

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

APPLICATION NO. 18 OF 2021

BETWEEN

ABASAMIA HWOLERANE ASSOCIATION LTD =====APPLICANT

AND

JINJA CITY COUNCIL =====RESPONDENT

APPLICATION IN RESPECT OF THE PROCUREMENT FOR ENFORCEMENT OF
COLLECTION OF REVENUE FROM PROPERTY RATES AND GROUND RENT IN
JINJA CITY SOUTH WEST IN SOUTHERN DIVISION UNDER PROCUREMENT
REFERENCE NO. JC755/SRVCS/21-22/00001

BEFORE: FRANCIS GIMARA S.C, CHAIRPERSON; NELSON NERIMA; GEOFFREY
NUWAGIRA KAKIRA; AND PAUL KALUMBA, MEMBERS

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. Jinja City Council (the Respondent) advertised (issued an Invitation to bid under open bidding vide procurement reference No. JC/PROC/01/2021-2022), a procurement for provision of various services in the New Vision of on Monday, April 19, 2021.
2. The Respondent in the invitation to bid grouped the procurements (under Revenue Centers) for enforcement of collection of revenue into four categories i.e. “A”, “B”, “C” to “D”. Each category had different items to be bid for individually and the invitation to bid clearly stated that no bidder was allowed to bid for more than one item in a category. Category “A” had three items namely:
 - 1) Enforcement of collection of revenue from property rates and ground rent in Jinja City South West in Southern Division,
 - 2) Enforcement of collection of revenue from property rates and ground rent in Jinja City South East in Southern Division
 - 3) Enforcement of collection of revenue from property rates and ground rent in Northern Division
3. In respect of item 1 in category “A” (revenue collection from Property Rate and Ground Rent in Jinja City South West in Southern Division) there were 5 bidders namely Rojoke Photo Lab & Art Co. Ltd, Unique Commodity Services Limited, White Knights Consults Ltd, Chrisanna Consults and Abasamia Hwolerane Association Ltd. **(the Applicant)**. The bids were opened on May 7, 2021. All the five bidders passed the preliminary evaluation stage and were subjected to commercial and detailed technical evaluation stage. Four bidders that included the applicant namely Rojoke Photo Lab & Art Co. Ltd, Unique Commodity Services Limited, Chrisanna Consults and Abasamia Hwolerane Association Ltd. (the Applicant), passed commercial and detailed technical evaluation stage.
4. At the Financial Comparison stage of the Evaluation, Abasamia Hwolerane Association Ltd (the Applicant) was ranked the second-best evaluated bidder while Rojoke Photo Lab & Art Co. Ltd was ranked the first best evaluated bidder and recommended for award of contract at a price of 5.9% commission on every collection

made, VAT inclusive as per the evaluation report dated 17th June 2021. Unique Commodity Services Limited and Chrisanna Consults were ranked third best and fourth best respectively. The Best Evaluated Bidder Notice was displayed on June 18, 2021.

5. Abasamia Hwolerane Association Ltd (the Applicant) being dissatisfied with the outcome of the procurement process, applied for administrative review to Accounting Officer of Respondent on June 23, 2021.
6. The Applicant complained that Rojoke Photo Lab & Art Co. Ltd bid for more than one item in a category contrary to the advert; that Rojoke Photo Lab & Art Co. Ltd was declared as best evaluated bidder at 10 % commission contrary to the 5.9 % commission that was read at the bid opening; and that the Applicant's previous performance was evaluated as unsatisfactory without any criteria or reasons.
7. The Respondent's accounting officer in accordance with Regulation 139 (2) of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006 appointed an Administrative Review Committee which concluded that the complaints were not valid and recommended continuation of the procurement process.
8. In a letter dated July 21, 2021, the Respondent's accounting officer communicated the findings of the administrative review committee to the Applicant.

B. FIRST APPLICATION TO THE TRIBUNAL

1. The Applicant being dissatisfied with the administrative review report filed the first Application No. 12 of 2021 on 3rd August 2021 before the Tribunal.
2. The Applicant under Application No. 12 , contested the Respondent's administrative review report on eight (8) grounds:
 - (a) The Respondent erred both in law and facts when she found that Rojoke Photo Lab and Art and Rojoke Photo Lab & Co. Ltd are two different companies.
 - (b) The Respondent erred in law when she allowed two applications by Rojoke Photo Lab & Art in category "A" contrary to the terms and conditions of the Advert.

- (c) The Respondent erred in law and fact when she awarded the contract for revenue collection of property rates and ground rent to Rojoke Photo Lab & Art which is a non-existent company.
 - (d) The awarding of the contract to Rojoke Photo Lab and Art was erroneous because she was not the highest bidder.
 - (e) The Applicant contests the findings of the Committee that there was no influence by Rojoke Photo Lab and Art.
 - (f) The Applicant contests the findings of the committee that the Applicant's performance in the previous contracts was unsatisfactory.
 - (g) The Respondent erred in law and fact in correction of an error in Rojoke Photo Lab & Art as there was no communication.
 - (h) Rojoke Photo Lab & Art submitted a bid in Jinja South East and another Rojoke Photo Lab & Art Co. Ltd in Jinja West. The Applicant contends it was irregular to award a contract to Rojoke Photo Lab & Art in Jinja West where she did not submit a bid.
3. The Tribunal issued its decision to Application No. 12 of 2021 on August 23, 2021.
 4. The direction of the Tribunal was that the impugned procurement be re-evaluated in a manner consistent with its decision. That Rojoke Photo Lab & Art Co. Ltd was ineligible for the impugned procurement for having submitted bids for more than one item in category "A" using connected entities and as such had a conflict of interest in the procurement for item 1 for revenue collection from property rates and ground rent in Jinja City South West in Southern Division.
 5. In the result, the first Application No. 12 of 2021 was allowed in part; the administrative review decisions of the Entity's Accounting Officer was set aside; the Entity was directed to conduct a fresh evaluation of the bids and that the said re-evaluation of the bids was to be strictly in accordance with the applicable legal provisions and the criteria in the Bidding Document and consistent with the Tribunal decision; and the Entity was ordered to refund the administrative review fees paid by the Applicant.

C. RE-EVALUATION

1. Contracts Committee of the Respondent on August 30, 2021 appointed a new evaluation committee constituted of Ms. Nabirye Rebecca, Ms. Munaaba Sarah and Mr. Taligoola John, to evaluate bids in the procurement of services for the enforcement of collection of revenue from property rates and ground rent in Jinja City South West in Southern Division

2. Only four bidders were evaluated. Three bidders out of four namely, M/s Unique M/s Commodity Services Limited, M/s White Knights Consults and M/s Abasamia Hwolerane Association Ltd passed the preliminary examination stage and progressed to the detailed technical and commercial evaluation stage. Rojoke Photo Lab & Art Co. Ltd was eliminated at the preliminary examination stage. The Evaluation Committee in its report dated 6th September 2021 noted
3. At the detailed technical and commercial evaluation stage, Abasamia Hwolerane Association Ltd (the Applicant) and White Knights Consults failed while Unique Commodity Services Limited progressed to the Financial Comparison stage of the Evaluation,
4. At the Financial Comparison stage of the Evaluation, Unique Commodity Services Limited was ranked the best-evaluated bidder and recommended for award of contract at a price of 7% commission on every collection made, VAT Inclusive as per the evaluation report dated 6th September 2021.
5. The Best Evaluated Bidder Notice was displayed on September 9, 2021. The Notice indicated that the Applicant was disqualified for being non-responsive to the requirement for 2 years' experience of the Company in similar business and further non-responsive to the requirement of submitting copies of its audited reports, profit and loss statements for the last 2 years.

D. SECOND APPLICATION TO THE TRIBUNAL

1. The Applicant being dissatisfied with the outcome of the procurement process, alleged lack of impartiality of the Respondent and thus applied directly to the Tribunal, seeking to review the decision of the Respondent to award the contract to Unique Commodity Services Limited on September 21, 2021.
2. The Applicant averred that in conduct of re-evaluation, the Respondent delved into matters that were not raised in the original evaluation report of 17th June 2021 issued by the respondent.

3. The Applicant contested the nomination of new members to the Evaluation Committee and contested the Committee's recommendation that the award of contract at a price of 7% commission on every collection made to Unique Commodity Services Limited compared to the Applicant's bid proposal of 6% commission.
4. The Applicant contended that the said re-evaluation of the bids was not conducted in a manner consistent with the decision of the Tribunal, in accordance with the applicable legal provisions and the criteria in the Bidding Document
5. The Applicant averred that the Entity had not refunded the administrative review fees as directed by the Tribunal

C. REPLIES TO THE APPLICATION

1. The Respondent averred as follows:
 - a) That in compliance with the orders of the Tribunal, the Respondent appointed a new evaluation committee that re-evaluated bids in a manner consistent with the decision of the Tribunal, in accordance with the applicable legal provisions and the criteria in the Bidding Document wherein Unique Commodity Services Limited was ranked the first best evaluated bidder and recommended for award of contract at a price of 7% commission on every collection made, VAT Inclusive
 - b) That the entity was waiting for the quarterly release of funds from the Ministry of Finance, Planning and Economic Development where upon, the Entity would then be in position to refund the Applicant administrative review fees.
 - c) That the Applicant's bid was not responsive to the evaluation criteria of the bidding document and that the experience submitted was not that of Abasamia Hwolerane Association Ltd (the Applicant) but of a different entity known as Abasamia Hwolerane Association.
 - d) That the Applicant submitted one set of audited books of Accounts for only one year (2020) contrary to the requirement of 2 years and that the pages 122, 123, 124, 125,126 as attached to the Application were not part of the original bid submitted to the Respondent by the Applicant.
 - e) Regarding the evaluation of only 4 bidders instead of 5 as was done by the first

evaluation committee. The Respondent contended Chrisanna Consults (U) Ltd was erroneously issued with Revenue Receipts indicating that it had bided in Jinja City South West Division. However, an examination of its Bid Submission sheet indicated that the said bidder was actually bidding for Jinja City South East in Southern Division. The second evaluation committee therefore rightly opted not to consider the said bid in its re-evaluation exercise.

D. THE ORAL HEARING

The Tribunal held an oral hearing via zoom cloud Application on 6th October 2021. The appearances were as follows:

1. For the Applicant - Egessa Patrick Neinda, the Managing Director of the Applicant
2. For the Respondent – Ms Janet Nabwanso, the Senior Procurement Officer of the Entity/Respondent

E. SUBMISSIONS

1. The Applicant highlighted their written submissions and also provided clarifications orally to the Tribunal.
2. The Respondent did not file written submissions. They however, highlighted their response and also gave clarifications to the Tribunal.
3. The Tribunal has considered the application, the response by the Respondent and the clarifications made at the oral hearing by the Applicant and the Respondent.

F. RESOLUTION BY THE TRIBUNAL

1. The grounds formulated by the Applicant raise 8 substantive issues as follows:
 - i. Whether the Respondent erred in law and fact when recommendation of the independent and fresh evaluation committee to award Unique Commodity Services Ltd with contract price of 7% commission against the Applicant with contract price of 6% commission.
 - ii. Whether the Respondent erred in law and fact when it conducted a re-evaluation which was not consistent with the decision of the Tribunal.
 - iii. Whether the Respondent erred in law and fact when it failed to refund the Applicant's Administration Review fees.

- iv. Whether the Respondent erred when it violated the principles of the methodology used in the Impugned procurement, the Technical Compliance Selection(TCS) methodology method and section 3 (2.1) of standard bidding document
 - v. Whether the Respondent erred when it stated that the Applicant was non-responsive on Audited books of Accounts for the two years
 - vi. Whether the Respondent erred when it stated that the Applicant was non-responsive on the requirement of two years' experience of the company in similar business and that the evidence of experience submitted by the bidder was for Abasamia Hwolerane Association who did not bid.
 - vii. Whether the two evaluation reports issued by the respondent are inconsistent to each other
 - viii. Whether the Respondent violated ITB 36.3 of the Standard Bidding Document. Annexure A8.
2. The Tribunal recast some of the issues during the resolution as follows:
- i. Whether the Application before the Tribunal is competent
 - ii. Whether the Respondent erred in law and fact when it conducted a re-evaluation contrary to the directions of the Tribunal
 - iii. Whether the Respondent erred in law and fact when it awarded the contract for Revenue Collection of property Rates and Ground Rent to Unique Commodity Services Limited
 - iv. What remedies are available to the parties

Resolution of the Issues

Issue 1

Whether the Application before the Tribunal is competent?

1. The Tribunal has in two recent decisions of K-Solutions Ltd Vs. Ministry of Energy And Mineral Development, Application No.16 of 2021 and in Beautiful Engineering & Equipment Ltd vs. Uganda Electricity Transmission Company Limited, Application No.15 of 2021 held that it is duty bound to inquire into the existence of the facts in order to decide whether it has jurisdiction. This is because Jurisdiction must be acquired before judgment is given. As such, the Tribunal must inquire into

the facts of whether the Applicant has locus to file an Application before it and secondly whether the Tribunal is seized or clothed with Jurisdiction to interrogate the merits of Application before it.

2. The term locus standi literally means a place of standing. It means a right to appear in court, and, conversely, to say that a person has no locus standi means that he has no right to appear or be heard in a specified proceeding. To say that a person has no locus standi means the person cannot be heard, even on whether or not he has a case worth listening to. See *Njau & Others vs. City Council of Nairobi* [1976–1985] 1 EA 397 at 407.

3. In *OWNERS OF MOTOR VESSEL “LILLIAN S” VS CALTEX OIL (KENYA) LTD* (1989) KLR 1, Justice Nyarangi JA (as he then was) stated:

“.....A question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, court has no power to make one more step. Where court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction”

4. Under section 91 I (2) of the Public Procurement and Disposal of Public Assets Act 2003, a bidder who alleged that the Authority had a conflict of interest in respect of a matter before the Authority and who believed that the matter could not be handled impartially by the Authority, was at liberty to apply to the Tribunal for a determination of the allegation and where necessary, of the matter that was before the Authority.

5. Section 91 of the Public Procurement and Disposal of Public Assets Act 2003 was repealed by section 34 of the Public Procurement and Disposal of Public Assets (Amendment) Act 2021. The repealed clause was then reproduced and inserted in section 89(9) of the Public Procurement and Disposal of Public Assets (Amendment) Act 2021 which now reads as follows;

“Where a bidder believes that the Accounting Officer has a conflict of interest in respect of the complaint, omission or breach that would be made under this section or that the matter cannot be handled impartially by the procuring and disposing entity, the bidder shall make an application to the Tribunal for determination of the complaint, omission or breach”

6. The Applicant in paragraph 3, page 2 of the Application pleaded that the Respondent is not impartial and stated as follows;

REASONS FOR APPLYING TO PPDA TRIBUNAL:

- Lack of impartially by the respondent.
 - Carrying out of two independent/ fresh evaluations which came up with new issues targeted at eliminating the applicant.
 - There has been numerous alleged errors and corrections of names of bidders, contract prices by the Respondent from the previous evaluation targeted at eliminating the applicant and erroneously corrected.
 - The Issue of allegation that the company submitted audited report for only year 2020 is not true as the audited reports submitted were for two years 2019 & 2020.
 - Failure by the respondent to carry out the re-evaluation which is consistent with the decision of the PPDA Appeals Tribunal by raising issues which did not arise in the original evaluation, it should be noted that this procurement went through the original evaluation, Administrative Review and PPDA Tribunal and these issues were not raised. Annexure A9.
 - Lack of consistence in the procurement process evaluation report. *The original report it had 5 bidders 2nd report has 4 bidders.*
 - The respondent formulated the issue of unsatisfactory performance in the previous evaluation and now again has come up with others all targeted at eliminating the Applicant.
 - In that respect therefore, the Applicant does not believe in the impartiality of the respondent hence applying for Administrative Review to the Tribunal.
7. The Public Procurement and Disposal of Public Assets Act 2003 and the Public Procurement and Disposal of Public Assets (Amendment) Act 2021, did not define the meaning of the adverb “impartially” as used in the text of the said statutes.
 8. However, Courts of law in Uganda have guided that the noun “impartiality” is “... a principle of justice holding that decisions should be based on objective criteria rather than on the basis of bias, prejudice or preferring the benefit to one person over the other for improper reasons”. See decision of Sekaana J in

BARYARUHA V ATTORNEY GENERAL (MISCELLANEOUS CAUSE-2016/149) [2019] UGHCCD 67

9. The 8th Edition of Black's Law Dictionary defines a Conflict of Interest as a real or seeming incompatibility between one's private interest and one's public or fiduciary duties.
10. In the case of Uganda vs Patricia Ojangole Criminal Case No. 1/2014 Justice Gidudu held that;

“Conflict of interest has also been generally defined as any situation in which an individual or corporation is in position to exploit a professional or official capacity in some way for their personal or corporate benefit”
11. It therefore goes without saying that allegations of conflict of interest of the Accounting Officer in respect of the complaint, omission or breach or partiality by the procuring and disposing entity in handling a matter must be pleaded and proved. It is not enough for one to state that they believe that the Accounting Officer has a conflict of interest in respect of the complaint, omission or breach or that the matter cannot be handled impartially by the procuring and disposing entity. The basis of that belief must be shown to the satisfaction of the Tribunal. This is because the burden of proving any fact that is within the knowledge of any person, is upon that person alleging the fact as per section 106 of the Evidence Act, Cap 6.
12. In order 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”. See *Metropolitan Properties Ltd vs Lannon* [1968] 3 All ER 304.
13. The Supreme Court of Nigeria has in Mohammed Oladapo Ojengbede v. M. O. Esan (Loja-Oke) (S.C. 132/1991) [2001] NGSC 58, while dealing with cases involving allegations of bias or real likelihood of bias or impartiality guided as follows;

“There must be cogent and reasonable evidence to satisfy the court that there was in fact such bias or real likelihood of bias as alleged. In this regard, it has been said, and quite rightly too, that mere vague suspicion of whimsical and unreasonable people should not be made a standard to constitute proof of such

serious complaints” See also R. v. Sussex Justices, Ex parte McCarthy (1924) 1 K.B. 259 and R. v. Camborne Justices & Anr Ex parte Pearce (1955) 1 Q.B. 41.

14. The Applicant bore the burden to prove that his complaint or matters arising out of the impugned procurement could not be handled impartially by the Respondent. The Applicant merely alleged “Lack of impartially by the respondent” but has not adduced cogent and reasonable evidence to satisfy the Tribunal that there was in fact such partiality or real likelihood of partiality as alleged.
15. It is important that fanciful and unmeritorious allegations of bias are discouraged and that there is proper regard to the context in which the issue arises. A line must be drawn between genuine and fanciful allegations of bias. Allegation of bias on imaginary basis cannot be sustained. See *Federation of Railway Officers Association v Union of India (2003) 4 SCC 289*, which was relied upon by **Sekaana J** in *BARYARUHA V ATTORNEY GENERAL (MISCELLANEOUS CAUSE-2016/149) [2019] UGHCCD 67*
16. The Applicant therefore failed to discharge the said burden and as such, the Tribunal cannot clothe itself with jurisdiction to hear the Application brought under section 89(9) of the Public Procurement and Disposal of Public Assets (Amendment) Act 2021.
17. Regarding the jurisdiction of the Tribunal, there are only four instances under which the Tribunal can exercise its jurisdiction. These instances are provided for under sections 89(8) and 89(9), read together with section 91I(1)(a)-c) of the Public Procurement and Disposal of Public Assets (Amendment) Act 2021 namely;
 - a) Where an Accounting Officer does not make a decision or communicate a decision within the period specified in subsection (7), or
 - b) where a bidder is not satisfied with the decision made by the Accounting Officer under section 89(8), or
 - c) Where a bidder believes that the Accounting Officer has a conflict of interest in respect of the complaint, omission or breach that would be made under this section; or
 - d) where a Bidder believes that the matter cannot be handled impartially by the procuring and disposing entity,

18. The time periods for the various modes of application are stated section 91I(2) of the Public Procurement and Disposal of Public Assets (Amendment) Act 2021
19. The Applicant in paragraph 3, page 2 of the Application pleaded lack of impartiality by the Respondent. This clearly indicated that the Application was being brought under PPDA Act Section 89(9) and 91I(1)(c) of the Public Procurement and Disposal of Public Assets (Amendment) Act 2021 that provides for ten days (that means calendar days) and not working days. The Applicant further pleaded and admitted that it became aware of its disqualification when he was availed a copy of the evaluation report on 9th September 2021, which also doubles as the date when the best evaluated bidder notice was displayed. It is from the 9th day of September 2021 that time begun to run and within which he was expected to file an application to the Tribunal.
20. It therefore follows that under section 91I(2) of the Public Procurement and Disposal of Public Assets (Amendment) Act 2021, the 10th day from 9th September fell on 19th September 2021 which is a Sunday and in light of 34 (1)(b) of the Interpretation Act (Chapter 3), Sunday was thus excluded. The next day being Monday, 20th September 2021, that became the last day within which the Applicant should have lodged its application. Therefore, the application lodged with the Tribunal on 21 September 2021 at 3pm was lodged out of time
21. We are fortified in our finding by the decision of Hon Justice Twinomujuni in Uganda Revenue Authority v Uganda Consolidated Properties Ltd (Civil Appeal-2000/31) [2000] UGCA 2 where he stated that “Time limits set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with”
22. The Tribunal has held that timelines within the procurement statute were set for a purpose and are couched in mandatory terms. There is no enabling provision within the PPDA Act 2003 that accords the Tribunal power to enlarge or extend time set under the law. 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 Kiyindi Electrical and Engineering Ltd Vs. PPDA, Misc Application No 1 Of 2020 and Empire Tools Vs PPDA, Application No. 8 Of 2019.
23. We would like to clarify that Section 91L(1)(c) of the PPDA Act 2003 referred to in the above decisions of “Kiyindi” and “Empire Tools” were repealed by section 40 of the Public Procurement and Disposal of Public Assets (Amendment) Act 2021. Instead, new time lines for the various modes of application are stated

section 91I (2) of the Public Procurement and Disposal of Public Assets (Amendment) Act 2021. The said new timelines under PPDA Act Section 91I (2) (b) and (c) changed from 10 working days of being served by authority with its decision as was earlier stated in the repealed Section 91L (1)(c) of the PPDA Act 2003 to 10 calendar days from date when the omission or breach by PDE is alleged to have taken place as stated in Section 91I(1)(c) of the Public Procurement and Disposal of Public Assets (Amendment) Act 2021.

24. The Application lodged with the Tribunal on 21 September 2021 at 3pm was therefore lodged out of time and the jurisdiction of the Tribunal is extinguished as far as the matter is concerned. The Application is therefore incompetent.

This issue is answered in the negative.

25. In view of our finding under issue No.1, it is not necessary to interrogate the merits of Application and the Applicant is not entitled to any remedy. The Respondent is entitled to continue with the procurement process.

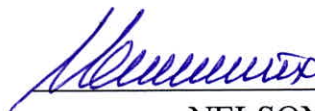
G. DISPOSITION

1. The Application is struck out.
2. The Respondent may continue with the procurement to its logical conclusion.
3. The Tribunal's suspension order dated 21st September, 2021 is vacated.
4. Each Party to bear its own costs.

Dated at Kampala this 7th day of October, 2021.



FRANCIS GIMARA. S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER