

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

**APPLICATION NO. 29 OF 2022**

**BETWEEN**

**JV AGT S.P.A & ZHUCHENG  
DINGCHENG MACHINERY CO. LTD =====APPLICANT**

**AND**

**PRIVATE SECTOR FOUNDATION UGANDA=====RESPONDENT**

**APPLICATION FOR REVIEW IN RESPECT OF A PROCUREMENT FOR  
SUPPLY, DELIVERY AND INSTALLATION OF KITCHEN BUFFET, BAR  
AND COFFEE SHOP EQUIPMENT FOR THE UGANDA HOTEL AND  
TOURISM TRAINING INSTITUTE UNDER PROCUREMENT REF NO. UG-  
PSFU-262850-GO-RFB USING OPEN DOMESTIC BIDDING METHOD**

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

## DECISION OF THE TRIBUNAL

### A. Brief Facts

1. The Respondent, *Private Sector Foundation Uganda (PSFU)*, initiated a procurement for Supply, Delivery and Installation of Kitchen Buffet, Bar and Coffee Shop Equipment for the Uganda Hotel and Tourism Training Institute under procurement ref no. UG-PSFU-262850-GO-RFB using Open Domestic Bidding Method.
2. On 9<sup>th</sup> August 2022, the Respondent issued a Notice of Best Evaluated Bidder in which *M/S Bivid (U) Ltd* was declared the Best Evaluated Bidder.
3. The Notice of Best Evaluated Bidder also stated that the bid of the Applicant was disqualified for the reason that "*The contracts cited by the bidder as similar experience did not meet the similarity requirement in terms of value, scope & complexity contrary to the requirement in the bidding documents that the bidder shall furnish documentary evidence of at least 2 completed contracts of similar scope, value, nature and complexity in the last five (5) years supported by copies of delivery notes and certificates of acceptance and/or good performance from the previous clients*"
4. The Applicant, being dissatisfied with the result of the procurement process, applied to the Chief Executive Officer of the Respondent for administrative review on 19<sup>th</sup> August, 2022.
5. The Project Coordinator of the *Competitive and Enterprise Development Project* made a response to the complaint in a letter dated 2<sup>nd</sup> September 2022 but received by the Applicant on 7<sup>th</sup> September 2022. He did not find merit in the complaint and dismissed it.



**B. Application to the Tribunal**

1. The Applicant being aggrieved by the said decision filed the instant application with the Tribunal on 19<sup>th</sup> September, 2022.
2. The Applicant invited the Tribunal to find that the contracts submitted by the Applicant met the similarity requirement in terms of value, scope & complexity.
3. The Applicant raised the following issues:
  - 1) Whether the Respondent erred by holding that none of the contracts submitted by the Applicant met the similarity requirement in terms of scope, value, nature and complexity?
  - 2) Whether owing to the above, the Applicant is entitled to the following reliefs:
    - i. A declaration that the Accounting Officer's decision to dismiss the Applicant's complaint was erroneous and should be set aside.
    - ii. An order directing the Respondent to re-evaluate the Applicant's bid.

**C. Response to the Application**

1. The Respondent averred that the Applicant submitted 6 Contracts to support its experience and technical capacity.
2. That upon assessment of the above contracts undertaken against the technical requirements in the bidding documents to determine how each of the contracts met the post qualification criteria as stipulated in the bidding documents, it was found that none of the contracts met the similarity requirement in terms of scope, value, nature and complexity.

3. That the decision of the Accounting Officer was not erroneous.
4. The Respondent prayed that the application be dismissed with costs.

**D. Applicant's written submissions**

1. The Applicant, through *Ortus Advocates*, submitted that the Accounting Officer erred by holding that none of the contracts submitted by the Applicant met the similarity requirement in terms of scope, value, nature and complexity.
2. That the Experience and Technical Capacity requirement was *evidence of at least two (2) completed contracts of similar scope, value nature and complexity in the last 5 years supported by copies of delivery notes and certificates of acceptance and/or good performance from the previous clients.*
3. That the Applicant to meet this requirement submitted the following contracts whose value, scope, nature and complexity met the similarity requirement:
  - a. *Supply and Delivery of Vegetable Washing and Processing Equipment for the project of clean vegetable processing plant in Tuchenggou village.*
  - b. *10000-ton Steak processing project of Beef Cattle Superiority Characteristic Industrial Cluster (Xinye) in southwest Henan.*
  - c. *Provision of Equipment for analytical laboratories, testing laboratories and industrial pilot plant for the project "improvement of regional economies and local development" EuropeAid/ 13334/IH/SUP/AR, Lot 2-Equipment for laboratory analysis, food processing and water quality control – Argentina.*



- d. *Supply, delivery and installation of one (1) complete set of equipment for a batch drying plant for maize (Factory equipment) for one (1) common user facility (Cuf) at Kwagyei, Sekyere Central District Lot-2 Financing AFDB Supply Contract No. MOT/REP/ICB/IFB/2019/03. (Drying plant for maize)*
- e. *Rice mill to Fiji.*
- f. *Fourniture des materiels destines aux clusters charges de l'accompangnement et de la formation des entrepreneurs du secteur du mais, de l'agroalimentaire, du bois et de sa transformation – Congo.*
4. That the first and second contracts squarely fell in the definition of “of scope, value, nature and complexity in the last 5 years” and are supported by proper documentation.
  5. That the word “similarity” does not mean “same” or “identical”, the interpretation attached to it by the Accounting Officer was erroneous. According to Oxford dictionary, the word “similar” means having a resemblance in appearance, character, or quantity, without being identical.
  6. That the Applicant was not under an obligation to adduce contracts for projects which are the same as the project at hand in order to meet the technical capacity requirement.
  7. That the Applicant’s bid offer was 14% lower than the one made by *M/S Brivid (U) Ltd*; if the Applicant’s bid was fairly considered the Respondent would have received value for money.
  8. That if an evaluation had been properly conducted, the Applicant’s bid would have been found to be the best commercial and technical responsive bid offering the best experience and prices compared to other bidders. Counsel relied on regulation 6

(1) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations*.

9. Counsel invited the Tribunal to review the record and find that the Accounting Officer erred by holding that none of the contracts submitted by the Applicant met the similarity requirement in terms of scope, value, nature and complexity and that the Applicant submitted contracts which met the similarity requirement in terms of scope, value, nature and complexity. He also relied on ***Arua Municipal Council v Arua United Transporters Sacco Civil Appeal No. 25 of 2017*** and ***Tribunal Application No. 6 of 2014: Lira Regional Hospital v PPDA***.
10. Counsel prayed that the Application be allowed with costs.

**E. Respondent's written submissions**

1. The Respondent, through *CMS & Co. Advocates*, raised a preliminary objection that the Application is filed against the wrong party and improperly before this Tribunal.
2. That the Application ought to have been brought against the Government of Uganda/Attorney General as the representative of the Government of Uganda.
3. That the inviter of bids and Purchaser was The Government of Uganda, using funds borrowed by Government of Uganda from World Bank under the Competitiveness and Enterprise a Development Project. That *Private Sector Foundation Uganda* is only an implementing entity on behalf of the Government of Uganda and not the proper party to be sued in this Application.
4. Counsel cited ***Phenehas Agaba Vs Swift Freight International Ltd HCCS No 143/2000*** for the submission that



a suit against an agent is unsustainable where there was a disclosed principal.

5. Without prejudice to the above submissions, counsel submitted that the contracts as submitted by the Applicant did not meet the technical specifications and standards as they were not similar in scope, value and similarity, save for only two that met the criteria on value.
6. That the procurement was conducted following due process and after evaluation of the bids submitted, *Brivid (U) Ltd* was the best evaluated bidder
7. Counsel prayed that the Application be dismissed with costs.

**F. The oral hearing**

1. The Tribunal held an oral hearing on 30<sup>th</sup> September 2022 via the *zoom* software. The appearances and representations were as follows:
  - 1) Sadam Solomon, counsel for the Applicant.
  - 2) Agaba Asaph and Helga Priscilla Naluwooza, Counsel for the Respondent.
  - 3) Johnmarie Kyewalabye and Robert Musana, representatives of the Respondent
  - 4) Kasaija Bridget, representative of Best Evaluated Bidder.
2. Counsel representing the Applicant and Respondents highlighted their written submissions and also provided clarifications to the Tribunal.

**G. Resolution by the Tribunal**

1. The Applicant raised 2 issues for determination by the Tribunal. However, in light of the pleadings, and the written submissions and oral submissions of the parties, the Tribunal has recast the

issues. The Tribunal has power to reframe issues under Order 15 of the Civil Procedure Rules (which are applicable by virtue of Regulation 36 of the *Public Procurement and Disposal of Assets (Tribunal) (Procedure) Regulations, 2016*. The Application will therefore be resolved on the following issues:

- 1) Whether this Tribunal has jurisdiction to entertain the Application?
  - 2) Whether the Application is brought against a wrong party?
  - 3) Whether the Application is time barred?
  - 4) Whether the Respondent erred by holding that none of the contracts submitted by the Applicant met the similarity requirement in terms of scope, value, nature and complexity?
  - 5) What reliefs are available to the parties?
2. The Tribunal has considered the written and oral submissions and the authorities cited by the parties and their counsel.

**Issue no. 1:**

**Whether the Application is brought against a wrong party?**

1. Section 91I of the *Public Procurement and Disposal of Public Assets Act* provides for applications to the Tribunal by bidders and other persons who are aggrieved by decisions of Accounting Officers. The section does not specify who the respondent or respondents should be.
2. In our view, the entity which is conducting the impugned procurement is a necessary party to the application.



3. According to the Bidding Document, the Government of Uganda received financing from the World Bank under the *Competitiveness and Enterprise Development Project*. Government of Uganda represented by *Private Sector Foundation Uganda* invited sealed bids from eligible bidders for this procurement. The top page of the bidding document indicates the purchaser as *Private Sector Foundation Uganda*. However, the Bid Data Sheet at page 35 of the Bidding Document states that the Purchaser is the Government of Uganda.
4. The Respondent has availed the Financing Agreement in respect of Additional Financing for (Competitiveness and Enterprise Development Project) between the Republic of Uganda and International Development Association; Subsidiary Grant Agreement between the Government of Uganda and the Private Sector Foundation Uganda; and the Project Agreement (Competitiveness and Enterprise Development Project) between International Development Association and Private Sector Foundation Uganda.
5. Under Section 1B of Schedule 2 to the Financing Agreement, the Government agreed to make part of the proceeds of the Financing allocated from time to time to a Project Implementing Entity under a subsidiary agreement, under terms and conditions approved by the Lender, including procurement of the goods, works, non-consulting services and services to be financed out of the Subsidiary Financing.
6. Under article 3.01 (b) of the Subsidiary Grant Agreement between the Government of Uganda and the Private Sector Foundation Uganda, the Private Sector Foundation Uganda has an obligation to *Procure the goods, works, non-consulting services and services to be financed out of this Agreement in accordance with the procurement rules and procedures of the Association and PPDA.*

7. We agree that the Purchaser in this procurement is the Ministry of Finance, Planning and Economic Development, of the Government of Uganda. However, the Ministry of Finance and Economic Planning contracted the procurement to the *Private Sector Foundation Uganda* under the Subsidiary Grant Agreement between the Government of Uganda and the Private Sector Foundation Uganda. Indeed, according to the Request for Bids document, Government of Uganda represented by *Private Sector Foundation Uganda* invited sealed bids from eligible bidders for this procurement.
8. The Bid Data Sheet of the Bidding Document provides that procurement-related complaints should be addressed to the Coordinator of the Competitiveness and Enterprise Development Project, Private Sector Foundation Uganda. The Applicant applied to the Chief Executive Officer of *Private Sector Foundation Uganda*, the Respondent, for administrative review on 19<sup>th</sup> August, 2022.
9. The Project Coordinator of the *Competitive and Enterprise Development Project* determined the merits of the complaint in a letter dated 2<sup>nd</sup> September 2022 but received on 7<sup>th</sup> September 2022. There was no objection that the complaint had been addressed to a wrong forum.
10. The *Private Sector Foundation Uganda* is therefore a proper party in the administrative review proceedings.
11. **Issue no. 1 is answered in the negative.**

**Issue no. 2:**

**Whether this Tribunal has jurisdiction to entertain the Application?**

12. The Public Procurement and Disposal of Public Assets Tribunal is a creature of the *Public Procurement and Disposal of Public*
- PPDA Appeals Tribunal Decision Application No. 29 of 2022-JV AGT & Anr v PSFU



*Assets Act.*

13. Under Section 2 (1) (d) of the *Public Procurement and Disposal of Public Assets Act*, the Act applies to a procurement financed from public finances, even if it is by an entity not being of Government, except where the Authority confirms in writing, that the procurement system of the entity is satisfactory. It is not in dispute that the funds for this procurement are public funds. The *Private Sector Foundation Uganda* is not an entity of Government but is using public funds. The *Public Procurement and Disposal of Public Assets Act* is therefore applicable.
14. Section 4 (1) of the *Public Procurement and Disposal of Public Assets Act* provides that where this Act conflicts with an obligation of the Republic of Uganda arising out of an agreement with one or more States, or with an international organisation, the provisions of the agreement shall prevail over this Act.
15. In the case of ***Dolomite Engineering Services Ltd v Attorney General & PPDA, Civil Suit 599 of 2014*** the High Court held that since the African Development Bank (AfDB) Rules provided for a different method of review from Administrative Review under the *Public Procurement and Disposal of Public Assets Act*, the AfDB Rules would prevail in view of Section 4 of the Act because there was a conflict between the AfDB Rules and the Act.
16. The Bid Data Sheet of the Bidding Document provides that the procedures for making a procurement-related complaint are detailed in the “*Procurement Regulations for IPF Borrowers (Annex III)*”.
17. The Tribunal has carefully perused the Financing Agreement between the Republic of Uganda and International Development Association; the Subsidiary Grant Agreement between the Government of Uganda and the Private Sector Foundation



Uganda; the Project Agreement between International Development Association and *Private Sector Foundation Uganda*; and the *Procurement Regulations for IPF Borrowers (Annex III)*”.

18. There is nothing in those agreements and procurement regulations that ousts the application of the *Public Procurement and Disposal of Public Assets Act* or the jurisdiction of this Tribunal. Under article 3.01 (b) of the Subsidiary Grant Agreement between the Government of Uganda and *Private Sector Foundation Uganda*, the *Private Sector Foundation Uganda* has an obligation to “*Procure the goods, works, non-consulting services and services to be financed out of this Agreement in accordance with the procurement rules and procedures of the Association and PPDA*”.
19. The Tribunal has also found nothing in the procurement rules and procedures of the *International Development Association* which ousts the jurisdiction of this Tribunal.
20. In ***Dott Services Limited & Hes Infra Private Limited JV v Ministry of Water and Environment, Application no. 25 of 2021***, this Tribunal exhaustively reviewed the “*Procurement Regulations for IPF Borrowers (Annex III)*” and found nothing which ousts the applicability of the *Public Procurement and Disposal of Public Assets Act* or the jurisdiction of the Tribunal.
21. In ***K-Solutions Limited v Attorney General & PPDA, Application no. 9 of 2020***, the Tribunal found that the Respondents had not adduced evidence to show that the agreement signed between the Government of Uganda and the World Bank ousted the application of the *Public Procurement and Disposal of Public Assets Act*. The Tribunal decided that *Public Procurement and Disposal of Public Assets Act Guidelines on Procurement of Goods, Works and Non-Consulting Services under World Bank Loans and IDA Credits & Grants by World Bank Borrowers of January 2011 (revised in July 2014)* do not



oust the jurisdiction of the PPDA Act or the Tribunal. In the absence of such evidence, the Tribunal determined that the *Public Procurement and Disposal of Public Assets Act* applied to that procurement and the Tribunal therefore had jurisdiction to handle the matter.

22. In the instant case, the Tribunal finds that the *Public Procurement and Disposal of Public Assets Act* applies to this procurement and the Tribunal therefore has jurisdiction.

23. **Issue no. 2 is answered in the affirmative.**

**Issue no. 3:**

**Whether the Application is time barred?**

24. The Applicant, being dissatisfied with the result of the procurement process, applied to the Chief Executive Officer of the Respondent for administrative review on 19<sup>th</sup> August, 2022.

25. On receipt of an application for administrative review, the Accounting Officer is mandated to make and communicate a decision, in writing, addressed to a complainant, within ten days of receipt of a complaint. See section 89(7) of the *Public Procurement and Disposal of Public Assets Act*.

26. The Accounting Officer of the Respondent was by law obligated to make and communicate a decision regarding the Complaint on or before Monday 29<sup>th</sup> August 2022.

27. The provisions of the procurement statute are for all purposes and intents mandatory and non-compliance with them makes the proceedings fatal. See ***Galleria in Africa Ltd v Uganda Electricity Distribution Company Ltd (Civil Appeal No. 08 of 2017) [2018] UGSC 19***, Per Mwendha JSC.

28. It is our finding that the administrative review decision of the Accounting Officer contained in the letter dated 2<sup>nd</sup> September,

2022 but communicated on 7<sup>th</sup> September 2022 was made out of time, in breach of the law and of no legal consequence. See ***Applications No. 26 and 27 of 2022- Vision Scientific & Engineering Limited v Makerere University.***

29. Under section 89(8) of the *Public Procurement and Disposal of Public Assets Act as amended*, where the Accounting Officer does not make or communicate a decision within ten days of receipt of the complaint, the bidder may make an application to the Tribunal.
30. Section 91I (2) (b) of the *Public Procurement and Disposal of Public Assets Act* provides that such application must be made within ten days of the expiry of the period given for the Accounting Officer to make a decision; that is to say within 10 days from 30<sup>th</sup> August, 2022.
31. The time for filling an Application with the Tribunal started running on 30<sup>th</sup> August, 2022 and lapsed on 8<sup>th</sup> September, 2022 in accordance with section 91I (2)(b) of the *Public Procurement and Disposal of Public Assets Act*. The instant Application was filed on 19<sup>th</sup> September, 2022 which was 11 days late.
32. The Tribunal has in its previous decisions affirmed that the time limits set in the procurement and disposal statute were set for a purpose, are couched in mandatory terms, are a matter of substantive law and not mere technicalities and must be strictly complied with. There is no enabling provision within the *Public Procurement and Disposal of Public Assets Act 2003 as amended* that accords the Tribunal power to enlarge or extend time.
33. 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 ***Mugabi David vs Sembabule District Local Government, Application No.24 of 2022; Mugerwa Fred vs***



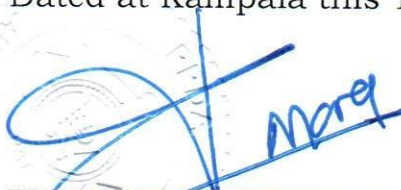
***Sembabule District Local Government, Application No. 23 of 2022 and Sanlam General Insurance vs UNRA, Application No.29 of 2021.***

34. The instant Application which was filed on 19<sup>th</sup> September, 2022 is time barred. The Application is therefore incurably defective and incompetent.
35. **Issue no. 3 is resolved in the affirmative.**
36. As a result, there is no need to delve further into the merits of the Application.

**H. Disposition**

1. The Application is struck out.
2. The Tribunal's suspension order dated 20<sup>th</sup> September, 2022 is vacated.
3. Each party to bear its own costs.

Dated at Kampala this 10<sup>th</sup> day of October, 2022.



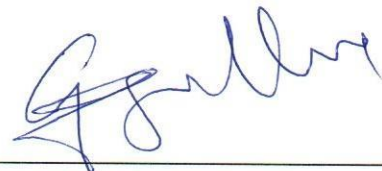
**FRANCIS GIMARA S.C**  
**CHAIRPERSON**



**NELSON NERIMA**  
**MEMBER**



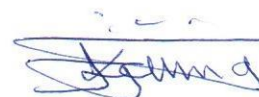
**THOMAS BROOKES ISANGA**  
**MEMBER**



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**MEMBER**



**PAUL KALUMBA**  
**MEMBER**



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**MEMBER**