

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

**APPLICATION NO. 15 OF 2024**

**BETWEEN**

**MULTIPLEX LTD:.....APPLICANT**

**AND**

**MASAKA CITY COUNCIL:.....RESPONDENT**

**APPLICATION FOR REVIEW IN RESPECT OF THE PROCUREMENT  
FOR THE CONSTRUCTION AND REHABILITATION OF MASAKA  
RECREATION GROUNDS ON PLOT 3-5, BROADWAY, KIMANYA  
WARD, MASAKA CITY PHASE 1 UNDER PROCUREMENT  
REFERENCE NUMBER: MASA607/WRKS/23-24/0001.**

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

## DETAILED DECISION OF THE TRIBUNAL

### **A. BRIEF FACTS**

1. Masaka City (the **Respondent**) initiated a tender for the construction and rehabilitation of Masaka Recreation Grounds on plot 3-5, Broadway, Kimanya Ward, Masaka City Phase 1 under procurement reference number: MASA607/WRKS/23-24/0001 using open domestic bidding on December 12, 2023.
2. Nine (9) bidders namely; *Multiplex Ltd* (the **Applicant**), *Zhonghao Oversees Construction Engineering Co. Ltd*, *GNM Projects Ltd*, *Jesani Construction Ltd*, *China Railway Construction Engineering Group*, *Stanfiled Property Partners Ltd*, *CK Associates Ltd*, *Bucons (U) Ltd*, and *Kaleeta Construction Ltd* submitted bids.
3. Upon the conclusion of the evaluation process, the Respondent issued a Notice of Best Evaluated Bidder on 13<sup>th</sup> February 2024 indicating *Kaleeta Construction Ltd* as the best evaluated bidder at a contract price of Ugx 18,143,372,438.31 VAT inclusive.
4. The Applicant was dissatisfied with the outcome of the procurement process and filed an administrative review compliant with the accounting Office on February 26, 2024.
5. The Accounting Officer of the Respondent dismissed the Applicant's complaint on March 6, 2024.
6. The Applicant being dissatisfied by the decision of the Accounting Officer of the Respondent filed the instant application with the Tribunal on on March 21, 2024 seeking to review the decision of the Respondent.

### **B. APPLICANT'S SUBMISSIONS**

1. In response to the Respondent's preliminary objection, the Applicant submitted that the decision of the Respondent's Accounting Officer was delivered and communicated to it on March 6, 2024. In accordance with Section 91I (2) (a) of the

PPDA Act it was duty bound to apply to the Tribunal within ten (10) working days from receipt of the decision.

2. That in the instant case, time started to run from March 6, 2024 to March 21, 2024. Therefore, the instant application filed on March 21, 2024 was filed in time.
3. The Applicant submitted that the Best Evaluated Bidder failed to demonstrate that it had specified experience to perform the contract as mandated under Part 1: Section 3, Evaluation methodology and Criteria, 6.2.8, page 59. That whereas it submitted two projects to demonstrate specified experience i.e., for the phased construction of Nakivubo War memorial Stadium on Plot 26 and 28 in Kampala, Phase I and II, these phases all constitute one project as opposed to two projects.
4. The Applicant submitted that the Best Evaluated Bidder equally failed to provide information in regard to its current commitments as such, it failed the post-qualification due diligence.
5. In response to the Respondent's contention that its bid was not compliant with the solicitation documents, the Applicant submitted proof of execution of three similar projects i.e., the rehabilitation of roads in Mbarara City Council Cluster 6, rehabilitation of roads in Kabale Municipal Council Cluster 6, and the construction of Maska Central Market in Masaka.

**C. RESPONDENT'S SUBMISSIONS**

1. The Respondent made reference to sections 89 (7) & (8) and 91 I (2) (b) of the *Public Procurement and Disposal of Public Assets Act 2003* and submitted that the application was time barred having been filed later than March 17, 2024.
2. Without prejudice to the above, the Respondent submitted that contrary to the contentions of the Applicant, the Best Evaluated Bidder submitted documentation to prove that it had completed two (2) similar projects of a value of atleast UGX. 15 billion.

These are Phase 1 & II of the design and construction of Nakivubo Stadium.

3. The completion certificates furnished by the Best Evaluated Bidder prove that Phase I worth UGX 23,598,958,531/= was completed on October 28, 2019 whilst Phase II work UGX 15,530,614,763/= was completed on November 10, 2023.
4. With regards to whether the Best Evaluated Bidder passed the Post Qualification, the Respondent submitted that it carried out a post qualification legal, technical and financial due diligence which all confirmed that the Best Evaluated Bidder passed the post qualification criteria specified in the bidding document.

**D. BEST EVALUATED BIDDER/INTERESTED PARTY'S SUBMISSIONS**

1. *Kaleeta Construction Ltd* submitted that it participated in the impugned procurement as a bidder and satisfied the requirements meriting it to be the Best Evaluated Bidder
2. It was *Kaleeta Construction Ltd's* submission that the instant Application was incompetent because the Applicant had no locus standi before the Tribunal and that the Application was out of time

**E. ORAL HEARING**

1. The Tribunal held an oral hearing on April 9, 2024 via Zoom videoconferencing. The appearances were as follows:
  - 1) Tom Magezi represented the Applicant. In attendance were Ndege Bbosa the Managing Director of Multiplex Ltd, Isaac Kalule, Kyobe Richard and Asebe Price all Engineers with the Applicant.
  - 2) Mr. Vincent Okurut the Chief Administrative Officer represented the Applicant.

- 3) John Kallemera represented the Best Evaluated Bidder. Denis Mulindwa a Technical Director of *Kaleeta Construction Ltd* represented the Best Evaluated Bidder.

**F. RESOLUTION**

1. The Application and the Response to the Application raised 4 grounds or issues that the Tribunal has framed as follows;
  - 1) *Whether the instant application was filed with the Tribunal within the statutory timeframe?*
  - 2) *Whether the Best Evaluated Bidder demonstrated that it had the specified experience to perform the Contract?*
  - 3) *Whether the Best Evaluated Bidder passed the Post qualification Evaluation as mandated under the Bidding document; Instructions to the Bidders Part 1, Section 1, under ITB 39, page 32*
  - 4) *What remedies are available to the parties?*

**Issue No.1:**

**Whether the instant application was filed with the Tribunal within the statutory timeframe?**

1. The Respondent in its response raised a preliminary objection regarding the competence of the Application. The Respondent contended that the Application ought to have been filed to the Tribunal by March 17, 2024, and not March 21, 2024, rendering it incompetent.
2. *Section 91I(1)(a)-(c) of the Public Procurement and Disposal of Public Assets 2003 and Reg 9(1)(a)-(c) of the Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2023 govern the incidences of filing applications before the Tribunal.*
3. *Section 91I(2)(a)-(c) of the Public Procurement and Disposal of Public Assets 2003 prescribes the timelines for filing applications before the Tribunal and states as follows;*

*(2) The application shall be made—*

- a) *for section 89 (7), within ten working days from the date of receipt of the decision of the Accounting Officer;*
- b) *for section 89 (8), within ten days from the date of expiry of the period specified in the section; and*
- c) *for section 89 (9), within ten days from the date when the omission or breach by the procuring and disposing (8entity is alleged to have taken place.*

4. For a proper understanding of the timelines applicable specified incidences, we will reproduce Sections 89(7), 89(8) and 89(9) of the *Public Procurement and Disposal of Public Assets Act 2003* here below;

*(7) The Accounting Officer shall, within ten days of receipt of a complaint, make and communicate a decision, in writing, addressed to the bidder who makes the complaint and which shall indicate the reasons for the decision taken and the corrective measure to be taken, if any.*

*(8) Where an Accounting Officer does not make a decision or communicate a decision within the period specified in subsection (7), or where a bidder is not satisfied with the decision made by the Accounting Officer under this section, the bidder may make an application to the Tribunal, in accordance with Part VIIA of this Act.*

*(9) Where a bidder believes that the Accounting Officer has a conflict of interest in respect of the complaint, omission or breach that would be made under this section or that the matter cannot be handled impartially by the procuring and disposing entity, the bidder shall make an application to the Tribunal for determination of the complaint, omission or breach*

5. Upon receipt of the Applicant's Complaint on February 26, 2024, the Accounting Officer was duty bound to make and communicate a decision, in writing, addressed to the Applicant indicating the reasons for the decision taken and the corrective measure to be taken, if any.

6. The time frame within which such an Accounting officer decision was to be made commenced on March 27, 2024, and

would elapse on March 7, 2024. However, the Accounting Officer made and communicated his administrative review decision on March 6, 2024, which is within the statutory timelines envisaged under section 89(7) of the *Public Procurement and Disposal of Public Assets Act 2003*.

7. In paragraph 3 of the application, the Applicant is dissatisfied with the decision of the Accounting Officer that has been described as erroneous.
8. It is trite law that where a bidder like the Applicant is not satisfied with the decision made by the Accounting Officer under this section, the bidder may make an application to the Tribunal, in accordance with Part VIIA of the Act. See the second limb of section 89(8) of the *Public Procurement and Disposal of Public Assets Act 2003* and Regulation 9(1)(b) of the *Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2023*.
5. It would then appear that the timeframe applicable to an application filed before the Tribunal where a bidder is not satisfied with the decision made by the Accounting Officer under section 89 (8), is within ten days from the date of expiry of the period specified in the section.
6. The only period specified in section 89 (8) is ironically, the period specified in subsection (7), to wit where an Accounting Officer does not make a decision or communicate a decision. This period for clarity, is within ten days of receipt of a complaint.
7. Section 91I (2) (b) of the *Public Procurement and Disposal of Public Assets Act 2003* therefore creates a legal absurdity in as far as it only prescribes a timeframe for only the first limb of section 89(8) of the *Public Procurement and Disposal of Public Assets Act 2003*, to wit where an Accounting Officer does not make a decision or communicate a decision within the period specified in subsection (7).

8. The draftsman omitted to prescribe a timeframe for the second or alternative limb of section 89(8) of the *Public Procurement and Disposal of Public Assets Act 2003* to wit *where a bidder is not satisfied with the decision made by the Accounting Officer under this section.*
9. The Tribunal has consistently held that where a bidder is aggrieved or dissatisfied with the decision made by the Accounting Officer, the bidder may make an application to the Tribunal within ten working days from the date of receipt of the a decision of the Accounting Officer. See in **Application 10 of 2023 Aponye House Limited v Uganda Revenue Authority, Para 12, page 9** and **Application 12 of 2023 Prudential Assurance Uganda Limited v Busitema University, para 8, page 5.**

We have not found any reason and none has been advanced by the parties, for the Tribunal to depart from its previous decisions. This position is well buttressed by **the clarity of section 89 (7) on the need to file within ten working days from the date of receipt of the decision of the Accounting Officer.**

10. Accordingly, the Applicant being dissatisfied with the March 6, 2024 administrative review decision of the Respondent's Accounting Officer, had 10 working days from March 6, 2024 to March 21, 2024 to file the instant application before the Tribunal.
11. We have observed that the date of March 8, 2024, being the *8<sup>th</sup> international women's day* was declared to be a public holiday in Uganda. It was a day on which offices including that of the Tribunal are closed and as such, it is excluded in the computation of days within which to file an Application before the Tribunal. See *Regulation 33(b) of the Public Procurement and Disposal of Public Assets (Tribunal) (Procedure) Regulations, 2016* and *Section 2(1) of Public Holidays Act, cap 255.*



12. The upshot of our finding is that Registry Application No. 15 of 2024 that was filed on March 21, 2024 was filed within the statutory timeframes.
13. **This issue is resolved in the affirmative.**

**Issue No. 2:**

**Whether the Best Evaluated Bidder demonstrated that it had the specified experience to perform the Contract?**

14. The resolution of this issue calls for an evaluation of the solicitation documents and the bid submitted by the BEB in response to the same. **Part 1 Section 3, Evaluation Methodology and Criteria, Item 6.2.8 in column 2 at page 57** of the bidding document required bidders to provide specific experience by way of *participation as contractor, management contractor, or subcontractor, in the last 5 years, at least two projects with a value of at least UGX. 15 billion, successfully or substantially completed (at least 70% complete) that are similar to the proposed works. The similarity is based on physical size, complexity, methods / technology or other characteristics described in section 6 statement of requirements.*
15. The solicitation document required a bidder to submit Form 10 and certificates of completion or substantial completion as stated in column 7 at page 57 of the bidding document in proof of the said specific experience.
16. The applicant contended that whereas the Best Evaluated Bidder submitted two completion certificates to demonstrate specific experience i.e., certificates for Phase I and II for the phased construction of Nakivubo War memorial Stadium on Plot 26 and 28 in Kampala, these phases all constitute one project as opposed to two.
17. We examined the bid submitted by *Kaleeta Construction Ltd* as the Best Evaluated Bidder and observed that the bidder submitted the following;

- (i) A Final Certificate of Completion dated January 8, 2020 issued by *ISB Consult Ltd* to *Kaleeta Construction Ltd* as sub-contractor for proposed design and construction of Nakivubo Stadium **Phase I** at a contract sum of - UGX. 23,598,958,531 majoring on Preliminary works, Earthworks, Steel works, Formwork, Concrete works, Fabrication and mechanical reticulations.

The project commenced on September 5, 2017, was completed on October 28, 2019, and handed over to client on January 7, 2020. The corresponding Form 10 on specific experience (contracts performed) and Form 10 A on specific experience (key activities) were also submitted.

- (ii) A Final Certificate of Completion dated December 15, 2023, issued by *ISB Consult Ltd* to *Kaleeta Construction Ltd* as sub-contractor for proposed design and construction of Nakivubo Stadium **Phase II** at a contract sum of - UGX. 15,530,614,763 with major activities on Steel works and formwork, concrete casting and related works, Set outs and preparation of turf base, Finishing works, Drainage works and electrical works.

The project commenced on November 17, 2021, was completed on November 10, 2023, and handed over to client on December 12, 2023. The corresponding Form 10 on specific experience (contracts performed) and Form 10 A on specific experience (key activities) were also submitted.

18. The Final Certificates of Completion for Nakivubo Stadium reveal distinct key activities from different phases, requiring careful interpretation to determine if the submitted documents are the same or different projects.
19. Furthermore, in light of the contestation as to what constitutes a 'project' for the purposes of this bid, it is imperative that this Tribunal adopts a purposive approach so as to give effect to the true purpose and intention of the Respondent in preparation of the solicitation documents. In so doing, regard will be had to extraneous material including the nature of the industry to which this bid relates i.e., construction industry.

20. In our view, construction projects vary in complexity, scope, and desired outcomes, phasing (breaking down) of a project into separate contracts gives logical and clear guidelines on what to expect in each phase with clearly defined tasks and objectives. Phasing of high value and complex projects helps developers to march their anticipated cash flow outlays. Breaking down of a complex project down to work packages requiring different speciality skills gives developers the flexibility to procure the best entity suitable to execute the works. By so doing, they are able to achieve the intended outcome.
21. It follows that for each completed phase of construction, a certificate of completion may be issued and that a certificate once issued, would suffice as a separate and distinct experience and project for a *contractor, management contractor, or subcontractor* involved at that particular phase as long as each is supported with a separate contract.
22. In this particular case, evidence was provided that Kaleeta Construction Ltd carried out construction works for the phased construction of Nakivubo War Memorial Stadium- Phase 1 at the sub contract of Ushs; 23,598,985,531/= (Twenty Three Billion five hundred ninety eight hundred eight million nine hundred fifty eight thousand five hundred thirty one shillings) and Construction/Completion of Nakivubo War Memorial Stadium- Phase 2 at the Subcontract sum of Ush; 15, 530,614,763 /= (Fifteen Billion five hundred thirty million, six hundred fourteen thousand, seven hundred sixty three shillings) whose sub contracts/ agreements were signed on 4<sup>th</sup> , September 2017 and 29<sup>th</sup> October, 2021 respectively.
23. The successful execution of these two phases were backed up by two Final Certificates of Completion together with information filled out in Form 10 and Form 10 submitted by *Kaleeta Construction Ltd.*
24. It is therefore our finding that two separate sub contracts backed by two certificates of completion satisfied the

requirement of responsiveness to specific experience, as set out in the solicitation document.

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

**Issue 3:**

**Whether the Best Evaluated Bidder passed the Post qualification Evaluation as mandated under the Bidding document; Instructions to the Bidders Part 1, Section 1, under ITB 39, page 32**

26. Part 1 Section 3, Evaluation Methodology and Criteria, 9.1 on determination of the best evaluated bid on page 59 stated that post qualification evaluation will be carried out on the best evaluated bidder as specified below;  
*Legal requirements - Due diligence shall be done to verify ownership of the company and its registration with appropriate body in the country of principal business*
- (i) *Technical requirements - Due diligence shall be done to*
    - a) *verify and validate the bidder's performance on previous indicated private and public contracts in the bidder's submission*
    - b) *verify and validate current commitments and litigation record of the bidder*
  - (ii) *Financial requirements - Due diligence shall be done to verify and ascertain the bidder's financial contracting capacity and bank commitment to provide a credit line to the bidder.*
27. We perused through the evaluation report and observed that a legal, technical and financial post qualification due diligence was duly conducted on the best evaluated bidder and that the bidder was found to have met the post qualification criteria. With specific reference to the technical aspects of the due diligence, the Respondent wrote to ISB Consult Ltd on February 5, 2024 seeking confirmation as to whether the BEB had completed the works for both Phase I & II. This letter was responded to by ISB Consult Ltd which confirmed that both phases were executed to their expectation and successfully completed.

28. The above correspondences were followed up by a physical visit to Nakivubo War Memorial Stadium and the BEB's yard and business premises located on Plot 178, Mugema Road, off Kasubi Kawala. The Respondent further wrote to the best evaluated bidder's bankers who ascertained their willingness and commitment to provide lines of credit to it. *See pages 54 and 55 of the evaluation report.*
29. It was on the basis of the foregoing that *Kaleeta Construction Ltd* was recommended and consequently awarded as the best evaluated bidder.
30. We have not found any reason to impeach the post qualification exercise that was undertaken by the evaluation committee, since it covered enough areas to grant them an affirmative determination that the best evaluated bidder is qualified to perform the contract satisfactorily.
31. **This issue is resolved in the affirmative.**

***Issue 4: Whether the Applicant's bid complied with the specific experience requirement in item 6.2.8 of Section 3 in bidding document?***

32. Having resolved issues No. 2 and 3 in the affirmative, it would be an academic exercise and hypothetical for the Tribunal to resolve issue No. 4 since it would not change the outcome of the procurement. The Tribunal does not resolve issues that cannot operate to grant any actual relief or issue orders for academic purposes or in the abstract. See **Mwiru Paul vs National Council for Higher Education and 2 Ors, Court of Appeal, Civil Appeal No 84 of 2016.**

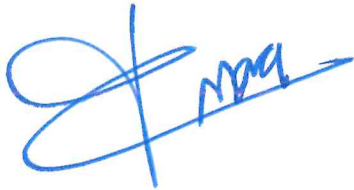
***Issue 5: What reliefs are available to the parties?***

33. The Applicant has failed to prove the substantive grounds of the Application and is not entitled to any reliefs.

**G. DISPOSITION**

1. The Application is dismissed.
2. The Tribunal's suspension order dated March 25, 2024, is vacated.
3. Each party shall bear its own costs.

Dated at Kampala this 15<sup>th</sup> day of April 2024.



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



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



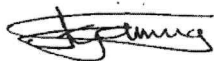
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**GEOFFREY NUWAGIRA KAKIRA**  
**MEMBER**




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**PAUL KALUMBA**  
**MEMBER**



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**CHARITY KYARISIIMA**  
**MEMBER**



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**KETO KAYEMBA**  
**MEMBER**