

**THE REPUBLIC OF UGANDA
IN THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC
ASSETS**

APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 41 OF 2022

BETWEEN

ORUNGO MARKET VENDORS ASSOCIATION =====APPLICANT

AND

AMURIA DISTRICT LOCAL GOVERNMENT =====RESPONDENT

**APPLICATION FOR REVIEW OF THE DECISION OF AMURIA
DISTRICT LOCAL GOVERNMENT IN RESPECT OF THE
PROCUREMENT FOR REVENUE COLLECTION FROM
ONYAMIGUROK WEEKLY CATTLE MARKET UNDER
PROCUREMENT REFERENCE NUMBER AMUN 565/SRVCS/2022-
23/00001**

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

A. BRIEF FACTS

1. Amuria District Local Government (the Respondent) invited bids from cooperatives/Associations to bid for numerous revenue sources including Onyamigurok weekly cattle market under Procurement Reference Number AMUN 565/SRVCS/2022-23/00001. The Bid Notice was advertised in the New Vision News Paper.
2. Two bidders namely Orungo Market Vendors Association (the Applicant) and Future Vision Marketing Association submitted bids on September 1, 2022.
3. Upon conclusion of the evaluation process, the Notice of Best Evaluated Bidder was displayed on September 29, 2022 with a date of removal being 12th October 2022. The Notice indicated that Future Vision Marketing Association was the Best Evaluated Bidder at a Total contract price of UGX 6,120,000/= per month.
4. The Applicant being dissatisfied with the evaluation process, applied for administrative review to the Accounting Officer of the Respondent in a letter dated October 7, 2022. The Respondent received the Compliant on October 10, 2022 and immediately suspended the procurement process.
5. The Accounting Officer of the Respondent did not respond to the complaint lodged. The Applicant thus lodged the instant application by letter to the Tribunal on October 31, 2022, seeking to review the decision of the Respondent.

B. APPLICANT'S SUBMISSIONS

Failure to conduct administrative review by the Respondent's Accounting Officer

1. The Applicant submitted that it applied for administrative review on October 10, 2022 but never received any communication from the Respondent. That by the Accounting Officer of the Respondent failing to communicate to the Applicant the outcome of the

administrative review, he breached the provisions of regulation 139 (5) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*.

2. That the Accounting Officer of the Respondent only purported to respond to the application for administrative review on the 1st November 2022 after receiving summons from this Tribunal. This was way beyond the 15 days stipulated by Regulation 139 (5) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*.

Reasons cited for disqualifying the Applicant

3. The reasons given by the Respondent for disqualifying the Applicant are immaterial and not captured in the requirements for eligibility as listed at page 8 of the Bidding Document.
4. That the standard bidding document issued by the Respondent is simply a guide that enables the Applicant to know the bidding requirements and compile them for submission. Failure to fill the said standard document can never be a valid reason for disqualifying the Applicant.
5. The Respondent is dwelling on the form of the document submitted and not the content. The resolution submitted by the Applicant conforms to the requirement of the Bidding Document regardless of the titles of the signatories. The only way the Respondent would prove whether the signatories of the resolution submitted by the Applicant were part of the Applicant association was by looking at the constitution of the Applicant in which members are listed. The Respondent has not pointed out whether the persons who signed the Applicant's resolution were not members in said association.
6. The organization structure was never part of the preliminary requirements for evaluation to determine eligibility of the bidders and as such ought not to have been considered by the Respondent.

Eligibility of Future Vision Marketing Association

7. Future Vision Marketing Association (Best Evaluated Bidder) has a tainted image of forgeries and fraud.
8. Future Vision Marketing Association Registered with Uganda Revenue Authority on November 29, 2021 and there is a Tax Clearance Certificate for Future Vision Marketing Association issued on July 29, 2021.
9. Future Vision Marketing Association had a history of defaulting. On November 25, 2021, the Senior Assistant Chief Administrative Officer wrote to the Managing Director of Future Vision Marketing Association citing irregularities in the conduct of business by the association.
10. Future Vision Marketing Association defaulted to remit revenue for the same market in November 2021 amounting to UGX 1,000,000/= (One Million Shillings).
11. Such conduct should have automatically disqualified Future Vision Marketing Association.
12. Future Vision Marketing Association does not have a PPDA Certificate of Registration as a service provider for the works bid for. The Applicant submitted that since Future Vision Marketing Association is not registered with PPDA, they were not eligible to compete and as such ought to have been rejected at the onset had the process been fair.
13. The Applicant prayed that the Tribunal be pleased to uphold the Application and disqualify Future Vision Marketing Association.

C. RESPONDENT'S SUBMISSIONS

Wrong Bid submission Sheet

1. The Applicant submitted his own bid submission sheet which did not contain provisions as in the original bid submission sheet issued by the entity in the bidding document.
2. The Applicant did not fill the original bid submission sheet and consequently, the bidder did not include the bid validity period

which was one of the provisions in the original bid submission sheet.

Contradictions between the resolution and the structure

3. The titles of the persons who signed the Resolution are;- Directors and Company Secretary who do not appear in the Organization structure, implying that they are not part of Association.. Directors would suggest that they belong to a registered limited company and not Association which was the entity's requirement. They in addition, did not submit a list of the members of the association but instead submitted an organization structure which did not bare the directors.

Eligibility of Future Vision Marketing Association

4. Future Vision Marketing Association were eligible and compliant to the set criteria in the bid document.
5. The formal contract entered by Future Vision Marketing Association and Amuria District Local Government was for FY 2021/22 was on 2nd December 2021. However, prior to the period of formal contractual arrangement, the district gave written permission to the sub county (Ogolai s/c) to do revenue collections pending the conclusion of the procurement processes. The Respondent was not privy to the informal agreement between the sub-county and Future Vision Marketing Association to collect revenue on their behalf. There was no formal contract between the two parties above which contradicts their complaint on past performance which should have been relied upon by the Contracts Committee to disqualify Future Vision Marketing Association.

D. THE ORAL HEARING

The Tribunal held an oral hearing on November 10, 2022.

The appearances were as follows:

Mr. Okodu Mohammed Jamal and Mr. Apedu Jonathan appeared for the Applicant. Canon George Adoko, the Accounting Officer of Amuria District Local Government and Ms. Akol Anne the Senior Procurement Officer of Amuria District Local Government appeared for the Respondent. Mr. Okello Simon Peter, the Chairperson of Future Vision Marketing Association appeared for the Best Evaluated Bidder.

The parties highlighted their respective written submissions and responded to questions put by the Tribunal.

E. RESOLUTION

Preliminary observation

1. Before we tackle the issues, we note that the Applicant commenced the Application by letter dated October 31, 2022.
2. Section 91L (1) of the Public Procurement and Disposal of Public Assets Act provides that an application to the Tribunal shall be in writing in the prescribed form and include a statement of the reasons for the application.
3. The formal requirements for an application to the Tribunal are contained in Regulation 6 (2) of the *Public Procurement and Disposal of Public Assets (Tribunal) (Procedure) Regulations, 2016*.
4. In the instant case, the application to the Tribunal dated October 31, 2022 was in writing (but not in the prescribed form); it included a reasons for the application; and filing fees were paid.
5. It is our finding that the Applicant's letter suffices for an application to the Tribunal for purposes of section 91L of the *Public Procurement and Disposal of Public Assets Act*.
6. Non-conformity with the prescribed form does not render the application void. In considering the substance rather than the form, we are fortified by section 43 of the *Interpretation Act* which provides that where any form is prescribed by any Act, an instrument or document which purports to be in such form shall not be void by reason of any deviation from that form which does not affect the substance of the instrument or document or which is not calculated to mislead. See: **SAMANGA ELCOMPLUS JV v PPDA & UEDCL, Application No. 4 of 2021** and **FRIDA B. KWIKIRIZA v BULIISA DISTRICT LOCAL GOVERNMENT, Application No. 28 of 2022**.

7. The Tribunal will now proceed to resolve the issues. The Application did not raise any issue for determination by the Tribunal. However, from the written submissions of the Applicant filed on November 4, 2022, the following issues are deduced;
 - 1) *Whether the Accounting Officer of the Respondent erred in law and fact when he failed to make and communicate a decision to the Applicant within statutory timelines?*
 - 2) *Whether the Respondent erred in law and fact when it disqualified the Applicant's bid?*
 - 3) *Whether the Respondent erred in law and fact when it declared Future Vision Marketing Association as the best evaluated bidder?*
 - 4) *What remedies are available to the parties?*

Issue No. 1: Whether the Accounting Officer of the Respondent erred in law and fact when he failed to make and communicate a decision to the Applicant within statutory timelines?

8. 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.
9. The Applicant applied for administrative review before the Accounting Officer of the Respondent on October 10, 2022. The ten days within which the Accounting Officer was required to make and communicate a decision started running on October 11, 2022 and expired on October 20, 2022. The Respondent's Accounting Officer purported to make a decision dated October 25, 2022 but even then, there is no evidence that it was communicated to the Applicant. The purported decision made outside the statutory timeline was a nullity.

10. The Respondent was apparently under the mistaken belief that the Accounting Officer had 15 working days within which to make and communicate an administrative review decision pursuant to regulation 139(5) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations 2006*. However, the provisions in Section 89 (7) of the *Public Procurement and Disposal of Public Assets Act* as amended which stipulates 10 days, take precedence over the regulations. See section 18(4) of the *Interpretation Act*.
11. The provisions of section 89(7) of the *Public Procurement and Disposal of Public Assets Act* are mandatory. The Accounting Officer of the Respondent therefore erred in law when he failed or omitted to make and communicate a decision on the Complaint filed by the Applicant within the time frame set under the Act.
12. Under sections 91I(1)(b) and 89 (8) of the *Public Procurement and Disposal of Public Assets Act*, where the Accounting Officer fails to make and communicate a decision, the aggrieved bidder must file an application before this Tribunal within ten days after the expiry of the ten days stipulated under section 89 (7).
13. The ten days started running on October 21, 2022 and would expire on Sunday October 30, 2022. Section 34 (1) (b) of the *Interpretation Act* provides that in computing time for the purpose of any Act, if the last day of the period is a Sunday or a public holiday (“excluded days”), the period shall include the next following day, not being an excluded day. Since October 30, 2022 was a Sunday, the last day was therefore Monday October 31 2022. The Applicant was therefore within its statutory rights to file the instant application with the Tribunal on October 31, 2022.
14. **Issue no. 1 is answered in the affirmative.**

Issue No. 2: Whether the Respondent erred in law and fact when it disqualified the Applicant’s bid?

15. The Notice of Best Evaluated Bidder indicated that the Applicant was disqualified for not indicating bid validity date in its bid submission sheet and having discrepancies in the designation of its signatories in the Resolution.
16. Part 1, Bidding Procedures at page 6 of the Bidding Document, required Bids to remain valid until January 2, 2023. The Bidder was expected to submit a bid submission sheet duly filled and signed by the authorized signatory.
17. The form for bid submission stated in Part 1, Bidding Procedures, at page 10 required the bid validity date to be inserted and that the said bid would remain binding on the bidder subject to modifications agreed upon during contract negotiations.
18. Non-conformity with the specific form of bid submission sheet provided for in the standard bidding document issued by the Respondent does not render the bid submission sheet void. See *Application No.13 of 2021 Kasokosoko Services Ltd v Jinja School of Nursing and Midwifery*; and section 43 of the *Interpretation Act*.
19. The bid submission sheet used by the Applicant was, in form, different from the one provided for in the standard bidding document issued by the Respondent. However, the Applicant clearly stated its bid price. The Applicant also enclosed the entire standard bidding document, including Part 1, Bidding Procedures at page 6 which stated a bid validity up to January 2, 2023. All pages were signed and stamped by the Applicant. The Applicant therefore adopted the bid validity period as stated in the Bidding document.
20. The Respondent erred when it prioritized form over substance.
21. Regarding the discrepancies in the designation of the Applicant's signatories in the Resolution and in the

Organizational Structure, the Tribunal has carefully scrutinized the impugned documents.

22. The resolution submitted at page 32 of the Applicant's bid registered with URSB on June 15, 2021 named *Opila Joseph* and *Okudu Mohamed Jamal* as signatories to the bank account to be opened in DFCU Bank. The resolution was signed by *Opila Joseph* as Company Secretary, *Okudu Mohamed Jamal* as Director, *Amwanika Peter* as Director and *Apoi Aisha* as Director.
23. The Constitution of the Applicant at page 61 of the bid indicated a list of 29 members of the Association together with their designations. Specifically, *Opila Joseph* is indicated as Secretary, *Okudu Mohamed Jamal* as Chairperson, *Amwanika Peter* as Vice Secretary and *Apoi Aisha* as Vice Chairperson.
24. The Organization Structure at page 23 of the Applicant's bid provided for numerous positions in the Applicant's organization such as *Market Master*, *Market Supervisor*, *Cashier*, *Internal Auditor*, *Revenue Collection*, *security guard* and *cleaners*.
25. The alleged discrepancies between the description of offices in the Organization Structure and the designations of persons who signed the resolution was a matter that could have been clarified upon had the Evaluation Committee made such a request pursuant to regulations 45 (9), 74, and 75(4 of the Local Governments (*Public Procurement and Disposal of Public Assets*) Regulations 2006. See *Application No.22 of 2022 Mbarara City South Boda Boda Operators SACCO vs Mbarara City Council*.
26. In any case, the alleged discrepancies in designation can be explained by the fact that the resolution was signed by the Applicant's Board of Directors since it is a company Limited by Guarantee, while the designations used in the Organization Structure were specific to implementation of the subject of the impugned procurement.

27. Nonetheless, nomenclature of office positions was not part of the evaluation criteria specified in the bidding document of the Respondent, and as such, relying on them was a departure from the evaluation criteria contrary to section 71(3) of the *Public Procurement and Disposal of Public Assets Act*.
28. The Applicant was therefore wrongfully disqualified on the basis of discrepancies in designation at the preliminary evaluation stage
29. **Issue no. 2 is resolved in the affirmative.**

Issue No. 3: Whether the Respondent erred in law and fact when it declared Future Vision Marketing Association as the best evaluated bidder?

30. The Tribunal noted that Future Vision Marketing Association at page 3 of its bid, submitted a Transactional Tax Clearance Certificate issued under TIN No. 1019689817 on 18/8/2022, No. SO01230072249 issued specific to the Respondent, in compliance with the evaluation criteria.
31. The Applicant casually made allegations of forgery fraud in its submissions. It is trite law that fraud must be strictly pleaded and proved. The Tribunal finds no merit in the said allegations and the same are dismissed.
32. However, the evaluation criteria stated that the record of past performance (particularly for non-payment or defaulting) would be considered in determination of commercial and technical responsiveness. The record of past performance was stated in general terms and it does not necessarily refer to performance of contracts with the Respondent. The criteria of how past performance would be assessed was not stated in the bidding document. Nevertheless, the Respondent was free to conduct due diligence to establish past performance, if any.
33. The Evaluation Report is silent as to whether the best Evaluated Bidder's record of past performance (particularly for

non-payment or defaulting if any) was considered. To this extent, the Respondent erred.

34. **Issue no. 3 is resolved in the affirmative.**


Issue No. 4: What remedies are available to the parties?

35. The Tribunal has found errors in the evaluation of both the Applicant's and Best Evaluated bidder's bids.
36. The matter will be remitted back to the Respondent for a re-evaluation.

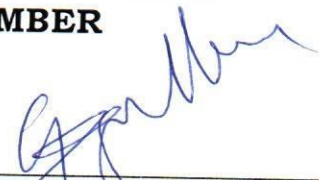
F. DISPOSITION

1. The Application is allowed.
2. The disqualification of the Applicant's bid and the award of the contract in the impugned procurement to Future Vision Marketing Association, are set aside.
3. The Respondent is directed to conduct a re-evaluation of the bids in a manner not inconsistent with this decision, the law and the bidding document.
4. The Tribunal's suspension order dated October 31, 2022 is vacated.
5. The Respondent shall refund the Applicant's administrative review fees.
6. Each party shall bear its own costs.


Dated at Kampala this 17th day of November, 2022.



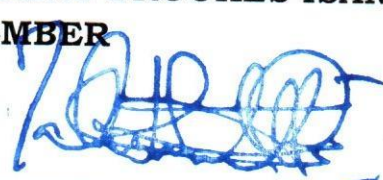
NELSON NERIMA
MEMBER



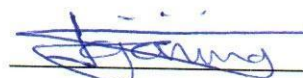
GEOFFREY NUWAGIRA KAKIRA
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PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER