

**THE REPUBLIC OF UGANDA**

**PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS  
APPEALS TRIBUNAL  
(PPDA APPEALS TRIBUNAL)**

**APPLICATION NO 3 OF 2017**

**APPLICATION FOR REVIEW OF THE PROCUREMENT PROCESS FOR  
THE CONSTRUCTION / CIVIL WORKS FOR UPGRADING  
RUKUNGIRI-KIHIHI-ISHAHA/KANUNGU ROAD FROM GRAVEL TO  
BITUMINOUS STANDARD PROCUREMENT REF NO. UNRA/WORKS  
/2016- 2017/00035.**

**APPLICANT: DOTT SERVICES LTD**

**1<sup>st</sup> RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF  
PUBLIC ASSETS AUTHORITY (AUTHORITY)**

**2<sup>nd</sup> RESPONDENT: UGANDA NATIONAL ROADS AUTHORITY  
(ENTITY)**

**(Before: MOSES JURUA ADRIKO CHAIRPERSON, DAVID  
KABATERAINE-MEMBER AND ABRAHAM NKATA- MEMBER)**

## **DECISION OF THE PPDA APPEALS TRIBUNAL**

### **1.0 BRIEF FACTS**

- 1.1 The Government of Uganda obtained a loan from the African Development Bank (hereinafter referred to as “ADB”) and a portion of the proceeds of the loan was to be applied towards payment for civil works for the construction and upgrading of the Rukungiri- Kihhi- Ishasha, Kanungu –Road. The Entity conducted the procurement in accordance with the African Development Bank Rules and Procedures for procurement of Goods and Works (ADB Rules)
- 1.2 On 1<sup>st</sup> March 2017 the Entity published a Best Evaluated Bidder Notice in which Zhongmei Engineering Group Ltd (hereinafter the BEB) was declared as Best Evaluated Bidder for the impugned procurement at UGX 220,105,788,739.31(Two Hundred Twenty Billion One Hundred Five Million Seven Hundred Eighty Eight Thousand Seven Hundred Thirty Nine Shillings Thirty one cents only). The BEB Notice stated that the Applicant’s bid was non- responsive because its evaluated bid price was higher than the best evaluated bid price.
- 1.3 On 14<sup>th</sup> March 2017 the Applicant being dissatisfied with the evaluation process complained to the Entity’s Entity Accounting Officer and sought administrative review, and enclosed a banker’s cheque for Ugx 15,000,000 in payment of Administrative fees. A copy of the application was served on the Authority on the same day. The Applicant in its prayers requested for suspension of procurement process until the administrative review process was disposed of.
- 1.4 By letter dated 16<sup>th</sup> March 2017, the Entity informed the Applicant’s Advocates that their application for administrative Review was misconceived and wrongfully brought under the Public Procurement and Disposal of Assets Act, 2003 as amended instead of the ADB rules and procedures for whistle blowers and complaints handling. The second Entity in its communication returned the Applicants bankers cheque.
- 1.5 By letter dated 17<sup>th</sup> March 2017, the Applicant’s advocates responded to the letter dismissing the application for administrative review disputing the reasons advanced for dismissal of their application by the Entity.
- 1.6 On 21<sup>st</sup> March 2017, the Applicant filed a complaint to Authority under section 90(3) of the Public Procurement and Disposal of Public Assets Act 1 of 2013 (hereinafter referred to as The Act), their prayers included a request to the first Entity to immediately suspend the Procurement Process pending disposal of the complaint.

- 1.7 Prior to the expiry of the statutory 21 working days, administrative review period granted to the Authority, on 27<sup>th</sup> March 2017, the applicant filed an application before the Tribunal on grounds inter alia that; -
- (a) The BEB had been illegally awarded the Contract because its bid was non-responsive in view of fraudulent misrepresentation to the Entity which resulted in illegal award of prior contracts, namely for Ntungamo- Mirama Hills Road and Gulu- Olwiyo Road.
  - (b) The BEB had been the recipient of illegal payments out of public funds,
  - (b) The BEB had been barred from participating in public procurements and blacklisted by the Parliament of Uganda,
  - (c) The Entity had failed to immediately suspend the procurement process and to pre-empt the continuing breach of the Act by the Authority,
  - (d) The Authority had failed or neglected to suspend the procurement process contrary to the Act, hence this application.

2.0 **APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION**

- 2.1 On 27<sup>th</sup> March 2017, the Applicant applied to the Tribunal for a review of the Authority's decision not to suspend the Procurement process immediately and to pre-empt the continuing breach of the Act by both the Authority and the Second Entity.
- 2.2 The Applicant sought an order setting aside the BEB notice and in its place a substitution of the Applicant as the Best Evaluated Bidder.
- 2.3 The Applicant sought a declaration that the BEB's actions tenders and execution of Ntungamo- Mirama Hills and Gulu-Olwiyo Roads were fraudulent.
- 2.4 The grounds for the Application to the Tribunal which were couched in a wide ranging complaint which mixed fact and arguments enumerated in 24 paragraphs supporting the application can broadly be categorized in 5 (five) grounds as follows:
- 2.4.1 That the Entity wrongly declared M/s Zhongmei Engineering Group Ltd the Best Evaluated Bidder, in total disregard of facts drawn to its attention by

the Applicant which proved that the BEB was fraudulent in the manner it had secured previous contracts for civil works with the Entity.

- 2.4.2 The BEB had been the recipient of illegal payments and had evaded paying taxes in Uganda.
- 2.4.3 The BEB had been blacklisted and banned from contesting for public procurements in Uganda in a report of the Committee on Commissions, Statutory Authorities and State Enterprises (COSASE) published by the Parliament of Uganda in December 2016, which inter-alia established that the BEB had stolen and converted for its own use public funds earmarked for compensation to parties affected by previous projects amounting to Ugx 6,500,000,000/-(Six Billion Five Hundred Million Shillings).
- 2.4.4 That the reasons advanced by the Entity in dismissing the application for administrative Review, were wrong in law and inconsistent with the Entity's previous practice in respect of similar contracts.
- 2.4.5 The Authorities failure to suspend the Procurement process immediately upon receipt of the application for administrative review and the Authority's similar inaction with respect to suspension of the Procurement Process contravened the Act.

### 3.0 **DISPOSAL OF APPLICATION**

In disposing of the Application for review, the Tribunal analyzed the following documents:

- 1) The Applicant's Application to the Tribunal dated 27<sup>th</sup> March 2017, annexes to the Application, the written and oral submissions.
- 2) The Authority's response to the Application, annexes to the response, the written and oral submissions.
- 3) The Entity's response to the Application annexes to the response and its written and oral submissions.
- 4) The BEB response to the Application, annexes to the response and its written and oral submissions

3.1 The Tribunal conducted a hearing for the Parties on 6<sup>th</sup> April 2017. The Applicant was represented by Mr. Enos Tumusiime, the Authority was represented by Mr. Uthman Segawa. The Entity was represented by Mr Titus Kanya who was assisted by Mr. Henry Mutungi and Mr. Kasibayo. The BEB (which appeared by invitation of the Tribunal) was represented by Mr. Kibandama. In attendance were representatives from the Applicants, the Entity and the BEB.

#### 4.0 **SUMMARY DECISION**

4.1 In accordance with Section 91 I (7) of the Act, the Tribunal delivered a summary of this decision on Monday 10<sup>th</sup> April 2017. What follows is the detailed reasoning in support of our decision.

#### 5.0 **ISSUES**

5.1 Four (4) issues have been formulated for resolution by the Tribunal as follows;-

- (a) *Whether the Tribunal has jurisdiction to determine and dispose of this application.*
- (b) *Whether the Entity's contravened the Act.*
- (c) *Whether the Applicant should be declared the Best Evaluated Bidder*
- (d) *Remedies*

#### 6.0 **SUBMISSIONS BY COUNSEL**

6.1 The Authority raised the first issue as a preliminary objection; however the Tribunal deemed it as a substantive issue to be resolved after a full hearing of the Application.

6.2 The first issue had several sub issues to wit.

- (a) Whether the Tribunal has jurisdiction to hear the instant application in light of High Court Miscellaneous Application 28/2017(HCMA 28/2017) and High Court Miscellaneous Application 43/17
- (b) Whether the Application was properly brought before the Tribunal prior to disposal of the applicants pending complaint to the Authority against the decision of the Entity dismissing its application for review.

- (c) Whether the Tribunal had jurisdiction to hear complaints arising out of African Development Bank (ADB) Rules and procedures in procurement of goods and works Contracts.
- (d) Whether the Tribunal had locus to hear the instant application in light of invocation of section 75 of the Act by the Entity's Accounting Officer.

6.3 In support of the issue mentioned in 6.2 above, both Counsel for the Authority and Entity argued that the award of the contract for construction/ Civil Works/ Upgrade of the Rukungiri- Kihhi-Ishaka/Kanungu Road from Gravel to Bituminous standard was the subject of *High Court Miscellaneous Application 28/2017, Muhoozi Grace and 6 others -vs- Uganda National Roads Authority (UNRA) and Public Procurement and Disposal of Public Assets Authority (PPDA) at Kabale* in which suit, the applicants had filed an application for judicial review seeking various remedies against both Entity's including declarations that;-

- (a) The Entity in concert with the Authority acted illegally and unlawfully in awarding contracts to the BEB.
- (b) The Authority and Entity had not acted fairly and in the interest of Ugandans when they awarded contracts to the BEB; which they alleged was a "dubious entity".
- (c) The Authority and the Entity abdicated duties imposed by Law on them when they awarded contracts to the BEB. The Applicants sought the following orders;-
  - i) Certiorari to quash the decision of the Entity to award contracts to the BEB, (which was described as a dubious company).
  - ii) Order of Prohibition against both the Entity and the Authority from endorsing "deals" with the BEB.
  - iii) Order of Injunction against the Entity and Authority to prevent them from any further trading with the BEB until it complied with the law.
  - iv) An order of Costs against both Entities.

6.4 The grounds of the application in summary were that;-

- (a) The Applicant brought the action against both the Authority and the Entity in the Public Interest because they had “failed in their mandate to ensure that roads are constructed by scrupulous companies that give value for money to Ugandans.
- (b) The Entity and Authority had repeatedly traded with the BEB despite queries about its character, reputation, competence and integrity.
- (c) The Entity and the Authority had ignored calls from the Citizenry including the Applicants and other government bodies to desist from dealing with the BEB
- (d) The Applicant contended that the Authority’s and Entity’s actions with respect to the BEB were illegal, arbitrary and improper.

6.5 Counsel for the Authority contended that the Miscellaneous High Court action which we have summarized above had largely being regurgitated by the Applicant in the instant application before the Tribunal. Counsel cited the sub-judice rule which precludes and bars any enquiry, public discussion or comment on matters before a competent court, in support of this argument Counsel cited **AG -vs- Times Newspaper Ltd (1973) 1 ALL ER 815** which held “ *It is undoubted law that, when litigation is pending and actively in suit before the Court, no one shall comment on it in such a way that there is a real and substantive danger of prejudice to the trial of the action...*” , such as the instant application before the Tribunal. Counsel buttressed his argument by reminding the Tribunal that it was subordinate in hierarchy to the High Court which had an appellate and supervisory jurisdiction over the Tribunal. Counsel referred the Tribunal to an interim order which was issued by the Kabale High Court in an application arising out of the main application(Kabale HCMA 29/207) for Judicial Review (Summarized above) “suspending the process of signing the contract with the Best Evaluated Bidder” (emphasis ours). Counsel argued that the interim order issued by the Kabale High Court had effectively suspended the procurement process.

6.6 With respect to the second sub issue Counsel for the Authority pointed out that the Authority had received an application for administrative review filed by the Applicant on 22<sup>nd</sup> March 2017, that barely five (5) days later the Applicant had filed the instant application before the Tribunal before the Authority had made a decision regarding the Application it had received from the Applicant. He argued that Section 91(4) of the Act gave the

Authority 21 working days within which to issue its decision after receiving a complaint. That the Authority had until 20<sup>th</sup> April 2017 to issue its decision in accordance with the Act, at which time the Tribunal would have jurisdiction to hear any complaints filed by the Applicant arising out of any decision made by the Authority. Counsel re-emphasized that the Authority had promptly given notice of the complaint to the Entity. He argued that the Authority was still considering the complaint filed by the Applicant and therefore the instant application had been prematurely filed before the Tribunal. In conclusion, he prayed that the instant application should be summarily dismissed on the basis of his submissions in support of the preliminary objection.

- 6.7. In support of the first issue, Counsel for the Entity associated himself with the arguments advanced by Counsel for the Authority that the Tribunal was precluded from hearing the instant application in light of HCMA 28/2017. He also pointed that there was another suit for judicial review pending at the High Court vide High Court Miscellaneous Application 43 of 2017 Moses Magezi -vs- Uganda National Roads Authority at Kampala in which, the applicants sought orders of mandamus to compel the Entity to implement the resolution of Parliament to blacklist seven(7) companies including the BEB as well as an order of prohibition barring the Entity from entering into any new dealings with the companies which were subject to the proceedings including the BEB. Counsel argued that the allegations of fraud in that suit were similar to the allegations of fraud in the instant application. It was therefore procedurally untenable for the Applicant to ask the Tribunal to pronounce itself on issues pending trial before the High Court, which enjoys appellate jurisdiction over the Tribunal. Counsel argued that in the alternative the Tribunal ought to stay proceedings pending the outcome of both applications in the High Court.
- 6.8. In support of the second sub issue, Counsel for the Entity argued that the Authority had not made a decision which required review by the Tribunal and that the Applicant had not shown that the instant application fell within the exception provided under Section 91(1) (2) of the Act. He concluded that the instant application was prematurely filed before the Tribunal, because the Applicant had sidestepped the review process prescribed in the Act.
- 6.9. With respect to the third sub issue as to whether the Tribunal had jurisdiction to hear complaints arising out of ADB Rules and procedures in Procurement of goods and works contracts Counsel argued that the procurement process which was the subject of the instant application was governed by the ADB rules and procedures for the procurement of goods and works. He stated that this fact had been drawn to the attention of all bidders through the Bid Solicitation Document. He argued that the Rules and Procedures in Appendix 1 provided an elaborate procedure for handling

complaints from bidders and provided guidelines for preventing and combatting corruption and fraud in the procurement process. He argued that the procedures in Appendix 1 were inconsistent with the procedures under the PPDA Act and PPDA Regulations. He argued that Section 4 (A) (2) of the Act provided that where there is conflict between the Act and provisions of the Financing Agreement, the provisions of the financing agreement prevailed over the Act, and therefore the Tribunal had no jurisdiction to handle the application, because the orders the Applicant sought could only be granted under the ADB complaints handling mechanism as provided in the Bid Solicitation Document.

- 6.10 In support of the fourth sub issue, regarding invocation of Section 75 of the Act, Counsel argued that this section gave the Accounting Officer power to reject bids, and that after rejection of the bids, the Tribunal was barred by section 91 1(4) (b) from reviewing the procurement process, Counsel argued that the legal effect of this section was to place an Entity's right to reject bids outside the jurisdiction of the Tribunal. Counsel argued that the Accounting Officers decision to cancel the procurement process after the Tribunal had issued an order to stay the Procurement process pending the outcome of the Administrative Review was not in contempt of the Tribunal. He also argued that cancellation of the procurement process did not violate the Interim order issued by the High Court because the Accounting Officer had not signed any Contract. In conclusion he argued that the instant application had been overtaken by the Entity's decision to reject all bids and therefore there was no valid complaint before the Tribunal.
- 6.11 Counsel prayed that for the reasons above the Tribunal should dismiss the instant application for lack of merit.
- 6.12 Opposing the arguments made by both Counsel summarized above, Counsel for the Applicant argued the Tribunal was not barred by the sub judice rule from entertaining this application contrary to the arguments advanced by Counsel for the Authority and Entity. In his view the Parties in the instant application were not the same as the litigants in the application before the High Court. He argued that Kabale HCMA 28/2017 which was brought by Muhoozi Grace and 6 others against the Authority and Entity, did not include the Applicant as one of the parties, as did High Court vide High Court Miscellaneous Application 43 of 2017 Moses Magezi -vs- Uganda National Roads Authority at Kampala, which did not include the Applicant as one of the parties. Secondly Counsel pointed out that the reliefs sought by the parties in the Judicial Review applications at the High Court were dissimilar to prayers and orders sought in the instant application. He also argued that the Tribunal did not have powers to make the orders and declarations sought by the applicants in the judicial review applications

referred to above. Finally Counsel argued that he was not aware of the two pending cases at the High Court when he filed the instant application.

- 6.13 In response to the above arguments raised by both Counsel for the Authority an Entity concluding that the instant application had been filed prematurely before the Tribunal on ground that the Authority still had 21 working days within which to make a decision on the complaint. Counsel stated that the application had been filed at the Tribunal after the Authority *“failed to promptly give notice of the Complaint to the respective procuring and disposing entity, suspending any further action thereon by the procuring and disposing entity until the Authority had settled the complaint before the Authority”* Counsel argued that the Tribunal also had jurisdiction to entertain the application because the Applicant had pointed out to both the Authority and the Entity *“glaring cases of fraudulent by the Entity the BEB .“* Counsel submitted that the practice has always been that the Authority would request a Procuring and Disposing Entity to suspend a procurement process upon receipt of complaint.
- 6.14 In response to the argument that the Tribunal had no jurisdiction to entertain an application relating to contracts procured in accordance with the ADB Rules Counsel argued that there was no conflict between the Act and the ADB Rules and Procedures for Whistleblowing and Complaints handling. Counsel cited Section 90 of the Act which gives an aggrieved bidder the right to file a complaint with an Accounting Officer of a procuring and disposing entity, which he argued was similar to The ADB Rules and Procedures for Whistleblowing which even enjoined the banks employees to report to the bank any information relating to fraud, bribery etc.
- 6.15 Counsel for the applicant argued that neither UNRA nor PPDA had cited the provisions in the Act which conflict with the ADB rules and procedures. Counsel criticized the Entity for misconstruing Section 4(2) of the Act as applicable to the ADB; instead he argued that this section was only applicable to Donors who had made grants to the Government of Uganda. He pointed out that the instant reference emanated out of procurement from funds lent and not donated to the Government of Uganda for the purpose of construction/civil works for the road in reference. Counsel argued that the Applicant had filed complaints in the past, arising out of procurements funded by the ADB which had been dealt with by the Entity under the Act and therefore the argument advanced by the Entity to oust application of the Act, in favour of the application of the ADB Whistle blower rules to the impugned procurement were without merit. Counsel argued that the Entity arguments were inconsistent with the facts pertaining to the Procurement because it had posted a BEB notice on 1<sup>st</sup> March 2017, pursuant to Rule 4(3) (b) Statutory Instrument 14 of 2014 and SI 7/14 of the Regulations. Therefore it was incongruous for the Entity having acted in this manner to

now attempt to opt out of the Act which had governed the entire procurement process.

- 6.16 Turning to the sub issue on invocation of Section 75 of the Act, which the Entity's Accounting Officer applied to reject all the bids, Counsel referred to a letter dated 29<sup>th</sup> March 2017 to all the bidders notifying them that the Entity had rejected all bids. Counsel argued that S.75 empowers the Entity to reject the bids before the award of a contract, however the Entity had already awarded the contract to the BEB, so it was too late for the Entity's Accounting Officer to reject all the bids. He argued that ADB Rule 2.4.6 provided for the Bank's prior approval before rejection of bids which approval had not been obtained by the Entity. He concluded that it was not possible for the Entity to reject all bids, and therefore the revocation/cancellation letter was a nullity.
- 6.17 In Rejoinder with the regard to the second sub issue, which addresses the question whether both the Entity and the Authority had breached the Act, Counsel for the Authority repeated his argument that the Authority had 21 working days to dispose of the complaint filed with the Authority by the Applicant. The Entity's Counsel also argued that they had not suspended the procurement process because they were awaiting clarification from ADB on the complaint filed with them by the Applicant. Counsel also relied on the interim Court order, to vindicate the Authorities actions because in his view the entire procurement process had been suspended upon issuance of the order by Kabale High Court. Thirdly the Authority also invoked the interim order issued on 27<sup>th</sup> March 2017 suspending the process.
- 6.18 In support of the same issue in 6.4 above, Counsel for the Entity argued that there had been no breach of the Act by itself or the Authority. He argued that the Applicant had been advised to file its complaint in accordance with ADB procedures, but the Applicant ignored this advice. In conclusion he argued that the Applicant had not exhausted all its remedies prior to filing the instant application, therefore the instant application was misconceived and an abuse of Court process.
- 6.19 In support of the proposition that both the Authority and the Entity had breached the Act, Counsel for the Applicant argued that the Authority contravened the Act when:-
- (a) They failed or refused to promptly give notice of the complaint to the Entity which contravened Section 91(1) of the Act.

- (b) They failed or refused to suspend any further action by the Entity which contravened Section 91(1) of the Act.
- (c) They refused to notify bidders of the Applicants complaint contrary to Section 91(3) of the Act. Counsel argued that the Interim order on which the Authority had based its actions did not stop it from taking action under Sections 91(1) (a b & c) of the Act.

6.20 Counsel for the Applicant argued that the Entity contravened the Act when;-

- (a) It failed to *“immediately suspend the procurement proceedings”*, he said this was contrary to Section 90(2) of the Act.
- (b) It awarded the contract to the BEB after it had received the application for Administrative Review.
- (c) It rejected all the bids in respect of the impugned procurement on 29<sup>th</sup> March 2017, in contempt of the interim order issued by the Tribunal on 27<sup>th</sup> March 2017. Counsel concluded that the Entity had in addition contravened the provisions of Sections 43, 45, 49 & 93 of the Act, when it made the BEB declaration.

6.21 In respect to the final issue that the Applicant should be declared the Best Evaluated Bidder, Counsel for the Applicant argued that the BEB had been proven to be a fraudulent bidder. In support of this contention he relied on his pleadings which listed the BEB’s fraudulent actions as follows;-

- (a) The BEB had been illegally and fraudulently subcontracted by Zhongmei Engineering Group Ltd of China to execute works for construction of the Ntungamo –Mirama Hills and Gulu- Olwiyo Roads.
- (b) The BEB had wrongfully received payment for construction of the roads in (a) above which payment was lawfully due to Zhongmei Engineering Group Ltd of China.
- (c) BEB and the Entity paid withholding Tax of 6% instead of 15% thereby evading income tax.
- (d) The Parliament of Uganda had banned the BEB from performing further contracts in Uganda. Counsel urged the Tribunal to take cognizance of the illegalities documented in his pleadings and the

report of Parliament which was annexed to the Application; he submitted that the Applicant had documented illegalities which nullified the BEB award. Counsel invited the Tribunal to nullify the BEB and award and the contract to the Applicant because its bid was compliant and evaluated the second lowest bid.

6.22 The Tribunal invited Counsel for the BEB to address, the Tribunal on the allegations of fraudulent conduct raised in the Applicants pleadings and on the findings and conclusions contained in the Parliamentary report which had been annexed to the instant application. Counsel for the BEB denied all the allegations leveled at it by the Applicant, he argued that the BEB had been lawfully registered in Uganda as a branch of Zhongmei Engineering Group which had been established in the People's Republic of China. He argued that there was no restriction barring the BEB from participating in public procurements, he said the BEB met all the basic qualifications for bidders. He disputed the Applicants submission that the BEB had been found by Parliament to have stolen and converted for its own use the sum of Ugx 6,500,000,000/- (Uganda Shillings Six Billion Five Hundred Million), which had been set aside for project affected persons, or that Parliament had blacklisted the BEB. Counsel argued that the mandate to suspend a bidder was solely vested in the Authority after compliance with an elaborate process set out in the Act and Regulations there under. He submitted that the Tribunal was not the proper forum to address the allegations of fraud advanced against the BEB by the Applicant, instead the Applicant should have reported these allegations to the Authority and to relevant tax authorities. Counsel prayed that the Tribunal make declarations on the legal status of the BEB and that it was lawfully conducting its business in Uganda.

6.23 Counsel for both the Authority and Entity argued that the BEB had not been found to be fraudulent by the Authority in whom the sole discretion to blacklist a company is vested. They argued that the Parliament of Uganda had no authority to blacklist a company, and therefore any pronouncements made by Parliament in this regard were a nullity. In conclusion both Counsel reiterated their prayer for dismissal of the instant application with costs.

## 7.0 RESOLUTION BY THE TRIBUNAL

The instant application raises a number of issues which the Tribunal will resolve in the same order as raised by the Parties.

7.1 Before the Tribunal embarks upon the process of disentangling the knotty matters raised in this application it is worth us recalling the mandate of the

Tribunal which is derived from *Section 91 I in Part 7* of the Act which provides (in part), as relevant to the instant application as follows;-

**91 I Tribunal to review decisions by the Authority**

(1) A bidder who is aggrieved by a decision made by the Authority under section 91(4) may make an application to the Tribunal for a review of the decision of the Authority.

7.2 Guidance on the exercise of this mandate, by the Tribunal which is an external administrative review tribunal has been provided by The *Hon Mr Justice Stephen Mubiru in High Court Civil Appeal 5/2016 Public Procurement and Disposal of Public Assets Authority -vs- Arua Kubala Park Operators and Market Vendors Cooperative Society Ltd where he held at pg 19 as follows;-* *“Unlike judicial review which holds public officials accountable for the correct exercise of their powers, rather than fairness of their decision with reference to merits of the case, administrative merits review concerns the reconsideration of both the factual basis and the lawfulness of a decision, and thus wider than judicial review, which is limited to the latter.”*

Expounding further on these principles the learned trial judge in **Arua Kubala Park Operators and Market Vendors Cooperative Society Ltd (supra)** at pg 20 held *“Administrative merits review tribunals, resources permitting may inquire more widely than courts, and may adopt a function closer to that of pursuing truth than that which Court may adopt. As statutory agencies both the Public Procurement and Disposal of Public Assets Tribunal and the Appellants (Authority) lie in the correct and preferable application of the relevant legislation and policy to procurement decisions , rather than on the procedural limitations of arguments as found in the Courts of law.*

7.3 The Tribunal agrees with the learned Judge and is bound by these principles which form the undelaying basis for resolution of matters before the Tribunal.

**7.4 FIRST ISSUE: JURISDICTION**

This issue has been broken down into four sub issues which will be resolved as here under

**7.5 Sub issue 1**

Whether the Tribunal has jurisdiction to hear the instant application in light of Kabale High Court Miscellaneous Application 28/2017 and Kampala High Court Miscellaneous Application 43 of 2017

- 7.5.1 Counsel for the Authority argued that there is a pending application for Judicial Review at Kabale High Court vide HCMA 28/2017, Muhoozi Grace & 8 others –vs- UNRA which in resolution of that application, will discuss the procurement which is the subject of this reference, canvass issues similar to those before the Tribunal, and thereafter make a determination on the remedies sought which are similar to those sought by the Applicant in the instant application. Counsel for the Entity essentially made a similar argument with respect to **HCMA43 OF 2017 Moses Magezi-vs- UNRA**, which is another application for judicial review affecting the impugned procurement.
- 7.5.2 As was observed in 7.2 above, this Tribunal is an Administrative Merits Tribunal designed to achieve a greater public good in procurement matters, by ensuring correct and preferable application of the relevant legislation and policy to procurement decisions, rather than the procedural limitations of pleadings and arguments as found in courts of law.
- 7.5.3 The Tribunal has perused both Miscellaneous Applications 28/2017 and 43/2017 for Judicial Review, and makes the following observations;-
- a) The Parties in those pleadings do not include the Applicant in the instant application who is an aggrieved bidder vested with statutory rights to initiate administrative review proceedings under Part VII and Part VIIA of the Act.
  - b) The remedies sought in both applications do not include declarations on removal of BEB status of the current BEB and pronouncement of the Applicant as BEB.
  - c) The Pleadings and Prayers do not include pronouncement on whether the ADB Procedures and Rules are inconsistent with the Act.
- 7.5.4 More fundamentally for this application the pending matters before the High Court do not include an investigation and determination as to whether the Authority and Accounting Officer of The Entity exercised their statutory

obligation to stay the procurement process upon commencement of the administrative review process in Part VII of the Act.

7.5.5 The Tribunal in turning to the question of whether the sub judice rule is applicable in the present circumstances, disagrees with the contention of both the Authority and the Entity, that the instant proceedings offend the sub judice rule because;-

- (a) The proceedings before the Tribunal are not a commentary on the proceedings at the High Court which in one way or another seek to influence the outcome of proceedings in the pending applications for judicial review, to the detriment of the parties in those proceedings.
- (b) As expounded in the preceding paragraph the parties, and matters before the Tribunal as well as the remedies sought by the Applicant are different from those sought by the parties in the applications for judicial review.
- (c) The statutory mandate of the Tribunal as discussed at length above is much wider than the mandate of the High Court in Judicial Review proceedings, because unlike a Court the Tribunal's mandate requires that it;- "*stands in the shoes of the original decision maker and reconsider the facts law and policy aspects of the original decision, unlike in the High Court proceedings in which the Court can only address the narrower question of the lawfulness of a decision.*" "*See Arua-Kubaala (Supra)*"

7.6 **Sub issue 2:**

Whether the Application was properly brought before the Tribunal prior to disposal of the applicants pending complaint to the Authority

7.6.1 Both Counsel for the Authority and Entity argued that the instant application before the Tribunal is premature in as far as that the Authority has not made a decision on the application filed by the Applicant on 22<sup>nd</sup> March 2017, which was three (3) days before the instant application was filed at the Tribunal. The Authority insisted that it has until 20<sup>th</sup> April 2017 to make a decision in accordance with the Act.

7.6.2 To determine whether this Tribunal is seized with Jurisdiction to dispose of this application we shall revisit the applicable provisions in the Act, reproduced below for ease of reference;-

7.6.3 Section 91 of the Act provides as follows;-

**91 Review by the Authority.**

- (1) Upon receipt of a complaint, the Authority shall promptly give notice of the complaint to the respective procuring and disposing entity, suspending any further action thereon by the procuring and disposing entity until the Authority has settled the matter.
- (2) The Authority shall unless it dismisses the complaint:-
  - (a) prohibit a procuring and disposing entity from taking any further action; or
  - (b) annul in whole or in part an unlawful act or decision made by the procuring and disposing entity.
- (3) Before taking any decision on a complaint, the Authority shall notify all interested bidders of the complaint and may take into account representations from the bidders and from the respective procuring and disposing entity.
- (4) The Authority shall issue its decision within twenty one working days after receiving the complaint stating the reasons for the decision and remedies granted, if any.
- (5) A bidder, who is not satisfied with the decision of the Authority given under subsection (4), may appeal against the decision in accordance with Part VIIA of this Act.

**91 I Tribunal to review decisions by the Authority.**

- (1) A bidder who is aggrieved by a decision made by the Authority under Section 91(4), may make an application to the Tribunal for a review of the decision of the Authority.

### **91L Application for review by the Tribunal.**

- (1) An application to the Tribunal for review of a decision of the Authority made under section 91 I shall:-
  - (a) be in writing in the prescribed form;
  - (b) include a statement of the reasons for the application;
  - (c) be lodged with the Tribunal within ten working days of being served by the Authority with its decision.

7.6.4 The Applicants complaint to which he sought recourse to the Tribunal prior to lapse of the 21 working days period granted to the Authority to deal with a complaint was their contention that the Authority contrary to section 91(1) of the Act had *“failed to promptly give notice of the complaint to the Entity directing it to suspend any further action with respect to the impugned procurement.”* The Authority in its defense has said that it has 21 working days to make a decision, including informing the Entity of the complaint and directions to it to cease any further action with respect to the procurement.

7.6.5 During proceedings Counsel for the Authority informed the Tribunal that the practice of the Authority had been to inform the procuring and disposing entity of a complaint immediately it was received and that the same communication would include an order stopping further action pending disposal of the review of the complaint by the Authority.

7.6.6 In the instant application the Authority had not communicated receipt of the complaint to the Entity or suspended further action in respect of the procurement by the time this application was heard by the Tribunal had a period of ten (10) working days from the time it received the complaint lodged by the Applicant with the Authority on 22<sup>nd</sup> March 2017. In answer to a question put by the Tribunal Counsel for the Authority had not taken the action mandated by section 91(1) of the Act, because it was waiting for a response from ADB on clarification it had sought on application of the Act to the impugned procurement and or because the High Court in Kabale had issued an interim order which had” *effectively suspended the procurement process”*

7.6.7 The Tribunal finds that the reasons advanced by the Authority for their failure or inability to act in accordance with Section 91(1) of the Act both unsatisfactory and totally inadequate, for the following reasons;

The provisions of section 91(1) of the Act directing the Authority's actions upon receipt of a complaint following the decision of an accounting officer are couched in mandatory terms, to wit “ the Authority shall promptly give notice of the complaint to the respective procuring and disposing entity, suspending any further action..... “. This mandatory direction or statutory command to the Authority upon receipt of a complaint are re-emphasized in **Regulation 8 (1) SI 16/2014 of The Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014**, which provides as follows

“*The Authority shall, where a complaint is filed under regulation 7, **immediately** (Emphasis ours):*

- (a) *notify the procuring and disposing entity of the complaint; and*
- (b) *suspend the procurement or disposal proceedings”.*

7.6.8 The language used in both the Act and regulations requires ***prompt*** and or ***immediate*** action. It would be unnecessarily pedantic for us to define what prompt or immediate action entails, in our view action informing the entity of a complaint and directing suspension of further proceedings should be issued no later than ***2 working days*** after the Authority has received a complaint from a decision of an Accounting Officer, the Authorities failure to take immediate and or prompt action in this regard even by the time the Tribunal was hearing this application, ***ten (10) days*** after the Applicant filed complaint is a matter of great concern having regard to the very grave allegations of fraudulent and unlawful conduct leveled against the BEB, which in all cases requires circumspection and a careful consideration of all the facts after suspension of further process consistent with the principles of public procurement.

7.6.9 Notification and directions suspending further action by a procuring and disposing entity are essential and vital first steps to be taken by the Authority to preserve the Administrative Review process, the Authority's inaction is therefore faulted and we find that the Appellant had a right to appeal to this Tribunal following the Authority's inaction or failure to take

the vital pre-requisite steps, immediately or promptly upon receipt of a complaint as required by the Act.

7.6.10 Turning to the second reason advanced by the Authority for their inaction or unwillingness to notify the Entity of the complaint and direction to suspend further action on the procurement, the Authority pleaded the interim order issued by the High Court of Kabale, which we discussed in detail above. For ease of reference we reproduce the Order which reads as follows;-

**ORDER**

*This Application coming up for final disposal this 14<sup>th</sup> day of March 2017 before HIS WORSHIP SAMUEL EMOKOR, the learned Deputy Registrar in the presence of Mr. BYAMUGISHA GABRIEL, Mr. AYEBAARE ROBERT and Mr. TAYEBWA MARTIN, Counsel for the applicants and Mr. MUHANGI HENRY for the Entity and Ms. REBECCA MASAJJAGE for the Authority.*

*It is hereby ordered as follows;*

- 1. An interim order is issued restraining the Entity, its agents and or its employees from executing a contract with Zhongmei Engineering Group Ltd for the construction of Rukungiri- Kihiki-Ishasha – Kanungu Road.*
- 2. The Order in (1) above shall remain in force until the 3<sup>rd</sup> April 2017 when High Court Miscellaneous Cause No 28 of 2017 is heard and determined.*
- 3. The costs shall abide the outcome of Miscellaneous Cause no 28 of 2017.*

**DEPUTY REGISTRAR**

7.6.11 Counsel for the Applicant complained that the order did not prohibit the Authority, in relation to the Entity from exercising its twin statutory obligations of prompt notification and issuance of direction suspending the procurement. We agree with this submission, the order did not stop the

Authority from exercising its mandate under **Section 91(1) of the Act**, and in any event how would the Authority's action under section 91(1) of the Act, have been in contradiction to the order above, if anything it would have complimented the order to ensure the integrity of the Administrative Review Process.

- 7.7 **Sub issue 3:** Whether the Tribunal had jurisdiction to hear complaints arising out of African Development Bank (ADB) Rules and procedures in procurement of goods and works Contracts.
- 7.7.1 Counsel for the Authority and Entity as seen above also cited the ADB whistle blowers rules and **section 4 of the Act**;- which provides for the supremacy of international obligations over the Act, as a bar to this tribunal determining this application, we find it absurd that the Entity took steps including advertising and notifying bidders of the BEB under the auspices of the Act and thereafter at this stage plead that the Act is inapplicable in as far as this complaint is concerned.
- 7.7.2 In any event the Entity was unable to cite to our satisfaction the relevant sections in the financing agreement or indeed the ADB rules and procedures for procurement of goods and services that ousted the provisions of the Act, in the circumstances the reference to **Section 4 of the Act**, as the premise for ouster of the jurisdiction of the tribunal is misconceived. The Tribunal is fortified in this regard by recalling the decision **of Justice Egonda Ntende in KM Enterprises and Others –vs- Uganda Revenue Authority HCCS 599 of 2001, cited with approval in Heritage Oil & Gas Ltd-vs- Uganda Revenue Authority HCCA14 of 2011 in which the Judge at pg 18 held as follows; “exercise of statutory powers and duties cannot be fettered or overridden by agreement, estoppels, lapse of time mistake, and such other circumstances.”**
- 7.8 **Sub Issue 4:** Whether the Tribunal had locus to hear the instant application in light of invocation of section 75 of the Act by the Entity's Accounting Officer.
- 7.8.1 The Entity as already seen above submitted that the Tribunal was barred by **section 91 I 4 (a) of the Act** from reviewing the instant application after the Entity's Accounting Officer, cancelled the impugned procurement pursuant to **section 75 of the Act**. It is worth pointing out that the Entity Accounting Officer cancelled the procurement by letter dated 29<sup>th</sup> March 2017, despite

the interim order issued by the Tribunal dated 27<sup>th</sup> March 2017 suspending any action with respect to the impugned procurement and the interim order issued by the High Court in Kabale reproduced above; we will comment on this later in the ruling.

For ease of reference we reproduce sections 75, 91 I (4) (a), 2 and 29 of the Act;

***Section 75: Rejection of bids***

*“A procuring and disposing entity may reject any or all the bids at any time prior to the award of the contract”.*

***Section 91(I) (4) (a) Tribunal to review decisions by the Authority.***

*“For the avoidance of doubt the following matters shall not be subject to review by the Tribunal-*

*(a) A decision by a procuring and disposing entity to reject any or all bids prior to award of contract under section 75.*

**“Award”** is defined in **section 2 of the Act** as follows;-

*“award means a decision by a district contracts committee established under the Local Governments Act, Cap 243 or Contracts Committee provided for in paragraph (b) of section 24, or any other subsidiary body of a procuring and disposing entity to which a Contracts Committee or a district contracts committee may delegate powers of adjudication and award within a specified financial threshold to determine the successful bidder;”*

**Section 29 of the Act** provides;

*29. A Contracts committee shall-*

*(c) award contracts in accordance with applicable procurement or disposal procedures as the case maybe.*

7.8.2 Applying the afore-cited sections of the Act, to the facts before it becomes apparent that the Entity’s contract committee upon posting the BEB notice on 1<sup>st</sup> March 2017 awarded the Contract to the BEB subject to negotiation and conclusion of contract with the BEB. It follows therefore that the Accounting Officer of the Entity could only exercise powers under section 75 of the Act, during the evaluation of bids stage and prior to a declaration of BEB by the Contracts Committee. After the Contracts committee has

awarded the contract to the BEB, the stage at which the Accounting Officer can exercise their powers to reject all bids ceases. In order for the Tribunal to be precluded from enquiring into the exercise of power by the Accounting Officer to reject all bids, such action on the part of the Accounting Officer must be taken prior to declaration of best evaluated bidder by the Contracts Committee of the procuring and disposing entity.

7.8.3 The Accounting Officer's letter dated 29<sup>th</sup> March 2017, rejecting all bids after the award of the contract and publication of the BEB was in contravention of section 75 of the Act and therefore null and void.

7.8.4 During the proceedings **Regulation 2.64 of the ADB Rules and Procedures for Procurement of Goods and Works** was brought to the attention of the Tribunal. The Tribunal reproduced this regulation given the bearing it has on the decision by the Accounting Officer to reject all bids;-

***2.64 The Bank's prior approval shall be obtained before rejecting all bids, soliciting new bids, or entering into negotiations with the Lowest Evaluated Bidder.***

7.8.5 The Entity was unable to provide proof at the hearing that this regulation in the ADB rules had been complied with prior to rejection of all bids.

7.8.6 Before the Tribunal conclude this issue, we are constrained to request all entities in receipt of lawful orders issued by this Tribunal to adhere to those orders; to ignore or reject Lawful orders issued by this Tribunal undermines the intention of the legislature to put in place a mechanism for speedy redress of procurement disputes and indeed the rule of law in general. It is regrettable that the order of the Tribunal staying action in the impugned procurement which formed the basis of this application was ignored without justifiable cause.

7.8.7 In conclusion, for all the reasons given on the sub issues above, the Tribunal has jurisdiction to hear this application and the Entity rejected the bids in contravention of the Act

**8.0 Second Issue: WHETHER THE ENTITYS CONTRAVENED THE ACT**

- 8.1 This Tribunal has already found in paragraph 7.6.7 above that the Authority acted contrary to Section 91(1) of the Act, when they failed to both suspend the procurement process and simultaneously notify the Entity of the complaint lodged with them by the Applicants.
- 8.2 The Tribunal has faulted the Accounting Officer's decision to reject all bids pursuant to section 75 of the Act, as discussed in Paragraph 7.8.3 above; we declared the action null and void.
- 8.3 The Tribunal equally faults the Entity's decision not to suspend the Procurement proceedings as required under section 90(2) (a) for the same reasons as seen in paragraphs 7.6.7 to 7.6.8 above, we find that the Entity's failure to suspend further action on the impugned procurement after receiving the Applicants complaint on 14<sup>th</sup> March 2017 breached the provisions of section 90(2) a of the Act.
- 9.0 Issue 3: **WHETHER THE APPLICANT SHOULD BE DECLARED BEST EVALUATED BIDDER**
- 9.1 Counsel for the Applicant made extensive submissions in which he alleged fraudulent and illegal behavior by the BEB in previous contracts and cited the report of the COSASE sub- committee published by the Parliamentary of Uganda which blacklisted the BEB for allegedly converting public funds meant to compensate people affected by various projects undertaken by the BEB. In the interests of natural justice we invited Counsel for the BEB to respond to these submissions which as seen above they rejected in totality.
- 9.2 The Tribunal finds that the accusations leveled against the BEB and recommendations made by the Parliament of Uganda adopting the COSASE report merit serious scrutiny and much wider investigation by bodies more competently equipped to undertake thorough investigations. This Tribunal given the time constraints imposed on it in the exercise of its mandate by the Act is not suited to authoritatively revoke the BEB status on the facts before the Tribunal.
- 9.3 For the reasons above the Tribunal remitted these allegations and report of the Parliament of Uganda to the Authority for further investigation and action on concluding their investigation in accordance with the statutory mandate in Section 8 of the Act.

10.0 **Issue 4: REMEDIES**

10.1 For the reasons above from paragraph 7.0 to 9.3, this application succeeds in part. The remedies are as described in 9.3 above and 11.0 below

11.0 **DECISION OF THE TRIBUNAL**

1. The Tribunal finds that it has jurisdiction to entertain this application.
2. The Tribunal finds that the Authority erred in law and fact when it neglected or omitted to give notice of the complaint to the Entity and when it also failed to suspend the procurement process in accordance with the law.
3. The Accounting Officer of the Entity also erred in law and fact when he/she neglected or omitted to suspend the procurement process in accordance with the law.
4. The Tribunal allows the application in part.
5. Consequently the Applicant is awarded half of the taxed costs of this application to be borne equally by the Authority and the Entity

Dated, signed and sealed by the Tribunal this 7<sup>th</sup> day of ~~May~~ June 2017.