

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

**APPLICATION NO. 43 OF 2022**

**BETWEEN**

**PRECISE ENGINEERING SERVICES LIMITED =====APPLICANT**

**AND**

**UGANDA ELECTRICITY TRANSMISSION  
COMPANY LIMITED=====RESPONDENT**

**APPLICATION FOR REVIEW IN RESPECT OF THE PROCUREMENT  
OF PLANT DESIGN, FABRICATION, GALVANISING, TESTING, IN-  
SPECTION BEFORE DISPATCH, SUPPLY AND DELIVERY OF FIVE  
(5) 132kv DOUBLE CIRCUIT TRANSMISSION LINE TOWER MONO-  
POLES TO UETCL STORES AT NJERU, JINJA DISTRICT UNDER  
PROCUREMENT REFERENCE NUMBER UETCL/SUPLS/2020-  
2021/00447**

**BEFORE: FRANCIS GIMARA SC; NELSON NERIMA; THOMAS  
BROOKES ISANGA; PAUL KALUMBA; AND CHARITY KYARISIIMA,  
MEMBERS**

## **DECISION OF THE TRIBUNAL**

### **A. BRIEF FACTS**

1. Uganda Electricity Transmission Company Limited (the Respondent) published an invitation for bids for the plant design, fabrication, galvanising, testing, inspection before dispatch, supply, and delivery of five (5) double circuit transmission line tower monopoles to UETCL stores at Njeru, Jinja District under procurement reference number UETCL/SUPLS/2020-2021/00447 on 19<sup>th</sup> May 2022
2. The bidding document was issued to 16 bidders of which only 4 bidders namely *Fara Gostar Bistoon*, *Precise Engineering Services Limited* (the Applicant), *Citic Construction Ltd* and *Coreplus Logistics Ltd* submitted bids by the closing date of June 29, 2022
3. Upon conclusion of the evaluation process, the Best Evaluated Bidder Notice was displayed on October 4, 2022, with a date of removal being October 17, 2022. The Notice indicated that *Fara Gostar Bistoon* was the Best Evaluated Bidder at a Total contract price of UGX 2,829,588,800/= tax inclusive.
4. On October 18, 2022, the Applicant being dissatisfied with the evaluation process, applied for administrative review before the Accounting Officer of the Respondent.
5. The Accounting Officer in a letter dated October 31, 2022, made, and communicated an administrative review decision to the Applicant stating that the complaint had no merit

### **B. APPLICATION TO THE TRIBUNAL**

1. The Applicant being aggrieved by the decision of the Accounting Officer lodged the instant application with the Tribunal on November 7, 2022, seeking to review the decision of the Respondent.

## C. SUBMISSIONS

### Applicant

1. The Applicant made specific responses to the grounds on which its bid was disqualified by the Respondent as follows:
  - i) Regarding the disqualification on failure or omission to submit general outline drawings for towers, the Applicant contended that the requirement for submission of General Outline Drawings for Towers applied to a Contractor and further that in section 2.1 of the Employer's Requirements and General technical Requirements of the Bidding document, the Contractor must submit the drawings "no later than six (6) weeks after award of contract" in the following manner: one (1) AutoCAD 14 computer file on a CD-ROM Disk and by E-mail, plus four (4) paper copies of each drawings to the Employer's Engineer.
  - ii) On the failure to submit the tower weights for each type, the Applicant relied on Part 2: Employer's Requirements and General technical Requirements of the Bidding document: Section 1.11: Submittals, 2.2 Drawings and contended that the said requirement also applied to contractors and further that in section 2.2 the Drawings to scale including dimensions, weight, center of gravity for transportation and installation, in the plan view and elevation which were to be submitted "no later than six (6) weeks after award of contract" to the Employer's Engineer.
  - iii) On the failure to submit type set reports, the Applicant contended that the requirement applied to Contractors and further that in section 8.4, type set reports would only be submitted after organising is full scale destructive tests and that the said reports are subject of a design process and thus could not be submitted at bidding stage
  - iv) On the failure to submit quality assurance program, the Applicant relied on Part 2: Employer's Requirements and General technical Requirements of the Bidding document: Section 1.11: Submittals, 9: Quality Control Program to argue that the requirement applied to contractors
  - v) Lastly on the ground of failure to submit a complete set of catalogues, the Applicant argued that the requirement applied to contractors.

2. The Applicant therefore prayed that the grounds upon which its bid was disqualified be reviewed and that its bid be considered for financial evaluation and that its administrative review fees be refunded.

### **The Respondent**

1. The Respondent contended it followed the law while conducting the procurement exercise and that its Evaluation team rightfully disqualified the Applicant's bid at the technical evaluation stage based on its material deviation of the requirements in the bidding document.
2. The Respondent further contended that the Applicant's bid was non-responsive to the technical requirement, having failed to produce the required documentary evidence and failing to adhere to Instructions to Bidders (ITB) as provided for in the Solicitation document when it failed to produce the documentary evidence as required.
3. The Respondent averred that the words "*Bidder*" and "*Contractor*" were used interchangeably in the bidding document to mean the same thing. That the Applicant selectively read the Solicitation document and therefore erred in attempting to make a distinction between the word "*bidder*" and "contractor".
4. The Respondent argued that the Applicant did not seek clarification on the choice of words used in the solicitation document as provided for in ITB 7 of the solicitation document and is therefore estopped for seeking clarifications at this stage of administrative review.
5. It was the Respondent's submission that it was mandatory for the Applicant under ITB 11, 18 & 30 to provide all documents comprising the Bid at the time of submitting the Bid. Therefore, it was impossible for the Respondent to properly evaluate the competency of the Applicant's bid when the required documents were missing or not submitted.
6. The Respondent explained that the submittals as indicated in the bidding document as documentary evidence were required for purposes of ascertaining whether the Applicant understood the scope of works required of them, proving, and checking the design features and ensuring quality of the product.

7. That if the Applicant's bid became successful after evaluation, then the Applicant or any other successful bidder would have been required to provide additional information before being permitted to finally manufacture the required equipment.
8. The Respondent prayed that the Application be dismissed with costs

***Fara Gostar Bistoon, the Best Evaluated Bidder***

9. *Fara Gostar Bistoon*, the Best Evaluated Bidder was effectively served all Tribunal process regarding the impugned procurement on November 9, 2022. No response or submissions were filed by *Fara Gostar Bistoon*.

D. **ORAL HEARING**

1. The Tribunal held an oral hearing on November 23, 2022 via *zoom* software. The appearances were as follows:
  - i) Arthur Bagarukayo, the Managing Director of the Applicant appeared for the Applicant
  - ii) Rwabushenyi Edward, the Principal Legal Officer-Litigation represented the Respondent.

In attendance were;

Robert Kavuma, a Consultant for the Applicant.

Jullian Nabaasa, the Senior Procurement Officer and Carol Atuhire a Procurement Officer for the Respondent

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

E. **RESOLUTION**

1. The Application raised one substantive ground for determination by the Tribunal. However, based on the pleadings filed by the parties, submissions made at the hearing and documents submitted to the Tribunal by the Respondent, the Tribunal has recast the issues as follows;

1. Whether the Accounting Officer of the Respondent erred in law when he did not communicate the administrative review decision within the statutory timeframe.
2. Whether the Respondent erred in law and fact when it disqualified the Applicant's bid at the technical evaluation stage
3. What remedies are available to the parties

**Issue No. 1: Whether the Accounting Officer of the Respondent erred in law when he did not communicate the administrative review decision within the statutory timeframe**

2. The Accounting Officer of the Respondent was by law obligated to make and communicate a decision regarding the Complaint within 10 days from October 18, 2022 when the Applicant's Complaint was received by the Respondent. See *section 89 (7) of the Public Procurement and Disposal of Public Assets Act 2003 as amended*.
3. Failure to make and communicate an administrative review decision within the statutory timelines is a blatant breach of the law. Any decision made outside the statutory timelines is null and void and has no legal consequence. See **Application No.36 of 2022 Canaansites Ltd vs Uganda National Roads Authority**
4. The Accounting Officer of the Respondent ought to have made and communicated his administrative review decision to the Applicant before or on October 28, 2022. It is our finding that the administrative review decision of the Accounting Officer contained in the letter dated **October 31, 2022**, was therefore made out of time, in breach of the law and of no legal consequence.

**This issue is resolved in the affirmative.**

**Issue No. 2: Whether the Respondent erred in law and fact when it disqualified the Applicant's bid at the technical evaluation stage**

5. The Best Evaluated Bidder Notice and Evaluation Report all indicated that the Applicant was disqualified at the Technical Evaluation stage for 5 reasons namely, did not submit general outline drawings for towers; did not submit the tower weights for each type; did not submit type set reports, did not submit quality assurance program; did not submit a complete set of catalogues.
6. The Respondent at page 2, para 5(vi) of its response did not include the “*Did not submit type set reports*” as one of the reasons for disqualifying the Applicant’s bid. No explanation was given by the respondent for the omission. Nonetheless, the reasons for elimination of the Applicant’s bid considered in this decision are derived from the Best Evaluated Bidder Notice of October 4, 2022.
7. The Applicant’s argument is that based on *Part 2: Employer’s Requirements and General technical Requirements of the Bidding document: Section 1.11: Submittals, 2.1, 2.2 Drawings, 8.4 Pole Type Tests, 9: Quality Control Program*, the said required documentations applied to a contractor and not a bidder per se. In short, there was no requirement to submit the said documents since they are futuristic in nature and can only be submitted after contract signing and during contract execution.
8. The Respondent contends that the Applicant failed to adhere to Instructions to Bidders (ITB) as provided for in the Solicitation document when it failed to produce the documentary evidence as required, that the words “Bidder” and “Contractor” were used interchangeably in the bidding document to mean the same thing and should not have been misconstrued by the Applicant.
9. It is important to note that the Standard Bidding Document for the Procurement of Supplies (open & restricted bidding), issued by the Public Procurement and Disposal of Public Assets Authority in March 2014 allows a prospective Bidder to seek clarification of the Bidding Document from the Procuring and Disposing Entity in writing. The same Standard Bidding Document was also used by the Respondent for this impugned procurement. See *ITB Clause 7 in Part 1: Section 1 Instruction to Bidders of the Standard Bidding Document*
10. Upon receipt of a request for clarification, a Procuring and Disposing Entity is obliged to respond in writing to any request for clarification, provided that such request is received no later than the date indicated in the Bid Data Sheet (BDS), and such response is copied all Bidders who have acquired the Bidding

Document directly from it, including a description of the inquiry but without identifying its source.

11. It therefore follows that the Applicant who did not seek clarification of the Bidding Document from the Procuring and Disposing Entity prior to bid submission but went ahead to submit its bid without any complaints on the contents of the solicitation document by June 29, 2022, cannot be allowed to challenge the impugned solicitation document after bid submission. See **Technology Associates Ltd & COMVIVA Technologies Ltd VS. Postbank Uganda Ltd, Application No.06 of 2022** and **Engineering Solutions (U) Ltd vs Ministry of Water and Environment, Application No.24 of 2021**
12. In this matter, the Tribunal notes that the Applicant is not challenging the contents of the bidding documents. The challenge is however, on the way in which the evaluation committee interpreted the *Employer's Requirements and General technical Requirements of the Bidding document* and relied on the same to disqualify the Applicant's bid at evaluation.
13. We carefully perused through the bidding document and noted the following;
  - (i) *Submittals 1.11 on page 5 of 60 of the bidding documents, 2022 the wording use is The Contractor shall provide as a minimum the following technical information, in English language, at the time of submitting his proposal....(a)-(g)* **emphasis ours**
  - (ii) It also follows immediately to state.. *The successful contractor shall provide the following additional information before proceeding with the manufacturing of equipment or during that period...(a)-(m)* **emphasis ours**
  - (iii) On work control schedules at para 1.12 page 6 of 60, the language used is the Contractor must submit within 15 days following award of contract.
  - (iv) On 2.1, Drawings, the Contractor was to prepare and submit for review of the Employer's Engineer, the Drawings indicated in this document. See page 7 of 60
  - (v) On Outline Drawings 2.2, the specifications are silent on who is to submit the drawings and whether at bid submission or contract execution.
  - (vi) On 8.4 Pole Type Tests at page 17 -18, a full scale destructive test is to be mandatorily organised by the Contractor for pole types chosen by the Employer.



- (vii) On 9: Quality Control Program at page 2, it's the duty of the Contractor to provide and maintain quality control programs as specified.
14. Our understanding of the objective and scope of this procurement as derived from the description stated on page 1 of 60, General, Description 1.1, Scope of Works 1.3, and Drawings 1.7 *Employer's Requirements and General technical Requirements of the Bidding document* is that the project consists of **plant design, fabrication, galvanising, testing, inspection before dispatch and supply** of five (5) double circuit transmission line tower monopoles to UETCL stores at Njeru, Jinja District.
  15. This means that a plant designing process would precede the supply. Whatever designs are submitted by the successful bidder would be subjected to approval of the Respondent's consultant resulting into final designs, which would form the basis of the consequent supplies.
  16. The offhand use of the words "*Contractor*" and/or "*Supplier*" in the statement of requirements see 1.6 work schedule, 1.7-Drawings (here, the words used are *contractor/supplier/manufacturer*), then singly Contractor on 1.11, followed by *successful Contractor*, then *Contractor* again in 1.12, 1.13. 2.1 2.4, 3.1, 3.2, 4.3, 8.2, 8.3, 8.4, 8.5, 9.1, 9.2.7, 12.1, 12.2, 12.4, 12.7 created ambiguity or uncertainty for the bidders relying on the said solicitation document.
  17. Any bidder bearing in mind the description of the project and scope of the procurement would be right to assume that the said submittals were to be made by a bidder after contract award or during contract execution.
  18. For instance, it is impractical to request for outline drawings when the design has not yet commenced. Work control schedules and technical date schedules can only be completed after plant design and not at bid submission stage. Type test reports are only possible **fabrication, galvanising and upon successful completion of** full-scale destructive tests and not at bid submission stage.
  19. The spasmodic usage of "*Contractor*", "*Supplier*", *successful Contractor* in the statement of requirements was contrary to the requirement that the specifications must be complete, precise, and unambiguous in describing the supplies. The ambiguity

made it impractical for the bidders, to closely and effectively meet the requirements, contrary to Reg 25 (2) of the *PPDA (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014*.

20. Little wonder the Applicant and *Coreplus Logistics Ltd* all failed at the technical stage of evaluation for failing to comply with the said requirements. The said bidders did not submit the said documents. As required by the bidding document, attributable to the ambiguity of the statement of requirements.
21. We also reviewed the bid of *Fara Gostar Bistoon* and noted the following;
  - (i) *Bidder did not submit the General outline drawings for towers as required in 1.11(a) on page 5 of 60 of the bidding document.*
  - (ii) *The BEB submitted Type Test Reports for SS Tower in the Uganda Opuyo-Moroto 132kv dc. T/L Pole Type SS dated January 23, 2019, March 18, 2019, and March 12, 2019.*

Our understanding is that the Type Test Reports should be specific to the subject of procurement and not for a completed project formerly executed by the bidder. What is submitted here, is therefore not responsive to the bidding document

- (iii) *Delivery and Completion Schedule for work control and technical date schedule (page 53-60)*
  - (iv) *Complete set of catalogues were submitted.*
  - (v) *Quality Assurance program was attached*
  - (vi) *The BEB submitted a schedule of monopole tower weights for monopole types DS1+0m, DS1+3m, and DS1+6m,*
22. The bidding document was therefore ambiguous and resulted into all bidders not being able to closely and effectively meet the requirements at the detailed technical stage of evaluation.
23. Furthermore, the evaluation criteria on technical criteria only stated that the technical responsiveness shall be evaluated in accordance with ITB Clause 33.3. It went ahead to state that the statement of requirements details the minimum technical requirements whose responsiveness would be determined by a comparison of the specification offered to the specification required in section 6. Evaluation would be conducted on a pass /fail basis. Substantial responsiveness would be considered a

pass. See **Part 1: Section 3, Evaluation Methodology and Criteria, 6 Technical Criteria 6.1 and 6.2 of the bidding document.**

24. We observed that ITB 33.3 purports to require bidders to comply with all requirements of the Statement of Requirements. The Statement of Requirements is 60 pages! The submittals in the statement of requirements apply to the contractor/successful contractor. Those documents are a result of a contract award to the successful bidder followed by a successful design. It was therefore premature to require the bidders to submit contract implementation documents at the bidding stage.
25. Having found that the bidding document especially in the statement of requirements (*Employer's Requirements and General technical Requirements of the Bidding document*) were ambiguous, the technical evaluation criteria itself was also not comprehensively detailed as required in section 71(2) of the PPDA Act 2003. Also see ***Mbale United Trucks and Pickups SAACO vs. Mbale City Council, Application No.12 of 2022.***
26. In the face of such ambiguity, the Evaluation committee ought to have exercised its discretion to determine the consequence of the omissions by the Applicant, *Coreplus Logistics Ltd* and *Fara Gostar Bistoon*, vis-à-vis or bearing in mind the scope and description of the subject matter of the impugned procurement as stated in the solicitation document.
27. Such a determination by an objective evaluation committee would have considered the omissions as either a material or non-material deviation with the consequence being a finding that the affected bidder is not passed and is non responsive or a non-material deviation that could be waived or request the bidder to clarify the non-conformity in accordance with ITB 31 of the bidding document and *regulations 10, 11(3) (a) and (b) and 11(4) of the PPDA (Evaluation) Regulations, 2014.* See ***Orungo Market Vendors Association vs Amuria District Local Government, Application No.41 of 2022*** and ***Mbarara City South Boda Boda Operators SACCO vs Mbarara City Council, Application No.22 of 2022*** para 28, pages 13-14

**This issue is resolved in the affirmative.**

**Issue No. 3. What remedies are available to the parties.**

28. The bidding document especially in the statement of requirements (*Employer's Requirements and General technical Requirements of the Bidding document*) was therefore not clearly understandable and resulted into bidders not being able to meet the requirements of the solicitation document closely and effectively.
29. The Evaluation Committee did not objectively exercise its discretion in evaluating the bids. This calls for a re-evaluation of the bids by the evaluation committee. It is not the duty of the Tribunal to evaluate bids and as such, the procurement file is remitted back to the respondent for re-evaluation in a manner consistent with the law and the decision of the Tribunal.

**F. DISPOSITION**

1. The Application is allowed
2. The impugned administrative review decision of the Accounting Officer dated October 31, 2022, is a nullity and therefore set aside.
3. The procurement process for the supply of five (05) 132kv double circuit transmission line Monopole Towers under Procurement Reference Number UETCL/SUPLS/2020-2021/00447 is remitted back to the Respondent for re-evaluation in a manner consistent with the law and this decision.
4. The determination in (3) above must be made within ten days from the date hereof.
5. The Tribunal's suspension order dated November 8, 2022 is vacated.
6. The Respondent should refund the administrative review fees paid by the Applicant.
7. Each party shall bear its own costs.

Dated at Kampala this 28<sup>th</sup> day of November 2022.



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**FRANCIS GIMARA SC.  
CHAIRPERSON**



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**NELSON NERIMA  
MEMBER**



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**THOMAS BROOKES ISANGA  
MEMBER**



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**PAUL KALUMBA  
MEMBER**



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**CHARITY KYARISIIMA  
MEMBER**