

**THE REPUBLIC OF UGANDA**

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

**APPLICATION NO 4 OF 2017**

**APPLICATION FOR ADMINISTRATIVE REVIEW IN RESPECT TO THE  
TENDER FOR CONSTRUCTION OF NDA TOWER PHASE ONE- BLOCK A  
AND BASEMENT FOR PHASE TWO- BLOCK B PROCUREMENT  
REFERENCE NUMBER  
NDA/WORKS/16-17/00005**

**APPLICANT: ROKO CONSTRUCTION LTD**

**RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF  
PUBLIC ASSETS AUTHORITY (AUTHORITY)**

**ENTITY: NATIONAL DRUG AUTHORITY (ENTITY)**

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

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

### **1.0 BRIEF FACTS AND BACKGROUND**

- 1.1 The National Drug Authority (hereinafter referred to as ‘the Entity’) is desirous of constructing an ultra-modern office complex on Plots Number 46-48 Lumumba Avenue, Plot 9, Wandegaya Road and Plot 93 Buganda Road. The objective of the Project is to provide sufficient space for the entity to accommodate all key operations in one location.
- 1.2 The Entity invited tenders for construction of the National Drug Authority Tower Phase One Block A and Basement for Phase 2 Block B under Procurement Reference No. NDA/WORKS/16-17/00005, by Open International Bidding method.
- 1.3 The Standard Bidding Document for the Procurement of Works for Construction of NDA Tower (Phase One-Block A and Basement for Phase Two-Block B Reference Number NDA/WORKS/16-17/00005) dated 13<sup>th</sup> October 2016 (Bid document) stated, as part of its *Evaluation Methodology and Criteria at Section 3, the following:*

*“C Detailed Evaluation Criteria 5. Commercial criteria 5.2 The assessment of responsiveness will consider the following criteria: (a) .... (d) evidence by the bidder that they have constructed a minimum of 03 (three) buildings each with a minimum of 9 floors in the East African Region during the last 5 years. At least 01 (one) among the three buildings should be of phased construction. The contract value of each building should be a minimum of USD 9,000,000 (United States Dollars nine million) or 30 billion Uganda shillings. The bidder should provide evidence by submitting completion certificates and copies of signed contracts clearly stating the values.*

#### **6.2 Post evaluation criteria**

*The Procuring and Disposing Entity will undertake a Post Qualification on the Best Evaluated Bidder to confirm whether the BEB has the capacity and financial resources to execute the procurement should it be deemed necessary.*

**6.2.7 Specific experience** *Participation as a contractor, management contractor, or subcontractor in at least 03 (three) contracts within the last 5 (five) years, each with a minimum value of USD 9,000,000 or UGX 30 billion Uganda shillings that*

*have been successfully completed and are similar to the proposed works. The similarity shall be based on the physical size, complexity, methodology or other characteristics as described in Section VI, Employer's Requirements."*

1.4 The Applicant together with six other bidders, submitted bids which were evaluated. On 23<sup>rd</sup> January 2017, M/s Seyani Brothers & Co (U) Ltd was named as Best Evaluated Bidder (BEB).

1.5 Being aggrieved by the decision of the Entity by letter dated 27<sup>th</sup> January 2017, the Applicant applied for administrative review, in which it raised two complaints to wit;- (i) *that the Projects submitted by the BEB as experience to support their bid for the construction of the NDA Tower (Phase 1- Block A and the Basement for Phase 2 –Block B) do not meet the requirements stated in the NDA bidding document* (ii) *That the BEB did not meet the requirements of being a beneficiary under the margin of preference scheme described in Section 59a(1a and 3b) of the Act and the NDA bidding document.*

For ease of reference, the tender submitted by the BEB is summarized as follows:

	Project	Number of Floors	Value and Currency
1	Construction of office premises for the office of Auditor General at Plot 2C, Apollo Kaggwa Road, Kampala	13	UGX 60,323,502,985
2	Commercial Development on Plot 24-26, Martin Road, Old Kampala	9	USD 10,668,090.00
3	Construction of foundations and a reinforced concrete frame for an office block known as Block A including a	15	USD 9,162,903.77

	basement car parking and rental outlet levels at Nile Avenue, Kampala		
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- 1.6 By letter dated 6<sup>th</sup> February 2017, the Entity rejected the complaint for administrative review and upheld the decision to award the tender to the BEB.
- 1.7 Being aggrieved by the Entity's decision to reject its application for administrative review, the Applicant filed a complaint with the Authority by letter dated 15<sup>th</sup> February 2017. The grounds of complaint were similar to those raised by the Applicant in their initial application for review by the Entity.
- 1.8 By letter dated 21<sup>st</sup> March 2017 the Authority rejected the application for administrative review.
- 1.9 The Applicant was dissatisfied with the finding and decision of the Authority, hence this Application.
- 1.10 Upon perusal of the application, the Tribunal added the Entity as a party in accordance with Regulation 18 SI 16/2016 and Order 1 rule 10(2) of the Civil Procedure Rules SI 71-1
- 1.11 On 4<sup>th</sup> and 11 April 2017, the Tribunal issued summons and hearing notices to the Applicant and Respondent; and copied the same to the Entity. Upon receipt of both summons and hearing notice, the Entity opted to be heard and appeared before the Tribunal on the hearing date duly represented by Counsel.

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

- 2.1 On 3<sup>rd</sup> April 2017, the Applicant applied to the Tribunal for a review of the decision of the Authority.
- 2.2 The applicant abandoned the ground raised concerning margin of preference scheme during proceedings at the Authority leaving only one ground for determination before the Tribunal couched as follows:

*That the Entity deviated from the criteria in the Bidding documents when it assessed the bid and made an award of the tender to the BEB.*

## 3.0 **DISPOSAL OF APPLICATION**

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

(i) The Applicant's Application to the Tribunal dated 3<sup>rd</sup> April 2017, Annexes to the Application, the written and oral submissions.

(ii) The Respondent's response to the Application, Annexes to the response, the written and oral submissions.

(iii) The Entity's oral submissions made during the hearing of the parties.

3.2 The Tribunal conducted a hearing for the Parties on 18<sup>th</sup> April 2017. The Applicant was represented by Ms. Winifred Adekule and Ms. Diana Nyakato, the Authority was represented by Mr. John Kallemera. The Entity was represented by Mr. Mark Kamanzi.

#### 4.0 SUMMARY DECISION

4.1 In accordance with Section 91I(7) of the Act, the Tribunal delivered a summary of this decision on Wednesday 19<sup>th</sup> April 2017. What follows is the detailed reasoning in support of our decision.

#### 5.0 ISSUES

5.1 Three (3) issues were formulated by the parties for resolution as follows:-

***1. Whether the Parameters as described in the bidding documents match the bid submissions by Seyani Brothers & Co (U) Ltd under detailed criteria and specific experience.***

***2. Whether the upholding by PPDA of the NDA evaluation and grounds stated thereunder are indeed substantive and not material deviations and therefore allow the procurement to proceed.***

***3. Remedies***

#### 6.0 Preliminary Objection

6.1 Counsel for the respondent raised a preliminary objection to the effect that the Entity had already signed a contract with the BEB as evidenced by a letter dated 5<sup>th</sup> April 2017. He wondered whether the Tribunal had powers to cancel a contract signed without any allegations of fraud.

6.2 In response to the preliminary objection, Counsel for the Applicant stated that she had not received communication that a contract had already been signed. She submitted that the Applicant filed an Application for administrative review and on 04<sup>th</sup> April, 2017, the Respondent and the entity received copies of the Application. She submitted that under the PPDA Act, an aggrieved party has ten days within which to file its appeal to the Tribunal. She further submitted that Regulation 8 (1) of the PPDA (Appeals Tribunal) Regulations provides that where the application is for review of a decision of the Authority under Section 91I (1) or (3) of the Act, the application shall be filed within ten days after an applicant is served with the decision of the Authority. She argued that the contract was therefore entered into by the entity while aware of the pending administrative review and therefore the entity entered into this contract as a way to defeat interests of justice. She prayed that the preliminary objection be dismissed and the matter be heard on its merits.

6.3 Counsel for the Entity, Mr. Mark Kamanzi disagreed with the submission of Counsel for the Applicant that the Entity's action of signing the contract was to defeat the interests of justice. He stated that the Entity did not sign the contract in bad faith at all. He further stated that when the Respondent directed as it did in its decision, the Entity effected the Authority's directives (*the decision of the Authority was 'the entity is directed to proceed with the procurement process and not to refund the administrative review fees paid by the Applicant'*). Counsel for the Entity further stated that the Solicitor General had already cleared the agreement. He also argued that the applicant did not notify the Entity that they intended to appeal the decision of the Respondent.

6.4 The preliminary objection was overruled for the following reasons;  
(a) Before delving into our decision on this point, the Tribunal is constrained to state that it was both disturbed and appalled that the Respondent, a body charged with the implementation of the procurement law in Uganda could raise this issue as a preliminary objection. One could be forgiven to think that the Authority is not aware of the provisions of section 90(7) of the PPDA Act. Section 90(7) provides as follows:

*"Subject to Part VIIA of the Act, a contract shall not be entered into by an accounting officer with a provider-  
during the period of administrative review; before the Authority makes a final decision in respect of a complaint lodged with the Authority under*

*subsection (3) or before a decision is made in accordance with Part VIIA of this Act (Proceedings before the Tribunal)”*

(b) The administrative review process under the PPDA Act starts with the filing of a complaint with the Accounting officer and ends with filing of an application at the Tribunal. The Act has clearly stipulated the rights of complainants under administrative review and the timelines within which those rights shall be exercised. Entities must respect the rights of bidders in administrative review and should not do something which is likely to be seen or interpreted as rendering those rights useless.

(c) A contract signed in contravention of section 90(7) is clothed with illegality right from inception and does not; in our view qualify to be called a contract.

## **7.0 Submissions by Counsel**

- 7.1 Counsel for the Applicant argued issues (2) and (3) together. Issue (2) *Whether the Parameters as described in the bidding documents match the bid submissions by Seyani Brothers & Co (U) Ltd under detailed criteria and specific experience* while issue (3) was *Whether the upholding by PPDA of the NDA evaluation and grounds stated thereunder are indeed substantive and not material deviations and therefore allow the procurement to proceed.*
- 7.2 Counsel for the Applicant submitted that in the Statement of Requirements in Section 6 Part 2 of the bidding document, the entity laid down the design considerations of the proposed complex. Phase 1 of the Complex was proposed to accommodate the Secretariat offices. The design considerations also laid down the requirements with respect to electrical and mechanical installations.
- 7.3 Counsel for the applicant submitted that the statement of requirements containing design considerations had to be read in conjunction with the requirement relating to specific experience at paragraph 6.2.7 i.e. *Participation as a contractor, management contractor, or subcontractor in at least 03 (three) contracts within the last 5 (five) years, each with a minimum value of USD 9,000,000 or UGX 30 billion that have been successfully completed and are similar to the proposed works. The similarity shall be based on the physical size, complexity, methodology or other characteristics as described in Section VI, Employer's Requirements."*
- 7.4 Counsel for the Applicant submitted that under detailed evaluation criteria, the bidder was supposed to have constructed a minimum of three buildings each with a minimum of 9 floors and to provide evidence by submitting certificates of completion of the contracted projects. She submitted that the entire bidding

document should be read as one to determine whether the BEB conformed to the criteria.

- 7.5 Counsel for the Applicant argued that the Commercial property at plots 24-26 at Martin Road, Old Kampala submitted by the BEB as one of the projects is an apartment block which cannot be compared to an office tower. That it was therefore erroneous on the part of the Entity and PPDA to consider this as a modern ultra-office.
- 7.6 Counsel for the Applicant further stated that the BEB also submitted Kingdom Building, Kampala as one of the projects. She contended that this is a complete frame structure. It should not have qualified as a complete ultra-modern office building.
- 7.7 Counsel for the applicant submitted that while Kingdom Building is a phased project as required under Part 1. Section 3 paragraph 6.2.8 of the bidding document (*.... Minimum experience in construction of phased buildings*), Counsel argued that Kingdom Building is not a phased project envisaged by the Entity. She contended that the entity wanted to construct three towers with separate functions. It is not clear what functions Kingdom house will serve. If you read in the design consideration, the first phase should be ready for occupation. The statement of requirements provide for electrical, water installations etc. This is not provided for in the Kingdom house. There is no similarity that could have been drawn in the Kingdom house and what the entity envisaged.
- 7.8 Counsel for the applicant further submitted that by considering the apartment block, both the Entity and the Respondent significantly deviated from the requirement of the bid document. She argued that there is no evidence showing that the entity sought clearance to deviate from the specific requirements against section 7 (e) of the Act which provides for deviation. There was no written approval.
- 7.9 On the issue of damages, Counsel for the applicant submitted that while the Act is silent on the issue of damages, Regulation 36 of the PPDA Appeals Tribunal Regulations allows damages. The damages are derived from the man hours, the loss of income and the cost of bidding and administrative review process. She stated that each party should bear its own costs. Counsel prayed that the application be upheld, damages and any other remedy be provided for by the Tribunal. She dropped the prayer of the Applicant to be declared BEB.

- 7.10 In response, Mr. Kallemera, Counsel for the respondent argued that the issue of deviation from the requirements of bidding document was not raised by the applicant in their pleadings. The issue raised by the applicant in the Application before the Tribunal is a departure from their pleadings and should be disregarded by the Tribunal.
- 7.11 Counsel for the respondent submitted that the entity in evaluating the bid was bound to follow the criteria as in the solicitation bid. He submitted that the bidding document under **commercial criteria** provided for responsiveness, three buildings, phase construction, a building of a value of 9 million USD and completion certificates. With regard to the building on Martin Road, the respondent found out that this building met the criteria. The commercial development had 9 floors, the contract value was of 9 million USD, the floors were comprised of car park, basement and a restaurant. The Authority found that this requirement was met by the BEB.
- 7.12 Counsel for the respondent submitted that under specific experience paragraph 6.2.7 (*already referred to*) of the solicitation document, the Bid document provided for similarities in size and other characteristics. This was expressly provided for purposes of determining similarity. It does not mean each specific requirement must be met. He further argued that the criterion stated how one can realize the similarity. That the evaluation committee has discretion to determine the similarity. With respect to the submission that Kingdom building was not a completed building, Counsel submitted that the criteria in the bidding document provided for a phased construction. That Kingdom was not necessarily a completed building but rather a contract that has been successfully completed. He further submitted that for phased construction, each phase is counted as complete and that therefore Kingdom house is completed. He contended that the detailed evaluation criterion was specific on the number of floors, the number of buildings, contract value, etc. The discretion was to be done by the evaluation committee.
- 7.13 Counsel for the Entity submitted that the bidding document which provided for completion signed completion certificates and this was shown by the BEB.
- 7.14 On damages, Counsel for the Respondent submitted that under **Section 91I**, the Tribunal does not have power to grant damages. Regulation 36 of the PAT Regulation only applies where there is ambiguity. S.91 J (5) is specific about costs.

He submitted that damages cannot be sought and prayed, and that the Application be dismissed with costs.

- 7.15 Counsel for the entity submitted that the Application before the Tribunal is not an appeal. He stated that the grounds for administrative review brought before the Authority are totally different from the ones brought before the Tribunal. He submitted that the Application is a complete departure from the complaint before the Authority. He prayed the Tribunal to reject the Application.

## **8.0 Resolution by the Tribunal**

- 8.1 The Tribunal carefully studied the Application, the responses to the Application and the written Submissions. It also carefully listened to the oral arguments made by the parties at the hearing. In resolving this application the Tribunal will deal with the issues in the same order as presented by the parties.

8.2. ***Issue 1: Whether the Parameters as described in the bidding documents match the bid submissions by Seyani Brothers & Co (U) Ltd under detailed criteria and specific experience***

- 8.2.1 In order to determine this issue, the Tribunal has to examine the wording of the relevant parts of the Detailed Evaluation Criteria of the Bidding Document. For ease of reference, they are reproduced below:

***“Evaluation Methodology and Criteria at Section 3, the following:***

***“C Detailed Evaluation Criteria***

### ***5. Commercial criteria***

***5.2 The assessment of responsiveness will consider the following criteria:***

***(d) Evidence by the bidder that they have constructed a minimum of 03 (three) buildings each with a minimum of 9 floors in the East African Region during the last 5 years. At least 01 (one) among the three buildings should be of phased construction. The contract value of each building should be a minimum of USD 9,000,000 (United States Dollars nine million) or 30,000,000 billion Uganda shillings. The bidder should provide evidence by submitting completion certificates and copies of signed contracts clearly stating the values.***

### ***6.2 Post evaluation criteria***

*The Procuring and Disposing Entity will undertake a Post Qualification on the Best Evaluated Bidder to confirm whether the BEB has the capacity and financial resources to execute the procurement should it be deemed necessary.*

#### **6.2.7 Specific experience**

*Participation as a contractor, management contractor, or subcontractor in at least 03 (three) contracts within the last 5 (five) years, each with a minimum value of USD 9,000,000 or UGX 30,000,000 that have been successfully completed and are similar to the proposed works. The similarity shall be based on the physical size, complexity, methodology or other characteristics as described in Section VI, Entity's Requirements."*

- 8.2.2 For a bid to be determined responsive under this procurement, the bidder had to satisfy the entity that it had constructed a minimum of three buildings each with a minimum of 9 floors in the East African Region during the last 5 years, and at least one among the three buildings should be of phased construction (5.2 (d) **Commercial criteria**).
- 8.2.3 The bidder did not have to only show that it had constructed a building with at least nine floors. The bidder had to show that it had participated as a contractor, management contractor, or subcontractor in at least three contracts within the last 5 five years that have been successfully completed and are similar to the proposed works. The similarity shall be based on the physical size, complexity, methodology or other characteristics as described in Section VI, Employer's Requirements (6.2.7 **Specific experience**). In other words, the building contracts in which the bidder had successfully participated in, should be similar to the works proposed by the Entity.
- 8.2.4 From the Record, the BEB submitted as part of its experience to the entity the following works: (1) Construction of office premises for the office of Auditor General at Plot 2C, Apollo Kaggwa Road, Kampala; (2) Commercial Development on Plot 24-26, Martin Road, Old Kampala and (3) Construction of foundations and a reinforced concrete frame for an office block known as Block A including a basement car parking and rental outlet levels at Nile Avenue, Kampala, also known as Kingdom Kampala.
- 8.2.5 Project 1 is not in dispute. The Applicant has alleged that Projects 2 and 3 do not fit the criteria specified in 5.2 (d) and 6.2.7.

8.2.6 The Tribunal having examined the project submitted by BEB found that the Old Kampala building is mixed residential and commercial and not ultra-modern office building required by the bidding document. [*Section 6.1.1 of the bidding document provides that National Drug Authority is desirous to construct an ultra-modern office complex on Plots Number 46-48 Lumumba Avenue, Plot 9 Wandegeya Road and Plot 93 Buganda Road. The objective of this project is to provide sufficient space for NDA to accommodate all key operations in one location. These space requirements include offices, laboratories, engineering rooms, libraries, stores, meeting rooms and parking facilities. The multi-storey state of the art building is expected to be a magnificent addition to the Kampala skyline.*

*Section 6.3.1 of the bidding document provides that this phase will initially have vehicular access from Wandegeya road. It has 9 floors above ground to accommodate NDA offices and two basements for parking. The office floors for this phase have a total gross area of 3640m<sup>2</sup> with a total of 37 parking spaces.*

8.2.7 It is the finding of the Tribunal that the Kingdom Kampala project submitted by the BEB does not fit the parameters of a building described in paragraph 5.2 (d) and 6.2.7 **Section 3 Evaluation Methodology and Criteria** of the Bidding Document(Referred above). This finding is based on the following:

(a) Kingdom Kampala structure is a building comprised of nine floors **constructed up to shell level and not completed**. BEB submission of a completed basement parking is not a completed office complex. What is completed of the Kingdom Kampala Project is the foundations and a reinforced concrete frame for an office block.

(b) The Kingdom Kampala project also fails the “*atleast one among the three buildings should be of phased construction*” test stipulated in 5.2 (d) of the evaluation criteria. The words in italics are free from any ambiguity. They clearly require that one of the three buildings must have been of phased construction. While it is true that Kingdom Kampala project is a phased construction, the requirement of 5.2(d) above is not met because there must be a nine floor completed building which is of phased construction. The phased construction must be of a completed building, not a shell structure as Kingdom Kampala project is.

(c) Lastly, Kingdom Kampala project fails the criteria laid down in 6.2.7. The criteria in 6.2.7 narrows down the type of building described in 5.2(d).

While paragraph 5.2(d) talks of a building with a minimum of 9 floors and a value of USD 9,000,000, paragraph 6.2.7 above points to the nature of the building that the bidder must have constructed. The bidder had to show that the buildings it has constructed have similarities with the work proposed by the entity such as physical size, complexity, methodology or other characteristics as described in Section VI of the Bidding Document, Entity's Requirements. Section VI of the Bidding Document details the use for which the proposed complex is required; the design considerations; the phasing considerations; electrical installations and mechanical installations. It is quite clear to see that the 9 floor shell structure of Kingdom Kampala is not a complete building similar to the works proposed by the Entity.

8.2.8 The Tribunal respectfully disagrees with the submission of the Respondent that the Evaluation Committee had discretion to determine the similarity outside the specified criteria in the bidding document. The Evaluation Committee had no such discretion. The Evaluation Committee was bound by the criteria laid down in 6.2.7, which indicated that the similarities had to be those specified in Section VI- the Entity's Statement of Requirements.

8.2.9 The Tribunal is in agreement with the submission of the Applicant that the bid document had to be read as a whole. The Respondent chose to focus on 'completed contract' in 6.2.7, leaving out the more direct criteria to responsiveness of bids 'a successfully completed building' under 5.2(d). These paragraphs had to be read together.

8.2.10 Section 28.2 of Instructions to Bidders in the Bidding Document provides that a substantially compliant bid and responsive bid is one that conforms to all terms conditions and specifications of the Bidding document without material deviation, reservation or omission.

8.2.11 Regulation 19 of the **Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014, S.I 9 of 2016** is instructive on this point. For ease of reference, the regulation is reproduced here below:

**"19. Detailed evaluation.**(1) *An evaluation committee shall conduct a detailed evaluation of a bid that passes the preliminary examination to assess—(a) the responsiveness of the bid to the terms and conditions of the bidding document; and(b) the technical responsiveness of the bid to the statement of requirements.*(2) *The detailed evaluation shall compare the details of a bid with the criteria stated in the bidding document.*(3) *The detailed evaluation shall—(a) determine whether a bid conforms to the terms and conditions of the bidding document, without any material deviation;(b) determine whether a bid conforms to the statement of requirements without any material deviation;(4) A bid which is not substantially*

*material deviation;(b) determine whether a bid conforms to the statement of requirements without any material deviation;(4) A bid which is not substantially responsive to the minimum requirement of the detailed evaluation shall be rejected at the detailed evaluation stage.”*

- 8.2.12 The bid of the BEB with respect to the Kingdom Kampala project did not conform to the evaluation criteria in 5.2 (d) and 6.2.7 of the Bid Document. The BEB fell short of having constructed a minimum of three buildings within the last five years and therefore its bid was not substantially compliant and should have been rejected by the entity as required by Paragraph 28.3 of the Bid document which states that if a bid is not substantially compliant and responsive to the Bidding Document, it shall be rejected by the employer.
- 8.2.13 The bid should have failed at the detailed evaluation stage and not been allowed to proceed to the financial evaluation stage in accordance with regulation 19 (4) of the ***Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014, S.I 9 of 2016*** which provides that a bid which is not substantially responsive to the minimum requirement of the detailed evaluation shall be rejected at the detailed evaluation stage.
- 8.2.14 By allowing a bid that this is not substantially responsive to the minimum requirement of the detailed evaluation to be awarded a contract, the entity contravened regulation 19 (4) of the ***Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014, S.I 9 of 2016***. The decision of the entity to award the contract was thus a nullity and so was the purported award of the contract to the BEB by the entity.

***In Clear Channel Independent Uganda Ltd v Public Procurement and Disposal of Public Assets Authority (Misc.App.No.380 of 2008)***, Justice Yorokamu Bamwine, described the effect of a nullity as stated in ***Macfay vs United Africa Co. Ltd [1961] 3 ALL E.R. 1169*** thus:

***“If an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And 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.”***

Justice Bamwine went on to state:

***“Applying the same principle to the facts herein, in view of the finding that there was no valid award by Civil Aviation Authority which could be okayed by the respondent (PPDA), the purported blessing of CAA’s award by the respondent***

*was contrary to law, illegal, void and a nullity on account of non-compliance with the provisions of PPDA Act.”*

8.2.15 The Tribunal would make the same statement made by Justice Bamwine in the above cited case. There was no valid award by National Drug Authority (NDA) which could be okayed by the respondent (PPDA). The purported blessing of NDA's award by the respondent was contrary to law, illegal, void and a nullity on account of non-compliance with the provisions of the ***Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014, S.I 9 of 2016*** and the Bidding Document. Consequently, since the award of the contract to the BEB was a nullity, the purported contract signed between the entity and the BEB was a nullity.

8.2.16 In conclusion on this issue, the Tribunal faults the decision of the Respondent that the Evaluation Committee properly evaluated the projects submitted by the BEB with respect to specific experience. The Tribunal further faults the Respondent for upholding the Entity's decision rejecting the Applicant's assertion that Kingdom Kampala project submitted by the BEB did not comply with the requirement of the bidding document.

8.2.17 Following from the above analysis, the Tribunal finds that the bid of the BEB was not substantially compliant and responsive.

8.3.0 **2<sup>nd</sup> Issue: *Whether the upholding by PPDA of the NDA evaluation and grounds stated thereunder are indeed substantive and not material deviations and therefore allow the procurement to proceed.***

8.3.1 Counsel for the Applicant on this issue submitted that by considering the BEB's apartment block in Old Kampala and the Kingdom Kampala project, both the Entity and the Respondent significantly deviated from the requirement. She submitted that there is no evidence showing that the entity sought clearance to deviate from the specific requirements contrary to section 7 (e) of the Act.

8.3.2 In their response, both Counsel for the respondent and the entity submitted that the Tribunal should not entertain the issue raised by the Applicant relating to deviation from the criteria since this issue was not raised during administrative review at the Authority. The power of the Tribunal to entertain matters not raised at the entity or Authority level was elaborately dealt with by Justice Stephen Mubiru in ***Public Procurement and Disposal of Public Assets Authority Versus Arua Kubala Park Operators and Market Vendors Cooperative Society Limited, Civil Appeal No 0005 of 2016*** and ***Public Procurement and Disposal of Public Assets Authority Versus Peace Gloria Civil Appeal No 0006 of 2016*** both of which arose from

appeals against the two decisions of the PPDA Appeals Tribunal. Justice Mubiru at pages 22 and 23 held thus:

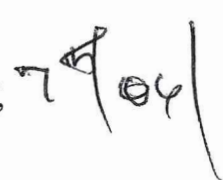
*“Section 91(6) of the Public procurement and Disposal of Public Assets (Amendment) Act, 2011 confers upon the tribunal wide powers to set aside the original decision and substitute it with a new decision of its own. Implicit within such power is the authority to consider both the lawfulness of the procurement decision it is reviewing and the facts going to the exercise of discretion, whether raised by the Applicant or not... . The Tribunal in performing its administrative review role functions more like a court at first instance. It is not an appeals tribunal whose powers may be limited by law or restricted to questions of law and only with the Appeals Panel’s leave, which may be extended to the merits. The Tribunal is required to determine the substantive issues raised by the material and evidence advanced before it, .... It may frame a case differently from how it has been framed by the parties“. The import of this decision is that the Tribunal has wide powers to investigate and determine a matter before it; it should not be limited by rules normally applicable to courts.*

8.3.3 Having regard to the submissions by both counsel and the law as cited in 7.3.2 above , the Tribunal finds that the Evaluation Committee deviated from the detailed evaluation criteria as provided in the Bid Solicitation Document. It follows therefore that the bid was simply non complaint and non-responsive and the Entity should have rejected it.

8.4.0 3<sup>rd</sup> Issue: Remedies (see 9.0 below)

## **9.0 DECISION OF THE TRIBUNAL**

1. The Preliminary Objection is overruled.
2. This application is allowed and the PPDA decision is set aside.
3. The Tribunal finds that the Evaluation Committee deviated from the detailed evaluation criteria as provided in the Bid Solicitation Document.
4. The Tribunal finds that the Contract was signed during the administrative review period contrary to Section 90(7) of the PPDA Act 2003.
5. The Tribunal orders the Entity to refund the administrative review fees.
6. Each party shall bear its own costs.

SIGNED, dated and sealed this day of,  2017 by the said

