

THE REPUBLIC OF UGANDA

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

APPLICATION NO.6 OF 2014

APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT OF RECOMMENDATIONS TO LIRA REGIONAL REFERRAL HOSPITAL ARISING OUT OF A PROCUREMENT PROCESS UNDER REFERENCE NUMBER LRH/WRKS/2013-14/00083 .

APPLICANT: LIRA REGIONAL REFERRAL HOSPITAL

RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY

(Before: OLIVE ZAALE OTETE- CHAIRPERSON, MOSES JURUA ADRIKO- MEMBER, DAVID KABATERAINE-MEMBER and ABRAHAM NKATA, MEMBER)

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BACKGROUND/FACTS

- 1.1 Lira Regional Referral Hospital received funds from the Government of Uganda to be used for the construction of eight (8) units of two (2) bed roomed staff houses. The Procurement was conducted in accordance with the open domestic bidding method contained in the Government of Uganda's Public Procurement and Disposal of Public Assets Act, 2003, (the Act).
- 1.2 On 22nd August 2014, the Public Procurement and Disposal of Public Assets Authority (the Authority) received a complaint from a whistle blower alleging among others that the evaluation process of the procurement for construction of a 2 bed roomed one block staff accommodation of 8 units in Lira Regional Referral Hospital was handled fraudulently by recommending a bidder who was non-compliant to the bid security format requirement and further that the bid price of the best evaluated bidder was irregularly altered from UGX 1, 131,501,262/= read out at bid opening to UGX 1, 528,648,508/=.
- 1.3 In exercise of its regulatory function under Section 8 (e) of the PPDA Act 2003, the Authority instituted an investigation into the matter and reviewed the procurement action file of the process.
- 1.4 The Objectives of the Investigation was to establish:
- (i) whether the bid security submitted by M/s Block Technical Services, the best evaluated bidder was in the required format
 - (ii) whether the bid price of the best evaluated bidder was irregularly altered from UGX 1,131, 501, 262/=, read out at bid opening to UGX 1,528, 648, 508/=.
- 1.5 After conducting the investigation the Authority made the following findings:-
- (i) The Authority established that the form of bid security in the bid of M/s Block Technical Services Ltd (the best evaluated bidder) was compliant to the requirements of the solicitation document.

(ii) on the issue of alteration of the bid price of the best evaluated bidder, the Authority observed that the evaluation committee sent a request to the bidder to accept the arithmetic corrections in the bid in compliance with Regulation 14(3) of the PPDA (Evaluation) Regulations 2014, however the request for clarification was not copied to all the bidders for information purposes contrary to ITB 27.1 of the Solicitation document.

(iii) The Procurement and Disposal Unit and the representatives of the Contracts Committee who witnessed the bid opening process did not comply with the stipulated procedure for public bid opening under Regulation 65(6) of the PPDA (Rules and Methods for Procurement of Supplies, Works, and Non Consultancy Services) Regulations 2014. They did not ensure that the key pages of all the bids and in particular, the pages containing financial information were endorsed, signed or initialed and stamped.

1.6 The Authority in accordance with Section 9 of the Act having regard to the findings in their report made the following recommendations;-

- (i) "In light of the above findings on the irregularities at the bid opening, the omission to copy the communication on the correction of arithmetic errors to all bidders and in order to ensure the application of the cardinal principles of transparency, fairness competition and value for money, the Authority recommends that the entity cancels the procurement process.
- (ii) As a corrective measure, the Authority further recommends that the Accounting Officer cautions the officials who mismanaged the public bid opening and who omitted to copy the communication on the correction of arithmetic errors to the other bidders."

1.7 The Applicant is not satisfied with the recommendations of the Authority, hence this Application for a review.

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION.

2.1 By letter dated 15th October 2014, the Applicant lodged an application containing grounds of Appeal with the Public Procurement and Disposal of Public Assets

Appeals Tribunal (the Tribunal) seeking to have the decision of the Authority reviewed on the following grounds:

(i) The decision of the Authority was unfair on the fact that the grounds of fraud raised by the 'whistle blower' were found not to have any merit.

(ii) The public bid opening was done in accordance with the provisions of the PPDA law; that a minor omission of not ensuring that the key pages of all the bids and in particular the pages containing financial information were endorsed, signed or initialed and stamped should not warrant a cancellation of the procurement process as recommended by the Authority.

(iii) The Applicant complied with the provisions of the PPDA (Evaluation) Regulations, 2014, specifically Regulation 14 (3) of PPDA (Evaluation) Regulations, 2014, on the requirement of communicating the arithmetic corrections (errors).

(iv) The Authority did not authenticate that there was any alteration to the bid price of the best evaluated bidder.

(iv) The Authority did not authenticate that there was any alteration to the bid price of the best evaluated bidder.

2.2 On 16th October 2014, the Tribunal wrote to the Authority (letter copied to Applicant) requesting the Authority to provide the Tribunal with:-

- (1) written response to the allegations or grounds of appeal;
- (2) record of proceedings;
- (3) all documents that the Authority relied on to arrive at its decision.

2.3 In the same letter, the Tribunal directed both parties to file with the Tribunal written submissions and any rejoinder to the submissions. This was done and the submissions were served on the respective parties by 24th October 2014.

3.0 **DISPOSAL OF APPLICATION**

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

- (1) Letter dated 15th October 2014 appealing against the recommendations of the Authority and the correspondences between the Applicant and the Authority attached to the Application as Annexes;
 - (2) The Applicant's written submissions and Annexes to the submissions;
 - (3) Written response and written submissions to the Applicant's application by the Authority and Annexes attached to the response and the submissions;
- 3.1 The Tribunal summoned both parties for a hearing on 29th October 2014. The Applicant was self-represented by Dr. William Oceng Ag Hospital Director/ Accounting Officer and Mr. Robert Bossa Procurement Officer. The Authority was represented by Ms. Sophia Masagazi, and Mr. John Kallemera.
- 3.2 The issues for resolution by the Tribunal were agreed to be the following:-
- (i) *Whether the Application for review was properly made to the Tribunal.*
 - (ii) *Whether the decision of the Authority was unfair on the basis that the bid price of the Best Evaluated Bidder (M/s Block Technical Services) was not irregularly altered and that the bid security was valid and in the correct format.*
 - (iii) *Whether the public bid opening was done in accordance with the law and if not, whether it warranted a cancellation of the procurement process.*
 - (iv) *Whether the Applicant duly notified all the bidders of the changes to the bid price in accordance with clauses 27.1 of the Instruction to Bidders (Solicitation Document).*
 - (v) *What remedies are available?*

4.0 RESOLUTION OF ISSUES.

4.1 Preliminary Objection.

At the outset of the hearing of this application the Authority raised a preliminary objection challenging the appearance of Counsel on behalf of the Applicant.

- 4.2 The Authority submitted that the advocate introduced to the Tribunal as Counsel for the Applicant had no locus standi before the Tribunal and could not make arguments in support of the Applicant because his services had not been procured in accordance with the Act and regulations.
- 4.3 The Applicant responded that they had instructed Counsel in an Individual Capacity and that the issue of his procurement should not be raised at the Hearing. In answer to a question put by the Tribunal, Counsel admitted that he had not been procured in accordance with the Act and Regulations thereunder. The Tribunal briefly adjourned the proceeding to make a ruling. The Tribunal considered Regulations 6 and 16 of the Public Procurement and Disposal of Public Assets (Procurement of Consultancy Services) Regulations 2014. These Regulations provide for the procedure under which a Procuring and Disposing Entity can procure the services of consultancy services by an individual consultant. Regulation 2 defines consultancy services to include services of an intellectual or advisory nature.
- 4.4 Regulation 6 provides for the methods of Procuring Consultancy Services. These include publication of a notice inviting expression of interest and developing a shortlist; developing a shortlist without publication of a notice inviting expression of interest; or inviting a single or sole consultant. Regulation 16 provides a detailed procedure for procuring a single or sole source consultant.
- 4.5 In ***Attorney General & Anor-vs- Uganda Law Society HCMC 321 OF 2013*** Hon Justice Stephen Musota held in his ruling at Pg 10 that legal services rendered by private advocates were professional services within the meaning of services under the PPDA Act.
- 4.6 The Tribunal noted that the Applicant did not provide evidence that their intended Counsel had been appointed in accordance with the afore-cited regulations which prescribe the method by which a Procuring and Disposing Entity procure Consultancy services.

- 4.7 Indeed Counsel admitted that he had not been appointed in accordance with the Act.
- 4.8 The Tribunal upheld the objection and accordingly held that Counsel introduced to act on behalf of the Applicant had not been procured in accordance with the Act and could not play any part in the proceedings before the Tribunal.
- 4.9 The Tribunal then proceeded to hear submissions from the Appellants representatives and the Respondents on the framed issues. In disposing of this application the Tribunal will deal with issues three (3) and four (4) together and the rest of the issues separately.
- 4.10 ***Issue one (1) whether the Application for review was properly made to the Tribunal.***

In their written submissions the Applicant stated that the entity had temporarily shelved the recommendation of PPDA pending further advice from the Tribunal, because the recommendations of the Authority to the Applicant left it in a dilemma on what to do. The Applicant wondered whether the recommendations could be ignored since they were not a “decision”, and yet these recommendations emanated from a regulatory authority. They submitted that as far as they were concerned the recommendations were tantamount to directives which fell within the review jurisdiction of the Tribunal because the Authority’s actions affected an aggrieved party in a procurement process. They further submitted that cancellation of (or recommendation to cancel) a procurement process was a weighty recommendation (decision) with far reaching consequences.

- 4.11 It was their contention that the recommendations flowed from a decision of the Authority, and so the application was properly made to the Tribunal.
- 4.12 In their written submissions the Authority submitted that, Section 91 (l) (3) of the Act provides for an application for review by a procuring and disposing entity. The import of the section was that the Tribunal has powers to review after certain conditions were met as follows;
- a) *The application should be properly made to the Tribunal;*

b) *The matter for review should be a decision of the Authority.*

4.13 The Authority referred to the letter from the Executive Director of the Authority dated 10th October 2014 which expressly stated that the Authority made recommendations subsequent to its investigation. In that letter it was stated that the Authority recommended that the entity cancels the current procurement process and that the Authority further recommends that the Accounting Officer cautions the officials who mismanaged the public bid opening and who omitted to copy the communication on the correction of arithmetic errors to the other bidders.

4.14 The Authority asserted that it did not make any decision regarding the impugned procurement process but only made recommendations to the Executive Director of the Applicant. The onus to implement or disregard the recommendations lay with the Applicant at all material times. The Authority referred to ***Edward Kasolo Kimuli v. The Attorney General & 2 others Miscellaneous Cause No. 10 of 2011*** where Hon Mr. Justice V T Zehurikize held “For the above reasons I am inclined to agree with the views expressed by counsel for the respondents that this application was instituted prematurely... The report in issue contains findings and recommendations but not decisions which would be subjected to the supervisory powers to this court under judicial review”.

4.15 The Authority also made reference to ***Wakiso Transporters Tour & Travel Ltd & 5 others v. Inspector General of Government & 3 others Miscellaneous Cause No. 53 of 2010***, where Hon Justice Kibuuka Musoke held “This case yet again raises the issue as to whether or not these findings, recommendations, suggestions and observations as opposed to decisions can be a subject of the prerogative orders of certiorari. In the case of ***Dott Services Ltd v. Attorney General and Auditor General (Misc Cause No. 125 of 2009)*** (unreported) the Hon. Justice V.F Musoke Kibuka discussed the distinction and held as follows:-

‘Certiorari issues to quash decisions made by a statutory body or by a public officer or an inferior court or tribunal. It cannot issue against mere findings, recommendations, suggestions or observations. In the instant application the report of the 2nd Authority against which the prerogative order is being sought clearly contains no decision that can be quashed by way of issuance of certiorari ...’

The Authority emphasized that all the above authorities were cited with approval in *Luwero Town Council v Attorney General (Misc Cause No. 150 of 2013) (unreported)* where like in this case the IGG had investigated a matter and made recommendations to discipline some official of Luwero Town Council including the Town Clerk. The Court held that there was no decision to review.”

- 4.16 The Authority laid emphasis on the holding in *Wakiso Transporters (supra)* where the Court held, “There is no decision contained in these recommendations that merits an order of certiorari to quash the impugned report.”
- 4.17 The Authority submitted that the cases cited expressly state that the remedy of certiorari can only be issued to quash a decision and it cannot be applied in the case of mere recommendations or findings.
- 4.18 The Authority opined that the principle established in the cases was applicable to the application before the Tribunal. The Act clearly provided under section 91 (I) (3) that the Tribunal could only entertain applications which seek to review decisions of the Authority whereas in the instant case the Applicant was seeking to review recommendations made by the Authority.
- 4.19 The Authority submitted that the application has not been properly made before the Tribunal on account that it sought to review recommendations made by the Authority and not its decisions.
- 4.20 The Authority contended that a finding in the affirmative by the Tribunal on this issue was sufficient to dispose of the application and prayed that the Tribunal accordingly dismisses this application with costs to the Respondent.

4.21 Resolution by Tribunal

- 4.22 The Tribunal carefully considered the submissions and authorities provided by Counsel for the Authority on this issue and recalled its holding in Public Procurement and Disposal of Public Assets Tribunal (PPDA APPEALS TRIBUNAL) Application No. 5 of 2014 between Hoima Taxi /Bus Owners and Drivers Savings and Credit Cooperative Society and the Public Procurement and Disposal of Public Assets Authority where it dealt with a similar issue as follows:

“The essence of the Authority’s submissions on this point is that the Authority at the end of the review of the decision of the Accounting officer merely made a recommendation, not a decision; that the Act empowers the Tribunal to review ‘decisions’, not ‘recommendations’ of the Authority.

In support of this argument, the Authority cited a number of cases wherein it was held that the remedy of certiorari can only be issued by courts to quash a decision and it cannot be applied in the case of mere recommendations or findings.

- 4.23 *In addressing this point, the Tribunal first considered the definition of the word 'decision'. The Oxford Dictionary defines decision as a 'resolution made after consideration'. The Online Audio English Dictionary defines decision as 'a position or opinion or judgment reached after consideration'. The operative word in the definition of the word decision is 'consideration'.*
- 4.24 *According to the extract of the Authority's review meeting (**Annexure D**), the Authority reviewed the findings of the administrative review decision by reviewing, one by one the grounds raised by Tweimukye, the complainant to the Accounting Officer as well as the grounds raised by the Applicant in its complaint to the Authority. The Authority's report indicates that after reviewing each ground, the Authority made its finding. After reviewing all the grounds and indicating its findings on each ground, the Authority finally made a recommendation that, inter alia, 'the Entity (Hoima Municipal Council) proceeds with the implementation of the decision that the process be repeated'*
- 4.25 *Applying the definition of the word decision as stated above, the 'recommendation' of the Authority is a decision because it was arrived at after 'consideration' of the grounds raised by the complainant and the Applicant. This makes it appealable to the Tribunal under Part VIIA of the Act.*
- 4.26 *Secondly, with respect to the authorities cited by the Authority on the subject of judicial review where the courts have held that a recommendation or finding is not a decision for which orders of certiorari may issue, the Tribunal finds as follows:*
In exercise of its review powers under the Act, the Tribunal is not conducting a judicial review similar to the one exercised by the High Court in the authorities cited by the Authority.
- 4.27 *Quoting HILARY DELANY in his book "JUDICIAL REVIEW OF ADMINISTRATIVE ACTION" 2001 SWEET AND MAXWELL at pages 5 and 6, Justice Kiryabwire in the case of **Rafiki Farmers Ltd v. Kumi District Local Government and Public***

Procurement and Disposal of Public Assets Authority HCT-00-CC-MC-01-2001, stated that the tests to be met for judicial review are well articulated as follows;

“... Judicial review is concerned not with the decision, but the decision making process. Essentially judicial review involves an assessment of the manner in which a decision is made, it is not an appeal and the jurisdiction is exercised in a supervisory manner... not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality...”

4.28 *In the case of William Tumwine v. Kampala City Council and Minister of Local Government HCT-00-CV-MC-0056-2009, His Lordship the Principal Judge, Justice Bamwine had this to say about judicial review:*

“One of the fundamental principles regarding judicial review is its restricted scope, when compared to an appeal..... . While it is the duty of the appellate court to review the record of evidence for itself in order to determine whether the decision of the trial court ought to stand, the scope of judicial review is restricted to supervisory jurisdiction, not an appellate one.”

4.29 *The Tribunal was established by the Act as an appellate Tribunal. The powers of the Tribunal are not restricted to ‘supervising whether the Authority is handling the matters before it fairly or not’. Section 91(6) of the Act gives the Tribunal powers to affirm, vary or set aside the decision of the Authority, powers usually enjoyed by an appellate court.*

4.30 *As an appellate Tribunal, the Tribunal has the duty to review the record of evidence for itself in order to determine whether the decision of the Authority ought to stand.*

4.31 *In conclusion of this point, the Tribunal finds that the review powers of the Tribunal are appellate in nature, thus distinguishable from the review powers of a court when exercising judicial review. Black’s Law Dictionary defines appellate review as the examination of a lower court’s decision by a higher court, which can affirm, reverse, modify or vacate the decision. Section 91.1 (6) of the Act confer on the Tribunal the powers to affirm, vary or set aside the Authority’s*

decision, thus confirming the fact that the Tribunal's powers are appellate in nature and hence wider than judicial review powers.

4.32. *Lastly, on the argument that the Tribunal lacks power to review a recommendation of the Authority, the Tribunal scrutinized its powers as laid down under Part VIIA of the Act. Under this Part of the Act, the only limits to the Tribunal's review powers are set out in section 91.1(4) of the Act. For ease of reference, section 94.1 (4) is reproduced here below:*

"91.1 (4) 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 a contract under Section 75;

(b) a decision of a procuring and disposing entity to discontinue a procurement process, after receiving submissions from bidders following an expression of interest or a pre-qualification; and

(c) a decision by a procuring and disposing entity to limit the participation of bidders under a preference scheme or a reservation scheme."

4.33 *On this basis alone, the Tribunal finds that it can review or consider any matter properly brought before it, whether the matter is couched as a decision, a recommendation or by whatever name called".*

4.34 The Tribunal has not been persuaded to depart from this position and holds that it has jurisdiction to review the Authority's recommendations. In summary, taking into account the Tribunal's findings as espoused in the foregoing paragraphs, the recommendation of the Authority is a decision which the Tribunal has power to review.

4.35 *Issue two (2) whether the decision of the Authority was unfair on the basis that the bid price of the Best Evaluated Bidder (M/s Block Technical Services) was not irregularly altered and that the bid security was valid and in the correct format.*

In their written submissions the Applicant complained that the Investigation Report of the Authority found that there was no evidence to establish that bid documents were swapped and figures doctored in connivance with the contractor to serve the interests of some Procurement and Disposal Unit (PDU) officials at the Entity to give undue advantage to the best evaluated bidder.

- 4.36 The Authority in its submissions stated that the issue was not relevant because the alteration of the bid price and the validity or format of the bid security did not form the basis of the Authority's recommendations and should not be raised in the application.
- 4.37 The Tribunal agrees with the Authority that this issue did not form the basis of the Authority recommendations, however the issue formed one of the objectives of the investigation by the Authority into the Procurement by the Applicant of 2 bedroomed one block staff accommodation of 8 units in Lira Regional Referral Hospital under Procurement Reference LRH/WRKS/20 13 -14 /00083, under Section 8(1) c of the Act.
- 4.38 Whilst the Tribunal agrees that the issue did not form the basis of the recommendations having been resolved by the investigation report in the Applicant's favour, it nevertheless was relevant for purpose of discrediting the Whistleblowers allegation and the integrity of the Applicant's actions.
- 4.39 ***Issue three (3) whether the public bid opening was done in accordance with the law and if not, whether it warranted a cancellation of the procurement process. And***
- 4.40 ***Issue four (4) whether the Applicant duly notified all the bidders of the changes to the bid price in accordance with clauses 27.1 of the Instruction to Bidders (Solicitation Document)***
- 4.41 In their submissions on these issues the Applicant states that the public bid opening was done in accordance with the provisions of the Act; that all bidders' representatives were invited to witness the bid opening in the presence of the hospital staff and contracts committee representative and that all the parties that participated in the bid opening were satisfied and no aggrieved party came

out to object to the bid opening process. Therefore, the Procurement and Disposal Unit and the representative of the Contracts Committee who witnessed the bid opening process did comply with the stipulated procedure for public bid opening under Regulation 65 (6) of the PPDA (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations 2014.

- 4.42 The Applicant further submitted that failure to ensure that the key pages of all the bids and in particular the pages containing financial information were endorsed, signed or initialed and stamped was a minor omission which should not warrant a cancellation of the procurement process as recommended by the Authority.
- 4.43 With respect to notification of all the bidders of the changes to the bid price in accordance with clause 27.1 of the Instruction to Bidders (Solicitation Document), the Applicant submitted that it had notified all companies that qualified for financial comparison but had arithmetic errors to which corrections were made; that the arithmetic corrections were agreed and confirmed by all these companies and had therefore complied with the requirement in clause 27.1; that the argument by the Authority that the request for clarification was not copied to all bidders for information purposes contrary to ITB 27.1 of the solicitation document was unfair and contrary to the law.
- 4.44 The Applicant submitted that the notification requirement which had been previously required under Regulation 180 (2) of the PPDA regulations, 2003 was repealed during the amendment process of the PPDA Regulations. They submitted that the Regulations took precedence over the solicitation document. The corrections were not only in the bid of the best evaluated bidder but also in other bids and all the bidders got to know the changes during the display and issuance of the notice of the best evaluated bidder since the price changes were reflected. That the basic principles of fair, competitive, transparent, non-discriminatory and value for money standards had not been breached in a major way to warrant cancellation of the entire procurement process.
- 4.45 They opined that the Authority in its own report did not find any evidence of fraud or lack of transparency apart from the minor omission of informing all bidders, and so there was no substantive reason to recommend cancellation of

the entire procurement process, because of non-adherence to some procedure which did not include any element of fraud or discrimination. They concluded that the hallmark of the process was value for money as the Best Evaluated Bidder had the lowest quotation.

4.46 In their submissions on both issues the Authority stated as follows;

The Applicant during their investigation noted that the Procurement and Disposal Unit and the representative of the Contracts Committee who witnessed the bid opening process erred by failing to ensure that the key pages of all the bid documents were signed and stamped in accordance with regulation 65 (6) of the PPDA (Rules and methods for procurement of supplies, works and non – consultancy services) Regulations, 2014. That the Investigation Report found that this omission exposed the bid documents to the possibility of manipulation.

4.47 The Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non – Consultancy Services) Regulations, 2014, provides for the procedure for public bid opening. Regulation 65 (6) requires the key pages of a bid including the typed pages that are unique to the bid, the bid form, the submission form, the bid submission sheet and the pages containing financial information to be endorsed with the stamp of the procuring and disposing entity and signed or initialed by the chairperson of the opening session.

4.48 The Authority submitted that the Applicant conceded that key pages of the bid were not signed and stamped in accordance with aforementioned regulation 65 but pleaded instead that that the failure to comply with the provision was only a minor omission that did not warrant a cancellation of the procurement process.

4.49 The Authority referred to Section 7 (r) of the Act, which mandates the Authority to administer and enforce compliance with all the provisions of the Act, regulations and guidelines issued under the Act. The Authority also referred to Section 6 (a) of the Act, which mandates the Authority to ensure the application of fair, competitive, transparent, non – discriminatory and value for money procurement and disposal standards and practices.

- 4.50 The Authority submitted that it had duly exercised its mandate under the Act, when it recommended cancellation of the procurement process.

With respect to notification of all the bidders of the changes to the bid price in accordance with clause 27.1 of the Instruction to Bidders (Solicitation Document), the Applicant submitted that:

The public bid opening was not in accordance with the law and this fact has been conceded to by the Applicant, and therefore it was justified in recommending the cancellation of the procurement process.

- 4.52 The Applicant referred to its investigation Report were a finding had been made that the request for clarifications by the best evaluated bidder was not copied to all bidders which was an indicator of lack of transparency in the procurement process contrary to ITB 27.1 of the solicitation document. They submitted that Clause 27.1 of the Instruction to Bidders (Solicitation Documents) provided that 'All requests for clarifications would be copied to all bidders ...'

- 4.53 In their opinion the Applicant had undeniably and by their own admission breached the provisions of the solicitation documents. Therefore in accordance with the Act, the Authority was mandated to recommend the cancellation of the procurement process.

- 4.54 The Tribunal carefully studied the Authority's investigation report dated October 2014, in its conclusion stated interalia that;-

- (i) There was no evidence to establish that the bid documents were swapped and figures doctored in connivance with the contractor to serve the interests of some Procurement and Disposal Unit (PDU) officials at the Entity to give undue advantage to the bidder.
- (ii) The Procurement and Disposal Unit(PDU) and the representative of the contracts committee who witnessed the bid opening process erred by ensuring that the key pages of all the bids were signed and stamped in accordance with Regulation 65(6) of the PPDA (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services)Regulations 2014.*This exposed the bid documents to the possibility of manipulation.(emphasis ours)*

- (iii) *The evaluation Committee rightly exercised its mandate to make corrections to the Arithmetic errors found in the bid of M/s Block Technical Services however the PDU failed to comply with ITB 27.1 of the s document which required communication of correction of arithmetic errors to all bidders therefore falling short of the principle of transparency.*
- 4.55 The Tribunal noted that the Authority made its recommendations on the basis of irregularities at the bid opening and its disapproval of the manner in which corrections were made to the arithmetical errors in the best evaluated bidders bid.
- 4.56 The Tribunal however takes a contrary view to the findings and subsequent recommendations made by the Authority.
- 4.57 Firstly reference must be made to the terms of reference of the investigation which were based on very serious allegations of fraudulent evaluation of a tender process resulting in recommendation of a best evaluated bidder that was non-compliant with the bid security format requirement of the solicitation document and irregular alteration of the best evaluated bidders price from UGX 1,528,648,508/= to UGX 1,131,501,262/=.
- 4.58 The Authority carried out an investigation and concluded that bid submitted by the best evaluated bidder was compliant with the requirements of the solicitation document.
- 4.59 Secondly the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non Consultancy Services) Regulations 2014, prescribe an elaborate procedure for public bid opening contained in 13 (thirteen) sub regulations. Of these sub regulations, the Applicant was found to have infringed only sub regulation (6) which provides that key pages of the bid would be stamped by the PDE and signed or initialed by the Chairperson of the opening session. The Authority was concerned that this omission may have exposed the bid documents to the “possibility of manipulation” None of the Bidders had complained that their documents had been manipulated. The Authority did not find that the bid documents had been “manipulated” This begs the question as to why this oversight would have

vitiating the entire process leading to a recommendation that the Procurement be cancelled. It should also be observed that the best evaluated bidder who put in time and resources into their bid should not be punished for the oversight of the procuring and disposing entity.

- 4.60 The Tribunal finds that the Applicant was substantially compliant with the public bid opening regulations and should not have been so severely sanctioned for the oversight. It is also noteworthy that none of the other bidders faulted the bid opening process.
- 4.61 We are unable to agree that this oversight infringed the cardinal principles of transparency, non –discriminatory, and value for money procurement.
- 4.62 It is our finding that this mistake did not warrant the disproportionate recommendation made by the Authority advising the Applicant to cancel the procurement process.
- 4.63 In arriving at this conclusion the Tribunal is fortified by the holding of the Hon Principle Judge in *Motor Centre East Africa Ltd-vs- Public Procurement & Disposal of Assets Authority HCMA 90 OF 2010*, where the Learned Judge held at Page 10 as follows; “ Courts have time and again been implored not to treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature; *Tarlol Singh Saggu-vs- Roadmaster Cycles (U) Ltd CACA 46 of 2000*.
- 4.64 Similarly with respect to notification to other bidders of corrections made to arithmetical errors of the best evaluated bidders and the other 3 bidders, it should be noted that the corrections were made to the best evaluated bidder and the three other bidders. All the bidders affected by this exercise accepted and confirmed the corrections. The Authority in its investigation report found that the Applicant rightly exercised its mandate in this regard.
- 4.65 Regulation 14(3) of the PPDA (Evaluation) Regulations 2014(SI 9/14) provides as follows:-
“(4) A bidder shall be promptly notified of an arithmetic correction and requested to agree within five working days in accordance with the procedure for clarification of bids in regulation 10”.

- 4.66 The Tribunal finds that there was no requirement on the Applicant under the Regulations to notify all the bidders as concluded by the Authority. The Solicitation document must be read in conformity with the regulations and to the extent there was an inconsistency the provisions of the regulations would prevail. Notification of all bidders as specified in ITB 27(1) should be considered as a good practice; failure to notify all bidders should not lead to cancellation of a procurement process.
- 4.67 For the above reasons the Tribunal faults the Authority's recommendations which arose out of their investigation into the procurement process under procurement reference number LRH/ WRKS/20 13-14/008.

4.68 *Issue five (5) REMEDIES*

The Applicant submitted that the Application for review of the Authority's decision was properly filed with the Tribunal; that the Application has merit and should be allowed with costs to the Authority.

- 4.69 The Authority maintained that the Application for review lacked merit and should be dismissed with costs.
- 4.70 The Tribunal has in the preceding paragraphs given reasons to show that the Application for review filed by the Applicant is properly before it.
- 4.71 The Tribunal has noted that the Authority in its investigation report (Annexure A 2) established, among other things, that the Applicant complied with the law in respect to the procedure relating to correction of arithmetic errors; the Authority however faulted the Applicant on failure to notify all other bidders as required by ITB 27(1) and for improperly handling the public bid opening process by failing to endorse, sign, initial or stamp the key pages.
- 4.72 As already indicated, the Tribunal found that the requirement to notify all bidders stipulated in the ITB is no longer part of the law, though it may be maintained as a good practice. The Tribunal found that the Applicant was substantially compliant with the public bid opening regulations and should not

have been so severely sanctioned for the oversight of failing to stamp the key pages.

In the circumstances the Tribunal upholds the Application for review.

5.0 DECISION OF THE TRIBUNAL

1. The Tribunal faults the recommendations of the Authority and sets them aside.
2. In exercise of the power granted to it under section 91.I (6) of the Act, the Tribunal substitutes the recommendation of the Authority with the following recommendations:
 - a) *The Applicant proceeds with the procurement process.*
 - b) *The Accounting Officer of the Applicant sensitises the officers of the Procurement and Disposal Unit on the provisions of the law governing public bid opening”.*
3. Each party shall meet its own costs.

Dated at Kampala this 30th Day of October 2014.

SIGNED by
OLIVE ZAALE OTETE

SIGNED by
MOSES JURUA ADRIKO

SIGNED by
DAVID KABATERAINE

SIGNED by
ABRAHAM NKATA