

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

APPLICATION NO. 01 OF 2023

BETWEEN

APPLE PROPERTIES LTD ::::::::::::::::::::::::::::::::::::::: APPLICANT

AND

UGANDA HUMAN RIGHTS COMMISSION ::::::::::: RESPONDENT

**APPLICATION FOR REVIEW OF THE DECISION OF UGANDA
HUMAN RIGHTS COMMISSION IN RESPECT OF THE
PROCUREMENT OF OFFICE SPACE FOR THE HEAD OFFICE
UNDER REF UHRC/NCONS/22-23/00005, USING THE OPEN
DOMESTIC BIDDING METHOD**

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

A. BRIEF FACTS

1. Uganda Human Rights Commission (the Respondent) initiated a procurement of Office Space for their Head Office under Procurement Reference No. UHRC/NCONS/22- 23/00005 using Open Domestic Bidding method of procurement. The Bid Notice was published in the New Vision Newspaper of October 11, 2022, with a deadline for submission at 10.00 a.m on November 09, 2022.
2. *Global Center Ltd* paid for the bidding document on November 2, 2022 at 13:05pm through Diamond Trust Bank under Uganda Revenue Authority (URA) payment registration number (PRN) 2230004506427.
3. *Rumme Investments Ltd* paid for the bidding document on October 12, 2022 at 12:28pm through Diamond Trust Bank under URA payment registration number (PRN) 2230003790848.
4. Apple properties Ltd (the Applicant) paid for the bidding document on November 8, 2022 at 8:13 p.m through *Payway* under URA payment registration number (PRN) 2230004753324.
5. According to the record of sale or issue of bidding document (form 8), *Rumme Investments Ltd* and *Global Center Ltd* were issued the bidding document on October 12, 2022 at 1:00 p.m and November 03, 2022 at 3:20pm respectively.
6. Bids were received from Apple properties Ltd (the Applicant) on November 9, 2022 at 8:34am and *Rumme Investments Ltd* on November 9, 2022 at 9:20 a.m respectively according to the record of receipt of bids (Form 11). The bids were opened on the same day in the presence of representatives of both bidders and recorded on Form 12. The bids were evaluated and an evaluation report signed on November 15, 2022 prepared.

7. Upon completion of the evaluation process, the evaluation report was presented to the Respondent's Contracts Committee and the Contracts Committee awarded the contract on December 20, 2022, to *Rumme Investments Ltd*, a contract price of UGX 123,616,800/= per month VAT inclusive.
8. The Respondent displayed the Best Evaluated Bidder Notice on December 21, 2022 with a removal date of January 4, 2023, in which *Rumme Investments Ltd*, was declared the Best Evaluated Bidder with a contract price of UGX 123,616,800/= per month VAT inclusive.
9. The Best Evaluated Bidder Notice indicated that the Applicant's bid was rejected because there was no evidence that the bidder obtained the bid document directly from the Respondent in accordance with regulation 48 (a) of the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014*, and Instruction to Bidders (ITB) 6.3 of the solicitation document.
10. The Applicant being dissatisfied by the evaluation process sought administrative review of the entire procurement process before the Accounting Officer of the Respondent on December 23, 2022. The Accounting Officer in a letter dated January 5, 2023 did not find merit in the Applicant's complaint and rejected it.

B. APPLICATION TO THE TRIBUNAL

1. The Applicant being dissatisfied with the decision of the Accounting Officer, filed the instant application with the Tribunal by letter on January 12, 2023, seeking to review the decision of the Respondent. The Application was lodged through *STEK Advocates*.
2. The Applicant alleged that the Respondent declined to review their decision and threatened them with criminal prosecution if they pursued the matter further.

3. That the Applicant requested for guidance on the fees for administrative review and where to pay but the Respondent declined to respond and failed to do an administrative review.
4. The Applicant contended that on November 3, 2022, it solicited for the solicitation document by an email from their attorney Letisha Sylvia to Jona Mugonya, an employee of the Respondent in the Procurement and Disposal Unit. That she paid for the same and a receipt for the same was issued.
5. That the Applicant requested for guidance on the fees for administrative review and where to pay but the Respondent declined to specify and effectively failed to do an administrative review.
6. That the readout price of UGX 1,257,120,000/= clearly stated that it was exclusive of local taxes as indicated in best evaluated bidder's bid submission sheet. The award read out was UGX 123,616,800/= monthly VAT inclusive which is not consistent with what was read out at bid opening. The Best Evaluated Bidder Notice has wrong dates for example the date of display is December 21, 2022 and the date of removal is January 4, 2022 as opposed to January 4, 2023.
7. The Applicant prayed that it be declared the Best Evaluated Bidder.

C. RESPONSE TO THE APPLICATION

1. The Respondent averred as follows:
2. That it is not true as alleged that the Respondent threatened the Applicant with criminal prosecutions if it further pursued the matter. It is a misinterpretation of the statement made in response to the Applicants letter that the Commission was ready to adduce evidence relating to Applicant's misconduct through its agents.

3. By November 3, 2022, the Respondent had only received payment from *Rumee Investments Limited* and *Global Center Limited*. The Commission had not received any payment and request from *Apple Properties Limited* by that date.
4. Global Center Limited had sent a written application letter to the Respondent and on receipt of proof of payment, the Respondent issued the bid document to *Global Centre Limited*. The bid issued was never intended for *Apple Properties Limited* because at this point in time *Apple Properties Limited* had not shown any interest in the bids, neither had it contacted the Respondent in anyway. The bid to *Global Centre Limited* was sent by email to letishasyvia@gmail.com managed by Letisha Jjingo Nalongo and this was at the request of a representative of *Global Centre Limited*, a one Joseph K.
5. *Global Centre Limited* made the payment on November 2, 2022, and the bid document was sent on November 3, 2022. *Apple Properties Limited* made a payment via *Payway* on November 8, 2022 at 08:13 pm way after close of business for the day. Given the fact that *Apple Properties Limited* paid on November 8, 2022, there is no way that the bid document which was sent on November 3, 2022 to *Global Centre Limited* was in any way intended for *Apple Properties Limited*.
6. The format of bid document which was submitted by *Apple Properties Limited* is different from the bid document which was issued by the Respondent.
7. The record of issue and sale of the bidding Document (Form 8) does not include *Apple Properties Limited*.
8. The Respondent guided on the fees for administrative review in its letter dated January 5, 2023.
9. The complaint was procedurally not valid since it was not made upon payment of the prescribed fees.

10. In regards to the readout price for *Rumee Investments Limited*, UGX 1,257,120,000 (annually) was read out and the bid submission sheet clearly states that it is exclusive of local taxes. This is consistent with UGX 123,616,800 (monthly) VAT Inclusive as it appears in the detailed price schedule and therefore considered during the financial comparison stage.
11. There was a typing error on the best evaluated bidder notice regarding the date of removal. The Respondent intended to communicate January 4, 2023 instead of January 4, 2022 as it appears on the issued copies. This was noticed after the copies were issued out. However, the content of the notice clearly indicates the statutory period.
12. The Commission's decision was in reference to ITB 6.3 of the bid document indicating that bidders who did not obtain the bidding document directly from the procuring and disposing entity will be rejected during evaluation. This is consistent with Regulation 48 of the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procuring, Supplies, Works and Non-Consultancy Services) Regulations 2014*.

D. WRITTEN SUBMISSIONS

Applicant

1. M/S *STEK Advocates*, counsel for the Applicant, raised a preliminary issue that the Respondent failed to file and serve a response to the application within the time stated under the summons.
2. That the Tribunal issued summons on January 12, 2023 directing the Respondent to file and serve a response to the application by January 16, 2023.
3. Counsel also faulted the failure by the Accounting Officer of the Respondent to carry out an administrative review as envisaged under section 89 of the *Public Procurement and Disposal of Public Assets Act*.

4. The Applicant wrote seeking guidance regarding the administrative review fee and where to pay, however in response to the same, the Secretary of the Uganda Human Rights Commission wrote stating flimsy reasons and purportedly raising defences to the compliant without necessarily guiding on the administrative process. The actions of the Accounting Officer did not amount to an administrative review process.
5. On whether the Respondent erred when it rejected the Applicant's bid, counsel submitted that the Applicant purchased the bid document from the Respondent, and there is proof of payment for the same by the Applicant. The bid document was received by the Applicant by way of email sent by a one Jona Mugonya an employee and agent of the respondent on the 3rd November 2022 as per the email correspondences attached to the Application.
6. On whether the Accounting Officer erred in law when he failed to declare the Applicant as the best evaluated bidder with the best price contrary to Sections 43, 44, 45 and 46 of the *Public Procurement and Disposal of Public Assets Act*, counsel submitted that the read out price for the best evaluated bidder was UGX. 1,257,120,000/= which translates to UGX. 104,760,000/= per month, Value Added Tax exclusive but the awarded price was UGX. 123,616,800/= per month Value Added Tax inclusive. This shows that there was a lot of intrigue, syndicate and misrepresentation of facts.
7. That in comparison with the contract value of the Applicant, there is a big difference of UGX. 463,401,600/= per year. The price of the best evaluated bidder per month is Ugx. 123,616,800/= which translates to UGX. 1,483,401,600/= per annum whereas the Applicant's price was UGX. 85,000,000/= per month which translates to UGX. 1,020,000,000/=.
8. That under Regulation 5(a) of the *Public Procurement and Disposal of Public Assets (evaluation) Regulations 2014*, evaluation of bids for the procurement of non-consultancy

services is done within a period of twenty (20) working days from the date of bid opening as opposed to this particular one in issue which took two months, and no reasons were given for the failure to complete the evaluation within the twenty days neither was there any extension of time.

9. That the allegations of misconduct by the Applicant are denied and there is no evidence to that effect. There is no evidence that the alleged *whatsapp* communication was with the Applicant.
10. That there were several and persistent breaches of the *Public Procurement Disposal Assets Act* and the relevant regulations. The decision of the Accounting Officer as well as the respondent fell short of the threshold stated in the Act and the same cannot be left to stand.
11. Counsel prayed that the Tribunal declares that the Applicant was the lowest and cost-effective bidder, and proceeds to declare the Applicant as the best evaluated bidder.

Respondent

12. On whether the response was filed out of time, the Respondent contended that the Tribunal issued summons on January 12, 2023 directing the Respondent to file and serve a response to the Application by January 16, 2023. Regulation 11 (1) of the *Public Procurement and Disposal of Public Assets (Tribunal) (Procedure) Regulations* require the Respondent to lodge a Response with a Registrar within 2 working days of being served with an application. The application was received at the Respondent's Registry on Friday January 13 at 4:00 pm and the following two (2) days were Saturday and Sunday which are weekend days and not working days. The Respondent therefore had Monday the 16th and Tuesday the 17th within which to prepare and file a response. The Respondent was able to file a response on January 17, 2023 at 8:10 am.
13. The Respondent prayed that this was a technicality which is curable under Article 126 (2) (e) of the 1995 Constitution.

14. On whether the Respondent's Accounting Officer failed to carry out an administrative review, the Respondent averred that on January 5, 2023, the Respondent advised the Applicant where the particular procurement fell which is in category 4 of the schedule of the *Public Procurement and Disposal of Public Assets Act*. As an afterthought the Applicant paid the administrative review fees on January 12, 2023. UGX 300,000/= was paid which was far less than the prescribed fee of UGX 5,000,000/=.
15. On whether the Respondent erred when it rejected the Applicant's bid, the Respondent averred that it was *Global Centre Ltd* who made payment on November 2, 2022 and the bid document was sent to their agent Letisha Jjingo Nalongo via email on November 3, 2022 at the request of a one Joseph K who presented proof of payment for the bid document and accordingly signed on Form 8 Record of Issue//Sale of the bidding document.
16. The Applicant made a payment for the bid Document via *PAYWAY* on November 8, 2022 at 8:13 pm which was after close of business of that day.
17. Therefore, there is no way that the bid document which was sent on November 3, 2022 to *Global Centre Ltd* was in any way intended for/sent to the Applicant who had not paid by that date.
18. The Applicant only submitted a sealed bid on the last day on November 9 2022 at 8:34 am as evidenced by Form 11 – Record of bids received.
19. There was transparency and integrity throughout the entire process applied by the Respondent.
20. The format of the bid document submitted by the Applicant was different from the bid Document issued to other bidders i.e. the bid submission sheet and the price schedule. The qualification form is missing in the "bid" submitted by the Applicant.

21. On whether Respondent's Accounting Officer erred in law when he failed to declare the Applicant as the best evaluated bidder, the Respondent averred that the Applicant alleges fraud on the part of the Respondent but does not give any particulars or evidence of the alleged fraud.
22. The Applicant failed at the preliminary examination stage and in accordance to ITB 6.3 could not therefore be considered at other stages which is in line with regulation 48 (a) of the *Public Procurement and Disposal of Public Assets Regulations*.
23. The Respondent was not under any obligation to declare the Applicant as the Best Evaluated Bidder although it quoted the lowest price.
24. There was misconduct on the part of the Letisha Jjingo - Applicant's agent who was trying to influence the bidding process before submission and after submission. The agent was trying to establish the prices which had been quoted by other bidders with intention of basing on the information which could have been provided to quote lower than other bidders. This is evidenced by the WhatsApp conversations from between the Respondent's officers and the Applicant's agent. This was unethical practice by the agent of the Applicant which was contrary to the Code of Ethical Conduct in business for bidders and Providers.
25. The Respondent relied on *Wen Jie Vs Nabimanya Isaac and Another HCCS 605 of 2014* and section 8 of the *Electronic Transaction Act 8 of 2011*, to submit that the WhatsApp messages are admissible in evidence.
26. That the opening of bids was held on November 9, 2022. Evaluation commenced on November 14, 2022 and ended on November 11, 2022 with signing of the evaluation report and minutes. The evaluation of bids therefore took 5 days to be completed and the assertion by the Applicant that the evaluation of bids took 2 months is baseless.

27. On November 16, 2022, the Commission sought for technical support from the Chief Government Valuer for valuation of the Best Evaluated Bidder's premises to ascertain whether the bid price is commensurate with the market value of rent paid to such office premises. The intention was to ensure value for money. The valuation report was received on December 20, 2022 and immediately together with the evaluation report sent to contracts committee on December 21, 2022 for approval.
28. On remedies, the Respondent submitted that the Applicant has failed to prove any breach of the Act and regulations and is not entitled to prayers sought. That the Applicant should instead be investigated for fraud and pay costs to the Respondent.

E. THE ORAL HEARING

1. The Tribunal held an oral hearing on January 24, 2023 via *zoom* software. The appearances were as follows:
Simon Tendo Kabenge jointly with Deogratiuous Counsel for the Applicant.
Ida Nakiganda Counsel for the Respondent.
Representations were as follows;
Mrs. Letisha Jjingo Nalongo Donee of Powers of Attorney of the Applicant
Ms. Ejang Margaret Lucy the Acting Secretary of the Respondent.
2. The parties highlighted their respective written submissions and responded to questions put by the Tribunal.
3. The Applicant's counsel also raised a preliminary objection to the Respondent's submissions. Counsel submitted that the Respondent's submissions were filed out of time and that the Respondent had also illegally attached new evidence to the submissions when such evidence had not been part of the response to the Application.
4. The Tribunal has carefully considered the pleadings, written and oral submissions of the parties.

F. RESOLUTION

1. The Application did not frame any issues for determination by the Tribunal. However, our consideration of the respective oral and written submissions of the parties leads us to frame the following issues:
 - 1) Whether the format of the Application is competent.
 - 2) Whether the Response to the Application was filed out of time.
 - 3) Whether the documents attached to the Respondent's submissions can be lawfully relied on in the determination of the Application.
 - 4) Whether the Accounting Officer of the Respondent erred in law when he failed to guide the Applicant on payment of administrative review fees.
 - 5) Whether the Accounting Officer of the Respondent failed to carry out an administrative review.
 - 6) Whether the Respondent erred when it rejected the Applicant's bid
 - 7) Whether the Respondent erred when it declared Rume Investments Ltd. as the best evaluated bidder

Issue 1:

Whether the format of the Application is competent

2. The Application (by way of letter) did not follow or comply with the prescribed format provided for in the *Public Procurement and Disposal of Public Assets (Tribunal) (Procedure) Regulations 2016*. The Tribunal has earlier on held that non-conformity with a particular form does not render a document void. In considering the substance rather than the form, section 43 of the Interpretation Act provides that where any form is prescribed by any Act, an instrument or document which

purports to be in such form shall not be void by reason of any deviation from that form which does not affect the substance of the instrument or document or which is not calculated to mislead. See *Application No.13 of 2021 Kasokosoko Services Ltd vs Jinja School of Nursing and Midwifery; and Application No. 41 of 2022- Orungo Market Vendors Association v Amuria District Local Government*.

3. The Tribunal shall therefore consider the merits of the Application since it sets out the complaint of the Applicant and the remedies sought.
4. Issue no. 1 is resolved in the affirmative.

Issue No. 2:

Whether the Response to the Application was filed out of time.

5. The Tribunal issued summons on January 12, 2023 with the following directions, among others:
 - (1) The Respondent to file and serve its written response to the application by January 16, 2023.
 - (2) The Respondent to compile and file the record of proceedings, the notice of the decision, and all other documents relied upon by the Respondent to arrive at its decision by January 16, 2023.
 - (3) The Applicant to, file and serve written submission by January 18, 2023.
 - (4) The Respondent to file written submissions if any, by close of business on by January 20, 2023.
6. Regulation 11 (1) of the *Public Procurement and Disposal of Public Assets (Tribunal) (Procedure) Regulations 2016* require a Respondent to lodge a response within 2 working days of being served with an Application.
7. The summons and Application were served on the Respondent on Friday January 13 at 4:00 pm and the following two (2) days

were Saturday and Sunday which are not working days. The Respondent therefore had Monday the 16th and Tuesday the 17th within which to prepare and file a response. The Respondent filed a response on January 17, 2023 at 8:10 am.

8. The direction to the Respondent to file and serve its written response application by January 16, 2023 was an erroneous computation since the two working days were due to expire on January 17, 2023.
9. The Tribunal therefore agrees with the Respondent that the response was filed within time.
10. The timeline for filing a response to an application is not stipulated in the Act.
11. **Issue no. 2 is resolved in the negative.**

Issue no. 3:

Whether the Document attached to the Respondent's submissions can be lawfully relied on in the determination of the Application.

12. Counsel for the Applicant submitted that the Respondent had also illegally attached new evidence to the submissions when such evidence had not been part of the response to the Application.
13. It is true that the Respondent submitted fresh evidence with its written submissions.
14. In the summons, the Respondent had been directed to compile and file the record of proceedings, the notice of the decision, and all other documents relied upon by the Respondent to arrive at its decision by January 16, 2023. Therefore, any documents which the Respondent allegedly relied on to arrive at its decision were required by the Tribunal.
15. The Applicant had an opportunity at the hearing to address the Tribunal about these documents.

16. Regulation 27 of the *Public Procurement and Disposal of Public Assets (Tribunal) (Procedure) Regulations 2016* provides that the Tribunal may not strictly observe the rules of evidence in the hearing of an application. The Tribunal tries to avoid undue formality and may rely on any available relevant evidence which comes to its knowledge in order to render a fair and just decision.
17. Therefore, the Tribunal will not at this stage strike out the evidence attached to the Respondent's submissions. The Tribunal will examine each piece of evidence and determine whether it is relevant and useful in the determination of the application.
18. The preliminary objection is overruled.
19. **Issue no. 3 is resolved in the affirmative.**

Issue no. 4:

Whether the Accounting Officer of the Respondent erred in law when he failed to guide the Applicant on payment of administrative review fees.

20. Section 89 (1) of the *Public Procurement and Disposal of Public Assets Act* as amended by Act 15 of 2021 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"
21. Section 89(3)(a) of the *Public Procurement and Disposal of Public Assets Act* requires a complaint against a Procuring and Disposing Entity to be in writing and submitted to the Accounting Officer, of the Procuring and Disposing Entity on payment of the fees prescribed.
22. Regulation 11 of the *Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014* provides that the fees in the second column of the Schedule to the regulations shall be paid to a procuring and disposing entity, for the

administrative review for a procurement or disposal of a value specified in the first column.

23. The Public Procurement and Disposal of Public Assets Authority issued Circular No. 3 of 2015 on *Procedure for Administrative Review by the Accounting Officers*. The circular guided that on receipt of an application for Administrative Review, the Accounting Officer should advise the complainants on the required Administrative Review fees and where to pay the said fees.
24. The Applicant applied to the Respondent's Accounting Officer for administrative review on December 23, 2022. No administrative review fees were paid.
25. An Accounting Officer is duty-bound to advise a complainant on the prescribed Administrative Review fees and where to pay the said fees, upon receipt of a Compliant.
26. The Respondent's Accounting Officer ought to have automatically guided the Applicant on the prescribed administrative review fees and the mode of payment thereof. See: *Applications No. 26 and 27 of 2022- Vision Scientific & Engineering Limited v Makerere University, and Application No. 28 of 2022-Frida B. Kwikiriza v Buliisa District Local Government*.
27. By letter dated January 4, 2023, the Applicant formally asked the Respondent's Accounting Officer for guidance regarding the administrative review fees and where to pay. By that date, the ten days prescribed under section of the ten days for making and communicating an administrative review decision had expired.
28. The purported guidance was given in the Accounting Officer's decision dated January 5, 2023. It is stated at page 2 of the decision that the fees for this procurement are under category 4 of the schedule to the *Public Procurement and Disposal of Public Assets Act (Administrative Review) Regulations, 2014*. With due

respect, this communication was vague, belated and perfunctory. On receiving the application for administrative review, *the* Respondent's Accounting Officer ought to have promptly guided the Applicant on the amount of fees payable and the modalities for payment thereof. A perfunctory guidance is not sufficient.

See: *High Court Civil Appeal no. 93 of 2020- Mbarara University of Science & Technology v Public Procurement and Disposal of Public Assets Authority & Steam Investments (U) Ltd.*

29. This Tribunal has been consistent on the principle that late payment of administrative review fees is not necessarily fatal, and that even actual non-payment of court fees has been held not to be fatal so long as the proper fees can be assessed and paid. See: *Samanga Elcomplus JV v. Uganda Electricity Distribution Company Limited, Application No.17 of 2021; Vcon Construction Ltd Vs Uganda Development Bank, Application No.22 of 2021, Samanga Elcomplus Jv Vs. Uganda Electricity Distribution Company Limited, Application No. 17 of 2021; Kasokoso Services Limited Vs. Jinja School of Nursing And Midwifery, Application No. 13 of 2021; and Application No. 28 of 2022-Frida B. Kwikiriza v Buliisa District Local Government.*
30. In the instant case, the Respondent's Accounting Officer rendered a purported decision even before the belated administrative review fees were paid. The belated and insufficient payment was due to her failure to properly guide the Applicant.
31. **Issue no. 4 is answered in the affirmative.**

Issue no. 5:

Whether the Accounting Officer of the Respondent failed to carry out an administrative review

32. Section 89(7) of the *Public Procurement and Disposal of Public Assets Act* requires the Accounting Officer to make and communicate an administrative review decision within ten days from the date of receipt of the application.

33. The Applicant applied for administrative review before the Accounting Officer of the Respondent on December 23, 2022. The ten days within which the Accounting Officer was required to make and communicate a decision started running on December 24, 2022 and expired on January 2, 2023. The Respondent's Accounting Officer purported to make a decision dated January 5, 2023. The purported decision made outside the statutory timeline was a nullity.
34. 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.
35. 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).
36. The ten days started running on January 3, 2023 and would expire on January 13, 2023. The Applicant was within its statutory rights to file the instant application with the Tribunal on January 12, 2023.

34. **Issue no. 5 is answered in the affirmative.**

Issue no. 6:

Whether the Respondent erred when it rejected the Applicant's bid

34. The Procuring and Disposing Entity's determination of a bid's compliance and responsiveness is to be based on the contents of the bid itself. A substantially compliant and responsive bid is one that conforms to all the terms, conditions, and requirements of the Bidding Document without material deviation, reservation, or omission. See ITB 28.1, 28.2 of the

bidding document at 17, section 70 of the *Public Procurement and Disposal of Public Assets Act 2003*, and regulations 7(1), 18 and 19 of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014*

35. The standard invitation to bidders found in part 1: section 1, *Instructions To Bidders* at page 3 of the bidding document was explicit that persons intending to participate in the impugned procurement were expected to make a written application addressed to the specified address of the Respondent, expressing interest or desire to purchase the bidding document and upon payment of a non-refundable fee of UGX 200,000/=.
36. Sale of a bidding document is permitted under regulation 47(4) of the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014*.
37. The sale and issuance of a bidding document is recorded in Form 8, pursuant to regulations 47(1) and 47(3) of the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014*.
38. Bidders who did not obtain the Bidding Document directly from the Procuring and Disposing Entity are to be rejected during evaluation and in the event where a Bidding Document is obtained from the Procuring and Disposing Entity on a Bidder's behalf, the Bidder's name must be registered with the Procuring and Disposing Entity at the time of sale and issue. See ITB 6.3 of the Bidding Document at page 10 and regulation 48(a) of the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014*.
39. In the instant case, the Best Evaluated Bidder Notice indicated that the Applicant's bid was rejected because there was no

evidence that the bidder obtained the bid document directly from the Respondent.

40. The Applicant claims that on November 3, 2022, it solicited for the bidding document by an email from their attorney Letisha Sylvia to Jona Mugonya of an employee of the Respondent in the Procurement & Disposal Unit. That she paid for the same, but the receipt was erroneously issued in the name of *Global Center Ltd*.
41. It is the Tribunal's finding that the Applicant did not apply for or obtain the bidding document from the Respondent.
42. By a letter November 2, 2022, addressed to the Respondent, *Global Center Ltd* expressed interest in the tender process. Global Center Ltd paid for the Biding Document through Diamond Trust Bank on November 2, 2022.
43. The email communication dated November 3, 2022 was from Letisha Sylvia (letishasylvia@gmail.com) to one Jona Mugonya (jmugonya@gmail.com). In the email, Letisha Sylvia does not specify the company she represents but claims that they paid for the bid document but had not received it.
44. This request for the bidding document could not have been on behalf of the Applicant who by that date had not paid for the Bidding Document. The Applicant paid for the Bidding Document on the eve of the submission deadline on November 8, 2022 at 8:13 pm through *Payway* upon a self-assessment and payment registration number (PRN) 2230004753324 on URA. The Applicant submitted a bid on the morning of November 9, 2022 but had not made any application to the Respondent, requesting to purchase or to be issued with the Bidding Document.
45. The Applicant's claim that it had earlier paid for the Bidding Document but the receipt was erroneously issued in the name of *Global Center Ltd* cannot be sustained. The payment by

Global Center Ltd was made pursuant to a self-assessment and payment registration number (PRN) 2230004506427 on the Uganda Revenue Authority. It is therefore not possible that a receipt was generated in a wrong name. The receipt of payment was issued in the name of *Global Center Ltd* who had generated the self-assessment and paid the assessed amount of UGX. 200,000.

46. The Applicant and *Global Center Ltd* are apparently affiliated but they are separate legal entities. *Global Center Ltd* paid and requested for the Bidding Document but the Applicant did not.
47. The Respondent did not issue the Bidding Document to the Applicant. The Applicant therefore erred when it submitted a bid without Bidding Document issued by the Respondent.
48. The Respondent therefore rightfully rejected the Applicant's bid during evaluation in accordance with ITB 6.3 of Bidding Document read together with regulation 48(a) of the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014*.
49. **Issue no. 6 is resolved in the negative.**

Issue no. 7:

Whether the Respondent erred when it declared Rumeo as the best evaluated bidder.

50. There were only two bidders; the Applicant and Rumeo Investments Ltd. The Applicant's bid was lawfully rejected, despite quoting the lowest price. The evaluation committee determined that the bid of Rumeo Investments Ltd was the least cost bid and was accordingly ranked first. Following post-qualification, Rumeo Investments Ltd was recommended as the best evaluated bidder. This was consistent with regulation 21 (6) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014* which provides that the best evaluated bid shall be the lowest priced bid which is eligible and

administratively compliant to the technical requirements specified in the bidding document.

51. Under Part IV of the *Public Procurement and Disposal of Public Assets Act*, all public procurement and disposal must be conducted in accordance with the basic principles of — (a) non-discrimination; (b) transparency, accountability and fairness; (c) maximisation of competition and ensuring value for money; (d) confidentiality; (e) economy and efficiency; and (f) promotion of ethics.
52. The Applicant made allegations of misconduct against the Respondent but the same were not strictly pleaded and proved. The Respondent similarly made allegations of fraud against the Applicant but did not also prove them. Both parties relied on alleged *whatsapp* communications. The recipients of the alleged *whatsapp* messages were not called as witnesses. The telephone numbers of the senders and recipients were not established. There was no explanation as to how and by whom the screen shots of the alleged messages were made and printed.
53. Under section 8(2) of the *Electronic Transactions Act 8 of 2011*, a person seeking to introduce a data message or an electronic record in legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.
54. In the absence of evidence to prove the authenticity of the alleged *whatsapp* messages, the Tribunal is unable to attach any evidential value to them.
55. However, on review of Rume Investments Ltd's bid and the procurement action file, the Tribunal has found unexplained discrepancies in the power of attorney and the supporting board resolution.
56. Instructions to Bidders 20.2 required that the signatory of the bid be authorised by a registered power of attorney. The Tribunal has examined the bid of Rume Investments Ltd. The

power of attorney and board resolution of *Rumee Investments Ltd* appointing *Kushuboo R. Vadodaria* as its lawful attorney are both post-dated October 14, 2022 but apparently registered with Uganda Registration Services Bureau on September 20, 2022.

57. The power of attorney authorises the attorney “*To obtain bidding document for the procurement of Non-Consultancy Services of office Space for UHRC Head Office to Uganda Human Rights Commission under procurement Reference Number: UHRC/NCONS/22-23/00005*”.
58. The earliest document on the procurement action file is an internal memo from the Acting Secretary of the Respondent to the Director Finance and administration to communicate a decision of the Commission to procure new office premises for the head office and to request that the procurement process be initiated. The confirmation of funding and approval to procure (Form 5) was signed by the Acting Secretary on September 22, 2022. The Contracts Committee approved the bid notice, bid document price, amount of bid security, draft solicitation document, procurement method and evaluation committee on October 7, 2022. The bid notice was published in the *New Vision* newspaper on October 11, 2022.
59. The apparent post-dating of the power of attorney; the mention therein of the procurement and its correct procurement reference number; and its purported registration on September 20, 2022, unless satisfactorily explained, can lead to a suspicion that *Rumee Investments Ltd* was privy to confidential internal information about the procurement before publication of the bid notice. If proved, such prior knowledge and ability to access internal information before other bidders would negate the cardinal principles of non-discrimination; transparency, accountability and fairness; maximisation of competition; ensuring value for money; confidentiality; and promotion of ethics.
60. In *Arua Municipal Council v Arua United Transporters’ SACCO*, High Court at Arua 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 Document, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document. There should be no undisclosed preferences, no secret preferences and no discussions or decisions made, except above-board.”

61. In the same case, it was also held as follows:

“All public procurement must conform to the three pillars of integrity, transparency and accountability. Decision-making criteria at all stages must be clear, justifiable and objective. An obligation is imposed on every procuring and disposing entity to act in a manner compatible with the integrity and openness of the process as contained in the PPDA Act, the Regulations and applicable policies in order to prevent the procuring and disposing entity from unilaterally and unfairly departing from the procedures put in place for the attainment of the objectives of the three pillars”.

62. At the hearing, the Tribunal asked Saeed Hernandez, the Project Manager and representative of Rume Investments Ltd, to explain the discrepancy. He had no explanation. He however, claimed that the registration of the power of attorney was handled by their lawyers. Counsel for the Respondent opined that the stated registration date was an error. For now, it is not clear whether the post-dating was deliberate or an error.

63. During preliminary evaluation, the evaluation committee determined that Rume Investments Limited was complaint with the requirement of a registered power of attorney. Had the evaluation committee carefully scrutinised the power of attorney and supporting board resolution, they would have noticed the discrepancy. The evaluation of the power of attorney was conducted in a perfunctory manner. The evaluation committee fell short in their duty to conduct proper scrutiny and due diligence on the impugned power of attorney and board resolution. It was their duty to determine whether the bidder

actually got knowledge of the procurement in advance; or if the registration date of September 20, 2022 was an innocent error.

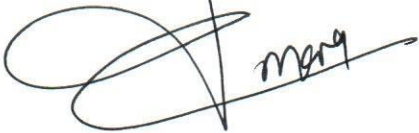
64. In the circumstances, having found that the evaluation of the impugned power of attorney was not properly conducted, the Tribunal has determined that the Respondent erred when it declared Rume Investment Limited as the best evaluated bidder.
65. **Issue no. 7 is answered in the affirmative.**
Issue no. 8:
What remedies are available to the parties
66. The Applicant complained that the Respondent failed to ensure principles of public procurement.
67. The apparent post-dating of the power of attorney; the mention therein of the procurement and its reference number; and its pre-registration were not specifically raised by the Applicant. Those are facts which have come to light following the Tribunal's scrutiny of the Rume's Investments bid and the procurement action file, which documents were not available to the Applicant.
68. The *Public Procurement and Disposal of Public Assets Appeals Tribunal* is a merits review body and has wide powers to set aside the original decision and substitute it with a new decision of its own. Implicit within such a power is the authority to consider both the lawfulness of the procurement decision it is reviewing and the facts going to the exercise of discretion, whether raised by the Applicant or not, provided all interested parties are provided with an opportunity to present their case (the right to be heard), are notified in advance that a decision is to be made on the basis of that material and are given an opportunity to respond (procedural fairness), determine the matter in an unbiased manner (an absence of bias) and give reasons for the decision. See: *Arua Municipal Council v Arua United Transporters' SACCO, High Court at Arua C.A 25 of 2017.*

69. The Respondent and best evaluated bidder were given an opportunity to explain the discrepancies in the power of attorney and board resolution.
70. Merits review allows all aspects of an administrative decision to be reviewed, including the findings of facts and the exercise of any discretions conferred upon the decision-maker. The merits review Tribunal, or other reviewer, considers both the lawfulness of the administrative decision it is reviewing and the facts going to the exercise of discretion. A merits review Tribunal generally has wide powers to set aside the original decision and substitute a new decision of its own. As a merits review Tribunal, it has the authority to consider both the lawfulness of the administrative decision it is reviewing and the facts going to the exercise of discretion.
See: *Arua Municipal Council v Arua United Transporters' SACCO*, High Court at Arua C.A 25 of 2017.
71. In exercise of its powers as a merits review Tribunal under section 911 of the *Public Procurement and Disposal of Public Assets Act*, the Tribunal has decided to remit the procurement back to the Respondent for re-evaluation.

G. DISPOSITION

1. The Application is allowed in part.
2. The procurement of Office Space for the Head Office of the Respondent under Procurement Ref No. UHRC/NCONS/22-23/00005 is remitted back to the Respondent for re-evaluation in a manner not inconsistent with this decision.
3. The Tribunal's suspension order dated January 12, 2023 is vacated.
4. Each party to bear its own costs.

Dated at Kampala this 2nd day of February, 2023.



FRANCIS GIMARA S.C
CHAIRPERSON



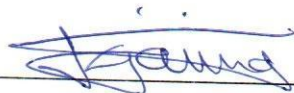
NELSON NERIMA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER