

A. BRIEF FACTS

1. The Directorate of Government Analytical Laboratory (**the Respondent**) invited bids from two prequalified firms namely *Seyani Brothers & Co. (U) Ltd. & Parbat Siyani Construction Ltd Joint Venture (the Applicant)* and *China Railway Construction Engineering Group Ltd* to undertake the construction of the proposed national forensic deoxyribonucleic (DNA) Data Base Building Plot 2-4 Loudel Road, Wandegeya, Kampala under Procurement Reference Number DGAL/WRKS/21-22/00081.
2. Upon conclusion of the evaluation process, the Best Evaluated Bidder Notice was displayed on 7th September, 2022 with a date of removal being 20th September 2022, The Notice indicated that the Applicant was the Best Evaluated Bidder at a Total contract price of *UGX 103,005,783,219/= tax inclusive*.
3. On 6th October 2022, the Applicant wrote to the Respondent seeking *an update on the contract signing, given that the ten (10) working days period, post issuance of Best Evaluated Bidder Notice, expired on 20th September 2022 in accordance with ITB 44.1 of the Bidding Document*.
4. On 7th October 2022, the Respondent's Accounting Officer wrote to the Applicant to inform her that the procurement process had been cancelled. The Applicant was advised to collect its bid security that was submitted from the Procurement & Disposal Unit, Directorate of Government Analytical Laboratory, Head Office, Wandegeya, Kampala.
5. The Applicant being aggrieved by the actions of the Respondent's Accounting Officer, requested the Respondent by a letter dated 10th October, 2022 to rectify what it termed as an illegality and communicate a date for contract signing before 14th October, 2022.

6. The Applicant in a letter dated 11th October, 2022, requested the Respondent's Accounting Officer to avail it with information on administrative review fees payable and bank details to which the fees would be paid.
7. The Applicant later applied for administrative review to the Accounting Officer of the Respondent in a letter dated 12th October, 2022.
8. The Applicant's lawyers in a letter dated 18th October, 2022, addressed to the Respondent's Accounting Officer, further reiterated the Applicant's earlier request for information on administrative review fees payable and bank details to which the fees would be paid.
9. The Accounting Officer of the Respondent did not respond to the complaint lodged. The Applicant thus lodged the instant application with the Tribunal on 28th October, 2022 under sections 89(8) and sections 91I (1) (a) of the *Public Procurement and Disposal of Public Assets Act*.
10. The gist of the Applicant's case is that the Respondent could not lawfully cancel the procurement after award of the contract and publication of Notice of Best Evaluated Bidder.
11. The Respondent opposed the application. It averred that there was a significant change in the technical details of the procurement and therefore cancellation was necessary in accordance with section 75 (2) (b) of the *Public Procurement and Disposal of Public Assets Act*. The Respondent further averred that the issuance of the Presidential directive to support local companies was also a ground for cancellation in accordance with Section 75 (2) (c) of the *Public Procurement and Disposal of Public Assets Act*.

B. SUBMISSIONS

Applicant

1. The Applicant filed written submissions. The applicant's case is hinged mainly on a question of law relating to the stage at which a procurement may be cancelled.
2. That on 10th October 2022, the Respondent notified the applicant that in accordance with Instruction to Bidders (ITB) 42 of the Bidding Document, the procurement process for the above project has been cancelled. Under Clause 42 of the ITB and section 75 of the *Public Procurement and Disposal of Public Assets Act*, a procurement cannot be cancelled where a contract has already been awarded to the Best evaluated Bidder.
3. The Applicant sought the following remedies:
 - 1) that the Tribunal finds that the procurement process was still within the Administrative Review Period and cancels any new procurement process to avoid two parallel procurement processes running at the same time.
 - 2) that the Tribunal finds merit in the application and reinstates the illegally cancelled procurement process and instructs the Respondent to sign a Contract with the Best Evaluated Bidder, after approval by the Attorney General, in accordance with Clause 44.1 of the ITB.

Respondent

4. The Respondent admitted that on 7th September 2022, a Notice of Best Evaluated Bidder for the procurement was displayed indicating *Seyani Brothers & Co. (U) Ltd and Parbat Siyani Construction Limited Joint Venture* as the Best Evaluated Bidder. That in the course of the procurement process, a meeting was held between the various stakeholders who are users of the DNA database project. The stakeholders identified the need to incorporate DNA requirements in the National Identification Cards (IDs) and how to effectively collect DNA biometric data. It was decided that the Respondent shall prepare storage for the DNA samples to be collected.

5. The statement of requirements in the bidding document does not include storage for the DNA samples.
6. The Respondent also cited a presidential directive to support local companies and letters from the Minister and Permanent Secretary to halt the procurement process.
7. Further, that the Public Procurement and Disposal of Public Assets Authority advised that in light of the President's directive, the Respondent can cancel the procurement process and undertake a new procurement process.
8. That following the significant changes to the statement of requirements to incorporate storage for the DNA samples, as well as the directive from the President, the Respondent cancelled the procurement.
9. That there was a significant change in the technical details of the procurement and therefore cancellation was necessary in accordance with Section 75 (2) (b) of the Act i.e. the need to incorporate storage space for the DNA samples. The issuance of the Presidential directive to support local companies was also a ground for cancellation in accordance with Section 75 (2) (c) of the *Public Procurement and Disposal of Public Assets Act*.
10. Where circumstances arise that necessitate the cancellation of a procurement process, an Entity can cancel a procurement process. In the instant case, the Entity cancelled the procurement process in accordance with the circumstances for cancellation which are provided for under Section 75 (2) (b) and (c) of the *Public Procurement and Disposal of Public Assets Act*.
11. An Entity cannot be compelled to proceed with a procurement process when circumstances for cancellation have arisen merely because a contract has been awarded.

Applicant's Rejoinder

12. After the hearing, the applicant filed a rejoinder to respond to matters that had been raised by the Respondent and the Tribunal. The Applicant submitted as follows:
13. The Respondent erred in law when he did not guide the Applicant on the required Administrative Review fees and where to pay the said fees after receiving an inquiry letter on 11th October, 2022.
14. That in addition to the physical delivery of the Administrative Review complaint to the Respondent's Accounting Officer on 12th October 2022, it sent an email to the official email address of the Respondent as listed in the bidding documents on 14th October 2022 and attached the Administrative Review complaint along with the reminder for guidance on payment of administrative review fees. The physical copy of the Administrative Review complaint was received by the Respondent's Accounting Officer.
15. The Respondent's Accounting Officer, having received the Administrative Review complaint within time, therefore erred in law, having failed to communicate a decision within the prescribed time, hence the Application's instant application.
16. The change in statement of requirements occurred after the impugned cancellation and it is erroneous for the Respondent's accounting officer to rely on it as a justification for cancellation.
17. Any additional statement of requirement i.e. the need to incorporate storage space for the DNA Samples could easily be handled as a variation or a separate contract.
18. That the advice from PPDA states that the Authority noted, that the procurement process to secure a contractor to construct the National DNA Database Building was at the stage of issue of notice of Best Evaluated Bidder. It is the Applicant's understanding that PPDA assumed that the Award Decision had not yet been made and therefore there was no BEB Notice.

19. The Applicant further relied on the legal opinion provided by the Attorney General dated 22nd September 2022 on the implementation of the Presidential Directives in circumstances where there are ongoing procurement processes. That the Attorney General opined that the Presidential Directive did not provide grounds for cancellation of an ongoing procurement process and the entity was advised to proceed with the ongoing procurement process in accordance with the law.
20. That section 75 of the *Public Procurement and Disposal of Public Assets Act* must be read as a whole and not in parts, as submitted by the Respondent.
21. In response to the Tribunal's inquiry into whether the Respondent was a Procuring and Disposing Entity, the Applicant submitted that neither the Applicant nor the Respondent queried the legal status of the Respondent in their application and submissions and therefore this was not an issue to be heard or disposed of by the Tribunal. That the Respondent is registered as a procuring and disposing entity with the PPDA; the Ministry of Internal Affairs official website lists the Respondent as a government institution; and it also has its own Tax Identification Number.

THE ORAL HEARING

1. The Tribunal held an oral hearing on 9th November, 2022 via *zoom* software. The appearances were as follows:

Sarfaraz Jiwani and Manish Siyani appeared for the Applicant. Ms. Fiona Muhumuza the Legal Officer of Ministry of Internal Affairs and Kepher Kuchana Kateu the Accounting Officer of the Directorate of Government Analytical Laboratory (DGAL) appeared for the Respondent.

In attendance was Robert Masasizi, Head of Procurement Department Unit DGAL.

2. The parties highlighted their respective written submissions and responded to questions put by the Tribunal.

C. **RESOLUTION**

1. The Application raised one substantive issue for determination by the Tribunal to wit; Whether the Respondent breached the law by cancelling the referred procurement process after issuance of BEB notice. However, in view of the pleadings, oral and written submissions of the parties, the Tribunal has recast the issues as follows:

- 1) Whether the Accounting Officer of the Respondent erred in law when he did not make and communicate an administrative review decision on the Applicant's complaint?
- 2) Whether the cancellation of the procurement by the Respondent was lawful?
- 3) What remedies are available to the parties?

Issue no. 1: Whether the Accounting Officer of the Respondent erred in law when he did not make and communicate an administrative review decision on the Applicant's complaint?

1. The Applicant averred in its Application that the Respondent did not guide the Applicant on the required Administrative Review fees and where to pay the said fees after receiving an inquiry letter on 11th October, 2022. The Applicant also averred that the Respondent did not respond to the administrative review complaint which was delivered to the office of the accounting Officer physically on 12th October 2022 and by e mail on 14th October 2022. The Respondent did not deny or otherwise controvert the applicant's assertions. The Applicant adduced evidence that indeed the said letters and email were delivered as alleged.

2. An Accounting Officer has an obligation to guide complainants on payment of administrative review fees. The Accounting Officer failed to guide the Applicant on the required administrative review fees and the modalities for payment.

See: ***Iganga Nkono Central Market Fish and Grocery Cooperative Society Ltd v Iganga Municipal Council, Application no. 32 of 2022.***

3. The Applicant applied for administrative review before the Accounting Officer of the Respondent on 12th October, 2022. The ten days within which the Accounting Officer was required to make and communicate a decision started running on 13th October, 2022 and would have expired on Saturday 22nd October 2022. Section 34 (1) (b) of the *Interpretation Act* provides that in computing time for the purpose of any Act, if the last day of the period is a Sunday or a public holiday (“excluded days”), the period shall include the next following day, not being an excluded day. Since 22nd October 2022 was a Saturday, the last day was Monday 24th October. Therefore, the Accounting Officer was bound to communicate his decision on or before the 24th October, 2022.
4. The provisions of section 89(7) of the *Public Procurement and Disposal of Public Assets Act* are mandatory. The Accounting Officer of the Respondent therefore erred in law when he failed or omitted to make and communicate a decision on the Complaint filed by the Applicant.
5. Under sections 91I(1)(b) and 89 (8) of the *Public Procurement and Disposal of Public Assets Act*, where the Accounting Officer fails to make and communicate a decision, the aggrieved bidder must file an application before this Tribunal within ten days after the expiry of the ten days stipulated under section 89 (7).
6. The ten days started running on 25th October, 2022 and would expire on 3rd November, 2022. The Applicant was within its

statutory rights to file the instant application with the Tribunal on 28th October, 2022.

7. **Issue no. 1 is answered in the affirmative.**

Issue No. 2: Whether the procurement process was lawfully cancelled by the Respondent?

8. 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.
9. The Tribunal has no jurisdiction to review 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*.
10. 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.
11. The Tribunal can only decline jurisdiction when it satisfies itself that the purported cancellation of the procurement was conducted within the four corners of the law.
12. 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*.

13. The Applicant avers that the cancellation of the procurement was illegal. The Respondent avers that the procurement was cancelled in accordance with the law.
14. 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; and***
15. 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*.
16. 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.
17. 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.

See: ***Kingdom Kampala Limited v Judicial Service Commission, Application No. 34 of 2022***

18. Section 75(1) of the *Public Procurement and Disposal of Public Assets Act* 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.*
19. For cancellation of a procurement process to be valid, it must be made prior to award of a contract and be approved by the contracts committee as provided under section 75 above.
See: ***Mulago Hill Diagnostics Limited v National Water and Sewerage Corporation, Application No. 13 of 2022.***
20. Section 3 of the *Public Procurement and Disposal of Public Assets Act* defines an award decision to mean a decision made by the Contracts Committee in accordance with section 28(1) (a) of the Act. Section 28 of the Act provides for the functions of the Contracts Committee which include approving recommendations of the other units in a procurement process like the Procurement Disposal Unit and the Evaluation Committee and making decisions to award contracts.
21. Under regulation 3 of *The Public Procurement and Disposal of Public Assets (Contracts) Regulations, 2014*, after evaluation and any negotiation process, a procurement and disposal unit submits to the contracts committee, a recommendation to award a contract. The Contracts Committee considers the recommendation and makes a decision to award the contract or reject the recommendation.
22. In the instant matter, the Evaluation committee report dated 6th September 2022 recommended *Seyani Brothers & Co. (U) Ltd and Parbat Siyani Construction Limited Joint Venture* as the Best Evaluated Bidder at a contract price of UGX. 103,005,783,219.

On 7th September 2022 the Contracts Committee approved the Evaluation report and contract award to the best evaluated bidder. On 7th September 2022, a Notice of Best Evaluated Bidder for the procurement was displayed indicating *Seyani Brothers & Co. (U) Ltd and Parbat Siyani Construction Limited Joint Venture* as the Best Evaluated Bidder at a contract price of UGX. 103,005,783,219.

23. On 6th October, 2022, the Procurement and Disposal Unit of the Respondent made a submission to the Contracts Committee for approval of cancellation of the procurement. Two justifications were given for the cancellation the first reason was that there were significant changes to the technical requirements that were brought to the attention of the Accounting Officer by stakeholders. The second justification was that the Accounting Officer received information about a presidential directive to engage a specific provider to undertake the works in order to promote capacity of the local construction company.
24. On 6th October 2022, the 153rd meeting of the Contracts Committee approved the request for cancellation of the procurement. In a letter dated 7th October 2022, the Accounting Officer of the Respondent notified the Applicant of the cancellation of the procurement process.
25. The Tribunal in the instant case is not concerned with the justifications or reasons for the cancellation. The issue is whether the procurement could be cancelled after contract award.
26. The Tribunal notes that this purported cancellation was made after the Contracts committee had made the award of contract to *Seyani Brothers & Co. (U) Ltd and Parbat Siyani Construction Limited Joint Venture*. The purported cancellation was therefore contrary to section 75(1) of the *Public Procurement and Disposal of Public Assets Act*. Section 75 (2) of the *Public Procurement and Disposal of Public Assets Act* gives justifications for cancellation of a procurement under section 75 (1). Section 75 (2) should not

be read in isolation but is subject to section 75 (1).

27. The Tribunal therefore holds that the purported cancellation of the procurement was contrary to sections 75(1) and 91I (3) (a) of the *Public Procurement and Disposal of Public Assets Act*.
28. **Issue no. 2 is answered in the negative.**

Issue no. 3: What remedies are available to the parties?

29. An award decision is not a contract. See section 76 (1) of the *Public Procurement and Disposal of Public Assets Act* and ***Galleria in Africa Ltd v Uganda Electricity Distribution Company Ltd, Supreme Court Civil Appeal No. 8 of 2017.***
30. A valid and enforceable contract comes into force after fulfillment of the requirements in sections 76 (2) and 76 (3) of the *Public Procurement and Disposal of Public Assets Act*, as well as the procedures in the *Public Procurement and Disposal of Public Assets (Contracts) Regulations*.
31. The Tribunal cannot therefore compel a procuring and disposing entity to enter into a contract merely because there has been a contract award. Ordinarily, where the Tribunal finds that a cancellation is illegal, it may substitute its own cancellation or refer the matter back to the procuring and disposing entity for further proceedings not inconsistent with the decision of the Tribunal.
See: ***Preg Tech Communications vs Uganda Police Force, Application No.32 of 2021*** and ***Kingdom Kampala Limited v Judicial Service Commission, Application No. 34 of 2022.***
32. The Respondent's Accounting Officer stated on record that no new procurement process has been commenced. However, since the Respondent is unwilling to proceed with the instant procurement, it would be an exercise in futility to refer the matter back to the Respondent. The Tribunal will therefore substitute its own cancellation of the procurement.

D. OBITER DICTA

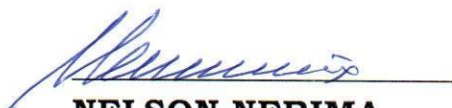
1. At the hearing, the Director of the Respondent informed the Tribunal that the Directorate of Government Analytical Laboratory is a department under the Ministry of Internal Affairs. That it has its own Vote and the Director is the Accounting Officer.
2. However, being a Vote and having an Accounting Officer under the *Public Finance Management Act* does not automatically equate to a procuring and disposing entity under the *Public Procurement and Disposal of Public Assets Act*.
3. Section 2 of the *Public Procurement and Disposal of Public Assets Act* defines a “procuring and disposing entity” to mean
 - a) a Ministry of Government;
 - b) a district council or a municipal council;
 - c) a body established by an Act of Parliament, which receives public finances from the Consolidated Fund and related special finances expended through the capital or recurrent budgets, whatever form these may take;
 - d) a company registered under the Companies Act in which Government or a procurement and disposing entity—
 - e) controls the composition of the board of directors of the company;
 - f) is entitled to cast, or controls the casting of more than fifty percent of the maximum number of votes that may be cast at a general meeting of the company; or
 - g) controls more than fifty percent of the issued share capital of the company, excluding any part of the issued share capital that does not carry a right to participate beyond a specified amount in the distribution of profits or capital; and
 - h) an entity not being of Government, to which section 2(1)(d) applies;
 1. and includes;
 - i) a commission established under the Constitution or under an Act of Parliament;
 - j) a public university and a public tertiary institution established under the Universities and other Tertiary Institutions Act, 2001;
 - k) Bank of Uganda except in exercise of the functions specified

- in section 4 of the Bank of Uganda Act; and
- l) any other procuring and disposing entity as may be prescribed by the Minister.
 - m) Before the amendment of the Act by the *Public Procurement and Disposal of Public Assets (Amendment) Act 2021*, the definition of a “procuring and disposing entity” included a *Ministry or department of Government*. After the amendment, a *department* of Government is not automatically a procuring and disposing entity.
 - n) A department under a Ministry can conduct procurement and disposal functions on its own in two instances. The first instance is if the Minister of Finance, Planning and Economic Development issues a statutory instrument to designate that department as a procuring and disposing entity. The second instance is if the Accounting Officer of the procuring and disposing entity concerned delegates certain procurement and disposal functions to that department under section 39 (a)(i) of the *Public Procurement and Disposal of Public Assets Act*.
4. In the instant case, the Respondent was not able to cite any instrument prescribing the Directorate of Government Analytical Laboratory is a procuring and disposing entity. The Respondent indicated that it needed more time to do so. The Tribunal has equally not found any such instrument. The Respondent also informed the tribunal at the hearing that the Accounting Officer of the Ministry of Internal Affairs has not delegated the procurement and disposal functions to the Directorate of Government Analytical Laboratory.
5. In the premises, following the enactment of the *Public Procurement and Disposal of Public Assets (Amendment) Act 2021*, there is need for legal and factual clarity as to the status of the Respondent and other departments which are conducting procuring and disposal functions as entities.

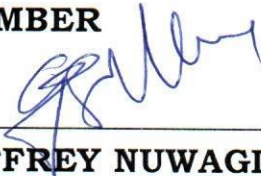
E. DISPOSITION

1. The Application is allowed in part.
2. The impugned cancellation of the procurement by the Respondent dated 7th October, 2022, is set aside.
3. The Tribunal substitutes its own cancellation of the procurement process initiated by the Respondent for the construction of the proposed national forensic deoxyribonucleic (DNA) Data Base Building Plot 2-4 Loudel Road, Wandegeya, Kampala under Procurement Reference Number DGAL/WRKS/21-22/00081.
4. Copies of this decision shall be served on the Accounting Officer of the Ministry of Internal Affairs and the Public Procurement and Disposal of Public Assets Authority for them to guidance on the implications of the amendment of the definition of a procuring and disposing entity in the *Public Procurement and Disposal of Public Assets (Amendment) Act 2021*.
5. Each party shall bear its own costs.

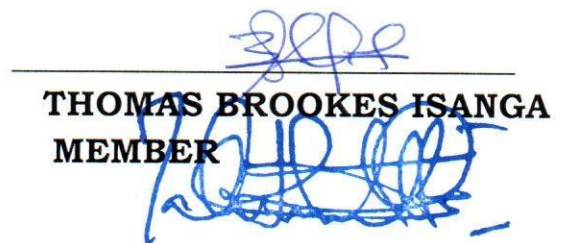
Dated at Kampala this 17th day of November, 2022.



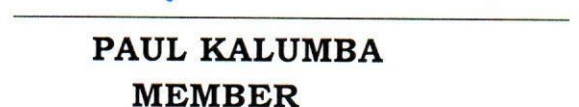
NELSON NERIMA
MEMBER



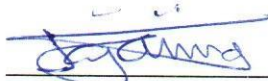
GEOFFREY NUWAGIRA KAKIRA
MEMBER



THOMAS BROOKES ISANGA
MEMBER



PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER