17th February 2021, the Contracts Committee awarded the contract to JV Orion – NR Joint Venture at UGX 3,163,826,202 inclusive of VAT.
11. On 24th February 2021, the Entity displayed the first best-evaluated bidder notice with a removal date of 10th March 2021.
12. On 26th February 2021, Samanga Solutions Ltd applied for the first administrative review before the Accounting Officer of the Entity. They contended that their presented experience was in line with the technical criteria in the bidding document.
13. The Accounting Officer rejected the application in a decision dated 5th March 2021.
14. On 5th March 2021, Samanga Solutions Limited applied for administrative review before the Public Procurement and Disposal of Public Assets Authority. They reiterated their contention that the attachments to the bid showing proof of experience was compliant with the requirements of the tender. They also attached a document further showing user-case scenarios of the implementation of SCADA systems done by their joint venture partner, *Elcomplus*.
15. On 7th April 2021, the Authority rejected the application for administrative review and advised the Entity to proceed with the procurement process.

B. First Application to the Tribunal

1. Samanga Elcomplus JV (The Applicant), being dissatisfied with the decision of the Authority, lodged Application No. 4 of 2021 before the Tribunal on the 23rd of April 2021 to challenge the decision of the Authority.
2. The Application raised 1 ground i.e.;

Whether the Authority erred in finding that the bidder did not present and attach in its bid in hard copy form, proof of experience for the design, supply and implementation of a remote monitoring and control system for power distribution in line with Part 1: Section 3, Clause 6.3, on Firm experience, listed under the Technical Criteria in the Standard Bidding Document.

3. The Tribunal issued its decision to Application No. 04 of 2021 on 7th May 2021.
4. It was our finding that the references submitted by the Applicant in its bid demonstrated successful completion of similar projects as stipulated in the evaluation criteria. That it was therefore erroneous for the Respondent to discount the Applicant's experiences gained in the oil and gas pipeline systems. That the Applicant was therefore unfairly eliminated from the bidding process merely because its similar projects were in the oil and gas sector and were also not directly related to power distribution. That the Entity can, if it so wishes, subject the Applicant's six references to a due diligence to confirm similarity of projects and successful completion.
5. In the result, the first Application was allowed in part; the administrative review decisions of the Authority and that of the Entity's Accounting Officer were set aside; the Entity was directed to conduct a fresh technical evaluation of the 5 bids which had passed the preliminary evaluation; the Entity was directed to conduct the re-evaluation of the bids strictly in accordance with the applicable legal provisions and the criteria in the Bidding Document; and the Entity was ordered to refund the administrative review fees paid by the Applicant.

C. Re-evaluation

1. At preliminary examination during the re-evaluation, two bidders out of seven were found non-compliant i.e. CYG Sunri Company Ltd and International Energy Technik (U) Ltd.
2. Five bidders passed the preliminary evaluation and proceeded to the detailed technical evaluation stage. At the technical evaluation stage, two (2) out of the five bidders were found substantially responsive i.e. MFI Document Solutions-Etap Automation JV and NR-Orion JV, while three bidders namely; Samanga-Elcomplus JV, SCADA Innovations-Blue Crane JV and Aircom-Joohitha Power JV were found non responsive.

3. The Two (2) responsive bidders at the technical evaluation stage, that is, MFI Document Solutions-Etap Automation JV and NR-Orion JV proceeded to the financial evaluation stage.
4. The Evaluation Committee recommended a contract award to NR-Orion JV (Best Evaluated bidder) for the Design, Supply, Installation and Commissioning of a Remote Power control and Monitoring system at a total evaluated bid price of UGX 3,163,826,202.
5. A best evaluated bidder notice was issued on 20th August 2021 with a removal date of 2nd September, 2021.
6. According to the best evaluated bidder notice, the Applicant's bid (Samanga) failed at technical evaluation stage because the bidder was found non-responsive to the due diligence process of the submitted bid references. That no single response was received from the project references.

D. Second Application to the Accounting Officer for Administrative Review

1. The Applicant being dissatisfied with the outcome of the procurement process applied to the Accounting Officer of the Respondent for administrative review vide a letter dated 2nd September 2021. They contended that due to the prevailing COVID-19 conditions, none of their partners was able to host the entity's team. The Applicant averred that they provided the option to carry out due diligence using an online platform and that remote due diligence should be sufficient.
2. The Respondent's Accounting Officer dismissed the application on 9th September 2021 on the ground that contrary to section 90(1a) of the Public Procurement and Disposal of Public Assets Act, 2003, the prescribed fee had not been paid.

E. Second Application to the Tribunal

1. The Applicant being dissatisfied with the administrative Review decision of the Respondent lodged the instant application with the Tribunal on 23rd September 2021.
2. The Applicant averred that it was not a requirement under the criteria for a physical visit/interaction neither was the Applicant under duty to make arrangements for the Respondent's committee to have a smooth due diligence exercise.

3. That the Applicant honored the request and indeed consulted its partners and due to prevailing COVID-19 conditions in their country (Russia) none of them was able to physically host the UEDCL team. That the Applicant provided the option to carry out due diligence remotely using an online platform.
4. That none of the bidders were requested for a physical interaction with the project owners in regard to the project references submitted except the Applicant.
5. The Applicant made this application on the following grounds:
 - a. Whether the Applicant was under duty to make arrangements for the respondent's committee to have a smooth due diligence exercise?
 - b. Whether the decision by the Respondent that the Applicant was non-responsive to the due-diligence process was proper?
 - c. Whether the entity erred in law and fact when it conducted an evaluation to award the contract to NR-Orion joint venture.

F. Reply to the Application

1. The Respondent stated that the application for administrative review made to the Accounting Officer was bad in law because it was made without payment of the prescribed fee.
2. That due diligence on this procurement was made in order to comply with the Ruling of the Tribunal made on the 7th May 2021 vide Application No. 4 of 2021, Samanga Elcomplus JV versus Public Procurement and Disposal Authority and Uganda Electricity Distribution Company Limited. The Tribunal ruled that the bids be re-evaluated in accordance with the applicable legal provisions and stated criteria in the bidding document.
3. That the performance of due diligence was among the methodology and criteria set for evaluation in the Bidding document.
4. That the evaluation committee found it necessary to carry out due diligence on the certificates and projects submitted by the three bidders who had qualified to the technical evaluation stage. The evaluation committee wrote letters to the

project owners/references that were submitted by the bidders in their bid proposals. The letters were all transmitted by email on the addresses indicated on the completion certificates.

5. That none of the six references as indicated on the Applicant's completion certificates replied. The Respondent made several phone calls on the telephone numbers indicated on the completion certificates but did not receive any replies to the inquiry for information. In the absence of such information, the Respondent could not confirm the technical experience of the applicant.
6. That the evaluation committee wrote letters to the 3 bidders who had qualified for technical evaluation to inform them that physical due diligence of the projects submitted for firm experience was to take place during the month of August 2021. The letters requested the bidders to contact the project owners to seek acceptance of the visit by the Respondent and to send invitation letters for purposes of visa applications.
7. That all the 3 bidders responded advising that due to COVID 19 related travel restrictions arrangements could not be made readily to some countries.
8. That the evaluation committee considered the option of virtual due diligence proposed by the 3 bidders and found that it would not be possible to authenticate that the project demonstrated on a screen was the actual physical location of what the bidder had submitted. The evaluation committee therefore waived both the option for physical travel to inspect and the option for virtual inspections and only used the available documents to confirm the projects carried out by the bidders, from the replies obtained from the project owners / references.
9. The Respondent contended in the alternative that virtual inspections were not part of the methodology for carrying out due diligence and the Respondent was under no obligation to accept such proposal from the applicant.
10. That in the absence of confirmation letters from its project owners/ references, the evaluation committee found that the Applicant's claim for successful similar projects could not be verified. The evaluation committee accordingly found the Applicant's bid non-responsive and submitted the evaluation report, including the due diligence report, to the Contracts Committee.
11. The Respondent prayed that the application be dismissed with costs.

G. Written submissions

Applicant

1. The Applicant submitted that Regulation 34(1) of the Public Procurement and Disposal of Public Assets Regulations, 2003¹ [SIC] provides that a Procuring and disposing entity may at any time during a procurement and disposal process carry out a due diligence test on a bidder or a provider. Regulation 34(2) further provides that a due diligence test may cover any areas of a provider's operations that a procuring and disposing entity determines requires verification or checking in exercising an obligation of due care in a procurement or disposal process.
2. On 30th June 2021, the Respondent wrote a letter to Samanga Solutions limited instead of Samanga ELcomplus JV, indicating that the evaluation committee was conducting due diligence on the project references that were submitted by the applicant in their bid.
3. The Respondent chose to do a physical visit and verification for proper appreciation for 3 projects during the month of August 2021.
4. In the said letter dated June 30th June 2021, the Respondent requested the applicant to make arrangements for the committee to have a smooth due diligence exercise. The Respondent further requested the Applicant to arrange with the Applicant's clients i.e. the project owners to ensure that they accept the visit by the evaluation committee and also to obtain invitation letters for the committee members scheduled to travel to Russia.
5. Whereas Regulation 34 cited above provides that the due diligence shall be carried out by the procuring and disposing entity, contrary to the law, the Respondent casted the burden of ensuring a smooth due diligence exercise on the Applicant yet it is a duty to be carried out by the entity as per the Public Procurement and Disposal of Public Assets Regulations, 2003 [SIC].

¹ The Public Procurement and Disposal of Public Assets Regulations, 2003, cited by the Applicant's counsel, were repealed by the Public Procurement and Disposal of Public Assets Regulations, SI No. 6 of 2014

6. The Respondent erred in law and in fact when it requested the Applicant to make arrangement for the evaluation committee to have a smooth due diligence exercise which is contrary to Regulation 34(1) and (2) of the PPDA Regulations 2003 [SIC].
7. The best evaluated bidder notice detailed NR Orion Joint Venture as the best evaluated Bidder and the Applicant was knocked out at the technical evaluation stage because it was found non responsive to the due diligence process of the submitted project references and no single response was received from the project references. Under Regulation 34(1) and (2) it is purely the duty of the procuring and disposing entity to carry out a due diligence test on a bidder or a provider and not the bidder. So the reason of non-responsiveness to the due diligence process is contrary to the law.
8. That the correspondence from LLC Gazprom Transgas Tomsk indicates that the said company considered the request by the Respondent to visit, however declined to permit a physical visit due to the prevailing epidemiological situation on the territory of company's activities and instead suggested a video conference with the participation of representatives of the company and even for other projects, it was suggested that a video conference should be done due to the prevailing COVID-19 pandemic of which at the time both Uganda and Russia were under total Lockdown.
9. Despite all challenges of the COVID-19 Pandemic and total lockdown, there was communication between the parties and specially Doreen Ninsima who was part of the due diligence team of the Respondent and was always in the know of all information regarding the said intended physical visits.
10. That it is not true that the Applicant was non-responsive to the due diligence process of the submitted project references.
11. That Section 34 of the Public Procurement and Disposal of Public Assets (Amendment) Act, 2021 repealed sections 90 and 91 of the principal Act. The Respondent's accounting officer relied on a repealed law to discuss the applicant's application for review which was no longer operative.
12. That Section 90(1) (a) requires a complaint to be in writing, submitted to the accounting officer of the entity with a prescribed fee. That the application was in writing, duly reviewed by the Accounting Officer. On the 9th September 2021, the Applicant wrote a letter to the Accounting Officer explaining

payment of administrative review fees, that the application was based on the previous fee payment which was not refunded to the Applicant despite of an order to do so by the Tribunal.

13. That although the Respondent's Accounting Officer dismissed the Applicant's application for review under repealed law, it was still in conformity with the requirements of such an application to the Accounting Officer.
14. The Applicant prayed that the Tribunal finds the said decision of the Accounting Officer a nullity.

The Respondent

15. The Respondent submitted that due diligence on this procurement was made in order to comply with the Ruling of the Tribunal made on the 7th May 2021 vide Application No. 4 of 2021, *Samanga Elcomplus JV versus Public Procurement and Disposal Authority and Uganda Electricity Distribution Company Limited*. The Tribunal ruled that the bids be re-evaluated in accordance with the applicable legal provisions and stated criteria in the bidding document.
16. That the performance of due diligence was among the methodology and criteria set for evaluation in the Bidding document. Section 6.3 on Firm Experience bullet 3 indicated that that the firm will be required to have completed at least four similar projects and completion certificates were required. The criteria further indicated that due diligence, would be carried out where necessary.
17. That the evaluation committee intended to carry out due diligence in 2 phases. The first phase was due diligence on documents submitted by the bidders and the 2nd phase was physical visits to project sites.
18. That the Respondent cited Regulation 34 of the Act² [SIC] on due diligence and highlighted the objective of due diligence.
19. That the Respondent contacted the references that were submitted by the three bidders including the Applicant, drawn from their past project certificates, in their bid submissions.

² The correct provision is regulation 31 of the *The Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities) Regulations, S.I No. 7 of 2014*

20. That whereas responses were received from project references for 2 bidders, none was received for the Applicant's references in respect of verification or authentication.
21. That the Applicant was not responsive on the document due diligence and verification phase.
22. That whereas it was the intention of the Respondent to carry out physical verification of project sites indicated by the 3 bidders in their responses, the visits could not be done, due to COVID 19 travel restrictions. The requirement was thus waived for all bidders, including the Applicant. The Applicant's assertion that it should not have been told to arrange for physical inspection of its sites is therefore irrelevant. The arrangement expected at that stage was that the bidders would contact their referees to send invitation letters for visa processing and also to obtain permission to visit the project sites.
23. That the emails forwarded to the Respondent were in respect of the travel restrictions prohibiting physical site visits and none of them confirmed or verified the completion certificates as required by the due diligence. The emails were not addressed to the Respondent and were simply forwarded by the Applicant.
24. That the Applicant's non-responsiveness was as a result of its referees failing to respond to the questions and had nothing to do with physical visits.
25. That the Applicant was rightly eliminated by the evaluation committee of the Respondent on technical ground because the experience submitted and the corresponding projects and completion certificates submitted could not be verified during the due diligence on the experience of the bidders.
26. That the proposal by the 3 bidders for virtual or online due diligence instead of physical visits was considered by the evaluation committee and it was found that the method was insufficient and could not deliver the intended benefits. The committee found that it was not possible to confirm that the project demonstrated on line was the actual project indicated in the references submitted.
27. That the application for administrative review made to the Accounting Officer of the Respondent was bad in law because it was made without payment of the prescribed fee under the Public Procurement and Disposal Act [SIC]. Accordingly, the Respondent dismissed the application. The application for

administrative review did not comply with section 33 (3) (a) of the 2021 Amendment of the PPDA Act.

28. That the Respondent prayed that the Tribunal rules that the evaluation of the bids was properly carried out in accordance with the Public Procurement and Disposal Act [SIC] and Regulations made thereunder and the applicant was non responsive; that the due diligence was properly carried out; and that the application be dismissed with costs.

The Best Evaluated Bidder

29. The best-evaluated bidder submitted that this application holds no merit due to non-payment of administrative review fees to the Respondent. That the first application where the Tribunal ordered a refund of administrative review fees under application No.4 is deemed separate in law.
30. That the Respondent is/was at liberty to probe the provided bid responses to confirm compliance with the evaluation criteria.
31. That all the reference letters provided by the Applicant were not translated by a recognized Ugandan Translation institution such as Makerere Institute of Languages. In addition, all the letters provided appear to be scanned copies emailed in by the Applicant and not original copies communicated to the Entity directly.
32. That the responses received were not only non-compliant but also for unmentioned projects and therefore no responses were provided.
33. That the Entity conducted a lawful evaluation of bids according to the Bid Document and NR Orion Joint venture emerged fully compliant with the technical evaluation and quoted a price lower than all other responsive bidders.

H. The oral hearing

1. The Tribunal held an oral hearing on 30th September 2021 via zoom software. The appearances were as follows:
2. Hasfah Nanteza, Counsel representing the Applicant. In attendance, Mzee Juma Binehe, Engineer for Samanga El Complus Ltd
3. Esther Naikoba Mulyagonja, Company Secretary, Dorothy Mubiru, Principal Legal Officer of the Respondent. In attendance, Paul Mwesigwa, Accounting Officer, Moses Mwine, Head Procurement and Disposal Unit; Moses Awateh, Chief Logistics Officer, Protaze Tibyakinura, James Moses Omara-Ogwang,

Doreen Keisha Ninsima and Shibuta Mark, all being members of the Respondent's Evaluation Committee.

4. Lauren Baguma, Internal Counsel for NR Orion JV. In attendance, Hanlin Liu, the General Manager, Paul Muhumuza, Nabachwa Isabel, Jason Wang, George Ding; all being officers of the Best Evaluated Bidder.
5. The parties highlighted their written submissions and provide clarifications.

I. Resolution by the Tribunal

Issues

1. The applicant in the application raised three substantive issues to which the parties and best-evaluated bidder made replies and written submissions. The Tribunal reframed the issues as follows;
 - a. Whether the accounting officer of the Respondent erred in law and fact when he dismissed the Applicant's compliant for non-payment of fees?
 - b. Whether the decision by the Respondent that the Applicant was non-responsive to the due-diligence process was proper?
 - c. What remedies are available to the parties?

Issue 1:

Whether the Accounting Officer of the Respondent erred in law and fact when he dismissed the Applicant's compliant for non-payment of fees.

2. Section 89 (1) of the *Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021* 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"
3. Section 89(3)(a) of the *Public Procurement and Disposal of Public Assets (Amendment) Act as amended by Act 15 of 2021* 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.
4. Regulation 11 of the *Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014* 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 first column.

5. Payment of fees for an administrative review is therefore mandatory. The Applicant did not accompany its application to the Accounting Officer with the prescribed fee. The Applicant did not also make any inquiry about the amount and mode of payment of the administrative review fee.
6. After dismissal of the application, the Applicant wrote to the Accounting Officer on 9th September 2021 and claimed that the “current” application was based on the previous fee payment that was not refunded after the Tribunal had given instructions for refund.
7. We do not agree that the new administrative review application to the Accounting Officer was based on the previous fee payment that was not allegedly refunded. This was a new application which attracted separate payment of fees.
8. The alleged non-refund of previous fees as ordered by the Tribunal was a separate matter which could be handled under appropriate procedure for enforcement of Tribunal decisions.
9. In any case the suggestion to apply the “non-refunded fees” was made after the application had already been dismissed. There was no pending application to consider.
10. We note that the Accounting Officer of the Entity dismissed the complaint of the Applicant for having failed to comply with the requirements of section 90(1a) of the *Public Procurement and Disposal of Public Assets Act 2003*.
11. However, section 90(1a) of the *Public Procurement and Disposal of Public Assets Act 2003* as cited by the Entity was repealed by section 34 of the *Public Procurement and Disposal of Public Assets (Amendment) Act 15 of 2021*. The appropriate provision for payment of administrative review fees is section 89(3) (a) of the *Public Procurement and Disposal of Public Assets Act* as amended by Act 15 of 2021.
12. Be that as it may, the Tribunal has consistently held and guided that upon receipt of a complaint, the Accounting Officer is duty bound to advise the Applicant on the modalities for payment of administrative review fees. See: ***OBON INFRASTRUCTURE DEVELOPMENT JV VS. PPDA AND MBARARA CITY, APPLICATION NO.5 OF 2021***, and ***SAMANGA ELCOMPLUS JV VS. PPDA & UGANDA ELECTRICITY DISTRIBUTION COMPANY LIMITED, APPLICATION NO.4 OF 2021***.

13. Indeed, the Authority issued Circular No. 3 of 2015 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.
14. In any case, late payment of filing fees is not necessarily fatal, and even actual non-payment of court fees has been held not to be fatal so long as the proper fees can be accessed and paid. See: **LAWRENCE MUWANGA v STEPHEN KYEYUNE (Legal Representative of Christine Kisamba, deceased) SUPREME COURT CIVIL APPEAL NO. 12 OF 2001.**
15. The Accounting Officer of the Entity was under a legal duty to guide the Applicant on the requirement and modalities for payment of the prescribed administrative review fees. Dismissal could only ensue if the Applicant had failed or refused to pay the fees after being so guided.
16. In the circumstances, the Accounting Officer of the Respondent erred in law and fact when he dismissed the Applicant's compliant for non-payment of fees.
17. **Issue no. 1 is answered in the affirmative.**

Issue 2: Whether the decision by the Respondent that the Applicant was non-responsive to the due-diligence process was proper?

18. Regulation 7(1) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014*, provides that the evaluation of a bid shall be conducted in accordance with the evaluation criteria stated in the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014 and in the bidding document.
19. Further, under 7(1) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014*, an evaluation committee shall not, during an evaluation, make an amendment or addition to the evaluation criteria stated in the bidding document, and shall not use any other criteria other than the criteria stated in the bidding document.
20. The evaluation methodology used in this procurement was the Technical Compliance Selection (TCS) Methodology. The detailed evaluation criteria in this Application are deduced from the Bidding Document (pages 32-37) Part 1: Section 3 Evaluation Methodology and Criteria, which stated that the evaluation

shall be conducted in three sequential stages namely;

- a) *a preliminary examination to determine the eligibility of the bidders and the administrative compliance of the bids received;*
- b) *a detailed evaluation of the bids to determine their technical responsiveness of the bids that are eligible after the preliminary examination carried out under paragraph (a); and*
- c) *a financial comparison of the bids that are eligible after the detailed evaluation carried out under paragraph (b) and to determine the best evaluated bid;*

21. Section 3 (Detailed Evaluation Criteria) of the Bidding Document provides in item 6.3 (Firm experience) as follows:

- *Ten (10) years' experiences in Design, supply and implementation of power network control systems*
- *Firm will be required to have successfully completed at least four (4) similar projects. Attach copies of completion certificates. **Where necessary UEDCL will conduct due diligence.***
- *In case of joint venture, one of the partners in the JV must fulfil all the conditions specified in bullets one and two above.*

22. Regulation 31 of *The Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities) Regulations, S.I No. 7 of 2014*, provides that a procuring and disposing entity may at any time during a procurement and disposal process carry out a due diligence test on a bidder or a bid. Further, that a due diligence test shall cover 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.

23. The Authority issued a *Circular on Conducting Due Diligence on Information submitted By Bidders*, dated 7th August 2014. Accounting Officers were advised that due diligence exercise informs the evaluation process and should be undertaken before the award of the contract to verify information included in the bid document and conform the capacity of the bidder to handle the procurement. Accounting Officers were further advised to ensure that due diligence is undertaken through verification of documentation submitted by bidders.

24. It follows that the Respondent was entitled to carry out due diligence on the Applicant in respect of any area of operation of the Applicant or any area of the bid that the Respondent determined to require verification or checking, in exercising due care in the procurement process. The Respondent was therefore justified to carry out due diligence on the completion certificates to assess whether the Applicant had successfully completed the claimed similar projects as per the evaluation criteria in of the Bidding Document.

25. **Annex 1** to the Evaluation Report is a *due diligence report for the submitted project references by the bidders.*

The due diligence report stated that the bidders were required to have successfully completed at least four (4) similar projects. They were required to attach copies of completion certificates and where necessary, UEDCL would conduct due diligence. The evaluation committee therefore decided to conduct due diligence as outlined below:

Objective of the criteria:

To cross check on and authenticate submissions made by the bidders.

To confirm physical presence of the project and the involvement of the bidder in its execution.

Methodology:

Write to the contacts provided by the bidders in the reference letters/completion certificates.

Physically assess the projects presented as performed and completed by the bidders.

Due diligence parameters:

1. *Write to the contacts provided by the bidders in the reference letters/completion certificates and the intention to do due-diligence*

a) *Confirm the existence of the client*

b) *Confirm the Authenticity of the completion certificate/reference letter*

c) *Confirm project completion certificate/reference letter (attached) was executed by the Bidder*

d) *Scope of works executed, cost and completion period*

2. *Physically assess the projects presented as performed and completed by the bidders.*

a) *Verify the existence of the client*

- b) Verify the referenced project completion certificate was executed by the Bidder*
- c) Verify scope of works executed, cost and completion period*
- d) Verify System key features - Remote Monitoring and Control capability - Nature of communication infrastructure used from remote nodes to control centre - Nature/Types of Nodes monitored/controlled*
- e) Obtain System Architecture*

26. According to the evidence produced by the Respondent, due diligence letters were sent to the references of all the 3 bidders who qualified for detailed technical evaluation.
27. In the case of the Applicant, it had submitted proof of experience of its joint venture partner Elcomplus, in form of reference letters from Sakhatransneftgaz Joint Stock Company, PJSC Gazprom, Khimprom PJSC, Open Joint Stock Company Tomskneft, Oil Joint Stock Company AKI-OTYR and Tomskneft Joint Stock Company.
28. The Respondent issued a letter dated 26th May 2021 which it addressed to each of the above references. The letters are in Annexure “R9” to the Respondent’s reply to the Application. The letter sought confirmation of the following facts:
 - a) The authenticity of the submitted completion certificates;
 - b) The summary of the project scope done;
 - c) The project cost;
 - d) Confirm if Elcomplus was a main or sub- contractor for the project;
 - e) The project commencement and completion dates;
 - f) The overall assessment of contract performance during the execution of the project (was the project completed in time without compromising quality).
29. The references were asked to provide the above confirmation /information and treat the enquiry with the confidentiality it deserves. The letter also stated that on receipt of the response, the entity would plan a visit (if necessary) to the project for further confirmation and appreciation.
30. The letters were sent as attachments to emails addressed to the email addresses indicated in the respective reference letters submitted by the Applicant in its

bid. The emails are part of Annexure “R9” to the Respondent’s reply to the Application.

31. An email communication is a valid data message as defined in the *Electronic Transactions Act 8 of 2011*. Under section 8(2) of the Act, a person seeking to introduce a data message or an electronic record in legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.
32. In the instant case, the Respondent has produced the printed emails addressed to the email addresses indicated in the respective reference letters submitted by the Applicant. The emails log was also produced. The Applicant has not disputed the email addresses indicated. The Applicant has not produced any evidence from the addressees to say that they did not receive the emails. There is no explanation as to why the Applicant’s references did not respond to the due diligence letters.
33. According to the report, there was no response from all the six (6) references of the Samanga-Elcomplus JV to the due diligence letters. All six (6) of the references of the NR-Orion JV responded positively to the due diligence letters. Three (3) of the seven (7) references of the MFI – Etap JV responded positively to the due diligence letters.
34. With regard to physical due diligence, the Chairman of the Evaluation Committee in a letter dated 30th June 2021, informed Samanga Solutions Limited that three of the submitted project references had been selected for a physical visit and verification for proper appreciation. These were OJSC Tomskneft, Tomskneft JSC and Khimprom. Samanga Solutions Limited was requested to make arrangements for the committee to have a smooth due diligence exercise, arrange with the clients (project owners) to accept the visit, and to obtain invitation letters for the evaluation committee members to enable them apply for visas. Samanga Solutions Limited was accordingly asked to confirm readiness of the project owners to receive the team, to issue invitation letters and any other required documents for inland travel while in Russia.
35. This letter did not require the Applicant to facilitate the Respondent to carry out conduct due diligence. It is obvious that the evaluation team merely wanted Samanga Limited (the joint venture partner of Elcomplus) to liaise with its clients to accept a visit from the evaluation committee and also issue invitation letters to enable the members of the evaluation committee to apply for visas

from the Russian Embassy. To that extent, we are unable to uphold the applicant's complaint that the Respondent cast the burden of ensuring a smooth due diligence exercise on the Applicant.

36. Three references of the Applicant namely, *Oil Joint Stock Company Aki-Otyr* in a letter dated July 16, 2021, *LLC Gazprom TRANSGAZ Tomsk* in a letter dated 21st July 2021 and *JSC Tomskneft VNK* in a letter dated July 2, 2021, all indicated that due to COVID 19 prevention measures, it was not possible to physically visit any of their facilities. *LLC Gazprom TRANSGAZ* offered to conduct a video conference with a video teleconference with representatives of the Respondent.

37. The due diligence report details the responses from bidders on physical due diligence arrangements as follows:

Samanga-Elcomplus JV initially provided a travel itinerary (via-email) on 13 July 2021.

Two weeks later Samanga-Elcomplus JV communicated that the physical due diligence had been halted by the Russian Government due to Covid-19 global crisis.

Samanga-Elcomplus JV offered to substitute the physical due diligence with online/virtual due diligence.

NR-Orion JV responded on 5th July 2021 detailing the travel requirements set by the Chinese Government due to the Covid-19 global crisis. This showed that it was possible to have the physical due diligence done but required at least 52 days of quarantine for each reference to be visited.

NR-Orion JV in response on 26th July 2021 proposed the project reference in Congo as viable alternative to the Committee's requested project References.

MFI-Etap JV in response on 5th July 2021 detailing travel restrictions due to the global Covid-19 pandemic but offered alternative Project references(submitted in the bid) for physical due diligence. When contacted on the alternatives, they responded on 26th July 2021 proposing virtual system demonstrations rather than the requested physical due diligence visit to any of the Project References.

38. The due diligence report continues to state that the evaluation committee analysed all the responses from the bidders and the referenced clients and made the following decisions:

The committee agreed that the proposed alternative of online/virtual system demonstrations could be subject to manipulation and hence it would not be

possible to authenticate that the demonstrations would be for the actual project executed. Therefore, the committee agreed to reject the proposed online/virtual system demonstrations. The committee agreed to waive the physical visits for due diligence on the various submitted project references. Responses received from all the three bidders indicated that physical visits were going to be difficult as a result of the restrictions imposed by the COVID-19 pandemic. The committee hence opted to concentrate on desk and documentary review and other inquiries in order to collect enough information required to make a due diligence decision.

39. The Tribunal appreciates that under the law, bids are evaluated by the evaluation committee. The evaluation committee therefore has wide latitude in the exercise of their discretion, subject to the law and the evaluation criteria stated in the bidding document. We find that it was within their competence to reject the online/virtual system demonstrations; waive the physical due diligence and rely on the desk and documentary review and other inquiries in order to collect enough information required to make a due diligence decision.
40. The due diligence report concluded that the evaluation committee was unable to confirm the authenticity and involvement of ElcomPlus in the submitted project references. NR-Orion JV and MFI-Etap JV were recommended for further evaluation.
41. According to the evaluation report, the two (2) responsive bidders, MFI Document Solutions-Etap Automation JV and NR-Orion JV, were considered at financial evaluation stage. The Evaluation Committee recommended a contract award to NR-Orion JV (Best Evaluated bidder) for the Design, Supply, Installation and Commissioning of a Remote Power control and Monitoring system at a total evaluated bid price of UGX 3,163,826,202 (Uganda Shillings Three Billion One Hundred Sixty Three Million Eight Hundred Twenty Six Thousand Two Hundred Two Only) VAT Inclusive.
42. The Tribunal upholds the finding of the Respondent that the Applicant was found non-responsive to the due diligence process of the submitted bid references. We find no reason to interfere with the decision of the Respondent to award the contract to NR-Orion JV.
43. **Issue no. 2 is answered in the affirmative.**

Issue 3:

What remedies are available to the parties?

44. In view of our finding under issue no. 2 the Applicant is not entitled to any remedy. The Respondent is entitled to continue with the procurement process.

J. 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 16th September 2021 is vacated.
4. Each Party to bear its own costs.

Dated at Kampala this 24th day of October, 2021.



**NELSON NERIMA
MEMBER**



**THOMAS BROOKES ISANGA
MEMBER**



**GEOFFREY NUWAGIRA KAKIRA
MEMBER**



**PAUL KALUMBA
MEMBER**