

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

APPLICATION NO. 30 OF 2022

BETWEEN

NALU TOUR & TRAVEL LIMITED =====APPLICANT

AND

JINJA CITY COUNCIL =====RESPONDENT

**APPLICATION FOR REVIEW IN RESPECT OF THE PROCUREMENT FOR
REVENUE COLLECTION FROM DAY STREET PARKING JINJA CENTRAL
UNDER PROCUREMENT REFERENCE NUMBER JC854/SRVCS/22-
23/00028.**

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

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. The Applicant participated in the tender for revenue collection from day street parking for Jinja Central Division under procurement reference number JC854/Srvcs/22-23/00028.
2. On 2nd September 2022, the Applicant received the Best Evaluated Bidder Notice declaring Peshi Contractors Uganda Limited as the best evaluated bidder. The Applicant's bid was unsuccessful and disqualified at the technical evaluation stage for lack of three years' experience, audited reports for the last two years, and a recommendation about the indebtedness from Jinja City.
3. On 8th September 2022, the Applicant, being dissatisfied with the evaluation process, applied for administrative review before the Accounting Officer of Jinja City Council.
4. The Applicant had not received any communication or decision from the Accounting Officer regarding its application for administrative review.
5. On 20th September 2022, the Applicant applied for administrative review before the Tribunal under section 89(8) and 91I(2)(b) of the PPDA Act, 2003 as amended being aggrieved by the failure and omission of the Accounting Officer to make and communicate a decision among other grounds.

B. APPLICATION TO THE TRIBUNAL

1. Relying on section 89 (8) and 91I(2)(b) of the PPDA Act, the Applicant averred that the Accounting Officer failed or omitted to make and communicate an administrative review decision within ten days from the date of receipt of the Applicant's complaint.

2. The Applicant averred that the Respondent erred in fact and law when it declared the Applicant's non-responsive on the ground that the Applicant lacked three years' experience, audited reports for the last two years, and a recommendation about its indebtedness from Jinja City.
3. The Applicant averred that the Best Evaluated Bidder did not meet the requirements of the bidding document and should not have been awarded the contract as its bid was deficient and non-responsive to the requirements.
4. The Applicant contended that the Best Evaluated Bidder did not submit registered powers of attorney authorising the signatory for the bid specific to the procurement. That the Best Evaluated Bidder did not attach academic qualifications together with copies of certificates of its key personnel. That the Best Evaluated Bidder's Team Leader did not possess a Diploma in Business or Management field with experience of more than three years in revenue collection. That the Best Evaluated Bidder did not possess the required experience in revenue collection. That the Best Evaluated Bidder was not authorised by its Memorandum and Articles of Association to undertake the business of revenue collection and that the business of revenue collection is not ancillary or related to the objects for which the Best Evaluated Bidder was established.
5. The Applicant contended that the Respondent erred in law and fact when it initiated and undertook a procurement process under the authority of Mr. Mawerere Peter, the Deputy Town Clerk of Jinja City; not being an appointed Accounting Officer under the law.
6. The Applicant contended that the Respondent erred in fact and law when it initiated and undertook a procurement process with ambiguous and discriminatory requirements in as far as indebtedness to the Respondent and past performance of a bidder is concerned contrary to sections 43(a), 44, 71(2) and 80(2) of the PPDA Act 2003 and Regulation

45 of the Local Government (PPDA) Regulations 2016.

7. The Applicant averred that the Respondent erred in law and fact when its officers and agents deliberately ignored or refused or delayed to issue the Applicant with a recommendation letter indicating that the Applicant has performed similar contracts with and is not indebted to Jinja City.
8. The Applicant prayed for declarations of the Tribunal that the Accounting Officer erred in fact and law when he failed or omitted to make and communicate a decision on the complaint of the Applicant within statutory timelines; that Peshi Contractors Uganda's bid was deficient and non-responsive; that Mr. Mawerere Peter (Deputy Town Clerk) was not an appointed Accounting Officer under the law and thus all actions and omissions performed by him are ultra vires and invalid; that the requirement relating to indebtedness to the Respondent and past performance of a bidder are ambiguous and discriminatory contrary to sections 43(a), 44, 71(2) and 80(2) of the Public Procurement and Disposal of Public Assets 2003 and Regulation 45 of the Local Government (Public Procurement and Disposal of Public Assets) Regulations 2016; that the Respondent erred in its declaration of the Applicant's bid as non-responsive; that the Respondent erred in law and fact when its officers and agents deliberately ignored or refused or delayed to issue the Applicant with a recommendation letter indicating that the Applicant has performed similar contracts and is not indebted to it; and an order that the procurement process be cancelled and retendered by the Respondent entity; fees and costs.

C. REPLY TO THE APPLICATION

1. The Respondent contended that the Deputy Town Clerk had the legal mandate to act as Accounting Officer for the subject procurement.

2. The Respondent averred that before the Accounting Officer could respond to the complaint, officials from the Office of the Inspectorate of Government took over the documents related to the procurement. That on the day they received the documents from the IGG's office, they also received a call from the Tribunal's office to suspend the entire procurement process.
3. The Respondent further averred that Jinja City Council could not have given the Applicant a recommendation letter as the Applicant was indebted to it to a tune of approximately UGX. 180 Million. That therefore the Applicant's bid was rightly unsuccessful compared to the Best Evaluated Bidder whose bid met the evaluation criteria.
4. The Respondent stated that the Applicant had not raised any documentary evidence against its award as the Best Evaluated Bidder.

D THE ORAL HEARING

The Tribunal held an oral hearing on **4th October 2022** via zoom software. The appearances were as follows:

1. Counsel for the Applicant, Mr. Noah Magumba and the Director, Mr. Luzze Robert Kamyia represented the Applicant.
2. The Respondent was represented by Ms. Janet Nabwonso, the Senior Procurement Officer.
3. The Best Evaluated Bidder was represented by Wilson Tarenga and Phillipe Bogere.

E. SUBMISSIONS

During the oral hearing, the Applicant and Respondent adopted their written submissions and also provided clarifications to the Tribunal.

F. RESOLUTION BY THE TRIBUNAL

Issues

We now revert to the substantive issues in this application:

- i. *Whether the Accounting Officer erred in law and fact when he failed or omitted to make and communicate an administrative review decision within ten days of receipt of the Applicant's complaint?*
- ii. *Whether the Respondent erred in law and fact when he declared Peshi Contractors Uganda Limited as the Best Evaluated Bidder?*
- iii. *Whether the Respondent erred in law and fact when it initiated and undertook a procurement process under the authority of the Deputy Town Clerk, Mr. Mawerere Peter; not being an appointed Accounting Officer under the law?*
- iv. *Whether the Respondent undertook a procurement process that had ambiguous and discriminatory requirements in as far as indebtedness to the Respondent and past performance of a bidder is concerned?*
- v. *Whether the Respondent erred in law and fact when it declared the Applicant's bid non-responsive on the ground that the Applicant lacked three years' experience, audited reports for the last two years, and a recommendation about its indebtedness from Jinja City?*
- vi. *Whether the Respondent erred in fact and law when its officers and agents ignored or refused or delayed to issue the Applicant with a recommendation letter indicating that the Applicant had performed similar contracts with and is not indebted to Jinja City?*
- vii. *What reliefs are available to the Parties?*

Resolution of Issues

Issue 1

Whether the Accounting Officer erred in law and fact when he failed or omitted to make and communicate a decision on the complaint of the Applicant within statutory timelines?

1. **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.

2. While the Applicant filed its complaint to the Accounting Officer on 8th September 2022, the Applicant had not received the decision of the Accounting Officer by the date of filing an application to the Tribunal.
3. This is contrary to the statutory timelines which require the Accounting Officer to make and communicate a decision within ten days from the date of receipt of a complaint. A decision in reply to a complaint lodged on 8th September 2022 ought to have been made and effectively served on the Complainant by the Accounting Officer before or on 19th September 2022 since the ten days lapsed on Sunday, 18th September 2022.
4. 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.***
5. The Accounting Officer's failure to make a decision within the statutory timeframe to date is a continuing violation and contravention of the PPDA Act 2003, as amended. See ***Application No.18 of 2022 Meera Investments Limited vs URA & Numani Mubiakulamusa and Technology Associates Ltd & COMVIVA Technologies Ltd VS. Postbank Uganda Ltd, Application No.06 of 2022.***
6. The Accounting Officer erred in law and fact when he failed or omitted to make and communicate a decision on the complaint of the Applicant within statutory timelines. This failure or omission by the Accounting Officer is a blatant breach of the law. See ***Applications No. 26 and 27 of 2022- Vision Scientific & Engineering Limited Vs. Makerere University.***

experience of not less than 3 years in revenue collection. See Section 3, Evaluation Methodology and Criteria, C. Detailed Evaluation Criteria, 5 Commercial and Technical Criteria, 5.1(b) on page 22-23 of the bidding document.

14. The qualification form submitted by the best evaluated bidder named *Umuhoza Clemence* as team leader and financial controller with 4 years' experience in proposed position and Bogere Phillipe as managing director with 5 years' experience in proposed position. The qualification form is dated July 27, 2022 but is unsigned yet the form is required to be signed as indicated in page 21-22 of the bidding document. We did not find any copy of certificates in proof of academic qualifications of Bogere Phillipe.
15. *Umuhoza Clemence* who was named as team leader possesses an Ordinary diploma in business Administration from Makerere University Business School (1st Class), awarded on May 31, 2019. The Academic Transcript has serial No. 125689.
16. The bid document was silent on how experience of key personnel would be proved by the bidders. It would have been prudent that a requirement for a resume detailing experience should have been demanded from the bidders.
17. Save for the insertions made in the qualification form, there is no way of proving experience of key personnel.
18. **The Tribunal has found merit in this ground.**
- c) **Peshi Contractors Uganda's team leader did possess a diploma in business or management field with experience of more than three years in revenue collection.**
19. We have found that *Umuhoza Clemence* who was named as team leader possesses a diploma in business administration.

20. The qualification form required the experience of the relevant personnel to be stated but did not require proof of that experience. The qualification form indicated that *Umuhoza Clemence* has 4 years' experience in the proposed position.
21. **The Applicant has not succeed on this ground.**
- d) **Peshi Contractors Uganda did not have the required experience in revenue collection.**
22. The evaluation criteria in the impugned procurement required bidders to have 3 years' experience in similar business of revenue collection. *The applicant must attach evidence of performance of the above contracts either in form of reference letters or completion certificates from the clients. This is applicable for both completed and current similar assignments.* See Section 3, Evaluation Methodology and Criteria, C. Detailed Evaluation Criteria, 5 Commercial and Technical Criteria, 5.1(d) on page 21-22 of the bidding document.
23. Peshi Contractors Uganda attached the following documents which we have analysed as indicated:
- 1) A letter to the Head PDU of Jinja City from Unique Commodity Services Ltd dated 24th August 2020, in which Peshi Contractors Uganda Ltd was subcontracted to collect property rates and ground rent in South West Division. This letter states that Peshi Contractors was subcontracted to collect property rates but does not indicate whether the work was actually done and the period of work.
 - 2) A letter from Rojoke Photo Lab Art dated 1st June 2019 in which Peshi Contractors Uganda Ltd was subcontracted to collect ground rent on a commission basis. The Letter is addressed to Peshi Contractors Uganda Ltd. This letter states that Peshi Contractors was subcontracted to collect property

rates but does not indicate where the work was done and the period of work.

- 3) A letter addressed to the Head PDU of Jinja City Council dated 30th April 2021 from Iganga Municipal Council indicating that Peshi Contractors Uganda Ltd was engaged in revenue collection for street parking in Northern Division and further recommending the company for further contracts. The letter does not indicate the period of revenue collection.
 - 4) Contract for bush clearing and site preparation in Karamoja Region between Peshi Contractors Uganda Ltd and Agromax (U) Ltd dated 31st August 2020. Bush clearing and site preparation are not similar to revenue collection.
 - 5) Addendum No.1 to the subcontract agreement for rent of machinery between Peshi Contractors Uganda Ltd and Click Communication Ltd dated 15th October 2020. Rent of machinery is not similar to revenue collection.
24. It is our finding that Peshi Contractors Uganda Ltd did not submit evidence of performance of similar contracts for 3 years, either in form of reference letters or completion certificates from the clients.
25. **The Applicant therefore succeeds on this ground.**
- e) **Peshi Contractors Uganda was not authorized by its Memorandum and Articles of Association to undertake the business of revenue collection and that the business of revenue collection is ancillary or related to the objects for which Peshi Contractors Uganda was established.**
26. Section 51 (1) of the Companies Act 2012 provides that the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything contained in the company's memorandum. It is therefore not fatal that revenue collection is not specifically stated in the memorandum of association of Peshi Contractors Limited.

27. We are also of the view that object "aa" of Peshi Contractors Uganda Ltd's Memorandum of Association is expansive enough to enable the bidder engage in business of revenue collection. The objective allows the company *to act as agents, brokers and trustees for any persons, firm or company.....*"
28. In any case, any dispute exceeding the mandate of a company is an internal management matter for members of the company and its directors. The Respondent who dealt with the company is entitled to assume that there has been compliance with objects clauses of the Company. See ***Mbarara City South Boda Boda Operators SACCO vs Mbarara City Council, Application No.22 of 2022.***
29. **We do not find merit in this ground.**

Issue 3

Whether the Respondent erred in law and fact when it initiated and undertook a procurement process under the authority of the Deputy Town Clerk, Mr. Mawerere Peter; not being an appointed Accounting Officer under the law?

30. An accounting officer has the discretion to delegate his procurement functions to a member of staff of the procuring and disposing unit. See **section 39(a) (ii) of the Public Procurement and Disposal of Public Assets Act 2003** in accordance with terms and conditions specified in Regulations made under the Act.
31. We found that Annex VII (Letter from the City Town Clerk to the City Deputy Town Clerk dated 13th July 2022 Ref. CR. 105) only delegated the duty to confirm funding for the Financial Year 2021-2022 in the absence of the City Town Clerk. The delegation of the function in **Regulation 14 (e and j) of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006** did not extend to the Deputy Town Clerk's performance other

duties of the Accounting Officer stated in **Regulation 14 of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations 2006.**

32. The confirmation of funds in this procurement on PP Form 1 was signed off by a Choli Goloba Joy as City Town Clerk and not Mawerere Peter. The only document signed off by Mawerere Peter is a 1st August 2022 letter, informing numerous appointees of their appointment to the evaluation committee that will evaluate bids for numerous revenue centres. The document is immaterial because the Contracts Committee at its sitting of 1st July 2022 rightfully approved the evaluation committee pursuant to **Regulation 17(b) of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations 2006.** Mawerere was therefore just administratively informing the appointed officers and nothing more.
33. **The Tribunal does not find merit in this ground.**

Issue 4

Whether the Respondent undertook a procurement process that had ambiguous and discriminatory requirements in as far as indebtedness to the Respondent and past performance of a bidder is concerned?

34. Whereas the scope of indebtedness required in the criteria was not defined, we did not find the said requirement ambiguous. A Bidder would be able to deduce from the said criteria that the Respondent did not want bidders who owed it any debt. **Conditions of the Tender No. 2** on page 21 of the bidding document expressly stated that any bidder indebted to the council or any entity would be automatically disqualified.
35. The objective and policy considerations of the impugned procurement would dictate that the contract should not be awarded to a bidder who has a previous record of non-performance or is in

arrears in as far as the much needed revenue source forms the subject matter of this procurement. There is nothing discriminatory in this procurement requirement. ***See Mbale Utd Trucks and Pickups vs Mbale City Council, Application No.31 of 2021.***

36. **The Tribunal does not find merit in this ground.**

Issue 5

Whether the Respondent erred in law and fact when it declared the Applicant's bid non-responsive on the ground that the Applicant lacked three years' experience, audited reports for the last two years, and a recommendation about its indebtedness from Jinja City?

37. The Applicant submitted audited books of accounts for the year ended May 31, 2022. The statement includes financials for the year ended May 31, 2022 and May 31, 2021.
38. Although the Applicant applied for a recommendation from the Respondent about indebtedness or performance of the Bidder, there was no submission of the said letter.
39. **The Applicant is not successful on this issue.**

Issue 6

Whether the Respondent erred in fact and law when its officers and agents ignored or refused or delayed to issue the Applicant with a recommendation letter indicating that the Applicant had performed similar contracts with and is not indebted to Jinja City?

40. The Respondent conceded that it denied the Applicant the said recommendation letter because the Applicant was indebted to the Respondent. We are of the opinion that the refusal should have been brought to the attention of the Applicant before the period for bidding expired than wait until 26th September 2022 to communicate reasons

for refusal. This conduct is against the principles of transparency, accountability and fairness.

41. We further perused the bids of other bidders and noted as follows:
- 1) *Peshi Contractors Uganda Ltd* submitted a letter addressed to the Head PDU of Jinja City Council dated 30th April 2021 from Iganga Municipal Council recommending the company for further contracts
 - 2) *Manyanja Technical services* submitted Letters dated 26th July 2022 from Njeru Municipal Council and Kamuli Municipal Council dated 14th July 2022 only recommended but did not mention anything on indebtedness.
 - 3) *Basima Consult Limited* attached letters from Entebbe Municipal Council dated 27th July 2022, 14th June 2019, 12th July 2017, 30th January 2017 and 19th May 2016 which only in substance recommended the bidder but did not comment on their indebtedness.
 - 4) *Eastern Rural Consult Ltd* attached letters from Namayingi District Local Government dated 21st July 2022, Entebbe Municipal Council dated 14th June 2019, and Busia Municipal Council dated 27th May 2019 which only in substance recommended the bidder but did not comment on their indebtedness
 - 5) *Fueless Technologies (U) Ltd* attached a letter from Fort Portal Tourism City dated 28th July 2022, which only in substance recommended the bidder but did not comment on their indebtedness
 - 6) *Central Investment Agencies Ltd* did not attach any recommendation and indebtedness letter.
 - 7) *Kampala Stage C Drivers' Association Limited* did not attach any recommendation and indebtedness letter.
 - 8) *Ssemaco Travel Services Ltd* did not attach any recommendation and indebtedness letter.
 - 9) *Socete Eco Holdings Limited* did not attach any recommendation and indebtedness letter.

If it was a requirement that bidders *performed similar contracts with and is not indebted to Jinja City*. Then PESHI should have been dropped at preliminary stage!!!

42. **The Tribunal finds merit in this ground.**

Issue 7

What reliefs are available to the Parties?

43. We have observed that the Applicant has been partially successful in some substantive grounds of the Application although its bid was not responsive to the requirements of the bidding document.
44. The Respondent did not subject the other bidders to same level of scrutiny regarding the requirement of a recommendation and indebtedness letter from former employers. We also found that none of the submitted bids was substantially responsive to the requirements of the bidding document. The Applicant and the Best Evaluated Bidder were not qualified for an award in this procurement.

G. DECISION OF THE TRIBUNAL

1. The Application is partially successful.
2. The procurement of non-consultancy services for revenue collection from day street parking – Jinja Central is cancelled.
3. The Respondent is at liberty to retender the same if it so wishes.
4. The suspension order dated 20th September 2022 be vacated.
5. Each party should bear own costs.


Dated at Kampala this 11th 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