

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

APPLICATION NO. 33 OF 2022

BETWEEN

CONSORTIUM OF

- 1. SRK EXPLORATION SERVICES LTD**
- 2. FALCONBRIDGE RESOURCES FZ-LLC (UAE)**
- 3. WARDELL ARMSTRONG**
- 4. CAIRN COMMODITIES INC=====APPLICANT**

AND

**MINISTRY OF FINANCE, PLANNING
AND ECONOMIC DEVELOPMENT =====RESPONDENT**

**APPLICATION FOR REVIEW IN RESPECT OF THE INVITATION BY
PRIVATISATION UNIT OF MINISTRY OF FINANCE, PLANNING AND
ECONOMIC DEVELOPMENT FOR EXPRESSION OF INTEREST
(EOI) FOR DEVELOPMENT OF KILEMBE MINES UNDER
PROCUREMENT REF NO. MOFPED/NON-CONS/2021-22/00154**

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

A. BRIEF FACTS

1. The Privatisation Unit of the Ministry of Finance, Planning and Economic Development (the Respondent), invited eligible companies to participate in the invitation for expression of interest (EOI) in the development of Kilembe Mines under procurement ref no. MOFPED/CONS/21-22/00154 using open international bidding method. The Notice of EOI was published on April 9, 2022.
2. 14 bidders namely *China Railway No. 10, Ginko Energy, Jervois Global, Liaoning Hongda T/A Wagagai Mining, Monta-Engil Uganda, Sarai Group, Sinomine Power China, Ad Meriola Ltd, Blencowe, Consortium of SRK Exploration Services Ltd, Falconbridge Resources FZ-LLC (UAE), Wardell Armstrong, Cairn Commodities Inc, Green Road ARC Resources, Puma Resources, Three Tier Construction, Victory Advisory and Horizon Corp* expressed interest in the procurement by May 10, 2022.
3. Upon conclusion of the evaluation process, a Notice of Best Evaluated Bidder was issued on August 23, 2022 with a removal date of September 6, 2022. The Notice of Best Evaluated Bidder named *China Railway No. 10, Ginko Energy; Jervois Global; Liaoning Hongda T/A Wagagai Mining; Monta-Engil Uganda; Sarai Group; and Sinomine Power China* as the Best Evaluated Bidders/Consultants that would be invited to submit proposals.
4. The Notice of Best Evaluated Bidder indicated that the Bidders, including Falconbridge Resources, were unsuccessful because they did not meet the minimum requirements of the expression of Interest.
5. The Applicant being dissatisfied with the evaluation process, applied for administrative review before the Accounting Officer by email dated September 6 2022 and a physical letter on September 7, 2022.

6. The Accounting Officer in a letter dated September 20, 2022 dismissed the Applicant's Complaint on grounds that there was no merit in the Complaint.

B. APPLICATION TO THE TRIBUNAL

1. The Applicant being dissatisfied with the decision of the Accounting Officer, filed the instant application with the Tribunal on September 26, 2022.
2. The Tribunal rendered a summary decision on 17th October 2022 whereby the Application was struck out. We now give the detailed decision.

C. RESPONSE TO THE APPLICATION

1. The Respondent responded to the Application by letter filed on October 4, 2022. The responses to the complaint were as follows:
2. That the complainant responded to the invitation through an online application on Tuesday 10th May 2022 at 9:40am.
3. The Notice of Best Evaluated Bidder was sent to all participants on August 23, 2022.
4. The communication which was submitting the EOI on behalf of the consortium members indicated that Falconbridge Resources was a leader of the consortium. None the less, Evaluation Committee evaluated all members of the consortium and all did not meet the requirements.
5. The consortium was evaluated as a whole therefore the reasons for being unsuccessful apply to the consortium.
6. The Ministry received the administrative review application on September 7, 2022, and the Accounting Officer's decision was made on 20th September, 2022 and even sent to the complainant's email on 21st September 2022 which is in accordance with section 89 (7) of the *Public Procurement and Disposal of Public Assets Act*.

7. That the Accounting Officer made the administrative review decision within the statutory timelines of 10 working days.
8. There is no proof of payment for administrative review fees and the Ministry is not aware of how much was paid.
9. The Respondent prayed that the Application be dismissed.

D. ORAL HEARING

1. The Tribunal held an oral hearing on October 12, 2022. Representations were as follows: Counsel Gad Wilson for the Applicant and Feysal Mayow the authorised representative of the Applicant attended the hearing virtually. Counsel Adrole Richard and Christine Nabiswa for the Respondent. Dr. Sengozi Damulira, the Accounting Officer of the Respondent was also present.
2. Counsel and the parties highlighted their written submissions and provided clarifications to the Tribunal.

E. APPLICANT'S SUBMISSIONS

1. The Applicant, through *Gad & Co. Advocates*, submitted that the Accounting Officer of the Respondent erred in law and fact when he failed to make an administrative decision within legislative timelines. That the Accounting Officer upon receiving the application by email on September 6, 2022, was expected to make a decision and serve it to the Applicant before September 16, 2022 so as to fit with in the 10 days prescribed by 89 (7) of the *Public Procurement and Disposal of Public Assets Act*
2. The decision was made on September 20, 2022 and communicated to the Applicant on September 21 by email. This was contrary to section 89 (7) of the *Public Procurement and Disposal of Public Assets Act* and thus illegal.
3. That the consequence of breach of a compulsory provision of the law is twofold. First it gives the Applicant the opportunity to apply to the Tribunal within the shortest time possible under section 911(2)(b) of the *Public Procurement and Disposal of Public Assets Act*. Secondly, it renders the entire procurement exercise invalid and it can only be sanitised by a re-tender. This

is because provisions of the public procurement and Disposal of Public Assets Act cannot be directory merely. They are for all purposes and intents mandatory and non-compliance with them makes the proceedings fatal. Procurement and Disposal activities are processes, one cannot move to another stage of the processes without fulfilling the first one as determined by Justice Mwendha in *Galleria in Africa Ltd v Uganda Electricity Distribution Company Ltd () [2018] UGSC 19*.

4. The Applicant at all times bided as a consortium of Falconbridge Resources, Cairn Commodities Partnership, SRK Exploration Services Ltd and Wardell Armstrong International. The Notice of Best Evaluated Bidder only reflected the bidder as Falconbridge Resources FZ-LLC. There is no statement in the Applicant's Expression of Interest that indicated that Falconbridge Resources was the lead in the procurement. There is no reason why other companies that bided as Joint Ventures were expressly indicated as Joint Ventures while when it came to the Applicant, only one member of the consortium is identified. The only explanation to this unfortunate debacle is that the Applicant was not evaluated at all. Such omission is discriminatory and against the principles of fair competition as stated in section 44, 45 and 46 of the *Public Procurement and Disposal of Public Assets Act*.
5. The Applicant's bid was disqualified for not having submitted documents. Had the Respondent been truthful about the evaluation process and interested in maximising competition, it would have sought for clarification from the Applicant, to clarify the details that were not apparent or could not be finalised at the time of bidding as stipulated in section 73 of the *Public Procurement and Disposal of Public Assets Act*.
6. The entire procurement process was a process that entirely relies on documentation and not price sensitive. It would not change the substance of the Applicant's bid after all the Applicant was already administratively compliant and responsive and thus no other bidder would be affected by any clarification that would have been made in accordance with

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Section 73 of the *Public Procurement and Disposal of Public Assets Act*.

7. Mota-Engil Uganda, China Railway No. 10, Sarai Group and Sinomine Power China do not meet the bidding requirements and had the evaluation committee competently done its job, it would have found that the aforementioned bidders did not meet the requirements of the bidding document. That would only leave the shortlist with 2 best evaluated bidders. Sinomine was found to be non-performing according to the Report of Kilembe Mines Winding-Up report of October 2017. This was subsequently followed by the Presidential Directive dated November 2022 which directed the then Minister of Energy and Mineral Development to find a new operator for Kilembe Mines due to the Sinomine group being incapable.
8. The Respondent did not mandatorily verify the accuracy, validity, and authenticity of certificates of registration of all the bidders in this procurement, and signed statements affirming that there is no conflict of interest. The requirement to verify the said documents is mandatory under Regulation 9(9) of the *Public Procurement and Disposal of Public Assets (Procurement of Consultancy) Regulations 2014*.
9. There cannot be best evaluated bidders without verification. Procurement activities are processes, one cannot move to another stage of the processes without fulfilling the first one as determined as determined by the Supreme Court in *Galleria in Africa Ltd v Uganda Electricity Distribution Company Ltd* () [2018] UGSC 19
10. That the Respondent did a lacklustre job in evaluating bids in this procurement. There were very fatal omissions or deliberate breaches of the Act and Regulations of PPDA which have the effect of rendering the entire process a nullity.
11. Counsel for the Applicant prayed that this Tribunal grants the Orders prayed for.

F. RESPONDENT'S SUBMISSIONS

1. The Respondent, through Attorney General's Chambers, submitted as follows:
2. That the Tribunal is not vested with jurisdiction to handle this Application.
3. That the subject matter before this Tribunal is not a public procurement for works, services or supplies as envisaged under section 3 of the *Public Procurement and Disposal of Public Assets Act* and that the Applicant is not a bidder as defined in the Act.
4. That the Respondent has no intention of drawing finances from the Consolidated Fund to engage in the alleged procurement. The Respondent is instead calling upon interested parties with the appropriate legal, technical, project management and financial capacities to enter into a Mineral Production Sharing Agreement to perform the financing, detailed exploration, feasibility studies, design, mine development among others. A Mineral Production Sharing Agreement (MPSA) is one that the government grants to a contractor for the exclusive right to mine within (but no title over) a specific area and includes a mechanism of sharing the resources. In return, the contractor provides the financing, technology, management and personnel for the mining project and Government shares in the production in kind or in value as the owner of the minerals therein. There is nothing that suggests an arrangement for a procurement of goods, services or supplies under an MPSA. Additionally, a successful entity will invest their own resources and finances into developing the Kilembe Mines. Such funds will not be accessed from the Consolidated Fund as is provided for under section 2 (1) of the *Public Procurement and Disposal of Public Assets Act*.
5. That the Tribunal is not seized with the jurisdiction to entertain the said Application for administrative review because the Respondent were not procuring any goods, services, or supplies but simply borrowing best practices from the *Public Procurement and Disposal of Public Assets Act*.

6. The Respondent's counsel further submitted that the subject matter laid before this Tribunal therefore is an investment or divestiture which is governed by the *Public Enterprises Reform and Divestiture (PERD) Act of 1993* and falls outside the scope of jurisdiction of the *Public Procurement and Disposal of Public Assets Appeals Tribunal*.
7. That under the First Schedule of the PERD Act, Class III, Kilembe Mines Limited is listed as a public entity from which Government is required to fully divest from; paragraph 7(1) (i) of the Second Schedule to the PERD Act provides for, 'any other method which the privatization unit may consider appropriate'.
8. That the Government of Uganda (GoU) through the Privatization Unit (PU), in exercise of its mandate under the Public Enterprises Reform and Divestiture (PERD) Act of 1993 wishes to implement the development of Kilembe Mines through a Mineral Production Sharing Agreement (MPSA) and to select a MPSA partner through a competitive bidding process.
9. That the evaluation committee that was set up to consider the Expressions of Interest is the Divestiture and Reform Implementation Committee (DRIC) under section 3 of the PERD Act.

G. RESOLUTION

1. In view of the preliminary points of law raised, the Tribunal has first considered the following issues –
 - 1) Whether this Tribunal has jurisdiction to entertain the Application?
 - 2) Whether the Applicant has *locus standi* before the Tribunal?

Issue no. 1

Whether this Tribunal has jurisdiction to entertain the Application?

2. In ***Baku Raphael & Obiga Kania vs Attorney General, Constitutional Appeal No. 1 of 2005***, Justice Oder held that

jurisdiction is a creature of statute and cannot be inferred. The Tribunal must therefore inquire into the facts of whether it is seized or clothed with Jurisdiction to interrogate the merits of the Application before it.

3. The Public Procurement and Disposal of Public Assets Appeals Tribunal is a creature of the *Public Procurement and Disposal of Public Assets Act*. Its jurisdiction arises out of the instances listed in section 91I (1)(a)-(c) of the *Public Procurement and Disposal of Public Assets Act*.
4. Section 2 of the *Public Procurement and Disposal of Public Assets Act* provides guidance on when the Act can be applied. Under Section 2 (1) (a) (iii), the Act is to apply to all public procurement and disposal activities to do with the public finances of a procuring and disposing entity. In addition, section 2 (1) (c) provides that the Act shall apply to procurement and disposal by a procuring and disposing entity within or outside of Uganda. Even if public finances are not being expended, the Act will apply to any procurement and disposal by a procuring and disposing entity within or outside of Uganda.
5. The procurement in issue is by the Ministry of Finance, Planning and Economic Development which is a Ministry of Government and therefore a procuring and disposing entity within the meaning of section 2 (1) (a) (iii) and 3 of the *Public Procurement and Disposal of Public Assets Act*.
6. The Respondent contends that the process herein is a privatisation under the *Public Enterprises Reform and Divestiture (PERD) Act of 1993* and is not a procurement under the *Public Procurement and Disposal of Public Assets Act*. The Tribunal does not agree, for the following reasons.
7. The Invitation for expression of interest in the instant application in paragraphs 3 and 4 stated as follows:
“With the increase in demand for copper and cobalt worldwide, the Government of Uganda (GoU) through the Privatisation Unit (PU), in exercise of its mandate under the *Public Enterprise and*

Reform Divestiture Act Cap.98 of the Laws of Uganda, 1993 wishes to implement the development of Kilembe Mines through the Mineral Production Sharing Agreement (MPSA) and to select an MPSA partner through a competitive bidding process.

GOU now invites eligible companies to express their interest in providing the required services mentioned herein among others..."

8. The exercise was allocated a procurement reference number (MOFPED/CONS/2021-22/00154) in accordance with regulation 3 (3) of the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-consultancy services) Regulations*. The notice of expression of interest was posted on the Respondent's website; and the website of the Public Procurement and Disposal of Public Assets Authority as provided under regulation 42 (2) of the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-consultancy services) Regulations*.
9. The Respondent used the PPDA forms and regulations for recording the issue and receipt of the expression of interest document. The Evaluation Committee was appointed and approved by the Contracts Committee. The members of the evaluation committee signed the declaration to abide by the code of ethical conduct under regulation 3 (4) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations*. An application for administrative review was made to the Accounting Officer. He suspended the process and made an administrative review decision under the *Public Procurement and Disposal of Public Assets Act*.
10. In view of the wording of the invitation for expression of interest and the conduct of the process, we are persuaded that this was a procurement for services by a procuring and disposing entity under the *Public Procurement and Disposal of Public Assets Act*.
11. Under the First Schedule of the Act, Kilembe Mines Limited is listed as a Class II public entity from which Government is

required to fully divest from. Government owns 99.99 % shares in Kilembe Mines Ltd. The invitation for expression of interest to provide the services stated therein will not result in the Government fully divesting from the company. The invitation for expression of interest to provide the listed services is a procurement which was subjected to the *Public Procurement and Disposal of Public Assets Act*. Having elected to conduct the process under the *Public Procurement and Disposal of Public Assets Act*, the Respondent cannot approbate and reprobate at the same time.

12. The Tribunal has not found anything in the *Public Enterprises Reform and Divestiture (PERD) Act* which would preclude the Respondent from procuring a service under the *Public Procurement and Disposal of Public Assets Act* in order to support the planned privatisation.
13. The Tribunal therefore has jurisdiction over the complaint.
14. **Issue no. 1 is answered in the affirmative. The Preliminary Objection is overruled.**

Issue no. 2

Whether the Applicant has locus standi before the Tribunal

During the hearing, the Tribunal noted a question of law in respect to locus standi and the same was brought to the attention of the Applicant. The Applicant made oral submissions during the hearing which the Tribunal has considered in arriving at its decision.

15. This application to the Tribunal was made under sections 89(8) and section 91I (2) (b) of the *Public Procurement and Disposal of Public Assets Act*. These provisions enable a bidder who is dissatisfied with the administrative review decision of the Accounting Officer to apply to the Tribunal.
16. For an Applicant to have *locus standi* before the Tribunal under

section 89(8), that Applicant must be a bidder who made an application for administrative review to the Accounting Officer.

17. According to the record of issue of bidding documents EOI, the bidding document for expression of interest was issued to Falconbridge Resources.
18. The Expression of Interest was submitted by via email dated May 10, 2022. The e-mail was sent from Feysal Mayow to the Procurement and Disposal Unit of the Respondent. The subject is "Kilembe Mines expression of Interest-Falconbridge Resources".
19. The body of the e-mail states: "We have the pleasure of submitting this expression of interest (EOI) in the development of Kilembe Mines on behalf of and in support of our partner Falconbridge Resources". Attached to the email were-
 - An expression of interest letter from Falconbridge Resources
 - The Kilembe Mines project proposal to support Falconbridge's EOI
 - An expression of interest from Wardell Armstrong International (UK).
 - An expression of interest from SRK Exploration Services (UK).
20. The letter from *Cairn Commodities* to the Respondent was a proposal for Kilembe Mines Project on behalf of Falconbridge Resources. It was not an independent Expression of Interest from *Cairn Commodities* itself.
21. *Wardell Armstrong International* was submitting its Expression of Interest to Mr. Feysal Mayow as a client. *Wardell Armstrong International* is therefore not a bidder but an independent contractor or consultant to *Mr. Feysal*.
22. The Letter from *SRK Exploration Services Ltd (UK)* dated 18th December 2021 is addressed to H.E the President of Uganda, expressing interest in re-evaluating the Kilembe Copper Mine in Kasese District. There is no mention of the consortium or

reference to the EOI. This letter predates the procurement. It is clear that *SRK Exploration Services Ltd (UK)* is not a bidder in this procurement.

23. The application for administrative review to the Accounting Officer was filed on September 7, 2022 by *Cairn Commodities* and signed by *Feysal Mayow* who described himself as *Authorised Representative of the Consortium- Cairn Commodities Inc.* Mr. Mayow conceded during the hearing that he did not have a power of attorney.
24. The Tribunal has not seen any evidence of a Consortium between *SRK Exploration Services Ltd; Falconbridge Resources FZ-LLC; Wardell Armstrong; and Cairn Commodities Inc.* The Tribunal has equally not found any evidence that Mr. Feysal Mayow was a representative of *SRK Exploration Services Ltd; Falconbridge Resources FZ-LLC; and Wardell Armstrong.* The reference to a “consortium” was a misnomer.
25. The application for administrative review by *Feysal Mayow* purporting to be the *Authorised Representative of the Consortium- Cairn Commodities Inc.* was incompetent due to lack of *locus standi*.
26. Matters were not helped when the Accounting Officer addressed his decision of September 20, 2022 to *Falconbridge Resources* who was not a complainant.
27. The Application to this Tribunal by the purported Consortium of *SRK Exploration Services Ltd; Falconbridge Resources FZ-LLC; Wardell Armstrong; and Cairn Commodities Inc.* is also incompetent for lack of *locus standi*. The purported Consortium is not a bidder and did not apply to the Accounting Officer for administrative review. It cannot have audience before this Tribunal under sections 89(8) and 91I (2)(b) of the Public Procurement and Disposal of Public Assets Act.
28. The Instant Application is therefore incurably defective and incompetent since there was no valid Application before the

Accounting Officer, which would form the basis upon which the Applicant would appeal to the Tribunal for review of a decision of the Respondent in accordance with *Part VIIA* of the Public Procurement and Disposal of Public Assets Act.

See: ***JV KADAC-GLOBETEC VS Uganda Prison Services, Application No.04 of 2022*** and ***Muhick International vs National Agricultural Advisory Services, Application No.20 of 2022.***

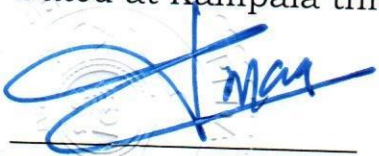
29. Since the Applicant has no *locus standi*, there is no need to delve into the merits of the Application.
30. **Issue no.2 is resolved in the negative.**

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H. DISPOSITION

1. The Application is struck out.
2. The suspension order dated September 29, 2022 is vacated.
3. Each party shall bear own costs.

Dated at Kampala this 18th day of October, 2022.




FRANCIS GIMARA S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER