

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

APPLICATION NO. 3 OF 2022

BETWEEN

VCON CONSTRUCTION (U) LIMITED:..... APPLICANT

AND

MAKERERE UNIVERSITY:..... RESPONDENT

**APPLICATION FOR ADMINISTRATIVE REVIEW IN RESPECT OF THE
PROCUREMENT OF WORKS FOR THE CONSTRUCTION AND
RESTORATION OF MAKERERE UNIVERSITY MAIN BUILDING;
REFERENCE NUMBER MAK/WRKS/2021/00009**

**BEFORE: FRANCIS GIMARA S.C, CHAIRPERSON; NELSON NERIMA;
PATRICIA.K.ASIIMWE; GEOFFREY NUWAGIRA KAKIRA; PAUL
KALUMBA; AND CHARITY KYARISIIMA, MEMBERS**

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. On 17th September 2021, Makerere University (The Respondent) published a Bid Notice in the New Vision Newspaper inviting bids for the construction and restoration of Makerere University Main Building Ref No. MAK/WRKS/2021-2022/00009 using open domestic bidding procurement method.
2. Bids were received from 9 bidders namely; *the Arab Contractors, Vcon Construction (U) Ltd* (the Applicant), *Ambitious Construction Co Ltd*, *Seyani Brothers & Co (U) Ltd*, *Canaan Construction Co Ltd*, *Scaffold Engineering and Construction Ltd*, *China Nanjing International*, *SMS Construction Ltd* and *Excel Construction Ltd* (Best Evaluated Bidder).
3. On 9th December 2021, the Respondent issued the Best Evaluated Bidder Notice. The notice indicated that the date of removal of the notice was 22nd December 2021. *M/s Excel Construction Ltd* was displayed as the Best Evaluated Bidder. The notice indicated that the Applicant was disqualified under the detailed evaluation stage of the procurement in respect to some criteria under technical staff, evidence of experience and evidence of equipment.
4. On 23rd December 2021, the Applicant being aggrieved by the decision of the respondent, applied to the Accounting Officer for Administrative Review.
5. In a letter dated 4th January 2021, Ref. No. MAK/US/01/2022, the Accounting Officer of the Respondent communicated his decision rejecting the applicant's application for administrative review.
6. On 17th January 2022, the Applicant being dissatisfied with the decision of the Accounting Officer, submitted an application to the

Tribunal.

B. APPLICATION TO THE TRIBUNAL

1. The Applicant's case is as follows:
 - a) When the Applicant filed their application for administrative review to the Accounting Officer of the Respondent, the Accounting Officer did not request the bidders to extend the validity of their bids.
 - b) The Accounting Officer did not deliver his decision within the statutory 10 days.
 - c) That the Applicant was aggrieved by the omission, actions, and purported decision of the Accounting Officer.
2. That Applicant sought administrative review under section 91I (b) of the *Public Procurement and Disposal of Public Assets Act* as amended.

C. REPLY TO THE APPLICATION

1. The Respondent raised a preliminary objection that the Applicant is no longer a bidder and therefore has no locus to file a complaint before the Tribunal since the bids expired on 31st December 2021. In addition, the Applicant was not a successful bidder in the procurement process and the Respondent did not decline to afford the Applicant a fair hearing. Therefore, the Applicant has no locus before the Tribunal.
2. The Respondent further averred that:
 - a) The decision of the Accounting Officer was communicated within the statutory time. However, the decision had been overtaken by the lapse of the validity of the bids and bid securities on 31st December 2021.

- b) The Applicant is not a person whose rights had been adversely affected by the decision of the Accounting Officer since the decision was rendered ineffective by the lapse of the period of validity of the bids and the bid securities.
- c) The Respondent had not entered into a contract with the best evaluated bidder.
- d) The Respondent intends to take corrective measures.

D THE ORAL HEARING

The Tribunal held an oral hearing on 7th February 2022 using the Zoom online platform. The appearances were as follows:

- 1. The applicant was represented by Mr. Nelson Walusimbi of Walusimbi and Company Advocates; Kenneth Naigambi Legal Officer of the Applicant; and Edwin Bamulanga, Assistant Legal Officer.
- 2. The Respondent was represented by its legal officers; Gonzaga Mbalangu and Phiona Leticia Natukunda.
- 3. The Best Evaluated Bidder was represented by Mr. Malkit Singh Saini – JMD, Mr. Satvinder Singh Saini – Director, Mr. Robert Scott - Project Manager, Mr. Ashok - Project Manager, Ms. Lynnette – Q S, and Ms. Vastine - Sr. Administrator

E. SUBMISSIONS

Applicant

- 1. The Applicant averred that under section 91I (1) (b) of the *Public Procurement and Disposal of Public Assets Act*, the Applicant is an aggrieved party whose rights are adversely affected by the decision of the Accounting Officer of the Respondent.
- 2. The Applicant averred that the Entity and Accounting Officer erred in law and fact when he omitted to request bidders to extend their bid

validity and bid security contrary to section 89 (5) and (6) of the *Public Procurement and Disposal of Public Assets Act* .

3. The Applicant further submitted that failure to extend the bids resulted in the procurement process coming to an end.
4. That the Respondent's Accounting Officer's decision was communicated out of time contrary to section 89(7) of the *Public Procurement and Disposal of Public Assets Act* and therefore null and void.
5. The Applicant's prayed for a declaration that the procurement process was terminated on account of the expiry of the bid validity; cancellation of the procurement process, a direction to the Respondent to retender the procurement; costs; a declaration that the decision of the Accounting Officer is null and void; and refund of the administrative review fees.

Respondent

6. The Respondent raised a preliminary objection that the Applicant has no locus to file the application before the tribunal since the Applicant is no longer a bidder and the Applicant has not been adversely affected by the decision of the Accounting Officer.
7. The Respondent contended that the decision of the Accounting Officer was communicated in time and that the 10 days under section 89(7) of the *Public Procurement and Disposal of Public Assets Act* do not include weekends and public holidays.
8. The Respondent argued that since the bid validity expired, no valid contract can be executed between the Respondent and the Best Evaluated Bidder.
9. The Respondent prayed that the application is dismissed with costs.

Best Evaluated Bidder

10. The Best Evaluated Bidder did not make any submission.

F. SUMMARY DECISION

After the oral hearing on 6th February 2021, the Tribunal issued a summary disposition of this Application. We now issue our detailed decision.

G. RESOLUTION BY THE TRIBUNAL

Preliminary issue:

1. The Tribunal deems it necessary to resolve the following preliminary point of law raised:

Whether there is a competent application for administrative review before the Tribunal.

2. Under section 91 I (1) (b) of the *Public Procurement and Disposal of Public Assets Act, 2003* as amended by Act 15 of 2021, on which this application is premised, a person whose rights have been affected by a decision made by the Accounting Officer may apply to the Tribunal for review of a decision of a procuring and disposing entity.
3. The Tribunal notes that the Applicant made its application to the Accounting Officer of the Respondent within time and at the time the bids were still valid.
4. Under section 89 (5) of the *Public Procurement and Disposal of Public Assets Act, 2003* as amended by Act 15 of 2021, on receiving a complaint from a bidder, the Accounting Officer shall immediately suspend the procurement process.

5. Under section 89 (6) of the *Public Procurement and Disposal of Public Assets Act, 2003* as amended by Act 15 of 2021, in addition to suspending the process, the Accounting Officer is required to request the bidders to extend the validity of their bids and bid securities.
6. The Tribunal notes that, the Accounting Officer, on receipt of the application for administrative review, did not request the bidders to extend the validity of their bids and the bid securities. The bids and the bid securities subsequently expired on 31st December 2021. At this point, the Applicant was no longer a bidder within the meaning of section 3 of the *Public Procurement and Disposal of Public Assets Act, 2003* where a bidder is defined as a physical or artificial person intending to participate or participating in public procurement or disposal proceedings.
7. The Applicant, therefore, proceeded to file its application to the Tribunal, premised on section 91 I (1) (b) of the *Public Procurement and Disposal of Public Assets Act, 2003* as amended by Act 15 of 2021. That provision allows persons who are not bidders to apply to the Tribunal for review of the decision of an Accounting Officer if their rights have been adversely affected by a decision of the Accounting Officer.
8. In the case of ***Old Kampala Students Association V Old Kampala Senior Secondary School & PPDA, Application No. 7 of 2017***, the Tribunal considered the issue of who is an aggrieved party and held that the Tribunal has to consider the facts of each case in determining whether an applicant is an aggrieved party.
9. In this case, the Applicant filed an application for administrative review to the Accounting Officer within the stipulated time. The Accounting Officer did not request the bidders to extend their bid validity and bid security validity contrary to section 89(6) of the *Public Procurement and Disposal of Public Assets Act 2003* as amended by Act 15 of 2021.

10. In the case of **TWED PROPERTY DEVELOPMENT LIMITED vs. PPDA, PAT APPLICATION NO. 9 of 2015**, the Tribunal held that the only method available for bid validity extension is when the Entity makes the request to the bidders to extend the validity of their bids.
11. The Tribunal, therefore, finds that the Applicant, who participated in the procurement in question, is an interested party in the procurement whose rights were adversely affected by the Accounting Officer's failure to request the bidders to extend their bid validity contrary to section 89 (6) of the *Public Procurement and Disposal of Public Assets Act 2003* as amended by Act 15 of 2021. This omission subsequently affected the validity of the decision of the Accounting Officer.
12. The Applicant therefore has *locus standi* under section 91 I (1) (b) of the *Public Procurement and Disposal of Public Assets Act 2003* as amended by Act 15 of 2021.
13. **The Tribunal answers this preliminary issue in the affirmative.**

Substantive issues:

14. The Tribunal will now proceed to handle the substantive issues:
 - (1) Whether the Accounting Officer erred in fact and in law when he decided not to or omitted to request the bidders to extend the bid validity and the bid security.
 - (2) Whether the procurement process came to an end on the 31st day of December 2021.
 - (3) Whether the decision of the Accounting Officer dated 4th January 2022 was valid and lawful.
 - (4) Whether the consequential contract can be legally entered into and executed by the Best Evaluated Bidder and the Respondent.
 - (5) What reliefs are available to the Applicant.

Issue 1:

Whether the Accounting Officer erred in fact and in law when he decided not to or omitted to request the bidders to extend the bid

validity and the bid security

15. On 23rd December, 2021 the Applicant submitted an application to the Accounting Officer of the Respondent.
16. Under section 89 (6) of the *Public Procurement and Disposal of Public Assets Act, 2003* as amended by Act 15 of 2021, the Accounting Officer must, on receipt of an application for administrative review, request bidders to extend their bid validity and bid security.
17. The provision is mandatory, and the Tribunal relies on the Supreme Court decision in ***Galleria in Africa Ltd versus Uganda Electricity Distribution Company Ltd (Civil Appeal-2017) [2018] UGSC 19*** where court held that:
".....there's no way the Act can regulate practices in respect of public procurement and disposal of public assets unless if the provisions are adhered to strictly to the letter. The provisions cannot be directory merely. They are for all purposes and intents mandatory and noncompliance with them makes the proceedings fatal. Procurement and Disposal activities are processes; one cannot move to another stage of the processes without fulfilling the first one".
18. The Accounting Officer of the Respondent did not request bidders to extend the validity of their bids and bid securities. The Accounting Officer thereby erred in law and in fact when he failed to request the bidders to extend the validity of their bids and securities.
19. **The Tribunal, therefore, answers issue no. 1 in the affirmative.**

Issue 2:

Whether the procurement process came to an end on the 31st day of December 2021

20. Under the Instructions to Bidders clause reference of 19.1 and 20.3 of the Bid Data Sheet, the validity of the bids and the bid security respectively was up to 31st December 2021. The bids therefore expired on 31st December 2021.

21. In the case of **Kazini Fredric Vs. PPDA, PAT Application No. 16 of 2015** the Tribunal held that once bids have expired the procurement process comes to an end. The Tribunal also came to the same conclusion in the matter of **Acacia Place Ltd Vs. PPDA and Electoral Commission, Application No. 10 of 2021**.
22. The procurement process came to an end on 31st December 2021 once the bids and the bid securities expired.
23. **The Tribunal, therefore, answers issue no. 2 in the affirmative.**

Issue 3:

Whether the decision of the Accounting Officer dated 4th January 2022 was valid and lawful

24. Under section 89(7) of the *Public Procurement and Disposal of Public Assets Act* as amended by Act 15 of 2021 an Accounting Officer shall make and communicate a decision to the bidder who makes the complaint within ten days of receipt of a complaint.
25. The Applicant applied for Administrative Review on 23rd December 2021. The Accounting Officer had 10 days within which to make and communicate a decision. In the recent case of **Elite Chemicals Limited Vs. Uganda Coffee Development Authority, PAT application No. 1 of 2022**, the Tribunal emphasized that the days stipulated in the section 89(7) are not working days. The ten (10) calendar days therefore elapsed on 2nd January 2022.
26. The Accounting Officer was, therefore, duty bound to make and communicate a decision on or before the 2nd January 2022. The Accounting Officer, however, purported to issue a decision on the 4th of January 2022, which was in breach of the law. In the case of **Super Taste Ltd V Bank of Uganda, Application No. 33 of 2021**, this Tribunal held that a decision issued out of time is “a blatant breach of the law and no decision at all.” The same finding was made in **Apa**

***Insurance Uganda Limited v Uganda National Roads Authority,
Application no. 2 of 2022.***

27. The Tribunal, therefore, finds that the purported decision of the Accounting Officer was invalid and unlawful.
28. **Issue no. 3 is answered in the affirmative.**

Issue 4:

Whether the consequential contract can be legally entered into and executed by the Best Evaluated Bidder and the Respondent

1. As discussed under issue 2 above, when bids expire, a procurement process comes to an end.
2. Under section 3 of the Public Procurement and Disposal of Public Assets Act, 2003 a contract is defined as follows:
...an agreement between a procuring and disposing entity and a provider, resulting from the application of the appropriate and approved procurement or disposal procedures and proceedings as the case may be, concluded in pursuance of a bid award decision of a Contracts Committee or any other appropriate authority.
3. The purpose of a procurement process is ultimately to enter into a contract between the procuring entity and the best evaluated bidder for the provision of goods, works, or services. The above cited definition of a contract makes it clear that a contract is a result of an appropriate and approved procurement process and a bid award decision. In this case, the procurement process ended when the bids expired. A contract cannot be signed in respect of an expired bid.
4. The Tribunal, therefore, finds that the entity cannot enter into a contract with a bidder on the basis of a procurement process that has ended.

5. **Issue no. 4 is answered in the negative.**

Issue 5:

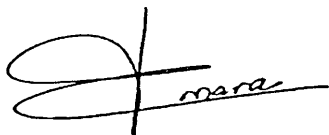
What reliefs are available to the Applicant

1. The Tribunal finds that the procurement process ended when the bids expired. Therefore, there is no process to cancel. The Tribunal does not have the powers to compel the Respondent to retender the procurement. It is also the finding of the Tribunal that no valid contract can be entered into with a bidder on the basis of a terminated procurement process.

H. DISPOSITION

1. The procurement process of works for the construction and restoration of Makerere University Main Building under Ref No. MAK/WRKS/2021-2022/00009, came to an end upon expiry of the bids on 31st December 2021.
2. The Entity may re-tender the procurement if it so wishes.
3. The Tribunal's suspension order dated 17th January 2022 is vacated.
4. Each party to bear its own costs.

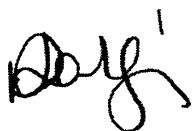
Dated at Kampala this 9th of February 2022.



FRANCIS GIMARA S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



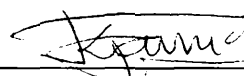
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PAUL KALUMBA
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CHARITY KYARISIIMA
MEMBER