

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

APPLICATION NO. 26 OF 2022

BETWEEN

VISION SCIENTIFIC & ENGINEERING LIMITED =====APPLICANT

AND

MAKERERE UNIVERSITY =====RESPONDENT

APPLICATION FOR REVIEW IN RESPECT OF THE PROCUREMENT FOR THE SUPPLY, DELIVERY, INSTALLATION AND COMMISSIONING OF INDUCTIVELY COUPLED PLASMA OPTICAL EMISSION SPECTROMETER (ICP-OES) EQUIPMENT UNDER NANO ADJUVANT PRESIDE PROJECT, UNDER PROCUREMENT REFERENCE NUMBER MAK/SPLS/2021-22/00819.

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

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. The Applicant responded to an invitation to bid by Makerere University for the supply, delivery, installation and commissioning of Inductively Coupled Plasma Optical Emission Spectrometer (ICP-OES) Equipment under Nano Adjuvant PRESIDE project, under procurement reference number MAK/SPLS/2021-22/00819
2. Bids were received from 7 bidders namely; *Qualichem Uganda Limited, Palin Corporation, Joh. Achelis Ltd, Vision Scientific & Engineering Ltd, Rima Uganda Ltd, Prepaid Meters Ltd, Smakk International Ltd* on Friday, June 24, 2022.
3. On 2nd August 2022, the Respondent issued a Notice of Best Bidder declaring Palin Corporation Limited the best bidder at the awarded contract price of UGX 428,500,000. The Notice indicated that the Applicant was disqualified for quoting a price higher than that of the best evaluated bidder.
4. On 12th August 2022, the Applicant applied for administrative review before the Accounting Officer. The Applicant was not guided by the officers of the Respondent on what to do with the complaint or any administrative review fees to be paid and where it was to be paid.
5. On 19th August 2022, the Accounting Officer wrote a letter dismissing the Applicant's complaint on the grounds that there was no evidence of payment of prescribed administrative review fees. The Applicant received this letter on 24th August 2022.
6. The Applicant contends that the Accounting Officer erred in law and in fact when he failed to make and communicate a decision to the Applicant within ten (10) days from 12th August 2022.
7. The Applicant is aggrieved by the failure and omission of the Accounting

Officer to make and communicate a decision within the statutory timeframe and therefore applied for administrative review before the Tribunal on 31st August 2022.

B. APPLICATION TO THE TRIBUNAL

1. Relying on section 91I(2)(b) of the Public Procurement and Disposal of Public Assets Act, the Applicant averred that the Accounting Officer made a decision outside the statutory timelines and that therefore the Applicant rightly applied to the Tribunal to review the omission and breach of the Procurement Act by the Accounting Officer.
2. The Applicant prayed for a declaration of the Tribunal that the Accounting Officer erred in law and in fact and law when he dismissed the complaint of the Applicant on the ground of non-payment of administrative review fees; when he failed or omitted to make and communicate a decision on the complaint of the Applicant within statutory timelines; and an order that the procurement process be cancelled and retendered by the Respondent entity; and costs.

C. REPLY TO THE APPLICATION

1. The Respondent averred that the Applicant has no cause of action against it.
2. The Respondent contended that on 2nd August 2022, the Respondent issued a Notice of Best Evaluated Bidder declaring Palin Corporation Limited the best evaluated bidder and that the Applicant failed to undertake a fundamental step in the process of seeking an administrative review of the above decision by the Accounting Officer as required by law, i.e. payment of administrative review fees.
3. That the Accounting Officer communicated that, this is to inform you that your complaint did not fulfil the requirements for carrying out an administrative review under the PPDA Act, 2003 (as amended) and the PPDA (Administrative Review) Regulations, 2014, in particular, there is

no evidence of payment of the prescribed fees to the Applicant on 19th August 2022 in response to its letter dated 12th August 2022.

4. The Respondent prayed that the Application be dismissed with costs.

D THE ORAL HEARING

The Tribunal held an oral hearing on Thursday, 15th September 2022 via zoom software. The appearances were as follows:

1. Counsel Pario Nick from Leadman Advocates represented the Applicant.
2. The Respondent was represented by Counsel Esther Kabinga.

E. SUBMISSIONS

During the oral hearing, the Applicant and Respondent highlighted their written submissions and also provided clarifications to the Tribunal.

Applicant

1. Relying on section 91I(2)(b) of the Public Procurement and Disposal of Public Assets Act, the Applicant averred that the Accounting Officer made a decision outside the statutory timelines and that therefore the Applicant rightly applied to the Tribunal to review the omission and breach of the Public Procurement and Disposal of Public Assets Act by the Accounting Officer.
2. The Applicant prayed for a declaration of the Tribunal that the Accounting Officer erred in fact and law when he dismissed the complaint of the Applicant on the ground of non-payment of fees; when he failed or omitted to make and communicate a decision on the complaint of the Applicant within statutory timelines; and an order that the procurement process be cancelled and retendered by the Respondent entity; and costs.

Respondent

1. The Respondent averred that the Applicant has no cause of action against it.

2. The Respondent contended that on 2nd August 2022, the Respondent issued a Notice of Best Evaluated Bidder declaring Palin Corporation Limited the best evaluated bidder and that the Applicant failed to undertake a fundamental step in the process of seeking an administrative review of the 2nd August 2022 decision by the Accounting Officer as required by law.
3. That the Accounting Officer communicated his decision to the Applicant on 19th August 2022 in response to its letter dated 12th August 2022.
4. The Respondent prayed that the Application be dismissed with costs.

F. RESOLUTION BY THE TRIBUNAL

Issues

We now revert to the substantive issues in this application:

- i. *Whether the Accounting Officer erred in law and fact when he dismissed the complaint of the Applicant on the ground of non-payment of fees?*
- ii. *Whether the Accounting Officer erred in law and fact when he failed or omitted to make and communicate a decision on the complaint of the Applicant within statutory timelines?*
- iii. *Whether in light of the said acts and omissions of the Accounting Officer, the Tribunal can inquire into the substance of the complaint filed by the Applicant before the Accounting Officer?*

Resolution of Issues

Issue 1

Whether the Accounting Officer erred in law and fact when he dismissed the complaint of the Applicant on the ground of non-payment of fees?

1. An aggrieved bidder is obliged to pay prescribed administrative review fees to the procuring and disposing entity upon filling a Compliant. See Section 89(3)(a) of the **Public Procurement and Disposal of Public Assets Act 2003** as amended read together with Regulation 11 of the

Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014

2. The Public Procurement and Disposal of Public Assets Authority (PPDA) issued **Circular No. 3 of 2015** on the procedure for administrative Review by Accounting Officers, in which it guided that Accounting Officers have to advise a complainant on the required Administrative Review Fees and where to pay the said fees, upon receipt of a Compliant.
3. The Applicant in paragraph (g) of its application avers that the Accounting Officer did not provide the required guidance but instead dismissed the Application. The Respondent did not rebut the said claim in its Reply but denied the same in its page 3 of the Submissions.
4. In **VCON Construction (U) Ltd versus UDB Application 22 of 2021**, the Tribunal held that non-payment of administrative review fees is not necessarily fatal as long as the fees can be assessed and paid.
5. This Tribunal has been consistent on the principle that late payment of administrative review fees is not necessarily fatal, and that even actual non-payment of court fees has been held not to be fatal so long as the proper fees can be assessed and paid. See **Vcon Construction Ltd Vs Uganda Development Bank, Application No.22 of 2021, Samanga Elcomplus Jv Vs. Uganda Electricity Distribution Company Limited, Application No.17 Of 2021, Kasokoso Services Limited Vs. Jinja School of Nursing And Midwifery, Application No. 13 of 2021**. In the said decisions, the Tribunal has relied on the Supreme Court decision in **Lawrence Muwanga V Stephen Kyeyune (Legal Representative of Christine Kisamba, Deceased) Supreme Court Civil Appeal No. 12 of 2001**.
6. It is our finding that the conclusion of the Accounting Officer on non-payment as a basis for dismissing a complaint, with due respect, is erroneous because the payment of fees for purposes of administrative review application under **Section 89(3)(a) of the Public Procurement and Disposal of Public Assets (Amendment) Act 2021** is not restricted to be within ten working days stated therein.

7. There is also no pre-condition that a complainant has to first ask for guidance before it can be provided. Where a complainant erred by omitting to pay administrative review fees, the Accounting Officer has an obligation to provide the required guidance. The Accounting Officer would only be justified to dismiss a complaint if the complainant fails to pay the administrative review fees even after being guided.
8. The Tribunal finds that the Accounting Officer breached his statutory duty to guide the Applicant on the required administrative review fees and where to pay the said fees. The Accounting Officer ought to have guided the Applicant on the modalities of payment of prescribed fees between August 12, 2022 and August 19, 2022 before deciding to dismiss the Complaint of the Applicant on the ground of non-payment of fees.
9. The Accounting Officer thus erred in law and fact when he dismissed the complaint of the Applicant on ground of non-payment of administrative review fees.
10. **The Tribunal resolves this issue in the affirmative.**

Issue 2

Whether the Accounting Officer erred in law and fact when he failed or omitted to make and communicate a decision on the complaint of the Applicant within statutory timelines?

11. **Section 89(7) of the Public Procurement and Disposal of Public Assets Act** requires the Accounting Officer to make and communicate an administrative review decision within ten days from the date of receipt of the application.
12. While the Applicant filed its complaint to the Accounting Officer on 12th August 2022, the Applicant received the decision of the Accounting Officer on 24th August 2022. This was outside the statutory timeline within which the Accounting Officer ought to have communicated his

decision to the Applicant. A decision in reply to a complaint lodged on 12th August 2022 ought to have been made and effectively served on the Complainant by the Accounting Officer before or on August 22, 2022.

13. The decision received by the Applicant on August 24, 2022 was made out of time, in breach of the law and is thus a nullity. See ***Application No.18 of 2022 Meera Investments Limited vs URA & Numani Mubiakulamusa and Technology Associates Ltd & COMVIVA Technologies Ltd VS. Postbank Uganda Ltd, Application No.06 of 2022.***
14. Therefore, the Accounting Officer erred in law and fact when he failed or omitted to make and communicate a decision on the complaint of the Applicant within statutory timelines.
15. **The Tribunal resolves this issue in the affirmative.**

Issue 3

Whether in light of the said acts and omissions of the Accounting Officer, the Tribunal can inquire into the substance of the complaint filed by the Applicant before the Accounting Officer?

16. **Section 91(I) of the Public Procurement and Disposal of Public Assets Act** allows a bidder who is aggrieved, as specified in section 89(7) or (8) to apply to the Tribunal for review of a decision of a procuring and disposing entity.
17. The Tribunal has inquired into the substance of the complaint addressed to the Accounting Officer and found that there was a valid complaint and as such, the Respondent was under a duty to make a communicate a decision to the Applicant within the statutory time period.
18. Having failed to do so, the Tribunal hereby orders the Respondent to


hear and consider the Applicant's complaint and any submissions in relation thereto; and make and communicate a decision in writing in accordance with the law.

19. In matters where the Accounting Officer has erroneously dismissed an Application on the ground of non-payment of fees, the Tribunal has restrained itself from inquiring into the merits of the matter. *See Application No.22 of 2021 VCON Construction (U) Ltd vs UDB.*
20. **The Tribunal hereby remits the matter back to the Accounting Officer to exercise his discretion, investigate and decide the matter on its merits.**

G. DECISION OF THE TRIBUNAL

1. The Application is successful.
2. The Decision of the Accounting Officer dated August 19, 2022 is a nullity and set aside.
3. The Accounting Officer is directed, within two days from the date hereof, to guide the Applicant in writing on the amount and mode of payment of the administrative review fees, which the Applicant must pay within one working day of being so guided.
4. Subject to payment of the administrative review fees as above, the Accounting Officer is directed to hear and consider the Applicant's compliant and any submissions thereto, and make and communicate a decision in writing no later than 10 (ten) days from date of this decision of the Tribunal.
5. The suspension order dated August 26, 2022 is vacated.
6. Each party should bear own costs

Dated at Kampala this 21st day of **September 2022**.



FRANCIS GIMARA, S.C
CHAIRPERSON



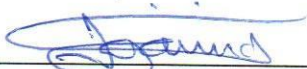
PAUL KALUMBA
MEMBER



THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



CHARITY KYARISIIMA
MEMBER



NELSON NERIMA
MEMBER