

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. On 6th August 2021, the Uganda Prisons Services (The Respondent) issued a call for bids for the design, construction, supply, delivery, installation, and commissioning of a grain processing and storage plant at Uganda Prison farms of Lugore, Simba and Ibuga, vide Procurement Ref. No. UPN/WRKS/2020-2021/00490 under restricted bidding method of procurement. The procurement was divided into 3 lots; one for each farm. The invitation was addressed to 6 bidders.
2. On 17th September 2021, bids were received from 4 bidders namely; Eco Conserve Ltd, Good News Limited in JV with Silo Master S.L.U, Perry Engineering Services in Association with Taifa Patterns Ltd and Kadac International Ltd in JV with Globaltec Ltd (the Applicant).
3. During the bid evaluation process, the Evaluation Committee noted that the Applicant provided a Tax Clearance Certificate that had expired on 30th June 2021. The Evaluation Committee resolved to seek clarification from the applicant.
4. In a letter dated 6th October 2021, the Chairperson of the Evaluation Committee sought clarification from the Applicant regarding the Income Tax Clearance and gave the Applicant a deadline of 8th October 2021 within which to respond. In a letter dated 8th October 2021, the Applicant submitted the same Income Tax Clearance Certificate that it had submitted in its bidding documents.
5. On 15th October 2015, the Applicant wrote to the Uganda Revenue Authority requesting for clarification on the validity of the Income Tax Clearance Certificate. On the same date, Dorcas Abalango,

Manager MTO Revenue Recovery via email confirmed that the certificate was issued by URA.

6. Uganda Revenue Authority issued the Applicant a tax clearance certificate dated 12/10/2021 for the period 01/07/2021 to 30/06/2022.
7. On the 8th December 2021, the Respondent issued the Best Evaluated Bidder Notice. The indicated date for removal of the notice was 21st December 2021. Good News Investments Ltd in JV with Silo Master S. L. U was displayed as that Best Evaluated Bidder for Lot 1- Lugore at a contract price of UGX. 14,736,577,598 and Perry Engineering Services in Association with Taifa Partners Ltd was displayed as the Best Evaluated Bidder under Lot 3- Ibuga.
8. The Notice of the Best Evaluated Bidder indicated that the Applicant was disqualified for the following reasons:
 - a) failure to provide a valid income tax clearance certificate addressed to the Respondent;
 - b) proposing to supply primary equipment from different manufacturers contrary to the requirements of the bidding document; and
 - c) and failure to demonstrate access to key equipment needed to execute the contract.
9. On 16th December 2021, the Applicant being aggrieved by the decision of the Respondent, applied to the Accounting Officer of the Respondent for administrative review.
10. On 21st December 2021, the Respondent requested the bidders to extend the validity of their bids and bid securities from 4th January 2022 to 20th May 2022.

11. In a letter dated 4th January 2021, Ref. No. UPN/WKS/2020-21/00490, (received by the Applicant on 5th January 2022) the Accounting Officer of the Respondent communicated his decision rejecting the applicant's application for administrative review.
12. On 19th January 2022, the Applicant being dissatisfied with the decision of the Accounting Officer, applied to the Tribunal for administrative review. The Applicant raised the following issues:
 - a) Whether the Applicant's bid was compliant with the requirements of the procurement.
 - b) Whether the determination by the Uganda Prisons Service of the bids by the Best Evaluated Bidders was in accordance with the law.
 - c) What remedies are available to the parties?

B. REPLY TO THE APPLICATION

The Respondent

13. The Respondent filed a written Statement of Defence denying the contents of the Applicant's application.

The Best Evaluated Bidders

(M/s Good News Investments Ltd in JV with Silo Master S. L. U - Lot 1- and Perry Engineering Services in Association with Taifa Partners Ltd Lot 3).

14. The Best Evaluated Bidders filed responses to the application with the same content largely as submitted in defence by the Respondent's counsel. They stated that the application was untenable and misconceived and should be rejected by the Tribunal.
15. They prayed that the application be dismissed with costs.

C. THE ORAL HEARING

The Tribunal held an oral hearing on 9th February 2022 using the Zoom online platform. The appearances were as follows:

1. The Applicant was represented by Counsel Esau Isingoma and Counsel Richard Bibangambah of K & K Advocates; Mr. Javier Valero Marin, Caroline Kekirunga, Manuel Molina, Edgar Byamugisha and Gadson Hafasha.
2. The Respondent was represented by State Attorneys, Twinomugisha Mugisha, Ms. Bingi Sarah, and Mr. Ebila Hillary; Kaliisa Jude - Commissioner Prisons, Dr. George Muge - Commissioner Prisons, Ojiambo Ronald - HPDU, Kembabzi Juliet - Senior Procurement Officer, PDU, Aliyo Naatukunda - Assistant Commissioner of Prisons, Kisitu Andrew - Commissioner of Prisons, Kaliisa Jude - Commissioner Prisons, Dr. George Muge - Commissioner Prisons, Ojiambo Ronald - HPDU, Kembabzi Juliet - Senior Procurement Officer, PDU, Nsalasatta David - Assistant Commissioner General - Production and Engineering and Mugaba Arthur - in charge of Agricultural Equipment - Prisons
3. The Best Evaluated Bidder for Lot 1 - Good News Limited in JV with Silo Master S.L.U was represented by Counsel Allan Bariyo from Allan and Partners.

D. SUBMISSIONS

The parties' written and oral submissions were as follows:

Applicant

1. That the Respondent erroneously disqualified the Applicant on three grounds.
2. The Respondent erred in finding that the Applicant did not provide a valid copy of the Income Tax Clearance Certificate addressed to the Respondent as required. The Applicant argued that what the law requires is that the bidder is tax compliant, and the period for tax compliance was not a requirement under the evaluation

criteria stated in the bidding document.

3. The Applicant further averred that the Respondent erred in disqualifying the bidder for providing primary equipment from different manufacturers. The Applicant argued that this was not a requirement in the bidding document.
4. The Applicant further argued that the Respondent erred in disqualifying the bidder for not demonstrating key equipment to execute the contract. The Applicant stated that the Applicant submitted evidence to the show that they were going to lease/hire the equipment in question.
5. The Applicant further stated that they provided the lowest priced bid and that it is a principle of law and justice that the Government should not incur unnecessary costs.
6. The Applicant prayed that its application be allowed, and the Applicant declared the Best Evaluated Bidder for Lots 1 and 3.

Respondent

7. The Respondent averred that the Tax Clearance Certificate submitted by the Applicant was issued on 24/03/2021 and was for the period 01/07/2020 to 30/06/2021. It had expired by the date of close of bidding process (17th September 2021), and therefore was not valid.
8. The Respondent argued that on page 23 of the bidding documents, it was a requirement that the primary equipment should be from the same manufacturer. The Respondent also stated that the Applicant had sought clarification on this issue and the Respondent clarified that the primary equipment must be from the same manufacturer.
9. The Respondent further stated that the Applicant was rightly disqualified for failure to demonstrate access to key equipment.
10. The Applicant did not extend their bid validity and bid securities following a request to do so from the Respondent and therefore the Applicant is not a bidder and has not locus before the Tribunal.

11. The Respondent prayed that the Applicant's bid be dismissed.

Best Evaluated Bidders

The Best Evaluated Bidders filed joint submissions and at the hearing, Counsel for the Best Evaluated Bidder for Lot 1, reiterated the submissions as follows:

12. That the application for Administrative Review was filed out of time, 14 days after the issuance of the decision of the Accounting Officer.
13. That the bidder in the procurement was a Joint Venture represented by Javier Valero Marin of Globatec. The Applicant was not a bidder in the process and therefore does not have locus standi to file the application.
14. The Applicant did not pay the requisite fees for filing the application. The procurement has three lots and the Applicant paid for only one lot.
15. The Applicant's bid expired and therefore the Applicant has no locus standi before the Tribunal. Counsel for the Best Evaluated Bidder relied on **Kasokoso Services Ltd V. Jinja School of Nursing Application No. 13 of 2021**.

Applicant's Rejoinder

In rejoinder the Applicant submitted as follows:

16. The Applicant in a letter dated 30th December 2021, extended their bid validity from 4th January 2022 to 20th May 2022.
17. The Application for administrative review to the Tribunal was filed within the statutory bidding period of 10 working days.

E. SUMMARY DECISION

After the oral hearing on 9th February 2021, the Tribunal issued a summary disposition of this Application. We now issue our detailed decision.

F. RESOLUTION BY THE TRIBUNAL

Preliminary issues

The Tribunal deems it necessary to resolve the preliminary points of law which the Tribunal has framed as follows:

Whether there is a competent Application before the Tribunal

a) Limitation of Time:

1. On 17th December 2021, the Applicant applied to the Accounting Officer for Administrative Review.
2. Under Section 89(7) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021, the Accounting Officer must make and communicate a decision within ten (10) days of receipt of a complaint. Therefore, the Accounting Officer was bound to communicate his decision on or before the 27th of December 2021. However, the Respondent's Accounting Officer purported to issue his decision in a letter dated 4th January 2022 (but received by the Applicant on 5th January 2022). The Tribunal has previously held that the days stipulated under section 89(7) are not working days. (***Elite Chemicals Limited Vs. Uganda Coffee Development Authority, PAT application No. 1 of 2022, and VCON Construction (U) Limited Vs. Makerere University PAT application No. 3 of 2022.***) The purported decision of the Accounting Officer was therefore issued out of time.
3. 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 purported decision of the Accounting Officer was therefore null and void.
4. Under section 89(8) of the Public Procurement and Disposal of Public Assets Act as amended, where an Accounting Officer does not make a decision within the specified period, a bidder may make an application to the Tribunal.

5. Under section 91 I (2) (b), of the Public Procurement and Disposal of Public Assets Act as amended, such application to the Tribunal shall be made within ten (10) days from the date of expiry of the period within which the Accounting Officer should have communicated his decision.
6. In the instant case, the ten (10) days started running from 28th December 2021 and ended on 6th January 2022. The Applicant, therefore, should have submitted the application to the Tribunal on or before 6th January 2022. The Applicant filed this application to the Tribunal on 19th January 2022 and was therefore time barred.
7. The Tribunal has previously held that the provisions in the Public Procurement and Disposal of Public Assets Act are mandatory. See ***Super Taste Ltd V Bank of Uganda, Application No. 33 of 2021***, and ***Apa Insurance Uganda Limited V. Uganda National Roads Authority, Application No. 2 of 2022***.
8. 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”.
9. ***In the case of Makula International Ltd versus Cardinal Nsubuga & Another Civil Appeal No. 4 of 1981***, court held that it is well established that a court has no residual or inherent jurisdiction to enlarge a period laid down by statute.
10. The Tribunal therefore finds that the application to the Tribunal was time barred, and the Tribunal does not have jurisdiction over

this application.

b) Locus Standi

11. Under section 89(1) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021, a bidder who is aggrieved by the decision of a procuring and disposing entity may make a complaint to the Accounting Officer of the procuring and disposing entity.
12. Under section 3 of the Public Procurement and Disposal of Public Assets Act as amended, a bidder is a physical or artificial person intending to participate or participating in public procurement or disposal proceedings.
13. Under ITB clause Ref. 6 of the Bid Data Sheet, it was provided that for bids submitted under a Joint Venture, the bidders were required to nominate a representative “who shall have authority to conduct all business for and on behalf of any and all the parties of the JV during the bidding process and in the event that the JV is awarded the contract and during contract execution.”
14. In the bid of the Applicant, under the Qualification Forms the name of the bidder is indicated as *JV KADAC-GLOBAL TEC*. The authorised representative of the bidder was indicated as Javier Valero Marin.
15. In ***Twenty Third Century Systems PVT Ltd (TTCS) Vs. PPDA & NSSF, PAT Application No. 5 of 2017***, the Twenty Third Century Systems PVT Ltd (Zimbabwe), Twenty Third Century Systems PVT Ltd (Uganda) and SAP East Africa submitted a bid to the National Social Security Fund as a Consortium. The Applicant in that matter did not apply to the Tribunal as a consortium, it applied as Twenty Third Century Systems PVT Ltd (Zimbabwe). The Tribunal found that the Applicant did not participate in the procurement as a bidder and therefore was not aggrieved by the decision of the Accounting Officer of the National Social Security Fund as to be entitled to apply to the Tribunal for administrative review.
16. In ***EGIS Road Operations SA Vs. PPDA and Uganda National***

Roads Authority PAT Appl. No. 11 of 2020, the Tribunal held that the applicant who was part of the consortium that had submitted a bid in the procurement, did not have the *locus standi* to file a complaint before the Accounting Officer in its own name.

17. In the application before this Tribunal, the application for administrative review to the Accounting Officer of the Respondent filed on 17th December 2021, (on which the application to the Tribunal is premised), was signed by Caroline Kekirunga, Managing Director, *Kadac International Ltd*. As indicated above the bidder in this procurement was *JV KADAC-GLOBAL TEC*. *Kadac International Ltd* was not the bidder in this procurement, and Carol Kekirunga was not the authorised representative of the bidder. The Applicant, therefore, had no *locus standi* to apply to the Accounting Officer of the Respondent for administrative review.

18. This application to the Tribunal is premised on Section 89(8) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021, which provides that a bidder who is dissatisfied with the decision of the Accounting Officer may apply to the Tribunal for administrative review. For an application for administrative review to the Tribunal to be competent under Section 89(8), the following conditions have to be met:
 - a) The Application must be made by a bidder as defined Section 3 of the Public Procurement and Disposal of Public Assets Act;
 - b) The bidder must have applied to the Accounting Officer of the entity for administrative review under section 89 (1) of the Public Procurement and Disposal of Public Assets Act;
 - c) The Accounting Officer should have made and communicated his decision within 10 days from the date of receipt of the complaint in accordance with section 89(7) of the Public Procurement and Disposal of Public Assets Act; and
 - d) The bidder must be aggrieved by the decision of the Accounting Officer.

19. In the present case, the Applicant at the Accounting Officer level

is different from the applicant in the application before the Tribunal. *Kadac International Ltd* applied to the Accounting Officer for administrative review. As highlighted above, Kadac International Ltd was not the bidder, the bidder was JV *KADAC-GLOBAL TEC*, who is the applicant in this application before the Tribunal. The decision issued by the Accounting Officer in respect of the complaint that was filed by *Kadac International Ltd* who was not a bidder as defined under section 3 of the Public Procurement and Disposal of Public Assets Act was null and void.

20. *JV KADAC-GLOBAL TEC*, (the Applicant) did not make an application for administrative review to the Accounting Officer. Therefore, while the Applicant in this case was the actual bidder i.e *JV KADAC -GLOBAL TEC*, the Applicant has no *locus standi* before the Tribunal because the Applicant did not apply to the Accounting Officer of the Respondent for administrative review.
21. The Tribunal also notes that while the Applicant to the Tribunal was *JV KADAC-GLOBAL TEC*, the signatory to the application was Carol Kekirunga who is not the authorised representative of the Applicant and therefore does not have the authority to represent the bidder.
22. The application before the Tribunal is therefore incompetent.
23. **The Tribunal therefore answers this issue in the negative.**
24. The Tribunal has not deemed it necessary to delve into the other preliminary objections, and the substantive issues.

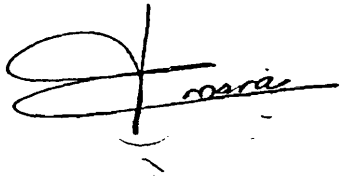
G. DISPOSITION

1. This Application, lodged on January 19, 2022, was filed out of time.
2. The Applicant, *Kadac International Ltd in JV with Globaltec Ltd* did not apply for administrative review to the Accounting Officer and

hence has no locus standi to file the instant application before the Tribunal.

3. For the reasons stated in nos. 1 and 2 above, this Application is incompetent and is struck out.
4. The Entity may continue with the procurement to its logical conclusion.
5. The Tribunal's suspension order dated January 20, 2022, is vacated.
6. Each party to bear its own costs.

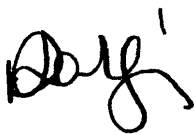
Dated at Kampala this 14th day of February, 2022.



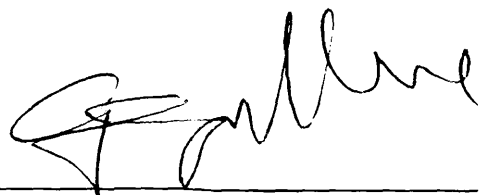
FRANCIS GIMARA S.C
CHAIRPERSON



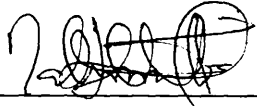
NELSON NERIMA
MEMBER



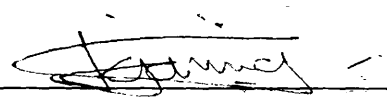
PATRICIA K. ASIIMWE
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



**PAUL KALUMBA
MEMBER**



**CHARITY KYARISIIMA
MEMBER**