

UGANDA / JUDGMENT

Dot Gov Solution LLC v National Information Technology Uganda (Application 49 of 2024) [2025] UGPPDPAAT 2 (14 January 2025)

[2025] UGPPDPAAT 2

COURT

Public Procurement and Disposal of Public Assets
Appeals Tribunal

BEFORE

Gimara SC, Chairperson, Nerima, Panel Member,
Nuwagira, Kalumba, Kyarisiima, Kayemba, cyrus
Titus Aomu, penal member

CASE / FILE NUMBER

Application 49 of 2024

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THE REPUBLIC OF UGANDA

PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS APPEALS TRIBUNAL

REGISTRY APPLICATION NO. 49 OF 2024

BETWEEN

dotGOV SOLUTIONS LLC::::

AND

NATIONAL INFORMATION TECHNOLOGY- UGANDA:::RESPONDENT

APPLICATION FOR ADMINISTRATIVE REVIEW IN RESPECT OF THE PROCUREMENT \$
\mathbf{OF}\$ PROPOSALS BY NATIONAL INFORMATION TECHNOLOGY- UGANDA FOR THE
DESIGN, DEVELOPMENT AND COMMISSIONING OF E-SERVICES DEVELOPMENT FRAMEWORK
UNDER PROCUREMENT REFERENCE NUMBER NITA-U/UDAP/SRVS/23-24/00053

BEFORE: FRANCIS GIMARA S. C CHAIRPERSON, NELSON NERIMA, GEOFFREY NUWAGIRA
KAKIRA, PAUL KALUMBA, CHARITY KYARISIIMA, KETO KAYEMBA; AND ENG. CYRUS TITUS
AOMU, MEMBERS

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DECISION OF THE TRIBUNAL

A. BRIEF FACTS

- The Government of Uganda, through National Information Technology Uganda (NITA-U) (the Respondent), received funds from International Bank for Reconstruction and Development or the International Development Association (World Bank) for the Uganda Digital Acceleration Project Government Network (UDAP-GOVNET).
- The Respondent initiated a tender for proposals for the design, development, and commissioning of an e-services development framework under procurement reference number NITA-U/UDAP/SRVS/23-24/00053 using Single-Stage-Two a Envelope through an open competitive bidding method.
- 3. The Respondent received proposals from TUCKSEE PTY Ltd, SOFTENGI UKRAINE LLC, dotGOV Solutions LLC /the Applicant) and ERNST & YOUNG LLP on June 20, 2024.
- 4. Upon evaluating the technical proposals, dotGOV Solutions LLC and ERNST & YOUNG LLP's technical proposals were found to be nonresponsive and rejected, and their respective financial proposals were returned to them unopened. On October 3, 2024, both dotGOV Solutions LLC and ERNST & YOUNG LLP were notified of the outcome of the technical evaluation.
- 5. The Respondent opened the financial proposals of TUCKSEE PTY Ltd and SOFTENGI UKRAINE LLC, which passed the technical evaluation stage on October 17, 2024.
- The Applicant, dissatisfied with the procurement process, filed a procurement-related complaint with the Respondent on October 22, 2024.

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- The Respondent's Accounting Officer made a response to the Applicant's complaint on December 16, 2024. The Accounting Officer did not find merit in the Applicant's complaint.
- 8. The Applicant, dissatisfied with the Accounting Officer's decision, filed the instant application electronically with the Tribunal on December 24, 2024, at 9:04 a.m., seeking to review the Accounting Officer's decision.
- The Application raised two issues for determination by the Tribunal. In view of the pleadings and submissions, the issues have been reframed as follows:
- *Whether the Applicant has locus standi before the Tribunal?*(i)
- Whether the Respondent was right to declare the Applicant's (ii) technical proposal as non-responsive on account of having been signed by CEO Sergey Chapkey instead of the delegated *Attorney* Rowan Vos and for non-registration/notarization?*

- *What remedies are available to the parties?* (iii)

\$B.\$ THE ORAL HEARING

- 1. The Tribunal held a virtual hearing on January 9, 2025, by Zoom Cloud Application. The appearances were as follows:
- Okiror Sam Ourum as Counsel for the Applicant. \$1)\$
- John Kallemera, counsel for the Respondent. In attendance was \$2)\$ Dr Hatwib Mugasa, the Respondent's Executive Director and Accounting Officer; Ms Rhoda Kimera - the Director of Finance and Administration; Mr Edmond Macheli - The Project Coordinator; Ms Jacqueline Musimenta-Procurement Officer; Ms Patricia Anabo - Legal Expert and Mr Alex Opira - Monitoring and Evaluation Specialist.

\$\mathbb{C}\$. SUBMISSIONS

The parties highlighted their written submissions and made oral submissions as follows:

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Applicant

- \$1.\$ The Applicant's Counsel adopted its written submissions filed on January 6, 2025.
- \$2.\$ The Applicant contended that the Applicant submitted its proposal to NITA-U (the Respondent) with all the relevant accompanying documents namely, Proposer Information form (annexure A1), signature authorization in lieu of power of attorney (annexure A2), owner's affidavit in lieu of power of attorney (Annexure A3), letter of proposal-Technical part (annexture A4), a certificate of organization issued on 9th January 2003 (annexure A5), dotGOV organization chart (annexure A6), a certificate of fact dated June 11, 2024, (annexure A7), a receipt dated January 16, 2014(annexture A8), membership certificate(annexure A9) among others, which documents referred to Mr Sergey Chapkey as the founder, sole owner and CEO of Alfa XP Web Software Company (doing business as dotGOV Solutions LLC).
- 3. The Applicant submitted that Mr. Sergey Chapkey signed and submitted a proposal to the respondent on June 19, 2024, and in the proposer information form (annexure A1), Mr. Sergey Chapkey was indicated as the proposer's authorized representative while in the signature authorization document dated 18th June 2024 in matters of Ref No. NITA-U/ADAP/SRVCS/2023-2024/00053, Mr Sergey Chapkey, as the founder, sole owner and chief executive of Alfa XP Web Software Company (doing business as dotGOV Solutions LLC), delegated his signature power to Mr Rowan Vos, manager of dotGOV Solutions Limited, in the Republic of Zambia.

- 4. The Applicant averred that in the document named as owner's affidavit in lieu of power of attorney, also dated June 18, 2024, Mr Sergey Chapkey remained with and retained "full legal right" to contract business and represent the company in all matters including but not limited to the above consultancy" and that any Page 4 of 13

efforts to detach Mr Sergey Chapkey and disqualify the proposal of the applicant on account that it was signed by Mr Sergey Chapkey instead of Mr Rowan Vos to whom he had delegated his signature power was erroneous and unjust decision by the Respondent. The Applicant contended that since both documents, i.e. signature authorisation and owner's affidavit, were signed by Mr Sergey Chapkey on the same day, June 18, 2024, and submitted along with the proposal, it can be construed that Mr Sergey Chapkey envisaged that upon submission and henceforth while at NITA-U, Mr Rowan Vos would sign documents, if any, where necessary and applicable on the Applicant's behalf.

- The Applicant submitted that the Rules of Natural Justice and 5. Equity should be applied in the instant application so that the Applicant's bid proposal is decided upon on merits rather than based on formalistic/administrative errors and lapses and should not necessarily debar the applicant from pursuit of its rights in the procurement process before the respondent (NITA- \$U\$).
- The Applicant relied on the provisions of Article 126 (2) (e) of the 6. Constitution of the Republic of Uganda to argue that substantive justice shall be administered without undue regard to technicalities and that the Respondent ought to consider the Applicant's success story in Zambia in the best interests and prospective value for money and for the benefit of the people of the Republic of Uganda.
- \$7.\$ The Applicant prayed that the Tribunal find merit in its application, set aside the Respondent's decision, and order a reevaluation of the Applicant's proposal. The Applicant also prayed for the Application's costs.

Respondent

The Respondent adopted its response filed on January 2, 2025, \$1.\$ Page 5 of \$13\$

and written submissions filed on January 8, 2025.

- The Respondent's Counsel raised a preliminary objection to the \$2.\$ effect that the Applicant has no locus standi to make this application before the Tribunal because its proposal expired on October 24, 2024.
- The Respondent argued that the Applicant declined to extend 3. the bid validity of its proposal before its expiry, as the Respondent had requested. The Applicant ceased to be a bidder on October 24, 2024, so the Applicant has no locus standi to make this application.

- 4. The Respondent relied on the decision in *China Civil Engineering and Construction Corporation v Uganda National Roads Authority* \$PPDA\$ Appeals Tribunal Application No. 11 of 2023 to argue that a party who applied for administrative review to the Accounting Officer as a bidder cannot change its status to a person whose rights are adversely affected by Accounting Officer's decision to obtain locus standi before the Tribunal. The Respondent invited the Tribunal to dismiss the application based on this preliminary objection.
- The Respondent also contended that the instant application was 5. incompetent because the procurement-related complainant before the Accounting Officer was made outside the prescribed timeframes stated in the World Bank procurement regulations for IPF Borrowers. That the Applicant received the notice of exclusion by email on October 3, 2024, but made a complaint by email on October 22, 2024, outside the prescribed ten (10) business days that would have ordinarily expired on 18 October 2024.
- The Respondent submitted that administrative review is a two-6. tiered process and that if there is a fatal defect in filing a complaint at the Accounting Officer stage, it affects the making of the application at the Tribunal stage. The Respondent cited Page \$6\$ of 13 the authority in **Macfay v United Africa c. LTD [1961] 3 ALL* ER 1169* to argue that "if an act is void, then it is a nullity. It is not only bad. but incurably bad... every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse". The Respondent prayed that the instant Application should be dismissed on account that the complaint to the Accounting Officer was made out of time.
- The Respondent also contended that the Applicant has no legal 7. capacity to make this application because it is not an artificial or physical person. That the bidder was Alfa XP Web Software Company, not the fictitious name dotGOV Solutions LLC, which are distinct persons.
- Regarding the merits of the Application, the Respondent 8. contended that the bidding document required all bidders to submit a power of attorney for proof of authorization to sign the proposal. The Applicant did not seek clarification on this issue; instead, in the Applicant's letter of proposal, it was stated that "We have examined and have no reservations to the request for proposals document, including addenda issued in accordance with instructions to Proposers (ITP 8)".
- 9. The Respondent argued that Mr Sergey Chapkey, as the founder, sole owner and chief executive of Alfa XP Web Software, delegated his signature power to Mr. Rowan Vos, manager of dotGOV Solutions Limited, in the Republic of Zambia, for the impugned procurement and thus could not turn around and ignore his delegation.
- The Respondent relied on the Tribunal's decision in *Plumb \$10.\$ Base Limited v National Agricultural Advisory Services PPDA Appeals Tribunal Application No. 19 of 2022* and in *Transtrack Limited v PPDA and Ministry of Works and Transport PPDA Appeals Tribunal Application No. 10 of 2017* to argue that where a bidding document provided for Page 7 of 13

power of attorney as the written confirmation of authorization to sign the bid on the bidder's behalf and did not provide for alternatives to the registered power of attorney, failure to submit a power of attorney is a material deviation and without a power of attorney there is no bid. The Respondent argued that a complaint made by the Applicant to the Accounting Officer without a power of attorney would be incompetent for lack of locus standi to make a complaint to the Accounting Officer or to apply to the Tribunal for administrative review.

The Respondent submitted that the instant application is 11. without merit, fatally defective and should be dismissed with costs to the Respondent.

\$D.\$ RESOLUTION BY THE TRIBUNAL

Issue no. 1 Whether the Applicant has locus before the Tribunal.

- We have observed that the instant application is premised on § 91I of the Public Procurement and Disposal of Public Assets Act 2003.
- It is important to note that the Law Revision (Commencement of § 2. the 7th Revised Edition) (Principal Laws) Instrument, 2024, prescribed that July 1, 2024, is appointed to be the day on which the Revised Edition of the Principal Laws of Uganda comprising volumes I to XIV shall come into force.
- What was hitherto cited as the Public Procurement and Disposal 3. of Public Assets Act, 2003 became the Public Procurement and Disposal of Public Assets Act, Cap 205, effective July 1, 2024.
- It follows that Section 91I of the Public Procurement and § 4. Disposal of Public Assets Act No. 1 of 2003 (as amended) relied upon by the Applicant is now Section 115 of the **Public**

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Procurement and Disposal of Public Assets Act Cap 205 dealing with application for review by the Tribunal.

- § 5. Under Section 115 (1)(a)-(c) of the Public Procurement and Disposal of Public Assets Act cap 205, the following may apply to the Tribunal for review of a decision of a procuring and disposing entity
- a bidder who is aggrieved, as specified in section 106 (7) or § 8. ;
- a person whose rights are adversely affected by a decision § b. *made by the Accounting Officer; and*
- a bidder who believes that the Accounting Officer has a § C. conflict of interest as specified in section 106(9).

- A bidder is defined as a physical or artificial person intending to participate or participating in public procurement or disposal proceedings, while a "procurement process" means the successive stages in the procurement cycle, including planning, choice of procedure, measures to solicit offers from bidders, examination and evaluation of those offers, award of contract, and contract management. See Section 2 of the Public Procurement and Disposal of Public Assets Act, Cap 205. Comparatively, also see regulation 42(2)(a)-(c) of the *Public* Procurement and Disposal of Public Assets (Procurement of Consultancy Services) Regulations, 2023.
- Thus, where the borrower or procuring and disposing entity deems it necessary to extend the period of validity of a proposal, the consultant or the consulting firm, as the case may be, shall be requested in writing before the expiry of the validity of the proposal of the consultant or the consulting firm, to extend the period of validity of the proposal. See Regulation 42(2) of the Public Procurement and Disposal of Public Assets (Procurement of Consultancy Services) Regulations, 2023.
- The purpose of a Bid/Proposal validity period specified in the request for bids/request for proposal document is to enable the

Borrower to complete the comparison and evaluation of *Bids/Proposals,* obtain *necessary approvals* within the Borrower's entity, allow for the Bank's prior review, if required in the Procurement Plan; and award the contract. See Section V. Procurement Provisions, Bid/Proposal Validity, Regulation 5.39, World Bank Procurement Regulations for IPF Borrowers, Fifth Edition, September 2023.

- The Tribunal has guided that the bid validity period is for 9 days. bidders to commit to keeping their bid legally binding for a specific number of days to assure the Entity that there will be no modification of their bid during the specified period. The expiry of the bid validity period before the date stipulated in the bidding document or before the conclusion of the procurement process leads to the conclusion that the bid submitted is no longer valid and thus non-existent.
- A bidder whose bid validity has since expired is not a bidder in the actual sense and thus has no locus standi to apply for administrative review. See Application No. 13 of 2021, Kasokoso Services Limited v Jinja School of Nursing and Midwifery, page 10-11, para 10.
- The Applicant submitted its proposal in the impugned procurement on June 19, 2024, and in its letter of proposal-Technical Part, paragraph (f), stated as follows; "Proposal Validity: Our proposal shall be valid until 24th **October 2024**, and it shall remain binding upon us and may be accepted at any time before the expiration of that period."
- On October 21, 2024, the Respondent electronically requested the Applicant to extend its bid validity period until January 30, 2025. The Applicant did not respond to the said request.

- 13. At the hearing, the Tribunal inquired about the validity of the Applicant's proposal. The Applicant's Counsel responded that the Applicant did not extend the validity of its proposal beyond Page 10 of 13

October 24, 2024, because the Applicant was preoccupied with pursuing its rights while filing its procurement-related complaint before the Accounting Officer.

- \$14.\$ Expiry of a bid validity is a matter of law, and the Tribunal has consistently held that "Once the bid validity expires, the procurement process comes to an end. By the time this application for review was made, the bid had expired, thereby ending the procurement process in question". Any Application based on an expired bid is incompetent. See Tribunal Decisions in Application No. 44 of 2024- Meera Investment Limited \$v\$ National Lotteries and Gaming Regulatory Board & Riverstone Africa Ltd/Grand Capital Reality, Kazini Fredric v PPDA, PAT Application No. 16 of 2015 and Twed Property Development Limited v PPDA Application No. 9 of 2015
- The Applicant was, therefore, no longer a bidder by the time of 15. filing the instant application before the Tribunal on December 24, 2024, and had no *locus standi* to bring an application before the Tribunal under Section 115 (1)(a) and (c) of the Public Procurement and Disposal of Public Assets Act cap 205.
- 16. Sections Section 115 (1)(b) of the Public Procurement and Disposal of Public Assets Act cap 205 of **Public** Procurement and Disposal of Public Assets Act Cap 205 is not helpful to the Applicant's case because 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 \$115(1)\$ (b) of the Public Procurement and Disposal of Public Assets Act Cap 205. See Mbarara City & Anr v Obon Infrastructure Development JV, High Court Civil Division Civil Appeal No. 45 of 2021, Application 14 of 2023 Globe World Engineering Uganda Limited v Mbarara City Council and Another, Application 11 of 2023-China Civil Engineering and Construction Page 11 of 13

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Corporation v Uganda National Roads Authority; MJB Technologies Limited v Mbarara City & Ors, Application No. 17 of 2022; Apple Properties Limited v Uganda Human Rights Commission, Application no. 6 of 2023 and Application No.5 of 2024 Ticos Investment Ltd vs Lira City Council

- 17. The Applicant, therefore, has no locus standi before the Tribunal. There is no need to delve into the merits of the Application
- 18. This issue is answered in the negative.

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$\mathbf{F}$. DISPOSITION

- \$1.\$ The Application is struck out.
- The Tribunal's suspension order of December 24, 2024 is \$2.\$ vacated.
- 3. Each party is to bear its own costs.

Dated at Kampala this 14th day of January 2025.

FRANCIS GIMARA S. C. **CHAIRPERSON**

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NELSON NERIMA MEMBER

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GEOFFREY NUWAGIRA KAKIRA MEMBER

PAUL KALUMBA MEMBER

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