

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

APPLICATION NO. 34 OF 2022

BETWEEN

KINGDOM KAMPALA LIMITED===== APPLICANT

AND

JUDICIAL SERVICE COMMISSION=====RESPONDENT

**APPLICATION FOR REVIEW OF THE DECISION OF THE JUDICIAL
SERVICE COMMISSION IN RESPECT OF THE PROCUREMENT FOR
PROVISION OF OFFICE SPACE UNDER PROCUREMENT
REFERENCE NO.JSC/NCONS/22-23/00033**

**BEFORE: NELSON NERIMA; THOMAS BROOKES ISANGA;
GEOFFREY NUWAGIRA KAKIRA, PAUL KALUMBA AND CHARITY
KYARISIIMA; MEMBERS**

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. Judicial Service Commission (the Respondent), initiated a procurement for provision of office space under procurement reference No.JSC/NCONS/22-23/00033 on 19th August 2022, using Direct Procurement Method.
2. The Bidding Document was issued to 4 bidders namely Eclipse Properties Ltd, Kingdom Kampala Ltd (the Applicant), RE/MAX Uganda and UAP/Old Mutual Property (U) Ltd. Bids were returned on 25th August 2022.
3. Having evaluated the bids the Evaluation Committee of the Respondent recommended the Applicant's bid as the best evaluated bid at a price of UGX 189,220,080/= inclusive of service charge and 18% VAT.
4. The Evaluation Committee further recommended that negotiations be conducted to fit the bid price within the budget of the Respondent. The Evaluation Committee proposed a negotiation team and further proposed the contract price to be UGX 189, 220, 080 inclusive of service charge and 18% VAT.
5. The Evaluation Report of the Evaluation Committee was submitted to the Contracts Committee by the Head of the Procurement and Disposal Unit on 5th September 2022 with the request to approve the Evaluation Report.
6. The Contracts Committee sat on September 6, 2022, considered the Report submitted and cancelled *the procurement process*.
7. The Respondent displayed the Notice of Best Evaluated Bidder on September 22, 2022 with a removal date of September 26, 2022. The Notice stated that there was no best evaluated bidder and that the Applicant's bid was unsuccessful for having a "*High bid price than the User's estimated bid price*".

8. The Applicant being aggrieved by the conduct of the procurement process, applied for administrative review before the Accounting Officer of the Respondent on September 26, 2022.
9. The Accounting Officer in a decision dated September 27, 2022 reiterated that the Applicant's bid was unsuccessful on account of its price being higher than the entity's estimated price and budget. That the law precludes an entity from entering into a contract unless the Accounting Officer confirms that funds have been committed for the proposed contract. The Accounting Officer implored the Applicant to accept the outcome of the procurement process.
10. The Applicant being dissatisfied with the decision of the Accounting Officer, filed the instant application with the Tribunal on **September 29, 2022**, seeking to review the decision of the Respondent's Accounting Officer.
11. The Respondent filed a reply in which is reiterated that the Applicant's bid price of UGX 189,220,080 was higher than the Respondent's estimated price of UGX 177,000,000 and negotiations were not permitted. That the procurement was cancelled and the Tribunal has no jurisdiction to review such a decision.

B. APPLICANT'S WRITTEN SUBMISSIONS

1. The Applicant, through *Walusimbi & Co. Advocates*, submitted that the methodology as stated in the bidding document was technical compliance selection. The technical compliance methodology according to the solicitation document required that the lowest priced bid, which is eligible, compliant and substantially responsive be considered.
2. *Kingdom Kampala Limited* had the lowest priced bid and should have been recommended for award of contract. Counsel cited regulations 21(6) and 31 of the Public Procurement and Disposal of Public Assets (Evaluation) regulations; the *Instructions to Bidders*; and **Arua Municipal Council v Arua United**

Transporters Sacco (Civil Appeal 25 of 2017) [2017] UGHCCD 171.

3. That the Contracts Committee could not reject the Applicant's bid, after recommendations from the Evaluation Committee to negotiate the price with the applicant.
4. That contrary to section 57 of the *Public Procurement and Disposal of Public Assets Act*, no communication was made of any cancellation of the procurement by the Respondent.
5. That under section 33(1) (a) and (b) of the Public Procurement and Disposal of Public Assets Act, requires that where there is a disagreement between the Contracts Committee and a Procurement and Disposal Unit (PDU), then the Committee is required to return the submission to the Procurement and Disposal Unit for review giving reasons for its disagreement or request for independent advice from the Authority.
6. The only options available to the respondent following the report of the Evaluation Committee were the remedies as cited under section 33, which the Respondent did not exercise. Counsel relied on the Tribunal decision in ***Impiger Technologies Private Limited v Higher Education Students Financing Board Application 25 of 2022*** to the effect that the role of the Contracts Committee is to approve or disapprove the recommendation to award a contract or cancellation of a procurement process and not to initiate the cancellation.

C. RESPONDENT'S WRITTEN SUBMISSIONS

1. The Respondent, through the Attorney General's chambers, raised a preliminary point of law that under section 91I (3) (a) of the *Public Procurement and Disposal of Public Assets Act*, a decision by a procuring and disposing entity to reject or cancel any or all bids prior to award of the contract under section 75 is not subject to review by the Tribunal.

2. That the Respondent did not depart from the evaluation criteria. The Evaluation Committee followed the methodology and criteria stated in the invitation. The Applicant's bid was the best evaluated but was higher than the Respondent's budget. Thus the recommendation for negotiations. The decision not to declare the Applicant as the best evaluated bidder was lawful.
3. The Evaluation Committee did not recommend negotiation of the price. The law does not allow negotiation on the price. The Contracts Committee could reject such a proposal if it were made. It is the mandate of the Contracts Committee to ensure that the procurement is conducted in accordance with the law. The Contracts Committee exercised the option to cancel the procurement process.
4. That the issue and display of the best evaluated bid notice which indicated that none of the bids was successful and the reasons for the failure, was sufficient communication in writing.
5. There was no disagreement between the Contracts Committee and the PDU. The PDU is the secretariat for the Contracts Committee, supports functions of the Contracts Committee and manages all procurement or disposal activities of the procuring and disposing entity under section 31(a)(b)&(e) of the *Public Procurement and Disposal of Public Assets Act*. Immediately the Contracts Committee takes a decision to cancel a procurement process, the process is thereby terminated.
6. That the Applicant's bid failed because it was higher than the Respondent's estimated price as well as its budget. The Respondent was not going to sign a contract with a bidder whose price was higher than the available funds. Section 75(1) of the *Public Procurement and Disposal of Public Assets Act* allows the Respondent to cancel a procurement process at any time before the award of a contract to the best evaluated bidder.
7. The reasons for the dismissal of the administrative review complaint by the Applicant are stated in the Accounting Officer's decision. All those reasons are valid in law.

D. ORAL HEARING

1. The Tribunal conducted an oral hearing on 12th October 2022 via the zoom videoconferencing software.
2. The appearances were as follows:
Applicant: Nelson Walusimbi as Counsel. Prabhat Misrah-General, Manager; Kenneth Naigambi- Legal Officer, and Jane Ouko-Senior Legal Officer were in attendance.

Respondent: Moses Mugisha, State Attorney, Attorney General's Chambers, as counsel. In attendance were Dr. Rose Nasali Lukwago the Accounting Officer, Jane Margaret Akurut the Under Secretary, Samuel Mugisha the Deputy Registrar, Nabwire Kiboli Grace the Procurement Officer, and Innocent Atwijukire the Policy Analyst.

E. RESOLUTION OF ISSUES

1. The Application originally framed 5 issues for determination. However, the Respondent raised a preliminary point of law relating to cancellation of a procurement and the jurisdiction of the Tribunal. Both parties submitted on those matters. In the premises, the following issues stand to be determined:
 - 1) Whether the Tribunal has jurisdiction to entertain this Application?
 - 2) Whether the cancellation of the procurement by the Contract's Committee of the Respondent was lawful? de
 - 3) Whether the Respondent departed from the criteria or methodology stated in the bidding document in evaluating the Applicant's bid?
 - 4) Whether the Respondent failed or omitted to make a determination to the effect that the Applicant's bid was the best evaluated bid?
 - 5) Whether the Respondent's Contracts Committee erred in fact and law when it failed or omitted to make an award decision in the impugned procurement?


- 6) Whether the reasons relied upon by the Respondent to dismiss the Applicant's complaint were proper in law?
- 7) What remedies are available to the parties?

Issue no. 1:

Whether the Tribunal has jurisdiction to entertain this Application?

2. The Tribunal is expressly barred from reviewing a decision of a procuring and disposing entity to cancel a procurement in accordance with section 75 of the *Public Procurement and Disposal of Public Assets Act*. See Section 91I (3) (a) of the *Public Procurement and Disposal of Public Assets Act*.
3. Section 75 (1) and (2) of the *Public Procurement and Disposal of Public Assets Act* provides that a procuring and disposing entity may, on the approval of the Contracts Committee, cancel a procurement process or a disposal process at any time, before a contract is awarded to the best evaluated bidder, as may be prescribed. A procurement process may be cancelled where the money available for the procurement is not adequate; there is a significant change in the technical details or circumstances of the procurement requirement; or the circumstances that gave rise to the request for procurement change significantly.
4. This Tribunal therefore has no jurisdiction to review a decision by a procuring and disposing entity to cancel a procurement in accordance with the law.
5. Procurement activities are processes and progressive in a nature that no other step can be taken until a designated stage is completed. See ***Galleria in Africa Ltd v Uganda Electricity Distribution Company Ltd, Supreme Court Civil Appeal No. 8 of 2017.***
6. The Tribunal can only lack jurisdiction when it satisfies itself that the purported cancellation was conducted within the four corners of the law.

7. The Tribunal therefore has jurisdiction to inquire into the decision-making process leading to the cancellation, in order to determine whether there is a valid cancellation within the meaning of section 75 of the *Public Procurement and Disposal of Public Assets Act*.
8. The Respondent avers that the Contracts Committee rejected the Evaluation Committee's recommendation for a negotiation with the Applicant and instead cancelled the procurement process, which ousts the jurisdiction of the Tribunal. On the other hand, the Applicant contends that the purported cancellation was illegal, and insisted that the Tribunal has Jurisdiction to review the processes leading to the cancellation.
9. The Tribunal has to inquire into the veracity of the allegations made by both parties so as to ascertain whether the cancellation decision was made in compliance with or contrary to section 75 of the *Public Procurement and Disposal of Public Assets Act*. The review powers of the Tribunal include the jurisdiction to inquire into the existence or non-existence of a decision by a procuring and disposing entity to cancel the procurement. See ***Mulago Hill Diagnostics Ltd v National Water and Sewerage Corporation, Application No.13 of 2022; Preg Tech Communications v Uganda Police, Application No. 32 of 2021; Mugerwa Fred v Sembabule District Local Government, Application No. 23 of 2022; and Impiger Technologies Private Limited v Higher Education Students Financing Board, Application No. 25 of 2022.***
10. Once the Tribunal determines as a fact that there exists a cancellation which was effected in accordance with section 75 of the *Public Procurement and Disposal of Public Assets Act*, the Tribunal would have no jurisdiction to inquire into the reasons for the said cancellation. However, if the Tribunal finds that there is in fact no cancellation or that the cancellation was not effected in accordance with section 75 of the *Public Procurement and Disposal of Public Assets Act*, then the Tribunal's jurisdiction is not ousted by section 91I(3) of the *Public Procurement and Disposal of Public Assets Act*.

11. The Tribunal is therefore duty bound to inquire into the veracity of the allegations made by the parties in as far as the procedural propriety of the purported cancellation is concerned.
12. Upon inquiry, once the Tribunal determines that a cancellation was effected in accordance with Section 75 of the *Public Procurement and Disposal of Public Assets Act*, its jurisdiction would then be ousted. However, if the cancellation was effected outside the precincts of the law, then the Tribunal's jurisdiction would not have been ousted.
13. **Issue no. 1 is resolved in the affirmative.**
Issue no. 2:
Whether the cancellation of the procurement by the Contract's Committee of the Respondent was lawful?
14. The Evaluation Committee report dated August 26, 2022 recommended that the best evaluated bid was from the Applicant at a total evaluated price of UGX 189,220,080/= inclusive of service charge and VAT. The Evaluation Committee further recommended that negotiations be conducted to fit the bid price within the budget of the Respondent. The committee proposed a negotiation team and further proposed the contract price to be UGX 189, 220, 080 inclusive of service charge and VAT. 
15. The Report of the Evaluation Committee was submitted to the Contracts Committee by the Head of the Procurement and Disposal Unit (PDU) on September 5, 2022 with a request to approve the Evaluation Report.
16. Under Minute 04/22-23/06 of the meeting of September 6, 2022, the Contracts Committee approved the Evaluation report but rejected the recommendation to negotiate with the best evaluated bidder. The reasons given were that the best evaluated bidder's price was higher than the user's estimated market price and the PDU could not ascertain whether the scope could be reduced to fit within the estimated cost.

17. According to the record of the discussions as captured in the Contracts Committee minutes, since it could not be established that the user could reduce on the scope so that the cost fits within the budget, it was recommended by the Contracts Committee that the procurement process be cancelled and that a new procurement process be initiated following the restricted bidding method with adjusted timelines.
18. At the hearing of this Application, the Procurement Officer informed the Tribunal that the cancellation was initiated by the Contracts Committee. That the Procurement Officer did not make a submission to the Contracts Committee to cancel the procurement.
19. Under section 28 (1) (a) of the *Public Procurement and Disposal of Public Assets Act*, the Contracts Committee adjudicates recommendations from the Procurement and Disposal Unit. Under section 75 (1) of the *Public Procurement and Disposal of Public Assets Act*, a procuring and disposing entity may, on the approval of the Contracts Committee, cancel a procurement process or a disposal process. The Contracts Committee has no power to initiate a cancellation of a procurement on its own volition.
20. The role of the Contracts Committee is to approve or disapprove the cancellation, not to initiate the cancellation. Submissions to the Contracts Committee are governed by regulation 13 of the *Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities) Regulations, 2014*. A request by a Procurement and Disposal Unit to the Contracts Committee is made using the appropriate Form. A Contracts Committee considers each request based on the information contained in the Form submitted and the supporting documents, and may approve or reject the request. Where a Contracts Committee rejects a request, it must indicate the reasons for rejecting the request.
21. The PDU made a submission to the Contracts Committee for approval of the Evaluation Committee report. It was one report.

The Respondent's Contracts Committee erred when it approved the Evaluation Report but at the same time purported to reject the recommendation in the same report for negotiations with the best evaluated bidder.

22. Section 33 of the *Public Procurement and Disposal of Public Assets Act* is instructive on how to handle a disagreement between the Contracts Committee with the Procurement and Disposal Unit. The proper course of action was for the Contracts Committee to either return the submission to the Procurement and Disposal Unit for review, giving written reasons for its disagreement; or to request for independent advice from the Authority.
23. The Contracts Committee has no residual power to initiate a cancellation of a procurement process on its own accord. It can only approve or disapprove the cancellation but not initiate the cancellation. The Contracts Committee may express its views or opinions but it cannot unilaterally initiate a cancellation and adjudicate it. The role of the Contracts Committee is to approve or disapprove what has been recommended and submitted by the Procurement and Disposal Unit. In case of a disagreement, section 33 of the *Public Procurement and Disposal of Public Assets Act* provides a resolution mechanism.
See: ***Impiger Technologies Private Limited vs Higher Education Students Financing Board, Application No.25 of 2022.***
24. The upshot of our finding is that the purported cancellation of the procurement process was premature and incompetent without, first, a recommendation from the Procurement and Disposal Unit to cancel the procurement and second, without the decisive approval of the Contracts Committee. There was no compliance with section 75(1) of the *Public Procurement and Disposal of Public Assets Act* in the purported cancellation.
25. The Contracts Committee of the Respondent erred when it unilaterally made a cancellation recommendation and proceeded to approve the purported cancellation in the absence of any

submission to that effect. The impugned cancellation is therefore a nullity and of no legal consequence.

26. **Issue no. 2 is resolved in the negative.**
27. Having found that the cancellation of the procurement was invalid, the matter shall be remitted back to the Respondent for further proceedings not inconsistent with the decision of the Tribunal.

F. DISPOSITION

1. The Application is allowed.
2. The decision of the Respondent's Accounting Officer dated September 27, 2022 is set aside.
3. The impugned cancellation of the procurement by the Respondent's Contracts Committee, dated September 6, 2022, is set aside.
4. The Respondent's Contracts Committee is directed to determine a lawful course of action in a manner consistent with the law and this decision.
5. The determination in (4) above must be made within ten days from the date hereof.
6. The Tribunal's suspension order dated September 29, 2022 is vacated.
7. The administrative review fees paid by the Applicant shall be refunded.
8. Each party shall bear its own costs.

Dated at Kampala this 20th day of October, 2022.



NELSON NERIMA
MEMBER



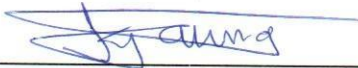
THOMAS BROOKES ISANGA
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GEOFFREY NUWAGIRA KAKIRA
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PAUL KALUMBA
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CHARITY KYARISIIMA
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