

THE REPUBLIC OF UGANDA

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

APPLICATION NO.5 OF 2014

**APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND
DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT OF THE TENDER TO MANAGE
AND COLLECT REVENUE FROM HOIMA TAXI/BUS PARK**

**APPLICANT: HOIMA TAXI/BUS OWNERS AND DRIVERS SAVINGS AND
CREDIT COOPERATIVE SOCIETY**

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

**(Before: OLIVE ZAALE OTETE- CHAIRPERSON, MOSES JURUA ADRIKO- MEMBER,
DAVID KABATERAINE-MEMBER and ARCHITECT JOEL KATEREGGA, MEMBER)**

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BACKGROUND/FACTS

- 1.1 Hoima Municipal Council published a bid notice inviting bids for the management of and collection of revenue from Hoima Taxi/Bus Park. Three bids were received from Hoima Drivers Cooperative Society, Tweimukye Park Operators Cooperative Society Limited and Hoima Taxi/Bus Owners and Drivers Savings and Credit Cooperative Society (the Applicant). A Notice of Best Evaluated Bidder (BEB) was displayed on 30th July 2014 and indicated the Applicant as the BEB.
- 1.2 By letter dated 8th August 2014, Tweimukye Park Operators Cooperative Society Limited (Tweimukye) applied for administrative review in respect of the procurement for the management of and collection of revenue from Hoima Taxi/Bus Park. The Accounting Officer Hoima Municipal Council appointed an Administrative Review Committee (the Committee) to handle the complaint.
- 1.3 In handling the complaint, the Committee scrutinized, among other documents, the bids of the three bidders. At the conclusion of the review, the Committee established that both Tweimukye and the Applicant had no Powers of Attorney; that the resolution by the members of the Applicant which had been submitted as an alternative to the Power of Attorney was not registered nor certified by the Registrar of Cooperatives. The Committee further established that all the bidders did not fulfill the requirement of submitting a certified copy of the Registration Certificate by the Registrar of Cooperatives. The Committee recommended that the procurement process be repeated.
- 1.4 By letter dated 2nd September 2014 (Annexure B), the Accounting Officer communicated the result of the administrative review to all the bidders. The result was to the effect that the Committee had found material shortcomings and inadequacies in the bids of the three bidders. The Accounting Officer terminated the procurement process for the management of and collection of revenue from Hoima Taxi/Bus Park and ordered for a repeat of the exercise within 14 days if no further complaint was received.

- 1.5 Dissatisfied with the decision of the Accounting Officer, the Applicant, as the BEB, by letter dated 4th September 2014 (T 2), appealed to the Public Procurement and Disposal of Public Assets Authority (the Authority) against the decision of the Accounting Officer on grounds that the entire review process was flawed since the Applicant was neither notified of the review nor invited by the Committee to be given a fair hearing.
- 1.6 By letter dated 19th September 2014 (T 3), the Authority wrote to the Applicant informing it that the Authority had received a copy of the decision of the Accounting Officer Hoima Municipal Council informing the Authority of the administrative review decision arising out of an application for administrative review by Tweimukye. The Authority in the same letter informed the Applicant that it had received the Applicant's complaint in respect to the decision of the Accounting Officer. By this letter, the Authority invited the Applicant to attend a meeting to be held on 30th September 2014. The Applicant did attend the meeting and was given an opportunity to present its grievances. The meeting was also attended by members from Tweimukye and Hoima Town Council.
- 1.7 Following the review of the Accounting Officer's decision, as required by section 90(4) of the Public Procurement and Disposal of Public Assets Act, 2003 (the Act), the Authority stated as follows:

" Observation.

- i. Under Part 1 of the bidding procedures of the solicitation document issued to bidders, bids were required to remain valid until 30th August 2014. There is no evidence of extension of the bid validity periods; and*
- ii. M/S Hoima Taxi/Bus Owners and Drivers Saving and Credit Cooperative Society Limited (the Applicant) did not apply for Administrative Review at Entity level and therefore did not pay administrative review fees. The appeal to the Authority although considered did not follow the Administrative Review procedure under the law.*

Conclusion:

In accordance with Section 90(4) of the PPDA Act 2003 and in light of the findings above Authority advises that:

- (a) The Entity proceeds with the implementation of the decision that the process repeated;*

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

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION.

On 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:

1. *Whether the Applicant rightly applied for administrative review as per the provisions of section 90(2) of the Act.*
2. *Whether the Applicant was denied its constitutional and statutory right of fair hearing at the first stage of the review by the Accounting Officer and whether this rendered the Accounting Officer's decision and every other procedure illegal thus rendering the decision null and void.*
3. *Whether it was a requirement for the bidders to certify the resolution as the bid document did not request so, the bid document having said it was a member's resolution.*
4. *The issue of bid validity as raised by the Authority was never raised at all administrative review stages.*
5. *Tribunal should review decision of the Authority and the Authority and the Entity be notified to halt implementation of the decision pending determination by the Tribunal.*

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

- (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.

2.2 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.

3.0 DISPOSAL OF APPLICATION

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

- (1) Notice of Appeal against the decision of the Authority dated 15th October 2014 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;
 - (4) Applicant's bid .
- 3.1 The Tribunal summoned both parties for a hearing on 24th October 2014. The Applicant was represented by Mr. Agaba Edgar and Mr. Mugarura Eric, both of M/s Agaba Muhairwe & Co Advocates. Mr. Kansiime David, Vice Chairperson of the Applicant attended the hearing. The Authority was represented by Ms. Sophia Masagazi, Ms. Esther Kusiima and Mr. John Kallemera.

The issues for resolution by the Tribunal were agreed to be the following:-

1. *Whether the Applicant rightly applied for administrative review as per the provisions of section 90(2) of the Act.*
2. *Whether the Applicant was denied its constitutional and statutory right of fair hearing at the first stage of the review by the Accounting officer.*
3. *Whether the Authority properly evaluated the evidence regarding certification of the resolution by members.*
4. *Whether the bid of the Applicant is still valid.*
5. *Remedies*

4.0 RESOLUTION OF ISSUES

Issue one (1): . Whether the Applicant rightly applied for administrative review as per the provisions of section 90(2) of the Act.

4.1 In their submissions on this issue, both parties quoted extensively the provisions of Sections 90 and 91 of the Act. The provisions are reproduced for ease of reference.

“ 90. Review by the Accounting Officer.

- (1) *A bidder who is aggrieved by a decision of a procuring and disposing entity may make a complaint to the Accounting Officer of the procuring and disposing entity.*
- (1a) *A complaint by a bidder against a procuring and disposing entity shall—*
 - (a) *be in writing and shall be submitted to the Accounting Officer of the procuring and disposing entity with the prescribed fee, and a copy shall be given to the Authority;*
 - (b) *be made within ten working days from the date the bidder, first becomes aware or ought to have become aware, of the circumstances giving rise to the complaint.*
- (2) *On receiving the complaint and the prescribed fee, the Accounting Officer shall—*
 - (a) *immediately suspend the procurement proceedings; and*
 - (b) *make a decision in writing, within fifteen working days, indicating the corrective measures to be taken, if any, and giving reasons for his or her decisions and submit a copy of the decision to the Authority.*
- (3) *Where—*
 - (a) *the Accounting Officer does not make a decision within the period specified in sub-section (2); or*
 - (b) *the bidder is not satisfied with the decision of the Accounting Officer, the bidder may make a complaint to the Authority within ten working days from the date of communication of the decision by the Accounting Officer.*

- (4) *Upon receipt of a copy of the decision of the Accounting Officer specified in subsection (2)(b), the Authority shall within fifteen working days, review the decision and make a recommendation in writing to the procuring and disposing entity, indicating the corrective measures to be taken, if any, and giving reasons for the recommendation.*
- (5) *Where the Authority fails to make a recommendation within the time prescribed under subsection (4), the Accounting Officer may implement the corrective measures indicated in the decision made under subsection (2)(b).*
- (6) *The bidder who makes a complaint under this section has a right to proceed under Part VIIA of this Act, where the Authority fails to make a recommendation as required under subsection (4).*
- (7) *Subject to Part VIIA of this Act, a contract shall not be entered into by an Accounting Officer with a provider—*
 - (a) *during the period of administrative review;*
 - (b) *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.*

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 its 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."*

4.2 In the written submissions, the Applicant stated that it rightly applied for administrative review as per the provisions Section 91 of the Act. The Applicant contended that the procedure provided for under Section 91 of the Act is for all other interested bidders who have not lodged a complaint/application for judicial review under Section 90(1) of the Act.

4.3 The Applicant opined that the only person(s) entitled to recourse under Section 90 of the Act are bidders who instituted a complaint before the Accounting Officer as seen under Section 90 (3) of the Act which provides that where the Accounting Officer does not make a decision within the period specified in sub-section (2); or *the bidder is not satisfied with the decision of the Accounting Officer, "the bidder"* may make a complaint to the Authority within ten working days from the date of communication of the decision by the Accounting Officer.

4.4 In its response, the Authority submitted that the complaints review mechanism under the Act is a three tier system and it has never been the intention of the law to have complaints directly submitted to the Authority without first having been heard by the respective Accounting Officer of the Entity from which the complaint arose; that the only exception being provided in Section 90(3)(a) of the PPDA Act 2003 and Regulation 140(1) of the Local Government (PPDA) Regulations, 2006 (Local Government Regulations) where the Applicant/Appellant has applied to the Accounting Officer for Administrative review and the Accounting Officer does not make a decision within the time allowed by the law.

- 4.5 The Authority submitted that Section 90 (1) of the Act and regulation 138 of the Local Government Regulations provide that a bidder who is aggrieved by a decision of a Procuring and Disposing Entity (the Entity) may make a complaint to the Accounting Officer of the Procuring and Disposing Entity.
- 4.6 Section 90 (1a) (b) of the Act provides that the complaint by a bidder against the Entity shall be made within ten working days from the date the bidder first becomes aware or ought to have become aware of the circumstances giving rise to the complaint.
- 4.7 It was the Authority's submission that the Applicant became aware or ought to have become aware of the facts giving rise to its complaint on or about 2nd September, 2014 when the Accounting Officer wrote to all bidders notifying them of the outcome of the administrative review. It is at this stage that the Applicant/Appellant became aggrieved by the decision of the Accounting Officer and from that date, had 10 days within which to apply to the Accounting Officer for administrative review.
- 4.8 The Authority further submitted that since the Applicant did not follow the procedure provided under the law for submission of an administrative review, the Applicant's application before the Tribunal is premature.
- 4.9 The Authority further submitted that it did not make any decision in the matter in issue; it only reviewed the Accounting Officer's decision as provided under Section 90(4) of the Act and advised the Accounting Officer following its findings from the review process. The administrative review process at the Entity level was in fact still being undertaken and the final decision lay with the Accounting Officer.
- 4.10 The Authority cited a number of authorities where it was held that "*findings and recommendations are not decisions which would be subjected to the supervisory powers of the court under judicial review/prerogative orders of certiorari*".
- 4.11 The authorities cited include, ***Edward Kasolo Kimuli vs. Attorney General, Public Procurement and Disposal of Public Assets Authority and Kyambogo University, High Court Miscellaneous Cause No. 10 of 2011; Wakiso Transporters Tour & Travel Ltd. & 5 others v. Inspector General of***

Government & 3 others Miscellaneous Cause No. 53 of 2010, Dott Services Ltd v. Attorney General and Auditor General (Misc Cause No. 125 of 2009) (unreported).

- 4.12 It was the Authority's submission that the aforementioned authorities 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.
- 4.13 It was further submitted that the above principle applies to the matter in issue before the Tribunal; that Section 91.I (3) of the Act enjoins the Tribunal to only entertain applications which seek to review decisions of the Authority whereas in the instant case, the Applicant is seeking to reverse/quash the recommendations made by the Authority to Hoima Municipal Council.
- 4.14 The Authority submitted that the Application was not properly made before the Tribunal in as far as it is seeking to review recommendations made by the Authority and not its decision; that in compliance with Section 90 (4) of the Act, the Authority by a letter dated 7th October, 2014 made a recommendation to the Accounting Officer of Hoima Municipal Council. The Authority contended that this issue alone is sufficient to dispose of the Application and asked the Tribunal to find as such.
- 4.15 It was further submitted that in the alternative but without prejudice to the foregoing, Regulation 57 of the Local Government (PPDA) Regulations, 2006 empowers an Entity to cancel a procurement process. The Applicant did not make a rejoinder on the issue of whether a recommendation is not a decision.
- 4.16 The Tribunal carefully considered the submissions and authorities provided by Counsel for both parties on this issue. The submissions on the issue raised a number of points on matters of law which the Tribunal will address. They are the following:
- i. *Can a bidder directly file a complaint to the Authority without having to go through the administrative review mechanism laid down in section 90 of the Act?*
 - ii. *Does Section 91 of the Act provide a window to all other interested bidders who are aggrieved by a decision of the Accounting Officer but who have*

not lodged a complaint before the Accounting Officer to directly file a complaint with the Authority?

iii. Does the recommendation of the Authority amount to a decision of the Authority which may be appealable to the Tribunal?

The points shall be addressed one by one.

4.17 Can a bidder directly file a complaint to the Authority without having to go through the administrative review mechanism laid down in section 90 of the Act?

A close scrutiny of Part VII of the Act “Administrative Review” shows that a bidder who is aggrieved by a decision of a procuring and disposing entity (the Entity) must first lodge a complaint with the Accounting Officer of the Entity.

4.18 Section 90(3) lays down circumstances under which that bidder (who has first complained to the Accounting officer) may file a complaint with the Authority. The circumstances are that the Accounting Officer has not made a decision within 15 working days from date of receiving a complaint or the bidder is not satisfied with the decision of the Accounting Officer. The complaint to the Authority must be filed within ten working days from the date of communication of the decision by the Accounting Officer.

4.19 Section 91 of the Act provides for a procedure of the Authority upon receiving a complaint from an aggrieved bidder who has filed a complaint to the Authority under section 90(3). The complaint received by the Authority under section 91 is therefore not a fresh complaint from a bidder who has not filed a complaint with the Accounting Officer.

4.20 The Tribunal finds that Part VII of the Act providing for administrative review has not provided for a direct route for a bidder to file a complaint for administrative review with the Authority. The bidder must start with the Accounting Officer.

4.21 The Tribunal is thus in agreement with the submission of the Authority that a bidder aggrieved by a decision of the Entity must follow the procedure laid down in section 90. Section 91 does not provide for a fresh procedure in the

administrative review mechanism, but is a continuation of the process started in section 90, specifically by bidders who complain that the Accounting Officer has not made a decision within the prescribed time or bidders who are dissatisfied with the decision of the Accounting Officer.

The Tribunal therefore finds that the Applicant should have filed a complaint with the Accounting Officer of Hoima Town Council under section 90 of the Act.

4.22 In spite of this finding, the Tribunal notes that the Authority by letter dated 19th September 2014 invited the Applicant as the bidder affected by the decision of the Accounting Officer, to participate in the review proceedings by the Authority of the Accounting Officer's decision. From the record, the Applicant did not only attend the proceedings but was given an opportunity to present its grievances.

4.23 In the words of the Authority, *"the appeal to the Authority, although considered did not follow the administrative review procedure under the law"*

From the foregoing statement of the Authority, the Applicant's appeal to the Authority was considered. Consequently, having been dissatisfied with the decision of the Authority, the Tribunal finds that the Applicant has rightly applied to the Tribunal under section 91.I of the Act for a review of the Authority's findings. The Tribunal does not therefore agree with the Authority's submission that the Application before the Tribunal is premature and misconceived. It would be absurd to expect the Applicant, having been allowed to present its case before the Authority, to again start the complaint process afresh with the Accounting Officer following the procedure under section 90 of the Act.

4.24 *Does Section 91 provide a window to all other interested bidders who are aggrieved by a decision of the Entity but who have not lodged a complaint before the Accounting Officer to directly file a complaint with the Authority?*

As explained above, section 91 of the Act does not provide a window to other interested bidders aggrieved by a decision of the Entity to directly file a complaint with the Authority in matters of administrative review.

4.25 The Tribunal has noted that under section 8(e) of the Act, the Authority may act upon complaints by procuring and disposing entities, providers or any other entity or person, in respect of any procurement or disposal activity, following the procedure under Section 91 of the Act. Counsel for the Applicant had contended that the Applicant filed its complaint to the Authority under section 91 of the Act.

4.26 The Tribunal finds that the procedure referred to in Section 90 of the Act is specific in nature; it is a procedure to be followed by a bidder aggrieved by a decision of the Accounting Officer in respect to administrative review. While section 8(e) of the Act allows the Authority to receive complaints and handle such complaints following the procedure specified in Section 91, it is the finding of the Tribunal that the complaints envisaged under section 8(e) are of a general nature, not related to administrative review because the procedure for administrative review is specified in Part VII of the Act. It is trite law that where a specific provision of the law exists that addresses a particular situation, one cannot rely on a general provision. In the present context, the specific procedure for administrative review commences in section 90 then proceeds to Section 91.

4.27 *Does the recommendation of the Authority amount to a decision of the Authority which may be appealable to the Tribunal?*

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.

4.28 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*'.

4.29 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*'

4.30 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.

4.31 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.

4.32 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...”

4.33 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.”

4.34 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.

4.35 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.

4.36 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.

4.37 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.”*

4.38 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.

4.39 Issue 2. *Whether the Applicant was denied its constitutional and statutory right of fair hearing at the first stage of the review by the Accounting officer.*

4.40 The case for the Applicant is that it was wrong for the Accounting Officer to take a decision which affected the Applicant without offering the Applicant a right to be heard. The Applicant submitted that the importance and magnitude of the right to a fair hearing is emphasized under article 28 and 42 of the Constitution of Uganda. The Applicant submitted that the Authority should have found that failure by the Administrative Review Committee to accord the Applicant a hearing affected the decision of the Accounting Officer.

4.41 The Applicant relied on the case of ***Mpungu & Sons Ltd v. Attorney General and Anor (Civil Appeal 17 of 2001) [2006] UGSC 15*** cited with approval in ***Rafiki Farmers Ltd (supra)*** where the Supreme Court found as follows;

“I agree that the Audi Alteram Partem rule is a cardinal rule in our administrative law and should be adhered to. Simply put the rule is that one must hear the other side. It is derived from the principle of natural justice that no man should be condemned unheard. (See Black's Law Dictionary 6th

Edition). However, one would have to prove that one had a right to be heard which had been breached, and that the decision arrived at by the administrative authority had either deprived him of his rights or unfairly impinged on those rights thereby causing damage to the individual concerned. Most cases involving the right to be heard have dealt with situations where a person was being deprived of his property or livelihood. But each case has to be looked at on its own merits."

4.42 The Applicant further submitted that the principle, so far as it affects the present case, is that if the Constitution or a statute prescribes, or statutory rules or regulations binding on a domestic tribunal prescribe, the procedure to be followed, that procedure must be observed. He relied on the case of ***Annebrit Aslund vs A. G. Miscellaneous Cause No. 441 of 2004*** cited with approval in ***Clear Channel Independent (U) Ltd v. Public Procurement and Disposal of Public Assets Authority Misc. Cause no. 156 of 2008*** where on Page 8 it was expressed that ***"it is trite that when an administrative body does something, which it has in law no capacity to do or does it without following the proper order, it is said to have acted illegally."***

4.43 The Applicant further relied on the case of ***Rafiki Farmers (supra)Ltd Versus Kumi District Local Government & Public Procurement and Disposal Authority*** wherein the Court held that

"I find that the applicant who was an interested bidder was neither notified, nor represented before the 2nd Authority made its decision in respect of the complaint and yet the decision affected its rights. I therefore find that the applicant was entitled to a hearing before the 2nd Authority made a decision that the 1st Applicant should re-tender the process, and therefore failure of the 2nd Authority to hear the applicant before arriving at the said decision amounted to breach of the principles of natural justice and therefore, the decision is void."

4.44 The Applicant contended that the decision of the Accounting Officer clearly affected the rights of the Applicant as the Best Evaluated Bidder and that therefore, in accordance with the decision of the Court in Rafiki's Case (***supra***) the Applicant should have been heard; that failure to accord the right to be heard nullified the decision of the Accounting Officer and that

consequently, *the Authority's decision is null, unenforceable and should be set aside.*

- 4.45 Counsel cited a number of authorities explaining the effect of an illegal decision including *Makula International Ltd v. His Eminence Cardinal Nsubuga & Anor [1982] HCB 11*, *Macfay vs United Africa Co. Ltd [1961] 3 ALL E.R. 1169* and *Clear Channel Independent (U) Ltd v. Public Procurement and Disposal of Public Assets Authority*.
- 4.46 In response, the Authority contended that the Applicant was given a right to be heard by the Authority as an affected party in the matter; that the matter had been sent for review of the Accounting Officer's decision under Section 90 (4) of the Act. The Authority submitted that its actions in reviewing the Accounting Officer's decision cannot be treated as a nullity since the Authority did not handle this matter as an appeal for administrative review against the decision of the Accounting Officer but as a review of the decision of the Accounting Officer under Section 90(4) of the Act.
- 4.47 At the hearing, the Authority further contended that the Applicant was heard because the Administrative Review Committee (the Committee) reviewed the documents of the Applicant and that documents speak for themselves; that all that the Committee did was to verify the documents that had been submitted as part of the Applicant's bid.
- 4.48 The Tribunal carefully studied the report of the Committee. The report of the Committee indicates that the Committee scrutinized the bids of Tweimukye (who had filed the Complaint) as well as the bid of the BEB, who is the Applicant.
- 4.49 The Committee found that both Tweimukye and the Applicant had no powers of Attorney; that the resolution by the members of the Applicant which had been submitted as an alternative to the Power of Attorney was not registered nor certified by the Registrar of Cooperatives. The Committee further found that all the bidders did not fulfill the requirement of having a certified copy of the registration certificate by the Registrar of cooperatives. The Committee recommended that the procurement process be repeated.

4.50 Considering the findings of the Committee, the Tribunal finds that the Committee arrived at its decision through scrutinizing the documents of the bidders. This is because the Report of the Committee does not indicate the information obtained from the persons who attended the Committee hearing.

4.51 With regard to the Authority of **Rafiki** (Supra) cited by Counsel for the Applicant the Tribunal finds that this case is distinguishable from the facts as presented. In **Rafiki** case, the Applicant in that case, being dissatisfied with the decision of the Accounting Officer lodged an application for administrative review with the Authority. The Authority ordered a retender without giving the Applicant a hearing. It should be noted that in **Rafiki**, the section under scrutiny was section 91 (3) of the Act which provides as follows:

“(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”.

4.52 A similar provision does not exist for a review by the Accounting officer under section 90 of the Act, which is applicable in the matter before the Tribunal. This means that the Accounting officer can review documents and make his or her decision basing on the findings obtained from a review of the documents.

4.53 The procedure to be followed by the Accounting officer is detailed in regulation 5 of the Public Procurement and Disposal of Public Assets (Administrative Review) Regulations 2014, S.I 16 of 2015. Under this regulation, there is no requirement for the Accounting officer to notify all interested bidders of the complaint or take into account representations from the bidders and from the respective procuring and disposing entity. The Accounting Officer is required to look at the record and only call for information, where necessary.

4.54 The Tribunal finds that the Accounting Officer, having reviewed the bid of the Applicant as required by regulation 5 of S.I 16 of 2014, fulfilled the requirements for administrative review. The documents spoke for themselves; the Applicant was heard.

4.55 Issue 3. Whether the Authority properly evaluated the evidence regarding certificate of resolution.

The Applicant submitted as part of its document a resolution of members of the Applicant endorsing Mr. Julius Bahemuka to be a signatory to the bidding process (Annex I). During the review process, the Committee found that the Resolution was not certified by the Registrar of Cooperatives.

- 4.56 For ease of reference, the solicitation document (Annexure B) contained the following requirement under eligibility criteria:

"A certified copy of the powers of attorney to the signatory (ies) of the bidding process/resolution by members of the co-operative.

- 4.57 The Applicant submitted that the requirement in the bidding document is simply a **"resolution by members of the cooperative."** Counsel for the Applicant opined that if the Procuring and Disposal Entity intended to receive certified copies of the resolution, the solicitation document should have clearly indicated the word **"certified"** before the word resolution as follows;

"4. A certified copy of the powers of attorney to the signatory (ies) of the bidding process/a certified resolution by members of the cooperative"

- 4.58 The Applicant relied on **Regulation 48(2) of the Local Governments Regulations** which provides that *bid documents shall have a statement of requirements that defines the requirements precisely and in a manner that leaves no doubt or assumption by a bidder of the requirements of the procuring and disposing entity and that determines how closely and effectively a bidder can meet these requirements.*

- 4.59 In its response, the Authority stated that since the Power of Attorney was required to be certified, the resolution of members as an alternative to the power of Attorney should also be certified. Asked by the Tribunal whether there was no ambiguity in the wording of the requirement, the Authority maintained that it was clear that the resolution of members also had to be certified.

- 4.60 In resolving this issue, the Tribunal relied on **regulation 48 (2) of the Local Governments Regulations** which provides that "bid documents shall have a statement of requirements that defines the requirements precisely and in a

manner that leaves no doubt or assumption by a bidder of the requirements of the procuring and disposing entity.

4.61 The Tribunal finds that the requirement as stated is ambiguous in that it is capable of being given more than one meaning, as indeed has happened in the instant case. The Tribunal is in agreement with the Applicant that for the avoidance of doubt, the words “certified” should have been inserted before the word “resolution”. In the instant case, the Entity took the position that the resolution had to be certified and so disqualified the Applicant on the ground that its resolution was not certified. Similarly, it could also be speculated that due to this ambiguity, if the entity preferred, it could take advantage and disqualify a bid on a matter of principle if a bidder submitted a “certified resolution” contrary to the eligibility criteria on grounds that the Bidding Documents did not call for certified resolutions.

4.62 Be that as it may, the Committee found the Applicant did not have a certified copy of the certificate of registration issued by the Registrar of Cooperatives. This finding was not disputed by the Applicant and did not form part of the Applicant’s grounds for review of the Authority’s decision. The Applicant’s bid was therefore not compliant to the extent that it did not possess one of the documents required as documents evidencing eligibility.

4.63 ***Whether the bid of the Applicant is still valid.***

Under Part I of the bidding procedures of the solicitation document issued to bidders (Annexure D) bids were required to remain valid until 30th August 2014.

The Applicant submitted that once the administrative review process was commenced by the Accounting officer, procurement proceedings were suspended; that on suspension of the proceedings, the time of the bid was frozen. He submitted that the bid of the Applicant is still as valid as it was at the point of administrative review. The Applicant relied on Regulation 52 of the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non- Consultancy Services) Regulations, 2014) which states as follows;

“(1) The bidding documents shall state the date up to which a bid shall be valid.

(2) A bid shall remain valid until the close of business on the last day of the validity period.

(3) When determining the duration of a bid validity period, sufficient time shall be allowed to enable—

- (a) the procuring and disposing entity to undertake evaluation, post-qualification and negotiation exercises, as may be appropriate;*
- (b) the contracts committee to adjudicate the award of contract recommendation;*
- (c) a bidder to challenge the award decision before a contract is formed; and*
- (d) the procurement and disposal unit to prepare a letter of bid acceptance or the contract document and obtain all necessary approvals prior to issue of the letter or document, within the validity period of the bid.”*

It was also Counsel’s opinion that the bid is valid until a contract is formed or sufficient time should be factored in any case so a contract can be executed.

4.64 In its response, the Authority submitted that Regulation 49 of the Local Government Regulations provides that where necessary, a bidder shall be requested in writing to extend validity of their bid. There is no evidence on record that such a request was ever made to the bidders in the procurement for management and collection of revenue from Hoima Taxi/Bus Park in Kahoora Division for FY 2014/2015. Therefore contrary to the claim by the Applicant, an extension to the initial period of bid validity was never requested from any bidder; that this being the case, the Applicant’s bid had expired.

4.65 The Tribunal finds that contrary to the Applicant’s submission that the bid validity period is frozen once a procurement process is suspended, regulation 49 of the Local Government Regulations specifically provides for how bid validity period may be extended regulation (49(4) and (5).

4.66 Regulation 49(5) provides that where an extension to the bid validity period becomes necessary, a bidder shall be requested in writing, before the expiry of validity of their bid, to extend the validity for a minimum period to complete the process outlined in sub regulation (3). It is only regulation 49 of the Local Government Regulations, and no other, which provides for

circumstances under which, and the procedure by which bid validity may be extended.

- 4.67 In the instant case, the Entity, Hoima District Council did not request bidders to extend their bids. Having decided that the procurement process be terminated, the Accounting Officer, by letter dated 29th August 2014 wrote to the Applicant as follows:

“Having completed the procurement process, you are hereby required to come and pick your bid security from the procurement office.”

This letter clearly communicated that the procurement process had ended, having been cancelled by the Accounting Officer due to anomalies established at administrative review. There was therefore no bid as alleged by the Applicant.

4.68 Issue 5: whether the parties are entitled to the Remedies prayed for?

Counsel for the Applicant asked the Tribunal to make orders to effect that the decisions of both the Authority and the Accounting Officer are void. Counsel prayed the Tribunal to instruct the Entity execute the contract for management and collection of revenue from Hoima Taxi/Bus Park Kahoora Division with the Applicant and award costs to the Appellant.

- 4.69 In response, the Authority submitted that the appeal lacked merit and should be dismissed with costs.

- 4.70 As already indicated earlier in this Decision, the Tribunal found that the Accounting Officer, having reviewed the bid of the Applicant as required by regulation 5 of S.I 16 of 2014, fulfilled the requirements for administrative review. The documents spoke for themselves; the Applicant was heard. The proceedings of the Accounting Officer and consequently the Authority were therefore not null and void. The Tribunal declines to refer the matter back to the Accounting Officer for a hearing as requested by the Applicant because there is no bid, the procurement process having been cancelled by the Accounting Officer who even asked the Applicant to pick its bid security from the procurement office.

4.78 The Tribunal found that the Accounting Officer rightly found that the Applicant had no certified copy of the certificate of registration, one of the documents evidencing eligibility to bid as specified in the Solicitation Document. This fact was not disputed by the Applicant. As the BEB, the Applicant therefore fell short of the eligibility requirement to wit, a certified copy of the certificate of registration. The Accounting Officer acted within his powers to cancel the procurement process, having found that the anomalies were material i.e. they affected eligibility.

5.0 DECISION OF THE TRIBUNAL

1. The Tribunal affirms the recommendation of the Authority that Hoima Town Council proceeds with the implementation of the Accounting officer's decision.
2. Each party shall meet its own costs.

Dated at Kampala this 29th Day of October 2014.

SIGNED by the said
OLIVE ZAALE OTETE

SIGNED by the said
MOSES JURUA ADRIKO

SIGNED by the said
DAVID KABATERAINE

SIGNED by the said
ARCHITECT JOEL KATEREGGA