

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

APPLICATION NO. 5 OF 2024

BETWEEN

TIJOS INVESTMENT LTD:.....APPLICANT

AND

LIRA CITY COUNCIL:.....RESPONDENT

**APPLICATION FOR REVIEW IN RESPECT OF THE
PROCUREMENT FOR THE CONSTRUCTION OF A TWO-
CLASSROOM BLOCK WITH AN OFFICE AT ANAI PRIMARY
SCHOOL- ANAI BUNG UNDER PROCUREMENT REFERENCE
NUMBER: LIRA606/WRKS/23-24/00002.**

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

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. Lira City Council (the Respondent) received funds from the Government of Uganda to support capital development projects. The Respondent then initiated a tender for the construction of a two-classroom block with an office at Anai Primary School- Anai Bung under procurement reference number: LIRA606/WRKS/23-24/00002 using open domestic bidding on July 18, 2023.
2. On August 7, 2023, the Respondent received bids from 3 bidders namely, *Olet Magezi Lira Hardware Company Ltd*, Whismy (U) Ltd and *Tijos Investment Ltd (the Applicant)*.
3. Upon the Conclusion of the evaluation process, the Respondent issued a Notice of Best Evaluated Bidder on September 21, 2023 indicating that the Applicant *Tijos Investment Ltd* was the best evaluated bidder with a Contract Price of Ugx 90,207,696/=.
4. On September 26, 2023, *Olet Magezi Lira Hardware Company Ltd* being dissatisfied with the outcome of the procurement process filed an administrative review complaint with the Accounting Officer.
5. The Accounting Officer constituted an administrative review committee to investigate the Complaint of *Olet Magezi Lira Hardware Company Ltd* on October 11, 2023.
6. The Administrative Review Committee in a report dated October 16, 2023, recommended that the Contract be awarded to *Olet Magezi Lira Hardware Company Ltd*. This report was received by the Accounting Officer on November 13, 2023.
7. On November 14, 2023, the Accounting Officer wrote to *Olet Magezi Lira Hardware Company Ltd*, with a copy to *Whismy (U) Ltd* and *Tijos Investment Ltd*, communicating his decision in which he cancelled the procurement process and advised that a fresh procurement process would be initiated.

8. On January 17, 2023, the Applicant through its lawyers *Ponsiano Okello & Co Advocates*, filed the instant application with the Tribunal, seeking to review the decision of the Respondent.

B. THE ORAL HEARING

The Tribunal held an online hearing on 30th January 2024. The appearances were as follows:

1. Counsel *Ponsiano Okello* and *Gabriel Obua* represented the Applicant. In attendance was *Mr. Ogwang Tito* and *Enyangu Moses* who are directors of the Applicant.
2. Counsel *Kwotek Geoffrey* and *Kakona Joel Geoffrey* represented the Respondent. In attendance was *Mr. Ojuk Dennis*, the Senior Procurement Officer of the Respondent.
3. Counsel *Opito Geoffrey* and *Patrick Odur* represented *Olet Magezi Lira Hardware Company Ltd* as the interested party. In attendance was *Mr. Olet Magezi* a director of the interested party

C. APPLICANT'S SUBMISSIONS

1. The Applicant contended having been awarded the Contract on September 21, 2023, the Accounting Officer unjustly and erroneously cancelled the award.
2. The Applicant contended that the Accounting Officer erroneously relied on extraneous reports of the City Education Officer and Supervising Engineer regarding the Applicant's experience in Adyel Division and at Ireda Primary School, to cancel the award yet the two district officers *Mr. Abura Jasper* and the *Mr. Okune Fred* duly issued the Applicant with completed certificates regarding the contracts in question.
3. The Applicant also averred that at no time was it informed of the alleged complaint by *Olet Magezi Lira Hardware Company Ltd* or the decision made in reply to the said complaint save for decision to cancel the award which was communicated on January 12, 2024.

4. The Applicant submitted that it was unfair for the Respondent to delay offering a contract to the Applicant for signature yet the days for display of the notice of best evaluated bidder had already expired.
5. The Applicant submitted that the Accounting Officer ought to be penalized for failure to extend the validity of bids following the lodging of an application before the Tribunal.
6. The Applicant prayed for the Accounting Officer's cancellation decision to be set aside and the contract award to the Applicant to be re-instated.
7. The Applicant prayed for costs of the Applicant to be awarded against the Respondent.

D. RESPONDENT'S SUBMISSIONS

1. The Respondent contended that the Applicant had no locus to file the Application before the Tribunal and that no notice to file an application before the Tribunal was served upon the Respondent.
2. The Respondent also contended that the Application for administrative review was filed out of statutory timelines before the Tribunal and prayed that it be struck out with costs.
3. The Respondent submitted that the Applicant was never awarded a contract to construct two-classroom block with an office but rather a notice of best evaluated bidder was gazetted in favour of the Applicant on September 21, 2023.
4. The Respondent averred that following a complaint to the Accounting Officer by *Olet Magezi Lira Hardware Company Ltd*, discrepancies in the advert and notice of best evaluated bidder were discovered, necessitating the cancellation of the procurement process by the accounting officer.
5. The Respondent contended that it received grave complaints from the Education Department of Lira City and the Supervising Engineer regarding the experience of the Applicant in renovating and painting the offices of former Adyel Division Headquarters and renovation of Ireda Primary School without catering for environmental safeguards.

6. The Respondent therefore prayed for the Application to be dismissed with costs.

E. SUBMISSIONS OF OLET MAGEZI LIRA HARDWARE COMPANY LTDAS INTERESTED PARTY

1. The interested party submitted that it was satisfied with the Accounting Officer's response to its administrative review complaint filed on September 26, 2023.
2. The interested party averred that it was erroneous for the bid notice and the bidding document to indicate the subject of procurement as a tender for the *construction of a two-classroom block at Anai Primary School- Anai Bung* but on display of the notice of best evaluated bidder, to indicate the subject of procurement to be the *construction of a two-classroom block with office at Anai Primary School- Anai Bung*. This changed the scope of the entire procurement to the disadvantage of other bidders.
3. The interested party prayed that the Application is dismissed and the decision of the Accounting Officer upheld.

F. RESOLUTION

The Application raised 7 issues for determination by the Tribunal. Considering the facts deduced from the pleadings and the procurement action file, the issues are reframed as follows:

- 1) Whether the Applicant has *locus standi* before the Tribunal?
- 2) Whether the Respondent's Accounting Officer erred in law and fact when he cancelled the procurement process?
- 3) What remedies are available to the parties?

Issue No. 1:

Whether the Applicant has locus standi before the Tribunal?

1. The Tribunal must inquire into the facts of the Application to determine whether it has the jurisdiction to entertain an application. The Tribunal would lack jurisdiction to review a matter before it where *inter alia*, its jurisdiction is expressly

ousted by the circumstances stipulated under section 91I(3) of the *Public Procurement and Disposal of Public Assets Act* or where the Application is incompetent.

See ***Applications 1& 2 of 2024, Pynet Technologies SMC Ltd vs Ministry of Lands, Housing and Urban Development, Application No. 35 of 2023, Passionate Ventures SMC Uganda Ltd Vs Bulambuli District Local Government, Mulago Hill Diagnostics Ltd v National Water and Sewerage Corporation, Application No.13 of 2022;***

2. The competence of the Application is, *inter alia*, premised on the determination of whether the Applicant has locus to file the Application before the Tribunal. See ***Application No.3 of 2024, G.E Solutions Vs. Ministry of Lands, Housing and Urban Development, Application no. 33 of 2023, Eclipse Edisoil JVC Ltd vs Napak District Local Government.***
3. For an Applicant to have locus before the Tribunal, the Applicant must fall within the ambit of sections 91I (1)(a) -(c) of the *Public Procurement and Disposal of Public Assets Act*.
4. The Applicant submitted that it is “one of the bidders which was eventually declared as the best evaluated bidder following the notice of best evaluated bidder displayed on the 21st September 2023” and thus concluded that it is an aggrieved party whose rights have been adversely affected by the decision of the Accounting Officer.
5. The Tribunal has over time emphasized that applications to the Tribunal are not restricted to bidders only but can also be filed by other persons whose rights are adversely affected by a decision of the accounting Officer. See ***Application 21 of 2023, EAA Company Limited v Uganda National Bureau of Standards, Application No. 20 of 2021, Obon Infrastructure Development J V v Mbarara City and Another and Application No. 20 of 2021, Old Kampala Students Association v PPDA and Old Kampala Senior Secondary school.***
6. However, a bidder who participated in an impugned procurement process, cannot change to a "person whose rights are adversely affected by the decision of the Accounting Officer" for purposes of obtaining locus standi before the Tribunal

under section 91I (1)(b) of the *Public Procurement and Disposal of Public Assets Act*. See ***Application 14 of 2023 Globe World Engineering Uganda Limited v Mbarara City Council and Another, Application 11 of 2023-China Civil Engineering and Construction Corporation vs. Uganda National Roads Authority; MBJ Technologies Limited v Mbarara City & Ors, Application No. 17 of 2022 and Mbarara City & Anr v Obon Infrastructure Development JV, High Court Civil Division Civil Appeal No. 45 of 2021; Apple Properties Limited v Uganda Human Rights Commission, Application no. 6 of 2023; and Tumwebaze Stephen Kiba v Mbarara City Council & Another, Application no. 21 of 2022.***

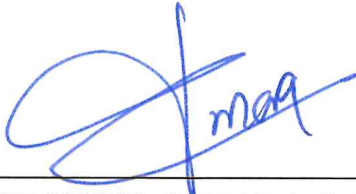
7. The Applicant having participated as a bidder in the tender for the construction of a two-classroom block with an office at Anai Primary School- Anai Bung under procurement reference number: LIRA606/WRKS/23-24/00002, does not have the discretion to cherry pick the most favourable administrative review forum available to it whether as a bidder to whom section 91I (1)(a) and (c) of the *Public Procurement and Disposal of Public Assets Act* applies or as a *person whose rights are adversely affected by the decision of the Accounting Officer* to whom section 91I (1)(b) of the *Public Procurement and Disposal of Public Assets Act* applies.
8. We therefore construe the Applicant as one of the bidders in the impugned procurement for purposes of the instant Application and not a "*person whose rights are adversely affected by the decision of the Accounting Officer*".
9. Relatedly, we have perused through the procurement action file and observed that **Part 1, Section 2** of the **Bid Data Sheet, ITB 17.1** on page 29 of the Bidding Document stated the Bid Validity to be up to December 6, 2023.
10. There is nothing on record indicating that the Respondent wrote to the bidders requesting them to extend the bid validity period of their respective bids post the date of December 6, 2023, as stipulated in regulation **49(5)** of the **Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006**.

11. The Applicant in its submissions on extension of bid validity, concedes that the Accounting Officer of the Respondent did not request the bidders to extend the bid validities and prayed that the Tribunal resolves the issue in the affirmative.
12. The Tribunal has held that once a bid's validity period has expired without a request for extension from the procuring and disposing entity, the affected bidder's participation in the impugned procurement process comes to an end once the bid validity period expires. See **Application No. 3 of 2022, VCON Construction (U) Ltd v Makerere University, Application No. 10 of 2021 Acacia Place Ltd Vs. Public Procurement and Disposal of Public Assets Authority and Electoral Commission** and **Application No. 16 of 2015, Kazini Fredric Vs. Public Procurement and Disposal of Public Assets Authority**.
13. It is our finding that the Applicant's bid expired on December 6, 2023 without a formal contract being entered into before the expiry of the said bid.
14. It therefore follows that upon the expiry of the Applicant's bid, it ceased to be and was no longer a bidder for all purposes and intents. The avenues provided for under **sections 89(8) and/or 89(9)**, read together with **section 91(1)(a) or (c)** of the **Public Procurement and Disposal of Public Assets Act** were no longer available to the Applicant. The Applicant had no locus standi before the Tribunal by the time it filed the Application on January 17, 2024.
15. In absence of locus standi by the Applicant, the Tribunal cannot therefore exercise its jurisdiction in this Application. See **Galleria in Africa Ltd vs. Uganda Electricity Distribution Company Ltd (Supreme Court Civil Appeal-2017) [2018] UGSC 19, Application 16 of 2023, Vital Capital Investments Limited and 2 Others v Ministry of Housing and Urban Development** and the Court of Appeal of Kenya in **Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1**.
16. In the circumstances we shall not delve into the merits of the Application.
17. **Issue no. 1 is resolved in the negative.**

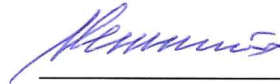
G. DISPOSITION

1. The Application is struck out.
2. The Tribunal's suspension order dated January 17, 2024, is vacated.
3. Each party shall bear its own costs.

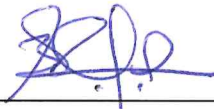
Dated at Kampala this 8th day of February, 2024.



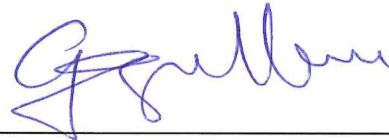
FRANCIS GIMARA S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



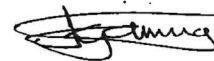
THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER



KETO KAYEMBA
MEMBER