

**THE REPUBLIC OF UGANDA  
PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS APPEALS  
TRIBUNAL**

**APPLICATION NO. 31 OF 2021**

**BETWEEN**

**MBALE UNITED TRUCKS AND PICKUPS DRIVER  
ASSOCIATION =====APPLICANT**

**AND**

**MBALE CITY COUNCIL =====RESPONDENT**

**APPLICATION FOR REVIEW IN RESPECT OF THE PROCUREMENT FOR  
THE COLLECTION OF REVENUE FROM VEHICLES/TRUCKS, LOADING  
AND OFFLOADING FEES IN MBALE CITY FOR THE FINANCIAL YEAR  
2021-2022 UNDER OPEN NATIONAL BIDDING VIDE PROCUREMENT  
REFERENCE NUMBER MBAL856/SRVCS/21-22/00009**

**BEFORE: FRANCIS GIMARA S.C, CHAIRPERSON; NELSON NERIMA;  
GEOFFREY NUWAGIRA KAKIRA AND PAUL KALUMBA, MEMBERS**

## **DECISION OF THE TRIBUNAL**

### **A. BRIEF FACTS**

1. On 2<sup>nd</sup> August 2021, Mbale City Council (the Respondent/Entity) published an advert in the New Vision Newspaper for open bidding for the collection of revenue from vehicles/trucks, loading and off-loading in Mbale City for the financial year 2021-2022.
2. On 24<sup>th</sup> August 2021, the Applicant and other interested bidders submitted their bids to the Respondent for evaluation and comparison for award of contract.
3. On 9<sup>th</sup> November 2021, the Notice of Best Evaluated Bidder was displayed by the Respondent naming M/s Mbale City Tippers Drivers & Owners SACCO as the Best Evaluated Bidder. The Applicant's bid was unsuccessful for alleged poor performance/indebtedness in terms of monthly payments/remittance to the City Council.
4. On 16<sup>th</sup> November 2021, the Applicant filed an application for administrative review with the Accounting Officer of the Respondent being dissatisfied with the decision of the Respondent.
5. The Accounting Officer had not furnished a decision to the Applicant in response to the application for administrative review dated 16<sup>th</sup> November 2021 by 30<sup>th</sup> November 2021, which prompted the Applicant to apply to the Tribunal for administrative review on 30<sup>th</sup> November 2021.

### **B. APPLICATION TO THE TRIBUNAL**

1. The Applicant averred that the Accounting Officer erred in law and in fact when he did not make a decision within 10 days of receipt of the administrative review complaint by the Applicant. That a decision made and communicated outside the statutory timeframe is a blatant breach of the law and therefore no decision at all.



2. The Applicant contended that the Respondent erred in law when it found and declared M/s Mbale City Tipper Drivers & Owners SACCO as the Best Evaluated Bidder.
3. The Applicant argued that the bid submitted by M/s Mbale City Tipper Drivers & Owners SACCO was not substantially compliant or responsive to the bid document since it lacked a registered specific power of attorney, a valid tax clearance certificate, and neither was it accompanied by the pre-requisite bid security. The Applicant stated that on this premise, the Best Evaluated Bidder's bid did not pass the required legal standard and that M/s Mbale City Tipper Drivers & Owners SACCO was erroneously declared as the Best Evaluated Bidder.
4. The Applicant stressed that the procurement exercise was flawed with malpractice and illegal conduct. That the Respondent's resolutions made to re-advertise the procurement are irregular and unjustifiably impose a tax burden on the economy to re-conduct a procurement process in which only two bidders participated. The Applicant averred that the appropriate course of action is to nullify the award to M/s Mbale City Tipper Drivers & Owners SACCO and issue the contract to the only remaining bidder in the process.
5. The Applicant prayed that the award issued to M/s Mbale City Tipper Drivers & Owners SACCO be nullified/cancelled and the contract be awarded to the Applicant; that the Respondent be condemned to punitive damages; that the Applicant be awarded general damages and the costs of this Application.

**C. REPLY TO THE APPLICATION**

1. On 6<sup>th</sup> December 2021, the Respondent's City Clerk in response to this application communicated in a letter that the Respondent had reviewed

the application in accordance with Regulation 139 of the Local Governments PPDA Regulations 2006 and found some merit in some of the grounds raised by the Applicant and therefore resolved that the impugned procurement be cancelled and be re-advertised.

**D**     **THE ORAL HEARING**

The Tribunal held an oral hearing on 14<sup>th</sup> December 2021 via zoom software. The appearances were as follows:

1. Counsel Nangulu Eddie and Counsel Kisakye Rebecca represented the Applicant. Mr. Abdu Madoi and Mr. Sam Nambasi representatives of the Applicant.
2. Mr. Kyasanku accounting officer of the Respondent and Mr. Wodero Ali Procurement officer appeared for the Respondent.
3. The Best Evaluated Bidder was not present at the hearing.

**E.**     **SUBMISSIONS**

During the oral hearing, the Applicant highlighted its written submissions and also provided clarifications to the Tribunal. The Respondent presented only oral submissions before the Tribunal.

Applicant

1. The Applicant averred that the Accounting Officer erred in law and in fact when he did not make a decision within 10 days of receipt of the administrative review complaint by the Applicant. That a decision made and communicated outside the statutory timeframe is a blatant breach of the law and therefore no decision at all.
2. The Applicant contended that the Respondent erred in law when it found and declared M/s Mbale City Tipper Drivers & Owners SACCO as the Best Evaluated Bidder. The Applicant argued that the bid



submitted by M/s Mbale City Tipper Drivers & Owners SACCO was not substantially compliant or responsive to the bid document since it lacked a registered specific power of attorney, a valid tax clearance certificate, and neither was it accompanied by the pre-requisite bid security. The Applicant stated that on this premise, the Best Evaluated Bidder's bid did not pass the required legal standard and that M/s Mbale City Tipper Drivers & Owners SACCO was erroneously declared as the Best Evaluated Bidder.

3. The Applicant stressed that the procurement exercise was flawed with malpractice and illegal conduct. That the Respondent's resolutions made to re-advertise the procurement are irregular and unjustifiably impose a tax burden on the economy to re-conduct a procurement process in which only two bidders participated. The Applicant averred that the appropriate course of action is to nullify the award to M/s Mbale City Tipper Drivers & Owners SACCO and issue the contract to the only remaining bidder in the process.
4. The Applicant explained that there was no possibility of fully complying with its previous contract with the Respondent due to the nationwide COVID-19 lockdown and argued that previous debt is not a bar against bidding in a subsequent procurement.
5. The Applicant prayed that the award issued to M/s Mbale City Tipper Drivers & Owners SACCO be nullified/cancelled and the contract be awarded to the Applicant; that the Respondent be condemned to punitive damages; that the Applicant be awarded general damages and the costs of this Application.

Respondent

1. The Respondent averred that on 6th December 2021, the Respondent's City Clerk in response to this application communicated in a letter that

the Respondent had reviewed the application in accordance with Regulation 139 of the Local Governments PPDA Regulations, 2006 and found some merit in some of the grounds raised by the Applicant and therefore resolved that the impugned procurement be cancelled and be re-advertised.

2. The Respondent argued that the purpose of the procurement was for it to obtain revenue and it could not award a contract to the Applicant who had defaulted payment in the previous contract with the Respondent by over UGX. 200 Million even after various extensions granted to it by the Respondent.
3. The Respondent prayed that the application be dismissed and the cancellation and re-tender of the procurement be allowed to proceed.

#### **F. RESOLUTION BY THE TRIBUNAL**

##### **Issues**

We now revert to the substantive issues in this application:

- i. Whether the Tribunal is clothed with jurisdiction to review matters raised by the instant Application?*
- ii. Whether the Respondent erred in law and fact when it disqualified the bid of the Applicant?*
- iii. What remedies are available to the Parties?*

#### **Resolution of Issues Raised**

##### **Issue 1**

**Whether the Tribunal is clothed with jurisdiction to review matters raised by the instant Application?**



1. **Section 75 of the Public Procurement and Disposal of Public Assets Act, 2003** as amended provides that a procuring and disposing entity may reject any or all bids at any time prior to the award of the contract.
2. The Respondent in a letter addressed to the Tribunal dated December 6, 2021 indicated that it had reviewed the complaint of the Applicant, found merit in the same and had therefore decided to cancel the impugned procurement and further ordered the same to be re-advertised.
3. In essence, the Respondent was pleading that the Tribunal could not review its decision to cancel a procurement pursuant to **section 91I (3) (a)** of the **Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021** which provides that a decision of procuring and disposing entity to reject any or all bids prior to the award of contract under section 75 of the Act shall not be subject to review by the Tribunal.
4. The Tribunal has previously dealt with a somewhat similar circumstance in ***Dott Services Ltd v PPDA & UNRA Application No. 3 of 2017***. In that case, the Tribunal held that the jurisdiction of the Tribunal to review an application is only restricted if the matter before it falls within the ambit of **section 91I (3) (a)-(c) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021** .
5. **Section 91I (3) (a) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021** only comes into play when there has not been an award of contract under Section 75 of the Act. Therefore, for a procurement to be validly cancelled, the cancellation must have occurred prior to or before a contract is awarded to the best evaluated bidder



6. For the Tribunal to properly resolve this question, the underlying questions that need to be answered are what amounts to an award of a contract and whether a decision to award a contract by a contracts committee amounts to an award.
7. The interpretation section of the **Public Procurement and Disposal of Public Assets Act 2003** as amended, defines an “award” to mean “a decision by a district contracts committee established under the Local Governments Act, Cap. 243 or Contracts Committee provided for in paragraph (b) of section 24, or any other subsidiary body of a procuring and disposing entity to which a Contracts Committee or a district contracts committee may delegate powers of adjudication and award within a specified financial threshold, to determine the successful bidder” **emphasis added.**
8. Section 29 (c) of the **Public Procurement and Disposal of Public Assets Act 2003** provides that the contracts committee has power to award contracts. Regulation 17 (1) (c) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations 2006* similarly provides that the contracts committee has power to award contracts.
9. Accordingly, it is the duty of a Contracts Committee to award contracts in accordance with applicable procurement or disposal procedures as stipulated under **Section 29 (c) of the Public Procurement and Disposal of Public Assets Act 2003** and the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations 2006*.
10. It is important to note that under the **Public Procurement and Disposal of Public Assets Act 2003**, as amended, an award decision is not a contract. Further, an award shall only be confirmed by a written contract signed by both the provider and the procuring and disposing entity as per Section 76 (1) and (3) of the **Public Procurement and Disposal of Public Assets Act 2003**.



11. Therefore, although used interchangeably with the legislative text of the procurement statutes in Uganda, the words “*an award decision*”, “*award of a contract*” and “*award*”, all refer to the act of a Contracts Committee of approving the evaluation Report and making an award within a specified financial threshold, to determine the successful bidder. This act is normally concretized by execution of a written contract signed by both the provider and the procuring and disposing entity.
12. We noted that in the Respondent’s letter dated November 29, 2021 addressed to the Applicant’s lawyers and 6<sup>th</sup> December 2021 letter addressed to the Registrar of the Tribunal, the Accounting Officer of the Respondent communicates the decision to the effect that “*the procurement process for loading and offloading in Mbale City for the financial year 2021/2022 be cancelled*”.
13. A “*procurement process*” as defined in the interpretation section of the PPDA Act 2003 as amended, means *the successive stages in the procurement cycle including planning, choice of procedure, measures to solicit offers from bidders, examination and evaluation of those offers, award of contract, and contract management*. It thus follows that the purported cancellation of the procurement process by the respondent was intended to terminate the entire process including award of contract by the contracts committee.
14. The purported cancellation in the instant application occurred after the contracts committee had on 9<sup>th</sup> November 2021, approved the award of contract to the best evaluated bidder culminating into the display of the best evaluated bidder notice (NOBEB) on November 9, 2021.
15. At the request of the Tribunal, the Respondent on 14<sup>th</sup> December 2021, availed a copy of a Contracts Committee decision dated 29<sup>th</sup>



November 2021, in which the committee *approved the administrative review report and its recommendation to cancel the procurement process and prepare to re-advertise the procurement.*

16. It is our finding that the Contracts Committee having made an award of Contract on 9<sup>th</sup> November 2021, it could not purport by a subsequent sitting on 29<sup>th</sup> November 2021, cancel the entire procurement process. This is because **section 75 of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021** is emphatic that a procurement process can only be cancelled at any time, before a contract is awarded to the best-evaluated bidder. After the award of contract on 9<sup>th</sup> November 2021, the Contracts committee was thus *functus officio* in as far as its powers to cancel a procurement process is concerned.
17. **Sections 89(1) and 89(2) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021** allows a bidder to seek administrative review where the bidder is aggrieved by a decision of a procuring and disposing entity and/or in circumstances where there is any omission or breach by a procuring and disposing entity, of this Act, regulations or guidelines made under this Act or any provision of the bidding documents.
18. **Section 89 (1) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021** as amended states that 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.
19. **Section 89 (3) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021** as amended states that:  
*A complaint 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 on payment of the fees prescribed;*
- (b) *be made within ten working days after the date the bidder first becomes aware or ought to have become aware of the circumstances that give rise to the complaint.*

20. An application for administrative review made pursuant to **Sections 89(1) and 89(2) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021** must be resolved and a decision made within ten days of receipt of the complaint as per **Sections 89(7) and 89(2) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021** . For a complaint that was received by the Accounting Officer on November 16, 2021, the Accounting Officer was statutorily expected to make and communicate his decision regarding the Complaint by 26<sup>th</sup> November 2021.

21. The Tribunal finds that the Accounting Officer erred in law and in fact when he did not furnish a decision within the prescribed timeframe of ten (10) days from 16<sup>th</sup> November 2021 when the Applicant applied for administrative review to the Accounting Officer. It is our finding that the decision communicated on 29<sup>th</sup> November 2021, was 3 days late and contrary to section 89(7) of the **Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021** . Such dilatory conduct by the Accounting Officer must not be condoned for non-compliance with provisions of the procurement statute is fatal.

22. Indeed, in ***Galleria in Africa v Uganda Electricity Distribution Company [2018] UGSC 19***, the Supreme Court held as follows:

***“... There’s no way the Act can regulate practices in respect of public procurement and disposal of public assets unless if the provisions are adhered to strictly to the letter. The provisions cannot be directory merely. They are for all purposes and***



***intents mandatory and non-compliance with them makes the proceedings fatal.”***

23. In absence of a decision by the Accounting Officer, the deadline for the Applicant to file an application with the Tribunal pursuant to sections 91I (1)(a) and 91I(2)(b) of the **Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021** began to run on November 27, 2021 and would end on December 6, 2021. It therefore follows that the instant application filed with the Tribunal on November 30, 2021 was tritely filed within the statutory timelines and is therefore competent.
24. It is therefore our finding that the cancellation of a procurement process by an Accounting Officer based on the erroneous approval of the Contracts Committee was in breach of the Act, regulations or guidelines made under the Act. The illegality of the actions of the Accounting Officer were further exacerbated by the omission to make and communicate a decision on the Compliant in time, tritely bringing the entire procurement process within the ambit of and vesting the Tribunal with jurisdiction to review the instant Application pursuant to **section 91I (1) (a) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021**.
25. **The Tribunal answers this issue in the affirmative.**

## **Issue 2**

**Whether the Respondent erred in law and fact when it disqualified the bid of the Applicant?**

26. A Procuring and disposing entity's determination of a bid's compliance and responsiveness shall be based on the contents of the bid as per **Regulation 73(1) of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006**.



27. In *Arua Municipal Council v Arua United Transporters' SACCO C.A 25 of 2017*, Justice Mubiru held as follows:
- “...All bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.”***
28. **Regulation 73(2)** of the ***Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*** states as follows *“A substantially compliant and responsive bid shall be one that conforms to all the instructions, requirements, terms and conditions of the bid documents without material deviation, or omission”*. This requirement is reproduced in **ITB 28.2** of the Bidding Document.
29. It thus follows that where a bid is not substantially compliant and responsive to the bid documents, it shall be rejected by the procuring and disposing entity and may not subsequently be made compliant or responsive by the bidder by correction of the material deviation, or omission as per **Regulation 73(3)** of the ***Local Governments (Public Procurement and Disposal of Public Assets) Regulations***. Also see **ITB 28.3** of the Bidding Document
30. ITB 31.2 of the bidding document read together with the **Commercial and Technical Criteria 5.1 (a)** required a bidder to submit proof of experience of *“a manager with a minimum qualification of Diploma in any field and with experience of one year in services of a similar nature (Bidders will be required to submit a copy of the diploma certificate/ transcript and a copy of the CV as evidence)”*.
31. **Commercial and Technical Criteria 5.1 (b)** stated as follows, *“Experience of the firm/ managers in collection of revenue of the similar nature (Bidders will be required to submit copies of contract*



**agreements/Local purchase orders/reference letters or receipts as evidence). NOT APPLICABLE TO NEW SACCO's**

32. Accordingly, the Applicant submitted reference letters as evidence of its experience in compliance with the **Commercial and Technical Criteria 5.1 (b) of the bidding document**

33. We noted that matters related to the past or previous performance of the Applicant first surfaced in the Evaluation Report of September 30, 2021 at page 3 where the evaluation committee stated as follows:

**Recommendation**

*On the basis of the evaluation method and criteria stated in the Invitation, the evaluation committee recommends that;*

1. *The contract for revenue collection from loading and offloading fees is from Mbale United Trucks and Pickups Driver Association with the best-evaluated bid total of UGX 19,500,000/=.*
2. *However, the firm is indebted to the Council and management should agree with the services provider on the resettlement plan to run concurrently with the new contract.*
3. *Negotiations are not required*

The Contracts Committee in its sitting of 4<sup>th</sup> October 2021 at Minute MC/CC/024/2021-22(c) at page 2 observed that “the recommendation of the firm’s indebtedness to council was not clear, the evaluation committee should determine how much Council demands, since the C.F.O’s previous letter indicated that they are highly indebted.

**Resolution**

*The contracts committee rejected the evaluation report and its recommendation to award the contract for revenue collection from loading and offloading to Mbale United Trucks and Pickups Driver Association and that re-evaluation be conducted taking into account the indebtedness of the firm.*



34. It is on the said resolution of the Contracts committee that the re-evaluation of bids resulted into the Applicant's bid being declared as non-responsive at the technical evaluation stage. The Re-evaluation Report of November 5, 2021 stated as follows:

*“Bidder no.1 Mbale United Trucks and Pickups Driver Association SACCO was disqualified due to non-payment or poor payment of revenue. Refer to the Principal Finance Officer's Letter Ref: CR. 155/1 dated 21<sup>st</sup> June 2021.”*

35. The said evaluation report further waived the requirement for a tax clearance certificate on the basis that Mbale City Tipper Drivers & Owners SACCO had just registered on 23<sup>rd</sup> August 2021 under Registration Number P. 19873 yet the bidding was closed on August 24, 2021.

36. It is our finding that the omission to submit the same was fatal and a material deviation since its rectification would unfairly affect the competitive position of other bidders presenting substantially compliant and responsive bids, contrary to ITB 28.2(c) and the preliminary examination criteria 3.1(c) of the bidding document.

37. It is important to note that the bid notice for the impugned procurement under category B: MANAGEMENT OF REVENUE SOURCES clearly stated that registered SACCO's in the above revenue sources shall be given priority subject to the fulfilment of the conditions detailed in the bidding documents. A SACCO like Mbale City Tipper Drivers & Owners SACCO which had not fulfilled the requirement for a tax clearance certificate could not thus be given any priority.

38. Accordingly, a purported waiver of the requirement for a tax clearance certificate in favour of Mbale City Tipper Drivers & Owners SACCO would definitely substantially alter anything such as a tax clearance certificate which forms a crucial or deciding factor in the evaluation



of the bid at the preliminary evaluation stage contrary to **Regulation 74(1)(a) and 74(2)(c) of Local Governments (Public Procurement and Disposal of Public Assets) 2006**. Mbale City Tipper Drivers & Owners SACCO had thus failed the eligibility test and thus ought to have been disqualified. See **Old Kampala Students Association vs. Old Kampala Senior Secondary School & PPDA, Application No. 7 of 2017**

39. It is trite to note that **Regulation 59 of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations 2006** gives the Procuring and Disposal Entity the discretion to carry out due diligence test on a bidder or a bid in any operations of a bidder that a contracts committee determines as requiring verification or checking in exercising an obligation of due care in a procurement or disposal process and such an exercise is not confined to the pre or post-qualification stage or the procedure or content relating to those stages.
40. The Ministry of Finance, Planning and Economic Development in a circular addressed to Accounting Officers on conducting due diligence on information submitted by bidders dated 7<sup>th</sup> August 2014 guided that *due diligence exercise should inform the evaluation process and should be undertaken before the award of contract to verify the information included in the bid document and confirm the capacity of the bidder to handle the procurement.*
41. The policy justification for the said guideline is deduced from the opening paragraph of the circular addressed to Accounting Officers on conducting due diligence on information submitted by bidders dated 7<sup>th</sup> August 2014 and premised on the fact that Accounting Officers were committing the Government under high value contracts with bidders without following the requisite procedures for due diligence resulting into a number of contracts being signed with non performing bidders.



42. The Tribunal has in its decisions guided that a due diligence test should be relevant to the Bid and should not extend to extraneous or remote matters which have no proximity to the evaluation criteria. See ***Elite Chemicals Ltd vs. Uganda Coffee Development Authority (UCDA), Application No. 8 of 2021*** at Paragraph 31 of the decision.
43. It thus follows that the Respondent had a duty to conduct due diligence on the Applicant as the evaluation committee's recommended best evaluated bidder, to ascertain its capacity to perform the contract, at any time, before award of contract as per the guidance provided by the Ministry of Finance, Planning and Economic Development.
44. The procurement in this instant application relates to collection of revenue from vehicles/trucks loading and offloading in Mbale City under category B: MANAGEMENT OF REVENUE SOURCES. It thus follows that due diligence exercise conducted on the operation of a bidder including the procurement and disposing entity's knowledge or past association with the bidder and the risks associated with non-performance of the bidder is not alien to the evaluation criteria but lawful and tritely provided for under **Regulation 59(3)(b)& (c) of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations 2006**.
45. We have reviewed the City Treasurer's letter addressed to the City Clerk dated 21<sup>st</sup> June 2021 in which he requested for a contract extension of the contracts of contracts implementing revenue contracts for a further 3 months from July 2021 to September 2021 to allow the said contractors pay the outstanding arrears. A schedule of arrears was attached in which it indicated at No. 9 that Mbale United Trucks and Pickups Driver Association had an opening balance of UGX 25,300,000/= as at 1<sup>st</sup> July 2020, an additional balance of UGX168,000,000/= and that at 30<sup>th</sup> July 2021, its arrears stood at 169,000,000/=. Recoveries worth UGX 24,300,000/= had been made with the Financial year 2020/21.



46. The City Treasurer's letter addressed to the City Clerk dated 21<sup>st</sup> June 2021 therefore informed the procurement and disposing entity's knowledge or past association with the bidder and the risks associated with non-performance of the bidder of the current contract arising out the instant procurement process.
47. It is important to note that as per **Section 95(1) (f) of the Public Procurement and Disposal of Public Assets Act 2003**, the procuring and disposing entity may after appropriate investigations reject the proposal for award of the contract to a bidder where the entity is satisfied that the affected bidder to whom a proposal to award a contract is made, is engaged in a fraudulent practice. The investigations contemplated in this provision are expansive enough in scope to include conduct of due diligence exercise.
48. The definition of a "fraudulent practice" *includes misrepresentation of facts in order to influence a procurement or disposal process or the execution of a contract to the detriment of a procurement and disposing entity*".
49. The attachment of reference letters from divisions of the Respondent city to show the Applicant's compliance with the **Commercial and Technical Criteria 5.1 (b) of the bidding document** well aware that its performance was not satisfactory amounted to misrepresentation of facts in order to influence a procurement or disposal process.
50. The Contracts Committee was therefore within its rights to reject the proposal for award of the contract to the Applicant in its sitting of 4<sup>th</sup> October 2021 at Minute MC/CC/024/2021-22(c). The policy considerations in the impugned procurement would dictate that the said contract should not be awarded to a bidder who has the previous record of non-performance and is in arrears in as far as the much



needed revenue collection source that forms the subject matter of this procurement is concerned.

51. The Contracts Committee would have found that both **Mbale United Trucks and Pickups Driver Association** and **Mbale City Tippers Drivers & Owners SACCO** were not qualified for an award in the instant procurement and would have gone ahead to order for a re-tender of the entire procurement process than ordering for a re-evaluation. The order for re-evaluation was therefore erroneous.
52. We also noted that the drafting of the Commercial and Technical Criteria 5.1 (b) of the bidding document favoured newly registered SACCOs to the detriment to the Applicant and thus acted to minimise competition and impeded on the intended achievement value for money contrary to **Section 46 of the Public Procurement and Disposal of Public Assets Act 2003** as amended.
53. In light of the fact that the bid notice for the impugned procurement under category B: MANAGEMENT OF REVENUE SOURCES clearly stated that **Registered SACCO's in the above revenue sources shall be given priority subject to the fulfilment of the conditions detailed in the bidding documents.** It is therefore our finding that the drafting of the Commercial and Technical Criteria 5.1 (b) of the bidding document in favour of newly registered SACCOs was discriminatory and contrary to **Section 43 of the PPDA Act 2003** as amended.
54. Had the entity intended to effectively assess the capability of the bidders to execute the contract, it would have provided for post qualification as a criteria in the bidding document in accordance with **Regulation 82 of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006.**



55. It is also important to note that findings of the due diligence exercise on the best evaluated bidder must be shared with the affected bidder in respect of their right to a fair hearing and that the affected bidder given any opportunity to rebut or challenge the contents of the due diligence report in accordance with the principles of non-discrimination, transparency, accountability and fairness as stipulated in sections 44 and 45 of the Public Procurement and Disposal of Public Assets Act 2003. See the Tribunal decision in ***Coil Limited vs PPDA & UNRA, Application No.3 of 2021.***
56. It is our finding that the Applicant was not given any opportunity to rebut or challenge the contents of the *C.F. O's previous letter referred to in the* Contracts Committee sitting of 4<sup>th</sup> October 2021 at Minute MC/CC/024/2021-22(c) or even the Principal Finance Officer's Letter Ref: CR. 155/1 dated 21<sup>st</sup> June 2021 as referred to in the Re-evaluation Report of November 5, 2021, before the Contracts Committee rejected the award of Contract to the Applicant. This was unfair to the Applicant and contrary to the principles of non-discrimination, transparency, accountability and fairness as stipulated in sections 44 and 45 of the Public Procurement and Disposal of Public Assets Act 2003
57. The Contracts Committee may have through its investigations found that the Applicant had been engaged in fraudulent practices but the procedural steps taken to reject the proposal for award of the contract to the Applicant in its sitting of 4<sup>th</sup> October 2021 at Minute MC/CC/024/2021-22(c) were irregular and contrary to provisions of the Act and regulations made thereunder.
58. **The Tribunal resolves this issue in the negative.**

### **Issue 3**

#### **What remedies are available to the Parties?**



59. Having found that the purported cancellation of the procurement process by the Contracts Committee on 29<sup>th</sup> November 2021 was illegal and *ultra vires*, that both the Applicant and Best evaluated bidder were not qualified for an award under the impugned procurement and that there were numerous fatal non-compliance with provisions of the Public Procurement and Disposal of Public Assets Act and Regulations made thereunder, the Applicant is not entitled to any of the reliefs prayed for. The most prudent and preferable course of action is that entire procurement process is cancelled and the entity be at liberty to re-tender the said procurement process if it so wishes.

**G. DISPOSITION**

1. The Application is partially allowed.
2. The decisions of the contracts committee and Accounting Officer of the Respondent dated 29<sup>th</sup> November 2021 are set aside.
3. The procurement for collection of revenue from vehicles/trucks loading and offloading in Mbale City under Reference Number MBAL856/SRVCS/21-22/00009 is hereby cancelled.
4. The Respondent may re-tender the procurement process if it so wishes.
5. The Tribunal's suspension order dated December 3, 2021 is vacated.
6. Each party to bear its own costs.

Dated at Kampala this 16<sup>th</sup> day of December 2021.



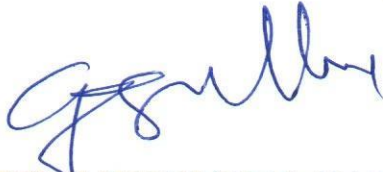
**FRANCIS GIMARA S.C**  
**CHAIRPERSON**



**NELSON NERIMA**  
**MEMBER**



**PAUL KALUMBA**  
**MEMBER**



**GEOFFREY NUWAGIRA KAKIRA**  
**MEMBER**