

UGANDA / JUDGMENT

Preg-Tech Communications Limited v Uganda Police Force (Application No. 32 of 2021)

[2021] UGPPDPAAT 8 (21 December 2021)

[2021] UGPPDPAAT 8

COURT

Public Procurement and Disposal of Public Assets
Appeals Tribunal

BEFORE

Nerima, Panel Member, Isanga, Ag. Chairperson,
Kakira, Kalumba

CASE / FILE NUMBER

Application No. 32 of 2021

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THE REPUBLIC OF UGANDA**PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS APPEALS TRIBUNAL****APPLICATION NO. 32 OF 2021****BETWEEN****PREG-TECH COMMUNICATIONS LIMITED ===== APPLICANT****AND****UGANDA POLICE FORCE=====RESPONDENT**APPLICATION FOR REVIEW IN RESPECT OF THE PROCUREMENT BY THE UGANDA POLICE
FORCE FOR SUPPLY A VIDEO SPECTRAL COMPARATOR WITH MICROSCOPE VIDE
PROCUREMENT REF NO: UPF/SUPLS/2021-2022/CFC00032BEFORE: FRANCIS GIMARA S. C, CHAIRPERSON; NELSON NERIMA; THOMAS BROOKES
ISANGA; GEOFFREY NUWAGIRA KAKIRA; AND PAUL KALUMBA, MEMBERS

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DECISION OF THE TRIBUNAL

\$\mathbf{A}\$. BRIEF FACTS

- Uganda Police Force (the Respondent) invited competent firms \$1.\$ through Restricted Bidding method of procurement for the supply of a Video Spectral Comparator with Microscope vide Procurement Ref No: UPF/SUPLS/2021-2022/CFC00032.
- \$2.\$ Preg-Tech Communications Ltd (the Applicant) submitted its bid in the captioned procurement \$17^{\text{th}}\$ September 2021.
- \$3.\$ The bidding document in the impugned procurement provided timelines to the effect that submission and opening of the bids would take place on 17th September 2021, the evaluation process would be concluded within 20 days from bid closure, the display of the Best Evaluated Bidder Notice would be made within 10 days from award of contract by the Contracts Committee and that a contract would be issued by 19th November 2021.
- 4. On 8th November 2021, the Applicant wrote to the Accounting Officer of the Respondent to bring to his attention an allegation that one of the bidders Tel Care Ltd had submitted a counterfeit manufacturer's authorisation. The Applicant claimed that in response to an email from a member of the evaluation committee, the president of Foster + Freeman (the manufacturer) had replied that the company did not have a reseller agreement with Tel Care Ltd.
- \$5.\$ The Applicant alleged that the conduct of Tel Care Ltd. was in contravention of the ethical code of conduct and that any bidder found in contravention of ethical code shall be suspended from the process.
- Having received no communication from the Respondent, the \$6.\$ Applicant filed an application for administrative review before the Accounting Officer on November 17, 2021. The application raised four complaints i.e.

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- The Applicant as a bidder had not received any \$1)\$ communication from the entity on the progress of the procurement, whether they were successful or not, and if they were not successful, the reasons for disqualification of their bid
- \$2)\$ No debrief had been made.
- \$3)\$ Failure to respond to the allegation of fraud and corruption with respect to the manufacturer's authorisation of Tel Care Ltd.
- In light of the fact that Tel Care Ltd submitted a false and \$4)\$ forged manufacturer's authorisation, the bid of Tel Care Ltd was non-responsive to the detailed evaluation criteria.

- The Applicant sought the disqualification of the bid of Tel Care Ltd; declaration that the Applicant's bid is responsive to the requirements of the bidding document; a consequential award of contract to the Applicant; and in the alternative for the entity to submit to the Applicant a copy of the best-evaluated bidder notice.
- By a letter dated 1st December, 2021, the Respondent invited the 8. Applicant to appear before the Administrative Committee of the Respondent on 6th December 2021, which meeting the Applicant duly attended.

B . APPLICATION TO THE TRIBUNAL

- The Applicant lodged the instant application on December 8, 2021, challenging the entire procurement process, having not received any communication from the Accounting Officer regarding its Complaint.
- The Applicant raised 3 issues for the determination of the Tribunal namely:

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- Whether the Accounting Officer of the Respondent erred in fact and law when he failed or omitted to make and communicate a decision on the Complaint of the Applicant by November 17, 2021 as required by law.
- Whether in light of the said acts and omissions of the Accounting Officer, the Tribunal can inquire into the substance of the Complaint filed by the Applicant before the Accounting Officer.
- What reliefs are available to the Applicant.
- The Applicant sought a declaration that the Accounting Officer failed or omitted to make and communicate a decision on the complaint of the Applicant by November 17, 2021; an in-depth review of the Applicant's complaint originally lodged before the Accounting Officer, by the Tribunal; disqualification of the bid of Tel Care Ltd for submission of a forged manufacturer's authorisation; a consequential declaration that the Applicant's bid is responsive to the requirements of the bidding document; a consequential award of contract to the Applicant; in the alternative for the entity to submit to the Applicant a copy of the best evaluated bidder notice; refund of administrative review fees and costs.
- On 9th December 2021, the Accounting Officer of the Respondent communicated to the Applicant the findings of the Administrative Committee:
- It was established that the solicitation document issued to the 1. bidders as stated the detailed preliminary evaluation required **bidders** submit to a copy *manufacturer's* of the authorization/Reseller authorization/ Dealership authorization, you submitted two manufacturer's authorizations, one dated 25th August 2021 before the procurement process commenced and another dated 10th September 2021 a part of your bid document while the other bidder submitted a Buying

reseller's authorization.

- It was established from \$M\$ Foster & Freeman that the two \$2.\$ manufacturer's authorizations you submitted are genuine

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although the committee was concerned that the two signatures and the logo are completely different.

- The Committee was unable to establish whether the buying 3. reseller's authorization submitted by the other bidder was false having written to Ms Foster & Freeman on December 7th 2021 with a reminder mail on December 8th 2021 and still got no response by the time the review was concluded. However, on further scrutiny of the Buying reseller's authorization submitted by the other bidder, the committee noted that the buying reseller's authorization did not provide for full guarantee and warranty to UPF in accordance with clause 28 of the General Conditions of Contract.
- It was confirmed that you were involved in the development of \$4.\$ the specifications and costing of the requirements well knowing you intended to participate in the tendering process and as a result, the specifications were biased towards a specific brand rather than being generic which amounted to a conflict of interest limiting transparency and competition contrary to Sec 45 and 45 of the PPDA Act.
- It was also established that the requirement was over specified 5. with some items being described as nonsensical dribble, a sign that there was going to be unnecessary expenditure. As part of evidence of previous performance, you submitted a copy of contract between GAL and yourselves where you supplied the same equipment at a total contract price of UGX 303,985,825 compared to your bid price 2,489,146.609, an indication that the entity might not have realized value for money contrary to Sec.48 of the PPDA Act.
- It was established that you were verbally communicated to 6. through a phone call about the status of the procurement. (Refer to your various phone communications with IP Walter Gingiera).

From the fore going and, in accordance to Sec. 90 (2) \$(b)\$ of the PPDA Act as amended, the process is hereby cancelled and the entire procurement is to be re-tendered.

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RESPONSE TO THE APPLICATION \$\mathbf{A}\$.

The Respondent did not make a formal response to the application. However, by a correspondence dated 17th December 2021, the Accounting Officer of the Respondent indicated that the procurement was cancelled on 9th December 2021.

\$\mathbf{B}\$. THE ORAL HEARING

The Tribunal held an oral hearing on 20th December 2021 via zoom software.

- \$1.\$ Mr. Simon Peter Lwanjo, the Managing Director of Preg-Tech Communications Limited appeared and made submissions on behalf of the Applicant
- \$2.\$ The Respondent was not represented though duly served. In accordance with Regulation 25 (1) (a) of the Public Procurement and Disposal of Assets (Tribunal) (Procedure) Regulations No.16 of 2016, the Tribunal therefore proceeded with the hearing in the absence of the Respondent.
- The Applicant's Managing Director highlighted the Applicant's \$3.\$ case and also provided clarifications to the Tribunal.

\$\mathbf{C}\$. RESOLUTION OF ISSUES

- The Applicant raised 3 issues for determination by the Tribunal. \$1.\$ However, owing to the Accounting Officer's communication dated 17th December 2021, the Tribunal has recast the issues into 4 as follows:
- Whether the Tribunal has jurisdiction to hear this application. \$1)\$
- Whether the Accounting Officer of the Respondent erred in fact \$2)\$ and law when he failed or omitted to make and communicate a decision on the Complaint of the Applicant.
- Whether the Applicant's complaint has merit i.e. \$3)\$
- \$a)\$ that the Applicant as a bidder had not received any communication from the entity on the progress of the procurement, whether they were successful or not, and if they were not successful, the reasons for disqualification of their bid.
- that no debrief was made. \$b)\$
- failure to respond to the allegation of fraud and corruption with \$c)\$ respect to the manufacturer's authorisation of Tel Care Ltd.
- that in light of the fact that Tel Care Ltd submitted a false and \$d)\$ forged manufacturer's authorisation, the bid of Tel Care Ltd was non-responsive to the detailed evaluation criteria.
- \$4)\$ What reliefs are available to the Applicant.

Issue no. 1:**Whether the Tribunal has jurisdiction to hear this Application**

- \$2.\$ The procurement was purportedly cancelled on 9th December 2021 under section 90(2) (b) (Sic). This section of the Act was however repealed by section 34 of the *Public Procurement and* Disposal of Public Assets (Amendment) Act 15 of 2021.
- \$3.\$ It is only under section 75 of the *Public Procurement and Disposal* of Public Assets Act as amended by Act 15 of 2021, that a procuring and disposing entity may, on the approval of the Contracts Committee, cancel a procurement process or a disposal process at any time, before a contract is awarded to the best evaluated bidder, as may be prescribed.
- However, under section 911 (3) (a) of the Public Procurement and 4. Disposal of Public Assets Act as amended by Act 15 of 2021, a decision by a procuring and disposing entity to reject or cancel any or all bids prior to award of a contract <u>under section 75 shall</u> not be subject to review by the Tribunal.
- A cancellation under section 75 of the Public Procurement and \$5.\$ Disposal of Public Assets Act as amended by Act 15 of 2021 is valid only if it is done before a contract is awarded to the bestevaluated bidder, and approved by the Contracts Committee.

Once those conditions are proved, the Tribunal cannot inquire into the reasons for cancellation. But the Tribunal can inquire into the existence or non-existence of a valid cancellation. See the Tribunal decision in **DOTT Services Ltd v Uganda National Roads Authority**, Tribunal Application No. 3 of 2017.

- 6. On 8th December 2021, the Tribunal served the Respondent's Accounting Officer with a suspension order in respect of this procurement. The Accounting Officer was also directed to submit the entire procurement action file to the Tribunal. This order was not complied with.
- 7. In the instant case, the cancellation was made prior to award of a contract. However, the Accounting Officer issued the cancellation letter but did not cite any approval by the contracts committee. The Respondent has not provided the Tribunal with any documents relating to this procurement. On the available information we have, there is no evidence that the Contracts Committee approved this cancellation. In the absence of such evidence, it is our finding therefore that there is no valid cancellation within the meaning of sections \$75\$ and 911 (3) (a) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021.
- In the premises, the Tribunal has jurisdiction to hear and 8. determine the merits of this complaint.
- In the instant case, the Applicant made a Complaint to the 9. Accounting Officer and no decision was made by the Accounting Officer within the statutory period.

- In the absence of a decision by the Accounting Officer, the 10. Tribunal has jurisdiction to entertain the Application under section 89 (8) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021.
- Under section 911 (2) (b) of the Public Procurement and Disposal \$11.\$ of Public Assets Act as amended by Act 15 of 2021, where an

Accounting Officer fails to make a decision, an application to the Tribunal must be made within ten days from the date of expiry of the period for making the decision. In the instant case, the Applicant made a complaint to the Accounting Officer on 17th November 2021. Under section 89(7) of the Act, the Accounting Officer had 10 days to make a decision. The 10 days expired on 27th November 2021. The Applicant had 10 days from 27th November 2021 within which to make an application to the Tribunal.

- The period of 10 days from 27th November 2021 expired on 8th 12. December 2021; the same day this application was filed. The Application was therefore within time.
- The Tribunal therefore invokes its jurisdiction under section 89 13. (8) of the Public Procurement and Disposal of Public Assets Act as amended by Act No. 15 of 2021.

The Tribunal answers issue no. 1 in the affirmative. \$14.\$

Issue no. 2:

Whether the Accounting Officer of the Respondent erred in fact and law when he failed or omitted to make and communicate a decision on the Compliant of the Applicant?

- Section 89 (7) of the Public Procurement and Disposal of Public 15. Assets Act as amended by Act 15 of 2021 states that "The Accounting Officer shall, within ten days of receipt of a complaint, make and communicate a decision, in writing, addressed to the bidder who makes the complaint and which shall indicate the reasons for the decision taken and the corrective measure to be taken, if any".
- The legal requirement is that upon receipt of a complaint, the 16. Accounting Officer must within 10 days, make and communicate a decision, in writing, addressed to the bidder who makes the complaint.
- The Tribunal has held in Abasamia Hwolerane Association Ltd 17. vs. Jinja City Council (JCC), Application No. 12 of 2021 and Globe World Engineering (U) Limited vs. Jinja City Council, Application No. 11 of 2021 that under section 89 (7) of the Public Procurement and Disposal of Public Assets Act as amended, the Accounting Officer must make a decision within ten (10) days of receipt of a complaint and then communicate to the complainant the decision, reasons for the decision and corrective measures if any.

- The Accounting Officer having received a complaint on November 18, 2021, he was statutorily obligated to make and communicate a decision to the Applicant by November 27, 2021. The purported decision issued on 9th December 2021 is a nullity. This delay was contrary to section 89 (7) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021.
- Issue no. 2 is answered in the affirmative. \$19.\$

Issue no. \$3(a)\$:

Whether there is merit in the complaint that the Applicant as a bidder had not received any communication from the entity on the progress of the procurement, whether they were successful or not, and if they were not successful, the reasons for disqualification of their bid?

- 20. According to the Applicant, the bidding document in the impugned procurement provided timelines to the effect that submission and opening of the bids would take place on 17th September 2021; the evaluation process would be concluded within 20 days from bid closure; the display of the Best Evaluated Bidder Notice would be made within 10 days from award of contract by the Contracts Committee and that a contract would be issued by 19th November 2021.
- The stipulation of the above timeline has not been disputed or 21. rebutted by the Respondent.

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- \$22.\$ Section 48 of The Public Procurement and Disposal of Public Assets Act provides that all procurement and disposal shall be conducted in a manner which promotes economy, efficiency and value for money. It cannot be gain said that conducting a procurement in a timely manner would promote efficiency and value for money.
- Regulation 5(1) and (2) of *The Public Procurement and Disposal of* 23. *Public Assets (Evaluation) Regulations, 2014* provides as follows:
 - (1) An evaluation exercise shall, for each type of procurement, be concluded within the time period specified in this regulation-
 - (a) twenty working days for the evaluation of bids for the procurement of supplies or non-consultancy services, from the date of opening of the bids; and
 - (b) forty working days for the evaluation of bids for the procurement of works, from the date of opening of the bids.

- (2) Where an evaluation committee is not able to complete an evaluation exercise within the time specified in subregulation (1), the evaluation committee shall in writing explain to the Accounting Officer the reasons for this and request for extension of the time period for the evaluation exercise.
- \$24.\$ Regulation 3 (1) and (2) of *The Public Procurement and Disposal* of Public Assets (Contracts) Regulations, 2014 provide as follows:
 - (1) After evaluation and any negotiation process, a procurement and disposal unit shall submit to the contracts committee, a recommendation to award a contract.
 - (2) The contracts committee shall consider the recommendation and make a decision to award the contract.
- Regulation 4 (1) of *The Public Procurement and Disposal of Public* 25. Assets (Contracts) Regulations, 2014 provide as follows:
 - A procuring and disposing entity shall, within five working days \$(1)\$ after the decision of the contracts committee to award a contract— (a) deliver a copy of the notice of best evaluated bidder to all bidders who participated in the bidding process; (b) display

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a notice of best evaluated bidder on the notice board of the procuring and disposing entity; and (c) send a copy of the notice of best evaluated bidder to the Authority for publication on the website of the Authority.

- The above-cited provisions of The Public Procurement and 26. Disposal of Public Assets (Evaluation) Regulations, 2014 and The Public Procurement and Disposal of Public Assets (Contracts) Regulations, 2014 prescribe timelines for conclusion of the evaluation and issue of the notice of best-evaluated bidder notice.
- 27. However, we are of the considered view that failure to complete evaluation within forty working days is not fatal to the procurement. This timeline is directory. It was intended to be directory only to ensure expeditious evaluation of bids. On the import of directory provisions, see the case of **SITENDA SEBALU v SAM K. NJUBA & THE ELECTORAL COMMISSION**, SUPREME COURT ELECTION PETITION APPEAL NO. 26 OF 2007.
- There was no report of the evaluation committee; therefore, the 28. question of the contracts committee awarding a contract cannot arise.
- 29. The rest of the timelines in the bidding document are tentative indicative dates, which can be extended at the discretion of the entity.
- The bid document was issued on \$2^{\text{nd}}\$ September 2021. The delay 30. to complete the procurement process is not so extreme as to warrant intervention by this Tribunal.

- The notice of best-evaluated bidder is the official communication 31. to bidders regarding the outcome of the procurement process. Prior to the issue of the notice of best-evaluated bidder, a bidder does not have a statutory right to receive any update on the progress of the procurement.
- 32. Issue no. \$3\$ (a) is answered in the negative.

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Issue no. \$3(b)\$:

Whether there is merit in the complaint that no debrief was made?

- Regulation 6 of The Public Procurement and Disposal of Public 33. Assets (Contracts) Regulations, 2014 provides for debriefing of bidders. It provides as follows:
- (1) After signing a contract, the procuring and disposing entity shall at the request of a bidder give the bidder a written debrief stating the reasons for the success or failure of the bids.
- \$(2)\$ A debrief shall—
- (a) state the name of the best-evaluated bidder and the evaluated price of the bid;
- (b) where any scores were awarded during the evaluation process, provide a breakdown of the scores awarded against each criterion, for the best evaluated bidder and, where applicable, the scores awarded to the bid of the unsuccessful bidder; and
- (c) in the case of an unsuccessful bidder—
- (i) state the evaluated price of the bid;
- (ii) state at the stage of the evaluation at which the bid was rejected; and
- (iii) provide brief details of any material deviation, reservation or omission that led to the rejection of the bid or state the relative weakness of the bid.
- (3) The debrief shall be unique to each bidder and shall not provide details on any other bids, other than the information required by sub-regulation (2) or that is otherwise publicly available.
- (4) The debriefing of bidders shall not apply to micro procurement, direct procurement or direct selection.
- Pursuant to the above regulation, debrief of bidders is applicable 34. after signing of the contract. The procurement in the instant case had not reached contract award or even signing. The Applicant was not entitled to a debrief.

Issue no. 3 (b) is answered in the negative. 35.

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Issue no. 3(c) and 3(d) :

- (c) Whether there is merit in the complaint about failure to respond to the allegation of fraud and corruption with respect to the manufacturer's authorisation of Tel Care Ltd?
- (d) Whether there is merit in the complaint that in light of the fact that Tel Care Ltd submitted a false and forged manufacturer's authorisation, the bid of Tel Care Ltd was non-responsive to the detailed evaluation criteria?
- We agree with the Applicant that the Accounting Officer is by law 36. required to investigate complaints by providers and submit a copy of the complaint and reports of the findings to the Authority pursuant to sections 26 (1)(h) & (i) of the Public Procurement and Disposal of Public Assets Act 2003 as amended.
- We are, however, of the opinion that a complaint by a provider 37. who is a bidder should be made to the Accounting Officer using the administrative review mechanism provided in section 89 (1) & (2) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021; the Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014 and regulation 66(3) of the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, works and Non-Consultancy Services) Regulations, 2014. Even then, where the procurement is under evaluation, the Accounting Officer should not usurp the powers of the evaluation committee or pre-empt their findings by making his or her own decision regarding the allegation.
- Whether or not documents submitted by a competitor bidder are 38. authentic is a question to determine during evaluation. There are procedures for clarification and due diligence during evaluation. Further inquiries can be made during post-qualification. In the instant case, there is no evidence that the Respondent accepted the impugned manufacturer's authorisation. Even if they had accepted it, the Applicant can only complain to the Accounting Officer in relation to evaluation outcome after the evaluation process is completed and a decision is made and communicated. In our view, it was premature for the Applicant to pre-empt the

evaluation by making this complaint regarding an uncompleted evaluation process.

The role of this Tribunal is to hear applications lodged by bidders 39. or aggrieved persons under section 911 of the Public Procurement and Disposal of Public Assets Act. We can inquire into the grounds of an administrative review application made to an Accounting Officer under section 89 of the Public Procurement and Disposal of Public Assets Act; but not a whistleblower's letter made outside the ambit of administrative review.

See: APPLICATION NO. 28 OF 2021-SABA ENGINEERING PRIVATE LIMITED COMPANY & HERSUN CONSULT LIMITED VS. UGANDA NATIONAL ROADS AUTHORITY.

Issues no. 3 (c) and 3 (d) are answered in the negative. 40.

Issue no. 4: What reliefs are available to the Applicant

- 41. It is our finding that prior to the issue of the notice of best evaluated bidder, a bidder does not have a statutory right to receive any update on the progress of the procurement. It is also our finding that the Applicant was not entitled to a debrief. The Applicant's expectation of an investigation into the impugned manufacturer's authorisation, prior to completion of the evaluation, was misconceived and premature.
- On the other hand, we have found that the purported 42. cancellation decision by the Respondent is a nullity.
- However, in view of the factual findings of the Respondent's 43. administrative review committee as communicated on 9th December 2021, and which have not been rebutted, it would appear that this procurement is no longer tenable.
- In the premises, we shall substitute our own cancellation of the \$44\$ procurement process.

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- The Applicant is not entitled to any relief sought in the 45. Application.
- Issue no. 4 is answered in the negative. 46.

D. DISPOSITION

- The Application succeeds in part. \$1.\$
- The decision of the Respondent's Accounting Officer dated 9th \$2.\$ December 2021 is set aside.
- The procurement is cancelled by the Tribunal. 3.
- The Respondent shall refund the Applicant's administrative \$4.\$ review fees.
- \$5.\$ Each party to bear its own costs.

Dated at Kampala this 21st day of December 2021.

FRANCIS GIMARA S. C. CHAIRPERSON

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NELSON NERIMA MEMBER

THOMAS BROOKES ISANGA MEMBER

GEOFFREY NUWAGIRA KAKIRA MEMBER

PAUL KALUMBA MEMBER

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Prepared on 13 October 2026 · Esheria